IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. PAUL HENSLEY, Defendant and Appellant.	CAPITAL CASE Case No. S050102

San Joaquin County Superior Court
Case No. SC054773A
The Honorable Frank A. Grande, Judge

RESPONDENT'S BRIEF

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
HARRY JOSEPH COLOMBO
Deputy Attorney General
CLIFFORD E. ZALL
Deputy Attorney General
State Bar No. 148141
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5281
Fax: (916) 324-2960
Email: Cliff.Zall@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE CASE

On May 4, 1993, indictment number 93F03740 was filed in the Sacramento County Superior Court charging appellant, Paul Loyde Hensley, with capital murder and assorted other charges connected to the homicide of Gregory Renouf. (RT [Sac Co. May 7, 1993] 2-4.) On September 9, 1993, the district attorney filed information number SC054773A in San Joaquin County Superior Court charging appellant with capital murder of Larry Shockley along with numerous other counts. (1 CT 104-110.) Also on September 9, 1993, information number SC056271A was filed in San Joaquin County Superior Court charging appellant with felony escape from jail. (SCT[1] 10-11.)

On September 23, 1993, the parties entered into a stipulation whereby it was agreed that all charges against appellant would be consolidated and tried in San Joaquin County and the Sacramento prosecution would be dismissed. (1 CT 115-119.) As a result, on September 23, 1993, the district attorney filed amended information number SC054773A charging appellant with both the Sacramento and San Joaquin capital homicides and numerous other offenses. (1 CT 122-131.) The information was subsequently amended to consolidate in the escape charges. (2 CT 341.) As a consequence of these consolidations, the second amended information filed on January 27, 1994, was the relevant charging document at the time of trial, it charged appellant as follows:

In Count 1 appellant was charged with the Capital Murder of Larry Shockley on October 16, 1992, in violation of Penal Code section 187,

---

[1] "SCT" refers to the Clerk's Supplemental Transcript on Appeal dated March 25, 2003.

subdivision (a).[2] Also contained in Count 1 were special circumstance allegations that the murder was committed in the course of a robbery as specified in section 190.2, subdivision (a)(17)(i), and a burglary as specified in section 190.2, subdivision (a)(17)(vii). Further in Count 1 there was a special circumstance allegation that appellant committed multiple murders as specified in section 190.2, subdivision (a)(3). Also alleged was the special allegation that appellant personally used a firearm in the commission of the murder as specified in section 12022.5.

Count 2 charged appellant with the second degree robbery of Larry Shockley in violation of section 211. It was also alleged as to this count that appellant personally used a firearm in the commission of the robbery. In Count 3, appellant was charged with vehicle theft from Larry Shockley in violation of section 10851 of the Vehicle Code. Count 4 charged appellant with first degree residential burglary of the home of Larry Shockley in violation of section 459. Also as to this count it was alleged that appellant personally used a firearm. In Count 5, appellant was charged with the attempted premeditated murder of Stacey Copeland on October 17, 1992, in violation of section 187, subdivision (a)/664. It was further alleged as to this charge that appellant personally used a firearm and caused great bodily injury to the victim as specified in sections 12022.5 and 12022.7. Count 6 charged appellant with second degree robbery of Stacey Copeland in violation of section 211. As to this count it was also alleged that appellant personally used a firearm and inflicted great bodily injury on the victim. In Count 7, appellant was charged with second degree robbery of Scott Rooker in violation of section 211. This count also contained a personal firearm use allegation.

---

[2] Unless otherwise indicated all further statutory references are to the California Penal Code.

Count 8 charged appellant with the capital murder of Gregory Renouf on October 17, 1992. This count contained both a robbery special circumstance allegation and a multiple murder special circumstance allegation. It was further alleged that appellant personally used a firearm in the commission of the offense. Count 9 charged appellant with second degree robbery of Gregory Renouf with a personal firearm use enhancement. In Count 10 appellant was charged with first degree burglary of Renouf's residence along with a personal firearm use allegation. Finally, in Count 11 appellant was charged with felony escape from the San Joaquin County jail on June 19, 1993, in violation of section 4532, subdivision (b). (ACT-A[3] 5-13; SCT 10-11; 2 CT 341.)

On January 31, 1994, appellant was arraigned on the amended consolidated information and entered pleas of "not guilty" on all counts and denied all the special allegations. (2 CT 341.)

On June 6, 1994, the trial court denied appellant's request for a change of venue. (4 CT 841.) On June 10, 1994, the trial court denied appellant's motion to suppress his videotaped confession. (4 CT 862.) Thereafter, appellant's trial began on June 27, 1994. (4 CT 886.) On August 16, 1994, the court considered and denied appellant's *Batson-Wheeler*[4] motion to dismiss the jury panel. (5 CT 1235.) Also on that same day a jury was selected to try the cause. (5 CT 1235.) On October 7, 1994, the jury returned its verdict finding appellant guilty on all 11 counts. All the special circumstances and enhancement allegations were found true with the exception of the arming allegation as to Count 4 which was found not true. (6 CT 1476-1493.) The penalty phase of the trial commenced on

---

[3] "ACT-A" refers to the Clerk's Augmented Transcript on Appeal-A, dated December 30, 2003.

[4] *Batson v. Kentucky* (1986) 476 U.S. 79: *People v. Wheeler* (1978) 22 Cal.3d 258.

October 18, 1994. On December 7, following three days of deliberations, the jury indicated that it remained hopelessly deadlocked 9-to-3; the court discharged the jury and declared a penalty mistrial. 7 CT 1785.)

The second penalty phase trial began on January 10, 1995. (7 CT 1815.) On March 13, 1995, a jury was selected to try the cause. (7 CT 2017.) On May 18, 1995, the jury returned its verdict fixing the penalty at death. (8 CT 2207-2208.) Thereafter, appellant's counsel moved for a mistrial on the grounds that juror Y.M. had consulted his minister regarding the case while the jury was deliberating. After a full hearing, the trial court denied the motion on May 22, 1995. (8 CT 2210, 2238-2239.)

On September 26, 1995, the court sentenced appellant to death on Counts 1 and 8. Appellant was also sentenced to a non-capital term of 31 years in the state prison. (9 CT 2395-2396.)

STATEMENT OF FACTS

I. GUILT PHASE

A. Count 7 – Robbery of Scott Rooker (Oct. 15, 1992)

On October 15, 1992, appellant entered a Baskin-Robbins store in Stockton around lunchtime. (24 RT 6587.) Seventeen-year-old Scott Rooker was alone in the store working at that time. (24 RT 6569.) Appellant ordered an ice cream cone, and, as Rooker was ringing up the sale, appellant came around the counter, displayed a gun, and ordered Rooker to the ground. Appellant took all the money from the cash register and rifled through an unlocked safe near the register. He fled out the back door. (24 RT 6569-6577.)

B. Counts 1,2, 3 and 4 – Crimes involving Larry Shockley (Oct. 16, 1992)

On October 16, 1992, appellant's father-in-law, Larry Shockley was working his normal graveyard shift as a guard for Pinkerton Security at the

General Mills plant in Lodi. He was scheduled to leave work at 6:00 a.m. (20 RT 5507.) At around 5:45 a.m., his co-worker Donna Rhyne arrived for work, and Shockley told her that he had to leave work a few minutes early to go to Hwy 12 and I-5 to pick up his son-in-law, appellant. (20 RT 5507-5508.) Shockley left at around 5:50 a.m. driving his new 1991 blue Oldsmobile station wagon. Appellant met Shockley at the truck stop at I-5 and Hwy 12. From there they went in Shockley's car to a dirt road off Highway 12, a little east of Guard Road. After they exited the car, appellant shot and killed Shockley. First, he shot Shockley in the back of the head, then he covered his body with a tarp and fired two more shots to Shockley's face through the tarp at point blank range. (20 RT 5383, 5446-5448, 5453-5456, 1 ACT-B[5] 234-236.) These gunshot wounds were the cause of death. The shot to the back of the head was made from some distance and would have likely resulted in death within a few minutes. The shots to the face were contact wounds, made from less than a foot away and would have been instantly fatal. (20 RT 5477-5480, 5487-5488.) After killing Shockley and trying to conceal his body, appellant turned Shockley's pockets inside out and took Shockley's car keys and wallet. (20 RT 5421, 5433, 1 ACT-B 239, 286) Appellant then stole Shockley's car and drove over to Shockley's house on Bordeaux street in Lodi. (1 ACT 237-239.) Bullets found at the scene of the Shockley homicide were determined to have been fired from the gun found on appellant at the time of his arrest. (24 RT 6709.) After his arrest, appellant admitted to luring Shockley out to Highway 12 and I-5 with the intent to rob him and thereafter shooting him and killing him. (1 ACT 303, 306, 314.)

---

[5] "ACT-B" refers to the transcript of appellant's recorded statement to the police, contained in "Clerk's Augmented Transcript on Appeal-B," filed on July 14, 2004.

That same morning, after the murder, a number of Shockley's neighbors saw appellant at Shockley's house loading items into a trailer that was attached to Shockley's station wagon and had been backed up to the house. (20 RT 5546-5547, 5527-5530.) Some of the neighbors approached appellant and asked him where Shockley was. Appellant said that he (Shockley) was in the car, but the neighbors did not seen him. (20 RT 5554.)

Ultimately, the neighbors called the police. (20 RT 5555.) After the police made entry into Shockley's home, the house appeared to have been ransacked. A front window had been broken and forced entry had been made. (20 RT 5588.) After detectives were called to the scene, they processed the property and it was determined that a number of expensive items like TVs and a stereo were missing. (20 RT 5610, 5713.) A total of eight prints were lifted from the exterior of Shockley's home. (21 RT 5682-5691.) Six of the eight were determined to be from appellant. (22 RT 6297-6299.) After his arrest, appellant admitted burglarizing Shockley's home both before and again after he murdered Shockley. He also admitted to stealing Shockley's vehicle (1 ACT 233, 239, 353.)

C. Counts 5 and 6 – Stacey Copeland Robbery/Attempted Murder (Oct. 17, 1992)

Stacey Copeland was a prostitute working in the area of the Oasis Bar in East Stockton. (21 RT 5752.) On October 17, 1992, at around 1:00 p.m., appellant approached Copeland for a "date." Appellant was driving a nice, new, dark blue Oldsmobile station wagon. (21 RT 5754.) After they had agreed on the terms of their transaction, Copeland got in appellant's car and they drove to an open field nearby. (21 RT 5752-5755.) Appellant paid Copeland the agreed upon $50 and then they got in the back of the station wagon and had sex. (21 RT 5756.)

Afterwards, Copeland got dressed and got back in the front passenger seat. As appellant started to drive away, something scratched appellant's car. Copeland opened the door to get a better look, and appellant pulled a gun and shot her in the back. The blast from the gun threw her out of the car onto the ground. She looked up and saw appellant holding the gun. Appellant left her there and sped off. (21 RT 5757-5758.)

Copeland couldn't move; she laid there for over an hour thinking she was going to die. Then she saw a young Mexican boy walking through the field where she was lying. She called out for help, and shortly thereafter the police and an ambulance arrived. She identified appellant at the scene as the man who had shot her. (21 RT 5760-5761.)

Copeland was left paralyzed from the waist down as a result of the shooting. There was no indication that appellant had been under the influence of any drugs during Copeland's interactions with him. Appellant had seen her put his $50 in her purse. Her purse was still in the car with appellant when he had driven off and left her there. (21 RT 5763, 5767-5768, 5771.)

Three fingerprints belonging to appellant were located on items in Stacey Copeland's purse which had been found and turned over to the police. (23 RT 6282-6284.) After his arrest, appellant admitted shooting Stacey Copeland in order to take her money and her dope. He admitted going through her purse and taking her money and drugs and throwing everything else away behind a mall in Galt. (1 ACT-B 250, 251.)

D. Counts 8, 9 and 10 – Robbery/Murder and Burglary involving Gregory Renouf (Oct 17, 1992)

In the evening of October 17, 1992, appellant was in Sacramento, having driven there after the shooting of Stacey Copeland. Appellant went to a pornography shop on Del Paso Boulevard and met Gregory Renouf. Appellant and Renouf agreed to have sex and made a plan to meet at an

abandoned warehouse a mile up the road. Each drove his own vehicle to the scene. (1 ACT- B 261-264, 269.) Appellant's plan was to rob Renouf by shooting him and taking his money. When they arrived at the agreed location, Renouf got out of his car. Appellant fired at Renouf six times, striking him five times and killing him. Appellant took Renouf's keys and his wallet and went to Renouf's apartment on G Street in Sacramento. There, appellant ransacked and burglarized Renouf's apartment. He also took Renouf's checks since appellant decided that Renouf looked enough like appellant that he (appellant) could cash Renouf's checks. (1 ACT –B 265, 269-270.)

Renouf's body was found by a passerby late in the evening of October 17. (21 RT 5891-5892.) Renouf's body was face down in a lot of blood in front of his car with his head partially under the vehicle bumper. (21 RT 5909.) A fingerprint belonging to appellant was found on a Marlboro cigarette pack recovered from the scene. (23 RT 6338.) Six bullet casings from a .25 caliber weapon were found close to the car. (21 RT 5923.) Renouf had five gunshot wounds, including wounds to the top of the forehead, both cheeks, his lower back and rear. All the shots were from a distance of greater than 18 to 24 inches. The wounds to the forehead and back were fatal. (21 RT 6152-6160.) Fingerprint evidence taken from Renouf's apartment matched appellant, and witnesses testified that appellant cashed and wrote several checks using the name and identification of Gregory Renouf. (23 RT 6348, 25 RT 6957-6961, 6973-6976.) At the time of his arrest, appellant had Renouf's drivers license and checkbook on his person. (22 RT 6061-6063.) The gun found on appellant at the time of his arrest fired the casings found near Renouf's body, and the bullets taken from Renouf's body were most likely fired by this same gun. (22 RT 5981; 24 RT 6701-6702, 6706-6711.)

E. Appellant's Arrest and Confession

In the early morning hours of October 18, 1992, Sacramento Police Officer Marty Gish was ending his shift. While walking towards the police station, he noticed a new Oldsmobile station wagon had a license plate that did not match up with the vehicle. Gish called for back-up and Officer Sweeney arrived to assist. (22 RT 6037-6040.) The officers checked and the vehicle came back as stolen. Appellant was sleeping in the car. After the officers removed appellant, they patted him down and found a loaded .25 caliber handgun along with identification issued to Gregory Renouf. Appellant was arrested and handcuffed. (22 RT 6041-6046, 6111-61115.) The officers transported appellant across the street to the police station. As they approached the entrance, appellant tried to escape by pulling violently to the left. (22 RT 6049-6050, 6116-6118.) Upon booking appellant, officers discovered further identification of Gregory Renouf along with a wallet with the name "Larry" stamped on it. Additionally, a baggie containing rock cocaine was found on appellant. (22 RT 6057-6063, 6119.)

Appellant underwent a medical assessment that same day. The intake nurse noted a minor abrasion on appellant's forehead which he had sustained as a result of his attempt to escape from the arresting officers. The nurse noted that appellant was alert, oriented, and his speech was clear. (23 RT 6515, 6519.) Appellant submitted to having his blood taken. His blood tested positive for .07 milligrams of methamphetamine. No other drugs were detected. (23 RT 6543-6547, 6549, 6555.)

Appellant was subjected to extensive questioning by law enforcement officers following his arrest. Initially, he denied involvement in any of the above described crimes, blaming things on a woman named Donzelle and a man named Kyle Mooney. (1 ACT-B 20-26.) Upon further questioning by authorities concerning the Shockley homicide, he gradually admitted his involvement, although he at first continued to claim that Mooney had shot

Larry Shockley. (1 ACT-B 25-130.) Finally, appellant admitted that he alone had robbed and killed Shockley. (1 ACT-B 226.) He further admitted that he had burglarized Shockley's home both before and after the murder. (1 ACT 353.) He stated that the story concerning Donzelle and Kyle Mooney was untrue. (1 ACT 244.) Appellant then admitted to robbing and shooting Stacey Copeland and robbing and killing Gregory Renouf. (1 ACT-B 249, 269.)

F. Count 11 – The Escape from San Joaquin County Jail (June 19, 1993.)

On June 19, 1993, appellant was in custody at the San Joaquin County jail awaiting trial on charges relating to the above-described crimes. Appellant was assigned to Housing Unit Four. Early in the afternoon, appellant and six other inmates escaped from the jail by breaking a window on the second floor, and climbing over the chain link fence. (24 RT 6619-6620.) Four days later, the San Joaquin County Sheriff's Department received information indicating that appellant might be hiding out in the Haight-Ashbury district of San Francisco. On June 23, 1993, six officers traveled to that area looking for appellant. The officers located appellant near a McDonald's restaurant and after a brief struggle appellant was arrested and transported back to San Joaquin County. (24 RT 6637-6641.)

II. THE PENALTY PHASE

Appellant's first penalty phase trial ended in a mistrial. The second penalty phase trial resulted in the instant death sentence. In this second penalty phase trial, the prosecutor presented as aggravating factors pursuant to section 190.3; evidence of the underlying offenses, appellant's past violent criminal conduct, and appellant's prior felony convictions.

The evidence presented to the second penalty jury concerning the underlying offenses was simply a streamlined version of the evidence that was presented in the guilt phase. (See 47 RT-51 RT.)

In terms of evidence of appellant's past violent criminal activity that did not result in a conviction, the prosecutor presented the following:

> On November 26, 1977, 16-year-old Dawn Evans was babysitting a 3-year-old child when appellant knocked on the door and asked for water. Upon gaining entry, appellant went into the kitchen to get some water and emerged with a knife and grabbed her from behind, put one hand on her throat and put a box-cutter knife to her neck. Appellant then told her to be quiet and put down the child. Instead she held onto the child and screamed very loud. Appellant dropped the knife and ran. The incident was reported to the police but was never prosecuted. (47 RT 13435-13451.)
>
> On August 27, 1992, appellant robbed the Stockton Savings Bank. Appellant walked up to the window and displayed a gun to Jo Ann Wagner a teller. He had her put the money in a plastic grocery bag which he gave her. Appellant then fled the scene. (47 RT 13542-13555.)
>
> On May 4, 1992, a few months prior to his murder, Larry Shockley and appellant got into an argument. Shockley called the police and according to the officer who responded, Shockley claimed that appellant had pushed him into a wall. (53 RT 15234-15238.)
>
> On August 31, 1992, appellant and his wife Anita Hensley got into an argument after appellant failed to come home for almost three days. During the argument, appellant grabbed Anita by the throat, lifted her off the ground, and struck her twice. Appellant was arrested and jailed for a month in connection with this incident. (54 RT 15667-15670.)

Finally, the prosecutor presented evidence of appellant's prior felony convictions as follows:

> On December 29, 1979, 17-year-old Sheri Turner was working at Zip's hot dog stand in Concord. Appellant entered the store and came around the counter armed with a knife and removed money from the register. He was convicted of robbery. (47 RT 13428, 13463-13466.)
>
> On January 2, 1980, appellant robbed Betty Klekar while she was working at Casper's Hot Dogs in Concord. Appellant

entered the restaurant and walked right up to the register brandishing an 8 to 10-inch kitchen knife. He then opened the register and withdrew money. Appellant was convicted of robbery. (47 RT 13428, 13474-13476.)

On January 12, 1980, 17 year old Linda McVey was working at a KFC restaurant in Concord. Appellant entered the restaurant, walked behind the counter and pulled out a knife. Appellant removed money from the register and left. He was convicted of robbery. (47 RT 13428, 13618-13623.)

In 1984, a CHP officer was attempting to assist appellant whose vehicle had been disabled. Prior to giving appellant a ride, the officer indicated he would have to pat search appellant. Appellant informed the officer that he had a weapon. Appellant was convicted of being an ex-felon in possession of a firearm. (47 RT 13502-13507.)

On November 13, 1986, appellant assaulted Rick Jones with a baseball bat resulting in his conviction for assault with a deadly weapon. According to Jones' girlfriend, appellant's wife used her car to force Jones' car off the road, then appellant came at Jones with the bat. Jones was struck twice and sustained large bruises to his rib cage and left forearm. (47 RT 13513-13519.)

A. Defense Case

In mitigation, the defense presented evidence about appellant's difficult early childhood through the testimony of Sonny Cordes, appellant's stepfather, and Steven Thori, the brother of appellant's second stepfather Terry Thori. Both men testified that appellant's mother's marriages were stormy and characterized by heavy drinking.

Sonny Cordes testified that appellant had a bed-wetting problem and stayed in diapers until he was five years old. Appellant also missed a lot of school as a young child, as his mother failed to get up in the morning to get him to school. He did poorly as a young child because of his problem with his eyes and his difficulty in paying attention. Sonny was only involved in appellant's life from when he was a baby until appellant was about seven.

Appellant lived with his mom and Terri Thori from 1969 until 1975, from age seven until age 13. Steven Thori testified that he did not see appellant's mom or his brother having much interaction with appellant. Penny and Terri drank heavily and had many fights. In 1975, when appellant was 13, Penny asked Keith Passey, a family friend, if he could take appellant in. Passey and appellant had a good relationship so Passey agreed to this. Passey had been a longtime family friend of the Thori family. Passey had more of a relationship with appellant than Thori. Passey did things with appellant and they had a good relationship.

The defense also presented testimony concerning appellant's adult life experiences with particular emphasis on his relationship with his wife and young children. Anita Hensley, appellant's wife, testified about their family life and their four young children. They were married in September 1984 and had four children: Amanda, born May 12, 1985; Samantha, born July 14, 1989, Paul Jr., born June 12, 1990; and Danielle, born March 16, 1994. Between 1988 and 1989 appellant held steady employment in the pest control industry and appellant was a very good employee. Other witnesses also testified that during this time appellant talked about and paid attention to his young children.

Anita Hensley also testified about appellant's methamphetamine addition and expert testimony was also offered by the defense concerning appellant's severe addiction and the consequences of methamphetamine use. According to appellant's expert, irrational and hostile behavior is generally associated with the abuse of methamphetamine. Further, the worst side effects of methamphetamine abuse are those that occur due to high dosages used over long periods. For example, long-term use can result in drug-induced psychosis, in which a person can lose touch with reality and exhibit paranoid behavior.

Finally, James Park, a former CDC high-level employee, offered expert testimony that appellant would make a good adjustment as a lifetime state prison inmate. This opinion was based upon appellant's prior behavior while incarcerated in the state prison system and his age. Further, Park testified that there was almost no possibility that appellant could escape from the state prison system.[6]

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR CHANGE OF VENUE

Appellant contends that the trial court erred in denying his motion for change of venue. Appellant is mistaken.

A. Background

On May 11, 1994, appellant filed his Motion for Change of Venue. (3 CT 679-696.) The People's opposition was filed on May 18, 1994. (3 CT 705-727.) On May 23 and 31, and June 6, 1994, the court conducted a hearing on appellant's motion. (3 CT 728, 827; 4 CT 841.)

