SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **FREDDIE FUIAVA,** Defendant and Appellant.	**CAPITAL CASE** S055652

Los Angeles County Superior Court No. BA115681
The Honorable Robert J. Perry, Trial, Judge

RESPONDENT'S BRIEF

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DEATH PENALTY

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Constitutional Provisions

Statutes

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Other Authorities

TABLE OF AUTHORITIES (continued)

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STATEMENT OF THE CASE

In an amended information filed by the District Attorney of Los Angeles County, appellant was charged in count 1 with the May 12, 1995, murder of Deputy Sheriff Stephen Blair, in violation of Penal Code section 187, subdivision (a), a serious felony within the meaning of Penal Code section 1192.7, subdivision (c)(1). Two special circumstances were alleged: (1) the murder was committed for the purpose of avoiding and preventing a lawful arrest, in violation of Penal Code section 190.2, subdivision (a)(5); and (2) the murder was intentional and carried out while Deputy Blair was engaged in the performance of his duties, as defined in Penal Code section 190.2, subdivision (a)(7). Count 2 charged appellant with the May 12, 1995, attempted wilful, deliberate, and premeditated murder and attempted murder of Deputy Sheriff

Robert Lyons, a peace officer engaged in the performance of his duties, in violation of Penal Code sections 664/187, subdivision (a), a serious felony within the meaning of Penal Code section 1192.7, subdivision (c)(8). It was alleged in both counts 1 and 2 that appellant personally used a handgun within the meaning of Penal Code section 12022.5. The information further alleged two prior felony convictions within the meaning of Penal Code section 667.5, subdivision (b), and one prior serious felony conviction within the meaning of Penal Code sections 667, subdivision (a)(1), and 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i). (CT 299-302.) Appellant was arraigned, pled not guilty, and denied the special-circumstance allegations. (CT 628; RT 52-53.)

Trial was by jury. (See RT 300-144 through 300-145.) Following the guilt phase, appellant was found guilty of counts 1 and 2 and the special-circumstance and weapon-use allegations were found to be true. (CT 747-750.) At the conclusion of the penalty phase, the jury fixed the penalty at death. (CT 784.)

Appellant's motion for new trial was denied. Appellant's motion for reduction of the murder charge, deemed by the court as a motion for modification of the verdict, was denied. (CT 827.) The court sentenced appellant to death as to count 1, in accordance with the jury's verdict, and stayed a 10-year sentence for the use of a firearm. On count 2, the court

imposed and stayed a consecutive sentence of life with possibility of parole plus ten years for the firearm enhancement, plus an additional six years for the prior felony convictions pursuant to Penal Code sections 667, subdivisions (a), and 667.5, subdivision (b). (CT 827-832.)

This appeal is automatic following a judgment of death. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS[1/]

I. Evidence Presented At The Guilt Phase

This case involves the deliberate and premeditated murder of a uniformed deputy sheriff in the lawful performance of his duties by an armed gang member who believed he had two prior convictions within the meaning of the Three Strikes Law and who did not want to return to prison for the rest of his life as a result of a third "strike."

On the evening of May 12, 1995, the Los Angeles County Sheriff's Department deployed its Gang Enforcement team in the neighborhood surrounding the Century Station which was the "territory" of the Young Crowd gang. Deputy Stephen Blair and his partner Deputy Robert Lyons, both of

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1. Appellant's Statement of Facts fails to present the facts in the light most favorable to the judgment below, includes evidence not presented to the jury (specifically, facts relevant to civil lawsuits filed against the Los Angeles County Sheriff which were presented at an Evidence Code section 402 hearing, but which were not admitted at trial), and fails to distinguish between evidence presented during the prosecution and defense cases-in-chief.

whom were in full uniform, were part of the Enforcement Team. They were one of 25 marked patrol units which "saturated" the neighborhood.

That evening, Deputies Blair and Lyons came into contact with appellant, a member of the Young Crowd gang. Appellant, who knew that conditions of his parole were that he was not to carry firearms or associate with Young Crowd gang members, was armed with two guns. Appellant believed he had two prior strike convictions. As the deputies turned their patrol vehicle onto Duncan Avenue, appellant and Ernesto Avila, a Young Crowd gang member, were standing together on the sidewalk. After noticing the patrol vehicle, appellant and Avila started walking away from the approaching patrol car. Avila got frightened and tossed an object over his shoulder into a yard. Deputies Blair and Lyons decided to stop the men and investigate what had been tossed. When the deputies stopped the patrol car, Avila stopped on the sidewalk, but appellant continued walking toward a tree. Deputy Blair, show service revolver was in his holster, exited the driver's side of the patrol car. However, before Deputy Blair was completely out of the patrol car, appellant, who did not want to return to jail "for the rest of his life" as a "three striker," opened fire on him and Deputy Lyons. Deputy Blair died of two gunshot wounds, including one bullet which entered his neck through the lower throat area.

Appellant's defense was self-defense and defense of Avila. He claimed Deputy Blair fired first.

A. Prosecution's Evidence

1. The Events Of May 12, 1995

In early May 1995, there was an increase in gang activity in Lynwood in the neighborhood surrounding the Century Station of the Los Angeles County Sheriff's Department. This area was the territory of the Young Crowd Gang. In order to abate the rising criminal activity by gang members in the area, the Los Angeles County Sheriff's Department deployed its Gang Enforcement Team, a specialized unit with a "gang saturation patrol," to the neighborhood on Friday evening, May 12, 1995. Approximately 50 uniformed gang enforcement officers in 25 marked patrol cars participated in the operation and "saturated" the area with their presence. The units supplemented the routine patrol units in the area. The gang enforcement units took calls from their sergeant who directed them to specific areas in the neighborhood to deal with gang activity. (RT 354-360, 366-369, 372, 386-387.)

Prior to deployment, the gang enforcement officers were briefed on gang-related incidents which had occurred in the area during the previous week. Specifically, the officers were told about two incidents: 1) a foot pursuit in which an Athens Park Gang member fired gunshots at a police officer; and 2)

the finding and recovery of a bullet-ridden, demolished pickup truck in an area off Martin Luther King Boulevard and Duncan. The numerous gunshots in the pickup truck were from automatic weapons and a shotgun. A five-pointed star (similar to the star on a sheriff patrol car) was painted on the door of the pickup truck with the word "sheriff" above the star. Also painted on the pickup truck were the following words: "kill sheriff," "fuck the sheriff," "don't hide behind the badge fools," and "the crowd [Young Crowd] is going to get you." (See Peo. Exh. 1.) The Gang Enforcement Team was asked to "saturate the area and try to keep the gang activity down for the evening." The briefing ended around 6:20 p.m. (RT 370-374, 380-392, 526-527, 534, 597.)

Los Angeles County Sheriff's Deputies Stephen Blair (the victim in count I) and Robert Lyons (the victim in count II) were partners on the evening of May 12th and one of the 25 gang enforcement units which "saturated" the neighborhood surrounding Century Station. Both officers were in full uniform and in a marked patrol car. Deputy Blair drove the patrol car because he was more familiar with the area. Deputy Lyons was the passenger or "book man." While on patrol, the deputies passed the area where the bullet-ridden pickup truck had been found earlier in the week. The deputies were aware that a search of the residence where the pickup truck had been recovered had produced several firearms, including semi-automatics, pistols, an AK 47, a rifle, and a shotgun. Deputy Lyons was concerned

> Because I know that [an AK 47] can go through pretty much anything, meaning patrol cars, meaning a deputy's [bullet proof] vest, meaning a person, just go through-and-through.

Deputy Blair "couldn't believe, you know, the type of fire power [the Young Crowd] had to do all the damage to that truck." Based on the briefing, in addition to what the officers discovered at the residence earlier in the week, Deputy Lyons "kinda figured that this particular gang was going to be more aggressive than any other gang we contacted before." (RT 360-366, 386-392, 400-402, 407-417, 527-528.)

At approximately 7:55 p.m., while it was still daylight, Deputy Blair turned the patrol car from southbound Duncan Avenue onto eastbound Walnut Avenue. Deputy Blair was driving at a normal patrol speed (15-20 m.p.h.). Two males were standing side-by-side on the north sidewalk of Walnut with their backs to the approaching patrol car. The two males, who were about 50 feet in front of the patrol car, caught the attention of Deputy Lyons when they looked over their right shoulders for "a split second." Immediately thereafter, the two men walked at a normal pace eastbound (away from the patrol car) on Walnut, a deadend street with no traffic, toward Ham Park. (RT 416-431.)

About two to three seconds after the males initially looked toward the deputies, the shorter male reached into the pocket of his black jacket, pulled out a large object, and threw it with "a great deal of force" over his right shoulder

(like a "hook shot" in basketball) into a yard of one of the residences on Walnut. Deputy Lyons, who believed the thrown object was either narcotics or a weapon, told Deputy Blair, "We have a toss." At that point, the shorter male stopped walking on Walnut, while the taller man quickened his pace and continued walking eastbound on Walnut away from the patrol car toward Ham Park. Deputy Blair told Deputy Lyons, "You get the shorter guy, I'll get the taller guy." (RT 431-443.)

The shorter male was five feet, five inches to five feet, eight inches tall, wearing a baseball cap, light-colored pants and a dark shirt. The taller male was five feet, ten inches to six feet tall, wearing a baseball cap, dark pants, and a long jacket that went down to his knees. Deputy Lyons opined the two males were dressed in gang attire. Deputy Lyons did not know whether the two men were members of the Young Crowd Gang, or who they were. (RT 424-428, 599-600.)

Deputy Blair parked the patrol vehicle in the opposite lane of traffic at an angle toward the curb alongside the shorter male who had thrown the object. The shorter male stopped walking, turned around, and stood on the sidewalk about five feet in front of the patrol car. The shorter male faced the patrol car and had his hands at his side. The taller man continued to walk eastbound toward a big tree in front of the patrol car. The tree "covered" the taller male from the view of Deputy Lyons. Deputy Lyons, who was focusing

his attention on the shorter male, exited the passenger side of the patrol car before it came to a complete stop. (RT 442-451.)

Deputy Lyons took two steps toward the front of the patrol car, reaching the front tire. As Deputy Blair was getting out of the driver's side of the patrol car, Deputy Lyons heard five shots fired in rapid succession from what sounded like an automatic weapon. Deputy Lyons did not believe the gunshots sounded like they came from a nine millimeter handgun, the caliber of firearm used by deputy sheriffs. As the shots were fired, the shorter male raised his hands with his palms up in the air gesturing that he did not have anything in his hands. (RT 451-462, 576.)

When the shots were fired, Deputy Blair, a "distinguished expert" in marksmanship, was still getting out of the driver's side of the patrol car. Deputy Blair, who was right-handed and wore his service handgun on the right side, had his right hand on the top of the driver's door pulling himself out of the patrol car when the shots were fired. As the shots were fired, Deputy Blair was "almost standing up" and "when the shots rang out [Deputy Blair] took a combative stance and tried to conceal himself behind the [driver's] door" of the patrol car. Deputy Blair was "actually exposed" in front of the driver's door even though he had his right hand on the top of the door. As the shots were fired, Deputy Lyons saw Deputy Blair bring his right hand down from the top of the driver's door toward his service handgun in the holster and take a combative stance

behind the driver's door while looking in the direction of the tree, approximately 15 to 20 feet from the patrol car, where the taller man had gone. Deputy Lyons went down on his knees behind the patrol car and did not see Deputy Blair bring his service handgun back up from the holster. Based on his observations, Deputy Lyons believed the gunshots were not fired by Deputy Blair. (RT 454-470, 506-507, 509-512, 602-604, 624.)

Deputy Lyons did not know where the shots came from but he thought he was being shot at since the bullets "whizzed" by his left ear. Deputy Lyons removed his service handgun and squatted down with his knees on the ground near the patrol car's right front tire. Deputy Blair took a combative stance behind the driver's door. Deputy Lyons, who could not see the taller man behind the tree, screamed four or five times, "Steve [Deputy Blair], are you okay?" There was no answer. (RT 464-474.)

Deputy Lyons looked in the direction of the tree and saw the figure of the taller man running "full sprint" eastbound on Walnut toward Ham Park. The shorter man ran westbound on Walnut toward Duncan. As the taller man was running toward Ham Park and Deputy Lyons was moving along the passenger side toward the back of the patrol car, there was a second round of approximately eight gunshots which sounded like it was fired from a gun different than the one used in the first round of gunfire. The second round of

gunshots sounded like they were fired from the type of firearm used by deputy sheriffs.[2/] (RT 474-479, 483-484, 499, 576.)

Deputy Lyons heard what he believed were bullets strike a red Mazda pickup truck parked behind the end of the patrol car. Deputy Lyons thought he was being fired upon so he went to the tailgate portion of the Mazda pickup truck for cover. From that vantage point, Deputy Lyons saw Deputy Blair lying face down on the ground with blood coming out his mouth. Deputy Blair's feet were facing the tree and his head was facing the trunk of the patrol car. Deputy Blair's service handgun was in his right hand. Deputy Lyons screamed and asked if Deputy Blair was okay. There was no response. Deputy Lyons went to Deputy Blair's location. Holding Deputy Blair's head in his arms, Deputy Lyons used his portable radio and requested assistance and indicated his partner had been shot. (RT 480-497, 515, 519, 605-606; see Peo. Exh. 5 [tape recording of call]; see also RT 608-614.)

Craig Roberts, a Los Angeles County deputy sheriff assigned to Century Station, Patrol Division, was the first police unit to arrive at the crime scene in response to a radio dispatch indicating an officer was "down" at Duncan and Walnut. Deputy Roberts arrived at the scene within 30 to 60 seconds after receiving the radio call. Approaching eastbound on Walnut from Duncan, Deputy Roberts observed the black and white patrol car and Deputy

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2. Deputy Lyons was later told that the second round of gunshots were fired by Deputy Blair. (RT 561-562.)

Blair lying face down on the ground near the rear portion of the driver's side of the vehicle. A large pool of blood was under and adjacent to Deputy Blair. Deputy Blair's right arm was extended over his head with his service revolver in his hand with the hammer of the weapon cocked back, meaning the weapon had been fired. Deputy Lyons was kneeling on the ground immediately adjacent to Deputy Blair. Deputy Lyons was putting out a broadcast over the radio of a description of the suspects and requesting fire and paramedics to respond. Deputy Roberts rolled Deputy Blair onto his back. Deputy Blair was unconscious but his eyes were open. Deputy Roberts believed Deputy Blair was dead. (RT 767-775.)[3/]

2. The Witnesses To The Shooting

a. Connie Elaine Buske

On May 12, 1995, Connie Elaine Buske lived at 11501 Louise Avenue in Lynwood. At about 8:15 p.m., Buske exited the back door of her house, which faced Walnut; Ham Park and Louise Avenue were to her right; and Duncan Avenue was to her left. Buske heard three gunshots fired in rapid succession, then a pause of two or three seconds, and then another round of three

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3. Deputy Roberts used to be a partner to Deputy Blair. Deputy Roberts explained that Deputy Blair usually drove and that he had a particular way of getting out of the patrol car: "Steve [Deputy Blair] always exited the car by reaching over and grabbing the top of the door frame and pulling himself out" of the driver's seat with his right hand. Deputy Roberts also noted that Deputy Blair was right-handed and wore his service revolver on the right side. (RT 765-767.)

shots fired "fast." Buske could not tell if one or more guns were used to fire the two rounds of gunshots. Buske saw a marked patrol car parked across and down Walnut. Buske also saw the back of a uniformed Black police officer standing at the rear of the patrol car screaming rather "scarily," "Oh, fuck. Oh, fuck." Buske saw a second police officer lying on his back on the ground of the driver's side of the patrol car. (RT 658-676, 694-699.)

Buske then looked over her shoulder and saw appellant, whom she recognized from the neighborhood as "Smoky," and another man running "as fast as they could" on the sidewalk toward Ham Park. Appellant, who was running ahead of the second man, was wearing dark clothing, including a dark baseball cap, dark pants, and a long black jacket down to the knees. Appellant entered Ham Park by either going through the opening in the wall or climbing over the two-foot high block wall which separates Ham Park from Walnut. The second man turned off the sidewalk and went in between some houses before he reached Ham Park. (RT 676-693.)

Buske, who was well aware of the Young Crowd Gang in the neighborhood, saw several police officers arrive, but did not initially tell them what she saw because she was scared and "didn't want to get hurt or anything." Later, Buske told the police at the police station that she had heard gunshots and saw two unidentified people running. She did not identify appellant as one of the two men running because then she would be "needed" for the case and

would have to go to court and testify, which she was afraid to do. Sometime thereafter, Buske told the police that "Smoky" or appellant was one of the two men running toward Ham Park. Following the shooting, Buske moved out of the neighborhood and relocated. The Sheriff's Department paid for Buske's airfare. (RT 700-708.)

b. Ismael Rubio

On May 12, 1995, at approximately 8:00 p.m., Ismael Rubio, an off-duty Long Beach police officer, had just finished playing soccer in Ham Park. Rubio and some other soccer players were sitting on benches on the north side of Ham Park, just south of Martin Luther King Boulevard. Rubio heard gunfire from the west. He heard about four gunshots fired in rapid succession. After five or ten seconds, Rubio heard another round of about four rounds in rapid succession. The second round of gunshots was louder than the first round. Also, unlike the first round of gunfire, bullets in the second round were "pretty low and pretty loud" and "making the whistling sound flying above us." Rubio and the soccer players went "to the ground" for cover. Rubio believed that a gunshot fired at a person would sound louder than a gunshot fired away from the person. (RT 723-731, 747-757.)

While lying on the ground, Rubio looked in the direction of the shots and saw two men jumping over the cinder block wall on the west side of Ham Park. The taller man, who jumped over the wall first, was dressed in black and

wearing a long-sleeved, bulky jacket down to his knees. He was approximately five feet, nine inches to six feet tall. The second man wore a beige or off-white sweater and was about five feet, seven inches tall and 170 pounds. The taller man had his hand tucked under his jacket, as if concealing something, possibly a gun, in his waistband. The two men walked toward the parking lot, then back-and-forth several times between the parking lot and a bungalow. The shorter man stayed near the bungalow. The taller man returned to the parking lot walking "around looking in every direction." Rubio thought the taller man might be waiting for someone to pick him up. The taller man then walked to Louise Avenue and headed north. Rubio thought the taller man might be "a suspect of some sort" since he was walking around "acting nervous." (RT 730-740; see RT 744-746.)

c. Martha Godinez

On May 12, 1995, at approximately 8:20 p.m., Martha Godinez was parked in the parking lot at Ham Park watching a soccer game when she heard gunshots from Duncan Avenue. Ms. Godinez looked up and saw several individuals, including appellant whom she recognized from the neighborhood, running from the area of the shots. Appellant was wearing black pants, a long black jacket down to his knees, and a black baseball hat. Appellant and another man entered Ham Park and ran by Ms. Godinez' car in the parking lot. (RT 1355-1365.)

d. Renele Brooks And Sara Frausto

On the afternoon of May 12, 1995, Renele Brooks and her friend Sara Frausto went to the home of Nancy Pantoja, the aunt of Brooks' son, at 5237 Walnut. Brooks and Frausto had been romantically involved with Young Crowd Gang members, and "hung out" with them. Pantoja's residence was located behind 5235 Walnut, which was about three houses from Ham Park. A one-foot high cinder block wall and wrought iron fence enclosed the front yard of 5235 Walnut. Both women knew appellant, who was also known as "Smoky," from the neighborhood and usually talked with him in the front yard, which was near the deadend of Walnut by Ham Park. That afternoon, both women saw appellant, as well as his blue Isuzu Amigo (see Peo. Exhs. 20-23), on Walnut near Ham Park. (RT1083-1095, 1204, 1224-1233, 1304-1305.)

Around 8:15 p.m., Brooks, Frausto and others, including "Silent," "Little Man," Doug (Pantoja's boyfriend), "Conejo," "Chino," Kito, and appellant's brother Robert, also known as "Gato," were in the front yard of 5235 Walnut. At least two of the other persons, "Silent" and "Little Man," were Young Crowd Gang members. Brooks heard about three or four gunshots and turned to her right. She saw a patrol car on Walnut partially blocked by a pickup truck. The passenger door of the patrol car was open and Brooks could see the top of a police officer's head behind the passenger door. Brooks also saw a silhouette running on the sidewalk in her direction away from the patrol car.

Brooks then heard more gunshots and ran back to Ms. Pantoja's house when she felt bullets passing by her head. (RT 1093-1100, 1233-1243.)

Frausto heard 5-10 gunshots to her right. When Frausto looked to her right, she saw a police officer crouching down behind the door of a police car stopped in the middle of the street pointing toward Ham Park. The police officer was shooting a gun with both arms extended in front of himself in the direction of Ham Park (or toward Frausto's location). When Frausto heard bullets passing by her, she ran back to Pantoja's house. When she turned to go back to Pantoja's house, Frausto saw a "quick shadow running" on the other side of the street toward Ham Park. A deputy sheriff was firing a gun at the fleeing figure. (RT 1098-1105, 1108-1111.)

At Pantoja's house "basically the attitude was that no one was going to say anything about what happened, saying about who shot if they saw somebody shoot." Frausto, however, overheard Doug whispering to Pantoja that "Freddie did it." When interviewed by the police that evening, both Frausto and Brooks denied any knowledge of what occurred. Neither wanted to get involved in the matter. Both were scared of revenge from Young Crowd if they talked to the police. En route to Fontana early the next morning, Frausto told Brooks that she saw "Smoky" shoot. (RT 1111-1120, 1155-1157, 1242-1246.)

3. The Cause Of Death

Deputy Blair died from two gunshot wounds. One bullet entered Deputy Blair's neck near the lower throat area and exited his right lower lateral back. This bullet was fatal: the bullet cut through the aorta among other things. The wound caused "the instantaneous and total cessation of all blood supply to all of the organs of [Deputy Blair's] body, including the brain." Although the wound "almost instantly [caused] fatal destructive shock to the central part of the body," it was possible for Deputy Blair to continue to engage in purposeful activity, including firing a handgun, for up to six seconds. The other bullet entered the right shoulder area and exited in the center of Deputy Blair's back. This bullet proceeded downward and basically went through the back but never entered the chest cavity. The exit wound for the bullet was in the center of the back. This was a potentially fatal wound. (RT 1042-1059, 1068.)[4/]

4. The Ballistics Evidence

Deputy Sheriff Bruce Wayne Harris, a firearms examiner employed by the Los Angeles County Sheriff's Department, opined there is no way to determine the caliber of a weapon by the loudness of the gunshot because there were two many variables involved, including the type of ammunition used, the

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4. The bullet which entered Deputy Blair's neck caused an unusually abraded wound, causing the autopsy surgeon to opine the wound was caused by a "tumbling bullet" – a bullet which could have hit the top of Deputy Blair's bullet-proof vest causing the bullet to flip around and enter Deputy Blair's neck backward. (RT 1062-1064.)

position of the person who heard the gunshot, and the direction that the gun was pointed. Deputy Harris could not state with certainty that a .44 caliber gunshot would necessarily be louder than a nine millimeter gunshot. (RT 943-944, 993-1005.)

The ballistics evidence in this case revealed the following: Five expended nine millimeter shell casings (see Peo. Exh. 12 [Items 1, 2, 3, 6 and 24] recovered at the scene were fired from Deputy Blair's service handgun (see Peo. Exh. 12 [Item 5]). Based on the throw pattern of a Baretta 92-F handgun, the location of the five shell casings was consistent with Deputy Blair pointing his service handgun in a northeasterly direction toward the tree in front of the patrol car. A piece of lead from a bullet (see Peo. Exh. 12 [Item 21]) found on top of a red pickup truck was also fired from Deputy Blair's service handgun. Deputy Blair's service handgun (see Peo. Exh. 12 [Item 5]) was found loaded with 10 live rounds in the 15-round magazine and one live round in the chamber. The handgun was "off safe" meaning that "it's ready to fire." (RT 790-805, 957-960, 975-977, 987-988.)

The bullets recovered from Deputy Blair's body were .44 caliber and fired from the same weapon which was manufactured by Taurus, Llama, or Smith and Wesson. (see Peo. Exh. 26.) A .45 caliber semi-automatic handgun (see Peo. Exh. 12 [Item 22]) was found on the grass near a tree between the residences at 5215 and 5219 Walnut. A box of .44 caliber bullets was recovered

at the scene from a Hyundai belonging to Eddie Perez. Bullet impacts were found at the residence at 5210 Walnut (see Peo. Exh. 13) and the residence at 5219 Walnut (see Peo. Exh. 14). (RT 805-806, 819-824, 858-862, 945-949, 978-983; see RT 983-987.)

5. The Telephone Call

It was stipulated that on May 12, 1995, at 11:51 p.m., a telephone call was placed to a telephone subscribed to by Miguel Narango at 5247 Walnut, Lynwood, from the telephone at the Viva Mexico Bar at 11020 S. Atlantic Avenue. (RT 856-857; see RT 831-832.)

Jesus Meza Alfaro was at the Viva Mexico Bar that evening. He received a page from his wife shortly after 11:00 p.m. Mr. Alfaro went outside the bar to use the telephone in the parking lot to call his wife. As Alfaro was walking toward the telephone, appellant and another man ran up to the telephone before Alfaro could make his call. Appellant was wearing a dark long vest or jacket down to his knees. Appellant, who sounded desperate and who was speaking in English, told the person he had called that "he had shot police" and "to come and pick him up quickly" in front of Pescado Mojado, which was across the street from Viva Mexico. Alfaro stayed outside until he saw a woman driving a white Astro van arrive and pick up appellant and the other man. After the men got into the van, it proceeded down Imperial Highway. (RT 831-841, 850, 854; see RT 841-848.)

6. Appellant's Arrest

On May 24, 1995, after leaving a residence in the 16800 block of Ramona in Fontana, appellant was stopped while driving a blue Isuzu Amigo as the suspect in Deputy Blair's murder. The residence had been under surveillance by the Los Angeles County Sheriff's Department. Deputy Sheriffs James Corrigan and Jeffrey Riggin of SWAT effectuated the traffic stop while several other police units blocked traffic. The deputies were driving a marked black and white patrol car. The deputies were dressed in blue jeans and raid jackets marked with Sheriff identification over bullet-proof vests. The deputies were heavily armed: Deputy Corrigan was armed with a semi-automatic Baretta pistol and a Colt M-16 rifle (a fully automatic machine gun); Deputy Riggin was also armed with the same type of Baretta as Corrigan, but Riggins was also armed with an H and K MP-5 – a nine millimeter machine gun which had the capacity to fire semi or fully automatic. (RT 868-879, 925-931.)

At approximately 8:45 a.m., Deputies Corrigan and Riggin effectuated the traffic stop just north of Baseline on Sierra. Five to eight unmarked police units blocked traffic and a police helicopter circled overhead. Appellant, who was alone in the Amigo, immediately pulled over, exited the car, and initially obeyed the officers commands. However, after Deputy Riggin placed the handcuff on appellant's left wrist, but before the handcuff was placed on appellant's right wrist, appellant stood up without being told to do so and a

struggle erupted with Deputy Riggin hanging onto appellant's back with his right arm around appellant's neck. Appellant then walked toward Corrigan, who had his rifle pointed at appellant, at a "rapid walk of large extended steps." Deputy Corrigan placed his left arm around appellant's neck while holding onto his M-16, a fully automatic rifle, in his right hand. During the ensuing struggle, appellant grabbed the barrel of the M-16 for five to eight seconds and tried to pull it away from Deputy Corrigan. (RT 878-911.)

Five to seven other officers who were blocking traffic ran and "swarmed" appellant The officers had to jump on appellant as a group in order to subdue him. "[Appellant] wouldn't drop to the ground, it was unbelievable." Appellant fell, and his face hit the ground. While on the ground being handcuffed, appellant said, "Kill me, just fucking kill me." Appellant was taken to the hospital, where he was treated for injuries to his face from the fall. (RT 911-916, 932-936.)

7. Appellant's Conversations With Sara Frausto And Renele Brooks

In the days following Deputy Blair's murder, appellant engaged in several conversations about his involvement in the shooting with Frausto and/or Brooks at Brooks' house in Fontana.

During one conversation, appellant told Brooks that on the night of the incident he and Avila were walking down Walnut when the patrol car pulled up and the police officer said, "Let me see those hands, guys." Appellant, who was in possession of two guns, could only think about "going to jail." He told Avila, who was acting nervous, to be "cool" and the police would probably leave them alone. But, appellant explained, Avila threw his gun and all appellant could think of was "going to jail for the rest of his life." Appellant told Brooks he shot at the police officer "because [appellant] had two strikes." Appellant, who did not want to go back to jail, was angry at Avila for throwing the gun. Appellant did not tell Brooks he shot at the officer to save his or Avila's life. Rather, appellant said he shot at the police officer because he "did not want to go to jail for the rest of his life." (RT 1249-1254.)

On Monday, May 15, 1995, while at Brooks house, Ms. Frausto told appellant, "I know you did it [the shooting of Deputy Blair]." Appellant, who was "stunned" and "surprised" at Frausto's comment, responded, "How do you know?" Frausto said, "I saw you do it." Frausto then acknowledged she was "playing around" with appellant and did not see him do the shooting. But, Frausto then told appellant she overheard Doug whispering to Pantoja and told appellant, "Doug said you did it." Appellant, who was surprised, said, "Doug knows too." Appellant said, "I did it" because "[I] didn't want to go back to prison." (RT 1120-1129, 1157-1158.)

At some point during the next week, Frausto was at Brooks' home watching the afternoon news when a story aired about Deputy Blair's murder. The story related that the police were looking for a Hispanic suspect. Appellant, who had "a big smile on his face" from "ear to ear," laughed and said the police "would never know it was him . . . because he was Samoan." Later that evening, Frausto discussed with appellant what would happen if the police came to her house to look for him. Appellant "said he would go into the restroom and he would kill himself before the cops got to him . . . because he did not want to go back to jail."[5/] During this conversation, appellant told Brooks that should the police inquire, she should "basically stick with the original story that we had told the police that night at Century Station, that we didn't know anybody in the that area and that a friend of ours was down there." Appellant also told Brooks that if the police broke down her door looking for him, she should tell the police that appellant was in the back room of the house with a gun. Appellant wanted Brooks to tell the police he had a gun, even though he did not appear to have one, because appellant "did not want to go back to jail" and "I'm not going back

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5. Frausto repeatedly lied to the police and did not tell them what she knew about the shooting and appellant's involvement because she was afraid appellant might kill her or that someone from Young Crowd would do something to her. Eventually, Frausto told the police the truth because she realized the police knew what happened that night and she did not want to get caught in a lie or become an accessory to murder. After testifying at the preliminary hearing that appellant was the shooter and he shot because he did not want to go back to prison, Frausto relocated her residence with police assistance. Frausto relocated "because finally I testified, and now they [Young Crowd] will do something now." (RT 1167-1189.)

to jail." Appellant told Brooks that he had two "strikes" already and that on the night of May 12, 1995, he was armed with two guns which would lead to a third "strike." And, appellant told Brooks, he was not going to spend the rest of his life in jail for "that bullshit." (RT 1129, 1159-1164, 1268-1278, 1332-1334.)[6/]

8. Appellant's Recorded Conversation In Jail

On June 3, 1995, pursuant to a court order, the Los Angeles County Sheriff's Department tape-recorded a conversation between appellant and his mother and sister, whose first name was Sasa. The conversation took place in a visitor's cubicle of the jail while appellant and his visitors talked on the telephone. The conversation, which was in Samoan, was translated into English, transcribed and read to the jury. (RT 1338-1350, 1492-1539; see Peo. Exh. 32 [tape recording]; CT 27-114 [transcript].)

During the conversation, the following occurred:

(1) Appellant instructed his mother not to talk to the police because "I'm saying one thing to the lawyer, and you go tell the police something else" regarding appellant's whereabouts at the time of the shooting incident. Appellant apparently had told his lawyer he was asleep in the garage at the time

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6. Brooks also lied to the police. Brooks did not want to testify against appellant because she was afraid of "revenge" from Young Crowd. Brooks continued to lie to the police until after they raided her home on May 24, 1995 (the day of appellant's arrest). Although she initially lied on May 24th, Brooks finally told the police the truth when she believed they already knew that appellant had shot the deputy. Brooks relocated because she was afraid of retaliation for telling the truth. (RT 1278-1286, 1289-1299.)

of the shooting and appellant's mother told the police that appellant "was at the house that day" "cleaning up that evening." Appellant instructed his mother to tell the lawyer "I was at the house the whole night. I was sleeping at the house." Appellant also said,

> Man, it's bad to waste my fucking time here. I'm saying one thing to the lawyer, and you go tell the police something else. That's why things are all mix.

Appellant's mother then tried to reconcile the conflicting stories by telling appellant, "Look, there is no problem. All you say is that your mother doesn't know anything because your mother goes to sleep early about 8:00 p.m." (RT 1500-1503.)

(2) Appellant told his mother and Sasa to tell Lopaki[7] and Herman to say that appellant was at the house at the time of the shooting. (RT 1504, 1505, 1507, 1516, 1527.)

(3) Appellant stated that the police did not have an identification of the shooter from a witness: "no one pointed me out." (RT 1504-1505, 1508.)

(4) Appellant instructed Sasa as to what she should say about her activities on the day of the shooting and how she found appellant sleeping at the house following the shooting incident. (RT 1505-1507.)

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7. Appellant's brother Robert was also known as Lopaki and as Gato. (RT 1988.)

(5) Appellant told Sasa to tell his wife, Tina,[8/] that Tina could help him if Tina claimed Tina talked to police because the police threatened to take Tina's baby. (RT 1508, 1511-1514, 1527.)

(6) Appellant told Sasa to tell Avila not to change his story, and to continue to say that he did not see appellant on the day of the shooting. (RT 1517.)

Appellant also said "I'm not going to jail for the rest of my life. . . . I'm going to the chair." (RT 1524.) Appellant also said he carried a gun because he did not want to end up like "Ric Rac," a fellow gang member who was shot in the back by the police in the week preceding the instant shooting incident. (RT 1531-1532.) As explained by appellant:

> That's why wherever I go my gun is always with me. But what happened that night we got caught because of my friend. If he kept on walking, the police wouldn't come to us. But he go scared, man. He panicked. He threw his gun. That's why the police came to us. . . .
>
> Threw it in the yard. I don't know where he threw it to, but the police saw that and came to us.
>
> You know, I had two guns. If they found those, it's all over. I don't know what would have happened. They probably shoot me. You know, they just shot my friend, what three days before that . . . .

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8. At trial, appellant identified this woman as his wife, Tina. (RT 2016.)

(RT 1530-1531.) Appellant later noted that "They're going to try and kill me out there." (RT 1538.)

9. Appellant Was On Parole

At the time of Deputy Blair's murder, appellant was on parole, having suffered two prior convictions for assault with a firearm in violation of Penal Code section 245, subdivision (a). The first conviction was suffered on October 16, 1989, and the second conviction was suffered on May 14, 1992. (See Peo. Exh. 28 [abstract of judgment].) Appellant was sentenced to state prison for both convictions. (RT 1036-1040.)

The terms of appellant's parole included the following conditions: (1) not to own, use or have access to or under his control any type of firearm or instrument or device capable of being used as a firearm; (2) not to associate or to have any "contact of any form" with the Young Crowd Gang; and (3) to keep his parole agent advised of his current residence (see Peo. Exh. 27 [conditions of parole]). Ivan Boling, appellant's parole officer, told appellant about these conditions and that if he violated any of the conditions, he would "more than likely" be sent back to prison. (RT 1017-1021, 1030-1040.)

B. Defense Evidence

Appellant presented a defense of self defense. According to appellant and three others who claimed to witness the shooting, Deputy Blair, not

appellant, fired first. Appellant also attempted to demonstrate, through the testimony of Deputy's Blair's ex-wife, that Deputy Blair had a volatile temper.

1. Appellant's Testimony

At the time of Deputy Blair's murder, appellant, a member of the Young Crowd Gang, was on parole for a 1992 assault with a firearm. Prior to the 1992 assault, appellant had been convicted and sentenced to prison for firing a weapon at a man who "was messing around with my lady." (RT 1874-1879, 1932-1934.) Appellant, when he was a juvenile, confessed to shooting a woman. (RT 1927-1932.)

The police had harassed and verbally threatened members of the Young Crowd Gang, including appellant, in the weeks and months prior to May 12, 1995. For example, in early April, when appellant denied to a deputy sheriff knowing anything about a pending lawsuit against the Sheriff's Department, appellant was told by the deputy that the lawsuit was "coming up" and "You guys [Young Crowd] want things to be rough around here and shit, you know. You guys haven't seen anything yet." Another deputy sheriff told appellant, "The Vikings are back." Appellant, unaware of the Vikings, later found out that the Vikings were "just a bunch of white cops that, you know, mess around with homeys all the time." Appellant was also told that the Vikings had tattoos and "flashed" gang signs. (RT 1881-1885.)

On the afternoon of May 12, 1995, appellant and other members of the Young Crowd Gang gathered in the front yard of Kito's residence. Kito lived on Walnut three houses from the deadend near Ham Park. The gang members engaged in a discussion of the "big problem" in the neighborhood: how "all the cops [were] out to get us." While some gang members talked about how the police tried to kill homeboy Rascal (Jose Nieves) like they had done some time ago with homeboy Stranger in Watts, one of the "the little homeys" made a comment "that we should just blast them fools [the police] from now on." Appellant explained that "me and my homey were having a conversation and it was all kinds of people around playing cards, playing dominoes . . ." when the "little homey" made the comment about "blasting" the police. (RT 1879-1881, 1908-1911.)

At approximately 8:00 p.m., appellant was in an area between Ernest Avila's rear house and the front house at 5209 Walnut. Appellant retrieved two loaded weapons – a .44 caliber revolver and a nine millimeter automatic – hidden underneath the house. Appellant, who was wearing Docker pants and a black sweater, placed the weapons in his waistband, walked out to the front of the house where Avila was playing with the children in the yard, and walked down the sidewalk on Walnut toward Kito's house. While walking, appellant saw "flashing . . . car lights." Appellant turned around and saw the police "swoop up on Ernie [Avila]." After appellant took another couple of steps, he

heard a gunshot. Appellant ducked and turned around to see what was going on. A police officer was holding a gun straight in front of himself and pointing it toward the sidewalk. Avila was in a crouched down position and running. (RT 1885-1889.)

