SUPREME COURT COPY

SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

REGIS DEON THOMAS,

Defendant and Appellant.

CAPITAL CASE
S048337

Los Angeles County Superior Court No. BA075063
The Honorable Edward Ferns, Judge

RESPONDENT'S BRIEF

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. REGIS DEON THOMAS, Defendant and Appellant.	CAPITAL CASE S048337

STATEMENT OF THE CASE

In an amended information filed by the Los Angeles County District Attorney, appellant was charged as follows: counts 1, 2, and 3 -- murder of victims Carlos Adkins, Kevin Burrell, and James MacDonald in violation of Penal Code section 187, subdivision (a);[1] counts 4 and 6 -- possession of a firearm by a felon in violation of section 12021, subdivision (a); and count 5 -- convicted felon in possession of a concealed firearm in a vehicle in violation of section 12025, subdivision (a)(1). It was alleged as to counts 1, 2, and 3, that appellant personally used a handgun within the meaning of section 12022.5, subdivision (a). As to counts 2 and 3, it was also alleged that victims Burrell and MacDonald were peace officers who were intentionally killed while engaged in the performance of their duties pursuant to section 190.2, subdivision (a)(7). A multiple murder special circumstance was alleged, pursuant to section 190.2, subdivision (a)(3). (CT 597-602.)

Appellant pled not guilty and denied the special allegations. (CT 653, 657.) Thereafter, he withdrew his plea of not guilty as to counts 4 and 5 and

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

entered a plea of guilty. (CT 826.) Trial of the remaining counts was by jury. (CT 828.)

In count 1, appellant was convicted of the second degree murder of Carlos Adkins. In counts 2 and 3, appellant was convicted of the first degree murders of Officers Burrell and MacDonald. The jury found true the allegations that the Officers Burrell and MacDonald were killed while engaged in the performance of their duties and that appellant should have known they were peace officers. The jury found true the special circumstance that appellant was convicted of multiple murders. As to counts 1 through 3, the jury also found that appellant personally used a handgun within the meaning of section 12022.5. In count 6, appellant was convicted of possession of a firearm by a felon in violation of section 12021, subdivision (a).[2] (CT 972, 979-986.) Following a penalty phase, the jury fixed the penalty at death. (RT 1138.) Appellant's new trial motions and automatic motion to modify the death verdict (§ 190.4) were denied. (CT 1001, 1203, 1210-1214.)

On May 30, 1995, appellant was sentenced on counts 4 and 5. The court sentenced appellant to the high term of three years on count 4 and stayed imposition of sentence on count 5 pursuant to section 654. Appellant received custody credit for 1179 days, which included 393 days of conduct credit. Appellant was ordered to pay a restitution fine in the amount of $200. (CT 1001.)

On August 15, 1995, appellant was sentenced to death as to counts 1, 2, and 3. The court further sentenced appellant to a determinate term of six years and four months in the state prison for the section 12022.5 findings in counts 1, 2, and 3, as follows: the high term of five years on count 3; the high term of

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2. This count is referred to as "count 4" in the verdict forms, due to the fact that counts 4 and 5 as charged in the initial information were removed from consideration by the jury as a result of appellant's guilty plea. (See CT 826, 1208.)

five years on count 2, stayed pursuant to section 654; and one year and four months (one-third the middle term) as to count 1. Appellant was sentenced to the high term of three years on count 6, stayed pursuant to section 654. The determinate terms were ordered to run concurrently pending execution of the death penalty. Appellant received total custody credit for 2004 days, which included 668 days of conduct credit. (CT 1001, 1172-1179, 1203-1204, 1207-1209, 1214-1215.)

This appeal is automatic. (§ 1239.)

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution Evidence

a. Murder Of Carlos Adkins

Janice Chappell lived in the Nickerson Gardens housing project with her three children. Her now-deceased husband, Andre Chappell ("Chappell"), lived there sporadically.[3] Her unit was a two-story unit with the living room and kitchen downstairs, and the bathroom and two bedrooms upstairs. (RT 1183-1185, 1266.)

On January 31, 1992, Bertrand Dickson was visiting family at Nickerson Gardens.[4] (RT 1289-1290.) Dickson had been talking to Carlos Adkins,

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3. On March 20, 1992, Chappell was shot and killed in front of 1432 East 111th Place in Nickerson Gardens. (RT 1774.)

4. At the time of this visit, Dickson had just been released from custody for a parole violation. (RT 1290.) At the time of trial, Dickson was in custody for burglary. The only promise he had received from the prosecution relating to his testimony was that he could serve the remainder of his time out of state "because of the consequences following [his] testimony." (RT 1286-1288.) Dickson's convictions consisted of the following: two counts of

whom he had known for approximately 25 years, in the parking lot. While there, he saw his friend "Romeo," who was on his way to a hamburger stand. Dickson asked Romeo to buy chili dogs. Dickson then saw Chappell, whom he had known for approximately 20 years. At the time, Chappell was living with Janice, and he was standing on the front porch of their home. Chappell gave Dickson some money to purchase cigarettes from a woman who sold them in Nickerson Gardens and told him to buy the cigarettes and then return to play a game of chess. (RT 1184-1185, 1290-1299.)

Dickson purchased the cigarettes and when returning to Chappell's apartment, he heard someone call out "Lucky," his nickname. Believing it to be Romeo, he yelled, "Romeo, down here." Appellant, driving a burgundy four-door car, yelled, "You don't know me. Don't try to sell me something."[5] (RT 1296-1300, 1315.) Dickson responded, "Your name Romeo? I'm not talking to you. I'm talking to Romeo." (RT 1301.) When Dickson stepped up on the curb in front of Chappell's house, he saw appellant pointing a gun at him from the window of the car. Dickson went inside Chappell's house, where Adkins and Chappell were playing chess. Dickson told them someone was outside with a gun. (RT 1302-1306.)

There was a banging on the apartment door, and Chappell opened the door. Appellant pushed Chappell out of the way and entered the apartment. Appellant was holding a black handgun to his side. He told Dickson, "'I know who you is.' . . . I heard you just got out,' . . . 'but nigger, you don't know me. You don't be trying to sell me nothing.'" (RT 1307-1308, 1312, 1314.)

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burglary in 1975; burglary and grand theft in 1976; attempted burglary in 1986; robbery in 1987; and burglary in 1992. These crimes were related to Dickson's drug problems. (RT 1376-1377.)

5. Dickson identified appellant at trial, in a photographic lineup, and in a live lineup. (RT 1315; 1342-1345, 1351, 1524, 1528-1535; Peo. Exhs. 14-16.)

Dickson apologized. He explained he was calling to Romeo and that he had not been trying to sell something. (RT 1307, 1313.)

Adkins stood up, and appellant asked him what he thought he was going to do. Appellant said to Adkins, "I know you're a Tillman." Appellant hit Adkins with the gun and knocked him down on the love seat. (RT 1308-1309, 1314-1316.) Dickson told appellant that Adkins was not named "Tillman," but that his name was "Carlos Adkins." Appellant told Dickson to "shut up." (RT 1316.)

At approximately 2:00 a.m., Janice was awakened by the sounds of arguing. She walked down the stairs until she was five or six steps from the bottom, where she could see into the living room. (RT 1185-1189, 1267.) She saw Chappell, Dickson, and Adkins. Chappell was seated on a chair,[6] Adkins was standing against a wall, and Dixon was seated on the love seat against the same wall as Adkins. Appellant was standing in the center of the room.[7] (RT 1190-1198, 1214-1223.) Chappell told appellant that Dickson thought he was someone else. Appellant was upset and angry, and Chappell appeared to be trying to calm things down. (RT 1198-1201.)

Appellant started to leave the apartment. Dickson thought he heard appellant say, "I'm Renzi." Appellant looked at Janice, who was still on the stairs, and told her he was sorry for "disturbing [her] house." (RT 1204-1207, 1317-1319.) Janice saw Adkins walk toward the door. (RT 1209.)

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6. Dickson placed Chappell on the couch. (RT 1316.)

7. Janice said everything about appellant was the same as the man she had seen on the night of the shooting. She said she was 98 percent certain of her identification. Janice also identified appellant from a photographic lineup, stating that the photograph of appellant "looks like" the man who shot Adkins. (RT 1214-1223, 1238, 1256, 1519-1520; Peo. Exhs. 11-12.) Detective Peterson attempted to contact Janice to secure her attendance at a live lineup, but was unable to do so. (RT 1529.)

Adkins then said, "You don't know who I am either."[8] (RT 1319-1320.) Appellant placed the gun between Adkins's eyes and said he would "blow his brains out." (RT 1320.) Dickson saw Adkins grab the gun, and the two men wrestled. (RT 1321-1322.) As Janice walked back upstairs, she saw sparks from the gun held by appellant. Appellant fired two shots. (RT 1207-1212, 1241.) After hearing the first shot, which penetrated Adkins's stomach, Dickson ran out the back door of the apartment and called 911. (RT 1322.)

Dickson was on his way to meet the ambulance when he was stopped by appellant and another man. The men threw Dickson into the car and "were pistol whipping" him. Appellant told Dickson that if he said anything, appellant would "get him" and that he knew where Dickson's family and daughter lived. The other man said that Dickson would not "tell" because he was a "G," which meant gang member.[9] (RT 1322-1323, 1326-1327.) Appellant said, "Fuck that. Let's take him for a ride." (RT 1324.) The two men opened the trunk and forced Dickson, at gunpoint, to sit in the trunk. Appellant ordered Dickson to lay down, but Dickson struggled out of the trunk and ran away. (RT 1328, 1449-1450.) Dickson did not return to Chappell's house because he was afraid of appellant. (RT 1328-1329.)

Los Angeles Police Officer Deanna Benedict responded to the scene, where she saw that Adkins had been shot in the chest area. A rescue ambulance was present and administering medical assistance. Adkins tried to say something, but then stopped talking. (RT 1460-1464.) Adkins died as a result of a gunshot wound to the right lower chest. (RT 1589-1590.) The bullet, which was recovered from Adkins's chest, traveled from right to left and

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8. Janice did not hear Adkins say anything. (RT 1212.)

9. Dickson had been a member of the "Bounty Hunters" until he was 19 years old. At the time of trial, he was 40 years old. (RT 1325.)

slightly downward.[10] (RT 1590-1593, 1596-1602, 1605-1607; Peo. Exhs. 20-21.)

At approximately 4:15 a.m., Los Angeles Police Detectives Robert Peterson and Talbot Terrell responded to the scene. (RT 1485-1486.) Detective Terrell recovered a nine-millimeter shell casing from the grass area in front of the apartment. The casing appeared to have come from a semi-automatic pistol. (RT 1486-1489; Peo. Exh. 18.)

At approximately 5:30 a.m., Detective Peterson interviewed Chappell. As a result of that interview, his investigation was focused on a shooting occurring outside the apartment. (RT 1490.) Detective Peterson later spoke with Dickson, Janice, and again with Chappell. As a result of those interviews, he changed the focus of the investigation to inside the residence. (RT 1495-1496.)

Later in the day of January 31, Dickson contacted his parole officer, Larry Johnson, for advice and because he needed money to go to Orange County. He was afraid to remain in the area.[11] He told Johnson that he had witnessed a shooting in Nickerson Gardens and that the suspect had later pulled a gun on him and tried to put him in the trunk of a car. Johnson advised Dickson to speak with the police. Dickson agreed to do so, although he was afraid. (RT 1329-1333, 1451, 1657-1665, 1670-1673.)

Johnson contacted Detective Peterson at 4:00 p.m. and informed him that Dickson may have information relating to the case. (RT 1497-1499, 1662-1663.) The following day, Detectives Peterson and Terrell met with Dickson

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10. This bullet was not fired from the gun used in the murders of Officers Burrell and MacDonald. (RT 1765; Peo. Exh. 32.)

11. Dickson's $200 from the "release fund"relating to his release on parole had not been received. (RT 1329-1330, 1657-1658.) Johnson lent Dickson $20 pending the release of the funds. (RT 1666-1667.)

at Johnson's office. (RT 1500, 1664-1666.) During the meeting, Dickson related his account of the shooting, including the fact that he had been "pistol whipped."[12] (RT 1500-1503.) Dickson told police that the shooter's name was "Renzi." "Renzi," or Lorenzo Foreman, was one of the men whose photographs appeared in an initial photographic lineup, at which Dickson had failed to identify a suspect. (RT 1333-1336, 1337-1338, 1501-1502, 1505-1508; Peo. Exh. 13.)

After Dickson named "Renzi" as the suspect, he received word that Renzi's brother wanted to see him. He met with a man named "Renzi," Renzi's brothers, and another person. After seeing Renzi, Dickson knew he was not the person who shot Adkins. Dickson learned from some people "on the street" that the correct name was "Reggie" and informed the police of this fact (RT 1334-1340, 1452-1454.)

City of Los Angeles Housing Authority Police Officer Eddie Cole spent six to seven years patrolling Nickerson Gardens. He knew appellant during the last four of those years, and he saw appellant on a regular basis. Appellant stated his address was 11320 South Success, which is in Nickerson gardens. Officer Cole also knew appellant's mother, Iris Thomas. (RT 1720-1722.) He had contacted both appellant and his mother at 11320 South Success. (RT 1721-1722, 1727-1730; Peo. Exh. 33.) In connection with the shooting of Adkins, Officer Cole called Detective Robert Peterson of South Bureau Homicide. He provided appellant's name and a photograph to Detective Peterson as a suspect in the shooting. (RT 1733-1735.)

After receiving the information from Dickson about the different name,

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12. Detective Peterson did not include this assault in his initial police report because he planned to interview Dickson via video tape and would have then included the assault. Detective Peterson did not later ask Dickson about the event because he did not see any bruises and did not deem it necessary. (RT 1504.)

Detective Peterson created another photographic lineup containing appellant's photograph, and appellant was identified by Dickson. (RT 1505-1510, 1513-1515, 1518-1523; Peo. Exhs. 11-14.) Detective Peterson arranged a live lineup at which Dickson identified appellant. (RT 1524, 1528-1535; Peo. Exhs. 15-16.) Detective Peterson obtained an arrest warrant for appellant. (RT 1523-1524.) He tried to serve the arrest warrant at appellant's address two or three times, but there was no response at the home. (RT 1536-1537.)

On May 23, 1992, Los Angeles County Sheriff's Deputies James Collett and Aaron Egger saw appellant driving his red Chevrolet truck, license number 4J88557, on Hawthorne Boulevard.[13] The deputies conducted a stop for Vehicle Code violations. In the course of the traffic stop, they learned of the existence of an arrest warrant for appellant arising out of the shooting of Carlos Adkins. Appellant was arrested on the warrant. (RT 1774-1775.)

Six days after speaking with the police, Dickson was "caught inside of a garage" and sent back to prison. (RT 1346-1347.) On September 21, 1992, Dickson was transported for proceedings relating to the instant case to the Compton court where he was placed in the same holding cell as appellant. (RT 1353-1356.) Appellant asked Dickson why he was going to testify. Appellant explained that he "didn't mean to do it" and that he had been "tripping." Appellant said it was his "woman's" birthday, and he had argued with her.[14] Appellant said he went into Chappell's house because he thought Dickson was going to get a gun. Appellant said if Adkins had not grabbed the gun, the

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13. On March 9, 1992, Mark Buster sold a red 1992 Chevrolet 454 pickup truck, license number 4J88557, to appellant for $18,000. (RT 1643-1654, 2883, 2886-2888; Peo. Exh. 22-24.) The truck was registered to "Regis Thomas" at 11320 Success, the address of appellant's mother. (RT 2884.) Respondent refers to this truck as appellant's truck.

14. Deshaunna Cody, appellant's girlfriend, testified her birthday was February 3, which was three days after the murder. (RT 2882.)

incident would not have happened. Dickson asked appellant why he tried to hurt him, and appellant said he was just trying to scare him. Appellant said that if Dickson testified, he (Dickson) would not be able to go back to the "projects," where his daughter remained. Appellant told Dickson not to end up like Chappell. Appellant said he would give Dickson $5,000 if Dickson "turned the cheek." Because Dickson was worried about his daughter and afraid of "complications," he told the prosecutor that he had identified the wrong person. Appellant was released. He thanked Dickson. (RT 1356-1362.)

Dickson was returned to prison and released on September 5, 1993. He received a subpoena to testify at a preliminary hearing relating to Adkins's murder. He contacted the prosecutor and requested compensation so that he could "leave town." He was told he would receive no compensation, and he decided not to testify. Ultimately, he changed his mind because of Adkins's family and his conscience. (RT 1362-1366.)

Firearm's Examiner, Dwight Van Horn, testified that to fire a semi-automatic, the magazine must be loaded, the slide recess pushed, and a round of ammunition placed into the chamber. The gun is then ready to be fired. If someone grabbed the gun by the slide, the slide would not slide back, and the spent casing would not eject. Further, the new bullet would not load into the firing chamber. As long as the gun was held, the gun could not be fired a second time. (RT 1750, 1752-1758; Peo. Exh. 32.) People's Exhibit 18, a nine-millimeter luger expended cartridge case found at the scene of the shooting, was consistent with the expended bullet recovered during the coroner's investigation. (RT 1758-1763.)

On September 14, 1990, appellant was convicted of perjury. (RT 1181; Peo. Exh. 8.)

b. Murder Of Officers Kevin Burrell And James MacDonald

(1) Witness Accounts

Officer Kevin Burrell was a police officer for the Compton Police Department. Officer James MacDonald was a reserve officer. MacDonald was a community volunteer, receiving one dollar a year assisting the police department. (RT 2553-2554, 2580-2584.) On February 22, 1993, shortly after 11:00 p.m., Officers MacDonald and Burrell, along with Compton Police Officers Mark Metcalf and Gary Davis, responded to a radio call of shots fired in the area of 137th Street and Grandee. The officers found nothing at the scene. Officers Burrell and MacDonald left the scene of that call and traveled on Wilmington toward Rosecrans. (RT 2538-2539, 2548, 3820.)

At 11:06 p.m., Margarita Gully left her house in her 1985 Nissan Sentra, to pick up her son, Deshon Gully, from the Compton Blockbuster, located on Rosecrans and Central, where he worked. Gully's 12-year-old son, De'Moryea, was seated in the front passenger seat.[15] Gully's 11-year-old daughter, Ebony, and Alicia Jordan, Deshon's girlfriend, were seated in the rear seat.[16] (RT 1777-1780, 1992-1994, 2216-2221; Peo. Exh. 34.)

Gully was traveling southbound on Wilmington. At approximately 11:11 p.m., she turned onto westbound Rosecrans Avenue. (RT 1780-1783, 1996.) She saw a marked Compton Police Department vehicle. Its lights were flashing and the spotlights were activated. (RT 1784, 1832.) The police

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15. When Gully spoke to the police, she said that Alicia Jordan was seated in the right front passenger seat, and De'Moryea was in the right rear passenger seat. (RT 1905-1907.) Jordan confirmed that De'Moryea was in the front passenger's seat. (RT 2220-2221.)

16. Jordan later recalled she was seated behind Gully. (RT 2329.) Ebony was lying down in the seat. (RT 2329.)

vehicle was stopped on westbound Rosecrans Avenue. Stopped in front of the police vehicle was a red Chevrolet pickup truck in an apparent traffic stop. (RT 1784-1786, 1805, 1823-1824, 1826-1827; Peo. Exhs. 24, 38.) The driver's side door of the pickup truck was open. (RT 1786.) As Gully approached, she saw Officers Burrell and MacDonald struggling to put a man's hands behind his back.[17] She could not see the man's hands. All three men were facing in her direction. (RT 1787-1790.) Officer Burrell was closest to the roadway, holding one of the man's arms. Officer MacDonald was holding the other arm. The man was bent over at the waist at about a 30-degree angle. (RT 1790-1791, 1793, 1797-1798.) Gully commented to her son that the police were bothering "another nice clean-cut gentleman." (RT 1794.)

Gully slowed her car to approximately 25 miles per hour as she approached the struggle. (RT 1792-1793, 1802-1803.) When she was approximately eight to nine feet from the scene, the struggling man lifted his head, and she was able to look into his face. His face was illuminated by the lighting from the police car. (RT 1798-1804, 1827-1828, 1832-1833; Peo. Exhs. 36, 38.) Gully described the man as clean shaven, nicely dressed, and masculine, as if he lifted weights. He had very short hair in a "quo vadis" style. He appeared to be between 20 and 25 years old. He was wearing a dark green bomber jacket and slacks. (RT 1794-1795, 1803.) Appellant looked like the man Gully saw that night. His features, head shape, hair, age, and muscular build appeared the same as the man she saw. (RT 1833-1836.)

As Gully was passing the scene of the struggle, she heard gunfire coming from the right side of her car in the area where the officers and the man were located. Ebony was asleep, but everyone else in the car panicked in fear of stray bullets. (RT 1809-1810, 1828, 2626; Peo. Exhs. 38, 62.) Gully

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17. Gully was able to identify Officers Burrell and McDonald from photographs. (RT 1801; Peo. Exh. 35.)

continued driving, and De'Moryea yelled that an officer had been shot. Gully looked through her rearview mirror and saw Officer McDonald lying in the street. She also saw Officer Burrell lying on his stomach by the curb. The struggling man was now straddling Officer Burrell's legs. He was pointing a gun about three to four feet from Officer Burrell's head. She heard additional shots fired. (RT 1811-1812, 1814-1823, 1828-1831, 1840, 1842, 2626; Peo. Exhs. 24, 35, 37-38, 62.)

Gully sped up and continued driving. She heard "commotion" in her car and someone said, "He's coming." She looked in her rear-view mirror and saw the red pickup truck, which had been stopped in front of the patrol car, approaching to the right of her car. (RT 1841.) The truck passed her, traveling at about 50-55 miles per hour and turned right onto Central Avenue. (RT 1842-1844; Peo. Exhs. 39-40.) Gully was shown a photograph of the pickup truck sold to appellant by Mark Buster and testified that it was similar to the one she saw on the night of the shooting. She stated there was nothing different between the two pickup trucks.[18] (RT 1823-1824; Peo. Exh. 24.)

De'Moryea also had seen the police vehicle stopped with the lights flashing. A red truck was stopped in front of the police vehicle. He saw two uniformed officers attempting to arrest a suspect. They were behind the suspect trying to grab his hands. De'Moryea could not see the suspect's hands, but each officer had one of the suspect's arms. (RT 1997-2001; 2047-2049, 2626; Peo. Exhs. 38, 63.) The suspect was a Black man, approximately 25 or 26 years old. He had a muscular build and a quo vadis haircut. (RT 2003-2004.) The officers and the man were toward the rear of the truck, moving toward the police car. (RT 2002, 2004.)

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18. Appellant's truck had been in an automobile accident in March, 1993. Appellant was driving the truck. Prior to that time, the truck was in good condition. (RT 2889-1891; Peo. Exh. 74.)

As Gully's car passed by the struggle, De'Moryea heard the sound of five to seven gunshots. (RT 2005-2010, 2049, 2103-2109, 2626; Peo. Exhs. 38, 63.) He ducked down and looked out the back window. (RT 2010-2012, 2026; Peo. Exh. 34.) He said, "They're shooting him in his head."[19] (RT 2012, 2018.) Ebony and Alicia screamed.[20] (RT 2012-2013.) De'Moryea saw Officer MacDonald lying on his stomach on the ground in the street. The suspect was straddling the officer and holding a gun. De'Moryea saw the gun spark and heard two or three more shots. (RT 2015-2021, 2032-2033, 2049-2050, 2103-2109, 2626; Peo. Exhs. 38, 63.)

After the shots were fired, Gully sped up a little bit. De'Moryea saw the suspect step into the pickup truck. (RT 2032, 2036-2038; Peo. Exh. 47.) De'Moryea next saw the suspect in the truck speeding by Gully's car. The truck turned right. (RT 2045.) On the side of the truck, De'Moryea saw writing indicating "4 something 4." When shown a photograph of appellant's truck with the number "454" on the side, De'Moryea said the "4"s he saw looked the same as those on the pickup truck depicted in People's Exhibit 24. (RT 2039-2044, 2050; Peo. Exh. 24.)

Passenger Jordan saw the lights from a police car. (RT 2221-2228.) She, too, saw a red pickup truck parked in front of the police vehicle, as if the police had been conducting a traffic stop. (RT 2229-2233, 2314-2315, 2485-2490, 3041-3042; Peo. Exhs. 24, 38, 77) As Gully's car drew near, Jordan saw Officers Burrell and MacDonald with a third man between the pickup truck and the police car. She saw the third man from head to toe, although she could not

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19. Although he said "they," he was talking about only one person. (RT 2018.)

20. De'Moryea also believed that Ebony was "half-asleep." He was not paying attention to what Ebony and Alicia were doing. (RT 2041, 2100.)

remember which part of him she saw. (RT 2233-2234, 2468-2469.) The third man was a Black male with "low cut" hair. As they passed, she heard more than five shots coming from the right side of Gully's car. She and De'Moryea said "they were shooting the police officers."[21] (RT 2237.)

Jordan saw Officer MacDonald falling in the street. He was between the police car and the red pickup truck, and he was face down. (RT 2239-2244, 2249-2250, 2310-2315, 2316, 3041-3042; Peo. Exhs. 38, 51-53, 77.) She saw the third man carrying a handgun and moving around the officers. The man shot Officer Burrell two times, and Officer Burrell was face down on the curb. The man then walked to Officer Burrell's body, stood between the waist and shoulder area and shot downward in his head area. At that time, Jordan could see the shooter's profile. (RT 2241, 2251-2256, 2260-2262, 2311, 2315, 2475-2476, 3041-3042; Peo. Exhs. 38, 77.)

The shooter got into the red pickup truck, passed Gully's car, and turned right. Jordan followed the pickup truck with her eyes as it approached and as it passed. (RT 2323-2330, 2469-2475; Peo. Exh. 55.) When the pickup truck passed, Jordan saw "Chevrolet" written on the back. The truck she saw was similar to the pickup truck in the photograph of appellant's truck. (RT 2229-2233, 2265-2279, 2314-2315, 2326, 2485-2490, 3041-3042; Peo. Exhs. 24, 38, 77) Jordan also saw the driver's face from approximately nine feet away. (RT 2271-2272, 2474.)

At approximately 11:15 p.m., Ingrid Crear was traveling northbound on Central Avenue, approaching a green light at Rosecrans. As she neared the intersection, she saw a standard-size, red Chevrolet truck turn onto Central Avenue in front of her. She had to brake to avoid the truck. The truck had no custom wheels, standard suspension, and tinted windows. She could not

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21. Jordan said there was only one shooter. When asked why she used the word "they," she said "I just do that sometimes." (RT 2238.)

determine who was in the truck because of the window tinting. The truck was similar to appellant's truck, although she did not see any writing on the back of the truck. (RT 2495-2509; Peo. Exh. 24.)

Dong Lee worked at a Shell Gas Station on Imperial and Central Avenue, across the street from Nickerson Gardens. Appellant was a regular customer, visiting the station approximately two times per week and always driving a red pickup truck similar to appellant's truck depicted in People's Exhibit 24. (RT 2629-2639, 2651; Peo. Exh. 24.) On February 22, 1993, between 11:15 and 11:30 p.m., Lee was seated in the cashier's booth at the gas station. He heard a screeching sound and saw a red truck, which looked like appellant's truck, enter the gas station from Central Avenue and exit onto westbound Imperial Boulevard. The truck was traveling fast and did not stop for gas. Thereafter, Lee did not see appellant for over a month. (RT 2639-2650.)

Also at about 11:15, p.m., Bobbie Harris, a licensed vocational nurse, was traveling westbound on Rosecrans with her adult son. (RT 2174-2175.) She approached Dwight Street and saw the body of Officer MacDonald lying face-down in the street. (RT 2175-2176.) A police vehicle was parked on the side of the street with the emergency lights activated. Officer Burrell was lying face-down in front of the police car, partially on the curb. (RT 2177-2183, 2189-2190, 2196; Peo. Exh. 49.) Harris's son called 911 from a nearby telephone booth. (RT 2185, 2188.)

Officers Metcalf and Davis, who were still patrolling in the area, turned onto Rosecrans. They saw the back of a police vehicle with the lights flashing. They proceeded toward the vehicle to provide backup assistance to the officers, who were apparently conducting a traffic stop. At 11:16 p.m., a radio call was broadcast regarding the shooting, and Officer Metcalf arrived at the scene seven seconds later. (RT 2539-2543, 3810, 3814; Peo. Exh 113.)

Officer Metcalf saw Officer Burrell lying face-down north of the police vehicle in the curb area and Officer MacDonald lying in the street just south of the police vehicle. Officer Metcalf believed Officer Burrell to be unconscious. Bobbie Harris, who had remained at the scene, heard gurgling sounds, leading her to believe that Officer Burrell had suffered chest injuries. She also noted he was breathing. There was blood next to Officer MacDonald and on the back of his head. He appeared to have suffered a gunshot wound to the head. Harris assisted in turning over Officer MacDonald. There appeared to be an exit wound in Officer MacDonald's right cheek area. Harris felt for a pulse and determined Officer MacDonald was alive. His eyes were rolling up and down, but he did not speak. (RT 2193-2196, 2543-2546.)

Compton Police Officer Frederick Douglas Reynolds then arrived and saw the police vehicle. (RT 2584-2587, 2597, 3042; Peo. Exhs. 38, 78.) Officer Reynolds saw Officer MacDonald lying on his back. MacDonald had a bullet hole in the right side of his face, and his head was lying in a puddle of blood. It appeared that he had also been wounded in the torso. (RT 2589, 2594.) Officer Reynolds also saw blood around Officer Burrell's head. (RT 2589-2590, 2594, 2597-2598, 3042; Peo. Exhs. 38, 78.) Both officers were in uniform, and their guns were holstered. There was a police baton and flashlight close to Officer MacDonald's body. A pager was also discovered. (RT 2595, 2599, 2821, 2824-2825; Peo. Exhs. 49, 70.) There were nine spent nine-millimeter shell casings and one expended projectile just in front the police vehicle. The casings and projectile were measured, photographed, and collected for testing. (RT 2596, 2598, 2610, 2786-2800, 2818-2824, 3042; Peo. Exhs. 38, 49, 70-72, 78.) A skid mark was located about seven feet in front of the police vehicle. (RT 2600-2602.)

(2) Witness Identifications

Gully was in shock after witnessing the killing of the police officers and did not want to get involved. She then thought about what she would do if her own child had been shot, and she sought advice from her sister, who knew police officers. Three to four days later, she was contacted by police officers and interviewed. (RT 1845-1848.) On February 27, Gully met with an artist from the Los Angeles County Sheriff's Department and created a composite drawing of the shooter. (RT 1849, 2156-2159; Peo. Exh. 41.) On April 6, Gully attended a live lineup. She did not identify anyone, although she chose appellant as someone who had the same build, skin coloring and "clean shaving" as the shooter. (RT 1850-1853; Peo. Exhs. 42-43.) Gully viewed a photograph of Calvin Cooksey and said that he was not the shooter. (RT 1855-1856; Peo. Exh. 45.)

After her contact with police, Gully stayed at the Ramada Inn, where Compton Chief of Police Hourie Taylor had established a command post. She remained there for two to three weeks. Due to the presence of gangs in her neighborhood, she felt the police presence at her house and in her neighborhood put her in danger. She received approximately $1,200 to relocate. Weeks after the shooting, Gully became aware of a reward offered by the City of Compton. According to Chief Taylor, the reward was in the amount of $46,000 and was conditioned upon arrest and conviction. Gully had no interest in the reward. She stated she would never forget witnessing the officer being killed, and she was looking for peace in her life. (RT 1856-1859, 3432-3435.)

De'Moryea attended a live lineup. He was unsure of an identification, although appellant most resembled the suspect. Appellant's build, hairstyle, skin color, were the same as the that of the suspect. (RT 2052-2054, 2057-2058; Peo. Exhs. 42, 48.)

Jordan did not initially cooperate with the police because she was afraid

to get involved, and her father had told her not to get involved. (RT 2332, 2337.) When her father told her she could not longer live with him, she asked the Compton Police Department for witness protection. On August 25, 1993, she was placed in the Compton Ramada Inn where she remained for one and a one-half years. During that time, she had a baby. She then moved into an apartment. The City of Compton provided her with $1,500 for furnishings and paid her $400 rent for three months. (RT 2336-2338, 2344, 3435-3436.) A few days after the shooting, she became aware that a reward was offered for suspect information. She remained uncooperative because she did not want the money. She eventually talked to the police because it was the right thing to do. (RT 2340-2341, 3435-3438.)

While Jordan was staying at the Ramada Inn, Jordan's friend, Nicole Prince would visit. In September, 1994, Jordan told Prince that she could identify the suspect, but she was afraid. (RT 2491, 2521-2522, 2529-2530.) At trial, Jordan identified appellant as the shooter. Her identification was based on the night of the shooting and not on television reports or appellant's presence in court. (RT 2320-2323, 2491-2492.) Jordan viewed a photograph of Calvin Cooksey and said that he was not the shooter. (RT 2348; Peo. Exh. 45.)

(3) Events Occurring After The Shooting

Deshaunna Cody had a relationship with appellant since 1983 and married him on May 25, 1993. (RT 2880-2881.) She and appellant had lived together in San Pedro since 1992, and they had six children together. He stayed almost every night with her, with the exception of one or two nights some weeks when he stayed at his mother's home at 11320 Success in Nickerson Gardens. (RT 2882-2886.) On the day the officers were killed, Cody and appellant had arrived home at around 5:00 or 6:00 p.m. Appellant left in his pickup truck before eating, stating that he was going to his mother's house in

Nickerson Gardens. (RT 2893-2896.) Cody did not see appellant with a gun when he left her house on February 22. Although she initially told police he had a gun the night of the shooting, that was not the truth. (RT 2896-2897, 2915.)

Cody did not see appellant again until she woke up the following morning and found him in bed with her. He had a gun in his hand. (RT 2911-2912, 2915.) A day or two after the shooting, Cody asked appellant whether he shot and killed the officers. (RT 2934, 2950, 2958.)

In early 1993, Keyon Pye lived on Kalmia Street near the Jordan Downs housing project. (RT 2675.) She had met appellant in the Nickerson Gardens housing project, and they were good friends. (RT 2676, 2692.) In the middle of February 1993, appellant unexpectedly arrived at her house asking for a favor. He gave her a gun wrapped in a bag and told her he would be back to get it the following day. Pye placed the gun under her mattress. (RT 2690-2712; Peo. Exh. 65.)

Calvin Cooksey had known appellant for eight to ten years. He met him in Nickerson Gardens through his cousin, Phillip Cathcart. They would "hang out," and Cooksey had been to appellant's residence in Nickerson Gardens once or twice. (RT 3047-3049.) Cathcart and appellant were very close friends. (RT 2921-2925, 3050; Peo. Exh. 75.)

In February, 1993, Cathcart lived in an apartment in Gardena. (RT 3050-3051.) Around February 24 or 25, 1993, Cooksey was at Cathcart's apartment, along with Cathcart's girlfriend, Shamica Hargrave, and Cathcart's mother. Cooksey and Cathcart were inside watching television. Appellant was dropped off by a friend. On television were several news broadcasts relating to the killing. The broadcasts included descriptions of a truck. Appellant was "jittery." When Cooksey looked at him, he said, "Yeah, I did it. Fuck those mother fuckers. They slipped." "Slipped" meant failed to take precautions.

(RT 3056-3061, 3063-3072, 3078-3079.) Appellant said that when Officer Burrell reached the quarter panel of appellant's pickup truck, appellant kicked the door open, and shot him in the chest. He then aimed over and shot Officer MacDonald in the face while MacDonald was still in the police car. He then went over to MacDonald, shot him three more times, and went back to Officer Burrell and shot him three more times in the head. (RT 3079-3082, 3189-3192.) Appellant said he acted alone. Cooksey told appellant he did not believe him and that he thought appellant was trying to get "clout." (RT 3083-3085.)

Later that day, Cooksey asked appellant where the gun was located. Appellant said he had it, and Cooksey offered to get rid of it. Appellant said the gun was "put up" and that he would give the gun to Cooksey that night. (RT 3086-3091, 3095.) When it was dark, appellant and Cathcart led Cooksey, who was traveling in a separate car, to the get the gun.[22] The car Cooksey drove was a blue Pontiac Grand Am lent to him by his girlfriend. (RT 3057, 3061-3062, 3093, 3095-3097; Peo. Exh. 67.) Cooksey still did not believe appellant had shot the officers, but he wanted to make some money from the sale of the gun.[23] (RT 3093-3094.)

The group went to a house by the Jordan Downs housing project. Appellant knocked on the door and talked to someone. He then went back to Cooksey's car and told Cooksey to return to the house in 45 minutes to an hour. (RT 3097-3099.) A woman stuck her head out of the door, and appellant told her, "When he comes back in the car, give him whatever he said." (RT 3100.)

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22. On cross-examination, Cooksey said he may have received the gun the following day. (RT 3198.)

23. Cooksey said he never would have taken the gun to sell it if he had known it was a murder weapon. He either would not have touched it, or he would have destroyed it. (RT 3094.)

When Cooksey returned, the woman asked if he was "the guy." Cooksey responded, "Yes." The woman looked out, saw the car, reached over to a table and got a bag. She gave Cooksey the bag. He looked inside and saw a SIG Sauer nine-millimeter pistol.[24] (RT 3101-3105, 3107-3108, 3254; Peo. Exh. 32.)

According to Pye, the day after appellant gave her the gun, a man she had never seen before came to her house and told her he was there to pick up the gun for appellant. Pye gave him the gun. The man left in a dark blue car. (RT 2714-2721.)

Cooksey traveled to 82nd and Main Streets in San Pedro, looking for Robert Rojas. Cooksey said he knew Rojas because Rojas purchased "hot" items, and Cooksey had sold him things before. Rojas testified that he had purchased clothing from Cooksey. Cooksey located Rojas, and Rojas bought the gun from him for $250 according to Cooksey, or $200 according to Rojas. (RT 3106-3110, 3447-3454, 3456-3457, 3473; Peo. Exh. 67.) Rojas placed the gun in his uncle's backyard. (RT 3352-3353, 3472.)

After Cooksey sold the weapon, appellant spent the night at Cathcart's house for three days to a week. (RT 3111-3112.) Cooksey went with appellant and Cathcart in Cooksey's car to the San Pedro house so that appellant could get some clothes. Appellant said that he was cold and that he needed a coat. Cooksey noted that news broadcasts had mentioned a military green Army jacket. Appellant had been dressed in such a coat on numerous occasions. (RT 3112-3114.) Cooksey began to believe that appellant was the shooter because appellant would not go home, he put the license plates on his truck, his wife drove the truck, and appellant would not drive it anymore. (RT 3114-3115.)

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24. Cooksey identified the gun at trial as Exhibit 32, the SIG Sauer, but he referred to it as a Glock in his testimony. (RT 3108.) He remembered the gun was not a Glock because a Glock is "more square." He used the term "Glock" in a non-specific manner. (RT 3254.)

On February 28, 1993, Deputy Ronald Duval received information from a housing authority officer and, based on that information, he performed a Department of Motor Vehicles computer check on license plate number 4J88557. On March 1, based on the information he received relating to registration of the vehicle, he traveled to 107 North Beach Street in San Pedro. There, he saw a red Chevrolet pickup truck parked directly in front of the location. He photographed the truck. (RT 3504-3506; Peo. Exh. 24.)

On March 4, 1993, Cooksey, Cathcart, and appellant were in Nickerson Gardens. Appellant had received a telephone call, and he said that the sheriffs wanted to interview him. He said that if he ran, he would look guilty. He changed his clothing and then returned. Cooksey and some other men went to a vacant apartment 20 feet from appellant's mother's apartment and watched Deputies Duval and MacArthur speak with appellant. The deputies left. Appellant said, "They think I did it, but they can't prove it. Somebody is going to have to tell on me in order for them to bust me on this." (RT 3086-3089, 3146-3148, 3506-3508, 3512-3514.)

On March 8, 1993, Deputy Duval was in Nickerson Gardens when he saw the red Chevrolet pickup truck. It was parked and appeared not to have been driven "for awhile." The following day, Deputy Duval was in the same area of Nickerson Gardens when he again saw the red truck, license number 4J88557. (RT 3513-3514.)

On March 22, 1992, Cooksey was arrested in Hollywood with a gun while driving the Pontiac Grand Am.[25] The gun was a Lorcin .380 semi-automatic pistol. He obtained the gun in Nickerson Gardens from a friend of Cathcart's named "Stanley." (RT 2764-2769, 3116-3117, 3120-3121, 3188; Peo. Exh. 28.)

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25. Cooksey had also been convicted of receiving stolen property in 1984 and robbery in 1987. (RT 3118-3119.)

Los Angeles County Sheriff's Deputy Larry Joseph Brandenburg was assigned to a task force to investigate the murders. (RT 2830-2831.) More than a year before the instant case, Deputy Brandenburg had become involved with Calvin Cooksey in relation to a stolen vehicle in which Cooksey's father was the victim. Cooksey's father decided he did not want to prosecute his son. When Deputy Brandenburg advised Cooksey that the case was not going to be filed against him, Cooksey was grateful. (RT 2831-2833, 3123.) Cooksey would occasionally call Deputy Brandenburg with the names of drug dealers, but he never followed through with the information. (RT 2833-2834, 3160.)

On March 25, 1993, Deputy Brandenburg received a telephone call from Cooksey. Cooksey said he knew who had killed the officers and that he knew the location of the gun used in the shooting. Cooksey said he had "gotten rid" of the gun for the killer.[26] (RT 2835-2838, 3371-3372.) Deputy Brandenburg traveled to Los Angeles County Men's Central Jail, where Cooksey was incarcerated, for an interview. Cooksey said the name of the killer was "Reggie" or "Regis Thomas." (RT 2838-2840, 3124-3125, 3134, 3372-3373.) He provided Deputy Brandenburg with an account of the events leading to the sale of the gun. (RT 3376-3378, 3384.) Cooksey said that he thought the gun used to kill the officers was the one he had sold. (RT 3125.) Cooksey explained appellant had offered him a nine-millimeter handgun, and he took it. He then sold it to Robert Rojas for $260. (RT 3386.)

In the middle or near the end of the interview, Cooksey asked about a reward. Deputy Brandenburg told him the reward was $50,000, but he did not

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26. Cooksey did not initially tell the police officers that he knew appellant was the shooter because he did not want to be a "part of it." He revealed the information because his conscience was bothering him, he was motivated by the reward, and he hoped for assistance in the weapons possession case. The case was dismissed in October because, Cooksey believed, the car did not belong to him. (RT 3117-3118, 3133-3137.)

know how the money would be dispersed. (RT 3387-3388.) Deputy Brandenburg also told Cooksey he may be given some type of protection, such as moving him to a place of safety and providing first and last months' rent and utility payments. According to Deputy Brandenburg, Cooksey did not ask for assistance relating to the charge for which he was incarcerated. Deputy Brandenburg told him"up front" that he was not in a position to help him on that case.[27] (RT 3388-3390.)

On March 31, 1993, Deputy Duval interviewed Cooksey at the County Jail Arraignment Court. (RT 3514-3515; Peo. Exh. 45.) Cooksey asked Deputy Duval if he could get him any help with the charges for which he was incarcerated, and Deputy Duval said he did not know. (RT 3517-3518.) Cooksey then told Deputy Duval that he had been at his cousin's house on El Segundo Boulevard in Gardena and that appellant had shown up there a day after the murders and had stayed for a few days. Cooksey told Deputy Duval that a news bulletin relating to the officers' murders had come on television, appellant became excited, said he "did that," and that he had used a nine-millimeter weapon. (RT 3516-3520.) Cooksey had gone to 10605 Kalmia Street in Los Angeles, where appellant had gone up to a door, spoke with a girl, returned to the car, and told Cooksey to return in 40 minutes and the girl would give him the gun. Cooksey returned on his own 40 minutes later, contacted the girl, and received a brown paper bag containing a handgun. He had sold it and said he could get it back. (RT 3520-3521.)

Deputy Brandenburg obtained a removal order for Cooksey in order to

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27. Cooksey was permitted to stay at the Ramada Inn from June, 1993 to March, 1994. Cooksey was asked to leave after a dispute with a hotel employee. Cooksey received an advancement from the reward fund of approximately $9,600. He received another $2,000 from another fund, for a total of $12,000. Cooksey received his first advance on May 27, 1993. (RT 3157-3158, 3245, 3438-3441.)

have Cooksey locate the person to whom he had sold the gun. (RT 2842, 3137.) Deputy Brandenburg drove around with Cooksey for a couple of hours trying to locate Robert Rojas. They were unable to find him, and Cooksey was returned to Central Jail. (RT 2844.)

On April 1, 1993, Detective William Jackson was advised that he was to accompany Cooksey to repurchase a gun. (RT 3301-3302.) Cooksey was released on his own recognizance. Deputies Duval and MacArthur drove him to the Firestone Sheriff's Station. From there, he traveled to the area of 82nd and San Pedro with Detective Jackson, an undercover officer, and located Rojas. Cooksey told Rojas he wanted to buy back the gun because it belonged to his uncle and his uncle wanted it back. Rojas told Cooksey that it would cost him "extra." Rojas said he had loaned the gun to a friend and that he would try to get it back. (RT 3138-3140, 3302-3306, 3522, 3524-3526.; Peo. Exh. 45.)

The following day, Cooksey, who was again at the Firestone Sheriff's Station, spoke with Rojas. Rojas returned Cooksey's call and told him he could get the gun, but it would cost an additional $100. (RT 2855-2857, 3140-3142, 3525.) The plan was that Cooksey and Officer Jackson, acting undercover, would buy back the gun. Cooksey was searched prior to leaving the station. (RT 2857-2858, 3142, 3525-3526.) Officer Jackson had $350 with which to buy the weapon. (RT 2859, 3308.)

Officer Jackson and Cooksey got into an undercover car and drove to the area of 81st and San Pedro to a liquor store. Cooksey went into the store and bought a beer. (RT 2858-2859, 3142-3143, 3308-3310, 3526.) When he returned, he said he had paged Rojas. (RT 3310.) Rojas passed by Cooksey in a car with a man Cooksey knew as "Fat Boy." (RT 3143, 3310.) Detective Jackson and Cooksey were directed to follow. (RT 3310.) Cooksey and Detective Jackson followed Rojas's car to the area of Wall Street. Rojas parked, and Detective Jackson parked behind him. Fat Boy got out of the car,

and Cooksey got in. Cooksey got the gun, gave Rojas the money, and gave the gun to Detective Jackson.[28] (RT 3143-3146, 3311-3312; Peo. Exh. 32.) After the weapon was recovered, Cooksey said there was something he had neglected to tell the detectives about the gun. He said he had knowledge that the gun was the murder weapon, but he had been afraid to provide this information because he thought he might be implicated in the murders. (RT 3386-3387, 3418.)

A search warrant was served at Cody's home on April 6, 1993 at 5:00 a.m. A forced entry was made. Cody and five children came downstairs. Cody was carrying one of her children and a purse. The purse was taken from her. Inside was a Firestar nine-millimeter pistol. (RT 3028-3036; Peo. Exh. 30.) According to Cody, appellant gave her the gun two weeks before the shooting pursuant to her request.[29] (RT 2902-2904, 2919.)

On April 6, 1993, Deputy Sheriff Timothy Miley served a search warrant at the home of Dorneal Pirtle on El Segundo Boulevard. While conducting the search, Deputy Miley learned that Philip Cathcart lived in the apartment next door. A telephonic search warrant was procured for that apartment, and entry was made at about 7:30 a.m. Present in the apartment were Cathcart, Hargrave, and their child. (RT 3552-3555.) A loaded nine-millimeter Glock was found under the stove. Although there was grease, lint, and dust on the floor under the stove, the gun was clean. (RT 3556-3560; Peo. Exh. 26.) Also recovered in the apartment were two holsters, a separate nine-millimeter magazine, a loose

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28. Rojas said Cooksey gave him $250 for the gun. (RT 3466.) The gun was a black nine-millimeter, but he recalled that it had a silver design on the side, unlike People's Exhibit 32. (RT 3466-3468.) A week before Cooksey returned to get the gun, Rojas had taken the bullets out and given them to a friend. (RT 3455-3456.)

29. At the preliminary hearing, Cody testified that appellant gave her a gun for protection because he felt she needed it. She did not ask for a gun. (RT 2906.)

round, a piece of paper bearing the name of "Regis Thomas," documents containing the names of Cathcart, Hargrave, and Pirtle, and a loose round of ammunition. (RT 3330-3337, 3355, 3561-3566; Peo. Exh. 81.)

Deputy Brandenburg assisted in the search of Hargrave's apartment and spoke with Hargrave about appellant's presence at the apartment. (RT 3390-3392.) Deputy Brandenburg asked Hargrave if appellant had stayed at her apartment in the latter part of February. She said she was not certain of the number of days appellant had stayed, but that he had been there either several days or almost a week. (RT 3393-3394.) At trial, Hargrave testified that appellant frequently visited the apartment, but she denied telling Deputy Brandenburg that in the latter part of February, 1993, appellant stayed with her and Cathcart for a number of days. (RT 3318, 3323, 3338-3339.)

(4) Medical And Firearms Evidence

The following guns were missing from Active Sports gun shop in Las Vegas, Nevada, after a burglary: a nine-millimeter Glock model 19, serial number ACA672US; a Lorcin .380, serial number 100806; a nine-millimeter Interarms Firestar, Model M43, serial number 2022532; and a nine-millimeter SIG Sauer, Model 226, serial number U438901. (RT 1682-1700; Peo. Exhs. 25-32.) The guns were missing from the store after a burglary, occurring between the time the shop closed on February 8, 1993 and the time it reopened on February 9, 1993. (RT 1701-1703, 1706-1709.) These guns were the Firestar located in Cody's purse (RT 3033-3036; Peo. Exh. 30), the Lorcin found upon Cooksey's arrest (RT 2764-2769, 3116-3117, 3120-3121, 3188; Peo. Exh. 28), the Glock found under the stove in Cathcart's apartment (RT 3556-3560; Peo. Exh. 26), and the SIG Sauer recovered by Cooksey (RT 2861-2864, 3313-3314, 3528-3529; Peo. Exh. 32). The cartridge casings found at the scene were fired from the SIG Sauer. The bullet discovered at the scene could have also come from the same gun. (RT 2793-2800, 3669-3673; Peo. Exhs. 32,

72.) The Lorcin, Firestar, and Glock guns could not have fired the casings in this case. (RT 3690-3692.)

Officer Burrell died of multiple gunshot wounds. (RT 3577.) He suffered a gunshot wound to his arm (gunshot wound number one), face (gunshot wound number two), left foot (gunshot wound number three), and head (gunshot wound number four). (RT 3573-3578, 3583-3584; Peo. Exh. 83.) He would have survived for seconds or minutes. (RT 3607.)

Gunshot wound number one entered the front of the right arm toward the armpit, traveled downward through the arm bone, lacerating the artery which supplied blood to the arm and hand, and exiting from the inside back part of the right upper arm. A piece of lead was recovered from Officer Burrell's right upper arm. This wound would have rendered the arm useless. (RT 3579-3583, 3583-3585, 3596-3597, 3601-3604, 3629-3630; Peo. Exhs. 83-86, 91-94, 99.) Laceration of the artery was potentially fatal, as was the extensive tearing of bone and muscle tissue which would have resulted in the loss of blood into the arm. (RT 3591.) The nature of the injury would be consistent with the wound being received while Officer Burrell was reaching for his weapon with the shooter directly in front of him, or with the officer in the process of buckling over. (RT 3586.) The presence of gun residue on Officer Burrell's jacket demonstrated that the gun which inflicted this wound was fired from a distance between two and three feet. (RT 3686-3688; Peo. Exh. 92.)

Gunshot wound number two entered the chin below the lip, passed through the jaw bone, and exited through the underside of the chin. The projectile then reentered above the left collarbone, severing a vein which brings blood to the heart. The bullet was recovered in front of the outside part of the left shoulder blade near the inside of the left armpit. This wound was potentially fatal because of the laceration of the vein. The path of the projectile demonstrated that Officer Burrell was bent forward toward the shooter at the

time the wound was received. (RT 3580, 3586-3591, 3596-3604; Peo. Exhs. 83-88, 91-94.) The bullet could have come from the SIG Sauer. (RT 3679-3680; Peo. Exhs. 32, 87.) The presence of gun residue on Officer Burrell's jacket demonstrated that the gun which inflicted this wound was also fired from a distance between two and three feet. (RT 3686-3688; Peo. Exh. 92.)

Gunshot wound number three entered the sole of Officer Burrell's right foot. It traveled through the ankle area and exited through the front of the lower leg just above the ankle. A projectile had been removed from Officer Burrell's left boot area at the hospital. This wound could be consistent with Officer Burrell lifting his foot while on the ground. It would not have been a fatal wound. (RT 3580-3581, 3591-3593, 3596-3597, 3605-3607, 3613-3614; Peo. Exhs. 83-86, 91, 95-96.) The bullet could have come from the SIG Sauer. (RT 3680; Peo. Exhs. 32, 96.)

Gunshot wound number four entered the top of the head. When it hit the top of the skull, the bullet broke into pieces. Once piece traveled to the right and exited the skull. The other piece went downward into the brain, inflicting a fatal wound. (RT 3580-3581, 3593-3597; Peo. Exhs. 83-86, 89-91.)

A piece of lead was recovered from Officer Burrell's t-shirt during the autopsy. (RT 3629; Peo. Exh. 98.)

Officer MacDonald also sustained four gunshot wounds. He died of a gunshot wound to the chest. (RT 3614-3615; Peo. Exh. 97.) He received gunshot wounds to the left armpit area (gunshot wound number one), the middle back (gunshot wound number two), the upper back (gunshot wound number three), and behind the right ear (gunshot wound number four). (RT 3615-3616.) Officer MacDonald was pronounced dead approximately one and one-half hours after the shooting. (RT 3649.)

Gunshot wound number one entered the left armpit area just behind the left breast and exited the left lower back. It collapsed the left lung and damaged

many other vital organs and was a fatal wound. The bullet lodged in the back plate of Officer MacDonald's bullet proof vest. The trajectory of the bullet was consistent with Officer MacDonald leaning forward and reaching with his left shoulder toward the shooter. (RT 3616-3617, 3630-3632, 3640, 3644-3647, 3675-3677; Peo. Exhs. 97, 100, 104-107, 110.) The bullet could have been fired from the SIG Sauer. (RT 3677-3678; Peo. Exhs. 32, 109.)

Gunshot wound number two was a hole below the left shoulder blade in the middle back area. The shot came from the rear. The bullet deformed the back plate of the bulletproof vest, but did not penetrate the skin. This wound would have been consistent with Officer MacDonald having his back to the shooter. A bullet was recovered from the vest. (RT 3617-3618, 3632-3633, 3640-3641, 3643-3644, 3646, 3648, 3675-3676; Peo. Exhs. 97, 100, 104-107, 109.) This bullet probably came from the SIG Sauer. (RT 3678; Peo. Exhs. 32, 110.)

Gunshot wound number three was possibly fatal and entered the area above the left shoulder blade near the base of the neck and back. It traveled sharply upward, stopping in the upper part of the throat area. The bullet was recovered. The trajectory was consistent with Officer MacDonald having his back to the shooter and either falling or already down. (RT 3617, 3624-3625, 3633-3638, 3640, 3642-3643, 3646-3649; Peo. Exhs. 97, 101-107.) The bullet could have been fired from the SIG Sauer. (RT 3678-3679; Peo. Exhs. 32, 101.)

Gunshot wound number four entered the base of the right ear, also contacting the surface of the ear. It tunneled underneath the cheekbone and exited through the cheek. The exit wound was "shored," meaning that the skin was against another surface, such as the pavement or sidewalk, at the time the bullet went through. There was bruising to the right side of the face caused by ricochet fragments, also indicating that Officer MacDonald's right cheek would

have been against a surface when he received the wound. There was stippling around the entrance of the bullet wound, indicating that the range of fire would be less than one foot. The wound was consistent with Officer MacDonald laying face down on the pavement, and the shooter standing over him and firing into the back of his head. (RT 3617-3624, 3638-3640, 3680-3686; Peo Exhs. 97, 104, 111.)

2. Defense Evidence

a. Murder Of Carlos Adkins

At the time of his death, Adkins's blood-alcohol level was .086 percent. His blood also contained .130 micrograms per milliliter of phencyclidine ("PCP"). Most people have some impairment of motor abilities and judgment at a blood-alcohol level of .086 percent. A PCP level of .130 is very high. It is associated with rigidity in muscle movements, decreased sensation, posturing, bizarre behavior, unpredictability, agitation, and coma. Unless a person was a chronic user of PCP and had an enormous tolerance, it would be unlikely that he would be capable of playing chess.[30] (RT 3747-3750.) There is tremendous variability in impairment, but PCP has in general higher levels of impairment at higher doses. (RT 3758.)

b. Murders Of Officers Kevin Burrell And James Macdonald

According to February 22 log entries, Officer Metcalf arrived at 906 Willowbrook at 9:55 p.m. and left at 10:10 p.m. He left the Willowbrook location and proceeded to Mahalo, arriving at 10:14 p.m. He left that location at 10:45 p.m. He saw Officers Burrell and MacDonald there. Officer Metcalf's

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30. Officer Benedict did not smell or see any signs of PCP use in Chappell's apartment. (RT 1467-1469.)

log then indicates he arrived at Wilmington and Walnut at 10:50 p.m. He arrived at 137th and Grandee at approximately 11:04. He saw Officers Burrell and MacDonald at that location. The last time he saw the officers was at Stockwell and Wilmington. The last log entry for Officers MacDonald and Burrell was for 11:05 p.m. on North Culver. (RT 3788-3793, 3842-3848; Peo. Exh. 61; Def. Exhs. H, W, MM, NN.)

On February 24, 1993, Compton Police Officer Arnold Urias Villaruel saw a truck with a license plate number of 4J88557 at 113th and Parmelee. (RT 3822-3823; Peo. Exh. 24.)

Alicia Jordan was shown a photographic lineup on April 20, 1993, which contained appellant's photograph. (RT 3866.) At the time, she was uncooperative. She glanced at the photographs and said she did not want to look at them. (RT 4000-4001.) On July 10, 1993, Alicia Jordan said she could not get a good look at the driver of the red truck because the windows were tinted.[31] (RT 3905-3906.)

Los Angeles County Sheriff's Department Senior Criminalist Giselle Lavigne tested the SIG Sauer for blood, but found none. (RT 3879-3882; Peo. Exh. 32.) She did find a hair at the front site. The hair was not similar to the hair of Officers Burrell or MacDonald. No hair sample was requested from appellant. (RT 3853, 3883, 3893-3894.)

On March 6, 1993, Los Angeles County Sheriff's Department Criminalist Lynne Denise Herold examined the curb on Rosecrans Boulevard for contact by a vehicle. There appeared to be a swipe mark on the side of the curb. On March 12, 1993, she again examined the curb in a different location for transfer materials. She took one cement sample and four paint samples. She also examined a vehicle with license plate number 4J88557. She found no

31. This occurred during a reenactment. At that time, Jordan was uncooperative and would not talk to Detective Bumcrot. (RT 4002.)

significant damage consistent with a transfer of metal onto a curb. (RT 3885-3892; Peo. Exh. 24; Def. Exhs. OO, PP.)

B. Penalty Phase

1. Prosecution's Evidence

a. Other Offenses

On March 20, 1995, appellant was convicted of being a felon in possession of a firearm and carrying a loaded firearm in a vehicle, an incident different than the charges in the instant case. (RT 4559; Peo. Exh. 119.)

On February 16, 1990, Los Angeles Housing Authority Police Officer Steven Judd was on patrol in Nickerson Gardens with his partner, Officer Victor Bonner. (RT 4457-4460.) At 12:50 a.m., he noticed a vehicle make a u-turn and then stop in the middle of the street. Officer Judd saw a male standing on the north side of the street. The man approached the driver's side of the vehicle. As the officers neared the vehicle, the person who had been standing at the driver's side door ran. The vehicle then continued to travel southbound. Officer Judd activated his emergency lights. The vehicle picked up speed and turned into a parking lot almost in front of 11320 Success. (RT 4460-4465, 4474-4475; Peo. Exh. 114.)

Appellant swung open the door and jumped out of the vehicle. He waived his arms and yelled, "What are you stopping me for?" Officer Judd observed a dark object in appellant's right hand. Appellant began walking toward the police car. Officer Judd asked appellant what was in his hand, and appellant responded that it was his pager. Appellant dropped the pager as instructed. Appellant seemed agitated, and he was waiving his arms. Officer Judd crossed between the cars and positioned himself between appellant and his partner. As Officer Judd got close, appellant reached around the back part of

his waistband and brought his left arm out real fast toward the side of Officer Judd's head. Officer Judd smacked appellant's hand away and saw that the object in his hand was a wallet. (RT 4465-4467, 4475-4476; Peo. Exh. 114.)

Officer Judd instructed appellant to put his hands behind his back, but appellant did not comply. He took a couple of steps backward and then began to run. Officers Judd and Bonner chased appellant while radioing for assistance. (RT 4468-4470.) Officer George Holt, who was working with Officers Alexander and Staal, heard the broadcast and headed toward Officer Judd's location. He saw Officer Judd chasing appellant. (RT 4481-4482.) While he ran, appellant reached inside the front part of his waistband. Officer Judd yelled that appellant was "going for" his waistband. Officer Judd lost sight of appellant. (RT 4470-4471.)

Officer Holt saw appellant run around a corner toward him. He and the other officers exited their car. Appellant reached into his waistband and threw an object. Officer Holt ordered appellant to lay on the ground, and he complied. As Officer Holt began to handcuff him, appellant resisted and fought. (RT 4482-4486.)

When Officer Judd again saw appellant, he was struggling with Officers Holt and Alexander. He was rolling on the ground, kicking and hitting the officers, and they were having a hard time controlling him. Officer Judd attempted to assist and was struck by appellant in the right eye. Appellant struck Officer Holt in the lip. (RT 4472-4473, 4486-4488, 4490-4491; Peo. Exh. 115-116.) Appellant was finally taken into custody. A loaded handgun was found in the flower bed in front of the unit where appellant had been when he threw the object. (RT 4489.)

b. Victim Impact Evidence, Carlos Adkins

Willie Mae Adkins was Carlos Adkins's mother. Adkins was born in

1942 and was one of seven children. Adkins grew up "mostly in Nickerson Gardens," with her and his father, Henry Adkins. Adkins still visited her almost every day. Adkins was interested in animals. He raised birds and kept fish. He had four children, who loved him. He was a good father. Adkins helped Mrs. Adkins with household chores. He would wash dishes or "anything." Prior to his death, Adkins was attending college in Long Beach and studying architecture. (RT 4500-4506.)

Mrs. Adkins last saw Adkins on January 31 when he left her house to go to school. Mrs. Akins received a call from someone in the "projects" advising her that Adkins had been shot. Mrs. Adkins went to Martin Luther King Hospital where she discovered that he was dead. (RT 4504-4505.)

Since Adkins's death, Mrs. Adkins has had trouble remembering things. She was hospitalized for two or three months and had a nervous breakdown. Holidays had changed for her, and she preferred to stay at home. If she could tell Adkins one more thing, it would be that she missed him. (RT 4505-4508.)

Dalicia Adkins, Adkins's daughter, was 22 years old. The family was close and spent one night of each week in a family activity, such as going to a movie. Dalicia had a baby, and when the apartment of her own did not "work out," she moved back home to live with her mother and Adkins. (RT 4508-4511.) Every day, Adkins would cook breakfast and then go to school. Every night, he came home. The night he was killed was his birthday. The family had dinner and a cake ready for him, but he did not appear. Adkins was an architect. He loved painting, drawing, and other types of art. Dalicia called him "Santa Clause" because he made sure that his family and friends had Christmas trees. He would also paint windows for Christmas. (RT 4512-4514.)

Since her father's death, Dalicia has been nervous and has had nightmares. She feels scared and lonely. (RT 4515-4517.)

c. Victim Impact Evidence, Officer James MacDonald

James ("Jimmy") MacDonald was the son of James and Tonia MacDonald. Jimmy was born on November 4, 1968, and he had one brother, John. (RT 4519.) The family was very close, and John and Jimmy were best friends. The family spent weekends and vacations together. Jimmy was athletic. He played football, basketball, baseball, and he swam. He was an "all-league" quarterback for his high school football team and was on the All Star Team. Jimmy went to college at Long Beach State University, graduating with a major in communications and a minor in criminal justice. He had wanted to be a police officer for many years. He had a knack for helping people and traveled to elementary schools to talk about staying away from drugs. (RT 4520-4522, 4529, 4545.)

When he graduated from the Police Academy, Jimmy told his parents that he planned to become a reserve police officer with the City of Compton. Jimmy wanted to work in Compton because he said the people of Compton were good people and treated him well. (RT 4523-4525.) He worked two shifts a month for free. If he worked additional hours, he received $10 per hour. Jimmy shared a house with his college friends in Long Beach. He planned to start working with the San Jose Police Department on March 8, 1993. He was elated. (RT 4530-4531.)

The last time Mr. and Mrs. MacDonald saw Jimmy was in January, 1993. Jimmy had gone home to take his physical examination with the San Jose Police Department. He had rented a house in San Jose and had moved in his things and was preparing the house to move in. Mr. MacDonald tried to talk him into staying in San Jose, but Jimmy said he needed to return to Compton to work two remaining shifts. (RT 4533-4534, 4553-4554.)

The Compton Police Department called Mrs. MacDonald and told him Jimmy had been shot. (RT 4534.) Mr. MacDonald was told that Jimmy was

in surgery and was doing fine. Mrs. MacDonald was spending the night at her sister's house, about an hour and a half from Santa Rosa, and Mr. MacDonald went to get her. When they returned, Mr. MacDonald called the Compton Police Department to see how Jimmy was doing. He was told that Jimmy was still alive and that a Santa Rosa Police Officer would come and take them to the airport. When the officer arrived, he said they needed to wait for another police officer. When the other police officer arrived, he told Mr. and Mrs. MacDonald that their son was dead. (RT 4534-4535.)

Mr. and Mrs. MacDonald were taken to the airport, and they flew to Los Angeles. They were unable to see Jimmy because the coroner had picked up his body. After about a week, his body was flown home and services were held in Santa Rosa. (RT 4537-4538, 4552.) A memorial service conducted by the City of Compton was held at Dominguez College, and on the one-year anniversary of the deaths, a candlelight vigil was held. (RT 4541.) Mr. and Mrs. MacDonald had traveled to Washington D.C. and to Sacramento for services for policemen killed in the line of duty. Jimmy's bedroom was been turned into a memorial, filled with plaques, and special flags. (RT 4542.)

Mr. MacDonald went to the cemetery every morning at 7:00 a.m. to talk to Jimmy. (RT 4538.) Every time he saw a police car making a traffic stop, he would feel sick. Some of Jimmy's high school friends started a memorial fund for people graduating from high school and going into law enforcement. Every year, there is a softball tournament to raise money for a scholarship fund. (RT 4540-4541.) If Mr. MacDonald could talk to Jimmy one more time, he would trade places with him and tell him to go home. (RT 4543.)

Mrs. MacDonald described Jimmy as playful. She said holidays were special in the MacDonald household, and when Jimmy moved away to attend college, Mrs. MacDonald missed him before he left. (RT 4546-4547.) Jimmy always wanted to work with people. When Mrs. MacDonald learned that

Jimmy had been accepted by the Compton Police Department she was proud, but also afraid. She did not try to talk Jimmy out of the job because it was what he wanted to do, and she knew he would be a good policeman. Jimmy was disappointed that he had not been hired by the Compton Police Department. But the family was also excited that Jimmy would be closer to home. (RT 4547-4549.)

John and Jimmy were very close. When John got married, Jimmy was in the wedding party. John's daughter was born three weeks after Jimmy died. Jimmy would go home quite often. He was home for holidays and would go home whenever he had time off of work. (RT 4549-4551, 4554.)

On the night Jimmy was shot, Mrs. MacDonald was at her sister's house. She heard her husband knocking at the door. She opened the door, and asked her husband what was wrong. He started crying and told her Jimmy had been shot in the face. Mrs. MacDonald got dressed and they left. Mrs. MacDonald prayed that if her son were to die, she would get there in time to say goodbye. She found out that he was dead around 3:30 a.m. She was angry at God. (RT 4551, 4552.)

Mrs. MacDonald would go to the cemetery twice a day. When Jimmy first died, the pain she felt was physical. She thought that if it had not been for her son John and his family, she and Mr. MacDonald would not be around today. At the time she testified, the pain was no longer physical, but the mental pain was just as strong. Jimmy was a part of her, and she felt he had taken a part of her heart with him. If she could speak to him one more time, she would tell him she missed him, she was proud of him, and she loved him. (RT 4555-4556.)

d. Victim Impact, Officer Kevin Burrell

Kevin Burrell's father, Clark Burrell, testified that Kevin was 29 years old at the time of his death. His birthday was May 5, 1963. Kevin was one of

seven children, six boys and one girl. (RT 4560-4561.) Kevin had one son, Kevin, Jr. (RT 4573-4574.)

Kevin grew up in Compton, about eight blocks from where the shooting occurred. He graduated from Compton High School. Mr. Burrell was close to his son. Mr. Burrell was a plumber, and Kevin would help him. The family would go to Compton High School to watch ball games. Kevin wanted to be a policeman from the time he was four or five years old, and he was an "Explorer" as a teenager. As he got older, Kevin said he wanted to be a police officer because he had seen a lot of kids go "down the wrong road." He helped quite a few of them turn their lives around. When he graduated from the Police Academy, Mr. Burrell was very proud and encouraged him. (RT 4562-4566.)

Kevin lived with another police officer in Paramount, but he still came home to visit almost every day. If he was on duty, he would drive by and "toot" his horn. When Kevin came to visit, they would play dominoes and talk about Kevin's job. (RT 4566-4567.)

The last time Mr. and Mrs. Burrell saw Kevin was the day he was killed. He and Jimmy had come by for dinner. (RT 4568-4569, 4584, 4585.) That night, Mrs. Burrell had been listening to the police scanner. She had also heard the shots being fired because she did not live far from the location. She knew where Kevin worked and believed "it was Kevin." (RT 4585, 4587.) A police officer knocked on the door and told Mr. and Mrs. Burrell to get dressed and accompany them to the hospital because Kevin had been shot. Mrs. Burrell could do nothing but scream. By the time Mr. and Mrs. Burrell got to the hospital, Kevin was dead. (RT 4569-4570, 4585.) February 23 was Mr. and Mrs. Burrell's wedding anniversary, and February 24 was Mr. Burrell's birthday. Mr. Burrell asked God what he had done to deserve such a thing. (RT 4570-4571.)

Mr. Burrell had been to the cemetery to visit Kevin once. He could not

stand to go back again. Mr. Burrell frequently drives by Rosecrans and Dwight. He sees flowers and a plaque there. He thinks about the time he had with his son. (RT 4571, 4574-4576; Peo. Exh. 121.) The pain of Kevin's death had not diminished. Mr. Burrell had stopped doing many of the things he used to do, such as going to the coffee shop and doing odd "side jobs." Plaques and mementoes of Kevin are hung in the wall of the dining room. Mr. Burrell does not want anyone to forget Kevin. If Mr. Burrell could talk to Kevin again, he would tell him to always stay ready and not to take chances. Mr. Burrell did not know why Kevin was not "ready" that night. (RT 4576-4578.)

Mrs. Burrell and Kevin had a very loving relationship. She and Kevin did many things together. Kevin once took her to Las Vegas to see her other son perform with Gladys Knight. Kevin was a basketball player at Dominguez College, and she would watch him play basketball there. From the time he was 14 or 15 years old, Kevin was always at the police department. Kevin had always wanted to be a police officer and to help people. He traveled to schools to talk to the children about drugs. Mrs. Burrell was proud of him. (RT 4580-4583.)

Mrs. Burrell suffered anxiety attacks. Sometimes she could not leave the house. She felt like a part of her was gone. Mrs. Burrell would tell Kevin she was proud of him, she loved him, and that although he was "with the Lord," she missed him. (RT 4587-4588.)

2. Defense Evidence

Deshaunna Cody Thomas met appellant in 1983 at a football field. They had six children together: Cherish, Regis, Tristin, Monaisha, and twins Mya, and Mea. Three were born when appellant was in jail. (RT 4604, 4610-4611; Def. Exhs. RR, TT.) Cody worked at Los Angeles Unified School District cafeteria, and the children were either in school or day care. (RT 4607.) Cody

and appellant married in May, 1993 in the county jail. (RT 4614.) Appellant was a good father. He disciplined the children well. He would talk to them on the telephone, or she would take them to see him. After conversations with him, the children would "shape up." The children would ask for appellant, but Cody had not told them that he was not coming home. Cody accepted the jury's verdict. However, she needed appellant's assistance in raising the children. (RT 4605-4607, 4614.)

Appellant was a good husband to her. He had never been abusive. She and appellant would write to each other. Appellant sent cards and letters to the children. Cherish was old enough to write letters, and she wrote to appellant. (RT 4608-4609; Def. Exh. SS.)

Cody was aware that appellant had a three- or four-year-old child with Kawaska Jackson and a six-year-old child with Latonya Morris. Cody was also aware that appellant had two other daughters with two other women during the course of their relationship, but she did not know the names of the children. (RT 4612, 4625-4627.)

Kim Graham was a preschool teacher and appellant's neighbor in San Pedro from 1991 until the time of his arrest. Graham was at appellant's house three or four times a day. She saw appellant interact well with his children. Graham had spoken with appellant on the telephone while he was in jail, telling him to "keep the faith." When the verdict was returned, Graham consoled Cody. She also talked to appellant's son, Reggie. Reggie said that appellant was never coming home. Graham told him to have faith. (RT 4685-4690.)

Kawaska Jackson coached basketball at Leusinger High School in Lawndale. She met appellant in Nickerson Gardens in 1982. (RT 4634.) She had a relationship with him from 1988 to 1991. As a result of that relationship, she had a three-year old son named Deon. Deon was having behavior problems, and appellant would talk to Deon on the telephone. (RT 4635-4636.)

Jackson's mother approved of appellant because she knew appellant's mother and knew that appellant was not abusive. (RT 4637-4638.) Jackson did not know appellant to be a violent person. Deon saw appellant on television and wanted to go "get" him. Jackson told Deon that appellant was not coming home, but he had not accepted that. Jackson took Deon to jail to see appellant. There was a glass partition, and they could not touch each other. (RT 4640-4644.)

Jackson said appellant had respect for the elderly and for women. He would help older ladies in the projects with their groceries and trash. (RT 4641-4643.) On Valentine's Day in 1989, appellant gave her a ring. (RT 4643.) Jackson knew appellant had several other children with Cody. She got along well with Cody and would attend birthday parties for all the children. (RT 4643-4644.)

Appellant was born on June 16, 1970, in Phoenix, Arizona when Iris Thomas, his mother, was 16 years old. His father was Edward Charles Armstrong. (RT 4698-4700.) Appellant did not know his father. Appellant had two younger sisters and two younger brothers: Cornelius, Thurston, Ayana, and Dorshunda. Dorshunda was nine years old. The boys's father was Thurston Stewart. He never lived with them. (RT 4704, 4724-4725.)

Mrs. Thomas moved to Los Angeles in 1971 and received a business degree from Sawyer's College. She became a stock clerk at Sears and then worked as a quality control inspector at Norris Industries, where she met Riley. (RT 4701-4702.) Mrs. Thomas bought a house on 96th Street and Normandy in 1976 and lived there for 11 years. She lost the house in 1983 and moved into an apartment. She then moved into an apartment with her aunt, Eva Hunter, in Nickerson Gardens. Appellant was bused to schools in Encino, and dropped out of school in the 11th grade. Appellant was picked on because he was small. He fought almost every day with someone in the projects. (RT 4705-4710.)

Appellant would perform chores, such as watching his little sister, cooking, and washing dishes. Mrs. Thomas considered appellant both her son and brother because they grew up together. (RT 4709-4710.)

Mrs. Thomas had been addicted to cocaine since 1976. (RT 4714.) Appellant became aware of the problem when Mrs. Thomas left the house for a week after having her daughter. He told her not to ever leave like that again, and, in 1990, he told her he wanted her to stop using cocaine. (RT 4714-4716.) He got frustrated with Mrs. Thomas, and he got a little "meaner." He did not feel anyone loved him. Two years prior to the trial, Mrs. Thomas spent $300 to $400 per day on cocaine. Conrnelius was in prison. Thurston had a home, but he did not want Mrs. Thomas to know where he lived because she talked too much. She has spoken with appellant and told him to stay strong. Without appellant, she might as well die. (RT 4716-4718, 4722, 4725.)

Eva Hunter, appellant's aunt, took care of appellant while Mrs. Thomas went to school. Appellant moved from her home when he was approximately four or five years old. They would attend church together, and appellant was in the "pastor's choir." (RT 4832-4835.) Appellant believed in helping people. She saw appellant on a regular basis in the months before his arrest. He would stop by her house and help her out. Appellant would give Hunter money to feed the homeless. He would give advice to people. Appellant helped Hunter with her foster children. (RT 4834-4837.)

Willie Riley had a relationship with appellant's mother. He moved into her home and acted as appellant's father figure when appellant was ten years old. Before that time, no father had been in the home. Appellant rejected Riley when he first moved in. Riley was a disciplinarian and would "whip" the children when they did something wrong. Eventually, they "grew on each other." (RT 4662-4666.) Riley and appellant would play sports, go to the park, and go camping. Appellant helped with chores. (RT 4667-4668, 4672.)

Appellant would take care of the smaller children in the house. (RT 4668-4669, 4672.) He was eager to learn. He got along with Riley's son, Willie, Jr., "like a brother." (RT 4669.) Riley remained in the household for two years. His relationship with appellant's mother ended, partly due to her narcotic addiction, and he moved out. (RT 4671, 4674)

Sheila Nelson, appellant's aunt, had known appellant since birth. Nelson lived with Mrs. Thomas from 1973 to 1975 and again in 1983 for about a year. Appellant was very protective of his siblings and of Nelson's three children as well. Nelson said that when Riley left the home, there was no one there for appellant. (RT 4727-4731.) Appellant would be angry when a lot of people were at the house getting "high." Appellant and Mrs. Thomas fought, and appellant hit the television. He left crying. There were times when the utilities were turned off. Appellant would tell Mrs. Thomas to "stop getting high and pay the bills." (RT 4732-4734.)

Appellant helped others. He gave money to Jackson's mother and helped her move. He helped other people move as well. He would give children money for the ice cream truck and play with them. When a neighbor broke an arm, appellant helped him. He helped a cousin with her chemotherapy medication. He told a little boy to stay in school. He would give food to homeless people. (RT 4734-4738.)

Daniel Wells was Eva Hunter's 16-year-old foster son. (RT 4763-4764, 4838.) He had been placed with Hunter approximately four years earlier. Wells had a physical disability and had difficulty speaking, walking, and talking. Appellant helped Hunter take Wells to the doctor when he had foot surgery. Appellant also befriended him and would play with him. (RT 4838, 4763-4766.) Appellant would stick up for him and tell other people not to make fun of him. (RT 4767.) He wanted appellant to continue to live so they could remain friends. (RT 4768.)

Another cousin, Patricia Mosley, lived in the same household as appellant in Nickerson Gardens in approximately 1983. She had always been close to him, and he was her favorite cousin. Ten years previously, appellant was upset that his mother was using drugs. He talked to Mosley, and she tried to calm him down. When appellant was in junior high school, he went with Mosley to her college orientation at California State University, Long Beach in 1984. Appellant said he wanted to go to college. She told him he had to finish school. Mosley saw appellant with his children. He would talk to them, play with them, and discipline them. (RT 4753-4758.)

Katherine Mosley was close to appellant, her cousin. Appellant was the "big brother type." Katherine lived in the same household with appellant for a time. He got along well with his siblings. Appellant would stop the younger ones from arguing. Appellant was also close with Katherine's three children, he was respectful of others, and was giving and friendly. He always appeared at family gatherings. He loved children and would play with them and try to teach them what was right. If given the opportunity, appellant could still provide guidance, support, and love to his family. (RT 4770-4775.)

Michelle Ridmaden, appellant's cousin, had been in treatment for cancer for four years. She had known appellant since he was a small child. Appellant helped her when she needed him. At a time when Ridmaden did not want to fight the cancer any longer, appellant told her she had to be strong because she had a son and family to live for. His support had helped her. (RT 4812-4816, 4840.)

Sabrina Thomas, Sheila Nelson's daughter, had lived in the same household as appellant for two years at one point and another two years at another point. Appellant was her big brother, cousin, and friend. She could rely on him. When Sabrina had difficulties with her mother and was skipping school, appellant encouraged her to graduate. Appellant was never

disrespectful of his mother; he was protective. (RT 4819-4822.) There was a carnival in Nickerson Gardens every year around Halloween to benefit the children, and appellant participated and worked at the carnival. (RT 4823.)

ARGUMENT

ISSUES RELATING TO JURY SELECTION

I.

THE USE OF JUROR NUMBERS DID NOT RESULT IN AN ANONYMOUS JURY SUCH THAT APPELLANT WAS DENIED HIS RIGHT TO A PUBLIC TRIAL OR TO THE PRESUMPTION OF INNOCENCE

Appellant contends that the use of juror numbers during trial without sufficient justification resulted in a violation of his right to the presumption of innocence and the right to a public trial. (AOB 42-55.) He complains that the use of juror numbers created the impression that he was someone to fear and that he could not be trusted with the jurors' names. (AOB 46-50.) Respondent submits that the use of juror numbers in this case did not deprive appellant of a public trial nor did it effect the presumption of innocence because the jurors' names were provided to the parties, and the jurors were well aware of this fact.

A. Relevant Proceedings

During discussions relating to jury selection, the prosecutor requested that the jurors not be referred to by name, but rather by number. The prosecutor explained that an incident had occurred in which a witness had to move and change her job because she was being harassed. The prosecutor further explained that two significant witnesses had received threats relating to their testimony, and one witnesses, Margarita Gully, received a telephone call in which a man offered her $14,000 not to testify. The prosecutor was concerned

that if the jurors were referred to by name, and if they entered and exited the courtroom with spectators present, there was a significant possibility that someone would attempt to contact jurors and bribe them. (RT 69, 131-135.)

Defense counsel objected both to an anonymous jury and to having the jury use a different elevator, arguing that "it is fraught with problems in terms of their perception of the danger posed to them." (RT 133-134.)

The trial court planned to deal with the hardship requests and then number the remaining jurors, providing the parties with a corresponding index of the names. (RT 136-137, 471-472.)

Immediately prior to jury selection, the prosecutor renewed his request to use juror numbers. (RT 436.) Defense counsel renewed his objection. (RT 437-438.) The trial court stated:

> Each of you have the questionnaires with the names of the jurors. It's not a situation wherein I have just given you numbers and it's completely anonymous. [¶] Therefore, out of an abundance of caution or based on the representations of [the prosecutor], I'm going to find that there is justification for using numbers seating the jurors.

(RT 438.)

Pursuant to defense counsel's request, the trial court agreed to inform the jurors that the numbering system would be used for their own privacy due to the media attention. The jurors would further be informed that they would not be photographed. (RT 440.) The parties agreed that the jurors should be advised to inform the judge if they were contacted by anyone, including the defense, the prosecution, or the media. The prosecutor renewed his request to have the jurors use the back elevator, but the trial court denied the request. (RT 462, 467-469.)

During jury selection, the potential jurors were, in fact, referred to by number. (RT 479-480.) The jury pool was advised as follows:

> Initially, I want to explain to you the reason we're going to use the numbers is there has been some media request.
>
> One is to -- I don't know whether it will or will not happen -- set up a camera. Maybe come in and record or to view some of the presentation of the case and what have you.
>
> The understanding will be that if the media, if I do permit them to bring in a camera . . . no jurors will be photographed. So and out of an abundance of caution, we have given you numbers, also, so that they're not familiar with your names. The lawyers know your names because of going through the questionnaire[s] . . . .
>
> One thing that I want to emphasize to you. If anybody contacts you, let me know.
>
> When I say "anybody," I mean the media, anybody that may be involved with the defendant or defense or anybody that may be involved with the prosecution or witnesses in the case.

(RT 482.)

B. Appellant's Constitutional Rights Were Not Implicated By The Use Of Juror Numbers Because The Jury Was Not Anonymous

In *People v. Goodwin* (1997) 59 Cal.App.4th 1084, the trial court referred to potential jurors by number rather than by name. The procedure was for the convenience of the court reporter, who, in compliance with an administrative memorandum of the Los Angeles Superior Court, would otherwise have to redact juror names from the transcript after the jury's verdict. In rejecting the defendant's complaint that he was tried by an anonymous jury, the court in *Goodwin* stated:

> The names of the jurors were not recorded in the reporter's transcript, but the names were nonetheless available to the court and counsel.

> Since the jurors' names were known to the court and counsel, the jurors were not anonymous.

(*Id.* at p. 1090.) The court held:

> We find that, although the jurors' names were not stated aloud in court and thus not transcribed into the record, the court and counsel had available to them a list with the prospective jurors' names and corresponding identification numbers, and that the procedure employed did not violate any legislative proscription, nor deny appellant his constitutional right to a public trial.

(*Id.* at p. 1087.)

By the same token, the trial court's practice in this case of referring to jurors by number rather than by name did not violate appellant's constitutional rights. The trial was open to the public. Prior to jury selection, the parties were provided with jury lists and were well aware of the jurors' names. Likewise, the jurors were aware that the parties knew their names. (RT 479-482.) In addition to the trial court's remarks that the attorneys knew their names, the parties occasionally used a juror's name rather than the juror's assigned number. (See RT 555, 604.) The fact that appellant's jury was *not* anonymous distinguishes this case from those cases relied upon by appellant where the trial court needed to justify empaneling an anonymous jury. (See AOB 45-50; *United States v. Kraut* (5th Cir. 1995) 66 F.3d 1420, 1426, fn. 5; *United States v. Ross* (11th Cir. 1994) 33 F.3d 1507, 1519; *United States v. Thomas* (2d Cir. 1985) 757 F.2d 1359, 1363; *United States v. Melendez* (E.D.N.Y. 1990) 743 F.Supp. 134, 137-139 [on facts of the case, complete anonymity not required, although court determined that withholding of first names, exact addresses, and other identifying information was appropriate]; *State v. Accetturo* (1992) 261 N.J. Super. 487, 488-494 [619 A.2d 272].)

Appellant claims that *Goodwin* was erroneously decided. (AOB 48.)

He argues that the court did not take into consideration the effect on due process of the jurors' belief that their names are secret from the defendant and the public. He reasons that "[f]rom the jurors' perspective, they are wholly anonymous, safe from retaliation and influence by the 'dangerous defendant.'" (AOB 48.) However, because the jurors in the instant case were aware that the parties knew their names, there was no reason for them to believe that the use of numbers was related to appellant's dangerousness such that the presumption of innocence was affected. Under these circumstances, the trial court's explanation that the procedure was used to provide some protection from the media was plausible. Additionally, as the *Goodwin* court noted in response to the defendant's argument that protecting the jurors weakens juror accountability, "it can be just as logically argued that protecting juror identity encourages jurors to act without fear and to proceed on the courage of their convictions." (*People v. Goodwin, supra,* 59 Cal.App.4th at p. 1091, fn. 3.)

In any event, if any justification was called for in this case, the record supports the conclusion that the trial court acted within its discretion in determining that the use of numbers was warranted. (*United States v. Kraut* (5th Cir. 1995) 66 F.3d 1420, 1427.) The Ninth Circuit Court of Appeals has determined as follows:

> The trial court may empanel an anonymous jury "where (1) there is a strong reason for concluding that it is necessary to enable the jury to perform its factfinding function or to ensure juror protection; and (2) reasonable safeguards are adopted by the trial court to minimize any rise of infringement upon the fundamental rights of the accused." [Citation.]

(*United States v. Shryock* (9th Cir. 2003) 342 F.3d 948, 971.)

In determining whether a court has abused its discretion in empaneling an anonymous jury, reviewing courts consider the evidence available at the time the jury was empaneled and relevant evidence introduced at trial. (*Ibid.*)

Courts have considered the following factors:

> (1) the defendants' involvement with organized crime; (2) the defendants' participation in a group with the capacity to harm jurors; (3) the defendants' past attempts to interfere with the judicial process or witnesses; (4) the potential that the defendants will suffer a lengthy incarceration if convicted; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.

(*Ibid.*)

Here, the prosecutor's reason for requesting the number system was to ensure that the jurors were not contacted because there had been attempts at interference with the judicial process. The prosecutor represented to the trial court that two witness had been threatened relating to their testimony and that Margarita Gully had received a telephone call in which a man offered her $14,000 not to testify. (RT 131-135, 340, 344.) At trial, the evidence demonstrated that immediately after the Atkins murder, appellant and another man had attempted to abduct Bertrand Dickson at gunpoint and had warned him not to say anything. Appellant said he knew the location of Dickson's family and daughter and that he would "get him." (RT 1322-1327.) Later, when Dickson and appellant were in the same holding cell, appellant offered Dickson $5,000 not to testify and again threatened his life and the safety of his daughter. (RT 1356-1362.) Moreover, there was certainly the potential that appellant would suffer a lengthy incarceration, and possibly death. Finally, a trial involving the murder of three victims, two of whom were police officers, could expect to receive considerable publicity, enhancing the possibility that the jurors' names would become public and that they could be exposed to intimidation. Indeed, the parties discussed media coverage prior to jury selection, presumably as a result of prior media attention. (See CT 617, 619-

622, 775, 778-779; RT 66, 69-70.) There was ample reason to believe that the use of numbers would protect the jury against outside influence.

Furthermore, the trial court adopted safeguards which minimized the risk of infringement upon appellant's fundamental rights. As discussed previously, the trial court's advisement that the use of numbers was to protect the jurors against possible media attention was a plausible explanation, especially in light of the climate at the time of appellant's trial. The record reflects that the O.J. Simpson trial was fresh on everyone's mind, and the presence of the media was a timely concern. The jurors were questioned about media coverage of criminal events and as to whether of the presence of the media would influence or intimidate them. (See Supp. CT 21; RT 433-434, 557-558, 582-583, 591, 651, 755-758, 839-840-841.) Moreover, as stated above, the jurors knew that their names were not kept from appellant. As a result, it was not logical to assume that the use of numbers was related to appellant's dangerousness. The trial court's admonition that the jurors were to report *any* contact -- from the media or anyone involved with the defense, prosecution, or witnesses -- further negated any inference that appellant posed any danger to the jurors. (RT 482.)

Accordingly, the trial court did not abuse its discretion in identifying the jurors by number in order to ensure a fair and impartial jury.

C. Appellant Was Not Prejudiced By The Use Of Juror Numbers

Appellant claims that the use of numbers in this case resulted in prejudice because the jurors were likely to infer that the procedure was a result of the court's belief that appellant was dangerous. (AOB 51.) Even if the there was insufficient justification for the use of juror numbers, as appellant argues, any error was harmless beyond a reasonable doubt. (See *People v. Phillips* (1997) 56 Cal.App.4th 1307, 1309-1310.)

Appellant' s contention is unsupported because the trial court offered a

neutral, plausible explanation for the procedure, and the jurors were aware that the parties knew their names. The evidence at trial indeed demonstrated that appellant was a dangerous man. He had murdered three people. But it was the evidence, not the use of numbers, that demonstrated appellant's dangerousness.

In sum, the trial court acted within its discretion in identifying jurors by numbers, and even if the trial court erred, appellant was not prejudiced.

II.

THE TRIAL COURT WAS NOT REQUIRED TO CONDUCT INDIVIDUAL, SEQUESTERED VOIR DIRE

Appellant contends the trial court erred in denying the parties' request for individual, sequestered voir dire during the death-qualification process, as required by this Court's decision in *Hovey v. Superior Court* (1980) 28 Cal.3d 1. (AOB 56-64.) This claim lacks merit.

A. Background

During discussions relating to jury selection, the trial court expressed an intention to allow the attorneys to review the "exceptionally detailed" questionnaires and to voir dire the jury as a group. The court's intention was to allow each attorney two hours to question the potential jurors. Both the prosecutor and defense counsel requested individual, sequestered voir dire. The trial court indicated it would give the matter some thought, but noted that it would allow the prospective jurors to take the questionnaire home and fill it out and that much information could be gleaned from the questionnaires. (RT 71-76, 431.)

Ultimately, the trial court denied the request for individual, sequestered voir dire. The trial court determined that the questionnaires contained adequate information about the death penalty, and the attorneys would be permitted to

ask follow-up questions. (RT 140-141.)

B. General Principles Of Law

> The state and federal guarantees of trial by an impartial jury include the right in a capital case to a jury whose members will not automatically impose the death penalty for all murders, but will instead consider and weigh the mitigating evidence in determining the appropriate sentence.

(*People v. Weaver* (2001) 26 Cal.4th 876, 910.) Voir dire is critical to ensuring the right to an impartial jury. (*People v. Earp* (1999) 20 Cal.4th 826, 852.) Without adequate voir dire, the trial court cannot fulfill its "responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence." (*Ibid.*, quoting *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188 [101 S.Ct. 1629, 68 L.Ed.2d 22].)

There is no constitutional right to a particular manner of conducting voir dire. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1086.) Voir dire is conducted under the supervision of the trial court, and its scope is necessarily left primarily to the sound discretion of that court. (*Ristaino v. Ross* (1976) 424 U.S. 589, 594 [96 S.Ct. 1017, 47 L.Ed.2d 258].)

At the time of appellant's trial, former Code of Civil Procedure section 223 governed the manner in which voir dire was to be conducted:[32]

> In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors

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32. Code of Civil Procedure section 223 was amended in 2000 to allow counsel the right to examine prospective jurors.

upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases. [¶] Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause. [¶] The trial court's exercise of its discretion in the manner in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

C. Individual, Sequestered Voir Dire Was Not Required

Appellant contends that failure to conduct individual, sequestered voir dire in all cases violates a criminal defendant's federal and state constitutional rights to trial by an impartial jury. (AOB 58-60.) This is incorrect.

In *Hovey v. Superior Court, supra*, 28 Cal.3d at p. 80, this Court held that voir dire in capital cases concerning prospective juror views regarding the death penalty "should be done individually and in sequestration." This requirement was not based on the federal or state Constitutions or on statute, but rather on this Court's supervisory power. (*People v. Cudjo* (1993) 6 Cal.4th 585, 628.) In 1990, Proposition 115 was enacted, which included the adoption of Code of Civil Procedure section 223. Code of Civil Procedure section 223 provided that in all criminal cases, including those involving the death penalty, the trial court must conduct the voir dire of any prospective jurors, where practicable, in the presence of the other prospective jurors. The *Hovey* holding was abrogated by Proposition 115. (*People v. Stitely* (2005) 35 Cal.4th 514, 537-538; *People v. Box* (2000) 23 Cal.4th 1153, 1180; *People v. Waidla* (2000) 22 Cal.4th 690, 713; *Covarrubias v. Superior Court* (1998) 60 Cal.App.4th

1168, 1171.) Thus, sequestered voir dire is not required in all cases.

D. Individual, Sequestered Voir Dire Was Not Required On The Facts Of This Case

Appellant additionally contends that even if individual, sequestered death qualification voir dire is not constitutionally compelled in all cases, the trial court abused its discretion in denying the parties' request for the procedure in this case. He contends that although the trial court appeared to recognize its discretion to conduct group voir dire on death penalty issues, its comments and actions did not reflect an exercise of discretion about whether group voir dire was practicable under the particular circumstances of the case. (AOB 60–62.) The trial court here properly exercised its discretion and refused to conduct individual, sequestered voir dire.

The trial court is vested with discretion to determine the practicability of large group voir dire. (See *People v. Waidla, supra,* 22 Cal.4th at pp. 713-714; *Covarrubias v. Superior Court, supra,* 60 Cal.App.4th at p. 1180.) This Court employs the abuse-of-discretion standard to review a trial court's granting or denial of a motion on the conduct of the voir dire of prospective jurors. A trial court only abuses its discretion when its ruling "falls outside the bounds of reason." (*People v. Waidla, supra*, 22 Cal.4th at pp. 713-714, quoting *People v. Ochoa* (1998) 19 Cal.4th 353, 408.)

Here, each juror filled out a 22-page questionnaire, which included a significant number of questions relating to his or her attitudes about the death penalty. (See Supp. CT 1-22.) Jurors were instructed that each questionnaire must be filled out individually without assistance and under penalty of perjury. The trial court permitted the prospective jurors to take the questionnaires home and fill them out. (RT 204-205, 210-211.) The prospective jurors were advised to mark any questions they wished to discuss in private. (RT 211-212, 506.)

After the questionnaires were returned to the trial court, extensive voir dire was conducted. In addition to the trial court's voir dire, each attorney was given in excess of two hours to address the potential jurors. (RT 431-432, 860.) If a prospective juror's response to questions relating to the death penalty appeared confusing, incomplete, or required further elaboration, the trial court questioned that juror accordingly, either at the bench or in open court as the circumstances warranted. (RT 511-514, 519-521, 523-526, 530-535, 543-545, 548-550, 639-641, 663-675, 687-693, 734-740, 743, 746-747, 786-788, 792, 828-830, 867, 870-874, 880-881, 903-906, 913-917, 920-921, 924-928, 935-941.) Both the prosecutor and defense counsel were given ample opportunity to further inquire into the prospective jurors' views of the death penalty. (RT 531, 540, 550-551, 555-556, 566-568, 570-572, 573-575, 583-584, 586-587, 589-594, 612-619, 626-634, 636-641, 712-713, 714-718, 720-721, 752-754, 764-768, 793-798, 802, 809-811, 833-834, 844-847, 852-854, 868-869, 881-883, 886-891, 893-898, 919-920, 929-933, 943-949.) During the course of voir dire, both defense counsel and the prosecutor reiterated that jurors were free to approach the bench to discuss their answers if they wished privacy. (RT 552, 587, 608.)

Appellant's contention that the trial court did not address counsel's concerns that jurors would not be candid about their opinions in a group setting is simply unfounded. (See AOB 61.) The trial court addressed these concerns by determining that the questionnaires contained "exhaustive" information about the death penalty, and by permitting the attorneys the opportunity to ask follow-up questions. (RT 140-141.) In fact, the individual, sequestered voir dire to which appellant claims he was entitled was effectively provided through the use of the questionnaires. If appellant believed a prospective juror answered in a particular manner due to the responses of other jurors, he had only to look at the juror's questionnaire to determine the consistency of the response and

question that juror as to the response. This is what occurred with prospective juror 12. Appellant alleges that this juror's responses on his questionnaire conflicted with his responses in court. (AOB 62.) When this fact was brought to the trial court's attention, the trial court questioned prospective juror 12 at the bench. (RT 902-906.)

Accordingly, the trial court did not abuse its discretion in refusing to conduct individual, sequestered voir dire.

E. Appellant Was Not Prejudiced By The Manner In Which Voir Dire Was Conducted

Even if the trial court erred in failing to conduct individual, sequestered voir dire, appellant suffered no prejudice. Generally, any claim that the trial court abused its discretion in conducting voir dire is evaluated for a miscarriage of justice. (Code of Civ. Proc. § 223.) As to appellant's claim that his right to due process was violated, unless the voir dire was so inadequate that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal. (*People v. Holt* (1997) 15 Cal.4th 619, 661 (citing *Mu'Min v. Virginia* (1991) 500 U.S. 415, 425-426 [111 S.Ct. 1899, 114 L.Ed.2d 493]); see *People v. Bittaker, supra*, 48 Cal.3d at pp. 1086-1087 [reversals should be limited to those cases in which defendant's right to a fair and impartial jury effected]).) Appellant can show neither.

As set forth above, the prospective jurors filled out lengthy questionnaires in which they provided, through a series of questions, their views on the death penalty, including their overall opinions of the death penalty and their ability to weigh aggravating and mitigating factors in determining penalty rather than automatically imposing either the death penalty or life imprisonment. Many of the jurors were questioned more thoroughly both in open court and privately, and both counsel were permitted to ask further

questions. Appellant does not now complain that any juror was biased, nor does he claim that additional questioning would have been helpful as to any particular juror. Thus, even if the trial court erred during voir dire, any error did not result in a fundamentally unfair trial or a miscarriage of justice, and reversal would be improper.

In conclusion, appellant has failed to establish he is entitled to relief on his claim that the manner in which the trial court conducted voir dire deprived him of his rights to an impartial jury and due process of law.

III.

PROSPECTIVE JURORS 56 AND 102 WERE PROPERLY EXCUSED FOR CAUSE

Appellant next contends that the trial court violated his right to an impartial jury by excusing for cause prospective jurors 56 and 102. (AOB 65-78.) Respondent submits that substantial evidence supported the trial court's findings that prospective juror 56 and prospective juror 102 each held views concerning capital punishment that substantially impaired his ability to perform his duties as a juror.

A. Relevant Proceedings

1. Prospective Juror 56

During a discussion at sidebar, prospective juror 56 discussed his opinions of police officers. He said that he had bad experiences with Compton police officers approximately two years earlier. He believed that police may "cover up the evidence" and "just throw the client in jail." (RT 789-790.) He stated that police officers "bother" him because he is Black. (RT 790.) He did not "care" for police and he did not know whether he could put aside his personal feelings in evaluating the believability of a police officer's testimony.

(RT 790-792.)

Prospective juror 56 had not answered some of the questions on the questionnaire relating to the death penalty, and the trial court asked for his responses verbally. (RT 792; Supp. CT 758-759.) Prospective juror 56 stated he could not choose the death penalty because he could not live with his decision. (RT 790-792.) Under questioning by defense counsel, prospective juror 56 said he could probably follow the law, but he then said that he could not impose the death penalty even if he felt the circumstances warranted it. Under further questioning, he said he could probably impose the death penalty in the appropriate case, such as if the defendant had murdered 50 people. (RT 795-796.) Under questioning by the prosecutor, prospective juror 56 said that the death penalty went against everything he stood for, and he could not see himself "putting [the] death sentence on somebody and living with that." (RT 796.) Prospective juror 56 said he did not think he was the "man for it." (RT 797-798.)

The prosecutor moved to excuse prospective juror 56 for cause based on his feelings toward police officers and the Compton Police Department in particular. The prosecutor further stated that he had a total lack of ability to impose the death penalty. Defense counsel argued that the juror had indicated he could follow the court's instructions. (RT 820.) The trial court granted the prosecutor's motion, stating

> I do think that looking at his questionnaire and the demeanor in his answering the questions, that his personal views are such that it would prohibit him from doing his job properly in this particular type of case.

(RT 821.)

2. Prospective Juror 102

In his questionnaire, prospective juror 102 indicated he did not like the idea of judging a person in such a serious matter and that his religious beliefs

made it difficult for him to make such judgments and to impose the death penalty. He did not know if he could mentally or morally handle sentencing another person to death. He believed that the only reason for the death penalty was "wrongfully killing kids." (Supp. CT 2227, 2232-2234.) His feelings about the death penalty were such that they would interfere with his ability to be objective during the guilt phase of the trial, although he stated he would neither be more inclined to find the defendant guilty or not guilty. (Supp. CT 2235.) Prospective juror 102 stated he could set aside his personal feelings about the death penalty and follow the law because it was his duty, but it would personally affect him. (Supp. CT 2237.) He concluded that he would prefer not to serve as a juror in this case because he did not want to decide a "case of such a serious moral matter." (Supp. CT 2241.)

During voir dire in open court, the trial court asked prospective juror 102 about the responses in his questionnaire. Prospective juror 102 said, "The situation with my duty as juror, I guess I would have to go beyond the way I feel and make the decisions." (RT 735.) The trial court stated that if prospective juror 102 could set aside his personal feelings and follow the law, he could sit on the case. (RT 736-737.)

Under questioning from defense counsel, prospective juror 102 said that he would have to listen to both sides to reach "proper opinions" and that both sides of the story would have to be presented before he would feel comfortable in reaching a decision. (RT 749-750.) He also said he would be more comfortable if the standard of proof was higher than beyond a reasonable doubt. (RT 751.) Under questioning from the prosecutor, prospective juror 102 indicated again that he was very uncomfortable with judging a person in a death penalty case, and he did not know whether he could reach a death sentence. (RT 764-766.) The prosecutor asked:

> So based on these feelings that you have had [about the death

> penalty], being the mitigating factors and the aggravating factors, is it your state of mind now that you don't know if you could, in fact, come in with a verdict that the defendant is to die?

(RT 766.) Prospective juror 102 responded: "Right." (RT 766.)

The prosecutor challenged prospective juror 102 for cause, noting that prospective juror 102 did not want to make a decision, could not made a decision, and his feelings would affect his ability to render a decision for the death penalty. (RT 779-780.) The court granted the motion as follows:

> Well, let me tell you, I think [juror number 102] is trying to do the best he can.
>
> I looked at his questionnaire, and I looked at him when he tried to answer the questions, and I think emotionally, truly from his demeanor and even while you two are asking questions of other jurors, I watched him, and I watched his body language, and I think that his personal views would substantially impair him from performing his duties as a juror.
>
> Just from the questionnaire when I spoke to him, then each of you spoke to him, and I think that the man is trying. But I don't think that he can do the job under the standard.

(RT 780.)

B. Substantial Evidence Supports The Trial Court's Excusal Of Prospective Jurors 56 And 102 For Cause

In *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841], the Supreme Court held that a prospective juror could be excused because of his views against the death penalty if those views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Id.* at p. 424; accord, *Morgan v. Illinois* (1992)

504 U.S. 719, 728 [112 S.Ct. 2222, 119 L.Ed.2d 492].) This Court first adopted the *Witt* standard in *People v. Ghent* (1987) 43 Cal.3d 739, 767.)

The *Witt* test repeatedly has been described as a "clarification" of the test earlier articulated in *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776]. In *Witherspoon*, "the United States Supreme Court implied that a prospective juror could not be excused for cause without violating a defendant's federal constitutional right to an impartial jury unless, as relevant here, he made it 'unmistakably clear' that he would '*automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case [before the juror]. . . .'" (*People v. Mickey* (1991) 54 Cal.3d 612, 679, quoting *Witherspoon*, *supra*, 391 U.S. at p. 522, fn. 21, italics in *Witherspoon*.)

Witt went on to clarify that:

> [T]his standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. [Fn. omitted.] Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

(*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 424-425.)

Thus, a finding on the potential effect of a prospective juror's views relating to capital punishment is reviewed for substantial evidence. (*People v. Griffin* (2004) 33 Cal.4th 536, 558; *People v. Memro* (1995) 11 Cal.4th 786, 817-818.) Further, if the prospective juror's answers are equivocal, conflicting, or confusing, the trial court's overall determination about the state of mind which produced them is binding.[33] (*People v. Griffin, supra,* 33 Cal.4th at p. 558; *People v. Millwee* (1998) 18 Cal.4th 96, 96, 146; *People v. Bradford* (1997) 15 Cal.4th 1229, 1318-1319; *People v. Cain* (1995) 10 Cal.4th 1, 60; *People v. Mason* (1991) 52 Cal.3d 909, 953-954; *People v. Kaurish* (1990) 52 Cal.3d 648, 698-699.)

Here, the trial court's findings that prospective jurors 56 and 102 held views of the death penalty which would have prevented or substantially impaired them from performing their duties are certainly supported by substantial evidence. Prospective juror 56 unequivocally stated that he could not impose the death penalty under the circumstances of this case. His responses indicated that he did not want to impose the death penalty, he did not believe in the death penalty, and he could not impose the penalty and live with himself. He indicated that he could "probably" follow the law under the right circumstances, but the circumstances imagined by prospective juror 56 involved the murder of 50 people. (RT 793-795.) Accordingly, there was no violation of *Witt* and *Witherspoon*. (*People v. Roybal* (1998) 19 Cal.4th 481, 519 [court's removal of juror, who repeatedly stated she could not vote for death "in

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33. A good explanation of the ultimate reason for this rule appears in *People v. Fudge* (1994) 7 Cal.4th 1075, 1094:

> In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress of being a prospective juror in a capital case, such equivocation should be expected.

this case" and only in an extreme case, was proper].) Even if prospective juror 56's responses could be deemed equivocal, substantial evidence, demonstrated that his personal views would substantially impair him from performing his duties as a juror. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1114-1115 [while some answers showed willingness to follow the law and the court's instruction, other answers furnished substantial evidence of prospective juror's inability to consider a death verdict].)

Likewise, the trial court's determination that prospective juror 102's personal views of the death penalty substantially impaired him from performing his duties as a juror was supported by the record and binding. Prospective juror 102 was equivocal in his responses, indicating both that he could follow the law and that he could not impose the death penalty absent circumstances involving the murder of children. Ultimately, prospective juror 102 indicated that he did not believe he could reach a death verdict. (RT 766.) The trial court noted the equivocation when ruling on the motion to dismiss prospective juror 102. The court noted that prospective juror number 102 was "trying," but based on his demeanor during the course of voir dire and his responses to questions, he could not "do the job." Indeed, it was clear as to prospective juror 102, as with prospective juror 56, that the instant case was not the "extreme case" in which he could impose the death penalty. (See *People v. Roybal, supra,* 19 Cal.4th at p. 519.)

> With respect to each of these prospective jurors, the trial court, having had the opportunity to observe the demeanor of each and to assess the degree of reluctance and apprehension expressed by each prospective juror in responding to questioning, reasonably could find that each prospective juror's views on the death penalty would substantially impair [his] ability to perform the duties of a juror in accordance with the trial court's instructions

(*People v. Griffin, supra,* 33 Cal.4th at p. 560.)

Appellant seems to contend that where prospective jurors provide equivocal responses, the state has not carried its burden of proving that the juror's views would prevent or substantially impair the performance of his duties as a juror, and the juror may not be excused. (AOB 71, 75.) Appellant relies upon *Adams v. Texas* (1980) 448 U.S. 38 [100 S.Ct. 2521, 65 L.Ed.2d 581] and *Gray v. Mississippi* (1987) 481 U.S. 648 [107 S.Ct. 2045, 95 L.Ed. 622]. Appellant's contention has been squarely rejected by this Court. (*People v. Schmeck* (2005) 37 Cal.4th 240, 262-263.)

In this case, the trial court understood very well the standard to be applied. (RT 79, 427-428, 538.) The trial court had reviewed *Wainright v. Witt* and had declared that the standard which would be used in evaluating challenges for cause was the *Witt* standard -- whether a juror's views on the death penalty would prevent or substantially impair the juror from performing his or her duties. (RT 538.) There was nothing inconsistent about the trial court's rulings in this case. The trial court excused prospective jurors 56 and 102, not because they had strong opinions which would have affected their deliberations. Rather, the trial court excused prospective juror 56 because the trial court determined, based on substantial evidence, that his views on the death penalty would prohibit him from doing his job properly. (RT 821.) And, the trial court excused prospective juror 102 because, based on substantial evidence, the trial court found that his personal views would substantially impair him from performing his duties as a juror. (RT 779-780.) Thus, the trial court utilized the standard set forth in *Wainright v. Witt*, the trial court's findings were supported by substantial evidence, and appellant's claim that reversal is required based on the exclusion of prospective jurors 56 and 102 should be rejected.

C. Even If Either Prospective Juror 56 Or 102 Was Improperly Excluded, Reversal Would Be Required Only As To The Penalty Phase

Appellant contends that the unlawful exclusion of a prospective juror who is opposed to capital punishment requires reversal of the penalty phase. He also contends that such an error requires reversal of the guilt phase as well. (AOB 78.) However, "[t]he exclusion of a prospective juror in violation of *Witherspoon* and *Witt* requires automatic reversal -- but only as to penalty and not as to guilt." (*People v. Ashmus* (1991) 54 Cal.3d 932, 962 (citing *Gray v. Mississippi, supra,* 481 U.S. at pp. 666-668; *Witherspoon v. Illinois, supra,* 391 U.S. at pp. 521-523).)

In sum, the no error occurred in the exclusion of prospective jurors 56 or 102, and even if error occurred, reversal is required only of the penalty phase.

IV.

THE TRIAL COURT PROPERLY FOUND THAT APPELLANT HAD NOT ESTABLISHED A PRIMA FACIE CASE OF RACIAL DISCRIMINATION IN THE EXERCISE OF PEREMPTORY CHALLENGES

Appellant contends that the trial court erred in finding no prima facie case of discrimination when the prosecutor peremptorily challenged prospective jurors 86, 103, 34, 50, 91, and 93. (AOB 79-97.) However, the record clearly reflects that the defense did not meet its burden of establishing a prima facie case of racial discrimination in the challenges to the prospective jurors.

A. Background

1. Prospective Juror No. 91

Prospective juror 91 provided the following information. She had been the victim of an assault, but no one had been arrested. Her daughter had been

the victim of a robbery, after which a man was ordered to serve a seven-year term. Her son had been convicted of armed robbery in 1991. She did not believe the prosecutor had treated him fairly, but rather had made an example of him. She had a prior bad experience with police officers when the officers went into her Carson neighborhood and were rude and pushy. She was familiar with Nickerson Gardens and would not be able to avoid the area because she took her grandson there once a week. Prospective juror 91's feeling on the death penalty were mixed. She stated that religion was the most important part of her life, and she believed it was possible that her religious beliefs would make it difficult for her to sit in judgment of another person. Previously, she did not believe in the death penalty at all. However, she could vote for death or life without the possibility of parole depending upon the circumstances. She was not sure, however, if a person could ever determine if information was true such that one could make a life or death decision. Prospective juror 91 knew the Compton Chief of Police, Hourie Taylor. Due to this connection, she preferred not to serve as a juror. (Supp. CT 2066-2087; RT 526-531, 633-635.)

2. Prospective Juror No. 93

Prospective juror 93 provided the following information. Her aunt had been kidnaped from her condominium at gunpoint. Her uncle had been killed in a robbery at a liquor store, but no one had been arrested. She felt she was up to the task of making a decision in the case and stated that there was nothing relating to her uncle's murder that would prevent her from doing so. Prospective juror 93 provided conflicting views on her opinions of the death penalty. She stated that she was a Baptist, and religion was very important in her life. According to her faith, "you should not kill someone because they kill someone." She felt obligated to accept this view because two wrongs do not make a right. She also stated, however, that she believed the death penalty was

appropriate in certain cases. Prospective juror 93 also indicated she had heard about the case on the news. (Supp. CT 2088-2109; RT 830-832, 841-842, 851-852.)

3. Prospective Juror No. 103

Prospective juror 103's husband worked with the Housing Authority, and she lived in the area of Nickerson Gardens. She had heard about the case. Although she was not familiar with the names on the witness list, she thought she might recognize people. She seemed to have a personal belief that if she were to be accused of a crime, she would simply go to jail. If someone said she was guilty, there would be nothing she could do. She did not believe in the death penalty. She repeatedly stated that no one had the right to take another's life in any situation. She had previously voted against the death penalty. She contradicted herself later, by stating that she did not believe the death penalty should never be imposed. Although it would be against her religious beliefs to vote for the death penalty, she believed she could do it. (Supp. CT 1224-1245; RT 883-885, 889-891.)

4. Prospective Juror No. 34

Prospective juror 34 was a divorced mother of two. Her mother and a girlfriend had been the victims of crimes-- a purse snatching and an armed robbery. No one had been arrested for either crime. In her questionnaire, she indicated that her religious beliefs may make it difficult for her to sit in judgment of another person. She corrected herself in court, stating that her religious beliefs would not affect her ability to judge. She stated in her questionnaire that she thought a witness would lie to cover up something or make it appear worse than it was. She meant that it is possible for people to lie for self-serving purposes. As to the confusion in her questionnaire, she

indicated that she had been awake until midnight filling out the questionnaire and helping her children with their homework. (Supp. CT 431-452; RT 887-888, 897-899.)

5. Prospective Juror No. 50

Prospective juror 50 demonstrated very strong opinions against the death penalty in her questionnaire. Her religious organization opposed killing, and religion was very important to her. She stated she would always vote for life without parole and reject the death penalty regardless of the evidence presented at trial. She did not believe that the death penalty would "compensate" for the murder and would only free space in jail momentarily. She did not answer certain questions in the questionnaire because she did not feel comfortable. After sitting through voir dire, she indicated she no longer maintained the opinion that she would always vote for life without parole. She believed that in certain circumstances, such as the death of a child, she would not have much sympathy for the killer. She did not believe that her feelings about the death penalty would interfere with her ability to be objective. If the case involved a child, she would have no sympathy. (Supp. CT 1669-1690; RT 915-919.)

6. Prospective Juror No. 86

Prospective juror 86 had never thought about the death penalty, but indicated she could choose it or reject it in the appropriate case. She had heard something about the instant case, but did not recall what it was. Prospective juror 86 had her car and purse stolen, and the police were still investigating the matter. Her cousin had been killed, but she did not know the details. She had been to a "custody facility" to visit a friend approximately ten years previously, but no longer knew the location of that friend. Prospective juror 86 had prior jury experience in a murder case. (Supp. CT 2022-2043; RT 873-874, 886,

891-893.)

As the parties were discussing challenges for cause, the trial court, with apparent humor, asked the prosecutor whether he planned to challenge for cause prospective juror 86, to which the prosecutor replied, "She is weird." (RT 907.) Later, the prosecutor noted that when prospective juror 86 sat down he "got bad vibes," and he wanted to review her questionnaire. After reviewing her questionnaire, he exercised a peremptory challenge. (RT 955.)

7. Use Of Peremptory Challenges

The prosecutor initially accepted the jury with prospective juror 91 and then exercised his ninth peremptory challenge to excuse her. (RT 782, 823.) The prosecutor also accepted the jury with prospective juror 93 before exercising his tenth peremptory challenge to excuse prospective juror number 93. He exercised his thirteenth peremptory challenge to excuse prospective juror 103, his fourteenth peremptory challenge to excuse prospective juror 34, his fifteenth peremptory challenge to excuse prospective juror 50, and his sixteenth peremptory challenge to excuse prospective juror 86. (CT 782, 857-858, 909, 952, 955, 958, 998.) After the prosecutor exercised a peremptory challenge to excuse prospective juror 86, defense counsel moved for a mistrial pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258, 280. (RT 956.) Defense counsel stated:

> I have not made comment up until this time. [¶] However, my review of the peremptory challenges which prompted this motion by the last one was that [prospective juror number 86] was a female Black. [¶] The peremptory challenges have been five female Blacks and one male Black. I don't know if my math is correct, but I believe it is correct. [¶] So I can see where perhaps others might have been excused in connection with their views on the death penalty, but my notes indicate

> that none of the female Blacks with the exception of juror number 50 . . . had expressed any reservation about the death penalty.

(RT 956.) The trial court denied the motion as follows:

> Your motion is denied. I would indicate that on this particular case, obviously the questionnaires are very significant. [¶] The first time the prosecution accepted the panel . . . . [¶] it appeared to me of 12 jurors, there were two African American males and two African American females.
>
> The prosecution then accepted the panel two times with jurors 49, 84, and 88, who appear to be African Americans. The way the juror panel presently sits -- . . . . [¶] juror number 49 appears to be an African American female. Juror number 88 appears to be an African American female. And juror number 13, it's interesting on her questionnaire which I thought was unusual, she had noted that she is half African American and half Caucasian, the way she put it.
>
> Now, I grant you that the cases don't say that just because you have accepted a particular group means that there is not a systematic exclusion, but *I don't see any evidence in this particular case of a systematic exclusion of either African Americans as a class or African American women or African American males.*

(RT 956-957; emphasis added.)

At the end of jury selection, the jury, including alternates, contained the following: eight African Americans; one "Afro-Cuban;" one "½ African-American ½ Caucasian;" one "French Creole;" one Egyptian; two Hispanics; and four Caucasians. (CT 828; Supp. CT 298, 453, 541, 652, 784, 806, 828, 1026, 1070, 1158, 1180, 1290-1293, 1316, 1360, 1581, 1713, 2132, 2198, 2300.)

B. General Principles Of Law

Exercising peremptory challenges because of group bias violates the California and the United States Constitutions. (*People v. Cornwell* (2005) 37 Cal.4th 50, 66.) The United States Supreme Court has reiterated the applicable principles regarding the discriminatory use of peremptory challenges as follows:

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

(Id. at pp. 66-67, quoting *Johnson v. California* (2005) ___ U.S. ___ [125 S.Ct. 2410, 2416, 162 L.Ed.2d 129].)

In determining whether a prima facie case is established, this Court previously held the applicable standard is whether there was a showing of a strong likelihood that the juror was challenged for group bias. (*People v. Wheeler* (1978) 22 Cal.3d 258, 280.) However, under *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69], the applicable standard is whether the circumstances of the challenge raised an inference that the challenge was racially motivated. (*Tolbert v. Gomez* (9th Cir. 1999) 190 F.3d 985, 988.) This Court determined both tests are consistent in that there must be a showing the challenge was "more likely than not" racially motivated. (*People v. Johnson* (2003) 30 Cal.4th 1302, 1328.) Ultimately, on June 13, 2005, the United States Supreme Court resolved the issue by rejecting the "more likely than not" standard and deciding a prima facie case is established if the totality

of the relevant facts give "rise to an inference of discriminatory purpose." (*Johnson v. California, supra,* 125 S.Ct. at p. 2417.)

In *Johnson*, the defendant, a Black male, was found guilty of second degree murder and assault. During jury selection, after several prospective jurors were removed for cause, forty-three eligible prospective jurors remained. Of the remaining prospective jurors, only three were Black. The prosecutor used three of his twelve peremptory challenges to remove the Black prospective jurors. The empaneled jurors and alternates for the trial all were Caucasian. (*Johnson v. California, supra,* 125 S.Ct. at p. 2414.)

After the prosecutor had used a peremptory challenge as to the second of the three prospective Black jurors, the defense objected that the prosecutor was using race as a basis for the peremptory challenges in violation of the United States and California Constitutions. (*Johnson v. California, supra,* 125 S. Ct. at p. 2414.) Relying on *People v. Wheeler*, *supra,* 22 Cal.3d at p. 258, the trial court overruled the objection without asking the prosecutor to explain the reason for his challenge, finding that there was no strong likelihood that the exercise of the peremptory challenges were based on race. The trial court warned the prosecutor that "we are very close." (*Johnson v. California, supra,* 125 S. Ct. at pp. 2414-2415.)

When the prosecutor exercised the peremptory challenge as to the remaining prospective Black juror, the defense again objected. The trial court again overruled the objection without asking the prosecutor to explain the reason for the challenge. The trial court explained that its own examination of the record showed that the peremptory challenges could be justified by race-neutral reasons. The trial court also opined that the prospective Black jurors offered equivocal or confused answers on the jury questionnaires. Therefore, the trial court found that no prima facie case of discrimination had been established. (*Johnson v. California, supra,* 125 S. Ct. at pp. 2414-2415.)

Noting the trial court's comment that "we are very close," and this Court's acknowledgment that "it certainly looks suspicious that all three African-American prospective jurors were removed from the jury," the Supreme Court found the inferences that discrimination may have occurred were sufficient to establish a prima facie case of race-based discrimination. (*Johnson v. California, supra,* 125 S.Ct. at p. 2419.)

C. The Record Supports The Trial Court's Finding That Appellant Failed To Establish A Prima Facie Case Of Racial Discrimination

Here, defense counsel's *Wheeler* motion was based on the number of African Americans excused from the jury and the fact that none, with the exception of prospective juror 50, had any reservations about the death penalty. (RT 956.) The trial court did not indicate the standard used in determining that defense counsel had not presented a prima facie case of race-based discrimination, but stated it did not find "any evidence" evidence of a systematic exclusion. (RT 956-957.) A review of the record demonstrates that defense counsel did not make a sufficient showing, indeed any showing, to establish an inference[34] of a discriminatory purpose. (See *People v. Cornwell, supra,* 37 Cal.4th at pp. 36-37.)

The record demonstrates that the prosecutor was more than willing to accept African American jurors on the panel. Indeed, the final jury contained ten African Americans. The jury was, by all accounts, extremely diverse. Respondent submits that the number of African American jurors seated in the jury box and the prosecutor's repeated acceptance of African American jurors was sufficient to conclusively rebut appellant's allegation that his use of

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34. In *Johnson*, the Court defined "inference" as a "conclusion reached by considering other facts and deducing a logical consequence for them." (*Johnson v. California, supra,* 125 S.Ct. at p. 2416, fn. 4.)

peremptory challenges as to prospective African American jurors was an attempt to systematically exclude them from the jury panel. (See *People v. Gray* (2005) 37 Cal.4th 168, 187-188 [exclusion of two African-American jurors and the retention of two failed to raise inference of racial discrimination].)

The record here contains additional evidence that these potential jurors were excused for reasons other than race. "A prospective juror's views about the death penalty are a permissible race- and group-neutral basis for exercising a peremptory challenge in a capital case. [Citation.]" (*People v. McDermott* (2002) 28 Cal.4th 946, 970.) Prospective juror 91's response to questions about the death penalty were equivocal. She thought her religious beliefs might make it difficult for her to sit in judgment. She previously did not believe in the death penalty. Although she could not vote for either death or life without parole, she was not sure if one could ever have sufficient information to make such a decision. (Supp. CT 2066-2087; RT 526-531, 633-635.) Prospective juror 93 was also equivocal in her opinions on the death penalty, but indicated that pursuant to her faith, the death penalty was wrong, and she felt obligated to accept this view. (Supp. CT 21088-2109; RT 830-832, 841-842, 851-852.) Although prospective juror 103 said she could vote for the death penalty, she also indicated it was against her religious beliefs, and she did not believe in the death penalty because no one had a right to take another's life in any situation. (Supp. CT 1224-1245; RT 883-885, 889-891.)

In addition to the above views on the death penalty, the record reflected other very good reasons for excusing some of these prospective jurors. It is true, as appellant states (AOB 96), that prospective juror 91 knew the Compton Chief of Police. It is also true, though, that because of that connection, she did not want to serve on the jury. Additionally, she had unfavorable feelings about law enforcement. She indicated that her son had been convicted of armed robbery in 1991, and the prosecutor did not treat him fairly. She had a prior bad

experience with police officers who had been rude and pushy. Finally, there was a danger that her familiarity with Nickerson Gardens and inability to avoid the area during trial would influence her during the trial. (Supp. CT 2066-2087; RT 526-531, 633-635.)

As with prospective juror 91, the prosecutor may well have believed that prospective juror 103 would be improperly influenced by the fact that she lived in the area of Nickerson Gardens, and there was a danger that she would recognize testifying witnesses. (Supp. CT 1224-1245; RT 883-885, 889-891.)

Prospective juror 34 appeared to be overwhelmed and could not pay attention to the proceedings. She attributed her confusing and omitted responses in her questionnaire to the fact that she had been awake until midnight filling out the questionnaire and helping her two children with their homework. (Supp. CT 431-452; RT 887-888, 897-899.) Given the importance and length of the trial, any prosecutor would have excused a potential juror whose ability to focus on the proceedings was impaired.

The prosecutor's reasons for excusing potential juror 86 were clearly not race-based. The prosecutor described this potential juror as "weird" and said she gave him "bad vibes." The trial court apparently picked up on the fact that something was amiss with this prospective juror when he humorously asked the prosecutor if a challenge for cause was pending. (RT 907, 955.)

Appellant argues that the instant offense was interracial and that the risk of racial prejudice was particularly great. (AOB 95.) This was not a racially-sensitive case such that the prosecution would use challenges to secure as many Caucasian jurors as possible to enlist racial fears, as appellant suggests. (AOB 95-96.) Two of the three victims were African American, and as stated above, the jury was extremely diverse, with more African-Americans represented than any other group.

A review of the record here does not support the slightest inference that

the prosecutor challenged these jurors on the basis of race. Appellant's claim that he was deprived of his rights under the Equal Protection Clause and to a trial by jury drawn from a representative cross-section of the community under the California Constitution should be rejected.

V.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING JURY SELECTION

In his final claim of error relating to jury selection, appellant contends that the prosecutor committed misconduct when he presented a hypothetical for the purpose of demonstrating that all persons are entitled to the presumption of innocence. (AOB 98-103.) Appellant has forfeited this claim. Even if the claim is not forfeited, no prosecutorial misconduct occurred because the prosecutor presented a correct statement of the law, and appellant was not prejudiced by the comments.

A. Background

During voir dire, there was some confusion regarding the presumption of innocence and whether a defendant should testify or produce some evidence to prove that he or she is not guilty. Defense counsel spent a great deal of time during voir dire addressing the confusion and explaining that a person is presumed innocent until the prosecution proved its case beyond a reasonable doubt. (RT 558-565, 572, 574-575, 592.) In his own remarks, the prosecutor voiced his concern that there was still some confusion as to the concept of innocent until proven guilty. The prosecutor advised the venire:

> And I'm thinking now – I could be wrong – but I'm thinking now that maybe some of you are still puzzled about, "Well, wait a minute. What is this presumption of innocence? I'm not really sure what it is."

I want to do what I can or give you what I believe is a correct statement of the law on the presumption of innocence and then I have always found that by giving examples, it's very easy to understand the concept. All right.

When a defendant comes into a courtroom like the defendant is now, he is presumed under the law to be innocent. That is a legal presumption. He's presumed to be innocent.

What does that mean? [¶] Let me give you an example of what that means.

Totally unrelated to this case suppose you drive home or you drive home today and you decide to stop off at Von's market or Ralph's market or one of the markets. You go inside. You want to get some milk and some bread. You're waiting in the line to buy your food. There is a person directly in front of you appearing to also want to buy food.

Once that person gets up to the cash register, this person pulls out a gun and says to the cashier, "give me the money."

The cashier does not respond fast enough and this person shoots and kills the cashier and leaves. Okay.

That person, if that person could be caught, would be prosecuted for murder. But that person would be presumed innocent, even though you saw it happen right before your eyes. The law places this legal presumption that the person is presumed innocent until one of two things happens.

One, the person comes into the courtroom and says, "I'm guilty," or, two, 12 jurors decide that he's guilty. And until and unless that occurs, that person is presumed innocent and it wouldn't matter if you by yourself witnessed it or if there were 40 people in the line and 40 people observed it.

(RT 597-598.)

Defense counsel objected to the statement. The trial court overruled the objection, but advised the venire that if one of them had witnessed the crime, he or she would not be a juror on the case. (RT 599.) The prosecutor went on to explain that the defendant did not have to testify and did not have to put on a defense: it was the prosecution's burden to prove him guilty beyond a reasonable doubt without any help from the defendant. (RT 600.)

B. Applicable Law

Under the federal Constitution, to be reversible, a prosecutor's improper comments must "'so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [94 S.Ct. 1868, 40 L.Ed.2d 431]; *People v. Frye* (1998) 18 Cal.4th 894, 969.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Cunningham* (2001) 25 Cal.4th 983, 1000; *People v. Earp* (1999) 20 Cal.4th 826, 858.)

Moreover, in the absence of an objection and request for a curative admonition, a defendant may not be heard to complain about the prosecutor's statement for the first time on appeal. (*People v. Valdez* (2004) 32 Cal.4th 73, 122; *People v. Cunningham, supra,* 25 Cal.4th at p. 1000; *People v. Seaton* (2001) 26 Cal.4th 598, 682; *People v. Earp, supra,* 20 Cal.4th at p. 858; *People v. Price* (1991) 1 Cal.4th 324, 447.) If an objection has not been made, the point is reviewable only if an admonition would not have cured the harm caused by the prosecutor's remark. (*People v. Valdez, supra,* 32 Cal.4th at p. 122; *People v. Cunningham, supra,* 25 Cal.4th at p. 1001; *People v. Earp, supra*, 20 Cal.4th at p. 858.)

C. Appellant Has Forfeited His Claim

In this case, appellant objected to the prosecutor's hypothetical, but he did not request a curative admonition. Thus, his claim has been forfeited. (See *People v. Valdez, supra,* 32 Cal.4th at p. 122.) A simple admonition relating to the presumption of innocence and the burden of proof, as well as a reminder that the hypothetical was not related to the instant case, would have cured any harm relating to the comments. Accordingly, the failure to request any type of admonition has resulted in the waiver of the claim.

D. The Prosecutor's Remarks Were Permissible

Even if appellant's claim is not waived, it is meritless. The prosecutor's hypothetical merely reiterated that everyone is entitled to a presumption of innocence until he or she is proven guilty beyond a reasonable doubt either by a guilty plea or by the verdict of a unanimous jury. This is a correct statement of the law. The prosecutor's comments were in the same vein as those made by the prosecutor in *Seaton*. There the prosecutor remarked that "even Jack Ruby (whose killing of Lee Harvey Oswald was broadcast on national television) had the right to a jury trial." (*People v. Seaton, supra,* 26 Cal.4th at p. 636.) Just as in *Seaton,* the prosecutor's remarks here were within the scope of permissible voir dire.

E. Appellant Was Not Prejudiced By The Prosecutor's Remarks

Should this Court determined the remarks were improper, appellant was not prejudiced. The jury was well aware of the presumption of innocence. Aside from the fact that both defense counsel and the prosecutor explained the presumption of innocence, the trial court instructed the jury on the principle. (CT 1063.) Moreover, as this Court has reasoned:

> as a general matter, it is unlikely that errors or misconduct occurring during voir dire questioning will unduly influence the jury's verdict in the case. Any such errors or misconduct prior to the presentation of argument or evidence obviously reach the jury panel at a much less critical phase of the proceedings, before its attention has even begun to focus upon the penalty issue confronting it.

(*People v. Seaton, supra,* 26 Cal.4th at p. 636.)

Accordingly, appellant's claim that the prosecutor committed misconduct as a result of the remarks made prior to the start of trial should be rejected.

ISSUES RELATING TO THE GUILT PHASE

VI.

THE MURDER CHARGES WERE PROPERLY JOINED

Appellant contends that the trial court's refusal to sever the Adkins murder charge from the Burrell and MacDonald murder charges resulted in a due process violation. (AOB 104-121.) He claims severance was mandated because the evidence was not cross-admissible, the officers' murders were far more inflammatory than the Adkins murder, a weak charge was joined with a strong charge, and the charges were capital offenses. (AOB 107-121.) As the statutory requirements for joinder were satisfied (i.e., the Adkins murder and the Burrell and MacDonald murders were of the same class of offense), appellant can only predicate error on a showing of potential prejudice. Appellant cannot show potential prejudice because, even if the evidence was not cross-admissible, the charge involving the murder of Adkins was no more inflammatory than the Burrell and MacDonald murders and vice versa, and neither case was a weak case. Moreover, appellant cannot show that, even if

the trial court's denial of his severance motion was correct at the time it was made, he suffered prejudice resulting in a "gross unfairness" or a denial of due process and a fair trial. Accordingly, the trial court acted well within its discretion in denying appellant's severance motion, and the joinder of the offenses was not prejudicial. Appellant's claim must therefore be rejected.

A. Background

Appellant moved to sever the charge involving the Adkins murder from the charges involving the Burrell and MacDonald murders, arguing that the evidence was not cross-admissible, the officers' murder was highly inflammatory, the evidence in support of the Adkins murder was weak, and joinder gave rise to a special circumstance. Further, appellant argued that he may want to testify as to one case and not the other, leaving the jury with the impression that he had something to hide. (CT 675-686, RT 81-87.)

The prosecutor opposed severance. He argued that appellant had failed to meet his burden of clearly showing potential prejudice because the evidence in both cases was strong, the officers' murders were not more inflammatory than the Adkins murder, and the special circumstance did not arise solely by virtue of the joinder of the murder counts. He also argued, with regard to the fact that appellant may want to testify in one case and not the other, that appellant had failed satisfy the requirement of making a convincing showing that he had important testimony to give concerning one count and a strong need to refrain from testifying on the other. (CT 727-742; RT 87-91.)

The trial court denied appellant's motion, finding that cross-admissibility was not dispositive, that one crime was not more inflammatory than the other crime, one crime would not "bolster" the other crime, and joinder did not change the fact that the crimes involved special circumstances. (CT 77; RT 91-94.)

Appellant later renewed his motion to sever based on "newly discovered evidence." (CT 814-816.) His argument was based on the fact that the prosecutor planned to introduce evidence that Bertrand Dickson was afraid because appellant had told him, "you know what happened to Andre." (CT 815.) He argued that should the jury hear evidence of Andre Chappell's death and appellant's statement to Dickson, severe prejudice would occur. (CT 816.) The trial court reconsidered the issue and again denied the severance motion. (RT 408.)

B. Applicable Law

The requirements for joinder of criminal charges are set forth in section 954, which states in relevant part:

> An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated . . . ; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. . . .

The law prefers consolidation of charges because consolidation ordinarily promotes efficiency. (*People v. Ochoa, supra,* 19 Cal.4th at p. 409.) Consolidation obviates the need to select an additional jury, avoids the waste of public funds, conserves judicial resources, and benefits the public due to the reduced delay in the disposition of criminal charges. (*People v. Mason* (1991) 52 Cal.3d 909, 935; *People v. Bean* (1988) 46 Cal.3d 919, 935-936, 939-940.)

Where the statutory requirements for joinder are satisfied, the defendant bears the burden of proving error by making a clear showing of potential prejudice. (*People v. Kraft* (2000) 23 Cal.4th 978, 1030; *People v. Ochoa, supra*, 19 Cal.4th at p. 409; *People v. Cummings* (1993) 4 Cal.4th 1233, 1283; *People v. Sandoval* (1992) 4 Cal.4th 155, 172.)

The determination of prejudice depends upon the circumstances of each case, but

> "[r]efusal to sever may be an abuse of discretion where: (1) evidence of the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case." [Citation.]

(*People v. Kraft, supra,* 23 Cal.4th at p. 1030; accord *People v. Ochoa* (2001) 26 Cal.4th 398, 423.)

Where cross-admissibility is present under Evidence Code section 1101, prejudice is dispelled. However, "the absence of cross-admissibility does not, by itself, demonstrate prejudice." (*People v. Stitely, supra,* 35 Cal.4th at pp. 532-533; *People v. Kraft, supra*, 23 Cal.4th at p. 1030 (citing *People v. Bradford, supra,* 15 Cal.4th at pp. 1315-1316).) Indeed, section 954.1 provides:

> In cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading, or where two or more accusatory pleadings charging offenses of the same class of crimes or offenses have been consolidated, evidence

concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact.

The propriety of the trial court's ruling on a motion for severance must be judged by the information available to the court at the time the motion was heard. (*People v. Stitely, supra,* 35 Cal.4th at p. 531; *People v. Cummings, supra*, 4 Cal.4th at p. 1284; accord, *People v. Ochoa, supra*, 19 Cal.4th at p. 409.) The trial court's ruling is reviewed for an abuse of discretion, i.e., whether the trial court's denial fell outside the bounds of reason. (*People v. Ochoa, supra,* 26 Cal.4th at p. 423.)

Finally, even if the trial court's ruling was correct when made, the judgment of conviction must be reversed if a defendant shows that joinder actually resulted in "gross unfairness," amounting to a denial of due process and a fair trial. (*People v. Stitely, supra,* 35 Cal.4th at p. 531; *People v. Mendoza* (2000) 24 Cal.4th 130, 162; *People v. Arias* (1996) 13 Cal.4th 92, 127; *People v. Davis* (1995) 10 Cal.4th 463, 508-509.)

C. The Trial Court Acted Within Its Discretion In Denying Appellant's Severance Motion

1. The Offenses Were Of The Same Class

Section 954 permits joinder of all assaultive crimes against the person because they are all considered "of the same class of crimes or offenses." (See *People v. Walker* (1988) 47 Cal.3d 605, 622.) As appellant concedes (AOB 110), the murder of Adkins and the murders of Officers Burrell and MacDonald were offenses of the same class. Therefore, the counts were jointly chargeable offenses.

2. Cross-Admissibility

The prosecutor did not argue that the evidence was cross-admissible, and the trial court did not base its decision on a finding that the evidence was cross-admissible. (RT 92-93.) Even if this Court determines the evidence was not cross-admissible, joinder was appropriate based on the remaining factors. (See *People v. Ochoa, supra*, 26 Cal.4th at pp. 423-425 [court did not address cross-admissibility because court did not find that either charge was unusually likely to inflame the jury or that the evidence of either charge was weak].)

3. Neither The Adkins Murder Nor The Burrell And MacDonald Murders Were Particularly Inflammatory As To The Other

This Court has never treated two relatively similar crimes such as these as carrying an inflammatory effect when joined. (See *People v. Marquez* (1992) 1 Cal.4th 553, 573; accord, *People v. Bradford, supra*, 15 Cal.4th at p. 1317.) The two shootings were not "particularly brutal, repulsive, or sensational.'" (*People v. Arias, supra*, 13 Cal.4th at p. 130, fn. 11, quoting *People v. Balderas* (1985) 41 Cal.3d 144, 174.) Both sets of crimes were senseless shootings, but were not particularly gruesome or inflammatory. Appellant did not demonstrate that the nature of the crimes would have inflamed the jury such that it would be more likely to convict appellant of the Adkins murder simply as a result of the MacDonald and Burrell murders and vice versa.

4. Evidence That Appellant Committed All Three Murders Was Strong

Appellant contends that in order to ensure that joinder was not prejudicial, the evidence of each count must be overwhelming. (AOB 115.)

Appellant cites cases in which this Court found that the evidence of each charge was overwhelming or very strong. (See *People v. Odle* (1988) 45 Cal.3d 386, 404; *People v. Lucky* (1988) 45 Cal.3d 259, 278.) But overwhelming evidence of the joined charges is not required. The test is whether a weak case has been joined with either a strong case or another weak case, so that the aggregate evidence might alter the outcome. (*People v. Ochoa, supra,* 26 Cal.4th at p. 423; *People v. Kraft, supra,* 23 Cal.4th at p. 1030;see *People v. Price, supra,* 1 Cal.4th at p. 389 [prosecution's case as to each charge was strong but not overwhelming].) Here, there was no danger of any "spillover" effect because the evidence of the Adkins murder was equally as strong as that of the Burrell and MacDonald murders.

There was substantial evidence presented at the preliminary hearing that appellant murdered Adkins. The evidence demonstrated that appellant shot Adkins after following Dickson into an apartment because Dickson had mistaken his identity. Los Angeles Police Detective Robert Peterson testified about his interview with Bertrand Dickson. In the interview, Dickson had relayed the following: Dickson was on his way to Andre Chappell's residence when he encountered a man he identified in photographic and live lineups as appellant. Dickson thought he recognized appellant and called him by the wrong name. After a verbal altercation with appellant, Dickson ran into Chappell's house. Inside the residence, Andre Chappell and Carlos Adkins were playing chess. Appellant followed Dickson inside. Appellant was armed. Adkins rose, and appellant shot Adkins. (CT 387-394.)

Additionally, the prosecutor indicated his intention to utilize at trial a statement made by appellant to Dickson while the two were together in lockup. Appellant had asked Dickson not to testify and had stated, "You know what happened to Andre." This evidence, the prosecutor argued, was relevant to appellant's awareness both of what happened to Chappell and that Chappell

was present at the time Adkins was killed. (RT 391, 404-407.)

Dickson's account of the events was corroborated by the testimony of Janice Chappell,[35] who also lived at the residence. She had been asleep when she had heard an argument about Dickson calling someone by the wrong name. Chappell and Adkins were attempting to calm the man. Once the argument died down, the man walked to the door. Adkins also walked to the door, and the man shot Adkins. (CT 363-364.) Janice stated that appellant "looked like" the shooter. (CT 355-369, 374-375.)

There was also substantial evidence presented demonstrating that appellant murdered Officers Burrell and MacDonald.

The evidence demonstrated that both officers were murdered, and the murders were deliberate and premeditated. The autopsies of both officers indicated they had died as a result of gunshot wounds. (CT 575; Peo. Exhs. 41-42.) Alicia Jordan and Margarita Gully witnessed the shootings. Gully testified that on February 22, 1993, at 11:00 p.m., she was driving on Rosecrans when she saw a police vehicle with the lights flashing. A red Chevrolet pickup truck was in front of the police vehicle. As she drove by, she saw the officers attempting to put the man's hands behind his back. The man kept moving his hands back to his sides. (CT 192-203, 230-231.) As she passed the struggle, she heard six to ten gunshots. She looked in the rear-view mirror and saw an officer on the ground. The man was straddling the officer and shooting him in the head. (CT 210-211, 221, 234.) Gully continued driving, and the pickup truck passed her, traveling at approximately 55 to 60 miles per hour, and turned onto Central Avenue. (CT 238.)

Alicia Jordan, who had been riding in the back seat of Gully's vehicle, also testified at the preliminary hearing. She, too, had seen the red pickup truck

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35. Janice Chappell will be referred to by her first name to avoid confusion.

in front of the police vehicle. (CT 301-307.) She heard shots as Gully's car passed the officers and the truck. She saw a Caucasion police officer fall, and she saw a man standing over a Black police officer, shooting. (CT 310-321.) After the truck passed them, it turned onto Central Avenue. (CT 322-324.)

As the pickup truck turned onto Central Avenue, Ingrid Crear testified that she had to brake to avoid a collision. (CT 267-271.) Vincent Rankin, who had been using a pay telephone at the corner of Central Avenue and Rosecrans heard the gunshots and saw the near collision at the corner of Central and Rosecrans. When he hung up the telephone, he saw the two injured officers on the ground. (CT 277-284.) Tong Won Lee, who worked at the Shell Station on the corner of Imperial Boulevard and Central Avenue, saw a red truck screeching through the gas station, entering the station from Central Avenue and exiting onto Imperial Boulevard. (CT 496, 498-500.)

The evidence also demonstrated that appellant was the shooter. Gully testified at the preliminary hearing that the shooter looked like appellant. When asked if she noticed anything different between the shooter and appellant, she responded, "No." (CT 206-207.) She had also participated in a live lineup and had identified appellant as looking similar to the shooter. (CT 207-210.) Jordan was "almost positive" the shooter was appellant. (CT 317-318, 351.) Calvin Cooksey testified that appellant had admitted the murders. (CT 408-411.)

Additionally, the red pickup truck was linked to appellant. The evidence was clear that appellant had purchased and drove a red Chevrolet 454SS pickup truck. (CT 105-117, 152-156, 403, 487-493; Peo. Exh. 9.) Gully testified that appellant's truck was similar to the one she saw on the night of the shooting. Looking at a photograph of appellant's truck, Gully stated there was nothing different about the truck. (CT 198-200; Peo. Exh. 9.) Jordan testified that appellant's truck looked like the truck she had seen the night of the shooting.

(CT 206-207; Peo. Exh. 9.) Lee recognized appellant as a regular customer, who frequented his gas station approximately twice per week, always driving the a red Chevrolet truck. Lee believed it was appellant who had driven the red truck through his gas station on the night of the shooting because Lee had only one "red truck customer" and the time coincided with the time appellant usually visited the gas station. Although Lee could not say that the truck was exactly the same as the one he saw on the night of the shooting, it was the same type of truck. The only difference was that he thought the truck he saw on the night of the shooting had an aluminum sash. (CT 496-499, 501-504, 512; Peo. Exh. 9.) Ingrid Crear thought the truck she saw was "like" appellant's truck. She did not notice writing on the truck on the night of the shooting, but she stated that because the truck was turning when she saw it, she may not have seen the writing on the side. (CT 271-275.) Rankin thought appellant's truck resembled the truck he saw turning onto Central Avenue, although he thought he had seen a black bed cover which was not present on appellant's truck. (CT 279, 287-299.)

Appellant was also connected to the murder weapon. After appellant stated he had killed the officers, Cooksey offered to dispose of the murder weapon. Appellant led Cooksey to a home and instructed Cooksey to return later when a woman would give him the gun. Cooksey returned, and the woman gave him the gun. (CT 412-417.) Keyon Pye confirmed that appellant had given her a gun, and that a man had arrived the next day to retrieve the gun. She offered inconsistent testimony as to when this occurred, but had told police it had happened in middle to late February or in March. (CT 158-164, 176-177, 184-185.) Cooksey sold the gun to Robert Rojas. (CT 418-420, 459.) Cooksey later contacted police and told them he knew the location of the gun. (CT 421.) With the assistance of an undercover officer, Cooksey led police to Rojas and repurchased the gun. (CT 421-422, 566-570.) It was a nine-

millimeter SIG Sauer. (CT 564, 570-571; Peo. Exh. 7.) The bullets recovered as a result of the shooting were probably fired from the SIG Sauer automatic handgun. The casings found at the scene were indeed fired from the SIG Sauer. (CT 576-577.)

Other evidence established a connection between appellant and the SIG Sauer. The SIG Sauer had been stolen from a Las Vegas sporting goods store. Another gun stolen from the same store was found in Deshaunna Cody's purse during the execution of a search warrant. Cody, appellant's girlfriend, testified that appellant had given her the weapon for "protection." (CT 68-80, 88-94, 97-102, 137-138, 555-558.)

Based on the above evidence, the prosecutor's case did not involve the joinder of two weak offenses, nor was there an extreme disparity between a weak case and a stronger one. Appellant contends the jury was likely to aggregate the evidence because one of the witnesses did so. He claims that prior to the preliminary hearing, Janice Chappell testified she was not able to positively identify appellant as the person who shot Adkins, nor was she able to recall a previous identification of appellant. He contends she only identified "Regis" as Adkins's murderer after she saw him on television as a result of the murders of the officers. (AOB 115.) This is incorrect. Janice chose a photograph of appellant as looking like the person who shot Adkins. The only thing she learned as a result of the television coverage was appellant's name. (CT 364-369, 371-375.) Her opinion that appellant looked like the shooter did not change after the television coverage. (CT 379-380.)

Accordingly, the prosecutor's evidence was compelling in strength as to both offenses, and the trial court acted well within its discretion in denying the severance motion. (*People v. Bradford, supra,* 15 Cal.4th at p. 1318; *People v. Price, supra*, 1 Cal.4th at pp. 389-390.)

5. Joinder Of The Offenses Did Not Turn The Matter Into A Capital Offense

The instant case was not one in which capital charges resulted solely from the joinder of the two incidents. (See *People v. Sandoval, supra,* 4 Cal.4th at p. 173; *People v. Marquez, supra*, 1 Cal.4th at p. 573.) Here, it was alleged that Burrell and MacDonald were peace officers who were intentionally killed while engaged in the performance of their duties pursuant to section 190.2, subdivision (a)(7). A multiple murder special circumstance was also alleged, pursuant to CALJIC No. 190.2, subdivision (a)(3). These special circumstances would have been available with or without the Adkins murder.[36]

6. Severance Was Not Required Based On Appellant's Claim That He Might Testify In One Case And Not The Other

Appellant also claims, as he did in the trial court, that the cases should have been severed because of the possibility he might testify in one case, but not the other. (RT 83; AOB 117.) Appellant failed to establish potential prejudice based on a claim of separate defenses.

In *People v. Sandoval, supra,* 4 Cal.4th at pp. 173-174, this Court considered the allegation that a defendant would be prejudiced because he desired to testify as to one incident but not the other. Addressing the issue for the first time, this Court noted:

> The need for severance does not arise in federal courts "'until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other.'" [Citations.] Federal courts have required the

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36. As the trial court noted, had the murders been tried separately, an additional special circumstance could have been alleged under section 190.2, subdivision (a)(2), for a prior conviction of first or second degree murder. (RT 92.)

> defendant to present enough information to satisfy the court that the claim of prejudice is genuine and to enable it to weigh the consideration of economy and expedient judicial administration against the defendant's interest in having a free choice with respect to testifying. [Citation.]

(*Id.* at p. 174.)

Appellant herein relied on pure speculation. Appellant presented nothing more than a hypothetical -- stating that if he hypothetically were to testify in the Adkins case as to self-defense, imperfect self-defense, or that an accidental shooting had occurred, but that he did not wish to testify as to the officer incident, he would be in a predicament. (RT 82-85.) Appellant did not even indicate there was testimony he actually wished to present. As in *Sandoval*, appellant's showing "fell far short of anything that would have satisfied the federal standards or any standard this court might adopt." (*People v. Sandoval, supra,* 4 Cal.4th at p. 155.) Certainly, had appellant been concerned about revealing any possible defenses, he could have requested an in camera hearing to discuss such issues. However, granting severance based on appellant's hypothetical would place the determination of severance into the hands of the defendant. (*Ibid.*)

Accordingly, as appellant failed to show potential prejudice resulting from the trial court's denial of the motion to sever the charges, his claim must be rejected unless he can show the trial court's ruling, however correct at the time it was made, resulted in "gross unfairness," amounting to a denial of due process and a fair trial. (*People v. Arias, supra*, 13 Cal.4th at p. 127; *People v. Davis, supra*, 10 Cal.4th at pp. 508-509.) Respondent submits appellant has not, and cannot, meet such a burden.

D. Appellant Cannot Show "Gross Unfairness" Or A Denial Of Due Process And A Fair Trial

Finally, appellant appears to contend the joinder of the murder counts deprived him of due process and a fair trial "because the death verdicts were the product of a 'spillover effect'." (AOB 117-119.) Respondent disagrees. Appellant cannot demonstrate gross unfairness because there is no reasonable likelihood that he would have avoided conviction on either the Adkins murder or the officers' murders had severance been granted. (See *People v. Davis, supra*, 10 Cal.4th at pp. 508-509.)

First, standing alone, the murder of the officers and the murder of Adkins were supported by compelling evidence. The evidence as to Adkins's murder was similar to that presented at the preliminary hearing. Bertrand Dickson and Janice Chappell offered eyewitness testimony of the murder. Dickson testified he had been returning to Chappell's apartment in Nickerson Gardens when he heard someone call out his nickname. He thought the man was "Romeo," and he yelled out, "Romeo, down here." A man Dickson repeatedly identified as appellant was driving by and yelled, "You don't know me. Don't try to sell me something." (RT 1297-1300, 1315, 1342,-1345, 1351, 1524, 1528-1535.) Appellant's mother lived in Nickerson Gardens, and appellant was in Nickerson Gardens on a regular basis. (RT 1720-1722.) Dickson told appellant he was not talking to him, and appellant pointed a gun at him. Dickson entered Chappell's home where Adkins and Chappell were playing chess, and appellant pushed his way inside. He was holding a handgun and he instigated a verbal confrontation. Dickson apologized for the mistake in identity and explained he had been calling to "Romeo." (RT 1302-1309 1312-1316.)

Janice testified that she was awakened by the arguing and confirmed that the men were arguing over a mistaken identity. She walked down the stairs so

that she could see into the living room. She saw a man who appeared to be appellant.[37] She stated that appellant was upset, and Chappell was trying to calm things down. (RT 1185-1188.) Appellant began to leave the apartment and apologized to Janice for the disruption. (RT 1204-1207, 1317-1319.) Adkins then walked toward the door. (RT 1209.) According to Dickson, Adkins said, "You don't know who I am either." (RT 1319-1320.) Appellant placed the gun between Adkins's eyes and threatened to "blow his brains out." (RT 1320.) Adkins grabbed the gun. (RT 1321-1322.) Appellant fired two shots. Janice saw the sparks from the gun. (RT 1207-1212, 1241.) After the first shot, Dickson ran out the back door of the apartment and called 911. (RT 1322.)

Dickson was thereafter stopped by appellant and another man. Appellant threatened Dickson, stating that if he said anything, appellant would "get him" and that he knew where Dickson's family and daughter lived. Appellant and the other man attempted to force Dickson into the trunk of the car, but Dickson escaped. (RT 1322-1329, 1449-1450.)

Dickson, later in custody for an unrelated burglary, was placed in the same holding cell as appellant. Appellant told Dickson he "didn't mean to do it." Appellant said he was trying to scare Dickson. He had followed Dickson into Chappell's house because he thought Dickson was going to get a gun. He also said he was "tripping because it was his "woman's" birthday and he had argued with her."[38] (RT 1286-1288) Appellant asked Dickson to look out for him and offered him $5,000 to "[t]urn the cheek." Appellant told Dickson that

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37. Janice had identified appellant from a photographic lineup as looking like the man who shot Adkins. At trial, she said she was 98 percent certain of her identification. (RT 1214-1223, 1238, 1256, 1519-1520.)

38. Cody's birthday was February 3, three days after the murder. (RT 2882.)

if he testified, he could not go back to the projects where his daughter remained and cautioned him not to end up like Andre Chappell, who had been killed. Dickson then recanted his identification because he was concerned about his daughter and afraid of "complications." He refused to testify at the preliminary hearing because the "prosecutor" denied the compensation he requested so that he could "leave town." Ultimately, he decided testifying was the right thing to do. (RT 1356-1366.) Dickson later met with his parole agent and sought advice relating to the fact that he had witnessed a shooting. This meeting led to interviews with Detective Peterson, during which Dickson relayed essentially the same account as that given at trial. (RT 1501-1503.)

The evidence clearly demonstrated that appellant killed Adkins and that he did so with malice.

The evidence presented at trial relating to the murders of Officers Burrell and MacDonald was also very strong. As in the preliminary hearing, the evidence again demonstrated that the killing was deliberate and premeditated in that appellant stood over Officers Burrell and MacDonald and repeatedly shot them in what can only be termed an execution. (See RT 1808-1823, 1828-1831, 1840, 1842, 2005-2021, 2032-2033, 2049-2050, 2103-2109, 2237-2244, 2249-2256, 2260-2262, 2310-2316, 2475-2476, 2602-2607, 2626, 3041-3042, 3573-3607, 3613-3625, 3629-3649, 3675-3688, 3690-3692.)

There was ample evidence that appellant was the shooter. Appellant admitted the shooting to Calvin Cooksey.[39/] (RT 3069-3072, 3078-3082, 3189-

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39. During Cooksey's cross-examination, he stated that he had "lost" his mother. (RT 3196.) Also during cross-examination, he stated that he had been placed on a bus with appellant at which time appellant had tried to convince him not to testify. (RT 3242.) When the prosecutor asked Cooksey about the conversation with appellant on redirect, Cooksey said he had asked appellant what had happened to his (Cooksey's) mother. Appellant responded that he did not know and that whoever had killed Cooksey's mother had made him look bad. (RT 3277.) Defense counsel further questioned Cooksey on his

3192, 3516-3520.) Additionally, witnesses to the shooting provided evidence that appellant was the shooter. Gully believed that appellant looked like the shooter and testified that his features, head shape, hair, age, and build appeared the same as the man she saw. (RT 1833-1836, 1850-1853.) De'Moryea also believed that appellant's build, hairstyle, and skin color were the same as the shooter's. (RT 2057-2058.) Jordan had revealed to a friend that she could identify the suspect, but she was afraid. (RT 2491, 2521-2522, 2529-2530.) At trial, Jordan identified appellant as the shooter. (RT 2320-2323, 2491-2492.)

Evidence also demonstrated that appellant was the driver of the red pickup truck, which had been stopped by Officers Burrell and MacDonald and which was driven from the scene of the shooting. The evidence was again clear that appellant had purchased and drove a red Chevrolet 454SS pickup truck. (RT 1643-1654, 1774-1775, 2682-2687, 2883-2888.) Gully testified that appellant's pickup truck was similar to the one she saw on the night of the shooting. Looking at a photograph of appellant's pickup truck, she stated there was nothing different about the truck. (RT 1823-1824.) De'Moryea testified

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conversation with appellant and voiced his concerns to the trial court that the fact that Cooksey's mother was murdered would have to be addressed. (RT 3282-3384.) Thereafter, evidence was introduced that Cooksey had filed a lawsuit against the City of Los Angeles, County of Los Angeles, and City of Compton for 125 million dollars based on the wrongful death of his mother. (RT 3289.) As a result of this testimony, the following stipulation was presented to the jury:

> The Los Angeles Police Department conducted an investigation into the death of Calvin Cooksey's mother, and their findings were that [appellant] was not directly or indirectly responsible for the death of Calvin Cooksey's mother.

(RT 3362.) The jury was instructed to accept the stipulation as fact. (CT 1037; RT 3362.)

that the tires on appellant's truck and the "4"s on the side looked like what he saw on the night of the shooting. (RT 2030, 2042-2043.) Jordan testified that appellant's truck looked like the truck she had seen the night of the shooting. (RT 2229-2233, 2314-2315, 2485-2490, 3041-3042.) Lee testified consistently with his preliminary hearing testimony that he believed the truck he saw speeding through his gas station belonged to appellant, his regular customer, and that the photograph of appellant's truck was similar to the truck he saw the night of the shooting. (RT 2629-2639, 2640-2650.) Crear again testified that the truck had turned in front of her and that the photograph of appellant's truck was like the truck she saw, although she did not think the truck she saw the night of the shooting had the word "Chevrolet" on the back. (RT 2498-2508.)

Appellant was tied to the crime by ballistics evidence. Evidence similar to that presented at the preliminary hearing again demonstrated that appellant gave a gun to Keyon Pye. When Cooksey asked appellant what happened to the murder weapon, appellant said the gun was "put up." Cooksey obtained the gun, at appellant's direction, from Pye. Cooksey then sold the gun to Robert Rojas. Later, the gun was retrieved from Rojas. It was determined that the gun had been used in the shooting. Casings found at the scene of the shooting came from the gun, and the bullets recovered in relation to the shooting were consistent with having been fired from the gun. (RT 2690-2716, 2719-2721, 2793-2800, 2861-2864, 3057, 3061-3062, 3086-3110, 3143-3146, 3254, 3311-3314, 3386-3387, 3418, 3447-3461, 33466, 473, 3477, 3528-3529, 3669-3673, 3677-3680.) Additionally, the guns discovered in this case linked appellant to the shooting. Appellant had given Deshaunna Cody a Firestar nine-millimeter gun, which had been stolen from a Las Vegas sporting goods store. The gun used in the shooting had been taken from the same store. Another gun taken in the burglary of the store was discovered with Philip Cathcart, appellant's friend, and another was discovered with Calvin Cooksey, Cathcart's cousin. (RT

1682-1709, 3033-3036, 3116-3117, 3120-3121, 3188, 3556-3560.)

Further, the chance that the evidence would be aggregated was lessened by the fact that the jury was well aware that the charges were separate and were to be decided separately. The jury was instructed that each count charged a distinct crime and that each count had to be decided separately. (CT 1095; CALJIC No. 17.02.) It is assumed the jury understood and followed this instruction. (See *People v. Frank* (1990) 51 Cal.3d 718, 728.)

Furthermore, the prosecutor did nothing to encourage cumulation of the evidence, as appellant suggests. (AOB 117.) Appellant points out that, in opening statements, the prosecutor said the murders were all committed with nine-millimeter ammunition. Thus, the prosecutor suggested the same person killed all three victims. It is true that the prosecutor stated all three men had been shot with nine-millimeter, semi-automatic pistols. But there was no indication that the same gun was used, and nothing in the prosecutor's argument could be construed as such. (RT 1120.) In fact, in closing argument, the prosecutor argued the evidence separately. It was very clear that one crime was not relevant to the other crime. (See RT 4060-4085, 4231-4233, 4236 [Adkins murder]; RT 4085-4140, 4213-4231, 4237-4240 [Burrell and MacDonald murders].)

In sum, the trial court properly denied appellant's severance motion, and even if the denial was in error, appellant cannot demonstrate that the denial resulted in gross unfairness. Accordingly, appellant's contention should be rejected.

VII.

INTRODUCTION OF EVIDENCE RELATING TO THE BURRELL AUTOPSY WAS PROPER

Appellant contends that the introduction into evidence of the autopsy

report concerning Officer Burrell prepared by Dr. James Wegner, who was deceased, as well as any evidence based upon the autopsy report (i.e., the testimony of Dr. Ribe), violated his right to confront witnesses. (AOB 122-130.) Appellant has forfeited this claim. Even if cognizable, the claim fails because the type of evidence involved in this case is not "testimonial" and because experts may offer opinions based upon hearsay sources. Furthermore, appellant was not prejudiced by introduction of the evidence.

A. Background

Dr. James Wegner performed the autopsy of Officer Kevin Burrell. Prior to trial, Dr. Wegner passed away. (RT at 3575-3577; Peo. Exh. 83.) Dr. Ribe[40] testified as to the procedures of the coroner's office for conducting autopsies. (RT 3573-3575.) He had studied Dr. Wegner's report, and he indicated that Officer Burrell died of multiple gunshot wounds. (RT 3576-3577.) Officer Burrell had sustained gunshot wounds to his arm, face, left foot, and head and would have survived for seconds or minutes. (RT 3577-3578.)

In testifying, Dr. Ribe utilized five photographs taken the day before the autopsy and one taken the day of the autopsy, x-rays, a mannequin, and Officer Burrell's clothing to demonstrate entrance and exit wounds and the path of the bullets. (RT 3578-3607; Peo. Exhs. 84-86, 88-89, 91-95.)

Dr. Ribe testified that the wound to Officer Burrell's arm would have been consistent with having been received while Officer Burrell was reaching for his weapon with the shooter in front of him or with Officer Burrell buckling over. (RT 3586.) The bullet which caused the gunshot wound to Officer Burrell's face had traveled back through the torso and was recovered from the front of the shoulder blade. (RT 3586-3588; Peo. Exh. 87.) The angle of the

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40. Dr. Ribe conducted the autopsy of Officer MacDonald. (RT 3614.)

gunshot wound would have been consistent with Officer Burrell bending over at the time the wound was received. (RT 3591, 3597-3599; Peo. Exh. 92.) The gunshot wound to the foot could be consistent with having been received while Officer was on his back lifting his foot. (RT 3593, 3605-3607; Peo. Exh. 95.) The gunshot wound to the head entered the top of the head. A projectile was recovered from the right portion of Officer Burrell's head. (RT 3595-3596; Peo. Exh. 90.)

B. Appellant Has Forfeited His Claim

A defendant may not complain for the first time on appeal that the admission of evidence violated the right to confrontation, or any other right under the federal Constitution. (*People v. Boyette* (2002) 29 Cal.4th 381, 424 [due process, reliable penalty determination, and cruel and unusual punishment]; *People v. Alvarez* (1996) 14 Cal.4th 155, 186 [confrontation]; *People v. Zapien* (1993) 4 Cal.4th 929, 979-980 [confrontation]; *People v. Raley* (1992) 2 Cal.4th 870, 892 [confrontation and due process].) In this case, appellant raised no objection to the testimony of Dr. Ribe on the ground that it was based on the autopsy conducted by Dr. Wegner.

The Supreme Court's decision in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L. Ed. 2d 177], does not change the fact that appellant has waived his constitutional claim. *Crawford* merely applied the Confrontation Clause. The decision did not create a new constitutional right which was not in existence at the time of appellant's trial. Thus, if appellant wished to object on the specific ground that there was a violation of the right to confrontation, he could have done so even before *Crawford*. It remains the rule that in order to preserve an issue for appeal, there must be an objection on a specific basis. (*People v. Champion* (1995) 9 Cal.4th 879, 918.)

United States v. Cotton (2002) 535 U.S. 625 [122 S.Ct. 1781, 152

L.Ed.2d 860], is illustrative. In *Cotton*, the Supreme Court found that the federal defendants had forfeited their claims under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] by not objecting at trial, despite the fact that *Apprendi* was decided while the defendants' case was on appeal. (*Cotton, supra,* 535 U.S. at pp. 628-629, 631.) If the defendant in *Cotton* forfeited his Sixth Amendment claim by failing to object, then appellant waived such a claim here.

C. The Alleged Hearsay Was Nontestimonial

The alleged hearsay involved in this case was the opinion of Dr. Ribe that was based upon the certified autopsy report of Officer Burrell, which was prepared by Dr. Wegner. The autopsy report was not testimonial hearsay within the meaning of *Crawford.*

In *Crawford*, the Supreme Court held that the Sixth Amendment right to confrontation in criminal cases prohibits testimonial hearsay evidence when the declarant is unavailable and the defendant had no prior opportunity to cross-examine the declarant. (*Crawford, supra*, 541 U.S. at pp. 68-69.) The *Crawford* Court declined to "spell out a comprehensive definition of 'testimonial,'" but stated that it included, at a minimum, prior testimony at a preliminary hearing, before a grand jury, and at a former trial, and statements made during police interrogations. (*Id.* at p. 68.) A person "who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." (*Id.* at p. 51; *accord, People v. Butler* (2005) 127 Cal.App.4th 49.) The United States Supreme Court made it clear in *Crawford* that "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . ." (*Crawford , supra*, 541 U.S. at pp. 50-52.)

An autopsy report does not bear testimony, or function as the equivalent of in-court testimony. If the doctor who had personally prepared the report had appeared to testify at appellant's trial, he would merely have authenticated the document. It was a business record or an official record prepared by a public employee. (See Evid. Code §§ 1271, 1280; *People v. Beeler* (1995) 9 Cal.4th 953, 978-981.) The certified record describing the cause of death would be admissible just as a certified death certificate could be admitted without the live testimony of the doctor signing the death certificate.

This Court has recognized the differences between testimonial evidence and documentary evidence:

> Generally, the witness's demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports . . . where often the purpose of this testimony simply is to authenticate the documentary material, and where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action.

(*People v. Arreola* (1994) 7 Cal.4th 1144, 1157; accord *People v. Johnson* (2004) 121 Cal. App. 4th 1409, 1413 [a criminalist's report was " routine documentary evidence," not "testimonial" hearsay under *Crawford*].) The difference between the actual doctor who performed the autopsy testifying from what he had previously written in his report and another doctor interpreting the same report is insignificant. An autopsy report describing the cause of death is simply not the kind of "testimonial" evidence *Crawford* sought to exclude under the Sixth Amendment.[41/] Indeed, the High Court in *Crawford* stated that

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41. Other states have determined that autopsy reports are non-testimonial. (See *People v. Durio* (Sup.Ct. 2005) 794 N.Y.S.2d 863, 868-869

business records were a type of non-testimonial hearsay. (*Crawford, supra,* 541 U.S. at p. 56.)

Additionally, Dr. Ribe was clearly testifying as an expert. His testimony was not hearsay. Experts are permitted to base their testimony upon matters "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code § 801.) The autopsy report was, under the circumstances of expert opinion, not admitted for the truth of the matter asserted, but as the basis for Dr. Ribe's opinion. Appellant was free to challenge Dr. Ribe's opinion. Should he have chosen, appellant could have presented contrary evidence or the opinion of his own expert that the report did not support Dr. Ribe's conclusions as to the nature of the injuries and that Officer Burrell died of multiple gunshot wounds. *Crawford* was not intended to address such a non-hearsay issue. *Crawford* itself says it does not apply to testimonial statements for purposes other than establishing the truth of the matter asserted. (*Crawford*, *supra*, 541 U.S. at p. 59, fn. 9.)

D. Appellant Was Not Prejudiced By The Introduction Of Dr. Ribe's Testimony

As the United States Supreme Court has previously held, violations of an accused's right to confront witnesses as guaranteed by the Sixth Amendment

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[7 Misc. 3d 729] [autopsy report was not testimonial, and was admissible despite the absence of the report's preparer]; *Denoso v. State* (Tex.App. 2005) 156 S.W.3d 166, 182 [statements within autopsy report which set forth the location and nature of decedent's injuries and the cause of death were not testimonial because the report was not prior testimony or a statement given in response to police interrogation]; *Smith v. State* (Ala. Crim App. 2004) 898 S.2d 907, 916-918 [autopsy evidence and report not testimonial, although confrontation rights violated under facts of the case because the cause of death was a crucial element of the charge].)

are subject to harmless-error analysis under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24, [87 S.Ct. 824, 17 L.Ed.2d 705] i.e., whether the error was harmless beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 18 [119 S.Ct. 1827, 144 L.Ed.2d 35]; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680-684 [106 S.Ct. 1431, 89 L.Ed.2d 674].) Nothing in *Crawford* changed this analysis. Here, even if Dr. Ribe's testimony should have been excluded, appellant was not prejudiced. It was undisputed that Officer Burrell was shot to death. The evidence was also very strong, even without Dr. Ribe's testimony, that the murder was deliberate and premeditated. Margarita Gully saw a man who looked like appellant straddling Officer Burrell's legs, pointing a gun about three to four feet from Officer Burrell's head. She then heard additional shots fired. (RT 1811-1812, 1814-1823, 1828-1836, 1840, 1842, 2626; Peo. Exhs. 24, 35, 37-38, 62.) Alicia Jordan saw a man who appeared to be appellant holding a gun and moving around the officers. While Officer Burrell was face down on the curb, the man walked to Officer Burrell's body, stood between the waist and shoulder area and shot downward in the area of Officer Burrell's head. (RT 2251-2256, 2260-2262, 2311, 2315, 2320-2323, 2475-2476, 2491-2492, 3041-3042.)

Officer Reynolds testified that blood had been located on Officer Burrell's clothing, and a bullet hole was present in the bottom of his boot. (RT 2603-2605; Peo. Exh. 59.) Deputy Sheriff Dwight Van Horn, a firearms examiner, testified that a bullet had been removed from Officer Burrell's boot. (RT 3680.) He also testified to the presence of holes in Officer Burrell's jacket and that gun residue on the jacket demonstrated that the gun which inflicted the wound to the chest was fired from a distance between two and three feet. (RT 3686-3688; Peo. Exh. 92.)

Additionally, Dr. Ribe did conduct the autopsy of Officer MacDonald, whose body was found along with Officer Burrell's body and who suffered a

very similar fate. (RT 2175-2183, 2189-2190, 2196, 2543, 2589-2590, 2594, 2597-2598, 3042, 3614-3625, 3630-3649, 3675-3686; Peo. Exhs. 32, 97, 100-107, 109-111.)

Based on the foregoing, it did not take expert coroner's testimony to demonstrate that Officer Burrell's murder was deliberate and premeditated. There is simply no reasonable possibility that the jury would have reached a different verdict absent Dr. Ribe's testimony relating to Officer Burrell's autopsy. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

VIII.

ARTIST RENDERINGS WERE PROPERLY ADMITTED TO ILLUSTRATE WITNESSES' TESTIMONY

Appellant contends that the trial court erred in admitting into evidence artist renderings because the renderings constituted inadmissible hearsay, were inaccurate, and violated his rights to confrontation and due process. (AOB 131-147.) Respondent submits appellant has forfeited any claims based on the federal Constitution, the renderings were properly admitted, and even if erroneously admitted, appellant was not prejudiced.

A. Background

The prosecution moved to admit artist renderings as illustrative of witness testimony. The prosecutor explained that the renderings were intended to assist the jury in visualizing the incidents in order to gain a more complete understanding of the witnesses' testimony. (CT 663-674.) Defense counsel filed an opposition, arguing that the renderings were not accurate, constituted hearsay, and were misleading. (CT 760-764.) The trial court granted the prosecution's motion to use the renderings as illustrative of the testimony of live witnesses, provided the parties took the position that the artist was not

there, and the drawings were not actual drawings of what occurred. (CT 777; RT 112-115.)

Defense counsel renewed his objection on the ground that the drawings were not accurate. (RT 126.) The trial court overruled the objection, finding that the renderings could be used to illustrate oral testimony. The trial court noted it would consider any foundational objections raised by defense counsel at the time the renderings were used and that it would consider any requested instruction, but it also noted that it did not anticipate the renderings would be presented as actual fact. (RT 323-324.) At trial, the artist renderings were used as set forth below.

Margarita Gully was shown an artist rendering. The prosecutor asked her whether the relationship between the two officers and the suspect was how she recalled that relationship on the night of the shooting and whether the angle and position of the shooter was correct. She responded that the positioning was correct and that the manner in which the shooter looked up was "similar." (RT 1803-1804; Peo. Exh. 36.) Gully was shown another rendering and asked whether the rendering depicted what she saw in her rearview mirror when the suspect straddled officer and shot him and if the rendering depicted the relationship of the pickup truck to the police car and the angles of both vehicles. She stated the depiction was correct. (RT 1822-1823; Peo. Exh. 37.) Artist renderings of a truck were shown to Gully, and she confirmed that the renderings showed the position of the truck passing her car on the right and turning onto Central. (RT 1843-1844; Peo. Exhs. 39-44.)

On cross-examination, defense counsel showed Gully the drawings and brought out errors in the renderings. Gully testified that the color of the shooter's jacket in the drawing was the wrong shade of green. (RT 1876-1880; Peo. Exh. 38.) She further testified that although the rendering depicted a license plate number on the truck, she did not see a license plate number.

Further, although the renderings showed a "454" on the side of the truck and the word "Chevrolet," she did not see the writing. (RT 1880-1881; Peo. Exhs. 39-40.) Gully explained that although more information appeared than what she gave the artist, she had been concerned about describing the position of the truck in the preparation of the drawings. (RT 1882.) As to People's Exhibit 37 which showed the shooter straddling Officer Burrell, Gully testified that although the rendering had white marks coming from the gun, she did not remember sparks. (RT 1882-1884; Peo. Exh. 37.)

De'Moryea was also shown an artist rendering. He testified that the drawing showed the position of the shooter as he got into the pickup truck and the location of Officer MacDonald on the ground. (RT 2037-2038; Peo. Exh. 47.)

Jordan testified she saw Officer MacDonald falling. At that time, he was between the police car and the red pickup truck and the street. (RT 2242.) She testified that an artist rendering, People's Exhibit 51, depicted Officer MacDonald falling and his location in front of the police vehicle. People's Exhibit 52, showed Officer MacDonald closer to the ground in the same spot, and it more accurately depicted Officer MacDonald falling.[42] (RT 2241-2244, 2249.) Jordan stated that another rendering, People's Exhibit 53, was consistent with her recollection of the relationship of Officer MacDonald to the police car. (RT 2250.) People's Exhibit 54 accurately depicted the moment she saw the shooter firing and the relationship of the shooter to where the officer was located on the ground. (RT 2312-2314.) People's Exhibit 55, which depicted the driver's side of the truck, accurately showed Jordan's view at the time the truck passed her on the right. (RT 2323-2324.)

On cross-examination, defense counsel showed Jordan People's Exhibit

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42. People's Exhibit 51 was not introduced into evidence. (RT 3743.)

36, the artist rendering which had previously been shown to Gully. She did not recall seeing the police officers with a shooter in the manner depicted in the drawing. (RT 2391-2392.) Defense counsel also showed her People's Exhibit 55, and she again testified the rendering accurately depicted what she saw and that the tinting on the windows was correctly portrayed. She admitted, however, that she had looked at the rendering for a longer period of time than the time she viewed the same scene on the night of the incident. (RT 2461-2463.)

In later consideration of whether the renderings would be admitted into evidence, the trial court noted it had some concerns about the artist renderings because there had been no testimony about the license plate number. (RT 1966-1967.) The prosecutor offered to cover the license plate number. (RT 1968.) Defense counsel reiterated that he objected to introduction into evidence of all the renderings. However, he indicated that if the renderings were to be admitted regardless of accuracy, he would want the renderings admitted "as is" for tactical reasons. (RT 3994.) The trial court noted that the initial objection had been on the point that they did not accurately depict the scene, but the renderings were admitted with the errors. (RT 3996.)

In final argument, defense counsel used the artist renderings as an example of what he called "shading the truth." He showed the jury a photograph of appellant's truck with the license number. (RT 4185; Peo Exh. 24.) He then stated:

> These renderings were done to assist witnesses in describing to you what they saw. People's 39 is a red pickup. It's got a license plate number, 4J88557. [¶] All right. If this is not the greatest distortion of the truth, I don't know what is. [¶] There is nothing in the record . . ., no witnesses -- and you know this -- who were able to say that that is his truck at the scene or that they saw a license plate. [¶] And yet it is

offered to you by the prosecution in People's 39 and in People's 40. That is not the truth. No one can dispute that. That's not the truth. No one saw a license plate number. That is a distortion of the truth.

(RT 4185-4186.) He further pointed out that People's Exhibits 39 and 40 did not accurately depict appellant's truck. (RT 4190-4191.) Defense counsel made a similar argument as to People's Exhibit 55, calling a "distortion of the truth" and urging the jurors to look at it for as long as they liked. (RT 4186-4187.)

The prosecutor responded to defense counsel's argument, admitting the inaccuracies in the drawings, but stating that the purpose of the drawings was "to show the relevant relationships of the vehicle to the road, the vehicle to the suspect, and to the officers." (RT 4225-4226.)

Appellant moved for a new trial on grounds including introduction into evidence of the artist renderings, and the motion was denied. (CT 1183-1184, 1203; RT 5010.)

B. Appellant Has Forfeited His Claim Of Federal Constitutional Error

Appellant did not object to the introduction of the artist renderings on the grounds that the evidence violated his due process rights or his right to confrontation. As such, he has waived this claim. (Evid. Code, § 353; *People v. Williams* (1997) 16 Cal.4th 153, 250; *People v. Padilla* (1995) 11 Cal.4th 891, 971; *People v. Sanders* (1995) 11 Cal.4th 475, fn. 27; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20.) Contrary to appellant's assertion (AOB 140-141), his failure to object is not excused by the United States Supreme Court's decision in *Crawford v. Washington, supra,* 541 U.S. 36. (See Argument VII, § B.) Even if appellant preserved his claim of federal constitutional error by an objection on state-law grounds, there was no error in the admission of the drawings. (See *People v. Yeoman* (2003) 31 Cal.4th 93,

123 [federal constitutional claim not waived where legal standard and facts are essentially the same as state law claim].)

C. Introduction Of The Renderings Was Proper

Appellant contends the introduction of the artist renderings constituted error under state law because the drawings consisted of inadmissible hearsay and were inaccurate.[43] (AOB 136-140.) This is incorrect.

In determining whether the trial court erred under state law in introducing evidence, Evidence Code section 351 provides that all relevant evidence is admissible, unless otherwise provided by statute. "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; see also *People v. Scheid* (1997) 16 Cal.4th 1, 13; *People v. Mendoza, supra,* 24 Cal.4th at p. 171.) The trial court is vested with broad discretion in determining the admissibility of evidence. (*People v. Karis* (1988) 46 Cal.3d 612, 637.) The admissibility of evidence is generally a state law error only, except in the rare instances when the error is so grievous as to infect the entire trial with fundamental unfairness and thereby create a violation of due process. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 116 L.Ed.2d 385]; *People v. Harris* (2005) 37 Cal.4th 310, 336.) The trial court here acted well within its discretion in admitting the artist renderings.

First, the renderings were not inadmissible hearsay. 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

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43. To the extent appellant contends introduction of the drawings was improper because the drawings were inaccurate, appellant has waived this claim. (AOB 139-140, 144.) The trial court offered to alter the drawings to the extent the drawings contained extraneous information, but defense counsel indicated that if the drawings were to be admitted, he wanted them admitted "as is." (RT 3994.)

stated." (Evid. Code § 1200.) Contrary to appellant's assertion that the drawings were the artist's interpretations of the scene (AOB 138), the drawings in this case were certainly not offered for such a purpose. The drawings were admitted only to illustrate the witnesses' testimony. (See *People v. Rodrigues, supra,* 8 Cal.4th at p. 1116 [videotape not introduced for hearsay purpose of refreshing recollection; rather it was offered to demonstrate physical layout of an apartment building and witness's vantage point].)

Moreover, the inaccuracies in the artist drawings did not render the drawings inadmissible. Decisions of this court relating to demonstrative videotape evidence are instructive.

In *People v. Mayfield* (1997) 14 Cal.4th 668, the prosecution used a videotape of the crime scene to impeach the defendant on cross-examination. (*Id.* at p. 745.) The defendant argued that the videotape did not fairly and accurately portray the crime scene, because it was shot at night and was made almost 18 months after the crime. (*Id.* at p. 747.) This Court rejected that argument as follows:

> [T]he videotape was admitted only to show the height and location of walls and fences and what could be seen by looking over them at certain locations. For these limited purposes, the lighting was irrelevant, and the prosecution elicited testimony that the walls and fences had not changed since the events in question. Moreover, the jury could determine this by comparing the videotape to photographs taken within hours or a few days after those events. Accordingly, the videotape was sufficiently authenticated.

(*Ibid.*) The Court also rejected the defendant's argument that the trial court abused its discretion, because the probative value was outweighed by the risk of undue prejudice because the videotape could have assisted the jury in evaluating the defendant's testimony and it presented minimal risk of undue

prejudice. (*Id.* at p. 748.)

Similarly, in *People v. Rodrigues*, *supra*, 8 Cal.4th 1060, this Court rejected a claim that it was error to introduce a videotape where the lighting was not the same as at the time of the crime and where there were obvious differences between the defendants and the people depicted in the videotape because such discrepancies were immaterial to the purpose for which the exhibit was being offered:

> In particular, the videotape had been intended in part to show [the witness'] vantage point as she witnessed the assailants flee the scene. Therefore, once [the witness] confirmed in her testimony that the videotape accurately showed the area where she was and where she saw the assailants, the trial court could correctly conclude that the videotape was a reasonable representation of the physical layout of the apartment building and [the witness'] vantage point. Moreover, the court could properly find that a viewing of the videotape would aid the jurors in their determination of the facts of the case notwithstanding the claimed inaccuracies.

(*Id.* at pp. 1114-1115 [footnote and citation omitted].) This Court also addressed inaccuracies in the videotape as follows:

> Furthermore, we reject defendant's claim that the videotape's inaccuracies created a misleading impression of the events witnessed [], as well as his further claim that the tape should have been excluded as being more prejudicial than probative. First, defendant fails to demonstrate how the various inaccuracies could have made the videotape misleading as to the purposes for which it was offered. Second, the inaccuracies either were obvious to the jurors (such as the fact that [the witness] had not testified to seeing one White male in a white shirt flee the scene), or, if not so, were specifically brought to their

> attention. . . . Moreover, the prosecutor made no attempt to pass the videotape off as depicting exactly what [the witness] saw the night of the murder. He also never assumed or suggested through his questioning of [the witness] that she was outside of her apartment, or that she was looking through an open bedroom door when she saw the assailants. Hence, any potentially prejudicial effects of the inaccuracies were minimized, if not virtually eliminated. No abuse of discretion appears.

(*Ibid.*)

Here, there was no suggestion that the artist renderings were relevant to determine any of those items which appellant contends were inappropriately contained in the renderings. (AOB 138-140.) The drawings were not utilized to prove facts related to the license plate number, the lighting conditions, the location of expended shell casings, or the number "454" on side of the truck. It was absolutely clear that the drawings were simply used to illustrate positions and points of view. The fact that the drawings contained inaccuracies or details which were not supported by the witnesses' testimony did not render the drawings inadmissible.

For the same reasons, introduction of the renderings did not violate appellant's rights to confrontation or due process. As discussed in Argument VII, in *Crawford*, the Supreme Court held that the Sixth Amendment right to confrontation in criminal cases prohibits testimonial hearsay evidence when the declarant is unavailable and the defendant had no prior opportunity to cross-examine the declarant. (*Crawford, supra*, 541 U.S. at pp. 68-69.) The drawings here were not admitted as statements of the artist, but rather simply to illustrate the witnesses' testimony. The witnesses were available for cross-examination on any point contained in the drawings, and were indeed thoroughly cross-examined. Thus, appellant's claim that his right to

confrontation and due process were violated is meritless even if not forfeited.

D. Appellant Was Not Prejudiced By The Introduction Of The Artist Renderings

Because the application of a state's ordinary rules of evidence does not implicate the federal Constitution, any error in admitting the evidence is reviewed to determine whether there is a reasonable probability of a different outcome absent admission of the evidence. (*People v. Harris, supra,* 37 Cal.4th at p. 336.) Even if the error implicated the federal Constitution, the error is harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Appellant thoroughly cross-examined Gully, De'Moryea, and Jordan as to their ability to perceive the events, specifically questioning them about their statements which had been illustrated through the use of the drawings and as to inaccuracies in the drawings. (See, e.g., RT 1876-1884 [jacket wrong color, and more information on renderings than what she provided, but she was concerned about positions], 2070 [sprinkling outside], 2081 [no "454", although there was a "4 something 4"], 2462 [length of time Jordan viewed the rendering longer than the time she viewed the scene the night of the incident]. Defense counsel used the inaccuracies to his advantage during closing argument, arguing the obvious discrepancies in the renderings. (RT 4185-4191.) The prosecutor fully admitted that the drawings contained extraneous information, but clarified they were only relevant to establish positioning and relationships. (RT 4225-4226.) There was simply no danger that the drawings misled the jury in light of the manner in which they were presented, especially in light of the strong evidence of appellant's guilt. (See Statement of Facts, Argument VI, § D.)

Thus, appellant's claims should be rejected.

IX.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE CONSISTING OF PHOTOGRAPHS, MANNEQUINS, BLOOD-STAINED CLOTHING, AND OTHER EVIDENCE RELEVANT TO THE NATURE OF THE MURDERS

Appellant contends the introduction of the following evidence was error because it was more prejudicial than probative: coroner photographs (Peo. Exhs. 84, 97); mannequins and photographs of the mannequins (Peo. Exhs. 85, 91, 100, 104); blood-stained clothing and photographs of the items (Peo. Exhs. 59, 60, 92-95, 105-107); photograph of Officers Burrell and MacDonald in uniform while alive (Peo. Exh. 35); photograph of the officers' faces on the autopsy table (Peo. Exh. 50); evidence that Reynolds had been a friend of Officer Burrell (RT 2581); Officer Reynolds's description of blood and vomit at the scene (RT 2589-2590); Officer Metcalf's testimony about the condition of the officers when he arrived at the scene (RT 2546); testimony of Harris when she arrived at the scene (RT 2171, 2195-2196); and "much of the testimony of the coroner."[44] (AOB 148-160.) Respondent submits that appellant has waived any claim of federal constitutional error as a result of the admission of this evidence, and the trial court acted well within its discretion in admitting the evidence because it was highly probative and not unduly prejudicial.

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44. Appellant states that some of the evidence was irrelevant (AOB 148), but respondent has found no claim in this section arguing that a particular piece of evidence was irrelevant. The heading of the argument and the nature of the argument indicate that appellant's claim is that the evidence was more prejudicial than probative.

A. Appellant Has Forfeited Any Claim Of Federal Constitutional Error

Appellant did not object to the introduction of any of the evidence now at issue on grounds that the evidence violated his rights under the federal Constitution and has forfeited his claims. (Evid. Code, § 353; *People v. Williams, supra,* 16 Cal.4th at p. 250; *People v. Padilla, supra,* 11 Cal.4th at p. 971; *People v. Sanders, supra,* 11 Cal.4th at p. 539, fn. 27; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1116, fn. 20.) Even if appellant's claims are preserved, they are meritless. (See *People v. Yeoman, supra*, 31 Cal.4th at p. 123.)

B. General Principles Of Law

Appellant claims that the above-listed evidence was more prejudicial than probative and could have only had the effect of inflaming the jury. (AOB 148.) As previously discussed, all relevant evidence is admissible, unless otherwise provided by statute. (See Evid. Code, §§ 210, 351; see also *People v. Scheid, supra*, 16 Cal.4th at p. 13; *People v. Mendoza, supra*, 24 Cal.4th at p. 171.) This Court has stated that the admissibility of evidence the type of which appellant now complains has two components:

> "(1) whether the challenged evidence satisfied the 'relevancy' requirement set forth in Evidence Code section 210, and (2) if the evidence was relevant, whether the trial court abused its discretion under Evidence Code section 352 in finding that the probative value of the [evidence] was not substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice. [Citation].

(*People v. Carter* (2005) 36 Cal.4th 1114, 1166, quoting *People v. Heard* (2003) 31 Cal.4th 946, 972.) The "'prejudice'" referred to in Evidence Code

section 352 is that which "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*People v. Garceau* (1993) 6 Cal.4th 140, 178; see also *People v. Smithey* (1999) 20 Cal.4th 936, 973; *People v. Scheid, supra*, 16 Cal.4th at p. 19.) The trial court's exercise of discretion will not be disturbed on appeal unless the probative value of the evidence is clearly outweighed by the prejudicial effect. (*People v. Carter, supra,* 36 Cal.4th at p. 1167.)

This Court has observed, "victim photographs and other graphic items of evidence in murder cases always are disturbing." (*People v. Hart* (1999) 20 Cal.4th 546, 615.) But this Court has noted:

> As a rule, the prosecution in a criminal case involving charges of murder or other violent crimes is entitled to present evidence of the circumstances of attending them even if it is grim. Service on a murder trial jury is not entertainment; such duty is serious and onerous; by serving, the jurors are executing a primary and necessary duty as citizens. Often the details of evidence are unpleasant, but adult finders of fact must face this duty calmly and undismayed.

(*People v. Reil* (2000) 22 Cal.4th 1153, 1195 [citations and internal quotations omitted].) As to claims relating to the cumulative nature of such evidence, evidence is not cumulative simply because the facts have been established by testimony. (*People v. Wilson* (1992) 3 Cal.4th 926, 938; see *In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843 ["Evidence may be relevant even though it is cumulative; thus, the only ban on cumulative evidence is found in Evidence Code section 352."].)

Finally, the admissibility of evidence is generally a state law error only, except in the rare instances when the error is so grievous as to infect the entire trial with fundamental unfairness and thereby create a violation of due process. (*Estelle v. McGuire, supra* 502 U.S. at p. 72.)

C. Evidence Used By The Coroner

Appellant argues that the evidence used by Dr. Ribe in his testimony consisting of photographs, x-rays, mannequins, and blood-stained clothing was more prejudicial than probative.[45] (AOB 149-150, 152-153.) The trial court did not abuse its discretion in admitting this evidence.

Prior to trial, defense counsel objected to the use of coroner photographs, arguing they were more prejudicial than probative because there was no dispute relating to cause of death, intent, identity of the victims, or any other issue that might be proffered for their introduction. (CT 765.) The prosecutor responded that the photographs were necessary to illustrate the coroner's testimony and aid the jury in understanding medical testimony. Further, he argued they were relevant to prove that the murder was intentional and cold-blooded and to explain how one defendant could shoot two officers without either one drawing his weapon. (RT 798-804, 811-812.) At a hearing on the relevance of the photographs, the prosecutor addressed each photograph and explained what each photograph would show, concluding that the photographs were relevant to intent to kill, willfulness, deliberation, and premeditation. The prosecutor pointed out that the autopsy photographs were "pretty sanitary." (RT 115-123.) Defense counsel responded that the testimony should be sufficient to show the intent to kill and premeditation. (RT 124.) The trial court found the evidence relevant to demonstrate willful, deliberate and premeditated murder and further found that the probative value outweighed the prejudicial effect. (RT 319-320.)

Prior to the testimony of Dr. Ribe, appellant objected to the introduction of mannequins, x-rays, photographs, and clothing on the ground that the

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45. Respondent notes that the mannequins and the bloody clothing were not actually provided to the jury. Photographs of those items were provided. (RT 3716.)

evidence was highly inflammatory. The trial court overruled the objections. (RT 3570, 3608, 3625.)

> [Dr. Ribe] is very clinical, and I think that he is not using terminology that typically inflames people in his analysis and therefore, that is one reason why I think it's appropriate to use the materials at this time.

(RT 3625.)

As to Officer Burrell, Dr. Ribe utilized autopsy photographs, x-rays, a mannequin, and clothing to demonstrate entrance and exit wounds, the path of the bullets, and the damage that would have occurred as a result of the gunshots. (RT 3578-3607; Peo. Exhs. 84-86, 88-89, 91-95.) Specifically, Dr. Ribe utilized the evidence to demonstrate that the wound to Officer Burrell's arm would have been consistent with having been received while Officer Burrell was reaching for his weapon while the shooter was in front of him or with Officer Burrell buckling over. X-rays depicted the broken bones, and destruction of the arm. Dr. Ribe testified that the wound would have rendered Officer Burrell's arm useless. (RT 3583-3586; Peo. Exhs. 84-86.) The angle of the gunshot wound to Officer Burrell's face would have been consistent with Officer Burrell bending over at the time the wound was received. (RT 3586-3591, 3597-3599; Peo. Exhs. 84-85, 87-88, 92.) The gunshot wound to the foot could be consistent with having been received while Officer Burrell was on his back lifting his foot. (RT 3593, 3605-3607; Peo. Exhs. 84-85, 95.) The gunshot wound to the head entered the top of the head. (RT 3593-3596; 3605-3607; Peo. Exhs. 84, 89.) As to Officer Burrell's clothing, Dr. Ribe testified about the relationship of the bullet holes in the clothing to the wounds and to Officer Burrell's position. He testified the holes to the shirt demonstrated "vigorous activity." (RT 3598-3607; Peo. Exhs. 92-95.) Deputy Sheriff Dwight Van Horn, the firearms examiner, also testified as to the presence of holes in Officer Burrell's jacket and that gun residue on the jacket demonstrated

that the gun which inflicted the wound to the chest was fired from a distance between two and three feet. (RT 3686-3688; Peo. Exh. 92.)

In his testimony about Officer MacDonald, Dr. Ribe again utilized autopsy photographs, x-rays, a mannequin, and clothing to demonstrate entrance and exit wounds, the path of the bullets, and the damage that would have occurred as a result of the gunshots. (RT 3614-3625, 3630-3649; Peo. Exhs. 97, 100, 101-103, 105-107.) Gunshot wound number one was a fatal wound in which the bullet entered the left armpit area, traveled through the rib cage, caused collapsing of the left lung, damaged the spleen, stomach, pancreas, kidney and exited the left lower back. The bullet lodged in the back plate of Officer MacDonald's bullet-proof vest. The path was consistent with Officer MacDonald leaning forward and reaching with his left shoulder toward the shooter. (RT 3616-3617, 3630-3632, 3640, 3644-3647, 3675-3677; Peo. Exhs. 97, 100, 104-107, 110.) Gunshot wound number two was a hole below the left shoulder blade in the middle back area and would have come from the rear, consistent with Officer MacDonald having his back to the shooter. (RT 3617-3618, 3632-3633, 3640-3641, 3643-3644, 3646, 3648, 3675-3676; Peo. Exhs. 97, 100, 104-107, 109.) Gunshot wound number three entered the area above the left shoulder blade near the base of the neck and back. It traveled sharply upward, stopping in the upper part of the throat area and was consistent with Officer MacDonald having his back to the shooter and either falling or already down. (RT 3617, 3624-3625, 3633-3638, 3640, 3642-3643, 3646-3649; Peo. Exhs. 97, 101-107.) Gunshot wound number four entered the base of the right ear and exited through the cheek. The exit wound was "shored," meaning that the skin was against another surface, such as the pavement or sidewalk, at the time the bullet went through. The stippling around the entrance of the bullet wound indicated that the range of fire would be less than one foot. The wound was consistent with Officer MacDonald laying face down on the pavement, and

the shooter standing over him and firing into the back of this head. (RT 3617-3624, 3638-3640, 3680-3686; Peo Exhs. 97, 104, 111.)

The physical evidence, including the mannequins, photographs, x-rays, and clothing were highly useful in illustrating Dr. Ribe's testimony. The evidence explained how one shooter could have killed both officers, it explained the debilitating nature of the wounds, it explained the officers' inability to defend themselves, and it certainly explained the cold-blooded nature of the killing.

The evidence utilized by Dr. Ribe also assisted in corroborating the eyewitness testimony of Gully, De'Moryea, and Jordan. The evidence was highly relevant to demonstrate the first degree, premeditated and deliberate murder, which was not the result of provocation. The testimony was clinical, the photographs, though unpleasant, were certainly not gory. The mannequins also properly helped to illustrate the testimony. Finally, the use of the clothing was not particularly inflammatory. (See *People v. Carter, supra,* 36 Cal.4th at p. 1168 [photographs illustrated and corroborated the testimony of various witnesses and were not unduly gory or inflammatory]; *People v. Bolin* (1998) 18 Cal.4th 297, 318-319 [photographs of victim's body to illustrate criminalist's testimony about blood spatters and drips highly relevant to the issue of intent, premeditation, and planning]; *People v. Carrera* (1989) 49 Cal.3d 291, 329 [enlarged, clinical depictions of victim's wounds relevant to theory of wilful, deliberate and premeditated murder in addition to felony-murder and were not particularly gruesome]; *People v. Milner* (1988) 45 Cal.3d 227, 247 [photographs of body not unduly gruesome and admissible to show premeditation and deliberation and to corroborate testimony of autopsy physician and a testifying police officer]; *People v. Thompson* (1988) 45 Cal.3d 86, 114-115 [photographs of victim's ear through which a fatal stab wound had been inflicted used by the pathologist to describe and explain the wounds and

which of them had resulted in death were relevant and not unduly gruesome or cumulative]; *People v. Jackson* (1980) 28 Cal.3d 264, 302-303 [color photograph of victim's face disclosing multiple bruises properly admitted under Evidence Code section 352 because it was relevant to show malice]; *People v. Riel* (2000) 22 Cal.4th 1153, 1194 [exhibits relevant to circumstances of the crime, and the fact that they involved blood was due to the crime]; *People v. Medina* (1995) 11 Cal.4th 694, 753-754 [use of mannequin relevant to show defendant's intent to kill and identity as the same person who executed two others].) The prosecutor was not required to stipulate to any of the evidence or to present it case in a sanitized manner. (*People v. Carter, supra,* 36 Cal.4th at pp. 1169-1170.)

Thus, the facts demonstrate that the trial court understood and exercised its discretion in admitting the above evidence, and that the trial court did not abuse its discretion in finding that the evidence was not unduly prejudicial. Nor was introduction of this evidence so grievous an error as to constitute a violation of due process. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72.)

D. Photographs Of Victims While Alive And Autopsy Photographs Used To Establish Identity

Appellant complains about the introduction of photographs of the uniformed officers while alive and of the officers' autopsy photographs as shown to Officer Frederick Reynolds and Bobbie Harris. (AOB 150-151; Peo. Exhs. 35, 50.) Appellant has waived this claim and it is meritless.

Prior to the testimony of Bobbie Harris, defense counsel offered to stipulate that the individuals Harris saw at the scene of the shooting were Officers Burrell and MacDonald, although defense counsel noted that the prosecutor had the right to present the case "the way they want to." (RT 2168-2172.) His offer was motivated by respect for the families of the victims who

were sitting in the audience. The prosecutor declined the stipulation.[46] (RT 2172.) During the examination of Harris, the prosecutor asked her whether she saw the officers's faces, and she responded that she had. She testified that the faces of the officers in People's Exhibit 50 (autopsy photograph) were the same as the faces of the officers she saw at the scene. (RT 2192-2193.)

Prior to the testimony of Officer Reynolds, defense counsel stated he had no objection to Officer Reynolds identifying the officers and stating that they were the same officers at the scene, but questioned the necessity of identifying the coroner's photographs with the officer. (RT 2578.) The prosecutor explained that he wished to show the officers alive to establish that they were in fact Officers Burrell and MacDonald and the coroner photographs to establish that these were the same officers. (RT 2578.) The trial court permitted the prosecutor to ask Officer Reynolds to identify the officers, but asked him not to post the photographs until the coroner testified. (RT 2578-2579.) During his examination, Officer Reynolds was shown the photographs of the officers while alive, and he confirmed that he recognized the officers. He was also shown the autopsy photograph, and he identified the officers in the photograph. (RT 2580; Peo. Exhs. 35, 50.)

Officer Mark Metcalf, who had seen Officers Burrell and MacDonald before the shooting and who was the first officer to respond to the scene, also identified the officers from the photograph of the officers while alive. (RT 2535-2536; Peo. Exh. 35.)

Although appellant objected to the admission of photographs of the victims while alive (Peo. Exh. 35) and to the coroner's photographs (Peo. Exh. 50) after the prosecution rested (RT 3708), he did not object to the introduction

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46. To the extent defense counsel's offer of a stipulation on the ground that the issue would no longer be disputed could be construed as an objection pursuant to Evidence Code section 352 (RT 2172), as explained below, the claim is meritless.

of the photographs at the time they were shown to the witnesses on the ground that they were more prejudicial than probative. The failure to make a timely and specific objection waives any claim on appeal that the evidence was erroneously admitted. (Evid. Code § 353; *People v. Seijas* (2005) 36 Ca.4th 291, 301-302.)

Furthermore, the photographs were properly admitted. This Court has cautioned against the use of photographs of victims while alive, but has permitted the use of such photographs as long as the photographs are relevant. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1230.) The photographs were relevant here to "establish the witnesses' ability to identify the victims as the people about whom they were testifying." (*Ibid.*; accord *People v. Martinez* (2003) 31 Cal.4th 673, 691-692 [photographs of victim while alive and autopsy photographs properly used to identify victim as individual in autopsy photographs].) These relatively benign photographs were clearly for identification purposes and the introduction of the photographs was not unduly prejudicial. Again, the prosecution was not required to accept a stipulation on this point. (*People v. Carter, supra,* 36 Cal.4th at p. 1170.)

The trial court acted within it discretion in admitting the photographs Further, the introduction of this evidence was not so grievous an error as to constitute a violation of due process. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72.)

E. Allegedly Inflammatory Testimony

Appellant also contends that witnesses offered impermissibly inflammatory evidence as to the scene of the shooting. (AOB 151, 155.) Not so.

Harris and Officer Metcalf, and Officer Reynolds all testified as to the time they arrived on the scene of the shooting, the location of the vehicles, the

location of the bodies, and the condition of the bodies. (RT 2174-2185, 2188-2199 [testimony of Harris], 2534-2548 [testimony of Officer Metcalf] 2584-2590, 2594-2608 [testimony of Officer Reynolds].) Defense counsel interposed no objection to the testimony of Harris or Officer Metcalf. Appellant's claim as to the introduction of this testimony is waived due to the lack of objection. (Evid. Code § 353; *People v. Seijas, supra,* 36 Ca.4th at pp. 301-302.)

Appellant objected when Officer Reynolds testified that he had seen blood and vomit, and the objection was sustained. Officer Reynolds then continued to testify as to blood and gunshot wounds, but did not again mention vomit. (RT 2589-2590.) Defense counsel argued that the testimony relating to blood and gunshot wounds was inflammatory and prejudicial. (RT 2589-2591.) The trial court noted that the issue was the gunshot wounds and cause of death and noted that vomiting had no evidentiary value. He discussed with Officer Reynolds the fact that the officer needed to focus on gunshot wounds and blood because the attorneys were attempting to elicit cause of death evidence. (RT 2591-2592.) Officer Reynolds then offered limited testimony as to Officer MacDonald's wounds. (RT 2594.)

Whether or not appellant preserved his claim that the above evidence was more prejudicial than probative, the trial court did not abuse its discretion in admitting the evidence. The evidence was relevant to corroborate the testimony of Gully, De'Moryea, Jordan, and Lee as to the time of the incident and the time the red pickup truck was seen speeding from the scene. The timing of events was also disputed by appellant. (RT 3788-3793, 3842-3848.) Further, the evidence corroborated the testimony of Gully, De'Moryea, and Jordan as to the nature of the shooting, and it was relevant to cause of death. As such, the evidence was highly probative circumstances-of-the-crime evidence and it lent credibility to the important testimony of other witnesses. The fact that the evidence was unpleasant did not render it unduly prejudicial.

(See *People v. Carter, supra,* 36 Cal.4th at p. 1168.)

Appellant also complains about Officer Reynolds's testimony of his friendship with Officer Burrell. (AOB 151.) Contrary to appellant's assertion (AOB 2581), he did not object to Officer Reynold's statement that he knew Officer Burrell, that they were friends, and that they worked together as police officers. (RT 2580-2581.) He has waived his claim that the evidence was erroneously admitted. (Evid. Code § 353; *People v. Seijas, supra,* 36 Ca.4th at pp. 301-302.) In any event, Officer Reynolds's fleeting comment was in the context of describing Officer Burrell's general procedures for conducting a traffic stop, rather than a felony stop. The evidence explained why the officers had not drawn their weapons and tended to negate any inference of provocation. The mention of a friendship in this context was not more prejudicial than probative.

The trial court did not abuse its discretion in admitting this evidence, nor did its admission constitute a violation of due process. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72.)

F. Appellant Was Not Prejudiced

Appellant argues that he was prejudiced as a result of introduction of the above evidence because it allowed the prosecutor improperly to generate sympathy for the victims and bias against appellant. (AOB 157.) Given the facts, this was not a close case in which sympathy for the victims would have led the jury to improperly convict appellant or influence the penalty. (*People v. Carter, supra*, 36 Cal.4th at p. 1171 [applying test of *People v. Watson* (1965) 46 Cal.2d 818, 836 and finding no prejudice from allegedly inflammatory photographic or testimonial evidence]; *People v. DeSantis, supra*, 2 Cal.4th at p 1231; *People v. Carpenter* (1997) 15 Cal.4th 312, 385 [no prejudice from either live or autopsy photos]; *People v. Anderson* (1990) 52

Cal.3d 453, 474-475 ["charming" but "ordinary" photo of victim alive could not have been prejudicial at either guilt or penalty phases].) Even if this Court reviews the error under the federal standard, *Chapman v. California, supra,* 386 U.S. at p. 24, any alleged error was harmless beyond a reasonable doubt.

In sum, the prosecutor used the complained-of evidence to prove first degree, premeditated and deliberate murder. The prosecutor was not required to attempt to prove his case in a sanitized manner absent the evidence simply because the evidence was unpleasant. None of this evidence was so unduly prejudicial as to indicate the trial court abused its discretion in permitting its introduction, nor would its introduction have prejudiced appellant either at the guilt phase or the penalty phase.

X.

THE TRIAL COURT DID NOT ERR IN PERMITTING WITNESSES TO DEMONSTRATE THE MANNER OF SHOOTING

Appellant argues that permitting Gully, De'Moryea, and Jordan to physically demonstrate the manner in which appellant committed the shooting was more prejudicial than probative and was introduced in violation of Evidence Code section 352 and his federal constitutional rights. (AOB 161-174.) Appellant is mistaken.

A. Background

During Gully's testimony, defense counsel objected to any demonstration of the manner in which the shooter straddled Officer Burrell. He indicated that there was no question about the manner in which the shooting occurred and that the demonstration would inflame the passions of the jury. Further, he argued that what was seen in court could not depict what Gully saw

at the scene because the incident occurred at nighttime. (RT 1817-1818.) The prosecutor noted he had the burden of proving specific intent to kill, as well as willfulness, deliberation, and premeditation. He stated, "A description by words is nowhere near as clear and as accurate as a visual representation." The prosecutor further argued that the demonstration was highly relevant, and the jury could see the proportional relationship of the suspect and the officer, as well as the distance between the end of the gun and the officer's head. (RT 1817-1818.) The trial court overruled the objection, stating that the prosecutor had the burden of proof and was permitted to have a demonstration of the "body situation and the actions." (RT 1818.) Thereafter, the following demonstrations occurred.

Gully was asked to step down from the witness stand. The prosecutor handed her an unloaded nine-millimeter gun and positioned himself on the floor of the courtroom. He asked Gully to duplicate the actions of the shooter. Gully did so. (RT 1820-1822.)

De'Moryea conducted a similar demonstration with the prosecutor positioned on the floor in the same position as that of Officer MacDonald. De'Moryea stood over the prosecutor, holding the gun three feet from the prosecutor's head. (RT 2018-2021.)

Jordan was also asked to duplicate what she saw. She, too, was given a handgun with which to perform the demonstration and asked to position the prosecutor as Officer Burrell had been positioned. Jordan said she did not want to perform a demonstration. After the prosecutor offered to move closer to her, and after she was permitted to use her finger rather than a gun, she agreed to do the demonstration. Jordan could not recall exactly how Officer Burrell was positioned, but she demonstrated the manner in which the shooter walked around Officer Burrell's body. (RT 2256-2262.)

B. Appellant Has Waived Any Claim That The Introduction Of The Evidence Violated The Federal Constitution

Appellant did not object to the demonstrations on grounds that the evidence violated his rights under the federal Constitution and he has therefore forfeited his claims. (Evid. Code, § 353; *People v. Williams, supra,* 16 Cal.4th at p. 250; *People v. Padilla, supra,* 11 Cal.4th at p. 971; *People v. Sanders, supra,* 11 Cal.4th at p. 539, fn. 27; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1116, fn. 20.) Even if appellant's claims are preserved, they are meritless. (See *People v. Yeoman, supra*, 31 Cal.4th at p. 123.)

Additionally, appellant failed to object to the demonstrations conducted by De'Moryea and Jordan on the ground that the demonstrations were more prejudicial than probative. He contends that he should be excused from the failure to object because any objection would have been futile based on the overruling of the objection to Gully's demonstration. (AOB 166-167.) It is true that any objection to the remaining two demonstrations would have been unavailing, but that is because any objection would have lacked merit. (See *People v. Coddington* (2000) 23 Cal.4th 529, 624 [overruled on another point by *Price v. Superior Court* (2001) 25 Cal.4th 1046].) All three demonstrations were appropriate.

C. The Demonstrations Were Clearly Admissible

Appellant contends that the demonstrations were more prejudicial than probative because they were inaccurate as to lighting conditions and the amount of time the witnesses' saw the events, and, he argues, the evidence was inflammatory. (AOB

In Arguments VIII and IX, respondent has set forth the applicable law relating to the admission of evidence and the determination of whether evidence is more prejudicial than probative. In determining whether this type of

evidence was erroneously admitted, this Court determines whether the trial court abused its discretion under Evidence Code section 352 in finding that the probative value of the evidence was not substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice. (*People v. Carter, supra,* 36 Cal.4th at p. 1166.) "Prejudice" is that which "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*People v. Garceau, supra,* 6 Cal.4th at p. 178.)

Here, the evidence was highly relevant to demonstrate the nature of the injuries and the manner of killing. The evidence was not a reenactment. It was testimony, offered by the witnesses, to show how appellant shot the officers. The distance from which appellant shot the officers and the manner in which he conducted himself at the scene clearly demonstrated first degree premeditated and deliberate murder. It is true that the witnesses offered testimony as to how the shooting occurred, as appellant notes. (AOB 161-166.) But it is difficult to establish positions and distances with words. Having the witnesses stand in the manner that the shooter stood over the officers and point the gun in the same manner the shooter pointed the gun assisted the jury in assessing positions and distances.[47] The fact that the lighting conditions were not the same and that the demonstrations by themselves did not take into account the amount of time the witnesses had to view the scene did not render the testimony inadmissible. The demonstrations were not presented for the purpose of establishing either of those two things. The jury was well aware that the crime occurred at night, not in a well-lit courtroom, and that the witnesses saw the events from a moving car. (*People v. Rodrigues, supra,* 8 Cal.4th at p.

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47. Respondent notes that defense counsel performed a similar demonstration. Most certainly, he did so because asking the witness to physically demonstrate distances and positions in some physical manner is simply clearer than an oral description. (RT 1242-1243.)

1115.) This evidence was clearly more probative than prejudicial, and the trial court did not abuse its discretion in permitting the demonstrations. Certainly, introduction of the evidence did not implicate appellant's federal constitutional rights. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72.)

D. Appellant Was Not Prejudiced By The Demonstrations

Whether reviewed under the state or federal standard of prejudice, appellant was not prejudiced as a result of the witness demonstrations. (See *People v. Watson, supra,* 46 Cal.2d at p. 836 [not reasonably probable a result more favorable to defendant would have been reached in the absence of the error]; *Chapman v. California, supra,* 386 U.S. at p. 24 [harmless beyond a reasonable doubt].) Even if the court should have prevented the demonstrations, appellant was not prejudiced. The evidence in this case was very strong, and the accounts offered by Gully, De'Moryea, and Jordan were corroborated by the coroner's evidence, as well as the evidence of Officer Reynolds, Officer Metcalf, and Bobbie Harris, the first individuals to respond to the scene. (See Arguments VI, § D, IX). Although the demonstrations clarified evidence, they did not offer any new information. Accordingly, appellant's claim should be rejected.

XI.

EVIDENCE OF APPELLANT'S REFERENCE TO THE DEATH OF ANDRE CHAPPELL IN THREATENING DICKSON WAS PROPERLY ADMITTED

Appellant contends that the trial court erroneously admitted evidence of Andre Chappell's death through the testimony of Bertrand Dickson and that the admission of the statement violated state evidentiary rules and his federal constitutional rights. (AOB 175-184.) Specifically, he contends the evidence

was more prejudicial than probative under Evidence Code section 352. (AOB 179.) Respondent disagrees.

A. Background

Defense counsel asked the trial court for a ruling on the admissibility of evidence that Andre Chappell had been killed. (RT 324, 327.) The prosecutor explained the history of the threat made by appellant to Dickson in which appellant said, "You know what happened to Andre. Homeboys that give information, bad things happen to them." (RT 344.) Thereafter, the prosecutor explained, Dickson recanted. (RT 344.) The prosecutor believed appellant's statement to be highly relevant to explain why Dickson had been uncooperative. He further argued that it was relevant to appellant's consciousness of guilt and to connect appellant to the killing because it demonstrated that appellant knew what happened to Chappell and that Chappell was present when Adkins was killed. (RT 345-346, 404-407.)

Defense counsel agreed that the evidence was admissible to explain Dickson's state of mind and that an argument could be made that the statement was an admission. He said, however, that if the statement was admitted for that purpose, any admonition that appellant had nothing to do with the death would be meaningless. (RT 405.)

The trial court ruled that the evidence could be admitted as to Dickson's demeanor and as an admission pursuant to Evidence Code section 1220. The trial court believed it was relevant that appellant had mentioned Chappell. (RT 413-415.) Thereafter, the trial court overruled appellant's objection to the jury being informed of the death of Andre Chappell during opening statements. (RT 1111-1112.) During his opening statement, the prosecutor referenced appellant's statement to Dickson and the fact that Chappell had been shot multiple times with a nine-millimeter pistol in an unsolved murder. (RT 1128-

1131.) Prior to the start of Dickson's testimony, the prosecutor offered to advise the jury that no evidence had been presented that Chappell's death was related, but defense counsel was worried about highlighting the evidence. (RT 1249-1250.)

Dickson testified that he had been transferred to the Compton court's lockup area and placed in a holding cell with appellant. (RT 1353-1356.) Appellant asked Dickson whether he intended to testify and explained to Dickson that he did not mean to "do it." (RT 1356-1357.) Appellant said that if Dickson testified he could not return to the projects, his daughter was still there, and Dickson would not want anything to happen. Appellant said he would be in jail, and "it would be out of his hands." Appellant said Dickson "didn't want to end up like Andre . . . . "You know how homeboys is . . . you know, it ain't cool." (RT 1359.)

Dickson knew Chappell was dead, although appellant did not indicate he had killed Chappell. Dickson thought about it and realized he could not go back to the projects if he testified. He recanted, and appellant was released. (RT 1358-1362.) At trial, Dickson testified he understood that he would be labeled a "snitch" for testifying, but he wanted to do what was right. He explained that "snitches" get killed or hurt or their families are harassed. As a result of his concerns, he had been promised that "if I get prosecuted, I can do my time somewhere else." (RT 1286-1288, 1404-1405.)

Later, the parties again addressed the introduction of additional evidence that Chappell had been killed, and where and when he was killed. The prosecutor reiterated his offer of proof that the evidence was relevant to give meaning to Dickson's state of mind and as to why he recanted his prior identification and that it was relevant as circumstantial proof connecting appellant to the killing of Adkins because appellant knew to mention what had

happened to Chappell.[48] (RT 1631, 1635.) Defense counsel objected on the grounds that the evidence was cumulative and more prejudicial than probative. (RT 1632-1633.) The trial court noted the relevance of the evidence, but indicated that it was "truly a 352 issue" and that it required a weighing process. (RT 1634.)

The prosecutor proposed a stipulation that Chappell was shot and killed on March 20, 1992, at 9:35 p.m., at 1432 East 111th Place in Nickerson Gardens. (RT 1635.) The court found the evidence relevant and that the probative value outweighed the prejudicial effect. (RT 1636.) The parties entered into a stipulation containing the prosecutor's proposed language, and the jury was instructed to accept the stipulation as evidence. (RT 1774.)

During discussions of jury instructions, the subject was discussed as to whether an instruction should be given relating to the evidence of Chappell's death. Defense counsel considered whether he wanted to "leave it alone." (RT 3960-3961.) The trial court observed:

> My inference from reading [Dickson's] testimony was that there was no connection necessarily with [appellant]. It was just a matter of what happens in the community with homeys or homeboys or what have you in general.

(RT 3961.)

Appellant moved for a new trial based on the ground that the above evidence was prejudicial, and the motion was denied. (CT 1186-1187, 1203; RT 5010.)

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48. The prosecutor admitted that evidence of the use of a nine-millimeter in the Chappell killing was inadmissible under Evidence Code section 352. (RT 1635-1636.)

B. Evidence Of Appellant's Statements To Dickson Referencing The Death Of Andre Chappell Were Not Unduly Prejudicial

Appellant does not contend that the evidence of appellant's reference to Andre Chappell was inadmissible. He admits that the evidence was relevant to Dickson's state of mind. He argues, though, that the probative value of the evidence as it related to consciousness of guilt was slight because Chappell, Adkins, and Dickson were from the same neighborhood where "word seemed to get around." (AOB 175, 179-180.) Further, he claims the prejudicial effect was great because the jury was likely to have considered the evidence to show that appellant was a "bad man with a murderous character" who likely killed Adkins. (AOB 180.) Thus, it appears, appellant's argument is that the evidence should have been admitted with an instruction limiting its consideration to Dickson's state of mind. (AOB 175,179-180.) The trial court did not abuse its discretion in admitting the evidence to demonstrate consciousness of guilt.

As appellant acknowledged, the evidence of appellant's statement relating to Chappell was relevant to Dickson's state of mind and his recantation of his identification. (Evid. Code § 780; *People v. Gray, supra,* 37 Cal.4th at p. 220; *People v. Sapp* (2003) 31 Cal.4th 240, 281; 1433 *People v. Faegin* (1995) 34 Cal.App.4th 1427, 1433-1444.) The evidence was also highly relevant on the issue of consciousness of guilt for exactly those reasons stated by the prosecutor. The fact that appellant named Chappell in his threat demonstrated his knowledge of particulars of Chappell's death, including knowledge of those present when Adkins was shot. The statement connected appellant to Adkins's death.

Appellant argues there may have been a different explanation for appellant's knowledge of Adkins's presence. (AOB 179.) He states that appellant may have known of the facts surrounding the Adkins murder because

in that neighborhood, "word" got around. (AOB 179; RT 1339.) Appellant, however, was free to argue this point. (See *People v. Hughes* (2002) 27 Cal.4th 287, 335 [false statements demonstrated consciousness of guilt and not unduly prejudicial even though an alternate basis for the denial may have existed].)

As to appellant's claim that the jury could have used the evidence as propensity evidence (AOB 180-181), the prosecutor did not present the evidence in this manner, but rather as evidence of Dickson's state of mind and of appellant's consciousness of guilt, just as he stated he would. (RT 4082-4083.) If appellant was concerned that the evidence could be considered as propensity evidence, he certainly could have requested a limiting instruction.[49] (See *People v. Farnum* (2002) 28 Cal.4th 107, 154 [evidence of defiant conduct not admitted as propensity evidence, and if defendant believed such an impermissible inference was possible, limiting instruction should have been requested].)

The evidence at issue was highly relevant and did not "uniquely tend[]to evoke an emotional bias against [appellant]." (*People v. Garceau, supra,* 6 Cal.4th at p. 178.) The trial court did not abuse its discretion in permitting introduction of this evidence. (*People v. Carter, supra,* 36 Cal.4th at p. 1167.) Nor was introduction of this evidence was so grievous an error as to constitute a violation of due process. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72.)

C. Appellant Was Not Prejudiced

Whether reviewed under the state or federal standard of prejudice, appellant was not prejudiced as a result of the introduction of appellant's statement relating to Chappell as evidence of consciousness of guilt. (See

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49. It appears, however, that defense counsel chose not to request further instruction on the evidence because he did not want to highlight the evidence. (RT 1249-1250, 3960-3961.)

People v. Watson, supra, 46 Cal.2d at p. 836 [not reasonably probable a result more favorable to defendant would have been reached in the absence of the error]; *Chapman v. California, supra,* 386 U.S. at p. 24 [harmless beyond a reasonable doubt].) As stated above, appellant does not dispute that the evidence was admissible as to Dickson's state of mind; thus, the evidence would have been before the jury in any event. Further, as the trial court noted, the manner in which the testimony was presented suggested not that appellant had anything to do with Chappell's death, but rather that gang members who provide information suffer serious consequences. (RT 3961.) Appellant states that introduction of evidence of Chappell's death impacted his ability to demonstrate that appellant did not intend to kill Adkins. (AOB 183.) Respondent fails to see how this is so. Although the evidence demonstrated appellant's presence, his remarks about Chappell's death did not demonstrate he intended to kill Adkins. Finally, any error would not have resulted in prejudice in light of the strong evidence of appellant's guilt. (See Statement of Facts, Argument IV, § D.)

Appellant contends that the error must be considered in conjunction with the evidence of the death of Cooksey's mother and the jury's consideration of the shooting death of Mark Buster's wife. He argues that jury instructions not to consider those events would have been useless. (AOB 181-183.) Respondent strongly disagrees with appellant's assessment. In order to consider the death of Cooksey's mother, the jury would have had to completely disregard evidence it was instructed to accept as true. By stipulation, the jury was advised that appellant had nothing to do with Cooksey's murder. (RT 3362.) The jury was told it was required to accept the stipulation as fact. (CT 1037; RT 3362.) The jury was also instructed that Mrs. Buster's death had nothing to do with this case and that it was unrelated. (RT 4360-4361.) The jury was not instructed merely to disregard the other deaths, it was specifically advised that

the deaths had nothing to do with this case.

Therefore, appellant's contention that the introduction of the evidence requires the reversal of the guilt and penalty judgments should be rejected.

XII.

INTRODUCTION OF EVIDENCE AS TO THE TIME, PLACE, AND MANNER OF CHAPPELL'S DEATH WAS PROPER

In a related contention, appellant argues that the trial court erred in permitting the introduction of evidence that Chappell had been shot and killed in Nickerson Gardens because the evidence was more prejudicial than probative and its introduction violated his federal constitutional rights. (ABO 185-189.) For the same reasons presented in Argument XI, this contention lacks merit.[50]

As the prosecutor argued, evidence that Chappell was shot in Nickerson Gardens was highly relevant to Dickson's state of mind. Appellant states that evidence had already been admitted that Chappell had been shot. (AOB 187.) Respondent has found no such testimony. It is true that Dickson testified Chappell was "dead." (RT 1359.) But the evidence of the location and method of Chappell's death, as the prosecutor noted, gave meaning to Dickson's fears. (RT 1635.) As the prosecutor noted, the fact that Chappell was shot and killed was relevant because death can occur from a variety of causes. If Chappell had died in a traffic accident, appellant's statement to Dickson would have had very little meaning. (RT 1635.) The fact that Chappell was shot and killed in the same area where the Adkins murder had taken place was relevant to Dickson's recanting of his previous identification. (Evid. Code § 780; *People v. Gray,*

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50. The facts relating to the evidence of the time, place, and manner of Chappell's death are intertwined with the facts relating to appellant's claim that his statements about Chappell's death were inadmissible and are thus contained in the Background section of that argument. (See Argument XI.)

supra, 37 Cal.4th at p. 220; *People v. Sapp, supra,* 31 Cal.4th at p. 281; *People v. Faegin, supra,* 34 Cal.App.4th at pp. 1433-1444.) In light of its probative value, the trial court did not abuse its discretion in admitting the evidence. (*People v. Carter, supra,* 36 Cal.4th at p. 1167.) Certainly, introduction of the evidence was not so grievous an error as to constitute a violation of due process. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72.)

Additionally, for the same reasons presented in Argument XI relating to appellant's statement that Dickson knew what had happened to Chappell, appellant was not prejudiced by introduction of the evidence of the time, place, and nature of Chappell's death under either the federal or state standard of prejudice. (See *People v. Watson, supra,* 46 Cal.2d at p. 836 [not reasonably probable a result more favorable to defendant would have been reached in the absence of the error]; *Chapman v. California, supra,* 386 U.S. at p. 24 [harmless beyond a reasonable doubt].) Appellant points out that the prosecutor, during his opening statement, indicated that Chappell had been murdered with a nine-millimeter handgun, although that evidence was not introduced at trial. (AOB 187.) However, immediately before the prosecutor gave his opening statement, the trial court cautioned the jury that an opening statement is not evidence. (RT 1118-1119.) Further, the jury instructions provided that the statements of counsel were not evidence, and the jury is presumed to have followed this instruction. (CT 1037; CALJIC No. 1.02; See *People v. Frank* (1990) 51 Cal.3d 718, 728.)

Appellant is not entitled to reversal of either the guilt or the penalty phases as a result of the introduction of this evidence.

XIII.

CALJIC NO. 2.90, AS GIVEN, WAS PROPER

Appellant contends that CALJIC 2.90, as given in this case, was

constitutionally defective for the following reasons: (1) it erroneously implied that the jurors were required to articulate a reason for their doubt; (2) it unconstitutionally admonished the jury that a possible doubt is not a reasonable doubt; (3) it failed to instruct that the defense had no obligation to present or refute evidence; (4) it failed to explain that an attempt to refute prosecution evidence did not shift the burden of proof; (5) it failed to advise the jurors that a conflict in evidence or lack of evidence could leave them with a reasonable doubt as to guilt; (6) it failed to inform the jury that the presumption of innocence continues throughout the entire trial, including deliberations; (7) and it improperly described the prosecution's burden as continuing until the contrary was proved. (AOB 190-206.) However, every court which has considered the validity this version of CALJIC No. 2.90 has upheld the instruction. (See, e.g., *People v. Hearon* (1999) 72 Cal.App.4th 1285, 1286-1287 [listing cases].)

A. CALJIC No. 2.90

The jury in this case was instructed pursuant to the 1994 revision of CALJIC No. 2.90 as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an

abiding conviction of the truth of the charge.

(CT 1063; see § 1096.)

B. Appellant Has Waived This Claim

To the extent appellant argues that CALJIC No. 2.90 was simply inadequate, he has waived the claim. In order to preserve such a claim, appellant was required to bring his complaint to the trial court's attention. (See *People v. Johnson* (1993) 6 Cal.4th 1, 52.)

C. CALJIC No. 2.90 Does Not Require That The Jurors Articulate Reasonable Doubt

Appellant argues that, although the jurors were not expressly instructed that they must articulate reason and logic for their doubt, the instructional language of CALJIC No. 2.90 so implies. (AOB 190-192.) Respondent agrees that a jury is not required to articulate doubt. (See *People v. Hill* (1998) 17 Cal.4th 800, 831-832.) However, CALJIC No. 2.90 cannot reasonably be said to require any articulation of doubt, expressly or impliedly. CALJIC No. 2.90, as discussed in Sections D through H, *infra,* contains a proper definition of reasonable doubt which does nothing to shift the burden of proof.

D. CALJIC No. 2.90 Correctly Defines Reasonable Doubt

Appellant contends that CALJIC 2.90 unconstitutionally admonished the jury that a possible doubt is not a reasonable doubt. (AOB 192-195.) This claim has been rejected by both the United States Supreme Court and this Court.

In *Victor v. Nebraska* (1994) 511 U.S. 1 [127 L.Ed.2d 583, 114 S.Ct. 1239], the defendant objected to the language in CALJIC No. 2.90 stating that reasonable doubt is "not a mere possible doubt." The Supreme Court held this

language was adequate. (*Id.*, at pp. 13, 17.) This Court's authority also precludes appellant's claim. In *People v. Freeman* (1994) 8 Cal.4th 450, this Court revisited the then-existing version of CALJIC No. 2.90, following the federal high court's decision in *Victor v. Nebraska*. Based on *Victor*, this Court recommended trial courts delete the "moral certainty" language from the former CALJIC No. 2.90.[51] The court also recommended trial courts use the *same definition* of reasonable doubt which the trial court used in the instant case. This included the language to which appellant now objects.[52] (*Freeman*, *supra*, 8 Cal.4th at p. 504, fn. 9.) Indeed, the court specified that, other than deleting the "moral evidence" and "moral certainty" language from the former CALJIC No. 2.90, *no other* changes should be made. (*Id.* at p. 505.)

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51. The former version of CALJIC No. 2.90 provided,

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on *moral evidence*, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, *to a moral certainty*, of the truth of the charge.

(CALJIC No. 2.90 (5th ed. 1988), emphasis added.)

52. This Court recommended CALJIC No. 2.90 be changed to read,

> [Reasonable doubt] is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(*Freeman*, *supra*, 8 Cal.4th at p. 504, fn. 9.)

Hence, CALJIC No. 2.90 properly sets forth the definition of reasonable doubt and is not confusing. Appellant's claim contradicts rulings by the United States and this Court.

E. CALJIC No. 2.90 Adequately Explains The Burden Of Proof

In two related claims, appellant contends that CALJIC No. 2.90 was deficient and misleading because it did not instruct that the defense had no obligation to present or refute evidence or that an attempt by appellant to refute prosecution evidence did not shift the burden of proof. (AOB 195-201.) The instructions clearly advised the jury that the defense had no obligation of presenting evidence.

The first paragraph of CALJIC No. 2.90 clearly advised the jury that appellant had no obligation to present or refute evidence. It cloaked appellant in the presumption of innocence and squarely placed on the prosecution the burden of proving otherwise. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1134 [instruction that defendant need not prove his innocence or another's guilt properly refused in light of CALJIC No. 2.90; *People v. Martinez* (1987) 191 Cal.App. 1372, 1378-1379 [CALJIC No. 2.90 cautioned jurors that People must prove defendant's guilt rather than defendant's having to prove his innocence or guilt of another].) Other instructions reinforced this principle. CALJIC No. 2.91 provided:

> The burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crime with which he is charged.
>
> If, after considering the circumstances of the identification and any other evidence in this case, you have a reasonable doubt whether the defendant was the person who committed the crime, you must give the defendant the benefit of that doubt and find him not guilty.

(CT 1064.) CALJIC No. 2.60 told the jury that no inference could be drawn from the fact that a defendant does not testify. (CT 1056.) The jury was also advised, pursuant to CALJIC No. 2.61, that the defendant was entitled to rely on the state of the evidence and that no lack of testimony on the defendant's part could make up for a failure of proof by the People. (CT 1057.) No reasonable juror would have believed that appellant was required to present evidence to establish a reasonable doubt.

F. A Modification Setting Forth A Preponderance-Of-The-Evidence Standard Would Have Been Erroneous

Appellant appears to contend that CALJIC No. 2.90 was incomplete and misleading because it failed to include a preponderance-of-the-evidence standard. He states the trial court should have instructed the jury that if the evidence is in equipoise, the party with the burden of proof loses. (AOB 201-202.) Such a modification to CALJIC No. 2.90 would be inappropriate. The jury was properly instructed on the burden of proof. Had the trial court modified CALJIC No. 2.90 in the manner now suggested by appellant, it is likely appellant would now complain of error. (See *People v. Anderson, supra,* 52 Cal.3d at p. 472 [prosecutor's comment that, if the evidence is tied, the benefit goes to the defendant did not lessen the burden of proof in light of proper instruction pursuant to CALJIC No. 2.90 and defense counsel's explanation of burden of proof].)

G. CALJIC No. 2.90 Informs The Jury That The Presumption Of Innocence Continues Through To A Verdict

Appellant also posits that CALJIC No. 2.90 was deficient because "it did not assure that the jury would not shift the burden to the defense at some point prior to completing its deliberations." (AOB 202-203.) Respondent submits

that the Court of Appeal, Division Two properly acknowledged the scope of CALJIC No. 2.90 in *People v. Goldberg* (1984) 161 Cal.App.3d 170, 189-190:

> Once an otherwise properly instructed jury is told that the presumption of innocence obtains until guilt is proven, it is obvious that the jury cannot find the defendant guilty until and unless they, as the fact-finding body, conclude guilt was proven beyond a reasonable doubt.

(*Ibid.*) The court further found that since such a conclusion could not be reached prior to deliberation and unanimous agreement, CALJIC No. 2.90 effectively preserves the presumption up and until a unanimous agreement is reached. (*Id.* at p. 190.) Respondent submits that the *Goldberg* court was correct. Nothing in CALJIC No. 2.90 could be construed to permit burden shifting at some stage of the trial before its conclusion, as appellant suggests. (AOB 202.)

H. Use Of The Term "Until" Did Not Undermine The Prosecution's Burden Of Proof

In a related contention, appellant argues that the portion of CALJIC No. 2.90 which instructed the jury that a defendant "is presumed to be innocent until the contrary is proved" undermined the prosecution's burden of proof. (AOB 203-204.) He contends that the word "until" should be replaced by the word "unless" in order to indicate that sufficient proof might never be presented. (AOB 203.) This Court has rejected this contention previously. (*People v. Lewis* (2001) 25 Cal.4th 610, 651-652.) This court concluded:

> there is no reasonable likelihood that the jury in defendant's case would understand the instruction to mean that to convict defendant, the state could sustain its burden without proving his guilt beyond a reasonable doubt. Here, the instruction first informed the jury that "a defendant in a criminal action is presumed to be innocent until the contrary is proved"

> and that if there is a reasonable doubt as to his guilt, he must be acquitted. The next sentence stated that the just-described presumption of innocence "places upon the People the burden of proving him guilty beyond a reasonable doubt." The jury was then provided a definition of reasonable doubt. Contrary to defendant's argument, there is no reasonable likelihood that the jury understood the disputed language to mean it should view defendant's guilt as a foregone conclusion.

(*Id.* at p. 652.)

Appellant has offered no reasons to depart from this Court's earlier decision.

I. Appellant Was Not Prejudiced By The Giving Of The 1994 Revision Of CALJIC No. 2.90

Under the totality of the instructions given (*People v. Snow* (2003) 30 Cal.4th 43, 97-98; *People v. Williams, supra,* 16 Cal.4th at p. 675; *People* v. *Dellinger* (1989) 49 Cal.3d 1212, 1222, fn. 2; *People* v. *Burgener* (1986) 41 Cal.3d 505, 538), there was no reasonable likelihood the jury misconstrued or misapplied the words of CALJIC No. 2.90. (*People* v. *Clair* (1992) 2 Cal.4th 629, 663.) A full and fair reading of the instructions establishes that the jury could not have believed appellant had the burden of establishing his innocence or that the prosecution's burden of proof was something less than beyond a reasonable doubt.

XIV.

THE STANDARD JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT AND NOW CHALLENGED BY APPELLANT WERE PROPERLY GIVEN AND ARE CONSTITUTIONAL

Appellant contends the trial court delivered a series of standard jury

instructions that allegedly diluted the requirement of proof beyond a reasonable doubt. (AOB 207-220.) Specifically, appellant argues the standard instructions on circumstantial evidence are unconstitutional (CALJIC Nos. 2.01 [sufficiency of circumstantial evidence], 2.02 [sufficiency of circumstantial evidence to prove specific intent or mental state], 2.90 [reasonable doubt]; 8.83 [sufficiency of circumstantial evidence to prove special circumstance], and 8.83.1 [sufficiency of circumstantial evidence to prove mental state for special circumstance]). (AOB 208-211.) Appellant also argues CALJIC Nos. 1.00 [respective duties of judge and jury], 2.21.1 [discrepancies in testimony], 2.21.2 [willfully false witnesses], 2.22 [weighing conflicting testimony], 2.27 [sufficiency of evidence, one witness], and 2.51 [motive] are unconstitutional. (AOB 211-216.)

However, as appellant notes (AOB 216-217), this Court has repeatedly rejected such attacks on these instructions. (See, e.g., *People v. Cleveland* (2005) 32 Cal.4th 704, 750-751 [addressing instructions on circumstantial evidence and CALJIC Nos. 2.21.2, 2.22, 2.51]; *People v. Crew* (2003) 31 Cal.4th 822, 847-848 [addressing CALJIC Nos. 1.00, 2.01, 2.02, 2.21.2, 2.22, 2.51, 2.52, 8.20, 8.83, 8.83.1]; *People v. Nakahara* (2003) 30 Cal.4th 705, 713-714 [CALJIC Nos. 1.00, 2.01, 2.02, 2.21.2, 2.22, 2.51, 8.20, 8.83]; *People v. Maury* (2003) 30 Cal.4th 342, 428 ["Because the [standard reasonable doubt] instruction, individually, correctly defines reasonable doubt, we reject defendant's claim that this instruction, when considered together with the other complained-of instructions [CALJIC Nos. 2.01, 2.21.2, 2.22] was improper. [Citation.]"]; *People v. Hughes*, *supra*, 27 Cal.4th at pp. 346-347 [addressing instructions on circumstantial evidence]; *People v. Osband* (1996) 13 Cal.4th 622, 678 [same]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [same]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [same]; *People v. Riel*, *supra*, 22 Cal.4th at p. 1200 [addressing instructions on circumstantial evidence and willfully

false witness]; *People v. Montiel* (1993) 5 Cal.4th 877, 941 [CALJIC No. 2.27].) *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing instructions on circumstantial evidence and willfully false witness same]; *People v. Turner* (1990) 50 Cal.3d 668, 697 [CALJIC No. 2.27].)

Respondent submits this Court's reasoning is sound, requires no revisiting, and appellant's claims should be summarily rejected.

XV.

INSTRUCTIONS ON VOLUNTARY AND INVOLUNTARY MANSLAUGHTER WERE NOT REQUIRED AS TO ADKINS'S MURDER

Appellant contends that the trial court erred in refusing to instruct the jury on the lesser included offenses of voluntary manslaughter and involuntary manslaughter as to Adkins's murder. (AOB 221-236.) Respondent submits neither instruction was supported by evidence, and any failure to give the requested instructions was harmless.

A. Background

As to the Adkins murder, appellant requested instructions on the lesser included offenses of voluntary and involuntary manslaughter. (RT 3923.) Defense counsel argued specifically that an involuntary manslaughter instruction was warranted because the killing was committed during the course of a brandishing, a misdemeanor violation of section 417. (RT 3924, 3928-3929.) Defense counsel's argument was based on appellant's statement that the murder would not have occurred if Adkins had not grabbed the gun. (RT 3924.)

The prosecutor argued that the evidence demonstrated assault with a firearm, not simply the display of a firearm in a threatening manner. Further,

the pointing of a loaded gun at someone's head, even absent intent to kill, was a "classic example of implied malice." Further, the prosecutor pointed out that the evidence did not demonstrate provocation such that an instruction on voluntary manslaughter was required. (RT 3925-3929.)

The trial court denied appellant's request, finding that where someone was resisting a gun pointed at his head, there was no basis for instructions on voluntary or involuntary manslaughter. (RT 3937-3939.)

B. Applicable Law

A defendant has a constitutional right to have the jury determine every material issue presented by the evidence. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1007 (citing *People v. Lewis* (2001) 25 Cal.4th 610, 645).) To protect this right and the broader interest of safeguarding the jury's function of ascertaining the truth, a trial court must instruct on lesser-included offenses, even in the absence of a request, whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present. (*People v. Cunningham, supra,* 25 Cal.4th at p. 1008 (citing *People v. Lewis, supra,* 25 Cal.4th at p. 645).) Conversely, even on request, a trial judge has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction. (*People v. Cunningham, supra,* 25 Cal.4th at p. 1008.) Speculation is insufficient to require the giving of an instruction on a lesser-included offense. (*People v. Mendoza, supra,* 24 Cal.4th at p. 174.)

C. Instruction On Involuntary Manslaughter Was Unwarranted

As he did in the trial court, appellant now contends he was entitled to an instruction on involuntary manslaughter on the ground that the Adkins homicide was an accidental killing in the course of a brandishing. (AOB 229.) The evidence did not demonstrate involuntary manslaughter.

Murder is the unlawful killing of a human being with either express or implied malice. (§§ 187, 188; see *People v. Whitfield* (1994) 7 Cal.4th 437, 450.) Malice is express, "when there is manifested a deliberate intention unlawfully to take the life of a fellow creature." (Pen. Code, § 188; *People v. Hansen* (1994) 9 Cal.4th 300, 307-308; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.) Malice is implied, "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (Pen. Code, § 188; *People v. Hansen, supra*, 9 Cal.4th at p. 308; *People v. Nieto Benitez, supra*, 4 Cal.4th at pp. 102-103.) Implied malice requires the performance of "'an act, the natural consequences of which are dangerous to life'" and that the "'the defendant knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life.'" (*People v. Hansen, supra*, 9 Cal.4th at p. 308, quoting *People v. Patterson* (1989) 49 Cal.3d 615, 626, and *People v. Watson* (1981) 30 Cal.3d 290, 300.)

Involuntary manslaughter is a lesser-included offense of murder. (*People v. Lewis, supra*, 25 Cal.4th at p. 645; *People v. Ochoa, supra*, 19 Cal.4th at p. 422.) Involuntary manslaughter is a killing that occurs "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b); see also *People v. Lewis, supra*, 25 Cal.4th at p. 645; *People v. Prettyman* (1996) 14 Cal.4th 248, 274; CALJIC No. 8.45.) Thus, a killing committed in the course of the misdemeanor offense of brandishing a weapon, in violation of section 417, subdivision (a)(2), is involuntary manslaughter. (*People v. Lee* (1999) 20 Cal.4th 47, 60-61.)

Appellant correctly speculates that respondent will argue an assault with a firearm was completed at the time the struggle occurred, and thus, the evidence did not support a finding of involuntary manslaughter. (AOB 229-

230.) This is so because this was the state of the evidence. Appellant placed the gun to Adkins's head and said he would "blow his brains out." Adkins grabbed the gun, and two shots were fired. Evidence was presented that, to fire the gun, the magazine must be loaded, the slide recess pushed, and a round of ammunition must be in the chamber. If someone were to grab the gun by the slide, the slide would not slide back, and the spent casing would not eject. Further the new bullet would not load into the firing chamber. As long as the gun was held, the gun could not be fired a second time. (RT 1207-1213, 1320-1322, 1750, 1752-1763.) The evidence demonstrated implied malice murder at the very least.

Appellant theorizes that because Adkins grabbed the gun, it would be reasonable for a properly instructed jury to conclude that appellant fired the shots accidentally brandishing the gun. (AOB 230.) Such an assertion overlooks the evidence that appellant placed the gun between Adkins's eyes and threatened to kill him before Adkins grabbed the gun. Appellant relies on pure speculation in his assertion that the evidence demonstrated that he merely brandished the gun. Such speculation is not sufficient to require the trial court to give a lesser included instruction on involuntary manslaughter.

D. Instruction On Voluntary Manslaughter Was Unwarranted

Appellant also contends that the jury should have been instructed on voluntary manslaughter based on evidence that Adkins was killed when appellant went into a rage after having been provoked by Adkins's grabbing of the gun. (AOB 232.) Even if such an act caused appellant's rage, that act would not form the basis for a voluntary manslaughter instruction.

A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of the lesser-included offense of voluntary

manslaughter.[53] (§ 192; *People v. Barton* (1995) 12 Cal.4th 186, 199; see also *People v. Lewis, supra,* 25 Cal.4th at p. 645.) A defendant who intentionally and unlawfully kills lacks malice only in limited, explicitly defined circumstances: either when the defendant acts in a "sudden quarrel or heat of passion" or when the defendant kills in "unreasonable self-defense." (*People v. Barton, supra,* 12 Cal.4th at p. 199.)

The factor which distinguishes the "heat of passion" form of voluntary manslaughter from murder is provocation. (*People v. Lee, supra*, 20 Cal.4th at p. 59.) The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*Ibid.*)

> "Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinary reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.'"

(*Ibid.*, quoting *People v. Barton, supra*, 12 Cal.4th at p. 201; see *People v. Breverman* (1998) 19 Cal.4th 142, 163.)

Thus, the heat of passion theory of voluntary manslaughter involves both objective and subjective elements. (*People v. Wickersham, supra,* 32 Cal.3d at pp. 326-327.) While the subjective element requires that the defendant be under the actual influence of strong passion at the time of the homicide, the

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53. At the time appellant committed his crimes and was tried, intent to kill was an element of voluntary manslaughter. In *People v. Lasko* (2000) 23 Cal.4th 101, 107-108, and *People v. Blakeley* (2000) 23 Cal.4th 82, 88, 90, this Court held a killing that occurs in a heat of passion, or as a result of unreasonable self-defense, respectively, constitutes voluntary manslaughter if the accused had the intent to kill or acted with conscious disregard for human life.

objective or reasonable person element of sufficient provocation must also be met. (*Ibid.*)

Here, the evidence demonstrated that appellant followed Dickson into Chappell's apartment where he engaged the men inside in an argument over the fact that someone had dared to mistake him for someone else. When Adkins pointed out that appellant had mistaken his identity as well, appellant placed the gun between Adkins's eyes and said he would "blow his brains out." (RT 1185-1201, 1214-1223, 1267, 1307-1309, 1312-1320.) Adkins then grabbed the gun. (RT 1321-1322.) Although it certainly may be argued that appellant was angry, the circumstances surrounding Adkins's killing were not sufficient to inflame the passion of an ordinarily reasonable person. To the extent appellant argues that Adkins's act in grabbing the gun inflamed appellant's passions, respondent points out, as did the trial court (RT 3937-3938), that Adkins's actions were entirely predictable and did not constitute provocation. (*People v. Balderas* (1985) 41 Cal.3d 144, 196 [Predictable conduct by a victim who is resisting a felony does not constitute provocation.].)

E. Appellant Was Not Prejudiced by the Failure to Provide Manslaughter Instructions

Appellant contends that any error in failing to instruct the jury on voluntary or involuntary manslaughter was reversible per se. (AOB 235-235.) Respondent disagrees. In a noncapital case, the erroneous failure to instruct on a lesser-included offense must be reviewed for prejudice under *People v. Watson, supra*, 46 Cal.2d at pp. 818, 836. (*People v. Breverman, supra,* 19 Cal.4th at p. 178.) In other words, a conviction of the charged offense may be reversed in consequence of this form of error only if, after an examination of the entire cause, it appears reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred. (*Ibid.* [citing *People v. Watson, supra,* 46 Cal.2d at p. 836]; see *People v. Sakarias* (2000)

22 Cal.4th 596, 621.)

The United States Supreme Court has held that, in a capital case, the failure to instruct on a given lesser-included offense does not constitute federal constitutional error if the trial court did instruct the jury on another lesser offense supported by substantial evidence. (*Schad v. Arizona* (1991) 501 U.S. 624, 647 [111 S.Ct. 2491, 115 L.Ed.2d 555].) In *Schad*, the United States Supreme Court held that the principles of *Beck v. Alabama* (1980) 447 U.S. 625 [100 S.Ct. 2382, 65 L.Ed.2d 392] were satisfied if the jury was provided some noncapital, third option between the capital charge and acquittal. (*Schad v. Arizona, supra,* 501 U.S. at p. 647; see *People v. Breverman, supra,* 19 Cal.4th at p. 167.)

The instant case was not one in which the jury was presented with an all-or-nothing choice between capital murder and innocence of the type discussed in *Schad* and *Beck*. In light of the murders of Officers Burrell and MacDonald, the Adkins murder was unnecessary to the capital charge. (§ 190.2, subd. (a)(3).) The error here was one of state law only. Appellant must show a reasonable probability that the lack of manslaughter instructions affected the verdict. (*People v. Sakarias, supra,* 22 Cal.4th at p. 621.) Appellant cannot do so because the evidence that he killed Adkins either in the course of brandishing a weapon or under the heat of passion was nonexistent compared to the evidence that appellant committed second degree murder. Even if the refusal of the instructions somehow violated appellant's federal constitutional rights, any error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

Accordingly, this claim must fail.

XVI.

THE JURY WAS PROPERLY INSTRUCTED WITH CALJIC NO. 8.74

Appellant contends that he is entitled to reversal of his conviction because the trial court erred in failing to instruct the jury that it must be unanimous about the degree of homicide. (AOB 237-245.) Appellant's claim must fail because the trial court instructed the jury pursuant to CALJIC No. 8.74, albeit in a delayed fashion. Further, appellant was not prejudiced by the delay in giving the instruction.

A. Background

The prosecutor suggested the following instruction:

> Before you may return a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or not guilty, but also, if you should find [him] guilty of an unlawful killing, you must agree unanimously as to whether [he] [she] is guilty of [murder of the first degree] [or] [murder of the second degree] [or] [[voluntary [or] [involuntary] manslaughter].

(CT 913.) The trial court refused the instruction on the ground that it contained language relating to manslaughter. (RT 3972.)

During jury deliberations, the jury asked if it was necessary to have a unanimous decision as to whether murder was in the first or second degree. (CT 909; RT 4382.) The trial court noted the jury had not received CALJIC No. 8.74, but that CALJIC No. 17.50 told them that all 12 jurors had to agree to the decision, and that instruction seemed to cover the issue. (RT 4382.) However, the trial court decided to reread CALJIC Nos. 8.70 [jury must find whether offense is murder of first or second degree], 8.71 [if jury has doubt

about degree of murder, verdict must be second degree murder],[54] and to provide the jury with CALJIC No. 8.74. (RT 4382-4386.) The version of CALJIC No. 8.74 provided was as follows:

> Before you may return a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or not guilty, but also, if you should find him guilty of an unlawful killing, you must agree unanimously as to whether he is guilty of murder of the first degree or murder of the second degree.

(CT 1109; RT 4385.)

After the jury reached its verdict, defense counsel moved for a new trial based on the trial court's failure to read CALJIC No. 8.74 until two weeks into the jury's deliberations. Defense argued that the verdict forms as to the murders of Officers Burrell and MacDonald had been signed prior to the time the court instructed the jury with CALJIC No. 8.74, and thus had been reached without the necessary instruction. (CT 980-984, 995-998.) The trial court denied the motion, finding that the jury had been properly instructed, and CALJIC No. 8.74 was only a clarification. (RT 4428-4429.)

B. The Jury Was Properly Instructed

Here, there was no error in failing to provide the jury with CALJIC No. 8.74 because the instruction was actually given. (RT 4382-4386.) Although the instruction was given after the jury had signed the verdicts for counts 3 and 4, had there been any confusion as to the principle that the jury had to decide, the jury could have reconsidered its decision.

Additionally, the correctness of jury instructions is to be determined from the entire charge. (*People v. Smithey, supra,* 20 Cal.4th at p. 963.) Other

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54. Appellant contends the trial court did not read CALJIC No. 8.71 to the jury. (AOB 237.) Appellant is incorrect. (RT 4039.)

instructions given in this case covered the same principle covered by CALJIC No. 8.74--that the jury was required to agree unanimously as to whether appellant was guilty of murder of the first degree or murder of the second degree. The jury was instructed pursuant to CALJIC Nos. 8.70, 8.71, and 17.50. (RT 4039, 4254.) These instructions advised the jury that it was required to state in the verdict whether it found the murder to be of the first or second degree, that a second degree murder verdict must be returned if the jurors had a reasonable doubt as to whether the murder was of the first degree or second degree, and that all 12 jurors were required to agree as to the decision and to any finding included in the verdict.

C. Appellant Was Not Prejudiced By The Delay In Giving CALJIC No. 8.74

In any event, even if the trial court was required to have given the instruction in a more timely manner, the error was harmless under either *People v. Watson, supra,* 46 Cal.2d at p. 836, or *Chapman v. California, supra,* 386 U.S. at p. 24. The failure to give CALJIC No. 8.74 has been defined as a "minor deficiency." (*People v. Kozel* (1982) 133 Cal.App.3d 507, 528-529; *People v. Aikin* (1971) 19 Cal.App.3d 685, 703, fn. 13.)

Appellant contends that any error was prejudicial because there was evidence that the killings of the police offers were not in the first degree. (AOB 244.) However, as discussed above, the instructions covered the principle contained in CALJIC No. 8.74. Furthermore, it is clear that the jury unanimously agreed that appellant was guilty of the first degree murders of Officers Burrell and MacDonald. The jury was instructed that *if* it found appellant guilty of first degree murder, *then* it must determine whether the special circumstance of murder of a peace officer in the performance of his duties was true. (CT 1078; RT 4039; CALJIC No. 8.81.1.) Accordingly, the

jury would not have found true the special circumstances without also unanimously agreeing that appellant was guilty of first degree murder. Further, the verdict forms as to both Officer MacDonald and Officer Burrell specifically indicated unanimous findings that the murder was murder of the first degree. (CT 982, 984; RT 4391-4392.) The special circumstance verdict form contained the following language.

> The crime of MURDER IN THE FIRST DEGREE of which you have found the defendant guilty was the murder of peace officer James M[a]cDonald. Place an "x" beside the answer to which you unanimously agree.

(CT 980; RT 4393.) The jury indicated a "true" finding.[55] (*Ibid.*) When these verdicts were read, the jurors were polled and each answered that the verdict given was his or her verdict. (RT 986; RT 4394-4395.) Therefore, it is entirely clear that the jury unanimously found appellant guilty of first degree murder in both counts 2 and 3. (*See People v. Kozel, supra,* 133 Cal.App.3d at p. 528-529 [no deficiency where jury instructed pursuant to CALJIC Nos. 17.49, 17.50, verdicts were instructive, and jury polled].)

Appellant's claim should be rejected.

XVII.

THIS CASE WAS PROPERLY PROSECUTED IN THE NAME OF THE PEOPLE OF THE STATE OF CALIFORNIA

Appellant claims he was denied his state and federal constitutional rights to due process and to a fair trial by the prosecution's reference to itself as "The People" during the trial and in the jury charge. (AOB 246-254.) A similar

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55. The same verdict form and response was provided as to Officer Burrell. (CT 981; RT 4391.)

claim was rejected by the California Court of Appeal in *People v. Black* (2003) 114 Cal.App.4th 830, 832-834.) For the reasons stated therein and discussed below, it should be rejected here as well.

A. Appellant Has Forfeited This Claim

Preliminarily, appellant never objected at trial to the challenged references to the People; as such he has forfeited this claim on appeal. (See, e.g., *People v. Guiuan* (1998) 18 Cal.4th 558, 570; *People v. Rodrigues, supra,* 8 Cal.4th at pp. 1192-1193.) However, even if the claim is not waived, it lacks merit.

B. Background

California's first Constitution was adopted on November 13, 1849, prior to statehood. (Deerings Ann. Cal. Const., Foreword, at p. v.) As amended in 1862, article VI, section 18 of the 1849 Constitution provided, "The style of all process shall be: 'The People of the State of California,' and all prosecutions shall be conducted in their name and by their authority." (*Id.*, App. I, at p. 494.) The current state Constitution was adopted by constitutional convention and ratified on May 7, 1879. (Deerings, Cal. Const., Foreword, at p. v.) In 1872, prior to adoption of the 1879 Constitution, Penal Code section 684 was enacted and provides, "A criminal action is prosecuted in the name of the people of the State of California, as a party, against the person charged with the offense." "[T]he people in their sovereign capacity are the sole party plaintiff upon the record" of a criminal case. (*People* v. *McLaughlin* (1872) 44 Cal. 435, 437.)

The state Constitution was amended by initiative adopted June 5, 1990, to add, inter alia, article I, section 29, which provides, "In a criminal case, the people of the State of California have the right to due process of law and to a speedy and public trial." Section 29 implicitly recognizes "the People" as the

proper *party* prosecuting a criminal case.

C. Reference To “The People” Did Not Violate Appellant’s Constitutional Rights

The Due Process Clause guarantees more than fair process, and the “liberty” it protects includes more than the absence of physical restraint. [Citation omitted.] The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. (*Washington v. Glucksberg* (1997) 521 U.S. 702, 719-720 [117 S.Ct. 2258, 138 L.Ed.2d 772].)

However, the fundamental rights and liberties recognized by the high court have been limited to "issues of marriage, family procreation, and certain forms of bodily integrity." (*People v. Frazer* (1999) 21 Cal.4th 737, 772, fn. 31; see *Washington v. Glucksberg*, *supra*, 521 U.S. at pp. 719-720.) The High Court has "always been reluctant to expand the concept of substantive due process" and has exercised "the utmost care whenever we are asked to break new ground in this field" in order to avoid converting policy preferences into constitutionally protected liberty. (*Ibid.*; see also *People* v. *Frazer*, *supra*, at p. 772, fn. 31.) While caution is not abrogation of the court's role in addressing constitutional challenges, in entertaining such challenges the court must presume the constitutional validity of legislative acts and resolve doubts in favor of the statute. (*Dawn D. v. Superior Court* (1998) 17 Cal.4th 932, 939.)

Starting, then, with a presumption in favor of the 128-year-old legislative determination to designate the prosecution as the People of the State of California (Pen. Code, § 684), which finds its genesis 10 years earlier in a constitutional provision (Cal. Const. of 1849, as amended 1862, art. VI, § 18), the due process analysis has "two primary features." (*Washington v. Glucksberg*, *supra*, 521 U.S. at pp. 720-721.) There must first be a careful

description of the asserted fundamental liberty interest. (*Dawn D. v. Superior Court*, *supra*, 17 Cal.4th at p. 940.) The description must be "concrete and particularized, rather than abstract and general." (*Ibid.*)

> Second, the court must determine whether the asserted interest, as carefully described, is one of our fundamental rights and liberties; central to this determination is whether the asserted interest finds support in our history, our traditions, and the conscience of our people.

(*Ibid.*)

Here, appellant apparently asserts a fundamental liberty interest in not having the prosecution referred to as "the People." (AOB 246-254.) Appellant asserts the nation's legal practices support finding a due process violation because it is the practice in a majority of jurisdictions to refer to the prosecution as "The State," "The Commonwealth," or the "United States." Based on the fact that other jurisdictions employ different practices, he infers that "California currently operates in a tiny minority of jurisdictions which have not yet recognized the more constitutionally sound manner of administering justice." (AOB 248.) The fact that many, or even most, states and the federal government engage in a different method of designating the prosecution demonstrates nothing greater than a policy choice. Appellant fails to show that the policy decision amounts to a universal condemnation of California's practice.

Appellant cites *Duncan v. Louisiana* (1968) 391 U.S. 145 [88 S.Ct. 1444, 20 L.Ed.2d 491], and *Washington v. Glucksberg, supra,* 521 U.S. at p. 702. (AOB 247-248.) However, those cases do not support his contention. In *Duncan*, the Supreme Court held the Sixth Amendment right to trial by jury was protected against state action by the Fourteenth Amendment. (*Duncan v. Louisiana*, *supra*, 391 U.S. at p. 149.) In *Glucksberg*, the court held the asserted right to assistance in committing suicide was not a fundamental liberty

interest protected by the due process clause. (*Washington v. Glucksberg, supra*, 521 U.S. at pp. 705-706.) Although the court based its holdings in part on the "Nation's history, legal traditions, and practices" (*id.* at p. 710), the detailed historical analyses presented in those Supreme Court cases are not comparable to the result of appellant's research on case titles in the instant case. (See *Washington v. Glucksberg, supra*, 521 U.S. at pp. 710-716; *Duncan v. Louisiana, supra*, 391 U.S. at pp. 151-154.) The fact, if true, that most jurisdictions denominate the prosecution as some governmental body falls far short of the necessary showing that the practice of prosecuting in the name of "the People" is "consistently condemned" and constitutionally prohibited. (*Ibid.*)

Appellant argues that reference to "the People" aligned the State and the jury against him. (AOB 249-252.) He claims that the prosecution "sent a message" to the jury that appellant was set against them and was not one of "the People" when James MacDonald, the father of Officer MacDonald, testified that the *people* in Compton treated him well. This claim is completely speculative and defies logic. As the Court of Appeal has observed:

> We are not aware of a single instance in which the fact that a prosecution was brought in the name of "The People" has had any influence whatsoever on the decision of a jury with respect to a defendant's guilt or innocence.

(*People v. Black, supra,* 114 Cal.App.4th at p. 833.) Appellant's claims of unfairness, lack of a fair trial, and presumption of innocence are unsupported. For the same reasons, it is not reasonably probable the jury would have reached a different outcome had the court referred to the prosecution as "The State of California" instead of "The People." (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) And, any error was harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 18.) Hence, appellant's claim

should be rejected.

XVIII.

SECTION 190.2, SUBDIVISION (A)(7), IS NOT OVERBROAD

Appellant contends that the killing of a peace officer special circumstance contained in section 190.2, subdivision (a)(7), is unconstitutionally overbroad because the class of individuals who qualify as peace officers is broad, and it permits the imposition of the death penalty for someone who did not know the victim was a peace officer. (AOB 255-262.) This Court has previously rejected this constitutional challenge to section 190.7, subdivision (a)(7), and appellant has offered no reason for reaching a contrary conclusion in this case.

This Court repeatedly has held the California statutory scheme adequately performs the constitutionally required narrowing function. The special circumstances set forth in Penal Code section 190.2 "are not over inclusive by their number or terms. . . ." (*People v. Ray* (1996) 13 Cal.4th 313, 356 (citing *People v. Stanley* (1995) 10 Cal.4th 764, 842-843; *People v. Crittenden, supra,* 9 Cal.4th at pp. 154-155); see also *People v. Earp, supra,* 20 Cal.4th at 904-905; *People v. Barnett, supra,* 17 Cal.4th at p. 1179.) "Nor have the statutory categories been construed in an unduly expansive manner." (*People v. Barnett, supra,* 17 Cal.4th at p. 1179 (citing *People v. Arias, supra,* 13 Cal.4th at p. 187).)

Section 190.2, subdivision (a)(7), provides that the penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole upon the following special circumstance:

The victim was a peace officer, as defined in Section 830.1, 830.2,

> 830.3, 830.31, 830.32, 830.33, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties . . . .

This Court has determined that this special circumstance does not violate the Eighth Amendment. (*People v. Daniels* (1991) 52 Cal.3d 815, 874; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224; *People v. Brown* (1988) 46 Cal.3d 432, 444-445; *People v. Rodriguez* (1986) 42 Cal.3d 730, 780-782.)

In *Rodriguez,* this Court considered the question: "Would sentencing defendant to death because he should have known his victim was a peace officer 'measurably contribute to the retributive end of ensuring that the criminal gets his just desserts' ([*Enmund v. Florida* (1982) 458 U.S. 782, 890 [102 S.Ct. 3368, 73 L.Ed.2d 1140]])." (*People v. Rodriguez, supra,* 42 Cal.3d at p. 780.) This Court answered this question in the affirmative as follows:

> The provision in question gives effect to the special outrage that characteristically arises from the intentional murder of persons acting in certain official public safety capacities. Society considers such killings especially serious for several reasons. The community abhors the human cost to these especially endangered officers and their families, "who regularly must risk their lives in order to guard the safety of other persons and property." [Citation.] Murders of this kind threaten the community at large by hindering the completion of vital public safety tasks; they evince a particular contempt for law and government and they strike at the heart of a system of ordered liberty. Applying longstanding values, the electorate may reasonably conclude that an intentional murderer increases his culpability, already great, when he kills one whom he knew or should have known was a police officer

> performing his duties.
>
> The electorate could also reasonably determine that the goal of deterrence would be served by the statutory provision. We find the commentary to the Model Penal Code's discussion of the justification for criminal liability based on criminal negligence to be illuminating here: "When people have knowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk, they are supplied with an additional motive to take care before acting, to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct. To some extent, at least, this motive may promote awareness and thus be effective as a measure of control. Moreover moral defect can properly be imputed to instances where the defendant acts out of insensitivity to the interests of other people, and not merely out of an intellectual failure to grasp them. In any event legislators act on these assumptions in a host of situations, and it would be dogmatic to assert that they are wholly wrong." [Citation].

(*Id.* at p. 781.)

Appellant argues that because the list of peace officers includes so many categories, a jury could find true this special circumstance based on the murder of someone who did not appear to be a peace officer. (AOB 256-257.) This argument does not help appellant because it overlooks the requirement that the defendant must have known, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties. Moreover, respondent notes that although appellant makes only a facial challenge to section 190.2 subdivision (a)(7), the "peace officers" in his case were uniformed officers traveling in a marked police vehicle with flashing lights -- not of the "obscure" type to which appellant refers.

Appellant's claim fails.

XIX.

SECTION 190.2, SUBDIVISION (A)(3), IS NOT OVERBROAD

Appellant also contends that the multiple-murder special circumstance (§190.2(a)(3)) is overbroad because it does not consider the defendant's mental state. (AOB 263-264.) As appellant acknowledges, this claim has been previously rejected. (AOB 263.) Respondent submits the claim should be rejected here, as well.

> [C]ategorizing as especially deserving of the ultimate penalty those offenders who kill two or more victims in one criminal event is not arbitrary, unfair or irrational, and performs the necessary narrowing of the pool of potential offenders required by the Eighth Amendment to the United States Constitution.

(*People v. Boyette, supra,* 29 Cal.4th 381, 440, accord *People v. Sapp* (2003) 31 Cal.4th 240, 286-287; *People v. Box, supra,* 23 Cal.4th at p. 1217.)

XX.

NO PREJUDICIAL JUROR MISCONDUCT OCCURRED

Appellant contends that he is entitled to reversal of his conviction because some of the jurors read an article about the shooting death of Mark Buster's wife. (AOB 265-272.) Although the jurors discussed reports of the death of Buster's wife, the conduct did not amount to misconduct, and appellant was not prejudiced.

A. Background

Mark Buster testified at trial that he sold a red 1992 Chevrolet 454

pickup truck, license number 4J88557, to appellant for $18,000. (RT 1643-1654; Peo. Exh. 22-24.)

During guilt phase deliberations, a juror indicated that she believed there had been a "violation of our instructions." (RT 4289-4292.) Based on the juror's representation, the trial court questioned the jurors as to whether they had discussed the case with anyone outside the jury room. (RT 4303.) During the questioning on that issue, juror 49 revealed that a discussion had occurred relating to the shooting death of Mark Buster's wife. (RT 4308-4309.) Juror 49 stated:

> I elaborated also because it was something that I did take notice of, and when everyone started talking, it just got a little out of hand, and there were several people in there that elaborated on that situation that took place.

(RT 4309.)

Defense counsel indicated he thought the discussion regarding Mark Buster's wife was inappropriate and that it was his understanding that she had been hit by a stray bullet. Defense counsel pointed out that Buster and appellant had a good relationship. Defense counsel was concerned that the event may have impacted deliberations. (RT 4323-4324.) The trial court noted:

> I will say that -- you said that the relationship between [appellant] and Mr. Buster has been a good relationship to the point that in front of the jury when he left the witness stand he went over and shook hands with [appellant] and had a few words with him. [¶] I don't know what was said, but he did do that in open court in front of the jury. (RT 4325.)

The trial court further indicated that Buster simply sold a car and it was interesting to see him shake hands with appellant. The prosecutor pointed out that Buster was a minister in "South Central" and he had wanted to meet with appellant. (RT 4327.) Appellant moved for a mistrial based on jury

misconduct. (RT 4382.) The trial court determined that it would question the jurors on the matter. (RT 4329.)

The jurors were questioned, and the following was revealed:

Juror 59 - This juror indicated there had been discussions of the news report that Buster's wife had been killed in front of a church. Mrs. Buster was apparently trying to protect a child, and there was speculation that there was gang involvement. The discussion had been "tabled" because although it had been brought up innocently, "it was getting into an area kind of related to the case." This juror stated that the event had not entered into deliberations, the subject had not come up again, and the subject was not significant enough to effect deliberations. (RT 4335-4336.)

Juror 49 - A five-minute conversation occurred regarding the shooting. The matter had not entered into his deliberations. (RT 4337-4339.)

Juror 68 - There had been some speculation about what happened first, Buster's testimony or his wife's death. No one knew, so they moved on. It had not affected this juror's deliberation. (RT 4340.)

Juror 84 - This juror had heard of the shooting and had also heard that the killer had turned himself in. The shooting had not entered into juror 84's deliberations. (RT 4342.)

Juror 11 - There was a discussion about the shooting death, but juror 11 did not consider the incident in deliberating. The juror indicated other speculation had occurred, but, "we always stop them." (RT 4344-4345.)

Juror 23 - The shooting did not enter into juror 23's deliberations. (RT 4346-4347.)

Juror 35 - This juror could barely could recall Mark Buster and could not recall any discussions about the shooting of his wife. (RT 4348.)

Juror 97 - She recalled discussions about the news report of Mrs. Buster's death and thought it was shocking and scary. She believed it had been

a drive-by shooting but did not think the shooting had entered into any jurors' decision-making, and stated it did not enter into her decision-making. (RT 4349.)

Juror 36 - This juror had seen the report of the shooting on the news and recalled discussions about the shooting in the jury room. Juror 36 was "amazed" at Buster's composure, but did not consider the report in deciding appellant's case. (RT 4350-4352.)

Juror 88 -- There was a discussion that Mrs. Buster had been killed in a drive-by shooting, but it had not affected his deliberations "whatsoever." (RT 4352-4353.)

Juror 13 - He recalled that someone had brought up the fact that Mrs. Buster had died before Mark Buster testified. The juror thought it was unrelated to the case. (RT 4355.)

Juror 95 - She recalled a discussion that Mrs. Buster wife had died, but she did not believe the matter had entered into anyone's deliberations. (RT 4357.)

After questioning the jurors, the trial court denied the motion for mistrial as follows:

> I believe from the discussion that we have had in chambers, I don't think that it [a mistrial] is an appropriate remedy, and I don't think that from what the jurors have said -- I mean technically they have violated the admonition, but it has not entered into their deliberations.

(RT 4359.) The trial court did, however, instruct the jury as follows:

> I just wanted to tell you that the death of Mark Buster's wife has nothing to do with this case and is unrelated to this case; that is, it is not to enter into your deliberations or decision-making in any way, any form, or fashion.

(RT 4360-4361.) The trial court then reread CALJIC No. 1.03 [juror forbidden

to make independent investigation] and CALJIC No. 17.40 [individual opinion required]. (RT 4361-4362.)

B. Applicable Law

Every criminal defendant has a right to a trial by an unbiased, impartial jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16.) Juror exposure to matters outside of the trial evidence may constitute juror misconduct. (E.g., *People v. Nesler* (1997) 16 Cal.4th 561, 578-579 [juror received information from a woman in a bar who claimed to be the defendant's former babysitter]; *People v. Holloway* (1990) 50 Cal.3d 1098, 1108-1112 [juror reading newspaper account of trial in violation of court admonition]; *People v. Marshall* (1990) 50 Cal.3d 907, 949-950 [juror stating he had a law enforcement background and that the legal principles in the case were extraneous and irrelevant]). While jurors may express opinions based on their life experiences, jurors should

> not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct.

(*In re Malone* (1996) 12 Cal.4th 935, 963.)

This Court has explained the standard for reviewing a matter where the jury has received information from an extraneous source:

> When juror misconduct involves the receipt of information about a party or the case from extraneous sources, the verdict will be set aside only if there appears a substantial likelihood of juror bias. [Citation.] Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the

information is not "inherently" prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was "actually biased" against the defendant.

(*People v. Nesler, supra,* 16 Cal.4th at pp. 578-579.)

Inherently likely bias occurs when "the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment," and determination of such bias depends upon a review of the trial record to determine the prejudicial effect of the extraneous information. (*In re Carpenter* (1995) 9 Cal.4th 634, 653.)

Actual bias is defined as:

the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

(*People v. Nesler*, *supra*, 16 Cal.4th at p. 581 [quoting Code Civ. Proc., § 225, subd. (b)(1)(C)].) Under the test for actual bias, the court considers all pertinent portions of the record. (*People v. Danks* (2004) 32 Cal.4th 269, 303.)

The presumption of prejudice 'may be rebutted, inter alia, by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual bias.'

(*Ibid.*, quoting *In re Carpenter, supra,* 9 Cal.4th at p. 654.) "Actual bias supporting an attack on the verdict is similar to actual bias warranting a juror's disqualification." (*People v. Nesler*, *supra*, 16 Cal.4th at p. 581.)

In assessing prejudice, the reviewing court accepts the trial court's findings of fact if supported by substantial evidence, but independently reviews whether prejudice arose from juror misconduct. (*People v. Danks, supra,* 32

Cal.4th at pp. 303-304; *People v. Nesler*, *supra*, 16 Cal.4th at p. 582.)

C. There Was No Misconduct Regarding Consideration Of The Shooting Death Of Mark Buster's Wife; In Any Event, Appellant Was Not Prejudiced By The Jury's Discussion Of The Event

There was no misconduct in the present case. The shooting of Mark Buster's wife was neither about a party to the case, nor was it information about the case. (*People v. Nesler, supra,* 16 Cal.4th at p. 578.)

In any event, if misconduct occurred, the discussion of Mrs. Buster's death was not so prejudicial as to be substantially and inherently likely to cause bias, nor did it constitute actual bias. Again, the shooting had nothing to do with this case. It is clear that the jurors did not consider the event to be related, except that it was noted Mark Buster was very composed for having experienced such a tragedy. (RT 4350-4352.) Moreover, any insinuation that appellant had anything to do with this shooting would strain reason. The shooting clearly occurred while appellant was on trial. Buster's testimony was extremely limited. He testified only as to the sale of the truck. (RT 1643-1654.) And, it was apparent that appellant and Buster were on good terms. After giving his testimony, the trial court noted that, in front of the jury, Buster shook appellant's hand and commented to him. (RT 4325.)

Additionally, the trial court confirmed for the jury that the shooting was unrelated to appellant's case and should not be considered. (RT 4360-4361.) The trial court also reiterated that the jury was to base its decision only on the facts presented in the trial and not from any other source and that each juror must decide the case individually. (RT 4360.) The presumption of prejudice may be dispelled by an admonition to disregard the improper information. (See *People v. Pinholster*, *supra*, 1 Cal.4th at p. 927; *People v. Cooper* (1991) 53 Cal.3d 771, 838; *People v. Holloway, supra,* 50 Cal.3d at pp. 1111-1112.)

Finally, the evidence in this case was so strong (see Statement of Facts,

Argument IV, § D), and Buster's testimony so limited that it is not likely that the information biased a juror against appellant. (*In re Carpenter, supra,* 9 Cal.4th at p. 654.)

Thus, appellant's contentions that juror misconduct requires the reversal of the guilt and penalty judgments should be rejected.

ISSUES RELATING TO THE PENALTY PHASE

XXI.

APPELLANT'S CONVICTIONS FOR WEAPONS POSSESSION WERE PROPERLY ADMITTED

Appellant contends that his death sentence must be reversed at the penalty phase because the trial court permitted the introduction of two convictions relating to weapon possession under factor (c), although the convictions had not occurred before commission of the murders. (AOB 273-278.) Appellant's claim fails because the convictions were properly admitted under factor (a).

A. Background

The amended information in this case charged six offenses. In count 4, appellant was charged with possession of a firearm by a felon (§ 12021, subd. (a)), and in count 5, he was charged with being a convicted felon in possession of a concealed firearm in a vehicle (§ 12025, subd. (a)(1)). The offenses were alleged to have occurred on May 23, 1992. (CT 601.) On March 20, 1995, after appellant's motion to sever these charges from the murder charges was denied, appellant pled guilty to counts 4 and 5. (RT 108, 446-461.) During the plea colloquy, appellant was advised that the prosecutor would seek to introduce the convictions as aggravating circumstances at the penalty phase.

(RT 460.)

Prior to the penalty phase, the prosecutor indicated his intention to present the convictions for possession of a firearm to the jury. Defense counsel stated that since the convictions were part of the instant case, they could not constitute prior convictions for the purposes of penalty. The trial court observed that if the convictions were not prior convictions, they would fall under the "circumstances of the filed case." In spite of having noted that the convictions were part of the instant case, defense counsel objected to introduction of the prior convictions on this basis. The prosecutor noted the unfairness of allowing a guilty plea to remove the convictions from the knowledge of the jury at the penalty phase. (RT 4412-4415.)

Later, defense counsel again objected to the use of the convictions on counts 4 and 5 as prior convictions under factor (c). The prosecutor argued that the convictions fell under factor (a). The trial court indicated that if counts 4 and 5 were presented to the jury, the jury could consider the evidence (presumably under factor (a)). Further, the trial court believed that the convictions were admissible under factor (c). (RT 4442-4444.)

At the penalty phase, a certified copy of the March 20, 1995 judgment of convictions was admitted. (RT 4559; Peo. Exh. 119.)

B. The Convictions Were Admissible Under Factor (a)

Respondent agrees with appellant that the prior convictions were inadmissible under factor (c). Factor (c) is limited to crimes occurring before the present crime in light of its purpose to show that a defendant was undeterred by previous criminal sanctions. (*People v. Gurule* (2002) 28 Cal.4th 557, 636-637.) The prior convictions described under this factor are limited to those entered prior to the commission of the capital offense. (*People v. Carter, supra,* 36 Cal.4th at p. 1215, 1271; *People v. Williams, supra,* 16 Cal.4th at p.

274; *People v. Balderas, supra,* 41 Cal.3d at p. 201.) However, appellant was not prejudiced because the convictions were admissible under factor (a). (See *People v. Carter, supra,* 36 Cal.4th at p. 1270 [harmless error where trial court improperly admits evidence under factor (c) because the evidence was admissible under factor (b)]; *People v. Carter, supra,* 36 Cal.4th at p. 1146 [same].)

Section 190.3, subdivision (a), specifically permits the jury to consider:

> The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

As this Court has explained:

> "The word 'circumstances' as used in factor (a) of section 190.3 does not mean merely the immediate temporal and spatial circumstances of the crime. Rather it extends to '[t]hat which surrounds materially, morally, or logically,' the crime."

(*People v. Smith* (2005) 35 Cal.4th 334, 352, quoting *People v. Edwards* (1991) 54 Cal.3d 787, 833.)

Here, the fact that appellant entered a partial plea to certain charges in the information does not exclude the resulting convictions from consideration by the jury as circumstances of the crime. Appellant was convicted of those crimes in the present proceedings in accordance with section 190.2, subdivision (a). Certainly, this is so when a defendant pleads guilty to the capital offense. The plea is admissible in the penalty phase which follows. (See *People v. Fairbank* (1997) 16 Cal.4th 1223, 1232, 1243-1244 [most of the evidence that would have been relevant to the guilt phase absent the guilty plea was relevant at the penalty phase because it related to the circumstances of the crime or the existence of special circumstances.].) The result should be no different when a defendant pleads guilty to other offenses contained in the charging document.

Even if the convictions were inadmissible in the penalty phase, there is no reasonable possibility appellant would have received a verdict other than death had the convictions been excluded.[56] (See *People v. Ochoa, supra,* 19 Cal.4th at p. 479.) The jury was well aware that appellant armed himself on several occasions. The three murders in this case were, of course, shooting deaths. Appellant was convicted in count 6 of possession of a firearm by a felon in violation of section 12021, subdivision (a).[57] (CT 972, 979-986; RT 4393-4394.) Evidence was admitted during the guilt phase that appellant's wife, Cody, had seen appellant with a gun. (RT 2897-2898, 2900, 2928, 3042.) Appellant had also given her a gun to carry. (RT 2902-2904.) The jury was aware of the evidence that appellant had thrown a loaded handgun as police officers chased him on February 16, 1990. (RT 4482-4489.) The bare convictions that appellant had been in possession of a firearm in an additional incident added very little to the mountain of aggravating evidence. And, significantly, the convictions did not tell the penalty jury anything they did not already know about appellant's character, namely, that he was a very violent individual who did not hesitate to use a weapon against individuals, including police officers.

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56. The reasonable possibility standard for assessing prejudice in the penalty phase is the same in substance and effect as the beyond a reasonable doubt standard of *Chapman v. California, supra,* 386 U.S. at p. 24. (*People v. Ochoa, supra,* 19 Cal.4th at p. 479.)

57. As respondent previously noted, this count was referred to as "count 4" in the jury verdicts due to appellant's plea to counts 4 and 5 and the removal of these counts from the jury's consideration. (See CT 826, 1208.)

XXII.

NO PREJUDICIAL PROSECUTORIAL MISCONDUCT OCCURRED DURING THE PENALTY PHASE

Appellant contends that the prosecutor committed prejudicial misconduct at the penalty phase by appealing to the passions and prejudices of the jury as follows: (1) asking Cody whether she planned to have conjugal relations with appellant if able; (2) referencing appellant's expensive pickup truck and his lack of employment; and (3) suggesting that if the jury did not sentence appellant to death, he might get a "freebie." (AOB 279-285.) Appellant has waived his contentions relating to the prosecutor's question of whether Cody planned to have conjugal relations with appellant and the questions relating to appellant's lack of employment and source of income. Even if none of the claims is waived, none of these incidents were improperly calculated to arouse passion or prejudice (see *People v. Bradford, supra,* 15 Cal.4th at p. 1379), and none of the comments resulted in prejudice.

A. General Principles Of Law

As discussed in Argument V, under the federal Constitution, to be reversible, a prosecutor's improper comments must "'so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright, supra,* 477 U.S. at p. 181; *Donnelly v. DeChristoforo, supra,* 416 U.S. at p. 643; *People v. Frye, supra,* 18 Cal.4th at p. 969.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Cunningham, supra,* 25 Cal.4th at p. 1000; *People v. Earp, supra,* 20 Cal.4th at p. 858.)

Moreover, in the absence of an objection and request for a curative

admonition, a defendant may not be heard to complain about the prosecutor's statement for the first time on appeal. (*People v. Valdez, supra,* 32 Cal.4th at p. 122; *People v. Cunningham, supra,* 25 Cal.4th at p. 1000; *People v. Seaton, supra,* 26 Cal.4th at p. 682; *People v. Earp, supra,* 20 Cal.4th at p. 858; *People v. Price, supra,* 1 Cal.4th at p. 447.) If an objection has not been made, the point is reviewable only if an admonition would not have cured the harm caused by the prosecutor's remark. (*People v. Valdez, supra,* 32 Cal.4th at p. 122; *People v. Cunningham, supra,* 25 Cal.4th at p. 1001; *People v. Earp, supra,* 20 Cal.4th at p. 858.)

B. Conjugal Visits

Appellant complains that the prosecutor committed misconduct in asking Cody, appellant's wife, whether she planned to have conjugal relations with appellant if able. (AOB 280.) As appellant notes, defense counsel objected to this question on grounds of relevance, and the trial court sustained the objection. (RT 4629.) Appellant has waived any claim of prosecutorial misconduct on this ground for failing to request a curative admonition, which certainly would have cured any harm. (*People v. Valdez, supra,* 32 Cal.4th at p. 122.)

In any event, no misconduct occurred. Although the trial court sustained the objection,

> the prosecutor sought only to place [Cody's] mitigating testimony in its proper perspective, and to remind the jurors that the sentence [appellant] sought would allow him to enjoy benefits and relationships, as with [Cody], which he had forever denied his victim[s]. As such, the argument was proper.

(*People v. Arias, supra,* 13 Cal.4th at p. 178 [addressing argument relating to the defendant's ability to receive conjugal visits].)

Additionally, it is not reasonably possible that the brief question relating to Cody's continued contact with appellant could have had an impact on the jury's penalty determination, especially in light of the strong aggravating evidence consisting mainly of the heinous, cold, and calculating circumstances of the crimes. (*People v. Ochoa, supra,* 19 Cal.4th at p. 479.)

C. References To Appellant's Expensive Pickup Truck And His Lack Of Employment

Appellant next contends that the prosecutor should not have questioned witnesses as to appellant's lack of employment and his purchase of the $18,000 truck. (AOB 280-281.) He also argues the prosecutor committed misconduct in closing argument by arguing that appellant only gave money to his family when he could, but he could afford an $18,000 truck. (AOB 280-284.) The questioning and comments were proper and did not result in prejudice.

The questioning and comments about which appellant complains (AOB 280-281) are as follows: At the penalty phase, defense counsel questioned Cody about appellant's ongoing relationship with his children. (RT 4604-4614.) Cody testified that appellant had always been a good father and that he was a good husband. (RT 4605, 4608.) On cross-examination, Cody testified that appellant contributed financially to the family. The prosecutor questioned her about appellant's lack of employment. (RT 4614-4622.)

Defense counsel objected to the questions apparently believing they related to whether appellant was "dealing drugs." The prosecutor explained: "the line of questioning is to impeach her statements that he was a good husband and a good father." The trial court sustained the objection because Cody had already answered the question relating to appellant's source of income. The prosecutor then argued that he wished to question Cody about the fact that appellant had no bank account because it was consistent with him not

contributing to the family. The trial court found the line of questioning relating to the bank account more prejudicial than probative, and the prosecutor moved on to another line of questioning. (RT 4622-4624.)

Kawaska Jackson also testified as to appellant's skills as a father. She testified that at one time, appellant had a job in a liquor store and he would contribute money to his family. (RT 4636-4646.) On cross-examination, the prosecutor elicited evidence that appellant had given Jackson small amounts of money to buy clothes or shoes. The "total support" appellant had given to Jackson was $80. Jackson could not recall whether appellant was working at the liquor store when he provided her with this "support." (RT 4647-4649.) Defense counsel did not object to this line of questioning.

Kim Graham offered additional testimony as to appellant's abilities as a father, stating that she was at his house three to four times a day watching him interact with his children. (RT 4685-4687.) In spite of her claimed closeness to appellant and his family, the prosecutor elicited evidence that she had no idea whether appellant worked or not, and she never spoke with appellant or Cody about "what they did" because it was none of her business. (RT 4694.) Again, there was no objection to the questioning.

The prosecutor addressed Sheila Griggs Nelson's claim that appellant provided financial support to various people. He asked Nelson if she knew where the money was coming from, but she did not know. Defense counsel objected to this question, but the objection was overruled. (RT 4740-4742.)

Appellant's cousin, Patricia Mosley, testified that appellant was always there for his children and that the other siblings in appellant's family looked up to him. (RT 4758.) In the course of cross-examination, the prosecutor asked Mosley whether appellant had a red truck, and she stated that he did. The prosecutor asked if appellant was working, and she responded, "no." (RT 4760.) Defense counsel did not object to this question.

During argument, in the context of addressing factor (k), the prosecutor argued:

> The defendant is a good father and a good husband. Yet, you know from the guilt phase that the defendant, he dropped out of school. I'm sorry, you know that from the penalty phase. You know that he does not work and had not worked for a year prior to the killing of Officers Burrell and MacDonald, and he spent one to two nights a week away from home. He has four other children by four other women while he has been going with or seeing Deshaunna . . . Cody Thomas.
>
> I can only suggest to you that that is not what I believe -- That is not what you would call a good husband or a good father, having four other children with four other women.
>
> He contributes money to the family only when he is asked. Yet he can afford a truck the cost of which is $18,000.

(RT 4879.) At this point defense counsel objected. The trial court overruled the objection, recalling that the amount paid for the truck was $18,000. (RT 4879.) The prosecutor continued:

> I think you can at least discern from that, Ladies and Gentlemen, these are not really the traits of a good husband and good father. A good husband would be there every night. A good father would be there every night. A good father and husband would not be out impregnating other women, and a good father wouldn't devote 18 grand to a truck and only contribute to the household when asked.

(RT 4879-4880.)

As to those incidents above in which defense counsel either did not object and/or request a curative admonition, appellant has waived any claim of error. (*People v. Valdez, supra,* 32 Cal.4th at p. 122.) Furthermore, the questioning and the argument were appropriate since they were based on

evidence in the record. Substantial evidence was introduced in an attempt to demonstrate that appellant was a good family man. The prosecutor was entitled to attempt to rebut such evidence. (See *People v. Jenkins* (2002) 22 Cal.4th 900, 1043-1044 [comment that defendant had several children from women he had not married appropriate to rebut claim that defendant was a good family man].) That was the nature of the evidence and argument.

Even if the questions and argument were inappropriate, based on the context in which the questions were asked and in which the argument was made, the jury certainly would not have construed the questions and arguments as suggesting that appellant was "dealing drugs." Further, based on the overwhelming aggravating evidence which demonstrated appellant's violence, it is not reasonably possible that appellant would have obtained a verdict less than death even if the questions and argument did so suggest. (See *People v. Ochoa, supra,* 19 Cal.4th at p. 479.)

D. Argument Regarding Future Dangerousness

In appellant's final claim of prosecutorial misconduct, he argues that the prosecutor's comments relating to future dangerousness were improper. (AOB 281-282.) This claim, too, is meritless.

As appellant states, the prosecutor argued that appellant presented a danger to all because he had killed Adkins, Officer Burrell, and Officer MacDonald "for virtually no reason. He executed them." (RT 4883.) The prosecutor argued that appellant presented a danger to other inmates if allowed to live, and that if he committed an act of violence against another inmate, "what could be done to him? It would be a freebie." (RT 4883.) Defense counsel objected, and the court stated, "You are to disregard that." (RT 4883.)

Although the trial court ordered the jury to disregard the prosecutor's comment about the "freebie," the argument relating to future dangerousness

was proper. Argument relating to future dangerousness is permissible when based on the defendant's conduct rather than on expert opinion. (*People v. Stitely, supra,* 35 Cal.4th at p. 570; *People v. Boyette, supra,* 29 Cal.4th at p. 446; *People v. Ervin* (2000) 22 Cal.4th 48, 99.)

In *People v. Ervin,* this Court found that an argument similar to the one made here was appropriate. (*People v. Ervin, supra,* 22 Cal.4th at p. 99.) There, the prosecutor had argued that if the defendant were sentenced to life in prison without the possibility of parole, based on his record, he would present a discipline problem because he would have "nothing to lose," and "he can try to get away with anything, and no one can give him one more day's time." (*Ibid.*) This court found that the prosecutor's remarks constituted argument derived from evidence indicating that defendant might cause disciplinary problems if sentenced to life imprisonment. (*Ibid.*)

Here, as in *Ervin*, the argument that appellant could present a danger in the future was well-supported by appellant's actions in committing the three murders.

In any event, the trial court sustained defense counsel's objection and instructed the jury to disregard the remark. "We can only assume they followed the instruction, and did not allow this isolated remark to affect the verdict." (*People v. Stitely, supra,* 35 Cal.4th at p. 570.) This is especially so in light of the strength of the aggravating evidence.

XXIII.

THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT EVIDENCE CONSISTING OF PHOTOGRAPHS OF THE VICTIMS AND THEIR FAMILIES

Appellant contends that the use of photographs of the victims and their families to illustrate the victim impact evidence violated his rights to due process, equal protection, and a reliable determination of guilt and penalty.

(AOB 286-295.) Respondent submits that the photographs were properly admitted at the penalty phase as circumstances of the crime evidence, and, even if not properly admitted, appellant was not prejudiced.

A. Background

At the penalty phase, the prosecutor planned to introduce into evidence photographs of Officers Burrell and MacDonald. The photographs relating to Officer Burrell depicted him in his uniform at his brother's wedding, with his mother and father, and feeding his infant son, Kevin, Jr. A recent photograph of Kevin Jr., who was approximately three years old when Officer Burrell was killed, was also included. (RT 4446-4447.) The photographs relating to Officer MacDonald depicted him with his brother at a young age, with his brother more recently, at his brother's wedding, at his graduation from Long Beach State University with his parents, and at his graduation from the Reserve Police Academy with his parents. (RT 4446-4447.)

Defense counsel objected to the introduction of the photographic evidence as follows:

> I am going to object to all the photographs that the prosecution is going to introduce in the penalty phase. I think there is a photograph of a wedding, of a graduation. Photograph of Officer Burrell feeding a small child.
>
> I think that we're getting into the issue of emotion rather than reason and I'll submit it.

(RT 4445.)

The trial court reviewed the photographs and determined that the photographs were admissible with the exception of the photographs of Officer MacDonald with his brother at a young age, and the photograph of Officer MacDonald with his brother at a wedding. (RT 4446-4448.)

At the penalty phase, Officer MacDonald's father, James MacDonald, Sr., identified the photographs of Officer MacDonald at his graduations from Long Beach State University and the Rio Hondo Police Academy and with his brother. (RT 4531-4532; Peo. Exh. 118.) Officer Burrell's father, Clark Burrell, identified the photographs of Officer Burrell in uniform at his brother's wedding, at a birthday party with his parents, feeding an infant Kevin, Jr., and the photograph of Kevin, Jr. alone. (RT 4571-4574.)

B. The Photographs Were Properly Admitted As Victim Impact Evidence

In *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720], the United States Supreme Court held:

> if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed.

(*Id*. at p. 827.)

In *People v. Edwards* (1991) 54 Cal.3d 787, this Court held that victim impact evidence is admissible under Penal Code section 190.3, factor (a), which includes the circumstances of the crime as an aggravating factor. (*Id.* at p. 835; see also *People v. Taylor* (2001) 26 Cal.4th 1155, 1171-1172.) Evidence of the specific harm caused by the defendant is a circumstance of the crime. (*People v. Edwards, supra,* 54 Cal.3d at p. 833.) This Court recently reiterated that "evidence showing the direct impact of the defendant's acts on the victim's family and friends is not barred by state or federal law [citation]." (*People v. Benavides* (2005) 35 Cal.4th 69, 107 (citing *People v. Pollock* (2004) 32

Cal.4th 1153, 1180).)

The photographs here illustrated the close relationships between the officers and their families. The photographic evidence implied that Officer Burrell's family and Officer MacDonald's family suffered grief and pain over their losses. They demonstrated the fact that appellant's actions ripped these families apart and ended the careers of two dedicated police officers. This was relevant to the jury's meaningful assessment of appellant's "moral culpability and blameworthiness." (See *Payne*, *supra*, 501 U.S. at p. 825.) "Thus, the jury could consider this evidence in determining whether death or LWOP was the appropriate punishment." (See *People v. Stitely, supra,* 35 Cal.4th at p. 565 [photograph of victim and her husband properly admitted to demonstrate husband's expression of love for victim] (citing *People v. Boyette, supra,* 29 Cal.4th at p. 444 [allowing photos of murder victims taken at unspecific times]).) Additionally, these photographs depicting the victims counterbalanced the photographs of appellant which the defense sought to introduce at the penalty phase. (RT 4604, 4610-4612, 4699.)

Appellant contends that the evidence was improperly used by the prosecutor to argue for a death penalty verdict when the prosecutor asked the jurors to compare the photographs of the victims while alive with the photographs of the deceased victims. (AOB 292-293.) Appellant did not object to the prosecutor's argument, and he has waived this claim. (*People v. Smithey, supra,* 20 Cal.4th at pp. 989-990) In any event, photographs of the victims' bodies was also admissible to demonstrate the circumstances of the crime. (*Id.* at p. 990; see also *People v. Harris, supra,* 37 Cal.4th at pp. 351-352 [testimony regarding condition of body as viewed by family members and photograph of gravesite properly admitted as a circumstance of the murders].) The argument by the prosecutor here was that appellant caused the harm. (RT 4897-4898.) The prosecutor's use of the photographs in this manner was

entirely appropriate. (See *People v. Edwards, supra,* 54 Cal.3d at p. 833.) In fact, this Court has found that prosecutorial misconduct claims based on argument of victim impact evidence in the penalty phase are without legal basis after *Payne*. (See *People v. Yeoman*, *supra*, 31 Cal.4th at p. 147; *People v. Navarette* (2003) 30 Cal.4th 458, 515 [claim of prosecutorial misconduct based on arguing victim impact evidence without legal basis].)

C. Appellant Was Not Prejudiced By Introduction Of The Photographs

In any event, there is no reasonable possibility, especially in light of the compelling aggravating evidence, that the jury's sentencing discretion was affected by the photograph. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1221-1222.) The photographs, though "charming," were ordinary photographs not likely to produce a prejudicial impact. (*People v. Anderson, supra*, 52 Cal.3d at p. 475.) Moreover, the jury was aware that Officer MacDonald had worked hard to become a police officer and that he had a very close-knit, loving family. (RT 4519-4531, 4529, 4545-4551.) The jury was also aware that Officer Burrell had realized a life-long dream of becoming a police officer and that he was dedicated. The jury knew that Officer Burrell's family was also very close and that Officer Burrell had a small child. (RT 4560-4568, 4571-4576, 4580-4583.) Additionally, the trial court instructed the jury, pursuant to CALJIC No. 8.84.1, not to be swayed by bias or prejudice against appellant.[58/]

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58. This instruction provided:

You will now be instructed as to all of the law that applies to the penalty phase of this trial.

You must determine what the facts are from the evidence received during the entire trial, unless you are instructed otherwise. You must accept and follow the law that I state to you. Disregard all other instructions in the guilt phase of the trial which may conflict with any of these new instructions.

(CT 1111.) The jury is presumed to have followed these instructions. (*People v. Rich* (1988) 45 Cal.3d 1036, 1102.)

The admission of the photographic evidence did not violate appellant's federal or state rights to due process, a fair trial, or a reliable penalty determination. Thus, appellant's claims should be rejected.

XXIV.

THE TRIAL COURT PROPERLY REFUSED APPELLANT'S PROPOSED INSTRUCTION CONCERNING THE VICTIM IMPACT EVIDENCE

Appellant contends the trial court erred in refusing his proposed instruction which would have advised the jury on the appropriate use of victim impact evidence pursuant to Defense Requested Instruction No. 29. (AOB 296-321.) Respondent submits the trial court properly instructed the jury regarding victim impact evidence and properly refused appellant's requested instruction. Further, any error in the trial court's instructions on victim impact evidence was harmless.

A. Background

Appellant requested the following instruction at the penalty phase:

> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence was not

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> Disregard all other instructions given to you in other phases of this trial.
>
> You must neither be influenced by bias or prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.

(CT 1111.)

received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction of death as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy.

(CT 956.) The trial court rejected the instruction. (CT 956; RT 4793.) Appellant moved for a new trial based, in part, on the failure to so instruct the jury. (CT 1189-1190.) The trial court denied the motion, noting as to the victim impact evidence:

> I believe the jurors deliberated on [the penalty] phase, it was either seven or eight days. [¶] I think inferentially I can make a finding or the appellate court could make a finding that it was not an emotional decision. When I say an emotional decision, one of these where people go back strictly on emotion and make a decision and come back 45 minutes or an hour later and say, "This is our finding."

(RT 5010.)

B. The Trial Court Properly Refused To Give Defense Requested Instruction No. 29

A trial court's duty to instruct at the penalty phase is guided by the following principles:

> [T]he standard CALJIC penalty phase instructions "are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards." [Citation.] Moreover, the general rule is that a trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative.

> [Citation.] Instructions should also be refused if they might confuse the jury. [Citation.]

(*People v. Gurule, supra,* 28 Cal.4th at p. 659.)

The trial court properly refused Defense Requested Instruction No. 29. It was duplicative of another instruction given at the penalty phase, CALJIC No. 8.84.1, which instructed the jury that it "must neither be influenced by bias or prejudice against the defendant, nor swayed by public opinion or public feelings." (CT 1111; see Argument XXIII, § C.) Appellant's proposed instruction "would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1, and the trial court properly refused to read special instruction No. [29]." (*People v. Ochoa, supra*, 19 Cal.4th at p. 455 [addressing an instruction identical to that proposed here].) Morever, as this Court recently stated regarding the identical instruction proposed by appellant:

> The court properly rejected the defense-proffered instruction as confusing; the instruction was unclear as to whose emotional reaction it directed the jurors to consider with caution--that of the victim's family or the jurors' own. Further, the instructions given as a whole did not give the jurors the mistaken impression that they could consider emotion over reason, nor did the instructions improperly suggest what weight the jurors should give to any mitigating or aggravating factor.

(*People v. Harris, supra,* 37 Cal.4th at p. 359.)

Respondent further submits that the proposed instruction was confusing because it seemed to imply that victim impact evidence could not be considered. The jury was correctly instructed with CALJIC No. 8.85, which stated that it was to take into account 11 factors, including "the circumstances of the crimes of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true," in determining which

penalty to impose. (See CT 1073-1074.) Victim impact evidence is relevant to section 190.3, factor (a) and, therefore, a proper consideration in determining which penalty is appropriate. (See *People v. Brown* (2003) 31 Cal 4th 518, 573; *People v. Edwards*, *supra*, 54 Cal.3d at p. 837.)

In sum, no further instruction was required, as CALJIC No. 8.84.1 sufficed. Appellant's constitutional rights were not violated.

C. Any Error The Trial Court Committed In Instructing The Jury On Victim Impact Evidence Was Harmless

Appellant claims that without guidance on the parameters of victim impact evidence, it is reasonably likely that the jury applied the instructions in a way that violated his constitutional rights. (AOB 217-321.) Even if the trial court erred in instructing the jury with the prosecution's modified instruction on victim impact evidence and refusing Defense Requested Instruction No. 29, appellant was not prejudiced. As stated above, CALJIC No. 8.84.1 covered the information that was in appellant's requested instruction. There is no indication that the jury misapplied CALJIC No. 8.84.1 in deciding the penalty. As the trial court noted, the jury did not return a quick response based on emotion, but rather engaged in what can only be construed as careful deliberations. The jury deliberated for eight days, during which time questions were asked of the trial court and exhibits were requested for examination. (CT 1020-1031, 1141.) There was no reasonable possibility that the trial court's alleged instructional error regarding victim impact evidence affected the verdict. (See *People v. Ochoa, supra,* 19 Cal.4th at p. 479.)

XXV.

APPELLANT WAS NOT ENTITLED TO AN INSTRUCTION ON LINGERING DOUBT

Appellant contends that the trial court violated his Eighth Amendment right to have the jury consider all mitigating evidence by refusing to instruct the jury on lingering doubt. (AOB 322-328.) Appellant, however, had no constitutional right to such an instruction.

Defense counsel requested an instruction on lingering doubt as follows:

> A juror who voted for conviction at the guilt phase may still have a lingering or residual doubt as to whether the defendant committed the crimes, or to what extent did he premeditate and deliberate. Such a lingering or residual doubt, although not sufficient to raise a reasonable doubt at the guilt phase, may still be considered as a mitigating factor at the penalty phase. Each individual juror may determine whether any lingering or residual doubt is a mitigating factor and may assign it whatever weight the juror feels is appropriate.

(CT 957; Def. Req. Instruction No. 30.) The prosecutor objected to the proposed instruction. (RT 4440.) The trial court refused the instruction, finding that the subject of lingering doubt fell within factor (k) of CALJIC No. 8.85, citing *People v. Cox* (1991) 53 Cal.3d 618, and *People v. Thompson, supra,* 45 Cal.3d at p.134. (CT 957; RT 4793.) The trial court properly refused to give the instruction.

"[A]lthough it is proper for the jury to consider lingering doubt, there is no requirement that the court specifically instruct the jury that it may do so." (*People v. Brown, supra,* 31 Cal 4th at p. 567 (citing *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219).) The rule is the same under the state and federal Constitutions. (*Franklin v. Lynaugh* (1988) 487 U.S. 164, 173-174 [108 S.Ct. 2320, 101 L.Ed.2d 155]; *People v. Lawley* (2002) 27 Cal.4th 102, 166.) Thus,

the proposed instruction was unnecessary because there is no requirement for it under either state or federal law. (*People v. Lawley*, *supra*, 27 Cal.4th at p. 166.; *People v. Berryman, supra,* 6 Cal.4th 1048, 1104, *People v. Rodrigues, supra*, 8 Cal.4th at p. 1187 ["Defendant clearly has no federal or state constitutional right to have the penalty phase jury instructed to consider any residual doubt about defendant's guilt."].)

Relying on *People v. Cox, supra,* 53 Cal.3d at p. 678, fn. 20, appellant additionally contends that even if a lingering doubt instruction is not always required, it was required in this case because trial counsel relied on the principle in arguing the case to the jury. (AOB 325-326.) However, as this Court stated in *People v. Ward* (2005) 36 Cal.4th 168, 219-220, the instruction is unnecessary where the court instructs in the standard terms of section 190.3, factors (a) and (k).

Here, the trial court instructed the jury that in making its penalty determination, it could consider "the circumstances of the crime of which defendant was convicted in the present proceeding and the existence of any special circumstance found to be true." (CALJIC No. 8.85, (a); CT 1125.) The jury was further instructed to consider

> any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(CALJIC No. 8.85(k); CT 1126.) Moreover, as appellant points out, defense counsel was not precluded from arguing the concept of lingering doubt to the jury. (AOB 325-326; RT 4911-4912.)

The instructions sufficiently encompassed the concept of lingering doubt, and the trial court was under no duty to give a more specific instruction.

(*People v. Ward, supra,* 36 Cal.4th at p. 220; *People v. Hines* (1997) 15 Cal.4th 997, 1068; *People v. Osband, supra,* 13 Cal.4th at p. 716; *People v. Sanchez* (1995) 12 Cal.4th 1, 78; *People v. Price, supra*, 1 Cal.4th at p. 489.) There was no error.

Even if a lingering doubt instruction should have been given, based on the instructions given and the arguments of counsel, there is no reasonable possibility that appellant suffered prejudice from the lack of the instruction. (*People v. Carter, supra,* 30 Cal.4th at pp. 1221-1222.) As previously stated, CALJIC penalty phase instructions "are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards." (*People v. Gurule, supra,* 28 Cal.4th at p. 659.)

Appellant's contention should be rejected.

XXVI.

THE TRIAL COURT PROPERLY REFUSED TO GIVE A SPECIAL INSTRUCTION DEFINING THE PENALTY OF LIFE WITHOUT POSSIBILITY OF PAROLE

Appellant argues that the trial court erred in refusing to give an instruction defining the penalty of life without the possibility of parole in violation of his constitutional rights. (AOB 329-336.) Appellant is incorrect.

Appellant requested the following instruction:

> You are instructed that life without the possibility of parole means exactly what it says: The defendant will be imprisoned for the rest of his life.
>
> You are instructed that the death penalty means exactly what it says: That the defendant will be executed.
>
> For you to conclude otherwise would be to rely on conjecture and speculation and would be a violation of your oath as trial jurors.

(CT 928; Def. Req. Instruction No. 3.) The prosecutor objected to the

instruction (RT 4784-4785), and the trial court refused to give the instruction (CT 928; RT 4793).

Appellant's proposed instruction was inaccurate because, as this Court has stated, the Governor may ameliorate a sentence through commutation or pardon power. (*People v. Ward, supra,* 36 Cal.4th at pp. 220-221; *People v. Arias, supra,* 13 Cal.4th at p. 172.)

Even if the instruction properly stated the law, this Court has consistently held that such an instruction is not required, and appellant has provided no reason to depart from prior decisions.[59] (See *People v. Ward, supra,* 36 Cal.4th at pp. 220-221; *People v. Stitely, supra,* 35 Cal.4th at p. 574; *People v. Snow, supra,* 30 Cal.4th at pp. 123-124; *People v. Kipp, supra,* 26 Cal.4th at p. 1138; *People v. Sakarias, supra,* 22 Cal.4th at p. 641.)

Appellant's reliance on the United States Supreme Court's decisions in *Simmons v. South Carolina* (1994) 512 U.S. 154 [114 S.Ct. 2187, 129 L.Ed.2d 133], *Shafer v. South Carolina* (2001) 532 U.S. 36 [121 S.Ct. 1263, 149 L.Ed.2d 178], and *Kelly v. South Carolina* (2002) 534 U.S. 246 [122 S.Ct. 726, 151 L.Ed.2d 670] is misplaced. (See AOB 330-334.) As this Court observed, these three cases are distinguishable "in that the juries in those cases were told that the alternative to a death sentence was one of 'life imprisonment' without instruction that a capital defendant given such a sentence would not be eligible for parole." (*People v. Snow, supra,* 30 Cal.4th at p. 123.) The jury here was instructed that it could sentence appellant to either death or "confinement in the state prison for life without possibility of parole." (CT 1110, 1136.) This

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59. Appellant's citation to empirical evidence does not warrant reconsideration of this Court's previous decisions, as appellant contends. (AOB 332-333.) Such empirical data, based on research that is not part of the record and has not been cross-examined, does not rebut the presumption that the jurors in this case understood and followed the instructions. (*People v. Welch* (1999) 20 Cal.4th 701, 772-773.)

instruction was sufficient to inform the jury that appellant would not be eligible for parole. (*People v. Snow, supra,* 30 Cal.4th at p. 124.)

Moreover, defense counsel's closing argument informed the jury of appellant's parole ineligibility under a sentence of life without the possibility of parole. Defense counsel argued:

> Life without the possibility of parole means exactly that. It means there is no parole. There are no parole hearings. There is no chance that he will ever rejoin society. He will be in prison until he dies.

(RT 4906.)

Here, unlike *Simmons*, *Shafer*, and *Kelly*, the instructions and defense counsel's argument fully informed the jury that appellant was not eligible for parole if it declined to sentence him to death. (*People v. Musselwhite, supra*, 17 Cal.4th at p. 1271 [*Simmons* inapplicable in light of standard penalty instructions, counsel's argument, and expert testimony]; *People v. Holt, supra*, 15 Cal.4th at p. 689 [*Simmons* inapplicable in light of standard instructions and counsel's argument that "notorious murderers who had received parole did so under the old law" and that under the present law, the defendant would have no parole hearings and "will not get out"].)

Finally, any error in failing to instruct the jury that appellant would never be released on parole was harmless because there was no reasonable possibility of a more favorable penalty verdict absent the error. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1232.) Although the term, "life without the possibility of parole," was set forth clearly, defense counsel also expanded on the principle during closing argument. (RT 4906.) Most importantly, though, each juror indicated in his or her questionnaire that he or she understood life without parole to mean that appellant would never be released from prison. (CT 312, 467, 555, 666, 798, 820, 842, 1040, 1084, 1172, 1194, 1330, 1374, 1595, 1727, 2146, 2198, 2300.)

For the above reasons, appellant's claim that the trial court erred in failing to define the term "life without the possibility of parole" should be rejected.

XXVII.

THE TRIAL COURT PROPERLY REFUSED APPELLANT'S PROPOSED "MERCY" INSTRUCTIONS

Next, appellant contends that he was deprived of a reliable sentencing determination as a result of the trial court's refusal to provide his proposed special instructions which told the jury it could be influenced by mercy. (AOB 337-351.) This Court has previously rejected similar claims and should do so here as well. (See *People v. Griffin, supra,* 33 Cal.4th at p. 590-591.)

Here, Defendant's Requested Instructions Nos. 2 and 11 would have advised the jury that it could be influenced by mercy, sympathy, compassion, or pity in deciding what weight to give a mitigating factor and in arriving at a proper penalty. (CT 926-927, 939.) Defendant's Requested Instruction No. 8 would have advised the jury that a mitigating circumstances is a fact which "in fairness, sympathy or compassion, or mercy, may be considered" in reducing the degree of moral culpability or justifying a sentence of less than death. (CT 936.) Defendant's Requested Instructions Nos. 19 and 23 would have advised the jury that if a mitigating circumstances aroused "mercy, sympathy, empathy, or compassion" such as to persuade the jury that death was not the appropriate penalty, the jury may impose a sentence of life without the possibility of parole; further, the jury was permitted to consider mitigating evidence relating to a defendant's character and background because the evidence may arouse sympathy or compassion for the defendant. (CT 947, 951.) The prosecutor objected to these instructions, arguing that no instruction on mercy was required and the proposed instructions were duplicative. (RT 4783-4784, 4786-4788.)

The trial court refused the instructions. (RT 4793.)

This Court has held that a capital defendant is not entitled to a "pure" mercy instruction at the penalty phase. (*People v. Lewis, supra,* 25 Cal.4th at p. 393.)

> We have cautioned that "'the jury must "ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase." [Citation.] The jury may not act on whim or unbridled discretion.'" [Citation.] "The unadorned use of the word 'mercy' implies an arbitrary or capricious exercise of power rather than reasoned discretion based on particular facts and circumstances. Defendant was not entitled to a pure 'mercy' instruction." [Citation.]

(*People v. Lewis, supra*, 26 Cal.4th at p. 393.)

To the extent that appellant's proposed instructions related mercy to the mitigating circumstances, this principle was already covered by the standard instructions. The trial court instructed the jury to disregard instructions given in other phases of the trial. (CT 1111; CALJIC No. 8.84.1) The trial court instructed the jury to consider all the evidence and to take into account and be guided by factors which included:

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. . . .

(CT 1125; CALJIC No. 8.85(k).) The jury was further instructed that a mitigating factor was

> any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the

death penalty

and that it could "assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors." (CT 1136; CALJIC No. 8.88.) The trial court was not required to give duplicative instructions. (*People v. Griffin, supra,* 33 Cal.4th at pp. 591-592 (citing *People v. Smith* (2003) 30 Cal.4th 581, 638; *People v. Hughes, supra,* 27 Cal.4th 287, 403; *People v. Lewis, supra,* 26 Cal.4th at p. 393).) Numerous cases have likewise held it is not error to fail to specifically instruct the jury to consider "mercy" in the penalty evaluation. (*People v. Brown, supra,* 31 Cal.4th at p. 570; *People v. Taylor* (2001) 26 Cal.4th 1155, 1180-1181; *People v. Bolin, supra,* 18 Cal.4th at p. 344; *People v. Wader* (1993) 5 Cal.4th 610, 663; *People v. McPeters* (1992) 2 Cal.4th 1148, 1195; *People v. Livaditis* (1992) 2 Cal.4th 759, 781; *People v. Nicolaus* (1991) 54 Cal.3d 551, 588; *People v. Wright* (1990) 52 Cal.3d 367, 442.)

Relying on *People v. Andrews* (1989) 49 Cal.3d 200, 227-228, appellant contends that the instructions in this case were inadequate because the prosecutor's argument prevented the jury from considering mercy. (AOB 346.) Nothing in *Andrews* or the record supports this assertion. In *Andrews*, the defendant claimed that the trial court erred in failing to instruct the jury that it had discretion to exercise mercy. (*Id.* at p. 227.) This Court found that the jury was not misinformed on its ability to show mercy. (*Id.* at p. 228.) The jury had been instructed that it could consider "any other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death."[60] Further, nothing in the parties' arguments indicated the jury could not consider mercy. Finally, the prosecutor had stated that although defense counsel would argue the defendant should be shown compassion, the jury

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60. The instruction also did not specifically advise the jury that it could consider sympathy. (*People v. Andrews, supra,* 49 Cal.3d at p. 227.)

should not do so because the defendant had not shown his victims any mercy. Such an argument acknowledged that the jury could consider compassion. (*Ibid.*)

As in *Andrews,* the jury here was instructed that it could consider any "other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (CALJIC No. 8.85(k); CT 1196.) Also as in *Andrews,* nothing in the parties' arguments indicated that the jury was not permitted to consider sympathy or mercy. The prosecutor's argument, pointed out by appellant (AOB 346; RT 4883, 4899), that appellant was not deserving of sympathy acknowledged that the jury could consider compassion. Defense counsel's argument advised the jury it was entitled to consider mercy. Defense counsel argued:

> You can exercise mercy. That is an appropriate consideration in a penalty phase. The law allows you to do that. The law does not require death in any case, and I plead with you on behalf of my client, please return a verdict of life without the possibility of parole.

(RT 4917.) The jury here was properly instructed.

Appellant also contends that the failure to instruct the jury on the principles of mercy prevented the jury from considering the impact of the death penalty on his family. (AOB 348-349.) However, that portion of Defendant's Requested Instruction No. 2 which would have permitted the jury to be moved by sympathy for appellant's family was simply incorrect. Sympathy for a defendant's family is not a mitigating factor. (*People v. Smithey, supra,* 20 Cal.4th at p. 1000.) This special instruction was also properly rejected because it was legally incorrect.

In this case, there is "no reason to believe the jury may have been misled about its obligation to take into account mercy or any of [appellant's] other

mitigating evidence in making its penalty determination." (*People v. Hughes, supra,* 27 Cal.4th at p. 403.) Further, based on the instructions and counsel's argument, there is no reasonable possibility that the alleged instructional error affected the verdict. (See *People v. Carter, supra,* 30 Cal.4th at pp. 1221-1222.) Appellant's claim should be rejected.

XXVIII.

APPELLANT WAS NOT ENTITLED TO A JURY INSTRUCTION ADVISING THE JURY THAT IT WAS IMPROPER TO RELY UPON THE FACTS SUPPORTING THE MURDER VERDICTS AS AGGRAVATING FACTORS

Appellant contends that his constitutional rights to due process, a fair and reliable capital trial, a properly instructed jury, and the right to be free from cruel and unusual punishment were violated when the trial court refused a special instruction which would have informed the penalty jury that it could not sentence him to death based on the same facts that caused it to find him guilty of first-degree murder. (AOB 352-360.) Appellant's contention is meritless.

Appellant proposed the following instruction:

> In deciding whether you should sentence the defendant to life imprisonment without the possibility of parole, or to death, you cannot consider as an aggravating factor any fact which was used by you in finding him guilty of murder in the first degree unless that fact establishes something in addition to an element of the crime of murder in the first degree. The fact that you have found [appellant] guilty beyond a reasonable doubt of murder in the first degree is not itself an aggravating circumstance.

(CT 934; Def. Req. Instruction No. 6.) The prosecutor objected to this instruction on the ground that it erroneously advised the jury that guilt phase

facts could not be used as an aggravating factor. (RT 4786.) The trial court refused the instruction. (RT 4793.)

As the prosecutor pointed out, appellant's proposed instruction was a misstatement of the law. As set forth previously in Argument XXI, Section 190.3, subdivision (a), specifically permits the jury to consider

> The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

Consideration of the facts of the crime is entirely proper. This Court has observed, "in order to perform its moral evaluation of whether death was the appropriate penalty, the facts of the murder cannot comprehensibly be withdrawn from the jury's consideration." (*People v. Hawkins* (1995) 10 Cal.4th 920, 965-966, internal quotations and citations omitted; see also *People v. Coleman* (1989) [trial court properly refused instruction advising jury that the fact it found the defendant guilty beyond a reasonable doubt could not be used as aggravating factor because the instruction was misleading and conflicted with section 190.3, subd. (a)].)

Appellant argues that the instruction was constitutionally required because the use of the guilt phase facts to support an aggravating factor "eviscerates the distinction between death-eligibility and death worthiness" and that, absent instruction, the jury may impose a death sentence based on no evidence other than that used to prove the elements of premeditated and deliberate murder. (AOB 357-359.) However, this Court has noted its repeated rejection of claims that "double-counting" facts common to all first degree felony murders "precludes any meaningful distinction between first degree murderers who receive death and those who do not." (*People v. Millwee, supra,* 18 Cal.4th at p. 164.) "The fact that the aggravating circumstance duplicated one of the elements of the crime does not make [the death] sentence

constitutionally infirm." (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 246 [108 S.Ct. 546, 98 L.Ed.2d 568].) In fact, this Court has approved "triple use" of the same facts to sustain: first degree murder based on felony-murder, a felony-murder special circumstance, and selection of a death sentence. (*People v. Webster* (1991) 54 Cal.3d 411, 456.) The facts underlying a special-circumstance finding serve different roles at different phases of the trial. In the penalty phase, the jury engages in a normative process to weigh the various aggravating and mitigating factors and to select an appropriate penalty. (See *People v. Ray, supra,* 13 Cal.4th 313, 358.) This principle is embodied in CALJIC No. 8.88, which defined aggravating factors and mitigating factors and advised the jury that it was to engage in a weighing process.[61]

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61. CALJIC No. 8.88 provided:

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

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors in each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by

Also, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427-433 [100 S.Ct. 1759, 64 L.Ed.2d 398], upon which appellant relies (AOB 358), "address[es] the constitutional ramifications of using vague factors to determine a defendant's eligibility for the death penalty" and is inapposite. (*People v. Yeoman, supra,* 31 Cal.4th at p. 157.) As this Court has elaborated,

> We find the concerns set forth in *Godfrey* inapposite to California's death penalty law. The statutory scheme embodied in section 190.3 does not encompass all murders that are "gruesome," "bloody," or otherwise share any one particular fact pattern. Rather, the clear import of our statute (and the CALJIC instructions based thereon) is to require the jury to weigh a variety of enumerated factors toward determining whether death is the appropriate penalty in each individual capital prosecution.

(*People v. Wright, supra,* 52 Cal.3d at p. 446.) The Constitution merely requires a death-penalty scheme to narrow the class of capitally eligible murders and then allow for considering mitigating circumstances and exercising discretion. (*Lowenfield, supra,* 484 U.S. at p. 246.) This is what California's scheme does. (*Tuilaepa v. California* (1994) 512 U.S. 967, 971-980 [114 S.Ct. 2630, 129 L.Ed.2d 750].) Appellant's requested instruction, which contravenes California's scheme, was properly rejected.

> considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(CT 1136-1137.)

XXIX.

THE TRIAL COURT PROPERLY REFUSED ADDITIONAL PROPOSED PENALTY PHASE INSTRUCTIONS

Appellant also contends that the trial court erred in refusing to instruct on several additional special instructions at the penalty phase which would have further addressed mitigating evidence, and, he claims, the error violated his rights to present a defense, to a fair and reliable capital trial, to the presumption of innocence, to the requirement of proof beyond a reasonable doubt, to due process, and to a properly instructed jury. (AOB 361-373.) To the contrary, the trial court committed no instructional error.

A. An Instruction That One Mitigating Factor Alone Could Serve As A Basis For Life Without The Possibility Of Parole Was Not Warranted

Appellant contends the trial court erred in refusing requested instructions relating to the fact that one mitigating factor could serve as a basis for life without the possibility of parole. (AOB 363-365.) Defendant's Requested Instruction No. 7, in pertinent part, would have provided that "[a]ny one mitigating factor, standing alone, may support a decision that death is not the appropriate punishment in this case." (CT 935.) Defendant's Requested Instruction No. 20 would have provided:

> Since you, as jurors, decide what weight is to be given the evidence in aggravation and the evidence in mitigation, you are instructed that any mitigating evidence standing alone may be the basis for deciding that life without the possibility of parole is the appropriate punishment.

(AOB 363-365; CT 948.) The prosecutor objected to the giving of these instructions, and the trial court refused to give them. (RT 4786, 4788, 4793-4794.)

Initially, as the prosecutor noted (RT 4786, 4788), the proposed instructions were argumentative because they stated that a single mitigating factor could be dispositive without saying the same about a single aggravating factor. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1134; *People v. Hines, supra,* 15 Cal.4th at p. 1069.)

Moreover, the instructions were properly refused because other instructions adequately addressed this point. As discussed previously, CALJIC No. 8.85 advised the jury that it could consider

> any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(CALJIC No. 8.85; CT 1126.) The court also gave the 1989 version of CALJIC 8.88, which, inter alia, told the jurors that the weighing of aggravating and mitigating circumstances did not mean mere mechanical counting or arbitrary assignment of weight, but they were free to "assign whatever moral or sympathetic value" they deemed appropriate. The instruction further directed that each juror "must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CT 1136-1137.)

In view of the instructions given, there was no error in the court's refusal to give the requested special instructions.[62] (See *People v. Smith, supra,* 35

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62. Arguing that the instructions given did not adequately advise the jury that a single mitigating factor could outweigh the aggravating evidence, appellant relies upon *People v. Sanders, supra,* 11 Cal.4th at p. 557. (AOB 364.) The jury in *Sanders*, however, was instructed pursuant to the pre-1989 revision of CALJIC No. 8.88. Under the current instruction, appellant's concern that the jurors would misapprehend the nature of the penalty determination process or the scope of their discretion to determine the penalty

Cal.4th at p. 371; *People v. Bolin, supra,* 18 Cal.4th at p. 343; *People v. Breaux* (1991) 1 Cal.4th 281; 316-317; *People v. Williams* (1988) 45 Cal.3d 1268, 1322.) Additionally, based on the instructions given, there is no reasonable possibility that appellant would have obtained a different result absent the alleged instructional errors. (*People v. Carter, supra,* 30 Cal.4th at pp. 1221-1222.)

B. The Trial Court Properly Denied Appellant's Requested Instructions Relating To The Scope Of Mitigation

Appellant claims that the trial court erred in refusing several proposed instructions relating to the scope of mitigation. (AOB 365-370.) These instructions were properly rejected because they were duplicative and, in some cases, argumentative.

1. Defendant's Requested Instruction No. 4A

Defendant's Requested Instruction No. 4A was a modification of CALJIC No. 8.85 and would have provided:

> In determining which penalty is to be imposed on the defendant, you shall consider all of which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall considered [sic], take into account and be guided by the following, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.
>
> (b) The presence or absence of criminal activity by the defendant,

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through the weighing process is unfounded. (See AOB 364.)

other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.

(d) The effect of the defendant's upbringing, childhood and family life.

(e) The effect of parental narcotic addiction

(f) The effect of having no biological father ever present in the home

(g) The relationship between the defendant and his mother, siblings, children, wife, relatives, and significant others.

(h) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt phase of this trial which conflicts with this principle.

(CT 931-932.)

The prosecutor objected to this proposed modification on the ground that appellant was not entitled to a pinpoint instruction on specific testimony. (RT 4785.) The trial court refused to modify CALJIC No. 8.85, finding that the proposed modifications rendered the instruction argumentative. (RT 4791-4792.) The trial court was correct.

Although instructions pinpointing the theory of the defense are appropriate, a defendant is not entitled to instructions that simply recite facts

favorable to him. (*People v. Benson* (1990) 52 Cal.3d 754, 805-806; see also *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1159 [defendant not entitled to instruction reciting the evidence he viewed as mitigating].) Appellant's proposed instruction merely outlined specific mitigating evidence. Moreover, CALJIC No. 8.85 was adequate and included consideration of appellant's mitigating evidence under factor (k). (CT 1126.) Thus, the proposed instruction was also duplicative. (See *People v. Gurule, supra,* 28 Cal.4th at p. 659.) Accordingly, the proposed modification to CALJIC No. 8.85 was properly rejected.

2. Defendant's Requested Instructions Nos. 7, 9, 10, And 11

Appellant claims it was error for the trial court to refuse to instruct the jury pursuant to Defendant's Requested Instructions 7, 9, 10, and 11 to the extent these instructions explained the unlimited nature of mitigating evidence. The relevant portion of Defendant's Requested Instruction No. 7 would have advised the jury that it should not limit its consideration of mitigating circumstances to specific factors but that it could also "consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty." (AOB 366-369; CT 935.) Defendant's Requested Instruction No. 9 provided that "[m]itigating factors are unlimited and anything mitigating should be considered and taken into account in deciding to impose a sentence of life without possibility of parole." (AOB 366-369; CT 937.) Defendant's Requested Instruction No. 10 indicated that "[a]ny aspect of the offense or of the defendant's character or background that you consider mitigating can be the basis for rejecting the death penalty even though it does not lessen legal culpability for the present crime." (AOB 367-369; CT 938.) The portion of Defendant's Requested Instruction No. 11, which appellant contends was important to the issue of the scope of mitigation, would

have advised the jury that the mitigating circumstances provided to the jury were examples and that mitigating evidence was not limited to those factors. (AOB 367-369; CT 939.) The prosecutor objected to, and the trial court properly refused, these instructions. (RT 4786-4787, 4793.)

This Court found in *People v. Hines*, *supra,* 15 Cal.4th at pp. 1068-1069, that a proposed instruction indicating the jury should not limit its consideration of mitigating factors to those factors specifically listed by the trial court was duplicative of the instruction advising jurors to consider:

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspects of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(*Ibid.*) Just as in *Hines*, appellant's proposed instructions were duplicative of CALJIC No. 8.85, factor (k), and were properly refused.

3. Defendant's Requested Instructions Nos. 8 And 12

Defendant's Requested Instruction No. 8 would have advised the jury that a mitigating circumstances is a fact which "in fairness, sympathy or compassion, or mercy, may be considered" in reducing the degree of moral culpability or justifying a sentence of less than death. (CT 936.) This instruction is addressed in Argument XXVII. As discussed in Argument XXVII, the instruction was duplicative of the principles covered by CALJIC Nos. 8.85 and 8.88 and was properly rejected. (See *People v. Griffin, supra,* 33 Cal.4th at pp. 591-592; *People v. Gurule, supra,* 28 Cal.4th at p. 659; *People v. Sanders*, *supra,* 11 Cal.4th at p. 560.)

Defendant's Requested Instruction No. 12 stated, "If the mitigating evidence gives rise to compassion or sympathy for the defendant, the jury may,

based upon such sympathy or compassion alone, reject death as a penalty." (CT 940.) The prosecutor objected to this instruction, and the trial court refused to so instruct the jury. (RT 4787, 4793.) This instruction was properly refused for the same reasons the proposed "mercy" instructions, including Defendant's Requested Instruction No. 8, were rejected as discussed in Argument XXVII. The instruction was duplicative of the principles covered in CALJIC Nos. 8.85 and 8.88 and was properly rejected. (See *People v. Griffin, supra,* 33 Cal.4th at pp. 591-592; *People v. Gurule, supra,* 28 Cal.4th at p. 659; *People v. Sanders, supra,* 11 Cal.4th at p. 560.)

4. Defendant's Requested Instruction No. 24

Defendant's Requested Instruction No. 24 stated:

> The permissible aggravating factors are limited to those aggravating factors upon which you have been specifically instructed. Therefore, the evidence which has been presented regarding the defendant's background may only be considered by you as mitigating evidence.

(CT 952.) The prosecutor objected to, and the trial court refused to give, this instruction. (RT 4788-4789, 4793.) Contrary to appellant's assertion (AOB 367), the trial court did not err in refusing this instruction.

The trial court need not identify which factors are mitigating and which are aggravating. This Court has stated:

> [w]e have held the standard instructions adequate despite their failure to identify the aggravating or mitigating character of the various sentencing factors, because such matters "should be self-evident to any reasonable person within the context of each particular case."

(*People v. Medina* (1990) 51 Cal.3d 870, 909, quoting *People v. Jackson, supra,* 28 Cal.3d 264, 316; accord, *People v. Lewis, supra*, 26 Cal.4th at p. 395; *People v. Box, supra*, 23 Cal.4th at p. 1217; *People v. Davenport* (1995) 11

Cal.4th 1171, 1229; see *Tuilaepa v. California, supra,* 512 U.S. at p. 979 ["A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision."].) Moreover, the trial court properly instructed the jury on aggravating and mitigating factors pursuant to CALJIC Nos. 8.85 and 8.88 (CT 1125-1126, 1136), and there was no error. (See *People v. Ochoa, supra,* 26 Cal.4th at p. 457 [instruction that evidence of defendant's background or lifestyle could only be considered as mitigating evidence properly refused because trial court properly instructed jury on aggravating and mitigating factors].)

5. Appellant Was Not Prejudiced By The Refusal Of The Trial Court To Provide The Above Instructions Relating To The Consideration Of Mitigating Factors

Appellant argues that reversal is required because the case was close, substantial evidence in mitigation was produced, and much of the evidence asked the jury to act mercifully. (AOB 372-373.) Even assuming this is so, as appellant also acknowledges, [t]his Court has routinely held that the pattern CALJIC instructions are sufficient. (AOB 371; see *People v. Barnett, supra,* 17 Cal.4th at pp. 1176-1177.) The instructions given provided the guidance required, and nothing prevented the jury from considering or properly weighing the aggravating and mitigating factors.

C. The Trial Court Properly Refused Appellant's Requested Instruction Relating To Cost And Deterrence

Appellant requested that the jury be instructed it could not consider the "deterrent or non-deterrent effect of the death penalty or the monetary cost to the State of execution or maintaining a prisoner for life." (CT 942; Def. Req. Instruction No. 14.) Because neither party in this case raised the issue of cost or the deterrent effect of the death penalty, the trial court did not err in refusing

this instruction. (*People v. Brown, supra,* 31 Cal.4th at p. 566.) Even if the instruction should have been given, there could have been no prejudice from the omitted instruction because the issues were not raised. (*Ibid.*)

In sum, the trial court's rejection of appellant's proposed special instructions relating to mitigating factors did not result in error, let alone prejudicial error, and thus appellant's claims fail.

XXX.

THE JURY WAS PROPERLY INSTRUCTED AS TO ITS ULTIMATE ROLE IN DETERMINING PENALTY

Appellant contends that the trial court improperly read guilt phase instructions at the penalty phase without also reading Defendant's Requested Instruction No. 1, which would have reminded the jury that its most important task was to render an individualized, moral determination as to penalty. (AOB 374-385.) He claims that this error resulted in the deprivation of his right to present a defense, to a fair and reliable capital trial, to due process, and to a properly instructed jury. (AOB 376-377.) Respondent submits that the jury instructions given provided the proper guidance to the jury.

A. Background

Appellant proposed Requested Defense Instruction No. 1, as follows:

> You have heard all the evidence [and the arguments of the attorneys], and now it is my duty to instruct you on the law that applies to this case. . . .
>
> You must determine what the facts are from the evidence received during the entire trial unless instructed otherwise.
>
> You must accept and follow the law as I state it to you, whether or not you agree with the law. If anything concerning the law said by the

> attorneys in their arguments or at any other time during the trial conflict with my instructions on the law, you must follow my instructions.
>
> Your duty in this phase of the case is different from your duty in the first part of the trial where you were required to determine the facts and apply the law. Your responsibility in the penalty phase is not merely to find facts, but also -- and most important -- to render an individualized, moral determination about the penalty appropriate for the particular defendant -- that is, whether he should lie or die.

(CT 923-924.) The prosecutor objected to the giving of this instruction, arguing that the CALJIC instructions were adequate, and there was no need for modification. (RT 4440, 4782-4783.)

During additional discussions on penalty phase jury instructions, the trial court indicated an intention to instruct the jury pursuant to CALJIC Nos. 1.01, 1.02, 1.03, 2.02, 2.11, 2.20, 2.21, 2.21.2, 2.22, 2.27, 2.90 (as it related to factors (b) and (c)), and 2.60 (Def. Req. Instruction No. 28). Defense counsel requested instructions on circumstantial evidence, "out of an abundance of caution." He provided an example that a "particular act" by appellant "might be circumstantial evidence of his good nature." (RT 4801-4802.) Defense counsel also agreed that CALJIC No. 2.27, relating to the testimony of one witness, should be read because "it applies to anything," and "that is a significant portion of the case." (RT 4803.)

In later discussions, defense counsel changed his position. He objected to the re-reading of CALJIC Nos. 1.02, 1.03, 2.00, 2.11, 2.22, 2.21.1, 2.21.2, 2.22, 2.27, 2.60, and 2.90. (RT 4849, 4853.) Defense counsel reasoned that providing the instructions again would give the impression that the penalty phase was more of a fact finding process. (RT 4853-4854.) Defense counsel stated:

> To a certain degree there is a fact finding process in the penalty phase,

> no question about it, but it's not the same type of a fact finding process by which you then determine whether evidence has been proven beyond a reasonable doubt as it relates to penalty, not as it relates to some other offense, uncharged offense in the penalty phase.

(RT 4854.) The trial court responded that according to the Use Notes to CALJIC No. 8.84.1, trial courts should follow CALJIC No. 8.84.1 with all appropriate instructions. The trial court agreed with the statement in the Use Notes that the recommended procedure would be less likely to result in juror confusion. (RT 4854-4855.)

B. The Instructions, As A Whole, Properly Guided The Jury

The jury's sentencing choice in the penalty phase is different from the guilt determination. "It is not simply a finding of facts which resolves the penalty decision, but . . . the jury's moral assessment of those facts as they reflect on whether defendant should be put to death." (*People v. Brown* (1985) 40 Cal.3d 512, 540 (internal citations and quotations omitted).)

> It is true that at the penalty phase, the choice between death and life imprisonment without possibility of parole depends on a determination as to which of the two penalties is appropriate, which in turn depends on a determination whether the evidence in aggravation substantially outweighs that in mitigation. [Citations.] But as explained, the ultimate determination of the appropriateness of the penalty and the subordinate determination of the balance of evidence of aggravation and mitigation do not entail the finding of facts that can increase the punishment for murder of the first degree beyond the maximum otherwise prescribed. Moreover, those determinations do not amount to the finding of facts, but rather constitute a single fundamentally normative assessment . . . . [Citations.]

(*People v. Griffin, supra,* 33 Cal.4th at p. 595 (footnote omitted).)

Nothing in the instructions conflicted with this principle. The instructions which guided the jury in assessing witness credibility, such as CALJIC Nos. 2.20, 2.21.1, 2.21.2, 2.22, and 2.27, were proper in the penalty phase. (See *People v. Benavides, supra,* 35 Cal.4th at pp. 69, 112 [CALJIC No. 2.27 not given, but the court's instruction pursuant to CALJIC No. 2.20 properly advised the jury that it could consider bias and interest in assessing witness credibility]; *People v. Johnson, supra*, 6 Cal.4th at p. 1, 48 [CALJIC No. 2.21 properly given at the penalty phase]; *People v. Gates* (1987) 43 Cal.3d 1168, 1209 [witness credibility instructions not specifically limited to issue of guilt or innocence].)

The remaining instructions were appropriate as well. CALJIC No. 2.00 did no more than define direct and circumstantial evidence, and by defense counsel's own admission, was helpful. (CT 1115; RT 4801-4802.) CALJIC No. 1.02 merely advised the jury as to what constituted evidence and what did not. (CT 1113.) CALJIC 1.03, in a similar vein, advised the jury that it must rely on evidence received in trial and not from other sources. (CT 1114.) CALJIC No. 2.11 simply told the jury that production of all available evidence was not required. (CT 1117.) Finally, CALJIC No. 2.60 was expressly requested by appellant in the form of Defendant's Requested Instruction No. 28[63] and could not have confused the jury about its role in the penalty phase. It advised the jury not to consider appellant's failure to testify.[64] (CT 1124.)

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63. To the extent appellant actually requested this instruction, any error was invited. (See *People v. Catlin* (2001) 26 Cal.4th 81, 150.)

64. Appellant includes CALJIC No. 2.90 in the list of instructions he claims should not have been re-read absent instruction pursuant to Defendant's Requested Instruction No. 1. (AOB 374.) However, CALJIC No. 2.90 was properly tailored to relate only to the allegation of criminal activity or prior felony convictions. (See CT 1129; *People v. Benavides, supra,* 35 Cal.4th at

Although re-reading the above instructions may not have been required, it was certainly recommended. As this Court has stated:

> we strongly caution trial courts not to dispense with penalty phase evidentiary instructions in the future. The cost in time of providing such instructions is minimal, and the potential for prejudice in their absence surely justifies doing so.

(*People v. Carter, supra,* 30 Cal.4th at p. 1222.)

Additionally, although the evidentiary instructions assisted the jury in making a determination as to whether the evidence in aggravation substantially outweighed that in mitigation, the jury was also thoroughly instructed on its ultimate role in the penalty phase. CALJIC No. 8.88 so advised. The instruction told the jurors that they were to take into account and be guided by the applicable aggravating and mitigating circumstances and that the weighing of factors was not a mechanical counting. The were told that they were free to "assign whatever moral or sympathetic value you deem appropriate to each and all of the factors you are permitted to consider." (CT 1136.) The jurors were instructed that in weighing the circumstances, they were to determine which penalty was justified and appropriate. (CT 1136.) Further, the jurors were advised that, to return a death judgment, each must be persuaded that the aggravating circumstances were "so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CT 1137.) Defendant's Requested Instruction No. 1 was merely duplicative. (*People v. Ochoa, supra*, 26 Cal.4th at pp. 456-457 [instruction that it was up to each individually to decide punishment and that jurors should "keep in mind that each of you bears the ultimate moral responsibility to determine the appropriate penalty under all the circumstances of this case" properly refused

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pp. 112-113 [jury may consider such evidence as a factor in aggravation only when proved beyond a reasonable doubt].)

because it was duplicative of CALJIC No. 8.88].)

Finally, in addition to the instructions, the arguments of counsel clearly addressed the duty of the jurors. The prosecutor noted that the decision was no longer one of guilt. (RT 4861.) The prosecutor's argument naturally focused on the factors in mitigation and aggravation. The prosecutor also addressed the weighing process and advised the jurors, "you *may* impose the death penalty if you find that the aggravating factors substantially outweigh the mitigating factors." (RT 4862-4899.) He concluded by arguing that the aggravating factors far outweighed the mitigating factors and that appellant was not entitled to their sympathy. (RT 4898-4899.)

Defense counsel also focused on the different nature of the penalty stage. (RT 4902-4917.) Significantly, defense counsel argued that the jurors had no duty to return a death verdict:

> The law does not say you shall return a verdict of death because even if you believe that the aggravating circumstances are so substantial, you may find that you don't want to impose the death penalty, and you don't have to and you would still be following the law.

(RT 4907.)

C. Appellant Was Not Prejudiced By The Failure Read Defendant's Requested Instruction No. 1

Even if the trial court erred in reading the guilt phase instructions without also providing Defendant's Requested Instruction No. 1, appellant was not prejudiced as there is no reasonable possibility of a different outcome. (*People v. Carter, supra,* 30 Cal.4th at pp. 1221-1222; *Chapman v. California, supra,* 386 U.S. at p. 24.) Based on the instructions given and the arguments of counsel, as discussed above, it is inconceivable that the jury would have believed that its duty was the same as that in the guilt phase.

Relying on a conversation between a juror and the trial court during the guilt phase as to whether anyone had considered inappropriate matter during deliberations, appellant posits that at least one juror did not factor in moral considerations in making a penalty determination. The questioned juror had indicated that another juror wanted to consider her personal knowledge of "life in the projects" and "attitudes toward African Americans." (AOB 383-384; RT 4351.) This argument is specious. Based on the instructions given and the arguments of counsel, the jury was well aware of its ability to consider life as an African American in the projects and to accord that evidence whatever "moral or sympathetic value" it deemed appropriate during the penalty phase. (CT 1125, 1136; CALJIC Nos. 8.85, factor (k); 8.88.)

For the reasons stated above, appellant's claim should be rejected.

XXXI.

THE TRIAL COURT PROPERLY ADVISED THE JURY THAT IT WAS NOT TO CONSIDER THE RAMIFICATIONS OF ANY FAILURE TO REACH A VERDICT

Appellant contends that, after the prosecutor remarked on what would happen if the jury failed to reach a verdict, the trial court violated his state and federal constitutional rights by refusing to instruct the jury that if it failed to reach a verdict, a retrial of only the penalty phase would be required. (AOB 386-394.) Respondent submits that the trial court properly refused appellant's proposed instruction because it was incorrect.

In closing argument, the prosecutor stated:

> You'll deliberate and your decision must be unanimous. If you are not unanimous, it's a hung jury. A mistrial will be declared on the penalty portion and the entire thing has to be done all over again.

(RT 4861.) The trial court interrupted the prosecutor's argument and told the

jury:

> [H]is comment about what will happen if there is a mistrial, you are to completely disregard that. That is not a factor in your decision making, all right, as if you didn't hear it. Disregard it.

(RT 4862.)

After several days of deliberations, defense counsel stated to the trial court:

> Today is the seventh day of deliberations. My instincts tell me that there may be a possibility that this jury may feel that if they can't reach unanimity on the penalty phase that the guilt phase would have to be retried.
>
> And I really don't see the harm in advising the jury that if they cannot reach a unanimous decision on penalty, that the verdict regarding the guilt phase remains intact. . . .

(RT 4973.) Pointing out that the jury had done nothing to indicate it was having problems, the prosecutor requested that the trial court offer no admonishment. (RT 4974.)

The trial court stated that after the prosecutor had made a comment relating to retrial, the jury had received an admonishment that such a consideration was not a factor in its decision-making. The trial court believed that this instruction had cured any harm. The trial court further observed that there was no indication the jury was having difficulty, noting that the jury had also taken a very long time reaching its verdict in the guilt phase. During the penalty phase, the jury had asked for a definition of "extenuating," and had requested some exhibits. Without a request from the jury for direction, the trial court stated the jury would not be advised as to the significance or consequences of a failure to reach a verdict. (RT 4974-4976.)

Initially, respondent disagrees with appellant's premise that the

prosecutor told the jury that retrial of the guilt *and* penalty phases would be required if the jury failed to reach a verdict. (AOB 389.) The prosecutor's comment was merely a comment that the penalty phase would have to be retried. (RT 4861.)

Nonetheless, the trial court properly advised the jury that the subject should be disregarded. Further instruction on the issue "'would have the potential for unduly confusing and misguiding the jury in their proper role and function in the penalty determination process.'" (*People v. Hines* (1997) 15 Cal.4th 997, 1075, quoting *People v. Belmontes, supra,* 45 Cal.3d at p. 814.)

Additionally, further instruction on the issue would have negated the trial court's instruction to the jury not to consider the effect of failing to reach a verdict. Giving appellant's proposed instruction would have only served to reinforce the time and expense of retrying the penalty phase and to further urge a unanimous verdict. This is especially so in light of the lack of any indication from the jury that it was having difficulty reaching a verdict.

Finally, even if the trial court should have provided the jury with appellant's proposed instruction, it is not reasonably possible appellant would have achieved a different result in light of the instruction actually given by the trial court and the danger that appellant's proposed instruction would have placed the subject in front of the jury anew. This claim fails.

XXXII.

INSTRUCTION PURSUANT TO CALJIC NO. 8.85 WAS PROPER

Appellant next asserts that instructing the jury pursuant to CALJIC No. 8.85 without his modifications violated his Eighth and Fourteenth Amendment rights. (AOB 395-409.) This claim is meritless.

A. The Trial Court Was Not Obligated To Instruct That Mitigating Factors Were Relevant Solely As Mitigators

Appellant claims that, absent his proposed instructions relating to and modifying CALJIC No. 8.85, the penalty phase instructions failed to advise the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either depending upon the evidence. (AOB 395-400.) He contends that the court's use of the statutory "[w]hether or not" language compounded the alleged error because the jury was free to conclude that a negative response could be considered an aggravating circumstance. (AOB 398.)

This Court has considered and rejected this contention in several cases, and no evidence suggests the jury was unable to properly apply the instruction. (See, e.g., *People v. Ramos* (2004) 34 Cal.4th 494, 530; *People v. Mendoza, supra,* 34 Cal.4th at p. 191; *People v. Kipp, supra,* 18 Cal.4th at p. 380-381.) Further, this Court has continued to recognize that a trial court does not err in failing to instruct as to which sentencing factors are aggravating and which are mitigating. (See, e.g., *People v. Combs* (2004) 34 Cal.4th 821, 867; *People v. Farnam*, *supra*, 28 Cal.4th at p. 177; *People v. Hillhouse* (2002) 27 Cal.4th 469, 508-509; *People v. Hughes*, *supra*, 27 Cal.4th at pp. 404-405; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1138; *People v. Riel*, *supra*, 22 Cal.4th at p. 1225; *People v. Welch*, *supra*, 20 Cal.4th at p. 771; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1383; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 420; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 153.) Nor does a trial court's use of the statutory "[w]hether or not" language exacerbate the alleged error. (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 420.)

This Court has noted, "no reasonable juror could be misled by the language of [CALJIC No. 8.85] concerning the relative aggravating or mitigating nature of the various factors." (*People v. Arias, supra*, 13 Cal.4th at

p. 188.) Indeed, "the aggravating or mitigating nature of these various factors should be self evident to any reasonable person within the context of each particular case." (*People v. Jones, supra,* 30 Cal.4th at p. 1123; *People v. Hillhouse, supra*, 27 Cal.4th at p. 509; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1268.) No such designation was required.

B. There Is No Requirement That Inapplicable Sentencing Factors Be Deleted

Appellant contends the trial court's failure to delete inapplicable sentencing factors from CALJIC No. 8.85 was a source of confusion, capriciousness, and unreliability, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 401-405.)

This Court has consistently rejected claims similar to appellant's claim and held that the failure to delete assertedly inapplicable mitigating factors from the instructions does not violate the federal Constitution. (*People v. Young* (2005) 34 Cal.4th 1149, 1226; *People v. Kipp, supra*, 26 Cal.4th at p. 1138; *People v. Riel, supra,* 22 Cal.4th at p. 1225; *People v. Earp, supra*, 20 Cal.4th at p. 899; *People v. Frye, supra*, 18 Cal.4th at pp. 1026-1027; *People v. Osband, supra*, 13 Cal.4th at p. 704.) "The problem with defendant's analysis is that deletion of any potentially mitigating factors from the statutory list could substantially prejudice the defendant." (*People v. Ghent* (1987) 43 Cal.3d 739, 776-777.)

Failure to delete assertedly inapplicable factors in this case was not error.

C. The Trial Court Was Not Required To Instruct The Jury That It Could Not Consider Aggravating Factors Not Enumerated In The Statute

Appellant also contends that CALJIC No. 8.85 violated his right to a fair and reliable sentencing determination because the trial court refused his

proposed modification which would have indicated that the jury should only consider as aggravating factors those circumstances enumerated in section 190.3. (AOB 405-407.) "Such an instruction is appropriate only when extraneous aggravating evidence not falling within any of the statutory factors has been presented to the jury." (*People v. Espinoza* (1992) 3 Cal.4th 806, 827.) Appellant does not contend that any such evidence was presented here, and thus his claim fails.

D. Factor (i) Is Not Vague

Appellant claims factor (i) is vague because it is treated both as an aggravator and mitigator. (AOB 407-408.) This exact claim has been repeatedly rejected and should be rejected here. (*See People v. Maury, supra,* 30 Cal.4th at p. 444; *People v. Jenkins, supra,* 22 Cal.4th at pp. 1051-1052; *People v. Smithey, supra,* 20 Cal.4th at p. 1006; *People v. Medina, supra,* 11 Cal.4th at p. 780; *People v. Sanders, supra,* 11 Cal.4th at pp. 563-564.)

In sum, CALJIC No. 8.85 properly guided the jury, and appellant's claim should be rejected.

XXXIII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY PURSUANT TO CALJIC NO. 8.87

Appellant contends that instruction pursuant to CALJIC No. 8.87 deprived him of due process and a reliable penalty verdict because it deprived him of a jury determination of whether the other criminal activity was properly to be consideration in aggravation, elevated the level of force from an implied threat to implied use of force or violence, and skewed the jury's deliberations

in favor of the prosecution.[65] (AOB 410-417.) The instruction was entirely proper.

Appellant complains that the instruction created a mandatory presumption by instructing the jury that the criminal act involved force or violence. (AOB 410-414.) This Court has held that "CALJIC No. 8.87 is not invalid for failing to submit to the jury the issue whether the defendant's acts involved the use, attempted use, or threat of force or violence." (*People v. Nakahara, supra,* 30 Cal.4th at p. 720 (citing *People v. Ochoa, supra,* 26 Cal.4th at p. 453).)

> The question whether the acts occurred is certainly a factual matter, but the characterization of those acts as involving an express or implied use of force or violence, or the threat thereof, would be a legal matter properly decided by the court.

(*Ibid.*) The instruction in this case left it to the jury to decide whether, beyond a reasonable doubt, appellant committed a battery on a peace officer. The determination of whether that act constituted an act of force or violence was up to the trial court to decide.

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65. The version of CALJIC No. 8.87 given the jury stated:

> Evidence has been introduced for the purpose of showing that the defendant . . . has committed the following criminal act: battery on a peace officer, which involved the express or implied use of force or violence. Before a juror may consider any such criminal act 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 act. A juror may not consider any evidence of any other criminal act 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 fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

Appellant also contends that the instruction in this case was erroneous because it "failed to inform the jury about implied threats." (AOB 410, 414-415.) Thus, "the instruction mistakenly defined the criminal acts as involving the 'implied use' of force or violence, rather than the 'implied threat' of such use." (AOB 414-415.) Not so. The determination as to whether to delete the bracketed language of CALJIC No. 8.87, which refers to the implied use of force or violence, is as much a determination for the trial court as is the decision of whether the criminal activity should be included under factor (b), as discussed above. In any event, appellant admits, as he must, that the incident involved the use of force. (AOB 415.) The evidence demonstrated that appellant struggled with police officers, punching and kicking them. (RT 4472-4473, 4486-4488, 4490-4491; Peo. Exh. 115-116.)

Appellant also claims the instruction was unconstitutional because it skewed the verdict in favor of the prosecution by failing to also advise the jury that no unanimity was required to find mitigating circumstances. (AOB 415-416.) The advisement contained in CALJIC No. 8.87 that the jurors need not agree clarified the manner of determining whether criminal activity had been proven beyond a reasonable doubt such that it could be considered as a fact in aggravation. (CT 1128.) The jury was not specifically advised that it did not need to agree on any aggravating factors. There was no lack of parity between the prosecution and the defense, as appellant contends. (AOB 416.) The instructions as a whole also told the jury that no unanimity was required as to mitigating circumstances or aggravating factors. The jury was advised, pursuant to CALJIC No. 17.40, that the People and the defendant were entitled to each juror's individual opinion, each juror must consider the evidence for the purpose of reaching a verdict, and that each juror must decide the case for himself or herself. (CT 1132.) Appellant's claim fails because the instructions, as given, adequately advised the jurors that resolution of penalty phase factual

questions as well as deciding the appropriate penalty, was an individual responsibility. (*See People v. Holt, supra,* 15 Cal.4th at pp. 685-686.)

Even if the instruction was erroneous, there is no reasonable possibility the jury would have reached a different verdict absent the error because appellant's conduct plainly involved the use of force or violence.

XXXIV.

INSTRUCTION OF THE JURY PURSUANT TO CALJIC NO. 8.88 WAS PROPER

Next, appellant argues that instruction pursuant to CALJIC No. 8.88 without proposed defense modifications violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights.[66] (AOB 418-434.) Each of his complaints has been rejected by this Court.

A. Instruction That A Sentence Of Life Without Parole Is Required If Mitigating Factors Outweigh Aggravating Factors Was Unnecessary

Appellant contends that CALJIC No. 8.88 improperly reduced the prosecution's burden of proof by failing to inform the jurors that if they determined mitigating factors outweighed aggravating factors, they were required to impose a sentence of life without the possibility of parole. (AOB 420-424.) CALJIC No. 8.88 is not flawed because it "does not inform the jury that it is required to return a verdict of life imprisonment without possibility of parole if it finds the aggravating factors do not outweigh the mitigating factors." (*People v. Jackson, supra*, 13 Cal.4th at p. 1243; accord, *People v. Taylor, supra*, 26 Cal.4th at p. 1181.) This Court has repeatedly explained that "'[t]he instruction clearly stated that the death penalty could be imposed only if the jury

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66. CALJIC No. 8.88, as given, is set forth in Argument XXVIII, fn. 61.

found that the aggravating circumstances outweighed mitigating,'" and that it is unnecessary to state the converse. (*People v. Jackson, supra*, 13 Cal.4th at p. 1243, quoting *People v. Duncan* (1991) 53 Cal.3d 955, 978.)

B. Instruction That The Jury Had The Discretion To Impose Life Without The Possibility Of Parole In The Absence Of Mitigating Evidence Was Not Necessary

Appellant next claims error in failing to inform the jurors that they had discretion to impose life without the possibility of parole even in the absence of mitigating evidence. (AOB 425-426.) As this Court has determined, under the instructions given, "[n]o reasonable juror would assume he or she was required to impose death despite insubstantial aggravating circumstances merely because no mitigating circumstances were found to exist." (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1192 (citing *People v. Johnson, suspra,* 6 Cal 4th at pp. 1, 52); accord *People v. Snow, supra,* 30 Cal.4th at p. 124.)

C. The Term "So Substantial" Is Not Unconstitutionally Vague

Appellant claims that the use of the term "so substantial" in CALJIC No. 8.88 violated the Eighth and Fourteenth Amendments because it created a standard that is vague, directionless and impossible to quantify. (AOB 427-428.) The term "so substantial" is not unconstitutionally vague. (*People v. Boyette, supra*, 29 Cal.4th at p. 465; *People v. Jackson* (1996) 13 Cal.4th 1164, 1243; *Breaux*, *supra*, 1 Cal.4th at pp. 315-316; see *People v. Millwee, supra,* 18 Cal.4th at pp. 162-163 ["We have repeatedly rejected claims that [CALJIC No. 8.88] is inadequate or misleading in describing when the balance of factors warrants the more serious penalty."].)

D. Use Of The Word "Warrant" In CALJIC No. 8.88 Was Appropriate

Appellant contends that CALJIC No. 8.88's instruction to the jury that

> to return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole

fails to convey that the central decision is the determination of the *appropriate* punishment. (AOB 428-431.) The use of the term "warrants" in CALJIC No. 8.88 is not "too broad" or "permissive," and it does not mislead a "jury into believing that it may impose death even when not the 'appropriate' penalty." (*People v. Jackson, supra,* 13 Cal.4th at p. 1243; see *People v. Boyette, supra*, 29 Cal.4th at p. 465; *People v. Breaux*, *supra*, 1 Cal.4th at p. 316.) Contrary to appellant's suggestion,

> [CALJIC No. 8.88] as a whole conveyed that the weighing process is "merely a metaphor for the juror's personal determination that death is the appropriate penalty under all of the circumstances." [Citation.] "There is no reasonable likelihood that the jury would have thought it could return a verdict of death if it did not believe that penalty was appropriate." [Citation.]

(*Jackson, supra*, 13 Cal.4th at pp. 1243-1244, quoting *People v. Johnson*, *supra*, 3 Cal.4th at p. 1250.)

E. Instruction On The Burden Of Proof Was Not Required

Finally, appellant contends that the trial court's failure to instruct the jury on the absence of standard of proof and that unanimity was not required as to mitigating circumstances resulted in an unfair, unreliable, and constitutionally inadequate sentencing determination. (AOB 431-433.) However, neither the

failure to instruct the jury on the lack of burden of proof or the lack of need for unanimity violated appellant's constitutional rights. (*People v. Panah* (2005) 35 Cal.4th 395, 499.) As this Court stated in *People v. Cornwell, supra,* 37 Cal.4th at p. 104, there is no basis for appellant's claim that the jury must be instructed on the absence of burden of proof. (See also *People v. Coffman* (2004) 34 Cal.4th 1, 125, [CALJIC No. 8.88 not defective for failing to inform the jury as to which side bore the burden of persuasion]; *People v. Hayes, supra*, 52 Cal.3d at p. 643 ["Because the determination of penalty is essentially moral and normative [citation], and therefore different in kind from the determination of guilt, there is no burden of proof or burden of persuasion"].)

In sum, instruction pursuant to CALJIC No. 8.88 was proper, and appellant has provided no reason to depart from prior decisions.

XXXV.

CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant claims that California's death penalty statue, as interpreted by this Court and applied at his trial, violates the United States Constitution. (AOB 435-500.) Appellant's claims have been repeatedly rejected by this Court.

A. Section 190.2 Is Not Impermissibly Broad

Appellant contends that California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. (AOB 436-440.) Appellant's claim that the special circumstances fail to adequately narrow the class of death-eligible first-degree murders, in violation of the federal Constitution, has been consistently rejected by this Court. (See

People v. Stitely, supra, 35 Cal.4th at p. 573; *People v. Ochoa, supra,* 26 Cal.4th at pp. 458-459; *People v. Kraft, supra,* 23 Cal.4th at p. 1078; *People v. Jenkins, supra*, 22 Cal.4th at pp.900, 1050; *People v. Frye, supra,* 18 Cal.4th at pp. 1028-1029; *People v. Holt, supra,* 15 Cal.4th at pp. 697-698*; People v. Ray* (1996) 13 Cal.4th 313, 356; *People v. Arias, supra,* 13 Cal.4th at p. 187; *People v. Crittenden, supra,* 9 Cal.4th at pp. 154-156.)

B. Section 190.3, Subdivision (a) As Applied Does Not Permit The Arbitrary And Capricious Imposition Of The Death Penalty

Appellant next contends that factor (a) is overbroad. (AOB 441-448.) This Court has already considered and rejected this claim in *People v. Boyette, supra*, 29 Cal.4th at p. 445, fn. 12 and *People v. Jenkins*, *supra*, 22 Cal.4th at pp. 1051-1053. (See also *Tuilaepa v. California, supra*, 512 U.S. at p. 967; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137-1138.) Appellant's claim that factor (a) improperly permitted the jurors to consider the same fact in aggravation multiple times (AOB 448-449) was addressed in Argument XXVIII, *supra*.

C. California's Death Penalty Statute Contains Adequate Safeguards Against Arbitrary And Capricious Sentencing

Appellant contends that California's death penalty statute violates the federal Constitution because it lacks the various safeguards against arbitrary and capricious sentencing. (AOB 449-492.) Each of appellant's contentions has been rejected by this court.

Appellant contends that the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d], and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], demonstrate that this Court has erred

in determining that the findings of one or more aggravating circumstances and that the aggravating circumstances outweigh the mitigating circumstances are not required to be made by a unanimous jury beyond a reasonable doubt. (AOB 450-463.) Appellant's contention is meritless, and has repeatedly been rejected by this court. (*People v. Stitely, supra,* 35 Cal.4th at p. 573; *People v. Morrison* (2004) 34 Cal.4th 698, 730; *People v. Prieto* (2003) 30 Cal.4th 226, 263; *People v. Anderson* (2001) 25 Cal.4th 543, 589.)

As appellant concedes (AOB 464-468), this court has determined that jury unanimity as to aggravating factors is not required. (*People v. Stitely, supra,* 35 Cal.4th at p. 573; *People v. Bolin, supra,* 18 Cal.4th at pp. 335-336; *People v. Taylor* (1990) 52 Cal.3d 719, 749.)

Appellant contends the due process and cruel and unusual punishment clauses of the United States and California Constitutions require the jury to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (AOB 468-473.) This court has found otherwise. (*People v. Stitely, supra,* 35 Cal.4th at p. 573; *People v. Hillhouse, supra,* 27 Cal.4th at p. 510.)

Appellant contends the failure to articulate any burden of proof for finding the existence of an aggravating factor, that the aggravating factors outweigh the mitigating factors, and that death is the appropriate sentence is unconstitutional. (AOB 473-476.) "The death penalty statute is not unconstitutional for failing to provide the jury with instructions of the burden of proof and standard of proof for finding aggravating and mitigating circumstances in reaching a penalty determination." (*People v. Morrison, supra*, 34 Cal.4th at p. 730; *People v. Welch*, 20 Cal.4th at p. 767.) "Unlike the determination of guilt, 'the sentencing function is inherently moral and normative, not factual,' and thus 'not susceptible to a burden-of-proof quantification.'" (*People v. Sanchez, supra,* 12 Cal.4th at p. 81 (internal

citations omitted).) Nor was an instruction on the lack of burden of proof required. (See Arg. XXXIV, § E; *People v. Cornwell, supra,* 37 Cal.4th at p. 104.)

Appellant's contention that the failure to require the jury to make written findings violates the Constitution (AOB 477-480) is meritless. (*People v. Stitely, supra,* 35 Cal.4th at p. 574; *People v. Morrison*, *supra*, 34 Cal.4th at p. 730; *People v. Sanchez*, *supra*, 12 Cal.4th at p. 82.)

Contrary to appellant's assertion (AOB 480-484), intercase proportionality review is not constitutionally required. (*People v. Stitely, supra,* 35 Cal.4th at p. 574; *People v. Morrison*, *supra*, 34 Cal.4th at p. 730.)

Regarding appellant's constitutional challenges to factor (b) (See AOB 484-490): (1) the United States Constitution does not require unanimous findings beyond a reasonable doubt of unadjudicated criminal activity (*People v. Ward, supra,* 36 Cal.4th at p. 221-222; *People v. Morrison, supra,* 34 Cal.4th at p. 729; *People v. Kipp* (1998) 18 Cal.4th 349, 381); (2) factor (b) is not impermissibly vague (*People v. Anderson, supra,* 25 Cal.4th at p. 601; *People v. Osband, supra,* 13 Cal.4th at p. 704); and (3) due process does not require that other crimes evidence be heard by a different jury, and the use of unadjudicated offenses does not violate equal protection (*People v. Young, supra,* 34 Cal.4th at pp. 1207-1208; *People v. Hawthorne* (1992) 4 Cal.4th 43, 76-77).

Finally, appellant's claim that the use of adjectives such as "extreme" (factors (d) and (g)) and "substantial" (factor (g)) act as barriers to the consideration of mitigation (AOB 491-492) should be rejected. (*People v. Morrison*, *supra*, 34 Cal.4th at pp. 729-730.)

D. Appellant's Equal Protections Rights Were Not Implicated By Absence Of Procedural Safeguards

Appellant contends the absence of procedural safeguards resulted in a denial of his equal protection rights,. because, according to him, those safeguards are provided to non-capital defendants. (AOB 492-498.) Insofar as these unspecified "procedural safeguards" relate to penalty phase procedures, capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (See *People v. Johnson, supra,* 3 Cal.4th at pp. 1242-1243.) Insofar as appellant argues the lack of intercase proportionality review in capital cases amounts to a violation of equal protection, this Court has previously rejected this claim and should do so here. (See *People v. Cox, supra*, 30 Cal.4th at p. 970.) California's sentencing scheme does not violate equal protection principles. (*People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288; see also *People v. Morrison*, *supra*, 34 Cal.4th at p. 731.)

E. No Presumption Of Life Instruction Was Necessary

Appellant maintains the failure to instruct the jury on the presumption of life is error. (AOB 498-499.) This Court has repeatedly rejected this claim. (*People v. Stitely, supra,* 35 Cal.4th at p. 573; *People v. Kipp, supra,* 26 Cal.4th at p. 1137; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064; *People v. Arias, supra,* 13 Cal.4th at p. 190.)

F. Use Of Prior Felonies In Aggravation Does Not Render The Sentencing Scheme Arbitrary And Capricious

Appellant's last claim is that the use in aggravation of prior felonies, but not subsequent felonies is arbitrary and capricious. (AOB 499-500.) However, as set forth in Argument XXI, factor (c) is properly limited to crimes occurring

before the present crime in light of its purpose to show that a defendant was undeterred by previous criminal sanctions. (*People v. Gurule, supra,* 28 Cal.4th at pp. 636-637.)

For the above reasons, appellant's constitutional challenges to California's death penalty statute should be rejected.

XXXVI.

CALIFORNIA'S USE OF THE DEATH PENALTY DOES NOT VIOLATE INTERNATIONAL LAW.

Appellant contends that California's use of the death penalty violates international law, particularly, the International Covenant on Civil and Political Rights ("ICCPR"). He 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. (AOB 501-509.) This Court, however, has rejected the contention that the death penalty violates international law, evolving international norms of decency, or the ICCPR. (See *People v. Turner* (2004) 34 Cal.4th 406, 439-440; *People v. Brown, supra,* 33 Cal.4th at pp. 403-404; *People v. Hillhouse, supra,* 27 Cal.4th at p. 511.) Accordingly, appellant's claim should be rejected.

XXXVII.

IF THIS COURT WERE TO REVERSE A COUNT OR SPECIAL CIRCUMSTANCE, REVERSAL OF THE DEATH PENALTY IS NOT COMPELLED

Appellant contends that if any count is reduced or vacated or if any special circumstance is vacated, the matter should be remanded for a new sentencing hearing to permit the jury to reconsider its death judgment. (AOB 507-509.) This argument is without merit.

This Court may uphold a death sentence where one of the underlying

convictions or special circumstances were invalid, as long as there are other valid aggravating factors. A determination of an invalid conviction or special circumstance is not prejudicial *per se*, but subject to harmless error analysis. (*Clemons v. Mississippi* (1990) 494 U.S. 738, 745-750 [110 S.Ct 1441, 108 L.Ed.2d 725]; *Zant v. Stephens* (1983) 462 U.S. 862, 890-891 [103 S.Ct. 2733, 77 L.Ed.2d 235] [fact that one aggravating factor may be found invalid does not mean a death penalty may not stand where there are other valid aggravating factors]; *People v. Hillhouse, supra,* 27 Cal.4th at p. 512 [invalid conviction for kidnaping for robbery, felony-murder theory, and felony-murder special circumstance did not require reversal of penalty]; *People v. Roberts* (1992) 2 Cal.4th 271, 327 [appellate court examines whether there is a reasonable possibility that the jury would have recommended a sentence of life without the possibility of parole]; *People v. Mickey*, *supra*, 54 Cal.3d at p. 703 [subject to harmless error analysis]; *People v. Benson, supra,* 52 Cal.3d at p. 754 [same]; *People v. Sanders* (1990) 51 Cal.3d 471, 520; *People v. Silva* (1988) 45 Cal.3d 604, 632 [death penalty upheld where three of four special circumstances were found invalid].)

Appellant, relying on *Ring v. Arizona, supra,* 536 U.S. 584, contends that because jurors must determine if aggravating factors exist, and must weigh the aggravating and mitigating factors, this Court cannot conduct a harmless error review should any of the convictions of special circumstances be reversed. (AOB 508-509.) Appellant is wrong, and *Ring* is inapplicable. In *Ring*, the Court held that the factfinder, rather than the judge, must make any factual determinations as to whether aggravating factors exist. California already had such a scheme. Thus, *Ring* has no impact on the instant matter. (*People v. Cleveland* (2004) 32 Cal.4th 704, 765 [*Ring* and *Apprendi* "do not affect California's death penalty law"]; *People v. Smith* (2003) 30 Cal.4th 581, 642 [same]; see also *People v. Morrison, supra,* 34 Cal.4th at p. 698, [neither *Ring*,

Apprendi nor *Blakely* affect California's death penalty law].) Here, the jurors made the required determinations as to the aggravating factors. Based on the clear body of law cited *ante*, any reversal of an underlying conviction or special circumstance finding does not result in a *per se* reversal of the penalty of death. The matter is subject to harmless error analysis. (See *Clemons v. Mississippi*, *supra*, 494 U.S. at pp. 745-750 [appellate court may uphold death sentence either by reweighing the aggravating and mitigating evidence or by harmless error review]; see also *State v. Ring (Ring III)* (2003) 204 Ariz. 534, 552, 65 P.3d 915 [Arizona Supreme Court applying harmless error analysis upon remand from United States Supreme Court].) Consequently, if this Court were to reverse either of appellant's non-homicide convictions or one of the special circumstances, reversal of the death penalty is not compelled.

XXXVIII.

THERE ARE NO ERRORS TO CUMULATE

Appellant argues that the cumulative effect of the penalty phase errors and the guilt phase errors, requires reversal. (AOB 510-512.) Appellant's claims of error as to the guilt phase are meritless. Appellant's claims of error as to the penalty phase are likewise meritless. Thus, appellant's claim of cumulative error must fail. (*People v. Kipp, supra,* 26 Cal.4th at p. 1141; *People v. Lewis, supra,* 25 Cal.4th at p. 678; *People v. Staten* (2000) 24 Cal.4th 434, 464.)

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment of conviction and sentence of death be affirmed.

Dated: November 22, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
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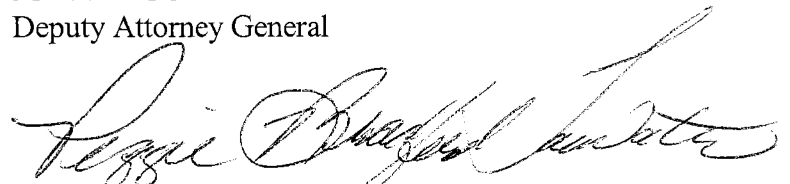

PEGGIE BRADFORD TARWATER
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Attorneys for Respondent

PBT:pbt:emo
LA1996XS0003

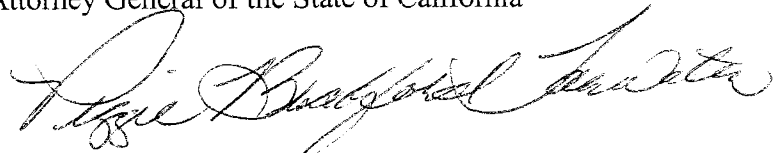
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 72320 words.

Dated: November 22, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



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DECLARATION OF SERVICE

Case Name: ***People v. Regis Deon Thomas***
Case No.: **S048337**

I declare:

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

On **November 28, 2005,** I placed a copy of the attached

RESPONDENT'S BRIEF

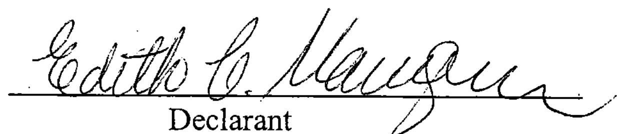
in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California, 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Mary McComb
Deputy State Public Defender
Office of the State Public Defender
801 K Street, Suite 1100
Sacramento, CA 95814

California Appellate Project
Attn: Michael Millman
101 Second Street, Suite 600
San Francisco, CA 94105-3672

That I caused a copy of the above document to be deposited with the Clerk of the Court from which the appeal was taken, to be by said Clerk delivered to the Judge who presided at the trial of the cause in the lower court; and that I also caused a copy to be delivered to the appropriate District Attorney.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on **November 28,2005**, at Los Angeles, California.



Declarant

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LA1996XS0003