Appellant's counsel claimed that a change of venue was required due to substantial and prejudicial pretrial publicity. In particular appellant claimed that the extensive publicity surrounding his alleged escape from the new taxpayer funded San Joaquin County jail and his subsequent profile on America's Most Wanted rendered it reasonably likely that he could not receive a fair trial in San Joaquin County. In support of his claim, appellant presented over 70 newspaper stories from the local papers and over 100

---

[6] In rebuttal the prosecutor offered his own prison expert who noted that there had been escapes from high security level state prisons in the past. Additionally the prosecutor presented evidence of appellant's numerous disciplinary problems while incarcerated at the San Joaquin County jail during the trial of this matter. (56 RT 18110-18118, 18258-18263, 18321-18342)

videotapes from local television stations concerning appellant's case. (2 CT 409-529.) Professor Roy Childs, Jr. also testified in support of appellant's change of venue motion. Childs' conducted a survey of county residents concerning their awareness of appellant's case. According to the survey, 32 percent of respondents recalled that appellant had been featured on America's Most Wanted and 48 percent recognized appellant as having been the alleged ringleader of the escape and having been labeled the most dangerous of the escapees. Eighty-eight percent of survey respondents indicated some degree of familiarity with appellant's case. According to Childs, this was relatively high. Childs' estimated that 58 percent of respondents had prejudged appellant as being probably or definitely guilty of the charges he faced. This was also a relatively high number compared to other surveys Childs had conducted. (4 RT 675-710, 816.)

Defense counsel argued that the jailbreak was so highly publicized and so infamous that appellant's connection with it rendered it impossible for potential jurors not to prejudge him. Counsel pointed out that the fact that the taxpayers had paid dearly for the new jail facility meant that the whole community was really the victim of the escape and that the citizenry would blame appellant for any further costs associated with fixing the deficiencies which appellant's brazen escape had exposed. (3 CT 679-680.)

The prosecutor responded that most of the press coverage had focused on the jail escape and not the capital murder charges that appellant was facing. The prosecutor claimed that it was absurd to suggest that the escape from the new jail made appellant infamous and that the public would blame appellant for any flaws and additional costs connected to the jail. The prosecutor further noted that the victims were not prominent, and that San Joaquin County was not one of the state's smaller counties. Finally, the prosecutor pointed out that Childs' survey exaggerated the degree of public prejudgment of appellant. In particular, the prosecutor noted that Childs'

estimation of 58 percent prejudgment of guilty included people who thought that appellant was "probably guilty." The prosecutor argued that most people entering the courtroom would believe the old adage "where there's smoke there's fire" but that this was not a useful measure of whether these potential jurors could after explanations and instructions be fair and impartial jurors. (4 RT 875-882.)

On June 6, 1994, the court denied the defense motion for a change of venue after consideration of the relevant factors. The court found that the offenses charged were "not extraordinarily sensational or salacious," when compared to other cases. The court also "gave great weight to" the fact that San Joaquin County was larger than most of the comparable cases where a change of venue was granted. The court also found that the nature and extent of the news coverage in this case was not sensationalized to such an extent as to create what the court called a "carnival-like atmosphere" that it found existed in other cases where change of venue motions were granted. The court further pointed out that the victims in this case were not prominent members of the local community. Additionally, the court rejected the defense contention that the escape from the jail and any costs or controversy as a result of that escape would somehow be connected to the defendant by potential jurors. Finally, the court did not find the survey offered by the defense provided compelling evidence of prejudgment on the part of the local jury pool. In particular the court felt that since the survey described the prosecution evidence but no defense evidence to the respondents it was absurd to presume a prejudgment of guilt from the fact that many respondent's indicated that the defendant was likely or probably guilty. For all these reasons the court denied the motion without prejudice

to the issue being raised again during the jury selection process.[7] (5 RT 892-895.)

B. Applicable Law

> The applicable law is settled. A change of venue must be granted where there exists a reasonable likelihood that, in the absence of such relief, a fair trial cannot be had. The court considers such factors as the nature and gravity of the offense, the size of the community, the status of the defendant, the popularity and prominence of the victim, and the nature and extent of the publicity. On appeal after a judgment following the denial of a change of venue, the defendant must show both that the trial court erred in denying the change of venue motion, i.e., that at the time of the motion it was reasonably likely that a fair trial could not be had, and that the error was prejudicial, i.e., that it was reasonably likely that a fair trial was not in fact had. The trial court's essentially factual determinations as to those factors will be sustained if supported by substantial evidence. (Citations).

(*People v. Edwards* (1991) 54 Cal.3d 787, 806-807.)

C. Analysis

Preliminarily, respondent notes that appellant has waived his claim of error regarding the venue issue. The trial court denied appellant's motion pre-voir dire without prejudice to counsel raising it again prior to the completion of jury voir dire. (5 RT 895.) Counsel failed to raise the issue again at the close of voir dire. (19 RT 5288.) This failure precludes him from raising the issue on appeal. (*People v. Williams* (1997) 16 Cal.4th 635, 654-655.)

In any event, a careful review of the relevant factors shows that the trial court correctly denied appellant's change of venue motion. Additionally, appellant cannot meet his burden of demonstrating that it was reasonably likely that he did not receive a fair trial. Thus, his claim must be rejected.

---

[7] Defense counsel did not raise the issue again.

1. The Nature and Gravity of The Offense

Appellant was charged with, inter alia, two counts of murder, attempted murder, and escape. He attempts, without any real factual support, to characterize these offenses as "especially heinous," and claims that the charges are of "extreme seriousness and gravity." (AOB 85.) But as this court has noted there is sensationalism and extreme gravity inherent in all capital murder cases but this will not in and of itself necessitate a change of venue. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1159). As was stated in *People v. Adcox* (1988) 47 Cal.3d 207, a murder case from Tuolumne County:

> Although this ambush of a fisherman was a senseless and pitiless murder, we observe that it was not unusually atrocious or as overly sensational as were the multiple and bizarre serial killings which were the object of media attention in *Corona v. Superior Court* (1972) 24 Cal.App.3d 872 and *Frazier v. Superior Court, supra,* 5 Cal.3d 827. Nor was it a crime involving sensational racial or sexual overtones (See, e.g. *Williams v. Superior Court* (1983) 34 Cal.3d 584, 593.

(*Adcox, supra,* 47 Cal.3d at 232.)

Indeed, in *People v. Hamilton, supra,* a brutal financial gain murder out of Tulare County, this Court again recognized the above distinction which is so pertinent to the instant case. In upholding the trial court's denial of Hamilton's motion to change venue this Court wrote:

> Defendant was charged with murdering his pregnant wife for profit [insurance policy] with a shotgun fired at close range, for which he was sentenced to death. These circumstances were bound to attract the attention of the press and public. However unlike recent cases in which a change of venue has been deemed proper, this case contains none of the elements courts have recognized as *peculiarly sensational or inflammatory* within the offended community. It involves neither mass murder (Cf. *Frazier, supra*, 5 Cal.3d 287, *Corona v. Superior Court* (1972) 24 Cal.App.3d 872; nor racial or sexual overtones (cf. *Williams, supra* 34 Cal.3d 584); nor victims who were popular or

> prominent members of the community (cf. *Fain, supra* 2 Cal.3d 46 ["popular athlete"], *Frazier, supra* [prominent surgeon and his family"]. Therefore, although the charged murders were repulsive, and heinous, their nature and gravity do not weigh compellingly in favor of a venue change.

(*People v. Hamilton, supra*, 48 Cal.3d at p. 1159 (emphasis added).)

This Court's comments regarding the *Hamilton* case are equally applicable here. As the trial court aptly found the crimes charged herein were not "extraordinarily sensational or salacious." (5 RT 892.) That finding is entitled to deference if as here it is supported by the record. Appellant can point to nothing of significance that would support a different conclusion. As noted above, he merely says that the charged crimes were "heinous" and "grave." But as has been explained in the context of a capital murder case, that is the norm not the exception and merely heinous or shocking will not suffice to warrant a change of venue. Appellant was accused of two brutal murders and an attempted murder during a drug induced crime spree. After his arrest he escaped from the main jail while awaiting trial. Heinous and brutal crimes to be sure, however, not to use this Court's words -- "peculiarly sensational or inflammatory." Accordingly, as in *Hamilton, supra*, the first factor, i.e., the gravity and seriousness of the offense does not weigh in favor of a change of venue.

2. The Size of the Community

"The larger the local population the more likely it is that preconceptions about the case have not become embedded in the public consciousness." (*People v. Balderas* (1985) 41 Cal.3d 144, 178). Despite appellant's attempts to characterize San Joaquin County as a "relatively small community." (AOB 90.) It was, in fact, 15th largest out of California's 58 counties based upon the population at the time of appellant's trial. (3 CT 718.) This county is much larger than most of the

counties in which a change of venue motion was deemed appropriate. For example, in *Balderas, supra*, a capital case out of Kern County, population 405,600 (14th out of California's 58 counties in 1981), this Court wrote:

> Cases in which venue changes were granted or ordered on review have usually involved counties with *much smaller* populations (E.g., *Williams, supra* 34 Cal.3d at p. 592 [Placer County, 117,000]; *Martinez, supra* 29 Cal.3d at p. 582 [Same, 106, 500 population]; *Frazier v. Superior Court* (1971) 5 Cal.3d 287, 293 Fn. 5 [Santa Cruz County, 123, 800 population, execution style slaying of prominent physician, sensational publicity, public concern about "hippies"]; *People v. Tidwell* (1970) 3 Cal.3d 62, 64 [Lassen County, 17,500 population, extensive publicity, widespread community hostility]; *Fain v. Superior Court* (1970) 2 Cal.3d 46, 52 Fn. 1[Stanislaus County, 184, 600 population, brutal crimes against young adults by outsider to the community, sensational publicity] ; *Maine v. Superior Court* (1968) 68 Cal.2d 375, 385, Fn. 10 [Mendocino County, 51,200 population, confession disclosed, political overtones.]"

(*People v. Balderas, supra* 41 Cal.3d at pp. 178-179, (emphasis added).) Moreover, San Joaquin County in 1992 had the 12th largest city in California; Stockton with a population then exceeding 200,000 people. (See 3 CT 718.) Thus, one city in San Joaquin County had a larger population than most of the counties where change of venue was deemed appropriate. Further, given the size of Stockton, San Joaquin County at the time of appellant's trial could not realistically be characterized as a particularly nonurban county.

Given the above, the size of the community in which appellant's trial took place does not weigh in favor of a venue change. (*People v. Balderas, supra*, 41 Cal.3d 178; see also *People v. Hamilton, supra* 48 Cal.3d at 1158-1159, *People v. Coleman* (1989) 48 Cal.3d 112, 134.)

3. The Status of the Victims and The Defendant

Despite appellant's claim that he became "notorious" as a result of his escape and his presence on "America's Most Wanted," in reality apart from the pretrial publicity which is a separate factor to be considered *infra*, appellant was an anonymous member of his community. Additionally, appellant was not an outsider or someone who the community might be particularly hostile toward based upon his ethnicity or affiliations. (Cf. *Williams v. Superior Court* (1983) 34 Cal.3d 584, 594 [defendant was a Black man from Sacramento and only 402 people out of Placer County's 117,000 population were Black]; *Frazier v. Superior Court* (1971) 5 Cal.3d 287, 293 [local prejudice against hippies]; *Clifton v. Superior Court* (1970) 7 Cal.App.3d 245 [Death Rider motorcycle gang in Humboldt County.]) The status of the defendant in the community does not weigh in favor of a change of venue.

As to the victims, this factor also does not weigh in favor of a change in venue. None of the three victims in this case were prominent in their communities before the crimes. Simply being popular amongst friends or family or respected in the neighborhood does not weigh in favor of a venue change. (*People v. Harris* (1981) 28 Cal.3d 935, 948-949.) Moreover, appellant's cursory argument that due to his escape from the county's brand new jail, the victims in this case were actually all the citizens of San Joaquin County is specious. The escape was a small portion of the prosecution's case. The two murders and the brutal attempted murder were the cornerstones of the complaint.

In sum, the status of appellant and his victims does not weigh in favor of a change of venue.

4. Extent of Pretrial Publicity

Appellant saves most of his argument concerning venue for the pretrial publicity in this case. He claims that the publicity was "sensational and prejudicial." (AOB 81-83.) However, the media coverage in this case was factual, generally fair, not excessive and not particularly inflammatory. The coverage was rather typical for this kind of case. (See *Odle v. Superior Court* (1982) 32 Cal.3d 932, 939).

First, the publicity in this case was not continuous. It lacked the kind of consistent and pervasive publicity which has held the attention of the community. Courts generally do not find that a change of venue is necessary when there has been a lapse of time between the press coverage and the trial. They recognize that through the passage of time, the danger of prejudice is significantly reduced. As this Court stated in *Odle, supra* "time dims all memory and its passage serves to attenuate the likelihood that extensive publicity will have any significant impact at the time of trial." (*Odle v. Superior Court, supra,* 32 Cal.3d at 943.) In this case, at the time of voir dire in June of 1994, over a year and a half had gone by since the murders and over a year had gone by since there was significant publicity concerning the case. Further, a full four months had gone by since the last news article had been published. Indeed, the last item cited by appellant in his brief (see AOB 87-88) was in September of 1993, a full nine months before jury selection in this case even began. (See 2 CT 409-528.) Many other murders had undoubtedly occurred in a county of this size in that intervening period. All these factors mitigate against the need for a change of venue.

Moreover, by and large the publicity generated by the case was straightforward and factual. Contrary to appellant's assertions, the coverage was not sensational or inflammatory as compared to other cases where a denial of change of venue was upheld. (Cf. *People v. Sully* (1991)

53 Cal.3d 1195, 1237 [extensive media coverage deemed "not particularly inflammatory" even though it included references to defendant as having a fondness for cocaine and prostitutes and references to him as "ringmaster" or "kingpin"]; *People v. Pride* (1992) 3 Cal.4th 195, 224 [news reports mentioned defendant's prior record, possibility he had committed other crimes in area, and jailhouse informant's claim that defendant admitted charged crimes].) Compare these cases and the instant case with *Williams v. Superior Court, supra,* 34 Cal.3d at 589, where this Court found the coverage inflammatory. In that case, this Court noted that words such as "sexual assault" and "rape" were referred to 145 times; bullet-ridden body was used four times; execution-style killing was used 12 times. The Court also noted that the phrase, "a young woman whose virginity had been robbed from her before she was killed" was used to describe the victim in several articles. The court further noted that there were numerous references made to the defendant's race as Black and the victim's race as White. (*Id.*) Nothing of the like is present in the instant case. Moreover the publicity about the case tended to focus on the jail escape rather than the murders themselves. Many of the articles failed to even mention appellant by name.

Because the news coverage in this case was not inflammatory, sensational or hostile or otherwise prejudicial and because of the passage of time after the initial periods of significant coverage, the nature and extent of the news coverage does not weigh in favor of a change of venue.

5. Any Error was Harmless

As noted above, even if it be assumed that the trial court erred in denying the motion for change of venue, the showing of error would not in itself justify reversal on appeal. The defendant must also demonstrate that in view of what actually occurred at trial it is reasonably likely that a fair trial was not in fact had. (*People v. Howard* (1992) 1 Cal.4th 1132, 1168.)

A review of the entire record of voir dire "may still demonstrate that pretrial publicity had no prejudicial effect." (*Id.*)

In *Howard*, the actual voir dire revealed that 10 of the jurors and one of the alternates had no recollection whatsoever of publicity, while the other two jurors and one alternate juror had possible exposure to pretrial publicity but remembered nothing about the case. The other alternate juror had heard about the crime but remembered only the nature of the crime. (*People v. Howard, supra*, 1 Cal.4th at p. 1169.) On such a record, this Court concluded it could not hold that there was a reasonable likelihood that defendant did not have a fair and impartial trial. (*Id.*) Even a "much greater degree of exposure to pretrial publicity" would not necessarily have compelled the court to order change of venue since jurors are not required to be ignorant of the facts and issues involved in a case. (*Id.* at pp. 1169-1170.) It is sufficient if the juror can lay aside any preconceived notions and render a verdict based on the evidence presented in court. (*Id.* at p. 1170.)

Appellant asserts that he was prejudiced because a number of the jurors that ultimately sat on the case were exposed to and recalled pretrial publicity, demonstrating, he argues, the pervasiveness, extent, and adverse impact of the media coverage. Appellant has not demonstrated anything other than that some of the jurors knew about the crimes, not that they had heard or had seen anything about appellant in particular. More importantly, appellant is unable to demonstrate that any of the jurors believed they could not set aside anything they heard or read about the case. In fact, the contrary is true, every juror in the case affirmatively indicated during voir dire that the pretrial publicity would not prevent them from acting as fair and impartial jurors. Without evidence to call into question those indications, appellant's claim fails. (See *People v. Harris, supra*, 28 Cal.3d at p. 950.) Furthermore, a defendant's failure to exhaust all of his

peremptory challenges as happened with respect to the first jury selected here (see 19 RT 5272) is a strong indication that the jurors were fair and that the defense itself so concluded. (*People v. Cooper* (1991) 53 Cal.3d 771, 807.)

In conclusion, none of the relevant factors discussed above weigh in favor of a change of venue motion. Thus, the trial court's decision to deny appellant's motion was entirely correct. Further, the jury selection process demonstrated that appellant's jury was in fact fair and impartial. Accordingly, appellant's claim fails.

II. THE TRIAL COURT PROPERLY DENIED THE DEFENSE *BATSON-WHEELER* MOTION

Appellant contends that the prosecutor improperly excluded prospective African-American jurors from his first trial. This claim was heard and denied by the trial court below. That ruling should be upheld by this Court.

A. Background

During the process of jury selection at appellant's first trial, two prospective black jurors that were subsequently the subject of counsel's *Batson-Wheeler* motion were questioned by the court and counsel.

Prospective juror Harmon B., a 52-year-old Black male, was subjected to questioning from the trial court and both attorneys. Harmon B. was employed as a systems analyst with the defense industry and had an extensive military background. In response to questioning from the trial court concerning his feelings on the death penalty, Harmon B. stated that he could follow the law but did not give any indication as to his personal feelings about the death penalty. Later, the court again tried to get at Harmon B.'s feelings on the death penalty and the juror stated that he would follow the law as instructed. In response to questions from defense counsel, Harmon B. stated that he had been on a court martial jury during his extensive time in the military. He stated it had been a murder case but

he couldn't recall the sentence. Defense counsel also tried unsuccessfully to get at Harmon B.'s feelings about death or life without parole. Harmon B. again replied that he could follow the law. In response to questioning by the prosecutor, Harmon B. indicated that he did not believe that there was evidence that the death penalty reduced crime. He also stated that he could not recall if the death penalty was an option in the court martial case he sat on. Harmon B. also stated that it might be dangerous to make judgments on a person's intoxication level based upon objective factors since other things such as diabetes could mimic that same behavior. Harmon B. also indicated that he had lost the hearing in his right ear but that he had a hearing aid which he could use if need be. (19 RT 5186-5203.)

Prospective juror Falvia C. was a 56-year-old Black woman. She was widowed and had six adult children and 14 grandchildren. She was a full-time elementary school teacher. She, too, was subjected to questioning by the trial court and counsel. In response to questioning from defense counsel, Falvia C. stated that drugs made people do things that they wouldn't normally do. In response to a question from the prosecutor, she stated that she believed in the phrase, "Thou shalt not kill." Although she later stated that this would not prevent her from voting for the death penalty if it was warranted. She also seemed at one point during questioning from the prosecutor to indicate that she would have trouble determining whether a person was really under the influence or not. (15 RT 3906-3929.)

On August 16, 1994, during jury selection at appellant's first trial, the prosecutor used a peremptory challenge against Harmon B. after which a 12-person jury was impaneled. (19 RT 5271-5272.) Thereafter, during the selection of alternate jurors, the prosecutor struck Falvia C., the only other prospective Black juror available. (19 RT 5276, 5278.) At that point, defense counsel made a motion pursuant to *Batson v. Kentucky, supra,* 476 U.S. at p. 89 and *People v. Wheeler, supra,* 22 Cal.3d 258, to declare a

mistrial and dismiss the existing jury panel. (19 RT 5276-5278.) In response, the court asked the prosecutor to explain his reasons for challenging those two prospective jurors.

The pertinent portions of the record dealing with this claim are accurately recited in appellant's brief. (See AOB 99-109 citing record at 19 RT 5278-5288.)

B. Applicable Law

It is well-settled that both the state and federal constitutions prohibit the use of peremptory challenges on the basis of race. (*Batson, supra,* 476 U.S. at p. 97; *Wheeler, supra* 22 Cal.3d at pp. 276-277.) Under *Batson* and its progeny, the trial court must engage in a three-step process in evaluating a motion asserting the use of impermissible race based challenges. First, the court determines whether the defendant has made a prima facie showing that a challenge was based upon race. Next, if such a showing is made, then the burden shifts to the prosecutor to show that the challenges were made for a race neutral reason. Finally, the court must determine whether the defendant has proved purposeful discrimination. Importantly, the ultimate burden of demonstrating a race based challenge starts and remains with the defendant. (*Rice v. Collins* (2006) 546 U.S. 333, 338.)

A prosecutor asked to explain his reasons for his actions must give a "'clear and reasonably specific' explanation of his legitimate reasons' for exercising the challenges." (*Batson, supra*, 476 U.S. at p. 98.) However, this explanation while it must be legitimate need not be significant. Indeed, even a trivial reason if genuine and neutral will suffice. As this Court has noted, "[a] prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (*People v. Lenix* (2008) 44 Cal.4th 602, 613.) A reviewing court reviews a trial court's determinations regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges with great restraint,

presumes that a prosecutor used peremptory challenges in a constitutional manner, and gives great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. (*People v. Burgener* (2003) 29 Cal.4th 833, 864) Nonetheless, this Court recently determined that in evaluating the trial court's ruling, evidence of comparative juror analysis must be considered if the record so permits and the defendant has relied upon such evidence in asserting his claim. (*Lenix, supra*, 44 Cal.4th at p. 622.) This type of evidence however, has its limitations. As the *Lenix* Court stated, "we are mindful that comparative juror analysis on a cold appellate record has inherent limitations." (*Id.*) Further, the Court noted, that comparative juror analysis is just another form of circumstantial evidence and like other forms of circumstantial evidence must be viewed with caution. (*Id.* at p. 627.) Ultimately, the fundamental question remains whether after considering all of the available evidence substantial evidence supports the trial court's finding of no discriminatory intent. (*Id.* at p. 624.)

C. Analysis

Appellant argues that applying the *Batson* analysis to the present record yields the conclusion that the challenges made by the prosecutor were race based. The trial court disagreed and denied appellant's motion below. That ruling is supported by substantial evidence.

Preliminarily, respondent agrees with appellant that although the trial court did not explicitly find a prima facie case of discriminatory purpose had been made by defense counsel, the court's actions in asking the prosecutor to explain his challenges (see 19 RT 5278, 5290) was an implicit finding that a prima facie case had indeed been made as to the challenges of

Harmon B. and Falvia C.. (See *People v. Fuentes* (1991) 54 Cal.3d 707, 716.)

Once a prima facie case has been made, the prosecutor must then explain his or her reasons for the challenges. We must examine those reasons here to determine whether the record supports the trial court's findings that those proffered reasons were race-neutral. (*People v. Wheeler, supra,* 22 Cal.3d at p. 281.)

The prosecutor's stated reasons for challenging Harmon B. were first and most significantly, that he offered no insight as to his personal opinions regarding the death penalty despite repeated efforts from the court and the prosecutor to explore his views. He merely stated that he could follow the law. (See 19 RT 5283-5284.) This reason is supported by the record.

For example, the court asked Harmon B, "What we are trying to ask there is do you [sic] favor the death penalty? Are you opposed to it? Do you have any feelings about it one way or another?. . ." In response, Harmon B stated that " . . I believe in hearing the evidence and taking instruction and enforcing the law." (19 RT 5188).

The prosecutor fared no better in trying to get at Harmon B's personal attitude towards the death penalty. In response to questioning regarding his views on the death penalty, Harmon B. stated, "If that's the law, I can [sic] hear the evidence and receive the instruction, and I can recommend the death penalty if the condition has been met." (19 RT 5199.) Again, this comment gives no insight into his personal views regarding the death penalty. However, immediately prior to that comment, Harmon B. had indicated that he personally did not believe that two wrongs make a right and also that he did not believe that the death penalty was a deterrent. (19 RT 5199.) These somewhat evasive or equivocal comments concerning Harmon B.'s personal views regarding the death penalty could have legitimately caused the prosecutor to be concerned that Harmon B. was

personally opposed to the death penalty. Obviously, in a capital murder case that would be a crucial matter and would provide a race-neutral reason for a challenge.

Even the trial court, which was in the best position to observe the demeanor of the prospective jurors, felt that Harmon B. may have been being evasive on his personal views regarding the death penalty. The Court stated, "Well the Court felt either he didn't understand it, or was avoiding it, or there was some difficulty getting it across. It wasn't a question of law in terms of the death penalty. . . " (19 RT 5284.)

A second reason offered by the prosecutor included that Harmon B. was very unemotional and mechanical. (See 19 RT 5283-5285.) The Court concurred noting that "He [Harmon B.] did sit bolt upright in his chair and seemed to be very guarded in what he said." (19 RT 5285.) These observations as to the demeanor of a prospective juror also provide a wholly legitimate and race neutral justification for a peremptory challenge. (See *People v. Lenix, supra,* 44 Cal.4th at p. 613.)[8]

---

[8] The prosecutor also offered a number of other reasons for his challenge of Harmon B. and appellant focuses on them in detail in his argument (See AOB 120-125.) However, the reasons discussed above, appellant's guarded and mechanical demeanor and his unwillingness to give his personal views on the death penalty were the ones credited by the trial court. Either or both of those two reasons provide a sufficient basis to demonstrate the legitimacy of the challenge and to support the trial court's ruling. (See *Lenix, supra*, 44 Cal.4th at p. 635 (concurring opinion of Moreno J.). In light of this, respondent does not discuss the other reasons offered by the prosecutor to justify the challenge. Moreover, the record reflects the prosecutor was reading from a list of notes he had taken during voir dire. This list seemed to include all comments or concerns regarding prospective jurors. It would be unfair and would discourage the making of a detailed record to examine every single comment made by the prosecutor and evaluate whether the record solidly supports its accuracy. Further, the bottom line is that one or two solid plausible reasons can demonstrate, as was the case here, that the prosecutor's challenge was subjectively made for

(continued...)

As to prospective alternate juror Falvia C., the prosecutor gave a number of reasons for challenging her.[9] First, he indicated his concern with Falvia C's comment that drugs make people do things that they wouldn't normally do. (19 RT 5287.) A review of the record demonstrates that Falvia C. did indeed express this sentiment and that it was a legitimate reason for concern and justified the challenge. When questioned by defense counsel about her views regarding drugs, she stated, "I just think drugs are bad because it makes people do things that they wouldn't ordinarily do." (15 RT 3921) Given that there was going to be evidence that the defendant had killed his victims during a methamphetamine induced crime spree, one could hardly fault the prosecutor for being concerned about a juror who perhaps might feel like the defendant wouldn't normally do such things but for the drugs and was therefore less blameworthy than someone who committed such crimes when sober. The prosecutor may have had a hunch

---

(...continued)
a non-discriminatory purpose. Once that is established further analysis of the objective reasonableness of other comments is unnecessary. After all it is the subjective genuineness of the race-neutral reasons given not the objective reasonableness, that is the key. (*People v. Reynoso* (2003) 31 Cal.4th 903, 924.)

[9]Respondent does not discuss all the reasons offered since it is sufficient if one reason provides a legitimate race neutral justification for the challenge. (See *Lenix, supra*, 44 Cal.4th at p. 635 (concurring opinion of Moreno J.)) Oftentimes when forced to explain a challenge prosecutors will simply recite everything in their notes in order to make sure they don't miss anything. This may often include things that if they had time to reflect on may not have been the real concern they had over a particular juror. For that reason it is unfair and incorrect as appellant does to suggest that every single reason or comment offered by the prosecutor concerning a juror be examined to ensure that all are supported by the record. As long as one reason is solid, genuine, and race neutral the fact that another comment may not be as fully supported by the record does not make the solid reason suspect. (*Id.*; see also fn. 8, *ante*.)

that Falvia C. might not be hard on the defendant because of his drug use. Such hunches may of course support a peremptory challenge. (*People v. Turner* (1994) 8 Cal.4th 137, 165.) Given the comments above, such a hunch would have been perfectly plausible, supported by the record, and non-discriminatory. Perhaps another advocate would not have felt this way, but that is beside the point. As was stated by this Court recently in *Lenix*, "The question is not whether a different advocate would have assessed the risk differently, but whether this advocate was acting in a constitutionally prohibited way." (*Lenix, supra* 44 Cal.4th at p. 629.) The prosecutor also expressed concern with Falvia C.'s use of the phrase "Thou shalt not kill." (See 19 RT 5287.) This comment is in the record (15 RT 3927) and could also have caused the prosecutor legitimate concern. Although she later stated that she could put aside her religious beliefs and enforce the law (15 RT 3927), the prosecutor might well have been concerned that she was harboring ambivalence about possibly being a part of putting someone to death. The prosecutor could have again had a hunch that when "push came to shove," Falvia C. would be reluctant to impose the death penalty. The record supports such a concern and it is plausible and non-discriminatory.

In sum, a review of the record supports the trial court's conclusion that the prosecutor offered legitimate race neutral reasons justifying the challenges of Harmon B. and Falvia C. Appellant's use of comparative juror analysis does not undermine this finding.

Appellant first compares Harmon B. with juror Gloria H, who served on appellant's first jury. He claims both had court martial experience but Gloria H.'s went unquestioned by the prosecutor. (AOB 121.) The prosecutor had expressed concern with Harmon B.'s attitude concerning his experience sitting on a court martial jury. (19 RT 5279, 5281.) However a close review of the record indicates that Gloria H and Harmon B. were not

similarly situated. Gloria H. stated that she had observed court-martials but had never actually sat on a court martial. (16 RT 4271.) Obviously merely observing a court-martial jury at work is far different than sitting on a court martial jury involving a murder where the death penalty may be an option. Certainly one would expect a prosecutor to ask more questions and inquire further of a person who actually sat on a court-martial jury involving a murder especially where as here that prospective juror was equivocal regarding the death penalty. Further, Gloria H was clear on her personal feeling of support for the death penalty (16 RT 4266.) unlike Harmon B. who was unwilling to give a clear answer as to his personal views. Thus, Gloria H. was not similar to Harmon B.

Next appellant suggests that the prosecutor questioned Harmon B. more extensively than other jurors due to a desire to uncover some pretext to dismiss him. In support of this suggestion, appellant notes that other non-minority jurors were not questioned regarding their lack of opinion regarding psychology. (AOB 121-122.) However, the prosecutor may very well have questioned Harmon B. more extensively because of his concern that Harmon B. didn't offer a personal opinion on a number of important issues in the case, particularly on the death penalty. Indeed, the trial court specially commented that Harmon B. was very guarded in his opinions. (19 RT 5285.) This is a plausible and race-neutral reason for the more detailed questioning of Harmon B. on psychology and other topics. Jury selection is designed to allow counsel to get at the personal biases of prospective jurors. A juror who is reluctant to disclose his personal views on important topics is a dangerous juror since counsel may have no idea what they are getting. Counsel would have been remiss in not questioning Harmon B. extensively.

Further, appellant cites as suspect the prosecutor's comment about Harmon B.'s hearing issue and points to two other seated alternate jurors who also suffered hearing impairments. (AOB 122-123.) However, as

noted above in footnote 8, *ante*, the prosecutor was looking at his notes and reciting to the court all of his comments regarding prospective juror Harmon B. The fact that he mentioned Harmon B's hearing as a concern does not mean that the hearing issue was the primary or even a key reason for the prosecutor's challenge of Harmon B. The fact is the two other jurors with minor hearing issues were both death penalty supporters. (See Thomas N. 16 RT 4165-4167; Paul T. 13 RT 13 RT 3432-3433, 3440.) That fact could have been more than enough to override any concern the prosecutor may have had with any hearing issue. On the contrary, as noted repeatedly, Harmon B. would not give his personal views regarding the death penalty and also stated that he didn't think it was a deterrent. Any comparison with other jurors with minor hearing issues is misleading.

One final point regarding appellant's comparative juror analysis argument concerning Harmon B. Appellant is pointing to other jurors who compare with Harmon B. in minor ways, not in the key reasons identified by respondent, based upon its detailed review of the cold record, something the prosecutor was not able to do, as the likely and plausible reasons for the challenge. Appellant seeks to penalize this prosecutor for being over rather than under inclusive by seizing on what appear to be secondary reasons. This runs contrary to this Court's expressed desire for creating a detailed record. (See *Lenix, supra* 44 Cal.4th at p. 624.) Not surprisingly, appellant does not offer up a seated juror who, like Harmon B., expressed ambivalence regarding the death penalty. Nor does he offer up another juror, like Harmon B., who was so guarded in his or her personal views. Thus, appellant does not point to comparable jurors who were ultimately seated yet had the same views as Harmon B. on the two crucial matters identified by the trial court. As such, appellant's attempts to undermine the trial court's finding on the basis of his use of comparative juror analysis should be rejected.

Also unavailing is appellant's citation to *Turner v. Mitchell* (9th Cir. 1997) 121 F.3d 1248. (AOB 124-125.) In *Mitchell*, the Ninth Circuit reversed for *Batson* error and in so doing declined to accept the prosecutor's justification for the strike, noting that the justifications offered were belied by the fact that the struck Black juror should have been considered an ideal prosecution juror. (*Id.* at p. 1252.) But here, Harmon B. was not an ideal prosecution juror. A prospective juror in a capital murder trial like Harmon B., who is unwilling to clearly express his sentiments regarding the death penalty, is simply not an ideal prosecution juror. *Mitchell* is clearly applicable.

For many of the same reasons, appellant's use of comparative juror analysis to question the trial court's ruling regarding the challenge of Falvia C. also fails. Once again, appellant highlights some of what appear to be the prosecutor's secondary reasons for his challenge while ignoring the most striking. It is unfair and misleading to fault the prosecutor here for getting out everything he had in his notes to allow for a more complete record. (See *Lenix, supra*, 44 Cal.4th at p. 624.) Yet that is what appellant asks this Court to do by focusing on some but not all of the reasons offered. In the case of Falvia C., as noted above, the most obvious comment that would have caused concern was her statement that drugs make people do things they wouldn't normally do. Appellant does not point to a comparable juror who had the same sentiment and yet ultimately served on the jury. Hardly a surprise since such a viewpoint would create legitimate concern for a prosecutor seeking the death penalty against a defendant who committed heinous crimes while "juiced up" on methamphetamine. Additionally, appellant does not point to a seated juror who expressed agreement with the phrase "Thou shalt not kill." As respondent noted above, such a comment could indicate a possible difficulty in applying the

death penalty even if a person, like Falvia C. did, stated the capacity to do so.

So rather than offer up comparable jurors on these most plausible reasons, appellant focuses on what respondent would characterize based upon its review of the cold record as secondary or ancillary reasons. In particular, appellant claims that the challenge of Falvia C. must have been racially motivated since other non-minority seated jurors and alternates with lots of children were not challenged by the prosecutor, yet the prosecutor mentioned as a concern regarding Falvia C. her large number of children and grandchildren. (AOB 126-127.) However, this argument fails even at the outset for these "comparative jurors" did not have nearly as many children and grandchildren as Falvia C. thus making even this misleading comparison suspect. (Compare Falvia C., six children and 14 grandchildren, with Charles H., four children, two grandchildren; Daniel T., three children, one grandchild; Sandra R., four children) Falvia C. thus had 20 total children and grandchildren compared to 14 total for the three jurors mentioned by appellant combined. Hardly a legitimate comparison.

Moreover, Falvia C. did have an extraordinary number of children and grandchildren thus perhaps rendering her more likely in the prosecutor's mind to have sympathy for the defendant at the possible penalty phase when his small children were likely going to be presented in an effort to win a mitigated sentence. The other jurors' number of children and grandchildren appear more average and certainly not extraordinary. Thus, the prosecutor could have had a hunch that Falvia C. but not the other jurors cited by appellant would not be an ideal juror whom he could count on to impose the death penalty despite appellant's young children. This would have provided a legitimate race neutral reason for the challenge. "A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (*People v. Lenix,*

supra, 44 Cal.4th at p. 613.) Thus, appellant's use of comparative juror analysis does not offer any basis to undermine the conclusions of the trial court regarding the prosecutor's challenge of Falvia C.

In sum, based upon the totality of the evidence, the prosecutor's proffered reasons for excusing Harmon B. and Falvia C. are fully supported by the record. In view of the deference given the trial court's finding's (see *Hernandez v. New York* (1991) 500 U.S. 352, 365), appellant has failed to meet his burden of demonstrating the prosecutor's reasons for excusing the two prospective jurors were not genuine. Appellant's *Batson-Wheeler* claim must therefore be denied.

III. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS HIS POST-ARREST STATEMENTS TO THE POLICE

Appellant claims that the trial court erred in denying his motion to suppress his post-arrest statements given to the police. (AOB 129-199.) Appellant is mistaken.

A. Background

Appellant was arrested in the early morning hours of October 18, 1992, after being found asleep in a station wagon parked in front of the H Street police station in Sacramento. (1 ACT 57-59.) While he was being transported across the street to the station, he attempted to break free from the officers and as a result appellant fell to the ground causing an abrasion on his forehead. (1 ACT 60.) Upon his arrival at the station, appellant was placed in an interview room and was questioned by Detective Faust of the Sacramento Police Department. (1 ACT 60-61.) At the beginning of the interview, which commenced at 9:41 a.m., Detective Faust read appellant has rights per *Miranda.*[10] However, at the end of the advisement he

[10] *Miranda v. Arizona* (1966) 384 U.S. 436.

deviated slightly from the wording on the pre-printed card by saying, "Understanding those rights, . . . I want to talk to you about what you've been doing over the last couple of days. Can I talk to you about that?" (1 ACT-B 1-2.) The card stated, "Having those rights in mind, do you wish to talk to us now." (1 ACT 70-71.)

During the initial phase of the interview, appellant steadfastly denied any involvement in the subject crimes, blaming things on persons named Donzelle and Kyle Mooney. (1 ACT 5-14.) At about 10:08 a.m., appellant indicated that he wanted an attorney:

HENSLEY: I'm being set up, I want to see my lawyer!

FAUST: No, you're not being set up.

HENSLEY: Um hum.

FAUST: Okay? We're not setting you up.

HENSLEY: No, I didn't say you were.

FAUST: Oh, okay.

(1 ACT-B 15.)

Detective Faust then terminated the interview and appellant slept for a few hours. At 1:24 p.m., Detective Faust reentered the room and asked appellant to remove his shirt so some pictures could be taken. As Faust was looking over appellant he noticed some blood on appellant's arms and hands. Faust then asked appellant, "Where do you get all this here, this red in here?" Appellant did not respond to this question, and further photos were taken. No further attempt was made to pursue this line of questioning. (1 ACT 106-107.) At 1:28 p.m., appellant asked Detective Faust, "When am I gunna uh [sic], get to see a lawyer or get a phone call or something..?" Faust responded, "Once you're booked into the county jail, you'll get that and you'll get your phone calls." Faust then told appellant to put his shirt back on saying, "You'll be going over okay?" (1 ACT-B 18.) Faust then

turned to leave the interview room. At this point, appellant initiated further conversation by asking Faust, "Can I talk to you for a minute?" Faust said, "Sure." Appellant proceeded to ask why the police were working him so hard, and in response Faust explained that the police had significant evidence linking appellant with a homicide. Appellant began to continue the conversation but Faust interrupted him and told appellant that he (Faust) could not talk to appellant because appellant had requested an attorney. Appellant continued to try to explain things and Faust again pointed out that he could not talk with appellant because appellant requested an attorney. (1 ACT-B 18-19.) The conversation continued as follows:

> HENSLEY: Well you've got to find Donzelle, Donzelle.
>
> FAUST: Was she with...
>
> HENSLEY: I don't want to get myself in trouble, that's all
>
> FAUST: I understand that, I wouldn't want to get myself in trouble either. Okay? Is Donzelle well. . . You wanna, you wanna talk or you want an attorney?

(1 ACT-B 20.)

Appellant then continued talking, manifesting his desire to talk with the detective, and the interview resumed. After a few minutes of questions and answers during which time appellant denied any involvement other than accepting a few checks from Donzelle, Faust again sought clarification from appellant that he wished to waive his rights and talk with the detective.

> FAUST: I'm gunna have to to you know, I want to talk to you, but I've got to clarify something um as long as, so I can understand okay, because I don't want to violate your rights. Do you understand where I'm coming from?
>
> HENSLEY: Uh huh

FAUST: Okay. You had initially told me that in my first interview with you that you, that you wanted an attorney. Okay you thought you were being set up, and you wanted an attorney.

HENSLEY: No by you, I.....

FAUST: Oh, no.

HENSLEY: I mean Donzelle and her fucken buddy tried to set me up for what they did. I don't, I don't go for that!

FAUST: Okay, so that's something we need to clarify too is that you. You think that Donzelle and Mooney are setting you up?

HENSLEY: Well hell, he parked me out in front of the fucken police station! Hey, I didn't do nothing but steal my fucken father-in-laws car. That's all I did. I had possession of some stolen property.

FAUST: Well, can I continue to talk to you without an attorney?

HENSLEY: Yeah, I don't give a fuck! I'm going to jail anyway.

(1 ACT-B 22-23.)

After this exchange, Faust continued questioning appellant who continued to minimize any involvement in the subject crimes. Appellant consistently blamed things on Donzelle and Kyle Mooney. At around 2 p.m., Detectives Ferrari and Ordez of San Joaquin County began questioning appellant. (1 ACT 51.)

During the interview with the San Joaquin County detectives, appellant began to admit his involvement in some of the crimes. He told the detectives that he had gone to Larry Shockley's house accompanied by Donzelle and Kyle Mooney. He had handcuffed Shockley and taken some of his property. Then appellant stated that he, Mooney and Donzelle had taken Shockley to a remote location and Mooney had shot Shockley in the head. (1 ACT-B 43, 59-61, 83-88.)

At around 3:30 p.m., appellant was removed from the interview room, booked, and given some food to eat. (1 ACT 140-141.)

The next interview of appellant was conducted by Detective Ferrari and the ultimate prosecutor of the case, San Joaquin County Deputy District Attorney George Dunlap. It began at 7 p.m. Ferrari reread appellant his *Miranda* rights and appellant agreed to speak with them. (1 ACT-B 121-122.) For most of this interview appellant again attributed Shockley's death and the taking of Shockley's property to Donzelle and Kyle Mooney. (1 ACT-B 126-161.) At around 9 p.m., appellant said he was tired and asked about sleeping arrangements at the jail. Detective Ferrari indicated that it was not his county but he would check on it. After Ferrari left and as the prosecutor was also leaving the room to terminate the interview, appellant asked to speak to the prosecutor alone:

HENSLEY: Sure (knocking sound) Just Mr. D.A. man.

DUNLAP: I'm sorry Mr. Hensley did you ask for me as I was walking out?

HENSLEY: Uh huh.

DUNLAP: I thought I heard you say...

HENSLEY: Yeah, did you wanna talk to me while he's not here please?

DUNLAP: Would you like me to talk...

HENSLEY: Uh huh

DUNLAP: With you alone? Sure

HENSLEY: You don't mind do you I mean?

DUNLAP: No, I don't mind.

(1 ACT-B 219-220.)

Appellant then proceeded to admit that he had not been truthful in his statements and asked the prosecutor if he could guarantee appellant the death penalty. Mr. Dunlap stated that he could not do that. Appellant then

stated that he was tired and wanted to sleep. Dunlap told him, in essence, look you asked to speak to the prosecutor well here I am do you want to tell me the truth now. Hensley replied that he wanted to sleep and have a cigarette and then he would tell Mr. Dunlap everything. (1 ACT-B 223-224.) Dunlap then asked, "Are you gonna tell me at least a little bit, a brief synopsis so that I know what, whether its worth it to drive all the way back up here for?" Appellant then admited for the first time to shooting Larry Shockley alone. (1 ACT-B 227.)

The next morning, Dunlap and Ferrari returned and appellant admitted to killing Shockley and to burglarizing Shockley's home both before and after the murder. Appellant admitted that he had acted alone. Appellant also admitted to shooting Stacey Copeland and taking her drugs and money. Finally, appellant admitted to killing Gregory Renouf. (1 ACT-B 233-264.)

Prior to trial, defense counsel sought to suppress appellant's statements. Counsel argued that the statements should be suppressed for variety of reasons: the *Miranda* admonition given by Detective Faust was deficient in that he varied from the warnings as written on the pre-printed card; appellant's sleep deprived state and his drug use and physical injuries precluded his statements from being deemed voluntary; the officers violated the no recontact rule of *Edwards v. Arizona* (1981) 451 U.S. 477 by engaging in further interrogation of appellant; and, the officers deceived and badgered appellant and conveyed false promises of leniency. (3 CT 546-585.)

The prosecutor responded as follows: the *Miranda* admonition given by Detective Fause was sufficient to convey to appellant the thrust of the *Miranda* warnings and that was all the law required; appellant reinitiated conversation with the police after he had invoked thus permitting further questioning by the police; the police or interviewers did not use improper interrogation tactics; appellant was mentally able to understand the

questioning despite any drug use or sleepiness and thus his statements were voluntary. (3 CT 593-604.)

After a full hearing and an opportunity to view the videotapes of all of appellant's interviews the court denied appellant's motion to suppress the above admissions along with other detailed statements appellant made over the course of his numerous interviews. The trial court relied on *Edwards v. Arizona, supra,* 451 U.S. 477. The court noted that under *Edwards*,

> once the accused expresses desire to deal with the police only through counsel, *Edwards*... holds that he's not subject to further interrogation by authorities until counsel has been made available to him unless...by himself he initiated further communications or exchanges with the police.

(5 RT 1051.) Here, the court ruled that first, appellant had invoked his right to counsel. Second, the court found that Detective Faust had violated *Miranda* by questioning appellant about the blood he noticed when photos of appellant were being taken after appellant had invoked. However, the court also found that appellant did not respond to those questions concerning the blood and any improper questioning had terminated when appellant was told in response to his question that he would be going over to be booked in the county jail. Finally, the court found that after this improper exchange had terminated and Detective Faust was in the process of exiting the room, appellant on his own initiative reinstituted contact with Faust by asking Faust if he (appellant) could talk to Faust for a minute. The court summed up its ruling as follows:

> So the [initial] advisement of rights is adequate, the invocation clear, the reinitation was based not upon the police misconduct which did take place but upon the defendant's own free will in reinitiating the discussions.

(5 RT 1051-1055.)

The court also implicitly found that appellant's statements were voluntary and were not the product of police coercion, improper promises

of leniency, improper police deception, or severe mental impairment due to drug use or sleepiness.

B. Applicable Law

> The Fourteenth Amendment to the federal Constitution and article I, section 15, of the state Constitution bar the prosecution from using a defendant's involuntary confession. [Citation.] The federal Constitution requires the prosecution to establish, by a preponderance of the evidence, that a defendant's confession was voluntary. [Citation.] The same is now true under California law as a result of an amendment to the state Constitution enacted as part of Proposition 8, a 1982 voter initiative. (See Cal. Const., art. I, 28, subd. (d); . . .) . . . Under both state and federal law, courts apply a 'totality of circumstances' test to determine the voluntariness of a confession. [Citations.] Among the factors to be considered are "the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity" as well as "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health."' [Citation.]

(*People v. Massie* (1998) 19 Cal.4th 550, 576.)

> A statement is involuntary if it is not the product of "'a rational intellect and free will.'" (*Mincey v. Arizona* (1978) 437 U.S. 385, 398.) The test for determining whether a confession is voluntary is whether the defendant's "will was overborne at the time he confessed." (*Lynumn v. Illinois* (1963) 372 U.S. 528, 534.)" "The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were "such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." [Citation.]' [Citation.] In determining whether or not an accused's will was overborne, 'an examination must be made of "all the surrounding circumstances-both the characteristics of the accused and the details of the interrogation." [Citation.]' [Citation.]"

(*People v. Thompson* [(1990)] 50 Cal.3d [134,] 166.)

> A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state

> Constitutions. (*People v. Benson* (1990) 52 Cal.3d 754, 778, citing *Colorado v. Connelly* [(1986)] 479 U.S. [157,] 167.) A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. (*Benson, supra*, at p. 778.) Although coercive police activity is a necessary predicate to establish an involuntary confession, it "does not itself compel a finding that a resulting confession is involuntary." (*People v. Bradford* (1997) 14 Cal.4th 1005, 1041.) The statement and the inducement must be causally linked. (*Benson, supra*, at pp. 778-779.)

(*People v. Maury* (2003) 30 Cal.4th 342, 404-405.)

> On appeal, a reviewing court looks at the evidence independently to determine whether a defendant's confession was voluntary, but will uphold the trial court's findings of the circumstances surrounding the confession if supported by substantial evidence.

(*People v. Lewis* (2001) 26 Cal.4th 334, 383; *People v. Massie, supra,* 19 Cal.4th at p. 576; *People v. Wash* (1993) 6 Cal.4th 215, 235-236.)

The burden is on the People to prove the voluntariness of a confession or admission by a preponderance of the evidence. (*People v. Markham* (1989) 49 Cal.3d 63, 71.)

C. Analysis

Appellant argues that under the applicable law the trial court's ruling was erroneous and that appellant's statements should have been suppressed. He claims that appellant's statements and ultimate confessions "resulted from a wide range of misconduct on the part of the authorities." (AOB 167-168.) According to appellant, this "misconduct" included: diluting the *Miranda* warnings; violating the non-recontact rule of *Edwards v. Arizona*; interrogating appellant despite his drug-impaired, sleep-deprived, and medically weakened condition; offering false promises of leniency; using deceptive interrogation tactics; and relentlessly interrogating appellant. (AOB 168-195.) Respondent submits that the *Miranda* warnings given

appellant were adequate and that under the totality of the circumstances appellant's statements were voluntary. Thus, this Court should uphold the ruling of the trial court.

1. The *Miranda* Warnings Given Appellant Were Adequate

Initially, respondent deals with the claim that Detective Faust's deviation from the standard language of the *Miranda* advisement renders the confession inadmissible. (AOB 168-171.) Although Detective Faust did indeed deviate from the standard language of the advisement, that deviation is irrelevant as long as the advisement given would reasonably convey to a suspect his or her rights as required by *Miranda*. (*People v. Samayoa* (1997) 15 Cal.4th 795, 830.) Here the admonition given deviated only in the final part where Faust asked appellant, "Can I talk to you," rather than asking appellant if he was willing to talk to Faust. Appellant strains to make the most out of this minor deviation claiming that this was a significant deviation from the letter and spirit of *Miranda*. However, respondent submits the deviation was merely semantic. Both "can I talk to you" and "are you willing to talk to us" simply ask the suspect if having heard the rights read to him he wishes to talk with the police. There is simply not a material difference. Clearly both phrases convey the same thing to the suspect and that is all the law requires. (*Id.*; see also *Duckworth v. Eagan* (1989) 492 U.S. 195, 203.) Moreover, appellant was not an unsophisticated criminal having had numerous contacts with the criminal justice system. Appellant's assertion that due to this minor deviation he didn't understand his rights as provided by *Miranda* is simply untenable.

2. Appellant's Post-Arrest Statements Were Voluntary

Appellant makes numerous arguments as to why his post-arrest statements should be deemed involuntary. (AOB 171-194.) Respondent will deal with each of them in turn.

a. The Police Violation Of The No-Recontact Rule Did Not Cause Appellant's Confession

Appellant claims that the police violation of the no recontact rule of *Edwards v. Arizona* led to his confession and thus the confession must be found to be involuntary. (AOB 171-178.) Not so.

In *Edwards v. Arizona, supra,* 451 U.S. 477, the United States Supreme Court held that if a criminal suspect invokes the right to counsel, the police may not resume interrogation until counsel is present, unless the suspect voluntarily initiates further contact. (*Id.* at p. 484.) This is referred to as "the *Edwards* no-recontact rule." (*People v. Storm* (2002) 28 Cal.4th 1007, 1023.) Any statement obtained as a result of a violation of this rule is presumed involuntary and thus inadmissible. (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 177.)

The problem for appellant is that no statements were obtained from him as a result of any violations of the *Edwards* rule. On the contrary the statements were the result of appellant's own independent reinitiation of contacts with law enforcement.

The first ostensible violation of the no-recontact rule occurred at the time appellant invoked. At the same time appellant invoked his right to counsel, he also implied that the police were setting him up. In response Detective Faust replied that the police were not setting him up. (1 ACT-B 15.) Appellant now asserts that this innocuous retort was improper continued contact designed to encourage an incriminating response. (AOB 172.) Regardless, nothing remotely incriminating was elicited. Appellant's only comment during this exchange was to say, "No, I didn't say you

were." (1 ACT-B 15.) This can hardly be called an incriminating statement.

The next post-invocation contact occurred when Faust returned to take photos of appellant. During the taking of the photos Faust observed blood on appellant's body and asked him, "Where did you get all this here, this red in here?" (1 ACT 106-107.) This question, as appellant points out, was a violation of the *Edwards* no-recontact rule, and a response to that question would have been inadmissible in the prosecution's case in chief. However once again there was no response elicited. (1ACT-B 17-18.) Appellant did not respond to that question and that encounter had terminated at the time appellant on his own reinitiated further discussions by asking Faust, "Can I talk to you for a minute?" (1 ACT-B 18.) Of course the law is clear that if the suspect himself reinitiates contact with the police then the resulting statements do not violate *Edwards*. (*People v. Marshall* (1990) 50 Cal.3d 907, 926.) The trial court also found that the police misconduct did not result in any incriminating statements and that any encounter engendered by the police misconduct had terminated when appellant renitiated contact with the police. (5 RT 1051-1055.)

Appellant goes to great lengths to try to avoid this obvious conclusion, citing to two recent cases from this Court and a 1991 federal case. However upon close inspection none of those cases help him. First, he cites to this Court's opinion in *People v. Davis* (2005) 36 Cal.4th 510. However in *Davis* unlike here an officer's improper recontact actually resulted in an incriminating response. The *Davis* Court thus rightly ruled that response inadmissible. (*Id.* at p. 555.) But *Davis* does not help appellant because here, unlike in *Davis*, appellant did not offer an incriminating statement much less any statement in response to the police violation of *Edwards*. The same is true of appellant's citation to this Court's decision in *People v. Boyer* (1989) 48 Cal.3d 247. In *Boyer* after

the defendant invoked an officer informed him of new evidence against him. Boyer then admitted, "I did it." Thus, like the defendant in *Davis* the violation of the *Edwards* no-recontact rule resulted in *Boyer* making an incriminating statement. (*Id.* at pp. 265-267.) Once again though, *Boyer* does not help appellant because appellant did not make an incriminating statement in response to the improper police contact.

Finally, appellant cites to *Collazo v. Estelle* (9th Cir. 1991) 940 F.2d 411, but *Collazo,* too, is distinguishable. In *Collazo*, after the defendant invoked, a police officer told him that once he obtained an attorney that attorney would advise him not to talk to the police, and then "it might be worse for you." Collazo was then permitted to visit with his wife. Three hours later, Collazo reinitiated contact with the officers and confessed. A divided Ninth Circuit Court of Appeals held that the defendant's confession was inadmissible because his reinitiation with the police was the product of coercive comments about the use of an attorney that occurred right after the defendant had invoked. (*Id.* at pp. 414-417.) The *Collazo* court was rightly concerned about the effect that the coercive comments concerning involving an attorney might have had on Collazo's state of mind at the time he reinitiated and subsequently confessed. (*Id.*; see also *People v. Neal* (2003) 31 Cal.4th 63, 81-82 [misconduct of officer in first interview after invocation in making threats to suspect tainted second interview which was initiated by suspect rendering confession given in second interview involuntary].) However, nothing of the sort is present in the instant case. Nothing coercive was said to appellant during any improper police questioning. It stretches reason to claim that the question about the presence of blood on appellant led somehow to his decision to reinitiate and ultimately confess. This case is thus nothing like *Collazo* and appellant's citations to it are inapposite. Appellant's reinitiation was not tainted by any

prior police misconduct but rather was a voluntary decision on his part to reestablish communication with Detective Faust.

In sum, no incriminating statements were elicited during any police violations of the *Edward*'s rule and any such violations did not taint appellant's subsequent voluntary decision to reinitiate contact with the police and ultimately confess.

b. Appellant's Sleepiness, Drug-Use, And Head-Injury Did Not Affect His Free Will

Appellant claims that "the combination of [his] drug-impaired, sleep-deprived and medically weakened condition weigh heavily in favor of a finding that appellant's statements to the officers were involuntary and thus, inadmissible." (AOB 179-183.) Appellant is wrong.

The mere fact of being in the state of drug withdrawal or sleepy or injured or all of those states does not render a confession given involuntary. The only issue is whether the accused's ability to reason or comprehend or resist were in fact so disabled that he was incapable of free or rational choice. (*People v. Hendricks* (1987) 43 Cal.3d 584, 591.

Here, Detective Faust testified that appellant was responsive, lucid, cooperative and repeatedly asked to continue the interview when asked if he would like questioning to cease. (23 RT 6416; 1 ACT 16, 28, 70.) Additionally, the entire interrogation was videotaped, thereby allowing independent confirmation of the fact that, whatever appellant's mental and physical problems, he was not so disabled as to not be exercising his "free will" in speaking with the police. Further, appellant declined treatment for his head injury when booked and the intake nurse deemed it an abrasion. (23 RT 6519.) Moreover, appellant was a regular user of methamphetamine and there was little evidence that it impacted his ability to deal with the police.

Appellant's citation to *In re Cameron* (1968) 68 Cal.2d 487 does not help him. *Cameron* involved an extreme situation not present in the case at bar. In *Cameron,* the defendant was given huge amounts of Thorazine which the expert testimony established has the effect of reducing normal anxiety. The result being that a person under this kind of a dose of Thorazine wouldn't care what was happening to him. Under that extreme situation this Court ruled that Cameron's confession was not "the product of a rational intellect and a free will." (*Id.* at pp. 501-503.) Appellant's situation is nothing like the defendant in *Cameron*. As is apparent from the tape, appellant while sleepy and with a slight abrasion on his forehead, clearly understood what was going on. (See also *People v. Breaux* (1991) 1 Cal.4th 281, 299-301 [defendant shot in arm and leg and given Morphine for pain then questioned and confessed, testimony was that he was lucid and understood questions so confession okay]; *People v. Jackson* (1989) 49 Cal.3d 1170, 1188-1189 [confrontation with police plus drug use not sufficient to show defendant did not understand questions so confession admissible].) Moreover, appellant was a sophisticated criminal with a long history of police contacts, unlike Cameron who had no prior contact with the criminal justice system.

In sum, the record shows that despite any difficulties, appellant was rational, lucid, and clearly understood what was going on. Any problems he may have had did not undermine the exercise of his free will.

c. Appellant Was Not Coerced By Any False Promises Of Leniency

Appellant claims that the statement by detectives to him at the beginning of two of his interviews that there were two sides to every story constituted a false promise of leniency sufficient to render his confession involuntary. (AOB 183-185.) This claim is unfounded.

It is no doubt true as appellant points out that any promise of leniency either express or implied, if it is the motivating cause of a confession, will render the confession involuntary and inadmissible. (*People v. Ray* (1996) 13 Cal.4th 313, 339.) However, appellant cites no cases -- and respondent has found none – where a court has found an implied promise of leniency sufficient to render a confession involuntary from the mere fact that police officers tell the defendant that there are two sides to every story. The cases in which promises have led to confessions being deemed inadmissible involve much more egregious behavior. (Cf. *People v. McClary* (1977) 20 Cal.3d 218, 229, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17 [telling defendant that if she cooperated she might face only accessory rather than murder charge]; *In re Shawn D.* (1993) 20 Cal.App.4th 200, 214 [repeated suggestions by officers that defendant would be treated more leniently if he confessed]; see generally *People v. McWhorter* (2009) 47 Cal.4th 318, 347-358). No such implication is present in the detectives here telling appellant that there were two sides to every story. (See 1 ACT-B 37-38, 120.) That comment merely implies that the police would like to hear the defendant's side of things. There is simply no promise of any kind present anywhere in such a comment, let alone an improper promise of lenient treatment. Further, there is no evidence that appellant confessed as a result of the innocuous statements from the detectives that there were two sides to every story. Rather, the record shows that appellant's ultimate reason for confessing was his desire to get the death penalty and hasten the inevitable. (1 ACT-B 220-224, 2 ACT-B 311-312.) "A confession is 'obtained' by a promise within the proscription of both the federal and state due process guaranties if and only if inducement and statement are linked, as it were by proximate causation." (*People v. Benson* (1990) 52 Cal.3d 754, 778.)

In sum, there is no evidence of any promise of leniency offered to appellant and further no evidence that any such promise if one existed was a cause in his decision to confess.

d. Appellant's Statements Were Not Coerced By Police Deception

Appellant asserts that his interrogation was tainted by deception. (AOB 185-189.) Not so.

As appellant observes, police deception is a relevant consideration weighing against a finding of voluntariness. (*In re Shawn D., supra,* 20 Cal.App.4th at p. 209.) On the other hand, "deception does not necessarily invalidate a confession." (*People v. Thompson, supra* 50 Cal.3d at p. 167.) "Where the deception is not of a type reasonably likely to produce an untrue statement, a finding of involuntariness is unwarranted." (*People v. Farnam* (2002) 28 Cal.4th 107, 182 ["deception concerning defendant's fingerprints was unlikely to produce a false confession"]; cf. *People v. Holloway* (2004) 33 Cal.4th 96, 116 [no deception in telling the defendant that "circumstances can reduce the degree of a homicide or, at least, serve as arguments for mitigation in the penalty decision"].)

Accepting that deception may lead to an involuntary confession in some circumstances, that is not the case here. First, there is no evidence of any real deception at all. Appellant suggests that because he did not receive a telephone call within three hours after arrest nor did the police make it easy for appellant to actually obtain an attorney after he invoked that this constituted deceptive behavior. (See AOB 185-186.) On the contrary given the fact that police were investigating two homicides from different counties involving different investigators on a Sunday morning things were being done in a very punctual manner. Moreover, appellant cites no case where a violation of the statutory right to make a phone call was the basis to suppress a confession. Finally, there is no evidence that even if this

delay were deemed deceptive that it is the type of deception that would lead to an untrue confession. Appellant was a sophisticated criminal; the fact that there was a delay in getting him his phone call did not and could not have led him to break down and fabricate a confession for the police. In fact, the delay had little impact on appellant. In his initial interviews appellant lied over and over again about his involvement in the crimes, blaming Kyle Mooney and Donzelle and claiming he was being set up. His decision to finally confess which came much later was due to his stated desire to hasten this process once he realized that his lies were unraveling. (2 ACT 311-312.) Moreover, appellant was about to be booked into the jail and presumably given the opportunity to contact an attorney when he of his own accord reinitiated contact with the police. It was only some time later after this that he confessed to the crimes. Thus any delay prior to that time whether caused by deception or not cannot be deemed to have had any bearing on appellant's confession.

Also unavailing is appellant's argument that by asking appellant if he wanted to talk or wanted an attorney after appellant's reinitiation, Detective Faust deceived appellant by offering a false choice between co-operation and seeking counsel. In fact, Faust was just being cautious making sure that appellant's desire to talk was clear given that he had previously invoked. There was no deception there. Further, this exchange did not lead to a confession but rather to continued denials of appellant's involvement.

In sum, no deception was present in the police contacts with appellant and if any were present they were not the type likely to lead to an untrue statement. Moreover there was no causal connection between any possible deception and appellant's ultimate confession.

e. Appellant's Confession Was Not Coerced By Relentless Police Interrogation

Finally, appellant claims that the police and the prosecutor engaged in illicitly coercive and relentless interrogation tactics rendering his confession involuntary. (AOB 189-194.) Appellant is incorrect.

It is of course true that a coercive interrogation in which the police exert improper influence on a suspect can lead to a confession being found involuntary. (*People v. Benson, supra*, 52 Cal.3d at p. 778.) However, two factors are necessary for such a finding neither of which are present in the instant case. First, the police pressure must be such as to overcome the free-will to resist and bring about confessions not freely made. (*People v. Thompson, supra,* 50 Cal.3d at p. 166.). Second, the confession and the coercive police pressure must be causally linked. (*Benson, supra* at p. 778.)

Here, there is no evidence that the police or the prosecutor engaged in coercive interrogation. The entire interrogation was captured on videotape allowing this Court to review the demeanor and the conduct of all parties involved. Nothing in the video shows any sort of improper arm twisting by either the police or the prosecutor. There was no aggressive conduct. There are repeated questions concerning appellant's willingness to continue. There are no threats present anywhere on the videotape.

Appellant also slept for a number of hours in the interview room without any contact from the police.

Further, appellant completely mischaracterizes the interaction between appellant and the prosecutor, Mr. Dunlap. It was appellant who when the interview with Detective Ferrari and Mr. Dunlap seemed to be ending, and Ferrari was going to check on sleeping arrangements for appellant in the jail, asked to talk to the prosecutor alone. During this exchange, appellant offered to tell the truth in exchange for the prosecutor promising appellant the death penalty. Dunlap rightly told appellant that he could not make

such a promise. As the conversation continued appellant said he would tell the whole truth if permitted to sleep and have a cigarette. In response, Dunlap wanted a "preview" in order to determine whether it was worth his time to come back the next day to hear more from appellant. Prior to this appellant had minimized his involvement in the subject crimes. Thus, it would be eminently reasonable to try to decide whether it would be worth coming back to Sacramento to hear more of the same or whether appellant might finally admit his responsibility for the crimes at issue. This was not relentless interrogation as appellant would have this Court believe but rather reasonable behavior.

Moreover, appellant was not an unsophisticated criminal but rather someone who had had numerous contacts with the system. This was not someone who could be worn down by law enforcement if they just leaned on him a bit more. (Cf. *In re Shawn D. supra*, 20 Cal.App.4th at pp. 213-214 [minor was an unsophisticated and naïve 16-year-old].)

Finally, there is no evidence of the required link between any undue pressure and appellant's confession. Appellant confessed after hours of denials and lies. He stated on the videotape that he did not want the process to drag out and that he would only be prolonging the inevitable by refusing to cooperate. That was the reason appellant confessed. His will was not overborne by police or prosecution misconduct

Appellant's citation to *People v. Hinds* (1984) 154 Cal.App.3d 222 disapproved on other grounds in *People v. Cahill, supra,* 5 Cal.4th at pages 504-505, fn. 16, does not change this conclusion. In *Hinds*, the police in addition to conducting a lengthy interrogation repeatedly suggested to the defendant that his refusal to admit the crime was cowardly and would make things harder on the defendant, his friends and family. Moreover, implied promises of leniency were also present in *Hinds*. (*Id.* at p. 238.) No such

improper tactics are present in the instant case. *Hinds* is thus distinguishable.

In sum, appellant's lengthy interrogation was not unduly coercive.

f. Under The Totality Of The Circumstances, Appellant's Statements Were Voluntary And The Trial Court Correctly Denied His Motion To Suppress

As noted above, the reviewing court must consider the totality of the circumstances in order to determine whether the defendant's "will was overborne at the time he confessed." (*Lynumn v. Illinois* (1963) 372 U.S. 528, 534.) This examination includes the characteristics of the accused and the details of the interrogation. (*People v. Williams, supra,* 16 Cal.4th at p. 660.)

Here, as discussed in detail above, all of the relevant factors point to the conclusion that appellant's confession was a product of his own free will. Although sleepy, appellant was lucid and rational during questioning. His repeated denials and attempts to blame others show that he was holding his own with the police. Appellant was not a newcomer to the criminal justice system as his lengthy record demonstrates. Additionally, the videotape itself reveals that appellant knew what he was doing during his interviews with police. There is no evidence that appellant was intimidated or frightened by the questioning. Appellant's personal characteristics during his questioning certainly do not weigh in favor of a finding of involuntariness. Further, the interrogation itself, as explained above and as supported by the videotape, was not coercive. There are no threats, no promises of leniency nor any improper influences present. The interrogation did not overpower appellant and lead him to do something he would not otherwise have done.

Under the totality of the circumstances, the trial court was entirely correct in finding that appellant's statements to the police and the

prosecutor were voluntary. Appellant's statements were thus properly admitted and his claim that the trial court erred in declining to suppress his statements should be denied.

IV. CALJIC No. 2.15 IS CONSTITUTIONAL

Appellant asserts that CALJIC No. 2.15, given to the jury here, unconstitutionally reduced the prosecutions burden of proof. (AOB 200-211.) Appellant is wrong.

CALJIC No. 2.15 deals with the inference that may be drawn with respect to theft-related offenses when a defendant is found to be in conscious possession of recently stolen property. At trial, defense counsel objected to the giving of this instruction (25 RT 7096) but the trial court overruled the objection and instructed the jury as follows:

> If you find that a defendant was in conscious possession of recently stolen property, the fact of such possession is not by itself sufficient to permit an inference that the defendant is guilty of the crime of robbery or burglary. Before guilt may be inferred, there must be corroborating evidence tending to prove the defendant's guilt. However, this corroborating evidence need only be slight and need not by itself be sufficient to warrant an inference of guilt.
>
> As corroboration, you may consider the attribute of possession-time, place and manner, that the defendant had an opportunity to commit the crime charged, the defendant's conduct, his false or contradictory statements, if any, and/or other statements he may have made with reference to the property, a false account of how he acquired possession of the stolen property [or] any other evidence which tends to connect the defendant with the crime charged.

(26 RT 7137-7138)

Appellant now asserts that this instruction

> affirmatively instructed the jury -- in a manner which undercut the proof-beyond a reasonable doubt standard-that 'slight' corroborating evidence beyond a factual finding that 'defendant

> was in conscious possession of recently stolen property' was sufficient to prove appellant guilty of robbery or burglary.

(AOB 202.)

This Court recently rejected a similar challenge to CALJIC 2.15 in *People v. Parson* (2008) 44 Cal.4th 332. The defendant in *Parson,* like appellant here, claimed that CALJIC No. 2.15 unconstitutionally lessened the prosecutions burden of proof. This Court, in rejecting that claim, stated as follows:

> CALJIC No. 2.15 is properly given in cases in which the defendant's intent to steal is contested. (*People v. Smithey* (1999) 20 Cal.4th 936, 977[parallel cites omitted].) The instruction does not create a mandatory presumption that operates to shift the People's burden of proof to the defense, for the instruction merely permits, but clearly does not require, the jury to draw the inferences described therein. (*People v. Yeoman* (2003) 31 Cal.4th 93, 131[and cases cited],[parallel cites omitted].) Perhaps more to the point, there is nothing in the instruction that directly or indirectly addresses the burden of proof, and nothing in it relieves the prosecution of its burden to establish guilt beyond a reasonable doubt. (*People v. Prieto* (2003) 30 Cal.4th 226, 248 [parallel citations omitted].) In any event, given the court's other instructions regarding the proper consideration and weighing of evidence and the burden of proof, there simply 'is no possibility' CALJIC No. 2.15 reduced the prosecution's burden of proof in this case.' (Id. at p. 248 [parallel citations omitted].)

(*People v. Parson, supra*, 44 Cal.4th at pp. 355-356.)

Appellant offers no cogent reason for this Court to revisit its ruling in *Parson* that CALJIC No. 2.15 does not lessen the prosecution's burden of proof. Moreover, appellant's jury also received standard instructions concerning the weighing of evidence and the burden of proof. Thus, those same instructions also insured that here as in *Parson* there was no possibility that CALJIC No. 2.15 lessened the prosecutions burden of proof.

In sum, because CALJIC No 2.15 did not lessen the prosecution's burden of proof, appellant's claim to the contrary must be rejected.

V. APPELLANT'S CLAIM OF CUMULATIVE ERROR IS MERITLESS

Appellant asserts that the cumulative effect of the errors during the guilt phase of his trial requires the reversal of his convictions. (AOB 212-217.) Not so.

It is of course true that as appellant points out that where multiple errors have occurred during a defendant's trial that the reviewing court must consider their cumulative impact. (*People v. Hernandez* (2003) 30 Cal.4th 835, 875-877.) However, it is also true that where an examination of the record reveals that all of the claims of error made by the defendant are incorrect then their cumulative impact obviously cannot be cause for reversal. (*People v. Ray, supra,* 13 Cal. 4th at p. 348.)

Here, all of appellant's claims of error lack merit. As explained in detail, *ante*, the trial court did not err in denying appellant's motion for change of venue. Nor did the trial court err in denying appellant's *Batson-Wheeler* challenge. There was also no error in the trial court's denial of appellant's motion to suppress his statements made to the police and the prosecutor. Finally, the trial court did not err in instructing the jury with CALJIC No. 2.15. In light of the fact that appellant's claims of error are all without merit then so too his claim of cumulative error must fail. (*Ray, supra* 13 Cal.4th at p. 348.)

SPECIAL CIRCUMSTANCE/DEATH-ELIGIBILITY ISSUES

VI. CALIFORNIA'S FELONY-MURDER SPECIAL CIRCUMSTANCE ADEQUATELY NARROWS THE CLASS OF FIRST DEGREE MURDERERS ELIGIBLE FOR THE DEATH PENALTY

Appellant claims that California's felony murder special circumstance is unconstitutional because "it fails to sufficiently narrow the class of first degree murderers eligible for the death penalty." (AOB 218-231.) This Court has rejected this same argument on numerous occasions (see e.g. *People v. Stanley* (2006) 39 Cal.4th 913, 968; *People v. Gurule* (2003) 28 Cal.4th 557, 663; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1265-1266) and appellant offers no new or compelling reasons for overturning those decisions. Accordingly, appellant's claim must be rejected.

VII. CALIFORNIA'S MULTIPLE MURDER SPECIAL CIRCUMSTANCE ADEQUATELY NARROWS THE CLASS OF FIRST DEGREE MURDERERS ELIGIBLE FOR THE DEATH PENALTY

Appellant claims that California's multiple murder special circumstance is unconstitutional because it fails to distinguish in an objective and evenhanded way between those defendants who deserve death and those who do not. (AOB 232-238.) This Court has repeatedly rejected this claim (see e.g. *People v. Loker* (2008) 44 Cal.4th 691, 755; *People v. Stevens* (2007) 41 Cal.4th 182, 211; *People v. Boyette* (2002) 29 Cal.4th 381, 440.) and appellant offers no new or cogent reasons for reconsideration of those rulings. Therefore, appellant's claim must be denied.

PENALTY PHASE ISSUES

VIII. NO PREJUDICIAL JUROR MISCONDUCT OCCURRED BY VIRTUE OF JUROR Y.M.'S CONTACT WITH HIS PASTOR DURING PENALTY DELIBERATIONS

Appellant alleges that prejudicial juror misconduct in violation of his rights to due process and a fair trial occurred when juror Y.M. consulted his minister during penalty deliberations. Respondent submits that the contact between the juror and his pastor was not prejudicial misconduct.

A. Factual Background

The bulk of the relevant factual background concerning this claim is laid out in appellant's brief. (See AOB 240-263, citing relevant portions of the record.) However, in addition, respondent would note the following pertinent facts gleaned from Y.M.'s pastor Reverend Sutton's testimony at appellant's hearing on his motion for a new trial.

Juror Y.M. did not discuss the details of appellant's case with him. (60 RT 19394.) During their conversation, Sutton repeatedly told Y.M. that as a Christian he had responsibility to obey the laws of the land. (60 RT 19389, 19396, 19411.) Sutton told Y.M. that he would have to "vote his own opinion about whatever took place." (60 RT 19314.) Sutton was very clear that he never told or even encouraged Y.M. to impose the death penalty. He never suggested that Y.M. had a duty as a Christian to impose the death penalty. He never told Y.M. what to do. (60 RT 19411-19417.)

With these additional facts, respondent accepts appellant's recitation of the relevant background material concerning this claim as spelled out in appellant's brief at pages 240-263.

B. Applicable Law

"It is [typically] misconduct for a juror to consider material [citation] extraneous to the record. [Citations] Such conduct creates a presumption of prejudice that may be rebutted by a showing that no prejudice actually

occurred." (*People v. Mincey* (1992) 2 Cal.4th 408, 467.) However, it is also true that the introduction of what might be labeled outside information cannot be always deemed misconduct. (*People v. Lewis, supra,* 26 Cal.4th at p. 390.)

> The jury system is an institution that is legally fundamental but also fundamentally human. Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do is one of the strengths of the jury system. It is also one of its weaknesses; it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated. '[I]t is an impossible standard to require... [the jury] to be a laboratory, completely sterilized and freed from any external factors.' (*Rideau v. Louisiana* (1963) 373 U.S. 723, 733 (dis. Opn. Of Clark J.) [parallel citations omitted].) Moreover, under that 'standard' few verdicts would be proof against challenge.

(*People v. Marshall, supra,* 50 Cal.3d at p. 950 [parallel citations omitted].)

In the event misconduct is determined to have occurred, then a determination must be made whether such misconduct was prejudicial. In *In re Carpenter* (1995) 9 Cal.4th 634, 653, this Court explained the process involved:

> [W]hen misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can appear in two different ways.
>
> First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. Under this standard, a finding of `inherently' likely bias is required when, but only when, the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment. Application of this `inherent prejudice'

> test obviously depends upon a review of the trial record to determine the prejudicial effect of the extraneous information.

Second, "even if the extraneous information was not so prejudicial, in and of itself, as to cause 'inherent bias' under the first test," the nature of the juror misconduct along with the "totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose." (*Id.* at pp. 653-654.)

In determining whether there is actual bias, "[a]ll pertinent portions of the entire record, including the trial record, must be considered." (*In re Carpenter, supra*, 9 Cal.4th at p. 654.) This includes:

> the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant. For example, the stronger the evidence, the less likely it is that the extraneous information itself influenced the verdict.
>
> The judgment must be set aside if the court finds prejudice under either test.

(*Id.* at p. 654.)

> Whether prejudice arose from juror misconduct ... is a mixed question of law and fact subject to an appellate court's independent determination." (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) However, the reviewing court will "accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.

(*Id.* at p. 654.)

It must also be noted that a court's inquiry into whether extraneous material influenced the verdict is severely limited by Evidence Code section 1150, subdivision (a), which prevents inquiry into the deliberative process or processes. As this Court has stated,

> This statute distinguishes between 'proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved... .'

(*People v. Steele* (2002) 27 Cal.4th 1230, 1261.)

This Court has also repeatedly emphasized that

> before a unanimous verdict is set aside, the likelihood of bias under either test must be *substantial* .... [T]he criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. The jury system is fundamentally human, which is both a strength and a weakness. (*People v. Marshall, supra*, 50 Cal.3d at p. 950 [parallel citations omitted].) Jurors are not automatons. They are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias. To demand theoretical perfection from every juror during the course of a trial is unrealistic."

(*Carpenter, supra,* 9 Cal.4th at pp. 654-655, emphasis in original.)

C. Analysis

Appellant claims that juror Y.M.'s conversation with his minister constituted misconduct and that the State cannot rebut the presumption of prejudice that arose from such misconduct. Specifically, he argues that the minster's comments to Y.M. effectively overrode the court's instructions and told Y.M. that mercy was to play no part in his decision regarding whether to vote for death or life imprisonment for appellant. He also asserts that the conversation Y.M. had with his pastor was the critical factor that directly led to his decision to vote for the death penalty. (AOB 264-277.) Respondent submits that the conversation between juror Y.M. and his pastor was not prejudicial misconduct.

Initially, respondent concedes that juror Y.M.'s actions in contacting his minister to discuss his concerns regarding the death penalty during the penalty deliberations in this case constituted juror misconduct. (*People v.*

Danks (2004) 32 Cal.4th 269, 309.) However, as will be explained below, such misconduct was not prejudicial.

In *People v. Danks, supra*, this Court dealt with the exact issue raised by appellant: namely, a claim of juror misconduct arising out of conversations between jurors and their ministers during death penalty deliberations.[11] In *Danks*, after the first day of penalty deliberations two jurors K.A. and B.P. independently spoke to their respective pastors over the weekend in ways that were improper. Juror K.A. spoke with her pastor who noted that some pro-death penalty scriptures which K.A.'s husband had given to her were good scriptures and then jokingly told her that if he were a juror he would impose the death penalty on the defendant. Juror B.P. told her pastor she was a juror on a murder case and asked if "there was anything in the Bible which speaks against the death penalty." In response B.P.'s pastor told her that he thought he knew what case she was on and that if he were in her shoes he would not hesitate to give the defendant the death penalty. (*Danks, supra,* 32 Cal.4th at pp. 297-301.) In addition, juror K.A. brought into the jury room and read to other jurors the pro-death penalty passage that her husband had referred her to and her pastor had said was good scripture. (*Ibid.*) Nonetheless, this Court held that no prejudicial misconduct had occurred.

First, this Court found that particularly in light of the compelling penalty phase evidence against the defendant the misconduct of the two jurors was not inherently prejudicial. (*Id.* at pp. 304-310.) This Court also found that considering the nature of the misconduct and the surrounding

---

[11] Curiously, appellant although citing *Danks* for the general proposition that it is misconduct to discuss the case with a non-juror (AOB 266), does not discuss *Danks'* application to the instant case even though *Danks* dealt with the exact issue presented herein.

circumstances there was no danger that the two jurors were actually biased against the defendant. (*Ibid.*)

The situation here pales by comparison to *Danks*. Unlike in *Danks*, Pastor Sutton did not offer his view on the appropriateness of the death penalty in this particular case. In fact, to the contrary, Sutton repeatedly told juror Y.M. that he must make his own decision based upon the law of the land. (60 RT 19389, 19396, 19411.) In *Danks*, both jurors' ministers told the jurors that they would impose the death penalty on the defendant. (*Danks, supra*, 32 Cal.4th at pp. 297-301.) Moreover, in *Danks* juror K.A. brought into the jury room and read to the other jurors arguably pro-death penalty scripture. (*Id.*)

In contrast, Y.M. apparently never mentioned to the other jurors his conversation with Pastor Sutton. (See 60 RT 19223-19226, 19230-19232.) Even more fundamentally, the scriptures and the comments from the two ministers in *Danks* contain arguably an endorsement of the death penalty in the particular case. (*Danks, supra,* 32 Cal.4th at pp. 298-299.) Here that endorsement is lacking. Sutton merely pointed out to juror Y.M. that the Bible had passages which supported the death penalty. (60 RT 19418-19419.) Certainly, juror Y.M. could have located such passages on his own. This Court has noted that privately reading one's Bible and considering one's religious beliefs or values during deliberations is not misconduct. (*Lewis, supra*, 26 Cal.4th at pp. 389-390.)

It is no doubt true that the strength of the penalty phase evidence in aggravation presented here was not as strong as that present in *Danks*. (See *Danks, supra*, 32 Cal.4th at p. 305 [Defendant was a remorseless multiple murderer who implied he would continue to be violent in prison and threatened the jury].) However, there was compelling aggravating evidence offered against appellant. He killed two people in cold blood and mercilessly shot a prostitute in the back and left her for dead. He then

masterminded an escape from the county jail while awaiting trial on these charges. Finally, he had a long and violent criminal record. Thus, the aggravating evidence was fairly strong.

Moreover, as noted above the biblical verses in the instant case were not shared by juror Y.M. with the other jurors and did not encourage Y.M. to impose the death penalty nor did the verses Pastor Sutton referred Y.M. to propound an alternative set of standards for when to apply the death penalty. (See *People v. Williams* (2006) 40 Cal.4th 287, 334-335. [reading of biblical verses not prejudicial misconduct where verses were in response to jurors concerns about sitting in judgment and merely counseled deference to governmental authority].) Based upon the above, juror Y.M.'s conversation with his minister regarding the death penalty was not "inherently and substantially likely to have influenced" Y.M. (*In re Carpenter, supra,* 9 Cal.4th at p. 653.)

Having concluded that this extraneous conversation was not inherently prejudicial, we must determine whether it is substantially likely that Y.M. was nevertheless actually biased against appellant as a result of his conversation with Pastor Sutton. (*People v. Nesler* (1997) 16 Cal.4th 561, 579.)

According to the trial court, and as amply supported by the record, Y.M.s inquiry to Pastor Sutton was merely whether imposing the death penalty would be inconsistent with his Christian beliefs. (60 RT 19423-19424.) In response, the minister told Y.M. that he had an obligation to follow mans law and also showed him that the Bible did indeed demonstrate that one could be a good Christian and impose the death penalty. (60 RT 19389, 19396, 19411, 19418-19419.) Pastor Sutton repeatedly told Y.M. that he (Y.M.) would have to make up his own mind on what to do. (60 RT 19314.) Also Pastor Sutton never suggested to Y.M. that he should be swayed by anything the Bible said. (60 RT 19411-

19417.) Again it bears repeating that the main message imparted to Y.M. from his minister was to follow the law of the land. Moreover, Y.M. never shared any of the information his minister gave him with the other jurors further evidencing a lack of bias on his part.

As this Court has recognized, "[a] juror's disclosure of extraneous information to other jurors tends to demonstrate that the juror intended the forbidden information to influence the verdict and strengthens the likelihood of bias" (*Nesler, supra,* 16 Cal.4th at p. 587), whereas a juror who is not biased will realize that the other jurors will not consider the improper information and is, therefore unlikely to mention it. (*Carpenter, supra*, 9 Cal.4th at 657; see also *Danks, supra,* 32 Cal.4th at p. 310.) Thus, the jurors conduct and the circumstances surrounding it do not show a substantial likelihood that Y.M. was actually biased against appellant. Additionally, the penalty record in this case further lessens the possibility that appellant suffered actual bias as a result of Y.M.'s conversation with his pastor. (*Carpenter, supra,* 9 Cal.4th at p. 653.)

Appellant, while inexplicably failing to discuss *Danks*, cites to a number of cases where a *prosecutor* invoked religious authority in his closing argument. (See AOB 271-273, citing cases.) Appellant attempts to rely on language from those decisions in which courts have rightly stated that the use of religious authority to argue for or against the death penalty is improper. However, those cases are inapposite because here no one including juror Y.M. ever used or relied on any religious authority to argue in support of imposing the death penalty on appellant. There is nothing in the record remotely suggesting that any juror used the Bible to argue that appellant deserved the death penalty. To the contrary the only evidence in the record is that Pastor Sutton told Y.M. that he should rely not on the Bible but on the law of the land. (60 RT 19389, 19396, 19411.) Thus, the cases cited by appellant are not relevant here. Moreover, the implication

made by appellant that juror Y.M. considered his minster's counsel or any Biblical passages in arriving at his own personal decision to impose the death penalty on appellant involves an improper look, albeit one done by implication, into juror Y.M.'s deliberative process. (See *Danks, supra*, 32 Cal.4th at p. 302.)

Finally, appellant's argument that Pastor Sutton's counsel effectively overrode the court's instructions and provided the critical determinate in Y.M.'s decision to vote for the death penalty (see AOB 276-277) is simply not supported by the record. As the trial court found, Y.M.'s minister told him that he was to follow the law of the land and also showed Y.M. that imposition of the death penalty was not inconsistent with his Christian beliefs. (60 RT 19423-19424.) In adopting a completely different view of the import of the minister's comments, appellant relies on one sentence in the lengthy transcript recounting the improper conversation. In that portion, Y.M. recalls being told by his minister that he could go with the law of the land or go with mercy sympathy and grace. (60 RT 19226.) Appellant seizes on this and takes it out of context in order to claim that somehow Y.M. was told that mercy or sympathy play no part in the penalty decision. As appellant would have it, once so misinformed Y.M. then immediately voted for death. However, a review of the entirety of the testimony shows that the key import of what Y.M. was told was that it was his decision and he should follow the law of the land. There was no discussion about any instruction that did or did not call for the use of mercy or sympathy. Thus, viewed in context it is clear that contrary to appellant's suggestions, the passage he cites is merely Y.M.'s recollection that his minister told him that he must apply the law of the land rather than rely on his sense of Christian mercy. This is what the trial court found. (60 RT 19423-19424.) Rather than suggest something improper that comment tells Y.M. to do things the right way by following the instructions as given

by the trial judge. In fact, applying Christian mercy in lieu of the court's instructions would be improper since that would be substituting ones religious beliefs for the law in this case. Further, both Y.M. and his minister repeatedly stated that Pastor Sutton told Y.M. to follow the law and make his own decision. Once Y.M. was satisfied that his religion allowed him to vote for the death penalty if the law of the land called for it then he was able to follow that law and vote for death. He was not encouraged to vote for death but was told that his religion permitted it. Rather than the conversation pushing Y.M. to vote for death as appellant suggests the conversation removed an improper impediment and allowed Y.M. to follow the law. That is what he did. Thus, notwithstanding the comment cited by appellant, under the totality of the circumstances there is not a "substantial likelihood of juror bias." (*Carpenter, supra,* 9 Cal.4th at 653.)

In sum, for the reasons stated above, although it was misconduct for juror Y.M. to speak with his minister about the death penalty, the misconduct was not prejudicial. Accordingly, appellant's claim must be denied.

IX. APPELLANT HAS FAILED TO PRESERVE FOR REVIEW HIS CLAIM THAT THE TRIAL COURT ERRONEOUSLY DENIED HIS CHALLENGE FOR CAUSE OF PENALTY PHASE JUROR S.B.; EVEN WERE THIS CLAIM PRESERVED IT HAS NO MERIT

Appellant contends that the trial court improperly denied his challenge for cause of juror S.B. who ultimately served on his second penalty phase trial. (AOB 278-290.) Specifically, appellant argues that the court should have granted his challenge for cause because juror S.B. indicated that he would automatically vote for death under the facts of appellant's case. According to appellant, this failure to grant his challenge was prejudicial because "defense counsel exhausted his peremptory challenges and S.B. sat on appellant's second penalty jury which returned a

death verdict." (AOB 278.) Respondent submits that appellant is wrong on the law and wrong on the facts. Contrary to appellant's assertions, defense counsel did not exhaust his peremptory challenges as to appellant's second penalty phase jury. Nor did counsel complain about the composition of that jury. Thus, appellant has waived this claim. Moreover, even on the merits appellant cannot prevail as the record supports the trial court's denial of his challenge of S.B.

> To preserve a claim of trial court error in failing to remove a juror for bias in favor of the death penalty, a defendant must either exhaust all peremptory challenges and express dissatisfaction with the jury ultimately selected or justify the failure to do so.

(*People v. Beames* (2007) 40 Cal.4th 907, 924; see also *People v. Avila* (2006) 38 Cal.4th 491, 539.) Here appellant did not make a peremptory challenge to juror S.B. who he claims should have been excused for cause. Further, appellant did not exhaust his 20 peremptory challenges; indeed, he had four remaining peremptories at the time he accepted the jury. (See 46 RT 13326-13329.) Nor did appellant complain about the composition of the actual jury. (*Id.*) Moreover, he makes no attempt to justify his failure to exhaust his challenges and complain about the actual jury that was chosen. Accordingly, appellant has failed to preserve this claim for review. (*People v. Beames, supra*, 40 Cal.4th at 924.)

Inexplicably, appellant repeatedly misstates the record and asserts that he did exhaust his peremptory challenges and complained about the jury's composition. (See AOB 283, 289-290.) He did neither.

The record clearly shows that at the time the actual jury was selected with S.B. on it appellant had four unused peremptory challenges. Moreover, counsel most certainly did not complain about the composition of the actual jury. (See 46 RT 13326-13329.) Counsel did however, exhaust his peremptories with respect to the selection of one of the alternate

jurors and did request an additional peremptory with regard to that alternate juror. (See 46 RT 13332-13336.) Because that alternate juror never served as an actual juror in appellant's case, appellant could not have been prejudiced by any failure to give him an additional peremptory challenge for that alternate juror's seat. (*People v. Hinton* (2006) 37 Cal.4th 839, 860.)

Even assuming that this claim had been properly preserved for review it lacks merit. Under well-settled principles:

> A prospective juror may be challenged for cause based upon his or her views regarding capital punishment only if those views would " 'prevent or substantially impair'" the performance of the juror's duties as defined by the court's instructions and the juror's oath.' [Citations] 'Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. [Citation]' [Citation.] On appeal we will uphold the trial court's decision if it is fairly supported by the record, and accept as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has given conflicting or ambiguous statements. [Citations]

(*People v. Farnam, supra,* 28 Cal.4th at p. 132, fn. omitted.)

Although some of juror S.B.'s remarks made during voir dire could be construed as suggesting he might automatically vote for death, other remarks he made indicated an ability and a willingness to be fair and open-minded when deciding on the appropriate penalty for appellant.

For example, S.B. stated in response to questioning from the trial court that the death penalty should not be automatic and it would be for the jury to decide the appropriate penalty after weighing other factors. (41 RT 11778.) Further, S.B. agreed with the court that whether the crime was impulsive and whether the defendant had used alcohol or drugs were proper things for the jury to consider when trying to determine life in prison versus death. (41 RT 11779.) It is true that after these comments, S.B. seemed to

indicate that he would be inclined to impose the death penalty under the circumstances present in appellant's case (see 41 RT 11782-11785.), but again those comments are followed by others that suggest that S.B. would consider the circumstances and was not an "automatic" death juror. (See 41 RT 11791-11792.) The trial court determined that S.B. could be fair and follow the law as given. (See 46 RT 13189-13191.) Given S.B.'s conflicting statements and the trial judge's opportunity to question him and evaluate his credibility, it is appropriate to defer to the lower court's determination regarding S.B.'s true state of mind regarding the penalty phase decision. (See *People v. Beames, supra,* 40 Cal.4th at p. 925.) Apparently, defense counsel agreed that juror S.B. was not an automatic death juror who was biased against appellant since he declined to exercise one of his remaining peremptory challenges to excuse S.B. from the jury. (*Ibid.*)

In sum, appellant has failed to preserve this claim for review and in any event the trial court correctly rejected the defense's challenge for cause of juror S.B. Thus, appellant's claim of error must be denied.

X. THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENTS OF APPELLANT'S PENALTY PHASE TRIAL

Appellant asserts that the prosecutor engaged in numerous instances of misconduct in his penalty phase closing arguments in violation of appellant's federal constitutional rights to due process and a fair trial. Specifically, appellant identifies the following areas of alleged improper actions by the prosecutor: a) arguing facts not in evidence by way of the impact of the murder of Gregory Renouf on his family; b) arguing that the jury should conclude that appellant's sister-in-law was adversely impacted by her father's death and favored appellant's execution based upon answers to questions she was not asked; c) arguing the absence of remorse as an

aggravating factor; d) arguing that the jury should show appellant the same mercy he showed his victims; e) disparaging a jury instruction concerning the consideration of appellant's mental health; and f) arguing that appellant deserved the death penalty because he was a neglectful parent. (AOB 291-292.) Respondent submits that appellant mischaracterizes the actions of the prosecutor in each of the cited instances and that properly viewed in context none of the actions that appellant complains of constituted misconduct. Moreover, even if any of these arguments could be seen as improper they were individually and collectively harmless in any event.

In order to make out a federal constitutional violation based upon the conduct of the prosecutor, defendant must establish conduct so egregious that it infects the trial with such unfairness as to make the resulting conviction a denial of due process. (*People v. Padilla* (1995) 11 Cal.4th 891, 939.) To preserve such a claim for review, the defense must make an on the record objection and request an admonition unless such requests would be futile. (*People v. Bennett* (2009) 45 Cal.4th 577, 595.) A defendant asserting an excuse for the objection and admonition requirement must find support for the exception in the record. The ritual incantation that an exception applies is not enough. (*People v. Panah* (2005) 35 Cal.4th 395, 462.) With this legal backdrop in mind, respondent now will analyze each claim of misconduct.

A. Arguing Facts Not In Evidence Concerning The Family Of Gregory Renouf

In arguing for the death penalty, the prosecutor briefly pointed to the impact that the murder of Gregory Renouf had on his family. (59 RT 18953-18954, 19080.) The defense objected asserting that this was improper since no family of Mr. Renouf had in fact testified at the penalty phase trial. (59 RT 18953.) The trial court overruled the objection (59 RT

18953-18954.) which appellant now renews before this Court. (AOB 293-297.)

It is true that no family of Gregory Renouf testified at the trial, however, it is also well-settled that the prosecutor may make reasonable inferences from the record. (*People v. Cook* (2006) 39 Cal.4th 566, 613.) As the prosecutor noted, "Mr. Renouf wasn't born by an egg." (59 RT 18954.) Thus, it was a reasonable inference to draw that those who were close to Mr. Renouf were impacted by his murder. Prosecutors are allowed significant latitude in making their closing arguments. (*People v. Bennett, supra,* 45 Cal.4th at p. 615.) There was nothing improper in the brief comments made by the prosecutor that those who were close to Mr. Renouf, particularly his friends and family, were impacted by his murder.

Appellant argues that the prosecutor's comments were based upon pure conjecture. (AOB 297.) On the contrary, it is not conjecture but a reasonable assumption that a living breathing human being has people that are close to him somewhere. Those people wherever they are would be impacted by that person's murder. Moreover, the prosecutor's comments were likely also designed to respond to the anticipated argument from the defense that appellant's family and particularly his children loved him and that his life was therefore worth sparing. In light of that argument, vigorously advanced by defense counsel (see 59 RT 19094-19095), the prosecutor's argument that murder victim Gregory Renouf had a life and people who cared about him as well was perfectly appropriate. There was no error in the prosecutor's brief comments.

Further, in light of the fact that appellant committed two brutal execution style murders, cold-bloodedly shot a prostitute in the back and left her to die, and then masterminded an escape from prison, the prosecutor's brief comments about the impact Renouf's murder had on those close to him cannot have affected the penalty verdict.

B. Arguing Facts Not In Evidence Concerning The Impact Of Larry Shockley's Death Upon His Stepdaughter

During his rebuttal argument, the prosecutor suggested to the jury that Denise Underhal, murder victim Larry Shockley's stepdaughter, missed him despite the fact that she had not specifically testified to that effect. The prosecutor told the jury:

> [D.A. Dunlap]: . . . [Mr. Fox] chastised the District Attorney, myself, said, Don't speculate about the victims having a family because they have the right to testify. They have the right to sit in that courtroom. That's what he said. He says, "Anything else is speculation. No evidence that these people had family."
>
> All right. Denise Underhahl is family. What? Is she going to be called to the stand and asked if she missed her grandfather – her father? Grandfather to her children? And then have to go back home, have her children play with Amanda [appellant's daughter], deal with that pressure of testifying in court?
>
> Counsel had the same opportunity to talk about that. Counsel did not ask Denise Underhal if she felt Paul Hensley deserved the death penalty.
>
> Is that a fair thing to ask someone who has to go home and deal with her sister, nieces, and nephews?

(59 RT 19079-19080.)

Appellant has twisted the prosecutor's brief and innocuous comments and thereby claimed he committed misconduct improperly implying that Ms. Underhal supported appellant's execution and missed her stepfather. Moreover, appellant asserts that the prosecutor improperly implied that he refrained from eliciting such statements from Underhal directly out of decency given her relationship with appellant's family. (AOB 297-302.) These assignments of misconduct are meritless.

First, appellant has waived these assertions of error by failing to object below and request an admonition. (*People v. Bennett, supra* 45 Cal.4th at p. 595.) Appellant's excuse for this failure is a simple

recantation of the standard argument that objection would have been futile because the misconduct was pervasive. (See AOB 319-320, citing *People v. Hill* (1998) 17 Cal.4th 800, 821.) Appellant's reliance on *Hill, supra*, to excuse his default is unavailing.

> There the prosecutor subjected the defense 'to a constant barrage of ...unethical conduct, including misstating the evidence, sarcastic and critical comments demeaning defense counsel, and propounding outright falsehoods,' and the trial court consistently failed to curb the prosecutor's excesses. (*Id.* at p. 821[parallel citations omitted].) Such egregious conduct did not occur here.

(*People v. Hinton, supra*, 37 Cal.4th at 903, citing *People v. McDermott* (2002) 28 Cal.4th 946, 1002.) Appellant has therefore not preserved this claim for review.

Assuming arguendo that this claim was properly preserved it lacks merit in any event. Once again, it is well-settled that the prosecutor may make reasonable inferences from the evidence presented, and enjoys wide latitude in his closing argument. (*People v. Bennet, supra*, 45 Cal.4th at p. 614.) Denise Underhal testified that she lived in the same duplex as the victim Larry Shockley. She testified that they were close. She testified that she saw him on a regular basis. (48 RT 13781-13804.) Given this testimony it is a reasonable inference that she was negatively impacted by his death. As this Court has held on numerous occasions, the victims family member need not specially recount that the victim is missed by them or that his or her death had an impact on them. The prosecutor may make this argument as a reasonable inference from the fact of the relationship. (See e.g. *People v. Montiel* (1993) 5 Cal.4th 877, 934-935; *People v. Wrest* (1992) 3 Cal.4th 1088, 1107-1108; *People v. Howard, supra,* 1 Cal.4th at pp. 1190-1191.) Thus, there was nothing improper about the prosecutor's brief comment implying that Ms. Underhal was impacted by the death of her stepfather.

As to appellant's argument that the prosecutor implied that Ms. Underhal favored the death penalty for appellant, respondent does not read the cited passage as implying anything of the sort. It was clear that Ms. Underhal had conflicted feelings and that appears to be what the prosecutor was getting at. Her kids played with appellant's daughter. Her sister was appellant's wife. However, she was also very close to Larry Shockley. (48 RT 13781-13804.) Thus, the reasons for any conflict were apparent and would have been a reasonable inference from the facts presented in this case. The prosecutor was explaining to the jury the difficulty Ms. Underhal faced due to her family situation. He also implied properly that both he and defense counsel may not have pressed Ms. Underhal too much due to this precarious situation. It is important to note here that prosecutorial misconduct implies a deceptive or reprehensible method of persuading the jury. Absent conduct likely to persuade, there can be no misconduct. (*People v. Price* (1991) 1 Cal.4th 324, 448.) Here, nothing that was said concerning Denise Underhal seems to be likely to persuade the jury. Rather it appears to be the prosecutor attempting to explain why, in light of defense counsel's objections concerning the references to the family of Mr. Renouf (see arg. X, (a), *ante*), Ms. Underhal was not asked directly about the impact of Larry Shockley's murder on her and her family. Nothing improper is present in these brief comments. Moreover, in light of the fact that appellant committed two brutal execution-style murders, cold-bloodedly left his third victim to die, and then masterminded an escape from prison, the prosecutors brief comments concerning Denise Underhal cannot have affected the penalty verdict.

C. Improperly Arguing A Death Verdict Based Upon Appellant's Lack Of Remorse

During his closing argument the prosecutor briefly referred to appellant's lack of remorse and concern for the victims as evidenced by the

videotaped conversations between appellant and the detectives that were played for the jury. The relevant remarks were as follows:

> [D.A.]: Ladies and gentlemen, you saw that tape [of defendant's statements to Detectives Faust and Ferrari].... [W]atch it in that interview room. Contact Detective Faust.
>
> Why are you fucking with me? I don't know what is going on. I'm asleep at the wheel. I don't know what's going on. Next thing I know I'm in here.
>
> Remorse? When you watch that videotape what are you doing?
>
> Let's talk about Detective Faust. Saw his demeanor, professionalism. He starts to question Mr. Hensley about a wallet in the car. Mr. Hensley invokes. I think that's enough. So then we watch several hours of him sleeping. Several hours.
>
> Didn't you see later in the afternoon Detective Faust and Detective Ferrari come in, take photographs of him. Told him he's going to be processed at the jail and Mr. Hensley reinitiates the interview.
>
> Why are you working me so hard? I didn't do nothing.
>
> Remorse? Detective Faust interviews Mr. Hensley and he lies.....
>
> Ladies and Gentlemen, when you look at that videotape you've seen already, there is no remorse for those victims. Not one time does he ask about the victims. The only thing he says about the victims is, I'm booked in for three murders today. He doesn't even know Stacey Copeland is alive.
>
> There is no remorse. No passion for the victims. The only sympathy you see is for Mr. Hensley himself, wondering what is going to happen to him.

(59 RT 18907-18910.)

Nowhere during these brief comments does the prosecutor even so much as imply that this lack of remorse and concern for his victims should be used by the jury as a factor in aggravation. As is true with much of the prosecutor's arguments what he was doing here was discussing the lack of

mitigation evidence. Appellant simply offers nothing other than his bare assertions to suggest that the prosecutor urged the jury to use this lack of remorse as an improper aggravating factor. (See AOB 302-307.)

"The prosecutor nowhere asked the jury to consider lack of remorse to be an aggravating factor." (*People v. Hinton, supra*, 37 Cal.4th at pp. 907-908.) Comment on the lack of remorse as demonstrating the lack of mitigating evidence is entirely proper. "The presence or absence of remorse is a factor '"universally" deemed relevant to the jury's penalty determination.'" (*People v. Hinton, supra*, 37 Cal.4th at p. 907, citing *People v. Marshall* (1996) 13 Cal.4th 799, 855.)

Moreover, the prosecutor's comments regarding appellant's lack of remorse also did not, contrary to appellants suggestions, constitute an inappropriate comment on appellant's exercise of his privilege not to testify. The comments clearly referenced the videotape confession made following appellant's arrest and did not in any way relate to appellant's failure to testify at the penalty phase trial. That is entirely proper. (*People v. Clair* (1992) 2 Cal.4th 629, 662.

Finally, appellant neither raised an objection nor sought an admonition to the jury regarding the prosecutor's comments concerning his lack of remorse. Therefore he has waived this claim of error. (*People v. Marshall, supra*, 13 Cal.4th at p. 855.) His belated claim of excuse for his failure to object and request an admonishment is unavailing. (*People v. Hinton, supra*, 37 Cal.4th at p. 903). Appellant has therefore not preserved this claim for review.

D. Improperly Arguing That The Jury Should Show Appellant The Same Mercy He Showed The Victims And Their Families

Appellant urges error from the prosecutor's argument that the jury should show the same mercy to appellant that he showed to his victims and

their families. (See AOB 308-309, citing 59 RT 18953.) This Court has repeatedly rejected similar claims in the past finding that it is proper argument to suggest that a defendant deserves the same sympathy or mercy that he showed his victims. (See *People v. Hinton, supra*, 37 Cal.4th at p. 908; *People v. Hughes* (2002) 27 Cal.4th 287, 395; *People v. Ochoa* (1998) 19 Cal.4th 353, 464-465.) Appellant offers no new or compelling reasons for this Court to reconsider its prior rulings on this issue. Moreover, appellant did not properly preserve this issue for review because he failed to object to the prosecutor's allegedly improper remarks. (*People v. Bennett, supra,* 45 Cal.4th at p. 595.) His belated excuse for this failure is unavailing. (*People v. Hinton, supra*, 37 Cal.4th at 903.)

E. Improperly Disparaging the Jury Instruction Regarding Consideration of Mental or Emotional Disturbance

The prosecutor did indeed as appellant points out (see AOB 310-312) preface his discussion of the issue of the possible mitigating effects of any emotional or mental disturbance that appellant may have been under at the time of the offenses with the statement, "you're going to get an instruction, believe it or not." It is also true as appellant points out that the prosecutor was signaling that this was a factor that they should not take too seriously. However, contrary to appellant's argument, there was absolutely nothing improper in the prosecutor's comments. He was not telling the jury to disregard the law. He was merely stating, albeit in a somewhat flip manner, that this was not a mitigating factor the jury should seriously consider because there was no substantial evidence that appellant was under the influence of any mental or emotional disturbance at the time he committed his crimes.

The instruction regarding the aggravating and mitigating factors that appellant's jury was given states in its preface that "you shall consider, take into account and be guided by the following factors, *if applicable*." (8 CT

2190, emphasis added.) Thus, the instruction is permissive in that it tells the jury that certain aggravating and mitigating factors may be present and applicable but others may not. The prosecutor was telling the jury that in this case the mitigating factor concerning mental or emotional disturbance was not present and they need not consider it. In other words he was saying it wasn't applicable. That is not urging the jury to disregard the law. It is permissible and vigorous argument. (See *People v. Valencia* (2008) 43 Cal.4th 268, 301.) The prosecutor was telling the jury that there was no substantial evidence concerning this factor; therefore, they should disregard that instruction. This is proper argument. Prosecutors are allowed significant latitude in making their closing arguments. (*People v. Bennett, supra*, 45 Cal.4th at p. 615.) Moreover, after an objection by defense counsel, the prosecutor withdrew the "believe or not remark" and asked that it be stricken from the record. Thus, even if it were error, the prosecutor's momentary misstatement cannot have impacted the penalty determination. Finally, after the prosecutor's request that the disparaging remark be stricken, defense counsel, apparently satisfied, did not request an admonition be given, thus any claim of error in this regard has been forfeited. (*People v. Hinton, supra*, 37 Cal.4th at p. 905.)

F. Improperly Arguing That Appellant Deserved The Death Penalty Because He Was A Neglectful Parent

In the prosecutor's argument he repeatedly referred to appellant's poor parenting to demonstrate a lack of mitigating evidence in the penalty phase trial. Incredibly, without any support in the record, and, despite direct contrary evidence in the very passages he cites, appellant asserts that the prosecutor in fact argued that appellant's poor parenting should be a factor in aggravation. (AOB 313-317.) His argument defies the law and the facts and must be rejected.

The prosecutor's comments regarding appellants poor parenting were as follows:

> Is he responsible for his conscious decisions at the time he takes a wife and begins a family? Is he responsible for his conscious decisions when he has a lifetime abuse of methamphetamine, brings children into this world?

(59 RT 18883.)

> [Anita Hensley] brought the kids to court for you to see, Ladies and Gentlemen. And that's what we are here about. Make no mistake. Because that's mitigation, under that factor (I). Okay. Fair enough.
>
> But when you consider those children, you consider the parent Paul Hensley has been to them. You consider that one of those children was consummated when he was a fugitive from custody. The third child, he's been incarcerated more than half the life. And almost the same with the other two.
>
> Consider the parent he had been when he abandoned them on his drug runs.
>
> Consider the parent he was as provider and as role model, consider that when you want to talk about those children, the effect of Paul Hensley on them.

(59 RT 18927-18928 [emphasis added].)

> I mean, you look at that mitigation, as you sit there right now thinking of the mitigation, you expected a burning building. You expected heroic effort. You expected a history of being a. good parent. You expected conduct that you can look to and say, "This man deserves a break. He has given to society. And although he has taken, he has earned the right to be given a break."

In this case, there is nothing of that. His parenting has been abusive. His violence has been repeated. His history has been constant, and has graduated to, finally, multiple murder.

.... [¶] [¶]

It really comes down to one thing I told you about: And, that is, the defendant has children. [¶.] How much of a factor in mitigation is that to be weighed?

I want to remind you that there's victims in this case. That the victims, they had no choice. They didn't.

Mr. Renouf had no choice but to be shot and killed and left in a vacant lot. [¶.] Stacy Copeland had no choice when she was shot in the back and left for dead. None. [¶.] Larry Shockley was judged by the defendant, Paul Hensley, and executed.

But the defendant had a choice to subject his children to this. He had a choice not to do this, with the responsibilities that he has.

Counsel points out that Paul Hensley should have the right to be an anchor for his children. And you better look at that closely and how important is that, and is that fair? And, finally, is that good? Paul Hensley's children will make it in spite of Paul Hensley, not because of him.

Counsel says nurturing, guidance, protection. Paul Hensley is not going to offer those.

(59 RT 19081-19083.)

It is true, that under the rule of *People v. Boyd* (1985) 38 Cal.3d 762, evidence of a defendant's character or background can only be used to extenuate the gravity of the crime; it may not be used as a factor in aggravation. (*Id.* at pp. 775-776). However, contrary to appellant's

argument, and as amply documented in the cited passages, the prosecutor never argued appellant's character as a poor parent as a factor in aggravation. Rather he merely argued that appellant's good character as a provider for his children and as a loving parent was lacking. Respondent counts four uses of the word mitigation in the above cited passages and not one use of the word aggravation. (See 59 RT 18927-18928, 19081-19083.) There is simply not a scintilla of evidence to support appellant's bare assertion that this evidence was improperly argued as a factor in aggravation. "The prosecution may rebut evidence of good character...and may argue that this mitigating factor is inapplicable. . . ." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1033.) The prosecutor's comments were proper argument concerning the lack of mitigating good character evidence. Appellant's unsupported claim to the contrary must be reject. Further, not surprisingly, defense counsel did not object to the prosecutor's argument and thus this claim of error has not been preserved for review. (*People v. Bennett, supra,* 45 Cal.4th at 595.)

G. Cumulative Effect Of Prosecutorial Misconduct

Appellant contends that the cumulative effect of all of the instances of prosecutorial misconduct rendered his trial fundamentally unfair in violation of his federal constitutional rights to due process and a reliable jury verdict. (AOB 319-328.) Respondent submits that based on the above cited authorities and argument no misconduct occurred, therefore there no is no cumulative error. (*People v. Ray, supra,* 13 Cal.4th at p. 348.) Moreover, contrary to appellant's assertions the penalty phase evidence in aggravation was overwhelming. Appellant committed two cold-blooded murders and burglarized the residence of both of his victims after he shot and killed them. He also shot a prostitute after paying her for sex and left her to die in an isolated area. Luckily she survived, but she was paralyzed and testified in her wheelchair as to appellant's depravity and cruelty in the

manner in which he tried to kill her. Appellant also had a long and violent record which was amply demonstrated to the penalty jury. Finally, appellant masterminded an escape from jail while awaiting trial on his capital murder charges and had numerous instances of aggressive misconduct while in custody. In sum, appellant was not a sympathetic figure. When this is weighed against the minor nature of the errors, if any, by the prosecutor there is no likelihood that any misstatements affected the verdict in a way as to render appellant's penalty determination fundamentally unfair. Accordingly, his claims must be rejected.[12]

XI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF APPELLANT'S LACK OF REMORSE AT THE PENALTY PHASE TRIAL

Appellant asserts that "the trial court erred in permitting the prosecutor to question Steven McElvain, a psychiatric technician who worked at San Joaquin County Jail, regarding whether appellant had expressed remorse regarding his crimes." (AOB 329; see also AOB 329-340.) Appellant further claims that defense counsel "properly objected to this evidence, which represented an illicit effort on the prosecutor's part to inject lack of remorse into the jury's consideration as a nonstatutory aggravating factor favoring death." (*Id.*) Respondent submits that first, appellant has misstated the record. Despite his claim to the contrary, the record reflects that defense counsel did not make an on the record objection to this line of questioning. Thus, appellant has waived this claim. Even on the merits, his claim fails. As will be shown, the trial court did not abuse its discretion in admitting this evidence. Finally, there is not a scintilla of

---

[12] For the reasons stated in the above argument, appellant's related claim that the trial court improperly denied his motion for a mistrial below on the same grounds of prosecutorial misconduct he raises here (see AOB 318-319) must also be rejected. (See *People v. Bennett, supra,* 45 Cal.4th at p. 613.)

evidence that the prosecutor used this testimony regarding appellant's apparent lack of remorse as an aggravating factor.

A. Procedural Background

The relevant portions of the record necessary for resolution of this claim are accurately laid out in appellant's brief. (See AOB 329-334, citing record at 58 RT 18582-18589, 18623-18625.) Given that, respondent does not repeat then here.

B. There Was No Error in the Admission of This Testimony

Initially, respondent notes that, as is apparent from the above cited portions of the record and despite appellant's contrary assertion (see AOB 329, 334), defense counsel did not object to the admission of this evidence. Defense counsel did indeed raise a concern regarding this line of questioning; however, this was not during the actual testimony but rather at the hearing regarding this testimony which was held outside the presence of the jury. (See 58 RT 18588-18589.) The record reflects no actual objection during the questioning and testimony concerning appellant's apparent lack of remorse. (See 58 RT 18624-18625.) Having failed to properly object to this line of questioning below, appellant has waived any claim of error here. (*People v. Hinton, supra,* 37 Cal.4th at p. 893.)

Additionally, it is apparent that counsel's primary concern at the pre-testimony hearing was that the questions concerning lack of remorse be limited to January of 1995 rather than open ended questions concerning expressions of remorse. Once the trial court made it clear the questions concerning expressions of remorse would be limited, defense counsel seemed satisfied. (See 58 RT 18588-18589.) Thus, arguably, counsel did not even object at the pre-testimony hearing along the lines that appellant now suggests. Regardless, there is no on the record objection during the

now objected to testimony thus, the claim is waived. (*Hinton, supra,* 37 Cal.3d at p. 893.)

Assuming arguendo that this claim were properly preserved for review, it lacks merit. It is well settled that the admission of evidence is committed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. (*People v. Vieira* (2005) 35 Cal.4th 264, 292.) Here, the trial court did not abuse its discretion in admitting the testimony that appellant had not expressed remorse for his victims. Appellant sought to admit the testimony of this witness in order to offer a possible explanation for prosecution evidence that appellant had had major disciplinary problems while confined in the jail in January 1995. (58 RT 18582-18588.) As is clear from the record of the preliminary hearing, the witness was prepared to testify that appellant had expressed anxiety about "his situation" in January 1995 and had requested a medication change. (*Ibid.*) Thus as the trial court stated, this evidence was relevant in order to show appellant's state of mind during the time when these jail incidents occurred. (58 RT 18582-18589.) Obviously, the defense felt that this might offset the impact of damaging evidence that appellant had been a disciplinary problem during this same period. However, by offering up evidence of appellant's state of mind during January 1995, appellant opened the door to prosecution evidence regarding his state of mind in that same time period. Allowing the defense to present evidence that appellant had anxiety and needed new medication without permitting questions regarding the source of that anxiety would have left the jury with incomplete information. The prosecutor rightly felt the need to make it clear that this anxiety was not due to any real concern for appellant's victims but was rather anxiety about the predicament appellant had gotten himself into. The trial court correctly ruled that once the defense had opened up the issue of appellant's state of mind during this time frame then

the prosecutor could question the witness regarding possible sources of that anxiety. (58 RT 18588-18589.) The trial court did not abuse its discretion in admitting this evidence.

Moreover, even if it were error to have admitted this evidence it could not have prejudiced appellant. First, on redirect of this witness, the defense made it clear that McElvain never discussed anything about appellant's case with appellant, making McElvain an unlikely candidate to whom appellant would express remorse. (See 58 RT 18625.)

Second, there is simply no evidence in the record that the prosecutor used this evidence in the improper manner alleged by appellant. As with appellant's prior argument in this regard (see Arg. X, (c) *ante*), he simply says that the prosecutor urged appellant's lack of remorse as an aggravating factor without any support in the record for such an assertion. "The prosecutor nowhere asked the jury to consider lack of remorse to be an aggravating factor." (*People v. Hinton, supra,* 37 Cal.4th at pp. 907-908.) Comment on the lack of remorse as demonstrating the lack of mitigating evidence is entirely proper. "The presence or absence of remorse is a factor "universally" deemed relevant to the jury's penalty determination." (*People v. Hinton, supra*, 37 Cal.4th at p. 907, citing *People v. Marshall, supra,* 13 Cal.4th at p. 855.) Moreover, a review of the prosecutor's arguments concerning appellant's lack of remorse fails to turn up a reference to the testimony of Steven McElvain. Rather, the prosecutor focused exclusively on appellant's lack of expressions of remorse to the detectives during his post-arrest interviews. (See Arg. X, (c) *ante*; 59 RT 18907-18910.) Thus, the prosecutor did not utilize this evidence at all in closing argument let alone in the improper manner suggested by appellant.

Finally, as noted above, contrary to appellant's assertions the penalty phase evidence in aggravation was overwhelming. Appellant committed two cold-blooded murders and burglarized the residence of both of his

victims after he shot and killed them. He also shot a prostitute after paying her for sex and left her to die in an isolated area. Luckily she survived but she was paralyzed and testified in her wheelchair as to appellant's depravity and cruelty in the manner in which he tried to kill her. Appellant also had a long and violent record which was amply demonstrated to the penalty jury. And, appellant masterminded an escape from jail while awaiting trial on his capital murder charges and had numerous instances of aggressive misconduct while in custody. In sum, this was not a sympathetic figure. When this compelling penalty phase evidence is weighed against the minor nature of the error, if any, in admitting the evidence of appellant's lack of expressions of remorse to Steven McElvain there is no likelihood that this error affected the penalty verdict.

XII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING MITIGATING EVIDENCE THAT KEITH PASSEY HAD MOLESTED APPELLANT AND OTHER YOUNG BOYS

Appellant claims that the trial court prejudicially erred in excluding mitigating evidence that Keith Passey, a man with whom appellant lived as a teenager, had molested him and other young boys. (AOB 341-360.) Respondent submits that the trial court did not abuse its discretion in excluding this evidence.

A. Background

During appellant's first penalty phase trial, the trial court admitted evidence that Keith Passey, an adult friend of the family with whom appellant had lived with from age 14 to 15, had molested appellant and other young boys. Specifically, the court had admitted hearsay testimony from appellant's former girlfriend, True Williams, that he had told her when he was 16 or 17 that Passey had molested him. (29 RT 8287-8288.) The court also permitted the testimony of two other young boys, Steve T. and Mark T. that Passey had molested them. (30 RT 8538-8539; 31 RT

8742-8743.) Prior to the admission of this evidence, the prosecutor had objected that the evidence was unreliable and lacked any probative value in establishing that Passey had molested appellant. (29 RT 8258-8261.) Defense counsel asserted that appellant as a capital defendant had a constitutional right to present penalty-phase mitigation evidence. (29 RT 8246-8258.) Ultimately, the court ruled the evidence admissible, in large part based upon its assumption that appellant would testify on his own behalf at the penalty trial. (29 RT 8263-8266.) During the hearing on the admissibility of this evidence, the court stated in part:

> And the court's taken the position, or it has in its tentative thoughts on the matter, that first he [appellant] has to establish that fact [that he was molested by Passey], then all the other stuff can come in. Robin True Williams can show that it wasn't something he just made up recently, it was something that had happened way long time before the incident in question, before the alleged crimes took place. And then of course the Thoris simply corroborating the character of the --Mr. Passey

(29 RT 8256-8257.)

Later in the hearing, the court stated:

> ...[I]ts hard for the Court to conceive of a case of this magnitude where defendant does not take the stand and testify.... So I'm wondering whether this really isn't an exercise in futility in the sense that he probably will be a witness anyways.

(29 RT 8261-8262.)

Finally, when the court actually issued its ruling that the evidence would be admissible, it again emphasized its belief that appellant would testify as being an important factor:

> . . . . And the Court also feels that the probabilities are that the defendant is going to testify anyway, so from that standpoint I don't see that it's a real crucial issue in that sense, because I think ultimately he will testify himself. And he'll be subject to cross-examination on the issue, even if he doesn't mention it himself. So the Court's going to allow it.

(29 RT 8265.)

Thus, it is clear from the record, that the admission of the hearsay testimony of True Williams that appellant was molested and the corroborating testimony of the other victims was premised on the court's strong belief that appellant would himself testify at the penalty trial. This makes perfect sense. Once appellant testified then he could either state he was molested by Passey or be subject to cross-examination on that issue. The other evidence would then properly be admissible as propensity evidence tending to show that appellant was in fact molested by Passey However, appellant did not ultimately testify at his first penalty trial; yet this molestation evidence was still presented to the first penalty jury.

In light of the fact that appellant did not testify at the first penalty trial, the prosecutor, at the beginning of the second penalty phase trial, asked the court to revisit its ruling concerning the admissibility of this evidence. The prosecutor argued that the admission of this evidence in the prior penalty trial had been premised on the assumption that appellant would personally take the witness stand and testify that Passey had molested him; the molestation-related testimonies of Williams, Steve T. and Mark T. had thus been deemed admissible for purposes of bolstering whatever first-hand account appellant might provide regarding having been sexually molested by Passey.

However, appellant had not testified in the earlier penalty trial. With regard to True Williams, the prosecutor argued that her testimony, lacking specificity as to "any date, time, location [or] place," did not rise to the level of reliable hearsay evidence. Additionally, the prosecutor complained that he had lacked a "sufficient and ample opportunity to cross-examine" Williams because "[s]he can't tell us where [appellant] told her. what year, what place, what time, what date, where the molestations occurred." (46 RT 13164-13165.) And the district attorney reasoned that if Williams was

not allowed to testify about appellant's reports of being molested and appellant did not take the witness stand to testify that Passey had molested him, it followed that the accounts of Steve T. and Mark T. were rendered irrelevant and inadmissible. (46 RT 13163-13164.) The court agreed that "[i]f True Williams is not allowed to testify regarding appellant's hearsay, then the testimony [of Steve and Mark] regarding their experiences would not be relevant." (46 RT 13164.) The court indicated that it would review the transcript of Williams' prior testimony and address the issue thereafter. (46 RT 13165-13166.)

The issue was further discussed on March 31, 1995, when the prosecutor again voiced his objection to True Williams' testimony. The prosecutor and the judge agreed that alcohol could be smelled on Williams' breath when she had previously been on the witness stand. (51 RT 14658-14659.) The prosecutor argued that Williams' testimony regarding Passey should be excluded because it was "hearsay and unreliable." (51 RT 14659-14660.) Defense counsel responded that it was unfair to assume that Williams would return under the influence of alcohol if she were recalled as a witness. (51 RT 14665-14666.) Defense counsel restated that he should be permitted to (1) introduce Williams' testimony to show that Passey molested appellant; (2) testimony from Steve T. and Mark T. should be admitted to collaborate that fact; and (3) that appellant's mother was aware of Passey's reputation as a pedophile and she nevertheless placed appellant in Passey's care and custody. (51 RT 14665-14673.) The court responded that it would give the matter more thought, but gave the following ruling: "The Court will not allow Robin True Williams to testify as to the defendant's statements as being incompetent hearsay." The Court also indicated that it was not inclined to admit the testimony from Steve T. and Mark T. but would reserve judgment on that issue.

On April 7, 1995, during the penalty phase retrial, defense counsel made an offer of proof that appellant's aunt, Marsha Jacobsen, be permitted to testify regarding a conversation she had had with appellant's mother Penny Hensley in 1971. (53 RT 15199.) At that time Penny was contemplating ending her troublesome marriage to Terry Thori. Penny told Jacobsen that she was thinking about leaving Thori and marrying Passey. Penny said that, if she did so. she would only have to clean house and cook for Passey; they would not have a sexual relationship because Penny knew that Passey was only sexually interested in boys. Penny could have boyfriends on the side in a discrete manner and Passey would not have a problem with that. (53 RT 15199-15200.) The judge asked counsel to brief the issue and he would rule on the admissibility of this evidence. (53 RT 15200-15202.)

On April 13, 1995, defense counsel filed a brief in support of the position that he should be allowed to introduce evidence of Passey's molestations of Steve T. and Mark T., Jacobsen's conversation with appellant's mother regarding Passey's sexual orientation, and Williams' testimony about her conversations with appellant about Passey's molestations. (8 CT 2088-2093.) Defense counsel argued that this evidence was relevant to show Passey's nature as a pedophile, as well as to demonstrate the character of appellant's mother Penny in sending appellant off to live with a man she knew or believed to be a pedophile.

On April 20, 1995, the court announced its final decision. The court indicated that it was reversing its prior ruling in the first penalty trial, and now ruled all the molestation evidence inadmissible. The court stated "in each case [cited by the defense] it seems to me the defendant has no other way to produce the [contested] evidence itself, save and except the declarations of the codefendants or polygraph tests or other things that have

to be brought in." (54 RT 15441.) Applying this standard, the court found the defense molestation evidence to be inadmissible:

> And the Court looks at the testimony of Mark and Steve [T.] regarding the sexual advances ofMr. Passey, there is no evidence there that there was actual molestation of Mr. Hensley by Mr. Passey. He had the tendency to do that but the Court feels that that just is not relevant. The subject matter itself is relevant, but the evidence itself is so remote as not to be relevant. And the Court so declares.
>
> The fact that a person commits a crime on day one does not mean he commits a crime on day two necessarily. That's possible, but if it doesn't relate to some intricate aspects of the commission of the crime, or the commission of the act, and then it doesn't really have to do with it. It has to do with the propensity, which I'm sure defense would like to get in.
>
> Besides, under 352 of the Evidence Code, applying that to the testimony. of Mr. Steve and Mark [T.], the Court feels that the probative value is minimal.
>
> In each instance, Mr. Passey attempted, if the facts are as they state they are, to molest them or to have some kind of sexual contact with them rebuffed, and, therefore, it has minimal probative value.
>
> The jurors – "Well, what's that got to do with the defendant? Well, he lived with the person. That means that he may or may not have tried to molest him" - the speculation that might go on in the jury room, "Was he actually molested by Mr. Passey or not? God only knows. What was the extent of it? Was it rebuffed by the defendant, or was he successful? How many times did it happen? Over what period of time?" I mean, the speculation there is just awesome that can go on.
>
> The probative value, therefore, is minimal. It's substantially outweighed by the three factors that I have to consider under 352.

> The fact that the admission of the evidence would consume undue time and testimony, the admission, when it creates substantial danger of prejudice against Mr. Passey.
>
> It would confuse the issues. Here we are worrying about did somebody molest Mr. Hensley or not. We don't know that one way or the other.
>
> But, also, mislead the jurors into engaging into rank speculation regarding whether or not Mr. Hensley was molested. The defendant really has other ways to introduce it if he wants to introduce it.
>
> And the Court would also tell you in passing that the defendant takes the stand and testifies, "I was molested by Mr. Passey," the Court, of course, would allow in the testimony of Steve and Mark [T.]. So the Court's not precluding it, but saying that it's not relevant now, because it's not brought home to the person of Mr. Hensley.
>
> Those are the Court's rulings.

(54 RT 15442-15443.) The Court did not revisit nor elaborate on its earlier ruling that True Williams' testimony was unreliable and therefore incompetent hearsay. (See 51 RT 14668, 14673.)

Appellant now asserts that the trial court erred in excluding the molestation evidence. Specifically, he argues that the exclusion of this evidence violated his right to due process and to present mitigating evidence under the federal constitution. (AOB 351-354.) He also claims that the evidence was properly admissible under section 1108 of the California Evidence Code which permits the use of propensity evidence to prove conduct. (AOB 354-356.) Finally, he contends that it violated due process for the trial court to reverse its prior decision on this matter. (AOB 357-359.) All of appellant's contentions lack merit.

B. The Court did not Abuse its Discretion in Excluding This Evidence

It is well settled that the admission of evidence is committed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. (*People v. Vieira, supra*, 35 Cal.4th 264 at p. 292.) Here, the trial court did not abuse its discretion in excluding the molestation evidence.

The proffered molestation evidence took two forms; first, the defense sought to introduce the hearsay statements of True Williams that appellant had told her he had been molested by Passey; second, in order to corroborate that testimony, the defense offered other evidence of Passey's sexual tendencies and testimony that he had 10 years prior to appellant living with him molested two other young boys. This evidence would then have been used by the defense to argue that appellant deserved mercy and sympathy due to a sexually traumatic childhood.

First, as to the hearsay testimony of True Williams that appellant had himself been molested, the trial court rightly pointed out the defense had another straightforward and non-hearsay way of presenting this evidence. Appellant himself could have taken the stand and asserted that he was molested by Mr. Passey. The testimony of True Williams that appellant told her that Passey had molested him was an effort by the defense to present this evidence without allowing the People the opportunity to cross-examine on this issue. Additionally, as the trial court properly found (51 RT 14659, 14663), there was no evidence that this hearsay testimony was reliable. As the prosecutor noted, the first time Williams testified she could not recall when or under what circumstances appellant had made the statement. Nor could she remember much specifics of the allegations. (29 RT 8298-8299) Despite appellant's protestations, the right to present mitigating evidence in the penalty phase does not override ordinary rules of

evidence. (*People v. Thorton* (2007) 41 Cal.4th 391, 454.) If the evidence is irrelevant or incompetent it is inadmissible (*People v. Gay* (2008) 42 Cal.4th 1195, 1220), and even if hearsay evidence is relevant exclusion does not violate defendant's constitutional rights if the hearsay is not reliable. (*People v. Phillips* (2000) 22 Cal.4th 226, 238.)

In *People v. Whitt* (1990) 51 Cal.3d 620, the defendant sought to introduce in his penalty phase hearsay statements of inmate witnesses recounting defendant's statements of reform. This Court upheld the trial court's ruling excluding this evidence stating,

> [D]efendant's personal 'Death Row' assurances of reform are not inherently reliable. Admission of such statements in the form and for the purpose offered here would effectively permit defendant to address the jury without subjecting himself to cross-examination.... [T]he defendant is entitled to no unique immunity from examination by the People.

(*Id.* at pp. 642-644.) Here, too, the admission of True Williams' hearsay statements that appellant told her he was molested by Passey would have effectively permitted the admission of this self-serving information without allowing the People to cross-examine the defendant and test the truth of the statement. Also as in *Whitt, supra*, the statements of Williams were not inherently reliable. When she testified in the first penalty trial she was apparently not sober and could not recall any details regarding these statements. (See 29 RT 8298-8299; 51 RT 14659, 14663.) She also apparently had significant credibility issues along with an ulterior motive to help her former childhood boyfriend. (See 51 RT 14663) The trial court did not abuse its discretion in excluding as unreliable the hearsay testimony of True Williams.

It follows that without the admission of any statements that appellant was molested either through his own testimony or that of True Williams the other proffered molestation evidence was properly excluded. In its final

ruling, the trial court excluded the other molestation evidence on relevance grounds. (54 RT 15442.) That decision was not an abuse of the court's discretion. Without direct testimony that appellant was molested, the other molestation evidence was not relevant to the penalty determination. That evidence if believed merely showed that Passey had some 10 years prior to appellant living with him molested two young boys and appellant's family may have known of Passey's tendencies. However, without a nexus to appellant the evidence does not tend to prove or disapprove any matter in issue. "[T]he [trial] court [has] the authority to exclude, as irrelevant, evidence that does not bear on the defendant's character, record, or circumstances of the offense. [Citation]. . . ." (*People v. Harris* (2005) 37 Cal.4th 310, 353; see also *People v. Gay, supra*, 42 Cal.4th at p. 1220.)

Moreover, as the trial court found, the evidence was also excludable under Evidence Code Section 352. Without a link to appellant the probative value of this evidence was minimal and it would have caused the jury to engage in rank speculation about whether appellant had himself been molested by Passey, if so how many times he had been molested, and the effects of any molestations.

Lastly, it would have consumed an undue amount of time. The trial court did not abuse its discretion in excluding this evidence.

Appellant disagrees citing to this Court's opinion in *People v. Falsetta* (1999) 21 Cal.4th 903. (See AOB 355-356.) However *Falsetta* does not help appellant. In *Falsetta*, this Court found constitutional California Evidence Code section 1108 which permits the introduction of propensity evidence of prior sexual misconduct to prove a defendant's guilt of a current sex offense. (*Id.* at pp. 908, 917-922.) *Falsetta* in essence held that where there is a current charge of sexual misconduct the charge may be directly bolstered by propensity evidence of past sexual misconduct. In other words if he did this sort of thing in the past it is more likely that he

did it as alleged in the current case. (*Id.* at pp. 911-912, 917-922) It is the fact of the current allegation which makes the propensity evidence relevant. It is offered to prove conduct in the present based upon conduct in the past. (*Ibid.*)

Nothing in *Falsetta* suggests that propensity evidence of past sexual misconduct is relevant without the nexus of a current allegation. Thus, contrary to appellant's claim, *Falsetta* actually supports the trial court's ruling herein. If appellant had testified and alleged that he was molested as the victim in *Falsetta* did (*id.* at pp. 908-909), then prior instances of misconduct, i.e., the Mark T. and Steve T. allegations, etc., could have been used to prove the truth of appellant's claim. That is what the trial court held. However, without any evidence that appellant had been molested, the prior instances of misconduct have nothing to bolster and are not relevant to prove a matter at issue. (See *id.* at pp. 912-915[evidence of prior bad acts relevant to prove current conduct]) *Falsetta* does not help appellant.

Appellant also cites to *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091 and argues that it violated due process for the trial court to reverse its earlier ruling and exclude the sexual misconduct mitigation evidence. (See AOB 357-359.) Appellant misreads this case. In *Bradley,* the Ninth Circuit Court of Appeals affirmed the United States District Court's granting of defendant Bradley's Petition for Writ of Habeas Corpus. (*Bradley v. Duncan, supra*, 315 F.3rd at p. 1101.) Defendant Bradley's first state trial jury had been given an entrapment instruction by the trial court, which ended in a hung jury. At his retrial, a different judge had refused the defendant's entrapment instruction and the jury had convicted him of narcotics trafficking. (*Id.* at p. 1094.) The Ninth Circuit, in affirming the grant of the writ, held that it was a violation of due process for the second judge to refuse Bradley's request for an instruction on entrapment. (*Id.* at pp. 1098-1100.) In the course of the opinion the Ninth

Circuit took the second state trial judge to task for refusing to give the entrapment instruction when the first judge had done so and nothing had changed. The Court also faulted the second judge for refusing the instruction without explanation. (*Id.* at pp. 1097-1098.) However, the central holding of the case was that Bradley was entitled to an instruction on entrapment and that it was constitutional error not to have so instructed his second jury. (*Id.* at pp. 1098-1101.)

The comments by the Court about the second judge reversing the ruling of the first trial judge are merely dicta. Moreover, this dicta does not apply here even were it of precedential value.

Here, unlike in *Bradley*, the facts changed dramatically. As noted above, at the first penalty trial court had admitted the molestation evidence under the mistaken assumption that appellant would testify in his own behalf. At the second trial, the court had no such misconception. Thus, unlike in *Bradley,* circumstances and impressions of the evidence had changed. These changes justified the reversal of the trial court's ruling in our case. Further, again unlike in *Bradley,* the trial court here gave a detailed explanation of why it had changed its mind regarding the admissibility of the proffered evidence. *Bradley* does not help appellant.

Finally, appellant's repeated citations to *Lockett v. Ohio* (1978) 438 U.S. 586 and other seminal cases involving the scope of evidence admissible in mitigation in a penalty trial does not help him. (See AOB 351-354.) As the United States Supreme Court and this Court have repeatedly held, nothing in *Lockett* or its progeny limits the traditional authority of the trial court to exclude as irrelevant evidence that does not bear on the defendant's character, prior record, or the circumstances of his offense. (See e.g. *Penry v. Lynaugh* (1989) 492 U.S. 302, 317; *Lockett v. Ohio, supra,* 438 U.S. 586 at p. 604 fn. 12; *People v. Harris, supra,* 37 Cal.4th at p. 353; *People v. Mickey* (1991) 54 Cal.3d 612, 693.) Nor does

anything in *Lockett* or subsequent cases in this area require the admission of unreliable hearsay evidence. (*People v. Phillips, supra*, 22 Cal.4th at p. 238; *People v. Whitt, supra*, 51 Cal.3d at pp. 642-644.) Here, the trial court excluded the proffered sexual misconduct evidence on the grounds that it was either unreliable hearsay or was irrelevant. (51 RT 14659, 14663, 15442-15443.) Respondent has already demonstrated above that those ruling were not an abuse of the trial court's discretion. Nothing in the cases cited by appellant offer any authority for changing that conclusion.

In sum, the trial court did not abuse its discretion in excluding the sexual misconduct mitigation evidence offered by appellant.

XIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING WITNESSES FROM THE COURTROOM DURING CLOSING ARGUMENT

Appellant asserts that the trial court violated his right to a public trial and thereby committed federal constitutional error by excluding appellant's wife and family members from the courtroom during closing argument. (AOB 361-377.) Respondent submits that appellant's right to a public trial was not implicated by the trial judges ruling which merely enforced its continuing order that witnesses be excluded from the courtroom when they were not testifying.

A. Background

During penalty phase closing arguments, the court's bailiffs continued to enforce the court's prior order that all witnesses, including appellant's family members, be excluded from the courtroom. (See 59 RT 19051-19052.) Defense counsel objected to the continuing enforcement of this order during closing argument asserting that excluding the defendant's family members violated his Sixth Amendment right to a public trial. (59 RT 19052-19055, 19059-19060.) The judge responded that he was not excluding the public from the trial but was merely excluding witnesses for

both sides. Counsel persisted telling the court that he had a case, *People v. Woodward* (1992) 4 Cal.4th 376, directly on point. In response the court stated:

> Well, I'm still not finding anything in here [*People v. Woodward*] regarding an exclusion of witnesses. Is there a case here that tells me about this? This courtroom is open to any other people except witnesses who have been excluded. That's – I want to make that clear. I'm not excluding anyone else besides those persons.

(59 RT 19057-19058)

Later on the court again made it crystal clear that it was only excluding witnesses and the trial was open to anyone else:

> If it's going to apply to one, it has to apply to all. In other words, it's going to be across the board. Excluding witnesses is the primary concern of the court. It's a public trial. People can come and go as they want. The public can come in, the press can come in. Interested people can come in...

(59 RT 19061-19062.) Defense counsel also asked for a mistrial based upon the court's ruling. This motion was denied. (59 RT 19059-19062.)

Appellant now claims that the trial court violated his Sixth Amendment right to a public trial by excluding his family members from the penalty phase closing argument. However, he ignores the court's clear statements that this was not an order excluding anyone *except* for witnesses and attempts to transform the court's order into one that implicated his right to a public trial. He then cites numerous cases which deal with the completely different situation of the exclusion of non-witness family members from a criminal defendant's trial. (AOB 361-377.) His argument lacks merit and must be rejected.

B. The Court Did not Abuse its Discretion in Excluding Witnesses

A ruling on a motion to exclude witnesses, is committed to the sound discretion of the trial court and is reviewed for abuse of that discretion. (*People v. Griffin* (2004) 33 Cal.4th 536, 574.) Here, the trial court determined that it would continue its previous order to exclude all witnesses from appellant's penalty retrial closing arguments. The court noted that it was concerned that information may come to light during the attorneys' summation of the evidence which, in the event of a retrial, might be misused by those witnesses if they had to testify again. As the court stated, "I do not want witnesses, defense witnesses, prosecution witnesses who may hear about the testimony who might possibly be called to testify at a later time at a retrial in court during the proceeding. . . ." (59 RT 19056.)

California Evidence Code section 777 gives the court the authority to exclude non-party witnesses when it deems it appropriate. (Cal. Evid. Code, § 777.) Here the court offered ample justification for its order. It is a standard concern for trial judges that witnesses be prevented from hearing information which may color their testimony. Moreover, this was the second penalty trial in this matter, so the court's concern about a retrial was not speculative but fact based. There was no abuse of discretion in the order excluding all witnesses from the penalty phase closing argument. (See *People v. Wright* (1990) 52 Cal.3d 367, 413 ["fundamentally," testifying witnesses subject to exclusion, asserted benefits of their attendance pure speculation.])

Appellant does not mention the court's discretion to exclude witnesses in his 17-page argument on this issue (see AOB 361-377); indeed he completely ignores the distinction between non-testifying family members and family members who are witnesses. Instead, he characterizes the

court's order as one implicating his right to a public trial. He then proceeds to argue that in excluding his family from the courtroom, the court violated that Sixth Amendment right. This argument is meritless. As is clear from the excerpts laid out above, the trial court was adamant that it was not closing the trial *to the public* but only excluding *witnesses* from the courtroom. Had any member of appellant's family who was not a witness requested permission to attend the closing argument no doubt they would have been permitted to attend. Not surprisingly, appellant offers no evidence that any non-witness family member was excluded. All of the many cases cited and discussed by appellant are therefore irrelevant since they all deal with the separate and more complex issue of whether and under what circumstances the trial court may exclude non-witnesses, either members of the public or defendant's family members, from the courtroom. (See e.g. *People v. Woodward, supra*, 4 Cal.4th at pp. 382-383 [right to public trial encompasses closing argument, exclusion of *public* from closing argument must be justified by overriding interest; *English v. Artuz* (2nd Cir. 1998) 164 F.3d 105, 106-109 [no overriding interest justifying exclusion of *family members* shown, court erred in closing courtroom to public], emphasis added.) However, as stated above we need not concern ourselves with that issue here as the trial court merely enforced its prior order excluding witnesses from the courtroom. As this Court has stated, "[f]undamentally, potential witnesses are subject to exclusion from the courtroom until called to testify." (*People v. Wright, supra*, 52 Cal.3d at 413). The trial court did not abuse its discretion in excluding all witnesses, including appellant's family members, from the penalty phase closing arguments.

XIV. THE INTRODUCTION OF EVIDENCE OF UNADJUDICATED PRIOR VIOLENT CRIMINAL ACTIVITIES DID NOT VIOLATE ANY OF APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant asserts that the introduction of alleged prior unadjudicated crimes during the penalty phase of appellant's trial violated his federal constitutional rights. (AOB 378-384.) This Court has rejected similar constitutional arguments in the past (see e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1207-1208; *People v. Anderson* (2001) 25 Cal.4th 543, 584-585; *People v. Avena* (1996) 13 Cal.4th 394, 428-429) and appellant offers no new or compelling reasons for overturning those decisions. Accordingly, appellant's claim must be rejected.

XV. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 8.88

Appellant alleges that CALJIC No. 8.88, as given herein, misled the jury in violation of appellant's rights under the Eighth Amendment because it failed to communicate to the jurors that one mitigating factor standing alone may be sufficient to outweigh all other factors. (AOB 385-389.) This Court has repeatedly rejected this and similar claims in the past (see e.g., *People v. Moon* (2005) 37 Cal.4th 1, 41-42; *People v. Vieira, supra,* 35 Cal.4th at p. 300; *People v. Barryman* (1993) 6 Cal.4th 1048, 1099-1100) and appellant offers no new or cogent reasons for reconsideration of those rulings. Therefore, appellant's claim must be denied.

XVI. THE JURY NEED NOT HAVE UNANIMOUSLY AGREED THAT A PARTICULAR AGGRAVATING CIRCUMSTANCE EXISTED

Appellant claims that the jurors should have been instructed that before they could consider an aggravating circumstance in the weighing process they had to unanimously agree that the particular aggravating circumstance existed. (AOB 390-393.) This Court has repeatedly rejected this and similar claims holding that there is no requirement that the jury

unanimously agree on the aggravating circumstances that support the death penalty, since the aggravating circumstances are not elements of the offense. (See e.g., *People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Stanley* (2006) 39 Cal.4th 913, 963; *People v. Medina* (1995) 11 Cal.4th 694, 782.) Contrary to appellant's arguments, nothing in *Apprendi v. New Jersey* (2000) 530 U.S. 466 or its progeny casts doubt on this conclusion. (*People v. Parson, supra*, 44 Cal.4th at p. 370). Therefore, appellant's claim must be rejected.

XVII. THE JURY NEED NOT USE THE BEYOND A REASONABLE DOUBT STANDARD TO DETERMINE THAT AGGRAVATION OUTWEIGHS MITIGATION AND THAT DEATH IS THE APPROPRIATE PUNISHMENT

Appellant contends that the trial court erred in violation of appellant's due process rights in failing to instruct the jury that it should have spared appellant's life unless it found beyond a reasonable doubt both that aggravation was weightier than mitigation and that death was the appropriate punishment. (AOB 394-403.) This Court has rejected this argument on numerous occasions. (See e.g. *People v. Parson, supra*, 44 Cal.4th at p. 370; *People v. Beames, supra*, 40 Cal.4th at p. 934; *People v. Moon, supra,* 37 Cal.4th at p. 43.) Contrary to appellant's arguments, nothing in *Apprendi v. New Jersey, supra,* 530 U.S. 466 or its progeny casts doubt on the holding of these cases that a reasonable doubt standard need not be used in the weighing process or in arriving at the final penalty determination. (*People v. Parson, supra*, 44 Cal.4th at p. 370). Therefore, appellant's claim must be rejected.

XVIII. THE ABSENCE OF A BURDEN OF PROOF IN CALJIC NO. 8.88, EXCEPT AS TO PRIOR CRIMINAL ACTS, IS NOT UNCONSTITUTIONAL

Appellant contends that the failure to articulate any standard of proof for the jury in CALJIC No. 8.88 amounted to federal constitutional error.

(AOB 404-409.) This Court has repeatedly rejected this claim holding that the absence of any burden of proof in CALJIC No. 8.88, except as to prior criminal acts, is not unconstitutional. (See e.g. *People v. Parson, supra*, 44 Cal.4th at p. 370; *People v. Beames, supra*, 40 Cal.4th at p. 935; *People v. Moon, supra*, 37 Cal.4th at p. 43.) Appellant offers no new or compelling reasons for reconsideration of this conclusion. Accordingly, his claim must be rejected.

XIX. THE TRIAL COURT NEED NOT INSTRUCT THE JURY THAT THE PROSECUTION BEARS THE BURDEN OF PERSUASION ON THE ISSUE OF PENALTY

Appellant asserts that the jury should have been instructed that the prosecution bears the burden of persuasion on the issue of penalty. (AOB 410-414.) This Court has rejected this same argument on numerous occasions. (See e.g. *People v. Parson, supra*, 44 Cal.4th at p. 371; *People v. Smith* (2007) 40 Cal.4th 483, 526; *People v. Combs* (2004) 34 Cal.4th 821, 868.) Appellant offers nothing that casts doubt on the soundness of those decisions. Therefore, appellant's claim must be rejected.

XX. THE TRIAL COURT NEED NOT INSTRUCT THE JURY ON A PRESUMPTION OF LIFE WITHOUT PAROLE

Appellant argues that the jury should have been instructed on a presumption of a life without parole sentence. (AOB 415-416.) This Court has repeatedly rejected this identical claim. (See e.g. *People v. Parson, supra*, 44 Cal.4th at p. 371; *People v. Abilez* (2007) 41 Cal.4th 472, 532; *People v. Moon, supra*, 37 Cal.4th at p. 43.) Appellant offers no cogent reasons for this Court to revisit this issue. His claim must, therefore, be rejected.

XXI. THE TRIAL COURT NEED NOT INSTRUCT THE JURY THAT THERE IS NO BURDEN OF PROOF IN THE PENALTY DETERMINATION

Appellant contends that even if it were constitutionally permissible for there to be no burden of proof in the penalty determination, the trial court erred in failing to instruct the jury to that effect. (AOB 417-418.) This Court has consistently rejected this claim. (See e.g. *People v. Parson, supra*, 44 Cal.4th at p. 371; *People v. Geier* (2007) 41 Cal.4th 555, 618-619; *People v. Moon, supra*, 37 Cal.4th at p. 43.) Appellant offers no new or compelling reasons for this Court to re-examine those conclusions. Accordingly, his claim must be rejected.

XXII. THE TRIAL COURT NEED NOT INSTRUCT THE JURY THAT IT MUST MAKE WRITTEN FINDINGS ON AGGRAVATING AND MITIGATING CIRCUMSTANCES

Appellant contends that the failure to instruct the jury that it was required to make written findings on aggravating and mitigating circumstances violated his federal constitutional rights and precluded meaningful appellate review. (AOB 419-423.) This Court has repeatedly rejected this and similar claims. (See e.g. *People v. Parson, supra*, 44 Cal.4th at p. 370; *People v. Stevens* (2007) 41 Cal.4th 182, 212; *People v. Moon, supra*, 37 Cal.4th at p. 43.) Appellant offers no new or compelling reasons for reconsideration of those rulings. Therefore, his claim must be rejected.

XXIII. APPELLANT'S CLAIM OF CUMULATIVE ERROR IS MERITLESS

Appellant asserts that the cumulative effect of the errors during the penalty phase of his trial requires the reversal of his death sentence. (AOB 424-430.) Not so.

It is of course true, as appellant points out (see AOB 927), that where multiple errors have occurred during a defendant's trial that the reviewing

court must consider their cumulative impact. (*People v. Hernandez , supra*, 30 Cal.4th at pp. 875-877.) However, it is also true that where an examination of the record reveals that all of the claims of error made by the defendant are incorrect then their cumulative impact obviously cannot be cause for reversal. (*People v. Ray, supra*, 13 Cal. 4th at p. 348.)

Here, as explained *ante*, all of appellant's claims of error lack merit. In light of the fact that appellant's claims of error are all without merit then so too his claim of cumulative error must fail. (*Ray, supra*, 13 Cal.4th at 348.)

XXIV. APPELLANT'S DEATH SENTENCE IS CONSTITUTIONAL

Appellant argues that his death sentence is unconstitutionally arbitrary, discriminate and disproportional. Specifically, he asks this Court to so rule after undertaking both intracase and intercase proportionality review of his death sentence. (AOB 431-435.) Respondent submits that under this Court's precedents intercase proportionality review of appellant's sentence is not required and under intracase proportionality review his sentence is not grossly disproportionate to his moral culpability.

First, as this Court has repeatedly held, intercase proportionality review is not required in California. (See e.g. *People v. Hoyos, supra*, 41 Cal.4th at p. 927; *People v. Cook* (2007) 40 Cal.4th 1334, 1368) Appellant offers no new or compelling reasons for undertaking such a review here.

However, this Court does engage in intracase review if requested to determine whether the death penalty is disproportionate to the defendant's individual culpability. (*People v. Mincey, supra*, 2 Cal.4th at p. 476.) Here, appellant's death sentence is not disproportionate to his moral culpability. Appellant committed two cold-blooded murders and burglarized the residence of both of his victims after he shot and killed them. He also shot a prostitute after paying her for sex and left her to die in an isolated area. Luckily she survived but she was paralyzed and testified

in her wheelchair as to appellant's depravity and cruelty in the manner in which he tried to kill her. Appellant also had a long and violent record which was amply demonstrated to the penalty jury. Finally, appellant masterminded an escape from jail while awaiting trial on his capital murder charges and had numerous instances of aggressive misconduct while in custody. His sentence was not disproportionate to his culpability.

XXV. CALJIC NO. 8.88 PROPERLY INSTRUCTS THE JURY ON ITS SENTENCING DISCRETION

Appellant claims that California's death penalty law, as embodied in CALJIC No. 8.88, violates due process of law in that it fails to channel or limit the jury's discretion to impose a death sentence. (AOB 436-439.) This Court has consistently rejected this and similar claims holding that "CALJIC No 8.88 properly instructs the jury on its sentencing discretion and the nature of the deliberative process," and there is no need to elaborate how the jury should consider any particular type of penalty phase evidence. (*People v. Valencia* (2008) 43 Cal.4th 268, 310; see also *People v. Moon, supra* 37 Cal.4th at pp. 41-42; *People v. Vieira, supra,* 35 Cal.4th at pp. 302-303.) Appellant offers no new or compelling reasons for this Court to revisit those rulings. Therefore, his claim must be rejected.

XXVI. CALIFORNIA'S DEATH PENALTY IS NOT CONSTITUTIONALLY FLAWED BASED UPON THE CHARGING DISCRETION AFFORDED TO PROSECUTORS

Appellant next contends that California's death penalty scheme is unconstitutional due to the discretion it gives prosecutors in determining those death eligible cases in which the death penalty will be sought. (AOB 440-442.) This Court has consistently rejected this identical argument. (See e.g. *People v. Tafoya* (2007) 42 Cal.4th 147, 198; *People v. Cornwell* (2005) 37 Cal.4th 50, 105; *People v. Barnett* (1998) 17 Cal.4th 1044,

1179.) Appellant offers no new or persuasive arguments for overturning those rulings. Thus, his claim must be rejected.

XXVII. INTERCASE PROPORTIONALITY REVIEW IS NOT CONSTITUTIONALLY REQUIRED

Appellant claims that California's failure to provide intercase proportionality review, or comparative appellate review as he calls it, in capital cases violates his federal constitutional rights. (AOB 443-449.) This Court has repeatedly rejected this claim holding that "intercase proportionality review is not constitutionally required in this state." (*People v. Parson, supra,* 44 Cal.4th at pp. 368-369; see also *People v. Hoyos, supra*, 41 Cal.4th at p. 927; *People v. Williams supra*, 40 Cal.4th at p. 310.) Appellant offers nothing to case doubt on this holding. Accordingly his claim must be rejected.

XXVIII. CALIFORNIA'S DEATH PENALTY STATUTE SUFFICIENTLY NARROWS THE CLASS OF DEATH-ELIGIBLE DEFENDANTS

Appellant contends that California's death penalty statute fails to narrow the class of offenders eligible for the death penalty in violation of the federal and state constitutions. (AOB 450-471.) This Court has rejected this identical claim on numerous occasions holding that California's death penalty statute adequately narrows those offenders who are eligible for death. (See e.g. *People v. Hoyos, supra*, 41 Cal.4th at p. 926; *People v. Williams, supra*, 40 Cal.4th at p. 339; *People v. Marks* (2003) 31 Cal.4th 197, 237.) Appellant offers no new or compelling reasons for reconsideration of those rulings. Therefore, his claim must be rejected.

XXIX. APPELLANT'S CLAIMS REGARDING THE MANNER OF EXECUTION ARE NOT COGNIZABLE ON APPEAL

Appellant asserts that the methods of execution employed in California violate his rights under the federal constitution. Specifically, he contends that the procedures set forth by California correctional officials violate his rights under the due process clause and that the methods of execution employed by California violate the prohibition against cruel and unusual punishment. (AOB 472-489.)

This Court has repeatedly held that such "claims are not cognizable on appeal because they do not affect the validity of the judgment itself and do not provide a basis for reversal of the judgment on appeal." (*People v. Tafoya, supra*, 42 Cal.4th at p. 199; see also *People v. Ramirez* (2006) 39 Cal.4th 398, 479; *People v. Demetrulias* (2006) 39 Cal.4th 1, 45) Appellant offers no cogent reasons for reconsideration of this holding. Accordingly, his claim must fail.

XXX. THIS COURT NEED NOT CONSIDER WHETHER VIOLATIONS OF STATE AND FEDERAL CONSTITUTIONS ALSO VIOLATE INTERNATIONAL LAW

Appellant argues that the violations of his state and federal constitutional rights he has identified also violate his rights under international law. (AOB 490-511.) Respondent submits that as demonstrated *ante*, none of appellant's claim have merit and he has therefore failed to identify any violations of his state or federal constitutional rights. Therefore this Court need not consider whether any such violations also violate international law. (*People v. Hoyos, supra*, 41 Cal.4th at p. 925; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Moreover, had appellant shown prejudicial error under domestic law, the judgment would have been set aside on that basis without resort to international law. (*Id.*)

XXXI. RESPONDENT AGREES WITH APPELLANT THAT THE TRIAL COURT COMMITTED TWO ERRORS WITH REGARD TO APPELLANT'S NON-CAPITAL SENTENCE

Appellant asserts that the trial court committed two errors with respect to his non-capital sentence. Specifically he contends that: 1) the court violated section 654 in imposing consecutive terms for the Shockley, Renouf, and Copeland robbery counts; and 2) the court violated section 1170.1 by imposing an upper one-third subordinate term for the Copeland robbery conviction. (AOB 512-516.) Respondent agrees.

A. Section 654 Error

The trial court imposed consecutive sentences for counts 2, 6, and 9, the robbery of victims Larry Shockley, Stacey Copeland, and Gregory Renouf respectively. However, the robberies of Larry Shockley and Gregory Renouf formed the underlying basis for the first-degree felony murder convictions for which appellant received a death sentence. Therefore, as appellant correctly points out, section 654 precludes the imposition of separate punishment for the underlying robberies. (See *People v. Hayes* (1990) 52 Cal.3d 577, 645.) As for the Stacey Copeland robbery in count 6, the evidence established that appellant's intent was to rob Copeland and steal her drugs and money. He accomplished this by shooting her in the back. Thus, his attempted murder of Copeland was part and parcel of his actions in robbing her. Thus, since he was sentenced to a nine year term for the attempted murder of Copeland in Count 5, section 654 precludes his also being punished in Count 6 for the underlying robbery. (*Id.*; see also *People v. Flowers* (1982) 132 Cal.App.3d 584, 588-589.)

Therefore, under section 654 the trial court erred in imposing punishment for Counts 2, 6, and 9. Those terms should be stayed in order to correct that error.

B. Section 1170.1 Error

The trial court imposed a consecutive sentence of one year and four months, or one-third the *upper* term for Count 6, the robbery of Stacey Copeland. Count 6 was a subordinate term to the principal term of Count 5. (61 RT 19469, 19471.) The imposition of one-third the upper term was, as appellant points out, error as section 1170.1 provides that subordinate terms shall consist of one-third the middle term. (§ 1170.1, subd. (a)). Accordingly, the term for Count 6 should be reduced to one year or one-third the mid-term of three years for second-degree robbery.

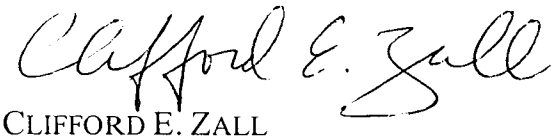
CONCLUSION

Appellant's non-capital sentence should be modified in that the sentences on Counts 2, 6, and 9 should be stayed per section 654, and the term imposed on Count 6 should be reduced to one year per section 1170.1, and in all other respects the judgment should be affirmed.

Dated: October 1, 2009.

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
HARRY JOSEPH COLOMBO
Deputy Attorney General



CLIFFORD E. ZALL
Deputy Attorney General
Attorneys for Plaintiff and Respondent

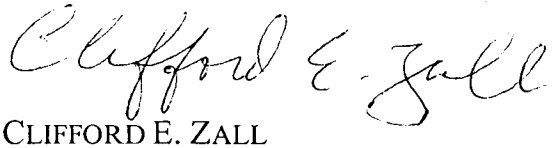
CEZ:lms
SA1995XS0008
hensley-RB-30851472.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 35,271 words.

Dated: October 1, 2009

EDMUND G. BROWN JR.
Attorney General of California



CLIFFORD E. ZALL
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **PEOPLE v. HENSLEY** No.: **S050102**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **October 2, 2009,** I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

- Richard L. Rubin, Attorney at Law
- Representing Appellant Paul Hensley
- 4200 Park Blvd # 249
- Oakland CA 94602 **(2 copies)**
-
- Honorable James Willett
- San Joaquin County District Attorney
- PO Box 990
- Stockton CA 95201
-
- California Appellate Project
- 101 Second Street, Suite 600
- San Francisco CA 94105

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **October 2, 2009,**, at Sacramento, California.

_____

DECLARANT