The police officer fired another round at Avila. Appellant, who was about 10 feet beyond the tree, yelled, "Hey man, what the fuck." The police officer, without any hesitation, turned and fired his weapon "right at [appellant]," even though appellant had his hands raised in the air and was walking back toward the officer. The first bullet passed "pretty close" to appellant's head and caused appellant to fall up against the fence. Only after the police officer fired more shots at him did appellant remove the .44 caliber revolver from his waistband. Appellant fired all five rounds in his .44 caliber revolver at the police officer because "that fool was trying to kill me." The police officer fell to the ground. Appellant ran to Martin Luther King Boulevard, where he flagged down someone he knew that was driving a car, got in, and was driven away. (RT 1889-1895.)

At the time of the shooting, appellant was aware of the Three Strikes Law, but did not know whether he had one or two strikes. Appellant did not go to the police afterwards because "I knew they would kill me." Appellant also did not think that anyone would believe that a police officer tried to kill his

homeboy, then fired at appellant when appellant yelled at the officer. (RT 1895-1897.)

Appellant moved around a lot after the shooting because he "was edgy" and "uncomfortable staying in one place, you know, for a long time. And I just kept moving around." Appellant told his sister Sasa that "a cop tried to smoke me and my homey that night. And that's why [the police officer] ended up getting killed." Appellant also talked with Tony about the incident, but no one else. Although appellant talked about what happened with others at Renele Brooks' house in Fontana, appellant "never said anything about what I did. The term that was always used was the homey that did this. . ." According to appellant, other than his sister and Tony, "everyone else pretty much saw it with their own eyes. I didn't have to tell nobody." (RT 1897-1908.)

Appellant gave the .44 caliber revolver he used in the shooting to a friend and told him to get rid of it. Appellant sold the nine millimeter and transported marijuana in order to raise money before he left for Mexico. Appellant denied making the telephone call outside the bar on the night of the shooting. (RT 1907-1908, 1994-1996.)

Appellant met Deputy Blair in February 1994. Appellant did not know whether Deputy Blair was a Viking. (RT 1908.)

Appellant was arrested on May 24, 1995. While lying on the ground with the armed officers yelling at him, appellant thought "these motherfuckers are going to kill me." Appellant, who thought if he stayed on the ground he

would be killed, "jumped up, and I started making a big old fuss right there, man" in "order to save [my] life." According to appellant, one of the officers said, "Damn, if there weren't so many witnesses," after noting that appellant looked at some bystanders. Appellant acknowledged he told the officers, "go ahead motherfuckers, kill me." (RT 1912-1919.)

Appellant admitted he made the statements read to the jury regarding the conversation he had in Samoan with his mother and sister while he was in custody. Appellant did not tell his mother that he shot Deputy Blair in self-defense, or that Deputy Blair had fired at Avila. Appellant told his mother that he was with Avila and that Avila had thrown a gun, causing the police to approach them. At trial, appellant testified that he was not with Avila and did not see him throw a gun. Several people told appellant they were willing to swear that they were with him that night and give him an alibi. Appellant "just wanted to lie my way out of it . . . because . . . nobody could place me at the scene, you know." (RT 1921-1927, 1947-1952, 1958.)

Appellant admitted he lied to the jury when he testified that he stayed at his friend Lovo's house after the shooting. Appellant actually stayed at the house of the "Border Brothers" who lived near Ham Park. (RT 1980-1985.)

2. Appellant's Witnesses Who Claimed Deputy Blair Fired First

[Continued to next page, due to computer formatting difficulties.]

Appellant presented three witnesses who claimed Deputy Blair fired first.

a. Ernesto Avila

On May 12, 1995, at approximately 8:00 p.m., Ernesto Avila, a member of the Young Crowd Gang, was standing in the front yard at 5209 Walnut talking to his five-year old daughter and her friend. Appellant walked down Walnut past Avila and "pretty much up the street" toward Kito's house, where Young Crowd gang members congregated. While talking to the children, Avila heard the sound of "squeaky brakes" and then observed a black and white police patrol car "coming around the corner pretty fast" onto Walnut. Avila told the children to go inside the house. Avila walked down the sidewalk on Walnut toward Kito's house and Ham Park. After he turned back and observed the patrol car again, Avila, who was on parole, reached into his waistband, removed a .45 caliber revolver which he carried for "protection," and "threw it" past a tree where a red Toyota was parked. As noted by Avila, he "chucked [the .45 caliber revolver] pretty far. As far as I could get it to go." (RT 1589-1598.)

Avila bought the revolver "off the streets" and carried it for protection from rival gang members, as well as members of the Vikings, a clique within the Los Angeles County Sheriff's Department consisting of police officers who "do basically the same thing that rival gang members do" including throwing [gang] signs and shooting people. Avila considered the Vikings to be an enemy gang;

tensions between Young Crowd and the Sheriff's Department were high since 1984 or 1985. About five days before May 12, 1995, deputy sheriffs shot a Young Crowd Gang member in the back. Vikings performed "flashlight therapy" in which gang members were beaten with a flashlight while forced up against a patrol car. According to Avila, Deputy Blair had stopped him three or four times in the past and gave him "flashlight therapy" more than once. Avila maintained that during the prior contacts, Deputy Blair said, "Fuck Young Crowd, this is the Vikings" and that the Vikings wanted "to beat up the Young Crowd." Avila also testified he had seen Deputy Blair "throw" Viking gang signs. (RT 1595-1604, 1611-1612, 1652-1654.) Avila maintained that Deputy Blair performed flashlight therapy on him in June or July 1994. Avila was sent to prison on June 4, 1994 and stayed there for about a year. (RT 1467, 1646-1652.)

After throwing the revolver, Avila took a few steps and stopped when the patrol car pulled up against the sidewalk. Avila turned around toward the patrol car, "threw [his] hands to the side," and said, "What's up?" The driver's door of the patrol car "flew open" and Deputy Blair, whom Avila recognized from prior contacts, got out of the car "pretty quick" and "had his [Deputy Blair] gun already drawn." The gun was pointed at Avila who thought, based on Deputy Blair's facial expression, that Deputy Blair "was planning to shoot." Avila, who was only 15 feet from Deputy Blair, ducked and ran back toward his

house. Deputy Blair fired shots at Avila. Avila heard shots "whizzing" by his head. As Avila continued running and ducking, he "heard more [shots] and it was like an exchange . . . and I just kept running." Avila believed the gunshots were fired from two different guns; a bigger one and a smaller one. Although some of the shots were fired from Deputy Blair, Avila did not know where the other shots were coming from. In all, Avila heard between 5 and 15 shots fired. Avila did not see who fired first. (RT 1597-1611, 1622, 1696, 1720-1721.)

Avila ran into his house where he stayed with family members. Because he was scared, Avila told those gathered inside his house that he did not know what happened outside. The next morning, Avila was taken to the Century Station and questioned by police. Avila lied to the police and told them that at the time of the shooting he was inside his house taking a shower. Avila lied to the police because a police officer had been shot and "I didn't want to be placed outside [the house] because they would have took me to jail." (RT 1612-1615, 1620.)

When arrested on May 24, 1995, Avila again lied to the police and told them he was in the shower at the time of the shooting. Avila explained he lied "because I didn't want to let them know that I knew anything about [the shooting incident]" because I was "scared that [the Vikings] would try and get me" because of Deputy Blair's death. Deputy sheriffs threatened Avila after the shooting. In one incident, deputy sheriffs forced Avila into a car, said they

believed Avila was involved in the killing of Deputy Blair, and said, "You guys fucked up. You killed one of ours and we are going to kill ten of yours." (RT 1615-1618.)

b. Douglas Bristol

On May 12, 1995, at approximately 8:00 p.m., Douglas Bristol, who lived in the rear residence at 5237 Walnut, was standing with others in the front yard of Kito's residence. At some point, a patrol car came around the corner "normally" nd everyone in Kito's yard turned and looked. The patrol car "then abruptly went to the curb" on Walnut. The driver and passenger doors of the patrol car "swung" open. Just as the patrol car was stopping, the driver "jump[ed] out [of the patrol car] with a gun in his [left] hand. And he was just about ready to place both hands on the gun" when the police officer fired two to three rounds toward the fence where two individuals were standing. The person standing by the tree in the area of the fence had his hands up in the air and said, "hey, hey, hey" or "Whoa, whoa, whoa." The police officer then turned toward that individual and fired more shots in the direction of the tree (which was the same direction of Kito's yard). As the police officer turned, "that's when the rounds started going over our head." Bristol heard a "volley" of gunshots between two different guns. The group that had gathered in Kito's yard ducked and ran for cover. Bristol ran back to the rear house where he resided. (RT 1734-1748.)

In all, Bristol heard between six and nine shots fired. Bristol explained that "first it was the police officers rounds, then it was a combination of two different guns going off. And that's the volley." Bristol saw the police officer's firearm discharge with slight flame and slight smoke. The police officer fired first in the direction of the fence and then, approximately one second later, in the direction of the tree, which was in line with where Bristol and the others were standing in Kito's yard. As noted by Bristol, "You could hear [the bullets] ring, you could hear them spin, RRRRRH, that is pretty close." (RT 1748-1751.) After the shooting, Bristol whispered to Nancy Pantoja, "I think Smoky did it." (RT 1771.)

Bristol lied to the police when he was interviewed following the shooting because he "was more afraid of what was going on." Bristol talked to the police two days later and told them what he had observed at the time of the shooting except for the fact that the person running from the tree toward Kito's house was "Smoky." Although Bristol was not a member of the Young Crowd Gang, he "was born and raised [in the neighborhood]. I have known them all since they were kids." (RT 1751-1754.)

c. Charlotte Bristol

Charlotte Bristol, who was five years old at the time, observed a shooting incident down the street while standing outside Francis's house on Walnut. Charlotte observed a police officer get out of a patrol car and start

shooting at "one of the homeboys." The police officer first shot straight ahead and then to the left. Charlotte saw the police officer fall to the ground after being shot by one of the "homeboys." Although Charlotte did not know what happened before the "homeboy" shot the police officer, she was "sure" the police officer shot first "Because I saw it." (RT 1848-1858.)

3. Appellant's Unsuccessful Effort To Demonstrate Deputy Blair Had A Volatile Temper

The defense called Rebecca Blair, the wife of Deputy Blair from 1983 to 1994, in an effort to demonstrate that her former husband had a volatile temper during their marriage. However, Ms. Blair repudiated the contents of the sworn declaration she filed during the divorce proceedings with Deputy Blair. Ms. Blair explained that the declaration, which the defense had relied on, was prepared by her attorney after Deputy Blair filed for divorce. Ms. Blair signed the declaration -- which related Deputy Blair got upset, broke furniture, and physically attacked her – because she was upset and hurt by her then-husband engaging in an affair with a woman he later married. Ms. Blair indicated the declaration was merely an effort to "get back" at her husband. (RT 2077-2079, 2094-2099.)

4. Other Defense Evidence

It was stipulated that there was a tattoo on the posterior aspect of Deputy Blair's left leg. The tattoo consisted of blue and red diagram of a Viking

with the letters "LXXI" above the head measuring two and one-half to three inches. (RT 2101-2102.)

Before appellant was arrested, the police publicized a $150,000 reward for assistance in finding the person who shot Deputy Blair. Detective Reynold Verdugo mentioned the reward to appellant's wife, Tina Fuiava, after she provided the "break in the case." (RT 2050-2051, 2055.)

Jesus Alfaro told Detective Verdugo that Alfaro overheard the man on the telephone outside the bar say, "I shot somebody." Alfaro did not tell Detective Verdugo that he heard the man say, "I just shot a policeman." (RT 2052-2053.)

Jose Nieves and six or seven other persons lived in a house. Nieves and most of the other persons who lived in the house were associated with or members of Young Crowd. Several persons painted a truck which was in Nieves' yard with a sheriff's star and wrote, "Fuck the sheriff" on the passenger door. Approximately two or three weeks later, on May 7, 1995, Nieves was shot. (RT 1797-1810.)

C. Rebuttal Evidence

A couple of days following the shooting of Deputy Blair, Ernesto Avila told his parole agent, Claretha Jackson, that at the time of the shooting he (Avila) was inside his house taking a shower and "didn't know anything about" the incident other than that a deputy sheriff was shot about 50 feet in front of his

residence. Avila also said that the children playing in the yard in front of his residence did not see anything. (RT 1811-1814.) Sometime later, Avila told agent Jackson that he moved out of his residence on Walnut and moved in with his brother-in-law in Compton because he "feared for his life." (RT 1814-1815.)

Agent Jackson interviewed Avila in jail two to three days after Avila was arrested on May 24, 1995. At that time Avila related the following: a couple of hours before the shooting incident, several members of the Young Crowd Gang, including Avila and appellant, were "hanging out and drinking" at Kito's residence on Walnut; the gang members discussed the Sheriff's Department harassment of them, as well as a pending lawsuit against the Sheriff's Department because of the Viking gang within the Sherriff's Department; there was also a discussion about "killing" a deputy sheriff because of the harassment; specifically, there was discussion about how "they was going to shoot one of them [a deputy sheriff] or do something or blast one of them or do something to that effect" the next time the police came around harassing them. Avila also told agent Jackson, "Just because . . . my fingerprints may be on the gun [which was present at Kito's that afternoon] doesn't mean that I had anything to do with the shooting." (RT 1815-1818, 1820-1821, 1824.) Avila also told agent Jackson that when he heard the patrol car approaching that evening, he went inside his house to take a shower. But when questioned further, Avila stated he went inside his house "because he didn't want any

trouble and then he heard the shots. And he didn't come out at that point because he didn't want to get involved with a shooting." (RT 1818-1821, 1824.)

II. Penalty Phase Evidence

D. The Prosecution's Case In Aggravation

1. Prior Unadjudicated Acts of Violence

The prosecution introduced evidence of four prior acts of violence.

a. The Two Shooting Incidents On September 9, 1984

On September 9, 1984, at approximately 9:30 or 10:00 p.m., Manuel Ramirez was driving southbound on Louise in a two-door 1968 Malibu Chevrolet. Also in the car were Ramirez's 10-or-11-year-old sister, two brothers (8 and 17 years old), a 5-year-old child, and Cristina, a woman in her mid forties. Cristina, who was "probably" a gang member, was sitting in the front passenger seat of the Malibu. The group was en route from Cristina's house to the residence of Cristina's boyfriend. After Ramirez stopped for the stop sign at Beachwood and proceeded through the intersection, an unidentified person standing on the left hand side of the street by a mailbox, yelled out "Manuel." Ramirez slowed down, placed his hand out the driver's window, and waved "Hi," even though he did not know who he was waving at. Thereafter, Ramirez sped up and when he got to the middle of a "pitch black" school field on the right side of the street, he heard what he thought were the sounds of firecrackers

coming from the field. However, one of Ramirez' brothers told him they were the sounds of bullets. Cristina then said, "I'm hit." Ramirez pulled over. Cristina was "bleeding a lot" from "her right side jaw." Ramirez sped to a nearby hospital where Cristina received treatment for her wound. (RT 2394-2404.)

Two to three days after the above shooting incident, Los Angeles County Deputy Sheriff Kele Kaulana Kaono, assigned to the Operations Safe Streets Gang Detail in Lynwood, interviewed appellant. Appellant acknowledged his participation in two shooting incidents at the intersection of Beachwood and Louise on September 9, 1984. The incidents occurred within minutes of each other and appellant used a .22 caliber sawed-off rifle during each incident. Appellant explained that on September 9, 1984, he and others went to the area of Beachwood and Louise to "crash" a party. However, after being rejected at the party, appellant saw a white car skid in the area. Since he thought the car contained rival gang members, appellant retrieved the .22 caliber gun he had previously "stashed" in the bushes, and opened fire on the white car. Appellant told Deputy Kaono "that if he believed someone was a gang member or a rival to his gang, then he shot at them." Appellant also told Deputy Kaono that within minutes of the shooting at the white car another car (the blue car driven by Ramirez) came by the area and appellant opened fire on the occupants

of the car because he believed it contained "faggot Segundo gang members." (RT 2419-2432.)

Deputy Koano interviewed Christina a week after the shooting incident. Christina had a gunshot wound in her jaw area and had difficulty, both physically and emotionally, talking about the incident. (RT 2441-2443.)

b. The Shooting Incident Prior To September 9, 1984

During the interview with Deputy Kaono, appellant admitted to another act of violence which occurred a couple of weeks to a month prior to September 9, 1984. Appellant related that sometime before the shooting incident there was a "confrontation" with a group of Segundo gang members at Ham Park. After the incident, appellant went to a homeboy, related what had occurred, and indicated "he wanted a gun in the event the Segundoes would return, he would be ready for them." Appellant apparently did not wait for the Segundoes to return. Appellant related to Deputy Kaono that he and other gang members went to the Segundoes "turf" and fired into a car which they believed contained members of the Segundo gang. There was no reason for firing into the car other than the earlier incident at Ham Park. (RT 2423-2424, 2430-2438.)

c. The Shooting Incident On March 14, 1992

On March 14, 1992, at approximately 1:15 a.m., Los Angeles County Deputy Sheriff Matt J. Brady responded to 12318 Halo Drive in Lynwood where

he encountered shooting victims Dee Dee Carr and Clifton Hill. Carr suffered a bullet wound on her head. The bullet passed through her hair along the top of her skull. The bullet actually removed pieces of hair from her head. The bullet did not penetrate the skin but it passed from front to back along the top of her head and "it looked like the bullet passed right through her hair but touching the scalp." Carr and Hill described the shooting, the vehicle involved, and the perpetrator. Shortly after the shooting incident, Hill identified appellant as the shooter at a field show-up. (RT 2603-2610.)

2. Victim Impact Evidence

The prosecution introduced victim impact evidence from family members and coworkers.

a. Family Members

Diana Blair, Deputy Blair's wife of five months, told the jury that "We did everything together" and "planned our whole future basically up until retirement, [including] what kind of rocking chairs we were going to have." As noted by Mrs. Blair,

> We did everything together. We went to school together. We worked together. We lived together. Everywhere we went, we were always together.

(RT 2555-2559.) Mrs. Blair informed the jury that her husband's death "gypped" her of the rest of her life:

I wish we wouldn't have waited to have a baby. I wish I could have–I don't know. It is just –all kinds of thoughts were running through my head.

We had everything planned out and just when I got to the hospital and they took me in the room and said he was gone, it's like I died too

. . . .

I lost everything. I lost my whole life. My best friend, my love.

I lost his kids. I lost our kids that we planned on having. I lost my whole future, everything – everything in my life just revolved around him and just in one second it was gone.

(RT 2565.)

Mrs. Blair also related that she talks to her husband "all the time" about what is going on in her life: "There's just not a second that goes by that I don't think of him and I wish that he was here with me. It's like a part of me missing." (RT 2568.)

Rebecca Blair, the ex-wife of Deputy Blair, related that she talked with Deputy Blair about their children the very day he was killed. Deputy Blair told her that since he was sick it might not be a good idea for him to have the children over the weekend. When she found out later in the day that her ex-husband had been killed, "There's no words [to explain what she was feeling]. He is the father of my children." Rebecca was upset and angry over

the "missed opportunities" for her children. As she explained, "there is no opportunities [for the children] to see their father, have him there, turn to him if they need him. He's not there. They can't turn to him." (RT 2540-2552.)

Olga Blair, the Hispanic mother of Deputy Blair, testified her son, when he was seven years old, told her that he wanted to be a deputy sheriff. Deputy Blair "tried to protect" his mother from what he did on the job. When she saw the body of her dead son at the hospital, Mrs. Blair said, "I will miss you forever." Mrs. Blair noted that she prays to her son every night "just to tell him, please be here for us, to please watch over the children when they are growing up that they go in the right direction just like I led him into." Mrs. Blair testified she was "very proud" of her son. (RT 2531, 2536-2539.)

Wayne Blair, the father of Deputy Blair, related that when he heard of his son's death, he felt "helpless, hopeless and very sad." Mr. Blair indicated it was "devastating" to see his son at the funeral home: "He was such a good kid. He was a good man. Just wasn't right. He didn't deserve to be there." The death of his son changed "everything" for Mr. Blair:

> just every aspect of my life changed. Everything I do, I remember him. . . . [¶] . . . Everything that happens, I remember things from his childhood, things from our vacations, just everything brings back memories.

Mr. Blair testified that "I still want to be able to tell him how much I love him and how much I miss him." (RT 2615-2620.)

Stephen Blair, Jr., the 12-year-old son of Deputy Blair, testified his father "did a good job" as a police officer and "he got shot." Stephen misses his father "being around, and I just miss him a lot," especially around Christmas. Stephen also misses his father being able to watch him play baseball. Stephen visits his father's grave and "talks" to him at night when he is about to go to sleep "because I miss him." (RT 2524-2529.)

Joseph Blair, the eight-year-old son of Deputy Blair, misses his father "all the time." (RT 2522-2523.) And, Michael Blair, the six-year-old son of Deputy Blair, related that his father is "in heaven." (RT 2520-2521.)

b. Coworkers

Deputy Sheriff Robert Lyons, Deputy Blair's partner, described Deputy Blair as "a best friend" who "made me really enjoy" the job of being a police officer. Deputy Lyons, who "felt guilty that [he] let someone else take [Deputy Blair's] life," explained that Deputy Blair was a "very honest and truthful person" whom he "compares everybody else to." Deputy Lyons, who had Deputy Blair's employee number inscribed on a pocket knife so Deputy Blair could be "with me at all times," told the jury he still had the uniform he wore the night of the shooting because "it's the only thing I have left." (RT 2407-2417.)

Deputy Sheriff Jack Tarasiuk met Deputy Blair in 1988 when they were both trainees in Lynwood. Deputy Blair, who had about two weeks more training, "basically cheered up" Deputy Tarasiuk when he (Tarasiuk) arrived in Lynwood. Deputy Blair told him "that it wasn't that bad. That I would be all right." They became "best friends" after that time. Deputy Blair showed Deputy Tarasiuk how to be a deputy sheriff. Deputy Blair encouraged Deputy Tarasuik to remain in law enforcement. (RT 2493-2512.)

Deputy Blair's death affected Deputy Tarasiuk "in many ways." Deputy Tarasiuk explained that when Deputy Blair died, that "part of me died with Steve, basically. That can never be replaced." Deputy Tarasiuk wears a bracelet in memory of Deputy Blair who taught him to spend the "extra minute" with people for positive feedback. Deputy Tarasiuk also wrote a poem reflecting his sentiments toward the loss of Deputy Blair. The poem is entitled, "Mr. Lynwood," which was Deputy Blair's nickname because he was dedicated to the city of Lynwood. (RT 2501-2515.)

Deputy Sheriff Richard Westin met Deputy Blair in 1990 when Westin was a new recruit at the Lynwood station. Deputy Blair went out of his way to make friends with Westin. They had a common interest in cars and "became best friends." (RT 2448-2452.) Deputy Westin "admired" Deputy Blair: "I am trying to be like he was . . . . I always viewed him as someone I wanted to be just like and his memories stay with me." (RT 2453.)

Deputy Westin described Deputy Blair as "calm," "professional," and "a very non-offensive person." Deputy Blair was reluctant to shoot at suspects even though he was legally entitled to do so. Deputy Westin related that the only time Deputy Blair shot at a suspect was when Deputy Blair was up against a wall and the suspect was going to stab him with a spear. Deputy Westin testified there were

> countless times where I witnessed myself where [Deputy Blair] could have just shot somebody and he didn't. He had a reverence for life and a degree of professionalism that was well beyond what would be expected of a deputy sheriff.

(RT 2454-2457.) Deputy Blair received over ten commendations. One of the commendations was for arresting a murder suspect without the use of deadly force in a situation where he was entitled to use such force. The commendation is posted in the briefing room of the Lynwood station as a "source of inspiration, the epitome of excellence, professionalism." (RT 2466-2475.)

Deputy Westin thinks about Deputy Blair "all the time." He wears a bracelet in Deputy Blair's memory because it gives him strength and "I'll never forget him." (RT 2458-2460, 2465.)[9/]

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9. The prosecution also introduced evidence that the Vikings is a group of tightly knit deputies who are good friends. The group has nothing to do with race, since it includes members from various races, including Blacks and Hispanics. The Vikings is merely a "bunch of guys that hang out together." The tattoo of a Viking on the member's leg is optional and is not "sinister or sadistic or evil." The tattoo is merely "a personal preference that is a decision

E. Appellant's Case In Mitigation

Appellant testified on his behalf and presented several family members, as well as non-family members, in support of why the jury should spare his life.

1. Family Members

Sasa Fuiava, appellant's older sister who grew up with appellant, related that they were raised in "a very active family" and that appellant participated in family activities except "when he was locked up." As a child, appellant was active in church activities and the Boy Scouts. As an adult, appellant interacted well with the children around Lynwood who referred to him as "Uncle Freddie" or "Uncle Smoky." Appellant was "protective" of his family and friends "anyway possible." Notwithstanding appellant's past problems, "as a character and as a person, [appellant] is a great father to his -- to Amanda. And also a great uncle to everybody, to all of our nephews and nieces." Appellant also "cared a lot" about his parents and "became really close . . . to the family and stuff" following his father's death. Sasa maintained appellant did not deserve the death penalty because "he protected a friend and himself." (RT 2625-2632.)

Sopo Fuiava, appellant's younger sister, grew up with appellant and "played around a lot" with him in such activities as wrestling, softball and

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based on your personal belief." Deputy Sheriff Bryan Hunt, an African American member of the Vikings with a Viking tattoo, noted he has the tattoo because he is "proud of Lynwood. I am proud of the station and proud of the guys that I associate with." (RT 2458-2459, 2587-2590.)

volleyball. Appellant was active in church activities and the Boy Scouts. One of appellant's nieces referred to him as "daddy" because appellant "was always there for her." Sopo thought the jury should spare appellant's life because "you guys don't know the other side [of appellant] like we do" and "I'm sorry for what he did but I truly believe that he did it to save his own life." (RT 2641-2646.)

Toetu Fuiava, appellant's older brother, grew up with appellant. They played basketball together "or just to hang out, go to the arcades . . . normal things brothers do." Toetu described appellant as "a loving, caring person" who "spoils" children by giving them whatever they want. Toetu believed the jury should spare appellant's life because "he was always there for everybody" and he "protects the little [children] from the big bullies that come around the neighborhood and do bad things." (RT 2650-2653.)

Melinda Fuiava, appellant's seven-year-old sister, testified she liked appellant "because he's nice to me. And he plays with me and he jokes around with me." Melinda thought the jury should "let [appellant] go" "because I don't think that he really did anything wrong." (RT 2682-2684.)

Lausei Fuiava, appellant's mother, related that as a child, appellant was active in church activities and the Boy Scouts. Appellant was "always there when I need him" and "he's the one that take care of the kids for me." The jury

should spare appellant's life, according to Mrs. Fuiava, because "I love my son very much." (RT 2694-2696.)

Cassandra Miller Noa, appellant's sister-in-law, has known appellant since junior high school. Appellant is "loving" and he has "a good heart" and "is very caring." Ms. Noa thought the jury should spare appellant's life because, "If the jury would decide to give him the death penalty, like previous family members have said, that a big part of their life would be taken away." Ms. Noa explained that appellant's heart goes out to people beyond his family. (RT 2661-2665.)

2. Non-Family Members

Elizabeth Nuno went to school with appellant. Appellant "has always been there when I needed him for my kids . . . if I needed someone to talk to, he would always be there for me." Ms. Nuno described appellant as a "loving" and "caring" individual who "tries to be there for whoever needs him." (RT 2667-2668.)

Terri Clark went to school with appellant and knows him "like a brother." She described appellant as a "good" and "kind" person who "does good things." (RT 2687-2698.)

Anastacia Ventura, a detention officer for the Los Angeles County Probation Department who grew up with appellant, testified, "I can only piggyback on the rest of those who came up here to testify on [appellant's]

behalf." Ms. Ventura thought the jury should spare appellant's life "because we can still touch him." As noted by Ms. Ventura,

> For you to take him would be to take all that we have of him, not only a piece of her heart or her heart or his heart, but something from us that we won't be able to talk to anymore.

(RT 2669-2677.)

3. Appellant's Testimony

Appellant testified on his own behalf at the penalty phase. Appellant testified the jury should spare his life

> for my family, for my friends, those who care about me, those who love me and especially my mom and those who know me better than this jury does and better than anybody who came up here and tried to make me out to be the monster that they tried to make me out to be.

Appellant continued,

> Those who love me and care about me know the real me, the person that ain't no way in hell could have killed Deputy Blair that night in cold blood like they portrayed in this courtroom.

(RT 2707-2708.)

APPELLANT'S CONTENTIONS

1. The trial court erred when it denied appellant's motion for new trial or modification of the verdict because the evidence shows that he is innocent. (AOB 46-57.)

2. The trial court's exclusion of certain defense evidence "crippled" appellant's defense, requiring reversal of the judgment. (AOB 58-102.)

3. The trial court's discharge of juror number eight, Mr. T., during deliberations and its denial of appellant's motion for a new trial due to that discharge requires reversal of the judgment. (AOB 102-134.)

4. The two substitutions of jurors during deliberations "served inevitably to coerce the verdicts," requiring reversal of the judgment. (AOB 135-139.)

5. The trial court's failure to determine whether other jurors were tainted by courtroom behavior by supposed associates of appellant that caused at least one juror to become fearful and contributed to her discharge requires reversal of the judgment. (AOB 140-153.)

6. The trial court's denial of defense counsel's motion to continue trial for three days because he needed that time to adequately prepare requires reversal of the judgment. (AOB 154-162.)

8. The court's admission of irrelevant and prejudicial evidence requires reversal of the judgment. (AOB 172-191.)

9. The trial court's rulings permitting the prosecution to present evidence supporting appellant's motive to shoot but excluding like evidence of Deputy Blair's motive to shoot worked a particular unfairness that requires reversal of the judgment. (AOB 191-195.)

10. The admission over objection of the preliminary hearing testimony of Martha Godinez requires reversal of the judgment. (AOB 195-202.)

11. The instruction permitting the jury to find guilt based on appellant's propensity for violence requires reversal of the judgment. (AOB 202-216.)

12. Prosecutorial misconduct during the guilt phase requires reversal of the judgment. (AOB 216-286.)

13. The trial court's denial of appellant's motion for discovery of documents from police personnel files helpful to the defense requires reversal of the judgment. (AOB 286-290.)

14. Cumulative prejudice requires reversal of the guilt judgments. (AOB 290-292.)

15. The trial court's voir dire of the venirepersons concerning their ability to make a fair penalty decision, and its excusal of venirepersons whose views favoring a life sentence did not substantially interfere with their ability to render a fair penalty determination, organized the jury to return a verdict of death and thus requires reversal of the judgment. (AOB 293-303.)

16. The admission of a range of improper evidence under the guise of victim impact evidence requires reversal of the judgment. (AOB 303-318.)

17. The trial court's admission of evidence that appellant confessed to committing two shootings, though there was no independent evidence of any such shootings and there were many reasons to suspect that he did not so confess, requires reversal of the judgment - particularly because the court's evidentiary ruling was aggravated by related instructional error. (AOB 318-328.)

18. Limiting to five minutes counsel's consultation with appellant concerning his proposed testimony at the penalty phase requires reversal of the judgment. (AOB 328-332.)

19. The trial court's refusal to permit appellant to express his sorrow for the suffering Deputy Blair's death caused his family and limitation of his testimony to "what the sentence should be" require reversal of the judgment. (AOB 333-338.)

20. The exclusion of evidence in the penalty phase concerning the fear and loathing that the Sheriff's Department created in appellant's community and the civil rights lawsuit that resulted from such, aggravated by admonitions to the jury that this evidence was remote and irrelevant and should be disregarded, requires reversal of the judgment. (AOB 339-345.)

21. The exclusion of evidence of the deleterious impact appellant's death would have on others was error that requires reversal of the judgment. (AOB 345-349.)

22. The trial court's refusal to instruct on lingering doubt as a relevant consideration requires reversal of the judgment. (AOB 349-358.)

23. Prosecutorial misconduct in the penalty phase requires reversal of the judgment. (AOB 358-386.)

24. The failure of California's death penalty law to meaningfully distinguish between those murders in which the death penalty is imposed from those in which it is not requires reversal of the judgment. (AOB 386-398.)

25. The judgment must be reversed because it was not premised on findings by a unanimous jury beyond a reasonable doubt of the presence of one or more aggravating factors that outweigh mitigating factors. (AOB 398-410.)

26. California's death penalty statute, as interpreted by this Court and as applied to appellant, violates the United States Constitution, requiring reversal of the judgment. (AOB 410-435.)

27. Impermissible race factors contributed to the judgment, requiring reversal. (AOB 435-440.)

28. Cumulative prejudice requires reversal of the death judgment. (AOB 441-442.)

29. Appellant was denied an impartial decisionmaker, requiring reversal. (AOB 443-446.)

RESPONDENT'S ARGUMENT

1. The trial court properly denied appellant's motion for a new trial or modification of the verdict.

   A. Standard of review applicable to sufficiency of the evidence claims.

   B. Sufficient evidence showed appellant did not act in self-defense.

   C. Sufficient evidence supported appellant's conviction on a theory of willful, deliberate, and premeditated murder .

   D. Sufficient evidence supported the special-circumstances finding.

2. The trial court's exclusion of certain defense evidence was proper.

   A. Relevant facts.

   B. The trial court properly excluded the evidence.

   C. Appellant's claims of state and federal constitutional error have been waived; in any event, such claims are meritless.

3. The trial court properly discharged Juror Number Eight, Mr. T.

   A. Factual background.

   B. Analysis.

   C. The trial court properly denied the motion for a new trial.

   D. Appellant's double jeopardy claim is meritless.

4. The trial court did not coerce the verdicts by substituting two jurors.

   A. Factual background.

   B. Analysis.

5. The trial court properly refrained from questioning the jury regarding courtroom behavior by two women associated with appellant .

A. Factual background.

B. Analysis.

6. The trial court properly denied defense counsel's motion to continue the trial.

A. Factual background.

B. Analysis.

7. The trial court's voir dire of the jury was proper.

A. Factual background.

8. The trial court properly admitted evidence.

A. General principles.

B. The trial court properly admitted evidence of appellant's criminal history.

C. The trial court properly admitted Deputy Lyon's testimony regarding Deputy Blair's police work.

D. The trial court properly admitted Deputy Harris's testimony regarding Deputy Lyons' perception of the direction of the gunfire.

E. The trial court properly admitted photographs of a simulated shotgun in a mock patrol vehicle.

F. The trial court properly admitted a photograph of a mannequin dressed in Deputy Blair's bloody uniform.

9. The trial court properly and evenly applied Evidence Code section 352.

10. The trial court properly admitted the testimony of Martha Godinez.

A. Factual background.

B. Analysis.

11. The admission of appellant's prior violent acts under Evidence Code section 1103, subdivision (b), to prove his violent character, and the trial court's corresponding instruction, did not violate appellant's constitutional rights.

A. Factual background.

B. Analysis.

12. There was no prosecutorial misconduct.

A. General principles.

B. Opening statement.

C. Cross-examination.

D. Examination of Deputy Lyons.

E. Examination of Nieves.

F. Examination of Brooks and Frausto.

G. Examination of Jackson.

H. The prosecutor did not attempt to deter Avila from testifying.

I. Closing arguments.

J. The alleged misconduct did not prejudice appellant.

13. This court may review the trial court's in camera transcripts regarding appellant's *Pitchess* motion.

A. Relevant background.

B. Analysis.

14. There was no cumulative error at the guilt phase which requires reversal of the guilt verdicts under state law or the federal constitution.

15. The trial court properly voir dired the venire persons regarding their views on the death penalty, and the for-cause excusals of prospective jurors C. and L. were proper.

A. Relevant proceedings.

B. Legal discussion.

16. The trial court properly admitted victim impact evidence.

17. The trial court properly admitted appellant's statements that he committed two additional shootings in 1984 and there was no related instructional error.

A. Factual background.

B. Analysis.

18. The trial court did not unduly restrict the amount of time defense counsel had to consult with appellant prior to appellant testifying on his own behalf at the penalty phase.

A. Relevant proceedings.

B. Legal analysis.

19. The trial court did not prohibit appellant from expressing remorse or sympathy for Deputy Blair's family.

A. Factual background.

B. Analysis.

20. The trial court properly restricted evidence of lawsuits filed against Lynwood deputies.

A. Factual background.

B. Analysis.

21. The trial court properly limited testimony regarding the impact that appellant's execution would have on his family.

A. Factual background.

22. The trial court properly refused appellant's requested instructions on lingering doubt.

A. Relevant proceedings.

B. Legal analysis.

23. Appellant waived most of his claims of prosecutorial misconduct during the penalty phase; in any event, there was no such misconduct and/or any misconduct was harmless.

A. Relevant law.

B. Claims of improper question and courtroom behavior.

C. Claims of misconduct during closing argument.

D. Harmless error.

24. The special circumstances in section 190.2 adequately narrows the class of persons eligible for the death penalty.

25. California's death penalty law does not require findings by a unanimous penalty jury beyond a reasonable doubt of the presence of one or more aggravating factors that outweighed mitigating factors.

26. California's death penalty law is constitutional.

A. Section 190.3, factor (a), is not impermissibly overbroad.

B. The trial court was not required to delete inapplicable factors from the statutory list of sentencing factors.

C. The trial court did not err in refusing to label the statutory factors as aggravating or mitigating factors.

D. Adjectives used in conjunction with mitigating factors did not act as unconstitutional barriers to consideration of mitigation.

E. The jury instruction regarding life without possibility of parole was proper.

F. The trial court was not required to instruct on the presumption of life .

G. The jury is not required to base a death sentence on written findings regarding aggravating factors.

H. Intercase proportionality review is not required by the federal or state constitutions.

I. Miscellaneous alleged constitutional defects.

J. Alleged insufficiency of post-conviction relief in federal and state courts.

27. Race was not a factor in appellant's trial.

28. There was no cumulative error at the penalty phase which requires reversal of the death judgment.

29. Appellant has failed to demonstrate he was denied an impartial trial judge.

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A NEW TRIAL OR MODIFICATION OF THE VERDICT

Appellant contends the trial court erred when it denied his motion for new trial or modification of the verdict because the evidence shows that he is innocent. Appellant also contends that there was insufficient evidence to support the judgment, violating the Due Process Clause of the Fourteenth Amendment. (AOB 46-57.) Appellant's claims lacks merit.

A. Factual Background

Appellant filed a motion for a new trial and/or reduction of the first-degree murder charge pursuant to Penal Code section 1181, subdivision 6, which provides that a court may grant a new trial where a verdict or finding is contrary to the law or evidence. Appellant specifically contended that there was insufficient evidence to show he did not act in self-defense and that there was insufficient evidence of premeditation. (CT 790-793.) The trial court denied the motion, specifically stating "the evidence was overwhelming of the guilt of [appellant], and some of the most compelling evidence came from his own mouth in his admissions to his mother and his sister while he was incarcerated here in the county jail." The trial court also stated that it "strongly disagree[d]" with the argument that appellant may have been innocent because "the evidence, in my view, of guilt was overwhelming." (RT 2810-3813.)

B. The Trial Court Properly Exercised Its Discretion By Denying The Motion For New Trial And/or Reduction Of The Murder Charge

This Court reviews a trial court's ruling on a motion for a new trial based on insufficiency of the evidence under a deferential abuse-of-discretion standard. (*People v. Navarette* (2003) 30 Cal.4th 458, 526; *People v. Davis* (1995) 10 Cal.4th 463, 524.) Here, the trial court's statements clearly indicate that it did not consider itself bound by any of the jury's findings, but, independently determined the credibility of the witnesses and the probative value of the evidence before denying the motion for a new trial and/or reduction of the murder charge. (RT 2810-2813, 2816.) Moreover, as set forth below, sufficient evidence supported the verdicts. Accordingly, the trial court did not abuse its discretion in denying appellant's motion.

C. Standard Of Review Applicable To Sufficiency Of The Evidence Claims

In determining whether a conviction is supported by substantial evidence - evidence which is reasonable, credible and of solid value - from which a reasonable trier of fact could find a defendant guilty beyond a reasonable doubt, appellate courts review the entire record in the light most favorable to the judgment below. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329; *People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Akins* (1997) 56 Cal.App.4th 331, 336-337 [a defendant bears a "massive burden" in claiming

insufficient evidence sustained his convictions because role of reviewing court is limited].) This standard also applies where the People rely primarily on circumstantial evidence, and circumstantial evidence may be sufficient to support a conviction. (*People v. Bradford, supra*, 15 Cal.4th at p. 1329.) Where the trier of fact's findings are reasonably justified by circumstantial evidence, an appellate court may not reverse a judgment even though it believes the circumstantial evidence might reasonably be reconciled with the defendant's innocence. (*People v. Bradford, supra,* 15 Cal.4th at p. 1329.) This standard also applies to special-circumstance findings. (*People v. Mayfield* (1997) 14 Cal.4th 668, 790-791.)

D. Sufficient Evidence Showed Appellant Did Not Act In Self-Defense

Appellant first contends the evidence was insufficient to overcome a reasonable doubt that he acted in self-defense, specifically contending: (1) Deputy Lyons testified he heard the first shots fired from Deputy Blair's direction, not appellant's; (2) several defense witnesses testified that Deputy Blair fired first; and (3) Detective Rubio testified that the first shots sounded like they came from a nine millimeter gun, the type used by Deputy Blair. (AOB 47-48.) This claim is meritless.

Appellant overlooks Deputy Lyons' testimony that: (1) when he heard the initial gunshots, Deputy Blair, who was right-handed and who wore his service handgun on his right side, was still getting out of the patrol car and had

his right hand on the top of the driver's door; (2) Deputy Blair then brought his right hand from the top of the driver's door toward his holstered service handgun; and (3) based on these observations, Deputy Lyons believed the initial gunshots were not fired by Deputy Blair. (RT 454-470, 506-507, 509-512, 602-604, 624.) Additionally, the evidence showed that appellant did not mention that Deputy Blair fired first when he spoke to his mother in a tape-recorded jail conversation (RT 1500-1538) or when he spoke to Renele Brooks and Sara Frausto (RT 1120-1129, 1157-1158, 1249-1254). Rather, in those conversations, appellant stated that he shot at the police officer, not in self-defense, but because he did not want to go to jail for the rest of his life as a result of his third strike.

Appellant also overlooks Detective Rubio's testimony that, based on what he heard, he did not know what type of weapons were fired but "could only estimate the loudness" of the guns (RT 748, 756) and that the difference in the noise between the two sets of gunshots that he heard could have been attributable to many things, including the distance each gun was from his location and the direction each gun was pointed (RT 747-757). Appellant also overlooks the testimony of Deputy Bruce Harris, a firearms expert, that there is no way to determine the caliber of a firearm based solely on the loudness of a gunshot because there were too many variables involved. (RT 943-944, 993-1005.) The testimony of Deputies Lyons and Harris, and Detective Rubio, as

well as the damning statements appellant made to Brooks, and Frausto, along with appellant's tape-recorded admissions to his mother and sister, support the jury's finding that appellant fired first and did not act in self-defense.

Nevertheless, appellant contends the evidence was insufficient to show that he did not act in self defense because defense witnesses testified that Deputy Blair fired first. However, appellate courts, in reviewing the sufficiency of the evidence, may not re-weigh the evidence, re-evaluate the credibility of witnesses, or resolve conflicts in the evidence. (See *People v. Snow* (2003) 30 Cal.4th 43, 66-67; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Appellant also asserts this was a "close case" where there was no overwhelming evidence of guilt. (AOB 47-48.) Appellant is mistaken. As noted above, the evidence of appellant's guilt, especially the testimony of Deputy Lyons and the incriminating statements appellant made to Brooks and Frausto, as well as those he made to his mother and sister, overwhelmingly establish that appellant shot Deputy Blair, not in self-defense, but rather so that appellant would not return to prison for the rest of his life as a result of a third strike. In any event, the test is not whether the evidence is "close" or conflicting, but whether there is substantial evidence to support the verdict. (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.) As demonstrated above, there is more than substantial evidence in this case to support the jury's verdict.

E. Sufficient Evidence Supported Appellant's Conviction On A Theory Of Willful, Deliberate, And Premeditated Murder

Appellant contends that there was insufficient evidence of premeditation. (AOB 48-52.) This contention lacks merit.

In reviewing the sufficiency of the evidence to sustain a conviction for willful, deliberate and premeditated murder, a reviewing court may look to three types of evidence, "planning," "motive," and "manner." (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) A reviewing court will uphold a first degree murder conviction typically when there is evidence of all three types, when there is "extremely strong evidence" of planning, or when there is evidence of motive in conjunction with evidence of either planning or manner. (*Id.* at p. 27.) This has clarified that these factors, "while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125; see also *People v. Hawkins* (1995) 10 Cal.4th 920, 957 ["The *Anderson* guidelines were formulated as a synthesis of prior case law, and are not a definitive statement of the prerequisites for proving premeditation and deliberation in every case."].) Indeed, "'premeditated' means 'considered beforehand,' and 'deliberate' means "formed or arrived at or determined upon as a result of careful thought and weighing of the considerations for and against the proposed course of action.' [Citations.]" (*People v. Mayfield, supra*, 14 Cal.4th at p. 767.)

> Premeditation and deliberation can occur in a brief period of time, and [t]he true test is not the duration of time as much as it is the extent of reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .

(*People v. Thomas* (1945) 25 Cal.2d 880, 900; accord *People* v. *Mayfield*, *supra*, 14 Cal.4th at p. 767; *People* v. *Memro* (1995) 11 Cal.4th 786, 862-863.)

In the instant case, there was sufficient evidence of motive, planning, and manner to support a finding of premeditation and deliberation. As to motive, there was compelling evidence from appellant's statements that he killed Deputy Blair because he did not want to go back to prison or jail for the rest of his life as a result of a third strike. (RT 1120-1129, 1157-1158, 1249-1254, 1530-1531.) Moreover, the manner in which appellant killed Deputy Blair indicated that the killing was the result of premeditation and deliberation. Appellant shot at Deputy Blair several times and struck him in the neck and shoulder. (RT 1042-1059, 1068, 1889-1895) Multiple gunshot wounds support a finding of premeditated murder. (*People v. Bolin* (1998) 18 Cal.4th 297, 332; *People v. Boyd* (1985) 38 Cal.3d 762, 770; see *People v. Pride* (1992) 3 Cal.4th 195, 247 [multiple stab wounds].) Additionally, the location of the gunshot wounds to Deputy Blair indicated appellant aimed at Deputy Blair's head, indicating that appellant did not merely want to injure Deputy Blair, but intended to kill him. (See, e.g., *People v. Bolin, supra,* 18 Cal.4th at p. 332.) Based on

appellant's statements that he fired at Deputy Blair because he did not want to go back to jail for the rest of his life as a result of a third strike, the number of times appellant shot at Deputy Blair, and the location of the gunshot wounds to Deputy Blair, a reasonable juror could conclude appellant reflected on his actions but nevertheless decided to kill Deputy Blair.

F. Sufficient Evidence Supported The Special-Circumstances Finding

The jury found true two special circumstances, that appellant murdered Deputy Blair for the purpose of avoiding and preventing a lawful arrest (§ 190.2, subd. (a)(5)) and that appellant murdered Deputy Blair, who was a peace officer engaged in the performance of his duties (§ 190.2, subd. (a)(7)). (CT 747.) "As used in the peace-officer-murder special circumstance, the phrase 'engaged in the course of the performance of his or her duties' means that the officer must have been acting lawfully at the time." (*People v. Mayfield, supra*, 14 Cal.4th 668, 791, quoting *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217.) An officer's lawful conduct must be established as an objective fact; the peace-officer-murder special circumstance does not require a subjective awareness on the part of the defendant that the officer had acted lawfully. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1020-1021.)

Appellant contends there was insufficient evidence to support the special-circumstance finding because there was no evidence that Deputy Blair's

conduct was lawful, or that the arrest sought to be avoided was lawful. Appellant specifically contends that there was no reasonable cause to detain him as a result of Avila's tossing of an object. (AOB 52-54.) This contention should be rejected.

A detention is lawful where the detaining officer can identify specific articulable facts that, considered in the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity. (*People v. Mayfield, supra*, 14 Cal.4th at p. 791; *People v. Souza* (1994) 9 Cal.4th 224, 231.)

Here, there was sufficient evidence that Deputies Blair and Lyons had reasonable cause to detain both appellant and Avila. Deputy Lyons testified both appellant and Avila, who were initially standing side-by-side and dressed in gang attire, immediately walked away from the patrol car after they looked over their shoulders at the deputies. Two to three seconds later, Avila reached into his jacket and tossed a large object over his shoulder into a yard. (RT 416-443, 459, 599-600.) Additionally, Avila and appellant, and Avila's toss, took place in known gang territory, which was being "saturated" with the Gang Enforcement Team because of a recent increase in gang criminal activity in the area. (RT 411-419.) Deputy Lyons's observations provided specific articulable facts providing an objective manifestation that appellant may have been involved in criminal activity, particularly that appellant was side-by-side with Avila, and that

both appellant and Avila began to walk away from the patrol car after they saw the deputies. Indeed, under these circumstances, the officers would have been remiss in their duties had they not stopped to investigate the incident.

Appellant, relying upon *Irwin v. Superior Court* (1969) 1 Cal.3d 423, 427-428, nevertheless contends that he was merely "minding his own business and doing nothing more than walking down the street." (RT 53-54.) First, the portion of *Irwin* relied upon by appellant is *dictum* which has been disapproved. (*People v. Souza, supra*, 9 Cal.4th at p. 233; *In re Tony C.* (1978) 21 Cal.3d 888, 893.) Second, that appellant's conduct may have been open to an innocent explanation does not demonstrate lack of a reasonable suspicion of criminal conduct. (*Ibid.*; see *Illinois v. Wardlow* (2000) 528 U.S. 119, 126, 120 S.Ct. 673, 145 L.Ed.2d 570 [the law accepts the fact that innocent persons may sometimes be detained].) Moreover, appellant overlooks Deputy Lyons's testimony that immediately after appellant and Avila made eye contact with the deputies, that they both walked in the opposite direction.

> Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

(*Illinois v. Wardlow, supra,* 528 U.S. at p. 126.) Thus, there was sufficient evidence to support the special-circumstance finding because there was substantial evidence that the deputies had reasonable cause to lawfully detain appellant.

II.

THE TRIAL COURT'S EXCLUSION OF CERTAIN DEFENSE EVIDENCE WAS PROPER

Appellant contends the trial court's exclusion of certain defense evidence "crippled" his defense, requiring reversal of the judgment. (AOB 58-102.) Appellant specifically complains the trial court excluded the following evidence which bolstered his theory that Deputy Blair fired first and that appellant fired back in self-defense: (1) that there was a "culture" of misconduct and violence by deputies at the Lynwood Sheriff's Station directed at the Young Crowd gang, including the existence of a group of "vigilante" deputies known as the Vikings; (2) that there was a civil lawsuit filed in federal court by certain Lynwood residents against Los Angeles County for misconduct by the Lynwood deputies that was pending at the time of Deputy Blair's murder; and (3) specific facts regarding two shootings of Young Crowd street gang members allegedly committed by the Vikings. (AOB 58-59, 64, 70-71, 86, 92.)[10/] This contention is meritless.

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10. To the extent appelalnt maintains this evidence violated the Sixth, Eight, and Fourteenth Amendments to the federal Constitution (see AOB 59), those claims have been waived and are subject to procedural default since appellant did not raise them below. Failure to raise a federal constitutional issue in the trial court precludes appellant from raising it for the first time on appeal. (See *People v. Williams* (1997) 16 Cal.4th 153, 250; *People v. Jackson* (1996) 13 Cal.4th 1164, 1231, fn. 17; *People v. Sanders* (1995) 11 Cal.4th 475, 510, fn. 3; *People v. Raley* (1992) 2 Cal.4th 870, 892.)

As detailed below, the trial court permitted appellant to present extensive evidence supporting his self-defense claim, including evidence regarding Deputy Blair's reputation for violence and prior specific acts involving violence, evidence that Deputy Blair was a member of the Vikings, that Young Crowd gang members considered the Vikings an enemy gang, and specific incidents showing tensions between the Vikings and Young Crowd. The trial court properly excluded evidence of the alleged "culture" of misconduct, civil lawsuits, and specific facts of two prior shootings of Young Crowd gang members as that evidence had little probative value and was substantially outweighed by the danger of undue prejudice, confusion of issues, or undue consumption of time. Additionally, much of the excluded evidence involved collateral facts and constituted inadmissible hearsay not based upon personal knowledge. Finally, assuming without conceding the trial court erred in the exclusion of the evidence, the error must be deemed harmless since most of the complained-of evidence was, in fact, ultimately presented to the jury, and the evidence of appellant's guilt – especially appellant's statements that he shot Deputy Blair, not in self-defense, but rather so he would not return to prison for the rest of his life as the result of a third strike – was truly overwhelming.

A. Relevant Facts

1. Preliminary Proceedings

Prior to voir dire, trial counsel indicated that the defense theory would be that Deputy Blair fired first at Avila, who was near appellant, and appellant fired at Deputy Blair in "self-defense." Trial counsel stated that some "side" issues would be that: (1) Deputy Blair was a member of a "police gang" called the Vikings and that he had a tattoo with a Roman numeral indicating his "initiation number"; and (2) at the time of the shooting, Deputy Blair was a named defendant in a pending civil suit in federal court where Avila was a named plaintiff. (RT 60-61.) The trial court stated that it would ask if any juror had heard of the Vikings, and would conduct further inquiry at side bar, but deferred ruling on the admissibility of such evidence. (RT 68-69.)

Prior to opening statements, trial counsel stated he wanted to refer to the pending civil lawsuit and Deputy Blair's membership in the Vikings in his opening statement. Trial counsel argued that the civil lawsuit was relevant on the issue of Deputy Blair's motive to shoot at Avila, and stated he would present Avila's testimony that Deputy Blair fired at him while Avila was unarmed and that he was one of several plaintiffs in the lawsuit, which involved several defendants, one of which was Deputy Blair. (RT 306-309.) The trial court ruled that trial counsel could mention that Avila saw Deputy Blair and knew him to be a "hot head" and believed Deputy Blair was "part of a group of deputies out

to get him." However, the trial court ruled that trial counsel could not refer to the lawsuit because "that is going to invite the jury to start speculating what the lawsuit was about, who was involved. What were the where's and why-fors" and would "open up" "side issues" regarding details about the civil lawsuit. (RT 311-314, 322.) The trial court also permitted trial counsel to state that there had been a considerable history of violence and threats between the Vikings and Young Crowd. (RT 317.) The trial court noted that under Evidence Code section 1103,[11] reputation evidence regarding the victim's character, offered by a defendant, was admissible to show the victim acted in conformity with that character. (RT 318-319, 323.) The trial court concluded by stating, "[w]e will again address all of these issues in light of [Evidence Code section] 352, undue consumption of time and propensity to inflame the jury unnecessarily." (RT 324.)

Trial counsel, during cross-examination of Deputy Lyons, asked whether Deputy Blair had ever told him about any legal problems he had, and Deputy Lyons responded, "No." The trial court ordered trial counsel not to ask

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11. Evidence Code section 1103 authorizes a defendant in a criminal case to offer evidence regarding a victim's character. That statute specifically provides:

> (a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character.

(Evid. Code, § 1103.)

any additional questions about the civil lawsuit, stating that it needed more information about the lawsuit in order to make an "intelligent" ruling on the admissibility of that evidence. (RT 535-537.) Subsequently, the prosecutor noted that he had contacted the attorney who represented Los Angeles County in the civil lawsuit and that attorney was creating an "information package" regarding that lawsuit. The trial court ruled that trial counsel could not refer to the lawsuit until it received more "concrete" information about the lawsuit. (RT 545-546.) The trial court also ordered trial counsel to provide a more detailed offer of proof regarding the Vikings, such as which specific deputies committed which specific act, and when they committed them. (RT 588-596.)

Subsequently, trial counsel stated that Avila would testify that: (1) he was a member of Young Crowd; (2) Deputy Blair assaulted Young Crowd gang members on prior occasions; (3) Deputy Blair referred to the Vikings when threatening him; (4) at the time of the shooting, tensions were rising between the Vikings and Young Crowd; and (5) a week prior to Deputy Blair's shooting, a deputy sheriff believed to be a Viking shot a Young Crowd member, Jose Nieves, in the back. Trial counsel also stated appellant would testify regarding similar allegations, and would also testify that deputy sheriffs increased assaults on Young Crowd members as the pending civil lawsuit approached its trial date. (RT 626-643.) The trial court ruled that trial counsel could not refer to the

Vikings or the civil lawsuit until it received additional evidence and information. (RT 646.)

At subsequent proceedings, trial counsel and the prosecutor presented some documents related to the civil lawsuit. The trial court deferred ruling on the admissibility of the lawsuit until it received more information regarding the lawsuit, including the testimony of lawyers involved in the civil lawsuit. (RT 653-656, 1139-1152, 1214-1216.)

The trial court ordered that a transcript of appellant's tape-recorded jailhouse conversation with his mother and sister be redacted to omit references to the civil lawsuit in federal court. The trial court found that, because it had not yet made a ruling regarding the admissibility of the lawsuit, such references were inadmissible hearsay and were inadmissible under Evidence Code section 352. The trial court stated that appellant could "revisit" the issue of redactions to the transcript after the court made a ruling on whether the civil lawsuit could be admitted. (RT 1387-1393.)

2. Evidence Code Section 402 Hearing

Carol Ann Humiston was a lawyer who was involved in defending a series of lawsuits brought against the Los Angeles County Sheriff's Department in federal court. In September 1990, approximately 70 plaintiffs filed lawsuits against 108 deputy sheriffs, the majority of whom were assigned to Lynwood Station. This series of lawsuits was referred to as the "Thomas case." In 1991,

a second set of lawsuits, referred to as the "Clark case," was filed against the Sheriff's Department. Appellant was not a plaintiff in any of the cases. (RT 1415-1419.)

Deputy Blair was a named defendant in two incidents in the Thomas case. In one incident, which was not gang-related, Deputy Blair was one of a number of deputies who responded to the scene of a shooting of a White man by deputies. In the other incident, the victim of an attempted carjacking by three members of the Lynwood Mob gang found some deputies and identified the three gang members. Two of them were arrested, and the third, Raul Gonzalez, ran into a house. Deputies, including Deputy Blair, forced entry into the house, and there was an altercation. (RT 1419-1424.)

The first lawsuit from the Thomas case started trial in June 1995. That lawsuit did not involve Deputy Blair or any Young Crowd members. (RT 1424-1426.) In 1991, at an early stage in the Thomas case, the federal court judge made a ruling that the Vikings were a "neo-Nazi White supremist gang" in the Sheriff's Department and issued a preliminary injunction requiring the Sheriff's Department to turn over certain reports. In 1992, the Ninth Circuit Court of Appeals reversed the injunction, finding "there was a conflict of evidence." During discovery in the Thomas case, "every deputy" was deposed and 20 to 25 of them acknowledged having Viking tattoos. The deputies with Viking tattoos were a "multi-racial group." During the trial on the first lawsuit in the Thomas

case, the plaintiffs did not present evidence regarding the Vikings. The trial on the first lawsuit in the Thomas case resulted in a verdict for the plaintiffs, and thereafter the remaining lawsuits in the Thomas case were settled out of court. No disciplinary action was taken against Deputy Blair as a result of the allegations in the Thomas case. (RT 1426-1430.)

Mark Glasser was an attorney who represented several plaintiffs in the Thomas case, including Gonzalez. Glasser could not remember whether Deputy Blair was alleged to have had physical contact with Gonzalez. Appellant and Avila were not witnesses in the first lawsuit in the Thomas case that went to trial in 1995. No other lawsuits in the Thomas case were scheduled to go to trial in 1995. (RT 1432-1435, 1446.)

Glasser believed Deputy Blair was a Viking because he had a Viking tattoo. It was alleged the Vikings committed unlawful shootings, searches, and arrests and intimidated witnesses. Glasser believed the Vikings were a "racist band" of deputies who "wreak their own form of law enforcement justice in the Lynwood community." Glasser deposed one deputy who stated that the Vikings "ran" the Lynwood Sheriff's station. Approximately 20 to 25 deputies were photographed with Viking tattoos; Glasser believed they were all White males. (RT 1435-1446.)

Viking evidence was not presented at the trial on the first lawsuit in the Thomas case because it was not an important issue and the deputies involved in

that particular lawsuit were not Vikings. That trial resulted in a verdict for the plaintiffs. The other cases were settled. Conditions of that settlement included that the Sheriff's Department institute a system to track which deputies were involved in particular uses of force. (RT 1447-1449.)

Avila testified that approximately four or five times, Lynwood Station deputy sheriffs (of all races) flashed "LV" hand signs at him and yelled "Vikings" as they drove by. On one occasion in June or July 1994, Deputy Blair flashed an "LV" sign at Avila and said, "F Young Crowd . . . this is Vikings." Avila heard that Deputy Blair had a Viking tattoo. (RT 1454-1456, 1462-1463, 1470.) Avila considered the Vikings to be a rival gang "that get together just like we do and do things that ain't really right." (RT 1459.) The Vikings beat Young Crowd members with flashlights; this was termed "flashlight therapy." (RT 1460.) Deputy Blair applied flashlight therapy on Avila in June or July 1994. (RT 1460, 1467.)

Avila was a witness in a lawsuit involving the Vikings and a Young Crowd gang member named Lloyd Polk. Deputy sheriffs told Avila that he should not testify in that lawsuit or he "would probably end up missing like Lloyd did." Avila was a plaintiff in another lawsuit regarding an incident at his house. Deputy Blair was not involved in either of the two lawsuits. (RT 1456-1459.)

Stanley Allen White, a "Detective Sergeant" with Los Angeles County Sheriff's Department, worked as a patrol sergeant at the Lynwood Station from April 1988 to April 1989. Detective White had difficulty supervising a group of deputies who worked the early morning shift, but those problems did not relate to any excessive use of force or flashing of gang signs. The deputies who worked that shift did not become known as the Vikings until after Detective White left Lynwood Station. The trial court ruled that Detective White's testimony was inadmissible because it was too remote to the issues involved in the instant case. (RT 1551-1582.)

3. Ruling Regarding Lawsuit

Prior to making its ruling, the trial court noted that Deputy Blair was only involved in two of the series of lawsuits, those two lawsuits involving Deputy Blair were not scheduled to go to trial in 1995, and Deputy Blair's alleged misconduct set forth in those lawsuits was committed against persons other than Young Crowd gang members. (RT 1476-1477.) The trial court stated trial counsel wanted to "offer evidence of the existence of the lawsuit as a possible motivation for [Deputy] Blair's shooting . . . [at Avila] in May of 1995." Trial counsel agreed, further arguing that "it's . . . a conspiracy that the brotherhood is threatened and they want to respond." (RT 1477-1478.)

The trial court, citing Evidence Code section 352, ruled "there should be no mention of the lawsuit and its status," explaining, "the probative value is

far outweighed . . . by the confusion and undue consumption of time that would be involved in the presentation of this evidence." (RT 1478-1479.) The trial court stated several reasons in support of this ruling. As one reason, the trial court found that the evidence was irrelevant and did not "really provide . . . any legitimate basis for [Deputy] Blair to have shot at [appellant], which is the defense allegation." (RT 1478-1479.) The trial court explained, "you [trial counsel] want the jury to make the leap that [Deputy] Blair was somehow concerned that some other members of his Viking group were going to somehow run afoul of the litigation process, and, therefore, he took it upon himself to engage in some action. [¶] I just -- It's not there based on a lawsuit. " (RT 1481.) The trial court also stated, "I feel that [Deputy] Blair is just too far removed from the significance of the lawsuit to have any reasonable likelihood that it bore on his activities on the day of the shooting." (RT 1481.)

The trial court also found that admission of the lawsuit would unduly prolong the trial. In this regard, the trial court noted that appellant was not a named plaintiff in any of the lawsuits, and that Avila was not a plaintiff in any specific lawsuit involving Deputy Blair. The trial court stated, "if we get into it, all of that is going to have to be explained." (RT 1478.) Further, the trial court found that the lawsuit was too remote in time, noting the first lawsuit was filed in 1990 and the instant shooting occurred in 1995. (RT 1478.) Finally, the trial

court found that admission of the lawsuit would cause the jury to "speculate as to what the lawsuit was about." (RT 1478.)

Despite the trial court's ruling prohibiting any mention of the lawsuit, appellant testified at trial that, in early April 1995, a deputy sheriff told him that there was a pending lawsuit against the Sheriff's Department and threatened that Young Crowd "haven't seen anything yet." (RT 1881-1885.)

4. Rulings Regarding Deputy Blair's Prior Acts And Reputation For Violence, Prior Shooting Of Jose Nieves (Rascal), And Vikings

The trial court ruled that, pursuant to Evidence Code section 1103, trial counsel could present any incident involving Deputy Blair's propensity for violence, including Avila's testimony that Deputy Blair struck him with a flashlight. (RT 1481-1484, 1585.) The trial court, after noting it had already admitted evidence that there was tension between Young Crowd gang members and deputy sheriffs, ruled that the defense could present evidence that a deputy sheriff shot a Young Crowd gang member about a week before Deputy Blair's murder. (RT 1585.)

The trial court ruled that the defense could present evidence that Deputy Blair was a Viking, that Avila could testify that there was a group of deputies who flashed gang signs at him, he viewed the Vikings as a rival gang, and that the Vikings were reputed to have conducted "flashlight therapy"

sessions. The trial court found that this was admissible as evidence of Deputy Blair's character. The trial court found that additional evidence regarding specific bad acts by Vikings was "too far afield." Trial counsel stated that he only intended to present the evidence described by the trial court as admissible, and "other than that, I don't plan to go any further." (RT 1585-1587.)

5. Rulings Regarding Avila's Testimony Regarding Shooting Of Lloyd Polk (stranger) And Nieves' Testimony Regarding His Shooting

Trial counsel attempted to elicit testimony from Avila that a deputy sheriff had shot Lloyd Polk, a Young Crowd gang member known as "Stranger." The trial court found the shooting was relevant as reputation evidence and permitted trial counsel to make an inquiry regarding this shooting that was restricted to the facts that a Young Crowd member had been shot by a deputy, and the date of the shooting. The trial court precluded any additional details because "it's going to invite all kinds of . . . issues. The People are going to want to bring in their witnesses to rebut this . . . allegation of that particular act so I don't want to get into the details." (RT 1716-1720.)

Subsequently, trial counsel elicited Avila's testimony that he was present when a gang member named Stranger was killed, and that the killing occurred in 1989 or 1990. The trial court ordered the jury to disregard this

evidence, finding it was "Too remote. 352." (RT 1720.) Appellant testified at trial that Stranger had been killed in December 1990. (RT 1909-1910.)

Before Nieves testified for the defense, the trial court precluded any testimony regarding the details of his shooting by deputies because "it is going to open up this whole area." (RT 1797-1798.) Subsequently, Nieves testified that he had been shot on May 7, 1995. (RT 1803-1804.)

B. The Trial Court Properly Excluded The Evidence

Evidence Code section 352 provides that a

> court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

A trial court's ruling on the admissibility of evidence, including its determinations regarding the probative value and prejudice of evidence under Evidence Code section 352, is reviewed for abuse of discretion. (*People v. Cox* (2003) 30 Cal.4th 916, 955; *People v. Waidla* (2000) 22 Cal.4th 690, 724.) That discretion is abused only where there is a showing that it was exercised in "an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People* v. *Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125, internal citations and quotation marks omitted.) Here, the trial court did

not abuse its discretion in limiting what evidence appellant could present in support of his claim of self-defense.

1. The Trial Court Properly Excluded The Lawsuit

The trial court did not abuse its discretion in excluding the lawsuit. The lawsuit was offered to prove Deputy Blair's motive to shoot at Avila to protect the "brotherhood" of Vikings, who allegedly wanted to intimidate witnesses or plaintiffs involved in that lawsuit. (RT 306-309, 1477-1478.) However, Deputy Blair was named as a defendant in only two of the many cases consolidated into two lawsuits, and neither of those cases involving Deputy Blair involved Young Crowd gang members or was scheduled to go to trial in 1995. Moreover, the first case that was scheduled to go to trial in June 1995 did not involve the Vikings or Young Crowd, and appellant and Avila were not witnesses in that case. (RT 1419-1426, 1432-1435, 1446-1449.) In light of these facts, the trial court properly concluded that the pending lawsuit did not "really provide . . . any legitimate basis" for the defense allegation that Deputy Blair fired at Avila because he was concerned that some other Vikings were "going to somehow run afoul of the litigation process" and that "Deputy Blair is just too far removed from the significance of the lawsuit to have any reasonable likelihood that it bore on his activities on the day of the shooting." (RT 1481.) In these circumstances, the lawsuit had "attenuated significance to the issues contested at trial." (*People v. Hart* (1999) 20 Cal.4th 546, 607.)

Further, the trial court properly determined that the probative value of the lawsuit was "far outweighed" by the risk of confusion and undue consumption of time and its remoteness. (RT 1478-1479.) As to confusion, the trial court properly concluded that the evidence of the lawsuit would have caused the jury to speculate regarding the facts of the lawsuit rather than focusing on the facts involved in the instant case. (RT 1478.) In similar circumstances, exclusion of a civil lawsuit was found to be proper. (See *People v. Hart, supra*, 20 Cal.4th at p. 607 [trial court acted within its discretion in excluding evidence of prosecution witness's lawsuit against Riverside Sheriff's Department because it would have shifted focus of trial away from facts relating to charged offenses].) Further, regarding undue consumption of time, the jury would have had to been informed about extensive collateral facts about the lawsuits (including that multiple cases were filed against several deputies at the Lynwood sheriff's station which were consolidated into two "umbrella" cases, the results of the lawsuit, Deputy Blair's involvement in the two cases in which he was a named defendant, Avila's role as a named plaintiff in one case and as a witness in another, and that a preliminary injunction was later reversed). The trial court properly noted that if it admitted the lawsuit, that all of these details would have to be explained. (RT 1478.) Additionally, the trial court correctly found the lawsuit was remote. (RT 1478.) The allegations in the lawsuits concerned conduct that occurred prior to 1990 or 1991, the date the lawsuits were filed, and

the instant shooting took place in June 1995. Thus, the trial court did not abuse its discretion in excluding the lawsuit pursuant to Evidence Code section 352.

2. The Trial Court Properly Limited Evidence Regarding Alleged Misconduct By Lynwood Deputies

As set forth above, the trial court permitted the defense to present extensive evidence regarding the Vikings, including a shooting of a Young Crowd gang member which occurred a week before Deputy Blair's death, because it was relevant evidence of Deputy Blair's character. However, the trial court found that additional evidence regarding alleged specific bad acts by the Vikings was inadmissible because it was "too far afield." (RT 1584-1587.)

Pursuant to the trial court's ruling, Avila testified at trial that the Vikings were a clique in the Sheriff's Department that behaved like a gang, including throwing gang signs and shooting people. Avila also testified that he considered the Vikings to be a rival gang, that tensions between Young Crowd and the Vikings had been high since 1985, that about May 7, 1995, deputies shot a Young Crowd gang member in the back, that Vikings performed beatings with flashlights, that he had been so beaten by Deputy Blair, and that he had seen Deputy Blair mention the Vikings and throw Viking gang signs. (RT 1595-1604, 1611-1612, 1652-1654.) Also, appellant testified at trial that he believed the Vikings were "just a bunch of white cops that . . . mess around with the homeys all the time," that deputies had beaten a Young Crowd gang member

named "Oso" in April 1995, that he was told the Vikings had tattoos and flashed gang signs, and that some of his gang members discussed how the police tried to kill two of his homeboys, Rascal and Stranger. (RT 1879-1885, 1908-1911.)

Despite the trial court's ruling admitting extensive evidence regarding the Vikings and that some evidence of other specific acts of misconduct by Lynwood deputies was admitted at trial (the beatings of "Oso" and Avila), appellant contends the trial court improperly precluded him from presenting additional evidence that the Vikings regularly used excessive force in policing Lynwood. (AOB 58-59, 82, 86, 91.) This claim is meritless.

As a preliminary matter, appellant has waived this claim. Though trial counsel presented evidence of other alleged misconduct by the Vikings during the Evidence Code section 402 hearing (specifically, the testimony of Detective White and attorney Mark Glasser), trial counsel later agreed with the trial court's ruling restricting the defense from presenting additional evidence of specific bad acts by the Vikings, stating that he only intended to present the evidence described by the trial court as admissible, and did not intend "to go any further." (RT 1585-1587.) As a general rule, issues regarding the admissibility of evidence will not be reviewed on appeal where a party has failed to make a specific and timely objection in the trial court on the ground sought to be urged on appeal. (*People v. Anderson* (2001) 25 Cal.4th 543, 586; *People v. Ashmus* (1991) 54 Cal.3d 932, 972, n. 10.) Here, appellant not only failed to make a

timely and specific objection, but also agreed with the trial court that additional evidence regarding specific bad acts by Vikings, other than that noted by the trial court, was inadmissible. In these circumstances, appellant has waived this claim.

Even assuming appellant has preserved this claim for appellate review, it is meritless. Appellant contends that the trial court should have admitted into evidence past acts of excessive force by Lynwood deputies because it was relevant on the issue of the reasonableness of appellant's belief in the need for self-defense or defense of Avila. (AOB 89-90.) This claim is meritless.

Where a defendant claims self-defense, prior threats by third parties whom the jury could infer that the defendant reasonably associated with the victim are admissible. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1069.) "Threats from the [third party] on the defendant's life would certainly tend in reason to make the defendant fearful. This is especially true where the group has a reputation for violence, and that reputation is known to the defendant." (*Id.* at p. 1066, internal citation and quotation marks omitted.) The exclusion of third party threats is determined on a case-by-case basis:

> [t]he more vague the threats, and the weaker the logical link between them and the defendant's actions, the more the court may be justified in excluding them. Similarly, evidence of a third party's reputation for violence may be particularly susceptible to exclusion.

(*Id.* at p. 1070.)

Here, appellant proffered attorney Glasser's testimony that the plaintiffs in civil lawsuits had alleged that the Vikings committed unlawful shootings, searches, and arrests, and Glasser's belief that the Vikings were a "racist band" of deputies who imposed "their own form of law enforcement justice in the Lynwood community." (RT 1435-1446.) However, this testimony was based on allegations of misconduct by deputies that occurred before those lawsuits were filed in 1990 or 1991, well before the murder of Deputy Blair in 1995. Appellant also proffered Detective White's testimony about alleged misconduct by deputies during his tenure at Lynwood Station from 1988 to 1989. However, Detective White's testimony regarded events *before* the Vikings were formed, and he testified that alleged misconduct *did not* involve excessive use of force. (RT 1551-1582.) Thus, appellant's proffered evidence of the Vikings' reputation for violence was "particularly susceptible to exclusion" because it concerned alleged misconduct that occurred several years before the murder of Deputy Blair. The proffered testimony thus had little, if any, probative value on the issue of appellant's belief in the need for self-defense or the defense of Avila at the time of Deputy Blair's murder. (See, e.g., *People v. Gonzalez* (1967) 66 Cal.2d 482, 500 [trial court properly determined that the reputation for violence of a member of a group related to the victim was "too remote to have significant probative value as to present character" because that reputation evidence concerned events which occurred seven years before charged acts].)

Moreover, the evidence proffered by appellant to prove other alleged misconduct by Lynwood deputies was inadmissible for reasons other than lack of probative value or remoteness. Glasser's testimony at the Evidence Code section 402 hearing about the plaintiffs' allegations of misconduct in the federal civil lawsuit and the declarations of persons alleging such misconduct in those lawsuits constituted inadmissible hearsay because the allegations were out-of-court statements made by persons who were not witnesses at the instant trial. (See Evid. Code, § 1200 [defining hearsay].) Appellant provided the trial court with no exception permitting the admission of this hearsay evidence. Indeed, trial counsel stated that he agreed that the allegations in the lawsuit constituted inadmissible hearsay. (RT 595.) "The proponent of hearsay has to alert the court to the exception relied upon and has the burden of laying the proper foundation." (*People v. Livaditis* (1992) 2 Cal.4th 759, 778.) Additionally, Glasser did not testify that he had personal knowledge of any misconduct by the Vikings. (See Evid. Code, § 702 [witness's testimony concerning a particular matter is inadmissible unless he has personal knowledge of the matter].)

Further, the lawsuit and allegations in that lawsuit did not involve any findings of fact. Though a federal judge, in granting an preliminary injunction, found that the Vikings were a "neo-Nazi White supremist gang," that preliminary injunction was later overturned by the Ninth Circuit based on a "conflict in the evidence." (RT 1426-1430.) Also, the first case in the two sets

of lawsuits did not involve any findings of fact regarding the Vikings, and the lawsuits were settled before any such findings were made. (RT 1447-1449.)

3. The Trial Court Properly Excluded Evidence Regarding The Actual Facts Of The Shootings Of Nieves And Polk

Appellant also asserts the trial court erred by excluding "the actual facts" regarding the shootings of two Young Crowd gang members, Nieves ("Rascal") and Polk ("Stranger"). (AOB 59, 71-72, 92.)

The trial court permitted multiple witnesses to testify that Nieves and Polk had been shot by deputies, including that Nieves had been shot in the back about a week prior to Deputy Blair's murder. (See RT 1205 [Frausto heard that a Young Crowd gang member was shot by deputy sheriffs], 1318, 1334-1335 [Brooks heard that deputies had shot a Young Crowd gang member named "Rascal"], 1531-1532 [appellant's statement during jailhouse visit that "Ric Rac" was shot by "cops" in the back in the week prior to Deputy Blair's murder], 1652-1654 [Avila knew that deputies shot a Young Crowd gang member in the back the week before Deputy Blair's murder], 1879-1881, 1908-1911 [appellant was "hanging out" with homeys who talked about how the police tried to kill homeboy Rascal and homeboy Stranger].)

Appellant, at trial and on appeal, has not identified which particular details of those shootings should have been admitted into evidence. Further, the trial court properly found that the details regarding these two shootings were too

remote, as those shootings did not involve Deputy Blair, and would involve unnecessary delay because the prosecution would then wish to present evidence to rebut defense witnesses's version of the details of the shootings. In these circumstances, the trial court properly excluded details of these two prior shootings because those details had little, if any, probative value, involved collateral facts, and would necessitate undue delay.

4. Despite Any Probative Value Supporting The Credibility Of Defense Witnesses, The Evidence Was Properly Excluded

Appellant contends the excluded evidence (the lawsuit and alleged "culture" of misconduct by Lynwood deputies, and details regarding the shootings of Polk and Nieves) should have been admitted because it had probative value in that it bolstered the testimony of himself and Avila. (AOB 90-92). This contention should be rejected.

First, appellant did not argue this as a factor for the admission of evidence. Rather, in the trial court, appellant argued the evidence had probative value in proving Deputy Blair's motive to shoot first, and as evidence of Deputy Blair's character for violence. (RT 306-309, 1477-1480, 1582-1584.)

Moreover, certain types of evidence are nevertheless deemed inadmissible even though it might bolster a witness's credibility. For example, unstipulated-to polygraph evidence that bolsters a witness's credibility is

inadmissible because such evidence is unreliable. (*People v. Maury* (2003) 30 Cal.4th 342, 413-414; Evid. Code, § 351.1.) Similarly, hearsay is excluded because of "particular difficulties" in assessing the credibility and reliability of those statements. (*People v. Cudjo* (1993) 6 Cal.4th 585, 608.) Here, as set forth above, the lawsuit itself and the allegations of misconduct in the lawsuit constituted inadmissible hearsay. Thus, despite any probative value of appellant's proffered evidence regarding the civil lawsuit in bolstering the testimony of defense witnesses, that evidence was nevertheless inadmissible because it was unreliable. Additionally, as set forth above, the probative value of the excluded Viking evidence was substantially outweighed by remoteness, confusion of the issues, undue consumption of time.

C. Appellant's Claims Of State And Federal Constitutional Error Have Been Waived; In Any Event, Such Claims Are Meritless

On appeal, appellant contends that the exclusion of evidence violated his rights under the state and federal Constitutions to present a meaningful defense, to compulsory process, and to have the jury determine guilt or innocence. (AOB 74-77, 88, 94-97.)

Appellant's claims of constitutional error should be deemed waived because he did not present them below. (*People v. Davis, supra*, 10 Cal.4th at p. 501, n. 1 [defendant's claims that exclusion of evidence violated the Due Process Clause of the Fourteenth Amendment and the Cruel and Unusual

Punishment Clause of the Eighth Amendment waived where, at trial, he "failed to make any argument whatever based on federal constitutional provisions"]; see also *People v. Kipp* (2001) 26 Cal.4th 1100, 1122 [defendant's claim that admission of evidence violated his rights under the state and federal Constitutions waived where he did not raise such objections below].)

Even assuming appellant's federal constitutional claims have been preserved for appellate review, they are meritless. First, the exclusion of the evidence did not violate appellant's right to present a defense.

> Application of the ordinary rules of evidence, such as Evidence Code section 352, generally do not deprive the defendant of the opportunity to present a defense [citation]; certainly the marginal probative value of this evidence does not take it outside the general rule.

(*People v. Snow, supra*, 30 Cal.4th at p. 90; see also *United States v. Scheffer* (1998) 303, 308 [118 S.Ct. 1261, 140 L.Ed.2d 413] [rules excluding evidence from criminal trials do not infringe upon a defendant's right to present a defense unless the rules are arbitrary or disproportionate to their purposes].) Here, as set forth above, the proffered evidence was inadmissible under the ordinary rules of evidence; specifically, Evidence Code sections 352, 702, and 1200. Moreover, as set forth more fully below, the trial court's rulings did not constitute a refusal to allow appellant to present a defense, but rather merely rejected certain evidence relating to that defense. Accordingly, appellant was not deprived of the

opportunity to present a defense. (See *People v. Reeder* (1978) 82 Cal.App.3d 543, 553 [defendant has no constitutional right to present all conceivably relevant evidence in his favor without regard to its probative value and potential for misleading the jury].)

Second, the exclusion of the evidence did not violate appellant's right to compulsory process. In *People v. Cudjo, supra*, 6 Cal.4th at pp. 611-612, this Court rejected the argument of the defendant and the dissenting opinion that the trial court's exclusion of a defense witness's testimony as unreliable violated his right, under the compulsory process clause of the Sixth Amendment, to present witnesses in his behalf. This Court reasoned that the United States Supreme Court "has never suggested that a trial court commits constitutional error whenever it individually assesses and rejects a material defense witness as incredible." (*Id.* at p. 611.) Moreover, in the instant case, the basis for the exclusion of the lawsuit, the alleged "culture" of misconduct by the Vikings, and details regarding two shootings of Young Crowd gang members was not based solely on the unreliability of that evidence, but rather its lack of probative value, remoteness in time, potential for confusing the jury, and undue consumption of time.

Finally, there was no violation of appellant's right to have the jury determine guilt or innocence. Appellant, citing a law journal essay, contends that the exclusion of the evidence in this case violated his Sixth Amendment

right to trial by jury. (AOB 75.) However, that essay concerned defense evidence that was excluded *solely* on grounds of unreliability. (Goldwasser, *Vindicating the Right to Trial by Jury and the Requirement of Proof Beyond a Reasonable Doubt* (1998) 86 Geo. L.J. 621, 623 ["This essay challenges the conventional wisdom about excluding a criminal defendant's evidence on grounds of unreliability."].) Professor Goldwasser argued that "more so than with other kinds of evidence rules, rules that are unreliability-based strike at the very heart of what the right to jury trial is about" because the right to a jury trial was predicated on the notion that jurors, not courts, should be responsible for determining the reliability of evidence. (*Id.* at pp. 636-637.)

Here, lack of reliability of the evidence was not the sole reason the evidence was properly excluded. Indeed, the trial court's reasons for excluding the evidence were based on facts set forth in Evidence Code section 352 (probative value, remoteness, prolonging the trial, jury confusion). Thus, because the evidence in question in this case was excluded for several reasons in addition to its unreliability, the exclusion of that evidence did not infringe upon the jury's role as the entity responsible for determining the reliability of evidence.

D. Harmless Error

Appellant nevertheless contends that this Court evaluate should prejudice under the *Chapman* (*Chapman v. California* (1967) 386 U.S. 18, 24

[17 L.Ed.2d 705, 87 S.Ct. 824]) standard applicable to federal constitutional errors. (AOB 94-97.) This Court has repeatedly held that where a trial court's ruling excluding defense evidence "did not constitute a refusal to allow [a] defendant to present a defense, but merely rejected certain evidence concerning the defense," the proper standard of review in assessing whether that ruling constituted reversible error is that set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 for evaluating prejudice from state-law error. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) As set forth above, appellant was not prevented from presenting his claim of self-defense, but rather was properly prevented from introducing inadmissible hearsay and statements not based on personal knowledge involving matters not directly related to the instant shooting.

Appellant also asserts the trial court's rulings here constituted "structural error" warranting automatic reversal. (AOB 92-93.) This contention is meritless. First, this Court has previously held that the erroneous exclusion of defense evidence is subject to harmless error review. (*People v. Hart, supra*, 20 Cal.4th at p. 607; *People v. Bradford, supra,* 15 Cal.4th at p. 1325; *People v. Fudge, supra,* 7 Cal.4th at pp. 1102-1103.) Further, there is a strong presumption that errors are subject to harmless-error analysis, and the United States Supreme Court has found structural error only in limited circumstances, which are not applicable here. (*Neder v. United States* (1999) 527 U.S. 1, 8 [119

S.Ct. 1827, 144 L.Ed.2d 35]; *Rose v. Clark* (1986) 478 U.S. 570, 579 [106 S.Ct. 3101, 92 L.Ed.2d 460].) Additionally, the cases cited by appellant in support of his contention of structural error do not involve the exclusion of evidence. (See *United States v. Gaudin* (1995) 515 U.S. 506, 507 [115 S.Ct. 2310, 132 L.Ed.2d 444] [trial court refused to submit question of materiality to jury where defendant was charged with making material false statements]; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202 [failure to instruct on defense theory of case].)

Under the *Watson* standard of review, reversal is warranted only if there is a reasonable probability that a result more favorable to appellant would have been reached in the absence of the alleged errors. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1089; *People v. Watson, supra*, 46 Cal.2d at p. 836.) In *People v. Fudge, supra,* 7 Cal.4th at pp. 1103-1104, this Court held the trial court's exclusion of defense evidence was harmless under the *Watson* standard where "much of the evidence was ultimately placed before the jury."

In the instant matter, as in *Fudge,* much of the complained-of excluded evidence was ultimately presented to the jury. First, appellant testified at trial that a deputy sheriff told him that there was a pending civil lawsuit against the Sheriff's Department and threatened that Young Crowd "haven't seen anything yet." (RT 1881-1885.) Thus, the jury was aware that a lawsuit had been filed

against the Sheriff's Department, and that deputies threatened appellant's gang after mentioning that lawsuit.

Second, the jury was well aware of allegations of misconduct by the Vikings. Appellant testified that the "cops were out to get us" and during the weeks and months prior to the murder of Deputy Blair, police officers had verbally threatened Young Crowd gang members, and beaten a Young Crowd gang member named Oso. (RT 1880-1881.) Avila testified that the Vikings essentially acted like a gang by throwing gang signs and shooting people and beat gang members with flashlights, and that he had been beaten by Deputy Blair, who was a Viking. (RT 1595-1604, 1611-1612, 1652-1654.)

Moreover, both prosecution and defense witnesses testified regarding shootings of Young Crowd gang members by deputies. Prosecution witness Brooks testified she heard that deputies shot "Rascal" and prosecution witness Frausto testified she heard that deputies shot a Young Crowd gang member. (RT 1205, 1318.) Appellant testified that his homeboy Rascal had been shot by sheriffs, and that his homeboy Stranger was shot and killed by sheriffs in December 1990. (RT 1909-1910.)

As such, because the jury was presented with much of the evidence appellant complains was improperly excluded, it is not reasonably probable that appellant would have received a better result at trial.

Moreover, appellant was permitted to, and in fact did, present evidence to support his theory that Deputy Blair fired first. In this regard, appellant presented evidence of Deputy Blair's character for violence, including his alleged prior beating of Avila with a flashlight (RT 1602-1604, 1611-1612) and Deputy Blair's membership in the Vikings (RT 2101-2102). The trial court also permitted appellant to present any other incident involving Deputy Blair's propensity for violence. (RT 1481-1484, 1585.)

Further, in light of the extremely strong evidence of appellant's guilt, including appellant's statements that he shot Deputy Blair to avoid a return to prison as a Three Striker, it was not reasonably probable that appellant would have received a more favorable result had the trial court admitted the evidence appellant argues was improperly excluded. Appellant conceded that he fired at Deputy Blair, and only claimed that he fired at Deputy Blair after Deputy Blair fired at Avila. However, the evidence that appellant did not fire at Deputy Blair in self-defense, or in defense of Avila, was truly overwhelming. During appellant's conversations with his mother, Brooks, and Frausto, appellant did not mention that Deputy Blair fired first, or that he fired at Deputy Blair in order to save his or Avila's life. Rather, in those conversations, appellant stated that he shot at the police officer because he did not want to go to jail for the rest of his life as a result of a third strike. (RT 1120-1129, 1157-1158, 1249-1254, 1500-1531.) Additionally, Deputy Lyons testified that based on his observations, he

believed the initial gunshots were not fired by Deputy Blair. (RT 454-470, 506-507, 509-512, 602-604, 624.)

Further, there was strong evidence of motive and manner of killing that indicated appellant premeditated and deliberated before killing Deputy Blair. Appellant told several persons he killed Deputy Blair because he did not want to go back to prison or jail as a third striker. (RT 1120-1129, 1157-1158, 1249-1254, 1530-1531.) Moreover, appellant shot at Deputy Blair several times and struck him in the neck and shoulder, indicating that the killing was the result of premeditation and deliberation. (RT 1042-1059, 1068, 1889-1895.)

Nevertheless, appellant states the length of the deliberations, about two and a half days, and extrapolates that the case was "close" and the error was not harmless. (AOB 101-102.) However, the jury had to decide the fate of appellant as to two counts, and decide the degree of murder, as well as the truth or untruth of two special-circumstance allegations. The jury also spent time going over their instructions to make sure they were properly carrying out their duties as well. (See *People v. Walker* (1995) 31 Cal.App.4th 432, 438.)

> However, defendant does not consider that important. Instead it appears that defendant just chooses to take the lump sum calculation of time and conclude that it was too long, thus the case was closely balanced as to reasonable doubt.

(*Id.* at p. 438.)

Here,

> the length of the deliberations could as easily be reconciled with the jury's conscientious performance of its civic duty, rather than its difficulty in reaching a decision.

(*Id.* at p. 439.) Thus, appellant's contention that the alleged error in excluding the evidence is prejudicial should be rejected.

III.

THE TRIAL COURT PROPERLY DISCHARGED JUROR NUMBER EIGHT, MR. T.

Appellant contends the trial court's discharge of Juror Number Eight, Mr. T., during deliberations and its denial of his motion for a new trial due to that discharge require reversal of the judgment.[12/] (AOB 102-134.) Appellant's claim lacks merit.

A. Factual Background

The jury began deliberating on July 19, 1996. (RT 2309, 2339-2342; CT 647.) On July 23, 1996, the trial court received notes from three jurors. The note from Juror Number One, the foreperson, indicated that Juror Number Eight,[13/] Juror T., wished to talk to the judge and included two notes from Juror T. and Juror Number Ten. (CT 650-653.)

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12. To the extent appellant maintains that the discharge of Juror Number Eight and the denial of appellant's new trial motion due to that discharge violates the federal Constitution (see AOB 129-131, 139), those claims have been waived and are the subject of procedural default since appellant did not raise those issues in the trial court. (See *People v. Hines* (1997) 15 Cal.4th 997, 1035; *People v. Holt* (1997) 15 Cal.4th 619, 666-667; *People v. Alvarez* (1996) 14 Cal.4th 155, 186.)

13. In order to comply with section 237, subdivision (a)(2), which requires that personal juror identifying information be kept sealed, Respondent will refer to Juror Number Eight, Mr. T, as Juror T. or Juror Number Eight. Similarly, other jurors will be referred to by their number or first initial of their last name.

Juror T.'s note read as follows:

As a juror of People v. Fuiava, I have encountered potentially significant and disturbing legal issue during the course of deliberation, which I believe can be addressed by the court and thus clarified to our fellow jurors. Juror #10, _____, on behalf of several jurors, has expressed and brought to my attention in explicit, no less certain terms, of their belief of reprehensible infraction for a juror to accentuate a testimony, while discrediting another statement by the very same witness, based on the juror's personal bias.

Meanwhile, more than one fellow juror have taken adamant stance to outright reject entire testimonies of some key witnesses, valid or not, based solely on the witness' age, alleged association with the defendant, or affiliation with the gang, The Young Crowd. Again, I must confess to my disagreement with the treatment of witness credibility.

I have rarely been accused of wrongdoing in my adult life, and never involving a matter with such momentous implication as in this case of determining the future of another individual's life. However, if the court's interpretation is fully consistent and concurs with [Juror Number Ten's] "admonition", I will ask for permission for dismissal

from the case at once as an unfit juror, *based on failure to comply with the court's instruction as stated.*

(CT 651; emphasis added.)

Juror Number Ten's note reads as follows:

I read #8's letter to you and strongly feel that he has misinterpreted what I and others have said. I would like to speak to you in regards to the letter. Please know that the letter does not accurately reflect what I have said.

Furthermore, I question #8's ability to follow the instructions of the law as you have instructed us to do. He is letting the "death penalty" and his emotions cloud the case. In addition, I question #8's understanding of English. If he feels he should be dismissed, I would support that request.

Thank you.

(Pgs to refer to: pgs 11, 15, 16, 17, 19, 21) In closing, Your Honor, I am disturbed that [juror] #8 thinks that I would discount a witness just because he/she is in Young Crowd or affiliated with YC. . . .

(CT 652.)

The trial court read the notes from Juror T. and Juror Number Ten into the record. The trial court noted that the pages referred to in Juror Number Ten's note referred to the following instructions: CALJIC Nos. 2.06 (page 11),

2.13 (page 15), 2.20 (page 16), 2.20.1 (page 17), 2.21.2 (page 19), and 2.23 (page 21). The trial court stated that it was "troubled" by the note from Juror T. for several reasons, including that it was not "sure what it is he's saying" and that it appeared that Juror T. was considering penalty in deciding appellant's guilt. (RT 2343-2348.) The trial court proposed that Juror T. should be called before the court and parties to explain what was on his mind. The trial court stated, "I do not view this . . . as an impermissible inquiry into how deliberations are proceedings. I view this more as a concern over what the law says and how the law should be understood." (RT 2348.) The parties agreed that the jurors had a disagreement regarding what the law required them to do in treating witness credibility. The prosecutor added that it appeared that Juror T., "by his own words," was inappropriately considering penalty. The trial court stated it was concerned that Juror T. discussed a juror's personal bias in evaluating witness testimony. (RT 2348-2350.)

The trial court, out of the presence of the other jurors and alternate juror, asked Juror T. whether he had a disagreement with some of the other jurors regarding what the law was. (RT 2351-2352.) Juror T. responded:

> Well, actually we had a discussion in the jury room this morning. I wrote that [note] actually last night following our deliberation.
>
> I mean it came to my attention -- I was not fully aware of your instructions at the time. But some of the jurors made it clear that --

well, she used the term "legal" to take account some part of a witness testimony while disregarding another by the witness.

And, also, that -- yeah, it was made clear to me today, but I was not comfortable with the instruction that -- to completely reject certain testimony from what I believe are key witnesses based on their age or some background.

I would have liked to look at both, but I cannot -- I have a problem with rejecting all the witness -- all the testimony because of certain inconsistencies.

(RT 2352.) The trial court asked Juror T. whether "there is a need to have better clarification on what the law says?" (RT 2352.) Juror T. responded that there was no need because the jurors had examined the instruction book that morning, and that he was "much more clear" about what the law regarding evaluating witness credibility. (RT 2352-2353.)

The trial court asked Juror T. whether he was able to follow the instructions and law. (RT 2353.) Juror T. responded:

I thought this over last night, and today, but I might not be fair to the prosecutors or the defense if my bias plays a role in which testimonies I will reject entirely while relying on other evidence or witness which to me was little bit less - well, more inconsequential.

So to reject these testimonies based on certain background, it may not be -- I might not be fair to the system as intended.

(RT 2353.) The trial court asked Juror T. whether, after thinking about the law, it was likely he would not be able to follow it. (RT 2353-2354.) Juror T. responded:

As, yes, stated in the instruction book. Of course, not all, but perhaps certain --the details. I may fail to meet the standards that you come to expect from the jurors.

(RT 2354.) The trial court stated that it expected the jurors to understand and apply the law, then asked juror number eight whether he thought he was not going to be able to follow the law. (RT 2354.) Juror T. responded, "Because of my -- well, perhaps because of my bias." (RT 2354.) The following colloquy took place:

THE COURT: *So you believe that you have a bias that will make it difficult for you to comply with the instructions on the law as you understand the instructions?* [¶] *Is that what you're saying?*

JUROR [T.]: *Yes, yes.*

THE COURT: Well, having said that, do you think that you should be excused from the case?

JUROR [T.]: I --

THE COURT: You know why I ask --

JUROR [T.]: I think I should -- I think I should be -- I think I should be --

THE COURT: Excused?

JUROR [T.]: Excused.

THE COURT: And, you know, this is not a personal thing. [¶] You understand that?

JUROR [T.]: Of course.

THE COURT: It is just that you are saying if I understand you -- and *I want to make it clear that you believe having thought about the law that you cannot follow the -- all the law's instructions; is that correct?*

JUROR [T.]: *Yes, yes.*

(RT 2354-2355, emphasis added.)

After Juror T. left the courtroom, the trial court stated :

I'm satisfied that the juror has indicated an unwillingness to follow the law. I think that he stated it very clearly. [¶] . . . I think he should be removed at this time and that an alternate should be seated . . .

(RT 2355-2356.) Trial counsel stated that he would like to know what bias Juror T. was referring to. The trial court stated:

> I don't think it's necessary to explore it further. [¶] I am satisfied that he said he will not follow the law. And that's all that I need I think to excuse him, and I think he should be excused.

(RT 2356.) Trial counsel stated that he believed that Juror T. did not specifically say that he could not follow the law, but felt that his own biases somehow prevented him from following the law. The trial court disagreed, stating:

> I think that it was very clear that he felt that he -- after talking to the jurors, after reading the instruction that he had personal biases that would prevent him from following he law. [¶] And I am satisfied. I am going to go ahead and excuse him.

(RT 2356-2357.) Thereafter, Juror T. was excused and replaced with one of the alternate jurors. (RT 2357-2358.).

After appellant was convicted, trial counsel made a motion to continue the sentencing hearing to permit Juror T. to appear in court and explain what he meant when he stated that he was biased. In a declaration attached to that motion, a defense investigator declared that he spoke with Juror T. on August 16, 1992. According to the defense investigator, Juror T. stated: (1) the other jurors felt that he was not following the law because he did not "want to totally disregard the testimony of gang members and witness associated with gang members"; (2) he told the court that he was biased in his evaluation of the evidence because he favored "one side over the other, that of the defense

witnesses"; (3) although he did not believe everything that was said by defense eyewitnesses, he believed other portions of their testimony enough to raise a reasonable doubt about appellant's guilt; (4) if asked what his bias was, he would have stated "it was because he favored part of the defense testimony and was not willing to totally disregard all of their testimony like the other jurors told him he had to. The other jurors told him he was not following the law, and that is why he told the court that he was biased and could not follow the law." Juror T. also stated that he did not want to sign a declaration, but was willing to come to court to explain things to the judge. (CT 822-823.)

The trial court indicated that it read the motion, but was not "inclined" to grant it. Trial counsel stated that Juror T. was not permitted to fully explain himself when he said that he was biased, and argued it was improper to the court to have excused Juror T. without doing so. Trial counsel argued the declaration showed Juror T. was not biased, but the other jurors felt he was because he was accepting portions of the defense's version of the case. (RT 2808-2909.)

The trial court stated that it excused Juror T. because "he stated in open court under oath that he could not follow my instructions on the law and that was the basis for the excusal." The trial court noted that Evidence Code section 1150 barred evidence of a juror's subjective reasoning process. The trial court stated there was an insufficient showing to justify a hearing regarding juror misconduct

or to provide a basis for continuing the sentencing hearing. The trial court denied the motion to continue. (RT 2810.)

B. Analysis

Pursuant to section 1089, a trial court may discharge a juror if "good cause" is shown that the juror is unable to perform his or her duty. (*People v. Farnham* (2002) 28 Cal.4th 107, 140-141; *People v. Cleveland* (2001) 25 Cal.4th 466, 474.) A juror who refuses to follow the court's instructions is unable to perform his or her duty within the meaning of section 1089. (*People v. Williams* (2001) 25 Cal.4th 441, 448; *People v. Daniels* (1991) 52 Cal.3d 815, 865.) Similarly, a sitting juror's actual bias is a proper ground for removal under section 1089. (*People v. Cleveland, supra*, 25 Cal.4th at p. 478; *People v. Keenan* (1988) 46 Cal. 3d 478, 532.)

A trial court's decision to discharge a juror and order an alternate juror to serve is reviewed for abuse of discretion, but in order to uphold that exercise of discretion, the dismissed juror's inability to perform his or her duties must appear in the record as a "demonstrable reality." (*People v. Cleveland, supra*, 25 Cal.4th at p. 474; *People v. Holt, supra*, 15 Cal.4th at p. 659; *People v. Elam* (2001) 91 Cal.App.4th 298, 198.)

Where a trial court is placed on notice that good cause to discharge a juror may exist, the court must make "'whatever inquiry is reasonably' necessary" to determine if the juror should be dismissed. (*People v. Cunningham*

(2001) 25 Cal.4th 926, 1029, quoting *People v. Espinoza* (1992) 3 Cal.4th 806, 821.) The decision whether to investigate the possibility of grounds for discharging a juror is within the discretion of the trial court. (*People v. Burgener* (2003) 29 Cal.4th 833, 878; *People v. Cleveland, supra*, 25 Cal.4th at p. 478.)

Here, the record shows that there was a demonstrable reality that Juror T. could not perform his duties as a juror. As set forth above, Juror T. repeatedly stated that he could not follow the law and instructions, as he understood them. Additionally, the record shows that Juror T. was not obeying at least one instruction given by the court. Juror T. himself, and Juror Number Ten, indicated that Juror T. was considering penalty during deliberations on the guilt phase of appellant's trial, in violation of the instruction (CALJIC No. 8.83.2; CT 714) that the jurors were not to do so. (CT 651-652.) Because Juror T. repeatedly stated that he could not follow the court's instructions and the record shows that he, in fact, had not followed at least one of the court's instructions, there was a demonstrable reality that he could not perform his duties as a juror. Thus, the trial court properly discharged him. (*People v. Williams, supra*, 25 Cal.4th at pp. 448-449 [citing several cases where jurors properly dismissed for inability to follow court's instructions]; *People v. Halsey* (1993) 12 Cal.App.4th 885, 892 ["Many cases have considered the exercise of this trial court discretion [in determining good cause to dismiss a juror]. Few have found abuse."].)

Nevertheless, appellant contends the trial court erroneously discharged Juror T. First, appellant contends the trial court abused its discretion by "singling" out Juror T. for questioning outside the presence of the other jurors because it "risked taint of the entire jury by encouraging speculation about that isolated inquiry" and "risked intimidation" of Juror Number Eight. (AOB 114.) This claim is meritless.

Appellant's speculative claim that Juror T. may have been intimidated by the court's inquiry is not supported by the record. Here, Juror T. asked to speak to the judge. (RT 2343; CT 650.) Further, the trial court specifically asked Juror Number Eight "is it okay with you to talk in this setting [in open court with the parties present and outside the presence of the other jurors]?" Juror T. responded, "This will do just fine." (RT 2351.) Thus, the record shows that Juror T. was not intimidated by the court's inquiry.

Similarly, the record shows that at least one other juror, Juror Number Ten, knew the substance of Juror T.'s note and that several other jurors disagreed with Juror T. over the proper way to evaluate witness testimony. Additionally, the record shows the jury foreperson knew that Juror T. asked to speak to the judge. (RT 2343-2346; CT 651.) As such, the record shows little, if any, risk that the trial court's inquiry would encourage the jurors to speculate that Juror T. was being punished for some unknown "problematic" behavior.

Further, by questioning Juror T. outside the presence of the other jurors, the trial court acted properly to limit the scope of the inquiry. This Court has concluded

> that a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations.

(*People v. Cleveland, supra*, 25 Cal.4th at p. 485.)

Appellant next contends that the trial court abused its discretion by continuing to inquire after Juror T. stated that the jury had resolved its differences about the law and did not require further guidance from the court. (AOB 115.) This claim should be rejected.

Here, Juror T. stated that there was no need for clarification of what the law meant because the jurors had examined the written instructions it had been given by the court and that he was "much more clear" about the law regarding evaluating witness testimony. (RT 2352-2353.) However, Juror T., in his note to the court, also mentioned that he might fail "to comply with the court's instruction *as stated*." (CT 651, emphasis added.) At the time Juror T. stated that the disagreement over the law had been resolved, the issue regarding his ability to follow the law had not yet been discussed. Accordingly, the trial court did not abuse its discretion by inquiring into this possible ground for dismissal.

Appellant also contends the trial court failed to conduct further inquiry regarding Juror T.'s statements regarding his bias and inability to follow the law. In this regard, appellant contends that Juror T.'s statements regarding his bias were unclear, and that the trial court's inquiry failed to establish that juror number eight was actually biased or unable to follow the law, rather than that he had a "bias" or inability to follow the law that was based on his misunderstanding of the instructions and his view of the credibility of defense witnesses that was different from other that of the other jurors. (AOB 115-129.) This contention should be rejected.

Justice Kennard, in her concurring opinion in *People v. Williams, supra*, 25 Cal.4th at pp. 463-465, which was cited to and quoted with approval by this Court in *People v. Engleman* (2002) 28 Cal.4th 436, 445-446, stated in relevant part:

> [I]n questioning a juror to determine whether the juror is refusing to follow the trial court's instructions on the law, as alleged by other jurors, a trial court should conduct only a very limited inquiry. The court should caution the juror that it does not want to know whether the juror is voting to convict or acquit the defendant, or the reasons for that vote. The court should then state that it wants to know only whether the juror is willing to abide by the juror's oath to decide the case "'according only to the evidence presented ... and ... the

instructions of the court'" (Code Civ. Proc., § 232, subd. (b)), to which the juror is to respond only with either "yes" or "no."

If the juror's answer is "yes," the trial court should simply order the entire jury to resume deliberations. If the answer is "no," the court should discharge the juror in question. If the juror's answer is equivocal, the trial court may have to inquire further. In doing so, however, the court should be mindful of these words of warning: "Where the duty and authority to prevent defiant disregard of the law or evidence comes into conflict with the principle of secret jury deliberations, we are compelled to err in favor of the lesser of two evils-protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity." (*U.S. v. Thomas, supra*, 116 F.3d at p. 623.)

(*People v. Williams, supra*, 25 Cal.4h at p. 464; see *People v. Engleman, supra*, 28 Cal.4th at p. 445 [Justice Kennard's concurring opinion in *Williams* "properly warned" of the inherent risk in permitting trial courts to conduct intrusive inquiries regarding the particulars of a juror's understanding or interpretation of the law as stated by the court]; *People v. Cleveland, supra*, 25 Cal.4th at p. 485 [trial court's inquiry into possible juror misconduct should be as limited as possible].) In light of Justice Kennard's concurring opinion in *Williams* and this Court's opinions in *Engleman* and *Cleveland*, the trial court acted properly by

limiting its inquiry to Juror T.'s ability to follow the court's instructions rather than further exploring Juror Number Eight's stated bias.

Appellant, citing *United States v. Brown* (D.C. Cir. 1987) 823 F.2d 591, *United States v. Thomas* (2d Cir. 1997) 116 F.3d 606, and *United States v. Symington* (9th Cir. 1999) 195 F.3d 1080), also contends that the dismissal of Juror T. was improper because there was a reasonable possibility that he was dismissed because he doubted the prosecution's case. (AOB 122-129.) This contention is meritless. This Court has expressly rejected a standard precluding dismissal of a juror where there is a reasonable probability that the juror was dismissed due to his or her views on the case, stating:

> [W]e do not adopt the standard promulgated in *Brown*, and refined in *Thomas* and *Symington*, that restricts a court's authority to inquire into whether a juror is unable or unwilling to deliberate and that precludes dismissal of such a juror whenever there is "any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case." Rather, we adhere to established California law authorizing a trial court, if put on notice that a juror is not participating in deliberations, to conduct "whatever inquiry is reasonably necessary to determine" whether such grounds exist and to discharge the juror if it appears as a "demonstrable reality" that the juror is unable or unwilling to deliberate.

(*People v. Cleveland, supra*, 25 Cal.4th at p. 484, citations omitted.)

Moreover, Juror T. was not removed because he harbored doubts about the prosecution's case. Rather, as set forth above, Juror T. was removed because he stated he could not follow the court's instructions, and the evidence showed he actually was not following at least one of the court's instructions by considering penalty during deliberations on the guilt phase of appellant's trial. Here, the trial court conducted an appropriate inquiry reasonably necessary to determine whether there were grounds for dismissing Juror T., and properly discharged him based on his statements and conduct which reflected a "demonstrable reality" that he was not able to or willing to follow the court's instructions.

C. The Trial Court Properly Denied The Motion For A New Trial

Appellant, relying primarily upon a defense investigator's declaration regarding Juror T.'s purported out-of-court statements regarding what he meant when he stated he was biased, contends the trial court improperly denied his motion for a new trial based on the ground that Juror T. had been improperly dismissed. (AOB 130-131.) Respondent disagrees.

The trial court did not abuse its discretion in denying appellant's motion for a new trial. (*People v. Navarette, supra,* 30 Cal.4th at p. 526; *People v. Davis, supra,* 10 Cal.4th at p. 524.) The purported statements of Juror T. were inadmissible double hearsay in that they were out-of-court statements made to

the defense investigator, who also was not available at trial. Moreover, the purported statements of Juror T. was inadmissible evidence of his state of mind. Evidence of what a juror "felt," or how he or she understood the court's instructions, is not admissible to impeach a verdict. (*People v. Steele* (2002) 27 Cal.4th 1230, 1261; Evid. Code, § 1150.) Further, for the reasons set forth above, the trial court properly dismissed Juror T. Accordingly, appellant's claim is meritless.

D. Appellant's Double Jeopardy Claim Is Meritless

Appellant contends that the improper removal of juror number eight bars retrial under state and federal constitutional double jeopardy principles. (AOB 131-134.) In *People v. Hernandez* (2003) 30 Cal.4th 1, 6-11, this Court rejected this identical contention. For the same reasons set forth in *Hernandez*, appellant's claim should be rejected.

IV.

THE TRIAL COURT DID NOT COERCE THE VERDICTS BY SUBSTITUTING TWO JURORS

Appellant contends the substitutions of two jurors, Jurors T. and G., "served inevitably to coerce the verdicts." (AOB 135-139.). Appellant's claim lacks merit.

A. Factual Background

After Juror T. was excused, he was replaced by Juror G., a woman. The newly-constituted jury was instructed to begin deliberations anew. (RT 2357-2360.) The following day, the trial court noted that Juror G. had called the bailiff and stated she was distraught, unable to sleep, and believed she was unable to deliberate. (RT 2361.) The trial court, in open court outside the presence of the other jurors, questioned Juror G. regarding her statements to the bailiff. Juror G. stated she was unable to discharge her duties as a juror, that she was unable to consider the evidence, and that she was concerned about retaliation. (RT 2362- 2363.) The trial court asked Juror G. to step outside, then stated that it believed that she should be excused because she was unable to function as a juror. The prosecutor agreed, and trial counsel did not object. Juror G. was excused and replaced with Juror K., another woman. The newly-constituted jury was instructed to begin deliberations anew. That jury reached verdicts on the case. (RT 2363-2368.)

B. Analysis

A trial court may not, through its remarks and instructions to jurors, exert undue pressure on jurors to reach a verdict. (*People v. Burgener, supra*, 29 Cal.4th at p. 879; *People v. Keenan, supra*, 29 Cal.4th at p. 534 ["A trial judge should refrain from placing specific time pressure on a deliberating jury and should never imply that the case warrants only desultory deliberation."]; *People v. Carter* (1968) 68 Cal.2d 810, 817 [trial court must avoid the impression that jurors should abandon their independent judgment "in favor of considerations of compromise and expediency"].)

Here, appellant contends that the substitution of Juror T. was coercive because: (1) the substitution communicated that the trial court endorsed the position of the jurors who disagreed with Juror T. about the credibility of defense witnesses; and (2) any new alternate juror was under pressure to join the rest of the jury, "whose one recalcitrant member the court had removed." (AOB 135-137.) These contentions are meritless.

Appellant's claims are based on speculation. There is nothing from the record that indicates that the jury understood the dismissal of Juror T. meant the trial court endorsed the position of the jurors who favored guilt. Indeed, the jurors were instructed that they were "not to speculate as to why [Juror T.] has been excused." (RT 2358.) It is presumed the jury understood and followed this instruction. (*People v. Holt, supra*, 15 Cal.4th at p. 662; *People v. Danielson*

(1992) 3 Cal.4th 691, 722.) Similarly, the record does not show that Juror T. was the sole recalcitrant dissenting juror who did not agree with the rest of the jurors that appellant was guilty. (See, e.g., *People v. Haskett* (1990) 52 Cal.3d 210, 238 ["There is no indication that Lizana was the 'last, lone, holdout juror'"]; *People v. Burgener, supra*, 29 Cal.4th at p. 879 ["the court had no knowledge (nor do we) that any deadlock existed"].) The trial court conducted no poll of the jurors to determine what their positions were. Thus, there is nothing in the record that supports appellant's claim that the other jurors had already agreed that appellant was guilty. As such, there is no support in the record for appellant's speculative claim that any alternate juror was under any pressure to adopt the position of the rest of the eleven jurors.

Appellant further contends that the substitution of Juror G. communicated to the jury that the trial court was inclined to remove any juror who was an impediment to quick consensus. Appellant finally contends that by the time Juror G. had been dismissed, the position of the remaining eleven jurors became so solid and cohesive that it was impossible to deliberate anew with a new juror. (AOB 137-139.) These speculative contentions are also meritless.

Here, the trial court instructed the jurors that Juror G. "has been excused for legal cause and replaced with an alternate juror. You must not consider this fact for any purpose." (RT 2366.) Thereafter, the jurors were instructed that they were to disregard their past deliberations and begin

deliberating anew. (RT 2366.) Because it is presumed the jurors followed these instructions, appellant's speculative claims that the jury understood the removal of Juror G. to mean that any juror who was an impediment to quickly reaching a verdict, and that it was impossible for the original jurors to begin deliberating anew, are meritless.

V.

THE TRIAL COURT PROPERLY REFRAINED FROM QUESTIONING THE JURY REGARDING COURTROOM BEHAVIOR BY TWO WOMEN ASSOCIATED WITH APPELLANT

Appellant contends the trial court's failure to determine whether other jurors were tainted by courtroom behavior of two spectators supposedly associated with him that caused at least one juror to become fearful and contributed to her discharge requires reversal of the judgment.[14/] (AOB 140-153.) Appellant's claim is meritless.

A. Factual Background

On the morning of July 19, 1996, shortly before defense counsel was to resume his closing argument during the guilt phase of appellant's trial, the trial court indicated that it had received a telephone call from Miss J., Juror Number Eleven ("Juror J."). According to the trial court, Juror J. said: (1) she had a migraine headache, which was caused by stress, and that she was nauseated and unable to come to court that day; and (2) one of the reasons for her migraine was that she had seen two women in the audience, whom she believed were "aligned" with the defense, pointing at the jurors. The trial court

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14. To the extent appellant maintains the trial court's refusal to question the other jurors regarding the courtroom behavior by the two spectators denied him an impartial jury under the Sixth and Fourteenth Amendments to the federal Consitution (see AOB 142), that claim has been waived since appellant did not raise that federal constitutional issue in the trial court. (See *People v. Hines, supra*, 15 Cal.4th at p. 1035; *People v. Holt, supra*, 15 Cal.4th at pp. 666-667; *People v. Alvarez, supra*, 14 Cal.4th at p. 186.)

asked Juror J. if anyone had approached her or said anything to her. Juror J. responded, "No." She also explained that

> in walking through the parking lot yesterday going home, that some of the jurors talked about this. And that Mr. A. [another juror] even suggested that perhaps a note should be sent to the court.

(RT 2208-2209.)

The trial court stated that it had not noticed any improper activity by anyone in the audience, and that the "vast majority" of the spectators appeared to be deputy sheriffs or other persons aligned with the prosecution. The trial court also noted that there were a "number" of spectators at trial who were associated with appellant. The trial court stated that, at a minimum, Juror J. would have to be excused and replaced with an alternate. The trial court then stated,

> Beyond that I am seeking counsel's input, to what, if anything, we should do to assuage any possible concerns that any of the [remaining] jurors have. [¶] My own feeling would be that until the other jurors tell us something, it's not necessary to take any action. [¶] If Mr. A. writes us a note, then we will read what the note is and we'll go from there.
>
> I was pleased that no one had said anything to any of the jurors and I don't know if [Juror J.] is just an overly sensitive person.

(RT 2209-2210.) The trial court further noted that it had Juror Number J.'s telephone number and that she could be called to state on the record what the trial court had reported regarding her telephone call. Trial counsel responded, "No, I don't need to do that." (RT 2210-2211.)

The trial court then stated:

> It was during yesterday's session that [Juror. J.] said -- you know, I looked in the audience and maybe I shouldn't have but it looked to me like the two women -- and [Juror J.] described one woman as having hair that was a little speckled . . . . And the other woman had different kind of hair, a colored kind of hair . . . and that they seemed to be talking among themselves and pointing at the jurors. And [Juror J.] was concerned about that.

(RT 2211.) The trial court further noted that Juror J. did not say that she believed she alone was being pointed at, but that the two women were pointing at various jurors. (RT 2212.)

Trial counsel stated that it was "perfectly possible" that two people in the audience were talking about the jurors, and that there was "certainly nothing improper about that." The trial court stated that Juror J. "did not say that the gestures were threatening." (RT 2212-2213.) The prosecutor stated that his feeling "would be that we let it lay." The prosecutor agreed that Juror J. should be dismissed, and suggested that the trial court, out of the presence of the jury,

admonish the people in the audience to not to make any kind of gestures, or that they would lose their right to attend the trial. (RT 2213.) The trial court stated it believed the admonishment would be appropriate. Trial counsel agreed, adding that the court should also mention that the spectators's gestures could be misinterpreted.

Subsequently, the trial court, outside the presence of the jury, admonished the spectators in the audience that making gestures or pointing at the jurors was improper behavior, and that persons who did so would be removed and could be held in contempt of court for trying to disrupt the proceedings. (RT 2214-2216.) After the jurors were brought into court, the trial court advised them that Juror J. was being replaced because she had a migraine headache that made her unable to serve as a juror. (RT 2216-2217.)

B. Analysis

A defendant has a constitutional right to be tried by an impartial jury. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *People v. Nesler* (1997) 16 Cal.4th 561, 577.) An impartial jury is one in which no member has been improperly influenced and every member is capable and willing to decide the case solely on the evidence presented at trial. (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) A sitting juror's involuntary exposure to out-of-court events, such as an outsider's attempt to tamper with the jurors by intimidation, *may* require examination for probable prejudice using the same standard which

applies to situations involving where a juror directly commits misconduct by violating his or her oaths or duties as a juror. (*Id.* at pp. 294-295.)

In *People v. Burgener* (1986) 41 Cal.3d 505, 518-520, overruled on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 753, this Court held that whenever a trial court is put on notice that good cause to discharge a juror may exist, including when improper or external influences are brought to bear on a juror, that it must conduct an inquiry determining whether the juror is competent to serve. (See also *People v. Cunningham, supra,* 25 Cal.4th at p. 1029, *People v. Chavez* (1991) 231 Cal.App.3d 1471, 1482.) The trial court's decision whether to conduct such an inquiry is reviewed for abuse of discretion. (*People v. Burgener, supra,* 29 Cal.4th at p. 878; *People v. Cleveland, supra*, 25 Cal.4th at p. 478.)

As a preliminary matter, appellant has waived his claim that the trial court abused its discretion by failing to inquire whether the jurors, other than Juror J., had been prejudiced by potentially intimidating courtroom behavior by two spectators supposedly associated with the defense. Here, after the trial court stated that it would excuse Juror J. and that it believed no further action was necessary unless the other jurors reported anything, appellant did not ask the trial court to examine the other jurors to determine whether they had been improperly influenced by the courtroom behavior. (RT 2209-2217.) In these circumstances, the claim has been waived. (See, e.g., *People v. Burgener, supra*, 41 Cal.3d at

p. 521 ["defendant cannot be permitted to prevent an inquiry into the condition of a possibly intoxicated juror on the basis that such an inquiry would "destroy the jury" and subsequently challenge the verdict of that very jury on grounds that the court's failure to conduct an inquiry prejudiced his interests."]; *People v. Federico* (1982) 127 Cal.App.3d 20, 39-40 [rejecting claim that trial court failed to inquire regarding alleged juror tampering because, as one reason, defendant failed to pursue remedies in trial court].)

Even assuming appellant has preserved this claim for appellate review, it nevertheless lacks merit. Here, the record does not show that the trial court was put on notice of good cause to believe that any of the other jurors were biased, improperly influenced, or intimidated by the behavior of two courtroom spectators. Although Juror J. reported that some of the other jurors discussed the behavior of two spectators, the trial court noted that Juror J. did not say that the spectators' actual gestures were threatening. Additionally, trial counsel contended the courtroom behavior was not improper. Further, none of the other jurors reported to the court any concern about the spectators' behavior, indicating that they were not affected by the spectators' conduct. Also, the trial court properly exercised its discretion to limit the inquiry regarding the spectator conduct to Juror J. In *People v. Leach* (1985) 41 Cal.3d 92, 107, this Court rejected the defendant's claim that the trial court should have inquired further

where the defendant's friend called a juror, who was subsequently excused, several times. The Court reasoned

> however guarded the court's questions to the other jurors might be, there was an ever-present danger that somehow it would come to light that Young [the juror] had been improperly approached on behalf of the defense.

(*Ibid.*) Similarly, in the instant case, had the court questioned the other jurors, there was a danger that the other jurors would have misinterpreted innocent courtroom observer behavior to mean that spectators supposedly associated with the defense were attempting to intimidate them.

Nevertheless, appellant contends the trial court erred by failing to conduct a hearing to determine the effect of spectator behavior on the other jurors because there was a potential that those jurors perceived that behavior as a threat and thus were biased against appellant. (AOB 146-147.) This contention should be rejected. As set forth above, trial counsel's position was that the spectators' conduct was not intimidating, but was proper, and the trial court noted that the actual gestures were not threatening. In contrast, the case cited by appellant involves a clearly threatening contact with a juror. (AOB 146, citing *United States v. Angulo* (9th Cir. 1993) 4 F.3d 843, 846 [juror received threatening phone call at home].)

Moreover, even if the trial court abused its discretion by failing to inquire, reversal is not required. In *People v. Burgener, supra*, 41 Cal.3d at p. 521, this Court found the trial court's error in not conducting an inquiry regarding possible juror misconduct did not warrant reversal, noting that defense counsel had objected to any inquiry of the juror, causing the record to be insufficient to evaluate the claim of juror misconduct. In *People v. Chavez, supra*, 231 Cal.App.3d at p. 1483, where it was alleged a juror spoke with a police officer about the case, the appellate court found reversal unwarranted, stating:

> Though the record before us does not suggest, as in *Burgener*, that counsel for defendant refused further inquiry by the court for *tactical reasons*, it was counsel for defendant who indicated to the court he had spoken to the officer and was satisfied the officer had not spoken about the case. . . . the court thereafter indicated that it would find no error and the matter was terminated. While the court here was required to hold a hearing, even though trial counsel was satisfied with the matter, we cannot find on these facts that reversal is required on this ground. Accordingly, we find the trial court's error in not holding a hearing was harmless beyond a reasonable doubt.

(*Ibid.*, emphasis in original.)

Here, as in *Chavez*, even though trial counsel did not actively refuse further inquiry regarding possible juror bias due to possible juror tampering, trial counsel did not request such inquiry or object when the trial court suggested such inquiry not be done. Further, as set forth above, none of the other jurors reported any note expressing any concern about spectator behavior, and they were instructed to consider only the evidence received at trial and not to be influenced by conjecture, prejudice, public opinion or public feeling. (CALJIC No. 1.00, CT 656-657.) It is presumed the jurors followed this instruction (*People v. Bradford, supra*, 15 Cal.4th at p. 1337; *People v. Osband* (1996) 13 Cal.4th 622, 714) and did not decide the case based on any antipathy toward the defense due to spectator conduct. Also, the record shows that there were many law enforcement spectators at trial (RT 2209), reducing the likelihood that any juror felt intimidated by the presence or behavior of any defense spectators at trial.

Nevertheless, appellant claims that prejudice in this case should be presumed. (AOB 148-150.) This claim should be rejected. As noted in Judge O'Scannlain's concurring opinions in *United States v. Jackson* (9th Cir. 2000) 209 F.3d 1103, 1110-1111, and *United States v. Duktel* (9th Cir. 1999) 192 F.3d 893, 899-902), three federal circuits (see *United States v. Sylvester* (5th Cir.1998) 143 F.3d 923, 934; *United States v. Williams-Davis* (D.C.Cir.1996) 90 F.3d 490, 496; *United States v. Zelinka* (6th Cir.1988) 862 F.2d 92, 95-96)

have found that the presumption of prejudice in alleged jury tampering cases established by *Remmer v. United States* (1954) 347 U.S. 227 [74 S.Ct. 450, 98 L.Ed. 654] has since been modified by the Supreme Court in *Smith v. Phillips* (1982) 455 U.S. 209, 215 [102 S.Ct. 940, 71 L.Ed.2d 78], where the Court held the remedy for allegations of juror bias is a hearing where the defendant has the opportunity to prove actual bias, and *United States v. Olano* (1993) 507 U.S. 725, 739 [113 S.Ct. 1770, 123 L.Ed.2d 508], where the Court de-emphasized the importance of presumptions of prejudice.

Additionally, Judge O'Scannlain noted the following problem with the *Remmer* presumption of prejudice

> We now have a hair trigger in this circuit for evidentiary hearings in cases of alleged jury tampering and we have placed too heavy a burden on the government at such hearings. While I concur in the court' disposition because I am bound by our circuit precedent, I continue to believe that the teaching of *Phillips* and *Olano* is that when defendants allege jury tampering, they "must establish that prejudice was likely to have resulted before the government should be required to prove the harmlessness of the intrusion." *Dutkel*, 192 F.3d at 899 (O'Scannlain, J., concurring). To hold otherwise is to invite mischief on a defendant's behalf sufficient to cause a mistrial by concocting threats in ways that can not be traced back to their source.

(*United States v. Jackson, supra*, 209 F.3d at p. 2111 [O'Scannlain, J., concurring].)

Finally, the *Remmer* standard of presumed prejudice should only apply where there is "egregious tampering or third party communication which directly injects itself into the jury process." (*United States v. Boylan* (1st Cir. 1990) 898 F.2d 230, 261.) In *Remmer*, the judicial contact consisted of a third party offering a bribe in exchange for a verdict favorable to the defendant. *Remmer v. United States, supra,* 347 U.S. at p. 228.) In contrast, the instant case involved courtroom conduct which was not inherently intimidating and which was not the type of "egregious" tampering or communication that directly affected the jurors. Accordingly, the *Remmer* presumption of prejudice should not be applied.

VI.

THE TRIAL COURT PROPERLY DENIED DEFENSE COUNSEL'S MOTION TO CONTINUE THE TRIAL

Appellant contends the trial court's denial of defense counsel's motion to continue trial for three days because he needed that time to adequately prepare requires reversal of the judgment.[15/] (AOB 154-162.) Appellant's claim is meritless.

A. Factual Background

On Monday, July 8, 1996, the date trial was set to begin, trial counsel made a motion to continue the trial. (RT 52-54.) The trial court stated that it was "real negative" toward that motion, noting that it had made "considerable effort" to persuade a jury selection supervisor to prepare a panel of 65 prospective jurors the previous Friday. The trial court also noted that the attorneys were both advised on July 3, 1996, the previous Wednesday, that trial would begin on July 8, 1996. (RT 54.)

Trial counsel explained he had a tooth problem, which would require a root canal, but had been given antibiotics and was able to function. Trial counsel stated the reasons for his motion for a continuance were: (1) to review

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15. To the extent appellant maintains the trial court's denial of his continuance motion denied him a reliable verdict in violation of the Eighth and Fourteenth Amendments of the federal Constitution (see AOB 157), that claim has been waived since appellant never asserted that claim in the trial court. (See *People v. Williams, supra*, 16 Cal.4th at p. 250; *People v. Jackson, supra*, 13 Cal.4th at p. 1231, fn. 17; *People v. Raley, supra*, 2 Cal.4th at p. 892.)

the evidence and "fine tune" himself to be adequately prepared for trial; and (2) permit his investigator to do some "last things" prior to trial. Trial counsel stated that the "last minute investigative work" was more important than his "fine tuning." (RT 54-56.)

The trial court responded that the trial would likely be short, the jurors were ready to proceed, and it would like to start the trial. The trial court also stated that it believed jury selection would take a while. The trial court granted trial counsel's request to have a ballistics expert analyze the evidence. Trial counsel responded that he was not seeking a continuance for ballistics analysis. (RT 56-57.) The prosecutor stated he had no position regarding appellant's motion for a continuance, but noted that he did not want to inconvenience the jurors. The prosecutor said he was ready to proceed with trial. (RT 57-59.)

The trial court denied the motion to continue, stating:

> I want to select the jury and we will see how long it takes to select the jury. [¶] You know, you are an experienced attorney. You know there will be periods of dead time probably between now and certainly the defense case. And I think that we should get started. [¶] So, the request for continuance is denied.

(RT 59-60.)

At an ex parte side bar conference, trial counsel stated that the defense theory would be self-defense. Trial counsel explained that he had obtained two

addresses for Deputy Blair's ex-wife, who had signed a declaration indicating that Deputy Blair had a violent temper, and wished to talk to her and subpoena her as a witness to testify regarding Deputy Blair's character for violence. Trial counsel stated that his investigator had determined one of the addresses for Deputy Blair's ex-wife was "not a good one" and visited the other address, but no one came to the door. Trial counsel also explained that he wished to present evidence that a civil lawsuit had been filed against Deputy Blair. Trial counsel called the lawyer who deposed Deputy Blair, but the lawyer had not responded. Trial counsel did not subpoena that lawyer. (RT 60-63.) The trial court stated it wanted to give trial counsel enough time to prepare its defense, but noted that "we're not going to get to the defense case until next week." (RT 63-65.) In proceedings held in open court, the trial court stated, "I do stand by my ruling denying the motion for continuance. I do believe that we should go forward today." (RT 66.)

B. Analysis

A trial court's decision whether to grant or deny a motion to continue is reviewed for an abuse of discretion. (*People v. Smithey* (1999) 20 Cal.4th 936, 1011; *People v. Jones* (1998) 17 Cal.4th 279, 318.) Absent a showing of an abuse of discretion and resulting prejudice, a denial of a motion for a continuance does not warrant reversal of a conviction. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1126.)

A showing of "good cause" to obtain a continuance requires a demonstration that both the party and counsel have used due diligence in their preparations. (*People v. Mickey* (1991) 54 Cal.3d 612, 660.) In determining whether to grant or deny a motion for a continuance, a trial court must consider: (1) the benefit which the moving party anticipates, and the likelihood that such benefit would result; (2) the burden on other witnesses, the jury, and the court; and (3) whether substantial justice would be accomplished or defeated by the granting of the motion. (*People v. Barnett, supra,* 17 Cal.4th at pp. 1125-1126; see also *People v. Frye* (1998) 18 Cal.4th 894, 1013 [one factor in determining good cause is whether a continuance would be useful].)

Here, the trial court did not abuse its discretion in denying the motion for a continuance. First, trial counsel did not comply with section 1050, subdivision (b), which requires that written notice of a motion for a continuance be filed and served at least two court days before the hearing. Section 1050, subdivision (d), provides that where a party fails to comply with the notice requirement, the court must deny the hearing unless, after a hearing, good cause is shown for the failure to comply. Here, trial counsel filed his motion for a continuance on the day of the hearing. (CT 624-625.) Additionally, trial did not establish any "good cause" for his failure to comply with this notice requirement. In similar circumstances, this Court has held trial courts have not abused their

discretion in denying motions for a continuance. (*People v. Smithey, supra*, 20 Cal.4th at p. 1012; *People v. Jones, supra*, 17 Cal.4th at p. 318.)

Additionally, the record reflects the trial court carefully considered the benefit trial counsel anticipated from a continuance. Trial counsel set forth three reasons for that request: (1) he had a tooth problem; (2) he wanted adequate time to "fine-tune" his trial preparations; and (3) he needed additional time for some investigative work to be done, specifically, that two potential defense witnesses, Deputy Blair's ex-wife and an attorney who deposed Deputy Blair, could be contacted, interviewed, and subpoenaed for trial. (RT 54-56, 60-63.) Trial counsel explained that the tooth problem had been solved with antibiotics and that he could function, and that he could finish his "fine tuning" at night, and that his major concern was the remaining investigative work. (RT 55, 56.) The trial court stated that the defense case would not begin for at least a week after the trial started, and noted that this gave trial counsel additional time to have the investigative work completed. The trial court also noted that a continuance would burden other parties, specifically noting that it contacted the jury panel supervisor, who had prepared a panel of 65 prospective jurors. (RT 54.) In light of the record, the trial court did not abuse its discretion in denying the motion.

Moreover, even assuming the trial court abused its discretion in denying the motion for a continuance, reversal is unwarranted. "In the absence of a showing of an abuse of discretion and prejudice to a defendant, a denial of

a motion for a continuance does not require reversal of a conviction." (*People v. Barnett, supra*, 17 Cal.4th at p. 1126; see also *People v. Snow, supra*, 30 Cal.4th at p. 74.) Here, appellant has not demonstrated any prejudice from the trial court's denial of the motion for a continuance. Appellant's claim that trial counsel was unprepared (AOB 156-162) is based on his speculation. Indeed, appellant cites nothing from the record to support his assertion that "the haphazard representation that counsel provided [appellant] demonstrates the depth of his unpreparedness." (AOB 162.)

Further, contrary to appellant's assertion, the record reflects trial counsel had adequate time to prepare. Trial counsel, who was appointed to represent appellant on October 27, 1995 (CT 328), had approximately eight months to prepare for trial. Moreover, on July 8, 1996, the day set for trial, trial counsel requested a few days continuance to review the evidence and "fine-tune" his case and stated that permitting time for additional investigative work was more important than his "fine tuning" (RT 54-56), indicating that he was essentially prepared for trial.

Moreover, as set forth above, at the time the motion for a continuance was denied, trial counsel still had adequate time to complete its investigation regarding Deputy Blair's ex-wife and the attorney who had deposed Deputy Blair in a civil lawsuit because jury selection and presentation of the prosecution case would take place before the defense case, where the possible testimony of

the two witnesses would be presented. Also, the attorney who deposed Deputy Blair testified at an Evidence Code section 402 hearing during the prosecution's case-in-chief (RT 1432-1449) and Deputy Blair's ex-wife testified during the defense case (RT 2077-2079, 2094-2099), indicating that trial counsel had adequate time to locate and subpoena those witnesses. Accordingly, because appellant has failed to demonstrated any prejudice, his claim that the denial of his motion for a continuance warrants reversal is meritless.

VII.

THE TRIAL COURT'S VOIR DIRE OF THE JURY WAS PROPER

Appellant contends the trial court's voir dire of the jury was inadequate, requiring reversal of the judgment. Appellant specifically contends the trial court failed to conduct an adequate inquiry to determine whether the jury could impartially consider the defense theory that he killed Deputy Blair in order to defend himself or a fellow gang member, and whether any jurors harbored racial bias. (AOB 162-172.) This claim should be rejected.

A. Factual Background

Prior to the commencement of voir dire, the trial court advised the parties that "it is my opinion that I can, I believe, voir dire myself the prospective panel. [¶] And I would not plan to use questionnaires." (RT 46.) The prosecution objected to not using a questionnaire in such a "serious" case "where a deputy sheriff was killed in the line of duty." The prosecutor maintained that judicial voir dire, without a questionnaire, was "inadequate to determine whether these jurors can be fair and impartial under the circumstances and would be willing to give the District Attorney's Office and the People of the State of California a fair guilt phase as well as a fair penalty phase." (RT 47.) *Trial counsel* advised the trial court: "*Your honor, I am of the opinion that the*

court will do a fine job and I agree with the court handling the voir dire." (RT 47, emphasis added.)

The trial court overruled the prosecutor's objection and advised the parties:

> THE COURT: I must say I want to try this. I have tried death penalty cases and non-death penalty cases with the use of questionnaires.
>
> The questionnaires, I think -- one argument in favor of the questionnaires, is that you get a great deal of information. But I believe that in my experience in death penalty cases with the questionnaire, the real heart issue of whether or not someone can look into their heart of hearts and impose the death penalty or can give honest answers is not well flushed out in a questionnaire setting. I think it is better to talk to these people directly.
>
> I had thought in my own mind, Mr. Richman [the prosecutor], that after I did the judicial voir dire, I would allow counsel probably half an hour a piece to do their own voir dire of the jurors so that you will have a chance to talk to these people as well. But that I will do the bulk of the work in terms of getting the information from them. And over your objection we will proceed with judicial voir dire.

I realize the seriousness of the case for both sides but I am confident, having tried probably now 64 murder trials, that I can do voir dire that will get the necessary information from the prospective panelists.

So, what I would ask, though, is that counsel, provide to the court in writing questions you want me to ask and areas you want me to pursue so that I don't miss anything.

(RT 47-48.)

Trial counsel submitted five proposed voir dire questions. The first two questions concerned the prospective jurors' willingness to impose a life sentence rather than death if they found the defendant guilty of first degree murder of a police officer, and whether they thought the penalty for such a crime could be anything other than the death penalty. The last three questions were:

3. Can you accept the concept in the law that if one's life is illegally placed in peril by another, one may kill in self-defense.

3(a) - Could you accept this legal premise if the evidence shows that a uniformed police officer illegally placed the life of a street gang member in peril, and that officer is then killed in self-defense?

4. Can you accept the concept in the law that if the life of one's friend is illegally placed in peril by another, deadly force may be legally used in response?

(CT 626-627.)

The prosecutor submitted nine proposed voir dire questions, eight of which concerned gangs, and the last one inquiring whether the jury could base its verdict on evidence that was presented through an interpreter. (CT 629-630.)

In a hearing regarding the proposed voir dire questions, the trial court stated that it would ask the prospective jurors about gangs, and whether they had heard of the Vikings or Young Crowd. The trial court also stated that it would discuss the death penalty "in some detail" during voir dire. The trial court also stated:

> Regarding the issue of self-defense, my general practice is that jurors have a conception of what self-defense is. Most jurors believe there is such a thing as self-defense. The concern is that jurors understand that if there is a self-defense issue, that they have to follow the court's instruction on the law regarding what constitutes self-defense. And will they do that and put aside their own ideas of what constitutes self-defense.
>
> I would be inclined to give some brief comment to that effect on the issue of self-defense along those lines, that they should not necessarily adhere to their feelings of what constitutes self-defense, that they must follow the court's instruction.

I view gangs as the more critical issue in terms of voir dire. But I think that some mention of self-defense is not inappropriate.

(RT 69-70.)

Thereafter, the trial court stated that it would not individually ask the prospective jurors their views on the death penalty during voir dire, explaining:

I think that under C.C.P. 223 it says the court shall, you know, conduct the examination. Voir dire shall occur in the presence of other jurors in all criminal cases, including death penalty cases.

(RT 75.) The trial court also explained that it was not going to use questionnaires because:

Frankly, in weighing the pros and cons of questionnaires, I believe questionnaires do not get to the real gut issues and only give indications of tendencies. And that is why I think I want to try it this way and see how we do. I plan to be very direct.

(RT 75-76.)

During voir dire, the trial court asked the prospective jurors regarding any hardship they might face from serving as a juror (RT 79-117), their views on the death penalty (RT 117-182, 212-256), any affiliation they had with law enforcement (RT 186-194, 264-270), their knowledge of the case from news sources (RT 209-212), whether they were crime victims (RT 270-278), whether they had been charged or convicted of any crime (RT 278-287), whether they

had been stopped by police officers (RT 287-298), whether they had experience with street gangs, specifically Young Crowd or the Vikings (RT "300-2 "-"300-12," "300-84"-"300-86," "300-114"-"300-118"), and standard questions regarding their employment, marital status, the occupation of their spouse, where they lived, possible prior jury service and if they had reached a verdict in a prior case, and whether they had children and their ages (RT "300-12"-"300-13.")

The trial court asked trial counsel and the prosecutor whether they had any follow-up questions. Trial counsel asked whether the trial court would give the attorneys an opportunity to ask questions during voir dire. The trial court responded, "Well, if you want, I can give you a little time. I feel I have done a pretty thorough job?" Trial counsel stated, "You have done a fine job" but requested that he be able to ask a prospective juror about her affiliation with the police. The prosecutor did not have any follow up questions. (RT "300-45"-"300-46.") Later, trial counsel asked the trial court whether it planned to ask the prospective jurors any other questions. The trial court stated, "I hadn't planned to." Trial counsel responded, "Okay, I would ask that you at least touch on self-defense." (RT "300-49.")

Thereafter, the trial court told the jurors:

> All right, ladies and gentlemen, it is very important -- I think we all have ideas of when the idea of self-defense is appropriate and when it isn't. I want to make sure that the jurors understand that if you are

instructed on what the law says is appropriate for self-defense, that you follow my instructions on the law. [¶] Anybody have any question about that? You follow what I am saying here?

(RT "300-53.") The trial court asked Prospective Juror A. whether he understood what it had just said. Prospective Juror A. responded, "Yes." The trial court then stated:

You may have in your own mind when you came in here an idea of when self-defense is appropriate. [¶] But you understand that if I instruct you -- I am not saying I will -- but if I instruct you on the law of self-defense, you must follow my instructions.

(RT "300-53.") Prospective Juror A. responded, "Right," and stated he did not have any problem with doing so. (RT "300-53.") The trial court asked two other prospective jurors whether they understood what it had said. They both responded, "Yes." (RT "300-53"-"300-54.") Subsequently, the trial court stated:

All right. You understood the point on self-defense, that you're to follow my instructions on what constitutes self-defense, not be governed by your own thoughts on the matter. Everybody understand that. [¶] All right.

(RT "300-86.")

B. Analysis

As a preliminary matter, appellant has failed to preserve his claim that the trial court's voir dire of the jurors was inadequate. The record shows that trial counsel did not ask the trial court to ask any questions regarding racial bias. Further, though trial counsel initially asked the trial court to ask the prospective jurors whether they could apply the doctrine of self-defense where one's life, or that of a street gang member, was "illegally placed in peril" by another person or a uniformed police officer (CT 626-627), trial counsel later asked the trial court to "at least touch on self-defense" (RT "300-49") and did not object or request further inquiry after the trial court so instructed the jury and questioned the jurors regarding their ability to follow the court's instructions regarding self-defense (RT "300-53"-"300-54," "300-86"). In these circumstances, appellant's claim has been waived. (See, e.g. *People v. Sanchez* (1995) 12 Cal.4th 1, 61-62 ["it is evident from the record that defendant failed to preserve his claim of improper voir dire by objecting to the court's questioning during trial."].)

Even assuming appellant has preserved this claim for appellate review, it nevertheless lacks merit. Voir dire provides a "critical function" in protecting a defendant's Sixth Amendment right to a trial by an impartial jury. (*People v. Bolden* (2002) 29 Cal.4th 515, 538; *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188 [101 S.Ct. 1629, 68 L.Ed.2d 22].)

> Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.

(*Rosales-Lopez v. United States, supra,* 451 U.S. at p. 188; see also *People v. Mello* (2002) 97 Cal.App. 4th 511, 518 [main purpose of voir dire is to "'ferret[] out bias and prejudice on the part of prospective jurors.'"].)

Trial courts have "great latitude" in deciding what questions should be asked on voir dire and in limiting the oral and direct questioning of prospective jurors by counsel. (*People v. Earp* (1999) 20 Cal.4th 826, 852; *People v. Carpenter* (1997) 15 Cal.4th 312, 353; *People v. Wright* (1990) 52 Cal.3d 367, 419.) Code of Civil Procedure section 223 provides that "Examination of prospective jurors shall be conducted only in the aid of the exercise of challenges for cause."

Appellant, relying upon *People v. Williams* (1981) 29 Cal.3d 392, 408, 410), contends the trial court's voir dire was inadequate because it failed to ask the jurors the proposed voir dire questions submitted by trial counsel regarding their "openness to the defense of self-defense in the homicide of a police officer by a reputed gang member." (AOB 168-169.) This contention should be rejected.

In *Williams*, the Court stated the following rule:

> in general a reasonable question about [a] potential juror's willingness to apply a particular doctrine of law should be permitted when from the nature of the case the judge is satisfied that the doctrine is likely to be relevant at trial. Reversal will be required, however, only if the doctrine is actually relevant, and the excluded question is found substantially likely to expose strong attitudes antithetical to the defendant's cause.

(*People v. Williams, supra*, 29 Cal.3d at p. 410.) The *Williams* Court, applying that rule, found that the trial court erred by refusing to ask jurors regarding their willingness to apply an instruction that provided that a person engaged in self-defense had no duty to retreat because there was a "real possibility that the average juror might disagree" with the "controversial" legal doctrine requiring no retreat in self-defense. (*People v. Williams, supra*, 29 Cal.3d at p. 411.) However, given the subsequent enactment of proposition 115, this holding in *Williams* has little, if any, precedential value.

At the time that *Williams* was decided, the scope of permissible voir dire questions included "matters concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact" and "reasonable inquiry into specific legal prejudices . . . as the basis for a

challenge for cause." (*People v. Noguera* (1993) 4 Cal.4th 599, 645-646, citations and internal quotation marks omitted.) The holding in *Williams* was not based on the state or federal Constitutions, but rather "legislative pronouncements of a 'commitment' to broad voir dire examination." (*People v. Leung* (1992) 5 Cal.App.4th 482, 493.) Subsequently, the Code of Civil Procedure was amended to restrict the scope of voir dire. (*People v. Noguera, supra*, 4 Cal.4th at p. 646; *People v. Leung, supra*, 5 Cal.App.4th at p. 494.)

> Since the decision in *Williams* was based on the then-existing statutory scheme, little vitality remains in its holding after the voters' enactment of an entirely new statutory scheme in Proposition 115. Code of Civil Procedure section 223 . . . statutorily overrules *Williams*. *Williams*, not being based on the state or federal Constitution, cannot survive the voters' disavowment of its holding.

(*People v. Leung, supra*, 5 Cal.App.4th at p. 494.) Thus, appellant's claim that the trial court was required to question the jurors regarding their willingness to apply the doctrine of self-defense in this case is meritless.

Even assuming *Williams* has some remaining vitality, appellant's claim nevertheless should be rejected. Under *Williams*, a court should permit questions about relevant, controversial legal doctrines that jurors are likely to resist applying. Here, the doctrines of self-defense and self-defense of another are not controversial, but rather are generally accepted by most, if not all,

jurisdictions. (See 1, Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, §§64, 65 p. 400 [self-defense and defense of third person are recognized in most jurisdictions].) Even under the rule set forth in *Williams*, appellant's claim lacks merit because the average juror would not disagree with the proposition that one has the right to self-defense or defense of a third person. (See, e.g., *People v. Johnson* (1989) 47 Cal.3d 1194, 1224-1225 [court acted within its discretion in precluding questions about viewing accomplice testimony with suspicion because "that is not a proposition with which the average juror would tend to disagree].)

Any controversy here was not the result of a particular legal doctrine, but appellant's specific view of the facts supporting that legal doctrine (that a gang member could use self-defense or defense of a third person as justification for killing a uniformed police officer). However, even under the *Williams* standard, voir dire questions must be neutral and nonargumentative, and cannot be used to argue a case, educate the jury panel regarding the particular facts of a case, or to indoctrinate the jury. (*People v. Williams, supra*, 29 Cal.3d at p. 408, footnote omitted; see also *People v. Mason* (1991) 52 Cal.3d 909, 939.) The proposed voir dire questions here were not neutral and nonargumentative, but rather involved particular facts of a case that tended to indoctrinate the jury. As phrased, appellant's questions assumed that the police officer "illegally

placed the life of a street gang member in peril" or "illegally placed in peril" the life of one's friend. (CT 626-627.)

Appellant also contends that the trial court's voir dire was inadequate because it failed to ask the jury about the racial aspects of the case. (AOB 171.) This contention is meritless. Trial courts do not have a duty to question prospective jurors regarding racial bias.

> In a case involving an interracial killing, such as this one, a trial court during general voir dire is required to question prospective jurors about racial bias *on request.* [Citation.] Here, there was no such request, and the trial court need not make the inquiry on its own initiative. [Citation.]

(*People v. Bolden, supra*, 29 Cal.4th at p. 538; see also *People v. Kelly* (1992) 1 Cal.4th 495, 518.)

Here, as in *Bolden*, trial counsel did not request that the trial court ask the prospective jurors whether they had any racial views or biases that would interfere with their ability to be fair in the instant case, which involved a Samoan defendant and a Hispanic/White victim. Because the trial court was under no duty to ask any questions regarding racial bias on its own initiative, the claim is meritless.

Finally, any alleged error was harmless under the *Watson* standard. (*People v. Leung, supra*, 5 Cal.App.4th at p. at p. 593 [noting *Williams* Court

applied *Watson* standard]; see also Code of Civil Procedure, section 223 [trial court's exercise of discretion in conducting voir dire, including "any determination that a question is not in aid of the exercise of challenges for cause, shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution."].)

Here, as set forth above, there was overwhelming evidence of appellant's guilt. Indeed, given appellant's statements that he killed Deputy Blair, not in self defense, but rather because he did not want to return to prison for the rest of his life as the result of a third strike, any error in the voir dire questioning regarding self defense must be deemed non-prejudicial. Moreover, the jury was instructed they were to decide the case based on the facts and the law, to accept and follow the court's instructions regarding the law, that they were not to be influenced by prejudice against the defendant, and that they must not be biased against the defendant. (CT 656-657.) In these circumstances, any alleged error was harmless.

VIII.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE

Appellant contends the trial court's admission of irrelevant and prejudicial evidence requires reversal of the judgment. (AOB 172-191.) This contention lacks merit.

A. General Principles

As set forth above (see Arg. II, *ante*), all relevant evidence is admissible (Evid. Code § 351), but is subject to exclusion by a trial court if it determines the probative value of the evidence is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create a substantial danger of undue prejudice, confusing the issues, or misleading the jury (Evid. Code § 352). A trial court's decision to admit or exclude evidence pursuant to Evidence Code section 352 is reviewed for abuse of discretion. (Arg. I, *ante*; see also *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

> The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. "[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is

'prejudicial.' The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' [Citation.]"

(*People v. Karis* (1988) 46 Cal.3d 612, 638; see also *People v. Zapien* (1993) 4 Cal.4th 929, 958 [Evidence Code section 352 uses the word "prejudice" in its etymological sense of prejudging a person or cause on the basis of extraneous factors].)

B. The Trial Court Properly Admitted Evidence Of Appellant's Criminal History

The trial court permitted the prosecution to introduce in their case-in-chief evidence that appellant had two prior convictions for assault with a firearm and was on parole at the time he shot Deputy Blair, with one parole condition being that appellant could not possess firearms. The trial court noted that only one of the two prior assault convictions qualified as a "strike," but nevertheless found the two convictions and appellant's parole status and parole condition were relevant because appellant's convictions corroborated Brooks' statement that appellant said that he was not going to go to jail for the rest of his life as a result of a third strike and thus showed his motive for that shooting, and appellant's parole status and no-firearm-possession-condition "provides

additional impetus and motive for the shooting." The trial court ruled that the facts underlying appellant's two prior convictions were inadmissible, and that only the convictions themselves, their dates, and the nature of the conviction could be admitted. (RT 27-40, 300-303, 971-972.)

The trial court subsequently permitted the prosecution to introduce evidence of the additional parole condition that appellant was not to associate with Young Crowd gang members and that appellant knew that if he was in violation of parole, he would be returned to prison. The trial court found the evidence was admissible to prove appellant's motive for shooting Deputy Blair and had "significant probative value that outweighs its prejudicial impact." (RT 971-972.)

Appellant contends the trial court erroneously admitted evidence of his prior convictions because they had low probative value and involved the risk of serious prejudice. (RT 174-178.)[16] This contention should be rejected. Evidence Code section 352 permits a trial court to exercise its discretion to exclude relevant evidence if its probative value is *substantially outweighed* by

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16. Appellant does not contend the evidence was improperly admitted under Evidence Code section 1101, subdivision (b), which provides that evidence of a defendant's prior bad acts is not inadmissible if relevant to prove some fact, including motive, other than disposition to commit such acts. Thus, any claim that the evidence was inadmissible under that statute has been waived. (*People v. Hill* (1992) 3 Cal.App.4th 16, 33, fn. 5 [issue is waived if not briefed].)

the danger of undue prejudice, not on the basis that such evidence is simply more prejudicial than probative.

Here, appellant's two prior convictions for assault with a firearm, even if one of the convictions did not qualify as a strike, had substantial probative value because such evidence had a tendency in reason to show that appellant had a motive to shoot at Deputy Blair to avoid being sent back to prison for a lengthy period of time. Such evidence also corroborated Brooks' statement that appellant told her that he shot at Deputy Blair because he had two strikes and did not want to go to jail for the rest of his life because he was carrying two guns which could lead to a third "strike" (RT 1249-1254, 1332-1334) and his statement to Frausto that he shot the Deputy because he did not want to go back to prison (RT 1129). That the convictions were not actually strikes did not preclude the likely possibility that appellant believed those two prior convictions qualified as strikes which would subject him to life imprisonment.

Appellant also contends that the trial court should have sanitized his prior convictions by precluding the parties from noting those convictions involved shootings. (AOB 178-179.) This contention is meritless. A trial court's determination as to whether to sanitize a prior conviction is reviewed for an abuse of discretion. (*People v. Sandoval* (1992) 4 Cal.4th 155, 178; *People* v. *Clark* (1996) 45 Cal.App.4th 1147, 1157.) Here, the trial court did not act arbitarily or unreasonably in refusing to sanitize appellant's prior convictions.

Rather, the trial court reasoned that there was greater risk of prejudice to appellant had those convictions been sanitized because the jury would have speculated as to the nature of his prior offenses, possibly concluding they were crimes more heinous or violent than shootings. (RT 30-31.)

Appellant next contends that evidence of his parole status and parole conditions was irrelevant because it did not prove the prosecution's theory that he shot at Deputy Blair to avoid facing a three-strikes sentence. (AOB 180-182.) This contention should be rejected. Evidence does not become irrelevant solely because it is cumulative of other evidence. (*People* v. *Smithey* (1999) 20 Cal.4th 936, 974; see also *People* v. *Thompson* (1988) 45 Cal.3d 86, 116.) That appellant had multiple motives to shoot Deputy Blair (to both avoid a Three Strikes sentence and to avoid being sent to jail on a parole violation) had very strong probative value in showing that appellant acted according to those motives.

Appellant finally complains that the manner in which his prior convictions were proven at trial was prejudicial because the prison documents reflecting those convictions were not sanitized to delete references to his prior parole suspension and revocation and prison rules violations which resulted in work credit losses. (AOB 181.) Appellant did not object when those prison documents (Peo. Exh. 28) were admitted into evidence at trial. (RT 1038-1040, 1545-1548.) As such, appellant has waived any claim of error regarding the

admission of such evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 717 [claims regarding the admissibility of evidence will not be reviewed in the absence of a timely and specific objection].)

Even assuming, arguendo, the trial court abused its discretion in admitting evidence of appellant's criminal history and parole status, the admission of such evidence was harmless under the *Watson* standard of review because it is not reasonably probable appellant would have received a more favorable result in the absence of the alleged error. (*People v. Earp, supra,* 20 Cal.4th at p. 877; *People v. Rodrigues, supra*, 8 Cal.4th at p. 1125.)

In the instant matter, even had evidence of appellant's prior convictions, parole status, and parole convictions been barred, the jury would have still been aware of appellant's statements to Frausto and Brooks that he shot Deputy Blair, not in self-defense, but rather to avoid being sent back to prison for life because he believed he had two prior strikes. Also, the jury would have been aware that appellant was involved in criminal acts. Appellant testified that after he shot Deputy Blair, he was involved in "some other criminal acts." (RT 1901.) Moreover, the prosecution presented overwhelming evidence, including appellant's tape-recorded statements to his mother and sister, that appellant fired first at Deputy Blair. (See Arg. II, *ante.*)

In light of the other admissible evidence of appellant's criminal history and the overwhelming evidence of appellant's guilt, any error in the admission

of appellant's actual convictions and his parole status and conditions was harmless.

C. The Trial Court Properly Admitted Deputy Lyon's Testimony Regarding Deputy Blair's Police Work

Appellant contends that the trial court erred by admitting Deputy Lyons' testimony that he and Deputy Blair were not the type of deputies that would, after telling gang members to dump their beer and turn down loud music and watching them drive away, later harass them by stopping them for driving under the influence. (AOB 183-184; RT 403.) This contention is meritless.

Deputy Blair's character was a disputed issue at trial. At the beginning of trial, trial counsel indicated the defense theory was that Deputy Blair fired first at Avila, a gang member, in part because he was a member of a police gang. (RT 60-61.) The trial court, at a early stage during trial, noted that evidence of Deputy Blair's reputation for violence would be admissible under Evidence Code section 1103. (RT 318-319, 323.) Thus, Deputy Lyons' testimony was relevant as it had a tendency in reason to show that Deputy Blair was not a violent person, or the type of deputy that would harass gang members.

Moreover, the evidence had little, if any, *undue* prejudical impact because it was not the type of evidence that uniquely tended to invoke an emotional bias against appellant. (*People v. Karis, supra,* 46 Cal.3d at p. 638.) Further, because, prior to Deputy Lyons' testimony, appellant announced his

intention to introduce evidence of Deputy Blair's character for violence and, after Deputy Lyons testified, presented such evidence, Deputy Lyons' testimony regarding his opinion of Deputy Blair's policework would have ultimately been admissible under Evidence Code section 1103, subdivision (a)(1), which provides the prosecution may introduce evidence of the character of a victim, in the form of an opinion or evidence of reputation, to rebut evidence of a victim's character which is presented by the defense.

D. The Trial Court Properly Admitted Deputy Harris's Testimony Regarding Deputy Lyons' Perception Of The Direction Of The Gunfire

At trial, Deputy Harris testified as a firearms expert for the prosecution. (RT 943-944.) Deputy Harris, in response to a hypothetical question from the prosecutor, testified that based on his experience, officers involved in shootings often were not able to determine from where a gunshot was fired. Deputy Harris then testified that Deputy Lyons' testimony that he heard shots from the left side of his head could be consistent with the shots actually being fired from the right side of his head. (RT 1007-1009.) Appellant contends this testimony was improperly admitted because Deputy Harris did not have any training in the science of acoustics or auditory perceptions. (AOB 184-186.) This contention should be rejected.

A trial court has wide discretion in admitting or excluding expert opinion testimony, including determining whether a witness qualifies as an expert, and its ruling on the issue is reviewed for an abuse of discretion. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1175; *People v. Sanders, supra*, 11 Cal.4th at p. 508.) Here, Deputy Harris testified that based upon his experience, in particular his involvement in the training of deputies under conditions involving gunshots and stress, it was difficult for those deputies to determine from which direction a gunshot was fired. Deputy Harris did not need any special training in the science of acoustics or auditory perceptions in order for his testimony to have been admissible. At most, appellant's claim regarding Deputy Harris' qualifications go to the weight of his testimony, not its admissibility. (See *People v. Bolin, supra*, 18 Cal.4th at p. 322.)

Moreover, appellant has not demonstrated that the probative value of this evidence was substantially outweighed by its prejudicial impact. Deputy Harris' testimony did not involve any extraneous facts with little impact on the issues or which would have evoked an emotional bias against appellant. Further, in addition to Deputy Harris' testimony, there was other overwhelming evidence that showed that appellant, not Deputy Blair, fired first. Deputy Lyons, based on his observations at the time of the shooting, testified he believed the initial gunshots were not fired by Deputy Blair. (RT 454-470, 506-507, 509-512, 602-604, 624.) Also, appellant did not, in conversations with his mother and sister,

and two other witnesses, state that Deputy Blair fired first. Indeed, appellant told two witnesses - Brooks and Frausto – that he shot Deputy Blair because appellant did not want to return to prison for the rest of his life as a result of a third strike. (RT 1120-1129, 1157-1158, 1249-1254, 1500-1538.)

E. The Trial Court Properly Admitted Photographs Of A Simulated Shotgun In A Mock Patrol Vehicle

Deputy Lyons testified that during a briefing before he went on patrol with Deputy Blair on the night of the shooting, a sergeant showed deputies photographs of a bullet-ridden truck that was painted to simulate a patrol car. At trial, Deputy Lyons identified from one of the photographs an object inside the bullet-ridden truck to be a simulated shotgun. (RT 380-384.) Appellant contends the trial court improperly admitted Deputy Lyons' testimony and the photograph showing the simulated shotgun. (AOB 186-188.) This contention should be rejected.

As a preliminary matter, appellant has waived this claim by failing to object to the admission of the photograph or Deputy Lyons' testimony below. (*People v. Waidla, supra,* 22 Cal.4th at p. 717.) Further, the claim is meritless. Deputy Lyons' testimony had some probative value in explaining what an object in the truck appeared to be. Moreover, the admission of Deputy Lyons' description of the simulated shotgun was not prejudicial. The jury was aware of other evidence, in addition to the simulated shotgun, that Young Crowd gang

members hated deputy sheriffs and used firearms. In addition to the shotgun, the mock truck included a mock sheriff's star and multiple bullets, and graffiti that read, "Fuck the sheriff,""Kill sheriff," "Don't hide behind the badge, fools," and "the Crowd is going to get you." (RT 371, 383.) Additionally, appellant admitted he had two guns on his person at the time of the shooting. (RT 1885-1889.)

F. The Trial Court Properly Admitted A Photograph Of A Mannequin Dressed In Deputy Blair's Bloody Uniform

Appellant contends the trial court erred by permitting the prosecutor to refer to and elicit testimony regarding photographs of a mannequin dressed in Deputy Blair's bloody uniform shirt. (AOB 189; RT 1061-1063.) This contention is meritless.

Appellant raised no objection to the use of the photograph, and, as such, he has waived the claim that it was inadmissible. (*People v. Waidla, supra,* 22 Cal.4th at p. 717.) Moreover, the photograph of the mannequin had probative value in demonstrating to the jury where Deputy Blair was struck by bullets. (See e.g., *People v. Weaver* (2001) 26 Cal.4th 876, 933 [jury is entitled to see the injuries a defendant inflicted on his victim]; *People v. Pride, supra*, 3 Cal.4th at p. 243 ["the photographs were pertinent because they showed the nature and the placement of the fatal wounds"].) Further, that Deputy Blair was struck in the neck and right shoulder area had a tendency in reason to show that

appellant, in shooting at Deputy Blair, intended to kill Deputy Blair and acted out of premeditation and deliberation. (See, e.g., *People v. Lucas* (1995) 12 Cal.4th 415, 450 [photographs admissible to illustrate, among other matters, intent to kill and deliberation].)

Further, appellant has not demonstrated that the photograph was unduly prejudicial, gory or inflammatory. Photographs of a more graphic nature have been found to not be unduly prejudicial. (See, e.g., *People v. Heard* (2003) ___ Cal.4th ___, ___ [4 Cal.Rptr.3d 131, 152-153] [photographs of injuries inflicted on victim].)

IX.

THE TRIAL COURT PROPERLY AND EVENLY APPLIED EVIDENCE CODE SECTION 352

Appellant contends the trial court applied Evidence Code section 352 in an arbitrary and uneven way that permitted the prosecution to present evidence supporting his motive to shoot but excluding like evidence of Deputy Blair's motive to shoot. (AOB 191-195.) This contention is meritless.

There is nothing in the record, and appellant provides no factual support, that shows the trial court imposed a greater evidentiary burden on him than on the prosecution. Indeed, the trial court's evidentiary rulings under Evidence Code section 352 were rational, balanced and proper. As set forth above, the trial court applied the balancing test of Evidence Code section 352 to both prosecution and defense evidence, measuring the probative value of the evidence against its undue prejudicial impact. The trial court also permitted extensive defense evidence supporting a theory of self-defense or defense of another, including evidence of Deputy Blair's character for violence, and evidence of conflict, violence, and tension between the Vikings and Young Crowd. (See Args. II, VIII, *ante*.) Accordingly, appellant's claim should be rejected.

X.

THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF MARTHA GODINEZ

Appellant contends the admission over objection of the preliminary hearing testimony of Martha Godinez requires reversal of the judgment.[17] (AOB 195-202.) Appellant's claim lacks merit.

A. Factual Background

At the preliminary hearing, Martha Godinez testified that on May 12, 1995, she was parked at Ham Park, heard gunshots, and shortly thereafter saw appellant and another man enter Ham Park. (CT 183-208)

At a due diligence hearing held on July 15, 1996, Deputy Sheriff Reynold Verdugo testified that in late June or early July 1996, he began his efforts to locate Godinez and served her with a subpoena to appear at trial, which began on July 9, 1996. At the time of the preliminary hearing, Deputy Verdugo discovered Godinez lived in a hotel, but used her brother's address. Deputy Verdugo went to Godinez's last known residence where she had lived with her brother and a motel in Downey, but the address was vacant and she had moved out of the hotel. Deputy Verdugo spoke with neighbors at the vacant house.

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17. To the extent appellant maintains the admission of the preliminary hearing testimony of Godinez violated his rights under the Sixth, Eighth and Fourteenth Amendments to the federal Constitution (see AOB 201), those issues are waived since appellant did not present such a claim to the trial court. (See *People v. Williams, supra*, 16 Cal.4th at p. 250; *People v. Jackson, supra*, 13 Cal.4th at p. 1231, fn. 17; *People v. Raley, supra*, 2 Cal.4th at p. 892.)

One neighbor said that Godinez had gone to Mexico. Deputy Verdugo gave Century Station patrol officers Godinez's description and photographs of her and asked them to contact him if they spotted her, and checked the county emergency room hospital system and a booking system. Deputy Verdugo also checked the with Department of Motor Vehicles; their records indicated Godinez did not have any change of address on her driver's license and an old address in Cudahy. Deputy Verdugo went to that Cudahy address, but did not locate Godinez. Deputy Verdugo checked the hospital and booking systems and DMV for Godinez's brother, but could not locate him. (RT 1131A-1138.)

The trial court, over appellant's objection, ruled that the prosecution had exercised due diligence in attempting to locate Godinez. At trial, Godinez's preliminary hearing testimony was read into the record. (RT 1138, 1355-1387.)

B. Analysis

A criminal defendant has the right under the state and federal Constitutions to confront adverse witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) The primary interest protected by the right to confrontation is the right to cross-examination at trial, which permits the testing of the credibility of the prosecution's witnesses by giving the factfinder an opportunity to evaluate a witness's demeanor on the stand. (*Ohio v. Roberts* (1980) 448 U.S. 56, 63 [100 S.Ct. 2531, 65 L.Ed.2d 597]; *People v. Cromer* (2001) 24 Cal.4th 889, 897.) However, the right to confrontation is not unlimited. (*Ohio v.*

Roberts, supra, 448 U.S. at p. 64; *People v. Cromer, supra*, 24 Cal.4th at p. 897.) There is no violation of a defendant's right to confrontation where there is a showing that a hearsay declarant is unavailable and the declarant's statement has "adequate indicia of reliability." (*People v. Cromer, supra*, 24 Cal.4th at p. 897; *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1434.)

Evidence Code section 1291 provides that the prior testimony of a witness may be admissible "if the declarant is unavailable as a witness" and the "party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." Additionally, statements which have been cross-examined at a preliminary hearing are "generally immune from subsequent confrontation attack" regardless of the "inherent reliability or unreliability of [the unavailable witness] and [her] story" because the cross-examination itself provides the requisite assurance of reliability. (*Roberts, supra*, 448 U.S. at 73, quoting *Mancusi* v. *Stubbs* (1972) 408 U.S. 204, 216 [92 S.Ct. 2308, 33 L.Ed.2d 293].)

Evidence Code section 240 provides several circumstances in which a hearsay declarant is "unavailable as a witness," including when the declarant is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her

attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) "Reasonable diligence" under this statute has been described as "due diligence." (*People v. Cromer, supra,* 24 Cal.4th at p. 898.) Appellate courts independently review a trial court's ruling on the issue whether a party has exercised reasonable diligence in attempting to obtain the attendance of a witness at trial. (*Id.* at p. 901; *People v. Sandoval, supra,* 87 Cal.App.4th at p. 1432.)

> [T]he term "due diligence" is "incapable of a mechanical definition," but it "connotes persevering application, untiring efforts in good earnest, efforts of a substantial character."

(*People v. Cromer, supra*, 24 Cal.4th at p. 904.)

In determining whether a party has exercised "due diligence," a court must consider the "totality of efforts of the proponent to achieve the presence of the witness." (*People v. Sanders, supra*, 11 Cal.4th at p. 523.) Relevant considerations include: (1) the importance of the witness's testimony; (2) whether efforts to obtain the witness's presence at trial were timely begun; (3) whether the proponent reasonably believed prior to trial that a witness would appear willingly; (4) the character of the proponent's efforts to obtain the presence of the witness; and (5) whether the witness would have been produced had reasonable diligence been exercised. (*People v. Cromer, supra*, 24 Cal.4th at p. 904; *People v. Sanders, supra*, 11 Cal.4th at p. 523.)

Here, Godinez's testimony, the key aspects of which were that she saw appellant in Ham Park shortly after hearing gunshots on May 12, 1995, was not crucial because there was other evidence regarding that point. Buske saw appellant run into Ham Park after the shooting (RT 676-693), and Rubio saw a man matching appellant's description at the park shortly after the shooting (RT 730-746). Further, the prosecution attempted to locate Godinez and have her served with a subpoena in late June or early July 1996, and trial began on July 9, 1996. Several appellate courts have upheld a trial court's finding of reasonable diligence where a witness search commenced a week or less prior to trial, or during trial. (See *People v. Saucedo* (1995) 33 Cal.App.4th 1230, 1238-1239 [listing examples].)

Further, the record shows the prosecution reasonably believed that Godinez would testify at trial because she appeared and testified at the preliminary hearing. Moreover, at set forth above, Deputy Verdugo's efforts to locate Godinez were extensive, including checking various locations, computer systems, and speaking with her neighbors. In similar circumstances, courts have found such efforts to locate a witness or obtain a witness's attendance at trial to constitute due diligence. (See, e.g., *People v. Wise* (1994) 25 Cal.App.4th 339, 416; *People v. Gutierrez* (1991) 232 Cal.App.3d 1624, 1640-1641.) "That additional efforts might have been made or other lines of inquiry

pursued does not affect this conclusion." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1298.)

In light of all of the circumstances, the trial court correctly found the prosecution exercised reasonable diligence in attempting to obtain Juarez's presence at trial. Even assuming, arguendo, the trial court erred in declaring Juarez an unavailable witness, any such error was harmless beyond a reasonable doubt. The *Chapman* (*Chapman v. California, supra*, 386 U.S. at p. 24) standard applies to violations of the Confrontation Clause. (*Lilly v. Virginia* (1999) 527 U.S. 116, 139-140; *People v. Sandoval, supra*, 87 Cal.App.4th at p. 1444.)

Here, Godinez testified at the preliminary hearing and was questioned by both appellant and the prosecution. (CT 183-208; RT 1355-1387.) Thus, both parties had the opportunity to test Godinez's credibility and memory in court. Moreover, as set forth above in Argument I, the evidence of appellant's guilt was overwhelming. And, significantly, there was no real dispute that appellant was in Ham Park following the shooting. Appellant admitted shooting Deputy Blair and fleeing afterwards. Thus, the fact that Godinez saw appellant in Ham Park following the shooting was of little consequence. Identity was not an issue in this case, only who shot first – appellant or Deputy Blair.

Finally, appellant's contention that Godinez's absence at trial, coupled with her testimony, suggested that she had come to harm at appellant's hands is

speculative. Moreover, the prosecutor did not argue that Godinez was not available at trial because she had been harmed by appellant's compatriots. (RT 2140-2177, 2248-2280.) As such, there was no violation of appellant's right to confront adverse witnesses, and any error was harmless beyond a reasonable doubt.

XI.

THE ADMISSION OF APPELLANT'S PRIOR VIOLENT ACTS UNDER EVIDENCE CODE SECTION 1103, SUBDIVISION (B), TO PROVE HIS VIOLENT CHARACTER, AND THE TRIAL COURT'S CORRESPONDING INSTRUCTION, DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant contends the trial court violated his federal constitutional rights to a fair jury trial, due process, and to be protected from cruel and unusual punishment by admitting evidence of his prior violent acts pursuant to Evidence Code section 1103, subdivision (b), and instructing the jury that his prior acts of violence could be used to show he acted in conformity with his violent character. Appellant specifically contends that Evidence Code section 1103, subdivision (b), violates constitutional due process provisions. (AOB 202-216.) Appellant's claim lacks merit.

A. Factual Background

The trial court permitted the prosecution, during its case-in-chief, to introduce evidence of appellant's two prior felony convictions (in 1989 and 1992) for assault with a firearm and his parole status and parole conditions pursuant to Evidence Code section 1101, subdivision (b), to prove his motive for shooting Deputy Blair and to corroborate prosecution witnesses's testimony. (RT 27-40, 300-303, 971-972, 1017-1021, 1030-1040.) The trial court also permitted appellant to introduce evidence of Deputy Blair's character for

violence under Evidence Code section 1103, subdivision (a), but stated that if appellant chose to do so, the prosecution would be permitted to introduce evidence of appellant's character for violence. (RT 318-319, 322-323, 1481-1484, 1585.) Appellant presented evidence of Deputy Blair's character for violence, including his alleged prior beating of Avila and his membership in the Vikings. (RT 1602-1604, 1611-1612, 2101-2102.)

During cross-examination of appellant, the prosecution presented additional evidence of appellant's prior criminal history. Specifically, the prosecution elicited testimony from appellant that he had confessed to shooting a woman in the jaw when he was a juvenile. (RT 1927-1932.)

The trial court, after discussion with the parties (RT 2137-2138), instructed the jury as follows:

> A person's character for violence may be shown by evidence of reputation, opinion, or specific acts of violence. Evidence of a person's character for violence may tend to show the person acted in conformity with such character.
>
> Whether a person had a character for violence and whether he acted in conformity with such character are matters for the jury to decide.

(RT 2294-2295.)

B. Analysis

As a preliminary matter, appellant failed to raise any objection to the instruction regarding the use of evidence of character for violence, or raise any argument that the evidence of his prior bad acts was inadmissible to prove propensity. Indeed, the record reflects that after the trial court informed the parties about the wording of the instruction, trial counsel stated, "That sounds good." (RT 2137-2138.) In these circumstances, appellant has waived his federal constitutional challenges to the trial court's instruction and the admission of the evidence to prove propensity. (See, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 122; *People v. Carpenter* (1997) 15 Cal.4th 312, 385.)

Even assuming, arguendo, that appellant has preserved his claim for appellate review, it nevertheless is meritless. Evidence Code section 1103, subdivision (a)(1), provides that a defendant in a criminal action may introduce evidence of a victim's character to prove the victim acted in conformity with that character. Subdivision (a)(2) provides that the prosecution may offer evidence of the victim's character to rebut evidence regarding the victim's character which was introduced by the defense. Subdivision (b) provides:

> In a criminal action, evidence of the defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made in admissible by Section 1101 if the evidence is offered by

the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under . . . subdivision (a).

Evidence Code section 1103, subdivision (b), has been held constitutional by state appellate courts. (*People v. Blanco* (1992) 10 Cal.App.4th 1167, 1173-1176; *People v. Walton* (1996) 42 Cal.App.4th 1004, 1015.) This Court should also find that Evidence Code section 1103, subdivision (b), does not violate due process.

In *People v. Falsetta* (1999) 21 Cal.4th 903, this Court summarized principles used to evaluate the constitutionality of a state criminal evidence statute, stating:

To prevail on such a constitutional claim, [a] defendant must carry a heavy burden. The courts will presume that a statute is constitutional unless its constitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity. [Citations.] In the due process context, [a] defendant must show that [a statute] offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. [Citations.] The admission of relevant evidence will not offend due

process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair. [Citations].

(*Id.* at pp. 912-913.)

The *Falsetta* Court, applying these constitutional principles, found that Evidence Code section 1108, which permits the admission of evidence of a defendant's prior sex offenses to show disposition or propensity to commit such crimes, did not violate due process constitutional provisions. The *Falsetta* Court stated that, as a general rule, the historical practice in California and other jurisdictions was that propensity evidence was inadmissible. (*Id.* at p. 913-914.) However, the *Falsetta* Court stated that "a long-standing practice does not necessarily reflect a fundamental, unalterable principle embodied in the Constitution" and noted that the general rule barring evidence of a defendant's prior bad acts to prove propensity was subject to "far-reaching exceptions" and stated that the enactment of an additional exception in sex offense cases may not necessarily violate fundamental historical principles. (*Id.* at p. 914.)

The *Falsetta* Court then held that even if the rule barring propensity evidence was a fundamental principle of justice, that it would nevertheless uphold Evidence Code section 1108 if it did not unduly offend that principle. (*Id.* at p. 915.) The *Falsetta* Court found that, in light of substantial protections afforded to defendants in all cases to which Evidence Code section 1108 applied, there was no undue unfairness in providing a limited exception to the

general rule against propensity evidence. (*Ibid.*) The *Falsetta* Court noted that these protections included: (1) section 1108 was limited to a defendant's prior sex offenses, only applied where he was charged with committing another sex offense, and required pretrial notice of the offenses to be proved, thus assuring that a defendant would not be surprised or unprepared to rebut propensity evidence and would not be unduly burdened with defending against unrelated charges; and (2) trial courts still retained the power under Evidence Code section 352 to exclude propensity evidence that necessitated undue consumption of time, or that was unduly prejudicial. (*Id.* at pp. 915-916.)

Here, Evidence Code section 1103, subdivision (b), does not offend any fundamental principle of justice rooted in the traditions and conscience of our nation. As set forth in *Falsetta*, in light of the "far-reaching exceptions" to the general rule against propensity evidence, it is doubtful whether California's rule barring such evidence is a fundamental principle of justice.

Moreover, even if that general rule is deemed fundamental, Evidence Code section 1103, subdivision (b), does not unduly "offend" that rule. Specifically, defendants in all cases to which Evidence Code section 1103, subdivision (b), applies, are given substantial protections. In this regard, Evidence Code section 1103, subdivision (b), does not permit "far ranging attacks" on a defendant's character, but rather is limited to evidence regarding a defendant's character for violence which may only be admitted after a

defendant has chosen to introduce evidence of the victim's character for violence.

As noted by one Court of Appeal:

> the statute in question here, which merely allows [evidence of a defendant's character for violence] in rebuttal to defense evidence [of the victim's character for violence], does not offend constitutional principles of due process. [A defendant] has a choice as to presenting evidence of the victim's character, which is similar to many tactical choices at trial - such as deciding whether to testify, or whether to present evidence of his own good character. The defense choice of strategy often makes admissible in rebuttal certain evidence which would not be admissible in the prosecution's case-in-chief. There is no due process violation in allowing the defense to govern the admission of such evidence in rebuttal.

(*People v. Blanco, supra,* 10 Cal.App.4th at p. 1176.)

Additionally, it cannot be said that Evidence Code section 1103, subdivision (b), permits the admission of evidence that rendered appellant's trial fundamentally unfair. Rather, it would have been manifestly unfair to permit appellant to attack Deputy Blair's character by introducing evidence of his reputation or past acts of violence while excluding similar evidence of appellant's violent character because that would have given the jury a distorted

view who was the likely aggressor. In this regard, the Committee Note regarding the 2000 amendment to Federal Rule of Evidence 404,[18] a statute similar to Evidence Code section 1103, provides:

> Rule 404(a)(1) has been amended to provide that when the accused attacks the character of an alleged victim under subdivision (a)(2) of this Rule, the door is opened to attack on the same character trait of the accused. . . . The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused. For example, in a murder case with a claim of self-defense, the accused, to bolster this defense, might offer evidence of the alleged victim's violent disposition. If the government has evidence that the accused has a violent character, but is not allowed to offer this evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. This may be the case even if evidence of the accused's prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in conformity with the accused's character on a specific occasion. Thus, the amendment is

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18. The relevant provisions of Federal Rule of Evidence 404 is set forth below.

designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim.

Further, the *Falsetta* Court, in support of its holding that Evidence Code section 1108 was constitutional, also noted that Federal Rules of Evidence 413 and 414, which were similar to Evidence Code section 1108, had been held by federal courts to be constitutional. (*People v. Falsetta*, supra, 21 Cal.4th at pp. 920-922.) Here, Federal Rules of Evidence 404 is similar to Evidence Code section 1103, subdivision (b). Specifically, Federal Rules of Evidence Rule 404 provides, in pertinent part:

> (a) Character Evidence Generally.--Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Character of Accused.--Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;
>
> (2) Character of Alleged Victim.--Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness.

Appellant has cited no cases that question the constitutionality of Evidence Code section 1103 or Federal Rule 404, and counsel for respondent has not found any such cases. Indeed, the Court of Appeal in *Blanco* noted that although many American jurisdictions have held that evidence of a defendant's bad character to show disposition is inadmissible,

> [s]ignificantly, however, they did so as a matter of statutory construction, common law development, or application of theoretical and jurisprudential principles; we are cited to no authority, and our own research has found none, which explicitly endorses appellant's argument that the Wigmore view [that evidence of a defendant's violent character is admissible if defendant offers evidence of the victim's violent character to support a self-defense claim] violates constitutional due process principles and that, therefore, a statute adopting the Wigmore rule would be unconstitutional. On the contrary, it appears that this issue is a matter of scholarly and judicial debate which has not heretofore been viewed as implicating issues of constitutional significance.

(*Id.* at p. 1174.)

The *Blanco* court further noted

> the critical point is that the very existence of the ongoing debate on the point seems to signify that there is no preclusive constitutional rule in operation to settle the point one way or the other.

(*Ibid.*) The *Blanco* court additionally noted that in Missouri, a similar rule permitting evidence of a defendant's bad character to rebut evidence of the victim's violent character presented by the defense had been applied "unhindered by constitutional constraint for the past 50 years." (*Ibid.*)

Nevertheless, appellant cites several lower federal court decisions in support of his argument that the admission of evidence of his bad character violated the Constitution. (AOB 208-216.) However, the decisions of lower federal courts are not binding on state courts. (*People v. Zapien, supra*, 4 Cal.4th at p. 989; *People v. Hightower* (2000) 77 Cal.App.4th 1123, 1148, fn. 18.) Moreover, none of the cases cited by appellant hold that the admission of evidence of a defendant's violent character to rebut evidence of a victim's violent character introduced by the defense violates due process. In *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 774, overruled on other grounds in *Woodford v. Garceau* (2003) __ U.S. ___ [123 S.Ct. 1398, 155 L.Ed.2d 363], the Ninth Circuit acknowledged that the United States Supreme Court

> has never expressly held that it violates due process to admit other crimes evidence for the purpose of showing conduct in conformity

therewith, or that it violates due process to admit other crimes evidence for other purposes without an instruction limiting the jury's consideration of the evidence to such purposes.

In fact, the Supreme Court expressly declined to answer this question. (*Estelle v. McGuire* (1992) 502 US. 62, 75, fn. 5 [112 S.Ct. 475, 116 L.Ed.2d 385]; *People v. Falsetta, supra*, 21 Cal.4th at p. 913 ["*Estelle* expressly left open the question whether a state law permitting admission of propensity evidence would violate due process principles"].)

Finally, even assuming the admission of appellant's prior shootings as evidence of his violent character to show he acted in conformity with that character was erroneous, any error was harmless beyond a reasonable doubt. (See *People v. Blanco, supra*, 10 Cal.App.4th at p. 1176 [applying *Chapman* standard].) Here, evidence of appellant's convictions in 1989 and 1992 for assault with a firearm and parole status at the time of the killing of Deputy Blair would have been independently admissible under Evidence Code section 1101, subdivision (b), to prove appellant's motive to shoot at Deputy Blair and to corroborate prosecution witness's testimony that appellant stated he shot at Deputy Blair to avoid being sent back to prison for the rest of his life as a result of a third strike. Additionally, the instruction regarding the use of prior acts of violence was phrased neutrally, and applied equally to past acts of, or reputation for, violence of both appellant and Deputy Blair. Moreover, as set forth above,

evidence of appellant's guilt was overwhelming. Accordingly, any constitutional error was harmless.

XII.

THERE WAS NO PROSECUTORIAL MISCONDUCT

Appellant contends that the prosecutor committed several acts of misconduct during the guilt phase, requiring reversal of the judgment. (AOB 216-286.) Appellant has waived most of these claims by failing to make objections and seek admonitions. Further, appellant's prosecutorial misconduct claims which he did preserve for appellate review lack merit, and any alleged error was harmless.[19/]

A. General Principles

Generally, a defendant cannot complain on appeal of the prosecutor's misconduct at trial unless he timely objects on grounds of prosecutorial misconduct and requests that the jury be admonished to disregard the impropriety. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Gionis* (1995) 9 Cal.4th 1196, 1215.) An exception lies where a timely objection and/or request for admonition would be futile, or if an admonition would not have cured the harm caused by the misconduct. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 820-821.) In order to make a timely objection for prosecutorial misconduct,

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19. To the extent appellant maintains the instances of alleged prosecutorial misconduct violated provisions of the federal Constitution (see AOB 286), those issues are waived since appellant never relied upon the federal Constitution in any of the objections he made to the prosecutor's alleged misconduct. (See *People v. Williams, supra*, 16 Cal.4th at p. 250; *People v. Jackson, supra*, 13 Cal.4th at p. 1231, fn. 17; *People v. Raley, supra*, 2 Cal.4th at p. 892.)

more than an ordinary objection must be made to preserve the issue for appeal. (*People v. Erickson* (1997) 57 Cal.App.4th 1391, 1403.) "In order to preserve alleged misconduct for review, the defendant must 'assign misconduct and request appropriate admonitions[.]'" (*Ibid.*, citing *People v. Gionis, supra*,9 Cal.4th at p. 1215.)

Under the federal Constitution, a prosecutor commits misconduct only when his or her behavior "comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Hill, supra,* 17 Cal.4th at p. 819.) Under state law, a prosecutor commits misconduct by using deceptive or reprehensible methods to persuade either the court or the jury, even if such actions did not render the trial fundamentally unfair. (*People v. Frye, supra*, 18 Cal.4th at p. 969; *People v. Hill*, *supra*, 17 Cal.4th at p. 819.) Whether a prosecutor has committed misconduct must be determined in light of the particular facts of each case. (*People v. Bryden* (1998) 63 Cal.App.4th 159, 182.)

Prosecutorial misconduct is cause for reversal only when it is reasonably probable that a result more favorable to the defendant would have occurred had the district attorney not committed the misconduct. (*People v. Barnett, supra,* 17 Cal.4th at p. 1133; *People v. Bolton* (1979) 23 Cal.3d 208, 214; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

B. Opening Statement

Appellant contends the prosecutor committed misconduct during his opening statement by stating that: (1) an unintended consequence of the Three Strikes Law was that Three Strike candidates would kill police officers rather than go to jail for 25 years to life, implying appellant was such a candidate with such a motive; and (2) appellant's motive for shooting Deputy Blair included avoiding a third strike sentence, his possession of two guns at the time of the shooting, and his parole officer's warning to not carry guns. (AOB 223-224.) The claim should be rejected.

Appellant only objected to the prosecutor's statement regarding Three Strike candidates, but did not seek an admonition for that statement, and made no objection and sought no admonition regarding the other complained-of statements. (RT 336-348.) Appellant has waived any prosecutorial misconduct claim regarding the prosecutor's comments during opening statement to the jury by failing to both make an objection *and* seek a request for an admonition. (See, e.g., *People v. Gurule* (2002) 28 Cal.4th 557, 651; *People v. Cunningham, supra*, 25 Cal.4th at pp.1000-1001.)

Even assuming appellant did not waive these claims, there was no prosecutorial misconduct. The purpose of an opening statement is to inform the jury of expected evidence and the manner in which the evidence and reasonable inferences relate to the prosecution's theory of the case. (*People v. Millwee*

(1998) 18 Cal.4th 96, 137; *People v. Harris* (1989) 47 Cal.3d 1047, 1080.) Here, the prosecutor referred to evidence of appellant's motive which was later presented at trial -- such as appellant's statements to Brooks that he shot Deputy Blair because he did not want to go back to jail for the rest of his life because he had two strikes (RT 1249-1254) -- and properly noted a reasonable inference was that persons who believed they were Three Strikes candidates would rather shoot the police than go to jail for a long period of time.

Moreover, any error was harmless because the jury was instructed that the attorney's statements were not evidence (RT 327, 332; CT 659) and appellant had an opportunity to confront all witnesses and challenge and rebut the prosecution's evidence. (See, e.g., *People v. Cunningham, supra*, 25 Cal.4th at pp. 1001-1002.)

C. Cross-Examination

Appellant contends the prosecutor committed numerous acts of misconduct during cross-examination of himself and Avila. (AOB 226-249.) Appellant has waived these claims by failing to object and/or to seek an admonition for the alleged misconduct. (See, e.g. *People v. Sapp* (2003) 31 Cal.4th 240, 279 [finding defendant waived claim that prosecutor committed misconduct during cross-examination of defense witness by failing to object and seek admonition]; *People v. Navarette, supra*, 30 Cal.4th at p. 507 [failure to object].) Moreover, to the extent appellant has preserved these claims for

appellate review, they are meritless. As set forth below, the prosecutor did not commit misconduct, as his questions were based on inferences drawn from the evidence and properly challenged the credibility of appellant and Avila.

The permissible scope of cross-examination is very wide. (*People v. Cooper* (1991) 53 Cal.3d 771, 822.) A prosecutor has wide latitude to discuss and draw inferences from the evidence at trial, and whether the inferences the prosecutor draws are reasonable is an issue for the jury to decide. (*People v. Smith* (2003) 30 Cal.4th 581, 617.) "A prosecutor does not commit misconduct by challenging the credibility of a defense witness . . . ." (*People v. Earp, supra,* 20 Cal.4th at p. 894.)

1. Cross-examination Of Avila

Appellant first contends that the prosecutor, after eliciting testimony from Avila that appellant's nickname was "Smokey" and that "smoke" had a street meaning of killing someone (RT 1641-1642), improperly asked Avila whether appellant's nickname "has a street vernacular meaning killing people" (RT 1642). (AOB 226-227.) Appellant has waived this claim by failing to raise any objection or seek an admonition. (RT 1641-1642.) Moreover, this contention is meritless because the prosecutor, in framing the question, was drawing an inference from the evidence, which he was permitted to do. Accordingly, there was no misconduct. (See, e.g., *People v. Smith, supra*, 30 Cal.4th at p. 617.)

Appellant next contends the prosecutor improperly asked Avila several questions whether Young Crowd gang members, including appellant, were typically armed because such questions called for irrelevant and prejudicial facts. (AOB 228-229.) Appellant did not request any admonitions for these questions (RT 1643-1644) and thus has waived his claim of prosecutorial misconduct. Further, the contention lacks merit. The questions were proper in order to test Avila's credibility. In this regard, that Avila knew his fellow gang members were armed and would likely protect him, but did not run toward them when Deputy Blair allegedly fired at Avila, had a tendency in reason to show that Avila's testimony that he ran toward his house, away from the Young Crowd gang members and closer to Deputy Blair, was not believable. (RT 1692-1693.)

Moreover, that Young Crowd gang members, including appellant and Avila, were typically armed was relevant to show that Deputy Lyons was truthful when he testified that he saw Avila toss something over his shoulder which was later discovered to be a gun. (RT 431-443.) Further, any error was harmless because Avila and appellant both testified on direct examination that they were armed. (RT 1595, 1885.) Thus, even had the prosecutor not elicited Avila's testimony that several Young Crowd gang members, including appellant, typically armed themselves, the jury would have been aware that at least two Young Crowd gang members, appellant and Avila, armed themselves.

Appellant further asserts the prosecutor improperly asked Avila about his prior criminal activities (including whether he had seen a shot-up mock patrol car in a fellow Young Crowd gang member's back yard, had been released on parole a month prior to the shooting of Deputy Blair, was a "hardened" gang member, the number of gunfights he had been in, and whether he was an armed felon) because such questions called for inadmissible evidence that was unrelated to appellant and remote from any material issue. (AOB 229-230, 236-237.) Appellant has waived his claims regarding the questions about the mock-up patrol car and the date he was released on parole by failing to object and he has waived his other claims by failing to seek admonitions. (RT 1645-1646, 1651-1652, 1658, 1667-1668.) Further, appellant's assertions are meritless.

Evidence that Avila had seen the shot-up mock patrol vehicle and had been released from prison a month prior to the shooting was relevant to test Avila's testimony regarding tensions and violence between Young Crowd and the Vikings, and evidence that he was a "hardened" gang member was relevant to test his testimony that he was afraid when he saw Deputies Blair and Lyons arrive in a patrol car. (RT 1646, 1658.)

Moreover, any alleged error was harmless. The trial court sustained objections to the questions regarding the number of previous gunfights Avila had been in and whether he was an armed felon known to be armed at all times

by his own admission (RT 1651-1652, 1667), and thus that evidence was not before the jury. A party generally is not prejudiced by a question to which an objection has been sustained. (*People v. Pinholster* (1992) 1 Cal.4th 865, 943; see also *People v. Cox, supra*, 30 Cal.4th at p. 952 [no prejudice where objection sustained and jury was admonished].) Additionally, the jury was instructed that the statements and questions of the attorneys were not evidence. (RT 327, 332, 2282-2283; CT 659.) Further, because other witnesses testified regarding the shot-up mock patrol vehicle (RT 370-374, 380-392, 1797-1810) and Avila testified on direct that he was on parole at the time of Deputy Blair's shooting (1595-1596), the jury would have been aware of those facts even had the alleged error not occurred.

Appellant also contends the prosecutor improperly asked Avila if he knew that appellant had been to jail at least two other times for shooting someone because the question was irrelevant. (AOB 230.) Appellant has waived this claim by failing to raise an objection or seek an admonition. (RT 1660.) Further, the claim is meritless. The question was relevant to test Avila's testimony that he and appellant never discussed not wanting to go to jail. Moreover, any error was harmless because the jury was presented with other evidence that appellant had two prior convictions for assault with a firearm. (RT 1036-1040.)

Appellant next asserts that the prosecutor "falsely 'testified'" that Avila had changed his testimony regarding the number of times Deputy Blair administered "flashlight therapy" to him. (AOB 230-233.) Appellant has waived this claim by failing to seek any admonitions. (RT 1647-1648.) Also, the contention lacks merit.

In an Evidence Code section 402 proceeding held outside the presence of the jury, trial counsel asked Avila whether he had heard about Deputy Blair giving "flashlight therapy." Avila responded that Deputy Blair had hit him a few times. Avila also testified that he had three or four "contacts" with Deputy Blair in 1993 or 1994. (RT 1460-1461.) The prosecutor later asked Avila whether he knew the deputies that gave him flashlight therapy. Avila initially responded that he could not remember, then testified that one of the deputies was Deputy Blair. The prosecutor asked Avila when "this incident" in which Deputy Blair gave him flashlight therapy occurred. Avila responded in June or July of 1994. (RT 1467-1470.)

Avila testified, in the presence of the jury, that he received flashlight therapy from Deputy Blair "more than once." (RT 1602.) The prosecutor then asked Avila a line of questions suggesting that he had changed his testimony regarding the number of flashlight therapy incidents from one to two, and asked him what had changed. Avila responded that he believed he said Deputy Blair gave him flashlight therapy a few times. The prosecutor then stated there was

a transcript of Avila's earlier testimony which could be checked. (RT 1648-1649.)

The prosecutor did not "falsely testify" that Avila had changed his testimony from the Evidence Code section 402 hearing. Rather, the prosecutor was drawing an inference, based on the fact that Avila only discussed details regarding one prior incident of alleged flashlight therapy at the Evidence Code section 402 hearing, that Avila was changing his testimony regarding the number of times such instances occurred.

Moreover, any error in this regard was harmless. As set forth above, the jury was instructed that the attorneys' statements and questions were not evidence. Further, appellant was free to rebut the prosecutor's inference or otherwise correct or explain Avila's testimony on re-direct examination, which he did not do. (RT 1716-1721.) Moreover, the key point regarding Avila's testimony about the alleged prior incidents of flashlight therapy was that he testified that an alleged incident occurred in June or July 1994, but Avila was in prison during that time. (RT 1467, 1646-1652.) Thus, even had the alleged error not occurred, Avila's credibility regarding the date when one of the alleged flashlight therapies occurred was suspect.

Additionally, appellant's claim that the prosecutor referred to facts not in evidence and violated his confrontation rights is meritless. Because Avila testified in court, reporter's notes or transcripts of that testimony were available

for appellant to use on re-direct examination to explain any inconsistency in Avila's testimony before the jury or to correct any inference made by the prosecutor. Moreover, Avila was available at trial to explain any discrepancies between his testimony at the Evidence Code section 402 hearing and his testimony before the jury. (See *People v. Smithey* (1999) 20 Cal.4th 936, 962 [citing *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643, fn. 15 [94 S.Ct. 1868, 40 L.Ed.2d 431] for proposition that "there is no deprivation of the right to confrontation when the prosecutor does not introduce statements made by persons unavailable for questioning at trial"].)

Appellant, relying upon *United States v. Geston* (9th Cir. 2002) 299 F.3d 1130, 1136, next contends that the prosecutor improperly asked Avila whether Claretha Jackson, appellant's parole agent, would be lying if she testified that Avila told her that he and other Young Crowd gang members talked about killing the first deputy that came down the street on May 12, 1995. (AOB 234-235; RT 1654-1655.) Appellant waived this claim by failing to make an objection or seek an admonition. Further, this claim should be rejected.

It is well settled that the decisions of lower federal courts, though they may have persuasive value, are not binding on state appellate courts. (*People v. Zapien, supra*, 4 Cal.4th at p. 989; *Raven v. Deukmajian* (1990) 52 Cal.3d 336, 352.) There is no published California authority regarding whether it is misconduct for a prosecutor to ask a defense witness regarding the truth or

falsity of another witness, and federal courts are divided on the issue. (*People v. Foster* (2003) __ Cal.App.4th ___, ___ [3 Cal.Rptr.3d 535, 539].) Respondent submits that this Court should follow those decisions which hold that a prosecutor's "were they lying" questions is not misconduct, or are proper under limited circumstances. (See *People v. Foster, supra*, __ Cal.App.4th at p. ___ [3 Cal.Rptr.3d at p. 540] [line of cases holding no misconduct reason that such questions merely emphasize the conflict in the evidence, which is for the jury to resolve, and line of cases holding such questions only constitute misconduct in limited circumstances reason that such questions are appropriate where the only possible explanation for the inconsistent testimony is that one of the witnesses is lying, or when the witness has opened the door by testifying about the veracity of other witnesses or when the questions have probative value in clarifying testimony].)

Moreover, any alleged error was harmless because appellant, on direct, testified that prior to Deputy Blair's shooting, one Young Crowd gang member discussed shooting the police "from now on." (RT 1879-1881, 1908-1911.) Thus, the jury would have been aware that Young Crowd members discussed shooting police officers shortly before appellant shot Deputy Blair.

Appellant next contends that the prosecutor improperly attacked Avila's credibility in violation of Evidence Code section 787 by eliciting details regarding specific acts of his prior misconduct, specifically that he had been in

prison for possession of a firearm. (AOB 236; RT 1660-1661.) Appellant waived this claim by not making any objections and failing to seek any admonitions. Moreover, this contention is meritless.

Evidence Code section 787 provides that evidence of specific acts of a witness's conduct relevant only as tending to prove a trait of the witness's character is inadmissible to attack or support the witness's credibility. Here, evidence that Avila had been to prison for possession of firearms was not introduced as evidence of Avila's character. Rather, that evidence directly contradicted Avila's testimony that he was in jail for "tickets." (RT 1660.) Thus, the prosecutor did not act improperly by asking Avila the real reason he was sent to prison.

Appellant also contends the prosecutor improperly asked Avila whether Avila's father lied about Avila's whereabouts on the night Deputy Blair was shot. (AOB 237.) Appellant has waived this claim by failing to object or seek any admonition. (RT 1701.) Further, any alleged error was harmless. Avila's father's credibility was not a disputed issue at trial, and Avila himself acknowledged that he lied to the police about his whereabouts on the night Deputy Blair was shot. (RT 1612-1615, 1620.)

Appellant next asserts that the prosecutor improperly asked Avila whether an armed Young Crowd gang member would come to the aid of a fellow gang member who was being harassed by deputies. In asking this

question, argues appellant, the prosecutor implied the existence of prejudicial facts which could not be proved. (AOB 237.) Appellant waived this claim by failing to seek an admonition. (RT 1714-1715.) Moreover, the claim is meritless because the prosecutor properly drew an inference from the evidence and asked Avila about it, and it was clear to the jury that the questions were based on the evidence it had heard.

Appellant also asserts the prosecutor improperly implied that Avila was an unfit parent by asking Avila why he did not bring his young daughter and her friend into his house when he saw the police arrive and where the girls were at the time of the shooting. (AOB 239-240.) Appellant waived this claim by failing to object on this ground at trial, and failing to seek an admonition. (RT 1672-1679.) Also, the claim is meritless. Avila testified that when he saw the deputies' patrol car, he walked away toward the park to avoid them. The prosecutor, in questioning Avila, properly pointed out that a reasonable inference was that it was more logical for Avila to take the children into his house if he wanted to avoid the police. Moreover, the prosecutor's questions regarding whether Avila saw the girls as the bullets were being fired were certainly relevant as those questions related to Avila's observations at the time of the shooting. (RT 1672-1679.) The prosecutor did not commit misconduct by eliciting evidence challenging the believability of Avila's testimony.

Appellant next asserts that the prosecutor falsely suggested that Avila had testified that appellant had almost reached Kito's house prior to the shooting. (AOB 240; RT 1696-1698.) Any alleged error is harmless, as the trial court sustained objections and stated in open court that the prosecutor was misstating the evidence, and that Avila had actually testified that appellant was walking in the direction of Kito's house and had not actually reached it. (RT 1710.)

2. Cross-examination Of Appellant

Appellant contends the prosecutor committed misconduct by asking several questions relating to his shooting of Christina Anthony when he was a juvenile. (AOB 241-243.) Appellant asserts the prosecutor's initial question regarding whether appellant knew Christina Anthony was irrelevant, the prosecutor "testified" by asking appellant, "You shot her. You don't know who she is?" (RT 1927), and the prosecutor assumed facts not in evidence when he asked if appellant remembered shooting Anthony in the jaw. (AOB 241.) Appellant raised no objection to any of these questions (RT 1927-1928), and thus the claims are waived. Moreover, the questions were relevant to challenge the credibility of appellant's testimony that he did not really shoot Anthony.

Appellant also contends the prosecutor asked an argumentative question by asking appellant whether he was shooting people when he was 13 years old, and persistently asked appellant questions that had been answered.

(AOB 241-242; RT 1929-1931.) Even assuming the questions were erroneous, there was no harm because the trial court sustained those objections.

Appellant further contends a related series of questions eliciting testimony that after the shooting of Anthony, appellant had been sent to juvenile camp, released, violated probation, and then sent to the Youth Authority, was irrelevant and only served to show he was a chronic offender. (AOB 242, RT 1932.) Appellant waived this claim by raising no objection. (RT 1932.) Further, the questions were entirely appropriate in light of appellant's initial response that he had only been sent to juvenile camp as a result of that shooting. (RT 1932.)

Appellant next asserts that the prosecutor committed misconduct by asking him whether he had the "darndest luck" after appellant testified that he had twice confessed to shootings he had not really committed. (AOB 243.) Any error in this regard was harmless because the trial court sustained the objection and admonished the jury to disregard it. (RT 1936.)

Appellant also asserts that the prosecutor repetitively questioned him regarding his prior convictions and prior prison incarcerations and did so in a derisive fashion, attempting to mislead the jury into concluding that appellant had a lifelong habit of shooting people. (AOB 244-249.) The contention is meritless. Appellant did not object to many of the questions asked by the prosecutor, waiving those specific claims of misconduct. Moreover, the prosecutor was required to question appellant in detail regarding his prior

shootings because appellant testified that he only shot one person and denied that he shot two others, explaining he was only taking the "rap" for those crimes to protect other Young Crowd gang members. (RT 1928-1937.) Much of the "repetitiveness" of the questions was proper in light of appellant's testimony denying culpability for those prior crimes. Further, any alleged error in this regard was harmless because the jury was presented with other evidence that appellant was on parole at the time of the shooting of Deputy Blair and had two convictions for assault with a firearm. (RT 1036-1040.) (See, e.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1171.)

Moreover, any alleged error in the prosecutor's tone in asking appellant questions on cross-examination were harmless. The trial court sustained objections to questions which were argumentative. (RT 1938-1939, 1953-1954, 1956.) Further, any error in the manner in which the prosecutor asked appellant questions was harmless in light of the fact the jury was instructed that the attorneys' statements were not evidence and that they were not to be influenced by sentiment, conjecture, or prejudice. (RT 327, 332, 2281-2283; CT 657,659.)

3. Cross-Examination Of Bristol

Appellant contends the prosecutor improperly "testified" and misstated Doug Bristol's testimony by asking him whether Deputy Blair's hands were up in the air and fingers extended when shots were first fired, and which direction Deputy Blair turned as he exited the patrol car. (AOB 260-261; RT 1754-1761.)

The contention is meritless. First, the record reflects appellant's characterization of the testimony regarding whose fingers were extended as referring to *Deputy Blair* is incorrect; the record shows the prosecutor and Bristol were discussing whether *appellant's* hands were empty at the time the first shots were fired. (RT 1754-1756.) Moreover, the prosecutor properly asked Bristol questions based on his testimony and demonstration on direct examination that Deputy Blair turned toward the left. (RT 1742.) Finally, any error was harmless, as the trial court explained that Bristol was correcting his earlier testimony, rather than changing his testimony, and instructed the prosecutor to not discuss the point further. (RT 1760-1761.)

D. Examination Of Deputy Lyons

Appellant contends the prosecutor, by asking Deputy Lyons whether the uniform he was wearing at trial contained the blood of Deputy Blair and whether the shooting affected his ability to be a deputy, elicited irrelevant evidence which was designed to invoke sympathy for Deputies Blair and Lyons and inflame the jury against appellant. (AOB 249-252.) Appellant waived his claim as to the question regarding the blood by failing to make any objection or seek an admonition. (RT 497-498.) Further, any alleged error was harmless. The trial court sustained the objection regarding the effect of the shooting on Deputy Lyons. (RT 602.) Moreover, the jury was instructed that they were not to be influenced by sympathy, prejudice, or passion. (RT 2281-2282; CT 657.)

Appellant further contends that the prosecutor improperly asked Deputy Lyons an argumentative question by asking him, "You don't need detectives or a degree in rocket science" in order to know that Deputy Blair did not fire the first set of shots. (AOB 252; RT 603-604.) Any alleged error was harmless as the trial court sustained the objection that the question was argumentative. (RT 604.)

Appellant further contends the prosecutor suggested facts not in evidence or misstated the evidence by asking Deputy Blair whether appellant was taking cover at the time of the shooting so he could better take aim and fire at Deputy Blair, and that Deputy Lyons was being assaulted. (AOB 252; RT 450, 466, 502.) Because the trial court sustained objections to the line of questions regarding taking cover, any alleged error was harmless. Moreover, the prosecutor was properly drawing inferences from the record in asking Deputy Lyons these questions.

E. Examination Of Nieves

Appellant asserts the prosecutor improperly asked Nieves questions about whether an AK-47 firearm had been found at his house and where deputies discovered a shot-up mock patrol vehicle. Appellant argues those those questions improperly suggested such a weapon had been found. (AOB 253, 1798-1809.) Appellant has waived this claim by failing to raise that specific objection. Moreover, the prosecutor's questions were entirely proper to test the

credibility of Nieves' initial testimony that no AK-47 was found at his house. (RT 1801.) Further, the prosecutor's questions were properly based on evidence which had already been admitted at trial, specifically Deputy Lyons' testimony that, during a briefing, he had been told that an AK-47 was found at the house where the mock patrol car had been found. (RT 407-408.)

F. Examination Of Brooks And Frausto

Appellant contends the prosecutor improperly vouched for Brooks' credibility by asking her: (1) whether, after initially not telling the police what she knew about the shooting of Deputy Blair, she finally talked to them "truthfully" in June; and (2) asking whether she had her lawyer go with her to the police station to "make sure that everything was legal that was going on." (AOB 255; RT 1329-1330.) Appellant did not object on grounds of prosecutorial vouching, and thus has waived this claim. (RT 1329-1330.) Moreover, the claim is meritless. The prosecutor's question regarding whether Brooks truthfully spoke to the police in June was properly based on Brooks' testimony that she initially lied to the police, then later told them the truth. (RT 1243, 1278-1286, 1289-1299.) Additionally, any alleged error in the question regarding why Brooks brought her lawyer with her to the police station was harmless in light of the fact that the trial court sustained an objection to that question and ordered the jury to disregard it. (RT 1330-1331.)

Appellant next contends the prosecutor improperly repeated a curse word included in a statement Brooks attributed to appellant (that appellant said "I'm not going down because of this bullshit") and twisted Brooks' testimony regarding appellant's statement. (AOB 256-257.) Appellant did not raise these specific claims and thus has waived them. (RT 1332-1334.) Moreover, the prosecutor properly asked Brooks regarding what she understood appellant's statement referring to "bullshit" meant.

Appellant further asserts that after Brooks testified that she remembered testifying that she had been in the neighborhood when Young Crowd gang members were talking about a fellow gang member who had been shot, the prosecutor improperly asked, "What did you hear in that regard, what do you hear in [sic] these gang members talking about?" Appellant complains that the prosecutor emphasized "gang members." (AOB 258; RT 1334.) Any error in the manner the prosecutor phrased this question was harmless because the trial court sustained an objection to it and noted that the manner in which the prosecutor phrased the question was argumentative.

Appellant also asserts the prosecutor committed misconduct by eliciting inadmissible hearsay evidence from Frausto regarding a statement by Doug Bristol which she overheard. (AOB 259.) This contention is meritless. The prosecutor, after the trial court ruled that Bristol's statement was inadmissible hearsay at that point in time because the prosecutor had not laid a

foundation that it qualified as an excited utterance (RT 1105-1106), properly refrained from asking Frausto the substance of that statement, specifically stating that he did not want Frausto to "get[] into the statement," and only asked whether she had heard Bristol make a statement (RT 1107, 1117.) The record shows the prosecutor complied with the trial court's ruling. The prosecutor later referred to the substance of Bristol's statement, that he said he saw "Freddie do it [the shooting]," *after* the trial court ruled it was admissible only to prove Frausto's state of mind and not for the truth of the matter asserted. (RT 1123, 1156-1157.) The prosecutor committed no misconduct in doing so; the prosecutor's questions were aimed at explaining what Frausto told appellant, and what he told her.

G. Examination Of Jackson

Appellant contends the prosecutor committed misconduct by asking Claretha Jackson, Avila's parole agent, the question, "The day of the shooting before the shooting happened, they are at Kito's house talking about killing a deputy?" Appellant asserts the question was leading and "translated" Jackson's testimony into words chosen by the prosecutor. (AOB 262; RT 1818.) The contention is waived because appellant raised no objection to the question. Moreover, the claim is meritless because Jackson, on direct, testified that the day Deputy Blair was shot, prior to the actual shooting, Avila told her that he and other Young Crowd members were "hanging out" at Kito's house and "they

were talking about how the Lynwood Sheriff's Department was harassing them" and said "they was [sic] going to shot one of them or do something or blast one of them or do something to that effect." (RT 1816-1818.) The prosecutor's question properly clarified Jackson's testimony that Young Crowd gang members discussed shooting a deputy shortly before Deputy Blair was killed and did not distort her testimony.

H. The Prosecutor Did Not Attempt To Deter Avila From Testifying

Appellant contends the prosecutor attempted to deter Avila from testifying by pointing out that if Avila testified, he might incriminate himself for the crime of being an felon in possession of a firearm, which would be a third strike. (AOB 262-264; RT 632-638.) This contention is meritless. Appellant raised no objection to the prosecutor's statement at trial, and thus has waived the issue. Moreover, the claim is meritless.

A prosecutor commits federal constitutional error by interfering with a defendant's right to present witnesses. (*People v. Mincey* (1992) 2 Cal.4th 408, 460.) In order to prevail on such a claim, a defendant must demonstrate three elements: (1) the prosecutor's conduct was of such a nature to transform a defense witness into one unwilling to testify; (2) the prosecutor's conduct was a substantial cause in depriving the defendant of the witness' testimony; and (3) the testimony the defendant was unable to present was material to his defense. (*People v. Lucas* (1995) 12 Cal.4th 415, 456.)

Here, the prosecutor's initial statement that Avila might incriminate himself and possibly be subject to prosecution for a third strike were made outside of Avila's presence. (RT 632-635.) The trial court informed Avila that he could have an attorney appointed for him because there was a possibility that if he testified for the defense that he would incriminate himself for criminal activity. (RT 637-638.) The prosecutor's statements clearly were not a threat directed at Avila. (See, e.g. *People v. Lucas, supra*, 12 Cal.4th at p. 458 [and cases cited therein].) Moreover, because Avila testified at trial, his claim of prosecutorial interference with his right to present witnesses is meritless.

I. Closing Arguments

Appellant contends the prosecutor committed several instances of misconduct during closing argument. (AOB 264.) The claims should be rejected.

A defendant who claims prosecutorial misconduct based upon improper remarks to the jury must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. (*People* v. *Berryman* (1993) 6 Cal.4th 1048, 1072; *People v. Benson* (1990) 52 Cal.3d 754, 793.) "In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye, supra*, 18 Cal.4th at p. 970.)

'It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness' " [citation], and he may "use appropriate epithets warranted by the evidence."' [Citations.]"

(*People v. Wharton* (1991) 53 Cal.3d 522, 567-568; *People v. Hill, supra*, 17 Cal.4th at p. 819 [quoting *Wharton*].)

1. Reference To The Viking Pin

The prosecutor, during rebuttal argument, stated:

Either Deputy Blair fired on an unarmed gang member because he is a Viking or it didn't happen, which is obviously what the People's version of the case is. [¶] Now, it doesn't mean the men and the women that are in court today and out there on the street protecting the lives of the people in Lynwood, if I am worthy enough – I actually asked permission before doing this – I am going to become a Viking. [¶] You see what this is? It's just a pin.

(RT 2249-2250.)

Appellant objected, stating "that is evidence." The prosecutor continued speaking, describing the pin as "[a] triangle and a Viking." The trial court ordered the parties to confer at side bar and asked to see the pin. The prosecutor stated it was "[j]ust a pin," and noted "they are all wearing it on the uniform" and that the pin was a "symbol of the station." Appellant responded that there had been no testimony regarding the pin. The prosecutor argued that he could still wear the pin on his lapel. The trial court agreed, but stated he could not testify that the pin was a symbol of the Lynwood station. The prosecutor responded that he did not tell the jury that it was a symbol of the station. The trial court stated, "I think that I want you to stick with the evidence." When the prosecutor resumed his rebuttal argument, he discussed appellant's argument that appellant would not have shot at Deputy Blair because there were too many witnesses around. (RT 2250-2251.)

Appellant contends the prosecutor's statements constituted "testimony" regarding facts not presented at trial that were based on a personal belief and improperly suggested the Vikings were a group of high integrity and character. Appellant also contends that the prosecutor improperly drew attention to the deputies present in the courtroom, improperly stated that the court authorized him to wear the pin, and appealed to passion and prejudice of the jury by referring to deputies as "people out on the street protecting the people in

Lynwood." (AOB 265-272.) Appellant has waived these claims. Appellant sought no admonition for any of the statements. Appellant's only objection was that there was no evidence presented at trial regarding the pin or the significance of it; appellant did not object on the grounds he now asserts on appeal. A defendant's failure to make a specific objection and to request an admonition regarding alleged prosecutorial misconduct in closing argument constitutes waiver. (*People v. Coddington* (2000) 23 Cal.4th 529, 635; *People v. Arias* (1996) 13 Cal.4th 92, 159.)

Further, appellant's contention regarding the prosecutor's statements about the Viking pin are meritless. There is no reasonable likelihood the jury understood or applied the complained-of statements in the manner alleged by appellant because the prosecutor was unable to finish his point regarding the pin because he was interrupted by appellant's objection. Moreover, as reflected by the record, the prosecutor did not state that the court had authorized him to wear the pin. Further, the jury was instructed that the statements of the attorneys were not evidence and that they were to decide the case based on facts presented at trial. (RT 2281-2283; CT 656-657.) In light of this instruction, and the fact the prosecutor's statements were interrupted, it is not likely that the jury understood those statements to mean that the prosecutor had evidence outside the record which showed the Vikings had high integrity and character.

2. Comments Regarding Appellant's Spouse

During closing argument, the prosecutor attacked appellant's claim of self-defense by noting he did not tell his mother that he shot Deputy Blair in self-defense. The prosecutor then stated:

> Who's number two on the hit parade? Your spouse. [¶] Now, you didn't hear from Tina Fuiava but you heard that she gave a statement to the police and that's what led to the defendant's arrest. And you can bet that if she had anything to offer that would help the defendant, she would have been up on this witness stand testifying. [¶] But what did you hear? What did you hear? Nothing from Tina Fuiava from the witness stand. [¶] I can't call her as a witness. I can't call someone's spouse as a witness. But they can.

(RT 2150-2151.) The prosecutor noted that appellant told his sister Sasa to tell his wife to leave or to lie for him, and then stated, "If she could help, she would have been up there [on the witness stand]." (RT 2151.)

Appellant contends the prosecutor committed misconduct by making these arguments. (AOB 272-275.) The claim should be rejected. First, appellant waived the claim by failing to object and failing to request an admonition. Moreover, the prosecutor properly referred to appellant's failure to present a logical witness in noting that appellant failed to call his spouse as a witness. A prosecutor may comment on a defendant's failure to present a logical

witness, including the failure to present the testimony of a defendant's spouse. (*People v. Wash* (1993) 6 Cal.4th 215, 263; *People v. Coleman* (1969) 71 Cal.2d 1159, 1167; 5 Witkin & Epstein (3d ed. 2000) Criminal Trial, § 73, pp. 819-820.)

3. Argument That Appellant Earned His Nickname By Shooting People

Appellant contends the prosecutor committed misconduct by arguing that appellant's nickname, "Smokey," was given to him because he shot and killed people, that appellant was a "shooter" and "that's what he does for a living," and stating that "you don't become a leader in a gang unless you are the baddest of the bad." (AOB 275-; RT 2160-2121.) Appellant waived this claim by failing to object to the statements or request an admonition. Further, the prosecutor's statements were his own conclusions and inferences based on evidence presented at trial. In this regard, the evidence showed that appellant's nickname was "Smoky" or "Smokey" and that he had three convictions for assault with a firearm. (RT 1641, 1927-1937.) "Argument that states the prosecutor's conclusions as to the weight of the evidence and conclusions to be drawn from it is proper." (*People v. Clark* (1990) 50 Cal.3d 583, 630; see also *People v. Stansbury* (1993) 4 Cal.4th 1017, 1059.)

4. Other Alleged Improper Arguments

During closing argument, the prosecutor argued that leaders of gangs were the "baddest of the bad." The prosecutor stated:

> They [gang members] pick the baddest dude with the biggest gun, two guns, like the Frito Bandito with his bandoliers and stuff like that. One gun isn't even enough for this guy. He has got to have two guns.

(RT 2161.) Appellant contends the prosecutor's reference to "Frito Bandito" constituted the use of a racist caricature that ridiculed and dehumanized him. (AOB 276-277.) Appellant did not raise any objection or request any admonition regarding this statement and thus has waived this claim. (*People v. Vargas* (2001) 91 Cal.App.4th 506, 567-568 [waiver of claim that prosecutor's argument injected racial and gender bias where no objection or request for admonition].) Further, it is not reasonably likely the jury understood the prosecutor's statement to be a racial slur against appellant because appellant was Samoan, not Hispanic. Rather, it is much more reasonable that the jury understood the prosecutor's statement to be an illustration used in argument.

At trial, appellant admitted he lied to the jury when he testified that he stayed at his friend Lovo's house after the shooting, and testified he actually stayed at the house of the "Border Brothers." (RT 1980-1985.) Appellant, in closing argument, argued that appellant lied because he did not want the "Border Brothers" to get into trouble, but after thinking about it, decided to tell the truth

at trial. (RT 2197.) In rebuttal, the prosecutor stated, "Rarely do you catch people in what is called a judicial admission of lying, okay." (RT 2269.) Appellant contends the prosecutor, in making this statement, argued facts not presented at trial. (AOB 277.) The contention has been waived because appellant failed to object to the statement or request an admonition. Moreover, the claim is meritless because there is no reasonable likelihood the jurors improperly understood or applied the complained-of statement. The statement was a proper reference to a matter of common knowledge: witnesses are not usually caught lying on the witness stand. Additionally, appellant himself conceded that he made the lie.

Appellant contends the prosecutor committed misconduct by arguing that appellant did not admit the lie on his own, but was persuaded to do so by trial counsel and the defense investigator in order to avoid having the prosecutor "drive that down your throat." (AOB 277; RT 2270.) Again, appellant has waived the claim by failing to object or request an admonition. Further, the prosecutor's comments were a proper inference or conclusion based on occurrences at trial.

Appellant further contends the prosecutor improperly referred to evidence outside the record by stating that trial counsel was able to present "nice and neat" charts but that the prosecutor was unable to do so because they were on a budget. (AOB 278; RT 2272.) Appellant waived this claim by failing to

object or request an admonition. Moreover, appellant has not alleged, let alone demonstrated, that it is reasonably likely the jury applied or understood this statement in an erroneous manner.

Appellant also contends the prosecutor improperly argued that appellant dragged Deputy Blair's reputation in the mud by putting his "widow" on the stand. (AOB 278-279; RT 2271.) However, because the trial court sustained appellant's objection that the defense presented the testimony of Blair's ex-wife rather than his widow and the prosecutor acknowledged that the defense presented the testimony of the ex-wife, the misstatement by the prosecutor was harmless.

Appellant contends the prosecutor committed misconduct by referring to appellant as "Smokey the Bear" and a "punk," and by misstating several facts presented at trial, including the number of times appellant had been sent to prison. (AOB 279-2277-2280.) Appellant only made two objections, to a "punk" comment and that appellant had been in jail three times. Thus, the other claims of prosecutorial misconduct have been waived by his failure to object and request an admonition. Further, though appellant had not actually been to prison three times, the evidence showed he was sent to prison twice and to a camp commitment for three assaults with a firearm. (RT 1874-1879, 1932.) Additionally, the prosecutor's "punk" comment was based on appellant's

repeated disrespect for the law, as demonstrated by evidence of his prior convictions.

Appellant finally contends that the prosecutor committed misconduct by arguing the jury should convict him to remove him from society, by stating, "We need to get these guys off the street," and by stating, "I will look forward to talking to you [the jurors] again at the penalty phase." (AOB 281-282, 2280.) Appellant did not object to any of these statements and did not request an admonition, and thus has waived these claims.

J. The Alleged Misconduct Did Not Prejudice Appellant

Appellant contends the prosecutor's misconduct individually and cumulatively prejudiced him. (AOB 282-285.) The claim is meritless. As demonstrated above, most of appellant's claims were waived by his failure to object and seek an admonition, the few claims which appellant did preserve for appellate review were meritless, and even if there was misconduct, in light of the instructions to the jury (particularly that the comments of the attorneys did not constitute evidence), any error was harmless. (See, e.g., *People v. Burgener* (2003) 29 Cal.4th 833, 876.) Additionally, in light of the very strong evidence of appellant's guilt, including appellant's incriminating statements (see Arg. II, subsection D), any error was harmless.

K. The Trial Court Properly Curbed Any Prosecutorial Misconduct

Appellant contends the trial court failed to curb the prosecutor's misconduct, violating his right to a fair trial. (AOB 285-286.) The contention is meritless.

Trial courts have a duty to curb misconduct by prosecutors. *(People v. McDermott* (2002) 28 Cal.4th 946, 1001; *People v. Hill, supra*, 17 Cal.4th at p. 821.) Here, as demonstrated above, any misconduct by the prosecutor was isolated and infrequent, and the trial court complied with its duty to curb misconduct by sustaining objections where appropriate.

The only specific instance of the trial court's alleged failure to comply with this duty that appellant raises is that the trial court permitted the prosecutor to wear a Viking pin. (AOB 285.) However, appellant has not demonstrated that the wearing of the pin by the prosecutor constituted misconduct, and thus the trial court did not err by permitting the prosecutor to do so.

Appellant, relying upon *Woods v. Dugger* (11th Cir. 1991) 923 F.2d 1454, 1459-1460 and *Norris v. Risley* (9th Cir. 1990) 918 F.2d 828, 829, contends the wearing of the pin constituted misconduct. (AOB 268-269.) This contention should be rejected.

The cases cited by appellant are not binding. (*People v. Zapien, supra,* 4 Cal.4th at p. 989.) Moreover, both of those cases do not demonstrate the prosecutor's wearing of the pin constituted misconduct. In *Norris*, where several

women spectators at a trial involving a defendant charged with kidapping and rape wore buttons stating "Women Against Rape," the Ninth Circuit found that the buttons presented an unacceptably high risk of depriving the defendant of fair trial and outweighed the spectator's First Amendment right to free speech. (*Norris v. Risley, supra*, 918 F.2d at pp. 829-834.) Here, in contrast, the pin itself expressly communicated no message regarding the offenses charged in the case. In *Woods v. Dugger*, the Eleventh Circuit found that the presence of numerous uniformed prison guards in the audience at a trial of a defendant charged with the murder of a prison guard deprived the defendant of a fair trial. (*Woods v. Dugger, supra*, 923 F.2d at pp. 1459-1460.) However, the United States Supreme Court and this Court have held that the presence of uniformed guards at trial does not deprive a defendant of the right to a fair trial. (*Holbrook v. Flynn* (1986) 475 U.S. 560, 568-569 [106 S.Ct. 1340, 89 L.Ed.2d 525; *People v. Jenkins* (2000) 22 Cal.4th 900, 995-996.) Further, in light of the instructions that the jurors were to decide the case based on the evidence before it and was not to be influenced by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" (RT 2281-2283; CT 656-657), any alleged prejudice from the trial court permitting the prosecutor to wear the pin was harmless.

XIII.

THIS COURT MAY REVIEW THE TRIAL COURT'S IN CAMERA TRANSCRIPTS REGARDING APPELLANT'S *PITCHESS* MOTION

Appellant contends the trial court's denial of his motion for discovery of documents from police personnel files requires reversal of the judgment and requests that this Court independently review those documents. (AOB 286-290.) This Court may independently review the documents and determine whether the trial court abused its discretion in denying appellant's discovery motion.

A. Relevant Background

Prior to trial, appellant filed a motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 for discovery of any evidence of excessive use of force or related misconduct by Deputies Blair, Corrigan, and Riggin in their police personnel files. (CT 554-569.) The trial court, after reviewing the *Pitchess* documents an in camera hearing, stated "[t]here is no information to be disclosed." The trial court sealed the transcript of that hearing and sealed certain *Pitchess* documents. (RT 22-26 [sealed portion of *Pitchess* hearing], 27; CT 608-609.)

Subsequently, on appeal, both parties were mistakenly sent copies of the sealed *Pitchess* documents and hearing. The trial court, at a record correction hearing, ordered the parties to return the documents. (RT [September

10, 1999] at 3-4, 52-54.) Thereafter, appellant filed a motion to remand the case, unseal *Pitchess* documents, and allow appellant to use *Pitchess* materials on appeal. Respondent and the Los Angeles County Sheriff's Department, filed oppositions to that motion. This Court denied the appellant's motion on February 11, 2003.

B. Analysis

The applicable standard of review is whether the trial court abused its discretion in denying appellant's request to discover information from the deputies' personnel files. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827; *Pitchess v. Superior Court, supra*, 11 Cal.3d at p. 535; *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1145.) Evidence Code sections 915 and 1045 require that such a review take place in an in camera hearing. The trial court is to exclude any information from the records that has no relevance, and any relevant information that (1) occurred more than five years before the event at issue in the trial, (2) represents a conclusion of an officer investigating a complaint pursuant to section 832.5, or (3) is so remote that its disclosure would be of little or no benefit. (Evid. Code, § 1045, subd. (b).)

Respondent does not have a copy of the sealed transcript and therefore asks this Court to independently review the sealed materials and determine whether the trial court properly exercised its discretion in denying appellant's discovery motion. As set forth above, an in camera hearing was held, and the

record of the *Pitchess* proceedings were subsequently sealed. (RT 22-27.) An examination of the officers' personnel records should reveal that the trial court properly exercised its discretion in denying appellant's motion. Accordingly, the judgment should be affirmed.

XIV.

THERE WAS NO CUMULATIVE ERROR AT THE GUILT PHASE WHICH REQUIRES REVERSAL OF THE GUILT VERDICTS UNDER STATE LAW OR THE FEDERAL CONSTITUTION

Appellant contends the cumulative effect of the errors at the guilt phase of the trial requires reversal of the guilt verdicts under state law and the federal Constitution. (AOB 290-292.) As to the purported errors, respondent has demonstrated in Arguments 1 through 13 that no error occurred at the guilt phase. Therefore, there cannot be any cumulative error. (See *People v. Hines, supra*, 15 Cal.4th at p. 1061.) And, to the extent there may have been error at the guilt phase, respondent has demonstrated that appellant did not suffer any prejudice. (See Args. 1-13.)

XV.

THE TRIAL COURT PROPERLY VOIR DIRED THE VENIRE PERSONS REGARDING THEIR VIEWS ON THE DEATH PENALTY, AND THE FOR-CAUSE EXCUSALS OF PROSPECTIVE JURORS C. AND L. WERE PROPER

Appellant contends he is entitled to a reversal of the judgment because he was denied the fair selection of an unbiased jury and to a reliable decision on the question of penalty. Appellant argues that "the manner in which the trial court voir dired the venire persons concerning their impartiality on penalty and its excusal of prospective jurors whose view favoring life [imprisonment] did not substantially impair their ability to determine the penalty" violated the Sixth, Eighth and Fourteenth Amendments of the federal Constitution, as well as the corollary provisions of article I, sections 15, 16 and 17 of the California Constitution. (AOB 297-298.) Specifically, appellant maintains the manner in which the trial court asked questions of the prospective jurors during voir dire about their views on the death penalty resulted in the selection of a jury "prone to impose the death penalty." Appellant argues the trial court's use of "suggestive and leading questioning of jurors who expressed any reservation concerning a death sentence was designed to remove them from the panel." (AOB 293, 294.) That the trial court's manner of conducting the death

qualification of the voir dire was improper is further evidenced, argues appellant, by the fact the trial court "excused eleven jurors on the basis that their views favoring a life sentence rendered them unable to fairly determine the penalty, yet excused only a single juror on the basis that his views favoring a death sentence rendered him unable to fairly determine the penalty." (RT 293-294.) Finally, appellant maintains the trial court improperly excused for cause prospective jurors C. and L. (AOB 295-303.) Respondent submits the trial court properly voir dired the prospective jurors regarding their views on the death penalty and properly excused for cause prospective jurors C. and L.

A. Relevant Proceedings

1. The Trial Court Conducts Voir Dire

As set forth above, the trial court conducted voir dire of the jurors without the use of questionaires. (See Arg. VII, *ante*.) Appellant did not object to that voir dire procedure. Indeed, trial counsel expressly approved of the trial court conducting the voir dire without the use of questionnaires: "Your Honor, I am of the opinion that the Court will do a fine job and I agree with the Court handling the voir dire." (RT 47.)

Before the first panel of prospective jurors was brought into the courtroom, the trial court advised both the prosecution and defense that he was going to get "the real gut issues" regarding the death penalty views of the prospective jurors and "be very direct" in his questioning:

THE COURT: I will not excuse anyone for death penalty issues until I have a chance to discuss them individually. I will make a note of the name when we are done with the death penalty voir dire.

MR. RICHMAN: Your Honor, if I may inquire in that regard, are we going to inquire of each individual juror individually concerning their views on the death penalty?

THE COURT: No, I think that under C.C.P. 223 it says the court shall, you know, conduct the examination. Voir dire shall occur in the presence of other jurors in all criminal cases, including death penalty cases.

I want to see how we do with that.

MR. RICHMAN: I need to clarify then my question. I am not asking for a *Hovey*-type voir dire. What I am asking is each individual be asked the death qualifying question.

THE COURT: Absolutely. I am very hopeful of stressing to the jurors that they not go to school on each other's answers. That is why I don't want to be excusing them.

Frankly, in weighing the pros and cons of questionnaires, I believe questionnaires do not get to the real gut issues and only give indications of tendencies. And that is why I think I want to try it this way and see how we do. *I plan to be very direct.*

(RT 75-76, emphasis added.)

2. Twelve Prospective Jurors Are Excused For Cause From The First Panel Of Jurors

Prior to questioning the prospective jurors in the first panel regarding their views on the death penalty, the trial court provided the panel a detailed explanation regarding the mechanics of a death penalty trial (see RT 117-124) and the need to select jurors "who can consider all the evidence and make the choice between life without the possibility of parole and death based on the evidence." (RT 124; see RT 124-129.) Before questioning any of the prospective jurors, the trial court advised the panel:

> I want to know what is in your heart and in your mind. I want you to tell me what you really think about this issue of the death penalty. Okay, and, again, no criticism is going to come to you regardless of what your answers are.

(RT 127.)

Thereafter, the trial court questioned 43 prospective jurors regarding their views on the death penalty. (RT 130-175.) The defense did not object to a single question asked by the trial court. (See RT 130-175.) At the conclusion of the death penalty voir dire, the trial court, without objection, excused 12 jurors for cause from the panel because of their views on the death penalty. (See RT 176, 177.)

3. Eight Prospective Jurors Are Excused For Cause From The Second Panel Of Jurors

Prior to questioning the prospective jurors on the second panel regarding their views on the death penalty, the trial court, once again, provided a detailed explanation regarding the mechanics of a death penalty trial (see RT 212-218), and the need to select jurors who can consider all the evidence and make a choice between life without the possibility of parole and death based on the evidence:

> Now, why am I going into all of this? Because the law promises each side, the defense and the prosecution, jurors who can make a decision between life without parole and death based upon the evidence.
>
> Jurors who would automatically vote for death cannot sit. Jurors who would automatically vote for life cannot sit.
>
> We need people who can consider all the evidence and make a decision between these two very serious consequences.
>
> And we're not talking about some hypothetical situation. We're not going to be asking you, gee, could you vote to put Adolph Hitler to death. That is not the question here.
>
> *The questions is, can you look in your heart and tell us that you can consider the evidence in a case like this and make a decision.*

Now, my experience in this matter -- and mine and those of other judges -- is that we have basically four types of people that are called as jurors in situations like this.

And I am not prejudging anybody. That is not my role here. I am not trying to convince any one of you to take a position one way or the other.

I want to know what is in your heart and what is in your mind, okay. Please, please, be straight with us. It is very important.

There are going to be four kinds of people here. One, people that would always vote for death regardless of what the evidence was. They believe in the death penalty. Eye for an eye. That is it. An officer was killed, man should always get the death penalty.

There are going to be people that would never ever under any circumstance vote for the death penalty. They don't believe in it. They think it is wrong morally. They think it is wrong for religious reasons or for some other reason they could never ever impose the death penalty.

In my experience there is the third kind of person. These are people that say they believe in the death penalty but when they really get down to it, even if they believe that the evidence that is aggravating

outweighs substantially the mitigating evidence, they themselves can't impose the death penalty. They just can't do it.

And I told the folks this morning about a story from a case we had a couple of years ago where two young boys were stabbed and left to die in the desert out in Lancaster. And we had gone through a very lengthy voir dire process. We asked the jurors written questions. We asked them oral questions. The attorneys talked to them and we finally selected jurors that had told us, yes, they could view the evidence and make a decision based upon the evidence and yes, if they felt it was appropriate, they could impose the death penalty. And yes, if they felt it was appropriate they could impose life without the possibility of parole.

And as we're sitting here, after we have sworn the jury, the attorneys and I were talking about scheduling matters, one of the jurors started crying. She hadn't even heard any evidence but she knew it was too much for her. She just couldn't do the service in a kind of case like this, the kind of service that a case like this demands.

Ladies and gentlemen, if you feel that way -- you are sitting in judgment on a fellow human being -- tell us now, please.

Don't get into something that is going to be over your head. You know yourselves better than we do. And I just implore you to not bite off more than you think you can chew, so to speak.

Now, for he fourth kind of person, the kinda person that we're looking for to serve on this jury, is the kind of person that can keep an open mind, not prejudge this case, wait to hear all the evidence, look at the totality of all the aggravating and all the mitigating evidence and then make a decision. And the decision would be one of two choices, life without parole or death. And you must presume that the jury's decision will be carried out.

Now, again, I am not telling you how you should decide this case. My only goal is to find jurors that can make a decision based upon the evidence.

I am going to talk to each one of you that came in for the afternoon decision about the issues on what is called a death penalty case because we want to know -- as I told the jurors this morning -- we don't want you going to school on what other jurors are saying. Tell us from your heart.

We had some jurors this morning that were crying at the prospect of even being close to a case like this. Well, that is fine. I don't prejudge that. That is their business. If they are opposed to the death

penalty, that is fine. I told them so. I admire the fact that they told us what their feelings were. *That is all what we want you to do, is tell us straight from the heart how you feel.*

(RT 217-221, emphasis added.)

Thereafter, the trial court questioned the prospective jurors from the second panel regarding their views on the death penalty. (RT 223-248, 251-254.) The defense did not object to a single question asked by the trial court when questioning the prospective jurors regarding their views on the death penalty. (See RT 223-248, 251-254.) At the conclusion of the death penalty voir dire, the trial court excused eight prospective jurors for cause because of their views on the death penalty. (RT 254.)

Appellant did not object to six of the eight prospective jurors excused for cause. (RT 254.) Appellant presented a timely objection only to the excusal of prospective juror L. (RT 250-251.) Appellant initially indicated some hesitation in the excusal of prospective juror C. and asked the trial court to ask her additional questions. (RT 249.) After the trial court asked additional questions of prospective juror C. (RT 251-252), appellant did not object when the trial court subsequently excused her for cause (see RT 254.)

4. The Excusal For Cause Of Prospective Juror C.

The following appears in the record regarding the questioning of prospective juror C.:

THE COURT: Okay.

Let's go to the next row, way over on the side, Ms. [C.]?

PROSPECTIVE JUROR [C.]: Hi.

THE COURT: How are you today?

PROSPECTIVE JUROR [C.]: Okay.

THE COURT: What did you think about all the discussion about the death penalty?

PROSPECTIVE JUROR [C.]: I am really nervous.

THE COURT: Okay, does that mean we should send you out of here, kick you off this jury, what do you think?

PROSPECTIVE JUROR [C.]: I would like to be on the panel but probably not on a murder case.

THE COURT: This is too much for you, you think?

PROSPECTIVE JUROR [C.]: Probably.

THE COURT: And why do you think it is too much for you, just too serious a matter?

PROSPECTIVE JUROR [C.]: I am very sensitive. I cry over when I see things in the street.

THE COURT: I am having a little trouble hearing.

You said you cry over --

PROSPECTIVE JUROR [C.]: People that are homeless on the street. So I could imagine what I would be hearing in this case.

THE COURT: Well, you are going to be hearing about somebody who died. You'll probably have pictures of a dead body.

PROSPECTIVE JUROR [C.]: Yes.

THE COURT: Okay. I mean that is going to be rough, don't you think, for you?

PROSPECTIVE JUROR [C.]: For me?

THE COURT: For you, yeah.

Do you like movies where there are lots of killing going on, Die Hard II and some of those?

PROSPECTIVE JUROR [C.]: (Juror shakes head).

THE COURT: You know, in Die Hard II there were more than two hundred people killed. You probably never saw that one?

PROSPECTIVE JUROR [C.]: No, sir, I don't like violence.

THE COURT: I don't either.

Now, I sense from you a serious reservation about ever voting for the death penalty; am I correct here? Do you think it would be very difficult for you to vote for death?

PROSPECTIVE JUROR [C.]: (Juror nods head).

THE COURT: Is that right?

PROSPECTIVE JUROR [C.]: At first I was thinking maybe I haven't heard the evidence so that is why I didn't raise my hand when you asked that question.

THE COURT: Now you have had a chance to think about it.

PROSPECTIVE JUROR [C.]: Yes, it is going to be very difficult.

THE COURT: And you think it would be very difficult.

Would you say impossible?

PROSPECTIVE JUROR [C.]: Considering it is about police officer, I have very high regard for police officers.

THE COURT: You have very high regard for police officers, but are very sympathetic person?

PROSPECTIVE JUROR [C.]: Right.

THE COURT: Very emotional and it is going to be difficult for to you make a decision in this case; is that right?

PROSPECTIVE JUROR [C.]: Right.

THE COURT: *And are you telling me that really deep down you think it is highly unlikely that you would ever vote for death regardless of the evidence?*

PROSPECTIVE JUROR [C.]: *Yes.*

THE COURT: Okay. Let me move on, then.

(RT 228-231, emphasis added.)

Following the questioning of the remainder of the prospective jurors in the panel, counsel addressed counsel outside the presence of the jury:

THE COURT: All right, some of the responses this time were not quite the black and white responses we had this morning.

I would think there would be no discussion or objection to [Jurors] C., A., S., T., K., Wayne S., Mr. S. and Ms. L.

. . . .

MR. HAUSER: Your Honor, my feeling is, I don't think we have enough information on [Juror] C. She said it was highly unlikely to vote for death. That seems to be a similar answer as Ms. [L.]

THE COURT: Well, I understood her to be putting herself in that third category where she felt she would never herself vote for death.

MR. HAUSER: She didn't really say that. I feel --

THE COURT: I will ask a few more questions of her.

(RT 247.)

Thereafter, the following appears in the record:

THE COURT: All right, just a couple of more questions and then we will take our afternoon recess.

Ms. [], yes, you have heard, you know, now, many of the others make their comments.

My recollection is, *you said it would be highly unlikely that you would ever vote for the death penalty.*

Is that correct?

PROSPECTIVE JUROR []: *Yes, your Honor.*

THE COURT: On this matter, yeah.

And so that means that -- well, I don't know how else to say that. *You see yourself, pardon me, as kinda in that third category of people, the people that say, you know, I believe that the death penalty is okay, but I really couldn't do it; is that right?*

PROSPECTIVE JUROR []: (Juror nods head).

THE COURT: I am sorry?

PROSPECTIVE JUROR [C.]: *Yes, your Honor.*

(RT 251-252, emphasis added.)

5. The Excusal For Cause Of Prospective Juror L.

Prospective juror L. was the last juror in the second and final panel to be questioned by the trial court regarding her views on the death penalty. (See RT 247.) The record reveals the following exchange:

PROSPECTIVE JUROR [L.]: *I don't have a problem weighing the evidence to determine innocence or guilt but I do have a problem voting for the death penalty.*

THE COURT: Are you telling me that you would never ever vote for death?

PROSPECTIVE JUROR [L.]: No, I just saying I have a real problem.

THE COURT: I have got to explore that with you.

You would have a real problem.

Are you saying that it is very unlikely that you would ever vote for death?

PROSPECTIVE JUROR [L.]: *Yes.*

THE COURT: Okay, let me see counsel at side bar, please.

(The following proceedings were held at the bench:)

. . . .

MR. HAUSER: . . . .

I did want to reiterate my feeling about Ms. [L.]

I don't think we have enough information. She is in a similar category.

THE COURT: *Oh, I felt she was real strong.*

MR. HAUSER: I think she said she had a problem voting for death. I think anybody would.

THE COURT: *When she says very unlikely, persuades me they would substantially compromise their ability to perform as a juror.* And that would be my thought.

So I am going to go ahead and excuse [Ms. L.] over objection. I will talk some more to these other three.

MR. RICHMAN: Thank you, your Honor.

(RT 247-251, emphasis added.)

B. Legal Discussion

1. Issues Regarding The Voir Dire In General

Appellant raises several issues regarding the manner in which the trial court conducted the voir dire of the prospective jurors regarding their views on the death penalty. (AOB 293-298.) Each contention is meritless.

Appellant's primary contention is that the manner in which the trial court questioned the prospective jurors regarding their views on the death penalty skewed the selection process such that the jury which was eventually selected "was prone to impose the death penalty." (AOB 293.) Appellant argues "the court's suggestive and leading questioning of jurors who expressed any reservation concerning a death sentence was designed to remove them from the panel." (AOB 294.) This contention must be rejected for several reasons.

First, as mentioned previously, defense counsel expressly agreed to the trial court conducting the voir dire: "I am of the opinion that the court will do a fine job [of questioning the jurors regarding their views on the death penalty] and I agree with the court handling the voir dire." (RT 47.) Second, appellant did not object to a single question asked of any juror during the voir dire on the death penalty. (See RT 130-176, 223-254.) Thus, appellant is precluded from now challenging for the first time on appeal the nature of the questions asked by the trial court. (See, e.g., *People v. Cudjo, supra,* 6 Cal.4th at pp. 627-628 [waiver of defects in death-qualifying voir dire]; *People v. Visciotti* (1992) 2 Cal.4th 1, 38, 41-42 [acquiescence in capital case jury selection procedure].) Third, the trial court repeatedly advised the jurors during voir dire that the questions were not designed to suggest a particular penalty, but rather to find out what the particular juror honestly felt in their "heart of hearts" and "mind" about the death penalty. (See RT 117-118, 127, 131, 147, 149, 158-159, 213, 221, 223, 242.) Fourth, a review of the entire death-penalty voir dire (RT 130-176, 223-254), including the voir dire of prospective juror C. upon which appellant relies (AOB 294-295), reveals the trial court did not ask improper or coercive questions, no doubt explaining why defense counsel did not pose a single objection to any question asked during the voir dire. The trial court's questions were, as the trial court indicated at the outset, "direct" and aimed at discovering how the particular juror truly felt about the death penalty. The trial court did not

err in the manner in which it conducted the voir dire regarding the prospective jurors' views on the death penalty.

Appellant also questions the propriety of the manner in which the death penalty voir dire was conducted because 19 of the 20 prospective jurors excused for cause were excused for their views favoring life imprisonment without the possibility of parole over death. (See AOB 294-297.) Such a numerical disparity does not provide a sufficient basis upon which to establish constitutional relief, especially where, as here, appellant did not object to the excusals and the record supports the trial court's excusals.

Appellant also questions the propriety of the trial court's advisement to the jury that the voir dire questions were directed to whether, based on the evidence, the juror could make a decision of either life imprisonment without the possibility of parole or death in the instant case, not some hypothetical case involving a "notorious murderer" like Adolph Hilter. (AOB 293; see RT 124, 218.) Appellant is precluded from raising the issue since he did not object or raise the matter in the trial court. (RT 124, 218.) In any event, this Court has held that the critical question in each challenge is "whether the juror's view about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror*." (*People v. Bradford, supra*, 15 Cal.4th at pp. 1318-1319, italics in original; *People v. Hill, supra*, 3 Cal.4th at p. 1003.) Appellant's claim must therefore be rejected.

2. The Excusals For Cause Of Prospective Jurors C. And L.

In *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841], the United States Supreme Court held,

> the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

(See *People v. Williams, supra,* 16 Cal.4th at p. 667; *People v. Crittenden* (1994) 9 Cal.4th 83, 120-121; *People v. Mincey, supra*, 2 Cal.4th at p. 456.) The critical question in each challenge is "whether the juror's view about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror."* (*People v. Bradford, supra*, 15 Cal.4th at pp. 1318-1319, italics in original; *People v. Hill, supra*, 3 Cal.4th at p.1003.)

If a prospective juror provides conflicting or equivocal answers to questions concerning his or her impartiality, the trial court's determination as to that person's true state of mind, which may include an evaluation of the juror's demeanor, is binding on the appellate court. (See *People v. Bradford, supra,* 15 Cal.4th at p. 1319; *People v. Mayfield , supra*, 14 Cal.4th at p. 727, *People v. Crittenden, supra*, 9 Cal.4th at p. 122.) A prospective juror who has expressed an unwillingness to impose the death penalty may properly be excused for cause.

(*People v. Jenkins, supra*, 22 Cal.4th at pp. 986-987.) Furthermore, the trial court's decision to excuse a prospective juror must be upheld if supported by substantial evidence. (*People v. Holt, supra*, 15 Cal.4th at p. 651; *People v. Mickey* (1991) 54 Cal.3d 612, 680.)

a. Prospective Juror C. Was Properly Excused For Cause

Although appellant initially inquired of the trial court regarding the excusal of prospective juror C. and requested that the trial court ask her additional questions (see RT 248-249), appellant did not object to her excusal following the asking of the additional questions (see RT 251-252, 253). Since appellant failed to renew his objection following the additional questions, he has effectively waived the issue for appeal regarding the propriety of the excusal of prospective juror C. for cause. In any event, assuming arguendo a timely objection, appellant's claim fails on the merits.

Respondent submits the trial court properly excused prospective juror C. for cause only after C.'s responses to voir dire questioning revealed the following: (1) she was "really nervous" about the death penalty (RT 248); (2) she wanted to be on a jury, but "probably not on a murder case" (RT 228); (3) a death penalty case is "probably" "too much" for her to handle (RT 228); (4) she does not like violence and is "very sensitive" (RT 228-229); (5) sitting on a death penalty case was "going to be very difficult" for her (RT 230); (6) it

would be difficult for her to make a decision in the instant case (RT 230); (7) that "really deep down" she believed it was "highly unlikely" she would ever vote for the death penalty regardless of the evidence (RT 230-231); and (8) she believed in the death penalty but "really couldn't" impose it (RT 251-252).

The record clearly supports the trial court's excusal for cause of prospective juror C. There is no inconsistency in C.'s responses: although she personally may have believed in the death penalty, she was an individual who "really couldn't" impose it in a particular case. Such views, respondent submits, are sufficient and ample evidence to support the trial court's excusal of C. since her views concerning capital punishment would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." (*People v. Millwee, supra*, 18 Cal.4th at pp. 146-147; *People v. Barnett, supra*, 17 Cal.4th at p.1114-1115; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1061-1062.)

b. Prospective Juror L. Was Properly Excused For Cause

Prospective juror L. was the last juror in the second and final panel to be voir dired regarding her views on the death penalty. Although her voir dire was brief, the answers she provided, in the context of the trial court's admonition to the panel at the outset of the voir dire that he was interested in finding out

what was in the juror's "heart of hearts" regarding the death penalty, make clear the trial court properly excused her for cause.

Respondent submits the trial court properly excused prospective juror L. for cause only after L.'s responses to the voir dire revealed the following: (1) although she did not have a problem deciding guilt, "I do have a problem voting for the death penalty" (RT 247); although she did not indicate she could never vote for the death penalty, L. related that "I have a real problem" voting for the death penalty (RT 247); and (3) it is "very unlikely" she would ever vote for the death penalty (RT 247-248). Although the voir dire was brief, L.'s answers make clear she had "a real problem" in voting for the death penalty and that it was "very unlikely" she would ever vote for the death penalty. The trial court commented on Juror L.'s responses by noting, I felt she was real strong [in her views]." (RT 251.) Such answers, respondent submits, provide sufficient and ample evidence to support the conclusion L.'s views on the death penalty would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] oath." Thus, the trial court's decision to exclude L. for cause must be upheld. (See *People v. Millwee, supra*, 18 Cal.4th at pp. 146-147 [excusal for cause proper where juror would have "problem" imposing death and life imprisonment was the "maximum" he would consider]; *People v. Bradford, supra*, 15 Cal.4th at pp. 1318-1321 [trial court's determination as to the juror's

true state of mind, based on factors such as demeanor, binding on appellate court]; *People v. Mayfield , supra*, 14 Cal.4th at pp. 727-729 [same].)

Relatively recently, this Court, in *People v. Heard, supra*, 31 Cal.4th at pp. 959-966, found reversible error from the dismissal of a prospective juror on *Witt* grounds, holding there was no substantial evidence supporting the trial court's determination that the juror's views on capital punishment would prevent or substantially impair the performance of his duties. The prospective juror in *Heard* unequivocally indicated "that he would not vote 'automatically'" for life without parole or death. (*Id.* at pp. 964-965.) The prospective juror also "indicated he was prepared to follow the law and had no predisposition one way or the other as to imposition of the death penalty." (*Id.* at p. 967.) Here, by contrast, prospective jurors C. and L. not only gave equivocal and conflicting answers on their ability to impose the death penalty, but made statements indicating that they could not vote for death. (RT 230-231, 251-252.) Thus, unlike the situation in Heard, there was substantial evidence in the instant matter that Jurors C. and L.'s views on capital punishment would prevent or substantially impair the performance of their duties, and the trial court properly excused them for cause.

XVI.

THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT EVIDENCE

Appellant raises several contentions the trial court improperly admitted victim impact evidence. (AOB 303-318.) Appellant has waived most of these claims and, in any event, the claims are meritless.

As a preliminary matter, the only claim appellant preserved for appellate review was that Deputy Lyons' testimony was "too far afield of victim impact." (RT 2380.) Accordingly, appellant's other claims regarding the admission of the testimony of witnesses other than Deputy Lyons regarding the impact of his death on them have been waived as he did not timely raise any of those specific objections in the trial court. (See, e.g., *People v. Crew* (2003) __ Cal.4th __, ___ [3 Cal.Rptr.3d 733, 755] [claim that victim's daughter's victim impact testimony should not have been admitted waived where no objection was made below]; *People v. Mickle* (1991) 54 Cal.3d 140, 187 & fn. 31 [defendant waited too long to contest victim impact evidence where two witnesses gave such testimony one day, and where no objection was made until a third witness was prepared to give similar testimony the next day].) In any event, appellant's claims are meritless.

In the penalty phase of a capital trial, the admission of evidence of a murder's impact on a victim, the victim's family and friends, and the community

as a whole is permissible under the Eighth Amendment. *(Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 270]; *People v. Marks* (2003) 31 Cal.4th 197, 235.) This Court has also found that victim impact evidence is admissible under section 190.3, factor (a), as a circumstance of the crime. (*People v. Boyette* (2002) 29 Cal.4th 381, 444 ["victim impact evidence is now admissible as a constitutional and statutory matter"].)

Appellant first contends the trial court improperly admitted the testimony of Deputy Blair's family members and co-workers regarding the impact of Deputy Blair's murder on them because that evidence had nothing to do with the circumstances of the crime and those witnesses were not personally present during the crime or its immediate aftermath. (AOB 311-312.) The contention is meritless. The admission of testimony from family members regarding their love of victims and how they miss them as victim impact evidence is proper and is admissible under section 190.3, factor (a). (*People v. Boyette, supra*, 29 Cal.4th at pp. 444-445 and fn. 12 ["'circumstances of the crime' reasonably include how the victims' deaths affected surviving family members"]; see also *People v. Marks, supra*, 31 Cal.4th at p. 235-236 [testimony of victim's employee properly admitted as victim impact evidence].) Moreover, this Court has rejected a similar argument that victim impact evidence should be

limited to the immediate impact of a murder. (*People v. Brown* (2003) 31 Cal.4th 518, 573 [trial court did not err by permitting witnesses to testify that, more than three years after the crime, they were still scared to go out at night] .)

To the extent appellant contends that the trial court improperly permitted evidence of Deputy Blair's commendations for his police work and photograph of Deputy Blair in a uniform (AOB 306-307), that contention is meritless. Such evidence was admissible to show the impact of Deputy Blair's loss on the community he policed. (See *People v. Marks, supra*, 31 Cal.4th at pp. 235-236 ["We have therefore drawn from *Payne* that it is proper to refer 'to the status of the victim and the effect of his loss on friends, loved ones, and the community as a whole.' [Citation.]"].) Further, a photograph of a victim while alive constitutes a "circumstance of the offense" which portrays the victim as the defendant saw them at the time of the killing. (*People v. Carpenter, supra*, 15 Cal.4th at p. 401.)

Appellant next contends that the trial court admitted excessive amounts of unduly prejudicial victim impact evidence that appealed to the passions of the jurors, preventing them from rendering a fair and reliable verdict regarding penalty. (AOB 304, 311, 313-314.) This contention is should be rejected. Victim impact evidence is relevant. (*People v. Brown, supra*, 31 Cal.4th at p. 573.) Further, a review of the victim impact evidence, considered together with the prosecutor's opening and closing arguments, shows that the admission of the

evidence did not violate appellant's right to have the jury decide the case based on the facts of the case. The prosecutor emphasized victim impact evidence, but also discussed the relevance of the facts of the crime itself, and other aspects about appellant, that showed the death penalty was appropriate. (RT 2380-2392, 2741-2781.) In similar circumstances, this Court has rejected the claim that the admission of victim impact evidence was so inflammatory as to cause the jury to decide penalty based on an emotional response unconnected to the facts of the case. (*People v. Boyette, supra*, 29 Cal.4th at p. 444.)

Appellant, relying upon Justice Kennard's concurring and dissenting opinion in *People v. Fierro* (1991) 1 Cal.4th 173, 257-264, contends that the victim impact evidence should only include facts or circumstances known by or reasonably apparent to a defendant at the time of a capital crime. (AOB 311.) This contention is meritless. No other Justice joined Justice Kennard's concurring and dissenting opinion. (*People v. Fierro, supra*, 1 Cal.4th at pp. 255, 257.) Moreover, as set forth above, in subsequent opinions decided after *Fierro*, this Court found the admission of victim impact evidence which included facts or circumstances not known or reasonably apparent to defendants to be properly admitted. (See, e.g., *People v. Marks, supra*, 31 Cal.4th at p. 235 [employee of victim testified victim treated him like a son and that after victim's

death, employee's physical condition deteriorated].) Accordingly, appellant's claim that the trial court improperly admitted victim impact evidence are meritless.

In any event, any error in the admission of excessive victim impact evidence was harmless. Here, even though some of the victim impact evidence may have been cumulative, it was nonprejudicial in light of the very strong evidence of aggravating factors (see Args. XVII, XXIII, *post.*) and properly admitted victim impact testimony. (See *People v. Boyette, supra*, 29 Cal.4th at p. 445 [finding no prejudice in the admission of victim impact evidence]; see also *People v. Cox, supra*, 30 Cal.4th at p. 958 ["where evidence of fear is admitted in error but 'is cumulative of other properly admitted evidence to the same effect,' such error is not prejudicial."]; *People v. Hughes* (2002) 27 Cal.4th 287, 336 [assuming photograph was improperly admitted because it was cumulative, no prejudice in light of other properly admitted evidence and overwhelming evidence of appellant's guilt].)

XVII.

THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S STATEMENTS THAT HE COMMITTED TWO ADDITIONAL SHOOTINGS IN 1984 AND THERE WAS NO RELATED INSTRUCTIONAL ERROR

Appellant contends the trial court's admission of evidence at the penalty phase that he confessed to committing two additional shootings in 1984, even though there was no independent evidence of those shootings and there were reasons to suspect that he did not so confess, requires reversal of the death judgment, particularly because the court's evidentiary ruling was aggravated by related instructional error. Specifically, appellant complains that the prosecution failed to satisfy the corpus delicti rule as to the two 1984 shootings prior to the admission of appellant's statements. And, appellant argues, the trial court compounded the error by failing to instruct the penalty jury as to the corpus delicti requirement for violent crimes alleged at the penalty phase. (AOB 318-328.) Appellant's claims lack merit.

A. Factual Background

At trial, evidence was presented that appellant committed five shootings. During guilt phase proceedings, evidence that appellant had committed three shootings was admitted at trial. The prosecution introduced

evidence that appellant had two convictions, one in 1989 and another in 1992, for assault with a firearm. (RT 1036-1040.) Appellant admitted he pled guilty to those two shootings and that he pled guilty to the 1984 shooting of Cristina Anthony when he was a juvenile. (1927-1937.)

During the penalty phase proceedings, the prosecution introduced evidence that appellant had committed two additional shootings. First, a few days after the 1984 shooting of Anthony, appellant, in an interview with Deputy Kele Kaono, admitted that on September 9, 1984 (the day of the Anthony shooting), he used a .22 caliber shotgun and shot at a car containing what he believed were rival gang members, then shot at a second car containing Anthony. (RT 2419-2432.) Second, during that interview, appellant admitted that a few weeks prior to the Anthony shooting, he fired into a car which he believed contained members of a rival gang, the Segundos. (RT 2423-2424, 2430-2438.)

Appellant objected before Deputy Kaono testified regarding appellant's admissions to the two shootings in 1984 which did not involve Anthony, stating, "[w]e don't have a corpus to the other shootings." The trial court responded:

> That is fine. You can argue that to the jury as to weight. But it is still admissible for the purpose -- if the man said I did 15 shootings or 35 shootings and the detective didn't investigate them or didn't

corroborate them, the fact that he still said he did them is something the jury can consider. So I am going to allow this.

(RT 2426.) Appellant did not cross-examine Deputy Kaono regarding the other two 1984 shootings he admitted to. (RT 2443-2444.)

During discussions regarding penalty phase instructions, appellant made no request for an instruction regarding his admissions to Deputy Kaono that he had committed two additional 1984 shootings. (RT 2713-2724.) The trial court instructed the jurors that: (1) they were to give the testimony of a single witness whatever weight they believed it deserved, and that the testimony of one witness which they believed regarding any fact was sufficient to prove that fact (RT 2730); and (2) evidence had been introduced that appellant had committed "the following criminal acts: assault with a firearm in 1984, 1990 and 1992 which involved the use of force or violence" and that, in order to consider such evidence of criminal activity as an aggravating circumstance, the jurors must be satisfied beyond a reasonable doubt that appellant committed that criminal activity (RT 2733). The trial court instructed the jurors regarding reasonable doubt and the elements of assault and assault with a firearm. (RT 2734-2737.) During closing argument, the prosecutor argued that the evidence showed appellant committed five prior shootings. (RT 2761-2763.)

B. Analysis

The corpus delicti rule requires that the prosecution prove that a crime occurred with evidence independent of a defendant's extrajudicial statements. (*People v. Sapp, supra*, 31 Cal.4th at p. 303; *People v. Ochoa* (1998) 19 Cal.4th 353, 405.) This rule

> originated in the judicial perception of the unreliability of extrajudicial confessions, and in the fear that a defendant, perhaps coerced or mentally deranged (since he has confessed to a crime he did not commit) would be executed for a homicide which never occurred.

(*People v. Hamilton* (1989) 48 Cal.3d 1142, 1176.) Due to the adoption of Proposition 8 adding section 28, subdivision (d) to Article I of the California Constitution, the corpus delicti rule no longer bars the admissibility of a defendant's out-of-court statements on the ground that independent proof of a crime is lacking. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1180.) As this Court stated in *Alvarez*:

> The issue presented by this case is narrow. We granted review to consider, for the first time since the adoption of Proposition 8, whether section 28(d) abrogated the corpus delicti rule in California. We will conclude that section 28(d) *did* abrogate any corpus delicti basis for excluding the defendant's extrajudicial statements from evidence. On the other hand, in our view, section 28(d) *did not* abrogate the corpus

delicti rule insofar as it provides that every *conviction* must be supported by some proof of the corpus delicti *aside from* or *in addition* to such statements, and that the jury must be so instructed.

(*People v. Alvarez, supra*, 27 Cal.4th at p. 1165.)

Thus, since appellant's statements were made subsequent to the 1982 passage of section 28(d), the trial court did not err in admitting appellant's statements that he committed two additional shootings in 1984 without the prosecution first establishing the corpus delicti of those shootings. (See *People v. Sapp, supra*, 31 Cal.4th at pp. 303-304.)

Further, respondent submits that the corpus delicti rule should not apply to conduct admitted as aggravating evidence under section 190.3, factor (b) at the penalty phase of a capital trial. It follows that if the corpus delicti rule is inapplicable, an instruction to the jury was not necessary. The corpus delicti rule should not apply for several reasons. The rule is inefficient, unnecessary, and can be abused to bar the admission of "perfectly reliable" extrajudicial statements. (Crisera, *Reevaluation of the California Corpus Delicti Rule: A Response to the Invitation of Proposition 8* (1990) 78 Cal. L. Rev. 1571, 1580-1584 (*Crisera*); Comment, California's Corpus Delicti Rule: The Case for Review and Clarification (1973) 20 UCLA L.Rev. 1055, 1087-1091 (*Comment*).) Moreover, the rule has no basis in federal constitutional law and

is not based upon any state statute. (*People v. Alvarez, supra*, 27 Cal.4th at p. 1168.)

In addition to policy considerations and the lack of any basis in statute or constitutional law, the corpus delicti rule should not apply in the instant case, which involves a penalty phase determination, i.e., whether death or life imprisonment is appropriate, rather than a determination regarding a defendant's guilt of a charged crime. In this regard, a penalty trial is not the equivalent of a criminal prosecution, because

> "the 'penalty phase is unique, intended to place before the sentencer all evidence properly bearing on its decision under the Constitution and statutes.'" (*People v. Stanley* (1995) 10 Cal.4th 764, 822-823, 42 Cal.Rptr.2d 543, 897 P.2d 481.)

(*People v. Burgener, supra*, 29 Cal.4th at p. 868.) That appellant admitted he was involved in two additional shootings is certainly the sort of evidence that a jury should consider in determining the appropriate penalty because it had a tendency in reason to show the presence of criminal activity by appellant which involve the use of force or violence. (See § 190.3, factor (b).)

This Court's recent opinion in *Sapp* is not inconsistent with respondent's position. *Sapp* did not hold the corpus delicti rule was applicable to evidence admitted under factor (b) as aggravating evidence at the penalty phase of a capital trial. Rather, *Sapp* rejected the defendant's corpus delicti

contention even "*assuming* that the corpus delicti rule applies to unadjudicated crimes admitted as aggravating evidence" under factor (b). (*People v. Sapp, supra*, 31 Cal.4th at p. 303, emphasis added.)

Moreover, appellant's reliance on *People v. Hamilton, supra*, 60 Cal.2d at p. 129 and *People v. Robertson* (1982) 33 Cal.3d 21, 42 (AOB 321-322) is misplaced. In *People v. Hamilton*, the trial court, at the penalty phase of a capital trial, permitted the prosecution to introduce appellant's extrajudicial admissions regarding other crimes for which no other evidence was produced. (*People v. Hamilton, supra*, 60 Cal.2d at p. 129.) The *Hamilton* Court found the admission of this evidence was erroneous because it violated the corpus delicti rule. (*Id.* at pp. 129-130.) However, *Hamilton* was decided well before this Court, in *Alvarez*, held that the corpus delicti rule has been abrogated by Proposition 8, and is no longer a basis for excluding an accused's extrajudicial admission or confession. