In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **STEVEN HOMICK,** Defendant and Appellant.	**CAPITAL CASE** Case No. S044592

Los Angeles County Superior Court Case No. A973541
The Honorable Florence-Marie Cooper, Judge

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STATEMENT OF THE CASE

In an amended information filed by the District Attorney of Los Angeles County, appellant was charged with conspiracy to commit murder (Pen. Code, §§ 182/187; count 1)[1] and the September 25, 1985, murders of Gerald and Vera Woodman (§ 187; counts 2 & 3). It was further alleged as special circumstances that the murders were carried out for financial gain (§ 190.2, subd. (a)(1)), that they were committed by lying in wait (§ 190.2, subd. (a)(15)), and that appellant committed multiple murder (§ 190.2, subd. (a)(3)). (1Supp. 3CT 846-857; 109RT 12760.)[2] Appellant pleaded not guilty and denied the special circumstance allegations.[3] (See A1RT 245-246; see also 5CT 1317-1328.)

Trial was by jury. (21CT 5867; 67RT 5340.) Following a six-month guilt phase trial, the jury found appellant guilty of one count of

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[1] Unless stated otherwise, all further statutory references are to the Penal Code.

[2] The Clerk's Transcript consists of the original set of 29 volumes of transcripts, as well as numerous supplemental sets (Supplemental 1 [8 volumes], 2 [6 volumes], 2A [19 volumes], 4 [3 volumes], 5 [9 volumes], 6 [13 volumes], 7 [11 volumes], 8 [9 volumes], 8A [3 volumes], 8B [1 volume], 9 [21 volumes], 10 [6 volumes], 11 [6 volumes], 12 [4 volumes], 13 [62 volumes], 14 [4 volumes], and 15 [1 volume]).

Respondent refers to the original set of the Clerk's Transcript as "CT," with the volume number preceding this abbreviation and the page number following it. Respondent refers to the Supplemental Clerk's Transcripts as "Supp. CT." The series number, volume number, and page number of the Supplemental Clerk's Transcripts are referred to as follows: "[series number]Supp. [volume number]CT [page number]."

The Reporter's Transcript consists of one set of transcripts. Respondent refers to the Reporter's Transcript as "RT," with the volume number preceding this abbreviation and the page number following it.

[3] Robert Homick, Neil Woodman, Stewart Woodman, and Anthony Majoy were also charged with the same crimes and the same special circumstance allegations, with the exception that the lying-in-wait special circumstance was not alleged as to Neil and Stewart Woodman. (9CT 2300-2313; 1Supp. 3CT 846-857.)

conspiracy to commit murder and two counts of first degree murder. The jury further found the financial-gain, lying-in-wait, and multiple-murder special-circumstance allegations to be true.[4] (1Supp. 4CT 1053-1055, 1064-1066; 133RT 16842-16843.) At the conclusion of the penalty phase, the jury fixed the penalty at death.[5] (1Supp. 5CT 1381; 147RT 18529.)

The trial court denied appellant's automatic motion for reduction of sentence, pursuant to section 190.4, subdivision (e). (1Supp. 7CT 2165-2168, 2189; 148RT 18676-18679.) In accordance with the jury's verdict, the court sentenced appellant to death as to counts 2 and 3. As to count 1, the court sentenced appellant to 25 years to life, which it stayed pursuant to section 654. (1Supp. 7CT 2168, 2189; 148RT 18681-18682.)

This appeal is automatic following a judgment of death. (§ 1239.)

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[4] Contrary to appellant's procedural summary, appellant was ultimately charged with three counts, not four (AOB 4), and no firearm allegations were charged or found to be true (AOB 6).

[5] Robert Homick and Neil Woodman were tried with appellant at the guilt phase only. The jury found Robert Homick guilty of two counts of first degree murder and further found the multiple-murder special-circumstance allegation to be true. The trial court declared a mistrial on the conspiracy charge (later granting the People's motion to dismiss the charge) and found the jury deadlocked on the financial-gain and lying-in-wait special-circumstance allegations. As for Neil Woodman, the jury was deadlocked on all of the charges, and the trial court declared a mistrial as to him. (1Supp. 4CT 1056-1067; 133RT 16845-16874; 147RT 18617-18618.) Neil Woodman was later separately re-tried and convicted of two counts of first degree murder and one count of conspiracy to commit murder. (California Court of Appeal Case No. B102452.)

Stewart Woodman and Anthony Majoy were tried together, prior to appellant's trial. They were both convicted of two counts of first degree murder and one count of conspiracy to commit murder, and all of the special circumstance allegations alleged as to each were found to be true. (13Supp. 62CT 17571-17575, 17594-17598.)

STATEMENT OF FACTS

INTRODUCTION

On September 25, 1985, at about 10:30 p.m., Gerald Woodman drove his Mercedes with his wife Vera at his side into the underground parking structure of their residence in West Los Angeles. The Woodmans were returning home from a Yom Kippur celebration at a relative's house. As the Woodmans drove to their parking stall, appellant was waiting for them in the dark inside the garage. When the Woodmans parked their car, appellant came out of the darkness up to the driver's side of the car where Gerald sat. Appellant pulled out a handgun, pointed it at Gerald, and fired repeatedly. The next shots hit Vera. Vera died almost immediately, and Gerald died a short time later under the care of the paramedics on the way to the UCLA Medical Center.

The Woodmans' sons, Neil and Stewart Woodman, had a long-standing relationship with appellant and his brother Robert Homick. Appellant and Robert were Neil's and Stewart's "muscle": they collected debts for them; they installed bugging devices for them; and they killed Gerald and Vera Woodman for them. Neil and Stewart were possessed by hate and greed. Their hatred for their parents and their need for money to save their family business -- Manchester Products -- drove them to have their mother murdered for a half a million dollars insurance money and their father out of pure hate. Neil and Stewart hired appellant and Robert to kill their parents. Thereafter, appellant orchestrated a conspiracy -- which included appellant, Robert, Neil, Stewart, Michael Dominguez, and Anthony Majoy -- to kill the elder Woodmans. Appellant and Robert stalked Gerald and Vera for over a year before murdering them. After the

murders, Neil and Stewart paid appellant and Robert $55,000 for the murders.

I. GUILT PHASE

A. People's Case-In-Chief

1. Manchester Products: the Woodman family business

In the 1960's, Gerald Woodman and his father-in-law, Jack Corvelle, were business partners in a plastics business. In 1975, after Corvelle died, Gerald formed Manchester Products (hereafter, Manchester), and he brought his sons Neil and Stewart into the business as co-owners. Gerald was the president of Manchester. Stewart was the vice-president in charge of sales. Neil was the vice-president in charge of manufacturing and was also the secretary-treasurer. Gerald's wife Vera owned 50 percent of the stock, and Stewart and Neil each owned 25 percent. (72RT 6226-6229; 76RT 6933-6935; 79RT 7651-7652.) Manchester was successful, and the Woodman family enjoyed its success. (72RT 6229.)

In 1978, Neil's and Stewart's younger brother Wayne graduated from Duke University and joined in the family business. Gerald gave Wayne half of Vera's stock, without Wayne having to invest any money in Manchester. Although Wayne did not initially receive the same salary as his brothers, that changed by 1981. (76RT 6934-6935; 79RT 7649-7654, 7692.) Neil and Stewart seemed bitter or disappointed about how Wayne was brought into the business and given 25 percent of the share, the same amount as each of them had. (76RT 6935-6937.) Also, Wayne often argued with Neil and Stewart about the day-to-day management of the business and claimed that he knew how to run the business better than his brothers because he was college educated and they were not. Many times, Gerald sided with Wayne. (76RT 6937, 6980-6981.)

In 1979, Gerald suffered a heart attack and went to work less frequently. Soon, the Woodmans began to have disputes about who was in control of Manchester. The disputes pitted Neil and Stewart against Gerald and Wayne. The disputes were ongoing and grew worse. (76RT 6938-6939, 6979-6980; 77RT 7300-7301; 79RT 7654, 7694-7700.)

2. Neil and Stewart take control over Manchester, locking their parents and brother out of the business

In late 1981, there was a drastic change at Manchester. Neil and Stewart held a meeting of the board of directors of Manchester. The board of directors consisted of Gerald, Neil, and Stewart. But Neil and Stewart held the meeting without Gerald present. At the meeting, Neil and Stewart issued themselves additional shares of stock, giving them more than 50 percent of the shares of Manchester. (72RT 6230, 6234; 79RT 7655, 7694.) Stewart and Neil thus took control of Manchester, each owning half of the business. Stewart became the chief executive officer and chairman of the board of Manchester, and Neil became the president. (76RT 6931, 6938-6939.)

Neil and Stewart locked their parents out of Manchester. Up to that point, Gerald and Vera had been drawing a salary at Manchester, had a car allowance, and had health insurance. All of that stopped immediately. Neil and Stewart terminated Wayne's and Gerald's employment. They also ended Wayne's benefits, including his health insurance and car allowance. (72RT 6231-6232; 79RT 7656-7657.)

3. Neil and Stewart refuse to cancel a life insurance policy owned by Manchester -- a policy on the life of their mother

Prior to Stewart and Neil taking control of Manchester, Manchester had purchased, and was the beneficiary of, a life insurance policy on Vera. The policy was a term life insurance policy for $500,000. The purpose of

the policy was to make sure that, at Vera's death, her share of Manchester would go to her two daughters. (72RT 6236; 73RT 6323-6325, 6331-6332, 6355-6356.) Once Neil and Stewart took over Manchester, Vera was no longer a shareholder, but Manchester continued to own the insurance policy on her life. Vera was very upset about Manchester having the policy on her life when she was no longer a part of the business. Gerald shared her concerns. (72RT 6234-6238.)

Vera's sister, Muriel Jackson, took some action on her sister's behalf to try to have the life insurance policy canceled. Jackson called Manchester's insurance agent and expressed Vera's concerns. A few weeks later, the agent told Jackson that he had talked to Stewart and Neil but was unsuccessful in getting the life insurance policy canceled. (72RT 6226, 6238-6241.)

Jackson spoke to Stewart several times about the life insurance policy. She told him that Vera was very upset about having the policy on her life when she was no longer a part of the business, and Jackson asked Stewart to cancel the policy. (72RT 6245.) The policy was not canceled. (72RT 6247.) During the last telephone conversation that Jackson had with Stewart about the life insurance policy, Jackson heard Neil laughing in the background and saying, "Look at the odds." (72RT 6249.) Jackson felt sick and hung up the telephone. (72RT 6249.)

Jackson also contacted Presidential Life Insurance and the California Department of Insurance to get the life insurance policy canceled. The policy, however, was not canceled. (72RT 6250-6251; 73RT 6319, 6333-6338, 6361-6367.) Around April 18, 1983, Jackson received a copy of a letter written by Stewart to Presidential Life Insurance. (72RT 6252.) The letter stated:

> This is in regards to your letter to Vera Woodman dated 4/14/83, about the term life policy on her life in the amount of

> 500 thousand dollars, which Manchester Products not only owns, but is the beneficiary. Please be advised that Manchester Products Company fully intends to pay for each premium before it is due, and to keep this policy in tact [sic] for at least the term of the policy, and if need be, we will talk to you about extending it later. We will not cancel this policy, and any correspondence you might receive about cancelling this policy should be disregarded. For your records, the only officers of Manchester Products Company are Stewart and Neil Woodman. If you have any questions, please feel free to call me. Stewart Woodman, chairman of the board.

(72RT 6255-6256.) The senior vice-president of administration at Presidential Life, to whom Stewart's letter was addressed, had never before received a letter from an owner indicating that a policy was not to be canceled. (73RT 6319, 6339.)

The insurance policy on Vera's life had a "reentry provision," which meant Manchester could apply for a lowering of the premium rate, but Vera would have to qualify physically before the premium would be reduced. (73RT 6328.) The premium due on the policy in October 1984 was $6,525. If the reentry provision had been utilized, the premium due would have been $2,785. (73RT 6331-6333.) On April 13, 1984, Presidential Life sent a letter to Manchester, informing Manchester about the reentry provision. Presidential Life never received a response from Manchester. (73RT 6340-6341.)

4. Neil and Stewart do not allow Vera to see her grandchildren

After the change of ownership of Manchester, Vera was unable to see Stewart's and Neil's children. Vera's sisters and other family members expressed Vera's desire to see her grandchildren to Neil and Stewart, but to no avail. (72RT 6247-6248; 79RT 7729-7734; 80RT 7848.) Neil barred Gerald and Vera from their grandson's bar mitzvah and hired armed guards

to keep his parents away from the bar mitzvah. (74RT 6472-6474, 6479-6480.)

5. Manchester and Woodman Industries (Gerald's new business) wage a "war" against each other

In late 1981, Wayne and his parents filed a lawsuit against Manchester. The lawsuit was resolved in favor of Wayne and his parents in early 1982 in the amount of $675,000. (76RT 6943-6944, 6984, 6986; 79RT 7657.) Shortly thereafter, Gerald and Wayne took this money (the "buyout"), mortgaged Gerald's and Vera's home, and started a new company called Woodman Industries. Because plastics was the business that Gerald knew, Woodman Industries had a product line that was identical to Manchester's in some, but not all, respects. It was not long before Manchester and Woodman Industries waged a "war" against each other. (72RT 6090, 6232-6233; 76RT 6966-6968, 6986; 79RT 7658-7659, 7669.)

Even before Woodman Industries opened its doors, Manchester announced a significant reduction in its prices for those products which Woodman Industries would also be producing. (76RT 6976-6977, 6987; 79RT 7670.) Once Woodman Industries started business, Neil and Stewart instructed salesperson Twyla Morrison to beat the price offered by their father, even if it meant giving the product away. (72RT 6090.) Neil and Stewart intimidated mutual suppliers, such as freight companies, telling the freight companies that Manchester would not do business with them if they did business with Woodman Industries. They also intimidated salespeople and plant personnel. (77RT 7193-7196.) Neil and Stewart called OSHA and complained that Woodman Industries was substandard. (73RT 6426-6427.) They also tried to convince Union Bank not to loan money to Gerald. (76RT 7073-7074.) In turn, Woodman Industries hired employees away from Manchester. (76RT 6967-6968.)

In June 1983, Woodman Industries failed. Gerald, Vera, Wayne, and Wayne's wife filed for bankruptcy. (79RT 7672.) Gerald and Vera lost their home in Bel Air and moved in with Wayne and his wife, who owned a condominium on Roscomare Road in Bel Air. Eventually, Wayne also lost his condominium due to the bankruptcy. In late 1984 or early 1985, Wayne and his wife moved to a duplex on Blackburn in the Fairfax District. Gerald and Vera moved to an apartment at 11939 Gorham Avenue in West Los Angeles. (72RT 6233-6234; 73RT 6300; 79RT 7672-7676, 7686, 7720; 94RT 10000.)

6. Even after Gerald and Vera are driven into bankruptcy, the family strife continues

In 1975, Vera's sister Gloria Karns had loaned Gerald and Vera $100,000 through two promissory notes to help start Manchester. During the first five-year term on the notes, Manchester had made the interest payments. In 1980, Karns had renewed the notes for another five-year term at $95,000, and Manchester had continued to make interest payments. Around 1981, Karns became aware of the problems at Manchester, and she sided with her sister Vera and Gerald. (72RT 6130-6133; 76RT 7081-7083.)

Around 1983 or 1984, Neil and Stewart, who then controlled Manchester, telephoned Karns and asked her if she would extend the notes for another two years, making the notes due in 1987, rather than 1985. Neil and Stewart said that the bank they were dealing with was unhappy about "all the money going out, particularly since they were building a new building." Karns had not seen Neil or Stewart in quite a while, and she decided to meet with them in person. Karns went to Manchester. There, she told Neil and Stewart that she would extend the notes but that she needed collateral. Stewart and Neil did not seem to have any collateral, and they got upset because Karns had not previously asked Gerald and Vera for

collateral. The day after this meeting, Stewart telephoned Karns. He told her that Manchester did not need the loan extended and that Karns would not see her money again. In the months that followed, as payments became due, Karns sued Manchester in small claims court. Manchester ultimately filed a lawsuit in superior court against Karns. (72RT 6130-6135, 6176, 6178; 76RT 7081-7083, 7086.)

In February 1984, in relation to the lawsuit, Karns attended a deposition of Neil. (72RT 6160-6161, 6181.) During a break, Neil picked up a magazine, flipped through it, and said, "When somebody annoys you, you can look in a magazine [and] find [] someone to stop them annoying you." (72RT 6161-6164, 6183.) Neil turned the magazine around so that Karns could see an article entitled, "This gun for hire." (72RT 6164-6165.)

Manchester's lawsuit against Karns went to trial, and both Gerald and Vera testified for Karns. Karns prevailed in the lawsuit. (76RT 7083-7088.) The court found that Manchester was obligated to make monthly interest payments on both notes (including pre-judgment interest and interest that would become due) and that Manchester had to pay the principal amount on both notes (i.e., $95,000) when the notes became due on September 29, 1985. (76RT 7092-7095.)

7. Financial storm clouds loom over Manchester

The financial statements of Manchester reflected the following: in 1981, the net income of Manchester was $11,171; in 1982, the net income of Manchester was $78,727; and, in 1983, the net income of Manchester was $160,540. (75RT 6781-6783.) The draft of the financial statement of Manchester in 1984 reflected a loss of $230,135. (75RT 6785.)

In order to pay Gerald and Vera the $675,000 judgment, Neil and Stewart took out a loan at Union Bank, which increased Manchester's debt and placed pressure on sales. (76RT 6943-6944, 6984; 77RT 7199.) Also, Manchester's price-slashing, in response to the opening of Woodman

Industries, eroded profits and caused losses for Manchester. (77RT 7193-7199.)

In 1983, Manchester moved to a larger building on Prairie Street in Chatsworth. (71RT 5985-5986; 72RT 6085.) A local lender financed 100 percent of the construction of the new plant. This financing was important to Neil and Stewart, because there was a shortage of cash in the business. (72RT 6189-6195.) Manchester paid $25,000 rent per month for the new building. (72RT 6195-6196.) By 1985, the rental payments from Manchester were late, and the problem only worsened. (72RT 6197.)

Manchester purchased a very expensive production machine, but the machine did not operate properly for six months. The problem affected Manchester's relationship with Union Bank. Manchester was receiving bills for supplies and raw materials but was unable to produce goods. Customers were slow in paying Manchester, because they were receiving poor quality products. (76RT 6945-6949.)

As a result, Manchester started to make financial misrepresentations to Union Bank. Manchester relocated old receivables into other accounts and "re-aged" (i.e., put more current dates on) old receivables so that they would not appear to be past due. Manchester also engaged in "prebilling," sending invoices to Union Bank for shipments that were not made. These tactics made it appear to the bank that the collateral the bank was relying on for the loan was intact and allowed Manchester to receive from the bank an advance of 80 percent on its invoice -- including invoices that were "ineligible" as collateral because they were past due and invoices on shipments that were not made. (75RT 6709-6711; 76RT 6948-6952, 6958, 6988; 77RT 7203-7205.)

In 1984, Manchester was up for renewal of its loan. Diane Eng, a loan officer in the accounts receivable department of Union Bank, was in charge of Manchester's account. When Eng reviewed Manchester's

paperwork, she noticed Manchester was collecting money from its customers at a slower pace. Eng asked for a special audit. Neil and Stewart were initially uncooperative but later agreed to a special audit. (76RT 7063-7065, 7069-7072.)

Before the audit, however, Neil and Stewart came up with the idea of installing a bugging device inside the room at Manchester where the auditors would be reviewing Manchester's books. When the auditors arrived at Manchester, Stewart, Neil, and their employees listened to the auditors during the audit. They then changed the dates on the shipping documents to match the dates on the invoices. (76RT 6954-6959, 6989-6990.) Ultimately, however, Eng was not satisfied with the special audit. She thus extended, but did not renew, Manchester's credit. (76RT 7069-7072, 7074.)

In June or July of 1984, Jon Strayer took over Manchester's account from Eng and took a more careful and complete look at the operations of Manchester. (74RT 6688-6689.) When Strayer reviewed Manchester's records for June 1984, he noticed that Manchester's customers were not paying Manchester in a timely fashion. Upon further review, Strayer discovered that Manchester was changing the dates on some of its invoices from the previous agings that were presented to the bank, thus misrepresenting the overall collateral that Manchester was allowed to borrow against. (75RT 6709-6711.) Strayer discovered that, in early to mid-1984, Manchester was reporting that it had about two to three percent "ineligible" invoices. However, from Strayer's initial sampling of 50 invoices, Strayer discovered that there was at least $500,000 in receivables

which were "ineligible" but which were represented to be "eligible" collateral.[6] (75RT 6721-6723.)

Based on Strayer's discoveries but prior to bank auditors investigating Manchester's records more extensively, Union Bank arranged a meeting with Neil and Stewart and implemented procedures designed to reduce the over-advance to Manchester. The bank had Manchester present its cash receipts, verifying which customers were paying what invoices. It also demanded 10 percent of the cash collected to reduce the over-advance to Manchester. (75RT 6724-6725, 6729-6730.)

On July 20, 1984, Union Bank audited Manchester once again. Although the bugging devices were used during this audit as well, the audit uncovered about $1.7 million worth of changes of invoice dates (i.e., $1.7 million in "ineligible" collateral that Manchester was misrepresenting as "eligible" collateral). (75RT 6727; 76RT 6959; 77RT 7208.) As a result, Union Bank sought additional collateral to secure its loan to Manchester. The bank obtained trust deeds on Stewart's and Neil's houses. The bank also had Manchester submit invoices and proof of delivery of products to customers.[7] Neil and Stewart agreed to cut their salaries in half, and they injected $85,000 into Manchester. (75RT 6728-6729.)

During this time, Neil and Stewart had daily business meetings with Steven Strawn, the chief financial officer of Manchester, and Richard

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[6] By October 1984, after another audit, Manchester was reporting that it had 33 percent "ineligible" invoices (as opposed to the two to three percent it was reporting a few months earlier), valued at over $1 million. (75RT 6724.)

[7] Edgar Ridout, who did business with Manchester, received monthly forms from Union Bank to verify the amount of money Ridout's company owed to Manchester. On one occasion, Ridout told Stewart that he could not sign the form, because it was not correct. Stewart told Ridout to sign it anyway. Ridout refused, because he believed he would have been committing fraud. (75RT 6844-6845, 6866, 6870.)

Wilson, the vice-president. (76RT 6931, 6938-6939; 77RT 7171-7172, 7197.) Strawn believed that, in 1984, Manchester was unstable, appeared insolvent, and was incapable of meeting its financial obligations with suppliers and Union Bank. (77RT 7200.) Strawn believed Manchester's financial situation became worse by 1985. (77RT 7202.)

Wilson told Stewart that Manchester needed to gross $40,000 per day to keep afloat. (76RT 6943-6944, 6984, 6986; 77RT 7199.) Wilson believed that, by 1985, the cash flow of Manchester was "terrible" and was "worsening by the day." (76RT 6945.) He described Manchester's relationship with Union Bank as "deteriorating beyond repair" and the production coming out of manufacturing as "not stable" and "worse than ever." The business was losing sales and was "on the verge of collapse." (76RT 6952.) In April 1985, Wilson told Stewart that he found the financial situation of Manchester to be "hopeless." (76RT 6952.)

Twyla Morrison was a salesperson for Manchester. (72RT 6082-6084.) In 1984 or 1985, Morrison's commission checks began to arrive late, and the situation grew worse in 1985. (72RT 6094.)

8. Neil and Stewart express their hatred for their parents

Fred Woodard was the superintendent of Manchester. (71RT 5984-5985.) One day, after Manchester had moved to the Prairie Street address in 1983, Woodard and Neil were in Stewart's office when Stewart hung up the telephone and said, "The old man is still fuckin with us." (71RT 5988-5989.) Neil said, "We ought to just kill the old bastard and be done with it." (71RT 5989.)

Nancy Woodard was an employee of Manchester from 1977 to 1981. (71RT 5998-6000.) She also heard Neil say several times in Stewart's presence about their father, "We ought to just kill the bastard and be done with it." (71RT 6000-6001.) One day, when Stewart was walking through

the office on his way out the door, Ms. Woodard heard Neil ask Stewart where he was going. Stewart turned back and said, "Dad's had a heart attack." Neil responded, "So what." (71RT 6006.)

Twyla Morrison, a salesperson for Manchester, heard Stewart and Neil express hatred towards their father. (72RT 6091, 6093.) She recalled telling the police that Stewart frequently said, "I had a dream last night that my father was beaten to death with my mother's face." (72RT 6103.) Neil made similar statements. (72RT 6105-6106.)

William Blandin was employed by Manchester in 1983. (72RT 6044.) Blandin heard Stewart and Neil refer to their father as an "asshole." (72RT 6047.)

Catherine Clemente, the receptionist at Manchester from April 1982 to April 1983, frequently heard Stewart and Neil talk about their hatred for their parents. Clemente believed it amused Neil and Stewart to cause their parents grief. (73RT 6425-6427.)

Steven Strawn, the chief financial officer of Manchester, heard Neil and Stewart say that they hated their parents. Neil and Stewart said that they hoped Woodman Industries would fail and that their parents would die prematurely. (77RT 7191.)

Richard Wilson, the vice-president of Manchester who was employed at Manchester from 1977 to 1985, heard Neil express hatred and bitterness towards his parents on a daily basis. Neil "bragged that he broke his parents" financially. Stewart also made statements about his parents, more in the nature of disappointment and hurt. Wilson warned Neil and Stewart not to make such statements, because they would be blamed if something ever happened to Gerald and Vera. Wilson never heard Gerald express any hatred towards his sons. (76RT 6964-6966, 7042-7043.)

Diane Eng, the loan officer in the accounts receivable department of Union Bank, had an introductory meeting with Neil and Stewart at

Manchester in 1982 when she took over Manchester's account. During the half-hour meeting, for about 15 minutes, Neil and Stewart pointed to a transcript of statements their father had made and repeatedly referred to their father as "crazy." (76RT 7063-7067.)

In the early 1980's, Edgar Ridout owned E.J.R. Plastics and did business with Manchester. (75RT 6814-6816, 6820.) Ridout had a social relationship with Stewart and often stayed at Stewart's home in Hidden Hills. (75RT 6817-6818.) Ridout believed that Neil and Stewart hated and obsessed about their parents. Sometime in late 1984, when Ridout was talking about his two-year child-custody battle with his ex-wife, Neil told Ridout that Ridout "didn't have to worry," that Neil "could have her hit, and all problems would be over with."[8] (75RT 6821-6825.) Ridout believed that Stewart hated his father more than he hated his mother. (75RT 6824.)

Edward Saunders, the real estate developer involved in the construction of Manchester at Prairie Street in 1983, frequently heard Neil and Stewart say that they hated their parents and "wished they were dead." Neil appeared serious in his comments, and Stewart said that he was serious. (72RT 6198-6202.) Stewart said he wished his parents would be killed in a crash or a head-on collision. (72RT 6209.)

Between February and July 1985, Gary Goodgame met Stewart at a bar mitzvah. Stewart told Goodgame that his father was in a competing business and was trying to put him out of business. Stewart said that he hated his father and could not allow his children to see their grandfather. (71RT 6013-6015.) Stewart said, "My God damn fuckin father stole my Rolls Royce." (71RT 6015.)

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[8] This statement was admitted against Neil only. (75RT 6877-6878.)

9. The Homick brothers: guns for hire

Appellant and Robert Homick were frequent visitors of Neil and Stewart at Manchester. Steven Strawn and Richard Wilson saw appellant at Manchester on a monthly basis, and they saw Robert there a little more frequently. Appellant appeared to have a closer relationship with Neil, and Robert appeared to have a closer relationship with Stewart. (76RT 6962-6964; 77RT 7187-7190.) Other employees also saw the Homick brothers at Manchester. (71RT 5993-5994; 72RT 6062.)

Neil and Stewart regarded appellant as their problem solver. One day, when Stewart was talking about appellant to Catherine Clemente, the receptionist at Manchester, Stewart said that appellant was "his man in Vegas." (73RT 6422-6423.) Stewart said that, if he needed anything done, appellant "was the man to do it." Neil told Clemente that, if the Mafia was considered tough, appellant was tougher. (73RT 6423.) Clemente heard similar statements by Neil and Stewart about appellant on other occasions. (73RT 6423.) Stewart also told Clemente that appellant collected gambling money for him. (73RT 6427, 6448.)

Stewart introduced Edgar Ridout, who did business with Manchester, to appellant. The introduction was made at Manchester. Ridout also had breakfast with appellant and Stewart at a Las Vegas casino. Stewart told Ridout that appellant did money collection work for Manchester. Stewart said that Manchester was having problems collecting money from a distributor or manufacturer in Florida. He told Ridout that he had sent appellant to take care of the problem and Manchester got paid right away. (75RT 6825-6828.)

On many occasions, Neil told Richard Wilson, the vice-president of Manchester, that appellant "could get anything done of an illegal nature for us upon request." (76RT 6964.)

a. Neil and Stewart turn to appellant to solve their problems

One week after Gerald and Wayne left Manchester, Neil and Stewart turned to appellant. Neil and Stewart had appellant "sweep the premises" of Manchester for a bugging device, because they were paranoid that Gerald had installed one. (76RT 6960.)

On July 14, 1985, the day of the bar mitzvah for Neil's son, Neil turned to appellant. Neil and appellant met with Jean Scherrer and John O'Grady, two former officers with the Los Angeles Police Department (hereafter, LAPD), regarding a private security assignment.[9] (74RT 6469-6474.) Appellant told Scherrer and O'Grady that there was going to be a bar mitzvah that day at a local temple and the primary goal for security was to make certain that Gerald and Vera were not permitted on the premises. (74RT 6474.) Appellant gave Scherrer and O'Grady descriptions of Gerald and Vera and their car. Appellant instructed that, should either Scherrer or O'Grady see the Woodman parents, they should inform appellant immediately. (74RT 6475.) Appellant said he would take care of the situation and added, "If necessary, I will waste them." (74RT 6476-6477.) Neil nodded his head in an approving fashion at appellant's statement. (74RT 6477.) Appellant added that, following the ceremony, there was going to be a party at the El Caballero Country Club, where Scherrer and O'Grady were to do the same type of security work. (74RT 6478.) Later that day, appellant, Scherrer, and O'Grady acted as security at the bar mitzvah and the party. Scherrer and O'Grady carried weapons. Gerald and

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[9] Appellant had also been a member of the LAPD for a short period of time. (74RT 6473; 95RT 10274.)

Vera did not show up at either location. Scherrer and O'Grady were each paid $250 for their work.[10] (74RT 6478-6481, 6486-6487, 6655-6656.)

When Manchester was facing the audit by Union Bank, Neil and Stewart turned to appellant. Appellant enlisted the help of Scherrer again, this time to install an intercom system at Manchester. Scherrer met appellant at Manchester. Appellant unlocked the outside door of Manchester with keys, and appellant and Scherrer entered the building. The company appeared to be closed that day. (74RT 6482-6484, 6497-6498.) Appellant gave Scherrer a tour of Manchester. (74RT 6488.) Appellant used keys to enter at least two locked offices at Manchester. (74RT 6485.) Appellant took Scherrer into a vacant office and said that Neil and Stewart wanted to run an intercom from that location back to Neil's office. (74RT 6486.) Scherrer determined what equipment was necessary, went to a local Radio Shack store, purchased an intercom with a microphone, and returned to Manchester. Appellant and Scherrer then installed the equipment. (74RT 6487-6489; 76RT 6955-6959.) As a result, anything said in the unused office could be heard in Neil's office.[11] (74RT 6490.)

Manchester wrote a check to Dolores Homick (appellant's wife) for $2,296, dated July 23, 1984, "for commission due for Steal Shield," a plexiglass product. The bank paid the check. Manchester wrote another check to Dolores Homick, dated September 26, 1984, which was also paid

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[10] Appellant's daily reminder book had the following notations for July 14, 1984: "Chernov," followed by the word "club." (74RT 6667; 76RT 7051-7054; 78RT 7381-7384.) The name of the general manager of the El Caballero Country Club was Seymour Chernov. (74RT 6651-6653.)

[11] In October 1985, Scherrer learned that Gerald and Vera had been killed. Scherrer also learned that a reward was offered, and he took steps to try to obtain the reward. Scherrer ultimately received $25,000 reward money. (74RT 6493-6494.)

by the bank. (76RT 7054; 77RT 7217-7223.) Dolores Homick had no business connection to Manchester. (77RT 7224.)

b. Neil and Stewart turn to Robert to solve their problems

Like appellant, Robert was also a problem solver for Neil and Stewart. Stewart had Manchester vice-president Richard Wilson give Robert the keys to a Monte Carlo automobile owned by Manchester. Robert drove the car to Nevada, and Manchester reported the car stolen to its insurance company. After the insurance was paid, Stewart and Manchester employees Wilson and Strawn were on an airplane flight. While flying over the desert in Nevada, Wilson said that he could see the burned Monte Carlo below. Stewart got angry at the joke. (76RT 6978-6979; 77RT 7212-7214.) On August 22, 1983, Las Vegas Metropolitan Police Department Officer Jimm Mattson, who was on routine patrol in the Nevada desert, came upon the Monte Carlo. (98RT 10891-10894, 10900, 10903.) The car looked like it had been purposefully set on fire.[12] (98RT 10892-10893.)

In 1983 or later, Stewart reported that his Rolls Royce had been stolen from his home garage. Stewart had a then top-of-the-line, $4,000 mobile phone installed in the car. The insurance company paid Stewart for the car, but the car was eventually found. (76RT 6977-6978; 99RT 10999-11004, 11012-11015, 11019.) Years later, the new owner of Stewart's

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[12] On March 11, 1986, a search warrant was served on Robert's apartment. (92RT 9816-9819.) During the search, officers recovered the license plates of the Monte Carlo (wrapped in a Las Vegas newspaper dated June 15, 1983), as well as the vehicle registration, a vehicle warranty, and Monte Carlo manuals. (100RT 11200-11204.) Officers also recovered a handwritten note from a briefcase in Robert's apartment. The entries on the note were the directions to the Monte Carlo in the Nevada desert. (98RT 10900-10903; 99RT 10972-10973; Peo. Exh. 266.)

former Rolls Royce went to the same mobile phone store to set up the car with a mobile phone. Although the cables in the front of the car had been cut and the cradle and handset were missing, the car still had the same mobile phone transmitter unit in the trunk. (99RT 11008-11010.) The mobile phone itself was found at Robert's apartment during the execution of a search warrant on March 11, 1986. (100RT 11208.)

Manchester did business with Soft Lite, a small company run by Jack Swartz and his daughter Tracey Hebard. Manchester and Soft Lite had a financial dispute. (71RT 5920-5924.) Stewart told Manchester employee Richard Wilson that he was going to send Robert to Soft Lite to collect its debt to Manchester. (76RT 6941-6943.) On June 5, 1984, Robert showed up at Soft Lite and told Swartz that he was sent by Manchester because Swartz owed Manchester money. Robert told Swartz that, if he did not pay Manchester, Robert would break his legs or "snuff out his life." (71RT 5923-5929, 5934-5935, 5953; 100RT 11332-11335.) Hebard called the police. (71RT 5929; 72RT 6113-6114, 6117-6119.)

10. Appellant and Robert stalk Gerald and Vera for over a year

a. Appellant stalks Gerald and Vera at the Roscomare address

Appellant habitually carried and made notes in daily reminder books. (82RT 8212.) Appellant's daily reminder books for 1984 noted Wayne Woodman's Roscomare address on several dates, including April 28, May 3, June 4, July 1, August 5, September 4, October 1, November 1, and December 2. (79RT 7680-7685; 100RT 11260-11267.) At the time, Gerald and Vera lived with their son Wayne and his wife at the Roscomare address. (79RT 7686.) Wayne did not know appellant. (79RT 7675.)

On some of the same dates in 1984, appellant's daily reminder books referred to "Ed B. Dino," "Ed B. grape," "Ed Bern grape," and "77."

(100RT 11264-11267.) Leith Adams, who was in charge of corporate archives at Warner Brothers Studios, explained that Ed Byrnes was an actor who played a character named "Kookie" in the late 1950's television show "77 Sunset Strip." Kookie's trademark was a black pocket comb, which he kept in his left breast pocket. Dino's was the restaurant featured in the television show. (100RT 11239-11250.) Gerald habitually carried a comb in his breast shirt pocket. (79RT 7687.)

For January 1, 1985, appellant's daily reminder book had an entry to the Roscomare address, as well as a reference to "Ed Bern." (100RT 11260.) For January 23, 1985, appellant's daily reminder book had the notation "11-7-80, gas on" and had Wayne's name next to it. The notation "11-7-80, gas on" was the same notation that was on the gas meter located at the Roscomare address. (79RT 7680.) On February 8, 1985, appellant's daily reminder book included a reference to the Roscomare address. (100RT 11260.) On February 12, 1985, appellant's daily reminder book listed Wayne's name and Wayne's new Blackburn address. (79RT 7675, 7687.)

b. Appellant and Robert stalk Gerald and Vera at the Gorham address

By early 1985, Gerald and Vera were living at the apartment building at 11939 Gorham Avenue in West Los Angeles. (79RT 7675-7676, 7686, 7720.) The entry for appellant's daily reminder book for February 22, 1985, noted Gerald's and Vera's new address. (Peo. Exh. 22.)

Appellant's daily reminder book had the following notations for February 24, 1985: the name "Sharon Armitage," her office telephone number, and "gold shirt, vest." Two days later, appellant's daily reminder book noted Armitage's license plate number and a portion of her name. In 1985, Sharon Armitage was a real estate agent for Merrill Lynch Realty, and a gold shirt or vest was a logo for a real estate company. In early 1985,

Armitage had a listing at 11939 Gorham, the building where Gerald and Vera lived. Armitage's name and telephone number appeared on the real estate sign outside the building. Armitage showed the listed unit and also showed the common areas of the building, including the subterranean parking area. She pointed out the security features, including the camera in the garage.[13] (78RT 7419-7428.)

Appellant's daily reminder book had the following notations for February 26, 1985: "Stoneridge," its address, and the telephone number for the Beaumont Company. In 1985, "Stoneridge" was the name of a building at 11956 Gorham, the building directly across the street from the entrance to the subterranean parking of 11939 Gorham, where Gerald and Vera lived. The Beaumont Company was the property management company. (78RT 7404-7409.)

Appellant's daily reminder for February 26, 1985, also had at least a partial notation to the license plate of Evelyn Grossman's car. Evelyn Grossman lived at the same apartment complex as Vera and Gerald. Like Vera, she drove a Mercedes-Benz. Grossman was five feet tall, weighed 104 pounds, and was born on August 27, 1912. Vera was five feet one inch tall, weighed 108 pounds, and was born on December 22, 1921. (72RT 6258; 79RT 7639-7645; Peo. Exh. 22.)

June 22, 1985, was Gerald's and Vera's 45th wedding anniversary. The Woodman family tradition was to go out to dinner on that day. Neil and Stewart had stopped joining in the family tradition in the early 1980's. On this anniversary, Wayne, his wife, his two sisters, their spouses, and his

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[13] About two and a half years later, on June 4, 1987, detectives showed Armitage some photographs, and she selected appellant's photograph as someone who looked familiar to her. (78RT 7431, 7437-7438.)

parents went out to dinner to Guido's Restaurant in Santa Monica. (79RT 7546-7550, 7562, 7650-7651.)

On that same day, David Miller and Eric Grant, who lived one apartment building away from Gerald and Vera, became suspicious when they saw Robert sitting in his car parked at different spots on Gorham Avenue for four to six hours. (78RT 7439-7448, 7454-7457, 7468-7469, 7480, 7485-7486; 101RT 11330-11331.) Grant walked by Robert's car and memorized the license plate number. (78RT 7449-7450, 7469-7472, 7479; Peo. Exh. 6.) He then called the police at 7:24 p.m. (78RT 7440; 83RT 8638, 8641.)

LAPD Officers Thomas O'Neil and Jackie Nicholson received a radio call about a possible burglary suspect in an older model blue Buick, which the officers spotted on Gorham Avenue. (78RT 7485-7487, 7490, 7500-7504.) Officer O'Neil approached Robert, who was sitting in the driver's seat, and asked him what he was doing. Robert said he was reading. (78RT 7487-7492; 101RT 11337-11338.) Officer O'Neil filled out a field interview card on Robert. (78RT 7488-7491, 7503-7504.)

11. Appellant prepares for the murders of Gerald and Vera

a. About two weeks before the murders, appellant secures walkie-talkies

On September 10, 11, or 12, 1985, appellant brought three Maxon walkie-talkies to Art's CB Shop, in Las Vegas, Nevada. He asked Art Taylor, his friend, to check the walkie-talkies to make sure they were working.[14] The walkie-talkies were for short-range communication with a

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[14] Art Taylor met appellant while running his business in the late 1970's or early 1980's, and the two became friends. (82RT 8301-8303.) Appellant was involved in vitamin sales and often asked Taylor to mail vitamins for him through his business. One day, appellant asked Taylor to (continued...)

maximum range of five miles and required line-of-sight contact. (82RT 8299-8300, 8322-8325; 83RT 8474.) Taylor discovered that one of the walkie-talkies was not working. (82RT 8326-8327.) Appellant said he wanted to use the walkie-talkies for surveillance work in Los Angeles. (82RT 8327.)

That same week, appellant went to Siegel and Associates in Las Vegas. Steward Siegel owned the company, and Dennis Scott ran the warehouse. (84RT 8743-8745, 8749-8751.) Appellant exchanged the walkie-talkie that was not working for one that worked. (84RT 8749-8750.) Scott overheard appellant tell Siegel that he was going to use the walkie-talkies for surveillance. (84RT 8760.)

b. Robert purchases a bolt cutter

In September 1985, Norma Drinkern was the manager of Rae's Hardware Store located on Santa Monica Boulevard in West Los Angeles. Drinkern operated the day-to-day operations of the store and served as a

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(...continued)
mail a package for him. Taylor gave the package to his daughter, but she forgot to mail it. When appellant found out, he became very unhappy. Based on this incident and other things, Taylor became concerned that appellant might be involved in dealing drugs. (82RT 8363-8367.)

Taylor went to the FBI. He first contacted Jack Salisbury, a neighbor who was an FBI agent, on July 4, 1983. Sometime later, Taylor met Agent James Livingston. He then provided the FBI with information on narcotics trafficking involving appellant. (82RT 8361-8362, 8365; 83RT 8596-8597.) From 1983 through early 1986, the FBI reimbursed Taylor about $10,000. (82RT 8369.) Around this time, there were tax liens on Taylor's shop. (82RT 8445.) At some point, Taylor asked Agent Livingston for help with the IRS, but Agent Livingston said he could not help Taylor. (83RT 8469-8470.) No one from any government agency helped Taylor remove the liens. (83RT 8596.)

The trial court instructed the jury that the testimony concerning drug dealing on the part of appellant, if believed, was to be considered only for the purpose of determining whether it tended to impeach Taylor's credibility. (82RT 8452.)

salesperson. The store sold bolt cutters, including the "Top Man" brand. (94RT 10095-10104.) The store was around the corner from Robert's apartment. (95RT 10354.)

Robert and Michael Dominguez came into the hardware store to look at bolt cutters. After looking around, they decided to shop elsewhere. However, a short time later, they returned and said that the price at the store was right. Robert and Dominguez purchased a bolt cutter and paid cash. (94RT 10105-10112.)

The register tape of the store showed a transaction for an item retailed at $17.99 on September 14, 1985, at 2:30 p.m. Records maintained by Rae's Hardware indicated that 14-inch bolt cutters were sold for $17.99. (95RT 10230-10232, 10240-10241.)

c. Two days before the murders, Stewart finds out that his parents will be celebrating Yom Kippur with family; appellant books his flight to Burbank

Two days before the murders, on September 23, 1985, there was a series of telephone calls involving appellant, Robert, and Stewart.

At 11:30 a.m., there was a 2.6 minute telephone call billed to the Sprint number of Ettinger Fine Art (located in Las Vegas) to Robert's residence.[15] A few minutes later, at 11:48 a.m., there was a 5.2 minute call billed to Ettinger Fine Art. This call was placed to the payphone at the Chevron Station near Robert's apartment. The entry for appellant's daily reminder book for that same day noted the telephone number to this payphone, with the letter "J" next to it. (100RT 11270; 126RT 15536; Peo. Exhs. 22, 300.) Appellant called Robert "Jesse." (82RT 8320; 94RT 10065.)

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[15] Larry Ettinger was a friend of appellant. (See 82RT 8328.)

At 3:41 p.m., there was a telephone call placed to Manchester from the same payphone at the Chevron Station near Robert's apartment. (Peo. Exh. 300.) At 3:42 and 3:43 p.m., there were one-minute telephone calls made from Manchester to the business of Sidney Michelson, Neil's and Stewart's uncle. (79RT 7729-7730; Peo. Exh. 300.)

At 3:44 p.m., Stewart telephoned his aunt Sybil Michelson at home from Manchester. (80RT 7848-7849; Peo. Exh. 300.) Sybil was Vera's sister, and she was married to Sidney. After the breakup of Manchester, Stewart had telephoned Sybil about once a week. However, when Sidney concluded that Sybil was getting too upset over these calls, he asked Stewart to not call Sybil at home. Thereafter, Stewart called Sidney at work. (79RT 7733-7734; 80RT 7845.) On this day, when Sidney got home from work, Sybil was on the telephone with Stewart, and she was crying. (79RT 7739-7740.)

Stewart told Sybil that he wanted to give his mother a message that he loved her and that she should have a good year. Sybil asked Stewart to send Vera a card. (80RT 7849.) Stewart asked Sybil, "Will you all be getting together to break the fast?" Sybil replied, "Yes." It was the family's habit and custom to get together for the breaking of the fast, and, in the few years before 1985, the family gathered to celebrate at the home of Muriel Jackson, Vera's sister.[16] (80RT 7850.)

At 4:03 p.m., there was a two-minute telephone call placed from Robert's apartment to Manchester. (Peo. Exhs. 300, 1074-A.)

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[16] A few weeks earlier, Stewart asked his cousin Linda Newman (the daughter of Sybil and Sidney) if the family would be getting together for Yom Kippur dinner, and Linda said, "Yes." Stewart asked where the dinner would be held, and Linda did not answer the question. Stewart asked Linda if the dinner would be held at the Jacksons' house, and Linda said she was not certain. (108RT 12646-12648.)

At 6:45 p.m., a telephone call was billed to the Sprint number for Ettinger Fine Art in Las Vegas. The call was placed to Robert's apartment. (Peo. Exh. 300.)

At around 7:48 p.m., two airline tickets were booked with Travel America, a tour agency in Las Vegas. (80RT 7924, 7928, 7965-7966.) One ticket was issued by PSA Airlines to appellant, serial number 545, for travel from Las Vegas to Burbank on Flight #119, in seat 4-E, on September 24, 1985, at 11:50 a.m. The second ticket was issued by PSA to "Mr. M. Dome," serial number 546, in seat 4-D (next to seat 4-E) on the same flight. The tickets were issued back-to-back. (80RT 7869-7873, 7933; Peo. Exhs. 139-A, 139-B.)

d. One day before the murders, appellant obtains "ammo" in Las Vegas

One day before the murders, on September 24, 1985, at about 10:00 a.m., Art Taylor met with appellant and William Homick (appellant's other brother) at Larry Ettinger's house in Las Vegas. Appellant had asked Taylor to meet him there and wanted Taylor to work with William in installing an alarm system and cameras at Ettinger's house. (82RT 8328-8329, 8333-8335.) William approached appellant, handed him a brown paper bag, and said, "This is the ammo that you had requested." Appellant said he had to leave because he was in a hurry to get to the airport for an 11:00 a.m. flight. Appellant left in his Mustang and took the brown bag with him. (82RT 8336-8338.)

That same morning, two telephone calls were billed to the Sprint number for Ettinger Fine Art. One was to Anthony Majoy's residence.[17] The other was to Robert's apartment. (Peo. Exh. 300.)

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[17] There were numerous references to Majoy in appellant's 1985 daily reminder books, including his name, his addresses, directions to his

(continued...)

e. Appellant flies to Burbank with Michael Dominguez

Records for PSA Airlines showed that the two tickets issued to appellant and "Mr. M. Dome" were used for travel on Flight #119, from Las Vegas to Burbank at 11:50 a.m. on September 24, 1985. (80RT 7868-7873, 7933; Peo. Exhs. 139-A, 139-B.) Burnell Shelton was a passenger on the same flight. He was "positive" that he saw appellant and Michael Dominguez on the flight from Las Vegas to Burbank.[18] (81RT 8002-8007, 8036.)

At 1:01 p.m., appellant rented a white Fifth Avenue Chrysler from the Budget Rent-A-Car location at the Burbank Airport. Appellant rented the car from Alphonso King, the manager of Budget Rent-A-Car who had known appellant for several years. (82RT 8239-8240, 8250-8252, 8258-

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(...continued)
home, and the telephone numbers to the payphones near his home. (99RT 10982-10984, 11021-11030; 100RT 11257-11258.)

[18] On January 13, 1986, four months after the flight, Shelton identified appellant and Dominguez as individuals who he had seen on the flight. Shelton indicated in a written statement that it was "possible" that Dominguez was sitting in the seat in front of him and that appellant "could have been on the plane, and walked down the aisle." Although Shelton used this language in his signed statement, he was positive in his identifications. (81RT 8002-8007, 8036; 101RT 11330-11331, 11340-11343.)

Marilyn Clark was one of the three flight attendants on the same flight. On February 12, 1986, detectives showed Clark photographs of individuals and asked Clark about the passengers on Flight #119. Clark recognized Dominguez and appellant but said she was uncertain whether she recognized them from the flight. (80RT 7937-7945; 101RT 11330-11331.)

8261.) Dominguez was with appellant when appellant rented the car.[19] (82RT 8264.)

f. While in Los Angeles, appellant experiences problems with the walkie-talkies and flies back to Las Vegas

That same day, on September 24, 1985, appellant telephoned Taylor at his store.[20] (82RT 8338-8339; Peo. Exh. 300.) Appellant said he was having a problem with the walkie-talkies and wanted to know where he could obtain a battery for a walkie-talkie. Taylor determined that appellant was near the San Diego Freeway in Los Angeles and suggested to appellant that he go to Henry Radio and various other locations. (82RT 8339-8341.) Appellant's diary entry for September 24, 1985, had the entry "Henry Radio." The diary also indicated other recommendations that Taylor had made to appellant about where to purchase a new battery for the walkie-talkie. (82RT 8413-8415.)

Dennis Pickering was an employee of Henry Radio, an electronics store located on South Bundy Drive in West Los Angeles. (84RT 8661-8663, 8696.) On September 24, 1985, Pickering received a telephone call requesting information about a certain type of battery. Pickering identified himself by his first name to the caller, gave the caller information on the battery, and provided the caller information on the location of Henry Radio. (84RT 8698-8700.) Appellant's diary entry for September 24, 1985, listed the information that Pickering provided to the caller. (84RT 8674, 8700-8701.)

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[19] Appellant's daily reminder book for September 24, 1985, listed Max Herman's address. Herman was a former member of the LAPD and a lawyer. (96RT 10384-10389.)

[20] Taylor believed appellant called him between 4:00 and 5:00 p.m. (82RT 8339.) The telephone records indicate the call was made at 4:11 p.m. (Peo. Exh. 300.)

That day, Pickering sold the battery to Robert.[21] Pickering prepared a sales receipt, indicating the sale was to Art's CB located at 1523 Corinth in Los Angeles. Robert provided Pickering with this information. The Corinth address was Robert's address. (84RT 8670-8673, 8698, 8701-8704, 8715, 8722; 94RT 10046-10047.)

That evening, at about 8:00 p.m., appellant telephoned Taylor at his home and expressed frustration about the walkie-talkies, which were still not working properly. (82RT 8341-8342.) Appellant said he was going to return to Las Vegas the following day. (82RT 8342.)

Airline records showed that a Western Airlines ticket was issued to appellant, for travel from Los Angeles to Las Vegas on Flight #194, on September 24, 1985, at 10:00 p.m. The ticket was purchased in Los Angeles, paid for in cash, and used. (80RT 7874-7876; Peo. Exh. 139-C.) Appellant's daily reminder book for September 24, 1985, had a reference to this flight. (Peo. Exh. 22.)

Robert booked a room at the Westwood Inn, with a check-out date of September 25, 1985, under the name "Richard Gilroy." (81RT 8164-8173.)

12. The day of the murders

a. While in Las Vegas, appellant deals with more problems with the walkie-talkies; appellant flies to Burbank

On September 25, 1985, the day of the murders, at 7:19 a.m., there was a one-minute telephone call placed to Manchester from the payphone at the Chevron Station near Robert's apartment. At 7:21 a.m., the call was returned in an eight-minute telephone call. (Peo. Exh. 300.)

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[21] Pickering recalled the sale occurring between 10:30 and 11:00 a.m. (84RT 8715.)

At 8:01 a.m., an airline ticket was booked with Travel America. The ticket was issued by PSA Airlines to appellant for travel from Las Vegas to Burbank on Flight #119 at 11:50 a.m. that day. (80RT 7877, 7906, 7935; Peo. Exh. 139-D.) Two other tickets were issued at the same time. (80RT 7934-7935.) One ticket was a PSA ticket issued to appellant for travel from Los Angeles to Las Vegas on Flight #512 on September 26, 1985. The other was a PSA ticket issued to "Mr. M. Dome" for the same flight. (80RT 7878-7879; Peo. Exhs. 139-E, 139-F.) There were references to these flights in appellant's daily reminder book for September 25, 1985. (Peo. Exh. 22.)

At about 10:00 or 10:30 a.m., appellant arrived at Art Taylor's shop in Las Vegas. He had the walkie-talkies with him. Appellant said he wanted Taylor to return the walkie-talkies to Steward Siegel and also wanted Taylor to give Siegel the new battery, along with a receipt from Henry Radio for the battery. (82RT 8343-8347.) Appellant expressed interest in trying to obtain some other walkie-talkies that might work in Los Angeles. Taylor told appellant that he did not know anyone who had walkie-talkies similar to the ones that appellant already had. (82RT 8345.) In the end, appellant decided to keep his walkie-talkies. (82RT 8344, 8347.) One of the walkie-talkies did not work and the other two did not work well, but appellant said the walkie-talkies were "better than nothing." (82RT 8348, 8352.)

Appellant asked Taylor to call Robert and ask Robert to pick up appellant at the airport at 1:00 p.m. Appellant then left Taylor's shop at about 11:00 or 11:30 a.m. (82RT 8352-8353.) Before Taylor could call Robert, Robert called Taylor and asked for appellant. (82RT 8355-8356.) Taylor relayed appellant's message to Robert. Robert asked if appellant had obtained new walkie-talkies. Taylor replied, "No." (82RT 8356.)

Airline records showed that a PSA ticket issued to appellant was used for travel on Flight #119 from Las Vegas to Burbank at 11:50 a.m. (80RT 7877, 7906; Peo. Exh. 139-D.) Lorraine O'Hara and her husband were on the same flight, and O'Hara saw appellant on that flight. (81RT 8041-8044.)

b. Gerald and Vera prepare for the breaking of the fast

September 25, 1985, was Yom Kippur. At about 10:15 a.m., Vera's sister Muriel Jackson picked her up and drove her to the temple. Gerald was already at the temple. Jackson then went to another temple to meet her husband. (73RT 6307.)

At around 2:15 or 2:20 p.m., Gerald and Vera went to Jackson's house. As Vera and Jackson had done for many years, they started to prepare for the breaking of the fast -- a dinner and joyous gathering with extended family. They planned for the breaking of the fast at around 6:00 or 6:30 p.m. (73RT 6307-6309.)

c. Robert has a minor car accident with one of Gerald's and Vera's neighbors

At about 6:30 p.m. that evening, Richard Altman, who lived at an apartment on Montana Avenue close to where Gerald and Vera lived, was driving his car to a meeting when he had a minor traffic accident with Robert. Robert got out of his car.[22] Altman talked to Robert for about five minutes. Robert and Altman were on a busy street and decided to relocate off the main street and exchange information. Altman drove to the other

[22] Altman did not see anyone else inside Robert's car. (99RT 11045.)

location, but Robert did not show up. After waiting for Robert for about 10 minutes, Altman went to his meeting.[23] (99RT 11038-11045.)

d. Robert is spotted at a nearby Chevron Station

Bette Saul and her husband Marvin were going to celebrate the breaking of the fast at Muriel Jackson's house. (73RT 6311; 93RT 9871-9873.) Before they went there, they stopped by the Fine Affair Restaurant for drinks. (93RT 9874-9875.) This was a four or five minute drive away from the gates up to Jackson's house.[24] (93RT 9874.) Saul's husband dropped her off at the front of the restaurant and went to park the car. As Saul stood in front of the restaurant, she noticed a car parked at the nearby Chevron Station. The car was dirty and banged up, and it had decals and a Nevada license plate. It was Robert's car. (93RT 9876-9879; 98RT 10795-10803.) Robert was standing next to the driver's side of the car. There was another Caucasian man with him. (93RT 9878, 9882-9883, 9887-9888; 101RT 11330-11331, 11338-11340.)

e. Gerald and Vera celebrate Yom Kippur at Muriel Jackson's house

That evening, about 70 people gathered at Jackson's home for the breaking of the fast. These were mostly family members, but there were

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[23] A few days later, Altman found Robert waiting for him at the parking stall of his building. Robert accused Altman of leaving the scene of a collision. Altman explained to Robert what had happened, and Robert did not appear to believe Altman. Robert wanted Altman to pay for the damage to his car. Altman agreed to have Robert's car fixed. Robert wanted a check for $300 and threatened to file a hit-and-run report. Altman later went to the address that Robert gave him and took photographs of Robert's car. (99RT 11050-11052.)

[24] Jackson lived in a gated community, which had a guard shack. The only way to Jackson's house was up Moraga Drive to the gates and the guard shack. (93RT 9892; 95RT 10349.)

also some friends. Gerald and Vera were there. Their daughter Maxine was there. Sidney and Sybil Michelson were there. Bette and Marvin Saul were there. Neil and Stewart were not present at the celebration. (73RT 6307-6311; 79RT 7552; 80RT 7836-7838, 7851-7852.)

At about 10:00 to 10:15 p.m., Gerald and Vera left Jackson's house in their tan-colored, two-seat Mercedes. (72RT 6258; 73RT 6312; 79RT 7549, 7651; 80RT 7836-7838.) Vera was carrying home some food. (73RT 6313.) Gerald and Vera lived 15 minutes away from Jackson. (73RT 6306.)

f. Gerald's and Vera's neighbors respond to the sound of gunfire

Robert Kelly was a UCLA student and an emergency medical technician for the Emergency Medical Services through the UCLA police department. (82RT 8371-8372.) On September 25, 1985, Kelly arrived home from work at 10:05 p.m. Kelly lived at 11959 Gorham, on the second floor of the building, with his roommate Jeff Carolan. The building was next door to the building where Gerald and Vera lived. Kelly went to his room, changed his clothes, and lay down on his bed. (82RT 8373-8375.)

Shortly thereafter, Kelly heard five gunshots separated by short pauses. Kelly knew the gunshots were coming from outside and were close by. (82RT 8373-8375.) Kelly heard a woman scream at the same time as the gunshots. The woman's scream seemed to come from the same distance as the gunshots. (82RT 8377.)

Kelly's roommate Carolan heard four gunshots. The sequence was: a shot, a pause, two shots together, another pause, and another shot. (93RT 9969-9970.) About 10 to 20 seconds later, Carolan heard someone yell, "Call the police." (93RT 9970.) Carolan asked Kelly if he thought they had heard gunshots. Kelly said, "Yes." About 30 to 40 seconds later,

Carolan and Kelly opened their front door. Carolan heard someone yell, "Call an ambulance." (82RT 8376; 93RT 9971.) Kelly went to his room, picked up a stethoscope and a pen light, and ran out of his apartment. Kelly and Carolan ran downstairs, down the stairwell. (82RT 8377-8378; 93RT 9972.)

The man yelling for assistance was Rodger Backman. (82RT 8378-8380; 85RT 8845-8846.) That evening, Backman was visiting his mother, who lived in a third-floor apartment in the same building as Kelly and Carolan. Backman heard five gunshots -- two rapid shots, followed by a pause, and then three more shots. The shots sounded alike, as though they were fired from the same gun. (85RT 8822-8823.) Backman jumped from where he was sitting and headed for the balcony. Backman opened the screen door and went onto the balcony. The balcony overlooked the building where Gerald and Vera lived. (85RT 8823-8825.)

Backman leaned over the railing and looked down. Backman heard rustling in the ivy on the 11939 side of the property line. Backman then saw a person who jumped over a wall which separated the two apartment complexes down the walkway. (85RT 8825, 8829.) The man came over the wall quickly. (85RT 8872.) The man landed on the walkway in a crouched position, with his arms out to the sides. (85RT 8825, 8883.) Backman heard some additional rustling sounds headed in the direction of Gorham. (85RT 8826-8827.) Backman was absolutely certain that there were two individuals in the ivy. He saw one, and he heard the other. (85RT 8901.)

Backman yelled from the balcony, "Hey, fucker. I see you." The person looked up. Backman made eye contact with the person. (85RT 8825, 8834, 8863.) The person was wearing a black, martial arts-type uniform and a hood. (85RT 8834.) The hood covered the top of the person's head; his hair was not visible. Backman saw the person's face half

an inch above the eyebrows down to about the bottom of the nose. This was the only exposed area of the face, and Backman was unable to see the person's mouth. (85RT 8835-8836.) The person had olive-toned skin. He was about five feet six inches tall, weighed 160 pounds, and did not appear muscular. (85RT 8836, 8852-8853.) Backman could not see an object in the person's hand, which he looked for to see if the person was a threat. (85RT 8836.) The person was wearing martial arts-type shoes. (85RT 8860-8862.) Backman concluded that the person who came over the wall was Asian or Hispanic. (85RT 8865.) Backman saw the hooded person for four seconds. (85RT 8838, 8901.)

The hooded person took off running towards the back of the building into the alley. Backman ran downstairs after him. (85RT 8836.) When Backman reached the walkway, he paused to make sure he was safe. He continued to the back carport area, around the trash dumpster. (85RT 8837.) Backman did not see the hooded person. (85RT 8838.)

Backman saw a car coming up the alley and believed the car was returning home and getting ready to park in the carport. Backman approached the person in the car and talked to the person.[25] (85RT 8838-8839.)

Backman returned to the walkway and to the front of the building. He investigated the area where he had heard the second sound of rustling in the ivy. (85RT 8839-8841.) There was good lighting in the area, including flood lights in the walkway. The subterranean parking of 11939 Gorham was also well lit, and light was emanating from there. (85RT 8853.) Backman got up on the retaining wall. When he glanced down in the

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[25] Richard Altman, who had had the minor car accident with Robert, was returning home at about 10:00 or 10:30 p.m. As he was driving down the alley, he saw Backman looking for someone in the alley and then saw Backman run south towards Gorham. (99RT 11042-11044, 11074.)

planter area, he saw that one of the sub-level gates which led to the garage area of 11939 Gorham was swung open. (85RT 8841.) Backman believed this must have been an entry point for something that had taken place. Backman jumped down the retaining wall,[26] which did not take extraordinary athletic ability,[27] and entered the garage to see what he could find. (85RT 8842-8843.)

Inside the garage, Backman discovered a parked Mercedes, with its two doors swung open. A man was sitting up in the driver's seat, with his chin on his chest. The man had gunshot wounds and was bleeding. (85RT 8843-8845.) Backman shook the man's left shoulder to see if he could get a response. He checked the man's pulse but could not determine if the man had a pulse. Backman knew he needed to get help. He exited the garage the same way he got in. (85RT 8845.)

Backman came over the wall and onto the walkway area. He saw neighbors, who had come out of their apartments. Backman yelled for help. He said someone needed to call the police and an ambulance. He asked if there was a doctor nearby. (85RT 8845-8846.) Kelly told Backman that he was a medical student. Backman said, "Great. Come on. I need your help. Somebody has been hurt." (85RT 8846-8847.) Backman directed Kelly and Carolan to go with him. (93RT 9972.)

Kelly saw that a grated window of the underground garage of 11939 Gorham was open. Kelly knew that this window was always closed, because he passed it every day. Kelly followed Backman into the

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[26] On the east side of the wall (closer to 11939 Gorham), the wall was to the shoulder level of Backman, who was six feet six inches tall. (85RT 8869-8870, 8872.) On the other side of the wall (closer to 11959 Gorham), the wall was waist-high to Backman. (85RT 8872.) Appellant was about six feet two inches tall. (110RT 13045.)

[27] Appellant was a person of some athletic skills. (83RT 8591-8592.)

underground garage through the window. (82RT 8378-8380; 85RT 8846-8847.)

Inside the garage, Backman directed Kelly to a tan-colored Mercedes. The engine of the car was not running, but the headlights of the car were on. Kelly approached the driver's side of the car. Kelly saw a man and a woman bleeding inside the car. The couple was later identified as Gerald and Vera. (82RT 8380, 8403.)

Gerald was unconscious in the driver's seat. He was sitting up, but his chin was on his chest. Kelly moved Gerald's chin back to open his airways and checked his pulse. (82RT 8381-8382.) Gerald had been shot and was bleeding severely from the back of his neck and around the front of his neck and chest area. (82RT 8382.) Kelly decided that Gerald was probably going to bleed to death and decided to help Vera. Kelly moved to the passenger's side of the car. (82RT 8383.)

Vera was partially out of the car. Her legs were in the car, but her right shoulder was almost touching the floor of the garage. She had a platter of fish in her lap. She was bleeding and unconscious. It appeared she had been shot in the upper torso. (82RT 8384-8385; 85RT 8847, 8850.) She had a rapid pulse, rapid hollow respiration, and dilated pupils. Kelly decided that Vera was worse off than Gerald. (82RT 8385.) Kelly pulled Vera out of the car, opened her airways, and raised her feet. (82RT 8386; 85RT 8847-8848.) Kelly went over to try to help Gerald again. Kelly knew that Gerald was still alive. (82RT 8387-8388.)

Backman believed that the police were going to arrive soon. He went through the gate, over the wall, onto the walkway, and towards the patrol car coming up Gorham. (85RT 8848.) Backman told a police officer, "Two people have been shot. One guy took off in the back alley. I believe there was a second person. He came out on Gorham. I have no idea which way they went although the person I seen was wearing a black

marital art-type outfit, and I seen him running off back into the alleyway behind -- behind these two buildings. . . ."[28] (85RT 8849.) More patrol units arrived. (85RT 8849.)

A police car pulled up into the garage entrance. Backman opened the gate using the emergency opening on the door. (82RT 8389.)

g. LAPD officers and paramedics respond to the shootings

Around 10:30 p.m., LAPD Officer Daniel Horan and his partner Officer Sean Kane were the first officers to arrive at 11939 Gorham. (94RT 9998-10000.) The officers entered the garage with their weapons drawn. (94RT 10001.) Officer Horan directed Kelly, Backman, and Carolan out of the garage so that the officers could check to see if the shooter was still in the garage. (82RT 8388-8390; 93RT 9978, 9987-9988; 94RT 10002.)

Officers Horan and Kane made a "sweep" of the garage and secured the crime scene. (94RT 10002-10003.) Officer Horan saw that there were security bars on the western side of the parking garage, secured with a chain. The chain had been cut, and the door was open. (94RT 10008.) Officer Horan also noticed that Vera was wearing jewelry, including a gold watch, a diamond ring, and a gold necklace. (94RT 10005-10006.)

Paramedic Robert Smalley and his partner Al Bush soon arrived. Smalley went to the driver's side of the Mercedes, and Bush went to the passenger's side. Smalley determined that Gerald was alive. Gerald was bleeding from the wound on the back of his neck. He had a gunshot wound

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[28] That night, Backman told the police that the person who he saw was a male, about five feet eight inches or five feet nine inches tall, in his early to mid-20's, and dark or olive-complected. He said the person appeared Asian or Hispanic. He described the black martial arts outfit and said the person was wearing black slipper-like shoes and white socks. (85RT 8878-8879.)

to his left side, below his skull, with an exit wound at the bottom of his chin. He also had a grazing wound across his chest. He had powder burn marks on his ear and on the back of his neck, indicative of a close-range gunshot. (94RT 10019-10023.)

Smalley asked Bush to call another rescue unit. Bush did so. Smalley and Bush moved Gerald from the car, began working on him, and transported him to the UCLA Medical Center. (94RT 10025-10027.) Within the first five minutes of treating Gerald, there were not enough fluids in his body for his heart to pump. (94RT 10031.) Gerald, however, was not pronounced dead at the scene or on the ride to UCLA, because he had electrical activity in his heart. (94RT 10033.)

Paramedic James Vlach treated Vera in the garage. Vlach found no electrical activity in Vera's heart. Vera had three bullet wounds to the left side of her body. Vlach pronounced Vera dead at the scene. (94RT 10038-10042.)

h. Gerald and Vera die from their gunshot wounds

Gerald died from two gunshot wounds. One bullet entered the left side of the back of Gerald's neck, went through his spine and throat, and exited the front of his neck below the chin. This was a fatal gunshot wound, and the gun was held within a foot of Gerald when this shot was fired. (97RT 10660-10665, 10686.) The second bullet caused a through-and-through wound on the front right side of Gerald's chest. This shot was not fatal. (97RT 10660-10661, 10668-10669, 10688.)

Vera died from three gunshot wounds, all of which were fatal. The first bullet entered the left side of her chest, causing injury to her lungs and aorta, and then exited at the right side of her back. The second bullet entered the left side of Vera's chest, traversed her stomach, and was

recovered from her hip.[29] The third bullet entered the left side of Vera's chest, traversed her stomach and liver, and exited from the right side of her chest. (97RT 10672-10677, 10688-10689.)

i. The investigators and the crime scene

At about 3:00 a.m., on September 26, 1985, LAPD Detectives Richard Crotsley and Jack Holder, the lead investigators in the case, arrived at 11939 Gorham Avenue. (95RT 10286-10288; 101RT 11359-11360.)

Detective Crotsley saw Gerald's and Vera's Mercedes. Nearby, he saw Gerald's blood-stained shirt, with a comb in the pocket. (95RT 10339-10340.) On the passenger's side of the car, he saw Vera's body lying on the ground. (95RT 10294.) Vera was wearing a necklace, earrings with colorful stones, a watch, and a ring. (95RT 10299.) Vera's purse was inside the Mercedes and unopened. (95RT 10302.) Lying near Vera's foot was a check made out to Gerald for $2,000 from his daughter Maxine. (95RT 10310-10311.) The presence of Vera's jewelry, her purse, and the check indicated to Detective Crotsley that the motive of the crimes was not robbery. (95RT 10302, 10310.)

Detective Crotsley noted that the subterranean garage had security. The main entrance of the garage had an electrical gate, which was activated by a pager. (95RT 10319; 96RT 10381-10382.) There were grated windows along the sides of the garage. There were only two gates which opened on the east side; the remainder of the gates were solid iron bars. The two gates which did open were locked that night by bicycle chain-type locks enclosed in green plastic tubing with a master lock. On the west side of the garage, there were two gates which could open. These two gates

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[29] The entrance wound to this gunshot was consistent with a tumbling projectile, i.e., a bullet that had passed through someone else before entering Vera's body. (97RT 10678-10679.)

were not locked with a chain that night, and one of the two gates was open. (95RT 10319-10323; 96RT 10382-10383, 10405.) Near the open gate, there was a pair of glasses.[30] (95RT 10326-10327.) Also, just outside the open gate, there were some plants. From this location, Detective Crotsley recovered a large chain link, a smaller piece of chain link, and green plastic tubing. These three items appeared similar to the chain and tubing securing the east side gates of the garage and had all been cut. (95RT 10330-10331; 96RT 10383, 10406.)

13. The activities of appellant and his co-conspirators after the murders

a. Appellant and Dominguez return to Las Vegas

On September 26, 1985, at 10:00 a.m., appellant and Dominguez returned the Chrysler rental car to Budget Rent-A-Car.[31] (82RT 8242, 8246, 8260, 8267.)

The PSA Airline tickets issued to appellant and "Mr. M. Dome" for Flight #512 from Los Angeles to Las Vegas on September 26, 1985, were both used for a different flight on the same day: Flight #446 going from Burbank to Las Vegas. (80RT 7877-7881.) Trisha Burnett and her husband were on that flight, and Burnett recognized appellant from the flight. (80RT 7966-7972; 101RT 11343-11345.) There was another person

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[30] Detective Crotsley later interviewed Dr. George Izmirian, Gerald's optometrist, about the glasses found inside the garage. The glasses were prescription glasses which Dr. Izmirian had prescribed to Gerald. (96RT 10420, 10424.)

[31] Majoy bowled with the "Men's Industrial League" on Wednesday nights. The starting date for the league was September 11, 1985, at 6:15 p.m., and Majoy bowled on that date. Majoy bowled on September 18, 1985, starting at 6:30 p.m. Majoy did not bowl with his league on September 25, 1985. Majoy bowled on October 2, 1985, at 6:30 p.m. (100RT 11110-11120.)

during the flight who caught Burnett's attention. He was a Mexican man in his 20's, with dark hair and dark skin. Burnett was unable to make a positive identification of him. (80RT 7977, 7980.)

b. Neil and Stewart collect the insurance money on their mother's life

On September 30, 1985, five days after the murders, a death claim was reported to Presidential Life. The company was informed that Vera had died as a result of a gunshot wound and that it was considered a murder. Presidential Life ultimately paid the claim in the amount of $506,855.94. (73RT 6341-6344.) Stewart endorsed the check. (73RT 6355.)

On December 30, 1985, Neil and Stewart opened a money market account at California First Bank in the name of Manchester. The check used to open this account was for $506,855.94. Neil and Stewart also each applied for $125,000 lines of credit with the bank, supported by second trust deeds on their homes. (99RT 10912-10922.)

c. Neil and Stewart each purchase a top-of-the-line, new Mercedes

On January 7, 1986, Neil purchased a 1986 Mercedes 560 SEL for $58,700.95, the top-of-the-line Mercedes in 1986. Neil paid $9,636.15 for the car and financed the car with Independence Bank for $55,000. (97RT 10578-10583.)

On January 12, 1986, Stewart purchased a 1986 Mercedes 560 SEL for $58,100.95. Stewart paid $7,720.95 for the car and financed the car with Independence Bank for $55,000. (97RT 10584-10585.)

d. Neil "wires" Robert $28,000 for the murders of his parents, and Robert pays Majoy

On January 9, 1986, Armen Safaei, an operational clerk at the Encino branch of California First Bank who handled the incoming and

outgoing wire transfers, prepared a money transfer application. (97RT 10506-10510.) The following request was made over the telephone: a transfer of $28,000 from Neil Woodman's line of credit to Robert Homick, account #767364 at Security Pacific National Bank.[32] (97RT 10511-10514; 99RT 10925.) The money was transferred, and Neil was notified of the transfer.[33] (97RT 10511-10518; 99RT 10926.)

The very next day, Robert wire-transferred from the Security Pacific National Bank in West Los Angeles $25,000 to Majoy at Security Pacific in Woodland Hills, account #718028825. (97RT 10536-10538, 10541.) Robert signed the transfer.[34] (97RT 10538.)

14. The investigation

a. The bullets

On October 1, 1985, LAPD Officer George Tyree recovered two bullets from Gerald's and Vera's Mercedes. One bullet was recovered from the passenger door panel and appeared to be a .38 Special or .357 Magnum. The second bullet was found on the floor of the car on the passenger side and also appeared to be a .38 Special or .357 Magnum. (100RT 11127-11132, 11137.) Officer Tyree determined that one of the bullets had passed

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[32] Robert's savings account, #767364, which was opened on May 28, 1981, reflected the following balances for the years 1981 through 1985: in 1981, $7.27; in 1982, $111.57; in 1983, $123.64; in 1984, $3.94; and, in 1985, $8.13. On January 9, 1986, prior to the wire transfer of $28,000 into Robert's account, the balance of the account was $8.13. (97RT 10531-10534.)

[33] Mark Butler, the financial services officer for California First Bank, knew Neil and recognized his voice. Although Butler did not recall whether Neil personally called the bank and made the request for the wire transfer, Butler would not have completed the wire transfer application if Neil had not done so. (99RT 10912, 10924.)

[34] The $25,000 was received into Majoy's account. Prior to the receipt of this money, Majoy's balance was $190.98. (97RT 10542-10548.)

through foreign material, because there was material consistent with body tissue clinging to the bullet. (100RT 11145-11147.)

On that same day, Officer Tyree examined the bullets that he received from the coroner's office. The caliber of both bullets was .38 Special or .357 Magnum. Officer Tyree opined that the two bullets that he recovered from the car were fired from the same weapon and the two bullets from the coroner's office were fired from the same weapon.[35] All four bullets were consistent with being fired from a revolver. (100RT 11133-11143.) Three of the four bullets were hollow points. Hollow point bullets are designed to expand and do more damage to body tissue. (100RT 11235-11236.)

b. Police surveillance of appellant and his co-conspirators

In January 1986, Officer James Vuchsas was in charge of a surveillance team, which conducted surveillance of appellant, Robert, Majoy, Stewart, and Neil. On January 25, 1986, the team observed appellant at an address on Tamarind Street in Hollywood. Appellant was soon joined by Robert and then Majoy. Appellant, Robert, and Majoy stayed at the Tamarind address for about 45 minutes and then got into a car, went to a nearby apartment building on Alexandria Street, and then returned to the Tamarind location. (79RT 7571-7581, 7615, 7622-7623; 81RT 8082-8094, 8124.)

On February 11, 1986, surveillance was conducted on Robert. Robert made and received several telephone calls at a bank of public telephones near his home. (79RT 7582, 7585-7586.)

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[35] Robert Hawkins, an independent firearm and tool mark examiner, later determined that all of the bullets were fired from the same gun. (108RT 12610, 12613, 12627-12631.)

c. March 11, 1986: arrest and search warrants are served

On March 11, 1986, several search warrants were executed in Los Angeles and Las Vegas. A number of people were arrested, and numerous items were recovered. (101RT 11361.)

LAPD Officer Robert Nelson was part of the task force set up to serve search and arrest warrants. On March 10, 1986, Officer Nelson followed appellant to an address on Hatton Street in Reseda and, along with 10 other officers, watched the residence all night. At 7:00 a.m. the next morning, the officers served search and arrest warrants at the Hatton address, and Officer Nelson arrested appellant. (81RT 8099-8103; 82RT 8222-8223.) A telephone directory and a daily reminder book labeled February 1986 were recovered from a table inside the room where appellant was arrested. The telephone directory contained the names of Majoy, Neil, and Stewart. (81RT 8109-8110.)

That same day, FBI Agent James Livingston and local law enforcement officers participated in the execution of a search warrant at 3680 Susanna Street in Las Vegas, Nevada, the residence of appellant and his family. Appellant's wife and daughter were at the house during the search. Agent Livingston and other officers recovered daily reminder books from the residence.[36] Agent Livingston found some of these daily reminder books in the master bedroom. Other books were found in an envelope with the name "Steve" on it, underneath a chest or dresser drawers. (76RT 7051-7054; 78RT 7381-7382.)

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[36] The daily reminder books were three inches by four inches and black in color. They had the day of the month, in tab fashion on the side of the book. They were notebook-style books with writing in the books. (76RT 7052.)

That same day, LAPD Detective Woodrow Parks served a search warrant on Robert's apartment in West Los Angeles. Detective Parks searched Robert's bedroom, which was cluttered with paper, and recovered a "Top Man," 14-inch bolt cutter. Robert was arrested pursuant to an arrest warrant. (92RT 9816-9822; 94RT 10046-10047.)

That same day, Detective Chad Wetzel participated in the execution of a search warrant at Manchester. He arrested Neil and transported him to the Van Nuys police station. (78RT 7368-7371.) From the county jail, Neil telephoned Steven Strawn, the chief financial officer of Manchester. Neil asked Strawn, in a hushed voice, if he was alone and if the police were still at Manchester. Strawn said he was alone in his office and that the police were no longer at Manchester. Neil then asked Strawn to do something for him. He asked Strawn to go to his office, which was down the hall, and move his desk. Neil told Strawn that he would find some papers underneath the desk. Neil asked Strawn to destroy the papers by burning them and flushing them down the toilet. Neil then repeated these instructions. Strawn said he would do as Neil requested. (77RT 7175-7178.) Strawn then went to Neil's office, closed the door behind him, and found the papers underneath Neil's desk. The papers consisted of two or three business cards, folded in half, and a piece of paper. Appellant's name was on more than one of the business cards. Then, as Neil had requested, Strawn burned and flushed these papers.[37] (77RT 7178-7181.)

Majoy's apartment was also searched that same day. A briefcase was found in his home office. It contained a brown envelope and an address book. The address book contained the telephone numbers of

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[37] The trial court instructed the jury that the evidence concerning Neil's telephone instructions to Strawn, if believed, should be considered as to Neil only, not appellant. (77RT 7357.)

appellant, Robert, and Manchester. A business card was also recovered from Majoy's apartment. On the back of the business card, there was a telephone number and the words, "Need to total zero."[38] A document found in Majoy's night stand had Robert's address.[39] (97RT 10610-10612, 10617-10623, 10628-10629; 100RT 11275-11281.)

d. The chain links and the bolt cutter

Detectives Crotsley and Holder asked William Lewellen, a supervising criminalist with the Scientific Investigation Division of the LAPD, to examine the two pieces of chain links found at the crime scene and determine if they were once continuous. (96RT 10443, 10456-10458.) After comparing the fracture contours, Lewellen determined that the chain links were once continuous. (96RT 10459.) Lewellen also determined that the tool marks on the chain links were consistent with the chain links having been cut with a bolt cutter. (96RT 10460.)

Lewellen later examined the bolt cutter found in Robert's bedroom. (96RT 10461-10463; Peo. Exh. 131.) After recreating its tool marks, Lewellen determined that, based on the striae which are unique to bolt cutters, the chain links were cut by the bolt cutter found in Robert's bedroom and no other bolt cutter. (96RT 10468.)

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[38] If each digit of some of the telephone numbers in appellant's daily reminder books were subtracted from 10, the resulting telephone numbers matched the telephone numbers of two payphones located near Majoy's home. (99RT 10974, 10977-10981.)

[39] Majoy's home was searched again on April 25, 1986. Officers located a telephone book. The zip code "90049" was circled at page A-6 of the telephone book. The word "Barrington" appeared above the zip code and was also circled. There was some other writing on the same page: "11349" was written over "11949" and next to that appeared "#203." On page A-7 of the telephone book, "Gouiam" and "11949" were written. (98RT 10786-10788.)

15. Stewart Woodman's testimony

a. Overview of testimony

On March 11, 1986, Stewart was arrested for the murders of his parents. In 1989 and 1990, Stewart was tried and convicted of conspiracy to commit murder and two counts of first degree murder. Stewart committed these crimes and was actively involved with his brother Neil, appellant, and Robert in the commission of the murders. Stewart and Neil hired and paid appellant approximately $50,000 to kill their parents. Gerald and Vera were killed on September 25, 1985, on Yom Kippur. (102RT 11540-11543.)

b. The Woodman family and Manchester Products

Manchester was founded in 1975. The company manufactured plastic sheets. There were three shareholders: Stewart, Neil, and Vera. Vera owned 50 percent of the stock, and Neil and Stewart each owned 25 percent. Gerald ran the company but did not own stock in the company. Manchester was originally located at 8966 Mason Avenue in Chatsworth. Later, in about October 1983, Manchester moved to 20401 Prairie Street, two blocks away. Manchester was a successful business. (102RT 11543-11546.)

From the time Stewart started to work for his father at the age of 16 until about 1975, he had a good relationship with his father. (102RT 11549.) Neil was six years older than Stewart. Neil had worked for Gerald in the early 1960's. Neil then worked for his uncle and later returned to work for Gerald. Gerald had not wanted Neil to return and always belittled Neil in the presence of others. (102RT 11552-11556.) On one occasion after 1975, Gerald handed Neil a broom and told him that all he was good for was to sweep up. (102RT 11557-11558.) Neil would tell everyone,

outside of Gerald's presence, that Gerald was a "son of a bitch" and "crazy." (102RT 11557.)

In October or November 1978, Gerald had a heart attack. (102RT 11558.) Before the heart attack, Gerald worked long hours. After the heart attack, Gerald worked half days. (102RT 11560.) Stewart and Neil became more exposed to different parts of Manchester after Gerald's heart attack. (102RT 11560-11561.) Stewart and Neil ran Manchester, and Manchester continued to prosper. (102RT 11562.)

When Gerald returned to work, he wanted to run Manchester. He sabotaged machinery so that he would be needed to fix the machinery. (102RT 11562-11565.) Neil pointed out the problems with Gerald and the machines to Stewart. (102RT 11568.) Miles Thomas or Fred Woodard, the foremen responsible for running the factory, were told to take instructions from Neil, and not Gerald. This was when all the arguing started. (102RT 11568-11569.) Stewart told Vera about Gerald's behavior. (102RT 11565.) Gerald also put other financial strains on the company, including an expensive trip to Europe. (102RT 11566-11567.) During this time, Gerald was on full salary at Manchester at about $2,000 per week, plus a car allowance of about $1,800 a month. (102RT 11569-11570.)

Stewart talked to Neil about the financial problems caused by Gerald. Stewart and Neil became closer. They made changes at Manchester, and Stewart believed Manchester was running better. Neil ran the production, and Stewart was in charge of sales. They were both involved with financing with the bank. (102RT 11570-11571.)

Stewart was about six years older than his brother Wayne. Shortly before Gerald's heart attack, Wayne had joined Manchester. Before that, Wayne was attending Duke University, which made Gerald proud. Stewart and Neil had not attended college. (102RT 11574.) When Wayne came into the business, he was given half of Vera's stock. (102RT 11575.)

Wayne came in at almost the same salary as his brothers. Wayne's other allowances were quickly equal to those of his brothers. Stewart and Neil had been working with their father for many years, but Wayne was soon at parity with them. Wayne's job was to collect money and approve credit. (102RT 11576.)

Friction developed among the brothers. Wayne was not working long hours, and the work was piling up. On one occasion, Manchester employee Richard Wilson told Stewart that Wayne had told him that he was taking over Manchester. Stewart approached Gerald about this. Gerald responded that he had sent Wayne to Duke and Wayne was going to do what he told him to do. Gerald endorsed the idea of Wayne taking over the company. Stewart believed that Gerald sided with Wayne on almost all matters. (102RT 11576-11579.)

There was an incident with a company called Jay Walter Thompson. Wayne approached Stewart and Neil with the idea of Jay Walker Thompson doing logos for Manchester. Stewart and Neil rejected the idea, but Gerald suggested that Stewart listen to Wayne. The logos cost Manchester $50,000. (102RT 11579-11580.)

Wayne worked half days. Steven Strawn was hired to take care of the work that Wayne was neglecting. Stewart expressed concern over these problems to Vera. Vera told Stewart that she would talk to Gerald, but it was to no avail. (102RT 11581-11583.) Stewart's and Neil's income from Manchester was their sole means of support. (102RT 11583.)

In April 1981, Stewart decided to buy a house in Hidden Hills. The house was worth a million dollars and was in a guarded and gated community in the San Fernando Valley. It was a significant investment for Stewart. (102RT 11583-11584; 104RT 12024.) In light of the pending purchase of the home, Stewart talked to Vera about the future of Manchester. On many occasions, Gerald had threatened to shut down

Manchester and leave everyone with nothing. In the past, Vera had promised Stewart that Manchester would not be shut down, because she owned the stock. When Stewart told his mother about the new house, Vera promised she would side with Stewart and Neil in terms of the business. Stewart was close to his mother. He relied upon her promise and purchased the new home. (102RT 11584-11586.)

There was an incident with a company called Plaston run by Howard Kraye, Manchester's first large account. (102RT 11586-11587.) In the summer of 1981, Kraye asked for a favor. (102RT 11589.) He asked for 150 days, instead of 90, to make payments, because he was opening a new location. Stewart agreed. This arrangement was profitable for Manchester, because there would be new business from Kraye's new location. (102RT 11590.) Gerald found out about the arrangement and had Stewart meet him and Vera at Manchester on a Saturday. Miles Thomas was the only employee at Manchester that day. Gerald refused to allow a shipment to Kraye, because Kraye owed Manchester a lot of money. (102RT 11591.) Gerald told Thomas not to ship the order. Stewart told Thomas to ignore Gerald. Vera sided with Stewart. (102RT 11592.) Gerald took Vera by the arm and threw her against the wall. Stewart picked up Vera and drove her to his house. Vera stayed there for a while and then wanted to go home. Stewart told Neil about this incident later. (102RT 11593.)

Within a month, in about September or October 1981, Stewart received a telephone call from Vera. Vera told Stewart that there was going to be a board of directors meeting at Manchester. There had never been a board of directors meeting before. Vera said Gerald had decided that Stewart had to go on the road for sales and be back home every other weekend, that Neil was going to be in the factory and not be allowed in the office, and that Gerald and Wayne were going to run Manchester. (102RT 11593-11595.) Vera told Stewart that, if he did not attend the board of

directors meeting, Gerald would liquidate Manchester. (102RT 11597.) Stewart could hear Gerald talking in the background. (102RT 11598.) Stewart did not want to be on the road and away from his children. (102RT 11595.)

Stewart immediately told Neil about the telephone call. (102RT 11595.) Neil told Stewart not to worry. Stewart and Neil decided to stop Gerald from getting into the factory, because they believed he could destroy the machines. When Vera said "liquidate," Stewart and Neil did not know what Gerald would do. (102RT 11599.) Neil and Stewart believed that their future was tied to the future of Manchester. (102RT 11600.) Neil had been saying their parents were "crazy" for years, and he was not going to give up running the business. (102RT 11608-11609.) Stewart felt betrayed by his mother. (102RT 11611-11612.)

That night, Neil and Stewart contacted Ralph Aronprice, Manchester's attorney. Aronprice said that he could not represent Neil and Stewart. The next morning, Stewart called the Hufstedler firm but learned that Gerald had already hired them as counsel. (102RT 11600-11601.) Stewart called attorney Dan Raiskin, who eventually represented Stewart and Neil. (102RT 11601.)

That same morning, Neil and Stewart changed the locks at Manchester and hired a 24-hour armed guard service. The guard was there to keep Gerald and Wayne away from the business. (102RT 11602.) Within a week, Stewart received documents from Vera and Wayne indicating that they were liquidating Manchester. (107RT 12497.)

Neil and Stewart decided on a lawsuit to save Manchester. (102RT 11602-11603.) Stewart learned from Raiskin that he had a right to buy Vera and Wayne out of Manchester. At the direction of Raiskin, Manchester issued new shares of stock, which Neil and Stewart purchased. Neil and Stewart thus owned more than 50 percent of Manchester. Stewart

and Neil then fired Wayne and Gerald, eliminated their salaries and allowances, and notified them that their health benefits would be terminated. (102RT 11604-11607.)

Wayne drove a Cadillac owned by Manchester. Stewart asked Wayne to return the car, but Wayne did not do so. One day, when Stewart was on the telephone with his sister Hilary, Hilary mentioned that she was going to meet Wayne for his birthday. Stewart found out where they would be meeting. He knew the Cadillac would be there. Stewart called his lawyer, Raiskin. Raiskin told Stewart that, if he had an extra set of car keys, he could take the Cadillac, as long as he returned all personal items to Wayne immediately. Neil agreed with the plan. Stewart drove with his wife to Manchester and picked up the extra set of car keys. Stewart and his wife went to the restaurant where Wayne was celebrating his birthday and picked up the Cadillac. Stewart and his wife drove to Manchester, left the Cadillac at the factory, and drove home. (102RT 11612-11615.)

Stewart later asked Manchester vice-president Richard Wilson to go through the car and sort out Wayne's personal belongings. Wilson did so. Neil and Stewart then went through the items. They discovered instruction booklets, which indicated to Stewart and Neil that Wayne was thinking of leaving Manchester. They also found paperwork from Jay Walter Thompson. (102RT 11616-11620.) Stewart and Neil concluded that Gerald and Wayne were planning on starting their own company which would compete with Manchester and were talking to Jay Walter Thompson about their own logo. Stewart concluded that this had been going on when he bought his house and that Vera knew about it, because she always knew what Gerald was doing. (102RT 11621-11623.) Stewart decided that he had been wrong about trusting Vera. (102RT 11624.)

The lawsuit over Manchester lasted six months. Manchester was appraised at $1.3 to $2.5 million. (102RT 11624-11625.) There was a

bitter trial. Neil participated in the trial. Stewart did not; he had had a stroke in January 1981. The outcome of the trial was that Stewart and Neil kept Manchester but had to pay Wayne and Vera $675,000. Neil and Stewart had made prior arrangements with Union Bank for up to $1.5 or $1.6 million. Vera and Wayne were paid. (102RT 11631-11632.) The cost of the buyout was approximately equal to the salaries of Gerald and Wayne, about $4,000 or $4,400 a week to Union Bank. (102RT 11638-11639.)

As a result of the lawsuit, Stewart and Neil did not permit their parents to see their grandchildren. This caused Vera anguish. (102RT 11626-11628.) Neil and Stewart thought Gerald was insane and frequently expressed feelings of hatred towards their parents. (102RT 11633-11634.) The employees at Manchester knew how Neil and Stewart felt about their parents. (102RT 11634.)

Neil and Stewart were thereafter equally in charge of Manchester. (102RT 11639.) Manchester was on receivable financing with Union Bank. Manchester turned over its invoices every day to Union Bank, and Union Bank gave Manchester immediate credit for 80 percent of the face value of the invoices. (102RT 11640.)

Sometime after the lawsuit, Manchester bought a new extruder, the machine which Manchester used to manufacture the plastics it sold. The machine, however, did not produce sheets of plastic that Manchester could sell. This caused a financial problem for Manchester. (102RT 11640-11643.) Strawn came up with the idea of changing the invoice date on the receivables aging. Neil, Stewart, and Strawn re-aged the accounts. This activity misled Union Bank, but only for a while. The bank decided to audit Manchester. Before the auditors came, Stewart learned that Neil had had appellant place a bugging device inside Neil's office so that they could listen to the conversations of the auditors in another room. When the

auditors came to Manchester, Stewart listened to their conversations. As the auditors were deciding to see certain invoices, Neil, Stewart, and Strawn altered invoices to match the aging. (102RT 11643-11648.)

In the end, Union Bank asked Manchester to make some changes. The bank asked Neil and Stewart to take a cut in their salaries and demanded 10 percent of the invoice payments. (102RT 11648.) Manchester was not permitted to give the bank an invoice until the order was shipped. (102RT 11649.) As the bank requested, Neil and Stewart injected about $500,000 to $700,000 into Manchester. (102RT 11649-11650.) Union Bank required Stewart and Neil to take second mortgages on their homes and had Manchester change its accountant. (102RT 11650-11651.) Union Bank sent out documents to Manchester's customers to verify how much they owed Manchester. Stewart asked these customers to falsely indicate that they owed as much as Union Bank said they owed, i.e., for invoices on orders which had not yet been shipped. Union Bank sent such a letter to Jack Ridout. (102RT 11651-11652.)

In about April or May 1982, Stewart learned about Woodman Industries from a customer who had received a price sheet from Gerald. Stewart, Neil, and a few of their employees went to the factory of Woodman Industries. Stewart and Neil believed Wayne and Gerald were in business and competing directly against Manchester. They believed Gerald wanted both businesses to fail so that the family could start over again together. (102RT 11653-11657.) Stewart tried to talk Union Bank out of loaning money to Woodman Industries. Stewart made statements of hate in the presence of John Strayer and perhaps Diane Eng who worked for Union Bank. (102RT 11676-11678.)

Manchester lowered its prices. Woodman Industries then lowered its prices and was losing money on every sheet of plastic it made.

Woodman Industries started production in September 1982 and went bankrupt by July 1, 1983. (102RT 11657-11659.)

The competition between Manchester and Woodman Industries was bitter. Stewart and Neil felt aggravated. (102RT 11659-11660.) Phony orders were placed with Manchester by Woodman Industries. Also, Woodman Industries told its suppliers it was the same business as Manchester and asked its suppliers to bill Manchester. (102RT 11660.) Neil called the suppliers and explained the situation to them, but the problem with the phony orders continued. (102RT 11661.)

On or about October 26, 1982, Stewart and Neil sent Gerald a letter, because Gerald's personal plumbing bills were being sent to Manchester. Neil and Stewart sent a copy of the letter to everyone in the family. The letter requested that Gerald stop what he was doing. (103RT 11770-11773.)

After Woodman Industries went bankrupt, Union Bank called Stewart, and Stewart went to Woodman Industries to look at their machinery. It was obvious to Stewart and Neil that Gerald had no interest in staying in business. (102RT 11661-11663.) Even after Woodman Industries went out of business, Manchester continued to receive calls from suppliers requesting payment for Woodman Industries. (102RT 11664.)

In 1980, when Gerald and Vera had drawn up their wills, Stewart had learned that Manchester owned a life insurance policy on Vera's life. The purpose of the policy was to take care of Stewart's sisters. Wayne, Stewart, Neil, and Vera each owned 25 percent of Manchester. In the event of Vera's death, Manchester had a choice: it could give $500,000 to be split between the two Woodman sisters and have the stock retire or the sisters could have the 25 percent of the stock and Manchester would get $500,000. (102RT 11665-11667.)

After the lawsuit, Harold Albaum, the insurance agent for Manchester, called Stewart and said that Muriel Jackson (Vera's sister) was demanding that the life insurance policy be canceled. The policy had been the furthest thing from Stewart's mind. Stewart understood that Vera wanted the policy canceled. Stewart talked to Neil about the insurance policy, and they decided to keep it. Jackson had been an aggravation; this was Stewart's way of telling her that she could not buy what she wanted. (102RT 11667-11669.) On April 18, 1983, Stewart wrote a letter to the insurance company, stating that he wanted to keep the insurance policy and would be paying the premiums. He sent a copy of the letter to Jackson and to his attorneys. Stewart and Neil jointly decided to send the letter. Within a week, Jackson called Stewart at work and demanded that the policy be canceled. Stewart refused. Neil got on the line and agreed with Stewart. Neil and Stewart then continued to make payments on the policy. (102RT 11669-11675.)

c. The Homick brothers and the events leading to the murders

Stewart and Neil first met appellant in Las Vegas in 1980 through a friend, Joey Gambino. Stewart liked to gamble. Appellant told Stewart that his brother Robert also liked to gamble. Stewart gave appellant his telephone number so that he could meet Robert. Robert then called Stewart, and the two became friends. Soon, they talked every day about gambling, and Robert came to Manchester. (102RT 11678-11681.) Stewart expressed feelings about his parents to Robert. (102RT 11682.)

During the years that Stewart knew Robert, Robert was unemployed. Stewart hired Robert to do collection work for Manchester on accounts that were past due. One such account was Soft Lite. (103RT 11805-11807.) After Manchester obtained a judgment against Soft Lite, Stewart sent Robert to the Soft Lite location to find out what assets the company had.

Stewart wanted to know if there was anything worth sending a marshal to go in and attach. (103RT 11808.) After Robert was there, Soft Lite eventually paid Manchester. (103RT 11809.)

In the early 1980's, Manchester had a Monte Carlo. Robert took the car and told Stewart and Neil to call their insurance company and report it stolen. Neil and Stewart did so and recovered insurance money. Stewart later learned that the Monte Carlo had been burned in the Las Vegas desert. (103RT 11809-11811.)

Stewart had owned several Rolls Royces. In July 1983, Stewart traded his Rolls Royce for a convertible Rolls Royce. Stewart had the car phone moved from the old car to the convertible. The convertible presented nothing but problems for Stewart, and Stewart told Robert that he was unhappy with the car. Robert suggested that he could take the car and Stewart could bill the insurance company. Stewart agreed. Stewart and Robert made arrangements for the car to be taken. (103RT 11811-11815.) The car still had the mobile phone in it when it was taken. Stewart filed a claim with the insurance company and was reimbursed. Stewart also filed a false report with the sheriff's department. The car was eventually found at the bottom of a canyon in Malibu. Robert never told Stewart that he had kept the car phone. In public, Stewart blamed the theft of the Rolls Royce on Gerald. (103RT 11816-11818.)

Sometime in the summer of 1983, when Stewart's friend Joey Gambino was at Stewart's house, Gambino witnessed the bitter feelings among the Woodman family members. Gambino said, "Stewart, you are going to kill yourself." Gambino added, "Why don't you let me handle this, and we will put an end to it." (102RT 11685; 103RT 11908.)

Gambino put Stewart in touch with appellant. In October 1983, appellant came to Manchester. Stewart and Neil walked appellant through the plant and talked about the situation with the parents. Appellant said

Gambino had told him about the problems with Gerald and Vera. Appellant said, "Let's put an end to it." (102RT 11684-11686; 103RT 11708, 11709.) Appellant said the aggravation by Gerald and Vera was going to kill Stewart. (103RT 11705.) Appellant said they would discuss the subject again later after Stewart and Neil thought about it. Neil and Stewart later agreed to see what appellant could do. (102RT 11686-11687.)

A couple of weeks later, in November 1983, appellant returned to Manchester and met with Neil and Stewart a second time. Appellant asked Neil and Stewart what they had decided. (102RT 11687; 103RT 11704, 11707.) Neil and Stewart said they had decided that they "wanted to go through with it." (102RT 11688.) Appellant wanted to know certain things about Gerald and Vera -- when they were together, where they went, and their habits. (102RT 11688, 11690.) Yom Kippur was a holiday that was mentioned as a day when Gerald and Vera were together. (102RT 11690.) Birthdays and anniversaries were also mentioned. (104RT 11938.) Stewart and Neil provided appellant information, and appellant wrote down their answers in a notebook. (102RT 11689.) Appellant asked where Gerald and Vera lived. Stewart gave appellant the Roscomare address. (102RT 11691-11693.) Appellant told Neil and Stewart that this would cost them between $40,000 and $50,000. (102RT 11693.)

Neil and Stewart were not convinced that appellant could carry through with the plan. Stewart wanted it to happen, and he believed Neil wanted it to happen. (102RT 11694.) Shortly after the second meeting, Stewart and Neil talked about whether Vera would be killed. Neil said that both Gerald and Vera had to be killed, because no one would suspect that Stewart was involved if Vera were killed. Stewart agreed. (102RT 11695; 103RT 11708.)

Sometime later, when Robert was visiting at Manchester, Stewart learned from Robert that there had been an attempt on Gerald's and Vera's

lives on Passover in 1984. Robert said, "We almost got them during the holidays but your father was driving like a lunatic." (103RT 11709.) Stewart learned that Robert was involved in the plan during this meeting. Stewart had asked appellant during one of the meetings not to involve Robert, because he believed Robert was a "klutz." (103RT 11710; 104RT 11943-11944.) Robert said he needed $5,000 or $6,000 for expenses. Neil and Stewart told Robert that they would give him the money. (103RT 11711-11712.) Stewart had not wanted Robert to know about the plan to kill the parents. Stewart talked to Neil about this, and Neil said he would talk to appellant. In Stewart's mind, it was too late, because Robert already knew about the plan to kill Gerald and Vera. (107RT 12484-12486.)

Neil and Stewart decided to draw the expense money out of the expense money at Manchester. They paid Robert $6,000 later that week at a supermarket. (103RT 11712-11713; 104RT 11958.) Stewart had doubts about whether appellant and Robert were going to go through with the plan, and he told Neil that he believed appellant and Robert were using them for money. Neil told Stewart to have patience and told Stewart that he was wrong. (103RT 11714-11715.)

Shortly thereafter, Neil told Stewart that he would be in charge of dealing with appellant directly. (102RT 11696-11697; 103RT 11715.) On four or five occasions, after appellant visited with Neil at Manchester, appellant told Stewart that the contract on the lives of his parents would be fulfilled and to have patience. (103RT 11716.) Appellant used the alias "Tony Galante" when he called Manchester, and he left telephone messages for both Neil and Stewart. (107RT 12463, 12465-12469.)

Appellant was the security guard at the bar mitzvah for Neil's son. (103RT 11717-11718.) Neil said he wanted to keep Gerald and Vera away from the event. Stewart believed there was no risk of Gerald and Vera showing up uninvited. Neil agreed, but he wanted Gerald and Vera to hear

from others who attended the celebration that Neil had hired security to keep them away. Neil believed this would humiliate Gerald and Vera. (103RT 11720.)

After Gerald and Vera went bankrupt, Stewart offered to buy his own bar mitzvah album from them through the bankruptcy court. Stewart's aunt Sybil called Stewart and told him that Vera would give him the book in exchange for photographs of Stewart's children. Stewart agreed. The exchange of the photographs took place at the home of Linda Rossine, Sybil's daughter, in July 1985. (103RT 11721-11727.)

During the exchange, the subject of Yom Kippur came up. Linda wanted Stewart and his family to attend the celebration on September 25, 1985, at the Jacksons' house. Linda said everyone would be there. Stewart refused. (103RT 11726.) This conversation confirmed to Stewart that his parents would be at the Jacksons' house on Yom Kippur. The family celebrated Yom Kippur only at the Woodman or Jackson home. Because the Woodmans had lost their home, the Jackson home was where the celebration would take place. (103RT 11727.)

A day or two later, Stewart relayed the information about where his parents would be on Yom Kippur to Robert and Neil. (103RT 11727-11728.) During the prior meetings, Neil, Stewart, appellant, and Robert had agreed that Vera and Gerald had to be together when the contract was fulfilled, and it was understood that they would be together on Jewish holidays. (103RT 11729-11730.)

On September 23, 1985, Stewart called his uncle Sidney at work at about 3:30 p.m., as he did for all holidays. Stewart did not reach Sidney but learned that Sidney would be at home in 10 to 15 minutes. (103RT 11732-11734.) When Stewart called Sidney's house, his aunt Sybil answered the telephone and became emotional. Sybil talked about why Stewart would not let Vera see his children and about why Stewart was not

going to go to the Jacksons' house. Sybil said the family would be at the Jacksons' house. This confirmed in Stewart's mind where his parents would be celebrating the holiday. Sybil asked Stewart to send Vera a New Year's card. Stewart did not agree. (103RT 11735-11737.)

After the conversation with Sybil, Stewart talked to Robert. Robert and Stewart tried to talk to one another as close to 4:00 p.m. as possible every day for gambling reasons. Robert discussed some bets. Stewart told Robert that he had just talked to Sybil and learned that his parents were going to be at the Jacksons' house. Robert said, "We know. Everything's ready." (103RT 11738.)

On September 25, 1985, Stewart went to work at 8:30 a.m., a little later than usual. He then ran some errands. Neil's habit on the holidays was to go to work early, if at all, and be at work before the shift change at 7:00 a.m. (103RT 11740-11742.) Neil was in charge of production schedules every day, regardless of whether it was a holiday. Manchester's factory was open 24 hours a day. (103RT 11743.)

That day, Stewart celebrated Yom Kippur at his house. Neil was there. There were about 120 friends and neighbors over for dinner. (103RT 11744-11745.)

d. Events following the murders

The next day at work after lunch, Stewart learned that appellant and Robert had killed Gerald and Vera. (103RT 11745.) Neil told Stewart, "They got both of them." (103RT 11746.) Neil told Stewart to stay strong. Neil knew they would be investigated. (103RT 11747.)

On the following Monday or Tuesday, Neil told Stewart that Lou Jackson, their uncle, had said that he was absolutely convinced that Neil and Stewart were involved in the killings. (103RT 11747-11748.) Neil told Stewart to hold himself together. (103RT 11749.)

That same week, Neil told Stewart that they had to pay appellant and Robert $15,000. Stewart met Robert at a supermarket and gave him $15,000 cash. (103RT 11750; 104RT 11957-11958, 11964.) Robert told Stewart: "This has nothing to do with the total amount of money that you're paying for this. This is just interest because you're not paying it all at once. When you have all the money at one time, that's when you'll pay it to us." (103RT 11752.) Stewart said that was not their agreement. (103RT 11752.) Stewart asked Robert if Gerald had survived for a while, as he had read in the newspaper. Robert said, "Believe me, Stewart. He was dead right away." (103RT 11753.) Stewart went back and talked to Neil about the money. (103RT 11752.) Neil told Stewart not to worry about it and that he would talk to appellant and take care of it. (103RT 11753.)

Within a few weeks, in October or November 1985, Neil told Stewart that they had to pay more expense money, until they were able to pay the balance on the contract. Stewart and Neil had applied for lines of credit with California First Bank for $125,000 each. The lines of credit had been approved, and Neil and Stewart were waiting for the lines of credit to be funded. The $28,000 balance on the contract was going to be paid from the lines of credit. Stewart and Neil drew the expense money from the normal week's expense check, and Stewart paid Robert $6,000. (103RT 11755-11756; 104RT 11957-11958, 11965.)

At the end of December 1985 or in early January 1986, Neil told Stewart that he had wired from his account to Robert's account the balance on the contract with appellant and Robert for the murders of their parents.[40]

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[40] The total payments on the murders were as follows: $6,000, $15,000, $6,000, and $28,000. The $28,000 was the wire transfer made by (continued...)

(103RT 11757-11758.) During this same period of time, Stewart and Neil each bought a 1986 SEL Mercedes. (103RT 11830-11831.)

Stewart contacted insurance agent Albaum about Vera's life insurance policy or Albaum contacted him. There were delays in getting the check, because Muriel Jackson tried to stop it. Neil and Stewart received a check for over $500,000, which included interest. (103RT 11759-11760.)

e. Stewart's arrest, trial, and post-conviction deal

Stewart was arrested on March 11, 1986. (103RT 11773.) He was in custody at the county jail for about five years. There were times when he was in the same cell as Robert, appellant, and Neil. (103RT 11774.) The four talked to one another and were friendly. (103RT 11774-11775.)

In mid-1986, while in the holding cell, appellant talked about how he had put Robert through school and, as smart as Robert was, how stupid he could be to get into a car accident right around the corner from where the murders took place and then to report the accident to the police. Robert explained that he had done it on purpose, because he thought that no one would believe that a murder suspect would get into a car accident where the murders occurred and then report the accident. (103RT 11775-11778, 11780.) This conversation reinforced in Stewart's mind that Robert was a "klutz." (107RT 12482-12484.)

After his arrest, Stewart learned that Robert had been near his parents' home on June 22, 1985. (107RT 12473.) In May or June 1986, when they spoke about this subject in the holding cell, Robert told Stewart that it was a coincidence that he had been near Gerald's and Vera's home

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(...continued)
Neil, and the remainder were the cash payments made by Stewart. (104RT 11957-11958.)

on June 22, their anniversary. (107RT 12475-12476, 12481.) Robert said that he had been there before and after that date. (107RT 12481.)

After his arrest, Stewart also learned that Majoy and Dominguez were involved in the murders. (103RT 11777; 106RT 12300.) During the preliminary hearing, when appellant was speaking to Stewart, Neil, and Robert in the holding cell, appellant said the police knew that Majoy was not the shooter (and was sitting on a nearby bus bench) and that Dominguez was the shooter. Appellant said the police would not admit that, because, for their own reasons, they wanted Dominguez to be the one sitting on the bus bench. (107RT 12488-12489.) Appellant was agitated when he said this, and he was spitting at the ceiling. (107RT 12489.)

On another occasion, when Stewart, Neil, and Robert were in a jail cell together, Robert and Neil said they had come up with an idea to explain the wire transfer. They said that, if the wire transfer was discovered by law enforcement, Robert and Neil would say that they were going into a business together -- a video service for lost children.[41] (103RT 11782-11784.)

On yet another occasion, Stewart's attorney Jay Jaffe and Stewart's wife Melody visited Stewart in the attorney room at the jail.[42] Jaffe told Stewart that, on the day that Stewart was arrested, Melody went to Jaffe's office and told him that she had once met with Neil at the El Caballero Country Club and, at that meeting, Neil had told Melody that the reason

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[41] Because Stewart was uncertain whether appellant was present during this conversation, this evidence was not admitted against appellant. (103RT 11783-11784.)

[42] The evidence of the jailhouse visit and Stewart's subsequent reaction to the visit was admitted as to Neil only. Also, the jury was instructed that the statements by Melody and Jaffe were not offered for the truth but only to explain Stewart's subsequent conduct. (103RT 11790-11791.)

that Stewart had high blood pressure and heart problems was because of the aggravation caused by their parents. Neil had told Melody that he would "take care of the problem" and she would not have to worry about it. (103RT 11787-11790.) Stewart talked to his attorney about how to get Neil to put in writing what had happened during the meeting between Neil and Melody. (103RT 11792.)

Immediately after this visit, Stewart returned to his cell and had some conversations with Neil, whose cell was one cell over from Stewart's cell. (103RT 11792.) Stewart told Neil that Melody and Jaffe had visited him. He said that Melody was hysterical and was talking about a meeting that Neil had had with her at the Country Club. (103RT 11794.) Neil said he would respond via a note to Stewart. (103RT 11795.) Neil wrote that he had told Melody to get the junk food out of the house and cook healthier meals for Stewart and that Melody had said that Stewart was mad at her when there was no food at the house. (103RT 11800.)

After reading Neil's first note, Stewart told Neil that Melody was too upset for that to have been the cause. Neil wrote a second note, stating that Melody was worried about Woodman Industries and that Neil had told her that they would eliminate Woodman Industries. (103RT 11801.)

Stewart accused Neil of lying and said that Woodman Industries had been out of business by the time Neil had met with Melody at the Country Club. (103RT 11801-11802.) Neil responded in a third note that Melody had said that Stewart's parents were "killing" Stewart and causing him to over-eat, and Neil told Melody that "that can be arranged, too, but didn't say it like I had that in mind." (103RT 11802.) Neil also stated in the note that he was concerned that Melody was "point[ing] the finger" at Neil to Stewart's attorney. Neil told Stewart that he had to find out what Melody had told Jaffe and if she had told anyone else. (103RT 11803.) After receiving the third of these notes from Neil, Stewart flushed the toilet in his

cell, pretending that he was getting rid of the notes. Stewart kept the notes and later gave them to his attorney, who used them at Stewart's trial. (103RT 11803-11804.)

In March 1990, Stewart was convicted of the murders of his parents and the conspiracy to commit those murders. (103RT 11832-11833.) Stewart understood there would be a penalty phase and decided to make an arrangement with the district attorney's office. Stewart gave a videotaped statement a few weeks after his conviction. (103RT 11833-11834.) Stewart's attorneys -- Jay Jaffe, David Wesley, and Scott Bindrup -- were present during the statement, and Stewart consulted with them before he gave the statement. Stewart then returned to court, and a written agreement was reached on March 28, 1990. (103RT 11834-11835; Peo. Exh. 276.)

The agreement stated that Stewart would be sentenced to life without the possibility of parole. (103RT 11835.) Stewart agreed to cooperate in the investigation and to testify in the trial and hearings of persons involved in the conspiracy to murder and the murders of Gerald and Vera Woodman. (103RT 11835-11836.) Stewart agreed to waive all appellate rights. (103RT 11836.) The agreement stated: "Overriding all else, it is understood that this agreement extracts from the defendant an obligation to do nothing other than reveal the truth. At all times he shall tell the truth and nothing other than the truth. He shall tell the truth whether the question is asked by a prosecutor, the judge or a defense attorney." Stewart agreed to this and complied. (103RT 11837.)

The agreement placed Stewart in federal protective custody outside California. (103RT 11837-11838.) Stewart reached this agreement for his own protection. He believed that he would be killed if he were incarcerated in the state system. (103RT 11837.) The day after the verdicts were read in his case, someone yelled at Stewart in the county jail: "No matter where they put you, we'll get you and you won't last a week. You'll be dead as

soon as you enter the next prison." (103RT 11838-11839.) Stewart also entered the agreement, because he wanted a chance to stay in contact with his children. (103RT 11837.) The level of comfort Stewart enjoyed in the federal system was far greater than that in county custody. (103RT 11838.)

16. Michael Dominguez

a. Dominguez is arrested and pleads guilty to the Woodman murders

On March 2, 1986, Dominguez was arrested in Las Vegas for possession of cocaine, being an ex-felon in possession of a gun, and parole violations. (88RT 9275; 109RT 12723-12726.) On March 12, 1986, Detective Crotsley learned that Dominguez wished to talk to the detectives. (101RT 11362-11364.)

On March 13, 1986, Detectives Holder and Crotsley interviewed Dominguez in Las Vegas.[43] (88RT 9266-9268; Peo. Exh. 252.)[44] Based on Dominguez's statement, the detectives successfully followed new leads in the investigation.[45] (101RT 11365-11367.) On March 26, 1986, the detectives interviewed Dominguez once again. (Peo. Exh. 253.)[46]

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[43] At appellant's trial, Dominguez testified that he was physically forced into giving the detectives a statement and that he did not have the opportunity to talk to his attorney prior to talking to the detectives. (85RT 8938-8940, 8944.) Dominguez testified that he lied when he testified at a prior proceeding that he did talk to his attorney before he talked to the police. (85RT 8943-8944.)

[44] The videotape of the March 13, 1986, interview of Dominguez was played for the jury. (88RT 9266-9268; Peo. Exh. 252.) The trial court instructed the jury that the tape was played for two reasons: (1) to determine whether Dominguez was coerced by the police at the time he gave this statement; and (2) to determine, whether, if at all, it impeached Dominguez in any way. (88RT 9266.)

[45] On March 13, 1986, Dominguez told the detectives that Robert had reserved a hotel room for him prior to the murders. At that time, the investigation had uncovered nothing about the Westwood Inn. That

(continued...)

On April 26, 1986, several LAPD detectives, including Detectives Holder, Crotsley, Otis Marlow, and Frank Garcia, accompanied Dominguez to various locations in West Los Angeles. The trip was videotaped by LAPD personnel.[47] (98RT 10870-10871, 10873.)

On May 9, 1986, Dominguez pleaded guilty to two counts of first degree murder for the murders of Gerald and Vera Woodman.[48] (85RT 8925.) Dominguez admitted the following summary of events underlying his plea: appellant recruited Dominguez to take part in a contract killing; Dominguez took part in the contract killing; Dominguez went through extensive planning and preparation with appellant, Robert, and Majoy; and Dominguez received $5,000 from appellant after the killing. (85RT 8933.) Dominguez was told during the plea hearing that, as a part of the plea bargain, he would be called as a witness to testify against his co-

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(...continued)
investigation developed after Dominguez's statement. (101RT 11365.) Also, during the interview, Dominguez said that appellant had come to Los Angeles on an occasion prior to September 25 and made an attempt on the victims' lives. At that time, Detective Crotsley had no information regarding Sharon Armitage, the real estate agent who was showing a unit at Gerald's and Vera's condominium complex, or the "Stoneridge," the building across the street from Gerald's and Vera's residence. That investigation developed after the police talked to Dominguez. (101RT 11365-11367.)

[46] The tape of Dominguez's March 26, 1986, statement was played for the jury. (92RT 9807-9808; Peo. Exh. 253.)

[47] One of the stops during this trip was Rae's Hardware store, where Dominguez identified Norma Drinkern as the person who had sold him the bolt cutter. (94RT 10111-10113.)

[48] At appellant's trial, Dominguez claimed that his guilty pleas were not voluntary and that, when the pleas were taken, he lied when he was asked to describe what he had done with respect to the crimes. (85RT 8924-8928.) Dominguez also claimed that he did not have enough time to talk to his attorney at the plea hearing and that he lied at the plea hearing when he said that he had had enough time to talk to his attorney. (85RT 8936-8937.)

conspirators. (85RT 8934-8935.) Also, he was told that, if the district attorney's office learned that he had lied in any material way or that he committed perjury once he testified, then the plea agreement would be declared null and void. (88RT 9331.) In 1988, Dominguez was sentenced to two concurrent terms of 25 years to life in prison. (85RT 8935-8936; 88RT 9334.)

b. The murders[49]

Dominguez had known appellant since 1972. (85RT 8946-8947.) In September 1985, appellant asked Dominguez to go to Los Angeles with him. Dominguez agreed. (85RT 8950-8952.) Appellant told Dominguez that he needed help in a robbery. Appellant explained that there were people he "was after" and that he was having a hard time "getting" them. Appellant said that the man who he "was after" drove quickly and walked his dog.[50] (85RT 8964-8967; 87RT 9211.) Appellant said that there was $50,000 at stake and that Dominguez would get $5,000. (85RT 8968; 87RT 9212-9215.) Appellant said that they had to "get" the people, because there was a lot of money involved and it would be a long time before they had another opportunity. (87RT 9215.)

Appellant purchased Dominguez's airline ticket, and appellant and Dominguez flew from Las Vegas to Burbank on a PSA flight on September 24, 1985. Appellant and Dominguez arrived in Burbank at noon. (85RT 8952-8955, 8958.) Appellant was carrying a brown carry-on bag, which contained two walkie-talkies. (85RT 8986-8987.) Appellant and

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[49] At appellant's trial, in response to questions, Dominguez contradicted prior statements and prior testimony, gave evasive responses, and sat silent. Dominguez was extensively impeached with his prior statements and prior testimony, as set forth here.

[50] Wayne Woodman testified that Gerald always walked his dogs. (79RT 7688.)

Dominguez rented a four-door, white car from a man named "Al" at a car rental place near the Burbank airport. (85RT 8960, 8962-8963, 8974-8975.) Appellant and Dominguez drove to Robert's house, and appellant and Robert made some telephone calls. (85RT 8975-8976.)

That day, appellant introduced Dominguez to Max Herman. Dominguez saw appellant carrying a black gun case from Herman's office, which appellant did not have with him when they arrived there. (85RT 8976-8980.) Dominguez saw the gun case in the rental car the next day and saw a revolver inside the gun case. (85RT 8980-8981.)

Appellant, Robert, and Dominguez tested the walkie-talkies to determine the distance they could be used. (85RT 8984-8985, 8987-8989.) Appellant and Robert made telephone calls from a gas station near Robert's house at a bank of six telephones. (85RT 8990-8993.) Dominguez heard appellant mention Art Taylor and "Sonny" on the telephone. (85RT 8999-9000.) One month earlier, Dominguez had driven to Los Angeles and had met a short man named "Sonny" or Anthony Majoy through appellant and Robert. (85RT 9001-9003.)

Appellant, Robert, and Dominguez went to a mountain location where there were iron gates and a guard post in order to test the walkie-talkies.[51] (85RT 9003, 9006-9007.) The people who they were after were supposed to be traveling from the mountain location. (85RT 9004.)

Appellant, Robert, and Dominguez then went to a residence about four miles down the road -- a gray, brick, three-story condominium complex. (86RT 9044-9046.) They tested the walkie-talkies, but the walkie-talkies did not work. Dominguez talked to appellant about the fact

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[51] Muriel Jackson lived in a gated community, which had a guard shack. (93RT 9892; 95RT 10349.)

that the walkie-talkies were not working, and there was a conversation about a call to Art Taylor. (86RT 9054-9057.)

After testing the walkie-talkies, appellant said he was going to go to Las Vegas. Appellant made some telephone calls. (87RT 9136-9139.) While Dominguez was riding around with appellant, appellant said he was going to rob an elderly couple. Appellant said he had "been after" the couple for a while but had "missed." Appellant also said that the woman had to be with the man. (87RT 9139-9140.) Appellant said he had tried to acquire, from a realty company, a room in the building where the couple lived in order to "get them." (87RT 9140-9142.)

After appellant left Los Angeles, Dominguez and Robert went to a hardware store across the street from Dolores restaurant, and Robert purchased a bolt cutter.[52] The bolt cutter was red with black handles and about a foot long. (87RT 9142-9144.) Robert then checked Dominguez into a motel room on Wilshire Boulevard. Robert later called Dominguez at the motel and said that he would pick him up the next day around noon. Dominguez spent the night at the motel. (87RT 9144-9146.)

The next day, Robert picked up Dominguez, and the two drove to the airport to pick up appellant. Appellant arrived at the airport around 1:00 p.m. (87RT 9151-9152.) Appellant had a walkie-talkie identical to the one he had previously. (87RT 9153.)

Appellant, Robert, and Dominguez tested the walkie-talkies between the mountain location and the condominium. (87RT 9187-9188.) They waited for it to get darker and then drove in two cars to the iron gates to test the walkie-talkies, as they had done the night before. (87RT 9188-9190.)

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[52] Rae's Hardware was across the street from Dolores' restaurant. (95RT 10354.)

They went back and forth several times between the mountain location and the condominium. (87RT 9190-9192.)

Appellant and Dominguez went to the condominium and drove around it, including in the alley. They parked the car. Appellant asked Dominguez to ring the doorbell of Mr. and Mrs. Woodman. Dominguez complied, and no one answered the doorbell. (87RT 9192-9198.) When Dominguez told appellant that no one answered the doorbell, appellant got out of the car, went to check around the condominium, and then told Dominguez that the people were not at home. (87RT 9199-9200.)

Appellant, Robert, and Dominguez then tested the walkie-talkies one more time. (87RT 9200-9202.) Robert then informed appellant over the walkie-talkie that he had gotten into a car accident. Appellant became upset. Appellant and Dominguez met Robert on Gorham, and appellant talked to Robert. (87RT 9202-9206.) Dominguez saw Majoy in Robert's car. Majoy was wearing a hooded, black sweatshirt and was trying to hide. (87RT 9206-9208.)

Appellant and Dominguez had walkie-talkies, a handgun, a shotgun, a bolt cutter, and luggage in the car. Dominguez believed the gun was going to be used to rob the people, but he did not know the purpose of the bolt cutter. (87RT 9208-9211.) Dominguez believed that there was going to be a killing that night. (87RT 9211-9212.)

Appellant dropped off Dominguez at a bus bench at the intersection near the condominium.[53] (87RT 9216-9217, 9221-9222.) Dominguez had a walkie-talkie with him in a shopping bag. (87RT 9218-9219.) Appellant told Dominguez that he was to look for an elderly couple driving a two-

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[53] There was a bus bench in front of Century Federal Savings and Loans on Gorham Avenue between San Vicente and Barrington. (93RT 9954-9957.)

door, tan-colored Mercedes. Appellant instructed Dominguez that, as soon as he saw the couple, he was to let appellant know. (87RT 9219-9220.) Dominguez had previously heard that the elderly woman was cooking dinner at the iron gates area. (87RT 9240-9241.)

Dominguez waited at the bus bench. He spotted the Mercedes traveling from the mountain area towards the condominium and saw that an elderly man was driving an elderly woman. (87RT 9223-9224.) Dominguez called ahead on the walkie-talkie and said that the couple was on its way. (87RT 9224-9225.)

About two to three minutes later, Dominguez saw appellant driving the white car. (87RT 9226-9227.) Appellant and Dominguez drove to a restaurant and had dinner. (87RT 9227-9229.)

A week later, in Las Vegas, appellant paid Dominguez $5,000. (87RT 9214-9215.) At some point, appellant told Dominguez that the elderly man had taken 12 minutes to die and that the elderly woman had died at the scene. (92RT 9805-9806.)

B. Appellant's Defense

1. Appellant's alibi

In 1985, Joseph Houston was an attorney in Las Vegas, and he represented appellant in a divorce proceeding. (109RT 12762-12763.) On September 25, 1985, Houston appeared in court for the court trial on the divorce. Houston did not know whether appellant had requested that date. (109RT 12763.) The hearing was scheduled for 9:00 a.m., but the matter might not have been heard at that time. (109RT 12764.) Houston did not recall what time appellant's case was heard. (109RT 12765.) Appellant testified in court. Also, as he was required under Nevada law, appellant presented the testimony of a resident witness, Mick Shindell, that appellant had resided in Las Vegas for six weeks. (109RT 12765, 12777.) Houston

believed he might have had breakfast with appellant that day. (109RT 12766.)

Mick Shindell had known appellant since 1979. (109RT 12864.) In September 1985, Shindell was the director of corporate security at the Imperial Palace Hotel in Las Vegas. Before that, he had been a police officer with the Las Vegas Metropolitan Police Department. (109RT 12865.)

On September 25, 1985, Shindell was a witness for appellant in his divorce proceeding. After the proceeding, appellant, Shindell, and Houston had breakfast together. (109RT 12865-12866.) Later, Shindell and appellant went to Shindell's office at the hotel. (109RT 12866.) Appellant left the hotel at about 11:30 a.m. (109RT 12867.) Appellant said he was going to Los Angeles to see a doctor. (109RT 12870.) Shindell saw appellant again later that day at about 10:00 or 11:00 p.m. at his house in Las Vegas. (109RT 12870.)

On March 11, 1986, a search warrant was executed at Shindell's home. (111RT 13200, 13214.) Shindell first learned about the Woodman murders on the night the search warrant was served. (111RT 13232-13233, 13237.) When Shindell learned about appellant being charged with the Woodman murders, he did not tell law enforcement that appellant was at his house on the night of the murders. (111RT 13226-13227.)

In September 1985, Deena Mann saw appellant at Los Angeles Sports Medicine, a doctor's office in Marina del Rey, California. Although Mann did not recall the date in September, she recalled that she saw appellant around the lunch hour. The doctor was not in that day, and appellant did not have an appointment. (110RT 12927-12931.)

Paula Kamisher also worked at Los Angeles Sports Medicine. On a Wednesday which was a Jewish holiday, appellant visited the office at the lunch hour. The doctor was not there. Appellant did not have an

appointment. (112RT 13407-13410, 13415.) Appellant did not make a subsequent appointment. (112RT 13419.)

2. Joseph Gambino refutes Stewart's testimony that Gambino referred Stewart and Neil to appellant in order to solve their problems with their parents

Joseph Gambino met appellant around 1970.[54] (109RT 12786.) At the time, appellant was doing carpentry work. (109RT 12815.) Appellant went into the casino business and was instrumental in helping Gambino get his first job in the casino business. (109RT 12819-12820.) Shortly thereafter, Gambino followed in appellant's footsteps once again and became a dealer at the MGM Grand Hotel in Las Vegas. (109RT 12822-12823.) Gambino later became a floor person and then a pit boss at the MGM. (109RT 12786, 12790.) The floor person's duty was to make sure dealers were not cheating the house, and the duty of the pit boss was to watch the floor person and act as a host to customers. (109RT 12790.)

Gambino remained a close friend of appellant for many years. (109RT 12827.) Gambino knew appellant's family. He knew appellant's wife and two daughters. (109RT 12794.) He knew appellant had put Robert through law school. (109RT 12795.)

In the 1970's, when Gambino was a floor person at the MGM, he met Melody and Stewart. (109RT 12791-12792.) They struck up a friendship. (109RT 12792-12793.) Gambino visited Stewart and Melody in Los Angeles. (109RT 12794.) Within a year of meeting Stewart, Gambino introduced Stewart to appellant at the MGM. At the time, Gambino was a floor person, appellant was a dealer, and Stewart and his wife were gambling. Gambino was talking to Stewart at the casino when

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[54] Gambino was not involved with the Gambino crime family. (109RT 12788.)

appellant happened to walk by, and Gambino made the introduction. (109RT 12797-12798, 12803, 12832.)

Gambino met Neil and his wife. (109RT 12796.) Gambino also met Gerald and Vera at the MGM. Gerald said that he was proud of Stewart. Gambino also saw Gerald at Stewart's house. Neither Vera nor Gerald expressed animosity towards Stewart or about the business. (109RT 12803-12805.) Gambino believed the Woodman family was "all one big happy family." (109RT 12841.)

In 1980, Gambino became a pit boss in Atlantic City. (109RT 12793.) He continued his friendship with Stewart. (109RT 12794.) Gambino knew from Stewart that there was a problem with the breakup of the family business in the early 1980's. (109RT 12799.) Gambino knew about the lawsuit and about Stewart's stress. (109RT 12846.) Stewart did not complain to Gambino that his health or well-being were threatened by his parents. (109RT 12799.)

Gambino did not interfere in the personal lives of Stewart and Neil. Gambino did not tell Stewart that he (Gambino) could solve Stewart's problems with his parents. He also did not tell Stewart that appellant could solve Stewart's problems with his parents. (109RT 12797, 12807.) If Stewart had approached Gambino for advice, Gambino would have told Stewart to talk to his father. (109RT 12800-12801.)

One day, Stewart called Gambino and broke down and cried. Stewart handed the telephone to Melody, who told Gambino that Gerald and Vera had been killed. Stewart seemed sincerely grief-stricken. (109RT 12806.) He did not tell Gambino that he had arranged to have his parents killed. (109RT 12807.) Gambino attended the bar mitzvah for Stewart's son. Stewart gave a speech, saying that he wished his parents could have been there. (109RT 12794, 12807.)

In August 1986, appellant called Gambino after he was arrested for the murders of Gerald and Vera. Appellant told Gambino to expect a visit from the police and to handle the visit "like it was cancer." (109RT 12828-12829, 12850.)

In 1986, Gambino was interviewed by the police, and his statement was tape recorded. In 1990, when Gambino was in Atlantic City, he was interviewed by the Los Angeles District Attorney's Office and by the LAPD. (109RT 12786, 12808.) Gambino had a great deal of sympathy for appellant. (109RT 12830.)

3. Art Taylor's former business partner believes Taylor is dishonest

In 1980 or 1981, Robert Grogan went into business with Art Taylor. Grogan infused money into their company, which was called Leisure Time Electronics. The company was adjacent to Art's CB Shop (Taylor's store), and Taylor and his wife ran it. (114RT 13681-13682, 13686.) After Grogan purchased insurance on their company, Taylor suggested that they burn down the business. (114RT 13697.) In 1983, the business partnership was dissolved, because Taylor was writing checks out of the business account for personal use. (114RT 13683, 13688.) Taylor also never repaid Grogan money that Taylor had borrowed from Grogan. (114RT 13687.) Grogan believed Taylor was not an honest or truthful person. (114RT 13695.) Grogan testified as a character witness on behalf of appellant at a court proceeding in Nevada. He testified that appellant was a good person. (114RT 13719.)

4. Possible culprits: Dominguez and the men with the wing-tipped shoes

a. Dominguez

In the early 1980's, Edward Bayard knew Dominguez.[55] (110RT 12938.) In 1981, Bayard drove Dominguez to the Jet Gas Station where Ray Ordish worked. (110RT 12939-12940.) Dominguez followed Ordish into the gas station. (110RT 12939.) Dominguez carried a black motorcycle helmet. Dominguez was wearing a red pair of sweats and a red faded sweater with a hood on it. (110RT 12940.)

When Dominguez came out of the gas station, he was wearing a pair of gloves. (110RT 12940.) Later, Dominguez told Bayard that he had committed a robbery at the gas station. Dominguez said that he and Ordish had set up the robbery. Dominguez said he went into the gas station, pulled a gun on Ordish, hit Ordish in the head with the gun to make it look "good," stole from Ordish, and locked him in a back room. (110RT 12941.) Dominguez said he used the motorcycle helmet to cover up his face so that no one could see him. (110RT 12942.)

Dominguez told Bayard about another robbery in which he had participated about one month after the gas station robbery. Dominguez said he had robbed Ordish's mother in front of a bank while he was on a motorcycle. (110RT 12942.) He said he had a difficult time getting the money bag from her and she tried to kick the motorcycle from underneath him. Dominguez said he then crashed into a car around the corner, spilled the money, grabbed what he could, and then left. Dominguez said he wore

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[55] Bayard had been convicted of burglary and grand theft auto and had served prison terms in Nevada and Arizona. (110RT 12948.)

the same clothes and helmet as he had during the gas station robbery. (110RT 12943.)

Dominguez favored a .38 caliber gun and had two of them. (110RT 12943-12944.) One of them needed a firing pin. Dominguez would try to shoot cars passing by on the highway from the desert. (110RT 12944.) Dominguez said he got paid once to break someone's leg. (110RT 12944.) Bayard described Dominguez as a "wolf in sheep's clothing." (110RT 12951.) Bayard gave the information regarding the robberies of Ordish and his mother to the police in 1981. (110RT 12947.)

Dominguez was interviewed by an FBI agent. He told the FBI agent that, in 1981, he stole a motor boat that was chained to a post in a friend's backyard. Dominguez said he used a pair of bolt cutters he found nearby to take the boat. (114RT 13680.)

On November 4, 1981, Officer James Davis of Henderson, Nevada, interviewed Raymond Ordish about the 1981 robbery at the Jet Gas Station. Ordish said that he and Dominguez had set up the robbery. Ordish said Dominguez came into the gas station wearing a black helmet with a dark visor and pulled a .32 or .38 caliber revolver on Ordish. Ordish said Dominguez was also wearing sweats, gloves, gray trousers, and a red jacket with a hood. Ordish said Dominguez put him in the back room and stole from the gas station. (112RT 13370-13376, 13386.) Officer Davis conducted investigations into Dominguez's other activities, and those investigations resulted in criminal prosecutions. Dominguez was being investigated for about 25 different felonies by the Henderson Police Department. Officer Davis believed it would be foolhardy to believe what Dominguez had to say about anything if his self-interest was at stake. Officer Davis believed Dominguez would lie to save himself or to better his circumstances, even if he was under oath. Officer Davis believed

Dominguez had no conscience and was a very dangerous person. (112RT 13376-13379, 13390-13391.)

On September 18, 1986, when Dominguez was in police custody, Detective Richard Aldahl and Detective Holder were boarding Dominguez onto a commercial flight to Nevada at the Burbank Airport. (110RT 12963-12964.) Prior to boarding, the detectives removed the handcuffs from Dominguez, as required by airline policy. When a crowd of people formed around the boarding gate, Dominguez pulled away from Detective Aldahl and ran down the corridor of the airport. (110RT 12964, 12981.) Detective Aldahl pursued Dominguez. (110RT 12964.) He drew his weapon, pulled out his badge, and yelled out, "Police. Stop that man." (110RT 12965, 12967.) A civilian at the airport tried to stop Dominguez, but Dominguez grabbed him and threw him to the floor. (110RT 12964-12965.)

Dominguez ran out of the terminal. Detective Aldahl ran after him. Detective Holder was behind Detective Aldahl, also in foot pursuit. (110RT 12966.) Dominguez ran into the multi-level parking structure, and Detective Aldahl followed. (110RT 12967-12968.) Detective Aldahl still had his weapon drawn. He considered Dominguez to be dangerous. (110RT 12967.) Detective Aldahl saw Dominguez at the end of the parking structure, running on a side street of the airport. Detective Aldahl ran after Dominguez and yelled at Dominguez to stop, but Dominguez did not stop. (110RT 12968-12969.)

Dominguez ran into the Lockheed facility but immediately exited the same way he entered the building and continued to run. Dominguez climbed a chain-link fence. Detective Aldahl fired a shot into the air and said, "Stop or I'll shoot." (110RT 12969.) Dominguez made it over the fence. He hung onto the fence and did not let go. (110RT 12970.) Detective Aldahl caught up to Dominguez, placed his revolver through the

fence, pointed it at Dominguez, and told him to stop. Dominguez complied. When Detective Holder arrived, Dominguez said, "Go ahead and shoot me. It doesn't matter." (110RT 12970.) The airport police arrived, and the detectives regained custody of Dominguez. (110RT 12970.)

Dominguez was in custody in state prison in Nevada from June 14, 1982, to December 13, 1984. (126RT 15536.)

b. The men with the wing-tipped shoes

In September 1985, Melissa Paul was living on Gorham, across the street from Gerald and Vera. (109RT 12877, 12885.) On the night the Woodmans were killed, Paul heard gunshots. (109RT 12877.) Afterwards, Paul saw a car in the alley behind her building.[56] (109RT 12878-12879.) The car was black or dark blue and did not have a California license plate. The car was in the alley for about 25 minutes, an unusually long period of time. The car was "creeping" down the alley. (109RT 12878, 12881.) At some point, two men exited the car. They were dressed in business suits and wing-tipped shoes. (109RT 12880.)

Paul was interviewed shortly after the murders by LAPD Officer Lerner. She gave Officer Lerner the license plate number of the car that she had seen in the alley behind her apartment. (116RT 14028.)

5. Errors made by the LAPD

a. Errors and omissions in police reports and logs

Detectives Holder and Crotsley, the lead investigators in the Woodman murders, acknowledged that there were some omissions and errors in the police reports and the chronological logs generated in this

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[56] This alley was different than the alley behind the building where Gerald and Vera had lived. (109RT 12886.)

case.[57] Sometimes, the error or the omission was only in the typed version of the police report or chronological log. (See, e.g., 110RT 13060-13071, 13092-13097; 112RT 13339, 13344; 113RT 13502-13503, 13519-13521; 114RT 13783, 13846; 115RT 13862-13863, 13906.)

However, Detective Holder explained that the LAPD interviewed hundreds of individuals during its investigation of this case. (113RT 13592.) In the course of the investigation, there were over 9,000 pages of discovery generated. (110RT 12997; 113RT 13591-13592.) Detective Holder probably saw all of the LAPD reports in this cases, but he did not cull through each document with regard to every subject matter and cross-reference all matters. (113RT 13592-13593.)

Also, there were over 100 pages of chronological logs and thousands of entries in the logs. (113RT 13607-13609.) The log was not a complete representation of everything that happened in the case. Sometimes, things which later turned out to be unimportant were recorded, and things which later turned out to be important were not recorded. (113RT 13611.) Detective Holder sometimes made an entry in the log referring to a report that he intended to write but, for whatever reason, never wrote. (113RT 13612.) Detective Holder did not proofread the typed log prepared by the secretary at the police department. (113RT 13613.)

b. The investigation of Dominguez

After corresponding with FBI Agent Jerry Doherty, Detective Crotsley prepared a report which stated that a third person was with Dominguez and appellant when they left from Burbank to Las Vegas on September 26, 1985. Detective Holder did not ask Dominguez about this

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[57] The log was an internal document used by investigators to record events in the case. Most of the entries on the log were made at or near the time of the event. (113RT 13607-13609.)

during the interviews. The same report also stated that Dominguez had used a credit card during the events relating to this case, but Detective Holder did not ask Dominguez about this either. (111RT 13295-13296.)

Detective Crotsley did not recall asking Dominguez if he had used a credit card to buy any airline ticket relating to this case. (114RT 13840.) Detective Crotsley did not try to obtain copies of any records relating to credit cards that Dominguez might have had in September 1985. (114RT 13841.)

c. The detectives sign a book deal

In April 1989, Detective Holder entered into a contract with Larry Attebery and became an adviser on a book that Attebery was writing about this case. Detective Holder was to provide Attebery with information on how to find information on the case. Before entering the contract, Detective Holder did not obtain prior approval and did not submit a summary of his employment with Attebery to anyone at the LAPD. (113RT 13578-13579.) The LAPD Manual stated that there were certain procedures an officer was supposed to follow prior to entering a contract of the type that Detective Holder entered, but Detective Holder did not follow the procedures. Detective Holder believed he had done nothing wrong in entering into the contract. (113RT 13580.) Detective Holder had not entered into a book deal on another case. (113RT 13578.)

Detective Holder received $500 from Attebery. The contract provided that Detective Holder would receive five percent of the profits if the book was written and one percent of the profits if a movie was made. (114RT 13754-13756.) Detective Holder's interest in the book did not affect how he answered questions in the case or the work he did in the case. (113RT 13581.)

Like Detective Holder, Detective Crotsley also entered into a book contract with Attebery. (115RT 13891.) Detective Crotsley had not previously entered into a book contract on another case. (115RT 13892.)

C. The Defenses of Robert Homick and Neil Woodman

1. Robert Homick's defense

a. Robert's relationship with appellant

Helen Copitka is Robert's and appellant's sister. (117RT 14193.) She is a counselor and consultant. She has a Bachelor's Degree in psychology and a Master's Degree in rehabilitation counseling. (117RT 14192-14193.)

In order of age from oldest to youngest, the Homick siblings are: appellant, Ms. Copitka, William, Nadine, and Robert. Appellant was born in 1940 and was 11 years older than Robert. (117RT 14193-14194, 14199.)

In 1953, sibling John Paul was born. John Paul had brain damage and intestinal problems. He had to be taken care of full time, and appellant's mother and father took care of him. Ms. Copitka and appellant helped out with John Paul. The care that appellant's mother provided to John Paul affected her ability to take care of her other children, especially Robert and Nadine who were in preschool. (117RT 14199-14201.) Ms. Copitka and appellant helped their mother take care of the small children so that their mother could get some rest. Much of the child care at that time fell on Ms. Copitka and appellant. (117RT 14201.) Ms. Copitka and appellant were the surrogate parents and told the other children what to do. (117RT 14209.)

Robert would "tag along" with appellant. (117RT 14201.) Appellant was outgoing. He was a very good baseball player and pitcher. (117RT 14204, 14208.) Robert was shy. Robert idolized appellant, trusted appellant, and attempted to please appellant. Appellant was a leader;

Robert was a follower. Ms. Copitka never saw the relationship between appellant and Robert change. (117RT 14210.)

When appellant graduated from high school, he left home and went to Ohio State. He played baseball there and periodically came home. (117RT 14202.) Appellant also played minor-league baseball. (117RT 14203.)

Appellant moved to California in 1965. When Robert graduated from high school, he moved to California and lived with appellant and his wife.[58] (117RT 14203.)

Lorraine Pritikin and her husband were best friends with appellant and his wife. Ms. Pritikin was a housewife, and her husband was a prosecutor. (117RT 14257-14260.) The Pritikins met Robert in the late 1960's. Robert was shy and quiet. (117RT 14260-14261.) Ms. Pritikin saw appellant telling Robert what to do. (117RT 14261.) Appellant was domineering over Robert, and Robert was agreeable with appellant. (117RT 14263.) Appellant and his wife moved from Los Angeles in 1971, but they remained friends with the Pritikins. (117RT 14262.)

The Pritikins remained close to Robert after appellant and his wife moved. Robert passed the bar and became a lawyer in California. Ms. Pritikin never saw the relationship between appellant and Robert change. (117RT 14263.)

b. Evidence regarding Max Herman

Clarence Stromwall was a retired superior court judge. Prior to being a judge, he had been a police officer for 21 years. (116RT 13963-13964.) He knew Max Herman, who had also been a police officer. They had been partners for 17 years. (116RT 13965.) Judge Stromwall believed

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[58] Appellant's father died in 1989, and his mother died in 1991. Both parents were sick in the mid-1980's. (117RT 14231.)

that Herman was savvy, streetwise, and not easily manipulated. (116RT 13967-13968, 13973.) He also knew Herman to be honest. (116RT 13972.) Judge Stromwall believed that Herman would not have given appellant a gun if he had any suspicion that it would be used for something illegal. (116RT 13973.)

c. Evidence regarding Robert's car accident on the night of the murders

On October 5, 1985, LAPD Officer David Ybarra took a citizen report from Robert for a hit-and-run accident. (117RT 14153-14154.) Robert said the accident was on September 25, 1985, at 6:30 p.m., on Westgate. Robert said Steven Kolodin was a witness. (117RT 14155-14157.) Kolodin was interviewed by the LAPD. (117RT 14157.) When Officer Ybarra ran the license plate number of the other car, he obtained the name of Richard Altman. (117RT 14157-14158.)

On September 25, 1985, Steven Kolodin witnessed a car accident. (117RT 14163.) He saw a ZX hit a bluish-green sedan. The drivers of the two cars talked to one another. The driver of the ZX drove towards Gorham Avenue. The driver of the bluish-green car, Robert, stayed there. Kolodin approached Robert. He gave Robert the license plate number of the other car and talked to Robert for 10 to 15 minutes. (117RT 14164-14166.) Kolodin recognized Altman in court as the driver of the other car. (117RT 14167.) Kolodin did not see anyone else in Robert's car. (117RT 14168.)

d. Dominguez's identification of the co-conspirators

In 1986, Joseph Gersky was an FBI Agent in Las Vegas. (116RT 14080.) On March 18, 1986, Agent Gersky interviewed Dominguez about the Woodman murders. (116RT 14081-14082.) Dominguez said he was a

lookout and that he used walkie-talkies to communicate with appellant when Gerald and Vera drove passed him. (116RT 14084.)

During the first interview conducted by Agent Gersky, Dominguez said that, other than appellant, he did not know who else was involved in the murders. An hour or so later, Agent Gersky interviewed Dominguez again. (116RT 14084-14085.) This time, Dominguez said that "Sonny" (Majoy) and "appellant's brother" assisted appellant in the murders. (116RT 14090.) Dominguez never said Robert assisted appellant. (116RT 14105.) Agent Gersky wrote in his report that appellant's brother "Moke" (William) assisted appellant, because that was the only nickname Agent Gersky had been given by other investigators. (116RT 14113-14114, 14119; Def. Exh. 1144.)

On May 14, 1986, Agent Gersky was contacted by law enforcement. (116RT 14090-14091.) He was told that another brother of appellant was involved, not Moke. (116RT 14091.) Agent Gersky was asked to prepare a supplemental report indicating that Robert, not Moke, assisted appellant and Sonny. Gersky prepared such a report. (116RT 14106, 14121-14122, Def. Exh. 1145.)

2. Neil Woodman's defense

The rabbi at the temple that Neil belonged to was Steven Reuben. (120RT 14691-14692.) Reuben maintained contact with Stewart after his arrest. He visited Stewart in jail, and Stewart called his house. Reuben's wife also talked to Stewart. Stewart never told Reuben that he was guilty of the murders. Before and during his trial, Stewart said that he was not involved in the murders. After the trial, he intimated that he was not involved. Stewart did not indicate in any way that he was guilty of the crimes of killing his parents. (120RT 14702-14705.)

During his trial, Stewart was positive he would be acquitted. Stewart said the evidence against him was circumstantial. (120RT 14705-

14708.) Stewart was devastated when the verdicts were read and shocked and fearful in the days following the verdicts. He said he was afraid he was going to get the death penalty and never see his children. (120RT 14709.) Stewart believed he was convicted because of his religion and wealth. (120RT 14710.)

About a week after Stewart made his deal, Reuben talked to Stewart. Reuben asked Stewart why he had made the deal. Stewart said he was told he would get the death penalty and this was the only way to see his children. (120RT 14711-14712.)

Later, Stewart discussed a new trial. (120RT 14712.) Stewart said he expected to have a mistrial. Reuben asked Stewart how he could expect to be released, given the confession. Stewart said, "There are enough holes in my confession to drive a truck through, that's not a problem at all." (120RT 14713.) Stewart expected to get out of prison in these conversations. (120RT 14715.)

Stewart said his attorney did not let him testify at his trial, even though he wanted to testify. Stewart thought that he would have been found not guilty if he had testified. (120RT 14716.) Stewart said his wife influenced his lawyer to not permit Stewart to testify. He said he did not think his trial was fair because of his wife and his lawyer. He said his wife wanted him to be in jail. (120RT 14717.)

D. Rebuttal

In 1986, Thomas Dillard was a homicide detective with the Las Vegas Metropolitan Police Department. His partner was Detective Robert Leonard. (121RT 14947-14948.) Detectives Dillard and Leonard were assigned to assist Detectives Holder and Crotsley in the investigation of the Woodman murders. After appellant's arrest, the Woodman murders was the lead story in the Las Vegas newspapers and on the local television stations. (121RT 14950.)

Detective Dillard had met Mick Shindell in the late 1970's. Shindell was a sheriff's deputy and a liquor and gambling enforcement officer. (121RT 14948.) Shindell was later employed at the Imperial Palace in the corporate security section. (121RT 14949.) Sometime after appellant's arrest, in about April to June of 1986, Detective Dillard had a chance meeting with Shindell on the street in downtown Las Vegas. Detective Dillard had been the affiant who had prepared the search warrant for the search of Shindell's house on March 11, 1986. (121RT 14951.) Shindell talked about the search. (121RT 14950-14951.) Shindell expressed disbelief about what had occurred. He said, "I hope you guys don't think I had any involvement." (121RT 14952.) Shindell said he could not believe appellant had been arrested for the Woodman murders. (121RT 14952.) Detective Dillard said he wanted to talk to Shindell about a couple of things. He asked Shindell to call him. (121RT 14952.) Shindell never called Detective Dillard. (121RT 14953.)

Shindell never told Detective Dillard that appellant was with him on the night of September 25, 1985. (121RT 14953.)

II. PENALTY PHASE EVIDENCE

A. People's Evidence in Aggravation

1. Background to the Tipton murders

Timothy Catt worked at one of the two Tower of Jewels stores in Las Vegas, Nevada. He made custom jewelry. In 1985, Catt managed one of the Tower of Jewels stores. (136RT 17092-17095.)

In mid-1984, Catt met appellant. Appellant was introduced to Catt as a former Detroit Tigers pitcher, an ex-LAPD vice-squad officer of 11 years, and head of security for an airline. (136RT 17096-17097.) Appellant was the head of security at the Tower of Jewels and had access to all of the areas of the store. (136RT 17097.) Catt knew Rena Homick,

appellant's daughter, who was an employee at the Tower of Jewels. (136RT 17099-17100.) Catt also met Dominguez in 1985 when Dominguez came to the store.[59] (136RT 17100-17101.)

One of Catt's customers was Bobbie Jean Tipton. (136RT 17098-17099.) Mrs. Tipton and her husband David Tipton had moved to Las Vegas in 1981 with their maid Marie Bullock. (138RT 17406-17408.) Mrs. Tipton ran an oil company that she had inherited from her father, and she was wealthy. Mr. Tipton was a real estate broker. (138RT 17409-17410.) The Tiptons lived at 2561 E. Oquendo Road. (138RT 17413.) They had four cars, including a Zimmer worth $64,000.[60] (138RT 17411.)

Mrs. Tipton owned between 50 and 200 pieces of jewelry, including family heirloom pieces. Her jewelry was valued at about $250,000. Mrs. Tipton kept her expensive jewelry in a floor safe inside the walk-in closet of her bedroom. She also had several jewelry boxes on her dresser in her bedroom. (136RT 17099, 17106; 138RT 17411-17413.)

In August 1985, Mrs. Tipton asked Catt to clean, polish, and appraise some of her jewelry. Catt agreed. Catt kept the jewelry for over two months inside the walk-in safe at the store. (136RT 17102-17103.) He cleaned and polished the jewelry in his office. (136RT 17104.)

Catt had five or six conversations with appellant about Mrs. Tipton's jewelry. (136RT 17104.) Appellant asked Catt who the jewelry belonged to, and Catt said it belonged to Mrs. Tipton. Appellant said he knew Mrs. Tipton, because his wife was a receptionist at the beauty salon, Neallia's,

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[59] After talking to appellant and clearing it with his boss, Catt gave Dominguez a watch worth $1,000. (136RT 17107.)

[60] The license plate numbers of two of the Tipton cars were "JOND" and "001ACC." (138RT 17416.)

where Mrs. Tipton went.[61] Appellant said Mrs. Tipton was a multi-millionaire with Texas oil money. He said she drove a Zimmer, which cost $85,000. (136RT 17105-17106.)

Appellant asked Catt about the value of Mrs. Tipton's jewelry. Catt told appellant the value of the jewelry on his desk was $90,000. (136RT 17108-17109.) Appellant asked Catt about the most expensive piece of jewelry, and Catt said it was a diamond worth $30,000. (136RT 17109.) Catt also told appellant about a 10-carat, yellow sapphire Bulgari piece worth $10,000. (136RT 17110.)

Sometime in 1985, appellant asked Billy Mau, an assistant manager at the Tower of Jewels, how diamonds were graded. (139RT 17632, 17643.) Mau wrote a table for appellant in appellant's daily reminder book, explaining the importance of color, clarity, cut, and carats of diamonds. (139RT 17643-17644.)

2. Appellant prepares for the murder of Mrs. Tipton

In September or October 1985, appellant telephoned Frank Smaka, a police officer with the Las Vegas Metropolitan Police Department whom appellant had met years earlier.[62] (136RT 17048-17055.) Appellant said he was the head of security at the Tower of Jewels and was doing private investigation work. Appellant asked Officer Smaka if he would "run" a few license plate numbers for him. Officer Smaka agreed but later forgot

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[61] Neallia Sullivan owned Neallia's Creative Hair, a beauty shop. Mrs. Tipton was a client, was at the shop on a weekly basis, and her hairdresser was Rick Gomez, who was a friend of Catt. In 1985, Dolores Homick, appellant's wife, was the receptionist at the beauty shop. Appellant visited the shop. (138RT 17400-17405, 17414.)

[62] The daily reminder page for February 25, 1985, listed Officer Smaka's name and telephone numbers. (136RT 17068-17069.) Officer Smaka's name also appeared at the daily reminder page of August 16, 1985. (136RT 17071.)

about the request. When appellant called back, Officer Smaka wrote down the license plate numbers that appellant was inquiring about on his calendar. (136RT 17055-17056.) They were "001ACC" and "JOND." Officer Smaka told appellant that he would run the numbers to determine the owner of the vehicles. (136RT 17061.) Within a week or two, Officer Smaka ran the numbers, but appellant did not call back. (136RT 17062.)

By November 1985, appellant no longer worked at the Tower of Jewels. (136RT 17112.)

The telephone number of the Tipton residence appeared in appellant's November and December 1985 daily reminder books. Mr. Tipton had never heard of appellant or his brothers. (137RT 17179; 138RT 17416-17418.)

On December 2, 1985, a call was placed to the Tipton telephone number from appellant's telephone. (139RT 17662-17664.) On December 11, 1985, a call was placed to the Tipton telephone number from William Homick's telephone. (139RT 17665.)

3. December 11, 1985: the day of the murders

On December 11, 1985, Las Vegas Police Officer Frank Glasper was looking for speeders with a radar gun one block from the Tipton residence, when he saw a woman wearing a wool cap and glasses driving a blue Mustang with tinted windows. Almost simultaneously, Officer Glasper spotted a speeder. Officer Glasper decided to cite the speeder. He noted on the speeder's citation that the violation occurred at 10:54 a.m. (138RT 17383-17387.)

Earlier that day, at about 8:45 a.m., Mr. Tipton had left for work. He and his wife had tentative plans to meet for lunch. At around 11:45 a.m., Mr. Tipton called Mrs. Tipton, but there was no answer. Mr. Tipton believed his wife had come up with something to do, and he had lunch at his office. At around 1:20 p.m., Mr. Tipton headed home to check the mail

to see if a check he was expecting had arrived. He got home at around 1:30 p.m. and saw a blue Mustang and a Toyota truck with a freezer in the back. Mr. Tipton was not expecting a meat delivery, but he had seen this type of truck before at his home. (138RT 17418-17422.)

Mr. Tipton picked up his mail and noticed that the front door was unlocked. Mr. Tipton made his way to the master bedroom. There, on the floor, he saw a man (later identified as James Meyers) who had been shot in the head. (138RT 17423-17425.) Mr. Tipton ran to the kitchen to call the police, but he did not find the wireless telephone. He went to his stepson's room and called the police from his stepson's telephone. Mr. Tipton returned to the master bedroom and saw Mrs. Tipton and Ms. Bullock on the floor in the closet. Both women appeared to be dead. (138RT 17425-17426.) The floor safe was open and empty. The bedroom had been ransacked. Empty jewelry boxes were strewn on the floor and on the bed. (138RT 17427-17429.)

At 1:40 p.m., Officer Glasper received a radio call that a man had reported that his wife had been shot and that a possible suspect had also been shot. Within minutes, Officer Glasper and his partner Allen Wall arrived at the Tipton residence. (138RT 17388-17389, 17427.)

Officers Glasper and Wall were the first officers to arrive at the scene. Mr. Tipton approached them, crying and screaming that his wife had been shot, that the maid had been shot, and that a possible suspect had been shot. (138RT 17389, 17430.) Officers Glasper and Wall entered the Tipton house. As they approached the master bedroom, they saw Mr. Meyers lying on his back with ties around his neck. Mr. Meyers looked as though he had been choked with the ties. He had a bullet hole in his head and appeared to be dead. Officer Glasper also saw Mrs. Tipton and Ms. Bullock. He recognized Ms. Bullock as the woman whom he had seen earlier in the day driving the Mustang. Ms. Bullock was still wearing her

cap and glasses. (138RT 17390.) Mrs. Tipton and Ms. Bullock had gunshot wounds to the head and also appeared to be dead. (138RT 17392.)

Outside the residence, there was a Cadillac, a van, a Mustang, and a Toyota pickup truck (that was still running) in the driveway. (138RT 17390.) The Mustang was the car that Ms. Bullock had been driving. The truck appeared to be Mr. Meyers's meat delivery truck. (138RT 17391.) The officers secured the area. (138RT 17392-17393.)

In the meantime, Detectives Thomas Dillard and Robert Leonard of the Las Vegas Metropolitan Police Department received a call to respond to the triple homicide known as "the Tipton murders." (137RT 17299-17302.) When they arrived at the residence, the white pickup truck was still in the driveway, with its engine running. (137RT 17304.)

Inside the house, there was a purse, keys, and unopened packages lying in the foyer. The purse was later determined to belong to Ms. Bullock. (137RT 17305-17306.) Just inside the master bedroom was the body of Mr. Meyers. Mr. Meyers was lying on his back and had an article of clothing draped around his neck. Mr. Meyers had a large caliber gunshot wound to the chest and a small caliber gunshot wound to the head. (137RT 17307-17310, 17313.) It appeared Mr. Meyers's body had been dragged to that location from the closet area of the bedroom. (138RT 17345-17346.) The sash around Mr. Meyers's neck was later matched to clothing found at the residence. (137RT 17320-17321.)

The master bedroom had been ransacked. There were open drawers. Empty jewelry boxes and drawers were on the bed. Jewelry was strewn about. (137RT 17311; 138RT 17344.) Inside the walk-in closet were the bodies of Mrs. Tipton and Ms. Bullock, each with gunshot wounds to the head. Ms. Bullock was wearing a wool cap, a suede coat, and leg warmers. (137RT 17318-17319.) There was an open and empty floor safe in the closet near the bodies of the two women. (137RT 17312-17313.)

Nine .22 caliber bullet casings were recovered from the closet. (138RT 17347.) A live .22 caliber round was recovered from the family room. (138RT 17348.)

Inside the family room, in an ashtray, there was a cigarette which had burned itself down to the filter. There was no sign of forced entry to the house. (137RT 17314.) The Christmas wreath obstructed the view from the peep-hole in the front door. (138RT 17346.)

Later autopsies revealed that Mrs. Tipton had four gunshot wounds to the head. One or two of the wounds suggested "tattooing," indicating close-range shots fired within inches of Mrs. Tipton. (138RT 17350-17351.) Ms. Bullock had three gunshot wounds to the head. (138RT 17351-17352.) Mr. Meyers had two gunshot wounds to the head with a small caliber gun and one gunshot wound in the center of the chest with a .38 caliber bullet. (138RT 17353.)

Detective Dillard investigated the possibility that the murders were committed to rob Mrs. Tipton of her jewelry. A bulletin was circulated among the jewelry stores in Las Vegas, and a list attached to the bulletin described the items of jewelry taken during the murders. The list was an edited insurance list which described the jewelry and indicated appraisal amounts. (138RT 17354-17356, 17432.)

4. Appellant is seen with Mrs. Tipton's jewelry

Billy Mau, the assistant manager at the Tower of Jewels, had known appellant since 1972. (139RT 17620-17621.) After Mrs. Tipton was killed, Mau became aware of the flyer which described her jewelry. (139RT 17623.) In January 1986, appellant showed Mau a pave' style ring, with a two-to-three-carat, pear-shaped diamond. (139RT 17624-17625.) Appellant asked Mau to appraise the ring, and Mau did so at $8,000. (139RT 17626.) The next day, Mau looked at the flyer again and came to

the conclusion that the ring which appellant showed him was listed on the flyer. (139RT 17627.)

One evening in January 1986, appellant telephoned Catt and asked Catt if he was alone. When Catt said, "Yes," appellant said he would be right over. Ten minutes later, appellant arrived at Catt's home. This was the first time appellant had visited Catt's home. (136RT 17113-17114.) Appellant pulled out jewelry bags and dumped jewelry onto a counter. Catt immediately recognized some of the jewelry as belonging to Mrs. Tipton, including the Bulgari yellow sapphire. (136RT 17115.) Appellant asked, "What the hell is this shit worth?" (136RT 17116.) Catt said the Bulgari was worth only $1,000. Appellant "blew up like a firecracker." He hit his fist against his hand and threatened the life of Catt's girlfriend. (136RT 17116-17117.) Appellant said, "Rats get their fucking heads blown off." (136RT 17118.) The value of the Bulgari piece was in the way it was put together; it would no longer be a Bulgari if it were taken apart and sold. Catt did not have the chance to explain this to appellant, who left with the jewelry. (136RT 17118-17119.)

In January 1986, Catt went to Los Angeles to look for a new location for a Tower of Jewels store. (136RT 17119.) Catt arrived in Los Angeles on January 23, 1986, and stayed with his friend Michael Champion. There, Catt received a call from appellant, who wanted to have dinner with Catt and Champion. (136RT 17121.) The next day, when Catt was alone at Champion's home, appellant arrived there with Robert. (136RT 17124.) Appellant said, "I want you to look at this shit." He pulled out Mrs. Tipton's jewelry. Catt recognized four to six pieces. (136RT 17125.) Appellant said, "This is paste, this is shit, this is crap." (136RT 17126.) Appellant was upset, because the jewelry was worthless. When Champion arrived, the conversation about the jewelry ended. (136RT 17126-17127.)

Catt and Champion had dinner with appellant, and the jewelry was never mentioned. (136RT 17128.)

Detective John Dial of the Los Angeles Police Department was part of a surveillance team assigned to track appellant on January 24, 1986. The surveillance of appellant began at the Burbank airport. Appellant rented a car and drove to Robert's apartment. The two drove to Orange County and met people at a business. They were joined by a third person. (139RT 17730-17735.) The three men talked, and appellant dominated the conversation. Appellant pulled out a bag. (139RT 17735.) They passed around an object. (139RT 17736.) Appellant and Robert then drove to a business complex in Orange County, picked up a third person, and drove to a different location. (139RT 17739-17741.)

Eventually, appellant and Robert drove to a location on Spaulding and Fountain and entered an apartment. (139RT 17742-17743.) Later, they went to Robert's apartment, and appellant met two men for dinner. (139RT 17743-17744.) Appellant went to an apartment on Tamarind, entered with a key, and the surveillance "put him to bed there." (139RT 17744-17745.)

The surveillance resumed the next day. Majoy visited appellant. (139RT 17745.) Appellant and Majoy opened a briefcase, which contained sandwich-type bags. The two opened the bags and passed objects back and forth, holding up the objects to the light. (139RT 17748-17749.) They were soon joined by Robert, and they all left the location. (139RT 17749.)

5. Appellant tells Catt: "I ransacked that fuckin house, she didn't have any money in the fuckin safe. . . . I shot her in the head. I offed her in the head. I dusted her. Wasted her."

In January 1986, after Catt returned to Las Vegas, he received a telephone call from appellant at work. (136RT 17129.) Appellant asked Catt to meet him around the corner at a liquor store. Catt complied. (136RT 17130.)

While inside Catt's car, appellant said he had no money. He then exploded -- screaming, yelling, and hitting things. (136RT 17131-17132.) Appellant said: "Rich people, these rich fuckin people." (136RT 17132.) He explained: "I ransacked that fuckin house, she didn't have any money in the fuckin safe. . . . I shot her in the head. I offed her in the head. I dusted her. Wasted her." (136RT 17132.) Appellant said he also shot the maid in the head. Appellant explained that the doorbell then rang, and "it scared the shit out of him." (136RT 17133.) Appellant said he ran to the front door, opened the door, and saw a man standing there. Appellant said he "snatched [the man], yanked him inside the house, and dusted him."[63] (136RT 17133.)

6. The investigation

On January 16, 1986, Detective Dillard obtained authorization to place wire intercept equipment on the telephones of appellant and William Homick. (138RT 17357.) Wire intercept equipment monitored conversations, as well as the telephone number called and the date and duration of the call. (138RT 17360-17362.) The interceptions began on January 20, 1986. (138RT 17358-17359.) At a later point, an order was issued to place wire intercept equipment on Dominguez's telephone. (138RT 17359.) A log of the conversations was maintained. (138RT 17362.) Some intercepted calls were recorded. (138RT 17364.)

On January 20, 1986, a telephone call was made to the Tipton residence from appellant's telephone. The Tipton answering machine came on. (139RT 17598-17599.) Seconds later, Dolores Homick left a message for another telephone number. This other telephone number appeared right

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[63] From time to time in January 1986, appellant was under surveillance in Las Vegas by the FBI and the Las Vegas police. He was not observed in a car with Catt. (140RT 17786.)

above the Tipton telephone number on the last page of appellant's November 1985 daily reminder book. (139RT 17600-17602.)

On January 23, 1986, between 7:09 and 7:12 p.m., there was an intercepted call between appellant and Ron Bryl. (138RT 17367, 17483-17484; Peo. Exhs. P-31, P-32.) Appellant said 585 was the European number indicating 14 carat and 750 was the number indicating 18 carat. (138RT 17487.)

In late January 1986, appellant visited the home of Ron Bryl with a box containing 10 to 12 pieces of jewelry. Appellant asked Bryl to remove some marks on the jewelry with a grinder. Appellant believed the jewelry could be identified with the marks. (139RT 17700-17704.) A day or two later, Bryl grinded off the markings on two or three pieces of jewelry. (139RT 17704-17706.) Three or four days after the first visit, appellant brought 10 or 15 more pieces of jewelry to Bryl's home. (139RT 17704-17705.)

That same week, appellant telephoned Bryl, asked that he meet his daughter Rena, and told Bryl that Rena would be giving him an envelope. Bryl met Rena, and she gave him an envelope. Inside the envelope was a flyer from the Metropolitan Police Department with an insurance list of jewelry taken in the Tipton murders. Appellant later talked to Bryl and had him compare the jewelry he had with the flyer. (139RT 17708-17713.)

On January 29, 1986, the police served a search warrant on Bryl's home and recovered a box with a diamond ring. The ring had a pear-shaped diamond and was pave' style. Appellant had asked Bryl to package and mail the ring to Art Toll, a friend of appellant's in Pennsylvania whom Bryl had met previously. Appellant told Bryl that the return address name was to be "C. Dietz" and the return address was to be William Homick's address. Bryl knew Charlie Dietz through appellant. Bryl wrapped the box and attempted to send it on January 29 but did not do so, because he

believed he was being followed. Later that day, the police recovered the ring. (138RT 17367, 17371-17374; 139RT 17718-17724.)

Bryl was arrested and was released on bail quickly. Bryl tried to communicate with appellant. (139RT 17724.) Bryl was arrested again 10 days later on drug charges. This time, he remained in custody for a while. (139RT 17725.)

Detective Dillard learned that the jewelry list did not accurately describe the recovered pave' ring and decided not to let it be known that the police had associated that piece of jewelry with the murders. Detective Dillard called Dietz, identified himself as burglary Detective Dale Wysocki, and asked Dietz if he owned the ring. Detective Dillard wanted Dietz and appellant to believe the police had not made the connection between the ring and the murders. (138RT 17376-17378.) Detective Dillard told Dietz he would return the ring to him if shown proof of ownership. Dietz said he had purchased the ring long ago and had no receipt. Detective Dillard said that an affidavit by someone else attesting to ownership would be sufficient proof of ownership. (138RT 17379.) Dietz told Detective Dillard that he thought he could arrange for an affidavit. (138RT 17448.)

Intercepted telephone conversations addressed the reacquisition of the ring. A decision was made that Dolores Homick would prepare an affidavit, but, at some point, appellant canceled the plan. (138RT 17448-17449.) Robert believed the procedure to reacquire the ring was a trap by the police. (138RT 17455.)

Investigators believed that, the longer Bryl was in custody, the more conversations would be stimulated between appellant and his brothers, because appellant might fear that Bryl would talk about the Tipton murders. Accordingly, Bryl's bail was set at a high amount. There were many recorded conversations about getting Bryl out of jail. (138RT 17456-17457.)

Transcripts were prepared on almost a daily basis of the intercepted and recorded telephone calls. On February 10, 1986, from 9:15 a.m. to 9:26 a.m., there was an intercepted call between appellant and his wife, Dolores. (138RT 17449-17453; Peo. Exhs. P-19, P-20.) There were many nicknames used during the call. (138RT 17451-17454, 17458.) Appellant said he thought the procedure regarding the recovery of the ring was a ruse by the police. (138RT 17455.) Appellant said, "But they are not going to drag any more people in, I am not going to concern myself with what the financial factor is down there, because -- the bail on those three people. . . ."[64] (138RT 17457.)

About 20 to 25 minutes later, at 9:41 a.m., appellant called his brother William and left a message. (138RT 17458-17459; Peo. Exhs. P-21, P-22.) Appellant said he had canceled all paperwork from "Pepper's mother" (i.e., Dolores) and made reference to a "burn and flush" command. (138RT 17380, 17460-17461.) Appellant said he had left a message with Dietz. Appellant said, "Let's wait and see after FF is out of the grease." "FF" was a reference to "French Fry" or Bryl, and "out of the grease" meant released from jail. (138RT 17461.) Appellant also referred to Dietz doing what he had to do with "the Hinge" (i.e., Mick Shindell). (138RT 17462.) Appellant said, "You might do all of that from your public stock offering, and, let me know what's happening." "Public stock offering" was appellant's instruction to William that he make calls from public telephones. (138RT 17462.)

Appellant suspected his telephone was being tapped and said so in numerous recorded conversations. (138RT 17463.) During an intercepted call on January 27, 1986, at 10:05 a.m., Shindell identified himself to

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[64] Three people were not in custody at the time, but there were three murder victims. (138RT 17458.)

appellant as "the Hinge" after Dolores had referred to him as Mick. Appellant said, "Not over the same line, dummy, you have already been introduced as Mick." (138RT 17464; Peo. Exhs. P-23, P-24.)

A call was intercepted between appellant and his daughter Rena ("Jammer" or "Jam") on January 31, 1986, from 12:37 p.m. to 12:52 p.m. (138RT 17466; Peo. Exhs. P-25, P-26.) Appellant said, "Probably going to book me for murder. Now, there's [sic] nothing to do with the Bobbie Tipton thing, you understand?" (138RT 17467.) At that time, appellant was a suspect in the Woodman murders. (138RT 17467.) Appellant referred to an accident with Ronnie. Ron Bryl had been arrested two days earlier. (138RT 17468.)

On February 5, 1986, at 8:15 p.m., appellant called Dominguez. (138RT 17470-17471; Peo. Exhs. P-27, P-28.) Appellant said, "I got a lot of fuckin problems. Ain't nothing wrong. I can't tell you what you need to know by now. But, you know, uh, uh, you know where me, you, and that fat guy was at one time?" (138RT 17471-17472.) Robert was called "Jesse," "the Library," "Chubby," and "the Fat Man." (138RT 17471.) Appellant said, "I just got a bunch of problems that I am trying to find out. I got 3 spots in the link of the chain, and I am waiting to see if one of them is going to bend or break, because when it happens, it's all going to come back on me." (138RT 17473.) Detective Dillard believed Bryl, Catt, and Larry Ettinger might have been those weak links. (138RT 17474.) Appellant said, "I had to cover a lot of tracks that somebody -- somebody tried to take something out of my yard. Evidently they did, and when they did, got caught doing it." (138RT 17474.) Appellant also said, "So what you do, uh, just, umm, you look around and make sure, uh, your glass and your mirrors are clean, you know." Appellant was instructing Dominguez to be aware of police surveillance. (138RT 17483.)

In February 1986, Bryl spoke to the Las Vegas Metropolitan Police and the FBI. They showed him the insurance list of Mrs. Tipton's jewelry, and Bryl said he recognized it. The officers asked him to identify the pieces of jewelry appellant had showed him, and Bryl complied by identifying several pieces from the list.[65] (139RT 17713-17717.)

Detectives Holder and Crotsley left their business cards on William's and Dominguez's doors, and this prompted more intercepted telephone calls. (138RT 17476-17477.) On February 7, 1986, from 6:57 p.m. to 7:00 p.m., William talked to appellant about the visit to Dominguez's home by the LAPD. (138RT 17479, 17481; Peo. Exhs. P-29, P-30.)

On March 3, 1986, Detectives Dillard and Leonard interviewed appellant's daughter Rena, and she was asked to remove some of her jewelry, including a pair of gold-nugget earrings which Mr. Tipton later identified as belonging to Mrs. Tipton. (138RT 17487-17488.) Rena later gave the detectives other jewelry. Twenty pieces were identified as belonging to Mrs. Tipton. (138RT 17488.)

In March 1986, Officer Smaka learned appellant was arrested for the Woodman murders and was a suspect in the Tipton murders. Officer Smaka realized the connection between the Tipton case and appellant's request regarding the license plate numbers. (136RT 17063-17064.) He found the entries on his calendar and ran them again. "JOND" was the license plate number of a pickup truck owned by the Tiptons, and "001ACC" was the license plate number of a motor home owned by the Tiptons. (136RT 17065.) Officer Smaka contacted Lieutenant John

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[65] Bryl was given immunity for receiving stolen property. (139RT 17725-17726.)

Connor of the Homicide Detail and said that appellant had asked him to run the license plate numbers. (136RT 17066.)

Mr. Tipton eventually saw a diamond ring and earrings in police possession that he recognized as belonging to his wife. (138RT 17433-17435.) FBI Agent Jerry Doherty also showed Mr. Tipton some jewelry which Mr. Tipton recognized as belonging to his wife. (138RT 17436.)

In 1984, Mrs. Tipton had asked Leon Marthon, a jeweler in Las Vegas, to create a piece of jewelry for her. Marthon used Mrs. Tipton's 2.2-carat, pear-shaped diamond to create a pave' style ring. (139RT 17606-17613.) The original appraisal value of the ring was $42,000, and it was later reappraised at $60,000. (139RT 17615.) After Mrs. Tipton's death, Marthon identified the ring when the police showed him the ring. (139RT 17618.)

On May 12, 1989, appellant was convicted of the murders of Mrs. Tipton, Ms. Bullock, and Mr. Meyers. (138RT 17489-17490; Peo. Exh. P-33.)

B. Defense Evidence in Mitigation

1. Evidence of the Tipton murders

James Meyers delivered meat and seafood for Michael's Gourmet Steaks and Seafood. Mr. Meyers used a white Toyota pickup truck to make the deliveries. There was no refrigeration unit in the back of the truck. Mr. Meyers used dry ice and containers to make deliveries. (141RT 18028-18031.)

On December 11, 1985, Mr. Meyers's wife Debbie helped her husband prepare for a delivery to the Tipton residence. They loaded meat into the truck. (141RT 18028, 18031.) Before he made the delivery to the Tipton residence, Mr. Meyers dropped off Mrs. Meyers at her sister's house, a less than five minute drive away from the Tipton residence.

(141RT 18032-18034.) Mrs. Meyers arrived at her sister's house at 10:20 a.m. (141RT 18034.) Mr. Meyers had no other scheduled stops, and there were no other loads for delivery in the truck. (141RT 18035.)

That day, at 10:30 a.m., Michael Carder, a delivery driver for UPS, delivered packages to the Tipton residence. He pulled up to the house and tapped the horn. He took the packages and proceeded to the door. He knocked, rang the door bell, and left the packages to the right of the door. He returned to his vehicle. When he was pulling out of the driveway, Mrs. Tipton came to the door dressed in a white robe. Carder waved to her. (140RT 17817-17819.) Mrs. Tipton made no indication that she was in some type of trouble. (140RT 17823.)

Carder had made deliveries to the Tipton house on 20 or 30 occasions. He had become familiar with the vehicles which were ordinarily parked in front of the house or in the driveway. Mr. Tipton owned a yellowish van. He also owned a roadster and a black Chevy. (140RT 17820-17821.) On December 11, 1985, Carder saw a vehicle in the Tipton driveway which he had not seen before: a white Toyota four-wheel drive. It had a camper shell and a brush guard in the front. (140RT 17821, 17824.) The engine was not running. There was no one inside the vehicle. Carder looked at it closely, because it was similar to his own car. (140RT 17822.) Carder was at the Tipton residence for about two minutes and then left. There was no other car parked in the driveway that day except for the white Toyota. (140RT 17824.)

At 10:30 a.m., Patricia Lundy, Mrs. Tipton's secretary, called Mrs. Tipton's residence from the office. Lundy had a check that needed to be signed by Mrs. Tipton and had to go to the bank, because the bank had called and indicated that it needed the check by 11:00 a.m. (141RT 18005-18009.) Mrs. Tipton answered the telephone but sounded strange. Lundy informed Mrs. Tipton about the situation with the bank and asked whether

she should bring the check over to Mrs. Tipton's house. Mrs. Tipton told Lundy not to bring the check over, that she would be at the office, and that the bank would have to wait. (141RT 18009-18010.)

Between 9:30 and 10:30 a.m. on December 11, 1985, Raymond Jackson saw a small, white, pickup truck in the Tipton driveway. (141RT 17960-17961.)

Between 9:30 and 10:30 a.m. on December 11, 1985, James Hampton was near the Tipton residence, constructing a home. (141RT 17967.) He saw a man walking from the cul-de-sac where the Tipton residence was located. The man walked across a vacant property and made an effort not to make eye contact with Hampton. (141RT 17968.) The man was wearing a long-sleeve, khaki jacket. (141RT 17974.) Hampton was about 12 feet from the man. (141RT 17975.) The next day, Hampton talked to the police. (141RT 17968.) He was not subsequently contacted by the police. (141RT 17969.) Later, Hampton spoke to a defense investigator, who showed Hampton a photograph of a person. (141RT 17969.) The man in Defense Exhibit D-19 looked like, but might not have been, the man who Hampton saw.[66] (141RT 17981.)

Jack Weinstein was the owner of the Tower of Jewels, and appellant worked at the Tower of Jewels until the time of his arrest. Weinstein did not recall Catt talking to him about a gold watch that appellant told him to give to Dominguez and did not authorize Catt to give Dominguez a gold watch. (140RT 17788-17789, 17793-17794.)

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[66] The person in the photograph does not appear to have been identified at trial. However, it appears the photograph was that of Kelly Danielson, a friend of Dominguez. (141RT 18051.)

2. Appellant's alibi

On December 11, 1985, Art Taylor saw appellant. Appellant was driving Larry Ettinger's Cadillac. Appellant and Taylor went to the bank and cashed a check. They returned to Taylor's shop, and appellant was paged. Appellant said he had to pick up Larry Ettinger and Susan Hines from an attorney's office and left Taylor's shop at around 10:30 a.m.[67] (140RT 17797-17799.) It was a 15 to 20 minute drive from Taylor's shop to the intersection of 6th and Bridger. (140RT 17800.)

Stewart Bell was an attorney licensed to practice in Nevada, and his office was at 601 Bridger in Las Vegas. (140RT 17837-17838.) On December 11, 1985, at 10:00 a.m., Bell had an appointment with his client Larry Ettinger. Ettinger arrived at the appointment with Susan Hines. (140RT 17839-17840.) Ettinger wanted to discuss the preparation of a will. (140RT 17840-17841.) The appointment with Ettinger lasted half an hour. (140RT 17844.) Ettinger left Bell's office not earlier than 10:15 a.m. and not later than 10:45 a.m. (140RT 17845.) Bell did not know how Ettinger and Hines arrived at his office or how they left. (140RT 17846-17847.)

Gwendlyn Bechdel was employed by Bell. (140RT 17862-17863.) Ettinger had an appointment with Bell on December 11 at 10:00 a.m. (140RT 17864.) Ettinger arrived for the appointment with Hines. (140RT 17865.) Ettinger was at Bell's office for about half an hour. (140RT 17866.) Bechdel did not know how Ettinger arrived at or departed from Bell's office. (140RT 17868.) Ettinger and Hines called or paged for a ride at the conclusion of the appointment. (140RT 17873-17874.)

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[67] On December 11, 1985, at 12:15 p.m., Taylor relayed the following information to Agent Livingston: appellant told Taylor that he had Dominguez "sitting on a place," had William doing something for him, and that he had something going on. (141RT 18065.)

Susan Hines[68] recalled that, on December 11, 1985, at around 9:00 a.m., appellant, Hines, and Ettinger left Ettinger's house, went to Ettinger's office, and went to the bank. They had a cashier's check drawn at the bank. (141RT 17985-17986.) Appellant then drove Ettinger's Cadillac to Bell's office. They arrived at the office at about 9:40 to 9:45 a.m. Appellant dropped off Ettinger and Hines. Ettinger had a 10:00 a.m. appointment with Bell to include Hines in his will. Ettinger and Hines were at the office for about 25 minutes.[69] (141RT 17986-17987, 17992-17993.) At the end of the appointment, Ettinger and Hines called appellant for a ride. Appellant arrived within minutes, picked up Ettinger and Hines, and drove them to Ettinger's house. It took about 15 minutes to get from Bell's office to Ettinger's house. Ettinger and Hines went inside the house, but appellant left. Thereafter, appellant was gone for some period of time. Hines did not see appellant again until later in the afternoon. At that time, Dominguez was at Ettinger's house waiting for appellant. (141RT 17987-17991.)

The distance from Bell's office to Ettinger's house was 5.5 miles. The average time it took to cover this distance was 13 minutes and 30 seconds. (141RT 18003-18005.) The distance from Ettinger's house to the Tipton house was 3.7 miles. The average time it took to cover this distance was 11 minutes and 40 seconds. (141RT 18004-18005.)

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[68] In 1985, Susan Hines worked at Larry Ettinger's art store. Appellant frequently came to the art store, and Hines and appellant struck up a romantic relationship. Hines was also romantically involved with Ettinger at the time, and she lived with Ettinger. In the later part of 1985, appellant occasionally stayed at Ettinger's house with Ettinger and Hines. (141RT 17991-17993.) Around December 1, 1985, Hines broke up with appellant. (141RT 17984-17985, 17992.) At the time of appellant's trial, she was Susan Hines Ettinger. (141RT 17984.)

[69] Hines told the Las Vegas Metropolitan Police that she and Ettinger were at the office for less than 45 minutes and that they left Bell's office between 10:15 and 10:30 a.m. (141RT 17988-17990.)

3. Telephone calls

Patrick Sullivan was a private investigator who worked on appellant's case. He reviewed pen register tapes for William Homick's telephone for December 11, 1985. On that day, there were 10 calls that used a long distance access number. The calls were made at 8:35 a.m., 8:37 a.m., 8:55 a.m., 8:56 a.m., 8:57 a.m., 8:58 a.m., 9:00 a.m., 9:25 a.m., 5:04 p.m., and 5:05 p.m. (142RT 18112-18113.)

On the same day, at 11:14 a.m., there was one telephone call made from William's telephone using a second access number to a telephone number that appeared at the December 11, 1985, page of appellant's daily reminder book. (142RT 18113-18115.) The same access number did not appear anywhere else on the pen register tapes for William's telephone from December 1 through 17, 1985. (142RT 18115-18116.)

Sullivan also reviewed the pen register tapes for appellant's telephone. There were no incoming or outgoing calls before 12:26 p.m. on December 11, 1985. (142RT 18116.) Also, there were 19 calls charged to the second access number between December 1 and 17, 1985. (142RT 18117.)

4. Michael Dominguez

While in custody in Nevada state prison for burglary, Manuel Correira met appellant and Dominguez.[70] (142RT 18076-18078.) Dominguez told Correira that he and Kelly Danielson, not appellant, had committed the Tipton murders. (142RT 18078-18079.) Dominguez said that appellant was not even present at the Tipton house and only received some jewelry after the murders. (142RT 18079-18080.) When Correira learned that appellant had been convicted of the Tipton murders, he called

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[70] Correira had many prior felony convictions. (142RT 18082-18086.)

and wrote to appellant's lawyer, informing him about the conversation with Dominguez. (142RT 18081.) In January 1991, Correira signed a declaration setting forth his conversation with Dominguez. (142RT 18080.)

In July or August 1985, Dominguez wrecked a car owned by Catt, because appellant wanted the insurance money on the car. In November 1985, Dominguez went to see Catt at the Tower of Jewels. Catt gave Dominguez a watch and a chain worth over $1,000. Dominguez did not pay for these items. (140RT 17884-17888.)

Dominguez was aware that Kelly Danielson had died on February 1, 1986, in a boating accident. (140RT 17898, 17900.) Dominguez had testified previously that Danielson was his partner in crime. Dominguez had also testified previously that he did not know Danielson. (140RT 17901-17902.) Dominguez did not respond when he was asked if he and Danielson had committed the Tipton murders. (140RT 17901.)

During prior testimony, Dominguez had testified inconsistently about his whereabouts on the morning of December 11, 1985. Dominguez had previously testified that he was with his friend Ricky Gray on the morning of December 11, 1985. (140RT 17903-17921.)

Ricky Gray knew both appellant and Dominguez. Gray testified that he did not see Dominguez on the morning of December 11, 1985.[71] (141RT 17951-17952, 17959.)

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[71] In March 1986, appellant asked Gray to deliver a message to Dominguez, who was in custody. The message was: "Nobody knows nothing. Nobody says nothing." (141RT 17956-17958.)

ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED MICHAEL DOMINGUEZ'S PRIOR STATEMENTS AND PRIOR TESTIMONY UNDER THE PRIOR INCONSISTENT STATEMENTS EXCEPTION TO THE HEARSAY RULE

Appellant's first three issues present challenges to the admissibility of the testimony of Michael Dominguez. In this first issue, appellant argues that the trial court committed state law error, state constitutional error, and federal constitutional error under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, by permitting Dominguez's refusals to answer questions to serve as a basis for the introduction of prior inconsistent statements.[72] Appellant further argues that this error was

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[72] With respect to this and nearly every claim on appeal, appellant urges that the error or misconduct he is asserting violated his federal constitutional rights. In this claim and in a few others, he also alleges a violation of his state constitutional rights. In most instances, to the extent that appellant raised the issue in the trial court, appellant failed to make some or all of the constitutional challenges he now advances. As this Court stated in *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17, and as is true in this case:

> In each instance, unless otherwise indicated, it appears that either (1) the appellate claim is of a kind . . . that required no trial court action by the defendant to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution. To that extent, defendant's new constitutional arguments are not forfeited on appeal. [Citations.] [¶] In the latter instance, of course, rejection, on the merits, of a claim that the trial court erred in the issue actually before that court necessarily leads to rejection of the newly applied constitutional "gloss" as well. No separate

(continued...)

exacerbated by additional errors in exposing the jury to improper references to polygraph examinations and by overemphasizing Dominguez's statements through the repeated use of his videotaped statements. (AOB 159-237.)

Respondent disagrees. The trial court properly admitted Michael Dominguez's prior statements and prior testimony under the prior inconsistent statements exception to the hearsay rule, correctly treating Dominguez's selective silence on direct examination as being "inconsistent in effect" with his prior statements and prior testimony. Further, Dominguez's silence during large portions of cross-examination by appellant's trial counsel did not result in a violation of appellant's constitutional rights. Finally, there were no additional errors with regard to the references to the polygraph examinations and the use of Dominguez's videotaped statements.

A. Relevant Proceedings

1. The arrests of the defendants and Dominguez's plea bargain

Gerald and Vera Woodman were murdered on September 25, 1985. On March 11, 1986, appellant, Robert Homick, Neil Woodman, and Stewart Woodman were arrested for those murders.[73] (78RT 7370; 81RT 8103; 92RT 9816-9819; 103RT 11773.) At the time, Michael Dominguez was already in jail in Nevada on unrelated crimes. (88RT 9275.)

(...continued)

constitutional discussion is required in such cases, and we therefore provide none.

[73] It is not clear from the record whether Anthony Majoy was arrested on the same day, but search warrants were served on his home that day. (97RT 10610-10612.)

On May 9, 1986, Dominguez pleaded guilty to the first degree murders of Gerald and Vera Woodman in case number A779943. (12Supp. 1CT 238-250.) Dominguez was represented by his appointed counsel, Charles Lloyd. (12Supp. 1CT 238.) In the course of entering the pleas, the following exchange took place between the prosecutor and Dominguez regarding the terms of his plea bargain:

> Q. Now, also as part of your plea bargain, you have been advised that you will be called as a witness to testify against the other co-conspirators in this case.
>
> A. Right.
>
> Q. Okay. Do you agree to do that?
>
> A. Right.
>
> Q. You also have been advised that the People expect your testimony to be truthful and honest and accurate.
>
> Do you understand that?
>
> A. Right.
>
> Q. If the District Attorney's Office or myself finds out that you've lied in any material way or that you commit perjury when you do testify, then all of our agreements will be declared null and void. That means that your plea agreement that you've worked out would be set aside and you would be brought back to municipal court to have a preliminary hearing on these charges. Do you understand that?
>
> A. Right.

(12Supp. 1CT 246-247.)

Additionally, during this hearing, the prosecutor placed on the record other representations he had made to Dominguez: that, whatever charges Dominguez pleaded to in Las Vegas, the State of Nevada would run the sentence concurrent to the California sentence; that pending charges in Texas and Hawaii against Dominguez would probably be handled through

the federal system and the sentence imposed would run concurrent to the California sentence; and that "after you [Dominguez] clear up this case, the ones in Nevada and any federal matters, you will be housed in an institution of your choice, perhaps either the Nevada system or a federal system, and this is being done for your own security to keep you separate and apart from the other co-conspirators in this case." (12Supp. 1CT 248-249.) Dominguez was later sentenced to two concurrent terms of 25 years to life for the Woodman murders. (22CT 6120-6121.)

Pursuant to his plea agreement, in May 1986, Dominguez testified as a prosecution witness at the preliminary hearing of appellant, Robert Homick, Stewart Woodman, Neil Woodman, and Anthony Majoy. (5Supp. CT, Volumes 4-7.) All of the defendants were held to answer. (5Supp. 9CT 2341-2348.) However, on April 12, 1988, the California Court of Appeal, Second Appellate District, Division Seven, ordered the superior court to dismiss the information as to all of the defendants. The Court of Appeal found that the right to counsel of the defendants were violated when the trial judge, without notice to and in the absence of the defense attorneys, ruled at an in camera hearing to restrict the defendants' cross-examination of prosecution witness Steward Siegel at the preliminary hearing about his career as a paid informant for the FBI. (22CT 6066-6089.)

Thereafter, the case was re-filed as case number A973541, and a second preliminary hearing was conducted in September 1988. Dominguez once again testified as a prosecution witness. (2CT 504-540; 3CT 581-643.) Appellant was not present at this second preliminary hearing, because he was in custody in Nevada on unrelated murder charges. (A1RT A3.) The remaining defendants were held to answer. (5CT 1188.)

A little over a year later, on October 30, 1989, Dominguez was called as a prosecution witness in the jury trial of Stewart Woodman and

Anthony Majoy. Outside the presence of the jury, Dominguez refused to testify. When the court asked Dominguez the reason for his refusal, Dominguez said, "I got other charges pending. I'm going to have other charges pending." (13Supp. 41CT 11473.) Later, when asked the same question, Dominguez responded, "I just refuse." (13Supp. 41CT 11484-11485.) Dominguez later repeated: "Like I said, I have got other charges pending to this case that I don't want to say nothing about." (13Supp. 41CT 11495.) The court appointed additional counsel, Victor Salerno, to represent Dominguez. (13Supp. 41CT 11508.) The next day, Dominguez continued to refuse to answer questions. (13 Supp. 41CT 11530.) Counsel for Dominguez informed the court that the reason Dominguez was refusing to testify was that he "has concerns regarding his safety, the welfare of his family." (13Supp. 41CT 11531.) The following day, Dominguez refused to testify. (13Supp. 42CT 11741.) A few days later, Dominguez again refused to testify. (13Supp. 42CT 11887.) The court then found Dominguez unavailable within the meaning of Evidence Code section 240, and Dominguez's testimony from the second preliminary hearing was read to the jury. (13Supp. 42CT 11897-11898; 13Supp. 43CT 11958.)

Later that same month, in November 1989, a third preliminary hearing was held. Appellant was the only defendant at this hearing. Dominguez refused to be sworn at this hearing. When the court asked Dominguez if he wished to explain why he refused to be sworn, Dominguez replied, "No." (2Supp. 4CT 788, 915.) The court found Dominguez unavailable, and Dominguez's testimony from the first preliminary hearing was read during this third preliminary hearing. (2Supp. 4CT 894-1017.) At the end of the hearing, appellant was held to answer. (2Supp. 4CT 1031-1032.)

2. Pretrial proceedings

Against this backdrop, on November 8, 1989, in preparation for the present trial of appellant, Robert Homick, and Neil Woodman, the People filed a "Memorandum of Points and Authorities Regarding Possible Unavailability Under Evidence Code section 240 of Witness Michael Dominguez." The People requested that, if Dominguez refused to testify at the present trial, the court find him unavailable and admit his testimony from the first preliminary hearing under the former testimony exception to the hearsay rule. (11CT 2777-2783.)

Counsel for appellant filed a responsive memorandum, opposing the People's position. Counsel argued that the Court of Appeal had found that the first preliminary hearing had been conducted unlawfully, in violation of appellant's right to counsel, because material information had been concealed regarding prosecution witness Steward Siegel. Counsel also argued that appellant did not have a full and fair opportunity to cross-examine Dominguez at the first preliminary hearing. Counsel concluded that the court should not allow use of any sworn statements taken from Dominguez at the first preliminary hearing at the present trial.[74] (11CT 2869-2876.)

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[74] In late 1990, appellant, Robert Homick, and Neil Woodman were tried in federal court in Nevada on racketeering and other charges. During the trial, a hearing was held outside the jury's presence about granting Dominguez immunity. At that hearing, Dominguez refused to be sworn. Dominguez explained: "I just refuse; no reason." (22CT 6125.) Dominguez said his intent was to refuse to answer any questions if granted immunity. (22CT 6128-6129.) He said that, on two occasions, he had refused to testify in California. The federal prosecutor asked Dominguez if his reason for not testifying at the federal proceeding was the same as it was in California. Dominguez responded: "There is no -- the reason is within myself. There's no other reason that -- the only reason is that I just refuse.

(continued...)

Nearly three years later, on July 30, 1992, counsel for Dominguez filed a motion to withdraw Dominguez's guilty pleas. (See 80RT 7797-7800.) Shortly thereafter, at a pretrial hearing, counsel for appellant informed the court that he wanted to participate in the hearing on Dominguez's motion. Counsel explained that he wanted to show that there were reliability issues with regard to Dominguez's former testimony. (46RT 2010-2015.) The prosecutor opposed the request. (46RT 2015-2016.) The court said it did not see any basis for the defense to participate in the hearing on Dominguez's motion but expressed a willingness to allow counsel to question Dominguez outside the presence of the jury, after the defense filed its motion to exclude Dominguez's testimony. (46RT 2018, 2020.)

On October 9, 1992, the court said that it had done some research on the issue of reliability of former testimony. The court said that it had found that reliability of former testimony is established if the party against whom it is offered had the right and the opportunity to cross-examine the declarant at the prior proceeding, with a similar interest or motive. The court found that there was no right to a separate determination of reliability, even when the defense possessed evidence to challenge the testimony of the witness at

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(...continued)
No other reason than that." (22CT 6129.) On examination by counsel for appellant, Dominguez said that he had written a letter to a judge in California and expressed that he felt that he had received a "bum deal." (22CT 6132.) Dominguez also said: "I've had . . . maybe about four or five [documents] written out of California and maybe about another four down here out of Nevada. And it seems like to me that the State of California or the State of Nevada could not honor what they wrote. [¶] And, so, when I was called as a witness in the State of California, I just refused to testify." (22CT 6135; see also 22CT 6139 [Dominguez states that the only reason he was refusing to testify was that he did not believe that the State of Nevada and the State of California had fulfilled what he considered to be the plea deals they had offered].)

the prior proceeding. Thus, the court concluded that there were sufficient safeguards to allow the introduction of the transcript testimony of Dominguez, should he be unavailable to testify at trial. (69RT 5694-5698.)

On the next court day, when opening statements were scheduled to begin, counsel for appellant said that there were issues that needed to be addressed with respect to whether Dominguez's testimony would be read to the jury if Dominguez refused to testify. These issues were: (1) whether the first preliminary hearing, conducted in a manner which violated the defendants' constitutional rights, could be considered a prior judicial proceeding; (2) whether Dominguez's refusal to testify was caused by the People and, if so, whether the People were trying to benefit from those actions; (3) whether the defense had an adequate opportunity to confront and cross-examine Dominguez at the first preliminary hearing; and (4) whether the jurors could make a proper credibility determination when former testimony is read to them. (70RT 5747-5750.) The court noted that the fact the case had been dismissed following the first preliminary hearing had nothing to do with Dominguez but, rather, had to do with information withheld from the defense as to prosecution witness Steward Siegel. The defense replied that it should have the opportunity to show that Dominguez's testimony at the first preliminary hearing suffered from the same problems as that of Siegel. The court deferred ruling on these issues and instructed the prosecutor to avoid referring to the expected testimony of Dominguez in his opening statement. (70RT 5752-5768.)

On November 3, 1992, appellant's counsel filed a "Motion to Exclude the Use of Former Testimony at Trial." (22CT 6048.) The motion reiterated many of the same arguments counsel had made in court regarding testimony from Dominguez. (22CT 6048-6065.)

The next day, the court heard Dominguez's motion to withdraw his guilty pleas. The court focused argument on the timeliness of the motion,

noting that Dominguez had entered his pleas on May 9, 1986, and the motion to withdraw the pleas was filed on July 30, 1992, over six years later. (80RT 7797-7800.) Counsel for Dominguez argued that Dominguez was "still within the very workings of the agreement originally worked out in 1986 as evidenced by his presence here sought to be used as a witness in this case. . . ." (80RT 7800-7801.) Counsel said that Dominguez had made it clear in a letter to the court dated September 1989 that he was dissatisfied with his deal. Counsel said that he had been appointed after that date. Counsel explained that he had been in constant contact with the prosecution regarding Dominguez's desire to withdraw his pleas. Counsel explained that he was hampered in his discussions with Dominguez, because of the distance between them, the press of other business, and the fact that the case was developing slowly. Counsel said that he had also spent time counseling Dominguez about the propriety of withdrawing the pleas, because withdrawing the pleas would expose Dominguez to the death penalty. Counsel explained that it was only when the trial in this case approached that he came to the realization that Dominguez wanted to go forward with the motion to withdraw the pleas. (80RT 7801-7803.)

The prosecutor argued that Dominguez's motion was untimely. He further argued that Dominguez appeared to have "buyer's remorse," even though he had the most favorable sentence of all of the defendants in the case. The prosecutor noted that Dominguez could have been sentenced consecutively on the murders but, instead, received concurrent sentences, and it was still possible that Dominguez would receive a parole hearing after 12 1/2 years. (80RT 7805-7807.)

The court found that there was a significant delay in Dominguez's request for relief. The court said that, even accepting the representations of Dominguez's counsel that he had tried to get the pleas set aside informally for two years, there was still a four-year delay, and Dominguez had not

presented justification for the delay. The court said that there was no information set forth in the motion which was not available to Dominguez on the day he entered his pleas. The court noted that the one exception was the fact that, after some period of time, Dominguez began to be housed in facilities that were not of his choosing. However, the court found that this would not justify setting aside the pleas and was not a justification for the significant delay. Accordingly, the court denied Dominguez's motion as untimely and said that, to the extent that it had reviewed the merits of the motion, it saw no basis for granting the motion. (80RT 7808-7812.)

A few days later, counsel for Dominguez informed the court that Dominguez would take the stand and answer questions at trial. (83RT 8598.) The next day, appellant's counsel said that he anticipated that, if Dominguez testified differently than he had previously, the prosecution might try to impeach Dominguez with his testimony from the first preliminary hearing. Counsel moved to exclude the use of Dominguez's testimony from the first preliminary hearing on the ground that the testimony was taken in an unlawfully conducted proceeding. The court denied the motion, stating that Dominguez's testimony was not tainted by the problems presented by the first preliminary hearing. (84RT 8795-8797.)

The following day, Dominguez was present in court. Prior to being called as a witness, the court addressed Dominguez, and Dominguez agreed to testify in the trial. (85RT 8917-8918.) The court instructed Dominguez not to refer to the polygraph examination that he had taken. (85RT 8922-8924.)

3. Trial proceedings

On direct examination, Michael Dominguez was initially responsive to the prosecutor's questions. Dominguez first answered some questions about his plea hearing. Dominguez testified that he had pleaded guilty to

two counts of first degree murder but said that he had done so at the request of his attorney. He testified that he recalled stating at the plea hearing that he was pleading freely but explained that everything that he said at the plea hearing was a lie. (85RT 8925-8928.) The prosecutor read the portion of the plea hearing outlining the factual basis of the pleas and asked Dominguez if he recalled the exchange. Dominguez testified that he recalled the exchange where he said "right" to the following summary of events underlying his pleas: appellant recruited Dominguez to take part in a contract killing; Dominguez took part in the contract killing; Dominguez went through extensive planning and preparation with appellant, Robert Homick, and Anthony Majoy; and Dominguez received $5,000 from appellant after the killing. (85RT 8929-8933.)

Dominguez then answered questions about the terms of his plea bargain. He testified that he was sentenced to 25 years to life but explained that he thought he would be sentenced to second degree murder or a lesser crime and maintained that he did not have enough time to talk to his attorney at the plea hearing. (85RT 8935-8937.)

Dominguez next answered questions about his police interview. He testified that he talked to Detectives Holder and Crotsley on March 13, 1986, but maintained that he was physically forced to give a statement and did not have the opportunity to talk to his attorney before the interview. (85RT 8938-8940.) The prosecutor then read Dominguez a portion of Dominguez's May 1986 testimony from the first preliminary hearing and asked Dominguez if he recalled testifying that he had talked to his attorney before talking to the detectives. Dominguez responded: "I could answer your questions, but you have got stipulations upon me. I can't tell the jury, so I am stuck." (85RT 8940-8944.) He then testified that, if he had previously testified that he had talked to his attorney before the police interview, it was a lie. (85RT 8944-8945.)

Dominguez then answered some questions about his relationship with the defendants. He testified that he had known appellant since the earlier 1970's but denied ever meeting Robert Homick. The prosecutor read Dominguez his testimony from May 1986 on the subject and asked Dominguez if he recalled the testimony. Dominguez said that he had lied when he had previously testified that he had known Robert Homick for about a year. (85RT 8945-8949.)

The prosecutor next asked Dominguez questions about the events of September 1985. Dominguez's responses consisted of many "I don't know" answers. Again, the prosecutor read the relevant portions of Dominguez's May 1986 testimony and asked Dominguez if he recalled the testimony. Dominguez responded that the words were not his. (85RT 8950-8952.) The prosecutor also read the relevant portions of Dominguez's March 13 police interview, and Dominguez testified that he had been coerced into giving the statement.[75] (85RT 8952.)

This pattern of examination continued about the events of September 1985, with many of Dominguez's answers consisting of "I don't recall" responses and claims of coercion. (85RT 8952-8955, 8958-8963.) Additionally, when Dominguez testified that he did not remember whether appellant had talked about the amount of money involved in the trip to California, the prosecutor read Dominguez the relevant portion of his testimony from September 1988 (the second preliminary hearing).

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[75] Appellant's counsel had previously objected to the prosecutor reading portions of the transcript of Dominguez's police interview, on the ground that the transcript had not been authenticated. In the course of that discussion, the court had ruled that it was proper for the prosecutor to ask Dominguez about his prior statements to the police and, if Dominguez denied making the statements, to read the statements to him to refresh his recollection. (85RT 8940-8941.)

Dominguez testified that he did not recall the testimony and had been coerced. (85RT 8967-8968.)

The prosecutor then asked Dominguez questions about the things that Dominguez had done with appellant and Robert Homick on the day before and on the day of the murders. For the most part, Dominguez testified "I don't remember" and "I don't recall," except that he denied seeing a revolver inside the gun case that appellant picked up from Max Herman's office. When the prosecutor read Dominguez his prior statements and prior testimony about these events, Dominguez testified that he did not remember the prior statements and prior testimony or that they had been coerced. (85RT 8974-8994.)

At this juncture, counsel for Neil Woodman objected to the prosecutor reading a particular portion of the May 1986 preliminary hearing testimony, arguing that it contained Dominguez's speculative conclusion that appellant had talked about the Woodman brothers on the day before the murders. Counsel explained that, after several days of cross-examination at the first preliminary hearing, it had become apparent that Dominguez had heard the Woodman name on television, not from appellant. The court initially stated that Dominguez's first answer at the preliminary hearing (i.e., that he had heard appellant talk about the Woodmans) could be read to him, because it had not been stricken. The court said that the fact that Dominguez had later changed his testimony at the preliminary hearing could be brought out on cross-examination. The court, however, deferred ruling on the issue, because counsel wanted to research the matter. (85RT 8994-8999.)

The same pattern of direct examination resumed, with Dominguez responding "I don't recall" and claiming his prior statements had been coerced. (85RT 8999-9007.) At the end of the first day of Dominguez's testimony, outside the jury's presence, the prosecutor raised an issue that he

acknowledged was still premature. He noted that Dominguez had testified that he had been coerced into giving the March 13 statement to the police. The prosecutor said that the videotape of that interview showed no coercion. Thus, the prosecutor requested permission to play the tape to the jury. Counsel for Neil Woodman suggested that the defense attorneys come up with an agreed upon edited version of the tape. The court agreed. (85RT 9008-9017.)

The following day, Robert Homick's and Neil Woodman's counsel said that they had no objection to the entire unedited tape of the March 13 interview being played to the jury, except the portions that discussed polygraph examinations and Dominguez's first trip to Los Angeles when he delivered cocaine. Counsel for appellant objected to the entirety of the tape and then listed his objections to specific portions of the interview. The court overruled some objections and sustained others. (86RT 9018-9032.)

The direct examination of Dominguez then resumed. Dominguez testified that he did not remember telling the detectives on March 13 about the various things that he had done with appellant on the day before and on the day of the murders. Dominguez testified that it would help him remember if he saw the videotape of the interview. (86RT 9039-9043.) The prosecutor read Dominguez relevant portions of his May 1986 testimony and asked Dominguez if he recalled the testimony. Dominguez responded that he did not remember and that he was "reading from a script" during his prior testimony. (86RT 9044-9057.) Dominguez then refused to answer any more questions until he talked to an attorney. (86RT 9059.)

Outside the presence of the jury, the court asked Dominguez if it would refresh his recollection to watch the tape of his March 13 interview. Dominguez said that he wanted the jury to watch the tape and would not testify if the jury was going to watch an edited version of the tape. Dominguez also said that he wanted to watch the videotape of his April 26

drive around West Los Angeles, during which he pointed out various locations to police officers. The court allowed Dominguez to watch that tape, and Dominguez also consulted with his attorney (Victor Salerno). Thereafter, Dominguez complained that the tape of the April 26 drive had been edited. The parties obtained the original tapes of the April 26 drive, and the court adjourned for the day so that Dominguez could watch those tapes, as well as the tape of the unedited version of the March 13 interview. (86RT 9063-9078.)

The next day, outside the presence of the jury, counsel for Dominguez informed the court that Dominguez did not want to testify any further. Dominguez said that he had two criminal contempt charges pending against him in Nevada, that each contempt charge carried an 18-year prison sentence, and that his new attorney on those matters (someone other than Salerno) had advised him not to testify in California. Attorney Salerno explained that Dominguez had two pending federal cases in Nevada, stemming from his refusal to testify against the defendants in federal court. The prosecutor noted that all of this information was known before Dominguez took the stand. The court found that nothing Dominguez testified to in this case would have any bearing on whether he was guilty of contempt for refusing to testify in another proceeding. The prosecutor offered Dominguez use immunity for his testimony, but Dominguez remained adamant that he did not want to testify any further. Dominguez said that, if the prosecutor believed that Dominguez was not living up to his end of the plea bargain, the pleas could be withdrawn. (87RT 9080-9094.)

Dominguez was then questioned by counsel for all of the parties outside the jury's presence. In response to questions from the prosecutor, Dominguez complained that the videotapes had been edited. In response to questions by the various defense attorneys, Dominguez attempted to

explain why he did not want to testify. He also said that the tape of the April 26 drive had been edited, including a portion when Officer Frank Garcia allegedly held a knife on him. Dominguez also talked about various polygraph examinations he had taken. (87RT 9094-9120.) At the conclusion of this questioning, the court informed Dominguez that he was placing the defendants in a bad position because, if he refused to testify, the court would be forced to strike his testimony and then Dominguez's testimony from the first preliminary hearing would be read to the jury. The court informed Dominguez that he did not have a right not to testify and that he would be found in contempt of court if he refused to testify. (87RT 9120-9122.)

At sidebar, the prosecutor noted that Dominguez was testifying, even though he had said that he was not going to testify. The prosecutor suggested that they "plow ahead" and, if Dominguez claimed not to remember something, counsel could use Dominguez's prior testimony to impeach him. Counsel for appellant and counsel for Robert Homick agreed. Counsel for Neil Woodman expressed concern that Dominguez would refer to polygraph tests. The court shared this concern but said that the matter could be resolved with an instruction to the jury. (87RT 9122-9125.)

Counsel for Neil Woodman then moved for a mistrial, arguing that the jury was going to believe that Dominguez was being uncooperative in order to help the defendants. The court disagreed and said that, if Dominguez was as obstinate during the defense case, the jury would get the impression that Dominguez was trying to help himself.[76] (87RT 9127-

[76] Contrary to appellant's suggestion (AOB 177, fn. 152), the trial court did not express the view that the intent underlying Dominguez's behavior was to assist the defendants.

9129.) The court stated: "I have seen recalcitrant witnesses who simply folded their arms and refused to speak. He's not unwilling to speak. He is just refusing to answer questions that are put to him on the subject that the People want to talk about. [¶] But he has a great deal to say. He is present, sworn and available. I can't find him unavailable under these circumstances." (87RT 9130.) The court denied the motion, stating that it assumed that all of the defendants joined in the motion. (87RT 9130.)

Counsel for appellant then noted that the prosecution had already introduced a number of statements that would not have been admitted if Dominguez had initially been found to be unavailable (e.g., Dominguez's statements to the police, Dominguez's testimony at the second preliminary hearing). Counsel expressed concern that Dominguez had, in effect, made himself unavailable, and the defense would be unable to cross-examine Dominguez regarding those statements. The prosecutor responded that he had been acting in good faith and suggested he could limit his examination to Dominguez's testimony at the first preliminary hearing. The court ruled that, if Dominguez limited his response to refusing to answer a question, then the prosecutor should limit his examination to the first preliminary hearing. However, if Dominguez gave a response, then the prosecutor could use Dominguez's other testimony or statements to impeach him. (87RT 9130-9133.)

Dominguez's direct examination resumed. In response to the prosecutor's first question, Dominguez testified that he had watched three tapes of his prior statements and had decided not to testify any further. The prosecutor asked Dominguez whether he saw on the tape that he had gone to a restaurant in Los Angeles near the time of the murders. (87RT 9134.) Counsel for appellant moved for a mistrial, arguing that the prosecutor violated the court's last ruling. The court rejected the argument and denied the mistrial motion, stating that Dominguez had testified that he had

watched the tape, as opposed to refusing to answer questions about whether he had watched the tape. (87RT 9135-9136.)

At this juncture, counsel for Robert Homick recognized that the situation with Dominguez was much like when a court finds that a witness is not being candid about his lack of memory, and the witness opens the door to impeachment with prior inconsistent statements. The prosecutor agreed. The court agreed as well and said that it had "no difficulty at all in making a finding that this witness is not being truthful when he says he doesn't remember; that he doesn't know; that he doesn't want to testify; that he has nothing to say. [¶] All of those are clearly not true so under those circumstances I don't know why 'I refuse to answer' is any different from 'I don't remember' when it's not truthful." (87RT 9135-9136.) Thus, the court concluded that all sides could impeach Dominguez with his non-testimonial statements. (87RT 9135-9136.)

The direct examination continued. During the next series of questions, Dominguez sat mute, and the prosecutor read portions of Dominguez's testimony from May 1986 regarding some of the things that Dominguez had done with appellant and Robert Homick on the day before and on the day of the murders. (87RT 9136-9146.) Dominguez then changed gears, and every response he gave referred to a polygraph examination. The court granted several motions to strike. (87RT 9146.)

Outside the presence of the jury, counsel for Neil Woodman made a motion for mistrial. Counsel for Robert Homick joined in the motion and, alternatively, requested that the court instruct the jury with regard to the references to polygraph examinations. Counsel for appellant joined in the mistrial motion. The court denied the motions. The court said that it believed that Dominguez would get tired of saying the word "polygraph." The court proposed to instruct the jury that there was no issue of a polygraph in the case and that the jury was to disregard any reference that

Dominguez might choose to make to a polygraph. Counsel for Neil Woodman asked for some time for the defense to propose an instruction. The court agreed. (87RT 9147-9149.)

The testimony resumed, and nearly every response from Dominguez referred to a polygraph. (87RT 9150-9152 ["Your answers are in the polygraph. . . ."; "I recall the polygraph test very well."; "I only recall the polygraph after the first one, the second polygraph."; "I recall at this point the second polygraph."].) In response, the prosecutor read to Dominguez portions of Dominguez's testimony from the first preliminary hearing. The court eventually interrupted and instructed the jury: "Ladies and gentlemen, there is no issue of polygraph in this case although Mr. Dominguez would like to create such an issue." (87RT 9152.) Dominguez replied: "I have paperwork that says different." (87RT 9152.) The court instructed Dominguez not to interrupt and continued: "The jury will please disregard any such reference." (87RT 9153.) Questioning resumed, and, after Dominguez continued to refer to polygraph examinations, the court gave the jurors a lunch break. (87RT 9153.)

Outside the presence of the jury, the court said that it was open to suggestions from counsel. The prosecutor recommended that they press forward. Counsel for Neil Woodman moved for a mistrial. He argued that the jury might speculate that Dominguez had passed polygraph examinations, because the prosecutor was presenting him as a witness. Counsel for appellant joined in the mistrial motion and argued that there had been a discovery violation -- that he had not received information that Dominguez was facing contempt proceedings in Nevada. Counsel for Robert Homick also joined in the motion. (87RT 9154-9158.)

The court said it was considering the option of striking Dominguez's testimony and finding him unavailable. The court recognized that, even when Dominguez had been cooperative, he had not provided helpful

testimony for the People. The court noted that Dominguez had claimed that everything said at the plea hearing was a lie and that he had been coerced into giving his prior statements and prior testimony. The court, however, said that it was concerned that the prosecutor had referred to Dominguez's statements to the police and to the second preliminary hearing (from which appellant was absent). The court decided to review the transcripts of Dominguez's testimony to decide what to do next. Counsel for Robert Homick said he preferred to press forward. Counsel for appellant expressed concern that Dominguez's actions were consistent with the prosecutor's conspiracy theory. (87RT 9161-9163.)

Following a break, outside the presence of the jury, the court presented counsel with a proposed jury instruction regarding Dominguez's refusal to answer questions and his references to polygraph examinations. Counsel for appellant said that, before addressing the instruction, he wanted to make clear that he believed that appellant's Sixth Amendment right to confrontation was being denied. Counsel argued that the court should find Dominguez unavailable and should conduct a hearing to determine whether the unavailability was caused by the prosecution's failure to live up to its bargain with Dominguez. The court responded that it had reviewed Dominguez's motion to withdraw his pleas, setting forth all of the allegations concerning the prosecution's failure to live up to the bargain, and found no credible evidence of any such failure by the prosecution. Thus, the court stated that it found no basis for conducting a hearing or declaring Dominguez unavailable. Counsel for appellant said that, if the court held a hearing to determine the cause of Dominguez's unavailability, he could present evidence that the court had not yet heard. (87RT 9165-9167.)

The parties then addressed the wording of the court's proposed jury instruction. Appellant's counsel argued that the instruction was inadequate

and renewed his motion for a mistrial. (87RT 9167-9173.) He argued that appellant was denied his right to confrontation because of misconduct by the prosecution. Counsel argued that the prosecution should not be able to benefit from its misconduct by reading into evidence prior testimony and then insulating Dominguez from any effective cross-examination. (87RT 9174-9175.) The court noted that, after it had denied Dominguez's motion to withdraw his pleas, Dominguez was willing to testify and did so for about a day. The court also noted that, when Dominguez changed his mind about testifying, there was no indication that it had anything to do with the plea bargain. The court denied the motion. (87RT 9174-9176.)

Dominguez was then brought into the courtroom. The court informed Dominguez that he would be found in contempt each time he refused to answer a question and that each finding of contempt would result in a five-day jail term. The court also instructed Dominguez not to refer to polygraph examinations and that each violation would also result in a five-day jail term. (87RT 9181-9182.)

The jurors were then brought back into the courtroom. (87RT 9182.) The court gave them the following instruction:

> You are instructed that Mr. Dominguez has no privilege not to answer questions in this case. The court has made a determination that a refusal to answer questions is tantamount to answering "no" to the attorney's question, and that Mr. Dominguez may be impeached, then, by his prior testimony.
>
> With respect to polygraphs or lie detectors, you are instructed that polygraphs have been proven to be unreliable; therefore, evidence concerning whether a person took or offered to take, or passed or failed a polygraph or a lie detector test is not admissible in any criminal proceeding. Whether one passed or failed a polygraph exam does not mean that that person either lied or told the truth.

> Statements concerning any such tests by Mr. Dominguez are irrelevant in this case, and you are instructed to disregard them.

(87RT 9183-9184.)

The prosecutor attempted to resume the direct examination but, before he could ask his first question, Dominguez exclaimed that a federal judge had told him that the polygraph examinations that he had taken were admissible in federal court. The court instructed the jury to disregard Dominguez's statement. (87RT 9184-9185.) The direct examination resumed. For some period of time, in response to almost every question, Dominguez referred to polygraph examinations. Following each answer, the prosecutor read Dominguez's prior testimony from May 1986 on the subject matter that he was questioning Dominguez about and then asked Dominguez if he recalled giving the prior testimony. In response, Dominguez referred to the polygraph examinations. (87RT 9185-9229.)

Outside the presence of the jury, counsel for Neil Woodman moved for a mistrial. Counsel said that he had counted 60 instances when Dominguez referred to a polygraph examination and noted that there were other answers that were unresponsive. Counsel argued that Dominguez's demeanor had reached a point where what he was saying was "totally lost." Counsel argued that the prosecutor was, in effect, testifying, and the jury was focusing on the prosecutor, not Dominguez. Counsel also argued that the jury would be overwhelmed by the questioning procedure. (87RT 9230-9232.) The court responded that the situation was much like when the testimony of an unavailable witness is read. The court found that the defendants' constitutional rights of confrontation and cross-examination had not been denied. The court noted that Dominguez had been receptive to answering questions from defense counsel outside the presence of the jury earlier in the day and concluded that it would wait to see what

Dominguez would do on cross-examination. (87RT 9232-9233.) The court said: "[W]e're this far along and we're in it this deep and certainly there is nothing to be lost by going a couple more days." (87RT 9233.) Counsel for Robert Homick agreed with the court's assessment and asked for more time to prepare for cross-examination. Appellant's counsel joined in this request.[77] The court granted the request and gave counsel one day to prepare. (87RT 9233-9234.) The court also clarified that it deemed a motion for mistrial made by one defendant a motion made by all. (87RT 9235.)

The court then addressed a note that it had received from Juror No. 10. The note stated: "Judge Cooper, should we consider the information read from prior proceedings as evidence? I do not understand how I should view this information." (87RT 9235.) The court proposed to read CALJIC No. 2.13. (87RT 9235.) Counsel for appellant argued that CALJIC No. 2.13 did not apply. The court said it had previously made the determination that a refusal to answer questions was tantamount to answering "no." Accordingly, the court said, this instruction was appropriate. (87RT 9236.) Appellant's counsel argued that the problem with CALJIC No. 2.13 and with the court's previous instruction was that the court had made a determination on an issue which was for the jury to decide -- whether Dominguez's non-responsive statements were equivalent to a "no" response. (87RT 9237.) Counsel for Neil Woodman suggested that the court read CALJIC No. 2.13 in conjunction with a portion of CALJIC No. 2.20, informing the jurors that they were the exclusive judges of the facts of the case. That way, counsel explained, the jurors would be informed that the fact the prosecutor had read the prior testimony did not mean that the

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[77] Contrary to appellant's suggestion (AOB 186), counsel did not ask for a week to prepare for cross-examination. (87RT 9234-9235.)

jurors had to accept it as true. The court decided not to modify CALJIC No. 2.13. (87RT 9237-9238.)

The jurors returned to the courtroom. The court read Juror No. 10's question to them. The court said the answer to the question was in a jury instruction which the jury would hear at the end of the case but which the court would read at that time. (87RT 9239-9240.) The court then instructed the jury as follows:

> Evidence that on some former occasion a witness made a statement or statements that were inconsistent or consistent with his testimony in this trial may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts stated by the witness on a former occasion.
>
> If you disbelieve a witness' testimony that he no longer remembers a certain event, such testimony is inconsistent with a prior statement or statements by him describing that event.

(87RT 9240.)

The direct examination resumed. The prosecutor asked Dominguez a few more questions. This time, Dominguez did not respond. The prosecutor read Dominguez's prior testimony from May 1986 as to each subject matter and asked Dominguez if he recalled the prior testimony. Dominguez did not respond. (87RT 9240-9243.) The direct examination concluded, and the court adjourned for the day. (87RT 9243.)

On the next court day, a hearing was held outside the presence of the jury to discuss the problem of impeaching Dominguez with prior crimes in which he claimed appellant was involved. The court said it was concerned that Dominguez would volunteer details that would incriminate appellant and that, if it instructed Dominguez not to refer to appellant's involvement, Dominguez would do so in response to each question. The court said that Dominguez's credibility was already suspect, and it questioned the need to cross-examine Dominguez about his other crimes. (88RT 9250-9252.) The

court suggested preparing a stipulation to cover the necessary facts. (88RT 9253.)

Appellant's counsel argued that it was necessary to address Dominguez's other crimes in order to effectively cross-examine Dominguez about his motivations in entering the plea agreement. Counsel also rejected the suggestion of a stipulation. (88RT 9254-9255.) The court responded that counsel was free to take the risk that Dominguez might volunteer appellant's involvement in the prior crimes. Counsel said that he believed the court was trying to protect appellant's constitutional rights but felt he was in an untenable position, because the prosecution had chosen to call Dominguez as a witness. The court responded that it was necessary for the prosecution to call Dominguez as a witness, because Dominguez was an important witness. (88RT 9255-9256.)

The prosecutor then returned to an issue that had been addressed previously. He requested permission to play the tape of the March 13, 1986, police interview of Dominguez. The prosecutor argued that the tape impeached Dominguez's claim that he had been coerced during the interview. (88RT 9256-9258.) Appellant's counsel moved for a mistrial, arguing that the tape of the interview was a prior statement on which he could not cross-examine Dominguez. The court disagreed and denied the motion, stating that Dominguez had denied everything on the tape or said that he had been coerced into making the statement. (88RT 9258-9259.)

Counsel for Robert Homick argued that the jury should be instructed that the statements on the tape were not being introduced for the truth. Counsel argued that, while some of the statements were admissible for the truth because Dominguez had been impeached, Dominguez was not questioned about various other statements on the tape. The court said that an instruction might be appropriate, telling the jurors that the tape was being played so that the jurors could determine whether Dominguez was, in

fact, coerced into making the statements and for the jurors to determine whether the statements on the tape impeached Dominguez in any respect in his testimony. The court concluded that such an instruction would "focus [the jury's] attention." Counsel for appellant asked the court to instruct the jurors that they were not allowed to consider the statements on the tape for the truth. The court denied the request. (88RT 9264-9265.)

The jury entered the courtroom, and the court instructed the jury that the videotape of the March 13, 1986, police interview of Dominguez was going to be played. The court informed the jury that the tape was being playing for two purposes: (1) to determine whether Dominguez was coerced by the police when he gave the statement; and (2) to determine whether, if at all, it impeached Dominguez's testimony in any respect. (88RT 9266.) The tape was played for the jury, with appellant's counsel voicing some additional objections to portions of the tape during a break. (88RT 9269-9271.)

Counsel for Robert Homick then began his cross-examination of Dominguez. (88RT 9272.) Dominguez was responsive to many questions. Other times, Dominguez responded "I don't know," "I don't recall," or "no" to questions, and Robert Homick's counsel read portions of Dominguez's prior testimony. Counsel also read portions of the plea hearing and Dominguez's interviews by the police and then asked Dominguez questions about the passages that he read. (88RT 9272-9359.)

On the following court day, Dominguez's cross-examination by counsel for Robert Homick continued in a similar manner. Counsel for Robert Homick made use of Dominguez's various police interviews and his testimony from the May 1986 and September 1988 preliminary hearings, both in impeaching Dominguez and in providing context to his questions which followed. (89RT 9364-9488.) At one point, Dominguez testified: "My whole purpose up here is to get a new trial." (89RT 9466.) Towards

the end of the examination for the day, Dominguez became unresponsive. (89RT 9479-9488.)

Outside the presence of the jury, counsel for appellant noted that Dominguez had once again gone into his nonresponsive mode. Counsel suggested that the court instruct Dominguez to answer the questions. The prosecutor joined in this request. (89RT 9488-9489.) The court, thereafter, instructed Dominguez to answer the questions. (89RT 9489-9490.) Dominguez, however, continued to sit mute in response to the remainder of the questions posed by counsel for Robert Homick. (89RT 9490-9494.) The court instructed the jurors: "The witness' failure to respond will be deemed a denial so he may be impeached with any evidence contrary to his denial." (89RT 9492.)

At the end of the cross-examination by counsel for Robert Homick, outside the presence of the jury, the prosecutor said that, on direct examination and at the beginning of cross-examination, the parties were following a procedure whereby they would ask questions and, if there was no response, the parties would impeach Dominguez. The prosecutor noted that there had been a series of questions by counsel for Robert Homick where "we have the questions hanging out there with no answers and no impeachment which would come into evidence. . . ." (89RT 9494-9495.) The prosecutor said the jury needed to be told that those questions were meaningless, unless there was follow up impeachment. (89RT 9495.) The court concluded that the jury did not have to be instructed. (89RT 9497.)

The next day, cross-examination by appellant's counsel began. At first, Dominguez answered a few questions. He said he did not want to testify because of the federal contempt proceedings against him. Very quickly, however, he went into his mute mode. The court instructed Dominguez to answer the questions, but Dominguez did not. (90RT 9501-9503.) The court stated: "The record will reflect there's no answer from

the witness, and the court will find that failure and refusal to follow the court's instruction is tantamount to a denial." (90RT 9503.) The court explained to Dominguez that his silence was tantamount to a denial, and his actions were enabling counsel to read his prior statements. (90RT 9508-9509.) In response to Dominguez's silence, appellant's counsel read portions of Dominguez's prior testimony. (90RT 9503-9507, 9509-9510.)

Counsel for appellant then began a line of questioning, with no follow up impeachment. (90RT 9510-9511.) The prosecutor objected to this method of questioning. At sidebar, the court told appellant's counsel that he had to be prepared to establish the points he was trying to make with admissible evidence. (90RT 9511-9512.) Counsel for appellant made an offer of proof, stating that he was going to introduce other witnesses to impeach Dominguez. The court, thereafter, permitted the line of questioning. (90RT 9512-9513.)

Appellant's counsel resumed the cross-examination. Dominguez remained mute. After a series of questions, counsel once again did not offer impeaching evidence. (90RT 9514-9517.) The prosecutor objected and argued at sidebar that, after receiving no response from Dominguez, appellant's counsel needed to impeach Dominguez with evidence. Counsel for appellant said that he was just about to do so. The court instructed appellant's counsel to question Dominguez and, if there was a denial or silence, to follow up with evidence. The court said that it was not requiring counsel to impeach Dominguez question by question, but it noted that several different areas needed to be covered on impeachment. The court added that it did not see a difference between Dominguez's behavior and a witness who says "no" to every one of the incriminating answers that he would be expected to give. The court said the alternative was to read Dominguez's prior testimony to the jury and, in that circumstance, the defendants' opportunity to impeach Dominguez would be far more limited.

(90RT 9517-9521.) Appellant's counsel said that Dominguez's silence could be a "yes," rather than a "no." The court responded it needed to treat Dominguez's silence as a denial of the incriminating answers that he would be expected to give, because Dominguez could not otherwise be impeached. The court explained that the jury was to treat the silence as a denial, listen to the impeachment, and then decide whether to believe Dominguez. (90RT 9521-9522.)

The cross-examination by appellant's counsel resumed. Counsel asked questions, Dominguez sat mute, and then counsel impeached Dominguez with prior testimony and prior statements. (90RT 9524-9535.) Outside the presence of the jury, appellant's counsel renewed his motion for mistrial on the ground that Dominguez was not answering any questions. The court denied the motion, stating that counsel was "doing very nicely" in his cross-examination. (90RT 9537.) At the request of counsel, the court addressed Dominguez outside the presence of the jury once again. Dominguez said that his Las Vegas attorney had advised him not to answer questions. (90RT 9538-9542.) Appellant's counsel then suggested that, in order to alleviate Dominguez's concerns about the federal prosecutions against him in Nevada, the prosecutor contact the United States Attorney's Office in Nevada in order to seek use immunity for Dominguez in the federal case. (90RT 9542.) When Dominguez suggested he would be willing to answer questions if granted use immunity by a federal judge, the court took a recess so that the prosecutor could contact the United States Attorney's Office. (90RT 9544-9545.)

After the break, the prosecutor said that he had talked to a federal prosecutor who had informed him that the granting of immunity was an involved process and, in any event, that the federal government did not grant immunity to defendants to enable their testimony in state proceedings. Appellant's counsel argued that appellant's due process rights were being

violated by the actions of the federal government, which was not prosecuting Dominguez for his various crimes but was prosecuting him for refusing to testify. The consequence, counsel argued, was that the defense could not adequately cross-examine Dominguez in this trial. Counsel moved to dismiss the case. The court denied the motion. (90RT 9545-9551.) Counsel for Dominguez then arrived in court and talked to Dominguez. Thereafter, counsel for Dominguez informed the court that he had advised Dominguez that he did not have a right to refuse to answer questions. Counsel said that he believed Dominguez would continue to refuse to testify. (90RT 9565-9566.)

The cross-examination resumed. Dominguez sat mute as appellant's counsel asked questions. After the unanswered questions, counsel read portions of various court proceedings and Dominguez's prior statements. (90RT 9572-9632.) During the examination, the court sustained the prosecutor's objection (voiced outside the jury's presence) that appellant's counsel was misleading the jury by reading only select answers from prior proceedings, even when those answers were contradicted in the very next sentence of the prior testimony. (90RT 9584.) The court also sustained the prosecutor's objection that appellant's counsel was asking questions which suggested that the murders had been committed by Kelly Danielson (Dominguez's friend) but had no evidence to support that suggestion. Based on this last ruling, appellant's counsel moved to strike Dominguez's testimony and moved for a mistrial, arguing he was unable to cross-examine Dominguez. The court said its ruling would be the same, even if Dominguez were answering questions. The court said the jurors would be instructed at the end of the case that questions by counsel were not evidence. Counsel for Neil Woodman expressed concern that the questions during Dominguez's testimony contained the meaningful information. The

court said that the parties would have to craft an instruction at the end of the trial. (90RT 9614-9618.)

At the end of the day, outside the presence of the jury, counsel for Neil Woodman moved for a mistrial, arguing that the questioning procedure being utilized did not allow for effective cross-examination. The prosecutor responded that, if the defense believed that it was being denied effective cross-examination, then it should make a motion to strike Dominguez's testimony and move that he be deemed unavailable so that Dominguez's prior testimony could then be read to the jury. (90RT 9632-9633.) The court denied the mistrial motion and found that the right to cross-examination had not been impaired. The court said that, in some ways, the defense was better off, because it did not have a "loose cannon" on the stand. (90RT 9634-9635.) The court said: "[Dominguez] is not saying any of the things [defense counsel] were afraid he might say and he is available for you to bring in all the impeaching evidence that you wish to bring in. . . ." (90RT 9635.) The court adjourned for the day. (90RT 9636.)

The next day, cross-examination by appellant's counsel resumed in the same fashion, with Dominguez maintaining his silence. (91RT 9642-9673.) Dominguez then answered questions about the tape of his April 26 drive around West Los Angeles with members of the LAPD. (91RT 9686-9697.) Dominguez then returned to maintaining his silence. (91RT 9697-9703.) Soon, Dominguez answered some more questions but again returned to maintaining his silence. (91RT 9705-9739, 9743-9746.)

At the end of the day, outside the presence of the jury, the prosecutor said that he wanted to play an audiotape on redirect examination of Dominguez's police interview on March 26, 1986. The prosecutor argued that the statement was a prior consistent statement which would rebut any claim of recent fabrication. The prosecutor argued that the cross-

examination of Dominguez had implied that Dominguez had a motivation to fabricate statements in May 1986 when he entered his plea agreement, and the March 26 statement to the police pre-dated the plea agreement. Appellant's counsel objected, arguing that it was his position that Dominguez's motive to fabricate arose before Dominguez ever spoke to the police on March 13, 1986. The court tentatively overruled the objection, subject to its review of the transcript of the police interview. (91RT 9749-9754.)

On the next court day, outside the presence of the jury, the parties addressed the admissibility of the March 26, 1986, police interview once again. Counsel for appellant objected to the playing of the tape on federal constitutional grounds but also stated his specific objections to portions of the tape. The court found that the statement was admissible as a prior consistent statement. (92RT 9756-9762.)

Cross-examination by appellant's counsel resumed once again. At first, Dominguez sat mute as counsel asked questions and read portions of Dominguez's prior testimony. (92RT 9763-9766.) Dominguez then changed gears and started to answer questions. Most of these questions were about his prior crimes. Dominguez also answered questions about the day of his arrest, when a .38 caliber gun was found in his car. (92RT 9767-9784.) When asked if the gun belonged to him, Dominguez said: "I had received it from the defendant, yes." (92RT 9781.)

Outside the presence of the jury, appellant's counsel asked that the court strike Dominguez's answer (i.e., that he had received the gun from "the defendant") as nonresponsive. The court noted that striking the answer would be moot, because, on redirect examination, the prosecutor could ask Dominguez where he got the gun. The court explained that such a question on redirect examination was relevant, particularly to the conspiracy to commit murder charge, and that appellant's counsel could make the jury

aware that Dominguez had not previously stated that he had obtained the gun from "the defendant." The court also found Dominguez's answer responsive and denied the motion to strike. (92RT 9785-9792.)

The prosecutor then began redirect examination. Dominguez either sat mute or responded "no comment" and sometimes answered questions. In response, the prosecutor read portions of Dominguez's prior testimony. The prosecutor also played the tape of the March 26 police interview for the jury. (92RT 9797-9811.) Counsel for appellant then conducted brief recross-examination, and then the prosecutor conducted brief redirect examination, bringing Dominguez's testimony to a close. (92RT 9812-9815.)

Two days later, appellant's counsel moved to strike Dominguez's testimony. Counsel argued that, although Dominguez answered most of the questions that counsel for Robert Homick asked him, Dominguez did not answer the bulk of the questions that appellant's counsel asked him. Thus, counsel argued that appellant was denied his right to confrontation. (94RT 10163-10164.) The court responded that it had already researched the issue and found no similar cases. However, the court recognized that there was a wealth of information that got before the jury to impeach Dominguez. The court concluded: "And the ultimate result was that the jury probably knew more about Mr. Dominguez and his conduct and, of particular importance, knew more about his credibility than they might have had he answered all the questions and attempted to tell a particular kind of story." (94RT 10164.) The court also said: "I will say . . . by having watched Mr. Dominguez those eight or nine days on the stand, I believe that his credibility was substantially impeached by all of the cross-examination engaged in by counsel." (94RT 10164-10165.) The court found that the cross-examination revealed sufficient information so that the jury could be

apprised of Dominguez's bias, motive, and credibility. Accordingly, the court denied the motion to strike Dominguez's testimony. (94RT 10165.)

B. The Trial Court Properly Treated Dominguez's Selective Silence on Direct Examination As Being "Inconsistent in Effect" with Dominguez's Prior Statements and Prior Testimony

As set forth more fully above, Dominguez initially answered some questions on direct examination. For the most part, however, he claimed he did not remember various events surrounding the crimes. He also testified that he did not remember his prior statements and prior testimony and that he had been coerced into making them. (See, e.g., 85RT 8974-8994.) When Dominguez informed the court that it would assist his memory if he were permitted to watch the videotapes of his prior statements, the court allowed him to watch those tapes. (86RT 9039-9043, 9063-9078.) Dominguez then refused to answer questions, stating that he was worried about federal contempt proceedings in Nevada. (87RT 9080-9094.) The court ultimately ruled: "I have no difficulty at all in making a finding that this witness is not being truthful when he says he doesn't remember; that he doesn't know; that he doesn't want to testify; that he has nothing to say. [¶] All of those are clearly not true so under those circumstances I don't know why 'I refuse to answer' is any different from 'I don't remember' when it's not truthful. (87RT 9135-9136.) Dominguez then sat mute during a short series of questions by the prosecutor. (87RT 9137-9146.) He then changed gears, and almost every one of his answers referred to a polygraph examination. (87RT 9146-9153, 9185-9229.) Finally, the direct examination concluded with Dominguez sitting mute during another short series of questions. (87RT 9240-9243.)

Appellant now argues that the trial court erred, in violation of Evidence Code section 1235 and his federal constitutional rights, in

permitting direct examination to continue when Dominguez began refusing to answer questions. (AOB 210-213.)

Initially, any objection to the use of the prior statements and prior testimony based on Evidence Code section 1235 has been forfeited by the failure of appellant (or any defendant) to interpose such an objection in the trial court. (Evid. Code, § 353 [a verdict or finding shall not be set aside on the basis of the erroneous admission of evidence unless there was "an objection . . . that was timely made and so stated as to make clear the specific ground of the objection"]; *People v. Hovarter* (2008) 44 Cal.4th 983, 1008; *People v. Saunders* (1993) 5 Cal.4th 580, 589.) In any event, the trial court did not abuse its discretion in treating Dominguez's selective silence as being "inconsistent in effect" with his prior statements and prior testimony.

A statement by a witness that is inconsistent with his trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770. Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Evidence Code section 770 provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action." "An appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in

question. . . ." (*People v. Hovarter, supra,* 44 Cal.4th at pp. 1008-1009, citations omitted.)

This Court has articulated the test for admitting a witness's prior statements pursuant to Evidence Code section 1235 as follows:

> The "fundamental requirement" of [Evidence Code] section 1235 is that the statement in fact be inconsistent with the witness's trial testimony. [Citation.] Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. (*People v. Green* (1971) 3 Cal.3d 981, 988 [].) However, courts do not apply this rule mechanically. "Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation], and the same principle governs the case of the forgetful witness." [Citation.] When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's "I don't remember" statements are evasive and untruthful, admission of his or her prior statements is proper. [Citation.]

(*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220; *People v. Hovarter, supra,* 44 Cal.4th at pp. 1008-1009; *People v. Fierro* (1991) 1 Cal.4th 173, 221 ["But justice will not be promoted by a ritualistic invocation of this rule of evidence. . . . [Citation.]"].)

In *In re Deon D.* (1989) 208 Cal.App.3d 953, one of the prosecution witnesses (Tyrone N.) selectively answered questions posed by the prosecutor and blatantly refused to answer any questions he did not want to answer. (*Id.* at p. 959.) The juvenile court admitted Tyrone's statements to a detective in evidence as prior inconsistent statements. (*Ibid.*) Specifically, similar to the trial court in this case, the juvenile court in *Deon D.* found "by the statement, 'I don't want to be a snitch, I don't want to testify, I don't want to answer any questions,' that he is stating a position inconsistent with what may have been a prior statement." (*Id.* at pp. 959-960.) The defendant appealed, arguing that Tyrone's refusal to answer

questions at trial did not amount to statements inconsistent with those previously given to the detective. (*Id.* at p. 961.)

The Court of Appeal, Second Appellate District, Division Four, rejected the argument. The court recognized that Tyrone answered some questions pertaining to the offense and that he also gave testimony expressly inconsistent with the statements that he had previously given to the detective. (*In re Deon D., supra,* 208 Cal.App.3d at p. 962.) As for Tyrone's refusal to answer some questions, the court stated: "With regard to Tyrone's obstructionist behavior, we see no reason to treat Tyrone's blatant refusal to answer specific questions posed by the prosecutor any differently than the *Green*[78] court treated [the witness's] evasive answers and supposed lapses of memory which stemmed from a desire not to testify." (*Ibid.*) The court, thereafter, concluded that the trial court had properly found that Tyrone's in-court testimony, as well as his refusal to answer questions, was materially inconsistent with his statement to the detective. (*Ibid.*)

Here, too, there is no reason to treat Dominguez's refusal to answer some questions on direct examination any differently than his evasive answers and supposed lapses of memory stemming from his desire not to testify. In this regard, ample evidence supports the trial court's determination that Dominguez's selective silence during the direct examination amounted to deliberate evasion. Some of Dominguez's responses on direct examination were outright denials and expressly

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[78] In *People v. Green, supra,* 3 Cal.3d 981, the chief prosecution witness initially testified about the defendant's telephone call to him about selling marijuana but later became evasive and claimed a lapse of memory when asked about the defendant's involvement. (*Id.* at pp. 986-987.) This Court concluded that the witness's trial testimony was materially inconsistent with his prior statements. (*Id.* at pp. 988-989.)

inconsistent with his prior statements and prior testimony. Still other responses, referring to polygraph examinations, were blatantly evasive. Dominguez's other answers consisted of "I don't know" or "I don't remember" responses, even though Dominguez had spent several hours watching the videotapes of his prior statements to refresh his memory. In this context, there was a reasonable basis in the record for the court to conclude that Dominguez's selective silence during two portions of the direct examination was evasive and "inconsistent in effect." (*People v. Johnson, supra,* 3 Cal.4th at p. 1219.) Accordingly, the trial court did not err in admitting Dominguez's prior statements and prior testimony under Evidence Code section 1235.

People v. Rojas (1975) 15 Cal.3d 540, cited by appellant, is readily distinguishable. (See AOB 211-212.) There, at a second trial, the chief prosecution witness who had testified at the preliminary hearing and at the first trial, indicated he was going to refuse to testify. (*Id.* at p. 547.) When called as a witness at the second trial, he refused to testify and later informed the court at an in camera hearing that he was refusing to testify because he feared for his life. (*Ibid.*) The court admitted the witness's prior preliminary hearing and first trial testimony (1) under Evidence Code section 1235, finding that the refusal to testify was an implied denial of his former testimony, and (2) under Evidence Code section 1291 (as former testimony), finding that the witness's refusal to testify made him an unavailable witness. (*Id.* at pp. 547-548.)

On appeal, this Court found that the witness's testimony was admissible under Evidence Code section 1291. (*People v. Rojas, supra,* 15 Cal.3d at pp. 548-552.) The Court, however, found that the evidence was not admissible under Evidence Code section 1235. (*Id.* at p. 548.) The Court found it significant that the witness *gave no testimony whatsoever* at the second trial. (*Ibid.* ["Accordingly, whether [the witness's] refusal to

testify at all is in effect a 'statement' inconsistent with earlier statements is irrelevant in view of the fact that [the witness] did not testify at the hearing at which the question of admissibility of testimony arose."].) Here, in contrast to the witness in *Rojas* who refused to testify *at all*, Dominguez selectively refused to answer a small portion of the questions on direct examination. (87RT 9137-9146, 9240-9243.) The record supports the trial court's finding that those refusals to answer questions amounted to a deliberate evasion and that an inconsistency was implied.

For the same reason, this case is also distinguishable from *People v. Rios* (1985) 163 Cal.App.3d 852, where two witnesses refused to answer any questions at trial. (See AOB 215-219.) The *Rios* court found that, when a witness gives *no testimony*, there is simply no evidence from which a finding of inconsistency can be made. (*Id.* at p. 864.) Unlike the two witnesses in *Rios*, Dominguez did not completely refuse to testify. Dominguez chose to answer some questions. He also mixed claims that he could not remember various prior statements with assertions that he had been coerced into making the prior statements, often in the same breath. (See, e.g., 85RT 8968.) Thus, because there is a reasonable basis in the record for finding Dominguez was being deliberately evasive in his refusal to answer some questions, the prior statements and prior testimony were properly admitted. (*People v. Johnson, supra,* 3 Cal.4th at pp. 1219-1220.)

Appellant makes the additional claim that the trial court erred in instructing the jury that Dominguez's failures to respond meant that Dominguez was answering the question with a "no" response. Appellant argues that this was error, because a refusal to answer a question does not imply a "no" any more than it does a "yes." He further argues that an attorney can easily manipulate the situation to produce a desired result, because any question that might truthfully be answered with a "no" can be

rephrased so a "no" answer has the opposite meaning. (AOB 213-215, 220.) The claim is without merit.

When Dominguez first indicated that he would refuse to answer questions, the trial court instructed the jury as follows: "You are instructed that Mr. Dominguez has no privilege not to answer questions in this case. The court has made a determination that a refusal to answer questions is tantamount to answering 'no' to the attorney's question, and that Mr. Dominguez may be impeached, then, by his prior testimony." (87RT 9183.) It does not appear that appellant's counsel objected to this language on the ground now asserted on appeal when the parties addressed the instruction before it was given to the jury. (87RT 9167-9173.)

In any event, with regard to Dominguez's failure to answer questions, the trial court also instructed the jurors: "The witness' failure to respond will be deemed a denial so he may be impeached with any evidence contrary to his denial." (89RT 9492.) The court also stated: "The record will reflect there's no answer from the witness, and the court will find that failure and refusal to follow the court's instruction is tantamount to a denial." (90RT 9503.) Thus, in light of the various instructions provided regarding Dominguez's refusal to answer questions, the jury was informed that Dominguez's failure to respond should be treated as a denial of any incriminating answers that he might be expected to give.[79] This was proper. Further, appellant has pointed to no portion of

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[79] Additionally, there is no indication in the record that the jurors were confused by the instructions regarding Dominguez's refusal to answer questions. (See AOB 220.) Juror No. 10's note asked: "Judge Cooper, should we consider the information read from prior proceedings as evidence? I do not understand how I should view this information." (87RT 9235.) This inquiry was about how to treat Dominguez's prior statements, not his refusal to answer questions.

the record where any attorney manipulated the trial court's instructions regarding Dominguez's refusal to answer questions.

Finally, contrary to appellant's suggestion (AOB 220), the trial court did not usurp the jury's fact-finding responsibility with its instructions regarding Dominguez's refusal to answer questions. It was the trial court's duty to evaluate whether Dominguez was being deliberately evasive and to make a finding of implied inconsistency. (See, e.g., *People v. Hovarter, supra,* 44 Cal.4th at p. 1008 ["When [the victim] testified at trial that she did not 'remember if [the defendant] said specifically that he had done it before,' a question arose whether her proclaimed lack of memory was a deliberate evasion, which could give rise to an implied inconsistency [citation], or a true case of a failed memory. Of course, dealing with a sexual assault victim's memory of the traumatic event can be a delicate matter and one committed to the trial court's discretion."].) It remained in the jury's province to decide whether Dominguez's prior inconsistent statements were, in fact, true.

In sum, the trial court properly treated Dominguez's selective silence on direct examination as being "inconsistent in effect" with his prior statements and prior testimony. No error, constitutional or otherwise, occurred.

C. Appellant's Constitutional Rights Were Not Violated During His Cross-Examination of Dominguez

On the first day of cross-examination by appellant's counsel, Dominguez initially answered a few questions. He said he did not want to testify because of the federal contempt proceedings against him. Very quickly, however, he sat mute in response to questions. (90RT 9501-9503.) In turn, appellant's counsel read portions of Dominguez's prior testimony. (90RT 9503-9510, 9524-9535, 9572-9632.) The next day, cross-examination resumed in the same fashion, with Dominguez maintaining his

silence. (91RT 9642-9673.) Dominguez, however, answered questions about the tape of his April 26 drive around West Los Angeles with members of the LAPD. (91RT 9686-9697.) Dominguez then returned to maintaining his silence. (91RT 9697-9703.) Dominguez then answered some more questions but soon returned to maintaining his silence. (91RT 9705-9746.) On the last day of cross-examination by appellant's counsel, Dominguez first sat mute as counsel asked questions and read portions of Dominguez's prior testimony. (92RT 9763-9766.) Dominguez then answered questions, which were predominantly about his prior crimes and the day of his arrest. (92RT 9767-9784.)

Appellant now argues that Dominguez's failure to respond to questions rendered the cross-examination conducted by appellant's trial counsel meaningless. Appellant contends that the only proper course was to strike Dominguez's testimony. (AOB 221-227; see also AOB 217-220.)

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) In *United States v. Owens* (1988) 484 U.S. 554 [108 S.Ct. 838, 98 L.Ed.2d 951], the United States Supreme Court explained that this right has long been read as "securing an adequate opportunity to cross-examine adverse witnesses." (*Id.* at p. 557.) In *Owens*, the Court held that the Confrontation Clause was not "violated by admission of an identification statement of a witness who is unable, because of a memory loss, to testify concerning the basis for the identification." (*Id.* at p. 564.) The Court stated: "'[T]he Confrontation Clause guarantees only "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."'" (*Id.* at p. 559.) "The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not a

constitutional guarantee." (*Id.* at p. 560.) The Court also noted that, when the declarant "is present at trial and subject to unrestricted cross-examination," "the traditional protections of the oath, cross-examination, and the opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements."[80] (*Ibid.*)

In *People v. Perez* (2000) 82 Cal.App.4th 760, the Court of Appeal, Second Appellate District, Division Four, rejected a Confrontation Clause claim on facts nearly identical to those here. In *Perez*, witness Monica Gutierrez observed a drive-by shooting and positively identified the two defendants from mug shots folders shown to her by the police. (*Id.* at p. 763.) Gutierrez was called as a prosecution witness at the joint trial and repeatedly answered "I don't remember" or "I don't recall" to virtually all the questions asked her about what she saw on the night of the murder and what she had told the police. (*Ibid.*) Her prior statements to an officer describing the crime and identifying the defendants were admitted into evidence pursuant to Evidence Code section 1235. (*Ibid.*) Following the defendants' convictions, one of the defendants argued on appeal that Gutierrez's professed inability at trial to testify to the circumstances of the crime rendered cross-examination so ineffective that it denied him his

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[80] *Owens* has been followed by this Court. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1292, fn. 32; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1172, citing *United States v. Owens, supra,* 484 U.S. at p. 559 ["[T]he federal Constitution guarantees an opportunity for effective cross-examination, not a cross-examination that is as effective as a defendant might prefer."].) In *People v. O'Quinn* (1980) 109 Cal.App.3d 219, a case which pre-dates *Owens*, the Court of Appeal, Second Appellate District, Division Five, concluded that there was no violation of the constitutional right to confrontation when "although [the witness] was ostensibly unable to remember the circumstance of the crime or her statements to the police, she was nevertheless on the stand and available for cross-examination." (*Id.* at p. 228.)

constitutional right to confront the witness. (*Id.* at p. 764.) He further argued that the trial court should have stricken the witness's testimony altogether on the ground that she could not be effectively cross-examined. (*Ibid.*)

The Court of Appeal found no merit to the argument. (*People v. Perez, supra,* 82 Cal.App.4th at p. 764.) The court first set forth the manner in which Gutierrez was questioned at trial and how she responded to questions. (*Id.* at p. 766.) The court noted that, in response to each of the prosecutor's questions about what she had observed on the night of the shooting or what she had told the police, Gutierrez answered, "I don't remember" or "I don't recall." (*Ibid.*) The court also noted that Gutierrez had admitted that she was reluctant to testify. (*Ibid.*) The court, thereafter, recognized that, in response to questions by counsel for the codefendant, Gutierrez answered questions relating to bias and also some other questions. (*Ibid.*) As for the defendant's cross-examination, the court said: "[Defendant] Aguilar's trial counsel next cross-examined the witness for about 25 pages of transcript. She consistently answered 'I don't recall' to numerous questions about the crime or her statements to the police, but did answer a question relating to bias. . . ." (*Ibid.*) Based on this record, the court in *Perez* found:

> The witness Gutierrez was not absent from the trial. She testified at length at trial and was subjected to lengthy cross-examination. The jury had the opportunity to observe her demeanor, and the defense cross-examined her about bias. Even though she professed total inability to recall the crime or her statements to the police, and this narrowed the practical scope of cross-examination, her presence at trial as a testifying witness gave the jury the opportunity to assess her demeanor and whether any credibility should be given to her testimony or her prior statements. This was all the constitutional right to confrontation required. [Citations and footnote.]

(*Id.* at pp. 766-767.)

Here, as in *Perez,* Dominguez appeared at trial and was examined for numerous days, including several days on cross-examination by appellant's counsel. (See RT Volumes 85-92.) During that cross-examination, the jury had the opportunity to observe Dominguez's demeanor and to assess his credibility, as Dominguez denied or explained away his prior inconsistent statements (91RT 9689-9697, 9705-9709), answered questions about his prior crimes and the day of his arrest (92RT 9767-9785), or simply sat silent in response to questions. Dominguez's behavior -- through his intermittent answers amid the failure to provide answers to other questions -- gave the jurors a basis for judging the credibility of Dominguez's prior statements and prior testimony.

Additionally, Dominguez's silence, which appellant claims was harmful to his case (see AOB 223), was, in fact, beneficial, because it provided the ammunition for extensive impeachment by appellant's counsel. As the trial court recognized, there was a wealth of information that got before the jury to impeach Dominguez. (94RT 10164.) Appellant's counsel cross-examined Dominguez about his bias, motive, and credibility. (See, e.g., 90RT 9503-9507 [Dominguez shoots Craig Miraldo and Sherry McDowell], 9524-9535, 9572-9581 [Dominguez's plea agreement was more favorable than what was stated at the plea hearing], 9588-9594 [Dominguez runs away from police officers, knocks a man unconscious in the process, and is never charged for this behavior], 9599-9601 [just two weeks after stating at the plea hearing that he was involved in the planning of the contract killings of the Woodmans, Dominguez testifies that he did not know anyone would be killed], 9605-9608 [in preparation of prior testimony, Dominguez listens to tapes of prior statements to keep his story straight], 9618-9624 [there were inconsistencies in Dominguez's prior statements and prior testimony regarding the events before the murders]; 92RT 9763-9765 [Dominguez

gives wrong directions to officers during the April 26 travel videotape].) As the trial court aptly summarized: "I will say . . . by having watched Mr. Dominguez those eight or nine days on the stand, I believe that his credibility was substantially impeached by all of the cross-examination engaged in by counsel." (94RT 10164-10165.) Under these circumstances, appellant was not deprived of his opportunity for effective cross-examination.

Appellant does not address *Owens* or the cases which apply its holding. Instead, appellant appears to rely predominantly upon *People v. Rios, supra,* 163 Cal.App.3d 852, a case which pre-dates *Owens*. (See AOB 217-224.) Even assuming the validity of the analysis in *Rios*, as stated previously, *Rios* is distinguishable. There, with the jury present, each of the two witnesses at issue testified to his name. (*Id.* at pp. 860-861.) One of the witnesses also gave his age. (*Ibid.*) Both of the witnesses, thereafter, refused to answer any further questions. (*Ibid.*) The *Rios* court found the jurors had no basis to evaluate the truth of the witnesses' prior statements. (*Id.* at p. 866.) In contrast, here, Dominguez provided extensive testimony on direct examination and on cross-examination by counsel for Robert Homick and also answered some questions from appellant's counsel. Unlike in *Rios*, the jury here had a basis for evaluating the truth of Dominguez's prior statements and prior testimony.

Appellant also claims that the playing of the videotape of Dominguez's police interview amounted to direct examination with no cross-examination. (AOB 208.) The claim has no merit. As the trial court explained, the videotape was proper impeachment evidence. Dominguez had denied everything on the tape. Also, the tape impeached Dominguez's claim that he had been coerced by the police into making his statement. (88RT 9258-9259.)

Additionally, contrary to appellant's assertion (AOB 221-222), the trial court did not give the prosecutor and counsel for Robert Homick an unfair advantage in the manner in which they examined Dominguez. The prosecutor and Robert Homick's counsel properly impeached Dominguez, whereas counsel for appellant sometimes did not follow up in his questions with the impeaching evidence. (See, e.g., 90RT 9511-9512, 9517-9521.) The trial court here placed no limits on the scope and duration of cross-examination by counsel for appellant.

Finally, to the extent appellant is also alleging a due process violation based on the federal government's refusal to grant Dominguez immunity in his federal contempt prosecutions in order to facilitate Dominguez's examination in this case (AOB 222-223), appellant was not denied a fair trial. (See *People v. Williams* (2008) 43 Cal.4th 584, 622 ["The grant of immunity is an executive function, and prosecutors are not under a general obligation to provide immunity to witnesses in order to assist a defendant."]; *id.* at p. 624 ["Defendant also refers to federal authority that characterizes as a due process violation a prosecutor's refusal to grant immunity to a defense witness when the refusal was undertaken 'with the deliberate intention of distorting the fact-finding process.' [Citations.] We note that these authorities discuss prosecutorial interference with defense witnesses, whereas [the witness in this case] was a prosecution witness."].)

In sum, no constitutional error occurred in the cross-examination of Dominguez. For the same reasons, the claim that the court erroneously denied appellant's motion to strike Dominguez's testimony should be rejected.

D. Appellant Was Not Prejudiced by Dominguez's References to Polygraph Examinations

Before Dominguez took the stand, the trial court instructed him not to refer to the polygraph examination that he had taken. (85RT 8922-8924.) A few days later, after Dominguez refused to testify any further, the parties questioned Dominguez outside the presence of the jury about his refusal to testify. During this hearing, Dominguez talked about various polygraph examinations that he had taken. (87RT 9094-9120.) Shortly thereafter, counsel for Neil Woodman expressed concern that Dominguez would refer to polygraph tests in his testimony before the jury. The court shared the concern but said that the matter could be resolved with an instruction to the jury. (87RT 9122-9125.) During the direct examination which followed, Dominguez first answered questions, then sat mute, and then eventually referred to a polygraph examination in nearly all of his answers. (87RT 9134-9152.)

The trial court struck these references and instructed the jury: "Ladies and gentlemen, there is no issue of polygraph in this case although Mr. Dominguez would like to create such an issue." (87RT 9152.) The court said: "The jury will please disregard any such reference." (87RT 9153.) Later, after conferring with counsel,[81] the court instructed the jurors as follows:

> With respect to polygraphs or lie detectors, you are instructed that polygraphs have been proven to be unreliable; therefore, evidence concerning whether a person took or offered

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[81] Contrary to appellant's contention (AOB 232), the trial court did not express doubt that any admonition would be helpful. Rather, the court expressed concern about how to word an instruction, because Dominguez's polygraph references were not communicating any information to the jury. (87RT 9148.)

> to take, or passed or failed a polygraph or a lie detector test is not admissible in any criminal proceeding. Whether one passed or failed a polygraph exam does not mean that that person either lied or told the truth.
>
> Statements concerning any such tests by Mr. Dominguez are irrelevant in this case, and you are instructed to disregard them.

(87RT 9183-9184.) Dominguez, however, continued to refer to polygraph examinations. The court granted the motions to strike these references. (87RT 9184-9229.) At one point, the court said that it had counted 95 references to polygraph examinations during the direct examination. (88RT 9260.) Dominguez did not refer to polygraph examinations on cross-examination.

Appellant now argues he was prejudiced, in violation of his federal constitutional rights, by Dominguez's references to polygraph examinations. (AOB 228-233; see also AOB 223.) In support of his argument, appellant cites cases where a party sought admission of polygraph evidence. (AOB 230-231, citing *In re Aontae D.* (1994) 25 Cal.App.4th 167, and *People v. Espinoza* (1992) 3 Cal.4th 806.)

Here, of course, no party sought admission of polygraph evidence. Also, the trial court instructed the jury that such evidence was unreliable and should be disregarded. This Court has stated: "When defendant's objections are sustained and the court admonishes the jury to disregard the improper comments, we assume the jury will follow the admonishment and any prejudice is avoided." (*People v. Mendoza* (2007) 42 Cal.4th 686, 702 [during the prosecutor's cross-examination of the defense psychiatrist, the prosecutor mentioned the defendant's prior arrests without first seeking the court's permission; there was no prejudice because the trial court sustained the defendant's objection and instructed the jury to disregard the questions and statements]; *People v. Lucero* (2000) 23 Cal.4th 692, 718 [the

defendant called a lieutenant to testify regarding the defendant's demeanor during the interrogation, and the lieutenant mentioned that the defendant had ended the interrogation by invoking his right to counsel; any possible prejudice was negated when the trial court struck the testimony and told the jury to disregard it]; *People v. Keenan* (1988) 46 Cal.3d 478, 525 [in the penalty phase, a witness testified about an elaborate robbery plan that he and the defendant had once concocted but had never carried out, although the evidence was excludable on the ground that the defendant received no advanced notice the prosecution might present it; there was no prejudice because the trial court struck the testimony and gave an appropriate admonition].)

Additionally, the nature and volume of Dominguez's references to polygraph examinations would have informed the jurors nothing more than that Dominguez was being a difficult witness. (See, e.g., 87RT 9146 ["The answer is found in the polygraph, like I told you."], 9185 ["That's in the fourth polygraph test I took."], 9186 ["That was in the 5th polygraph test."], 9187 ["Ask the polygraph."], 9188 ["If every polygraph I take, I take so many, I flunk some, I pass some."], 9188 ["Check the record in the polygraph."], 9190 ["I recall the polygraph."], 9192 ["Ask the polygraph. It will tell you."], 9194 ["The polygraph explains that."], 9196 ["Let's see the polygraph test."], 9204 ["Ask the polygraph test."], 9209 ["What we have here is 5 polygraph tests."], 9211 ["Ask the polygraph."], 9211 ["We would have to check the polygraph on that."], 9212 ["That's what we asked the polygraph."], 9213 ["Ask the polygraph."], 9213 ["The polygraph answers all your questions."], 9216 ["Ask the polygraph test."], 9216 ["All I remember at this point is the polygraph, so just add that to all your questions."], 9219 ["Ask the polygraph, it will tell you."], 9220 ["Ask the polygraph."], 9227 ["On the polygraph test."], 9229 ["Ask the polygraph test."].)

In light of the foregoing, there was no prejudice, and appellant's constitutional rights were not violated.

E. The Trial Court Properly Allowed the Prosecution to Play the Videotape of the March 13, 1986, Police Interview of Dominguez

At the end of the first day of Dominguez's testimony, the prosecutor noted that Dominguez had testified several times that he had been coerced into giving the March 13, 1986, statement to the police. (See, e.g., 85RT 8938-8939, 8952, 8953-8954, 8955, 8960, 8976, 8982, 8984, 8987-8989, 8990-8993, 8999-9000, 9001, 9003, 9004, 9006-9007.) The prosecutor said that the videotape of that interview showed no coercion. Thus, the prosecutor requested permission to play the tape to the jury. The court granted the request. (85RT 9008-9017.) At the close of direct examination, the tape was played for the jury, and the court informed the jury that the tape was being played for two purposes: (1) to determine whether Dominguez was coerced by the police when he gave the statement; and (2) to determine whether, if at all, it impeached Dominguez's testimony in any respect. (88RT 9266.)

Appellant now argues that he was prejudiced by the playing of the videotape, because the prosecutor had already read extensive portions of the March 13 interview during Dominguez's direct examination. (AOB 233-236.) Respondent disagrees.

Initially, as appellant acknowledges (AOB 234), he did not object to the playing of the tape on this ground in the court below. Accordingly, he has forfeited his claim of error on appeal. (Evid. Code, § 353.)

In any event, the claim has no merit. The primary purpose behind playing the March 13 videotape was to impeach Dominguez's testimony that he had been coerced by the detectives into giving his statement. That purpose was not, and could not have been, achieved when the prosecutor

read the various excerpts of the interview. Unlike the prosecutor's recitation from a cold transcript, the videotape allowed the jury to observe Dominguez's demeanor and interaction with the police. Thus, in this manner, this case is distinguishable from *People v. Stevenson* (1978) 79 Cal.App.3d 976, 990, where the Court of Appeal found that undue emphasis was given to evidence when the jurors were given transcripts to follow during the reading of the former testimony of the victims. (See AOB 234.) Here, there was no undue emphasis, because the impeachment value in playing the tape was, in large part, different than the impeachment value in reading various excerpts of Dominguez's interview.[82]

Appellant also argues that it was improper for the trial court to permit the playing of the videotape, because Dominguez had not denied *all matters* said during the interview. (AOB 235.) The record reveals that the prosecutor extensively examined Dominguez about his statements on the videotape, and Dominguez claimed that he did not recall making the statements. (See, e.g., 85RT 8952, 8955, 8960, 8974-8976, 8982-9004; 86RT 9039-9043.) Also, Dominguez, in effect, denied nearly everything on the tape, because he testified that he had not been to Los Angeles. (85RT 8952-8953.) In any event, the court focused the attention of the jurors and properly instructed them that the tape was being played "to determine whether, if at all, it impeaches Mr. Dominguez in any respect." (88RT 9266.)

In sum, the trial court properly allowed the prosecution to play the videotape of Dominguez's March 13 statement to the police.

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[82] Appellant argues that the error was compounded when the prosecutor played the videotape during closing argument. (AOB 235.) This reasoning would preclude the prosecutor from referring to any evidence during closing argument.

F. Even If the Trial Court Erred in Admitting Dominguez's Prior Statements and Prior Testimony into Evidence, the Error Was Harmless

Even assuming error in the admission of Dominguez's prior statements and prior testimony, the error was harmless under either *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], or *People v. Watson* (1956) 46 Cal.2d 818, 836.

Stewart Woodman provided damning evidence against appellant. He testified that he and his brother Neil hired appellant to kill their parents. Stewart described how appellant advised Stewart and Neil to "put an end" to their problems with their parents and told them that his price tag for the deed would be $40,000 or $50,000. Stewart testified that appellant collected and recorded information about Gerald and Vera Woodman and repeatedly assured Stewart that the contract on the lives of his parents would be fulfilled. Stewart also testified that appellant's brother Robert collected $55,000 from Stewart and Neil for the contract killings. (102RT 11684-11693; 103RT 11708-11709, 11716; 104RT 11957-11958; 107RT 12484-12486.)

Appellant suggests that Stewart Woodman's testimony should be disregarded, because the jury did not reach verdicts on Neil Woodman. (AOB 207.) As set forth in the Statement of Facts, Stewart provided a great deal of incriminating evidence against his brother Neil, who was a codefendant of appellant at trial. Appellant reasons that, because the jury was unable to reach a verdict as to Neil, the jury must have had doubts about Stewart's testimony and, thus, the case must rise or fall with the testimony of Dominguez. (AOB 207.) Appellant builds on sand. The assertion that the jury must have failed to convict Neil because it rejected Stewart's testimony is nothing but rank speculation. Stewart provided

solid, undeniable evidence that appellant orchestrated and was the mastermind behind the Woodman murders.

In addition to Stewart's testimony, the prosecution's evidence more generally showed that appellant was stalking Gerald and Vera for over a year. (79RT 7680-7685; 100RT 11260-11267; Peo. Exh. 22.) The evidence also showed appellant's preparation for the murders: two weeks before the murders, appellant purchased walkie-talkies (82RT 8299-8300, 8322-8325; 83RT 8474); on the day Stewart learned where his parents would be on Yom Kippur, appellant purchased airline tickets to Los Angeles (80RT 7869-7873, 7933; 81RT 8002-8007, 8036); on the day before the murders, appellant obtained "ammo" (82RT 8336-8338); appellant's daily reminder book for September 24 (the day before the murders) had a notation to Max Herman's address (96RT 10384-10389); and in the days before the murders, appellant dealt with the problems with the walkie-talkies (82RT 8339-8347, 8413-8415; 84RT 8674, 8700-8701).

Finally, as set forth more fully in the next argument, even assuming the court should have found Dominguez to be an unavailable witness, Dominguez's prior testimony from the first preliminary hearing would have been admitted into evidence under the former testimony exception to the hearsay rule. In that circumstance, the defense would have been unable to impeach Dominguez with his various prior statements and prior testimony (e.g., statements to the police, testimony during the second preliminary hearing), and Dominguez's testimony from the first preliminary hearing -- in conjunction with Stewart Woodman's testimony and the prosecution's case more generally -- would have secured a conviction and a death verdict.

II. THE TRIAL COURT COULD HAVE FOUND MICHAEL DOMINGUEZ UNAVAILABLE, AND DOMINGUEZ'S TESTIMONY FROM THE FIRST PRELIMINARY HEARING WOULD HAVE BEEN ADMISSIBLE UNDER THE FORMER TESTIMONY EXCEPTION TO THE HEARSAY RULE

As argued at the end of the previous argument, even assuming the trial court should have found Dominguez unavailable, Dominguez's prior testimony from the first preliminary hearing would have been admissible under the former testimony exception to the hearsay rule. That testimony -- together with Stewart Woodman's testimony and the prosecution's case more generally -- would have secured appellant's conviction and the death verdict.

In argument II, appellant attacks a segment of this harmless-error argument. He argues that any harmless-error argument, resting on the ground that Dominguez's testimony from the first preliminary hearing could have been admitted under the former testimony exception to the hearsay rule, must fail. He reasons that (1) the trial court was precluded from making a finding of unavailability, and (2) he was prejudiced by the admission of Dominguez's statements to the police and Dominguez's testimony from the second preliminary hearing. Appellant argues that any other holding would deprive him of his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 238-252.) He is mistaken.

Evidence Code section 1291, the former testimony exception to the hearsay rule, provides, in relevant part:

> (a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:
>
> (1) . . .

> (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

Appellant and respondent agree that, if the trial court had found Dominguez unavailable, then Dominguez's testimony from the first preliminary hearing would have been admissible at trial, but Dominguez's statements to the police and his testimony from the second preliminary hearing would have been inadmissible under this section. (See AOB 238-239.) However, appellant and respondent disagree on (1) whether the trial court was precluded from making a finding of unavailability and (2) whether appellant was prejudiced by the admission of Dominguez's statements to the police and his testimony from the second preliminary hearing.

As to the first of these two points, appellant argues that the trial court could not have found Dominguez unavailable, because the prosecution caused Dominguez's unavailability. More specifically, appellant claims that the prosecution failed to honor the plea agreement that it had with Dominguez by failing to house Dominguez in a prison of his choice. (AOB 243-246.) Appellant is mistaken. The record reflects that Dominguez's refusal to answer questions at trial stemmed, not from Dominguez's dissatisfaction with the People's failure to honor the plea bargain, but from Dominguez's concern about the federal contempt proceedings against him in Nevada.

As the trial court recognized, after it denied Dominguez's motion to withdraw his pleas, Dominguez was willing to testify and did so for about a day. As the court also recognized, when Dominguez changed his mind about testifying, there was no indication that it had anything to do with the plea bargain. (87RT 9174-9176.) In fact, when Dominguez first refused to

answer questions on direct examination and asked to talk to a lawyer, the court allowed Dominguez to consult with his attorney (Victor Salerno). (86RT 9059, 9067.) The next day, Dominguez explained to the court that he had two criminal contempt charges pending against him in Nevada, that each contempt charge carried an 18-year prison sentence, and that his new attorney on those matters (someone other than Salerno) had advised him not to testify in California. Attorney Salerno then informed the court that Dominguez had two pending federal cases in Nevada, stemming from his refusal to testify against the defendants in federal court. The court found that nothing Dominguez testified to in this case would have any bearing on whether he was guilty of contempt for refusing to testify in another proceeding. However, Dominguez remained adamant that he did not want to testify any further, based on those contempt proceedings. (87RT 9080-9094.)

Later on, after Dominguez sat silent during a portion of the cross-examination by appellant's counsel, the court addressed Dominguez outside the presence of the jury about his silence. Dominguez again said that his attorney on the Las Vegas matter had advised him not to answer questions. (90RT 9538-9542.) Appellant's counsel suggested that, in order to alleviate Dominguez's concerns about the federal prosecutions, the prosecutor contact the United States Attorney's Office in Nevada in order to seek use immunity for Dominguez in the federal cases. (90RT 9542.) The court asked Dominguez: "If the federal prosecutor got a federal court judge to sign an order saying that your testimony in this proceeding will not be used against you in anyway [sic] in a federal proceeding, would you then be willing to answer questions and testify?" (90RT 9544.) Dominguez responded: "Yeah. That's a thought, yeah." (90RT 9544.) The parties were, thereafter, unable to secure the immunity. However, these events

reveal that Dominguez's refusal to testify had nothing to do with the failure to house Dominguez in a prison of his choice.

Moreover, contrary to appellant's contention (AOB 240), the trial court found that the prosecution had not caused Dominguez to be unavailable. The court stated:

> With respect to any failure to live up to the bargain on the part of the prosecution, I read Mr. Dominguez's lengthy motion to withdraw his plea, which set forth all of his allegations concerning the failure of the prosecution to live up to the bargain, and I found no credible basis to find any such failure on the part of the prosecution.
>
> In fact, interestingly, when Mr. Dominguez was questioned by the defense this morning in that regard, he was asked questions, almost quotations, lifted from the declaration he filed in support of his motion, which he now denies as having been a problem.

(87RT 9166.)[83]

Thus, assuming the trial court should have found Dominguez unavailable, it was not impeded from doing so based on the actions of the prosecution. Consequently, the cases cited by appellant are inapplicable. (See, e.g., *People v. Louis* (1986) 42 Cal.3d 969, 991 [the prosecution has a duty to use reasonable means to prevent a witness from becoming absent].)

Turning to appellant's second point, appellant contends that, even if the record supports a finding of unavailability, he was prejudiced by the admission of many prior inconsistent statements (e.g., Dominguez's

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[83] At a hearing outside the presence of the jury, defense counsel asked Dominguez if his primary reason for refusing to continue with his testimony was that the prosecution had not lived up to what it had promised. Dominguez responded, "No." (87RT 9100-9101.) Referring to the lengthy sentences that he was facing in the federal contempt proceedings, Dominguez testified: "It's in my best interest not to say anything." (87RT 9103.)

statements to the police, Dominguez's testimony at the second preliminary hearing) that did not constitute former testimony. (AOB 248-252.) Respondent disagrees. Assuming arguendo error in the admission of that evidence under the prior inconsistent statements exception to the hearsay rule, the prejudicial impact of that evidence was minimal. Like the prosecution, the defense extensively used this evidence at trial to impeach Dominguez, by pointing out inconsistencies in Dominguez's various statements and prior testimony.

Appellant argues that he was prejudiced by the admission of the videotapes of his statements to the police, because they were more coherent and persuasive than any evidence admissible as former testimony. (AOB 249.) However, as evidenced by the transcript of the March 13, 1986, police interview of Dominguez, Dominguez was not an articulate witness. (9Supp. 2CT 375-444.) Thus, the actual evidence the videotape conveyed was not more coherent than the transcript evidence constituting former testimony. Additionally, the big bulk of the prosecutor's examination of Dominguez was based on Dominguez's testimony from the first preliminary hearing, which was properly admissible under Evidence Code section 1291. That evidence, as set forth in the Statement of Facts, persuasively conveyed the facts surrounding the murders to the jury.

Appellant also argues that he was prejudiced by the "choppy" manner in which the testimony admissible under the former testimony exception was presented to the jury. (AOB 250; see also AOB 208, 223.) Although the evidence from Dominguez was a patchwork quilt of Dominguez's former testimony, there is no indication in the record that the jury could not follow the evidence presented on either direct examination or cross-examination. Also, appellant was not prejudiced by the prosecutor's objections to various questions asked by appellant's counsel, particularly

because the objections were articulated outside the presence of the jury. (AOB 250.)

In sum, even assuming arguendo that the trial court was required to find Dominguez unavailable, the court was not precluded by the actions of the prosecution from making that finding. Dominguez's testimony from the first preliminary hearing would have then been admitted into evidence under the former testimony exception to the hearsay rule. The defense would have been unable to impeach Dominguez with his various prior statements and prior testimony (e.g., statements to the police, testimony during the second preliminary hearing). And Dominguez's testimony from the first preliminary hearing -- together with Stewart Woodman's testimony and the prosecution's case more generally -- would have secured a conviction and a death verdict.

III. MICHAEL DOMINGUEZ'S TESTIMONY WAS NOT RENDERED INADMISSIBLE BY THE TERMS OF HIS PLEA BARGAIN

In the last of appellant's challenges to Dominguez's testimony, appellant attacks the constitutional validity of Dominguez's plea bargain based upon *People v. Medina* (1974) 41 Cal.App.3d 438. (AOB 253-274.) In *Medina*, accomplices to two murders testified for the prosecution under orders granting them immunity on condition they not "'materially or substantially change [their] testimony from [their] tape-recorded statement already given to law enforcement officers. . . ." (*Id.* at p. 450.) The Court of Appeal acknowledged that a grant of immunity could be conditioned on a requirement that the witness testify fully and fairly to the facts, but held that the defendant is denied a fair trial when the terms of the immunity place the witness "under a strong compulsion to testify in a particular fashion." (*Id.* at p. 455.) In the case before it, the court found the immunity agreement denied the defendant a fair trial and the right to meaningful cross-examination. (*Id.* at pp. 450, 456.)

Relying upon *Medina*, appellant argues that Dominguez's testimony was inadmissible because of the nature of the plea agreement he made to cooperate with the prosecution. Specifically, appellant argues that the agreement that Dominguez made with the prosecution put Dominguez in a position in which any material deviation in his testimony, as compared to his earlier statements to the authorities, would abrogate the bargain and subject him to capital prosecution. Appellant further argues that Dominguez's plea agreement deprived appellant of his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 253-274.)

Respondent disagrees. Dominguez's plea agreement did not require that Dominguez testify in accordance with his police interviews, regardless of their truth. The plea agreement required only that Dominguez testify truthfully. Accordingly, the agreement did not deny appellant his constitutional rights.

A. Relevant Proceedings

1. Dominguez's plea agreement

Several months after the Woodman murders, on March 2, 1986, Michael Dominguez was arrested in Las Vegas, Nevada, for possession of cocaine, being an ex-felon in possession of a gun, and parole violations. (88RT 9275; 109RT 12723-12726.) Soon thereafter, while he was in custody at the county jail, Dominguez saw television news coverage that he had been "indicted" in California, along with the other defendants, for the Woodman murders. (88RT 9276-9278.) Dominguez told his attorney that he wanted to talk to the LAPD. (88RT 9282.) On March 12, 1986, Dominguez met with the LAPD, the Las Vegas police, and the FBI. (88RT 9283.) During this meeting, Dominguez learned that the various law enforcement agencies were aware of numerous crimes in which he was

involved, including arsons in Texas and Hawaii, the Tipton murders in Nevada, and two additional homicides in Nevada. (88RT 9288, 9293, 9295, 9300-9301.)

The next day, on March 13, 1986, there were two interviews of Dominguez. The first interview was conducted by Detectives Holder and Crotsley of the LAPD, and the second was conducted by Detectives Leonard and Dillard of the Las Vegas Metropolitan Police Department. (119RT 14591-14592; 9Supp. 2CT 375-546.)

At the beginning of the first interview, Detective Holder said that no agreements had been made between Dominguez and members of the LAPD, "other than an understanding that if [Dominguez] is fully cooperative, tells the truth and testifies on behalf of the People of the State of California in this matter, that the two officers who are present will go to bat for him in California and try to get him as good a deal as they possibly can . . . in a court of law in California." (9Supp. 2CT 377.) Dominguez was, thereafter, interviewed by the LAPD detectives about the Woodman murders. (9Supp. 2CT 375-444.) During the interview, Dominguez denied being the shooter. (9Supp. 2CT 429.) He described his role as being the lookout with the walkie-talkies a distance away from the Woodman residence and did not identify the shooter. (9Supp. 2CT 397, 402, 420.)

At the beginning of the second interview by the Las Vegas police, Steven Stein, counsel for Dominguez on the Las Vegas offenses, stated the following:

> I have spoken to [Dominguez] at the Clark County Jail. . . . He has stated to me that he wished to cooperate with [the] Los Angeles Police Department and the Las Vegas Metropolitan Police Department fully. . . . He is doing so with the understanding between myself, Detective Leonard and Bob Teuton from the District Attorney's Office [of Clark County] who was present in the room, that if [Dominguez] was not the actual shooter in any alleged or any incident under investigation

here regarding this murder, or these murders, and if he is fully cooperative and tells the truth, that the prosecutorial authorities and the investigating agency, Metro, will do what they can to have any crime to which he will plead guilty in the future, be such so that his sentence will be approximately the same type of sentence as was agreed upon tentatively with the Los Angeles Police Department. That being that somewhere, approximately eight to twelve to fifteen years down the road, uh, [Dominguez] would be released on parole assuming he is completely honest forth right [sic] and testifies for the [P]eople of the State of California and the [P]eople of the State of Nevada, uh, and is not in fact the shooter in any of these murders. That is not a binding agreement, that is just an understanding that we have.

(9Supp. 2CT 447-448.) Counsel repeated: "And that is the understanding we have. Non-binding, just an understanding." (9Supp. 2CT 448.) Dominguez agreed with these comments. (9Supp. 2CT 448.) Dominguez was, thereafter, interviewed by the Las Vegas police about the Tipton murders and numerous other crimes that he and appellant committed in Nevada. (9Supp. 2CT 445-546.)

A few months later, on May 9, 1986, Dominguez entered his guilty pleas in California. (12Supp. 1CT 247-250.) In the course of entering the pleas, the prosecutor informed Dominguez that, if he went to trial and was convicted of all charges, he would be subject to the death penalty or life imprisonment without the possibility of parole. (12Supp. 1CT 241.) Also, the following exchange took place between the prosecutor and Dominguez:

Q. Now, also as part of your plea bargain, you have been advised that you will be called as a witness to testify against the other co-conspirators in this case.

A. Right.

Q. Okay. Do you agree to do that?

A. Right.

Q. You also have been advised that the People expect your testimony to be truthful and honest and accurate.

Do you understand that?

A. Right.

Q. If the District Attorney's Office or myself finds out that you've lied in any material way or that you commit perjury when you do testify, then all of our agreements will be declared null and void. That means that your plea agreement that you've worked out would be set aside and you would be brought back to municipal court to have a preliminary hearing on these charges. Do you understand that?

A. Right.

(12Supp. 1CT 246-247.)[84]

2. Challenges to Dominguez's testimony, based on Dominguez's plea agreement

Prior to opening statements, appellant's counsel raised several issues regarding Dominguez's testimony. One argument he made was that Dominguez's plea bargain might violate appellant's due process rights. (70RT 5749.) Counsel for Robert Homick and counsel for Neil Woodman elaborated that Dominguez's testimony might be coerced, because Dominguez was told that the plea agreement was available to him if he was not the shooter in the California or Nevada cases. Counsel for appellant and counsel for Neil Woodman said that this issue had not been raised in

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[84] During this hearing, the prosecutor placed on the record other representations that he had made to Dominguez: that, whatever charges Dominguez pleaded to in Las Vegas, the State of Nevada would run the sentence concurrent to the California sentence; that pending charges in Texas and Hawaii against Dominguez would probably be handled through the federal system and the sentence imposed would run concurrent to the California sentence; and that "after you [Dominguez] clear up this case, the ones in Nevada and any federal matters, you will be housed in an institution of your choice, perhaps either the Nevada system or a federal system, and this is being done for your own security to keep you separate and apart from the other co-conspirators in this case." (12Supp. 1CT 248-249.)

prior proceedings, because the information regarding the plea agreement had been withheld from the defense. (70RT 5753, 5759.) The court determined that the prosecutor should not refer to the expected testimony of Dominguez in his opening statement and deferred ruling on the various issues regarding Dominguez's testimony. (70RT 5759, 5764, 5768.)

About one month later, the challenges to Dominguez's testimony were revisited. Citing *People v. Medina, supra,* 41 Cal.App.3d 438, counsel for Robert Homick argued that Dominguez's plea agreement was coercive, because it was contingent on Dominguez not being the shooter. Counsel argued that the only evidence that Dominguez was not the shooter was Dominguez's own statement. (84RT 8768-8772.) Counsel for appellant referred to the exhibits attached to the motion to exclude Dominguez's former testimony and argued that Dominguez's plea agreement was conditioned on Dominguez testifying to a certain set of facts. Counsel argued that, if Dominguez were to change his testimony and admit that he was the shooter, the District Attorney's Office would consider that to be untruthful and the plea agreement would be vacated. (84RT 8772-8774, 8785-8787.) Counsel also argued that the transcript of the plea agreement reflected that Dominguez was required not just to be truthful in his testimony, but also that he had always been truthful, thus precluding any material deviation from Dominguez's statement to the police. (84RT 8792-8793.)

The court said that its initial reaction was that the plea agreement was not coercive. The court explained that there were many specific and precise facts to which Dominguez could testify under the plea agreement. (84RT 8777.) The court then took the matter under submission. (84RT 8794.) Later that day, citing *People v. Fields* (1983) 35 Cal.3d 329, and *People v. Johnson* (1989) 47 Cal.3d 1194, the court denied the motion to exclude Dominguez's testimony. (84RT 8814-8816.)

B. Dominguez's Plea Agreement Did Not Violate Appellant's Constitutional Rights

A prosecutor may grant immunity from prosecution to a witness on condition that he testify truthfully to the facts involved. (*People v. Boyer, supra,* 38 Cal.4th at p. 455; *People v. Garrison* (1989) 47 Cal.3d 746, 768.) However, if the immunity agreement places the witness under a "strong compulsion" to testify in a particular fashion, the testimony is tainted by the witness's self-interest and is, thus, inadmissible. (*People v. Boyer, supra,* 38 Cal.4th at p. 455, citing *People v. Medina, supra,* 41 Cal.App.3d at p. 455.)

"Such a 'strong compulsion' may be created by a condition '"that the witness not materially or substantially change her testimony from her tape-recorded statement already given to . . . law enforcement officers."'" (*People v. Boyer, supra,* 38 Cal.4th at p. 455, citing *People v. Medina, supra,* 41 Cal.App.3d at p. 450.) "What is improper . . . is not that what is expected from the informant's testimony . . . will be favorable to the People's case, but that the testimony must be confined to a predetermined formulation or rendered acceptable only if it produces a given result, that is to say, a conviction." (*People v. Garrison, supra,* 47 Cal.3d at p. 769, quoting *People v. Meza* (1981) 116 Cal.App.3d 988, 994.)

In *People v. Fields, supra,* 35 Cal.3d 329, defense counsel elicited from a prosecution witness that her immunity was conditioned on testimony consistent with her prior statement. (*Id.* at p. 359.) On redirect, the witness testified that her prior statement was truthful, that the prosecutor had asked her to testify truthfully, and that the prosecutor never asked her to testify to a certain story. (*Id.* at p. 360.) This Court found that the witness's testimony showed, at most, that she understood that she was obligated to recount her prior statement because it was the truth. (*Id.* at pp. 360-361.) The Court found the evidence insufficient to conclude that the grant of

immunity required the witness to testify in accord with her prior statement, regardless of its truth. (*Id.* at p. 361.)

In *People v. Johnson, supra,* 47 Cal.3d 1194, the terms of the plea bargain required that Miller Hodges testify truthfully if called as a witness at the preliminary hearing and trial of defendant and Fields. (*Id.* at p. 1229.) In describing the agreement, the prosecutor stated: "[I]t's also conditioned of course, on the understanding that what he has told the Milpitas Police Department in previous statements is in fact the true testimony that he -- as he understands it --" (*Ibid.*) This Court found the agreement was that Hodges testify truthfully, and the prosecutor's assertion that he understood the truth to be what Hodges had told the police was not a term of the bargain. (*Ibid.*)

In *People v. Garrison, supra,* 47 Cal.3d 746, Gary Roelle's plea agreement, as disclosed at the preliminary hearing, provided that Roelle would testify truthfully at Garrison's trial. (*Id.* at p. 768.) It also provided: "As a further part of this plea agreement is that [sic] he has already truthfully stated to the investigating detectives what happened in this case." (*Ibid.*) This Court rejected Garrison's argument that Roelle's bargain was conditioned on the truthfulness of his prior statement. (*Id.* at p. 770.) The Court explained: "[T]he record does not demonstrate either that the plea bargain required Roelle to testify in accord with his statement regardless of its truth, or that Roelle so understood the agreement." (*Ibid.*) Instead, the Court observed: "[T]he record reflects that the district attorney and Roelle's counsel sought to ensure that the record reflected the factual basis for their belief that permitting Roelle to plead guilty to the lesser charges would be appropriate in light of their understanding of his actual involvement in the offenses." (*Ibid.*) The Court held: "It is a rare case indeed in which the prosecutor does not discuss the witness's testimony with him beforehand and is assured that it is the truth. However, unless the

bargain is expressly contingent on the witness sticking to a particular version, the principles of *Medina, supra,* 41 Cal.3d 438 . . . are not violated." (*Id.* at p. 771.)

In *People v. Boyer, supra,* 38 Cal.4th 412, two witnesses -- Kennedy and Cornwell -- were granted immunity on condition that they testify truthfully. (*Id.* at pp. 455, 457.) The agreements also recited that the witnesses had represented that their testimony would be consistent with specific recorded statements made to the police. (*Id.* at p. 455 [Kennedy's immunity agreement stated: "the witness has represented that [his] testimony . . . will be in substance as follows: Consistent with the tape recorded statements given to Fullerton Police Department, Detective Lewis, on December 17, 1982, . . . and December 20, 1982, . . . [t]ranscriptions of which are attached hereto. . . ."; *id.* at p. 457 [Cornwell's immunity agreement stated: "the witness represented that the testimony of the witness will be *truthful and* in substance as follows: consistent with the statements and information given to the Fullerton Police Department Investigation Officers in the attached reports. . . . (Italicized words added by handwritten interlineation.)"].)

In *Boyer*, this Court rejected the contention that the witnesses' testimony had been coerced to follow the prior statements. (*People v. Boyer, supra,* 38 Cal.4th at pp. 456-457.) This Court stressed that the witnesses were expressly obligated only to testify in accordance with the truth. (*Id.* at p. 456.) The Court found that the portions of the immunity agreements reciting expectations that their testimony would accord with their prior statements reflected the witnesses' and the prosecution's understanding that those statements had been truthful, but there was no agreement requiring the witnesses to reiterate the statements, regardless of their truth. (*Ibid.* ["[T]he agreement simply reflected the parties' mutual understanding that the prior statements were the truth, not that Kennedy

must testify consistently with those statements regardless of their truth."]; *id.* at p. 457 ["Cornwell's grant of immunity . . . simply reflected the parties' mutual understanding that the information the witness had previously supplied to the police was truthful, not that the witness had to iterate her prior statements, regardless of their truth."].) The Court, thus, concluded that the testimony had been properly admitted. (*Id.* at pp. 456-457.)

Most recently, in *People v. Reyes* (2008) 165 Cal.App.4th 426, witness Vidales, who was originally a defendant in the case, reached a plea agreement with the prosecution. (*Id.* at p. 432.) The plea agreement provided that Vidales would testify truthfully and completely at all proceedings concerning the victim's death. (*Ibid.*) Another provision of the agreement, referred to as the "interview provision," stated the following: "If we discover that you did not tell us the truth already, that you have already not told us the truth about a material significant matter in your . . . third interview . . . conducted by Detective[s] . . . you will be in breach of this agreement. . . ." (*Id.* at pp. 432-433.) Reyes argued that, even though the interview provision did not direct Vidales's testimony, it threatened to undo his plea bargain if his third interview were found to have been materially untruthful, in effect coercing Vidales to testify in accordance with the interview. (*Id.* at p. 434.)

The Court of Appeal, Second Appellate District, Division Eight, rejected this argument. The court stated: "This claim is hypothetical and unverifiable. Practically, it is far more likely that Vidales entered into the interview provision because he, like the prosecution, believed his interview was truthful. If that is so, the provision posed no improper compulsion. [Citation]." (*People v. Reyes, supra,* 165 Cal.App.4th at p. 434, citing *People v. Fields, supra,* 35 Cal.3d at p. 361.) Further, the court found that Reyes's claim was at odds with this Court's holdings in *Garrison* and

Boyer, that unless the bargain is "expressly contingent on the witness sticking to a particular version" of facts, *Medina* is not violated. (*People v. Reyes, supra,* 165 Cal.App.4th at pp. 434-435.) The court then concluded that, because the interview provision did not require Vidales to testify in accordance with his interview and because the plea agreement as a whole required only that Vidales testify truthfully, the agreement did not deny Reyes a fair trial. (*Id.* at p. 436.)

Here, the record of Dominguez's plea discloses that the specific bargain, put to Dominguez and accepted by him, was to testify truthfully -- not to testify consistently with his prior statements, regardless of their truth. The plea agreement provided: "You also have been advised that the People expect your testimony to be truthful and honest and accurate." (12Supp. 1CT 246.) Thus, the language of Dominguez's plea agreement stands in sharp contrast to the type of provision found improper in *Medina*. The plea agreement required Dominguez to be truthful, honest, and accurate in his testimony at appellant's trial. Indeed, at trial, Dominguez was impeached with his prior testimony about what the prosecutor had told him during the plea hearing: "'He told me to be truthful and honest.'" (92RT 9803.)

Dominguez's plea agreement also included the following provision: "If the District Attorney's Office or myself finds out that you've lied in any material way or that you commit perjury when you do testify, then all of our agreements will be declared null and void. That means that your plea agreement that you've worked out would be set aside and you would be brought back to municipal court to have a preliminary hearing on these charges." (12Supp. 1CT 246-247.) Focusing on this language exclusively, appellant argues: "If [Dominguez's] testimony materially deviated from the earlier statements, then either Dominguez lied in the earlier statement, or he would be committing perjury in his testimony." (AOB 263.) Thus, appellant concludes, "as long as there was a material deviation, then one or

the other was false and the agreement would be abrogated. . . ." (AOB 263.)

Like in *Reyes*, "[t]his claim is hypothetical and unverifiable." (*People v. Reyes, supra,* 165 Cal.App.4th at p. 434.) As in *Reyes*: "Practically, it is far more likely that [the witness] entered into the interview provision because he, like the prosecution, believed his interview was truthful. If that is so, the provision posed no improper compulsion. [Citation]." (*Ibid.*, citing *People v. Fields, supra,* 35 Cal.3d at p. 361.) Here, the provision of the plea agreement upon which appellant focuses shows, at most, that the parties understood that Dominguez had already told the police the truth in his interview.

Additionally, appellant's argument is at odds with this Court's holdings in *Garrison* and *Boyer*. In *Garrison*, this Court stated: "[U]nless the bargain is *expressly contingent* on the witness sticking to a particular version, the principles of *Medina, supra,* 41 Cal.3d 438 . . . are not violated." (*People v. Garrison, supra,* 47 Cal.3d at p. 771, emphasis added.) In *Boyer*, this Court reiterated this language, emphasizing the words "expressly contingent." (*People v. Boyer, supra,* 38 Cal.4th at p. 456.) Here, Dominguez's plea bargain was not "expressly contingent" on Dominguez "sticking to" the story he had told the police. (*People v. Garrison, supra,* 47 Cal.3d at p. 771.) Dominguez's agreement to testify truthfully was not qualified or restricted with any term regarding his prior statements to the police. And the plea agreement did not direct Dominguez to testify in conformity with his interview.

Appellant argues that his case is "subtly, but crucially" distinguishable from *Boyer*, because the agreements in *Boyer* indicated that the witnesses themselves (Kennedy and Cornwell) had represented that

their prior statements were truthful.[85] (AOB 263-264; see *People v. Boyer, supra,* 38 Cal.4th at p. 455 [Kennedy's immunity agreement stated: "the witness has represented that [his] testimony . . . will be in substance as follows: Consistent with the tape recorded statements given to Fullerton Police Department, Detective Lewis, on December 17, 1982, . . . and December 20, 1982, . . . [t]ranscriptions of which are attached hereto. . . ."; *id.* at p. 457 [Cornwell's immunity agreement stated: "the witness represented that the testimony of the witness will be *truthful and* in substance as follows: consistent with the statements and information given to the Fullerton Police Department Investigation Officers in the attached reports. . . . (Italicized words added by handwritten interlineation.)"].)

The distinction drawn by appellant is so subtle that it is nonexistent. First, this Court in *Boyer* did not find the distinction drawn by appellant to be significant in its analysis. In fact, the Court characterized these provisions as the "*parties' mutual understanding* that the prior statements were the truth." (*People v. Boyer, supra*, 38 Cal.4th at p. 456, emphasis added; see also *id.* at p. 457.) Second, appellant's argument does not survive *Garrison* or *Johnson,* where there was no representation by a witness and the Court found no *Medina* error as a result of comments by prosecutors similar to the one made by the prosecutor here. (See *People v. Garrison, supra,* 47 Cal.3d at p. 768 [the prosecutor stated that a part of the bargain was the following: "As a further part of this plea agreement is that [sic] he has already truthfully stated to the investigating detectives what

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[85] Appellant states: "Thus, in *Boyer,* the agreement only called for the truth and added a notion that the witness had **previously** made the representation that his prior statements had been the truth." (AOB 263-264, emphasis original.) Although appellant emphasizes the word "previously," *Boyer* simply indicates that the written immunity agreements contained the representations of the witnesses. (*People v. Boyer, supra*, 38 Cal.4th at pp. 455, 457.)

happened in this case."]; *People v. Johnson, supra,* 47 Cal.3d at p. 1229 [in describing the agreement, the prosecutor stated: "[I]t's also conditioned of course, on the understanding that what he has told the Milpitas Police Department in previous statements is in fact the true testimony that he -- as he understands it --"]; see also *People v. Reyes, supra,* 165 Cal.App.4th at pp. 432-433 [the prosecutor stated: "If we discover that you did not tell us the truth already, that you have already not told us the truth about a material significant matter in your . . . third interview . . . conducted by Detective[s] . . . you will be in breach of this agreement. . . ."].)

Appellant also suggests that Dominguez's testimony supports the contention that the plea agreement bound Dominguez to testify in a pre-arranged fashion. (AOB 256.) Appellant points to a portion of the record where Dominguez was impeached with prior testimony that he reviewed transcripts of his statements to the police in order to keep his story straight, because he knew that, after he testified, the prosecutor would determine whether he would get to keep his deal. (AOB 256, citing 90RT 9583.) However, Dominguez's prior testimony also reflected the opposite -- that the reason he wanted to keep his story straight was unrelated to the fact that the prosecutor would determine whether he would get to keep his deal. (90RT 9586.) Thus, Dominguez's testimony does not support the contention that the plea agreement bound Dominguez to testify in a pre-arranged fashion.

Appellant also argues that the plea agreement was conditioned on Dominguez not being the actual shooter. (AOB 267-273.) The transcript of the May 9, 1986, hearing setting forth the plea agreement does not mention such a condition. As for Attorney Stein's comments on March 13, 1986 (that, if Dominguez was not the shooter, "Metro[] will do what they can . . . so that his sentence will be approximately the same type of sentence as was agreed upon tentatively with the Los Angeles Police Department"),

the comments themselves reflect that Attorney Stein was not describing a binding plea agreement, but was merely describing the understanding of the parties or a "tentative[]" agreement. (9Supp. 2CT 447-448.) In fact, when Dominguez was read Stein's comments and questioned about them at trial, Dominguez testified: "Like I said, you just said yourself it's not an agreement. I told you I got a binding agreement from the LAPD and Las Vegas. What you're -- what you're speaking on has no -- no concern." (88RT 9311-9312.) Thus, the plea agreement was not conditioned on Dominguez not being the actual shooter. (*People v. Badgett* (1995) 10 Cal.4th 330, 358 ["Our review of the record . . . persuades us that although, as defendants claim, there was some mention of consistency [with the previous statements to the police] in the initial understanding with respect to immunity at Jasik's juvenile court detention hearing, the agreement under which she actually testified did not contain such a condition. It is the latter agreement, of course, that is determinative of defendants' claim."].)

However, even assuming that Dominguez was required to adhere to his statement that he was not the shooter, he was still required to give a complete and accurate account of the murders at trial in order to avoid breaching the plea agreement. No more was required under *Medina.*[86] (*People v. Gurule* (2002) 28 Cal.4th 557, 616-617 ["Although it is true that the immunity agreement was conditional on there being no new evidence

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[86] In conjunction with this contention, appellant argues that the evidence strongly indicated that Dominguez *was* the shooter. (AOB 267.) Appellant focuses on the testimony of Rodger Backman and argues that Backman's description of the "apparent killer" matched Dominguez. Backman, however, was absolutely certain that there were two individuals in the ivy near the crime scene. Backman saw one, and he heard the other. (85RT 8901.) Also, appellant presented no medical testimony that, because of his recent knee surgery, he was physically unable to commit the crimes and escape from the crime scene. (AOB 268.)

showing Garrison was the actual killer, [footnote omitted] and this condition probably resulted in some pressure on Garrison not to testify that he -- and not defendant -- actually stabbed the victim, that pressure already existed, for the plea agreement required Garrison to 'provid[e] truthful and complete statements,' and it was clear the prosecutor believed that Garrison's statement to police that defendant was the actual killer was true."]; *People v. Sully* (1991) 53 Cal.3d 1195, 1217 ["Under the plea condition at issue here, although Livingston was under some pressure to adhere to her statements that she had not killed any of the victims, she was nonetheless required to give a complete and truthful account at trial in order to avoid breaching the plea agreement. No more is required to satisfy *Medina*. . . ."].)

In sum, the plea agreement here did not require that Dominguez testify in accordance with his statements to police, regardless of the truth of the statements. The plea agreement required only that Dominguez testify truthfully. Accordingly, the plea agreement did not deny appellant his constitutional rights.

C. Any Error Was Harmless

Finally, even assuming error, the error was harmless under either *Chapman v. California, supra,* 386 U.S. at page 24, or *People v. Watson, supra,* 46 Cal.2d at page 836. Stewart Woodman described how he and his brother Neil hired appellant to kill their parents. Stewart testified that appellant advised Stewart and Neil to "put an end" to their problems with their parents and told them that his price tag for the deed would be $40,000 or $50,000. Stewart testified that appellant collected and recorded information about Gerald and Vera Woodman and repeatedly assured Stewart that the contract on the lives of his parents would be fulfilled. Stewart also testified that Robert Homick collected $55,000 from Stewart

and Neil for the murders. (102RT 11684-11693; 103RT 11708-11709, 11716 ; 104RT 11957-11958; 107RT 12484-12486.)

More generally, the prosecution's evidence showed that appellant was stalking Gerald and Vera for over a year. (79RT 7680-7685; 100RT 11260-11267; Peo. Exh. 22.) The evidence also showed appellant's preparation for the murders: two weeks before the murders, appellant purchased walkie-talkies (82RT 8299-8300, 8322-8325; 83RT 8474); on the day Stewart learned where his parents would be on Yom Kippur, appellant purchased airline tickets to Los Angeles (80RT 7869-7873, 7933; 81RT 8002-8007, 8036); on the day before the murders, appellant obtained "ammo" (82RT 8336-8338); appellant's daily reminder book for September 24 (the day before the murders) had a notation to Herman's address (96RT 10384-10389); and in the days before the murders, appellant dealt with the problems with the walkie-talkies (82RT 8339-8347, 8413-8415; 84RT 8674, 8700-8701).

Michael Dominguez's testimony served to supply the details: appellant recruited Dominguez to assist him in the plot to commit the murders; appellant prepared for the murders by obtaining a gun from Herman; appellant had a handgun, a bolt cutter, and walkie-talkies in his car on the night of the murders; appellant dropped off Dominguez at a bus stop near the Gorham residence on the night of the murders so that Dominguez could radio ahead when Gerald and Vera were headed home; and appellant paid Dominguez $5,000 for his role in the murders. (85RT 8964-8968, 8976-8989; 87RT 9200-9202, 9208-9225.) However, even without these details, the prosecution's case against appellant was overwhelming. Also, appellant's trial counsel had full knowledge of the terms of the plea agreement and had a full and fair opportunity to argue Dominguez's credibility to the jury based on the plea agreement.

Accordingly, in light of Stewart Woodman's testimony and the prosecution's case more generally, even if Dominguez's prior statements and prior testimony were improperly admitted, appellant was not prejudiced.

IV. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF THE MISSOURI INCIDENT

Appellant's next series of arguments allege various evidentiary errors. In this first argument, appellant claims that the trial court improperly excluded his proffered evidence of "the Missouri incident," based upon the perceived prejudice to Robert Homick. Appellant argues that this error violated his constitutional rights to a fair trial, to present all relevant evidence of significant probative value in his favor, and to reliable fact-finding underlying capital verdicts, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. (AOB 275-293.)

Respondent disagrees. As the trial court recognized, in addition to the potential of prejudice to Robert Homick, the evidence of "the Missouri incident" had slight probative value on a collateral matter and was cumulative evidence. The trial court's ruling excluding the evidence did not constitute a refusal to allow appellant to present a defense; rather, it merely rejected certain evidence relating to the defense. Thus, no error, constitutional or otherwise, occurred.

A. Relevant Proceedings

Early in the trial, the trial court held a hearing pursuant to Evidence Code section 402 concerning the admissibility of what the parties referred to as "the Missouri incident." Counsel for Robert Homick informed the court that the prosecution intended to call as a witness Robert Richardson. Richardson would testify about an incident in November 1983 in a suburb of Kansas City, Missouri. During the incident, Robert Homick allegedly

threw a can of oil through Richardson's window and then a subsequent telephone call was made to Richardson that was recorded indicating some type of threat to Richardson if he did not stop certain behavior with regard to Manchester. (75RT 6892.)

Counsel for Robert Homick explained he was unaware Richardson would be called as a witness and had done no investigation with regard to the incident. Counsel further said that prosecution witness Richard Wilson would testify that Stewart had said that Robert had thrown the oil can through Richardson's window, but the prosecutor had agreed not to elicit this testimony from Wilson until the issue of the admissibility of Richardson's testimony was resolved. Counsel asked the court for time to do some research, and the court agreed. (75RT 6892-6895.)

About two weeks later, the trial court held another hearing regarding Richardson's testimony. The prosecutor first provided the court with some more background information about the Missouri incident. The prosecutor explained that Richardson was a former employee of Manchester. In 1983, a dispute arose over $1,350 in expense money that Richardson claimed he was owed, and the dispute also involved Ann Heke, another Manchester employee who was given Richardson's sales territory by Manchester. On October 22, 1983, Richardson was fired or quit his job. On November 1, 1983, there was a crash through a window at Richardson's home in Missouri. The next morning, Richardson received a threatening telephone call, which was recorded by his answering machine. Richardson called the police. While the police were at Richardson's house, Richardson received a second threatening call. Detective James Lynch heard one of the two threatening calls. The caller told Richardson to stop calling Heke and, if he did not, the next object to be thrown through his window would have a bomb attached to it. (78RT 7522-7524.) The prosecutor said Detective

Dillard was prepared to testify that the voice on the tape-recorded telephone call was that of Robert Homick. (78RT 7523.)

The prosecutor argued that the evidence was relevant, because it was another example of a situation where there was a financial threat to Manchester (because Richardson's behavior was affecting sales for Manchester) and Robert Homick was used as a problem solver for the Woodmans. (78RT 7524-7526.) The court found the evidence was marginally relevant. It also found the evidence was cumulative, because evidence had already been introduced that the Woodmans hired Robert to act for Manchester. The court added that the evidence did not further the conspiracy and was improper character evidence as to Robert at that point. Thus, the court found the potential prejudicial effect of the evidence far outweighed any marginal relevance and excluded the evidence. (78RT 7526.)

About two months later, when appellant's counsel was cross-examining Stewart Woodman, he requested permission to cross-examine Stewart about the Missouri incident. Counsel explained that the Missouri incident involved Stewart having Robert use force on someone and Stewart putting himself at risk of being arrested as a co-conspirator to Robert's actions. Thus, counsel explained, the evidence was relevant to impeach Stewart's testimony that he did not want Robert involved in the murder plot because he believed Robert was a klutz. (106RT 12263-12265.)

The court said it was concerned about balancing what it had already determined to be improper character evidence against the extent to which the evidence might affect Stewart's credibility. The court observed that Stewart's credibility had already been challenged. The court also observed that the Missouri incident might have led Stewart to decide that he did not want to assign Robert to tasks in the future. Thus, the court found the

evidence was inadmissible character evidence against Robert that outweighed any slim relevance on credibility. (106RT 12265.)

Appellant renewed his severance motion and asked the court to reweigh its considerations, in light of the fact that appellant was a capital defendant and Stewart was placing more blame on appellant. Counsel argued this was the only incident which showed that Stewart involved Robert in crimes of violence. Counsel also argued that, although there were other areas in which he had impeached Stewart's credibility, this was the only area that went to appellant's culpability in the incident. (106RT 12265-12267.) The court said its ruling would stand and denied the severance motion. Appellant's counsel asked the court to order the prosecutor and Robert Homick's counsel not to refer in closing argument to Stewart's testimony about believing Robert was a klutz. The court said it would take up that matter at a later time. (106RT 12267.)

Later that day, the court addressed appellant's request to limit closing arguments. The court initially took the position that, based on the Missouri incident, it would be unfair to permit Robert Homick to argue that Stewart would not have hired Robert to commit the murders because he believed Robert was a klutz. The court said, if counsel for Robert Homick wanted to make the argument, then the court would allow the evidence of the Missouri incident. (106RT 12312.) Counsel for Robert Homick said he wanted to make the argument, because it was the main argument against Robert's involvement in the murders. The court replied it preferred to exclude the evidence of the Missouri incident "for a lot of reasons" but believed it would be unfair to allow Robert to make the argument, because it created a false impression. (106RT 12312-12313.)

Counsel for Robert Homick argued that, if the court admitted the evidence, he would have to defend against it, including locating witnesses in Missouri and Illinois at that late stage. He argued there would be a mini-

trial in the midst of trial. (106RT 12317-12318.) Counsel for Robert Homick then moved for severance on the ground of antagonistic defenses. (106RT 12319.) Counsel further stated that Richardson believed a third party (not Robert) was involved in the incident. Counsel explained that, when Richardson was interviewed by police regarding the incident, he identified a third party as the suspect, because Richardson had allegedly threatened to rape the sister of the person. Counsel added that Richardson had also sent a letter to the wife of a co-employee (John Limon) with a nude photo of a woman, stating that Limon was having an affair, and Limon had then threatened Richardson. (106RT 12317, 12323.) Accordingly, counsel explained, there was a great deal of "specter" surrounding the evidence. Moreover, counsel said a voice print was done on the tape-recording of the threat, and it was inconclusive. (106RT 12323.) Appellant's counsel and the People responded that Stewart would testify that Robert's voice was on the tape. (106RT 12323-12324.)

The People pointed out that, based on the state of the evidence, particularly the Soft Lite incident,[87] appellant's counsel could still attack the credibility of Stewart's testimony that he believed Robert was a klutz, without the Missouri incident. (106RT 12320-12321.) Counsel for appellant responded that the Soft Lite incident was minimized by counsel for Robert Homick, and the Missouri incident was more effective evidence. (106RT 12322.) At the end of this hearing, the court said it wanted to give the matter more thought. (106RT 12324.)

Later that same day, the Missouri incident was discussed again. Counsel for appellant argued that appellant's defense was that Stewart

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[87] This is the incident when Robert showed up at Soft Lite, a company that did business with Manchester, and told Jack Swartz that, if he did not pay Manchester his debt, Robert would break his legs or "snuff out his life." (71RT 5923-5935.)

chose Robert to go to Missouri to deal with Richardson, who Stewart believed was "crazy." (106RT 12348-12349.) Counsel for Robert Homick argued that, contrary to the argument made by appellant's counsel earlier, the Soft Lite evidence was not weak. He explained that appellant's counsel had elicited from Stewart the fact that Tracey Hebard had called Stewart and reported that Robert had made the threat at Soft Lite. Counsel further argued that appellant's counsel had also impeached Stewart's testimony about believing Robert was a klutz by cross-examining Stewart about the Soft Lite, Monte Carlo, and Rolls Royce incidents. Counsel argued that, in terms of the guilt phase, appellant's counsel already had the foundation to argue that Stewart was lying when he said he believed Robert was a klutz. Counsel suggested as a possible compromise that appellant could introduce evidence of the Missouri incident if there was a penalty phase. (106RT 12349-12351.) Appellant's counsel responded that he wanted to bolster his argument at the guilt phase that appellant was not involved in the murders, thus avoiding the penalty phase altogether. (106RT 12351.)

Following a break, the court said it had reviewed its notes concerning the testimony, particularly Tracey Hebard's testimony about the Soft Lite incident, corroborating evidence about the incident, and Richard Wilson's testimony concerning the Rolls Royce and the Monte Carlo. The court observed that all of that evidence "certainly provides substantial evidence from which it could be argued that the credibility of Stewart contending he didn't want Robert to be involved in this issue is subject to question." (106RT 12354.) The court said it had balanced against that the desire to present all of the evidence that was available on the relationship between Stewart and Robert. (106RT 12354.) The court explained that a number of factors came into play in its ruling:

> . . . Certainly the court's original concern, the danger that the jury would interpret this evidence as character evidence

against Robert; the short time available for the defense to locate witnesses to counter this evidence if it came in; its undue consumption of time that it would entail and the complexity of the evidence.

I read the statement of Mr. Stewart Woodman to the police, considered his personality and the conduct of the victim involved in this series of threats; and the assault on the property certainly would create a tremendous consumption of time on a collateral issue. So in reevaluating this issue one more time, I have concluded that counsel for Robert Homick may use Stewart's statement concerning his evaluation of the aptitude and skills of Robert as they see fit in argument.

I do not believe that this results in any unfairness to [appellant] because counter argument may also be properly raised based on the evidence which has already been introduced in this trial. So the original ruling stands and evidence of Robert Homick's trip to Missouri to take care of problems caused by Richardson is inadmissible.

(106RT 12354-12355.)

The next day, appellant's counsel argued that Robert Homick's cross-examination of Stewart Woodman and the redirect examination by the prosecutor (which had occurred after the court's ruling the previous day) made it clear that Robert Homick's counsel had become a second prosecutor. (107RT 12553.) Appellant's counsel noted that Robert Homick's counsel first elicited testimony from Stewart that he believed Robert was a liability in terms of getting "caught" and then the prosecutor elicited testimony that several incidents (including the Rolls Royce incident, the Monte Carlo incident, Robert's traffic accident shortly before the murders, and a phony note Robert prepared after the murders) reinforced Stewart's belief that Robert was a klutz. Appellant's counsel argued that there were only two to three witnesses regarding the Missouri incident and, but for Robert Homick, the evidence of the Missouri incident would be admissible through Stewart's testimony only. (107RT 12554-

12555.) Further, appellant's counsel argued that the proffered evidence was crucial. He argued the evidence was similar to Evidence Code section 1101 evidence to show common scheme or plan on the part of Stewart. He also argued that the Missouri incident had occurred in 1983, yet Stewart continued to use Robert, thus impeaching the notion that Stewart would not involve Robert in something that could get him "caught." (107RT 12555-12556.) Counsel suggested that the court could give a limiting instruction, telling the jury that the evidence was admitted for impeachment purposes only and was not to be used against Robert in any way as character evidence. (107RT 12557.)

The court said there was nothing in the cross-examination or redirect examination of Stewart Woodman warranting a change in its ruling. The court said: "I believe this evidence would be cumulative." The court explained that all it could do in evaluating evidence was to determine whether it appeared that a certain area of testimony had been substantially impeached. The court stated: "I think there is a great deal of impeachment against the notion that Mr. Stewart Woodman would not have used Robert Homick for a serious case." (107RT 12558.) Appellant's counsel then renewed his severance motion and made a motion for mistrial, explaining "this cuts to the heart of our defense." He stated, "The court is taking what little we do have away from us." (107RT 12558.) The court denied the motions. (107RT 12558-12559.)

Almost two months later, during the presentation of the defenses, appellant's counsel asked the court for permission to use the Missouri incident to rebut Robert Homick's defense. (120RT 14837-14839; see 117RT 14177.) Counsel said the court had allowed Robert's defense to elicit testimony from Art Taylor and Agent Livingston that appellant was involved in drugs and had also allowed Robert Homick's defense to play the tape of a police interview of Dominguez which mentioned a triple

murder with regard to the Las Vegas investigation. Additionally, counsel reminded the court that Stewart had testified that he would never use Robert in a murder plot. Counsel argued that all of this evidence had the potential of being extremely prejudicial to appellant, because it was essentially character evidence supporting the testimony presented by Robert Homick's defense that Robert was a pawn of appellant. Counsel argued that this evidence supported the argument that appellant was a person of bad character and the type of person who would direct his brother to unknowingly engage in illegal acts. (120RT 14839-14840.)

The court responded that the fact the jury had heard some evidence which reflected on the bad character of appellant with regard to drug activity did not mean that appellant was entitled to present similar evidence against Robert. Also, with regard to the tape of the police interview of Dominguez, the court recognized that there was no mention of appellant on the tape and no connection to appellant. Finally, with regard to Stewart's testimony, the court noted that Stewart was not attesting to Robert's good character or honesty; rather, Stewart said Robert was not competent to handle a murder. The court explained that there had been evidence that Robert was willing to defraud insurance companies, to destroy property, and to steal property and, thus, no defendant was ahead on the issue of character. (120RT 14840-14841.) The court concluded that there was nothing in Robert Homick's defense warranting a change in this ruling. (120RT 14841-14842.)

Appellant's counsel said that he did not intend to use the Missouri incident as character evidence but, rather, to show that the nature of the relationship between Robert and Stewart was such that Robert would do things at Stewart's direction. Counsel explained that the thrust of Robert's defense had been that Robert would follow appellant's direction, and counsel wanted to rebut that point. (120RT 14842.) The court said that the

point had already been rebutted by the evidence given to the jury. (120RT 14842.)

Appellant renewed his motion to sever and motion for mistrial, and the court denied the motions. (120RT 14842.) Appellant's counsel said the Missouri incident would have been admissible at a separate trial. The court responded: "There were a lot of 352 issues in connection with Mr. Richardson that I don't know that it would come in even if [appellant] were tried alone because it opens up about 19 other issues based on the character impeaching involved and the nature of the testimony. So I'm not sure what I would do but I don't have to decide that." (120RT 14843.)

B. The Trial Court Properly Excluded Evidence of the Missouri Incident

With regard to the evidence of the Missouri incident, appellant contends that the trial court erred in performing an Evidence Code section 352 analysis, abused its discretion in the Evidence Code section 352 analysis that it did perform, and deprived appellant of his constitutional right to present all relevant evidence of significant probative value in his favor. (AOB 284-293.) No error, constitutional or otherwise, occurred.

The application of Evidence Code section 352 is not limited to a conflict between opposing sides but may also apply to parties on the same side of litigation when they have adverse positions relative to the introduction of evidence.[88] (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 351, citing *People v. Ainsworth* (1989) 45 Cal.3d 984, 1007, fn. 10.)

> The rule is the same whether the party objecting to introduction of evidence is the prosecution or a defendant.

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[88] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

> However, in a joint criminal trial, if admission of evidence of significant probative value to one defendant would be substantially prejudicial to a codefendant the remedy is not exclusion of the evidence but rather a limiting instruction or severance. (*People v. Reeder* (1978) 82 Cal.App.3d 543, 553 [].) In such a situation, "Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense. . . . [¶] We do not mean to imply, however, that a defendant has a constitutional right to present all relevant evidence in his favor, no matter how limited in probative value such evidence will be so as to preclude the trial court from using Evidence Code section 352." (*Ibid.*)

(*People v. Greenberger, supra*, 58 Cal.App.4th at pp. 351-352.) Stated differently, although a criminal defendant has a constitutional right to present all relevant evidence of significant probative value in his favor, "[t]his does not mean that an unlimited inquiry may be made into collateral matters; the proffered evidence must have more than slight-relevancy to the issues presented." (*People v. Jennings* (1991) 53 Cal.3d 334, 372, internal quotations omitted.)

Additionally, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [106 S.Ct. 1431, 89 L.Ed.2d 674]; *People v. Jennings, supra,* 53 Cal.3d at p. 372.) Exclusion of impeaching evidence on collateral matters which has only slight probative value on the issue of veracity does not infringe on the defendant's right to confrontation. (*People v. Jennings, supra,* 53 Cal.3d at p. 372; *People v. Greenberger, supra,* 58 Cal.App.4th at p. 352 ["Cross-examination is subject to restrictions under Evidence Code section 352 if it is cumulative or if it constitutes impeachment on collateral issues."].)

Here, the trial court excluded the proffered evidence, because it concluded that the evidence had slight probative value, was cumulative on the issue of Stewart's credibility and on the issue of the relationship between Stewart and Robert, and had the potential of prejudice to Robert. (106RT 12265, 12354-12355; 107RT 12558; 120RT 14842.) The trial court's ruling did not constitute a refusal to allow appellant to present a defense; rather, it merely rejected certain evidence relating to the defense. Accordingly, appellant was not deprived of the opportunity to present a defense.

More specifically, as the trial court recognized, the evidence of the Missouri incident had slight relevance on the issue of Stewart's credibility. As noted by the trial court, the Missouri incident might have led Stewart to decide that Robert was a klutz and that he did not want to assign Robert to tasks in the future. (106RT 12265.) In fact, counsel for appellant cross-examined Stewart about his belief that Robert was a klutz. Referring to Stewart's testimony that he believed that Robert was a klutz, counsel asked: "This is the same Robert Homick that you had involved in a number of other criminal activities with yourself, correct?" Stewart Woodman responded, "That's the reason he shouldn't be involved in this one." (107RT 12579-12580.)

Additionally, whether or not Stewart believed Robert was a klutz, Stewart testified to Robert's participation in the murder plot and to the fact that all of the payments for the murders were made to Robert. Thus, the significance of the Missouri incident was on a collateral matter -- Stewart's evaluation of Robert's competence in participating in a murder plot. (See 106RT 12355; 120RT 14841; *People v. Jennings, supra,* 53 Cal.3d at p. 372.)

Further, in light of the other evidence impeaching Stewart's testimony that he believed Robert was a klutz and also demonstrating the

relationship between Robert and Stewart, the evidence of the Missouri incident was cumulative and threatened an unnecessary consumption of time. Evidence was introduced at trial that, at Stewart's request, Robert told Jack Swartz that he would break Swartz's legs or "snuff out his life" if Swartz did not pay his debt to Manchester. (71RT 5923-5929, 5934-5935; 76RT 6941-6943.) Evidence was introduced at trial that Stewart had Robert "steal" a Monte Carlo automobile owned by Manchester and then collected insurance proceeds on it. (76RT 6978-6979; 77RT 7212-7214; 98RT 10891-10894, 10900, 10903; 103RT 11809-11811.) Evidence was introduced at trial that Stewart had Robert "steal" his Rolls Royce and then collected insurance proceeds on it. (76RT 6977-6978; 99RT 10999-11004, 11012-11015, 11019; 100RT 11208; 103RT 11811-11818.) All of this evidence led to the inferences sought by appellant's proffered evidence -- Stewart did not believe Robert was klutz and used him as his "muscle."

Appellant argues that all of this evidence was not comparable to the proffered evidence, because the car thefts were property crimes and the evidence of the Soft Lite incident was weaker than the evidence of the Missouri incident. (AOB 290-291; see AOB 279, fn. 180.) Although the thefts of the cars were certainly property crimes, they were still crimes exposing Stewart to criminal liability for Robert's acts. Also, the evidence of the Soft Lite incident was not weaker than the evidence of the Missouri incident. Tracey Hebard testified that Robert showed up at Soft Lite in 1984 and told Jack Swartz that, if he did not pay Manchester, Robert would break his legs or "snuff out his life." (71RT 5923-5929, 5934-5935, 5953; 100RT 11332-11335.) Hebard's credibility was not impeached at trial. Moreover, Stewart corroborated Hebard's testimony. Counsel for appellant elicited testimony from Stewart that he received a telephone call from Hebard around the time of the incident reporting that Robert had threatened Swartz. (106RT 12333.)

Although the police department dispatcher's teletype did not record a report by Hebard of a threat by Robert, an officer testified at trial that the teletype was not intended to be a comprehensive report of what had happened during the incident. (72RT 6114-6119, 6123.) Similarly, the fact no police report had been prepared regarding the Soft Lite incident did not mean that no threat had occurred. The same officer testified that it was the responding officer's prerogative how a call was "cleared," and he could not testify with certainty as to why the responding officer (who was no longer with the police department) had not prepared a report regarding the Soft Lite incident. (72RT 6120, 6126-6127.) Finally, the effectiveness of the evidence of the Missouri incident would have been reduced if Richardson's credibility was impeached by evidence of his possible criminal conduct (e.g., threatening to commit a rape). In sum, other evidence admitted at trial led to the inferences sought by appellant's proffered evidence.

The case of *People v. Reeder* (1978) 82 Cal.App.3d 543 is readily distinguishable. (AOB 286-289.) In *Reeder*, defendant Reeder and codefendant Contreras were charged with the sale of heroin. (*Id.* p. 547.) At their joint trial, codefendant Contreras testified in his own behalf, corroborated much of the prosecution's case against defendant Reeder, and also testified to additional drug dealings he had with defendant Reeder. (*Id.* at p. 549.) Defendant Reeder sought to introduce the following evidence: Contreras had refused to repay Reeder money owed; Contreras had given Reeder's stepdaughter tuberculosis and attempted to introduce her to heroin; and Contreras had given Reeder's nephew an overdose of heroin which nearly killed him. (*Id.* at pp. 549-550.) The evidence was offered to corroborate Reeder's defense that he disliked Contreras and would never engage in narcotics dealings with him. (*Id.* at p. 550.) The trial court excluded the evidence on the ground it was unduly prejudicial to Contreras. (*Ibid.*)

The Court of Appeal ruled it was error for the trial court to exercise its discretion under Evidence Code section 352 to exclude evidence of significant value to a defendant because of the danger of substantial prejudice to a codefendant.[89] (*People v. Reeder, supra,* 82 Cal.App.3d at pp. 553-554.) Important to the court's ruling was that the evidence at issue was of significant probative value to defendant Reeder's defense in that the evidence tended to negate Reeder's guilt of the charged offense. (*Id.* at p. 553.) Also important was the fact that no other evidence introduced in the case showed that defendant Reeder disliked codefendant Contreras to such an extent that Reeder would not have engaged in narcotics dealings with Contreras. (*Id.* at p. 554.) In contrast, in this case, exclusion of the evidence of the Missouri incident did not inhibit appellant's defense in any way. As set forth above, the proffered evidence had slight relevance on a collateral matter and was cumulative to other evidence already admitted at trial. For the foregoing reasons, the application of Evidence Code section 352 to exclude the evidence did not infringe upon appellant's constitutional rights.

Finally, even assuming arguendo that the trial court erred in excluding the evidence of the Missouri incident, the error was harmless under either *Chapman v. California, supra,* 386 U.S. at page 24, or *People v. Watson, supra,* 46 Cal.2d at page 836. The jury would not have received

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[89] To the extent that appellant suggests that *Reeder* holds that an Evidence Code section 352 analysis is precluded under these circumstances (AOB 290), he is mistaken. (*People v. Reeder, supra,* 82 Cal.App.3d at p. 553 ["Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense. . . . [¶] *We do not mean to imply, however, that a defendant has a constitutional right to present all relevant evidence in his favor, no matter how limited in probative value such evidence will be so as to preclude the trial court from using Evidence Code section 352.*", emphasis added.].)

a significantly different impression of Stewart's credibility had appellant been permitted to pursue the proffered evidence to attack Stewart's testimony that he believed Robert was a klutz. Stewart was an accomplice in the murders of his parents, and the trial court instructed the jury that Stewart was an accomplice and his testimony should be viewed with distrust. (1Supp. 4CT 960, 962.) Moreover, Stewart had been convicted of the murders, and the trial court instructed the jurors that this was a fact that may be considered in determining Stewart's believability. (1Supp. 4CT 953.) Evidence that Stewart was lying when he testified that he believed Robert was a klutz would not have altered the jury's view of Stewart.

Also, the jury would not have received a significantly different impression of the relationship between Stewart and Robert had appellant been permitted to pursue the proffered evidence. Stewart did not portray Robert as someone who had been duped by his brother and was as an unwitting participant in the murders. Stewart testified to Robert's participation in the crimes, including Robert's receipt of the payments for the murders. (103RT 11712-11713, 11750, 11755-11758.) Also, Robert Homick's defense did not portray Robert as a "bumbling fool who was duped by his brother." (AOB 292.) Rather, Robert presented the testimony of his sister who testified that Robert idolized appellant and wanted to please him. (117RT 14210.) Moreover, the Soft Lite, Monte Carlo, and Rolls Royce incidents made it clear that Robert was Stewart's "muscle." Thus, the evidence of the Missouri incident would not have altered the jury's view about the relationship between Stewart and Robert.

More generally, there was overwhelming evidence of appellant's guilt. The prosecution's case showed how appellant stalked Gerald and Vera Woodman for over a year and then prepared for their murders in the days before the murders. Stewart Woodman described how he and his brother hired appellant to kill their parents. Also, Michael Dominguez's

testimony established how appellant recruited and then used Dominguez to assist him in carrying out the murders. In sum, even if the trial court erred in its ruling, there was no prejudice to appellant.

V. THE TRIAL COURT MADE PROPER EVIDENTIARY RULINGS ON THE EVIDENCE INTRODUCED BY CODEFENDANT ROBERT HOMICK

In the previous claim, appellant argued that, due in large part to the joint nature of the trial, he was precluded from presenting evidence of the Missouri incident. (See Arg. IV.) In this claim, appellant argues that the joint nature of the trial resulted in erroneous rulings that allowed Robert Homick to introduce evidence which deprived appellant of his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. (AOB 294-325.)

Respondent disagrees. The evidence introduced by Robert Homick was probative to his defense and not prejudicial to appellant. Moreover, appellant's constitutional rights were not violated by the admission of the evidence. Thus, as set forth below, the trial court made proper evidentiary rulings on the evidence introduced by Robert Homick.

A. Testimony That Art Taylor Became a Paid FBI Informant Because He Believed Appellant Was Involved in Dealing Drugs

Prior to Art Taylor's testimony, the trial court held a hearing pursuant to Evidence Code section 402. During that hearing, the prosecutor said he would not be asking Taylor about his ties to the FBI and drug dealings by appellant. (82RT 8272.) Counsel for Robert Homick said that he wanted to question Taylor about his status as a paid FBI informant in order to attack Taylor's credibility. Counsel stated that, in doing so, it would become necessary to address Taylor's explanation of why he approached the FBI -- that Taylor believed appellant was involved in dealing drugs. (82RT 8273.)

Counsel for Neil Woodman objected, arguing that the worse appellant looked, the worse his client looked. (82RT 8273-8274.) Counsel for Robert Homick responded that Neil Woodman had nothing to lose if Taylor went unchallenged. (82RT 8274.)

Appellant's counsel said that the People's position appeared to be that the defense was precluded from challenging Taylor's credibility based on the fact that he was a paid FBI informant, unless the defense wanted to take the risk of disclosing that Taylor was informing on appellant for dealing drugs. Counsel said the court should not allow the witness to be insulated in such a manner. Counsel suggested that one solution was that the court could allow the cross-examination of Taylor on the subjects of the FBI and drug dealing, without allowing Taylor to identify the person on whom he was informing. (82RT 8274-8275.)

Counsel for Robert Homick disagreed. Counsel explained that Taylor would testify that he was friends with appellant for a number of years and that, at some point, he realized appellant was using him to deal drugs. Counsel said Taylor would testify that he was anti-drugs because he had three daughters and he, therefore, approached the FBI. (82RT 8276-8277.) Counsel said that he believed that Taylor, in fact, had other motivations for going to the FBI and that appellant's involvement in drugs was Taylor's excuse. However, counsel said he could not make this showing unless he were permitted to elicit Taylor's explanation for his motivation. (82RT 8283.) Counsel said he did not have much more evidence by which to attack Taylor's credibility. (82RT 8278.)

The prosecutor said he had no interest in eliciting testimony on appellant's drug activity. However, he explained that Taylor became an informant because appellant was abusing Taylor's friendship and hospitality by using Taylor's radio shop as a place to conduct drug activities (e.g., having packages and messages sent there). The prosecutor

argued that it would mislead the jury for appellant's counsel to cross-examine Taylor about his paid informant status without telling the whole story -- that it was appellant's activities that caused Taylor to go to the FBI. (82RT 8278-8280.)

After hearing these arguments, the court ruled as follows:

> . . . I will instruct the People not to bring out any information concerning drug activities on the part of [appellant] through this witness on direct.
>
> It does not appear to me that it's possible for Robert Homick to fully and effectively cross-examine and impeach this witness without getting testimony from him concerning his motivation, drug activities that he believes [appellant] was involved in.
>
> I recognize that this brings out evidence which could be damaging character evidence against [appellant].
>
> I have two observations about that and the one is that, of course, it benefits [appellant] to the extent that Mr. Taylor's credibility is impeached and I will give the jury a limiting instruction as to the fact that they may not consider the testimony about [appellant]'s involvement in drugs, if they believe it, as character evidence or as evidence indicating that he was a person likely to commit crime.

(82RT 8284.)

Neil Woodman and appellant moved for severance. The court denied the motions. (82RT 8284-8285.)

The prosecutor then raised the concern that, if Taylor was not examined about his informant status on direct examination, it might look to the jury as though the prosecution was trying to hide that fact. The court found that, because counsel for Robert Homick was going to examine Taylor on the subject, the People could examine Taylor about his informant status and what caused him to approach the FBI. (82RT 8288-8290.)

Art Taylor then gave the following testimony on direct examination. While running his business (Art's CB Shop, in Las Vegas, Nevada) in the late 1970's or early 1980's, Taylor met appellant, and the two became friends. (82RT 8301-8303.) Appellant was involved in vitamin sales and often asked Taylor to mail vitamins for him through his business. One day, appellant asked Taylor to mail a package for him. Taylor gave the package to his daughter, but she forgot to mail it. When appellant found out, he became very unhappy. Based on this incident and other things, Taylor became concerned that appellant might be involved in dealing drugs. (82RT 8361-8369.) Taylor went to the FBI. He first contacted Jack Salisbury, a neighbor who was an FBI agent. Sometime later, Taylor met Agent Livingston and provided the FBI with information on narcotics trafficking involving appellant. (82RT 8361-8362, 8365; see also 83RT 8596-8597.) From 1983 through early 1986, the FBI reimbursed Taylor about $10,000. (82RT 8369.)

On cross-examination of Taylor, Robert Homick also covered these subjects. (82RT 8421-8422, 8425-8427, 8434-8437.) He then suggested through his cross-examination that the reason Taylor had approached the FBI was to have tax liens removed from his property. (82RT 8444-8451; 83RT 8460-8470.)

Following Taylor's testimony, the trial court instructed the jury:

> You are instructed that testimony concerning drug dealing on the part of [appellant], if believed by you, is to be considered only for the purpose of determining whether it tends to impeach the credibility of Art Taylor. You may not consider this evidence as showing [appellant] is a person of bad character or that he has a disposition to commit crime.

(82RT 8452.)

During the defense case, Robert Homick called Agent Livingston as a witness and asked him questions about his contacts with Taylor in the

months leading up to the Woodman murders. On cross-examination, the prosecutor asked Agent Livingston whether Taylor had told Agent Livingston why he had approached the FBI. Agent Livingston said that Taylor had done so. The prosecutor then asked Agent Livingston what Taylor had said. Appellant's counsel objected on the grounds of hearsay and Evidence Code section 352. The court overruled the objections. Agent Livingston responded that Taylor had said that he had discovered that appellant was involved in narcotics activities and that he (Taylor) was opposed to it. Appellant's counsel objected, made a motion to strike, and said he wanted to be heard at the bench. (119RT 14538.)

Outside the jury's presence, appellant's counsel made a mistrial motion, arguing that appellant was prejudiced by Agent Livingston's answer. The court stated that the jury had previously heard information about the fact that Taylor had talked to the FBI about drug transactions involving appellant. The court saw no prejudice to appellant and found that the answer was not hearsay. The court overruled the objection and denied the mistrial motion. (119RT 14539.) Appellant's counsel asked for a limiting instruction on the evidence. The court said it had already instructed the jury on the subject. Agent Livingston's testimony then resumed. (119RT 14540.)

At the close of the guilt phase, the trial court specifically instructed the jury regarding the evidence at issue here:

> Evidence has been introduced for the purpose of showing that defendants, Robert and Steven Homick, committed crimes other than those for which they are on trial.
>
> Such evidence, if believed was not received and may not be considered by you to prove that defendants are persons of bad character or that they have a disposition to commit crimes.

> Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:
>
> . . .
>
> As to Steven Homick, to explain the motivation for Art Taylor in going to the FBI and the nature and character of Art Taylor's relationship with the FBI.
>
> For the limited purpose for which you may consider such evidence, you may weigh it in the same manner as you do all other evidence in this case.
>
> You are not permitted to consider such evidence for any other purpose.

(126RT 15560-15561; 1Supp. 4CT 971-972 [CALJIC No. 2.50].) The trial court also gave a more general instruction on evidence limited as to purpose. (126RT 15546; 1Supp. 4CT 944 [CALJIC No. 2.09].) Finally, during closing arguments, the trial court reminded the jury that the evidence regarding drug dealing "was offered for a limited purpose" and "may not be used by anyone for any other purpose." (130RT 16306-16307.)

Appellant now argues that he was prejudiced, in violation of his federal constitutional rights, by the admission of the evidence that he was involved in dealing drugs. (AOB 295-305.) No error -- constitutional or otherwise -- occurred.

The evidence at issue had significant probative value to Robert Homick's defense. Both Robert Homick and appellant had an interest in attacking Taylor's credibility by showing that Taylor was a paid FBI informant. As the prosecutor aptly stated, it would mislead the jury to allow Taylor to be cross-examined about his paid informant status without telling the whole story -- that it was appellant's activities that caused Taylor to go to the FBI. (82RT 8278-8280.) Additionally, counsel for Robert Homick explained that he believed Taylor had other motivations for going

to the FBI, that appellant's involvement in drugs was only an excuse, and that he could not make this showing unless he were permitted to elicit Taylor's explanation for his motivation. (82RT 8283.) In fact, during Taylor's cross-examination, counsel for Robert Homick attacked Taylor's credibility by suggesting that Taylor had approached the FBI in order to have tax liens removed from his property. (82RT 8444-8451; 83RT 8460-8470.) Thus, the evidence here was highly relevant to attack Taylor's credibility, and appellant has pointed to no other evidence that served the same purpose. (See AOB 302.)

The evidence was also minimally prejudicial to appellant. First, in comparison to the murder and conspiracy to murder charges, evidence that appellant was involved in dealing drugs was not particularly inflammatory. Second, as the trial court recognized, the evidence at issue assisted appellant's defense to the extent that the jury learned that Taylor was a paid informant for the FBI. (82RT 8284.) Third, on multiple occasions -- after Taylor's testimony, during jury instructions, and during closing argument -- the trial court instructed the jury that the testimony concerning the drug dealing on the part of appellant, if believed, was to be considered only for the purpose of determining whether it tended to impeach Taylor's credibility and was not to be considered as proof that appellant was a person of bad character or that he had a disposition to commit crime. (82RT 8452; 126RT 15546, 15560-15561; 130RT 16306-16307; *People v. Greenberger, supra,* 58 Cal.App.4th at pp. 351-352 ["[I]n a joint criminal trial, if admission of evidence of significant probative value to one defendant would be substantially prejudicial to a codefendant the remedy is not exclusion of the evidence but rather a limiting instruction or severance."]; see *People v. Yeoman* (2003) 31 Cal.4th 93, 139 ["Jurors are routinely instructed to make . . . fine distinctions concerning the purposes for which evidence may be considered, and we ordinarily presume they are

able to understand and follow such instructions. [Citation.] Indeed, we and others have described the presumption that jurors understand and follow instructions as '[t]he crucial assumption underlying our constitutional system of trial by jury.' [Citations.] We see no reason to abandon the presumption . . . where the relevant instructional language seems clear and easy to understand."].)

In sum, there was no error with regard to the admission of this evidence.

B. Judge Stromwall's Testimony that Max Herman Would Not Have Given Appellant a Gun If He Had Any Suspicion It Would Be Used in a Crime

During the People's case-in-chief, Michael Dominguez's testimony established that, one day before the Woodman murders, Dominguez accompanied appellant to the office of Max Herman. Appellant met privately with Herman and then emerged from Herman's office with a gun case. On the day of the murders, Dominguez saw the same gun case inside appellant's rental car and saw a revolver inside the gun case. (85RT 8976-8981.) Detective Crotsley testified that Herman was an attorney and a former member of the LAPD. Detective Crotsley interviewed Herman in April 1986, but Herman passed away by the time of the trial. (96RT 10384-10385.)

Robert Homick called retired Superior Court Judge Clarence Stromwall in his defense. Judge Stromwall had been a judge since 1967. Prior to that time, he had been a police officer with the LAPD for 21 years and had been partners with Max Herman on the police department for 17 years. (116RT 13963-13965.) Herman practiced law after his service as a police officer, and Judge Stromwall maintained a relationship with him. By the time Herman died, Judge Stromwall had known Herman for about 40 years. (116RT 13966-13967.)

Judge Stromwall testified that Herman was a savvy, streetwise person. (116RT 13967.) Counsel for Robert Homick attempted to ask Judge Stromwall whether Herman would have given appellant a gun knowing it would be used in a crime. Appellant's counsel asked to approach the bench, and a hearing was held at the bench. (116RT 13968.) Appellant's counsel objected to this line of questioning. He argued that it was an effort on the part of Robert Homick's defense to paint appellant as a deceitful person and this was inadmissible character evidence. Additionally, counsel argued that Judge Stromwall's opinion as to whether Herman would knowingly give appellant a gun to commit a murder was irrelevant. In turn, counsel for Robert Homick argued that his defense was that appellant used people, including savvy individuals, for nefarious purposes and that this evidence was consistent with Robert's relationship with appellant. (116RT 13969-13970.)

The court found that the evidence was not being offered to "dirty up" appellant but, rather, to establish a defense for Robert Homick. Accordingly, the court found the evidence was admissible. (116RT 13970.) Appellant's counsel pointed out that the court had previously excluded evidence of the Missouri incident under Evidence Code section 352, because the court had found it to be prejudicial character evidence against Robert. Appellant's counsel argued that Judge Stromwall's testimony was even more damaging character evidence than the evidence of the Missouri incident, because it dealt with the character trait of deceitfulness. Appellant's counsel argued that he had not placed appellant's character for honesty in issue. (116RT 13970-13971.) The court replied that the Missouri incident was different, because it was cumulative evidence. The court found there was strong relevance to Judge Stromwall's testimony which outweighed the prejudice to appellant. (116RT 13971.)

The examination of Judge Stromwall resumed. Judge Stromwall testified that Herman would not have supplied a gun to appellant if he had any suspicion it was going to be used in a crime. Judge Stromwall further testified that Herman was not easily manipulated. (116RT 13973.)

During closing argument, counsel for Robert Homick made the following argument regarding Judge Stromwall's testimony:

> You heard in this trial the testimony regarding Max Herman. Max Herman gave [appellant] the murder weapon in this case. You heard about Max Herman.
>
> . . .
>
> [Judge Stromwall] said Max Herman is a man streetwise and savvy, extremely honest, and not easily manipulated, and a good judge of character. He would not have given someone a gun if he thought that person was going to use it in a crime, yet he gave [appellant] the murder weapon the day before the murders.
>
> What does that tell you? That [appellant] was very effective as a user of people. He could fool people. Max Herman trusted him enough to give him what turned out to be the murder weapon.

(129RT 16060.) The trial court interrupted the argument and instructed the jurors as follows:

> I am going to [] interrupt for a second.
>
> I asked the attorneys not to object, and so they are being very good about not objecting. I think there was a statement he gave Max Herman the murder weapon -- Max Herman gave him the murder weapon, and I don't think there's been evidence tying a particular weapon to being the murder weapon.
>
> So, again, I remind the jury you can draw what inferences you think are reasonable from the evidence. But if any attorney makes a statement that sounds like a statement of facts, remember you must base your decision on the evidence you actually hear.

(129RT 16060-16061.)

Following the court's instruction, counsel for Robert Homick continued:

> You will have to make the decision whether or not it's a reasonable inference that Max Herman, he gave [appellant] the gun that was used to commit the murders in this case.
>
> I would assert to you that that is the reasonable inference. And, again, the point is, that if that gun was the murder weapon, it was given to him by a man named Max Herman, who was a former police officer, who is not easily manipulated, who is a good judge of character, yet look at what happened here.
>
> [Appellant] operated on a need-to-know basis. Max Herman, Jean Scherrer, Art Taylor, Steward Siegel, what did they all have in common? They were all used by [appellant] to aid him in committing crimes.
>
> And one more name to the list; Robert Homick. Robert Homick was used by [appellant] to help him in the murders of Gerald and Vera Woodman. And like Max Herman, Jean Scherrer, Art Taylor, and Steward Siegel, he did not know [appellant]'s true intent.

(129RT 16061-16062.)

Appellant now argues that the admission of Judge Stromwall's testimony was error and violated his constitutional rights. (AOB 305-313.) No error -- constitutional or otherwise -- occurred.

As the trial court found, Judge Stromwall's testimony had probative value to Robert Homick's defense.[90] Robert was charged with the

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[90] Appellant argues that Judge Stromwall's testimony that Max Herman would not have supplied a gun to appellant knowing it was going to be used in a crime was inadmissible under Evidence Code section 1101. (AOB 308-309.) The claim is forfeited for failure to raise it in the court below. (Evid. Code, § 353; *People v. Raley* (1992) 2 Cal.4th 870, 892 [questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on (continued...)

conspiracy to murder the Woodmans. (1Supp. 4CT 998.) Thus, the jury had to find that Robert entered into an agreement with the specific intent to agree to commit the murders. (1Supp. 4CT 987-988.) Robert was also charged with the murders of the Woodmans under an aiding and abetting theory. (1Supp. 4CT 1015.) Thus, the jury had to find that Robert knew the murders were going to take place and intended to (and did) help commit them. (1Supp. 4CT 986.) Judge Stromwall's testimony was probative, because it had a tendency to prove that Robert might have unwittingly participated in the crimes. In other words, the reasonable inference that appellant had used Max Herman, a streetwise man, to commit the murders had a tendency to negate the state of mind necessary to convict Robert of the charges. (See 129RT 16062 [counsel for Robert Homick argued: "Robert Homick was used by [appellant] to help him in the murders of Gerald and Vera Woodman. And like Max Herman, Jean Scherrer, Art Taylor, and Steward Siegel, he did not know [appellant]'s true intent."]; *People v. Ainsworth, supra,* 45 Cal.3d at p. 1007, fn. 10; *People v. Greenberger, supra,* 58 Cal.App.4th at p. 351.)

In contrast, the prejudice to appellant from Judge Stromwall's testimony was minimal. On cross-examination, Judge Stromwall testified that Herman was a good judge of character. (116RT 13976.) He also testified that, as a lawyer, Herman represented many police officers and it would not surprise him if Herman associated with, and gave a gun to, appellant, who was a former police officer. (116RT 13975-13976.) Thus,

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(...continued)
the ground sought to be urged on appeal].) In any event, Evidence Code section 1101 provides that "evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion." The testimony at issue here was not offered to show Herman's conduct, i.e., that he provided appellant a gun.

an inference could be made from Judge Stromwall's testimony that appellant did not manipulate Herman.

Finally, as the trial court correctly recognized, the evidence of the Missouri incident was not comparable to Judge Stromwall's testimony. (AOB 312.) The evidence of the Missouri incident was cumulative to other evidence admitted at trial (e.g., the Soft Lite incident). (116RT 13971.)

In sum, there was no error with regard to Judge Stromwall's testimony.

C. The Testimony of Helen Copitka (Appellant's and Robert's Sister) about the Relationship between Appellant and Robert

During Robert Homick's defense, a hearing was held outside the presence of the jury. During that hearing, counsel for appellant informed the court that the next witness to be called by Robert Homick was Helen Copitka, Robert's and appellant's sister. Appellant's counsel asked for an offer of proof of her testimony. He said that he believed the thrust of the questioning of Ms. Copitka would get into character evidence as to appellant. Counsel argued that, because he had not placed appellant's character at issue, such evidence would be inadmissible. (117RT 14171-14172.)

Counsel for Robert Homick explained that Ms. Copitka would testify about the relationship between appellant and Robert -- how appellant would issue orders to Robert and how Robert would comply with those orders. Counsel explained that Ms. Copitka would testify to how appellant essentially raised Robert and how Robert looked up to appellant as more of a father, than a brother. Counsel argued that the evidence was relevant to show that Robert would have done things at appellant's request without asking questions and would have trusted appellant not to get him involved in murders. Counsel said that he would not introduce evidence of bad acts

committed by Robert at appellant's request, evidence that appellant had done anything illegal, or evidence that would touch on appellant's character for violence. (117RT 14172-14173.)

Appellant's counsel argued that Ms. Copitka had not lived close to either appellant or Robert in 20 years and had limited contact with them in their adult years. The court responded that inter-family relationships are established at early ages and tend to continue, and counsel's argument went to the weight of Ms. Copitka's testimony, not its admissibility. (117RT 14174.)

Appellant's counsel then asked the court to reconsider its prior ruling regarding the Missouri incident, arguing that the evidence showed Robert was not acting at appellant's request in that instance. Counsel requested permission to cross-examine Ms. Copitka about the incident and to ask her if it changed her opinion about the relationship between appellant and Robert. Counsel also requested permission to introduce the evidence of the Missouri incident in rebuttal. (117RT 14174-14176.) Counsel explained: "I am concerned that if we can't show that [appellant] doesn't lead Robert Homick around on a leash, that this type of evidence is what they are going to argue to the jury from Miss Copitka and, I believe, from another witness." (117RT 14176.) Counsel continued: "[W]e haven't been allowed to rebut that to show, in fact, that's not the case; that Robert Homick has a mind of his own and acts on his own in a way totally independent of [appellant]." (117RT 14176.)

The court said it would not be appropriate to examine Ms. Copitka about the Missouri incident, because Ms. Copitka's opinion was about the relationship between appellant and Robert and "that wouldn't be changed by anything involving other people." (117RT 14176.) The court, however, said it would consider appellant's request to introduce evidence of the

Missouri incident in rebuttal, depending upon what the court heard from Ms. Copitka and other witnesses. (117RT 14176-14177.)

Helen Copitka then gave the following testimony. Appellant was born in 1940 and was the oldest sibling. Ms. Copitka was two years younger than appellant, William (another brother) was about four years younger than appellant, Nadine (a sister) was about seven years younger than appellant, and Robert was about 11 years younger than appellant. Another sibling, John Paul, was born in 1953. (117RT 14193-14194, 14199.) John Paul had brain damage and intestinal problems. He required full time care, which appellant's parents provided. Ms. Copitka and appellant helped out with John Paul's care and also took care of the other siblings so that their mother could get some rest. (117RT 14200-14201.) Ms. Copitka and appellant were the surrogate parents to the other children. They told them what to do and how and when to do it. (117RT 14209.)

Ms. Copitka explained that, as a child, Robert would "tag along" with appellant. Appellant was outgoing, a leader, and a good baseball player. Robert was shy and a follower. Robert idolized appellant, trusted appellant, and attempted to please appellant. (117RT 14201, 14204, 14210.) When appellant graduated from high school, he left home and went to Ohio State where he played baseball. (117RT 14202.) Appellant also played baseball for the minor league. (117RT 14203.) In 1965, appellant moved to California. When Robert graduated from high school, he moved out to California and lived with appellant and his wife. (117RT 14203.) Later, when appellant moved to Las Vegas, Robert stayed in California, went to law school, passed the bar exam, and became a lawyer. (117RT 14224.) Ms. Copitka never saw the relationship between appellant and Robert change, although she had infrequent contact with her brothers as

adults.[91] (117RT 14201, 14204, 14208, 14210, 14226-14228.) In the mid-1980's, both of appellant's parents were sick. Appellant's father died in 1989, and his mother died in 1991. (117RT 14231.)

Appellant now argues that Ms. Copitka's testimony was improperly admitted into evidence, because it had limited probative value as to Robert Homick's defense and was "character assassination" as to appellant. Appellant further argues that the admission of the evidence violated his constitutional rights. (AOB 313-317.) No error -- constitutional or otherwise -- occurred.

Ms. Copitka's testimony was probative to Robert Homick's defense. The analysis here is similar to the analysis on the admissibility of Judge Stromwall's testimony. The conspiracy charge required the jury to find that Robert entered into an agreement with the specific intent to agree to commit the murders. (1Supp. 4CT 987-988.) The murder charges required the jury to find that Robert knew the murders were going to take place and intended to (and did) help commit them. (1Supp. 4CT 986.) Ms. Copitka's testimony was probative, because it had a tendency to prove that Robert might have unwittingly participated in the crimes. In other words, the evidence that Robert was a follower and did certain things only to please appellant had a tendency to negate the state of mind showing necessary to convict Robert of the charges. (See 129RT 16063 [counsel for Robert Homick argued: "We did not call Helen Copitka to appeal to your sympathy. . . . [¶] The issue in this case is Robert Homick's state of mind. . . . In order to do that, you must have all of the relevant

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[91] Ms. Copitka was a counselor. She had a Bachelor's Degree in psychology and a Master's Degree in rehabilitation counseling. (117RT 14192-14193.)

information."]; *People v. Ainsworth, supra,* 45 Cal.3d at p. 1007, fn. 10; *People v. Greenberger, supra,* 58 Cal.App.4th at p. 351.)

Appellant argues that Ms. Copitka's testimony had limited probative value, because she had minimal contact with her brothers as adults. (AOB 315.) As the trial court recognized, Ms. Copitka's limited contact with her brothers as adults went to the weight of her testimony, not its admissibility. (See *People v. Richardson* (2008) 43 Cal.4th 959, 1003 [prosecution's failure to establish how long a hair, which was consistent with the defendant's hair, had been at the crime scene went to the weight of the evidence, not its admissibility]; *People v. Cook* (2007) 40 Cal.4th 1334, 1346.)

As for appellant's claim that his sister's testimony was "character assassination" as to him (AOB 317), it is absurd. Ms. Copitka's testimony portrayed appellant as a loving human being, overcoming sad family circumstances. Appellant was not prejudiced by his sister's testimony in any way.

Additionally, the trial court properly did not permit appellant's counsel to cross-examine Ms. Copitka about the Missouri incident.[92] (AOB 316-317.) As the trial court recognized, the relevance of Ms. Copitka's testimony was the relationship between Robert and appellant, and "that wouldn't be changed by anything involving other people." (117RT 14176.)

In sum, the trial court properly admitted Ms. Copitka's testimony.

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[92] The request of appellant's counsel to present evidence of the Missouri incident to rebut Robert Homick's defense is addressed in Argument IV.

D. The Reference on a Videotape Exhibit to a Triple Murder Investigation

During the defense case, Robert Homick called Detective Holder as a witness and questioned him about the police interviews of Michael Dominguez. Detective Holder testified that, on March 13, 1986, there were two interviews of Dominguez. The first interview was conducted by Detectives Holder and Crotsley of the LAPD, and the second was conducted by Detectives Leonard and Dillard of the Las Vegas Metropolitan Police Department. (119RT 14591-14592.)

Detective Holder testified that he did not believe he had any discussion with Dominguez about a possible deal before the first interview. And, as far as he was aware, no one from the Los Angeles County District Attorney's Office had any such discussion with Dominguez. Detective Holder explained that, if he had talked to the prosecutor about giving Dominguez a deal, it was in general terms only, because he did not know what Dominguez would say during the interview. (119RT 14593-14594.)

Detective Holder testified that, during the first interview, several people were present, including FBI agents, Las Vegas officers, a representative from the Clark County District Attorney's Office, and Steven Stein (Dominguez's attorney). The interview began at 4:35 p.m. and ended at 6:10 p.m. Detective Holder did not believe there was any discussion about a deal with Dominguez during this interview. (119RT 14592-14596.)

Following the first interview, there was a 32-minute break before the second interview began. Detective Holder did not believe he discussed a deal with Dominguez during the break. (119RT 14596-14597.) Referring to this time period, counsel for Robert Homick asked Detective Holder: "Was there any discussion about a deal with Mr. Dominguez being conditioned upon the fact that he was not the shooter in any of the murders

under investigation at the time?" Detective Holder said he did not believe so. (119RT 14597.)

As for the second interview, Detective Holder testified that he "sat in" on the interview conducted by the Las Vegas police. (119RT 14597.) At this juncture, counsel for Robert Homick said: "I would like to play for you the beginning of the Las Vegas tape." (119RT 14597-14598; see 124RT 15304-15306.) The prosecutor requested permission to approach the bench, and a hearing was held at the bench. The prosecutor objected to the playing of the videotape. Counsel for Robert Homick said the videotape would impeach Detective Holder, because, at the beginning of the tape, Stein (Dominguez's attorney) said that there was a tentative agreement between the LAPD and Dominguez. (119RT 14599.) The prosecutor suggested that Detective Holder would not have interrupted the second interview, because the second interview was about the Tipton murders in Las Vegas. The court rejected this argument. (119RT 14600-14601.) The prosecutor then argued that Detective Holder would not be able to explain why the interviews were bifurcated without "open[ing] the bag" on the Tipton murders. The court said the prosecutor could elicit testimony that the Las Vegas police were investigating another crime, without mentioning "Tipton" or appellant. (119RT 14600-14601.) Addressing counsel for Robert Homick, the court said: "This portion you are going to play does not make any reference to Tipton anywhere because I'm not going to -- [¶] Or the fact that [appellant] is involved in the Las Vegas investigation?" (119RT 14602.) Counsel for Robert Homick said, "It makes no reference to Tipton, makes no reference to [appellant]." (119RT 14602-14603.)

The examination of Detective Holder then resumed. Counsel for Robert Homick played the beginning of the videotape of the interview of Dominguez by the Las Vegas police. (119RT 14603; Def. Exh. 810.)

During this interview, Dominguez's attorney said that, if Dominguez cooperated and pleaded guilty, his sentence would be the same type of sentence as was agreed upon tentatively with the LAPD and that, if Dominguez was not the shooter in any of the murders, he would be sentenced and released on parole eight to 15 years later. (119RT 14603-14604, 14608.) The portion of the videotaped played by counsel for Robert Homick also included an introductory remark that the Las Vegas police were investigating a triple murder. (See 120RT 14839.)

Upon watching the videotape, Detective Holder explained that his recollection, from seven years earlier, was that a tentative agreement had not been reached with Dominguez before the second interview, but that it appeared from the videotape that it had. (119RT 14604-14605.) Detective Holder also testified that he had no recollection of saying anything about the number of years before Dominguez would be paroled but he did not correct Dominguez's attorney during the interview. (119RT 14608.)

Following the examination by Robert Homick's counsel, Detective Holder was cross-examined by the prosecutor and by counsel for appellant. (119RT 14635, 14667.) At no time that day did appellant's counsel voice an objection to the videotape that was played or to the brief reference to it by the prosecutor in his examination of Detective Holder.[93] (119RT 14647.)

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[93] The relevant portion of the prosecutor's examination of Detective Holder was the following:

> Q. In fact, [in] a little snippet of the videotape that we watched on direct examination, Detective Dillard read off a DR number?
>
> A. Yes.
>
> . . .

(continued...)

The following day, to bolster his argument on the admissibility of the Missouri incident to rebut Robert Homick's defense, counsel for appellant said that the court had "allowed the defense of Robert Homick to play a tape recording [] which mentioned the triple murder with regard to the Las Vegas investigation as a means of impeaching Detective Holder and Michael Dominguez . . . which we believe has the potential, at least, if not the actuality, of being extremely prejudicial to" appellant. (120RT 14839.) The court denied appellant's request to present evidence of the Missouri incident and stated: "[A]s far as the mention of the triple murder on the tape, there was no mention of [appellant]'s name anywhere in there. There is no relationship or connection with [appellant]. [¶] If it dirties up anybody, it dirties up Michael Dominguez and no one else." (120RT 14840-14841.)

Appellant then moved for a mistrial. Counsel for appellant argued that the court was looking at the issue too narrowly. Counsel explained that the jury had heard that a deal was made with Dominguez based on his not being the shooter in the Woodman or any other case. Thus, counsel explained, there was an inference that law enforcement believed that someone other than Dominguez was the shooter in the triple murder. (120RT 14843-14844.) Counsel stated that the jury had heard evidence about the relationship between appellant and Dominguez. He then said: "I don't think it's very farfetched to think that when that jury heard about a triple murder, that would flash[] in their mind, especially with Detective

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(...continued)

Q. And this pertained to a triple homicide that [D]etectives Dillard and Leonard were investigating?

A. Yes.

(119RT 14647.)

Holder and Detective Crotsley being present during that interview, that they are hearing information that relates to [appellant]." (120RT 14844-14845.) Counsel noted that the prosecutor had also mentioned the triple murder on cross-examination. Counsel said: "[T]his jury now can very easily be thinking that that's a triple murder that [appellant] had something to do with based upon what has transpired in this trial." (120RT 14845.)

The court denied the motion, summarizing what was played for the jury as follows:

> I certainly disagree with you about the impact of the statement on the tape and, for the record, since the tape was not reported, although it will be undoubtedly an exhibit, at the beginning of the interview of Michael Dominguez by the Las Vegas police, there was introductory language about why they are there.
>
> The Las Vegas police officer said: And we're talking to you about a triple murder in Las Vegas and we're going to ask you some questions, et cetera.
>
> I see nothing in that that would even, under rank speculation, tie that into any defendant in this case; and the motion on that ground and on the cumulative argument is denied.

(120RT 14845-14846.)

Appellant now argues that he was prejudiced, in violation of his constitutional rights, by the playing of the videotape. (AOB 317-325.) His claim must be rejected.

Initially, appellant has forfeited his claim of error. The trial court held a hearing outside the presence of the jury, and the parties addressed the admissibility of the beginning portion of the videotape. Appellant did not object to the playing of the beginning portion of the tape at that time and did not do so until the following afternoon. (119RT 14598-14610; 120RT

14839.) Accordingly, he has forfeited his claim on appeal.[94] (*People v. Raley, supra,* 2 Cal.4th at p. 892.)

In any event, appellant was not prejudiced by the playing of the portion of the videotape that indicated the Las Vegas police were investigating a triple murder. Appellant was not mentioned in the videotape. (120RT 14840-14841.) And, as the trial court aptly stated, even rank speculation did not tie appellant, or any other defendant, to the triple murder.[95] (120RT 14846.) But that is exactly what appellant now engages in to support his claim of error.

Appellant argues that the jurors must have suspected that he was the shooter in the triple murder, because the jurors knew the LAPD officers "sat in" on the interview conducted by the Las Vegas police. (AOB 323.) The possibility that appellant was involved in a triple murder does not follow logically from the fact that LAPD officers "sat in" on an interview conducted by the Las Vegas police.

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[94] Three months earlier, counsel for Robert Homick had played the beginning of the same videotape to impeach Dominguez's testimony. Prior to the playing of the tape on that occasion, counsel for appellant said, "I do need to see the transcript of the portions [sic] that's going to be played." Counsel for Robert Homick responded: "I was going to skip the introduction that talks about triple murder, if that's what you are concerned about." (89RT 9426.) Thus, counsel for appellant was aware of the introductory remarks on the videotape and could have requested that the remarks not be played to the jury during Detective Holder's testimony.

[95] For the same reason, there was nothing improper about the prosecutor's brief reference to the triple murder investigation during his questioning of Detective Holder. (AOB 322.) The court did not instruct the prosecutor to use the words "another crime" when referring to the Las Vegas investigation; rather, the court focused on the importance of not mentioning appellant or "Tipton." (AOB 321; 119RT 14601-14602.) Additionally, if appellant believed the reference to the triple murder was prejudicial to him, he could have requested (outside the presence of the jury) that the trial court instruct the parties not to refer to it in their questioning of Detective Holder. Appellant failed to do so.

Appellant argues that the jurors must have suspected that he was the shooter in the triple murder, because the jurors knew the Las Vegas police were investigating other crimes for which they believed appellant was responsible. (AOB 323.) Appellant does not cite the portion of the record supporting the assertion that the jurors knew the Las Vegas police were investigating appellant for other crimes. Respondent has not been able to locate any such portion of the record.

Appellant argues that the jurors must have suspected that he was the shooter in the triple murder, because they knew appellant was sent to Las Vegas to stand trial. (AOB 323.) The jurors were not informed (during the guilt phase) that appellant stood trial in state court in Nevada. The jurors were informed that appellant had been tried in federal court, but it does not appear that they were informed that the federal court was located in Nevada. In any event, the jurors were told that the federal charges were interstate transportation to commit the Woodman murders. (102RT 11538-11539.) Thus, the jurors would not have tied their knowledge of the federal trial of appellant to a triple murder.

Appellant argues that the jurors must have suspected that he was the shooter in the triple murder, because, during another interview of Dominguez which was played for the jury, Dominguez said he believed appellant would commit the Woodman murders (as opposed to robbing the Woodmans) based on the things appellant had done. (AOB 323.) Dominguez's reference, in context, was to appellant's preparation for the Woodman murders, not to some other murders. (9Supp. 2CT 399 [Dominguez explains that he believed appellant was going to commit murders because appellant had met with a real estate agent about the Gorham property]; 86RT 9028-9029.) Similarly, Dominguez's comment during the same interview that he believed the Woodmans would be murdered (as opposed to robbed) because he just "knew better," did not

mean that appellant had previously committed murders. (9Supp. 2CT 403 [Dominguez explains he believed there would be a murder because appellant had been "chasing" Gerald and Vera for some time]; 88RT 9269.)

In sum, appellant was not prejudiced, nor were his constitutional rights violated, by the reference to the triple murder, which was not linked in any way to appellant.

E. Any Error in the Admission of the Evidence Was Harmless

Even assuming the trial court erred in the various evidentiary rulings addressed in this claim, whether they are taken singly or cumulatively, the errors were harmless. There was overwhelming evidence of appellant's guilt on the charges. The prosecution's case showed how appellant stalked Gerald and Vera Woodman for over a year and then prepared for their murders in the days before the murders. Stewart Woodman described how he and his brother hired appellant to kill their parents. Also, Michael Dominguez's testimony established how appellant recruited and then used Dominguez to assist him in carrying out the murders. In light of the foregoing, the alleged errors would be non-prejudicial under either the standard enunciated in *People v. Watson, supra,* 46 Cal.2d at page 818, or the standard set forth in *Chapman v. California, supra,* 386 U.S. at page 18. (*People v. Jablonski* (2006) 37 Cal.4th 774, 821; see *People v. Ainsworth, supra,* 45 Cal.3d at pp. 1007-1008, citing *People v. Watson, supra,* 46 Cal.2d at p. 836 [no prejudicial error found where codefendant's testimony related to an uncharged crime of rape committed by defendant Ainsworth upon the murder victim].)

VI. THERE WAS NO ERROR OR PREJUDICIAL ERROR WITH THE ADMISSION INTO EVIDENCE OF VARIOUS STATEMENTS MADE BY ROBERT HOMICK, NEIL WOODMAN, AND STEWART WOODMAN

Appellant next argues that the trial court improperly admitted a series of hearsay statements into evidence. These alleged hearsay statements were made by Robert Homick, Neil Woodman, and Stewart Woodman, and were testified to by various prosecution witnesses. Appellant maintains that the introduction of these statements violated his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 326-382.) As set forth below, as to most of these statements, there was no error. As to the remainder of the statements, even if there was error, there was no prejudicial error. And, as to all of the statements, there was no constitutional error.

A. Tracey Hebard's Testimony Regarding the Soft Lite Incident

Prior to trial, counsel for Robert Homick objected to the admission into evidence of Robert Homick's statement to Jack Swartz, the owner of Soft Lite, that if Swartz did not pay Manchester his debt, Robert would break his legs or "snuff out his life." Counsel argued that the evidence was inadmissible character evidence. (68RT 5552-5554.) The prosecutor responded that it was the People's burden to show a relationship -- particularly the nature of the relationship -- between the members of the conspiracy. The prosecutor argued that the proffered evidence showed that Robert was the Woodmans' "muscle." The prosecutor also noted that the date of the incident was June 4, 1984, within the timeframe of the conspiracy. (68RT 5555-5556.) Appellant's counsel argued that the

evidence was not relevant to the conspiracy to commit murder. (68RT 5559-5560.)

The court found that Robert's statement was not hearsay, because it was not being offered for the truth of the matter asserted. The court also found that the evidence was probative, because it showed the nature of the relationship between Stewart and Robert. (68RT 5564; see 68RT 5561 ["This evidence is relevant not to show that the defendants have bad character, but that they knew one another, they worked together, that they developed a relationship which ultimately evolved, under the People's theory, into a conspiracy to commit murder."].) Further, the court found that the evidence was minimally prejudicial, because the words "snuff out his life" were tantamount to "puffing" and "the kind of thing[] someone might say that wants to be an effective debt collector." (68RT 5564.)

The following day, counsel for Robert Homick requested that the court reconsider its ruling. Counsel noted that, at the federal trial, Stewart had denied sending Robert to Soft Lite to threaten anyone. (69RT 5698, 5700-5701.) The court again found that the evidence was not hearsay, was probative, and was minimally prejudicial. (69RT 5701-5702.)

Following opening statements, counsel for appellant said that the People's first witness was going to be Tracey Hebard, the daughter of Jack Swartz, who would testify to Robert's threats against Swartz. Appellant's counsel moved to exclude her testimony. He argued that the proffered evidence was irrelevant, because there was no showing that it was a part of any conspiracy to kill Gerald and Vera Woodman. Also, counsel argued that the evidence was inadmissible under Evidence Code section 352. (71RT 5911-5912.)

The court found the testimony was a part of the People's obligation to establish a conspiracy and denied appellant's motion. (71RT 5912-5913.) Counsel for appellant asked for a limiting instruction that appellant

was not involved in this incident. The court said it would listen to Hebard's testimony and, if it was apparent that the testimony bore no relationship to appellant, then the court would so instruct the jury. (71RT 5913.)

Tracey Hebard then testified that Manchester did business with Soft Lite, a small company run by Hebard and her father, Jack Swartz. Manchester and Soft Lite had a financial dispute. On June 5, 1984, Robert showed up at Soft Lite and told Swartz that he was sent by Manchester, because Swartz owed Manchester money. Robert told Swartz that if he did not pay Manchester, Robert would break his legs or "snuff out his life." (71RT 5920-5929, 5934-5935, 5953.) The court did not give the jury a limiting instruction regarding Hebard's testimony.

Appellant now argues that the trial court erred in admitting Hebard's testimony and that the admission of the evidence violated his constitutional rights. (AOB 345-349.) Respondent disagrees.

"'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Evidence Code section 352 permits a trial court, in its discretion, to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create the substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. This Court reviews for an abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code section 352. (*People v. Davis* (2009) 46 Cal.4th 539, 602.)

Here, a disputed issue at trial was the nature of the relationship between Stewart and Robert. The People's theory of the case was that Stewart regarded Robert as one of "the Woodmans' men." (70RT 5806-5809.) Robert's defense was that the relationship between Robert and Stewart centered around their mutual interest in gambling and that Robert

and Stewart also had a legitimate business relationship, i.e., that Robert occasionally collected overdue accounts for Manchester through his business, National Collections. (71RT 5897-5898.) The evidence of the Soft Lite incident was relevant, because it had a tendency of showing the true nature of the relationship between Robert and Stewart -- that Robert was Stewart's "muscle" and would threaten violence for him. (See 68RT 5561, 5564.) Consequently, the trial court did not abuse its discretion in admitting the evidence. (See *People v. Coffman* (2004) 34 Cal.4th 1, 75 [the trial court did not abuse its discretion under Evidence Code section 352 in granting defendant Marlow's motion and admitting into evidence letters in which defendant Coffman expressed her love and desire for defendant Marlow; the letters were probative of the nature of the defendants' relationship and also relevant to rebut Coffman's defense that she participated in the offenses only because of her fear of Marlow]; see also *People v. Guerra* (2006) 37 Cal.4th 1067, 1117-1118 [witness's testimony relating to the victim's love for Guatemala, its people, and its language was admissible to explain the victim's motive in interacting with the construction workers, including the defendant, on the day of the murders].)

Additionally, appellant was not prejudiced by Hebard's testimony or the fact that no limiting instruction was given regarding the evidence. (AOB 348-349.) First, the evidence did not refer to appellant at all. Second, as set forth in Argument IV, the evidence inured to the benefit of appellant's defense. It allowed appellant to attack the credibility of Stewart Woodman's testimony that he did not want Robert involved in the murder plot, because he believed Robert was a klutz. Also, the evidence showed that the relationship between Robert and Stewart was such that Stewart would turn to Robert (as opposed to appellant) to solve the problems with the parents. Third, the evidence was not inflammatory. It was appellant's position at trial that the evidence of the Soft Lite incident was effectively

minimized by counsel for Robert Homick. (106RT 12322.) Also, as the trial court noted, Robert's comment to Swartz was "puffing" and "the kind of thing[] someone might say that wants to be an effective debt collector." (68RT 5564.)

Accordingly, there was no error, constitutional or otherwise, in the admission of the evidence.[96]

B. Catherine Clemente's and Richard Wilson's Testimony Regarding Statements Made by Stewart and Neil about Appellant

Prior to the testimony of prosecution witness Catherine Clemente, the trial court held several hearings pursuant to Evidence Code section 402 to hear challenges to her testimony. Counsel for appellant explained that Clemente was a Manchester employee in 1982 and 1983. He objected to Clemente testifying that Stewart told her that appellant was "his man in Las Vegas" and that, if he ever wanted anything done, appellant would do it. (72RT 6038.) Counsel also objected to testimony from Clemente that Neil (referring to appellant) told Clemente that Neil had his own people who were tougher than the Mafia. (72RT 6038.) Counsel argued the statements were made before the conspiracy was formed and were not made in furtherance of the conspiracy, thus making them inadmissible under Evidence Code section 1223.[97] Counsel also argued that the statements

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[96] As the trial court found, Robert's statement was not hearsay, because it was not offered for the truth of the matter asserted. (68RT 5562.)

[97] Evidence Code section 1223 speaks to statements of co-conspirators and provides:

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(continued...)

were improper character evidence. (72RT 6038-6039; see also 72RT 6111.) The court overruled the objections, specifically finding that Stewart's statement furthered the objective of the conspiracy and came within Evidence Code section 1223. (72RT 6039, 6042.)

Later that day, appellant's counsel asked the court to revisit its rulings on Clemente's testimony. Counsel explained that Stewart would testify that Joey Gambino first suggested the solution of killing the Woodman parents in the summer of 1983. Counsel explained that Clemente had been fired from Manchester by April 1983. Thus, counsel argued, whatever statements Clemente heard were made before the start of the conspiracy. (72RT 6145-6147.) The court responded that the People's theory was that Neil and Stewart were using appellant and Robert for various conduct starting in 1981 and that the relationship eventually evolved into a conspiracy to commit murder. Counsel for Neil Woodman argued that there was no evidence of such conduct before 1984. (72RT 6147-6148.)

The court said it needed to determine when the conspiracy began. The prosecutor responded that the operative date was 1982, as set forth in the overt acts in the information. Counsel for Neil Woodman argued that

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(...continued)

> (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;
>
> (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and
>
> (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivision (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

the evidence would not support that date. The prosecutor replied that his recollection was that Stewart had said that he first met with appellant in 1982. The prosecutor also said that other witnesses would testify that appellant and Robert were present at Manchester in 1981 and 1982. (72RT 6152-6155.)

The prosecutor then argued that the People had to prove that there was a conspiracy and thus needed to show the nature of the relationship between the parties. The prosecutor argued that the statements at issue were not hearsay but were being offered to show the nature of the relationship among the co-conspirators. (72RT 6155-6156.) The court said that the evidence was relevant but was hearsay, and there was no hearsay exception for relationships. The court said that, if Stewart's statement was not being offered for the truth, it would not be relevant. (72RT 6157.)

Counsel for Neil Woodman then noted that, when the pretrial severance motions were litigated, the prosecutor had said that, if there were statements that presented problems under *People v. Aranda* (1965) 63 Cal.2d 518,[98] or presented other kinds of problems, he would not introduce them into evidence. Counsel for Neil Woodman complained that, instead of taking the prosecutor's promised course, limiting instructions were being contemplated. (72RT 6158.) The court deferred ruling on the admissibility of the statements. (72RT 6159.)

The matter was revisited later that afternoon, when the start date of the conspiracy was addressed once again. (72RT 6212.) Counsel for Neil Woodman said that the thefts of the Monte Carlo and Rolls Royce had occurred in June 1983 and November 1983, respectively. He also noted

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[98] In *Aranda*, this Court held that it is error to admit at a joint trial a codefendant's extrajudicial self-incriminating statement when the statement incriminates another defendant. (*People v. Aranda, supra,* 63 Cal.2d at pp. 529-530.)

that Stewart had testified at the federal trial that his conversation with Gambino had occurred in mid-1983 or in the fall of 1983. (72RT 6214-6215.) The prosecutor argued that Gambino's statement that he wanted to introduce Stewart to someone to solve his problems must have occurred before 1983, because eyewitnesses placed appellant at Manchester in 1981. (72RT 6216, 6218.)

The following day, the court said that the transcript of the federal trial revealed that Stewart had testified that appellant met with Neil and Stewart following Gambino's telephone call in the fall of 1983, after October. (73RT 6272.) The court said the conversation with Gambino appeared to be the beginning of the conspiracy. (73RT 6273.) Thus, the court concluded that the start date of the conspiracy appeared to be the fall of 1983. (73RT 6274.)

The prosecutor then once again argued that the complained-of statements were not hearsay. He also argued that the statements were operative facts that were circumstantial evidence of a conspiracy. The prosecutor explained that Neil's statement was not being offered to show that appellant was tougher than the Mafia. Rather, the statement was being offered to show the co-conspirators' state of mind and was circumstantial evidence of an agreement. (73RT 6275-6277.) The court recognized that the state of mind of the co-conspirators was relevant, particularly during the formation of the conspiracy. (73RT 6278.)

Counsel for appellant responded that the existence of a conspiracy could not be proven by the declarations of co-conspirators outside the presence of other conspirators. (73RT 6279.) He argued that the statements were not admissible under the state of mind exception against appellant and were highly prejudicial character evidence. (73RT 6281.) Further, he argued that the statements did not indicate an agreement had been made about killing the parents. (73RT 6282.)

The court tentatively found that the statements came before the conspiracy and were thus admissible against the declarant, as well as appellant if he was in earshot. The court said it would give a limiting instruction as to Robert. The matter was continued once again to determine the facts surrounding the statements. (73RT 6283-6286.)

Later that day, the prosecutor informed the court that appellant was not present when the complained-of statements were made. The prosecutor also argued that, if the court was not convinced that the statements were not hearsay, then the People's position was that there was a conspiracy to kill for financial gain in February 1983 when Stewart and Neil were trying to keep the life insurance policy on Vera's life in force. Accordingly, the prosecutor argued, Clemente could have heard the complained-of statements during the conspiracy. (73RT 6378-6380.)

Counsel for Robert Homick responded that the letters about the life insurance policy were evidence of Neil's and Stewart's hatred for their parents, not evidence of a conspiracy. Both appellant's and Robert Homick's counsel argued that the meeting with Gambino was the operative date of the conspiracy. Also, appellant's counsel argued that the statements were not in furtherance of the conspiracy. (73RT 6381-6382.) The court concluded that the statements were operative facts establishing the conspiracy and were admissible if made during the conspiracy. The court said that the letters regarding the insurance policy were circumstantial evidence of a conspiracy to kill Vera, but the members of the conspiracy at the time were Neil and Stewart. (73RT 6383.)

The prosecutor then said that, on the day that Clemente saw appellant at Manchester, there was a closed-door meeting involving appellant, Stewart, and Neil, and the complained-of statements were made after that meeting. Thus, the prosecutor argued, the statements were circumstantial evidence of a conspiracy. (73RT 6384.)

The court then heard testimony from Clemente outside the presence of the jury. Clemente testified that she was a receptionist at Manchester from April 1982 to April 1983. The first time she saw appellant at Manchester was in about March of 1983. Appellant met with Neil and Stewart in Stewart's office, behind closed doors. Later, after appellant left Manchester, Stewart asked Clemente if she knew who appellant was. She said, "No." Stewart said appellant was their "man in Vegas" and, "if you wanted anything[] done[,] he's the man to do it." Neil, who was present, then told Clemente that appellant was tougher than the Mafia. (73RT 6390-6396.)

Following this testimony, the court concluded that the evidence showed that there was a conspiracy in the spring of 1983, and Stewart's and Neil's statements were made while the conspiracy existed. Accordingly, the court ruled that Clemente's testimony regarding the statements was admissible pursuant to Evidence Code section 1223. (73RT 6416-6417.)

Clemente then gave the following testimony. Clemente was the receptionist at Manchester. One day, when Stewart was talking about appellant to Clemente, Stewart said that appellant was "his man in Vegas." (73RT 6422-6423.) Stewart said that, if he needed anything done, appellant "was the man to do it." Neil then told Clemente that, if the Mafia was considered tough, appellant was tougher. (73RT 6423.) At the end of Clemente's testimony, the trial court gave the jurors the following limiting instruction: "The testimony of the last witness concerning statements made by Neil Woodman and statements made by Stewart Woodman with respect to [appellant] may not be considered by you as evidence against Robert Homick." (73RT 6461A-6461B.)

A few days later, the trial court held a hearing pursuant to Evidence Code section 402 regarding challenges to testimony from prosecution witness Richard Wilson, the vice-president of Manchester. (75RT 6892.)

Counsel for appellant said that Wilson had testified at a prior proceeding that Neil had said that appellant could handle anything illegal for him. Counsel argued this was improper character evidence, not a statement in furtherance of the conspiracy, and unnecessary to establish a relationship between the parties (because the relationship had already been established by other witnesses). (75RT 6896-6897.) The court heard testimony from Wilson outside the presence of the jury. Wilson testified that Neil had made the complained-of statement several times during 1984 and 1985. (75RT 6901-6905.) The court, thereafter, overruled appellant's objections, finding that Neil's statement was made during the life of the conspiracy. (75RT 6914-6915.) Later, in the presence of the jury, Wilson testified that, on many occasions, Neil told him that appellant "could get anything done of an illegal nature for us upon request." (76RT 6964.)

Appellant now argues that the trial court erred in its rulings. Appellant finds fault with the court's admission of the following statements: (1) Stewart said that appellant was "his man in Vegas"; (2) Stewart said that, if he needed anything done, appellant "was the man to do it"; (3) Neil said that appellant was tougher than the Mafia; and (4) Neil said that appellant "could get anything done of an illegal nature for us upon request." Appellant further argues that, as a result of the court's rulings, his constitutional rights were violated. (AOB 349-369.)

The trial court here admitted the complained-of statements under the co-conspirator exception to the hearsay rule. However, as set forth below, it appears that the more correct statute for admissibility is Evidence Code section 1250. (See *People v. Dell* (1991) 232 Cal.App.3d 248, 258 ["It is immaterial if the ground relied on below was erroneous if the action taken . . . was otherwise proper."].)

As the prosecutor argued in the court below (see 73RT 6276-6277), the complained-of statements were *not* offered for a hearsay purpose.

Evidence Code section 1200 provides that hearsay evidence "is evidence of a statement that was made other than by a witness while testifying at the hearing *and that is offered to prove the truth of the matter stated.*" (Emphasis added.) Here, Neil's comment that appellant was tougher than the Mafia was not offered to prove that appellant was, in fact, tougher than the Mafia. Similarly, Stewart's comment that appellant could do anything that Stewart needed done was not offered to show that appellant, indeed, had the ability to carry out or take care of anything Stewart needed done. Likewise, Neil's comment that appellant could get anything of an illegal nature done was not offered to prove that appellant could meet any illegal goal. And Stewart's statement that appellant was "his man in Vegas" was not offered for the truth of whether appellant was, in fact, Stewart's "man" or was in "Vegas."

Instead, all of these statements were offered for the nonhearsay purpose of proving Neil's and Stewart's state of mind. Evidence Code section 1250 provides that evidence of a declarant's then-existing state of mind, "including a statement of intent, plan, motive, [or] design" is admissible to prove that state of mind or "to prove or explain acts or conduct of the declarant."

In *People v. Sanders* (1995) 11 Cal.4th 475, a witness was permitted to testify at defendant Sanders's murder trial that, while riding around in a car in Los Angeles, Carletha Stewart asked those in the car if they "wanted to make some money by robbing a Bob's Big Boy. . . ." (*Id.* at p. 517.) This Court found: "[Carletha] Stewart's statement was admissible for the nonhearsay purpose of establishing her state of mind in August 1980, i.e., her intention to form a conspiracy to rob Bob's Big Boy, which was clearly relevant to the issue whether she subsequently entered into a conspiracy with defendant to commit robbery." (*Id.* at p. 518.)

In *People v. Howard* (1988) 44 Cal.3d 375, Richard Lemock arranged the assassination of his business competitor. (*Id.* at pp. 385-387.) In the murder trial of defendant Howard, Lemock's pre-conspiracy statements (e.g., that the victim was "screwing up" his business, that he wished to kill the victim) were found to be admissible under Evidence Code section 1250. (*Id.* at pp. 403-404.)

Here, as stated, the complained-of statements were admissible to prove Neil's and Stewart's state of mind. Neil's and Stewart's state of mind were relevant to the conspiracy charge against appellant. In other words, the fact Neil and Stewart identified appellant as a problem solver was circumstantial evidence of their state of mind, which was relevant to the issue of whether they entered into a conspiracy with appellant to kill their parents. Accordingly, there was no error, constitutional or otherwise, in admitting the evidence.

Contrary to appellant's suggestion (AOB 366), the prosecutor did not use the complained-of statements in closing argument for a hearsay purpose. Rather, the prosecutor suggested that the complained-of statements were reflective of Neil's and Stewart's state of mind. The prosecutor argued:

> We're going to hear a lot of, at least from my perspective, hey-I'm-not-that-stupid defense here, in this case. I'm not that stupid to wire transfer the money.
>
> And you hear the same response with respect to Neil Woodman and his relationship with [appellant]; but Neil Woodman and Stewart Woodman -- here we're talking about Neil Woodman -- hires [appellant] to solve problems such as the bar mitzvah. We'll talk about that a little bit more. And the bugging of the office.
>
> And remember the statements that Neil Woodman made about [appellant]? He's my guy in Vegas. You think the Mafia is tough? Steve. Words to that effect. That was his guy.

(132RT 16580; see also 132RT 16647-16648.)

Focusing on Clemente's testimony, appellant argues that Clemente's testimony presented other problems. Appellant argues that Clemente might have seen Robert, not appellant, at Manchester on the day the complained-of statements were made. (AOB 364-365.) Appellant draws this conclusion from the fact that Clemente testified that the person who she saw at Manchester drove a car that looked like Robert's car. (AOB 364.) Appellant, of course, could have borrowed his brother's car on this occasion. And the fact no other witness testified to seeing appellant driving Robert's car on another occasion (see AOB 364) did not preclude that possibility. Also, Clemente's description of the appearance of the person who she saw was consistent with appellant's appearance. (See 73RT 6445; see Peo. Exh. 2.) In any event, at the hearing outside the presence of the jury and during her trial testimony, Clemente unequivocally identified appellant as the person who she saw at Manchester on the day that Neil and Stewart made their statements. (73RT 6392, 6420.) On both occasions, Robert was in the courtroom, and Clemente did not identify him as the person who she saw at Manchester.[99]

Appellant also argues that the trial court's limiting instruction regarding Clemente's testimony precluded the jury from making the factual determination of the identity of the person who Clemente saw at Manchester and, thus, violated appellant's constitutional rights. (AOB 365.) Appellant made no objection to the limiting instruction on this ground in the court below. Accordingly, he has forfeited his claim on appeal. (*People v. Riel* (2000) 22 Cal.4th 1153, 1207.) In any event, as

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[99] Additionally, appellant's claim concerns only the weight of the evidence, not its admissibility. (*People v. Guerra, supra,* 37 Cal.4th at p. 1122; *People v. Ochoa* (2001) 26 Cal.4th 398, 438.)

stated, Clemente twice unwaveringly identified appellant in court as the person who she saw at Manchester on the day the complained-of statements were made.

Focusing on Neil Woodman's Mafia comment, appellant argues that the comment was particularly inflammatory and analogous to cases where evidence of gang membership is improperly admitted into evidence. (AOB 366-367.) Appellant objected to Neil's statement in the court below on the ground of Evidence Code section 352. (See 73RT 6283.) It does not appear, however, that appellant specifically argued that the Mafia comment was unduly inflammatory. This claim of error is, therefore, forfeited. (Evid. Code, § 353.) However, in the event appellant's general objection under Evidence Code 352 was sufficient to preserve the claim, the claim has no merit. The Mafia comment is not analogous to the improper admission of evidence of gang membership. Neil's statement was not that appellant was a member of the Mafia, and there is no possibility that the jury construed the statement in this manner. Rather, the jury would have understood that the evidence was introduced to establish Neil's state of mind. (See *People v. Medina* (1995) 11 Cal.4th 694, 749 [no abuse of discretion where the trial court admitted evidence of defendant's tattoos of Nazi swastika and the grim reaper, because the identification of the tattoos strengthened witness's credibility regarding her identification of the defendant as the man who she saw with the gun].) Accordingly, there was no risk of undue prejudice to appellant.

C. Gloria Karns's Testimony Regarding Neil Woodman and the Magazine Article about Hit Men

Prior to the testimony of prosecution witness Gloria Karns, the trial court held a hearing pursuant to Evidence Code section 402 regarding challenges to her testimony. Counsel for appellant objected to testimony from Karns that, during the lawsuit involving Karns's promissory notes to

Manchester, Neil picked up a magazine article about hit men and said in Karns's presence: "When people are going to bother you these days, all you have to do is get a magazine and find somebody to hire to stop those people from bothering you." (72RT 6032-6033.) Counsel for Neil Woodman also objected to the evidence on the ground that it was improper character evidence. (72RT 6033.) The court overruled the objections, finding that the statement was made during the period of the conspiracy and was related to hiring people to solve one's problems with family members. (72RT 6034.)

Appellant's counsel requested that the court give a limiting instruction so that the testimony would be admissible against Neil Woodman only. He argued that Neil's and Stewart's financial disputes with other family members were a different matter than the conspiracy to murder Gerald and Vera Woodman. (72RT 6035.) The prosecutor responded that the evidence should not be limited to Neil Woodman. He noted that Neil's comment to Karns had occurred in February 1984. The prosecutor explained that this date was significant, because appellant's daily reminder books reflected that, a short time later, appellant was communicating with Neil and Stewart. Thereafter, a judgment was rendered in favor of Karns (based in part on Vera Woodman's testimony) and, within a week of the rendering of the judgment, there were notations to Gerald and Vera Woodman (e.g., their address, encoded references to Gerald) in appellant's daily reminder books. Accordingly, the prosecutor explained, there were many pieces of evidence connecting Neil's statement with the "hatching" or formation of the conspiracy. (72RT 6036-6037.) Based on the prosecutor's offer of proof, the court declined to give a limiting instruction. (72RT 6037.)

Karns then gave the following testimony. In February 1984, in relation to the lawsuit filed by Manchester against Karns, Karns attended

Neil's deposition. (72RT 6160-6161, 6181.) During a break, Neil picked up a magazine, flipped through it, and said, "When somebody annoys you, you can look in a magazine find [] someone to stop them annoying you." (72RT 6161-6164, 6183.) Neil turned the magazine around so that Karns could see an article entitled, "This gun for hire." (72RT 6164-6165.)

Appellant now argues that the trial court improperly admitted this testimony under Evidence Code section 1223, because Neil's statement was not in furtherance of the conspiracy. Appellant also argues that his constitutional rights were violated as a result of the alleged error. (AOB 369-371, 382.) Respondent disagrees.

The trial court instructed the jury pursuant to CALJIC No. 6.24 ["Determination Of Admissibility Of Co-Conspirator's Statements"], which described the criteria for considering Neil Woodman's statement. CALJIC No. 6.24 informed the jurors, in relevant part: "Evidence of a statement made by one alleged conspirator other than at this trial shall not be considered by you as against another alleged conspirator unless you determine: [¶] 3. That such statement was made in furtherance of the objective of the conspiracy." (1Supp. 4CT 1013.) Thus, the jurors were told that they could not consider Neil's statement against appellant, before making the preliminary finding that Neil's statement was made in furtherance of the conspiracy. In light of this instruction and the fact that Neil's statement did not refer to appellant at all, it is likely that the jury did not consider Neil's statement against appellant.

In any event, Neil's statement was admissible against appellant pursuant to Evidence Code section 1250. Evidence Code section 1250 provides that evidence of a declarant's then-existing state of mind, "including a statement of intent, plan, motive, [or] design" is admissible to prove that state of mind or "to prove or explain acts or conduct of the declarant."

As stated earlier, in *People v. Sanders, supra,* 11 Cal.4th 475, a witness was permitted to testify at the defendant's trial that, while riding around in a car in Los Angeles, Carletha Stewart asked those in the car if they "wanted to make some money by robbing a Bob's Big Boy. . . ." (*Id.* at p. 517.) This Court found: "[Carletha] Stewart's statement was admissible for the nonhearsay purpose of establishing her state of mind in August 1980, i.e., her intention to form a conspiracy to rob Bob's Big Boy, which was clearly relevant to the issue whether she subsequently entered into a conspiracy with defendant to commit robbery." (*Id.* at p. 518.)

Here, Neil's statement was not admitted to prove the truth of the matter asserted, i.e., that it is possible to open up a magazine and find a hit man to solve one's problems. Rather, the evidence was admitted to show Neil's state of mind. Neil's state of mind was relevant to the conspiracy charge against appellant. The very fact that Neil would be talking about hiring a hit man to solve problems was circumstantial evidence that Neil subsequently entered into a conspiracy with appellant to kill his parents. Accordingly, there was no error, constitutional or otherwise, in admitting the evidence.

D. Edgar Ridout's Testimony that (1) Neil Said that He Could Have Ridout's Ex-Wife "Hit" and (2) Stewart Said that Appellant Did Collection Work for Manchester

Prior to the testimony of prosecution witness Edgar Ridout, the trial court held a hearing pursuant to Evidence Code section 402 to hear challenges to his testimony. (75RT 6797.) Counsel for Neil Woodman first objected to testimony from Ridout that, when Ridout complained to Neil and Stewart about his ex-wife, Neil told Ridout that he (Neil) could have the ex-wife "hit." (75RT 6798-6799.) Counsel for Neil Woodman argued that the evidence was improper character evidence, possibly outside the operative dates of the conspiracy, and inadmissible under Evidence

Code section 352. (75RT 6799-6800.) Counsel for appellant argued that the evidence was not a statement in furtherance of the conspiracy and was outside the scope of the conspiracy. He also argued that the statement implied appellant's involvement. (75RT 6800-6801.)

Counsel for appellant also objected to any testimony from Ridout that Stewart said (1) that appellant was his "collection man" and (2) that he (Stewart) would have appellant collect difficult accounts. (75RT 6801-6802.) Counsel for appellant said that, at the time Stewart made these statements, Stewart made the gesture of smashing or pushing his fist into his hand, implying force would be used. (75RT 6801-6802.) Counsel argued that the evidence was improper character evidence and not in furtherance of the conspiracy to commit murder. (75RT 6802.)

The prosecutor argued that Neil's statement about having Ridout's ex-wife "hit" was admissible as an admission under Evidence Code section 1220. The prosecutor said that there was no reference to Robert Homick or appellant that would be prohibited under *Richardson v. Marsh* (1987) 481 U.S. 200 [107 S.Ct. 1702, 95 L.Ed.2d 176]. The prosecutor added that the evidence was admissible for the same reason that Karns's testimony about the magazine article about hit men was admissible -- it showed Neil's state of mind when it came to solving a problem. The prosecutor then said that the People were not seeking to have Neil's statement about the "hit" admitted against appellant or Robert. (75RT 6803.) As for Stewart's statement that appellant was his "collection man," the prosecutor argued that the statement was within the parameter of the conspiracy, because it illustrated the nature and extent of the relationship between the co-conspirators. The prosecutor said that other witnesses, such as Steven Strawn and Richard Wilson, would testify that both appellant and Robert did collection work for Manchester. (75RT 6803-6804.)

The trial court found that, with regard to Neil's statement about a "hit" on Ridout's ex-wife, the evidence was admissible against Neil to show means, opportunity, or ability, but was not relevant as to appellant or Robert. The court said it would give a limiting instruction regarding the evidence. (75RT 6805-6806.)

As for Stewart's "collections man" comment, the court said it did not see how the comment furthered the conspiracy. The prosecutor explained that the evidence was similar to the Soft Lite evidence in that it showed the relationship between the co-conspirators. The prosecutor said that Neil's and Stewart's relationship with appellant and Robert enabled Neil and Stewart to continue their financial success through collecting accounts or killing for an insurance policy. The court then commented that one could argue from the evidence that being a collection man for difficult accounts included committing a murder so that one could collect on insurance. (75RT 6806-6808.) Counsel for appellant disagreed, arguing that the insurance policy was not an account receivable. The prosecutor responded that Neil and Stewart viewed insurance as accounts receivables, as evidenced by the fact that they collected insurance money after arranging for the disappearances of the Rolls Royce and the Monte Carlo. (75RT 6808-6809.) The court found that it could reasonably be argued that Stewart's statement was in furtherance of the conspiracy to commit a murder in order to collect money for the company. Accordingly, the court found the statement was admissible under Evidence Code section 1223. (75RT 6810-6811.) Appellant's counsel objected pursuant to Evidence Code section 352. The court overruled the objection. (75RT 6811-6812.)

Ridout then gave the following testimony. In the early 1980's, he owned E.J.R. Plastics and did business with Manchester. Ridout had a social relationship with Stewart and often stayed at Stewart's home. (75RT 6814-6820.) Sometime in late 1984, when Ridout was talking about his

two-year child-custody battle with his ex-wife, Neil told Ridout that Ridout "didn't have to worry," that Neil "could have her hit, and all problems would be over with." (75RT 6821-6825.) Immediately following this testimony, appellant's counsel made a motion to strike and requested a limiting instruction. The court denied the motion to strike and declined the request to give a limiting instruction at that time. (75RT 6823.)

Ridout also testified that Stewart introduced him to appellant at Manchester. Stewart told Ridout that appellant did collection work for Manchester. Stewart said that Manchester was having problems collecting money from a distributor or manufacturer in Florida. He told Ridout that he had sent appellant to take care of the problem and Manchester got paid right away. (75RT 6825-6828.)

At the end of Ridout's testimony (and on the same afternoon as Ridout's testimony), the trial court instructed the jurors that, with regard to Neil's statement that he could have Ridout's ex-wife "hit," the evidence was admitted against Neil only, was not admitted against Robert or appellant, and was not to be considered by the jurors as evidence against Robert or appellant. (75RT 6877-6878.)

Appellant now argues that the trial court erred, in violation of his federal constitutional rights, in admitting Stewart's and Neil's statements. (AOB 371-378.) Respondent disagrees.

As to Neil's statement about having Ridout's ex-wife "hit," the trial court instructed the jurors that the evidence was not admitted against appellant and was not to be considered by the jurors in any way against appellant. (75RT 6877-6878.) Also, at the close of the case, the trial court instructed the jurors with CALJIC No. 2.07 ["Evidence Limited To One Defendant Only"]. (1Supp. 4CT 942 ["Evidence has been admitted against one or more of the defendants, and not admitted against the others. [¶] At the time this evidence was admitted you were admonished that it could not

be considered by you against the other defendants. [¶] Do not consider such evidence against the other defendants."].) It is presumed the jury followed these instructions. (*People v. Avila* (2006) 38 Cal.4th 491, 575 ["[A]ssuming Richard's extrajudicial statement about defendant incriminated defendant, it did not prejudice defendant because the court admonished the jury not to consider it for any purpose against defendant, and we presume the jury followed the instruction."]; see *People v. Yeoman, supra,* 31 Cal.4th at p. 139.)

Moreover, with regard to the timing of the limiting instruction, i.e., that it was not given the moment Ridout testified to Neil's statement (see AOB 376-377), the timing of limiting instructions is within the trial court's discretion. (*People v. Dennis* (1998) 17 Cal.4th 468, 533-534.) "[T]he trial court is not obligated to give limiting instructions the moment they are requested or when the limited evidence is presented. . . ." (*Id.* at p. 534.) Appellant has provided no persuasive reason why the trial court abused its discretion in giving the limiting instruction at the close of Ridout's testimony, on the very afternoon of the complained-of evidence. Appellant claims that "[b]y refusing, in the presence of the jury, to give the requested instruction, the court strongly signaled that it was permissible for the jury to consider this statement against [appellant]." (AOB 377.) The claim is pure conjecture and not supported by the record.[100] There was no error or prejudice to appellant.[101]

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[100] There was no *Aranda* issue with regard to the statement (because the statement did not refer to any other defendant), and the statement was not hearsay (because it was not being offered to show that Neil could arrange to have Ridout's ex-wife "hit"). Accordingly, the admission of the evidence was not inconsistent with the prosecutor's representation during the hearings on the pretrial severance motions that he did not intend to introduce any statement that would violate *Aranda* or would be hearsay as to a defendant. (46RT 1971 ["[I]t has always been our position . . . that if

(continued...)

Turning to Stewart's statement to Ridout that appellant did "collection work" for Manchester, even assuming arguendo that the statement was not admissible under Evidence Code section 1223 as an admission of a co-conspirator, there was no prejudice to appellant. Ridout did not testify to any words or gestures on the part of Stewart indicating that appellant used force or violence to collect debts. (75RT 6828.) If anything, the testimony suggested that appellant did legitimate work for Manchester. Accordingly, there was no prejudicial error with regard to this claim, and appellant's constitutional rights were not violated.

E. Steven Strawn's Testimony that He Destroyed Business Cards Bearing Appellant's Name at Neil's Request

Prior to the testimony of prosecution witness Steven Strawn, the trial court held a hearing pursuant to Evidence Code section 402 to hear challenges to Strawn's testimony. (77RT 7139.) Counsel for Neil Woodman noted that, according to Strawn: Strawn received a telephone call from Neil Woodman on the day of Neil's arrest; Neil asked Strawn to destroy some business cards hidden underneath Neil's desk; Strawn retrieved these cards and observed that they bore appellant's name; and Strawn destroyed the cards. (77RT 7141-7143.) Appellant's counsel objected to testimony about the telephone call and Strawn's subsequent actions. (77RT 7143.)

(,..continued)
we . . . seek to admit a statement that the court believes is not admissible and it's an *Aranda* violation, then it will not be admissible. . . ."]; see 43RT 1822-1823; see AOB 375.)

[101] Further, the evidence was properly admitted against Neil for the nonhearsay and relevant purpose of explaining his state of mind, i.e., that he was willing to resort to hiring hit men to solve problems. (Evid. Code, § 1250.) Also, the evidence was not made inadmissible by Evidence Code section 1101, because it was evidence of opportunity, not propensity. (See AOB 375-376.)

The prosecutor argued that the evidence did not violate *People v. Aranda, supra,* 63 Cal.2d 518, because appellant had a right to confront Neil about the evidence at the federal trial in Nevada. The court said it did not want to take that fact into consideration in its ruling on the admissibility of the evidence. (77RT 7146-7147.) Addressing the admissibility of the evidence as to Neil Woodman, the court said that the telephone call was admissible against Neil as an admission and as evidence of consciousness of guilt. As to appellant, the court said that the evidence did not appear to come within the conspiracy exception, because the conspiracy had ended. The court concluded that a limiting instruction would have to be given as to appellant. The court said that this was not a true *Aranda* situation, because Neil was not making a statement implicating appellant. (77RT 7147-7148.)

Appellant's counsel argued that the evidence implicated appellant, identifying him by name. Counsel added that a limiting instruction would not be satisfactory. (77RT 7148-7149.) The prosecutor replied that there was no statement by Neil implicating appellant. He analogized the case to gang cases, where a photograph depicting various gang members is introduced into evidence. The prosecutor argued that if Neil had asked Strawn to destroy a photograph of himself embracing appellant, there would be no *Aranda* issue. (77RT 7150.) Appellant's counsel responded that Neil's statement had meaning, because the business cards bore appellant's name and, thus, Strawn's actions were a part of Neil's statement that Neil was involved in the crimes with appellant. (77RT 7151.)

The court concluded that the evidence did not directly implicate appellant but implicated him indirectly. Accordingly, the court reasoned, because the implication was indirect, it was curable by a limiting instruction. Thus, the court said it would give a limiting instruction as to appellant. (77RT 7151, 7229-7230.)

Strawn then gave the following testimony. On March 11, 1986, Strawn arrived to work at Manchester and saw members of the LAPD conducting a search of the premises. Strawn soon learned that Neil had been arrested at the plant that morning. (77RT 7173-7175.) Later that day, shortly after the police left, Strawn received a telephone call from Neil from the county jail. Strawn was in his office at the time. Neil asked Strawn, in a hushed voice, if he was alone and if the police were still at Manchester. Strawn said he was alone in his office and that the police had left. (77RT 7175-7178.) Neil then asked Strawn to go to his office, which was down the hall, and move his desk. Neil told Strawn that he would find some papers underneath the desk. Neil asked Strawn to destroy the papers by burning them and flushing them down the toilet. Neil then repeated these instructions. Strawn said he would do as Neil requested. (77RT 7177-7178.) Strawn then went to Neil's office, closed the door behind him, and found the papers underneath Neil's desk. The papers consisted of two or three business cards, folded in half, and a piece of paper. Appellant's name was on more than one of the business cards. As Neil had requested, Strawn burned and flushed these papers. (77RT 7178-7181.)

After Strawn's testimony, the court gave the jurors a limiting instruction. The court stated: "You are instructed that evidence concerning Neil Woodman's telephone instructions to Steven Strawn, if believed by you, is to be considered only as it applies to Neil Woodman. It may not be considered in any fashion with respect to [appellant]." (77RT 7357.) Also, at the close of the case, the trial court instructed the jurors with CALJIC No. 2.07. (1Supp. 4CT 942 ["Evidence has been admitted against one or more of the defendants, and not admitted against the others. [¶] At the time this evidence was admitted you were admonished that it could not be considered by you against the other defendants. [¶] Do not consider such evidence against the other defendants."].)

Appellant now argues that no limiting instruction could have cured the harm to him. (AOB 380.) He is mistaken.

"One exception to the presumption jurors follow the court's instructions arises when the prosecution seeks to introduce the extrajudicial statements of a nontestifying codefendant." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1374, citing *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476], and *People v. Aranda, supra,* 63 Cal.2d 518.) The rule of *Bruton* is that a non-testifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given. (*Bruton v. United States, supra,* 391 U.S. at pp. 126-137.) In *Aranda,* this Court held that, even if a limiting instruction is given, it is error to admit at a joint trial a codefendant's extrajudicial self-incriminating statement when such statement inculpates another defendant. (*People v. Aranda, supra,* 63 Cal.2d at pp. 529-530.) As this Court has recognized: "Both *Bruton* and *Aranda* use the broad term 'statement' and the narrow term 'confession' interchangeably, and neither expressly nor impliedly limits its reach to the latter." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1123.)

In the present case, there was no "statement" or "confession" by Neil Woodman to constitute the basis of *Aranda/Bruton* error. Moreover, the business cards, which bore appellant's name, did not mention, or provide any information on, the crimes for which appellant and Neil Woodman were on trial. Under these circumstances, as the trial court concluded, a limiting instructions was appropriate.[102]

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[102] Because there was no "statement" at issue here, the admission of the evidence was not inconsistent with the prosecutor's representation during the pretrial hearings on the severance motions that he did not intend

(continued...)

Appellant also argues that, even if an effective admonition was possible, the one given here was inadequate. (AOB 380-381.) Appellant failed to ask for a different limiting instruction in the trial court. (77RT 7151-7152 [court stated it would allow counsel to see a draft of the limiting instruction before instructing the jury].) Accordingly, he has not preserved his claim on appeal. (*People v. Riel, supra,* 22 Cal.4th at p. 1207.)

F. Steven Strawn's Volunteered Testimony that Neil Perceived Appellant to Be a "Heavy Guy"

As stated earlier, prior to Steven Strawn's testimony, the trial court heard challenges to Strawn's testimony. (77RT 7139.) Appellant's counsel stated that Strawn had testified at the federal trial that he first met appellant and Robert in the middle to later part of 1982 and that either Neil or Stewart introduced appellant and Robert as "bad guys" or "heavy people." (77RT 7166.) Counsel argued that this statement was made before the beginning of any conspiracy, was outside the scope of the conspiracy, and was not made in furtherance of the conspiracy. Accordingly, counsel asked that the statement be excluded from evidence. (77RT 7167.) Before the court ruled, the prosecutor stated, "I would instruct the witness not to state that." (77RT 7167.) The court responded: "All right." (77RT 7167.)

During the cross-examination of Strawn by appellant's counsel, the following exchange took place:

> Q. By [APPELLANT'S COUNSEL]: Now, getting back to your testimony regarding visits of either Robert or [appellant], was there any point in time when you were talking with Stewart Woodman that he told you that [appellant]'s presence was wasting their time?

(...continued)
to introduce any *statement* that would violate *Aranda/Bruton*. (43RT 1822-1823; 46RT 1971; see AOB 380.)

A. He did.

Q. You mentioned that he ridiculed -- Stewart Woodman ridiculed on numerous occasions referring specifically to [appellant]?

A. Yes.

Q. Would he ridicule [appellant] in front of Neil Woodman?

A. Yes.

Q. Did he make fun of any relationship that Neil Woodman and [appellant] had?

A. Yes.

(77RT 7313-7314.)

On redirect examination of Strawn by the prosecution, the following exchange took place:

Q. In responses to [appellant's counsel's] questions, you stated that Stewart Woodman often, in front of Neil Woodman, ridiculed Neil Woodman's relationship with [appellant]; is that correct?

A. That's correct.

Q. Made fun of it?

A. Yes.

Q. Can you expand on that exactly[?] What or how did he make fun of their relationship?

A. He thought that, first of all, that [appellant] coming by was a waste of our time; that, secondly, Neil seeing him as a, quote, heavy guy went beyond the limits when Neil would use this in conversations with other people; and that by Neil using [appellant]'s reputation with other people, that had discredited both Neil as well as the company.

(77RT 7330-7331.)

Later, at a hearing outside the jury's presence, counsel for appellant stated that he believed that the prosecutor's redirect examination went beyond the scope of his cross-examination. He also said that Strawn's comment "heavy guy" was going to be a basis for a later mistrial motion.[103] (77RT 7343-7345.) The court noted that Strawn had volunteered the comment "heavy guy" as part of an answer. The court said: "The answer was a surprise to me. I mean, it just sort of came out of left field." (77RT 7345.) Counsel for Neil Woodman said, "It came in as innocuously as possible and it was gone." (77RT 7345.)

Appellant suffered no prejudice from Strawn's comment. Contrary to appellant's assertion (AOB 382), Strawn's comment "heavy guy" was not introduced as a part of the People's case. Rather, it is evident from the comments of the court and the parties that Strawn's comment "came out of left field." Additionally, as recognized by counsel for Neil Woodman, the comment was "innocuous." (77RT 7345.) Notably, it does not appear that appellant asked for any curative measure regarding Strawn's comment nor did he argue that a curative measure would not cure any harm. Accordingly, there was no prejudice to appellant.

G. Any Error in the Admission of the Evidence Was Harmless

Any evidentiary error by the trial court, cumulative as well as individual, was harmless. The complained-of evidence constituted only a small evidentiary portion of a lengthy and complex trial. The prosecution presented other evidence that overwhelmingly proved that appellant was guilty of the murders and the conspiracy to commit the murders. Stewart Woodman described how he and his brother hired appellant to kill their

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[103] It does not appear that appellant ever made a mistrial motion on this ground.

parents. Michael Dominguez's testimony established how appellant recruited and then used Dominguez to assist him in carrying out the murders. Also, the prosecution's case showed how appellant stalked Gerald and Vera Woodman for over a year and then prepared for their murders in the days before the murders. In light of the foregoing, the alleged errors would be non-prejudicial under either the standard enunciated in *People v. Watson, supra,* 46 Cal.2d at page 818, or the standard set forth in *Chapman v. California, supra,* 386 U.S. at page 18. (*People v. Jablonski, supra,* 37 Cal.4th at p. 821; see also *People v. Samuels* (2005) 36 Cal.4th 96, 113-114; *People v. Prieto* (2003) 30 Cal.4th 226, 251-252 ["Even if the jury had not considered the few hearsay statements defendant identified, it is not reasonably probable the jury would have reached a different verdict."].)

VII. EVIDENCE OFFERED BY THE PROSECUTION WAS PROPERLY ADMITTED AGAINST APPELLANT

In the last of his arguments alleging evidentiary errors, appellant argues that there were a number of additional instances at trial when evidence offered by the prosecution was improperly admitted against him. Appellant argues that these errors violated his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. (AOB 383-419.) As set forth below, this claim has no merit.

A. Art Taylor's Testimony that Appellant Usually Carried a Revolver

Before prosecution witness Art Taylor testified, appellant's counsel objected to any testimony from Taylor that appellant carried a weapon. Counsel argued that the evidence was not relevant and was highly prejudicial. (82RT 8292.) The prosecutor stated that Taylor had many dealings with appellant during the period of the conspiracy and that he would testify that it was appellant's habit and custom to carry a revolver in

his briefcase. The prosecutor also said that prosecution witness Robert Kelly would testify that, based on his experience, he believed the gunshots he heard on the night of the murders came from a revolver. (82RT 8292-8293.) Appellant's counsel argued that the evidence was improper character evidence. The court found that the evidence was relevant, stating "it is circumstantial evidence the jury can use to determine whether the case is proven that this defendant is connected to the murder." (82RT 8293.) The court thus overruled appellant's objections. (82RT 8294.) Taylor then testified that he had frequent contact with appellant, that appellant usually carried a briefcase, and that appellant usually carried a revolver inside the briefcase. (82RT 8311, 8314.)

Appellant now argues that the trial court erred in its ruling, in violation of his constitutional rights. (AOB 384-390.) Respondent disagrees.

In assessing this claim, the applicable standard of review is the deferential abuse-of-discretion standard. (*People v. Jablonski, supra,* 37 Cal.4th at p. 805 ["'[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question [citation].'"].) There was no abuse of discretion here.

In *People v. Riser* (1956) 47 Cal.2d 566, the evidence established that a murder had been committed with a Smith & Wesson .38 caliber Special revolver, which was never recovered. (*Id.* at p. 577.) This Court concluded that it was error to admit evidence that the defendant possessed a Colt .38-caliber revolver that could not have been the murder weapon. (*Ibid.*) This Court stated the rule of admissibility as follows:

> . . . When the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into

> evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no conclusive demonstration that the weapon in defendant's possession was the murder weapon. [Citations.] When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons. [Citations.]

(*Ibid.*)

In *People v. Carpenter* (1999) 21 Cal.4th 1016, this Court found that the trial court properly allowed evidence that one witness saw the defendant with a gun that looked like the murder weapon and that the defendant told another witness that he carried a gun in his van. (*Id.* at p. 1052 ["Although the witnesses did not establish the gun necessarily was the murder weapon, it might have been. . . . The evidence was thus relevant and admissible as circumstantial evidence that [the defendant] committed the charged offenses."]; see also *id.* at p. 1047.)

In *People v. Cox* (2003) 30 Cal.4th 916 (disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390), the defendant argued that the introduction into evidence of three guns found during the search of his car was prejudicial error, because they were never shown to have any connection with the commission of the offenses. (*Id.* at p. 955.) In addressing the admissibility of the evidence, this Court found it significant that it was not known how the victims had been killed. (*Id.* at p. 956.) The Court stated: "Although the prosecutor argued that the evidence pointed to a stabbing, such argument did not preclude the reasonable possibility that one or all three of the victims had been shot." (*Ibid.*) Accordingly, the Court concluded that the guns were relevant as possible murder weapons and there was no error in admitting the guns into evidence. (*Id.* at p. 957.)

In this case, Officer George Tyree, a forensics firearms examiner, testified that he examined two bullets recovered from Gerald's and Vera's Mercedes and two bullets recovered from the bodies of Gerald and Vera. He opined that all four bullets were consistent with being fired from a revolver. (100RT 11127-11143.) Thus, the revolver that Taylor saw inside appellant's briefcase might have been the murder weapon. Accordingly, the trial court properly admitted Taylor's testimony about the revolver.

In sum, no error, constitutional or otherwise, occurred.

B. Stewart's Testimony that Robert Said that It Was a Coincidence that He Had Been in Front of the Gorham Address on June 22, 1985

Before Stewart Woodman testified for the prosecution, appellant objected to Stewart Woodman testifying that, when Stewart and Robert spoke in the holding cell after their arrests, Robert told Stewart that it was a coincidence that he had been in front of the Gorham address on June 22, 1985 (Gerald's and Vera's anniversary), and that he had been there before and after that date. Counsel for appellant said that, even if Robert's statement was admissible against Robert, the evidence was harmful to appellant. Counsel explained that a part of appellant's defense was that there had been a plan to carry out the murders on June 22, 1985, a date when appellant was not in Los Angeles. Evidence had already been admitted that Robert was parked outside Gerald's and Vera's residence on that date, and appellant would be offering evidence of a flurry of telephone calls between Stewart and Robert on that date. Thus, counsel explained, Robert's statement that it was a coincidence that he had been at Gorham on June 22 cut into appellant's defense that there had been a plot to commit the murders on June 22. The court overruled appellant's objection. Appellant moved for severance, and the court denied the motion. (102RT 11534-11537.)

The issue was revisited a few days later. Appellant's counsel argued that Robert's statement was not admissible as to Robert or any other defendant. Counsel argued that the fact that Robert had been at Gorham on June 22 was exonerating as to appellant, because it suggested that there had been a murder plot on that day -- a day when appellant was not in Los Angeles. Counsel argued that he believed that the People wanted Robert's self-serving statement to be admitted so that they could weaken appellant's defense. The prosecutor responded that the People were offering Robert's statement, because it showed Robert's pattern of conducting surveillance of the victims, just like appellant's diaries reflected appellant's pattern of conducting surveillance of the victims. Appellant's counsel then offered to stipulate that Robert told Stewart that he had been at Gorham on June 22 and had been there before and after that day, without mentioning Robert's comment that his presence on June 22 was a coincidence. The court recognized that Robert's statement did not mention any other defendant, stated that it disagreed with the arguments made by appellant's counsel, and overruled the objection. (107RT 12476-12480.)

Stewart Woodman then testified that, when he was in a holding cell with Robert, Robert told him that it was a coincidence that he had been in front of the Gorham address on Gerald's and Vera's anniversary and that he had been there before and after that day. (107RT 12481-12482.)

Appellant now argues that he was prejudiced, in violation of his constitutional rights, by the admission of Robert's statement. (AOB 391-396.) Respondent disagrees.

As with the last claim, the applicable standard of review is the deferential abuse-of-discretion standard. (*People v. Jablonski, supra,* 37 Cal.4th at p. 805.) There was no abuse of discretion here.

Robert's statement was admissible against Robert as an admission. (See AOB 393-394.) Evidence Code section 1220 provides: "Evidence of

a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party. . . ." Here, as the prosecutor explained, Robert's statement was offered against Robert to show that he had a pattern of conducting surveillance of the victims.

Contrary to appellant's contention (AOB 394), the evidence was highly probative to the People's case. Robert's statement was tantamount to a confession of his surveillance activities of the victims. "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" (*Horton v. Mayle* (9th Cir. 2005) 408 F.3d 570, 580, quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 296 [111 S.Ct. 1246, 113 L.Ed.2d 302].)

Additionally, appellant was not prejudiced by the admission of Robert's statement (or by the fact that appellant's proposed stipulation was not accepted). There was no evidence that there had been a murder plot on June 22, 1985. In any event, even if appellant were able to show that there had been a murder plot on June 22 (when he was not in Los Angeles), it does not follow that appellant was not a co-conspirator in the murder plot on that day. Also, evidence that there might have been a murder plot on June 22, when appellant was not in Los Angeles, does not negate the evidence that appellant participated in the killings three months later, on September 25, 1985.

Appellant complains that no limiting instructions were given regarding Robert's statement. (AOB 395.) Appellant did not request a limiting instruction. And, as the trial court recognized, Robert's statement did not mention any other defendant. Thus, appellant might not have wanted the court to give the statement the emphasis of a limiting instruction. (*People v. Horning* (2004) 34 Cal.4th 871, 909-910.)

In sum, there was no error in the admission of Robert's statement.

C. FBI Agent Gersky's Testimony that He Believed Michael Dominguez after the Second Interview

FBI Agent Joseph Gersky was called as a witness by Robert Homick and testified that he interviewed Michael Dominguez on March 18, 1986, about the Woodman murders. (116RT 14080-14082.) Agent Gersky testified that, during the first of two interviews, Dominguez said that he was a lookout, that he used a walkie-talkie to communicate with appellant when Gerald and Vera drove by, but that he did not know who else was present and who (other than appellant) was involved in the shootings. (116RT 14084-14085.)

Counsel for Robert Homick then asked Agent Gersky if he interviewed Dominguez a second time. Agent Gersky testified that he did, about an hour or so after the first interview. (116RT 14084-14085.) Counsel for Robert Homick asked: "That's part of your standard technique?" Agent Gersky responded: "Well, because in this case I didn't believe what he said the first time, yes." (116RT 14085.) Agent Gersky then testified that, during the second interview, Dominguez admitted that he had withheld information during the first interview. Agent Gersky testified that Dominguez said that he and appellant went to Max Herman's office on September 24, that Herman gave appellant a revolver, and that "Sonny" and "appellant's brother" assisted appellant with the murders. (116RT 14085, 14090.)

Outside the presence of the jury, prior to cross-examining Agent Gersky, the prosecutor requested permission to ask Agent Gersky if he believed Dominguez after the second interview. The court said it believed the question was appropriate. Appellant's counsel objected and said that this would allow the prosecution to "get[] in through the back door what he can't get in through the front door with regard to polygraph evidence." (116RT 14093-14094.) Counsel explained that Agent Gersky's only task in

the case was to administer the polygraph examination on Dominguez. (116RT 14094.) Counsel added that he had not opened the door to the question. Also, counsel argued that Agent Gersky's testimony that he did not believe Dominguez after the first interview pertained to one statement -- Dominguez's statement that he had no knowledge of who was involved in the shootings. However, if the court permitted the prosecutor to ask Agent Gersky if he believed Dominguez after the second interview, the question would cover various statements by Dominguez during the second interview. (116RT 14094.) Finally, counsel argued that Agent Gersky was called as a witness to show that Robert was not initially identified by Dominguez, however, the prosecution was now being allowed to use Agent Gersky to introduce all sorts of statements about appellant's activities. Counsel moved to sever. (116RT 14096.)

The court expressed concern about the fact that Agent Gersky had been called as a witness for the limited purpose of showing that Robert was not initially identified as being involved in the shootings. (116RT 14097.) The court then ruled:

> What I am going to allow you [the prosecutor] to do is ask this witness on redirect [sic] whether there was a second interview, and if during that second interview Mr. Dominguez provided additional information, and more information, and at the conclusion of that second interview did he believe him. But not to go through and bring out all the statements that Mr. Dominguez made.
>
> I think I have to do that in order to balance the rights of these 2 defendants to bring in this evidence without prejudicing one for the benefit of the other.

(116RT 14100.)

Appellant's counsel argued that he should be permitted to question Agent Gersky about the basis of his opinion, which was the polygraph examination. (116RT 14100.) The court replied that the jury did not know

that the witness was a polygraph expert. (116RT 14100-14101.) The court noted that the fact that Agent Gersky believed Dominguez following the second interview was of "extremely minor significance." (116RT 14101.) The court added: "I think this jury's determination about the credibility of Michael Dominguez is not going to depend on whether this witness believed him or not." (116RT 14101.)

The testimony of Agent Gersky resumed. On cross-examination, the prosecutor did not ask Agent Gersky about Dominguez's statements during the second interview but, rather, focused on Dominguez's identification of those who assisted appellant in the murders. (116RT 14110-14115.) At the close of his examination, the prosecutor asked Agent Gersky: "And after the second interview . . . you believed Michael Dominguez, didn't you?" Agent Gersky responded: "Yes, I did." (116RT 14115.)

Appellant now argues that the trial court erred in its ruling, in violation of his constitutional rights. (AOB 396-411.) Assuming arguendo that the trial court erred in its ruling, there was no prejudice to appellant. (*People v. Coffman, supra,* 34 Cal.4th at p. 83 [no prejudice despite admission of opinion by psychologist that defendant Coffman was credible in her accusations against defendant Marlow]; see *People v. Padilla* (1995) 11 Cal.4th 891, 946-947 [declining to decide whether *People v. Melton* (1988) 44 Cal.3d 713 (prohibiting opinion testimony as to a witness's truthfulness, whether from an expert or a lay witness) survives Proposition 8], overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800.)

First, Dominguez noted appellant's involvement during both of the interviews. The difference between the two interviews was Dominguez's identification of other participants. Thus, the fact Agent Gersky believed Dominguez following one interview but not the other was not particularly significant to appellant's defense.

Second, as the trial court recognized, the fact that Agent Gersky believed Dominguez following the second interview was of "extremely minor significance." (116RT 14101.) As the court recognized, "the jury's determination about the credibility of Michael Dominguez is not going to depend on whether this witness believed him or not." (116RT 14101.) Dominguez was an accomplice in the murders, and the trial court instructed the jury that Dominguez was an accomplice and his testimony should be viewed with distrust. (1Supp. 4CT 960, 962.) Moreover, Dominguez had been convicted of the murders, and the trial court instructed the jury that this was a fact that may be considered in determining Dominguez's believability. (1Supp. 4CT 953.) The jury was also well aware that Dominguez was not a cooperative witness. Agent Gersky's testimony that he believed Dominguez following the second interview paled in comparison to all of this information received by the jury.

Further, the jury's exposure to Agent Gersky's testimony that he believed Dominguez following the second interview would have been unremarkable to the jurors. Based on their knowledge that the defendants had been charged in federal court with crimes pertaining to the Woodman murders, the jurors would have viewed Agent Gersky as an investigating officer in this case. (See AOB 410.) Moreover, the jurors were instructed that *they* were the "sole judges" of the credibility of a witness. (1Supp. 4CT 948 [CALJIC No. 2.20]; *People v. Riggs* (2008) 44 Cal.4th 248, 300 ["[W]e see nothing in the record that would lead us to conclude that the jury was likely to disregard the instructions it received concerning its duty to decide the issues of credibility and guilt based upon its own assessment of the evidence, not the opinions of any witness."].) Thus, Agent Gersky's testimony that he believed Dominguez following the second interview was, indeed, of "extremely minor significance."

For these reasons, there was no prejudice to appellant and no violation of his constitutional rights. (See *People v. Riggs, supra,* 44 Cal.4th at p. 301.)

D. Agent Gersky's Unresponsive Testimony that Appellant Was Notorious

As stated previously, FBI Agent Gersky interviewed Dominguez about the Woodman murders, and, at trial, Robert Homick called Agent Gersky as a witness. Agent Gersky testified that Dominguez told him that "appellant's brother" assisted appellant in the murders. Agent Gersky testified that he assumed that "appellant's brother" was William Homick and prepared a report to that effect. Agent Gersky explained that he later learned from other law enforcement agents that Robert Homick was the brother suspected of assisting in the murders, and he filed a supplemental report to correct his error. (116RT 14080-14082, 14090-14091, 14105-14106, 14113-14114, 14119-14122.)

During redirect examination by counsel for Robert Homick, the following exchange took place with Agent Gersky:

> Q. Were you aware that [appellant] was arrested on March 11th of 1986?
>
> A. Well, I knew [appellant] had been arrested, because he was a notorious person.

(116RT 14116.) Appellant's counsel objected and moved to strike the testimony. The court granted the motion and instructed the jury to disregard the last portion of Agent Gersky's answer. (116RT 14117.)

Later that day, outside the presence of the jury, appellant's counsel moved for a mistrial. Counsel argued that Agent Gersky's statement "cannot be unrung" and that the court's admonition was inadequate. The court denied the motion. (116RT 14146-14147.)

A couple of days later, appellant's counsel renewed his motion for mistrial. Counsel argued that, because Agent Gersky was a seasoned FBI agent and because of other evidence already admitted at trial (e.g., Neil Woodman's statement that appellant was tougher than the Mafia and the testimony about the magazine article about hit men), appellant was entitled to a mistrial. (118RT 14448-14449.) The court disagreed and stated:

> I certainly agree with you. The statement was, at the very least, irresponsible if not outrageous and I would just -- it's always shocking when somebody in law enforcement who has testified for years and knows better blurts something out like that.
>
> I know the DA's didn't hear it coming and I don't think anybody expected him to say it; but he does know better.
>
> But my evaluation has to be the impact on the jury and the impact on the trial as a whole. I don't believe that the appropriate sanction is a mistrial and I don't believe that it is as damaging as you do.
>
> I certainly concur in your analysis of the irresponsibility of that witness in making the statements.
>
> I am going to deny the mistrial.

(118RT 14450.)

Appellant now argues that he was prejudiced, in violation of his constitutional rights, by Agent Gersky's unresponsive statement. (AOB 412-415.) Respondent disagrees.

Agent Gersky's statement was not admitted into evidence. The trial court immediately struck the statement and instructed the jury to disregard it. (116RT 14116-14117.) "When defendant's objections are sustained and the court admonishes the jury to disregard the improper comments, we assume the jury will follow the admonishment and any prejudice is avoided." (*People v. Mendoza, supra,* 42 Cal.4th at p. 702 [during the prosecutor's cross-examination of the defense psychiatrist, the prosecutor

mentioned the defendant's prior arrests without first seeking the court's permission; there was no prejudice because the trial court sustained the defendant's objection and instructed the jury to disregard the questions and statements]; *People v. Lucero, supra,* 23 Cal.4th at p. 718 [the defendant called a lieutenant to testify regarding the defendant's demeanor during the interrogation, and the lieutenant mentioned that the defendant had ended the interrogation by invoking his right to counsel; any possible prejudice was negated when the trial court struck the testimony and told the jury to disregard it]; *People v. Keenan, supra,* 46 Cal.3d at p. 525 [in the penalty phase, a witness testified about an elaborate robbery plan that he and the defendant had once concocted but had never carried out, although the evidence was excludable on the ground that the defendant received no advance notice the prosecution might present it; there was no prejudice because the trial court struck the testimony and gave an appropriate admonition].)

Accordingly, there was no prejudice to appellant and no violation of his constitutional rights.[104]

E. Dominguez's Statements during a Police Interview that, before the Murders, He Believed Gerald and Vera Would Be Killed

During Michael Dominguez's testimony, the court held a hearing outside the jury's presence, and the parties addressed how the videotape of

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[104] To the extent that appellant is arguing that the trial court erred in denying his mistrial motion (AOB 412-415), there was no abuse of discretion. (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) A motion for mistrial should be granted when a party's chances of receiving a fair trial have been irreparably damaged. (*People v. Avila, supra,* 38 Cal.4th at p. 573; *People v. Ayala, supra,* 23 Cal.4th at p. 282.) Here, as shown above, there was no irreparable damage to appellant's chances of having a fair trial.

the LAPD interview of Dominguez on March 13, 1986, would be edited. (86RT 9018.) Appellant's counsel objected to the playing of various portions of the tape. One portion he objected to was the following:

> [DOMINGUEZ]: Well, see [appellant] had told me it was a robbery. Okay, anyways, you know, I knew better than that. Anyways, ah, . . .
>
> [INTERVIEWER]: Now, you say I knew better than that? What did you know better than that?
>
> [DOMINGUEZ]: Well, after well, you know, after I'd been down there, you know, and, well, let me tell you the first part. Okay, anyways, [appellant] and this guy had went down to California and, ah, you know this is what [appellant] told me. That they'd, you know, tried to get in these peoples [sic] house, the people that got shot. And, ah, they had, they were up there, [appellant] had on his flight, flight badge, you know? His flight badge like, you know, he worked for the airlines. . .
>
> [INTERVIEWER]: Huh, huh.
>
> [DOMINGUEZ]: And they went up there, I guess there was an empty room in the building and they went up there to look at the empty room. And, . . .
>
> [INTERVIEWER]: When you say they went up there, how did they, did they break in?
>
> [DOMINGUEZ]: No, ah-huh, they went up there to buy another room, to, you know. . .
>
> [INTERVIEWER]: They, what, met with the real estate?
>
> [DOMINGUEZ]: I think they, yeah, that's what they did. . . .

(9Supp. 2CT 399, punctuation as in original; 86RT 9027-9029.)

Addressing appellant's objection, the court noted that Dominguez had testified at trial that he believed there was going to be a robbery, not a murder. Accordingly, the court found that this portion of the interview would impeach Dominguez. The prosecutor corrected the court and stated

that Dominguez's testimony had been that he never went to Los Angeles. The court acknowledged this and stated: "One, I think this is going to be material to impeach Mr. Dominguez later on, his theory he didn't know there would be a murder; and, also, it is clear that . . . he's talking about what he thought and his own ideas of what was going on and he does not say that this is what [appellant] told him so I don't think it's properly objectionable by [appellant]; and I'm going to overrule that objection." (86RT 9028-9029.)

Appellant also objected to the following portion of the interview of Dominguez:

> [INTERVIEWER]: Okay. Back it up. Back it up a little bit. You said that [appellant] told you that this was going to be a robbery.
>
> [DOMINGUEZ]: Yes, huh-huh.
>
> [INTERVIEWER]: And you made the statement 'I knew better.'
>
> [DOMINGUEZ]: Yeah, huh-huh.
>
> [INTERVIEWER]: What's I knew better mean?
>
> [DOMINGUEZ]: Ah, well, you know, I just know [appellant], you know.
>
> [INTERVIEWER]: Well, you know, to tell me 'I knew better,' . . .
>
> [DOMINGUEZ]: Yeah, huh-huh.
>
> [INTERVIEWER]: You know, I don't know what that means.
>
> [DOMINGUEZ]: Yeah, huh-huh.
>
> [INTERVIEWER]: What does that mean to you?
>
> [DOMINGUEZ]: Well, I, what does it mean to me? It means that, you know, I knew there was more to it than, you

know, just a robbery, you know, because, ah, you know, why would you be chasing these people so long, you know?

[INTERVIEWER]: What did you think was going to happen besides robbery?

[DOMINGUEZ]: Ah, I thought, I thought they were going to get shot, you know.

(9Supp. 2CT 403, punctuation as in original; see 88RT 9269.)

Appellant also objected to the following portion of the interview:

[INTERVIEWER]: Mike, you told us that this was going to be a robbery.

[DOMINGUEZ]: No, that's what [appellant] had told me? [sic]

. . .

[INTERVIEWER]: Okay. What did he say about the people?

[DOMINGUEZ]: Well, he had said that he had been after them for a long time. When he went up there to the, buy that other building, when he, yeah, when he went up there to buy the building, when I seen him, down there on Decater [].

[INTERVIEWER]: Okay. That he'd been after them (?)

[DOMINGUEZ]: Yeah.

. . .

[INTERVIEWER]: What's after [them] mean to you?

[DOMINGUEZ]: Catch up with them.

[INTERVIEWER]: To do what?

[DOMINGUEZ]: To do whatever to, to, to kill 'em.

(9Supp. 2CT 433, punctuation as in original; 88RT 9269-9270.)

The court overruled appellant's objections to these portions of the interview, stating: "Again, I find this to be the opinion of the witness and

not anything more than that and that I see no reason to reverse the prior ruling." (88RT 9270.)

The March 13 interview of Dominguez by the LAPD was played for the jury. The court instructed the jurors: "The tape is being played for the jury for two purposes. One, to determine whether Mr. Dominguez was, in fact, coerced by the police at the time he gave this statement and also to determine whether, if at all, it impeaches Mr. Dominguez in any respect." (88RT 9266; Peo. Exh. 252.)

Appellant now argues that the admission of these portions of the interview was error and violated his constitutional rights. (AOB 415-418.) Respondent disagrees.

The applicable standard of review is the deferential abuse-of-discretion standard. (*People v. Jablonski, supra,* 37 Cal.4th at p. 805.) There was no abuse of discretion here.

The challenged portions of the interview were material to impeach Dominguez. As previously noted in Argument I, the trial court found that Dominguez was being deliberately evasive and lying when he answered questions by saying he had no recollection, including when the prosecutor asked, "Didn't you know there was going to be a killing that night?" (87RT 9211.) The trial court thus properly instructed the jurors that the tape of the interview was being played to "determine whether, if at all, it impeaches Mr. Dominguez in any respect." (88RT 9266; see 87RT 9149-9229; *People v. Dykes* (2009) 36 Cal.4th 731, 758 ["Under certain circumstances, testimony may be considered inconsistent with prior statements when it reflects absence of recollection or evasiveness."].)

The challenged portions of the interview were not evidence of appellant's intent (see AOB 416) or appellant's character (see AOB 417). Rather, they were evidence of Dominguez's understanding of the conspiracy. As the trial court explained, Dominguez was "talking about

what he thought and his own ideas of what was going on and he does not say that this is what [appellant] told him. . . ." (86RT 9028-9029.) Appellant argues that Dominguez's statement "could only be viewed by the jury as being based on a claim of prior knowledge that [appellant] was a violent man who had killed before. . . ." (AOB 417.) Dominguez's statements did not suggest that Dominguez believed there would be a killing, based on his prior knowledge that appellant was a violent man. Rather, read in context, Dominguez's statements reveal that Dominguez believed that Gerald and Vera would be killed based on appellant's preparations (e.g., attempting to buy another unit in the building where Gerald and Vera lived) and his lengthy pursuit of his victims.

For these reason, there was no error, constitutional or otherwise, in the admission of the challenged portions of Dominguez's interview.

F. Any Error in the Admission of the Evidence Was Harmless

Any evidentiary error by the trial court, cumulative as well as individual, was harmless. The complained-of evidence constituted only a small evidentiary portion of a lengthy and complex trial. Additionally, the prosecution presented other evidence that overwhelmingly proved that appellant was guilty of the murders and the conspiracy to commit the murders. Stewart Woodman described how he and his brother hired appellant to kill their parents. Michael Dominguez's testimony established how appellant recruited and then used Dominguez to assist him in carrying out the murders. Also, the prosecution's case showed how appellant stalked Gerald and Vera Woodman for over a year and then prepared for their murders in the days before the murders. In light of the foregoing, the alleged errors would be non-prejudicial under either the standard enunciated in *People v. Watson, supra,* 46 Cal.2d at page 818, or the standard set forth in *Chapman v. California, supra,* 386 U.S. at page 18.

(*People v. Jablonski, supra,* 37 Cal.4th at p. 821; see also *People v. Samuels, supra,* 36 Cal.4th at pp. 113-114.)

VIII. THE TRIAL COURT PROPERLY DENIED ALL MOTIONS FOR SEVERANCE, AND NO GROSS UNFAIRNESS RESULTED FROM JOINDER

Appellant, Robert Homick, and Neil Woodman moved for severance from one another before trial. Appellant renewed his motion after the opening statement of Robert Homick at the guilt phase, during the presentation of certain evidence at the guilt phase, and in a motion for new trial. Appellant now contends the trial court erred in denying these motions, thereby violating his rights to due process, a fair trial, and a reliable death judgment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. (AOB 420-475.) Respondent submits there was no abuse of discretion in the denial of severance, and appellant's claims of constitutional error likewise must fail.

A. Relevant Proceedings

On March 6, 1989, several years before the start of trial, Stewart Woodman, Anthony Majoy, Neil Woodman, and Robert Homick -- all capital defendants -- appeared in court, and the trial court heard Neil Woodman's and Stewart Woodman's motions to sever. (A1RT A159-A190.) The court granted the motions, initially stating there would be one trial for the Woodman brothers (with two juries) and a second trial for Robert Homick and Anthony Majoy. The court explained the case was appropriate for a joint trial, despite any potential difficulties at the guilt phase; however, given the risk of a lack of individualized treatment at the penalty phase, severance was warranted. The court also said that, as far as *Aranda* issues were concerned, statements could either be excised or disallowed but a complete ruling need not be made on that matter for purposes of the severance motions. (A1RT A195-A200.) After some

further discussions with counsel about their commitments in other cases, the court modified its ruling, stating that Stewart Woodman and Anthony Majoy would be tried together and then Neil Woodman and Robert Homick would be tried together, thus separating the two Woodman brothers. (A1RT A208.)

Later that year, appellant was arraigned, and the People stated they would be seeking the death penalty against him. (A1RT A244-A247.) Shortly thereafter, the People filed a motion to join appellant's case with that of Robert Homick and Neil Woodman. (A1RT A249(1)-A251.)

On January 19, 1990, the case was assigned to Judge Alexander Williams, III. (A1RT A256-A257.) Soon, Robert Homick and Neil Woodman moved to be severed from one another. The People initially took the position that there should be one trial for appellant, Robert Homick, and Neil Woodman, with two juries (one for appellant and another for Robert Homick and Neil Woodman). (A1RT A264-A267.) However, about one month later, the prosecutor said that, although the People continued to believe that all three defendants (appellant, Robert Homick, and Neil Woodman) could be tried together, the People now believed that only one jury was needed, because the People had decided not to use Steward Siegel's testimony, which would have been admissible against Robert Homick and Neil Woodman, but not appellant. (1RT 28-29.)

Later that year, on October 26, 1990, the court heard the People's motion to join appellant's case with that of Robert Homick and Neil Woodman, as well as Robert Homick's and Neil Woodman's motions to be severed from one another. Counsel for Neil Woodman expressed concern about antagonistic defenses and an individualized death determination. Counsel for Robert Homick echoed these concerns and expressed concern about two brothers being tried together. (9/10RT 395-409; see also 11CT 2959-2963.) Appellant joined in these arguments and objected to joinder.

Counsel for appellant also argued that two witnesses, Steward Siegel and Michael Dominguez, had been unavailable at his preliminary hearing but had testified at the preliminary hearing of the other two defendants, who would be able to use the testimony of these witnesses to show that appellant committed the crimes on his own. Counsel for appellant also argued that the law of the case was that two brothers should not be tried together. (9/10RT 410-413.) After hearing these arguments, the court met in camera with counsel for Robert Homick and then counsel for Neil Woodman. (9/10RT 424-433.) In the end, the court denied Neil Woodman's and Robert Homick's motions for severance. It also granted the People's motion to join appellant's case with that of Robert Homick and Neil Woodman. (9/10RT 434.)

Thereafter, counsel for Robert Homick filed a motion to be tried separately from appellant. (13CT 3438-3508.) Appellant joined in the motion based on the familial relationship of appellant and Robert Homick. The court found no reason to reconsider its prior ruling. (11/12RT 486-487.)

On February 4, 1991, counsel for Neil Woodman noted that appellant and Robert Homick had made a severance motion, based on a letter that had been admitted into evidence at the trial in Las Vegas. The letter was from Neil Woodman to Stewart Woodman and contained statements that could be considered to reflect on the guilt of appellant or/and Robert Homick. The prosecutor stated he intended to use evidence of the letter only to the extent it did not violate any of the defendants' *Aranda/Bruton* rights, the litigation of which was to be determined by the court during the trial. The prosecutor said that, whatever the court ruled with regard to the admissibility of the letter, the People would not seek separate juries or separate trials. (16RT 699-704.)

Over a year later, on March 25, 1992, the court said it hoped to resolve discovery issues by June and then proceed to pretrial motions and trial. Counsel for Neil Woodman asked for a separate trial, arguing that the trial of Neil Woodman could start immediately, whereas the codefendants were not prepared to proceed to trial. The prosecutor opposed the motion, arguing that the trial of Neil Woodman would be 90 to 95 percent identical to the trial of the Homick brothers. The court denied Neil Woodman's motion but said it was open to future severance motions. (40RT 1612-1613, 1625-1629.)

On May 29, 1992, the case was transferred to Judge John Oudekirk for trial. (42RT 1768.) Shortly thereafter, counsel for Neil Woodman noted that each defendant would be moving for severance. The prosecutor said the People would be opposing the motions. The prosecutor added that all of the codefendants' statements he would seek to introduce at trial would be within the co-conspirator exception to the hearsay rule and he did not intend to introduce any statement that would violate *Aranda/Bruton*. (43RT 1822-1823.) Counsel for appellant argued that the court needed to decide the admissibility of the statements before trial so that the People could decide whether to proceed to trial jointly or separately. (43RT 1824.) The prosecutor responded that he saw no need to lay out everything that was going to be introduced in the case, because, if the court ruled that a statement was hearsay or violated *Aranda/Bruton*, then the statement would be "cleaned up" or excluded from evidence. (43RT 1824-1827.) The court said that that is how the court had seen it done in other cases. The court explained that the People were taking the risk that, if a statement violated *Aranda/Bruton*, the People could not use the statement. Accordingly, the court said that there was no need to litigate the matter in a pretrial motion to sever. (43RT 1825, 1827.)

On June 18, 1992, appellant filed a motion for severance from Robert Homick and Neil Woodman and/or to empanel two juries. The motion argued: it was the law of the case that two brothers should not have their guilt and penalty issues heard by the same jury; there were seriously conflicting defenses requiring severance or separate juries; separate juries or severance was required to assure individual consideration at the guilt phase; family ties interfered with appellant's ability to present witnesses at both the guilt and penalty phase; fairness and judicial economy required separate juries given the volume of evidence to be introduced against appellant at the penalty phase; and severance or separate juries were warranted because the People intended to introduce a post-arrest statement by Neil Woodman implicating appellant in the offense.[105] (18CT 4874-4935.) The People filed an opposition to the motion. (18CT 4993-5005; see also 18CT 4955-4963, 5031-5037.)

On July 9, 1992, Judge Oudekirk recused himself, and the case was reassigned once again for trial. Judge Florence-Marie Cooper became (and remained) the trial judge on the case. (44RT 1865, 1867-1.) Thereafter, appellant filed a supplemental memorandum of points and authorities in support of the motion to sever and/or for separate juries. He argued the court should resolve the *Aranda/Bruton* issues at that stage of the proceedings. (19CT 5251-5256.)

On August 3, 1992, the court heard the pending motions for severance and/or for separate juries. The court said it had read the relevant pleadings and its initial reaction was that there was no basis for a severance of the guilt phase as to any defendant. The court, however, said it was concerned about whether there was a need for two juries -- one for appellant and one for Robert Homick and Neil Woodman -- because of

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[105] This letter (see 18CT 4934-4935) was not introduced at trial.

potential competence of counsel issues arising by virtue of any restrictions imposed on counsel by the wishes of appellant and Robert Homick to limit the introduction of evidence which might benefit each but injure the brother. (46RT 1895, 1899-1900.)

Following these comments, the court heard testimony from Charles Gessler, the Capital Case Coordinator of the Los Angeles County Public Defender's Office, who opined that there were serious problems with jointly trying two brothers at a penalty phase. (46RT 1901-1907.) The court then permitted counsel for appellant and counsel for Robert Homick to make separate ex parte showings on the severance/separate juries issue with regard to the penalty phase. (46RT 1927-1930, 1942-1964.) Thereafter, the court granted the request for separate juries (one for appellant and another for Robert Homick and Neil Woodman). (46RT 1965-1966.) At this juncture, the prosecutor elected not to seek the death penalty against Robert Homick. The prosecutor explained: "Based on the court's decision, it's the People's decision that we will not seek the death penalty against Robert Homick. Based on the court's earlier position, this was a penalty phase issue only. It would seem to me to eliminate the need for two juries." (46RT 1966.)

The court then heard Neil Woodman's motion to sever his trial from that of appellant and Robert Homick. Counsel for Neil Woodman asked for severance from appellant at the guilt phase, based on the letter written by Neil Woodman to Stewart Woodman and wiretap evidence. (46RT 1966-1970.) The prosecutor responded: "We would prefer to keep the defendants joined as opposed to introducing statements that would be admissible against one defendant but not all." (46RT 1971.) Counsel for Neil Woodman then argued that his client would be prejudiced by being tried at a penalty phase with appellant, because there was significant aggravating evidence against appellant. Counsel also argued that his client

would be prejudiced by being tried at the guilt phase with Robert Homick, because the jurors might speculate that Neil Woodman was in a more culpable category as a capital defendant. (46RT 1976-1977.) Appellant's counsel joined in these arguments and added that the court should resolve the *Aranda* issues before the trial, either in conjunction with the motion to sever or by addressing in limine motions. (46RT 1979.) After hearing these arguments, the court denied Neil Woodman's motion to sever. As far as *Aranda* issues, the court encouraged counsel to bring in limine motions before trial so that the court could resolve those issues before trial. (46RT 1986-1988.)

About two months later, appellant, Neil Woodman, and Robert Homick proceeded to trial before one jury. Following the opening statement of counsel for Robert Homick, appellant renewed his motion for severance on the ground of conflicting defenses.[106] The court denied the motion. (71RT 5911.)

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[106] In his opening statement, counsel for Robert Homick told the jurors that it was important not to lump appellant and Robert Homick together and to view the evidence as to each individually. (71RT 5897.) Counsel explained:

> When you hear that [appellant] was hired by Neil Woodman to provide security at the bar mitzvah of Neil's son, you are going to see that Robert Homick wasn't hired. . . . [¶] When you hear that [appellant] was brought in to bug the offices where the auditors would work, you are going to hear that Robert Homick has nothing to do with that. [¶] . . . Or you will hear them say, anything he wants done, meaning Neil or Stewart, [appellant] will do it for me. Not Robert. . . . [¶] [T]he evidence will show that when the Woodmans . . . wanted their parents killed . . . they went to [appellant]. [¶] In fact, the evidence will show, as introduced by the prosecution, that Stewart Woodman told [appellant] he didn't want Robert Homick involved.

(continued...)

During the guilt phase of the trial, appellant renewed his motion for severance. Appellant now lists 16 factual grounds, which he argues warranted severance. (AOB 444-448.) However, appellant renewed his severance motion with regard to only four of these grounds. (AOB 444-448, items 9, 10, 12, and 16.)

Finally, in his motion for new trial, appellant argued that the trial court erred in permitting joinder and denying severance, because the defenses at trial were conflicting. (1Supp. 7CT 1920-1921.) The court denied the motion. (148RT 18661.)

B. Relevant Law

Under section 1098, "[w]hen two or more defendants are jointly charged . . . they must be tried jointly, unless the court order[s] separate trials." Thus, a trial court must order a joint trial as the "rule" and may order separate trials as an "exception." (*People v. Cleveland* (2004) 32 Cal.4th 704, 726; *People v. Alvarez* (1996) 14 Cal.4th 155, 190.) "Joint trials are favored because they promote economy and efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent

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(...continued)
(71RT 5899-5901.) Counsel for Robert Homick also stated:

> Yesterday [the prosecutor] told you that the Woodmans hired the Homicks to kill Gerald and Vera Woodman. The prosecution's own evidence will show that that simply is not true. [¶] There was a man named Joey Gambino that told Stewart Woodman that if they wanted to take care of the problem . . . of his parents, the person to speak to was [appellant]. [¶] And shortly after that, the prosecution's evidence will show a meeting was held between Stewart Woodman, you will have to decide if Neil Woodman was there, and [appellant]. . . . [¶] Robert Homick was not at that meeting.

(71RT 5906-5907.)

verdicts." (*People v. Coffman, supra,* 34 Cal.4th at p. 40, internal quotations omitted.) A "classic case" for joint trial is presented when defendants are charged with common crimes involving common events and victims. (*People v. Cleveland, supra,* 32 Cal.4th at p. 726.)

"In light of this legislative preference for joinder, separate trials are usually ordered only in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (*People v. Box* (2000) 23 Cal.4th 1153, 1195, internal quotations omitted; *People v. Cleveland, supra,* 32 Cal.4th at p. 726.) However, antagonistic defenses alone do not compel severance. (*People v. Cummings, supra,* 4 Cal.4th at p. 1286.)

In *Coffman*, this Court set forth the applicable law regarding severance and conflicting defenses:

> In [*People v. Hardy* (1992) 2Cal.4th 86, 168], we said: Although there was some evidence before the trial court that defendants would present different and possibly conflicting defenses, a joint trial under such conditions is not necessarily unfair. [Citation.] Although several California decisions have stated that the existence of conflicting defenses may compel severance of codefendants' trials, *none has found an abuse of discretion or reversed a conviction on this basis*. [Citation.] If the fact of conflicting or antagonistic defenses *alone* required separate trials, it would negate the legislative preference for joint trials and separate trials would appear to be mandatory in almost every case. We went on to observe that although it appears no California case has discussed at length what constitutes an antagonistic defense, the federal courts have almost uniformly construed that doctrine very narrowly. Thus, [a]ntagonistic defenses do not *per se* require severance, even if the defendants are hostile or attempt to cast the blame on each other. [Citation.] Rather, to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury

> will unjustifiably infer that this conflict *alone* demonstrates that both are guilty. [Citation.] When, however, there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance. [Citation.]

(*People v. Coffman, supra*, 34 Cal.4th at pp. 41-42, internal quotations omitted; emphasis in original.)

This Court reviews a trial court's denial of a severance motion for an abuse of discretion based on the facts as they appear when the trial court ruled on the motion. (*People v. Lewis* (2008) 43 Cal.4th 415, 425; *People v. Alvarez, supra,* 14 Cal.4th at p. 189.) If this Court concludes that the trial court abused its discretion, reversal is required only if it is reasonably probable that the defendant would have received a more favorable result in a separate trial. (*People v. Lewis, supra,* 43 Cal.4th at p. 425; *People v. Coffman, supra,* 34 Cal.4th at p. 41.) If the court's joinder ruling was proper when it was made, however, this Court may reverse a judgment only on a showing that joinder resulted in "gross unfairness" amounting to a denial of due process. (*People v. Lewis, supra*, 43 Cal.4th at p. 425; *People v. Cleveland, supra,* 32 Cal.4th at p. 727.)

C. Appellant's Pretrial Motion to Sever

The trial court properly denied appellant's pretrial motion to sever his case from that of Robert Homick and Neil Woodman, because this was a "classic case" for joint trial. Appellant and his two codefendants were each charged with having committed the same crimes involving the same events and victims: the September 25, 1985, murders of Gerald and Vera Woodman and the conspiracy of the defendants to commit those murders.

Because the charges against appellant and the codefendants were nearly identical,[107] there was no danger of jury confusion and no danger of prejudicial association. There was also no suggestion at the pretrial proceedings that, if appellant were tried separately from his codefendants, the codefendants would provide exonerating testimony. Further, appellant presented no evidence of conflicting defenses to the trial court during the pretrial proceedings, nor has appellant identified any such showing made to the trial court.

Moreover, there was no issue of extrajudicial statements in which the codefendants implicated appellant. The prosecutor stated several times during the pretrial proceedings that the People preferred to try the defendants jointly, even if it meant excluding statements that would be admissible against one but not all defendants. The prosecutor explained that all of the codefendants' statements the People would seek to introduce at trial would be within the meaning of the admission of co-conspirator exception to the hearsay rule and that, if the trial court ruled a statement was hearsay or violated *Aranda/Bruton*, then the statement would be "cleaned up" or excluded. (43RT 1822-1827; 46RT 1971.) The trial court properly relied upon these representations in denying appellant's pretrial motion for severance. (43RT 1825, 1827; 46RT 1986-1988.) Appellant now argues that this procedure precluded him from fully litigating during the pretrial proceedings the admissibility of the statements the prosecution would seek to introduce. (AOB 450-451.) However, appellant was not precluded from litigating the admissibility of the statements during later

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[107] All three defendants were charged with the same crimes and the same special circumstance allegations, with the exception that the lying-in-wait special circumstance was not alleged against Neil Woodman. (9CT 2300-2313; 1Supp. 3CT 846-857.) Moreover, both appellant and Neil Woodman were capital defendants.

proceedings and renewing his severance motion at that time. In any event, as set forth in Argument VI, each of the statements introduced by the People was properly admitted against appellant, properly admitted with a limiting instruction, or non-prejudicial.

Thus, the trial court did not abuse its discretion in denying appellant's pretrial motion for severance.

D. Appellant's Renewed Motions for Severance

1. Appellant has forfeited many of his factual grounds for severance

Appellant argues he was prejudiced by evidence that was admitted because of the joint nature of the trial, which would not have been admitted if he had been tried separately. (AOB 443-448.)

In the pretrial proceedings, appellant argued that conflicting defenses and potential *Aranda/Bruton* issues warranted severance. These arguments were very general, identifying no specific evidence to support the arguments (other than the letter from Neil to Stewart which arguably implicated appellant but which was never presented at trial). (18CT 4892-4895.) Although appellant made a general request during the pretrial proceedings for the trial court to rule on the admissibility of the codefendants' statements that the prosecution would seek to introduce, the trial court said that such issues did not have to be resolved at that time and encouraged counsel to bring in limine motions to resolve those issues before trial. (46RT 1979, 1988; 19CT 5255; see also 43RT 1823-1827.) Thus, the trial court, in effect, invited appellant to renew his severance motion during later proceedings. Appellant, however, did not renew his severance motion when the trial court ruled on the admissibility of most of the evidence appellant now lists in his instant claim of error.

"If further developments occur during trial that a defendant believes justify severance, he must renew his motion to sever. Defendant made no

renewed motion in this case. Accordingly, he may not raise the point on appeal." (*People v. Ervin* (2000) 22 Cal.4th 48, 68; see *People v. Tafoya* (2007) 42 Cal.4th 147, 163 ["[D]efendant has forfeited this issue on appeal because he failed to assert this ground at the time his severance motion was heard by the trial court."].) Here, appellant did not renew his severance motion when the trial court ruled on the admissibility of most of the evidence appellant now lists in his instant claim of error. Accordingly, he should not be heard to complain that the trial court should have granted severance based on this evidence.[108]

This evidence includes the following:

(1) Robert Homick threatened violence against Jack Swartz, who did business with Manchester (71RT 5911-5914 [appellant argues the evidence is irrelevant, inadmissible under Evidence Code section 352, and not in furtherance of the conspiracy; he does not renew the severance motion on this basis];[109]

(2) Stewart Woodman told Catherine Clemente, the receptionist at Manchester, that appellant was "his man in Vegas" and, if he needed anything done, appellant "was the man to do it," and Neil Woodman told

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[108] In this respect, appellant is not being "penalized" due to the limited information available to the trial court during the pretrial proceedings. (AOB 437, fn. 228.) Appellant had a duty to renew his severance motion when further developments occurred during trial that appellant believed justified severance. (*People v. Ervin, supra,* 22 Cal.4th at p. 68.) The trial court had no sua sponte duty to monitor incoming evidence and reconsider its denial of severance. (*Id.* at pp. 68-69; *People v. Alvarez, supra,* 14 Cal.4th at p. 216, fn. 20.)

[109] As noted by the trial court, this evidence did not mention appellant. (71RT 5961.) Thus, appellant was not prejudiced by the evidence. In fact, one of the themes of appellant's defense was that Robert Homick had close ties to the Woodman brothers and was capable of having committed the murders himself. The evidence of Robert's threats of violence against Swartz thus inured to the benefit of appellant's defense.

Clemente that appellant was tougher than the Mafia (72RT 6038-6042, 6110-6111, 6144-6159; 73RT 6377-6418 [appellant argues the evidence was improper character evidence and not in furtherance of the conspiracy; he does not renew the severance motion on this basis];[110]

(3) Neil Woodman often told Richard Wilson, the vice-president of Manchester, that appellant could get anything done of an illegal nature for the Woodman brothers (75RT 6896-6915 [appellant argues the evidence was improper character evidence and not in furtherance of the conspiracy; he does not renew his severance motion on this basis];

(4) Neil Woodman displayed a magazine to his aunt Gloria Karns and referred to an article about hit men, stating that, when somebody annoyed him, he could look in a magazine and find someone to stop them (72RT 6032-6037 [appellant argues the evidence was not admissible against him and was not in furtherance of the conspiracy; he does not renew the severance motion on this basis]);[111]

(5) Neil Woodman told Jack Ridout that he could have Ridout's ex-wife "hit" if she was a problem (75RT 6796-6812 [appellant argues the statement was not in furtherance of the conspiracy; he does not renew the severance motion on this basis]);[112]

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[110] Contrary to appellant's assertion (AOB 423), the evidence was *not* that appellant was a member of the Mafia.

[111] The evidence did not refer to appellant. Accordingly, appellant was not prejudiced by the evidence.

[112] This evidence did not refer to appellant. Moreover, the trial court gave the jury a limiting instruction that this evidence was admissible against Neil Woodman only, not appellant. (75RT 6877-6878.) The trial court also instructed the jury with a more general admonition regarding "evidence limited to one defendant only." (126RT 15545; 1Supp. 4CT 942 [CALJIC No. 2.07].) It must be presumed the jury followed these instructions. (*People v. Avila, supra,* 38 Cal.4th at p. 575.) Accordingly, appellant was not prejudiced by the evidence. (*Ibid.*)

(6) Stewart Woodman told Jack Ridout that appellant did collection work for Manchester (75RT 6801-6812 [appellant argues the evidence is improper character evidence, not in furtherance of the conspiracy, and inadmissible under Evidence Code section 352; he does not renew the severance motion on this basis]);[113]

(7) shortly after his arrest, Neil Woodman asked Steven Strawn to destroy folded up cards hidden underneath Neil's desk, and appellant's name was on some of these cards (76RT 7139-7152 [appellant argues the evidence was inadmissible under *Aranda/Bruton*; he does not renew the severance motion on this basis]);[114]

(8) Neil Woodman referred to appellant as a "heavy guy" (77RT 7343-7346 [appellant argues the prosecutor's redirect examination which elicited this testimony went beyond the scope of his cross-examination; he does not renew the severance motion on this basis]);[115]

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[113] Ridout did not testify to any words or gestures on the part of Stewart indicating that appellant used force or violence to collect debts. Thus, there was no prejudice to appellant.

[114] The trial court instructed the jury that this evidence, if believed, was to be considered as it applied to Neil Woodman only and could not be considered in any fashion with respect to appellant. (77RT 7357.) The trial court also gave the jury a more general admonition on "evidence limited to one defendant only." (126RT 15545.) It is presumed the jury followed these instructions. (*People v. Avila, supra,* 38 Cal.4th at p. 575.) Accordingly, appellant was not prejudiced by the evidence. (*Ibid.*)

[115] It was counsel for appellant who elicited testimony from Strawn on cross-examination that Stewart ridiculed Neil about his relationship with appellant. (77RT 7313-7314.) On redirect examination, the prosecutor followed through on this line of questioning, by inquiring how Stewart made fun of the relationship between Neil and appellant. In response, Strawn testified that Stewart believed that Neil telling others that appellant was a "heavy guy" discredited Neil and the company. (77RT 7331.) Counsel for Neil Woodman described Strawn's testimony regarding the "heavy guy" comment as follows: "It came in as innocuously as possible and it was gone." (77RT 7345.)

(9) counsel for Robert Homick asked Agent Gersky if he knew that appellant had been arrested on March 11, 1986, and Agent Gersky responded, "Well, I knew [appellant] had been arrested, because he was a notorious person" (116RT 14116-14117 [appellant moves to strike the testimony, and the trial court grants that motion and instructs the jurors to disregard the testimony; appellant does not renew his severance motion on this basis]; 116RT 14146-14147; 118RT 14448-14450 [appellant makes mistrial motions based on the testimony; he does not renew his severance motion on this basis]);[116]

(10) Robert Homick called as a witness Judge Clarence Stromwall, who testified that Max Herman was streetwise, savvy, and not easily manipulated, and would not have supplied appellant a gun if he had any indication the gun might be used to commit a crime (116RT 13967-13973 [appellant argues the evidence is improper character evidence (i.e., that appellant would manipulate people) and inadmissible under Evidence Code section 352; he does not renew his severance motion on this basis]);[117]

(11) Robert Homick called his (and appellant's) sister, Helen Copitka, as a witness and she testified that Robert idolized appellant, trusted him, and attempted to please him (117RT 14171-14174 [appellant argues the evidence is improper character evidence; he does not renew his severance motion on this basis]); and

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[116] Although Agent Gersky's testimony that appellant was "notorious" was "brought out" during questioning by counsel for Robert Homick, counsel for Robert Homick did not elicit this testimony. Moreover, the court struck the testimony and instructed the jury to disregard it. Accordingly, this evidence does not support a claim of "conflicting defenses." Also, contrary to appellant's suggestion (AOB 423), Agent Gersky did not testify that appellant was wanted by the FBI.

[117] The testimony that Max Herman was not easily manipulated was not necessarily in conflict with appellant's defense. It was consistent with the defense that appellant did not obtain a gun from Max Herman.

(12) while questioning Detective Holder on direct examination, counsel for Robert Homick attempted to impeach the detective with Defense Exhibit 810, one of the interviews of Michael Dominguez by the Las Vegas Metropolitan Police Department, wherein law enforcement officers stated that they were talking to Dominguez about a triple murder in Las Vegas and that a deal was made with Dominguez based upon his not being the shooter in any case (120RT 14843-14846 [although appellant argues he is "taking the short end of it" because of the joint nature of the trial, he does not renew his severance motion on this basis; instead, he moves for mistrial and for a finding of cumulative error on the ground that there was an inference that law enforcement officers believed that someone other than Dominguez (perhaps appellant) was the shooter]).[118]

Thus, because appellant did not renew his severance motion when the trial court ruled on the admissibility of this evidence, he should not be heard to complain that the trial court should have granted severance based on this evidence.[119] In any event, as discussed below, no abuse of discretion or gross unfairness resulted from any of this evidence in the joint trial.

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[118] As the trial court noted, there was "nothing in [Dominguez's interview] that would even, under rank speculation, tie that into any defendant in this case." (120RT 14846; see also 120RT 14840; see AOB 423 [appellant incorrectly claims that the jury learned that he was "under investigation for unknown other crimes which apparently included other murders"]; AOB 463 [appellant incorrectly claims that the jury heard evidence that he "was suspected of being the shooter in a separate triple homicide in another state"].) There was thus no "conflict" between the defenses.

[119] See also 68RT 5539-5564 (defense counsel voice various objections to various pieces of evidence but do not renew the severance motion).

2. The trial court did not abuse its discretion in denying severance

a. Incriminating statements of codefendants

Appellant argues that extrajudicial statements made by his codefendants were introduced by the prosecution, even though the statements were not properly admissible and were not edited to excise portions prejudicial to appellant. Appellant lists nine items of evidence in this category. (AOB 453-454; see AOB 444-446, items 1-9.) As stated earlier, appellant failed to renew his motion to sever based on eight of these nine items of evidence. (AOB 444-446, items 1-8.)

In any event, as set forth in Argument VI, the evidence at issue here was properly admitted against appellant or was non-prejudicial as to him. (AOB 444-446, items 1-4, 6, 8.) As for the evidence admitted against some but not all of the defendants (AOB 445-446, items 5 and 7), the trial court gave the jurors limiting instructions on the evidence.[120] (75RT 6877-6878; 77RT 7357; 126RT 15545.) It is presumed the jury followed these instructions. (*People v. Avila, supra,* 38 Cal.4th at p. 575; see *Zafiro v. United States* (1993) 506 U.S. 534, 539 [113 S.Ct. 933, 122 L.Ed.2d 317] ["less drastic measures[] [than separate trials,] such as limiting instructions, often will suffice to cure any risk of prejudice"]; see also *People v. Yeoman,*

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[120] As such, the prosecutor did not "violate" his pretrial promise that, if the court ruled that a statement was hearsay or violated *Aranda/Bruton*, then the statement would be "cleaned up" or excluded from evidence. (See AOB 423, 428, 437, 443, 450-451.) Also, as for the use of limiting instructions on two items of evidence (Ridout's statement regarding a "hit" on his ex-wife and Strawn's testimony regarding the business cards hidden underneath Neil's desk), this was also consistent with the prosecutor's pretrial promise, because these items of evidence did not present *Aranda* issues. (See Arg. VI.)

supra, 31 Cal.4th at p. 139 ["Jurors are routinely instructed to make . . . fine distinctions concerning the purposes for which evidence may be considered, and we ordinarily presume they are able to understand and follow such instructions. [Citation.] Indeed, we and others have described the presumption that jurors understand and follow instructions as '[t]he crucial assumption underlying our constitutional system of trial by jury.' [Citations.] We see no reason to abandon the presumption . . . where the relevant instructional language seems clear and easy to understand."].)

Also, the record "fails to show that the jurors in this joint trial were unable or unwilling to assess independently the respective culpability of each codefendant or were confused by the limiting instructions." (*People v. Ervin, supra,* 22 Cal.4th at p. 69.) The verdicts indicate the contrary. (See *ibid.*) The jury found appellant guilty of all counts and found all special circumstance allegations true. The jury found Robert Homick guilty of two counts of first degree murder and found the multiple-murder special-circumstance allegation true but did not reach a verdict on the conspiracy charge and the financial-gain and lying-in-wait special-circumstance allegations. As for Neil Woodman, the jury was deadlocked on all charges. (1Supp. 4CT 1053-1067; 133RT 16845-16874; 147RT 18617-18618.) There was no abuse of discretion. (See *People v. Lewis, supra,* 43 Cal.4th at p. 460 ["Defendant did not raise the antagonistic defenses issue at trial . . . so the trial court's failure to grant severance on this ground was not an abuse of discretion."].)

As for the one item of evidence for which appellant moved for severance on the ground of an incriminating statement by a codefendant (AOB 446, item 9), the trial court properly denied severance. At trial, appellant objected to Stewart Woodman testifying that, when Stewart and Robert spoke in the holding cell after their arrests, Robert told Stewart that it was a coincidence that he had been at the Gorham address on June 22,

1985 (Gerald's and Vera's anniversary). Counsel for appellant explained that a part of appellant's defense was that there had been a plot to commit the murders on June 22 (when appellant was not in Los Angeles) but Robert's statement proclaiming a coincidence cut into that defense. The court overruled the objection. Appellant made a severance motion, which the trial court denied. (102RT 11534-11537.) The trial court did not abuse its discretion. Even if appellant were able to show that there had been a murder plot on June 22 and the plot did not involve his presence, Gerald and Vera Woodman were not killed on June 22. In other words, evidence that there might have been a murder plot on June 22 does not counter evidence that appellant participated in the killings on September 25, 1985. For the same reason, there is no reasonable probability that separate trials would have produced a more favorable result. (*People v. Avila, supra,* 38 Cal.4th at p. 575.)

b. Prejudicial association with codefendants

Appellant argues that his trial was marked by prejudicial association with codefendants. (AOB 454.) Appellant does not appear to have made this argument in the trial court. Accordingly, he has forfeited the ground on appeal as to his abuse of discretion claim. (*People v. Tafoya, supra,* 42 Cal.4th at p. 163.)

In any event, the charges against appellant and his codefendants were nearly identical. Significantly, all of the defendants were charged with conspiring with one another to kill Gerald and Vera Woodman. And appellant and Neil Woodman were capital defendants at trial. Accordingly, there was no danger of prejudicial association. (*People v. Cummings, supra,* 4 Cal.4th at p. 1287 ["Since defendants were crime partners in several of the robberies and the murder, prejudicial association with a codefendant is not a factor."].)

Appellant argues that the case against Robert Homick was stronger than the case against him. (AOB 454.) Respondent disagrees. The testimony of Stewart Woodman and Michael Dominguez provided overwhelming evidence of appellant's guilt. Also, other evidence presented by the prosecution showed that appellant stalked Gerald and Vera Woodman for over a year and then methodically prepared for their murders. Additionally, the jury's verdicts confirm that the case against appellant was stronger than the case against Robert Homick. The jury convicted appellant of all charges and found all special circumstance allegations true. However, the jury did not convict Robert Homick of the conspiracy charge or find true the financial-gain and lying-in-wait special-circumstance allegations.

As for appellant's association with Neil Woodman, as appellant acknowledges, evidence of Neil's hatred for his parents would have been admissible in a separate trial of appellant as evidence of motive. (AOB 455.) Also, evidence of Neil's hatred for his parents and mismanagement of Manchester pales in comparison to the evidence of appellant plotting and committing the murders.

c. Confusion of evidence on multiple counts

Appellant acknowledges, as he must, that the number of counts would have been the same in a separate trial. However, he argues that a separate trial from Neil Woodman would have been shorter and less confusing. (AOB 455.) It does not appear that appellant raised this ground in the court below. Accordingly, it is forfeited on appeal. (*People v. Tafoya, supra,* 42 Cal.4th at p. 163.) In any event, appellant has failed to identify any portion of the record demonstrating that the jurors were confused about how to independently evaluate evidence against each defendant.

d. Conflicting defenses

Pointing to the defense of Robert Homick only, appellant argues that conflicting defenses warranted severance from his two codefendants. (AOB 446-448, 456-468.) At trial, appellant moved for severance on this ground after the opening statement of counsel for Robert Homick. Also, although appellant now identifies seven items of evidence in this category (AOB 446-448, items 10-16), appellant renewed his severance motion on this ground at three instances at trial (AOB 446-448, items 10, 12, and 16). Additionally, appellant moved for a new trial on this ground. The trial court did not abuse its discretion in its rulings.

(1) Opening statement of counsel for Robert Homick

The opening statement of counsel for Robert Homick did not demonstrate conflicting defenses. Instead, counsel for Robert Homick merely recounted what the People's case would show -- that appellant would be incriminated by the evidence but not Robert. (71RT 5899-5900 ["the evidence will show, as introduced by the prosecution"], 5906-5907 ["Yesterday [the prosecutor] told you that. . . . The prosecution's own evidence will show. . . . [¶] . . . The prosecution's evidence will show. . . ."].) Accordingly, the trial court did not abuse it discretion in denying severance.

(2) FBI Agent Gersky's testimony that he believed Michael Dominguez after the second interview

Agent Gersky was called as a witness by Robert Homick and testified that, during his initial interview of Michael Dominguez, Dominguez said that he did not know who was present when the Woodmans were shot and who, other than appellant, was involved in the murders. Counsel for Robert Homick asked Agent Gersky if he

interviewed Dominguez a second time on that same day because it was his standard technique. Agent Gersky responded that he interviewed Dominguez a second time because he did not believe Dominguez after the first interview. (116RT 14084-14085.) Agent Gersky then testified that, during the second interview, Dominguez said that Max Herman gave appellant a revolver and "Sonny" and "appellant's brother" assisted appellant with the murders. (116RT 14085, 14090.)

Prior to cross-examining Agent Gersky, the prosecutor requested permission to ask Agent Gersky if he believed Dominguez after the second interview. Appellant objected and renewed his severance motion. (116RT 14093-14100.) The trial court overruled the objection and denied the motion. The court said the fact Agent Gersky believed Dominguez after the second interview was of minor significance and the jury's evaluation of Dominguez's credibility would not depend on whether Agent Gersky believed Dominguez. (116RT 14100-14101.)

The trial court did not abuse its discretion. As the court recognized, the jury's evaluation of Dominguez's credibility would not depend on whether Agent Gersky believed Dominguez after the second interview. (See *People v. Cleveland, supra,* 32 Cal.4th at p. 728 ["Some defendants will sometimes cross-examine witnesses differently from another defendant, and may thus elicit testimony on redirect examination that another defendant would not elicit, but such differences in trial tactics do not mandate severance."].)

(3) Art Taylor's testimony that appellant was involved in drug activity

Counsel for Robert Homick requested permission to question Art Taylor about his status as a paid FBI informant and that Taylor had first approached the FBI because he believed appellant was involved in dealing drugs. (82RT 8273.) The court found it did not appear possible for counsel

for Robert Homick to fully and effectively cross-examine Taylor about his status as an informant without eliciting testimony regarding Taylor's motivation for becoming one (i.e., his belief that appellant was involved in drug activity). (82RT 8283-8284.) The court recognized this would bring out evidence which could be damaging character evidence against appellant. However, the court also recognized that the evidence benefited appellant to the extent that Taylor's credibility was impeached with evidence that he was a paid informant. Appellant moved for severance, and the court denied the motion. (82RT 8284-8285.)

Following Taylor's testimony, the trial court instructed the jury: "You are instructed that testimony concerning drug dealing on the part of [appellant], if believed by you, is to be considered only for the purpose of determining whether it tends to impeach the credibility of Art Taylor. You may not consider this evidence as showing [appellant] is a person of bad character or that he has a disposition to commit crime." (82RT 8452.) During instructions, the trial court twice repeated similar admonitions. (126RT 15546, 15560-15561.) Finally, during closing arguments, the trial court reminded the jury that the evidence regarding drug dealing "was offered for a limited purpose" and "may not be used by anyone for any other purpose." (130RT 16306-16307.)

In light of the trial court's multiple limiting instructions to the jury -- coupled with the fact that this evidence was hardly as serious as the current charges -- the trial court did not abuse its discretion in denying the severance motion.

(4) Evidence of appellant's guilt, independent of Robert Homick's defense

Taking into account all of the evidence admitted at trial that appellant now argues demonstrates conflicting defenses (AOB 446-447,

items 10-15), the trial court did not abuse its discretion in denying severance on the ground of conflicting defenses. The prosecution presented strong evidence of appellant's guilt, independent of the evidence that Robert Homick offered in his defense.

As set forth in the Statement of Facts, Stewart Woodman described how he and his brother Neil hired appellant to kill their parents. Stewart testified that appellant advised Stewart and Neil to "put an end" to their problems with their parents and told them that his price tag for the deed would be $40,000 or $50,000. Stewart testified that appellant collected and recorded information about Gerald and Vera Woodman and repeatedly assured Stewart that the contract on the lives of his parents would be fulfilled. Stewart also testified that Robert Homick collected $55,000 from Stewart and Neil for the murders. (102RT 11684-11693; 103RT 11708-11709, 11716; 104RT 11957-11958; 107RT 12484-12486.)

Further, Michael Dominguez's testimony established how appellant recruited Dominguez to assist him in the plot to commit the murders. (85RT 8964-8968.) Dominguez's testimony established appellant's preparation for the murders in the days prior to, and on the day of, the murders, including obtaining a gun from Max Herman and testing the walkie-talkies. (85RT 8976-8989; 87RT 9200-9202.) Dominguez's testimony also showed that, on the night of the murders, appellant had a handgun, a bolt cutter, and walkie-talkies in his car and dropped off Dominguez at a bus stop near the Gorham residence so that Dominguez could radio ahead when Gerald and Vera were headed home. The testimony further established that appellant later paid Dominguez $5,000 for his role in the murders. (87RT 9208-9225.)

More generally, the prosecution's evidence showed that appellant was stalking Gerald and Vera for over a year. (79RT 7680-7685; 100RT 11260-11267; Peo. Exh. 22.) The evidence also showed appellant's

preparation for the murders: two weeks before the murders, appellant purchased walkie-talkies (82RT 8299-8300, 8322-8325; 83RT 8474); on the day Stewart learned where his parents would be on Yom Kippur, appellant purchased airline tickets to Los Angeles (80RT 7869-7873, 7933; 81RT 8002-8007, 8036); on the day before the murders, appellant obtained "ammo" (82RT 8336-8338); appellant's daily reminder book for September 24 (the day before the murders) had a notation to Herman's address (96RT 10384-10389); and, in the days before the murders, appellant dealt with the problems with the walkie-talkies (82RT 8339-8347, 8413-8415; 84RT 8674, 8700-8701).

All of this evidence independently established appellant's guilt of the charges. In other words, demonstration of appellant's guilt was not dependent on Robert Homick's defense. Thus, the trial court did not abuse its discretion in denying severance. (*People v. Coffman, supra,* 34 Cal.4th at pp. 41-42.) For the same reasons, there is no reasonable probability that separate trials would have produced a more favorable result.[121]

Contrary to appellant's contention (AOB 456-460), there was less reason to grant severance in this case than in *People v. Boyde* (1988) 46 Cal.3d 212. Unlike the codefendant in *Boyde*, Robert Homick did not directly cast blame of the murders on appellant. (*Id.* at pp. 228, 232.) The only arguably damaging evidence to appellant introduced by Robert Homick's defense was that appellant was involved in drug dealing and Robert did things to please appellant. This evidence simply does not have the same force as one defendant placing blame of the crimes on the other defendant. (*Id.* at pp. 228, 229.) Like in *Boyde*, Robert Homick did not

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[121] There is no indication the jury was unable to apply the reasonable-doubt standard as to each defendant in the joint trial. (See AOB 464-468.)

present the kind of extensive evidence against appellant which would have turned the trial into more of a contest between the defendants than between the prosecution and either of them. (*Id.* at pp. 233-234.)

(5) The Missouri incident

As set forth more fully in Argument IV, appellant requested permission to introduce evidence at trial that Stewart had Robert threaten Robert Richardson, a former Manchester employee who lived in Missouri. The trial court ruled the evidence was inadmissible, because it was cumulative evidence on the issues of Stewart's credibility and the relationship between Stewart and Robert, weak impeachment evidence of Stewart's credibility, and also prejudicial character evidence against Robert Homick. Appellant moved for severance following the court's ruling. The trial court denied the motion and added that, pursuant to Evidence Code section 352, the proffered evidence might even be precluded at a separate trial of appellant. (106RT 12263-12267, 12348-12356; 107RT 12553-12559; 120RT 14837-14843.)

The trial court did not abuse its discretion, and appellant suffered no prejudice from the exclusion of the evidence. The purpose of the evidence was to attack the credibility of Stewart's testimony that he did not want Robert involved in the murder plot because he believed Robert was a klutz and also to show the relationship between Robert and Stewart. Appellant was able to accomplish these goals with other evidence: (1) at Stewart's request, Robert told Jack Swartz that he would break Swartz's legs or "snuff out his life" if Swartz did not pay his debt to Manchester (71RT 5923-5929, 5934-5935; 76RT 6941-6943); (2) Stewart had Robert "steal" a Monte Carlo automobile owned by Manchester and then collected insurance proceeds on it (76RT 6978-6979; 77RT 7212-7214; 98RT 10891-10894, 10900, 10903; 103RT 11809-11811); and (3) Stewart had Robert "steal" his Rolls Royce and then collected insurance proceeds on it (76RT

6977-6978; 99RT 10999-11004, 11012-11015, 11019; 100RT 11208; 103RT 11811-11818).

Additionally, appellant's counsel questioned Stewart's belief that Robert was a klutz. Referring to Stewart's testimony that he believed that Robert was a klutz, counsel asked Stewart: "This is the same Robert Homick that you had involved in a number of other criminal activities with yourself, correct?" Stewart responded, "That's the reason he shouldn't be involved in this one." (107RT 12579-12580.) Thus, the proffered evidence might not have been impeaching at all.

Finally, as the trial court noted, the evidence of the Missouri incident might not have been admissible at a separate trial of appellant. Whether or not Stewart believed Robert was a klutz, Stewart testified to Robert's involvement in the murders. Thus, the probative value of impeaching Stewart on his belief that Robert was a klutz by introducing evidence of the Missouri incident was minimal. Additionally, the evidence would have opened the door to evidence of the various acts of misconduct by Richardson to impeach his credibility, thus necessitating an undue consumption of time. (*People v. Snow* (2003) 30 Cal.4th 43, 90 ["Application of the ordinary rules of evidence, such as Evidence Code section 352, generally do not deprive the defendant of the opportunity to present a defense [citation]; certainly the marginal probative value of this evidence does not take it outside the general rule."].)

e. Scarce judicial resources

Appellant recognizes that there was no possibility that, at a separate trial, the codefendants would have given exonerating testimony. However, he argues that another factor warranted severance -- scarce judicial resources, particularly the time the trial court spent resolving the severance motions and related issues during the course of the trial (as jurors, witnesses, and other court personnel "had to sit by idly"). (AOB 469-470.)

The trial court, of course, encouraged counsel to bring in limine motions before the start of trial so that such issues would not disrupt the trial. (46RT 1986-1988.) However, counsel did not do so.

Appellant argues that delays in the start of trial could have been avoided, at least as to some defendants, if the defendants had been tried separately. (AOB 469.) However, appellant makes his assertion with the benefit of hindsight about the schedules of counsel. He also overlooks the resources necessary to try the defendants separately. As the prosecutor explained early on in the case, there was a 90 to 95 percent overlap between the case against Neil Woodman and the case against appellant and Robert Homick. (40RT 1612-1613, 1626-1628.) The case was also complex: it involved almost 100 People's witnesses and over 300 exhibits. (18CT 5002.) Moreover, separate trials would have placed an emotion strain on the family of the victims. (18CT 5002 [in a declaration, the prosecutor states: "It is my information and belief that the emotional strain on the family of murder victims Gerald and Vera Woodman would dramatically increase if the remaining defendants' [appellant, Robert Homick, and Neil Woodman] cases were severed and the family was required to testify in two or three more jury trials"].)

The concern for scarce judicial resources warranted a joint trial.

E. There Was No Gross Unfairness As a Result of the Joint Trial

As stated earlier, even if a trial court's ruling on a severance motion was proper when it was made, this Court may nonetheless reverse a judgment, but only on a showing that joinder resulted in "gross unfairness" amounting to a denial of due process. (*People v. Lewis, supra*, 43 Cal.4th at p. 425; *People v. Cleveland, supra,* 32 Cal.4th at p. 727.) In *Coffman*, this Court concluded:

> In sum, given the prosecution's independent evidence of defendants' guilt and the trial court's carefully tailored limiting instructions, which we presume the jury followed [citation], even under the heightened scrutiny applicable in capital cases [citation], we find no abuse of discretion in the denial of severance. For the same reasons, defendants' claims that the joint trial deprived them of their federal constitutional rights to due process, a fair trial and a reliable penalty determination likewise must fail.

(*People v. Coffman, supra,* 34 Cal.4th at pp. 43-44.)

The above language applies with equal force here. As stated earlier, many of the statements of the codefendants were admissible against appellant, whether joint or separate trials were held. As for the evidence admitted against the codefendants but not appellant, the trial court gave the jury clear, limiting instructions, and it is presumed the jury followed these instructions. Other evidence was stricken by the court (e.g., Agent Gersky's comment that appellant was "notorious") or simply did not refer to appellant at all (e.g., the triple murder reference during Dominguez's interview by Las Vegas authorities). With regard to the evidence that appellant was precluded from introducing (i.e., the Missouri incident), the evidence was cumulative to other evidence already admitted. And, finally, the prosecution presented strong evidence of appellant's guilt, independent of the evidence that Robert Homick (or Neil Woodman) offered in his defense. In light of the foregoing, no gross unfairness resulted from the joint trial.

IX. SECTION 656 DOES NOT BAR APPELLANT'S MURDER CONVICTIONS

Before appellant was convicted of the murders of Gerald and Vera Woodman in the instant case, he was tried and convicted in federal court in Nevada for various offenses, including interstate travel in aid of murder for

hire, a violation of Title 18 United States Code section 1952A.[122] Appellant now contends that section 656[123] bars his California murder convictions. (AOB 476-502.) Respondent disagrees and submits that, because appellant's federal conviction for interstate travel was based upon a different act than his murder convictions, the murder convictions are not barred by section 656.

A. Relevant Proceedings

Prior to the start of trial, on September 20, 1991, when the Honorable Alexander Williams, III, was the trial judge on this case, counsel for Neil Woodman filed a "Former Judgment Plea." (2Supp. 5CT 1141.) In this document, Neil Woodman pleaded that he had already been convicted of the murders charged in this case by the judgment of the United States District Court in the case of *United States v. Neil Woodman, et al.*, case number CR-S-52-LDG. (2Supp. 5CT 1141.) Attached to this document was the guilty verdict of the jury in the federal case on count XI. (2Supp. 5CT 1142.) Also attached was a copy of the federal indictment,[124]

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[122] The murder-for-hire statute is now codified at Title 18 United States Code section 1958.

[123] At the time of appellant's trial, section 656 provided: "Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another State, Government, or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense."

[124] The federal indictment charged appellant with racketeering (count I), interstate transportation of stolen property (count II), receipt of stolen property (count III), conspiracy to distribute a controlled substance (count IV), distribution of a controlled substance (counts V, VI), possession of a controlled substance with intent to distribute (count VII), conspiracy to commit wire fraud (count VIII), wire fraud (count IX), interstate transportation in aid of racketeering (count X), and interstate travel in aid of murder for hire (count XI). (2Supp. 5CT 1143-1159.)

in which the grand jury charged appellant in count XI ("interstate travel in aid of murder for hire; aiding and abetting") as follows:

> From on or about September 23, through September 25, 1985, in the District of Nevada and elsewhere . . . did travel and cause travel in interstate commerce, that is travel between the State of Nevada and the State of California, . . . with the intent that a murder be committed in violation of the Penal Code of California, said murder to be committed in consideration for the receipt of and for a promise and agreement of money; which travel resulted in the deaths of Vera and Gerald Woodman.
>
> All in violation of Title 18, United States Code, Section 1952A.

(2Supp. 5CT 1157-1158.)

At a pretrial hearing, appellant's counsel noted that counsel for Neil Woodman had filed this document. Appellant's counsel and Robert Homick's counsel said that they joined in the "motion for [] former judgment plea." The court set the matter for a hearing on October 4, 1991. (26RT 1171-1172.)

On October 4, 1991, the court noted that counsel for Neil Woodman had filed a supplemental pleading, which moved to dismiss the murder charges based upon the prior federal conviction. The People stated that they intended to file a written response. (27/28RT 1202-1204; 2Supp. 5CT 1160-1170.) The court set the motion for a hearing on October 25, 1991. (27/28RT 1207.)

On October 25, 1991, counsel for Robert Homick said that he had prepared a written pleading, but there were some discrepancies in the documents he had received from Nevada. (29RT 1225-1227; see 14CT 3693-3713.) Counsel for appellant noted that appellant had entered, and filed with the court, a written plea of once in jeopardy. Counsel for appellant then said that he was also having problems obtaining certain documents from Nevada and requested that the hearing be continued.

(29RT 1227-1228; 14CT 3667-3668.) The court granted the continuance. It also noted that the People had filed an opposition to the motion to dismiss. (29RT 1228; 2Supp. 5CT 1171-1175.)

On the next court date, November 22, 1991, the court said that appellant had filed a statement of facts, points and authorities, and exhibits in support of the motion to dismiss.[125] The hearing was continued to a later date. (30RT 1288-1290; 14CT 3809-3854.)

On January 17, 1992, the court heard the motion. (32RT 1358.) The court said that it had read the pleadings filed on the motion and took judicial notice of the transcripts of the federal trial. (32RT 1359-1360.) Counsel for Neil Woodman argued that his client's due process rights were violated, because he was forced to put on a defense in the federal case and the prosecution in this case would be able to improve its case based on what had happened at the federal trial. (32RT 1361-1362.) Counsel for Robert Homick joined in this argument. (32RT 1362.)

Counsel for appellant conceded that federal law stated that a federal prosecution does not bar a subsequent state prosecution for the same acts. Counsel, however, argued that appellant could not be prosecuted in state court pursuant to sections 656 and 793.[126] Counsel said that appellant had

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[125] The exhibits included: some of the jury instructions given in the federal case (including the elements of murder pursuant to section 187, for purposes of counts I and XI of the federal indictment); a portion of the transcript of the sentencing hearing in the federal case; and the judgment of the federal court, sentencing appellant to a term of life on count XI. (14CT 3821-3852.)

[126] Section 793 provided: "When an act charged as a public offense is within the jurisdiction of another State or country, as well as of this State, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in this State."

been prosecuted in federal court on count XI. Counsel explained that, in order for appellant to receive a life sentence on that charge, the federal government was required to prove that a murder was committed, that the murder was for hire, and that the murder was for some financial gain. Counsel also said that the witnesses who had been called at the federal trial to prove count XI were the same witnesses who were going to be called in the instant case. He added that the jurors in the federal case had been instructed on California law, specifically the elements of murder, the same act being prosecuted in the instant case. Thus, counsel concluded, the act included in the state events was necessary to constitute the federal offense and, accordingly, the murder counts in this case were barred. (32RT 1363-1366, 1369-1370.)

At the conclusion of the hearing, the court ruled as follows:

> I do think that there are some distinctions. It's a very complex issue. . . . But I do think that we have a separate prosecution and a separate jurisdiction for separate crimes of different elements with a far different scope and consequence of proof than was required for essentially what remained a travel act violation.
>
> The gravamen of the offense in Nevada was, was triable as an aid of the alleged activity. So I'm going to overrule and deny the former judgment pleas of the several defendants on the grounds stated.

(32RT 1370-1371.)

Nearly one year later, the Honorable Florence-Marie Cooper was the trial judge on the case. A few days before the start of trial, counsel for appellant informed the trial court that appellant had previously entered a plea of once in jeopardy based upon the federal proceedings. Counsel argued that the jeopardy issue was an affirmative defense that he wanted to litigate before the jury. (68RT 5517-5520; see also 69RT 5702-5703.) The court denied appellant's motion. (73RT 6287-6290.)

During the defense case, appellant renewed the motion to dismiss on the ground of former jeopardy. (114RT 13853; 117RT 14345-14347.) At this hearing, in additional to making the arguments he had made previously, appellant also argued that his racketeering conviction in count I of the federal indictment barred his California murder prosecution under section 656.[127] (118RT 14364.) The court found that there was no bar to the California prosecution. The court explained that case law held that, if the federal prosecution required an additional act not required under California law, then section 656 did not bar the state prosecution. Here, the court explained, the federal prosecution required proof of interstate transportation, which was not required in California. Accordingly, the state prosecution was not barred by section 656. (See 118RT 14356-14382.)

B. Relevant Law

Prosecution and conviction for the same act by both state and federal governments are not barred by the Fifth Amendment guarantee against double jeopardy. (*People v. Comingore* (1977) 20 Cal.3d 142, 145.) However, a state is not precluded from providing greater double jeopardy protection than is provided by the federal Constitution under decisions of the United States Supreme Court, and a number of states have adopted

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[127] Count I of the federal indictment charged, in relevant part, that appellant "together with other individuals . . . constituted a racketeering enterprise . . . to wit: a group of individuals associated in fact, although not a legal entity, which enterprise was engaged in and the activities of which affected interstate commerce" and that appellant and others, being persons associated with the enterprise, "did unlawfully, willfully, and knowingly conduct and participate directly and indirectly, in the conduct of the affairs of said enterprise through a pattern of racketeering activity. . . ." (2Supp. 5CT 1144.) It was further charged, in addition to six other predicate acts, that it was part of the pattern of racketeering activity that appellant and others "did unlawfully, willfully, and knowingly aid, abet, counsel, command, induce and procure the killing" of Gerald and Vera Woodman, in violation of section 187. (2Supp. 5CT 1146-1147.)

statutes which provide at least some protection against successive prosecutions in different jurisdictions for offenses arising out of the same act. (*Ibid.*; *People v. Belcher* (1974) 11 Cal.3d 91, 97.) The applicable California statute is section 656, which precludes conviction in this state where the defendant has been previously acquitted or convicted in another jurisdiction in a prosecution "founded upon the act or omission in respect to which he is on trial" in California. (§ 656.)

The first case to construe the words "act or omission" as used in section 656 was *People v. Candelaria* (1956) 139 Cal.App.2d 432 ("*Candelaria I*"). There, the defendant argued that, under section 656, his prior conviction in federal court of robbery of a national bank was a bar to his subsequent state conviction for robbery of the same bank. The Court of Appeal agreed. The court found that "the federal prosecution and the state prosecution related to the one robbery involving the same [victim], and both prosecutions related to the same taking of the same money at the same time and place." (*Id.* at p. 440.) The court recognized that the federal prosecution involved the one additional element that the money belonged to a national bank whose deposits were federally insured. (*Ibid.*) However, the court found this additional element "pertained to the matter of jurisdiction of the federal court, and it did not pertain to any activity on the part of defendant in committing the robbery." (*Ibid.*) The court thus concluded that "[t]he physical act or conduct of defendant in taking the money was the same whether the robbery be considered as a federal offense or a state offense." (*Ibid.*) The court also stated: "All of the acts constituting the state offense were included in the federal offense and were necessary to constitute the federal offense." (*Ibid.*) Accordingly, the federal conviction was "founded upon the act" for which the defendant was tried in the state court, and the state prosecution was barred. (*Ibid.*)

Subsequently, a new information was filed against defendant Candelaria in state court, charging him with burglary arising out of the same transaction. (*People v. Candelaria* (1957) 153 Cal.App.2d 879, 880 ("*Candelaria II*").) The defendant was convicted and appealed, relying once again on section 656. (*Id.* at pp. 880, 883.) This time, the Court of Appeal rejected the defendant's argument. The court explained:

> The "act" spoken of in [section 656] must be "the same act." The burglary act complained of in the present case, that is, the entering the building with the intent to commit a theft, is not the same act complained of in the federal court, namely, that he pointed a gun at the teller and by force and fear compelled her to deliver over to him certain monies.

(*Id.* at p. 884.)

The first case of this Court to construe the words "act or omission" as used in section 656 was *People v. Belcher, supra,* 11 Cal.3d 91. In that case, the defendant robbed at gunpoint two undercover officers, one of whom was a federal agent. (*Id.* at p. 94.) The defendant was acquitted in federal court of assault with a deadly weapon upon a federal agent. (*Ibid.*) He was then convicted in state court, on the basis of the same incident, of assault with a deadly weapon and two counts of first degree robbery. (*Ibid.*) On appeal, he argued that he was denied his constitutional right to effective assistance of counsel because trial counsel failed to properly assert the defense of former acquittal. (*Id.* at p. 95.) Initially, this Court determined that the defense of former acquittal was a "crucial defense." (*Id.* at p. 96.) Thus, the question became whether the defendant's former acquittal in federal court of the charge of assault with a deadly weapon upon a federal officer was a "sufficient defense" to the state charges because it was founded upon the same "act or omission." (*Id.* at p. 98.)

After reviewing the two *Candelaria* cases, this Court stated that the two cases "clearly demonstrate the meaning to be given to the terms 'act or

omission' as they are used in section 656." (*People v. Belcher, supra,* 11 Cal.3d at p. 99.) The Court said that under section 656:

> a defendant may not be convicted after a prior acquittal or conviction in another jurisdiction if all the acts constituting the offense in this state were necessary to prove the offense in the prior prosecution (*People v. Candelaria, supra,* 139 Cal.App.2d 432, 440); however, a conviction in this state is not barred where the offense committed is not the same act but involves an element not present in the prior prosecution. (*People v. Candelaria, supra,* 153 Cal.App.2d 879, 884.)

(*Ibid.*)

Turning to the circumstances before it, this Court in *Belcher* held that the state prosecution for assault with a deadly weapon upon the federal agent was barred under section 656 because the same "act" was involved in both the state and federal prosecutions. (*People v. Belcher, supra,* 11 Cal.3d at p. 99.) The Court rejected the Attorney General's argument that the state conviction was not barred because the federal offense required proof of an additional element which was not required under the state offense, namely, that the assault was made upon a federal officer. (*Id.* at pp. 99-100.) Citing *Candelaria I,* the Court explained that "conviction of the federal offense required proof of no additional act on the part of defendant; it merely required proof of the status of the victim for jurisdictional purposes." (*Id.* at p. 100.) Thus, the Court concluded that section 656 was a sufficient defense to the charge of assault with a deadly weapon in state court. (*Ibid.*) However, as to the defendant's convictions in state court for robbery of the two officers, the Court held they were proper because they were not founded upon the same act for which the defendant had been acquitted in federal court. (*Ibid.*) The Court pointed out a conviction for each of the robberies "requires at the very least proof of an important additional act by defendant -- the 'taking of personal property in the possession of another' (§ 211) -- that need not be proved to establish

the federal offense of assault with a deadly weapon upon a federal officer." (*Ibid.*)

This Court revisited section 656 in *People v. Comingore, supra,* 20 Cal.3d 142. There, the defendant took the victim's car from her residence in California without her permission and drove it to Oregon, where he was arrested and later convicted of unauthorized use of a vehicle. (*Id.* at p. 144.) The defendant was then charged in California with grand theft and unlawful driving or taking of a vehicle, based on the same incident. (*Ibid.*) This Court held that the California prosecution was barred, because it was based on the same physical act by the defendant which resulted in the Oregon conviction. (*Id.* at p. 146.) Citing *Candelaria I* and *Belcher*, the Court rejected the People's argument that the California prosecution required an additional element, namely, intent to deprive the owner of his vehicle temporarily or permanently. (*Ibid.*) The Court explained that intent "is an element of a crime or a public offense, not an act." (*Id.* at pp. 146-148.)

Both *Belcher* and *Comingore* were decided in the 1970's. Since then, it does not appear that this Court has interpreted section 656 in any case. However, several Court of Appeal cases have addressed section 656. These cases have reviewed the decisional law interpreting section 656 and provide insight into how section 656 is construed.

In *People v. Walker* (1981) 123 Cal.App.3d 981, the defendant pointed a gun at an American Express employee and ordered him to hand over all of the money that he had. (*Id.* at p. 984.) The employee handed the defendant a bundle of traveler's checks. (*Ibid.*) Based on his possession of the traveler's checks taken from American Express, the defendant was convicted of receiving stolen property in Nevada. (*Id.* at p. 985.) Based on the same incident at America Express, he was later convicted of robbery in California. (*Id.* at p. 983.) The Court of Appeal,

Second Appellate District, Division Two, rejected the defendant's argument under section 656. The court found the California offense of robbery (i.e., the defendant pointing a gun at the American Express employee and compelling him to hand over the traveler's checks) was not the same act complained of in the Nevada court (i.e., the defendant possessing the checks taken in the American Express robbery). (*Id.* at p. 987.) The court found that evidence of the defendant's possession of the stolen checks would have been sufficient to convict him of possession of stolen property in Nevada but insufficient to convict him of the robbery in California, because robbery requires at the very least proof of an additional act by the defendant, namely, the taking of another person's personal property by force or fear. (*Ibid.*)

In *People v. Brown* (1988) 204 Cal.App.3d 1444, the Court of Appeal for the Third Appellate District affirmed the trial court's finding that the prosecution of the defendants in state court for burglary was not barred by their prior federal convictions for the conspiracy (formed in Nevada) to commit the burglary. (*Id.* at p. 1448.) The court first recognized that "[it] is settled that the 'act' referred to in section 656 means the physical act or conduct of the defendant for which he is prosecuted." (*Ibid.*) The *Brown* court then directly addressed this Court's summary in *Belcher* of the holdings of the two *Candelaria* cases. The *Brown* court noted that, in *Belcher*, this Court stated:

> "a defendant may not be convicted after a prior acquittal or conviction in another jurisdiction if all the acts constituting the offense in this state were necessary to prove the offense in the prior prosecution (*People v. Candelaria, supra,* 139 Cal.App.2d 432, 440); however, a conviction in this state is not barred where the offense committed is not the same act but involves an element not present in the prior prosecution. (*People v. Candelaria, supra,* 153 Cal.App.2d 879, 884.)"

(*Id.* at p. 1449, quoting *People v. Belcher, supra,* 11 Cal.3d at p. 99, followed in *People v. Comingore, supra,* 20 Cal.3d at p. 146.)

The *Brown* court found that this language in *Belcher* was unclear. The court explained that this language "could suggest that the bar of section 656 would apply where all acts constituting the state offense were necessary to prove the prior federal offense even though the acts might not be sufficient to prove the federal offense. Put differently, the bar of section 656 could apply even though the federal prosecution required proof of an act not at issue in the state prosecution." (*People v. Brown, supra,* 204 Cal.App.3d at p. 1449.) The *Brown* court then pointed out that, immediately after summarizing the holdings of the two *Candelaria* cases, this Court in *Belcher* addressed the Attorney General's argument that section 656 could not apply because the acts constituting the state prosecution were not sufficient to prove the prior federal offense. (*Ibid.*) The *Brown* court then reasoned:

> This discussion in *Belcher* [rejecting the Attorney General's argument that section 656 did not apply because the federal offense required proof of the additional element (not required by the state) that the assault was made upon a federal officer], echoing that in the first *Candelaria* case, plainly assumes that had the prior federal prosecution required proof of an act not required in the state prosecution, section 656 would have been inapplicable. Otherwise, the court would have dismissed the Attorney General's argument as irrelevant. Moreover, in *Comingore, supra,* 20 Cal.3d at page 147, the court reiterated *Belcher's* analysis of the Attorney General's argument.

(*Id.* at p. 1450.)

Based on the foregoing analysis, the *Brown* court identified the rule of section 656 to be the following: "under section 656 a prior prosecution has been 'founded upon the act or omission in respect to which [a defendant] is on trial' only where the acts necessary to prove the serial

offenses are the same." (*People v. Brown, supra,* 204 Cal.App.3d at p. 1450.) The *Brown* court explained that this was a just construction of the statute:

> Unlike section 793, which bars serial prosecutions, section 656 bars only serial convictions. [Citation.] The apparent fairness rationale of section 656 lies in its prohibition upon multiple convictions for the same wrongful conduct. This rationale has no validity where successive convictions are premised on different wrongful acts.
>
> If the prior federal conviction was premised upon a separate act not necessary to obtain the California conviction, then defendants were not serially convicted for the same wrongful conduct.

(*Ibid.*, footnotes omitted.)

The *Brown* court then applied this analysis to the federal conspiracy conviction and state burglary conviction before it. (*People v. Brown, supra*, 204 Cal.App.3d at p. 1450.) The court found that the act for which the defendants were convicted in federal court was their agreement in Nevada to commit the California burglary, but that there was nothing to suggest that the Nevada agreement was an act necessary to obtain the conviction of any defendant for burglary of the California store. (*Ibid.*) Accordingly, the state conviction was not barred by the federal conviction. (*Id.* at p. 1451.)

In *People v. Gofman* (2002) 97 Cal.App.4th 965, 974, the Court of Appeal, Second Appellate District, Division Four, found that the trial court erred in dismissing two state conspiracy counts against two defendants because the defendants had been convicted of substantive counts, but not the conspiracy charge, in the federal action. (*Ibid.*) Also, the Court of Appeal upheld the trial court's dismissal of a number of state conspiracy charges, because each of those counts related to a staged automobile accident forming the basis for the federal conspiracy count to which the

defendants had pleaded guilty in federal court. (*Ibid.*) As to this holding, the court stated: "While the federal charges carry the additional element that the United States mail be utilized in connection with the attempt to defraud, we conclude that related to the jurisdiction of the federal court." (*Ibid.*)

Further, the *Gofman* court upheld the trial court's dismissal of a number of state charges of insurance fraud, false and fraudulent claims, and grand theft, because the defendants had pleaded guilty in federal court to mail fraud. (*People v. Gofman, supra,* 97 Cal.App.4th at pp. 974-976.) The court found that the federal and state prosecutions required the same acts: the defendants successfully making a claim against three insurance carriers for three separate staged accidents. (*Id.* at p. 976.) The court stated: "The basis for the federal charges of mail fraud in each count was presentation of the settlement check, the final act of the fraud or grand theft alleged in the federal indictment. The fact that the mail was used to effectuate the fraud or grand theft is merely one additional act that formed the jurisdictional basis for the federal counts." (*Ibid.*)

In *People v. Friedman* (2003) 111 Cal.App.4th 824, the defendants were involved in multistate crimes, including robbery, extortion, kidnapping, and drug dealing. (*Id.* at pp. 826-828.) Two California victims were kidnapped for extortion and later murdered. (*Id.* at pp. 828-829.) The defendants were convicted in federal court of violations of the federal "Travel Act," which prohibits travel in interstate or foreign commerce or the use of the mail or the facilities of interstate or foreign commerce with the intent to commit a crime of violence to further an unlawful activity if the defendant thereafter performs or attempts to perform such an act. (*Id.* at pp. 829, 835.) The defendants were then charged in California with kidnapping for ransom and murder. (*Id.* at p. 830.)

In *Friedman*, the Court of Appeal, Second Appellate District, Division Five, reviewed the decisional authority analyzing section 656 and noted the *Brown* court's analysis of *Belcher*. (*People v. Friedman, supra,* 111 Cal.App.4th at pp. 830-836.) The *Friedman* court then held that the federal convictions of the defendants did not bar the California charges because "the 'acts' spoken of in the state statutes for kidnapping and murder are not 'the same acts' complained of in the federal court." (*Id.* at p. 837.) The court found that, "utilizing the *Belcher* analysis," the California crimes required that the kidnapping and murder be completed, which was not necessary for proof of the federal offense. (*Id.* at pp. 836-837.) The court also found that, "utilizing the *Brown* analysis," the federal offense required interstate travel, which was not required for proof of the California offenses. (*Id.* at p. 837.)

Most recently, in *People v. Bellacosa* (2007) 147 Cal.App.4th 868, the defendant committed numerous traffic law violations while evading officers in California and then crossed the border into Nevada where the officers of that state took up the pursuit. (*Id.* at p. 872.) The defendant eventually lost control of his vehicle and was apprehended. (*Ibid.*) He pleaded no contest in Nevada to driving under the influence and attempting to evade a police officer. (*Id.* at p. 873.) He was charged in California with felony driving under the influence and evading a peace officer. (*Id.* at p. 872.) He entered a plea of once in jeopardy to the California charges, and the court dismissed the complaint. (*Id.* at p. 873.) On the People's appeal, the Court of Appeal, Third Appellate District, reversed, stating: "[I]t is evident the physical acts defendant committed in California are not the same physical acts he committed in Nevada. . . . His California crimes were complete, and came to an end, when he entered Nevada. . . . [The Nevada offenses] did not begin until he left California, thus terminating his

conduct in California." (*Id.* at p. 877.) The court summarized the case law authorities analyzing section 656 as follows:

> Decisional authorities demonstrate that in considering whether a California prosecution is barred by a prior conviction or acquittal in another jurisdiction, courts look solely to the physical acts that are necessary for conviction in each jurisdiction. If proof of the same physical act or acts is required in each jurisdiction, then the California prosecution is barred. If, however, the offenses require proof of different physical acts, then the California prosecution is not barred even though some of the elements of the offenses may overlap.

(*Id.* at p. 874.)

C. Section 656 Does Not Bar Appellant's Murder Convictions in the Present Case

Appellant and respondent appear to agree that, when a state conviction includes an act not included in a prior conviction from another jurisdiction, section 656 does not bar the state conviction. However, appellant and respondent disagree on the applicability of section 656 when the prior conviction includes an act not included in the current state conviction. (AOB 480-502.) Respondent submits that, under the decisions of the courts of this state, when a prior conviction from another jurisdiction includes an act not included in the current state conviction, section 656 does not bar the current state conviction.

Initially, the *Brown* court was correct in its statement that some of the language in *Belcher* is unclear. The language at issue is *Belcher*'s summary of the holdings of the two *Candelaria* cases. More specifically, the *Belcher* court summarized the holding of *Candelaria I* to be the following: "a defendant may not be convicted after a prior acquittal or conviction in another jurisdiction if all the acts constituting the offense in this state were necessary to prove the offense in the prior prosecution." (*People v. Belcher, supra,* 11 Cal.3d at p. 99.) As the *Brown* court

recognized, this language could suggest that section 656 will act as a bar if all of the acts constituting the current conviction were necessary to prove the prior conviction in another jurisdiction even though the acts might not be sufficient to prove the prior conviction. (*People v. Brown, supra,* 204 Cal.App.3d at p. 1449.)

However, this possible suggestion in *Belcher* was not the holding of *Candelaria I.* In *Candelaria I,* the court stated that section 656 will act as a bar if "[a]ll of the acts constituting the state offense were included in the federal offense *and were necessary to constitute the federal offense.*" (*People v. Candelaria, supra,* 139 Cal.App.2d at p. 440, emphasis added.) Thus, under *Candelaria I,* section 656 will act as a bar if (1) all of the acts constituting the current offense were included in the prior offense (i.e., they were necessary to prove the prior offense) *and* (2) all of the acts constituting the current offense were necessary "to constitute" (i.e., to amount to or be equivalent to) the prior offense (i.e., they were sufficient to prove the prior offense). Any other interpretation of the second prong would make the language redundant of the first prong. Thus, the holding of *Candelaria I* was that the acts constituting the current and prior conviction must be the same for section 656 to act as a bar. [128] Accordingly, under *Candelaria I,* section 656 does not bar the current conviction when the prior conviction requires proof of an act not at issue in the current conviction.[129]

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[128] This ruling was necessary to the decision in *Candelaria I,* because the court was presented with the argument that the status of the bank distinguished the state and federal prosecutions. (See AOB 485.)

[129] Additionally, the *Belcher* court summarized the holding of *Candelaria II* as follows: "a conviction in this state is not barred where the offense committed is not the same act but involves *an element* not present in the prior prosecution." (*People v. Belcher, supra,* 11 Cal.3d at p. 99, emphasis added.) *Candelaria II* did not compare *elements* of offenses;

(continued...)

This conclusion is consistent with the analysis in *Belcher*. In *Belcher*, this Court considered the Attorney General's argument that section 656 could not apply because the acts constituting the state prosecution were not sufficient to prove the prior federal offense. (*People v. Brown, supra,* 204 Cal.App.3d at p. 1449.) As the *Brown* court explained, the discussion in *Belcher* "plainly assumes that had the prior federal prosecution required proof of an act not required in the state prosecution, section 656 would have been inapplicable. Otherwise, the court would have dismissed the Attorney General's argument as irrelevant." (*Ibid.*) Thus, the analysis in *Belcher* is consistent with the conclusion that section 656 does bar the current conviction when the prior conviction requires proof of an act not at issue in the current conviction.[130]

The conclusion that section 656 does not bar the current conviction when a prior conviction includes an additional act is also consistent with *Brown*, *Friedman*, and *Bellacosa*, the subsequent Court of Appeal cases addressing section 656.[131] It is also consistent with the intent that section 656 provide broader protections for individuals than the protection

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(...continued)
rather, it addressed *acts*. (*People v. Candelaria, supra,* 153 Cal.App.2d at p. 884; see *People v. Comingore, supra,* 20 Cal.3d at p. 142 [rejecting the People's argument that the California prosecution required an additional "element"].)

[130] Thus, respondent is not urging a "narrower interpretation" of section 656 than that set forth in *Belcher*. (AOB 501-502.) Accordingly, appellant's federal constitutional right to due process is not implicated.

[131] *Walker* addressed the applicability of section 656 when the current conviction includes acts not included in the prior conviction. It did not address the applicability of section 656 when the prior conviction includes an additional act. Also, for the reasons addressed below, *Gofman* is not inconsistent with the conclusion that section 656 does not apply when the prior conviction requires proof of an act not at issue in the current conviction.

provided by the federal Constitution, because prosecution and conviction for the same act by both state and federal governments are *not barred* by the federal constitutional protection against double jeopardy.[132] (*People v. Belcher, supra,* 11 Cal.3d at pp. 96-97.)

Turning to the present case, appellant was convicted in federal court of a violation of Title 18 United States Code section 1952A. This statute provided, in pertinent part:

> Whoever travels in or causes another (including the intended victim) to travel in interstate commerce or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, if death results. . . .

shall be guilty of an offense against the United States. (14CT 3841.)

Under section 187, "every person who unlawfully kills a human being with malice aforethought is guilty of the crime of murder. . . ." (126RT 15585.) Moreover, one of the special circumstances found true was the lying-in-wait special circumstance, which required proof that the defendant intentionally killed a victim and the murder was committed while the defendant was lying in wait. "The term 'lying in wait' within the meaning of the law of special circumstances is defined as a waiting and watching for an opportune time to act together with a concealment by ambush or by some other secret design to take the other person by surprise." (126RT 15594-15595; 1Supp. 4CT 1029 [CALJIC No. 8.81.15].)

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[132] Also, even assuming the California Constitution does provide greater double jeopardy protection than the federal Constitution (AOB 500), appellant cites no authority for the proposition that the California Constitution provides greater protection than section 656.

Here, the federal conviction was premised upon a separate act which was unnecessary to secure the guilty verdicts in the state case. The federal charge required interstate travel. (See *People v. Friedman, supra,* 111 Cal.App.4th at pp. 835-837 [finding that the Travel Act charge (18 U.S.C. § 1952) required interstate travel, a separate act unnecessary to secure guilty verdicts in California for murder and kidnapping for ransom charges]; see also *United States v. Nader* (9th Cir. 2008) 542 F.3d 713, 720, fn. 6 ["The sequential number of the Travel Act, 18 U.S.C. § 1952, and the original version of the murder-for-hire statute, 18 U.S.C. § 1952A (1985), as well as their parallel language, overlapping subject matter, and legislative histories show that the murder-for-hire statute was intended to supplement the Travel Act."].) The murder charges in the present case did not require interstate travel. Accordingly, section 656 does not bar the instant murder convictions.

Appellant argues that, because the act of interstate travel also happened to confer federal jurisdiction, section 656 should act as a bar like it did in *Candelaria I* (where *the status* of the financial institution that was robbed conferred federal jurisdiction and was the only difference between the federal and state prosecutions) and *Belcher* (where *the status* of the officer as a federal agent conferred federal jurisdiction and was the only difference between the federal and state prosecutions for assault). (AOB 481, 485.) Appellant's reliance on *Candelaria I* and *Belcher* in this regard is misplaced. The critical factor is not that interstate travel also provided a basis for federal jurisdiction. Rather, it is that interstate travel is a physical *act* committed by appellant, not a status.

Gofman does not change this conclusion. (AOB 494-495.) As stated earlier, the *Gofman* court concluded that the trial court properly dismissed a number of state charges of insurance fraud, false and fraudulent claims, and grand theft, because the defendants had pleaded guilty in

federal court to mail fraud, which required the same acts of the defendants successfully making a claim against three insurance carriers for three separate staged accidents. (*People v. Gofman, supra,* 97 Cal.App.4th at pp. 974-976.) In this context, the *Gofman* court stated: "The fact that the mail was used to effectuate the fraud or grand theft is merely *one additional act* that formed the jurisdictional basis for the federal counts." (*Id.* at p. 976, emphasis added.) Although the *Gofman* court identified the use of mail as "one additional act," it was not an additional act. The use of the mail was the means by which the defendant could commit the act of presenting false claims.

Appellant also argues that, because he lived in Nevada, the present state prosecution for the murders of the Woodmans necessarily required proof of interstate travel, making the state and federal convictions premised upon the same acts. (AOB 482, 485.) However, the prosecution here was not required to show, nor were the jurors here required to find, that appellant crossed state lines with the intent to commit murder.

Moreover, section 656 does not preclude the California murder convictions for an additional reason. The California murder convictions required a finding on the special circumstance of lying in wait (i.e., a finding on the *act* of lying in wait), which was not required in the federal prosecution. Thus, the act of lying in wait was an additional act required in the California case, not required in the federal case, making section 656 inapplicable here.[133]

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[133] As for the racketeering count charged in count I of the federal indictment, it required the act of appellant and the codefendants coming together to form a criminal enterprise. (See *United States v. Turkette* (1981) 452 U.S. 576, 583.) The murder convictions in the present case did not require that act. Additionally, the murders of Gerald and Vera Woodman were not essential to the racketeering conviction. The murders (continued...)

Finally, appellant argues that the policy rationales underlying the application of the prohibition against double jeopardy (i.e., that the government should not be allowed to make repeated attempts to convict an individual and should not be given the opportunity to rehearse its case and thus subject the individual to embarrassment, expense, and ordeal) support his position that the California murder convictions should be barred, because he had already been put through the ordeal of a lengthy federal trial based on the same acts at issue in the state murder trial. (AOB 498-499.) Again, the acts punished by the two prosecutions were not the same. And appellant committed offenses "against [the] peace and dignity" of two different sovereigns. It follows that he may be punished by each. (See *Abbate v. United States* (1959) 359 U.S. 187, 194 [79 S.Ct. 666, 3 L.Ed.2d 729]; *United States v. Lanza* (1922) 260 U.S. 377, 382 [43 S.Ct. 141, 67 L.Ed. 314].)

Moreover, a contrary interpretation of section 656 could produce unjust circumstances. (See AOB 481-482.) In *Bartkus v. Illinois* (1959) 359 U.S. 121, 137 [79 S.Ct. 676, 3 L.Ed.2d 684], in rejecting the argument that the Fourteenth Amendment barred a state conviction for robbery when the defendant had already been convicted for the same robbery in federal court, the United States Supreme Court stated:

(...continued)
were only one of seven predicate acts which could serve as a basis for a guilty verdict on the racketeering charge. (The predicate acts were: (1) racketeering act involving controlled substances; (2) Hawaii arson; (3) Woodman murders; (4) Tipton murders; (5) wire fraud; (6) Godfrey murder; and (7) Schwartz extortion.) The racketeering charge involved a claim that appellant participated in a continuing criminal enterprise consisting of a number of crimes, only one of which involved the murders of Gerald and Vera Woodman. (2Supp. 5CT 1144-1147; 14CT 3809-3852.) Thus, the racketeering conviction is not a bar to the instant murder convictions under section 656.

> In *Screw v. United States*, 5 U.S. 91, defendants were tried and convicted in a federal court under federal statutes with maximum sentences of a year and two years respectively. But the state crime there involved was a capital offense. Were the federal prosecution of a comparatively minor offense to prevent state prosecution of so grave an infraction of state law, the result would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines. It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States.

The federal conviction here, unlike in *Screw*, did not involve statutes with maximum sentences of a year and two years. However, the state prosecution here was a capital prosecution. And the prosecutors here objected to appellant being tried first in federal court. (See 32RT 1366-1367.) If the federal prosecution of appellant prevented the state capital prosecution, "the result would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines." (*Bartkus v. Illinois, supra,* 359 U.S. at p. 137.)

For all of the foregoing reasons, section 656 does not bar the murder convictions in this case.

X. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO REOPEN AND HIS ALTERNATIVE REQUESTS FOR RELIEF

After the parties finished presenting their evidence at the guilt phase, appellant informed his counsel during a meeting at the county jail that the gun that he had received from Max Herman the day before the Woodman murders was the same gun that was found at Robert Homick's apartment during the search conducted there on March 11, 1986. (AOB 506-507,

citing 126RT 15507-15520.)[134] By the time of the trial, Max Herman was dead. (96RT 10384-10385.) But the jury had learned through Michael Dominguez that appellant had picked up a gun from Max Herman's office the day before the Woodman murders. (85RT 8976-8981.) The jury had not heard evidence that a gun had been seized from Robert Homick's apartment; that gun had been test-fired and excluded as the murder weapon. (14Supp. 4CT 856-861.)

Upon receiving this information, counsel for appellant reviewed the police interview of Max Herman, as well as the police reports regarding the gun recovered from Robert Homick's apartment, and discovered that the two guns were physically similar. Counsel could not prove that the two guns were the same. However, counsel wanted to prove a lack of a follow-up investigation: that, during the police interview, Max Herman described the gun that he had given to appellant to the detectives; that, two days later, the police recovered a gun similar in appearance at Robert Homick's apartment and that gun was soon excluded as the murder weapon; but that it appeared that the detectives did not ask Herman for the serial number of the gun that he had given to appellant and did not show Herman the gun seized from Robert Homick's apartment to determine if it looked like the gun that Herman had given to appellant. Counsel also wanted to weaken any argument by the prosecutor that the evidence supported the inference that the gun that Herman had given to appellant was the murder weapon.

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[134] Pages 15507 to 15520 of volume 126 of the Reporter's Transcript are sealed transcripts. On April 8, 2009, respondent filed a Motion for Copies of Sealed Transcript, requesting copies of these pages of the transcript. On September 8, 2009, the Court invited appellant to file a response to the motion. In an e-mail to this Court, appellate counsel indicated he had no opposition to unsealing these pages of the transcript. As of the date of the filing of the Respondent's Brief, respondent has not received copies of these pages of the transcript.

Accordingly, counsel made a motion to reopen the defense or, alternatively, for the court to read to the jurors a stipulation or grant a mistrial. (126RT 15506-15534; 127RT 15794-15807.) The court denied all of appellant's motions. (127RT 15807, 15809-15810.)

Appellant now claims that the trial court's failure to provide any relief was an abuse of discretion and deprived him of his right to a fair trial and the right to present a defense under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. (AOB 503-529.) Respondent disagrees. The trial court acted well within its discretion when it denied appellant's various requests for relief.

A. Relevant Proceedings

During the People's case-in-chief, Michael Dominguez's testimony established that, one day before the Woodman murders, Dominguez accompanied appellant to the office of Max Herman. Appellant met privately with Herman and then emerged from Herman's office with a gun case. On the day of the murders, Dominguez saw the same gun case inside appellant's rental car and saw a revolver inside the gun case. (85RT 8976-8981; see also 96RT 10384-10385.) Detective Crotsley testified that Herman was an attorney and a former member of the LAPD. Detective Crotsley interviewed Herman in April 1986, but Herman passed away by the time of the trial. (96RT 10384-10385.)

During Robert Homick's defense, retired Superior Court Judge Clarence Stromwall testified that he had been a police officer for 21 years and had been partners with Max Herman for 17 years. He testified that Herman was honest, not easily manipulated, and would not have given appellant a gun if he had any indication a crime was going to be committed with the gun. (116RT 13963-13968, 13972-13973.)

After the close of evidence at the guilt phase but prior to instructions and closing arguments, the trial court met with counsel for appellant in chambers ex parte. (126RT 15506.)

Following the ex parte hearing, the prosecutors joined the court and appellant's counsel in chambers. The court informed the prosecutors that appellant had made a motion to reopen the defense based on newly received information that the gun seized from Robert Homick's apartment during the police search (and later excluded as the murder weapon) was the same gun that Max Herman had given to appellant. (126RT 15521, 15534.) The trial court then summarized the motion to reopen. The court explained that, during a tape-recorded interview with police, Max Herman said that appellant had called him, said that Eddie Benson had a gun that belonged him (appellant), and said that he wanted to pick it up. Herman said that appellant gave him the serial number of the gun and described it as a .357 Magnum. Herman said that he called Benson's widow, who located the gun and gave it to Herman, who then gave the gun to appellant. (126RT 15522.)

The court explained to the prosecutors that neither the taped interview of Herman nor the police reports indicated the serial number of the gun provided by Herman. So, there was no way for the defense to prove that the weapon found in Robert Homick's apartment was, in fact, the weapon that Herman had given to appellant. However, the court explained that, had appellant's counsel previously had reason to believe that the gun seized from Robert Homick's apartment was the same gun that Herman had given to appellant, counsel would have examined the detectives about whether they had asked Herman for the serial number and whether they had compared the serial numbers to see if they matched. The court explained that the defense wanted to reopen the case to ask the detectives these questions. (126RT 15523.)

The court further explained that this line of inquiry was important to the defense, because there was an inference in the People's case that the gun that Herman had given to appellant was the murder weapon. (126RT 15524.) Also, the defense wanted to show the lack of a follow-up investigation by the detectives, i.e., the detectives never showed the recovered gun to Herman. (126RT 15525.) The court asked the prosecutors to talk to the detectives and find out whether a comparison was made of the serial numbers, so that the parties could reach a stipulation.[135] (126RT 15523.) The court indicated the stipulation would refer to a weapon that was recovered during a search conducted in connection with this case but would not name Robert Homick. (126RT 15522.)

Appellant's counsel then stated that there was an additional matter he needed to point out -- the gun recovered from Robert Homick's

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[135] A proposed stipulation, apparently prepared by appellant's counsel, stated:

> It is hereby stipulated that during one of the March 11, 1986, searches related to this case, a Smith & Wesson, model 19, .357 [M]agnum calibre [sic], 4 inch blue steel, 6 shot revolver, with brown wood grips was recovered. There was a serial number on this gun. That gun was test fired on April 17, 1986, & determined not to be the murder weapon. On April 15, 1986, Detectives Crotsley & Holder spoke to Max Herman. He told them that he had given a .357 Magnum, blue steel revolver with a 4" barrel he thought [sic] brown plastic grips to [appellant] in 1985. [Appellant] had supplied him with the serial number of the gun sometime prior to Mr. Herman giving it to him. The serial number on the gun that he gave [appellant] matched the serial number that [appellant] had given him.
>
> Detectives Crotsley & Holder did not ask Mr. Herman for the serial number & never showed him the .357 Magnum that was recovered on March 11, 1986, to see if he could identify it as the gun he had given [appellant].

(14Supp. 4CT 862-863; see AOB 508, citing 126RT 15517-15518.)

apartment appeared to have a different serial number than the gun identified in the firearm report.[136] (126RT 15526-15527.) At this juncture, the trial court stated that it had addressed the need for a stipulation on the assumption that the gun recovered from Robert Homick's apartment was fired and excluded as the murder weapon. The court stated that, without knowing that the gun recovered from Robert Homick's apartment was excluded as the murder weapon, the information that it matched the description of the gun provided by Herman became substantially less significant. Accordingly, the court denied the request to reopen or to enter a stipulation. It also denied the request for a continuance for the defense to have its own expert test fire the gun recovered from Robert Homick's apartment. (126RT 15531.)

Later that day, the court read instructions to the jury. (126RT 15537-15601.) The prosecutor also began his closing argument. (126RT 15607.)

The following day, appellant's counsel requested that the trial court ask the detectives to bring to court the gun recovered from Robert Homick's apartment, along with the envelope in which the gun was contained, in order to mark it as an exhibit for purposes of the motion to reopen. The court did so. (127RT 15696.)

The prosecutor's closing argument then resumed. (127RT 15701.) During closing argument, the prosecutor stated:

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[136] The property report, item 137, described the gun recovered from Robert Homick's apartment as follows: K-83811A, Smith & Wesson, Model 19, 4-inch blue steel revolver, brown wood grips. The firearm-testing report described the test-fired gun as item 137 in the property report and as follows: revolver, Smith & Wesson, Model 19, .357 Magnum, 4-inch bbl, six-shot, blue steel, serial # K-318119, Crane # 38779. (126RT 15526-15527; 14Supp. 4CT 857, 859.)

> Judge Stromwall, who had known Max Herman for many years, told us that quite obviously Max Herman would not intentionally give a gun to [appellant] knowing that [appellant] was about to use it to commit a murder.
>
> But he did indicate that part of his law practice involved former policemen and that it would not surprise Judge Stromwall if Max Herman were to give a gun to a former LAPD officer. . . .
>
> So, clearly, Max Herman did not know he would be supplying a gun that would be used for a murder but it's not at all unreasonable that he may have provided a gun just as Mike Dominguez described for us.

(127RT 15729-15730.)

That afternoon, before the prosecutor resumed his argument, a discussion took place outside the presence of the jury. Counsel for appellant noted that the serial number of the gun recovered from Robert Homick's apartment, as reflected on the property envelope, matched that of the gun that was test-fired and excluded as the murder weapon.[137] Accordingly, appellant's counsel renewed his prior requests for relief. (127RT 15795.)

The court indicated it had already been made aware of this development and had drafted a proposed stipulation, which it distributed to the parties.[138] Counsel for Neil Woodman objected to the proposed stipulation, arguing that it left open the possibility that the gun located

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[137] The property envelope described the gun recovered from Robert Homick's apartment as follows: Smith & Wesson, Model 19, .357 Magnum, 4-inch barrel, blue steel, serial number K-318199. (127RT 15795.) The serial number on the property envelope was thus one digit off from the test-firing report, but, presumably, both documents were referring to the same gun.

[138] The trial court's proposed stipulation is not a part of the record on appeal.

during the search was found at Neil Woodman's home. The court rejected this argument, because there was no connection between Neil Woodman and any weapon. (127RT 15798-15799.) Counsel for Robert Homick objected to the proposed stipulation pursuant to Evidence Code section 352, arguing that it had no probative value. (127RT 15799-15800.) Counsel for appellant agreed with counsel for Robert Homick and requested that the court read to the jury the stipulation that he had proposed. (127RT 15800.)

The prosecutor then stated that, if all of the parties were objecting to the court's proposed stipulation, then the proposed stipulation should not be considered. The prosecutor agreed with defense counsel that the proposed stipulation had no probative value, because it did not identify where the gun, which was eliminated as the murder weapon, was recovered from. (127RT 15800-15801.) He further argued that it was significant that a connection had not necessarily been made between the seized gun and the gun that Herman had given to appellant. (127RT 15801.) Finally, the prosecutor argued that "this is all a little late." He noted that counsel had possessed Dominguez's statement about going to Herman's office for several years. Accordingly, counsel could have questioned the detectives (when they were on the stand for weeks at a time) about their investigation into the murder weapon. Thus, the prosecutor objected to the proposed stipulation. (127RT 15803.)

Counsel for appellant responded that the motion to reopen was based on newly discovered evidence. He added that the timing was also due to his own negligence but said that the timing was not completely inappropriate, because the court was still entertaining stipulations at the time that he acquiesced to a stipulation in lieu of reopening the defense case. (127RT 15803-15804.)

The court then stated that, even if the parties questioned the detectives, the parties would most likely learn that the detectives had asked

Herman about the serial number but that Herman had not retained it. The court stated that, if Herman had provided the serial number to the detectives, there was no reason for the detectives not to write it down in their reports. (127RT 15804-15805.) The court, thereafter, concluded:

> So we are just in a position where there is a physically similar gun found and tested, and excluded as a possible murder weapon, which does not preclude the prosecution from arguing the gun Max Herman provided could have been the murder weapon.
>
> I certainly don't see that it opens up any right to question the officers about whether they asked, forgot the number, or didn't ask, and why they failed to take the gun to Max Herman, and showed it to him, and may have felt he would or would not have recognized it. I don't know.
>
> I continue -- with all the thought I have given this, keep concluding that it is simply not sufficiently significant to do anything more about it, other than to leave the evidence in the state it's in.

(127RT 15805.)

Appellant's counsel argued that there was a good reason for the detectives not to write down the serial number, if Herman had provided it to them -- the detectives would have wanted to preclude appellant's defense from arguing that the weapon provided by Herman was not the murder weapon. Appellant's counsel also argued that it was important to show that, when the detectives recovered a gun that matched the description of the one provided by Herman, they did not even bother to ask Herman about the serial number or to show Herman the recovered gun to see if it looked like the gun that Herman had given to appellant. (127RT 15805-15807.) The court rejected these arguments. It then denied appellant's request for a stipulation or to reopen. (127RT 15807.) It also denied appellant's motion for mistrial. (127RT 15809-15810.)

During closing argument, counsel for Robert Homick made the following argument regarding the gun provided by Herman:

> You heard in this trial the testimony regarding Max Herman. Max Herman gave [appellant] the murder weapon in this case. You heard about Max Herman.
>
> . . .
>
> . . . [Appellant] was very effective as a user of people. He could fool people. Max Herman trusted him enough to give him what turned out to be the murder weapon.

(129RT 16060.) The trial court interrupted the argument and instructed the jurors as follows:

> I am going to [] interrupt for a second.
>
> I asked the attorneys not to object, and so they are being very good about not objecting. I think there was a statement he gave Max Herman the murder weapon -- Max Herman gave him the murder weapon, and I don't think there's been evidence tying a particular weapon to being the murder weapon.
>
> So, again, I remind the jury you can draw what inferences you think are reasonable from the evidence. But if any attorney makes a statement that sounds like a statement of facts, remember you must base your decision on the evidence you actually hear.

(129RT 16060-16061.) Counsel for Robert Homick then stated: "You will have to make the decision whether or not it's a reasonable inference that Max Herman, he gave [appellant] the gun that was used to commit the murders in this case." (129RT 16061.) He added: "I would assert to you that that is the reasonable inference." (129RT 16061.)

B. The Trial Court Acted Well Within Its Broad Discretion in Denying Appellant's Motion to Reopen

Appellant argues that the trial court abused its discretion in denying his motion to reopen. (AOB 521-525; see also AOB 516-519.) There was no abuse of discretion.

This Court reviews for an abuse of discretion a trial court's ruling on a motion to reopen a criminal case to permit introduction of additional evidence. (*People v. Ayala, supra,* 23 Cal.4th at p. 282.) "In determining whether a trial court has abused its discretion in denying a defense request to reopen, the reviewing court considers the following factors: '(1) the stage the proceedings had reached when the motion was made; (2) the defendant's diligence (or lack thereof) in presenting the new evidence; (3) the prospect that the jury would accord the new evidence undue emphasis; and (4) the significance of the evidence.'" (*People v. Jones* (2003) 30 Cal.4th 1084, 1110, quoting *People v. Funes* (1994) 23 Cal.App.4th 1506, 1520.) These factors support the conclusion that there was no abuse of discretion in the trial court's denial of appellant's motion to reopen.

As to the first of these factors, the motion to reopen was originally made shortly after the close of evidence. However, at that time, appellant was unable to show that the gun seized from Robert Homick's apartment (which resembled the gun that appellant had obtained from Herman) had been excluded as the murder weapon. By the time appellant renewed his motion after determining that the seized gun had been excluded as the murder weapon, the trial court had already instructed the jurors and the prosecutor was in the middle of his closing argument. Thus, if the court had granted the motion to reopen, it would have been disruptive to the prosecutor's closing argument.

As to the second factor, appellant's counsel was not diligent in discovering the "new evidence." In fact, the evidence at issue here was not "new" at all. There is no suggestion in the record that appellant's counsel did not possess during the trial a copy of the police interview of Max Herman, the police report summarizing the items seized from Robert Homick's apartment, and the firearm-testing report on the guns seized from Robert Homick's apartment. Thus, during the trial, counsel possessed the

information which would have enabled him to see that a gun recovered from Robert Homick's apartment physically resembled the gun that Herman had described to the detectives. Accordingly, while the detectives were still on the stand, counsel could have questioned them about the depth of their investigation into the murder weapon.

Additionally, with regard to this second factor, what triggered the motion to reopen was that appellant informed his counsel during a meeting at the county jail that the gun that he had received from Max Herman the day before the Woodman murders was the same gun that was recovered from Robert Homick's apartment. (See AOB 506-507, citing 126RT 15507-15520.) Although appellant apparently claimed he told his trial counsel about this earlier, trial counsel had no recollection of hearing this at an earlier time.

Appellant argues that the trial court never faulted his trial counsel for not realizing sooner that the two guns at issue resembled one another. (AOB 523.) However, the prosecutor argued that appellant's counsel was not diligent with regard to the evidence. (127RT 15803.) Counsel for appellant also admitted: "[I]t was negligence on the part of myself in not bringing it up at the appropriate time. . . ." (127RT 15803-15804.) And even if counsel's diligence was not a factor expressly relied upon by the trial court, as stated earlier, it is a factor an appellate court considers in reviewing a trial court's ruling on a motion to reopen. (*People v. Jones, supra,* 30 Cal.4th at p. 1110.)

As for the third factor, the prospect that the jury would accord the new evidence undue emphasis, appellant's counsel stated during the hearing on the motion that he "felt that [reopening the defense] would be unfair to the prosecution, because, in a sense, that would highlight this type of evidence. . . ." (127RT 15804.) Accordingly, trial counsel asked for the lesser remedy (i.e., a stipulation). (127RT 15804.) Given the lack of

significance of the evidence to be introduced (see the fourth factor, addressed below), allowing appellant to reopen the defense would have given the evidence at issue undue emphasis.

As to the fourth factor, the evidence at issue was simply not significant. Counsel for appellant did not seek to introduce evidence that the gun that Herman had provided to appellant was not the murder weapon. Rather, counsel wanted to show that the detectives had possibly failed to ask Herman for the serial number of the gun that Herman had provided to appellant and had possibly failed to show Herman the gun recovered from Robert Homick's apartment. (AOB 517.) Appellant reasons that, had he been allowed to develop this evidence,[139] he could have "seriously weakened whatever inference the jury might draw regarding the weapon supplied by Max Herman." (AOB 517.) Appellant is mistaken.

Even if appellant had been allowed to reopen and did prove that the detectives failed to ask Herman for the serial number and failed to show Herman the seized gun,[140] these deficiencies in the investigation add

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[139] Appellant does not explain how he would have elicited testimony on Herman's description of the gun (to prove that it was physically similar to the seized gun which was excluded as the murder weapon), without violating the hearsay rule.

[140] Contrary to appellant's assertion, it is not "clear" that the detectives would have testified that they did not ask Herman for the serial number of the gun that Herman had provided to appellant. (AOB 517.) As the trial court noted, another likely response was that the detectives had asked Herman for the serial number, that Herman said that he had not retained a written record of the serial number after he had located the gun seven months earlier, and that the detectives did not indicate this exchange in their report. (127RT 15804-15805.) In fact, during the trial, Detective Holder admitted that there were some omissions in the police reports in this case. (See, e.g., 110RT 13060-13061, 13065-13066, 13070-13071, 13096, 13097; 113RT 13502-13503, 13519-13521.) Herman's lack of a record of the serial number might have been one of those omissions.

(continued...)

nothing in establishing that the seized gun and the gun provided by Herman were the same gun. Thus, the inference could still be made with equal effectiveness that the gun that Herman had given to appellant was the murder weapon. As the trial court aptly stated: "So we are just in a position where there is a physically similar gun found and tested, and excluded as a possible murder weapon, which does not preclude the prosecution from arguing the gun Max Herman provided could have been the murder weapon." (127RT 15805.) As the trial court concluded, the showing that appellant wanted to make "is simply not sufficiently significant to do anything more about it, other than to leave the evidence in the state it's in." (127RT 15805.)

This conclusion is supported by the fact that the seized gun and the gun provided by Herman were physically dissimilar in at least one way. The gun seized from Robert Homick's apartment was described as having wood grips. (14Supp. 4CT 857.) Herman believed that the gun that he provided to appellant had plastic grips. (14Supp. 4CT 865.) Moreover, the seized gun and the gun provided by Herman were .357 Magnums. The .357 Magnum was introduced in 1934, and its use has since become widespread. (https://en.wikipedia.org/wiki/.357_Magnum.)

Appellant repeatedly states that his proposed line of inquiry was relevant and important, because both the prosecutor and counsel for Robert Homick stated unequivocally during closing argument that the gun that

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(...continued)

Also, it is not particularly significant that the detectives might not have showed Herman the seized gun. The most the detectives could have achieved in showing Herman the seized gun was that Herman would have said that the gun resembled the gun that he had given to appellant. This information would not preclude or even decrease the possibility that the gun provided by Herman was the murder weapon.

appellant had obtained from Herman was, in fact, the murder weapon. (AOB 503, 504, 505, 516, 518, 520.) Appellant is incorrect.

The prosecutor did not argue that the gun that appellant had obtained from Herman was the murder weapon. Rather, the prosecutor summarized the testimony of Judge Stromwall, who had known Max Herman for many years. The prosecutor stated that Judge Stromwall's testimony had established that "Max Herman would not intentionally give a gun to [appellant] knowing that [appellant] was about to use it to commit a murder." (127RT 15729-15730.) This was a proper commentary on the evidence, because Judge Stromwall had testified that Herman would not have provided appellant a gun if Herman had any indication that the gun would be used to commit a crime. (116RT 13972-13973.) Thus, the prosecutor did not even ask the jurors to draw the inference that the gun that Herman had provided to appellant was the murder weapon, let alone argue it as a fact proven by the evidence.

As for counsel for Robert Homick, counsel initially argued that Herman had given the murder weapon to appellant. However, the trial court immediately interrupted counsel and told the jurors: "I don't think there's been evidence tying a particular weapon to being the murder weapon." (129RT 16061.) The court then instructed the jurors: "I remind the jury you can draw what inferences you think are reasonable from the evidence. But if any attorney makes a statement that sounds like a statement of facts, remember you must base your decision on the evidence you actually hear." (129RT 16061.) Counsel for Robert Homick then corrected himself and stated: "You will have to make the decision whether or not it's a reasonable inference that Max Herman, he gave [appellant] the gun that was used to commit the murders in this case." (129RT 16061.) He added: "I would assert to you that that is the reasonable inference." (129RT 16061.) Thus, in the end, counsel for Robert Homick did not argue

that the gun that appellant had obtained from Herman was, in fact, the murder weapon. Rather, counsel asked the jurors to draw that inference. In light of the testimony from Dominguez, this was a proper inference to ask the jurors to draw. And, as stated above, even if appellant had been permitted to reopen his case, this argument would have still been proper and not diminished in any way, because appellant could not prove that the seized gun and the gun provided by Herman were the same gun.

Appellant argues that, in *People v. Carter* (1957) 48 Cal.2d 737, 757, this Court considered both the seriousness of the charges and whether the case was a close case, in reviewing a trial court's ruling on a motion to reopen. (AOB 524-525.) Appellant argues that these additional factors support the conclusion that the trial court abused its discretion in the present case. (AOB 524-525.) *Carter* was decided over 50 years ago, and it does not appear that these additional factors have been considered necessary or determinative by this Court since then in reviewing a trial court's ruling on a motion to reopen. In any event, in light of fact that the evidence at issue here was not significant, these additional factors do not support the conclusion that the trial court abused its discretion in denying the motion to reopen. Additionally, although serious charges were involved in this case, the case was not a close one. Overwhelming evidence supported the jury's verdicts.

Accordingly, the trial court properly denied appellant's motion to reopen his case.

C. The Trial Court Properly Denied the Motion for Mistrial

After the trial court denied appellant's motion to reopen, appellant moved for a mistrial. The trial court denied that motion as well. (127RT 15809-15810.) The trial court's ruling was proper. (See AOB 519-521.)

This Court reviews a ruling on a motion for mistrial for an abuse of discretion. (*People v. Ayala, supra,* 23 Cal.4th at p. 282.) A motion for mistrial should be granted when a party's chances of received a fair trial have been irreparably damaged. (*People v. Avila, supra,* 38 Cal.4th at p. 573; *People v. Ayala, supra,* 23 Cal.4th at p. 282.) As shown by the discussion above, there was no irreparable damage to appellant's chances of having a fair trial. Even if appellant had been allowed to present the evidence at issue, the inference could still be made with equal effectiveness that the gun provided by Herman was the murder weapon.

D. No Lesser Remedy Was Warranted

Appellant argues that the trial court should have informed the jurors about the evidence at issue by reading the jurors a stipulation, particularly the one drafted by appellant's trial counsel. (AOB 525-529.) However, as the trial court concluded, the evidence which appellant sought to introduce was "simply not sufficiently significant to do anything more about it, other than to leave the evidence in the state it's in." (127RT 15805.) Moreover, appellant's proposed stipulation contained inadmissible hearsay in that it summarized what Herman had told the detectives when they interviewed him. (14Supp. 4CT 862.)

Appellant argues that the only objections to the fairness of the stipulation proposed by appellant came from the two codefendants, who would not have been prejudiced by appellant's proposed stipulation. (AOB 528-529.) Although appellant is correct that the prosecutor objected to the wording of the court's proposed stipulation and did not specifically comment on the proposed stipulation by appellant's counsel, appellant's proposed stipulation was not specifically addressed by the parties. In any event, the record makes clear that the prosecution's position was that no stipulation was warranted, because there was not necessarily any

connection between the seized gun and the one that Herman had provided to appellant. (126RT 15530; 127RT 15801.)

E. Appellant's Constitutional Rights Were Not Violated by the Trial Court's Rulings

Appellant argues that the trial court's rulings denied him his constitutional rights to a fair trial and the right to present a defense. (AOB 518, 525, 527.) "Although a criminal defendant is constitutionally entitled to present all relevant evidence of significant probative value in his favor, this does not mean the court must allow an unlimited inquiry into collateral matters; the proffered evidence must have more than slight relevance." (*People v. Marshall* (1996) 13 Cal.4th 799, 836.) Here, as argued above, the evidence at issue was on a collateral matter, having slight relevance. Accordingly, appellant's constitutional rights were not violated.

F. Even If the Trial Court Erred in Denying Appellant's Various Motions, Appellant Was Not Prejudiced

Even if the trial court erred in denying appellant's motion to reopen or request to read the jury a stipulation, appellant was not prejudiced. Any error did not involve a violation of any federal constitutional right. Also, in light of the overwhelming strength of the evidence (e.g., Stewart Woodman's testimony, Michael Dominguez's testimony, and the prosecution's case more generally), there was no reasonable probability that, absent the error, the jury would have reached a different result. (*People v. Jones, supra*, 30 Cal.4th at p. 1117.)

XI. THE TRIAL COURT'S STATEMENT TO THE JURY, WHICH PROVIDED SOME BACKGROUND INFORMATION ON THE CASE, DID NOT IMPLY THAT APPELLANT HAD BEEN CONVICTED IN FEDERAL COURT OF CRIMES RELATED TO THE PRESENT CRIMES

Prior to Stewart Woodman's testimony, the parties anticipated that Stewart Woodman would be impeached with his testimony from the federal

trial in Nevada. (See 101RT 11469-11470.) Accordingly, the trial court prepared a proposed statement that it would read to the jury regarding the federal trial. The proposed statement also provided some additional background information on the case. The court distributed the proposed statement to counsel for input. Counsel for Neil Woodman initially expressed some concern that the court's proposed statement might make the jurors wonder about the outcome of the federal trial but then stated that the court's proposed statement might inure to the benefit of the defense. The trial court indicated that it had considered telling the jurors not to concern themselves with the result of the federal trial but had concluded that that would only call attention to the matter. Counsel for appellant did not object to the wording of the court's proposed statement, except requesting that the statement not refer to Anthony Majoy. The court modified its statement, omitting any reference to Majoy.[141] (102RT 11483-11488.)

Thereafter, immediately before Stewart Woodman's testimony, the trial court read the statement to the jurors as follows:

> The next witness who is going to be called to testify for the prosecution is Mr. Stewart Woodman.
>
> Mr. Woodman is presently in custody and he'll be brought into court accompanied by marshals.
>
> Before he testifies, I want to give you some information about some background on this case.

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[141] At the start of the trial, the parties had agreed not to refer to any state or federal trial in Nevada and to instruct their witnesses not to do so. (78RT 7365-7366; see also 68RT 5523-5524.) However, during Art Taylor's lengthy cross-examination, counsel for Robert Homick twice inadvertently referred to Taylor's testimony at the federal trial. Appellant moved for a mistrial based on the two inadvertent references, and the trial court denied the motion. (82RT 8447-8448.)

> After the defendants were arrested for the murders charged in this case, a severance was ordered by the court. The trial of Stewart Woodman was severed from the trial of the three defendants who are presently on trial here. He was tried before a jury in 1989 and 1990 and was convicted of the murders.
>
> Before the commencement of the penalty phase of that trial, Stewart Woodman entered into an agreement with the prosecution whereby he promised to testify against the remaining defendants in this trial and the prosecution agreed not to seek the death penalty against him but to accede to his being sentenced to life in prison without the possibility of parole.
>
> Thereafter, federal authorities filed charges against all the defendants charging them with interstate transportation to commit these same murders which is a federal offense.
>
> Stewart Woodman entered into an agreement with the federal authorities in that case. He was allowed to plead guilty to the federal charges in exchange for his testimony against the remaining defendants in the federal court.
>
> All defendants were tried in federal court in 1991 and Stewart Woodman testified against them in those proceedings.

(102RT 11538-11539.)

Appellant now argues that the trial court's statement to the jury improperly implied that appellant and his codefendants had already been convicted of crimes related to the present crimes in federal court. Appellant argues that this error violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. (AOB 530-533.)

Even assuming arguendo that the trial court's statement giving the jurors some background information on this case was tantamount to a jury instruction, appellant is precluded from raising this claim because he invited the alleged error. The trial court here specifically asked counsel if they had any objections to the court's proposed statement. Counsel for Neil Woodman recognized: "Maybe [the court's statement] will inure to our benefit because maybe they [the jurors] may feel that they [the jurors in the

federal trial] acquitted them." (102RT 11485.) Thereafter, appellant's counsel agreed that the court's proposed statement was satisfactory (other than requesting that no reference be made to Majoy). (102RT 11486-11487.) The record thus shows a tactical reason for the defendants to acquiesce to the court's statement. The invited error doctrine, thus, precludes this claim of error. (*People v. Moon* (2005) 37 Cal.4th 1, 37.) Also, because appellant failed to raise this particular claim in the trial court, he has forfeited appellate review of the issue. (*People v. Farnam* (2002) 28 Cal.4th 107, 165; *People v. Bolin* (1998) 18 Cal.4th 297, 326.)

In addition, the claim has no merit. Contrary to appellant's contention (AOB 531), no reasonable reading of the court's statement implies that appellant and his codefendants had been convicted in federal court of charges closely tied to the present charges. In fact, as counsel for Neil Woodman recognized, the trial court's statement left open the possibility that the defendants had been acquitted in federal court (and were thus being prosecuted in state court). (102RT 11485.)

The claim must, therefore, be rejected.

XII. THERE WAS NO CUMULATIVE ERROR AT THE GUILT PHASE WHICH REQUIRES REVERSAL OF THE GUILT JUDGMENT

Appellant contends that the cumulative effect of the guilt phase errors requires reversal of the guilt judgment. (AOB 534-544.) Respondent disagrees, because there was no error and, to the extent there was error, appellant has failed to demonstrate prejudice.

Whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (*People v. Seaton* (2001) 26 Cal.4th 598, 675; *People v. Ochoa, supra,* 26 Cal.4th at p. 447.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Box, supra,* 23 Cal.4th at p. 1214.) The record shows

appellant received a fair trial. His claim of cumulative error should, therefore, be rejected.

XIII. EVIDENCE OF THE NEVADA CONVICTION FOR THE TIPTON MURDERS WAS PROPERLY ADMITTED UNDER SECTION 190.3, SUBDIVISION (b)

The Woodman murders occurred on September 25, 1985, in Los Angeles. A short time later, on December 11, 1985, the triple murder -- known as "the Tipton murders" -- occurred in Nevada. Before appellant was tried for the Woodman murders, he was tried for the Tipton murders. On May 12, 1989, following a jury trial in state court in Nevada, appellant was convicted of the Tipton murders and was later sentenced to death for those crimes.

One issue at the penalty phase of the trial in the instant case was the admissibility of evidence of the Nevada conviction.[142] The trial court here ruled that evidence of the Nevada conviction was admissible, not under Penal Code section 190.3, subdivision (c) (i.e., as evidence of a prior felony conviction), but rather under subdivision (b), as evidence of criminal activity involving the use or threat of violence.

Appellant now argues that it was improper for the trial court to allow evidence of the Nevada conviction to be considered in this manner by the jury. He also argues that, in the alternative, the trial court erred by failing to provide guidance in the instructions as to the manner in which the jury could use this information. Appellant argues that these errors violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. (AOB 545-591.)

Respondent submits that, in light of this Court's decisional law and the legislative history of section 190.3, the trial court properly allowed the

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[142] Respondent uses the term "Nevada conviction" to refer to appellant's conviction for the Tipton murders.

prosecution to introduce evidence of the Nevada conviction pursuant to section 190.3, subdivision (b). In addition, the trial court's instructions were proper and provided the jury with adequate guidance regarding the evidence introduced pursuant to section 190.3, subdivision (b). Thus, no error, constitutional or otherwise, occurred.

A. Relevant Proceedings

1. The motion to strike the Nevada conviction

Prior to the start of the penalty phase, appellant filed a motion to exclude evidence of the Nevada conviction. In the motion, appellant argued that the evidence of the Nevada conviction was inadmissible under section 190.3, subdivision (c) (hereafter, subdivision (c) or factor (c)), because the Nevada conviction occurred after the Woodman murders. (24CT 6574-6577.) In a supplemental motion, appellant argued that the evidence of the Nevada conviction was also inadmissible under section 190.3, subdivision (b) (hereafter, subdivision (b) or factor (b)), because it was hearsay and inadmissible under Evidence Code section 352. (24CT 6578-6579A.)

At a hearing on the motion, the People argued that the Nevada conviction was not being offered to prove the fact of a conviction under subdivision (c). Rather, it was being offered under subdivision (b) to prove the presence of criminal activity by appellant that involved violence. (134RT 16908-16914.) The trial court took the matter under submission. (134RT 16914.)

On the next court date, the People filed points and authorities and cited *People v. Webster* (1991) 54 Cal.3d 411 and *People v. Kelly* (1992) 1 Cal.4th 495 in support of the argument that appellant's Nevada conviction was admissible under subdivision (b). The People also stated that the jury should be instructed that appellant had no prior felony convictions and that

factor (c) was a mitigating factor. (135RT 16956-16960; 24CT 6601-6602.)

The defense first responded that *Webster* and *Kelly* were distinguishable, because the defendants in those cases had not argued that the fact of the conviction was inadmissible hearsay. Citing *People v. Wheeler* (1992) 4 Cal.4th 284, the defense noted that misdemeanor conduct may be used to impeach a witness's credibility, but the fact of a misdemeanor conviction may not because it is hearsay. Also, the defense argued that evidence of a felony conviction is admissible under the Evidence Code, but only to impeach the credibility of a witness. Here, however, the People did not want to use the Nevada conviction to impeach a witness; rather, they wanted to use it to prove the Tipton murders. (135RT 16961-16964.) The defense also distinguished *Webster*, arguing that the conviction offered in aggravation in that case involved a guilty plea, making the defendant's admission admissible under an exception to the hearsay rule. (135RT 16970.)

Next, the defense argued that the evidence of the Nevada conviction was inadmissible under Evidence Code section 352, because it was the conduct, not the fact of conviction, that was probative. The defense also pointed out that, if the court allowed the evidence of the Nevada conviction under subdivision (b), it would be tantamount to telling the jurors that another jury -- which heard different evidence -- had come to the conclusion that the Tipton murders had been proven beyond a reasonable doubt. The defense argued that, without being read the transcript of the entire Nevada trial, it would be impossible for the jurors here to determine how to evaluate the evidence of the Nevada conviction. Accordingly, the defense concluded, it was meaningless for the jury here to know what some other jury had decided when the jury here was not going to know what evidence the other jury had before it. (135RT 16961-16971.)

Addressing this last point first, the trial court noted that the logic used by the defense would apply whenever the prosecution had a conviction that it wanted to use as a factor in aggravation. Yet, the court reasoned, jurors learn about convictions, sometimes without knowing any of the evidence considered by the jury in the prior case. (135RT 16966-16967.) The court then found that, under *Webster*, appellant's Nevada conviction was admissible under factor (b) as an item of proof of participating in violent activity. Addressing appellant's argument under *Wheeler*, the court noted that *Wheeler* addressed misdemeanor convictions for impeachment, not factors in aggravation, prior felony convictions, the Penal Code, or *Webster*. As for the defense attempt to distinguish *Webster* on the ground that it involved a guilty plea, the court did not find the distinction to be significant, particularly because *Kelly* (which allowed for the similar use of a conviction as *Webster*) did not involve a plea. (135RT 16968-16970.)

The trial court also rejected the People's proposal to instruct the jury that there was no prior conviction. However, the court said it would instruct the jury that the Nevada conviction was one piece of evidence that the jury may consider, along with the other evidence, to determine whether appellant engaged in violent conduct. (135RT 16967-16968.) As for appellant's argument under Evidence Code section 352, the court found the probative value of the evidence outweighed any prejudice, because the combination of arguments of counsel and the instructions given by the court would overcome any confusion by the jury. (135RT 16976.) Thus, the court denied the motion. (135RT 16972.)

2. Factor (b) evidence presented at the penalty phase

During the penalty phase, the People presented various witnesses who testified to the facts underlying the Tipton murders. The People also presented evidence that appellant had been convicted of the Tipton murders

in Nevada state court. As for the evidence of the conviction, Detective Dillard of the Las Vegas Metropolitan Police Department testified that he attended numerous court proceedings in Las Vegas in connection with the Tipton case. He testified that he was present in court when appellant was convicted of the Tipton murders. He also testified that, at the request of the prosecution in this case, he prepared People's Exhibit P-33, a packet of court certified documents pertaining to appellant's Nevada conviction. (138RT 17489-17490; Peo. Exh. P-33.)

During the defense case at the penalty phase, the defense presented an alibi defense and testimony pointing to Michael Dominguez as the person who had committed the Tipton murders. Additionally, the defense cast doubt on the validity of the Nevada conviction. The defense called several witnesses -- Raymond Jackson, James Hampton, Manuel Correira, Art Taylor, and Agent Livingston -- who not only testified to facts that appellant argued pointed to his innocence of the Nevada murders, but also testified to the fact that he (i.e., each witness) had not been called to testify (or had not been questioned on a particular subject) at the Nevada trial. (140RT 17802; 141RT 17961, 17972, 18062-18064; 142RT 18080-18081.) Agent Livingston also testified that the notes maintained by the FBI relating to the day of the Tipton murders were not turned over to any attorney for appellant prior to the conclusion of the Tipton trial. (141RT 18064.)

3. Jury instructions

At the close of the penalty phase, the parties addressed the subject of jury instructions. The trial court informed the parties that it would modify CALJIC No. 8.85 to inform the jury that one of the factors it was to consider in determining penalty was the following: "(c) The absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings." The modification made by the trial

court here was that the instruction did not refer to "the presence" of any prior felony conviction. Neither party objected to this modification. (1Supp. 5CT 1359-1360; 143RT 18181-18182.)

After reviewing the trial court's packet of instructions, the parties reviewed the special instructions proposed by the defense. Special instruction #2 stated: "You are instructed that [appellant] had no felony convictions before the crimes for which he was tried in the instant case. The absence of any such felony convictions is a mitigating factor." (1Supp. 4CT 1100.) In reviewing this special instruction, defense counsel stated to the court: "I thought you included that in 8.85." (143RT 18207.) The court responded: "I did, at 8.85.c, I modified it to include that. So I did not give instruction number 2." (143RT 18207.) The defense then stated: "Well the problem is, with 8.85.c, is that the jury doesn't know, and basically what the prosecution stipulated to, was that [appellant] had no felony convictions. And unless the court tells them in an instruction that he had none, the jury doesn't know he had none." (143RT 18207.) The court then stated: "I know there was some indication -- I don't know if it's as strong as a stipulation -- but some indication from the prosecution that that kind of instruction should be given. [¶] However, at pages 16967 [of the Reporter's Transcript], I said I would not give it, because I felt it would be misleading and confusing. So, the stipulation, if there was one, was not accepted." (143RT 18207-18208; see also 144RT 18217-18218.)

The trial court, thereafter, instructed the jury with the modified version of CALJIC No. 8.85. (144RT 18229.) The court also instructed the jury with CALJIC No. 8.87, which set forth the reasonable-doubt standard for the factor (b) evidence. (144RT 18231-18232.) Appellant did not object to this instruction. (143RT 18186-18187.)

4. Closing arguments

During penalty phase closing arguments, the prosecutor reviewed the various factors in aggravation and mitigation. While addressing factor (b), the prosecutor explained that the evidence presented by the People on this factor was the evidence of the Nevada conviction, as well as the testimony from numerous witnesses about the Tipton murders. (144RT 18272.) With regard to factor (c), the prosecutor stated: "The next one C is the absence -- and this is a mitigating factor -- the absence of any prior felony convictions. Prior meaning prior to the date of the Woodman crimes. There is none and that's a mitigating factor." (144RT 18296.)

Later, defense counsel argued: "To put it in its simplest terms, there are only four things that you can even think about considering as aggravation: The circumstances of the Woodman case, the Tipton crime, if you believe that the prosecution has proven [appellant] committed the murders beyond a reasonable doubt, [appellant]'s role in the Woodman crime that [the prosecutor] talked about and [appellant]'s age." (145RT 18437-18438.) Defense counsel further argued: "Some of you may find that the fact that [appellant] had no prior felony convictions prior to the Woodman murders is such a strong factor considering his age that that alone outweighs the aggravation that you have found." (145RT 18439-18440.)

With regarding to the Nevada conviction, defense counsel argued that "the criminal justice system is not perfect" and people are sometimes "wrongfully convicted." (145RT 18427.) He added: "Hopefully, you have seen that that is what occurred in Las Vegas." (145RT 18427.) Defense counsel then rhetorically asked how appellant could have been wrongfully convicted in Nevada. (145RT 18427.) He answered that question by suggesting that the defense attorneys at the Nevada trial had provided ineffective representation to appellant and that the federal government had

failed to disclose some evidence to those attorneys prior to the trial. (145RT 18428-18430.)

B. Evidence of the Nevada Conviction Was Properly Admitted under Factor (b)

In light of this Court's decisional law and the legislative history of section 190.3, the trial court properly allowed the prosecution to introduce evidence of the Nevada conviction under factor (b).

In *People v. Ray* (1996) 13 Cal.4th 313, the prosecution offered four Michigan crimes in aggravation at the penalty phase: (1) second degree murder for which the defendant was convicted in 1974; (2) armed robbery for which the defendant was convicted in 1984; (3) first degree murder for which the defendant was convicted in 1984; and (4) being an inmate in possession of a weapon for which the defendant was convicted in 1986. (*Id.* at pp. 348-349.) The prosecution offered only the 1974 murder under factor (c), because it was the only conviction sustained prior to the defendant's commission of the capital crimes. (*Id.* at p. 349, citing *People v. Balderas* (1985) 41 Cal.3d 144, 202.) However, the prosecution offered all four Michigan crimes under factor (b), as evidence of criminal activity involving the use or threat of violence. (*People v. Ray, supra,* 13 Cal.4th at p. 349.) As to each factor (b) crime, the prosecution relied upon the judgment of conviction to prove that the defendant had, in fact, committed the underlying violent criminal conduct. (*Ibid.*) Also, testimonial and photographic evidence established that the victim of the 1984 murder had 66 knife wounds. (*Ibid.*)

On appeal, the defendant argued that, to the extent that his convictions had been admitted under factor (b) to prove that he had committed the criminal conduct adjudicated therein, the admission of the convictions violated the hearsay rule. (*People v. Ray, supra,* 13 Cal.4th at p. 349.) The defendant argued that trial counsel should have moved to

exclude the convictions on this ground. (*Ibid.*) This Court rejected the defendant's claim of ineffective assistance of counsel, finding that counsel could reasonably believe he had nothing to gain and much to lose by interfering with the prosecution's attempt to prove defendant's numerous other violent crimes primarily by means of his felony convictions. (*Id.* at p. 350.) The Court stated that, "[e]ven assuming the trial court could properly sustain a defense objection of the sort now urged on appeal," the prosecution would have been free to establish the defendant's commission of the Michigan crimes and the surrounding circumstances through testimony of victims and witnesses and any physical and photographic evidence. (*Ibid.*) Accordingly, the Court reasoned, trial counsel might have known or reasonably assumed that a mini-trial of this sort could be far more damaging to the defense than allowing the jury to learn of the conduct through the bare fact of a conviction. (*Ibid.*)

Thus, the majority of the Court in *Ray* did not directly address whether the prosecution may prove the presence of criminal activity involving the use or threat of violence under factor (b) through the introduction of evidence that the defendant has been convicted of a crime involving the use or threat of violence. However, two concurring opinions in *Ray* -- one authored by Chief Justice George (concurred by Justices Baxter, Werdeger, Lucas [retired but sitting under assignment], and Arabian [retired but sitting under assignment]) and the other by Justice Mosk -- did directly address the issue and reached opposite conclusions.

For the reasons set forth below, respondent submits that the concurring opinion of Chief Justice George accurately concludes that evidence of a conviction is admissible under factor (b) to prove the presence of criminal activity involving the use or threat of violence. Accordingly, respondent urges this Court to adopt that holding here, as it has in numerous cases decided after *Ray*. (*People v. Hinton* (2006) 37

Cal.4th 839, 910 ["Defendant's prior convictions for murder, attempted murder, and assault with a firearm were [] admissible under section 190.3, factor (b) as proof of criminal activity by defendant. . . ."]; *People v. Combs* (2004) 34 Cal.4th 821, 859-860 [certified juvenile court records admitted under factor (b) to prove two separate armed robberies]; *People v. Ochoa, supra,* 26 Cal.4th at p. 457 ["We have observed a prior felony conviction for a violent crime could fulfill both section 190.3, factors (b) (violent criminal activity) and (c) (prior felony conviction)."]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1374 ["The evidence of the conviction for rape was admissible pursuant to section 190.3, factor (b), as proof of defendant's participation in the violent criminal activity underlying the rape conviction."]; *People v. Scott* (1997) 15 Cal.4th 1188, 1222 ["It is also clear the court could properly consider the conviction for raping Violet H. to establish the existence of other violent criminal activity under Penal Code section 190.3, factor (b)."]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1234, quoting *People v. Ray, supra,* 13 Cal.4th at p. 369 (conc. opn. of George, C.J.) ["As the majority of this court has recently concluded: '[T]he prosecution may rely upon a prior conviction of a crime involving the use or threat of force or violence to establish the presence of criminal activity involving the use or threat of force or violence for purposes of section 190.3, factor (b).'"].)

Beginning with this Court's decisional law, shortly after the enactment in 1957 of section 190.1 (which provided for separate trials of guilt and penalty issues in a capital proceeding), this Court held that the statute "'embodie[d] the broad, liberal rule on admission of evidence that has always existed where a defendant has pleaded guilty and the only issues being tried relate to the degree of the crime and the penalty to be imposed.'" (*People v. Ray, supra*, 13 Cal.4th at p. 364 (conc. opn. of George, C.J.), quoting *People v. Jones* (1959) 52 Cal.2d 636, 647.)

Thereafter, as noted by Chief Justice George, this Court consistently recognized that the prosecution may introduce evidence of a defendant's prior convictions at the penalty phase to bring before the sentencing jury the facts concerning the defendant's past conduct. (*People v. Ray, supra*, 13 Cal.4th at p. 364 (conc. opn. of George, C.J.), citing *People v. McClellan* (1969) 71 Cal.2d 793, 818 (dis. opn. of Mosk, J.) ["For efficient trial procedure, trial courts and counsel are entitled to know how prior crimes are to be established at the penalty trial; the majority offer little assistance. Certainly a certified record of conviction will suffice."],[143] *People v. Terry* (1964) 61 Cal.2d 137, 148-149 [hearsay evidence of a felony information inadmissible pursuant to Evidence Code section 352 because evidence did not have the "safeguard" of a jury finding beyond a reasonable doubt that the defendant had committed the alleged offense], *People v. Pike* (1962) 58 Cal.2d 70, 94, fn. 14 ["The evidence of the prior

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[143] In his dissent in *McClellan,* Justice Mosk criticized the majority's holding that, during a penalty trial, a jury should be instructed that it may consider evidence of other crimes only when the commission of such crimes is proven beyond a reasonable doubt. (*People v. McClellan, supra,* 71 Cal.2d at p. 817 (dis. opn. of Mosk, J.).) In this context, Justice Mosk recognized why the admission of evidence at the penalty phase must be freer than at the guilt phase. He stated:

> Since the jury in the penalty phase of a bifurcated trial is not considering the fate of a defendant presumed to be innocent -- he has by then been found guilty of first degree murder -- logic and the provisions of section 190.1 dictate that the rules of evidence be less, not more, strict for the penalty trial. . . . [T]here is far more reason to limit strictly the admission of evidence at the guilt phase, where both life and freedom hang in the balance for a presumptively innocent defendant, than at the penalty phase, after freedom has already been lost by a guilty felon.

(*Ibid.*)

conviction, of course, was admissible on the penalty phase."], and *People v. Robillard* (1960) 55 Cal.2d 88, 100; see also *People v. Tolbert* (1969) 70 Cal.2d 790, 813 ["evidence that defendant had previously committed and been convicted of the crimes of 'exconvict with a gun' in Nevada in 1952, and assault with a deadly weapon in California in 1961, and evidence of the circumstances surrounding the latter offense, was properly admitted."].)

Thus, as Chief Justice George concluded, this Court's decisions establish that under the initial legislation establishing California's bifurcated capital proceedings, the prosecution may rely upon evidence of convictions at the penalty phase to establish that the defendant engaged in prior criminal activity.[144] (*People v. Ray, supra*, 13 Cal.4th at p. 365 (conc. opn. of George, C.J.); see also *People v. Wheeler, supra,* 4 Cal.4th at pp. 299-300 ["Evidence Code section 1200 prohibits admission of hearsay to prove the matters asserted '[e]xcept as provided by law' (subd. (b)), and exceptions can therefore be created by 'decisional law.'"].)

In the context of this decisional law, the Legislature enacted the 1977 death penalty law. The 1977 death penalty law set forth in section 190.3 a list of factors that the jury is to consider at the penalty phase.

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[144] In his concurring opinion in *Ray,* Justice Mosk cites several cases in support of the proposition that, if evidence is inadmissible at the guilt phase, it is inadmissible at the penalty phase. (*People v. Ray, supra*, 13 Cal.4th at pp. 371, 375, 376 (conc. opn. of Mosk, J.), citing *People v. Edwards* (1991) 54 Cal.3d 787, 837-839, *People v. Harris* (1981) 36 Cal.3d 36, 67-71, and *People v. Nye* (1969) 71 Cal.2d 356, 372.) However, none of these cases address the admissibility of prior convictions, and none address the admissibility of evidence which has the same level of reliability as certified records of conviction. (*People v. Edwards, supra,* 54 Cal.3d at pp. 837-839 [admissibility of defendant's taped statement to police after his arrest and the notebook he completed after the shooting]; *People v. Harris, supra,* 36 Cal.3d at pp. 67-71 [admissibility of defendant's poetry]; *People v. Nye, supra,* 71 Cal.2d at p. 372 [admissibility of statement taken from report of court martial proceeding].)

Section 190.3 included factor (b) -- "the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence." As Chief Justice George recognized in his concurring opinion in *Ray*, the legislative history of section 190.3 makes clear that, in enacting section 190.3, subdivision (b), the Legislature intended to authorize the prosecution to introduce both evidence of a defendant's conviction of a crime involving the use or threat of force or violence and evidence that the defendant had engaged in such criminal activity without having been convicted of a crime. (*People v. Ray, supra*, 13 Cal.4th at p. 366 (conc. opn. of George, C.J.), citing *People v. Phillips* (1985) 41 Cal.3d 29, 69-72 (lead opn. by Reynoso, J.).)

Specifically, as set forth by Justice Reynoso in *People v. Phillips, supra,* 41 Cal.3d 29 (cited by Chief Justice George in the concurring opinion in *Ray*), the legislative history of section 190.3, factor (b), reveals the following: As originally drafted, section 190.3 of Senate Bill No. 155 (introduced in the Senate on January 19, 1977) provided, in pertinent part: "In the proceedings on the question of penalty, evidence may be presented by either the people or the defendant as to . . . the defendant's prior criminal activity. . . . In determining the penalty the trier of fact shall take into account any of the following factors if relevant: (a) The presence or absence of prior criminal activity by the defendant." (*Id.* at p. 70.) The section was subsequently amended in the Senate on March 10, 1977, to render admissible only evidence of the defendant's "prior convictions . . . for felonies involving the use or threat of force or violence against the person of another." (*Ibid.*) As amended on March 24, 1977, this evidence was characterized as "significant prior criminal activity," defined as "a conviction for a felony involving the use or threat of force or violence

against the person of another." (*Id.* at pp. 70-71.) The bill passed the Senate in this form. (*Id.* at p. 71.)

Following the passage of the bill in the Senate, section 190.3 was amended in the Assembly to delete any requirement of a felony conviction and to refer simply to "criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence." (*People v. Phillips, supra,* 41 Cal.3d at p. 71.) Significantly, as noted by Justice Reynoso, the Assembly Committee on Criminal Justice interpreted this language to provide "*no restrictions* on the evidence introduced to show the defendant's character to be bad because of any alleged criminal activity."[145] (*Id.* at p. 71, fn. 22, emphasis added.) Thus, the legislative history of section 190.3 demonstrates the Legislature intended to authorize the prosecution to introduce *at least* a defendant's conviction of a crime involving the use or threat of force or violence pursuant to factor (b). (*People v. Ray, supra*, 13 Cal.4th at p. 366 (conc. opn. of George, C.J.), citing *People v. Phillips, supra,* 41 Cal.3d at pp. 69-72.)

One year later, section 190.3 was amended to expand the list of aggravating and mitigating factors, adding factor (c), which permits the jury

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[145] As noted by Justice Reynoso, the section was subsequently amended again in the Assembly on April 28, 1977, to add: "However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction." (*People v. Phillips, supra*, 41 Cal.3d at p. 71.) Also, on May 9, 1977, the Assembly once again amended section 190.3 to add: "However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and was acquitted." (*Ibid.*) Senate Bill No. 155 was passed in this form on August 11, 1977. (*Ibid.*)

to consider "the presence or absence of any prior felony convictions." Unlike factor (b), factor (c) includes nonviolent felonies. As to these offenses, which are less relevant in the penalty determination, subdivision (c) "intends convictions to be the sole quick and reliable way" to prove the nonviolent felonies. (*People v. Balderas, supra,* 41 Cal.3d at p. 202; see *ibid.* ["Subdivision (b) allows in all evidence of violent criminality to show defendant's propensity for violence. Subdivision (c) allows in 'prior' nonviolent felony 'convictions' to show that the capital offense was the culmination of habitual criminality -- that it was undeterred by the community's previous criminal sanctions."].)

Thus, in light of the decisional law of this Court and the legislative history of section 190.3, the prosecution may rely upon evidence of convictions at the penalty phase to establish that the defendant engaged in criminal activity involving the use or threat of force or violence.

As for *People v. Wheeler, supra*, 4 Cal.4th 284, as Chief Justice George stated:

> Although *Wheeler* observed that, as a general matter, a record of conviction is "hearsay" when offered as evidence to prove that the underlying criminal conduct was committed [citation], and our decision applied that general legal principle in resolving the question whether a misdemeanor conviction is admissible for impeachment purposes [citation], *Wheeler* did not consider the permissible use of evidence of a prior conviction in a sentencing context, and did not examine the history of the use of prior convictions in California penalty phase proceedings or the language or legislative intent of section 190.3.

(*People v. Ray, supra,* 13 Cal.4th at p. 369 (con. opn. of George, C.J.).)

Appellant argues that *Webster*, upon which the trial court here relied, was distinguishable because the conviction offered in aggravation in that case resulted from a guilty plea, making the conviction admissible under a hearsay exception (i.e., Evidence Code section 1220 [admission of a party]). (AOB 557-558.) Respondent submits that appellant's argument is

tantamount to an additional, rather than the sole, reason why the conviction in *Webster* was admissible under factor (b). Also, none of the cases of this Court addressing the admissibility of convictions under factor (b) to prove violent conduct by the defendant have adopted the analysis set forth by appellant. (See, e.g., *People v. Kelly, supra,* 1 Cal.4th at p. 549 [conviction admissible under factor (b) was the result of a jury trial].)

Appellant argues that the evidence of the Nevada conviction was not relevant, because the jury here did not learn what evidence the Nevada jurors were presented. (AOB 575-578.) Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts. . . ." (*People v. Garceau* (1993) 6 Cal.4th 140, 177.) Here, the evidence of the Nevada conviction certainly had a "tendency in reason to prove or disprove" the disputed fact of the absence or presence of criminal activity by appellant which involved the use or attempted use of force or violence. Also, in light of the legislative history outlined above, the Legislature has found that a prior conviction is relevant on the question of whether a defendant has engaged in violent criminal activity.

Finally, appellant argues that the trial court abused its discretion in refusing to exclude the evidence of the Nevada conviction pursuant to Evidence Code section 352. (AOB 586-587.) The trial court did not abuse its discretion. The evidence of the Nevada conviction was probative on the issue of appellant's propensity for violence. And, compared to the impact of the live testimony regarding the brutal and senseless killings of Mrs. Tipton, Ms. Bullock, and Mr. Meyers, the prejudicial impact of the evidence of the Nevada conviction was minimal.

In sum, the trial court properly admitted the evidence of the Nevada conviction under factor (b).

C. There Is No Reasonable Possibility the Jury Would Have Reached a Different Result Had the Prosecution Been Precluded from Introducing the Evidence of the Nevada Conviction

Even assuming arguendo that the trial court erred in admitting the evidence of the Nevada conviction under factor (b), there is no reasonable possibility the jury would have reached a different result had the prosecution been precluded from introducing the evidence.

In addition to relying upon the circumstances of the instant capital crimes (i.e., the Woodman murders), the prosecution relied extensively upon the facts surrounding the Tipton murders. The prosecution showed that, while working at the Tower of Jewels, appellant inquired and learned that Mrs. Tipton owned at least $90,000 worth of jewelry. (136RT 17108-17109.) Appellant then began his investigation of the Tiptons: he had his friend, Officer Frank Smaka, "run" the license plate numbers of the cars belonging to the Tiptons and also noted the telephone number of the Tipton residence in his daily reminder book, the same daily reminder book in which he plotted the murders of the Woodmans. (136RT 17055-17056, 17061; 137RT 17179; 138RT 17416-17418.)

Then, shortly after the Tipton murders, Billy Mau and Tim Catt saw appellant with Mrs. Tipton's jewelry. When Catt told appellant that the jewelry was not as valuable as appellant believed, appellant's reaction was extreme: he "blew up like a firecracker" and threatened the life of Catt's girlfriend. (136RT 17113-17118; 139RT 17620-17627.) Later, appellant exploded once again -- screaming, yelling, and hitting things. (136RT 17131-17132.) Appellant said to Catt, "Rich people, these rich fuckin people." (136RT 17132.) He explained: "I ransacked that fuckin house, she didn't have any money in the fuckin safe. . . . I shot her in the head. I

offed her in the head. I dusted her. Wasted her." (136RT 17132.) Appellant said he also shot the maid in the head. He also said that, when the doorbell rang, he ran to the front door, opened it, saw a man standing there, "snatched him, yanked him inside the house, and dusted him." (136RT 17135.) Thus, in a fit of anger, appellant confessed to his brutal slayings of Mrs. Tipton, Ms. Bullock, and Mr. Meyers. Once these and other facts of the Tipton murders were disclosed, "the additional fact that [appellant] was convicted of [those murders] could have added very little to the total picture considered by the jury." (*People v. Kelly, supra,* 1 Cal.4th at p. 550, internal quotations omitted.)

Moreover, the relevance of the evidence of the Nevada conviction was challenged by appellant, in that the penalty jury here was presented with evidence suggesting that appellant was wrongly convicted in Nevada. The defense presented the testimony of Jackson, Hampton, Correira, Taylor, and Livingston at the penalty phase. Each of these witnesses not only testified to facts which appellant argued pointed to his innocence of the Nevada murders, but each witness also testified that he had not been called as a witness (or questioned on a particular subject) at the Nevada trial. Also, Agent Livingston testified that the notes maintained by the FBI relating to appellant's whereabouts on the day of the Tipton murders were not turned over to any attorney for appellant prior to the conclusion of the Tipton trial. Referring to all of this evidence, appellant's counsel argued to the jury that appellant had been wrongly convicted in Nevada. He said that there was no reason for defense counsel in Nevada to not present testimony from these witnesses and that the federal government had failed to provide relevant information about appellant's whereabouts on the day of the Tipton murders to appellant's Nevada attorneys before the trial. (144RT 18368, 18369, 18376; 145RT 18428-18430.) Thus, the impact of the

evidence of the Nevada conviction was challenged by the evidence presented by the defense at the penalty phase.

Accordingly, there is no reasonable possibility the jury would have reached a different result had the prosecution been precluded from introducing the evidence of the Nevada conviction.

D. The Trial Court Properly Instructed the Jury on Factor (b)

Appellant argues that the trial court erred in failing to sua sponte instruct the jury regarding the significance of the Nevada conviction. (AOB 587-590; see also AOB 575-578.)

Appellant has no support for the proposition that the trial court here had a sua sponte duty to instruct the jury with a special instruction regarding the jury's consideration of the Nevada conviction under factor (b). This Court has not held that a trial court has a duty to instruct the jury on how it should weigh evidence of a conviction under factor (b) when the jury is also presented evidence of the facts underlying that conviction.

In addition, appellant did not request such a special instruction. Appellant is correct that, in arguing for exclusion of the evidence of the Nevada conviction, his trial counsel argued that it would be meaningless for the jury here to know what some other jury had decided when the jury here was not going to know what evidence the other jury had before it. (135RT 16961-16971, 16976.) However, once the trial court ruled that the evidence of the Nevada conviction was admissible under factor (b), defense counsel did not request a special instruction on how the jury should weigh the evidence of the Nevada conviction, in light of the other factor (b) evidence. Accordingly, any claim of instructional error is forfeited by defense counsel's failure to request a special instruction in the court below. (*People v. Bennett* (2009) 45 Cal.4th 577, 612; *People v. Richardson, supra,* 43 Cal.4th at pp. 1022-1023.)

In any event, the claim of instructional error has no merit. The trial court here instructed the jury with standard CALJIC No. 8.85: to consider, take into account, and be guided by factor (b) -- the presence or absence of criminal activity by appellant. (144RT 18228-18229.) The court also instructed the jury with standard CALJIC No. 8.87: that evidence of three murders in Las Vegas had been introduced for the purpose of showing that appellant had committed acts which involved the express use of force or violence and that, before a juror may consider any such criminal acts as an aggravating circumstance, a juror must first be satisfied beyond a reasonable doubt that appellant did, in fact, commit such criminal acts. (144RT 18231-18232.) These were proper and adequate instructions in this case.

Appellant argues that the instructions invited the jury to accept the Nevada conviction as determinative, thereby negating his right to have factor (b) proven beyond a reasonable doubt. (AOB 589.) Respondent disagrees. Nothing in the language of the instructions given supports this argument. Moreover, in light of the evidence and the arguments of counsel, there is no reasonable likelihood the jurors would have understood that the evidence of the Nevada conviction was determinative under factor (b).

More specifically, in addition to presenting evidence of the Nevada conviction, the People presented extensive testimony from numerous witnesses about the facts surrounding the Tipton murders. Thus, the People's case at the penalty phase did not suggest that the Nevada conviction was determinative. In turn, the defense presented the testimony of various witness to establish an alibi defense for appellant, to suggest that Michael Dominguez had committed the Tipton murders, and also to challenge the validity of the Nevada conviction. Thus, like the prosecution, the defense case treated the Nevada conviction as one piece of evidence under factor (b). Similarly, during penalty phase closing arguments, both

the prosecution and the defense treated the Nevada conviction as a small part of the penalty phase evidence and focused extensively on the facts underlying the Nevada conviction. (See 144RT 18272-18296, 18329-18399; 145RT 18421-18432.) Thus, in the context of the instructions, evidence, and arguments, the jury would have viewed the Nevada conviction as one piece of evidence that it may consider, along with the other evidence, to determine whether appellant engaged in violent conduct beyond a reasonable doubt.

Finally, if there was instructional error, it was harmless. (See *People v. Morales* (1989) 48 Cal.3d 527, 566.) Even apart from the Nevada conviction, the evidence introduced by the prosecution on the Tipton murders proved appellant committed those crimes beyond a reasonable doubt.

E. The Trial Court Properly Instructed the Jury on Factor (c)

As stated earlier, the trial court here modified factor (c) of CALJIC No. 8.85 and instructed the jury that it was to consider "the absence of any prior felony conviction." (144RT 18229.) Appellant argues that the trial court erred in refusing to further instruct the jury that the lack of prior felony convictions was a mitigating factor and appellant had no prior felony convictions. (AOB 590-591.) The trial court properly instructed the jury here.

The trial court did not have a duty to identify factor (c) as a mitigating factor. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1268 [the aggravating or mitigating nature of the various factors should be self-evident to any reasonable person within the context of each particular case; thus, the trial court does not err in refusing to instruct the jury that particular factors could only be considered in mitigation]; *People v. Holt*

(1997) 15 Cal.4th 619, 701-702; see *Tuilaepa v. California* (1994) 512 U.S. 967, 979-980 [114 S.Ct. 2630, 129 L.Ed.2d 750].)

Also, the fact appellant had no prior felony convictions was not a contested issue in the case. The evidence showed that the Tipton murders and appellant's conviction for those crimes occurred after the Woodman murders. In closing argument at the penalty phase, the prosecutor emphasized that appellant had no criminal record when he committed the Woodman murders. The prosecutor argued: "The next one C is the absence -- and this is a mitigating factor -- the absence of any prior felony convictions. Prior meaning prior to the date of the Woodman crimes. There is none and that's a mitigating factor." (144RT 18296.) Defense counsel also argued that appellant had no prior felony convictions. (145RT 18439-18440.) Defense counsel argued: "Some of you may find that the fact that [appellant] had no prior felony convictions prior to the Woodman murders is such a strong factor considering his age that that alone outweighs the aggravation that you have found." (145RT 18439-18440.) Thus, the parties agreed that appellant had no prior felony convictions, and the trial court's modified version of CALJIC No. 8.85 instructed the jurors to consider the absence of evidence of prior convictions in its penalty determination. Under these circumstances, the instruction was proper. (See *People v. Kelly, supra,* 1 Cal.4th at p. 549 [finding no prejudicial error where ambiguous instructions suggested that a subsequent conviction was a prior conviction].)

XIV. APPELLANT WAS NOT ENTITLED TO A HEARING AT WHICH HE COULD CHALLENGE THE CONSTITUTIONAL VALIDITY OF THE NEVADA CONVICTION ON THE GROUND OF INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant argues that the trial court erred in refusing his request to determine the constitutional validity of the Nevada conviction in the Tipton case. He also argues that the trial court erred in refusing to allow him to

make a full showing before the jury concerning the deficiencies in the defense afforded to him in the Nevada proceedings. Appellant argues that these errors violated his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 592-630.)

Respondent submits that appellant was not entitled to a hearing at which he could challenge the constitutional validity of the Nevada conviction on the ground of ineffective assistance of counsel. Even if he was entitled to such a hearing, appellant failed to make a sufficient prima facie showing warranting such a hearing and also would not have met his burden at the hearing in establishing that the Nevada conviction was constitutionally invalid. Further, even assuming appellant could meet his burden at the hearing, there was no reasonable possibility that the jury would have returned a verdict of life without the possibility of parole, without the evidence of the Nevada conviction. Finally, the trial court properly denied appellant's motion to present expert testimony that appellant was denied constitutionally effective assistance of counsel at the Nevada proceedings. Thus, no error, constitutional or otherwise, occurred.

A. Relevant Proceedings

1. The motion to strike the Nevada conviction

Prior the start of the penalty phase, appellant's trial counsel asked for a continuance. He explained that he wanted the opportunity to have a hearing on the constitutional validity of appellant's Nevada conviction in the Tipton case. More specifically, counsel wanted to show that appellant was denied constitutionally effective assistance of counsel at the Nevada trial, in support of the argument that the Nevada conviction should not be admitted at the penalty phase in this case. (135RT 16976-16977.)

The trial court denied the request for a continuance. The court explained that the jurors had been told that the trial would last until April, but it was already May and the penalty phase had not started. The court, however, said that it would consider the issue of the constitutional challenge to the Nevada conviction based on a written motion and transcripts of the Nevada trial. And, the court added, if such a motion was going to be filed, the court would ask counsel not to mention the Nevada conviction in opening statements. (135RT 16977.)

Defense counsel said he would file such a motion and would do so by the end of the following week. The court indicated that the motion should be filed sooner, because the People's case might be completed by the end of the following week. The court noted that there had been "three weeks of down time" between the guilt and penalty phase, when the motion could have been litigated. (135RT 16978.) The court said that counsel did not need to prepare a treatise on the issue of competency of counsel but asked counsel to provide it with a written summary of what counsel believed the issues were or to point out the areas of concern and then the court would read the transcript of the Nevada trial on nights and weekends. (135RT 16979.)

Counsel for appellant explained that the claims of incompetency of counsel involved what Nevada counsel failed to do, as opposed to what counsel did do, during the trial. (135RT 16987.) As an example, counsel explained that Raymond Jackson was a witness known to the defense in the Nevada case because Jackson was interviewed by the police two days after the Tipton murders. Counsel explained that Jackson had told the police that he saw a small, white, pickup truck in the Tipton driveway (presumably, used by the suspect) between 9:30 a.m. and 10:00 a.m. on the day of the murders, a time when appellant had an alibi. However, Jackson was not called as a witness at the Nevada trial. (135RT 16988.)

The court asked the parties about the availability of the transcripts of the Nevada trial, as well the availability of the appellate briefs and the decision of the Nevada Supreme Court in the appeal. (135RT 16987, 16989, 16993.) The court rejected the defense argument that "due process in [Nevada] is not equal to due process in California" and stated that it would be helpful to the court to review the Nevada Supreme Court's opinion in the appeal. (135RT 16993; see also 135RT 16980.)

Later that afternoon, counsel for appellant said that he could prepare a handwritten declaration that evening as to what he had in mind with regard to the issue. Counsel stated that he wanted to file the motion under seal, because he intended to set forth the defense strategy in the declaration. Counsel said that, if the court believed the defense did not make a prima facie showing, then that would resolve the issue. However, if the court believed a hearing was warranted, then there would be an adversarial hearing. The court said it would review defense counsel's declaration in camera to see if it was something the People needed to address. (135RT 17004, 17010-17011.)

The following day, the court stated that it had received a handwritten declaration from defense counsel in support of the motion to exclude appellant's Nevada conviction. (136RT 17018.) The declaration stated, in pertinent part: (1) Raymond Jackson, who the defense failed to call as a witness at the Nevada trial, would have placed the suspect's vehicle at the crime scene at 9:30 a.m. to 10:00 a.m. -- a time period for which appellant had an alibi; (2) James Hampton, who the defense failed to call as a witness at the Nevada trial, identified Kelly Danielson from a photograph as someone who looked like the person who Hampton saw near the Tipton residence on the day of the murders, between 9:30 a.m. and 10:30 a.m.; (3) there was no testimony from Agent Livingston or Art Taylor at the Nevada trial relating to appellant having been with Taylor on the morning of the

Tipton murders between 10:00 a.m. and 10:30 a.m.; and (4) the cross-examination of Michael Dominguez at the Nevada trial was constitutionally inadequate. (2Supp. 6CT 1497-1504.)

The court said it had read the declaration, as well as the opinion of the Nevada Supreme Court on appeal and a more detailed factual summary contained in the appellant's opening brief filed in the Nevada appeal. The court denied the motion and ordered counsel's declaration to remain under seal. (136RT 17018.)

A few days later, after the presentation of some evidence in aggravation, the defense requested permission to present evidence that appellant had received ineffective representation at the Nevada trial. Counsel requested permission to call expert witnesses or attorneys representing appellant in the Nevada appeal who would testify about what was done by the attorneys representing appellant at the Tipton trial and why the experts believed appellant had received inadequate representation at that trial. (138RT 17340-17341 [Defense counsel stated: "[W]hat I am referring to is essentially calling a witness or witnesses . . . who would testify about what was done by the attorneys representing [appellant] on the Tipton case as far as the defense they presented and why they feel that defense was inadequately presented."].) The prosecution argued that the competency of appellant's Nevada lawyers was a legal question, not a jury question. The court deferred a ruling. (138RT 17341.) The following day, the court denied the motion, explaining that appellant had failed to make a threshold showing that he had received ineffective assistance of counsel at the Nevada trial. (139RT 17540-17541.) The court stated:

> [T]here was a motion to introduce evidence as to the incompetence of counsel in Nevada to this jury.
>
> I have reviewed the arguments on this issue with respect to having the court entertain a motion to keep out the fact of the conviction on that same basis; and in that connection the court

found no threshold basis for questioning the competency of counsel and, therefore, denied the right to continue and denied the right to hearing on that issue.

Nor is there any right to present this issue to the jury without that threshold basis having been established; and that request is denied.

(139RT 17540-17541.)

2. Testimony at the penalty phase and closing arguments

Although the trial court denied appellant's request for a hearing to determine the constitutional validity of the Nevada conviction and also denied appellant's request to call experts to opine that appellant had received constitutionally ineffective assistance of counsel at the Nevada trial, appellant did present evidence at the penalty phase, suggesting that he did not receive a fair trial in Nevada. This evidence can be summarized as follows:

Raymond Jackson saw a small, white, pickup truck in the Tipton driveway on the day of the Tipton murders, between 9:30 a.m. and 10:00 a.m. He told the Las Vegas Metropolitan Police Department about his observation. (141RT 17960-17961.) Jackson did not testify on a prior occasion regarding his observations of the pickup truck. (141RT 17961.)

James Hampton was near the Tipton residence, constructing a home, on the day of the murders. Between 9:30 a.m. and 10:30 a.m., he saw a man walking across a vacant property, from the direction of the cul-de-sac where the Tipton residence was located. The man made an effort not to make eye contact with Hampton. (141RT 17967-17968.) Hampton was about 12 feet from the man. (141RT 17975.) The next day, Hampton talked to the police about his observation, but he was not subsequently contacted by the police. (141RT 17968-17969.) Later, Hampton spoke to a defense investigator, who showed Hampton a photograph of a person.

(141RT 17969.) The man in Defense Exhibit D-19 looked like, but was not necessarily, the man who Hampton saw.[146] (141RT 17981.) Hampton did not testify on a prior occasion regarding his observation. (141RT 17972.)

Manuel Correira met appellant and Dominguez while in custody in Nevada state prison. (142RT 18076-18078.) Dominguez told Correira that he and Kelly Danielson, not appellant, had committed the Tipton murders. (142RT 18078-18079.) Dominguez said that appellant was not even present at the Tipton house and was just given some jewelry later on. (142RT 18079-18080.) Dominguez said that he delivered Danielson's share of the Tipton jewelry to appellant in front of the Tiffany's store in California. (142RT 18080.) When Correira learned that appellant was convicted of the Tipton murders, he called and wrote to appellant's lawyer, outlining his conversation with Dominguez. (142RT 18081.) In January 1991, Correira signed a declaration setting forth his conversation with Dominguez. (142RT 18080.) Correira did not think he had testified on a prior occasion regarding his conversation with Dominguez. (142RT 18080-18081.)

Art Taylor saw appellant on the day of the murders. Appellant was driving Larry Ettinger's Cadillac. Taylor and appellant went to the bank and cashed a check. They returned to Taylor's shop, and appellant was paged. Appellant said he had to pick up Larry Ettinger and Susan Hines from an attorney's office and left Taylor's shop at around 10:30 a.m. (140RT 17797-17799.) It was a 15 to 20 minute drive from Taylor's shop to the intersection of 6th and Bridger (where the attorney's office was located). (140RT 17800.) At about 12:15 p.m. that day, Taylor spoke to

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[146] The person in the photograph does not appear to have been identified at trial. However, it appears the photograph was that of Kelly Danielson, a friend of Michael Dominguez. (141RT 18051.)

Agent Livingston about the events of that morning. (140RT 17799.) Taylor was not called to testify at the Tipton trial. (140RT 17802.)

Agent Livingston was not questioned at the Tipton trial about the information provided to him by Art Taylor regarding appellant's whereabouts on the morning of the Tipton murders. (141RT 18062-18064.) The notes maintained by the FBI relating to the day of the Tipton murders were not turned over to any attorney for appellant prior to the conclusion of the Tipton trial. (141RT 18064.)

At the close of the case, defense counsel reminded the jurors that each of these witnesses had not been called at the Tipton trial (or, in Agent Livingston's case, had not been questioned on a particular subject at the Nevada trial). (144RT 18368, 18369, 18376; 145RT 18429.) With regarding to the Nevada conviction, counsel argued that "the criminal justice system is not perfect" and people are sometimes "wrongfully convicted." (145RT 18427.) He added: "Hopefully, you have seen that that is what occurred in Las Vegas." (145RT 18427.) Defense counsel then rhetorically asked how appellant could have been wrongfully convicted in Nevada. (145RT 18427.) He answered that question as follows:

> First and foremost, it happened because the federal government chose not to let [appellant's] attorneys know that he was with Art Taylor on December 11th, 1985, until 10:30 a.m. that morning. They did not let his attorneys know that until after the Tipton trial was complete.
>
> ...
>
> It's also unfortunate but I think you're all aware of the fact that the quality of one's representation can vary widely. Attorneys are no different than any other line of employment. There are good ones and there are bad ones.
>
> I'm not going to stand here and try to tell you that I'm a good one and that [appellant's] Las Vegas attorneys were bad

ones; but what I am going to ask you to do is I'm going to ask you if you can think of a reason why such important witnesses as Mr. Jackson, who told the police he saw the pickup truck between 9:10 in the driveway and Mr. Hampton who you saw testify about seeing a person near the Tipton residence between 9:30 and 10:30, why witnesses such as those two would not have been called as defense witnesses during the Tipton state trial.

...

. . . [H]opefully you have seen why based upon the evidence that has been presented to you here in Los Angeles, evidence that was not presented in Las Vegas.

Hopefully, you have seen why you should not rely upon that Las Vegas conviction as a reason to believe that [appellant] committed the Tipton murders.

(145RT 18428-18430.)

3. The new trial motion

The jury rendered its death verdict on June 8, 1993. (1Supp. 5CT 1383.) The motion for new trial was heard about a year and a half later, on January 13, 1995. (148RT 18642.)

At the outset of the hearing on the new trial motion, the trial court recognized that there had been a substantial passage of time since the jury had rendered its verdict. The court explained that the reason for the delay was that, in the interim, appellant had filed a petition for writ of habeas corpus in the Nevada case and a Nevada court had granted a hearing on the petition. The court explained that, because the Nevada conviction constituted evidence in aggravation in this case, the court was concerned about the resolution of the habeas petition. However, the court noted that appellant's habeas petition had been denied and, accordingly, the court was ready to proceed with the new trial motion. (148RT 18642-18643.)

In his motion for new trial, appellant once again argued that the trial court erred in denying his request for a hearing on the constitutionality of

the Nevada conviction. (1Supp. 7CT 1896-2087, 2140-2143; 148RT 18644, 18648.) In support of this argument, appellant submitted "Exhibit F," described by appellant's counsel as "an exhibit package which was submitted in support of the Petition for Writ of Habeas Corpus filed on behalf of [appellant] in . . . the Federal District Court in Nevada pertaining to the Tipton convictions." (148RT 18643-18644.) Exhibit F, counsel explained, was an offer of proof as to what information would have been developed had the trial court granted a hearing to litigate the constitutional validity of the Nevada conviction. (148RT 18648-18650.)

Exhibit F consisted of the following documents:

1) A letter dated April 30, 1987, from Clark County, Nevada, Chief Deputy District Attorney Robert Teuton to Los Angeles County Deputy District Attorney John Krayniak, addressing the need to get appellant returned to Nevada for trial on the Tipton crimes as soon as possible, to decrease any advantage for his appointed Nevada counsel in preparing the case for trial. (1Supp. 7CT 1941.)

2) Joint Investigation Documents: a press release (3/17/89); a letter from Detective Dillard of the Las Vegas Metropolitan Police Department to Detectives Holder and Crotsley of the LAPD (1/6/85); an FBI release (7/25/89). (1Supp. 7CT 1942-1946.)

3) A letter dated February 15, 1989, from William Smith, Nevada counsel for appellant, to Clark County Nevada Deputy District Attorney Melvin Harmon, requesting the following in discovery: transcripts of all previous sworn testimony by witnesses expected to be called by the State of Nevada at trial; evidence of prior bad acts of appellant and/or prosecution witnesses; underlying material referred to in discovery

already provided; and some FBI material (pen registers and surveillance reports).[147] (1Supp. 7CT 1947-1950.)

4) A motion to continue trial, filed by appellant's Nevada counsel on March 31, 1989, requesting that the Nevada trial on the Tipton crimes be continued until the federal racketeering case was completed in order to afford appellant full discovery from all police agencies who had worked on the case and to secure the availability of witnesses (Larry Ettinger and Susan Hines) at the state trial. (1Supp. 7CT 1951-1963.)

5) Police Report of Detective Karen Good of the Las Vegas Metropolitan Police Department (12/16/85), which documents the investigation of Detective Good on December 13, 1985, and summarizes that Raymond Jackson saw a white pickup truck in the Tipton driveway between 9:30 a.m. and 10:00 a.m. on the day of the Tipton murders. (1Supp. 7CT 1964-1968.)

6) Testimony of Raymond Jackson (presented to the penalty jury in this case on May 17, 1993). (1Supp. 7CT 1969-1974.)

7) Testimony of James Hampton (presented to the penalty jury in this case on May 17, 1993). (1Supp. 7CT 1975-1990.)

8) Testimony of Manuel Correira (presented to the penalty jury in this case on May 19, 1993). (1Supp. 7CT 1991-2026.)

9) Testimony of Art Taylor (presented to the penalty jury in this case on May 13, 1993). (1Supp. 7CT 2027-2044.)

10) Testimony of Special Agent Livingston (taken on May 11, 1993, and presented to the penalty jury in this case on May 17, 1993). (1Supp. 7CT 2045-2074.)

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[147] Contrary to appellant's characterization (AOB 599), this letter does not demonstrate that Nevada counsel for appellant was "struggling" to obtain discovery from the prosecution.

11) Cover letter and notes of Special Agent Livingston (5/11/93). (1Supp. 7CT 2075-2087.)

The trial court denied the new trial motion. As to the contention that the trial court erred in denying a hearing on the constitutional validity of the Nevada conviction, the trial court stated:

> As far as the constitutionality of the defendant's prior convictions, defendant contends that the court erroneously denied him a hearing on the constitutional validity of his prior conviction.
>
> His contention is without merit. Preliminarily, I will state that all the cases cited by the defendant in support of the court's duty to inquire into the constitutional validity of a prior where it's requested are cases where the defendant's prior was based on a guilty plea, the validity of which raises legal issues for the court.
>
> Here the validity of the conviction which was suffered following a jury trial was explored during the penalty phase when all the evidence surrounding the convictions was offered to the jury.
>
> The conviction admitted had been affirmed on appeal by the Nevada Supreme Court. This court declined an invitation to revisit the issues that had been resolved by the Nevada Supreme Court and the defendant's motion for new trial is denied.

(148RT 18662-18663.)

B. Appellant Was Not Entitled to a Mini-Trial in the Midst of the Penalty Trial in This Case, on the Claim that He Was Denied the Effective Assistance of Counsel at the Tipton Trial in Nevada

Respondent submits that, under the case law authority of this Court and the United States Supreme Court, appellant was not entitled to a hearing to challenge the constitutional validity of the Nevada conviction on the ground that he was denied the effective assistance of counsel at the Nevada trial.

"In numerous instances under provisions of California law, a criminal conviction may give rise to a variety of collateral consequences." (*Garcia v. Superior Court* (1997) 14 Cal.4th 953, 959.) Accordingly, many years ago, this Court decided that, in order to assure the constitutional validity of a prior felony conviction used to enhance a defendant's sentence for a current crime, a defendant is entitled to challenge the prior conviction in a petition for writ of habeas corpus. (*In re Woods* (1966) 64 Cal.2d 3.)

In *People v. Coffey* (1967) 67 Cal.2d 204, this Court considered whether a defendant charged with a prior felony conviction was limited to challenging the constitutional validity of the prior felony conviction by way of habeas corpus or could, instead, make the challenge in his current trial. The defendant in *Coffey* was charged with various offenses and with having suffered a prior felony conviction in Oklahoma. (*Id.* at p. 208.) He made a pretrial motion to dismiss the allegation of the Oklahoma prior conviction, claiming that, in the proceeding leading to the Oklahoma conviction, he had been denied the constitutional right to the assistance of counsel.[148] (*Id.* at p. 210.) The trial court denied the motion without a hearing, finding that "no such motion can be entertained as it is irregular. . . ." (*Id.* at p. 211.) During the trial, the defendant was impeached with his Oklahoma prior conviction. (*Ibid.*)

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[148] Filed in support of the motion was the sworn declaration of the defendant's attorney, which set forth the minute entry reflecting the defendant's arraignment on the Oklahoma charge and summarized further proceedings wherein the defendant, in propria persona, entered a plea of guilty and was sentenced to state prison for five years. (*People v. Coffey, supra,* 67 Cal.2d at p. 210.) Also in support of the motion, the defendant filed points and authorities which stated that he "was indigent at the time of his plea," that he "did not understand his right to counsel," and that he "did not clearly and expressly and intelligently waive his right to counsel." (*Ibid.*)

This Court held that the trial court erred in its ruling. (*People v. Coffey, supra,* 67 Cal.2d at p. 214.) The Court first recognized that the scope of the right to the assistance of counsel at trial was enunciated in *Gideon v. Wainwright* (1963) 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed.2d 799]. (*People v. Coffey, supra,* 67 Cal.2d at p. 214.) The Court then stated that, "to the extent that statutory machinery relating to penal status or severity of sanction is activated by the presence of prior convictions, it is imperative that the constitutional basis of such convictions be examined if challenged by proper allegations." (*Id.* at pp. 214-215.) The Court further found that such a challenge may properly be made in the present proceeding by a pretrial motion to strike the prior conviction. (*Id.* at p. 215.)

Several years later, this Court was presented with the question of whether the *Coffey* motion to strike was available to challenge a prior felony conviction alleged as a sentence enhancement on constitutional grounds other than the denial of counsel, specifically on the ground of a *Boykin/Tahl* violation.[149] In *People v. Sumstine* (1984) 36 Cal.3d 909, this Court answered the question in the affirmative. In *Sumstine*, the defendant moved to strike his prior Kern County felony conviction, presenting the following motion to strike the prior: "This challenge is directed at the Kern County court's complete failure to make a record showing that the plea was knowing, intelligent and voluntary. Nor is there a record to show that the defendant was informed of his right to jury trial, confrontation of witnesses, silence and presentation of evidence. Finally, the defendant was not informed of the consequences of his plea." (*Id.* at pp. 914-915.) The trial court denied the motion to strike the prior conviction on the ground that it failed to allege the denial of the right to counsel. (*Id.* at p. 915.) This

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[149] *Boykin v. Alabama* (1969) 395 U.S. 238 [89 S.Ct. 1709, 23 L.Ed.2d 274]; *In re Tahl* (1969) 1 Cal.3d 122.

Court, citing its "concern in *Coffey* that prior convictions obtained in violation of any of a defendant's constitutional rights not be used to enhance a prison sentence," concluded a defendant could raise a *Boykin/Tahl* claim in a motion to strike. (*Id.* at pp. 918-919.)

A few years after *Sumstine*, this Court was presented with the question of whether a defendant could properly make a *Coffey* motion to challenge the constitutional validity of a prior conviction, alleged as a special circumstance in a capital case. In *Curl v. Superior Court* (1990) 51 Cal.3d 1292, this Court held that a capital defendant may challenge a prior murder conviction alleged as a special circumstance by way of a pretrial motion to strike the allegation, on the ground that the defendant's *Boykin/Tahl* rights had been infringed and his prior guilty plea was involuntary because he was intoxicated at the time of the plea. (*Id.* at p. 1296.)

The United States Supreme Court then changed the landscape in this area of the law in *Custis v. United States* (1994) 511 U.S. 485 [114 S.Ct. 1732, 128 L.Ed.2d 517]. (See *People v. Allen* (1999) 21 Cal.4th 424, 431.) In *Custis*, the United States Supreme court narrowly restricted the grounds upon which a defendant may collaterally attack the validity of a prior conviction in the course of a federal sentencing proceeding. The Court found that the federal Constitution did not guarantee a criminal defendant the right, in the present case, to challenge a prior conviction on any ground other than the denial of counsel (a *Gideon* claim). (*Custis v. United States, supra,* 511 U.S. at p. 496.)

The High Court reached this conclusion after considering three factors. First, the Court recognized that the denial of one's Sixth Amendment right to counsel was a "unique constitutional defect" rising to "the level of a jurisdictional defect." (*Custis v. United States, supra,* 511 U.S. at p. 496.) Second, the Court recognized that the interest in promoting

finality of judgments provided additional support for its conclusion. (*Id.* at p. 497.) Third, and of particular relevance to the issue presented for this Court's determination here, the United States Supreme Court stated that the "[e]ase of administration also support[ed] the distinction [between the denial of the right to counsel and the denial of other constitutional rights]." (*Id.* at p. 496.) More specifically, the Court stated: "[F]ailure to appoint counsel at all will generally appear from the judgment roll itself. . . . But determination of claims of ineffective assistance of counsel . . . would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States." (*Ibid.*)

Prior to *Custis*, this Court did not directly face the issue of the administrative burden or other consequences that would result were the motion-to-strike procedure, established in *Coffey*, to be extended to encompass a challenge to a prior conviction that rests upon a claim of constitutionally ineffective assistance of counsel.[150] (*Garcia v. Superior*

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[150] In *People v. Coleman* (1969) 71 Cal.2d 1159, 1169, this Court reversed a judgment of conviction and sentence of death, remanding the case for retrial. With respect to the defendant's claim, raised in a companion habeas corpus petition, challenging the validity of a prior conviction on the ground of ineffective assistance of counsel, the Court very briefly, and with no analysis, noted that this claim could be raised on retrial by way of the motion-to-strike procedure established by *Coffey*, thereby obviating the need for the Court to determine this claim in conjunction with the appeal that was then before the Court. (*Ibid.*) The Court in *Coleman* did not discuss any of the practical considerations or problems set forth in *Custis* that might be raised by permitting the routine use of motions to strike to challenge the validity of prior convictions on the ground of ineffective assistance of counsel. (See *Garcia v. Superior Court, supra,* 14 Cal.4th at p. 960, fn. 4; see also *id.* at p. 966, fn. 6 [overruling *Coleman* to the extent it held that the motion-to-strike procedure is available in non-capital cases to challenge the validity of prior convictions on the ground of ineffective assistance of counsel].)

Court, supra, 14 Cal.4th at p. 960.) *People v. Horton* (1995) 11 Cal.4th 1068 was the first post-*Custis* case to consider the constitutional grounds that could serve as a basis to challenge a prior conviction in a motion to strike in a capital case.

In *Horton*, defense counsel in the present California proceeding asserted numerous violations of the defendant's constitutional rights in the prior Illinois proceeding, as follows: (1) failure to provide a constitutionally adequate fitness hearing; (2) denial of the right to counsel at the juvenile proceedings, during plea negotiations, and at critical stages of the trial; (3) speedy trial violations; (4) violations of the right to unconflicted counsel; and (5) ineffective assistance of counsel. (*People v. Horton, supra,* 11 Cal.4th at p. 1127.) This Court held that, notwithstanding *Custis*, in the context of a capital case, a collateral challenge to a prior conviction that has been alleged as a special circumstance may not properly be confined to a claim of *Gideon* error, but may be based upon *at least some* other types of fundamental constitutional flaws. (*Id.* at p. 1135.) The Court distinguished *Custis* on the ground that *Custis* did not involve a capital proceeding and that *Custis* did not consider the special emphasis upon the need for reliability in the capital context. (*Id.* at p. 1134.)

Taking into account the special emphasis upon the need for reliability in the capital context, this Court found in *Horton* that "the nature of at least one of the alleged constitutional violations that occurred at defendant's Illinois trial -- denial of the assistance of counsel at a critical stage of the trial -- constitutes a serious infringement of a defendant's fundamental right to counsel under the Sixth Amendment." (*People v. Horton, supra,* 11 Cal.4th at p. 1135.) The Court explained:

> In *Hogan* [*People v. Hogan* (1982) 31 Cal.3d 815], we recognized that the denial of the right to representation of

> counsel at a critical stage of trial, affecting a defendant's substantial rights, gives rise to a presumption of prejudice, both because of the fundamental nature of the right involved (the right to the assistance of counsel) and its relation to a fair trial. [Citation.] A conviction flawed by a constitutional violation of this magnitude is antithetical to the heightened need for reliability in the determination that death is the appropriate sentence. For these reasons, we conclude that an alleged constitutional violation of the right to counsel at a critical stage of trial falls within the bounds of the permissible grounds that, under *Coffey*, will support a motion to strike a prior-murder-conviction special circumstance in a capital case.

(*Id.* at pp. 1135-1136.) This Court then reviewed the evidence presented at the hearing on the defendant's motion to strike and agreed with the defendant's claim that he was denied the right to counsel at critical stages of the proceedings leading to his prior Illinois conviction. (*Id.* at p. 1137.) The Court, thereafter, concluded that the trial court erred in denying the motion to strike the prior-murder-conviction special circumstance. (*Id.* at p. 1140.)

Thus, the Court in *Horton* had the opportunity to identify a claim of ineffective assistance of counsel as one which "falls within the bounds of the permissible grounds that, under *Coffey*, will support a motion to strike a prior-murder-conviction special circumstance in a capital case." (*People v. Horton, supra,* 11 Cal.4th at p. 1136.) However, it did not do so. Instead, the Court in *Horton* left unanswered whether a defendant who faces enhanced punishment on pending charges because of a prior conviction may challenge the constitutional validity of that prior conviction in the course of the current prosecution on the ground of ineffective assistance of counsel. The Court, however, did provide guidance on what types of claims will support a motion to strike in a capital context, stating that a prior conviction must be "flawed by a constitutional violation of this magnitude [the denial of the right to representation of counsel at a critical

stage of trial]" to trigger the motion-to-strike procedure set forth in *Coffey*. (*Ibid.*)

Two years after *Horton*, this Court addressed whether a noncapital defendant who faced enhanced punishment on pending charges because of a prior conviction may challenge the constitutional validity of that prior conviction in the course of the current prosecution on the ground of ineffective assistance of counsel in the prior proceeding. In *Garcia v. Superior Court, supra,* 14 Cal.4th 953, this Court held that a defendant has no right under the federal or state Constitution to challenge a prior conviction on the ground of ineffective assistance of counsel in the course of a current prosecution for a noncapital offense. (*Id.* at p. 963.) The Court further found that, although there was some broad language in *Sumstine* suggesting that the motion-to-strike procedure established in *Coffey* is available to challenge the validity of a prior conviction based upon *any* constitutional ground, *Sumstine* did not determine that a defendant properly could employ a motion to strike to raise an ineffective-assistance-of-counsel claim. (*Id.* at p. 964.)

Further, the Court in *Garcia* recognized that compelling a trial court in a current prosecution to adjudicate an ineffective-assistance-of-counsel challenge to a prior conviction generally would require the court to review the entirety of the record of the earlier criminal proceeding, as well as matters outside the record, imposing an intolerable burden upon the orderly administration of the criminal justice system. (*Garcia v. Superior Court, supra,* 14 Cal.4th at pp. 956, 964.) "Such a claim [ineffective assistance of counsel] will necessitate a factual investigation with regard to counsel's actions, omissions, and strategic decisions, requiring the parties and the court to reconstruct events possibly remote in time, and to scour potentially voluminous records, substantially delaying the proceedings related to the

current offense." (*Id.* at p. 965.) The Court quoted Justice Baxter's dissenting and concurring opinion in *Horton*:

> "The danger arises that each charged prior would thus become the basis for its own mini-appeal, in which every arguable misstep in the prior case could be asserted as 'constitutional' error. [¶] Carried to its logical extreme, such a rule would require . . . the full examination of trial records in cases from any state or federal jurisdiction, long past and long final for all other purposes. Claims of 'constitutionally' ineffective assistance might further require the taking of new evidence at far-flung locations, decades after witnesses have died and memories faded. The current trial would have to be postponed while the accused was given the chance to assemble evidence against his prior convictions. The delays and difficulties inherent in such a system would seriously undermine the orderly administration of justice and would jeopardize the numerous provisions which enhance punishment for recidivism."

(*Ibid.*, quoting *People v. Horton, supra,* 11 Cal.4th at p. 1143 (conc. and dis. opn. of Baxter, J.).) Based upon all of these considerations, the Court in *Garcia* concluded that a defendant whose sentence for a noncapital offense is subject to enhancement because of a prior conviction may not employ the current prosecution as a forum for challenging the validity of the prior conviction based upon alleged ineffective assistance of counsel in the prior proceeding. (*Garcia v. Superior Court, supra,* 14 Cal.4th at p. 966.)

Respondent submits that, under the standard set forth in *Horton*, coupled with the considerations set forth in *Garcia*, appellant's claim of ineffective assistance of counsel may not serve as a basis to challenge the Nevada conviction under the motion-to-strike procedure set forth in *Coffey*.

Under the standard set forth in *Horton*, a claim of ineffective assistance of counsel is not a flaw of the same "magnitude" as the complete

denial of counsel at a critical stage of the proceedings.[151] Unlike a violation of the right to representation by counsel at a critical stage of trial, deficient performance by counsel at trial does not give rise to a presumption of prejudice. (*People v. Horton, supra,* 11 Cal.4th at pp. 1135-1136 ["[T]he denial of the right to representation of counsel at a critical stage of trial, affecting a defendant's substantial rights, gives rise to a presumption of prejudice. . . . A conviction flawed by a constitutional violation of this magnitude is antithetical to the heightened need for reliability in the determination that death is the appropriate sentence. "].) In *Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674], the United States Supreme Court ruled that a defendant alleging ineffective assistance of counsel must establish not only that "counsel's representation fell below an objective standard of reasonableness" (*id.* at p. 688), but also that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different" (*id.* at p. 694). The High Court concluded that a showing of prejudice was required because "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." (*Id.* at p. 691.)

Thus, unlike the denial of the right to representation of counsel at a critical stage of trial, a claim of deficient representation by counsel does not give rise to a presumption of prejudice. (*People v. Horton, supra,* 11 Cal.4th at pp. 1135-1136, citing *People v. Hogan, supra,* 31 Cal.3d 815.) Prejudice resulting from counsel's performance must be separately

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[151] As stated earlier, this Court in *Horton* had the opportunity to identify a claim of ineffective assistance of counsel as one which "falls within the bounds of the permissible grounds that, under *Coffey*, will support a motion to strike . . . in a capital case" (*People v. Horton, supra,* 11 Cal.4th at p. 1136), but it did not do so.

determined. (*Strickland v. Washington, supra,* 466 U.S. at p. 694.) Accordingly, a claim of ineffective assistance of counsel is not a constitutional violation of the magnitude falling within the bounds of the permissible grounds that, under *Coffey*, will support a motion to strike in a capital case.

Moreover, in light of the considerations set forth in *Garcia*, a current prosecution should not be a permissible forum for challenging the validity of the prior conviction based upon alleged ineffective assistance of counsel in the prior proceeding. The trial court in this case, in considering appellant's motion to strike, asked the parties about the availability of transcripts of the Nevada trial. The court was informed that the transcripts were 16 volumes, filling two boxes. (135RT 16990.) The court was concerned about further delays in the trial and indicated it would read the Nevada record on nights and weekends to rule on appellant's motion. (135RT 16977, 16979, 16987, 16989, 16993.) Defense counsel, however, indicated that the issue of ineffective assistance of counsel had to do with what Nevada counsel had failed to do, as opposed to what counsel did do, suggesting to the court that reading the transcript of the Nevada trial would be insufficient to resolve the motion. (135RT 16987.) These are the precise considerations which the *Garcia* court found " impos[e] an intolerable burden upon the orderly administration of the criminal justice system." (*Garcia v. Superior Court, supra,* 14 Cal.4th at p. 956.)

Accordingly, under the standard set forth in *Horton* and in light of the considerations addressed in *Garcia*, this Court should find that a claim of ineffective assistance of counsel, unlike a violation of the right to counsel at a critical stage of trial, does not fall within the bounds of the

permissible grounds that, under *Coffey*, will support a motion to strike a prior conviction in a capital case.[152]

C. Even If a Motion to Strike a Prior Conviction Can Rest upon a Claim of Ineffective Assistance of Counsel in the Context of a Capital Case, Appellant Failed to Make a Sufficient Prima Facie Showing Warranting a Hearing

If this Court finds that a claim of ineffective of assistance of counsel can serve as a basis for a motion to strike under the procedures set forth in *Coffey* in the context of a capital case, appellant failed to make a sufficient prima facie showing warranting a hearing.

In *Coffey*, this Court stated that "the issue [the challenge to the constitutional validity of the prior conviction] must be raised by means of allegations which, if true, would render the prior conviction devoid of constitutional support." (*People v. Coffey, supra,* 67 Cal.2d at p. 215.) A

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[152] At the hearing on the new trial motion, the trial court made some comments suggesting that appellant was barred from challenging the constitutional validity of the Nevada conviction because the Nevada Supreme Court had affirmed the case on appeal. (148RT 18662-18663.) In *Horton*, this Court stated: "[W]here an error in an appellate court's prior review of an alleged constitutional violation appears on the face of the judgment itself, and the claimed violation is tantamount to a complete denial of representation at a critical trial stage, the prior judgment should not bar a defendant from raising that claim in a California capital proceeding." (*People v. Horton, supra*, 11 Cal.4th at p. 1138.) Here, there is no "error in an appellate court's prior review of an alleged constitutional violation [that] appears on the face of the judgment itself," and the claimed violation is not tantamount to a complete denial of representation at a critical trial stage. Accordingly, this language in *Horton* does not apply.

However, even if this language in *Horton* does apply, and to the extent that the trial court here believed that appellant was barred from challenging the constitutional validity of the Nevada conviction in the present case, the trial court reached the correct result (for the reasons set forth above) even if its reasoning may have been faulty. (See *People v. Dell, supra,* 232 Cal.App.3d at p. 258 ["It is immaterial if the ground relied on below was erroneous if the action taken . . . was otherwise proper."].)

defendant seeking to challenge a prior conviction must allege actual denial of his constitutional rights. (*Curl v. Superior Court, supra,* 51 Cal.3d at p. 1306; *People v. Sumstine, supra,* 36 Cal.3d at p. 922.) If the defendant's showing is sufficient, the trial court must then conduct an evidentiary hearing as set forth in *Coffey* and *Sumstine*. (*Curl v. Superior Court, supra,* 51 Cal.3d at p. 1306.)

In *Coffey*, the defendant made a sufficient prima facie showing of the denial of the right to representation by counsel. The defendant, by means of his notice of motion, points and authorities, and declaration of attorney, clearly alleged that he was not represented by counsel in the course of the Oklahoma proceedings. (*People v. Coffey, supra,* 67 Cal.2d at pp. 215-216.) Also, he alleged that he did not clearly, expressly, and intelligently waive his right to counsel. (*Id.* at p. 216.) Accordingly, this Court found that the allegations made by the defendant in support of his motion to strike the Oklahoma prior conviction were sufficient to justify a hearing in the trial court for the purpose of determining whether, in the proceeding leading to the Oklahoma conviction, the defendant was accorded his right to counsel. (*Id.* at p. 217.)

In contrast, in *Sumstine*, the defendant failed to make a sufficient prima facie showing of a *Boykin/Tahl* violation. This Court found that the defendant's allegation that the record was silent as to his "rights to jury trial, confrontation of witnesses, silence and presentation of evidence" and as to the voluntariness of his guilty plea was insufficient. (*People v. Sumstine, supra,* 36 Cal.3d at p. 924.)

Like the defendant in *Sumstine*, appellant here failed to make a sufficient prima facie showing of ineffective assistance of counsel. In the declaration in support of the motion to strike, trial counsel for appellant in the present case asserted that Nevada counsel for appellant failed to present certain witnesses (Jackson, Hampton, Correira, and Taylor) and specific

testimony from another witness (Agent Livingston). (See 2Supp. 6CT 1497-1504.) Defense counsel in the present case further asserted that: there was no tactical reason for Nevada counsel to have failed to present the testimony of Jackson (2Supp. 6CT 1498); the absence of testimony from Hampton, Taylor, and Agent Livingston was the result of either the failure by Nevada counsel to pursue discovery or willful noncompliance with discovery/a *Brady*[153] violation (2Supp. 6CT 1501-1502); and the information provided by Correira, although not known to the defense until after the Nevada trial, created a due process problem if evidence of the Nevada conviction were admitted in the present case (2Supp. 6CT 1503).[154]

Starting with Correira, appellant failed to make a prima facie showing of ineffective assistance of counsel (or a due process violation). There is no indication that, at the time of the Nevada trial, the defense knew or had reason to know about the information ultimately provided by Correira. (See 2Supp. 6CT 1503 ["this information was not known to the

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[153] Under *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215], "suppression by the prosecution of evidence favorable to the accused . . . violates due process where the evidence is material either to guilt or to punishment. . . ." (*Id.* at p. 87.) Prejudice occurs if the evidence is "material." Evidence is material if there is a reasonable probability that, had it been disclosed to the defense, the outcome of the trial would have been different. (*Strickler v. Greene* (1999) 527 U.S. 263, 280-282, 289-290 [119 S.Ct. 1936, 144 L.Ed.2d 286]; *United States v. Bagley* (1985) 473 U.S. 667, 682 [105 S.Ct. 3375, 87 L.Ed.2d 481].) "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (*Strickler v. Greene, supra,* 527 U.S. at pp. 289-290.)

[154] In arguing that he made a prima facie showing, appellant cites to some of the materials attached to his motion for new trial. (AOB 624, 625.) This was not a part of appellant's prima facie showing in the trial court (see 2Supp. 6CT 1497-1504) and should not be considered here in determining whether appellant made a prima facie showing.

defense until after the Tipton verdicts"].) Accordingly, appellant failed to make a prima facie showing of ineffective assistance of counsel at the Nevada trial. Also, there was no showing in the declaration filed in support of the motion to strike that Nevada counsel failed to bring the information provided by Correira to the attention of the Nevada courts, once the information was known to the Nevada defense. Accordingly, appellant failed to make a prima facie showing of a due process violation with regard to the information provided by Correira.

Turning to Jackson, missing from appellant's showing of a prima facie case of ineffective assistance of counsel is a declaration from Nevada counsel setting forth the reason why Nevada counsel did not present the testimony of Jackson. Although Jackson told the police that he saw a pickup truck in the Tipton driveway between 9:30 a.m. to 10:00 a.m. on the day of the murders, Nevada counsel may have reasonably decided not to call Jackson as a witness because there was no evidence that the pickup truck was relevant to the Tipton murders.

As for Hampton, appellant did not make a prima facie showing of prejudice resulting from Nevada counsel's alleged failure to request the information provided by Hampton in discovery (or a prima facie case of materiality under *Brady*, creating a duty on the part of the prosecutors in Nevada to disclose this information). Hampton did not identify Kelly Danielson as the person whom he saw near the Tipton cul-de-sac between 9:30 a.m. and 10:30 a.m. on the day of the murders. Instead, Hampton said someone in a photograph (apparently, Danielson) *looked like* the man whom Hampton saw. Also, Hampton did not see this individual do anything other than *walk* across a vacant lot near the Tipton cul-de-sac. (141RT 17967-17968, 17974-17975, 17981.) Appellant thus failed to make a prima facie showing of prejudice to warrant a hearing on ineffective assistance of counsel.

Similarly, as to Taylor and Agent Livingston, appellant did not make a prima facie showing of prejudice resulting from Nevada counsel's alleged failure to request the information provided by these witnesses in discovery (or materiality under *Brady*, creating a duty on the part of the prosecutors in Nevada to disclose this information). Taylor and Agent Livingston would have testified that appellant was with Taylor until 10:30 a.m. on the day of the murders. However, as set forth in the declaration filed in support of the motion to strike, Susan Hines Ettinger testified at the Nevada trial and provided an alibi for appellant during the same time period. (2Supp. 6CT 1495.) Appellant thus failed to make a prima facie showing of prejudice as to these witnesses to warrant a hearing on ineffective assistance of counsel.

In sum, the record here supports the trial court's conclusion that appellant failed to make a prima facie case of ineffective assistance of counsel.[155] (139RT 17540-17541.)

D. Even If the Trial Court Had Held a Hearing on the Constitutional Validity of the Nevada Conviction, Appellant Would Not Have Met His Burden in Establishing that the Conviction Was Constitutionally Invalid on the Ground of Ineffective Assistance of Counsel

Even assuming that appellant made the threshold showing warranting a hearing, he would have failed to meet his burden at the

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[155] Although the trial court made some comments at the hearing on the new trial motion suggesting that it had denied the motion to strike because the Nevada Supreme Court had affirmed the Nevada conviction on appeal and because the Nevada conviction did not involve a guilty plea, during the hearing on the motion to strike -- one and a half years earlier -- the trial court denied the motion to strike because appellant had failed to make a threshold showing of ineffective assistance of counsel. (139RT 17540-17541 ["the court found no threshold basis for questioning the competency of counsel. . . ."].)

hearing in establishing that the Nevada conviction was constitutionally invalid on the ground of ineffective assistance of counsel.

When a defendant challenges the constitutional validity of a prior conviction, he bears the burden of establishing its constitutional invalidity. (*People v. Horton, supra,* 11 Cal.4th at p. 1136.) To meet that burden, it is not enough for a defendant simply to make some showing that a constitutional error occurred in the prior criminal proceedings. (*Ibid.*) "A prior conviction carries a strong presumption of constitutional regularity, and the defendant must establish a violation of his or her rights that so departed from constitutional requirements as to justify striking the prior conviction." (*Ibid.*, internal quotations omitted.)

Here, in his motion for new trial, appellant set forth the evidence he would have presented had his motion for a hearing under *Coffey* been granted. (148RT 18648-18650; 1Supp. 7CT 1939-2087, 2140-2143.) The bulk of this evidence was the testimony presented at the penalty trial in this case: testimony from Jackson, Hampton, Correira, Taylor, and Agent Livingston. Reviewing this evidence, it is apparent that appellant would have failed to carry his burden at the hearing in establishing that he was denied the effective assistance of counsel at the Nevada trial.

Beginning again with Correira, the absence of his testimony from the Nevada trial was not prejudicial to appellant. When called as a witness at the penalty phase in the California case, Correira testified that he had been adjudicated a habitual criminal offender in Nevada. He had sustained between five and ten felony convictions in the States of Nevada and New York. He had also been arrested in other states, including Texas. (142RT 18077, 18084-18086.) Correira had multiple aliases, including "Houdini" (having broken out of physical restraints, apparently while in custody). (142RT 18082.) He had been a high ranking and "3-star" member of "the Executioners," a criminal street gang in New York. (142RT 18082,

18091.) Correira had had his conversation with Dominguez while in "the hole," a location in which he had been placed in jail because he had wrapped another inmate's neck with a cord. (142RT 18087, 18089.) All of this evidence detracted considerably from the believability of Correira's testimony about his conversation with Dominguez.

Similarly, testimony from Taylor and Agent Livingston would not have changed the result of the Nevada trial. This is so, because it would have resulted in evidence very unfavorable to appellant: Taylor told Agent Livingston, on the day of the Tipton murders, that appellant told Taylor earlier that day that he (appellant) had Dominguez "sitting on a place," that appellant had William (appellant's brother) doing something for him, and that appellant had something going on. (141RT 18065.)

Testimony from Hampton would not have changed the result of the Nevada trial either. Hampton did not identify Kelly Danielson as the person who he saw near the Tipton house between 9:30 a.m. and 10:30 a.m. on the day of the murders. Instead, he said someone in a photograph (apparently, Danielson) *looked like* the man who Hampton saw. Also, Hampton did not see this individual do anything other than *walk* across a vacant lot near the Tipton house. (141RT 17967-17968, 17974-17975, 17981.)

Finally, as to Jackson, no testimony connected the pickup truck that Jackson saw to the murders.

Accordingly, even if appellant had been granted a hearing to challenge the constitutional validity of the Nevada conviction, he would have failed to meet his burden in establishing ineffective assistance of counsel.

E. Even If Appellant Had Met His Burden at a Hearing on the Constitutional Validity of the Nevada Conviction, There Is No Reasonable Possibility the Jury Would Have Returned a Verdict of Life Imprisonment without Parole, without the Evidence of the Nevada Conviction Itself

Finally, even assuming that appellant had met his burden at the *Coffey* hearing and established that the Nevada conviction was constitutionally invalid on the ground of ineffective assistance of counsel, the question is whether there is a reasonable possibility the jury would have returned a verdict of life imprisonment without the possibility of parole, instead of death, without the evidence of the Nevada conviction itself. (See *People v. Horton, supra,* 11 Cal.4th at p. 1140.) There is no reasonable possibility the jury would have done so.

In *Horton*, at the penalty phase, the prosecution presented no new evidence in aggravation, relying entirely in aggravation on the defendant's prior murder conviction, as well as the circumstances of the current capital offense. (*People v. Horton, supra,* 11 Cal.4th at p. 1140.) Accordingly, notwithstanding the validity of a separate robbery-murder special circumstance, the death penalty judgment had to be set aside. (*Ibid.*)

In contrast to *Horton*, in additional to the circumstances of the current capital offense, the prosecution here relied *extensively* upon the facts surrounding the Tipton murders. (See Statement of Facts.) The jury was also instructed that, before considering the facts surrounding the Tipton murders, it must first be satisfied beyond a reasonable doubt that appellant did, in fact, commit such criminal acts. (1Supp. 7CT 1365-1366.)

Moreover, the prejudice resulting from the admission of the evidence of the Nevada conviction was diminished by the fact that the penalty jury here was presented with the very evidence that Nevada counsel did not present at the Nevada trial: the testimony of Jackson, Hampton,

Correira, Taylor, and Livingston. Each of these witnesses not only testified to facts which appellant argued pointed to his innocence of the Nevada murders, but each witness also testified that he had not been called as a witness (or questioned on a particular subject) at the Nevada trial. Also, Agent Livingston testified that the notes maintained by the FBI relating to appellant's whereabouts on the day of the Tipton murders were not turned over to any attorney for appellant prior to the conclusion of the Tipton trial. Later, during closing argument, defense counsel for appellant argued that the Nevada conviction itself was flawed. He explained that there was no reason for defense counsel in Nevada to not present testimony from these witnesses and that the federal government had failed to provide relevant information about appellant's whereabouts on the day of the Tipton murders to appellant's Nevada attorneys before the trial. (144RT 18368, 18369, 18376; 145RT 18428-18430.)

In light of the foregoing, there was no reasonable possibility the jury would have returned a verdict of life imprisonment without the possibility of parole, instead of death, without the evidence of the Nevada conviction.

F. The Trial Court Properly Denied Appellant's Request to Present Expert Testimony that Appellant Was Denied Constitutionally Effective Assistance of Counsel at the Nevada Trial

Appellant also argues that his constitutional rights were violated when the trial court denied his motion to present evidence at the penalty phase, in the form of expert testimony or in the form of testimony from the attorneys representing appellant in his Nevada appeal, that appellant was denied constitutionally effective assistance of counsel at the Nevada trial. (AOB 613-618.) The trial court did not err in denying the motion.

First, as appellant acknowledges, "California policy clearly requires the question of the constitutionality of a prior conviction to be determined by the court and not by the jury." (*Curl v. Superior Court, supra,* 51 Cal.3d

at p. 1302, internal quotations omitted; see also *People v. Terry, supra,* 61 Cal.2d at pp. 144-145 ["T]he subject matter of the penalty trial . . . must not be directed solely to an attack upon the legality of the prior adjudication."].) Second, as the trial court here found, appellant failed to make a prima facie showing of ineffective assistance of counsel. Accordingly, the trial court correctly denied the motion to present expert testimony on whether appellant was denied constitutionally effective assistance of counsel at the Nevada trial.

Finally, there is no reasonable possibility the jury would have returned a verdict of life imprisonment without the possibility of parole, instead of death, had it been presented evidence from expert defense witnesses that appellant received constitutionally ineffective assistance of counsel at the Nevada trial. (See *People v. Horton, supra,* 11 Cal.4th at p. 1140.) The prosecution presented powerful evidence on the Woodman murders and the facts surrounding the Tipton murders.

Additionally, the significance of the excluded evidence is that it would show that the Nevada conviction was unreliable. Here, appellant was allowed to present evidence to the jury that the Nevada conviction was unreliable. In this regard, appellant presented the testimony of all of the witnesses who he believed Nevada counsel was ineffective in failing to present. Each of these witnesses provided testimony for the defense. Each witness also testified that he was not called as a witness at the Nevada trial (or was not questioned by Nevada counsel on a particular subject). Later, during closing argument, defense counsel for appellant argued that the Nevada conviction was flawed. He explained that there was no reason for defense counsel in Nevada to not present testimony from these witnesses and that the federal government had failed to provide relevant information about appellant's whereabouts on the day of the Tipton murder to appellant's Nevada attorneys before the trial. (144RT 18368, 18369,

18376; 145RT 18428-18430.) Thus, appellant was allowed to present evidence that the Nevada conviction was unreliable and to argue that the deficiencies in the Nevada trial warranted a sentence of life without the possibility of parole in the present case.

Moreover, if the trial court had granted the motion at issue here, the People could have presented expert testimony that appellant was not denied effective assistance of counsel at the Nevada trial. Under these circumstances, there was no reasonable possibility the jury would have returned a verdict of life imprisonment without the possibility of parole, had it been presented expert testimony that appellant did not receive constitutionally effective assistance of counsel at the Nevada trial.

XV. THE TRIAL COURT PROPERLY PRECLUDED DEFENSE COUNSEL FROM ASKING A QUESTION DURING VOIR DIRE WHICH REQUIRED A PROSPECTIVE JUROR TO PREJUDGE THE CASE[156]

The trial court conducted voir dire of each prospective juror individually and out of the presence of other prospective jurors. Immediately following questions on general voir dire, the court asked death-qualifying questions. (See *People v. Hovey* (1980) 28 Cal.3d 1, 80.) Thereafter, the attorneys asked general voir dire and death-qualifying questions. The court then entertained challenges for cause. This process occurred over the course of 14 days. All prospective jurors not excused for cause during this process were directed to return at a later date. When the prospective jurors remaining after voir dire assembled on that date, they were called into the jury box according to a computer-generated randomized list, at which time the court entertained peremptory challenges.

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[156] Insofar as appellant is contending that he was precluded from asking voir dire questions of more than one juror (see AOB 631), he has failed to cite to any portion of the record except the voir dire of a single juror, J.R.

In this manner, the final selection of the jury and the alternates was concluded. (See 45RT 1877-1879; 46RT 1988-1994; 66RT 5290; 67RT 5292-5297; see RT Volumes 53-66.)

On the fourth day of voir dire, the following exchange took place with Prospective Juror J.R.:

> [DEFENSE COUNSEL]: Now, let me give you a hypothetical situation. Say you're a juror on a case and you find beyond a reasonable doubt that the prosecution has proved to you that a person conspires with other people to plan and carry out a murder; that they do this for money; that they take steps to commit it, to do the murder over a period of several months; and that they, in fact, enlist the aid of others, go ahead and carry out the killings and there are killings of more than one person. It's all done for money.
>
> In that type of situation, can you ever conceive of yourself voting for any punishment other than the death penalty?
>
> [PROSPECTIVE JUROR J.R.]: Yeah, I could see voting for life without possibility of parole.
>
> [DEFENSE COUNSEL]: If you were [to] add to that evidence that you heard during the penalty phase, heard evidence about the person and heard evidence that convinced you that the same person had committed four other -- [[157]]
>
> [PROSECUTOR]: Objection. Prejudging the evidence.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: You heard evidence in the penalty phase that convinced you that this person had committed a number --
>
> [PROSECUTOR]: Same objection. May we approach?
>
> THE COURT: Yes.

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[157] The reference to four murders was to the Tipton murders and the Godfrey murder. The Godfrey murder was ultimately not introduced as aggravating evidence in this case. (56RT 3292-3295; 134RT 16905.)

[PROSECUTOR]: Thank you.

(56RT 3301-3302.)

The prosecutor argued that defense counsel's question was "so loaded with aggravating evidence" and that "this is really setting up the case for the juror and asking him how they would vote." (56RT 3303, 3304.) The trial court agreed, stating: "I think we have to stay completely away from bringing out a laundry list of what you think is going to be presented to them." (56RT 3304.) The voir dire of the prospective juror continued, with some more death-qualifying and general voir dire questions from the attorneys. (56RT 3306-3317.) Both appellant and the People challenged Prospective Juror J.R. for cause, but the trial court denied both challenges. (56RT 3317-3319.) Later on, the People exercised a peremptory challenge against Prospective Juror J.R. (67RT 5317.)

Appellant now claims that the trial court erred in refusing his request to inquire into the ability of prospective jurors to vote for life imprisonment without parole in the case of a defendant who had committed murders other than the murders charged in the case. He argues that reversal of the penalty phase judgment is compelled by this Court's holding in *People v. Cash* (1992) 28 Cal.4th 703, 718-723. He further contends that the error violated his rights to a fair and an unbiased jury in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 631-647.)

Appellant is mistaken. The trial court did not err in its ruling. The trial court did not deny appellant's counsel the opportunity to conduct voir dire on the subject of other murders. Rather, the trial court properly precluded defense counsel from asking a question to one prospective juror that was so specific that it required the prospective juror to prejudge the penalty issue based on a laundry list of aggravating circumstances. The trial court's ruling was well within its discretion.

This Court reviews limitations on voir dire, including death-qualification voir dire, for abuse of discretion. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1120, disapproved on other grounds in *People v. Doolin, supra,* 45 Cal.4th 390; *People v. Burgener* (2003) 29 Cal.4th 833, 865.) A trial court has considerable discretion to contain voir dire within reasonable limits, and this discretion extends to death-qualification voir dire. (*People v. Butler* (2009) 46 Cal.4th 847, 859; *People v. Zambrano, supra*, 41 Cal.4th at p. 1120.)

In *Cash*, the defense anticipated that the prosecution would introduce as aggravating evidence the defendant's murder of his elderly grandparents at age 17 (i.e., evidence of prior murders) and attempted to ask a prospective juror during voir dire whether there were "any particular crimes" or "any facts" that would cause that juror "automatically to vote for the death penalty." (*People v. Cash, supra*, 28 Cal.4th at p. 719.) The trial court ruled that the question was improper and also denied a subsequent motion to ask prospective jurors whether there were any aggravating circumstances that would cause them to automatically vote for the death penalty. (*Ibid.*)

This Court held that the trial court erred. The Court began its analysis with the basic principle that prospective jurors may be excused for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as a juror. (*People v. Cash, supra*, 28 Cal.4th at p. 719, citing *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].) The Court then explained:

> The real question is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror. [Citations.] Because the qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty [citation], it is equally true that the real question is whether the juror's views about capital punishment would

> prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror.

(*People v. Cash, supra*, 28 Cal.4th at p. 720, internal quotation marks omitted.)

Applying these principles in *Cash*, this Court found error in the trial court's refusal of the defense's proposed voir dire. The Court explained that the trial court's ruling prohibited defense counsel from inquiring during voir dire whether prospective jurors would automatically vote for the death penalty if the defendant had previously committed another murder. (*People v. Cash, supra*, 28 Cal.4th at p. 721.) The Court reasoned that because the defendant's guilt of the prior murders of his grandparents was a general fact or circumstance that was present in the case and that could cause some jurors to vote for the death penalty, regardless of the strength of the mitigating circumstances, the defense should have been permitted to probe the prospective jurors' attitudes as to that fact or circumstance. (*Ibid.*) Accordingly, the Court found that, in prohibiting voir dire on prior murder, a fact likely to be of great significance to prospective jurors, the trial court erred. (*Ibid.*; see *People v. Vieira* (2005) 35 Cal.4th 264, 286 [a trial court's categorical prohibition of an inquiry into whether a prospective juror could vote for life without parole for a defendant convicted of multiple murder would be error, because multiple murder "falls into the category of aggravating or mitigating circumstances 'likely to be of great significance to prospective jurors'"].)

This Court went on to recognize that death-qualification voir dire must avoid two extremes. (*People v. Cash, supra*, 28 Cal.4th at p. 721.) The Court explained:

> On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so

> specific that it requires the prospective juror to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. [Citation.] In deciding where to strike the balance in a particular case, trial courts have considerable discretion. [Citations.]

(*Id.* at pp. 721-722.)

The instant case is readily distinguishable from *Cash*, because the death-qualification voir dire proposed by appellant's trial counsel came well within the extreme of being "so specific that it required the prospective juror to prejudge the penalty issue. . . ." (*People v. Cash, supra*, 28 Cal.4th at p. 721.) Defense counsel here *did not attempt to ask* Prospective Juror J.R. whether he could vote for life imprisonment without parole for a defendant convicted of other murders. And, unlike in *Cash*, counsel here *did not attempt to ask* the prospective juror whether there were facts or circumstances that would cause the juror automatically to vote for the death penalty. Instead, a fair reading of the record shows that defense counsel attempted to asked the prospective juror a far more specific question: whether the prospective juror could vote for life without parole for a defendant who had enlisted and conspired with others to commit murder, who had planned to commit murder for several months, who had carried out killings of more than one person, who had done so for the purpose of financial gain, and who had additionally committed four other murders.

The instant case is far more analogous to *People v. Burgener, supra*, 29 Cal.4th 833. There, the trial court sustained the People's objections when defense counsel asked prospective jurors whether they would impose the death penalty after considering a rather detailed account of some of the facts of the case and whether a prospective juror could continue to be impartial after hearing a list of the defendant's prior crimes. (*Id.* at p. 865.) The trial court found that these questions invited the jurors to prejudge the case. (*Ibid.*) This Court found no error in the trial court's ruling, stating:

"Defendant had no right to ask specific questions that invited prospective jurors to prejudge the penalty issue based on a summary of the aggravating and mitigating evidence. . . ." (*Ibid.*)

Here, too, as the prosecutor and the trial court aptly recognized, defense counsel's question was "loaded with aggravating evidence" or a "laundry list" of aggravating circumstances -- a defendant who had enlisted and conspired with others to commit murder, who had planned the murder for months, who had committed multiple murders, who had done so for financial gain, and who had additionally committed murders not charged in the case. Such a question, which encompasses numerous aggravating circumstances, is tantamount to asking a prospective juror to prejudge the penalty. Like in *Burgener*, appellant had no right to ask specific questions that invited prospective jurors to prejudge the penalty issue.[158]

Finally, the trial court's ruling here did not preclude defense counsel from asking appropriate questions of subsequent prospective jurors to ascertain whether the prospective jurors could maintain an open mind on penalty if presented evidence of other murders. For example, on the same day as (and following) the voir dire of Prospective Juror J.R., appellant's counsel conducted voir dire of Prospective Juror K.W. Counsel asked

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[158] Citing *People v. Clark* (1990) 50 Cal.3d 583, appellant argues that defense counsel's question should have been permitted as a question on general voir dire, as opposed to a death-qualification question. (See AOB 633.) Even assuming arguendo that this is a correct reading of *Clark*, the claim must fail. First, appellant never objected to the limitation of his examination on this basis in the trial court. Second, defense counsel's question was not a proper question for general voir dire. Unlike the discrete subjects of arson and burn injuries in *Clark*, defense counsel's question here would have opened the door to the prosecution asking questions "loaded" with mitigating factors, resulting in a lengthy examination of prospective jurors about all of the specific details of the case.

Prospective Juror K.W. questions about the juror's comment that life imprisonment without parole was not an appropriate penalty for someone who was a serial killer or mass murderer. (56RT 3354-3355.) The gist of this question was whether the prospective juror could maintain an open mind on penalty if presented evidence that a defendant had committed numerous murders or had committed murder on more than one occasion. Similarly, the following day, appellant's counsel was permitted to ask Prospective Juror R.M. whether there were certain situations where she would feel that the only appropriate punishment was death. (57RT 3467, 3470; see also 59RT 3730-3734 [voir dire of Prospective Juror E.B.].) This is nearly the exact question the trial court erroneously precluded in *Cash*. (*People v. Cash, supra*, 28 Cal.4th at p. 719.) Similarly, during the voir dire of Prospective Juror S.S., appellant's counsel asked whether the prospective juror would automatically impose the death penalty for a serial killer (which the prospective juror defined as someone who killed on more than one occasion). (57RT 3499, 3502.) Thus, appellant's counsel was permitted to fully explore the subject of whether the prospective jurors could maintain an open mind to penalty if presented evidence of other murders.

In sum, given the trial court's broad duty to restrict death-qualification voir dire, the trial court here did not abuse its discretion in refusing the inquiry sought by defense counsel of Prospective Juror J.R.

XVI. THE TRIAL COURT PROPERLY REMOVED JUROR NO. 8 FROM THE PENALTY PHASE JURY, BECAUSE JUROR NO. 8 MADE STATEMENTS INDICATING SHE COULD NOT FOLLOW HER OATH AND INSTRUCTIONS TO CONSIDER IMPOSITION OF THE DEATH PENALTY IN THIS CASE

During penalty phase deliberations, Juror No. 8 informed the trial court that she could consider the death penalty in only three types of cases: a torture murder, a rape murder, or where there was a child victim. Juror

No. 8 expressly stated that, because this case did not involve one of her three "factors," she could not vote for the death penalty in this case. Based on these statements, the trial court removed Juror No. 8 from the jury. (1Supp. 5CT 1342, 1345; 146RT 18482-18488; 147RT 18509-18511.)

Appellant now argues that the trial court erred in removing Juror No. 8 from the jury. He argues that there was no good cause to remove Juror No. 8 and that the trial court did not conduct a meaningful inquiry into the matter. Additionally, appellant argues that the trial court coerced a verdict, because it was aware of the 11-to-1 split in favor of a death verdict at the time it removed Juror No. 8 -- the sole holdout juror. Appellant argues that these errors violated his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 648-677.) He is mistaken.

The record here reflects as a demonstrable reality that Juror No. 8 could not follow her oath and instructions to consider imposition of the death penalty in this case. Juror No. 8's views on capital punishment prevented or substantially impaired the performance of her duties as a juror. Accordingly, the trial court did not abuse its discretion in removing Juror No. 8 from the jury. Additionally, the trial court conducted a meaningful inquiry into the matter and did not coerce a death verdict.

A. Relevant Proceedings

1. The penalty jury commences deliberations on June 2, 1993, and deliberates for half a day

On Wednesday, June 2, 1993, at 11:17 a.m., shortly after the end of the penalty phase arguments, the jurors began to deliberate the penalty for appellant. (145RT 18459.) Following an hour-and-a-half lunch break, the jurors deliberated from 1:30 p.m. to 2:55 p.m. They then took a 15-minute break in the afternoon and deliberated from 3:10 p.m. to 4:17 p.m.

Deliberations were then continued to the following day. (145RT 18464-18465; 1Supp. 5CT 1339.)

2. On June 3, 1993, the penalty jury deliberates for half a day

On Thursday, June 3, 1993, the jurors commenced deliberations at 9:09 a.m. They took a 16-minute break in the morning. At noon, the jurors took a lunch break and returned an hour later. At 1:45 p.m., the jurors were excused for the day, because one of the jurors had a medical appointment. (145RT 18463; 146RT 18466; 1Supp. 5CT 1340.)

3. On June 4, 1993, the penalty jury informs the trial court that it has reached an impasse; the court orders the jury to resume deliberations

On Friday, June 4, 1993, the jurors resumed deliberations at 9:00 a.m. At 10:35 a.m., they took a break, and the court received a note from the jury foreperson. The note stated: "We have come to a point where an [sic] unanimous decision on either of the penalties can not [sic] be made." (1Supp. 5CT 1344.) After the jurors returned from their break, the court excused them for lunch and ordered them to return in the afternoon. (1Supp. 5CT 1342.)

At 2:15 p.m. that afternoon, outside the presence of the jury, the trial court held a hearing with all counsel present. The court read to the parties the note it had received from the jury foreman. The court said that the jury had deliberated for half a day on Wednesday and half a day on Thursday. The court then stated: "My tentative intention, based on a few hours of deliberation, is to instruct them to continue deliberating. But I will certainly listen to what they have to tell me." (146RT 18469.)

The jurors were then brought into the courtroom, and the trial court asked the foreman some questions about the voting process. The foreman said that the jury had taken five ballots. He explained that the jury had

taken a preliminary vote on Wednesday and that the numerical split at the time was seven to five. The foreman said that two votes were taken on Thursday. On Thursday morning, the numerical split was six to two, with four jurors who were undecided. On Thursday afternoon, the numerical split was ten to one, with one undecided juror. The foreman explained that two more votes were taken that morning (Friday). In the first vote, the numerical split was ten to one, with one undecided juror. In the second vote, which was the final vote, the numerical split was eleven to one. (146RT 18470-18471.) The foreman also said that, between the different ballots, the jurors were talking to one other and discussing the issues. (146RT 18471.)

Based on the foreman's comments, the trial court noted that there had been movement in the votes. The court also recognized that there was a substantial amount of evidence presented to the jury, and the jury had deliberated for only three partial days. The court stated that, based on these circumstances and the fact that the jurors appeared to be communicating with one another, it was reluctant to find that the jury was hopelessly deadlocked. (146RT 18471-18473.) The foreman then told the court: "I really feel that we may be hopelessly deadlocked, simply because the one has made it clear that they don't see any way that they can change." (146RT 18473.) The foreman added: "I think most of us feel that way." (146RT 18473.)

Based on these last comments, the trial court inquired of the other jurors: "Does everybody feel that that's the position you have reached now, that nothing will change, no matter how much time you spend together?" (146RT 18473.) Juror No. 4 responded: "I think we should talk a little more." (146RT 18473.) The court concluded: "That's all I need is one, just for the opportunity. And if it doesn't make any difference, it doesn't make any difference. But I would appreciate it if you would spend

a little more time to see if any result can be reached." (146RT 18473.) The court thus instructed the jury to resume deliberations. The jury did so. (146RT 18474.)

4. Later that same day, the trial court receives a note from Juror No. 8

Later that same day, after the jury took a break at 3:30 p.m., the trial court received a second note, this time from Juror No. 8. The note stated:

> When I was questioned about the Death Penalty at the very beginning of this trial I stated that I believed that I could vote for the Death Penalty under special circumstances. I believe that the Death Penalty should be imposed if: (1) a child is involved
>
> (2) torture of an adult
>
> (3) rape of an adult.
>
> Since none of these factors were involved I cannot vote for the Death Penalty for Steven Homick. That is the reason for the deadlock.

(1Supp. 5CT 1342, 1345.)

The trial court held a hearing outside the presence of the jury, with all counsel present, and read Juror No. 8's note into the record. (146RT 18478.) The court said that it had reviewed the daily transcript of the voir dire of Juror No. 8 and that the transcript reflected that Juror No. 8 had stated that she had been opposed to the death penalty but her views had changed because her friend's child had been raped and murdered. The court stated that when Juror No. 8 was questioned by the parties about whether her views about the death penalty were limited to situations involving rape or murder of children, she had twice answered, "No." The court said: "So what she is saying in the note today is inconsistent with the answers that she gave on voir dire." (146RT 18479.) The court explained that it intended to bring Juror No. 8 "out individually to read the answers

that she gave on voir dire, and to ask her if those answers reflect her views, or if the note reflects her views, and which is correct, and try to determine whether she was -- whether she has changed her mind, whether she was not telling us the truth on voir dire, or something in between." (146RT 18479.)

Juror No. 8 was thereafter brought into the courtroom, and the following colloquy occurred between the juror and the court:

> THE COURT: [Juror No. 8] . . . what I would like to do is ask you a couple questions so that I can get a better understanding of what your position is.
>
> And I have some confusion, because I remember when we talked to you about the death penalty before the trial started, and I do have the transcript with the answers you gave to some of the questions, and they seem to me, different from what you have written in this note. And maybe they are not, and so I am going to read to you what we asked you, and what you said before.
>
> [JUROR NO. 8]: All right.
>
> THE COURT: Then I will read your note to you again, and you can let me know if you think they are inconsistent. And if one reflects your views and one does not, you can tell me.
>
> [JUROR NO. 8]: All right.
>
> THE COURT: Mr. Barnes [appellant's counsel] asked you;
>
> Okay, let's take a hypothetical situation, a situation where several people get together and talk about killing more than one person. They set out and they plan it, and they do things to carry out their plan; and they accomplish their purpose after a number of months of preparation. They accomplish their purpose and kill more than one person as they set out to do, and this is done for financial gain. This is done for money.
>
> Now, in that situation, can you see yourself -- is that the type of crime where you could consider both penalties if you were to find that that had been proven beyond a reasonable doubt to you?

And you said,

Both penalties. You mean the death penalty and the life imprisonment?

Mr. Barnes said, life without parole.

You answered, yes, I think I could consider either one or the other.

What I am asking is, is there ever a type of crime where you would say that crime is so bad that I couldn't consider both?

And you answered, no.

And then Mr. Dixon [the prosecutor] questioned you some more, because we were all concerned about your friend whose child had been killed, and the impact that had had on you.

And Mr. Dixon's question, he said,

Now, in this case, if you were selected to be a juror in this case, and you reached the penalty phase, I think I can assure you that in this case there aren't any children victims.

[JUROR NO. 8]: I remember that.

THE COURT: Than [sic] you said,

There are no children?

And he said, there are no children who are victims. That is fair to say. Having that in mind, do you feel you still could think about the death penalty in a case where there were no children as victims, but adult victims?

Do you still think you might feel the death penalty might be an appropriate punishment in such a case? I am not asking to commit. I am asking, could you consider it?

You answer, yes.

So in your mind the death penalty would be appropriate even in cases where children were not involved, is that right?

And you said, oh, yes.

Now, the note that I received from you, and this is what confuses me, says,

When I was questioned about the death penalty at the very beginning of this trial, I stated that I believed I could vote for the death penalty under special circumstances. I believe the death penalty should be imposed if a child is involved, torture of an adult, or rape of an adult.

Since none of these factors were involved, I cannot vote for the death penalty.

[JUROR NO. 8]: Right.

THE COURT: Do those seem the same to you? Or maybe I just don't understand.

[JUROR NO. 8]: Yes, they seem the same to me. I have also had 9 months to think about it, too. I think that had a lot to do with it.

When Mr. Dixon asked me about that, I answered yes, I thought I could, and I did. I thought about it, and I thought, one of the instructions was that if I didn't feel that the crime was bad enough to merit the death penalty, then I could vote for life imprisonment.

THE COURT: Absolutely.

[JUROR NO. 8]: Well, I don't know how to explain this. Apparently they feel that I either did not understand the questions in the beginning -- but I told them, I said, they asked me about children, and I said if a child was involved, I thought the death penalty should be incurred; and if -- what I guess I didn't say, if there was -- whether torture or rape was involved. I guess I never mentioned that.

THE COURT: Right.

[JUROR NO. 8]: So I still could find the death penalty, as far as an adult is concerned -- I lost my train of thought -- if an adult was tortured, if an adult was raped, I could find the death sentence for that. But -- and it's not just this factor, your Honor. There are several other factors involved.

THE COURT: You don't need to explain. I am not asking you to explain or justify your position. You need not ever do that.

My concern was simply this note seemed to say, I have always said I could only do it in a case, for example, with a child, or rape, or torture. And that seemed different from what you had said at the beginning.

Now, perhaps it's not.

[JUROR NO. 8]: I don't feel that it is.

THE COURT: When you were asked the question --

[APPELLANT'S COUNSEL]: May we approach?

THE COURT: Let me ask one additional question.

When you were asked that question that sort of laid out the facts of this case, planning to commit a murder, 2 adults are murdered, plotting to commit a murder for money, and you said you could consider death in that case.

[JUROR NO. 8]: Yes.

THE COURT: Are you saying that was true?

[JUROR NO. 8]: Yes.

THE COURT: You could consider it, but you have concluded that that's not how you want to vote. But when you said before you could consider it, that was a true statement?

[JUROR NO. 8]: Yes.

THE COURT: I think I understand what you said, and what you have said in your note, but I just wanted to make sure that I knew what it was you were trying to communicate to us.

(146RT 18482-18488, internal indentations omitted; see also 54RT 2844-2864 [voir dire of Juror No. 8].)

A discussion then continued at sidebar. Defense counsel argued that it was clear that Juror No. 8 was saying that she did not believe the death

penalty was warranted in this case. The court stated: "I am with you." The prosecution disagreed. The court concluded that it would give the parties the weekend to think about the issue and the matter would be addressed again on Monday. (146RT 18489-18491.)

5. On June 7, 1993, the hearing on Juror No. 8 continues; Juror No. 8 is removed from the jury and replaced with an alternate juror

On Monday, June 7, 1993, the hearing on the issue of Juror No. 8 continued. The court said it had done some research over the weekend and had read the "Points and Authorities In Support of Motion to Seat Alternate Juror" filed by the People that morning. (147RT 18493; see 1Supp. 5CT 1347-1351.)

The court then heard from the parties. Counsel for appellant argued that Juror No. 8 had indicated that she had thought about the case for nine months and decided that the death penalty was unwarranted based on the facts of the case. (147RT 18493-18494.) Counsel noted that Juror No. 8 had said: "I thought, one of the instructions was that if I didn't feel that the crime was bad enough to merit the death penalty, then I could vote for life imprisonment." (147RT 18495.) Counsel argued that Juror No. 8 was following the court's instructions. Counsel pointed out that Juror No. 8 had said that "there are several other factors involved" in her decision to vote for a sentence of life without parole, that the court's instructions permitted the juror to consider "other factors," and that, in this juror's mind, the fact that adults were killed was a mitigating factor. (147RT 18495.) Additionally, counsel argued that because some of the "other factors" remained unidentified because the court had appropriately cut off the juror's explanation on that point, the People had not met their burden of establishing that the juror was impaired. (147RT 18508.) Finally, counsel argued that the jury was "composed of aggressive people" and the other

jurors were pressuring Juror No. 8. Counsel said that the jurors had "already driven off one juror in the guilt phase, and now they are attempting to shame or drive off another juror in the penalty phase." (147RT 18497-19498.) Counsel moved for a mistrial. (147RT 18508.)

The People argued that Juror No. 8 was impaired under *Wainwright v. Witt, supra*, 469 U.S. 412 and unable to follow her duties as a juror. The People argued that Juror No. 8's note made it clear that Juror No. 8 believed that there were only three factors warranting the death penalty and, because this case did not involve those three factors, Juror No. 8 could never consider the death penalty in this case. (147RT 18505-18506.) The People argued that whether Juror No. 8 had previously stated her belief about the limited circumstances in which the death penalty could apply was irrelevant, because section 1089 and case law allowed for the replacement of a juror, even during penalty phase deliberations, to ensure a fair trial. (147RT 18505-18506.) Finally, the People disagreed with the defense characterization of the jury as "aggressive" and, instead, described the jury as a collegial group. The People noted that, at the guilt phase, there was a hung verdict as to Robert Homick (with a vote of ten to two) and a mistrial as to Neil Woodman (with a vote of seven to five). The People also argued that it was significant that Juror No. 8 had sent the note to the court, as opposed to some other juror complaining about Juror No. 8. (147RT 18503-18504.)

After hearing from the parties, the trial court denied the mistrial motion and granted the motion to replace Juror No. 8 with an alternate juror, finding that Juror No. 8 was impaired under *Wainwright v. Witt* from properly performing her function as a deliberating juror in a capital case. The court reasoned as follows:

> My attention continued to return to the note written by [Juror No. 8] on Friday. This note is clear, it's specific, and

unambiguous, unlike her answers to the court's questions on Friday afternoon.

I believe the sequence of events is she wrote this note, which clearly reflects her views, and then she heard her voir dire answers, which I read to her on Friday, then she attempted to reconcile the 2.

And my continuing difficulty with the language of her note is based on the fact that it does appear to expressly state that she cannot fairly deliberate on the issue of penalty in this case, because she has a specific agenda. And that agenda, had she expressed it to the court and the attorneys during the initial voir dire, would have disqualified her from service in this trial.

The law supports the position of the district attorney that it is irrelevant that she is saying it now, rather than then. The effect is the same. She is not qualified to sit as a juror in a capital case.

. . .

The greatest difficulty imposed by the facts of this case arises from the court's knowledge of the numerical division of this jury's vote. . . .

And in trying to reach a decision on this, about which I have given a great deal of thought over the last 2 days, I realize, had I been unaware of the jury's numerical division, I would not have hesitated. I would have simply removed this juror and found she was impaired under Witt versus Wainwright without hesitation. . . .

So I make this decision after a great deal of soul searching. It's a very difficult one to reach, but I believe it's legally correct, and fair, and not coercive of any particular result, that she be removed.

(147RT 18509-18511.)

After indicating its ruling, the trial court informed the parties that it wanted to give the jury an instruction that would eliminate any impression that the court removed Juror No. 8 because she was voting for life without

the possibility of parole. (147RT 18512.) Defense counsel proposed that the court inquire further of Juror No. 8 and specifically ask the juror the following two questions: (1) "On Friday, you said that if an adult was tortured or raped you could vote for the death sentence. You said that was one factor, and there were other factors involved. What were these several other factors?" and (2) "Are you saying that the only time you could vote for death on an adult is if he was tortured or raped?" (147RT 18519.) Counsel for appellant also argued that it was error for the trial court to preclude the parties from questioning Juror No. 8. (147RT 18517-18518.) The trial court denied these requests. (147RT 18518.)

The jurors were then brought into the courtroom. The court first addressed Juror No. 8 and stated that, based on her note, she was excused from further service on the jury. (147RT 18521.) The court then read the following instruction to the remaining 11 jurors, prior to the selection of an alternate juror:

> Juror Number 8 has been removed from the jury by the court, and an alternate substituted. She was removed because of the contents of the note that she wrote to the court in which she made it clear that she could not follow the court's instructions with respect to considering both possible penalties in this case.
>
> It is important that you understand that she was not removed from this jury because of her refusal to vote for the death penalty, but because of her refusal to consider the death penalty in the type of case under consideration.

(147RT 18521-18522.) Thereafter, an alternate juror was selected to serve as Juror No. 8. (147RT 18522-18523.) The court then instructed all of the jurors that the fact a juror had been dismissed for legal cause could not be considered for any purpose by the jury. The court further instructed that it had not intended by anything it had said or done to suggest what the jury should find to be the facts or that a particular verdict should be reached.

The court then instructed the jurors to begin deliberations anew. (147RT 18523-18524.)

At 1:48 p.m. that afternoon, the jury began deliberations anew. The jury took a 10-minute afternoon break and deliberated until 4:16 p.m. (1Supp. 5CT 1346.)

6. On June 8, 1993, the jury continues deliberations and reaches a verdict at the end of the day

The following day, on June 8, 1993, at 9:05 a.m., the jury resumed deliberations. That morning, the jury requested a copy of the guilt phase instructions and took a 17-minute break. At 11:55 a.m., the jurors took a lunch break and resumed deliberations at 1:33 p.m. That afternoon, the jurors took a 14-minute break and requested exhibits from the guilt phase, specifically appellant's daily reminder books. At 3:53 p.m., the jurors informed the bailiff that they had reached a verdict. The trial court instructed the bailiff to have the foreman seal the verdicts and instructed the jurors to return to court the following morning for the taking of the verdicts. (1Supp. 5CT 1353-1355; 147RT 18528-18529.)

7. On June 9, 1993, the trial court reads the death verdict

On June 9, 1993, the trial court read the jury's verdict fixing the penalty at death. (1Supp. 5CT 1383; 147RT 18529-18530.)

8. The trial court denies the new trial motion, which was based in part on a claim of juror misconduct

Following the verdict, appellant filed a motion for new trial. Attached to the motion was a declaration from Juror No. 8, in which the juror stated: "In no way was I saying in the note nor in court that I believed that I could only vote for the death penalty in a case involving rape, torture, or a child." (1Supp. 7CT 1933.) Juror No. 8 also indicated in the declaration that there were a number of reasons why she believed that

appellant should not be sentenced to death and that she would have informed the trial court of those reasons, had she been permitted to do so.[159] (1Supp. 7CT 1933-1934.)

The trial court heard argument on the new trial motion and denied the motion, stating: "I see no basis for a new trial or for a hearing or further inquiry of any of the jurors demonstrated by the information contained in the motion and the court will not inquire into areas of the subjective reasoning processes of individual jurors." (148RT 18662.)

B. Relevant Law

A trial court's authority to remove a juror is granted by section 1089, which provides, in pertinent part:

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[159] The declaration of Juror No. 8 stated, in part:

> I believe that there were a number of reasons that [appellant] did not deserve death. Some of them involved the circumstances of the crime, such as my belief that [appellant] was not the shooter. Also important to me was the court's instruction that we could consider as mitigation the fact that deals were made with Stewart Woodman and Michael Dominguez, who I believe was the shooter, to receive sentences of less than death. I also thought that [appellant]'s age at the time he committed his crime was a reason not to impose death. It was my belief that his having lived a law-abiding life for so many years should mitigate his punishment. Additionally, I felt that life without parole was appropriate because I believe [appellant] deserved mercy. Part of my reason for this was that Mr. and Mrs. Woodman were not tortured, but died quickly.
>
> The above are only some of the reasons that I believed death was not the appropriate verdict and are some of the things I would have told the court if I had been allowed to explain what I meant when I told the court that there were circumstances involved in my decision.

(1Supp. 7CT 1933-1934.)

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.

"The substitution of a juror for good cause pursuant to section 1089, even after deliberations have commenced, '"does not offend constitutional proscriptions."'" (*People v. Wilson* (2008) 44 Cal.4th 758, 820-821.)

The standard of review for the removal of a juror pursuant to section 1089 is well-settled:

> "We review for abuse of discretion the trial court's determination to discharge a juror and order an alternate to service. [Citation.] If there is any substantial evidence supporting the trial court's ruling, we will uphold it. [Citation.] We also have stated, however, that a juror's inability to perform as a juror '"must appear in the record as a demonstrable reality."' [Citation.]"

(*People v. Cleveland* (2001) 25 Cal.4th 466, 474, quoting *People v. Marshall, supra,* 13 Cal.4th at p. 843; *People v. Wilson, supra*, 44 Cal.4th at p. 821; *People v. Samuels, supra,* 36 Cal.4th at p. 132.)

A sitting juror's actual bias, which would have supported a challenge for cause, renders him "unable to perform his [] duty" and thus the juror is subject to discharge and substitution under section 1089. (*People v. Keenan, supra,* 46 Cal.3d at p. 532.) A juror may be disqualified for bias, and thus discharged, from a capital case if his views on capital punishment "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Ibid.*, quoting *Wainwright v. Witt, supra*, 469 U.S. at p. 424.) "Under *Witt,* therefore, our duty is to 'examine the context surrounding [the juror's] exclusion to

determine whether the trial court's decision that [the juror's] beliefs would "substantially impair the performance of [the juror's] duties . . ." was fairly supported by the record.'" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1094.)

C. The Record Reveals As a Demonstrable Reality that Juror No. 8 Was Unable to Perform Her Duties As a Juror

Here, there was convincing evidence that Juror No. 8's reluctance to impose the death penalty was based, not on an evaluation of the particular facts of the case, but on an abstract inability to impose the death penalty in a case which did not involve a torture murder, a rape murder, or a child victim. In other words, the record reflects as a demonstrable reality that Juror No. 8 could not follow her oath and instructions to consider imposition of the death penalty in this case. Juror No. 8's views on capital punishment prevented or substantially impaired the performance of her duties as a juror. Accordingly, the trial court did not abuse its discretion in removing Juror No. 8.

In a note to the court, Juror No. 8 wrote:

> When I was questioned about the Death Penalty at the very beginning of this trial I stated that I believed that I could vote for the Death Penalty under special circumstances. I believe that the Death Penalty should be imposed if: (1) a child is involved
>
> (2) torture of an adult
>
> (3) rape of an adult.
>
> Since none of these factors were involved I cannot vote for the Death Penalty for Steven Homick.

(1Supp. 5CT 1342, 1345.) Juror No. 8 thus *expressly* and *unequivocally* stated that, unless one of her three "factors" was present, she would automatically vote for life in prison without parole, regardless of the aggravating evidence presented in the case. Thus, Juror No. 8's reluctance

to impose the death penalty in this case had nothing to do with an evaluation of the evidence presented. Accordingly, the note established that Juror No. 8's views on capital punishment prevented or substantially impaired the performance of her duties as a juror.

Later, when questioned by the trial court about her note, Juror No. 8 once again provided unequivocal statements indicating she would be unable to perform her duties as a juror and fairly deliberate on the issue of penalty in this case. She stated that "if a child was involved" she believed "the death penalty should be incurred." (146RT 18487.) She also stated: "I still could find the death penalty, as far as an adult is concerned . . . if an adult was tortured, if an adult was raped, I could find the death sentence for that."[160] (146RT 18487; see also 146RT 18487-18488 [Juror No. 8 affirms the trial court's characterization of her position to be that she "could *only* do it [vote to impose the death penalty] in a case, for example, with a child, or rape, or torture;" emphasis added].) Thus, Juror No. 8 expressed that she would automatically vote for life in prison without parole, regardless of any aggravating evidence presented, unless one of her three "factors" was present. Despite the fact that appellant points to other statements made by this juror during the inquiry, the juror's note plus these clear statements during her colloquy with the court clearly established her bias.

The People of the State of California have determined the categories of crime for which a criminal defendant may be subject to death, depending on the circumstances. (§ 190.2, subd. (a).) Also, as reflected in section 190.3, state law requires that, in deciding the question of penalty in such a case, a juror is required "to consider, take into account and be guided by"

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[160] Following this last comment, Juror No. 8 stated: "But -- and it's not just this factor, your Honor. There are several other factors involved." (146RT 18487.) This statement is addressed below.

listed aggravating and mitigating circumstances. (See 1Supp. 5CT 1359 [CALJIC No. 8.85].) Here, Juror No. 8 made statements clearly indicating her inability to follow the law in this respect. Juror No. 8 said that she could not vote to impose the death penalty in this case because the case did not involve torture, rape, or a child victim. Thus, Juror No. 8's position was not based on an evaluation of the particular facts of the case, but on an abstract inability to impose the death penalty where her three "factors" did not exist. This Court has repeatedly held that jurors like Juror No. 8 are substantially impaired and excludable under the *Witt* standard.[161]

In *People v. Pinholster* (1992) 1 Cal.4th 865, during voir dire, two prospective jurors expressed an unwillingness to consider the death penalty in a felony-murder case. (*Id.* at p. 917.) The first juror indicated he could not return a death verdict in a burglary-murder case, regardless of the aggravating circumstances, because a burglary murder was not "severe enough."[162] (*Ibid.*) The second juror said that he could not vote for the death penalty in the case of a burglary murder where there was no premeditation or intent to torture, regardless of the evidence in aggravation. (*Ibid.*) This Court found substantial evidence supported the determination of the trial court that the prospective jurors were not impartial with respect to the imposition of the death penalty and upheld the exclusion of the two prospective jurors. (*Id.* at pp. 917-918.) Citing *People v. Fields, supra,* 35

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[161] Although appellant characterizes the trial court's dismissal of Juror No. 8 as one based on a failure to deliberate (AOB 663-664), it is more accurately described as a dismissal for actual bias. (147RT 18511-18512.)

[162] Juror No. 8 made a similar comment in this case. She said to the court: "I thought, one of the instructions was that if I didn't feel that the crime was bad enough to merit the death penalty, then I could vote for life imprisonment." (146RT 18487.) Immediately after making this statement, she informed the court that she could vote to impose the death penalty only in a case involving rape, torture, or a child victim. (146RT 18487-18488.)

Cal.3d at pages 357-358, this Court stated: "'[A] court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases.'" (*People v. Pinholster, supra*, 1 Cal.4th at pp. 917-918.)

In *People v. Livaditis* (1992) 2 Cal.4th 759, a prospective juror indicated during voir dire that she could not vote for the death penalty in that particular case because of the defendant's age and the absence of a prior murder. (*Id.* at p. 772.) This Court upheld the exclusion of the prospective juror and the trial court's finding that the juror's views would prevent or substantially impair the performance of her duties as a juror. (*Ibid.*) The Court stated that, "[a]lthough the prospective juror indicated a willingness to consider the death penalty under facts not applicable to the case (a prior murder), the trial court properly found that her ability to perform her duty was substantially impaired in *this* case." (*Ibid.*, emphasis original.)

In *People v. Fudge, supra*, 7 Cal.4th 1075, a prospective juror stated on voir dire that she would not vote to impose the death penalty in the particular case because of the defendant's age, regardless of any aggravating circumstances. (*Id.* at p. 1094.) This Court upheld the exclusion of the juror, stating: "It thus appears that although [the juror] was willing to consider some of the anticipated sentencing factors, she would not consider all of them. She thus did not have an open mind regarding the penalty determination." (*Id.* at p. 1095.)

Similar to these cases, the record in this case reflects as a demonstrable reality that Juror No. 8 could not follow her oath and instructions to consider imposition of the death penalty in this case. Juror No. 8 was willing to consider the death penalty, but only in cases where there was torture, rape, or a child victim -- no other. This was an abdication

of her duties as a juror, and the trial court properly found that Juror No. 8 was unable to perform as a juror.

Appellant makes much of the fact that none of the other jurors reported to the trial court that Juror No. 8 was doing something improper. (AOB 659-660; see also AOB 667-668.) However, there is no indication in the record that the other jurors were aware that Juror No. 8 believed that the death penalty should be limited to her three "factors."

Accordingly, the trial court did not abuse its discretion in removing Juror No. 8 from the jury, because the record reveals as a demonstrable reality that Juror No. 8 was unable to perform her duties as a juror.

D. The Trial Court Conducted a Meaningful Inquiry into Whether Juror No. 8 Was Following Her Oath and Instructions

As mentioned earlier, at the hearing conduct by the trial court, after Juror No. 8 confirmed what she had written in her note (i.e., that she would consider the imposition of the death penalty only if a case involved torture, rape, or a child victim), Juror No. 8 also stated: "But -- and it's not just this factor, your Honor. There are several other factors involved." (146RT 18487.) The trial court responded: "You don't need to explain. I am not asking you to explain or justify your position. You need not ever do that." (146RT 18487.)

Pointing to these statements and the declaration signed by Juror 8 in support of the new trial motion, appellant argues that Juror No. 8's "other factors" were facts relating to the evidence presented in the case (proper considerations for a penalty phase deliberating juror), but the trial court "cut off" Juror No. 8 and did not allow her to explain these "other factors." Thus, appellant argues, the trial court failed to conduct a meaningful inquiry with regard to whether Juror No. 8 was following her oath and instructions. (AOB 658-666.) The argument has no merit. The trial court

conducted a meaningful inquiry, and the relevant questions and answers provided an adequate basis for the trial court's evaluation of Juror No. 8's state of mind and the trial court's ultimate decision to remove Juror No. 8.

"'On appeal, if the prospective juror's responses are equivocal, i.e., capable of multiple inferences, or conflicting, the trial court's determination of that juror's state of mind is binding.'" (*People v. Livaditis, supra*, 2 Cal.4th at p. 772, quoting *People v. Cooper* (1991) 53 Cal.3d 771, 809; *People v. Wilson, supra*, 44 Cal.4th at p. 779; *People v. Fudge, supra*, 7 Cal.4th at p. 1094 ["we defer to the trial court's evaluation of a prospective juror's state of mind, and such evaluation is binding on appellate courts"].)

Here, by the time Juror No. 8 referred to the "other factors," she had already clearly indicated that her views about capital punishment in the abstract would substantially impair her ability to perform her duties as a juror. First, Juror No. 8's note stated: "Since none of these factors [a child is involved, torture of an adult, or rape of an adult] were involved, I *cannot* vote for the Death Penalty for [appellant]." (1Supp. 5CT 1342, 1345, emphasis added.) As the trial court recognized: "This note is clear, it's specific, and unambiguous. . . ." (147RT 18509.) As the trial court also found, the note "does appear to *expressly state* that [Juror No. 8] cannot fairly deliberate on the issue of penalty in this case, because she has a specific agenda." (147RT 18509, emphasis added.)

Second, when questioned by the trial court, Juror No. 8 affirmed the position that she took in her note -- that she could impose the death penalty *only* if her three "factors" were involved. (See 146RT 18487-18488.) Juror No. 8 further explained that she had held this same position during voir dire but had failed to articulate during voir dire the limited circumstances that she thought warranted the death penalty for an adult (i.e., torture and rape). (146RT 18487.)

It was following her note and her affirmation of her note in court that Juror No. 8 added: "But -- and it's not just this factor, your Honor. There are several other factors involved." (146RT 18487.) In light of the emphatic position taken by Juror No. 8 both in her note and in court, the trial court could have reasonably concluded that no further inquiry into the "other factors" comment was required. (See *People v. Cleveland, supra*, 25 Cal.4th at p. 485 ["[A] trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations."].) Simply stated, Juror No. 8 made it clear that she could not consider the death penalty in this case. In other words, her unwavering position precluded *any possibility* that Juror No. 8's vote on penalty would be based on a fair evaluation of the evidence presented in the case. Thus, Juror No. 8's comment about "other factors" was, at best, a superfluous observation that there was evidence supporting the same verdict that she believed her three "factors" *mandated.*[163]

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[163] To the extent that the declaration signed by Juror No. 8 in support of the new trial motion indicates that the "other factors" were proper considerations for a deliberating penalty phase juror (AOB 675-677), the same response applies. Juror No. 8 had expressly and unequivocally stated both in her note and in court that her three "factors" mandated a verdict of life without parole. Her superfluous observation that there was evidence supporting the same verdict that she believed her three "factors" mandated was irrelevant.

Also, as for the portion of the declaration which states "In no way was I saying in the note nor in court that I believed that I could only vote for the death penalty in a case involving rape, torture, or a child" (1Supp. 7CT 1933), the statement is, in fact, the precise opposite of what Juror No. 8 stated in her note and in court. Accordingly, it was within the trial court's broad discretion to impliedly find that the statement lacked credibility and to deny the new trial motion. (*People v. Delgado* (1993) 5 Cal.4th 312, 328-329; *People v. Hill* (1969) 70 Cal.2d 678, 699 ["The weight and credibility to be attached to the affidavit . . . in support of defendant's

(continued...)

Contrary to appellant's argument (see AOB 658-659), this case is unlike *People v. McNeal* (1979) 90 Cal.App.3d 830. In *McNeal*, the trial court received information that one of the jurors possessed personal knowledge concerning the testimony of a defense witness. (*Id.* at p. 836.) The trial court questioned the juror at issue but instructed the juror not "to go into factual matters." (*Ibid.*) The juror said she could disregard any information that was outside the evidence, and she was permitted to rejoin the jury. (*Ibid.*) The Court of Appeal reversed, stating: "It is not enough for the juror alone to evaluate the facts and conclude that they do not interfere with his or her impartiality." (*Id.* at p. 838.)

The circumstances of this case are far different. The court here received *specific* information from Juror No. 8 herself that she could not impose the death penalty in this case because her three "factors" were not present. The court held a hearing and conducted a meaningful inquiry, during which Juror No. 8 confirmed the specifics of her bias. No more was required.

E. The Trial Court Did Not Coerce a Death Verdict

Citing *Brasfield v. United States* (1926) 272 U.S. 448 [47 S.Ct. 135, 71 L.Ed. 345],[164] appellant argues it was "inherently coercive" for the trial court to require the jurors to continue deliberating after the court had learned about the 11-to-1 vote favoring death.[165] (AOB 669-675.) As

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(...continued)
motion was for the trial judge, and defendant has failed to demonstrate any error or abuse of discretion."].)

[164] *Brasfield* concluded that inquiry into the jury's numerical split is inherently coercive, even where the number for conviction and acquittal is not requested or revealed. (*Brasfield v. United States, supra*, 272 U.S. at p. 450.)

[165] Appellant states that the trial court became aware that 11 of the jurors were voting for death, based on the discussions with the foreman.
(continued...)

appellant recognizes, however, this Court has concluded that *Brasfield* is not binding on California state courts, because it states only a rule of federal procedure. (AOB 670, citing *People v. Rodriguez* (1986) 42 Cal.3d 730, 776, fn. 14.) As appellant also acknowledges, this Court has rejected the claim that it is inherently coercive to refuse to discharge a jury after learning of an 11-to-1 vote favoring the death penalty. (AOB 671, citing *People v. Johnson, supra,* 3 Cal.4th at pp. 1254-1255, *People v. Pride* (1992) 3 Cal.4th 195, 265-266, and *People v. Sheldon* (1989) 48 Cal.3d 935, 959-960.)

Any claim that the jury was pressured into reaching a verdict depends on the particular circumstances of the case. (*People v. Pride, supra*, 3 Cal.4th at p. 265.) Here, the trial court never placed its stamp of approval on a particular penalty outcome.

Even before Juror No. 8 sent her note, the trial court made it clear to the jurors that it was placing no pressure on the jurors for a unanimous penalty verdict. When informed about a possible deadlock, the trial court told the jurors: "It's never my intention to coerce or pressure anybody to reach any kind of result." (146RT 18472.) Then, after learning that further deliberations might be helpful, the court asked the jurors to spend more time and see if any further deliberations might result in unanimity. The court said: "If they don't, they don't. And that happens." (146RT 18472-18473.) The court added: "And if it doesn't make any difference, it doesn't make any difference. But I would appreciate it if you would spend a little more time to see if any result can be reached. [¶] And if it can't, or if you do either way, you can let me know." (146RT 18473-18474.)

(...continued)
(AOB 670.) However, the record reflects that the trial court learned about the vote favoring death from Juror No. 8's note.

The court continued with this same message after it removed Juror No. 8. The court instructed the remaining 11 jurors:

> Juror Number 8 has been removed from the jury by the court, and an alternate substituted. She was removed because of the contents of the note that she wrote to the court in which she made it clear that she could not follow the court's instructions with respect to considering both possible penalties in this case.
>
> *It is important that you understand that she was not removed from this jury because of her refusal to vote for the death penalty, but because of her refusal to consider the death penalty in the type of case under consideration.*

(147RT 18521-18522, emphasis added.)

The court then seated an alternate juror and instructed all of the jurors as follows:

> One of your number has been dismissed for legal cause and replaced with an alternate juror. You must not consider this fact for any purpose. The People and the defendant have the right to a verdict reached only after full participation of the 12 jurors who returned a verdict.
>
> This right may be used only if you begin your deliberations again from the beginning. You must therefore set aside and disregard all past deliberations and begin deliberations anew. This means that each of the remaining original jurors must set aside and disregard the earlier deliberations as if they had not taken place.
>
> *I have not intended by anything I have said or done, or by any ruling I have made, to intimate or suggest to you what you should find to be the facts, that I believe or disbelieve any witness, or that you should reach any particular verdict.*
>
> *If anything I have done or said seems to so indicate, you will disregard it and form your own conclusion.*
>
> You shall now retire to begin anew your deliberations in accordance with all the instructions previously given.

(147RT 18523-18524, emphasis added.) Thus, the court made no remarks urging that a verdict be reached, let alone a verdict of death.

Appellant attempts to distinguish the cases declining to embrace the *Brasfield* rationale (i.e., *Sheldon*, *Pride*, *Johnson*, cited earlier). He argues that those cases involved deadlocked juries that were told to continue deliberating, with no juror being removed or replaced. By contrast, here, the sole holdout juror was removed. Thus, he argues, those cases, unlike this case, included at least one juror who felt that the death penalty was not appropriate. (AOB 672.) However, appellant overlooks the fact that evidencing a lack of coercion here is the fact that deliberations would begin anew and an alternate juror, who had the potential of bringing a new perspective on the evidence, would participate in the deliberations. Appellant's claim that the alternate juror would be told by the other jurors what had transpired previously is pure speculation. (AOB 669.) It must be presumed that the jurors followed the trial court's instruction that they "disregard the earlier deliberations as if they had not taken place." (*People v. Johnson*, *supra,* 3 Cal.4th at p. 1254.)

Finally, appellant repeatedly states that the jurors *knew* that the trial court believed a death verdict was appropriate. (AOB 669, 672, 674-675.) Thus, he argues, this would have placed "inevitable pressure" on the alternate juror who replaced Juror No. 8 "to go along with the lopsided majority and reach the result unmistakably sanctioned by the judge as appropriate." (AOB 672.) He also argues that such knowledge could have served to relieve the jurors of their own sense of responsibility for the penalty verdict. (AOB 674-675.) Appellant is mistaken. The trial court neither stated nor implied that it believed a death verdict was warranted, and nothing in the court's comments remotely can be construed as implying a desire that the alternate juror capitulate to the majority. The court instructed the jurors: "I have not intended by anything I have said or done,

or by any ruling I have made, to intimate or suggest to you what you should find to be the facts, that I believe or disbelieve any witness, or that you should reach any particular verdict." (147RT 18523-18524.) The court continued: "If anything I have done or said seems to so indicate, you will disregard it and form your own conclusion." (147RT 18524.) Jurors are presumed to understand and to follow instructions. (*People v. Yeoman, supra,* 31 Cal.4th at p. 139.)

In sum, the trial court did not abuse its discretion in removing Juror No. 8 from the jury. It conducted a meaningful inquiry into the matter and did not coerce a death verdict.

XVII. THE INSTRUCTIONS AT THE PENALTY PHASE DID NOT PLACE A BURDEN OF PROOF AS TO ANY MITIGATING FACTORS

Without objection (143RT 18186-18187), the trial court instructed the jury with a modified version of CALJIC No. 8.87 (1989 Revision) as follows:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts:
>
> The murders of three persons during the commission of the burglary and robbery in Las Vegas, Nevada, in December, 1985, which acts involve the express use of force or violence.
>
> Before a juror may consider any of such criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did, in fact, commit such criminal acts.
>
> A juror may not consider any evidence of any other criminal acts or activity as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a factor in aggravation. If the juror is not so convinced, that juror must not consider that evidence for any purpose.

> Likewise, it is not necessary for all jurors to agree as to the existence of any factor in mitigation. If any juror is *convinced* that such a factor exists, that juror may consider that factor in mitigation in determining the appropriate punishment.

(144RT 18231-18232, emphasis added; 1Supp. 5CT 1365-1366.)

Appellant now contends that the use of the word "convinced" in the last paragraph of this instruction placed a heavy burden of proof on the defense, when no burden of proof should have been present at all. Appellant argues that this alleged instructional error greatly diminished the likelihood that the jurors would conclude that important mitigating factors were present and justified a sentence other than death, depriving appellant of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 678-680.)

There was no instructional error. Contrary to appellant's contention, the last paragraph of CALJIC No. 8.87 addressed the subject of juror unanimity, not burden of proof. Read in context, the challenged portion of the instruction informed the jurors that they need not unanimously agree as to the existence of any mitigating factor. The instruction was thus favorable to appellant. (See *People v. Breaux* (1991) 1 Cal.4th 281, 314-315 [the trial court is not required to instruct the jury that it need not be unanimous in finding the existence of any mitigating factors]; see also *People v. Holt, supra,* 15 Cal.4th at pp. 686-687 [this Court rejects the argument that, because the jury was instructed in the language of CALJIC No. 8.87 that it was not necessary for all jurors to agree on evidence of other criminal activity and no such similar instruction was given on mitigating evidence, it would lead the jurors to infer that unanimity was required on mitigating evidence].)

Moreover, the use of the word "convinced" in the last paragraph of CALJIC No. 8.87 did not connote a particular burden of proof. Rather, the plain meaning of the challenged portion of the instruction was that, if a

juror was persuaded by evidence and argument that a mitigating factor existed, then that juror could consider that factor in mitigation. This was consistent with the instructions as a whole. (1Supp. 5CT 1359 [CALJIC No. 8.85: "You shall consider, taken into account and be guided by the following factors, if applicable. . . ."]; 1Supp. 5CT 1377 [CALJIC No. 8.88: "You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider."].)

Appellant argues that because the challenged language came immediately after the jurors were instructed on the need to find that other-crimes evidence had to be proved beyond a reasonable doubt, the jurors were all but certain to conclude that the same beyond-a-reasonable-doubt standard was applicable to factors in mitigation. (AOB 678.) There is no reasonable likelihood that the jury was confused in this manner. The fact the reasonable-doubt standard was mentioned as the applicable standard for other-crimes evidence -- and then *not mentioned* in the paragraph addressing mitigating evidence -- would have informed the jurors that the reasonable-doubt standard did not apply to mitigating evidence. Further, the trial court was not required to instruct the jury that, unlike with other-crimes evidence, there was no burden of proof regarding mitigating factors. (*People v. Riggs, supra,* 44 Cal.4th at p. 328; see *People v. Kraft* (2000) 23 Cal.4th 978, 1077 [rejecting claim that it was error for the trial court to refuse defense instruction that "a mitigating circumstance need not be proved beyond a reasonable doubt to exist"].)

For all of these reasons, this claim must fail.

XVIII. THE DEATH PENALTY STATUTE IS CONSTITUTIONAL, AND CALIFORNIA'S USE OF THE DEATH PENALTY DOES NOT VIOLATE INTERNATIONAL LAW

Appellant presents several familiar attacks on the constitutionality of California's death penalty statute. He also contends that California's use of the death penalty violates international law. (AOB 681-691.) This Court has previously rejected all of these arguments, and appellant presents no compelling reason for this Court to reconsider those holdings.

A. This Court has held that the failure to require that the jury unanimously find the aggravating circumstances true beyond a reasonable doubt, to require that the jury find unanimously and beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances, or to require a unanimous finding beyond a reasonable doubt that death is the appropriate penalty does not violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 681-683; *People v. Parson* (2008) 44 Cal.4th 332, 370; *People v. Salcido* (2008) 44 Cal.4th 93, 167.) This Court has also expressly found that the United States Supreme Court's recent decisions interpreting the Sixth Amendment's jury trial guarantee (*Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]; *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]) do not alter this conclusion or affect California's death penalty law. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 228; *People v. Salcido, supra*, 44 Cal.4th at p. 167; *People v. Stevens* (2007) 41 Cal.4th 182, 212.)

B. Contrary to appellant's contentions, California's death penalty statute is not unconstitutional in failing to require the jury to make written

findings concerning the aggravating factors it relied upon or in failing to require unanimity as to aggravating factors, nor does it fail to provide a procedure permitting meaningful appellate review. (AOB 683; *People v. Parson, supra*, 44 Cal.4th at p. 370; *People v. Riggs, supra*, 44 Cal.4th at p. 329; *People v. Salcido, supra*, 44 Cal.4th at p. 166; *People v. Watson* (2008) 43 Cal.4th 652, 703.) Also, California's death penalty statute does not violate equal protection by denying capital defendants certain procedural safeguards, such as jury unanimity and written jury findings, while affording such safeguards to noncapital defendants. (AOB 683; *People v. Parson, supra*, 44 Cal.4th at p. 370; *People v. Harris* (2008) 43 Cal.4th 1269, 1323; *People v. Watson, supra*, 43 Cal.4th at pp. 703-704.)

C. This Court has held that California's homicide law and the special circumstances listed in section 190.2 adequately narrow the class of murderers eligible for the death penalty. (AOB 683-684; *People v. Riggs, supra*, 44 Cal.4th at p. 329; *People v. Salcido, supra*, 44 Cal.4th at p. 166; *People v. Thornton* (2007) 41 Cal.4th 391, 468; *People v. Marks* (2003) 31 Cal.4th 197, 237.)

D. Both the United States Supreme Court and this Court have held that intercase proportionality review is not constitutionally required in California. (AOB 684; *Pulley v. Harris* (1984) 465 U.S. 37, 51-54 [104 S.Ct. 871, 79 L.Ed.2d 29]; *People v. Parson, supra*, 44 Cal.4th at pp. 368-369; *People v. Riggs, supra*, 44 Cal.4th at p. 330; *People v. Whisenhunt, supra*, 44 Cal.4th at p. 227.) Although appellant mistakenly claims California law does not include intra-case proportionality review and he does not specifically request it, he is entitled to intra-case proportionality review. (AOB 684; *People v. Valencia* (2008) 43 Cal.4th 268, 310-311; *People v. Prince* (2007) 40 Cal.4th 1179, 1298.) However, in light of the five murders appellant committed, his sentence is not disproportionate to his personal culpability. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 511.)

E. Appellant argues that California's death penalty law creates an impermissible barrier to consideration of mitigating evidence by precluding reliance on mental or emotional disturbance, or the dominating influence of another, unless such factors are "extreme" and/or "substantial," in violation of the federal Constitution. (AOB 684, citing § 190.3, subds. (d), (g).) Appellant's jury was not instructed as to these factors at all, let alone instructed improperly. (144RT 18228-18229; 1Supp. 5CT 1359-1360.) In any event, this Court has repeatedly rejected the claim that the use of the terms "extreme" or "substantial" in section 190.3 improperly limits the jury's consideration of mitigating evidence in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (*People v. Parson, supra*, 44 Cal.4th at pp. 369-370; *People v. Williams, supra,* 43 Cal.4th at p. 649; *People v. Thornton, supra*, 41 Cal.4th at p. 469.)

F. Contrary to appellant's contentions, the trial court was not constitutionally required to inform the jury that certain sentencing factors are relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not unconstitutionally suggest that the absence of such factors amounted to aggravation. (AOB 684-685; *People v. Parson, supra*, 44 Cal.4th at p. 369; *People v. Whisenhunt, supra*, 44 Cal.4th at p. 228; *People v. Page* (2008) 44 Cal.4th 1, 61.)

G. This Court has rejected claims that California's death penalty statute unconstitutionally grants unfettered discretion to prosecutors to decide whether to charge eligible defendants with a capital offense or seek the death penalty, resulting in disparate imposition of the death penalty throughout the state. (AOB 685; *People v. Salcido, supra*, 44 Cal.4th at p. 168; *People v. Prince, supra*, 40 Cal.4th at p. 1298; *People v. Avila, supra,* 38 Cal.4th at p. 615.) Citing *Bush v. Gore* (2000) 531 U.S. 98 [121 S.Ct.

525, 148 L.Ed.2d 388], appellant argues that because there are "equal protection violations where procedures for counting ballots in one county may differ from procedures for counting ballots in another county[,] surely procedures for determining which murder cases merit seeking a death penalty must also be reasonably uniform from one county to another." (AOB 685.) Setting up a uniform standard for the mechanical task of counting ballots is simply not analogous to an evaluation of the unique facts and circumstances of each case and defendant to determine which murder cases merit seeking the death penalty. In any event, the equal protection issue in *Bush v. Gore* stemmed from the lack of an adequate statewide standard in Florida for determining what was a legal vote. (*Id.* at p. 109.) California's statute defining special circumstances to murder provides a uniform statewide standard in California for identifying which murders qualify for the death penalty.

H. This Court has repeatedly rejected the claim that delay in the appointment of counsel on appeal and in processing the appeal, and the probable additional delay in execution, inflicts cruel and unusual punishment within the meaning of the Eighth Amendment to the United States Constitution. (AOB 685-686; *People v. Prince, supra*, 40 Cal.4th at p. 1298; *People v. Taylor* (2001) 26 Cal.4th 1155, 1176.)

I. Contrary to appellant's assertion, the statutory sentencing factors are not so arbitrary, broad, or contradictory that they provide inadequate guidance to the jury. (AOB 686; *People v. Harris, supra*, 43 Cal.4th at p. 1322; *People v. Williams, supra*, 43 Cal.4th at p. 648; *People v. Prince, supra*, 40 Cal.4th at p. 1298.)

J. This Court has held that there is no constitutional requirement of a presumption in favor of a sentence of life imprisonment without the possibility of parole. (AOB 686-687; *People v. Parson, supra*, 44 Cal.4th

at p. 371; *People v. Whisenhunt, supra*, 44 Cal.4th at p. 228; *People v. Prince, supra*, 40 Cal.4th at p. 1298.)

K. This Court has repeatedly rejected the claim that appellate review of death judgments by members of this Court is impermissibly influenced by political considerations in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 687-688; *People v. Prince, supra*, 40 Cal.4th at p. 1299; *People v. Avila, supra*, 38 Cal.4th at p. 615; *People v. Kipp* (2001) 26 Cal.4th 1100, 1140-1141.) Appellant argues that *Kipp*, which addressed and rejected this claim, "misses the point." (AOB 688.) He argued that, "[i]f California's death penalty law is so pervaded by politics that most, or even just many instances of appellate review are affected, then meaningful appellate view is impermissibly compromised. . . ." (AOB 688.) Contrary to appellant's suggestion, this Court in *Kipp* did not state or suggest that there are, in fact, instances of appellate review affected by politics. The Court stated that, *even assuming for the sake of argument* that there was a relationship between political pressures and affirmance of death sentences, there was no showing that a justice of this Court must affirm every death sentence or any particular death sentence. (*People v. Kipp, supra*, 26 Cal.4th at p. 1141.) In fact, this Court has stated in other cases that there is no basis for the claim that appellate review of death judgments by members of this Court is impermissibly influenced by political considerations. (*People v. Samuels, supra*, 36 Cal.4th at p. 138.)

L. Appellant contends that California's use of the death penalty violates international law, particularly, the International Covenant on Civil and Political Rights and the American Declaration of the Rights and Duties of Man. (AOB 688-689.) This Court, however, has rejected this contention. (*People v. Parson, supra*, 44 Cal.4th at p. 372; *People v. Alfaro*

(2007) 41 Cal.4th 1277, 1332; *People v. Hillhouse, supra*, 27 Cal.4th at p. 511.)

M. Appellant also contends that the use of the death penalty violates evolving international norms of human decency and, to the extent such international norms of human decency inform its scope, the Eighth Amendment to the federal Constitution. (AOB 689.) This Court, however, has rejected this contention as well. (*People v. Salcido, supra*, 44 Cal.4th at p. 168; *People v. Watson, supra*, 43 Cal.4th at p. 704; *People v. Williams, supra*, 43 Cal.4th at p. 650.)

N. Finally, appellant argues that, while this Court has considered each of the alleged defects identified above in isolation, it has failed to consider their cumulative impact and has failed to address the functioning of California's capital sentencing scheme as a whole. (AOB 690-691.) As stated above, this Court has rejected each and every claim of constitutional error and allegation of an international law violation made by appellant. Appellant's argument merely repeats his meritless individual complaints and makes a baseless assertion that they become error when considered together. This is not a valid challenge to the functioning of California's sentencing scheme as a whole. (See *People v. Richardson, supra,* 43 Cal.4th at p. 1036 ["'If none of the claimed errors were individual errors, they cannot constitute cumulative errors that somehow affected the penalty verdict.'"]; *People v. Hoyos* (2007) 41 Cal.4th 872, 927 ["Because we conclude there were no individual errors of any kind, we reject defendant's claim that any cumulative effect warrants reversal."].)

XIX. THERE WERE NO ERRORS AT THE GUILT PHASE REQUIRING REVERSAL OF THE DEATH JUDGMENT

Appellant contends that guilt phase errors that might have been harmless at the guilt phase were prejudicial at the penalty phase. He contends that improperly admitted character evidence affected the penalty

determination and also might have caused the jury to dismiss any lingering doubts it had concerning appellant's guilt. Appellant also argues that any error with potential impact on the jury's penalty determination implicates the Eighth Amendment's reliability requirement and is subject to the harmless-error test of showing beyond a reasonable doubt that the error did not contribute to the verdict under *Chapman v. California, supra,* 386 U.S. 18. Last, appellant argues that this case was close as to penalty, because there was no aggravating evidence of prior felony convictions or prior criminal acts involving the use or threat to use force or violence. (AOB 692-704.)

There is no basis for this claim. As set forth in the arguments relating to the claims of guilt phase error, with a few minor exceptions constituting a very small evidentiary portion of the lengthy and complex trial in this case, there was no error. Additionally, appellant's argument rests on two false assumptions -- that the evidence on the guilt determination was close and that the evidence on the penalty determination was close. As noted in the previous arguments, the evidence as to both guilt and penalty was overwhelming.

Appellant emphasizes the absence at the penalty phase of evidence of prior felony convictions and pre-murder criminal acts of violence and argues that, other than the five murders, "the prosecution was unable to offer any aggravating evidence at all." (AOB 702.) The lack of evidence of prior felony convictions and pre-murder criminal acts of violence pales in comparison to the sheer number of murders that appellant committed. Moreover, the nature of and the circumstances surrounding these murders was powerful evidence compelling a death verdict. Appellant masterminded a conspiracy to murder Gerald and Vera Woodman and shot them to death for money. Appellant also shot to death Bobbie Jean Tipton,

Marie Bullock, and James Meyers for money, callously stating that he "offed," "dusted," and "wasted" his victims.

This claim should be denied. (*People v. Prince, supra*, 40 Cal.4th at p. 1299.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment of conviction and sentence of death be affirmed.

Dated: September 14, 2009 Respectfully submitted,

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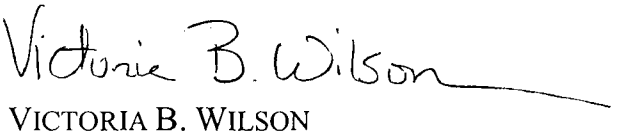
SHARLENE A. HONNAKA
Deputy Attorney General



VICTORIA B. WILSON
Supervising Deputy Attorney General
Attorneys for Respondent

VBW:ir
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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 137,118 words.

Dated: September 14, 2009

EDMUND G. BROWN JR.
Attorney General of California

Victoria B. Wilson

VICTORIA B. WILSON
Supervising Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Steven Homick**
No.: **S044592**

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 SEP 15 2009, I served the attached **RESPONDENT'S BRIEF (CAPITAL CASE)** 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 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Mark E. Cutler
Attorney at Law
P.O. Box 172
Cool, CA 95614
(Counsel for Appellant) – 2 copies

John A. Clarke
Clerk of the Court
Los Angeles County Superior Court
for delivery to:
Hon. Florence-Marie Cooper, Judge
111 N. Hill Street
Los Angeles, CA 90012

Patrick Dixon
John Zajec
Deputy District Attorneys
Los Angeles Co. District Attorney's Office
210 West Temple Street, Suite 18000
Los Angeles, CA 90012

California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3647

Governor's Office
Attn: Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

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 SEP 15 2009 at Los Angeles, California.

M.I. Rangel
Declarant

Signature

VBW:ir
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50506995.doc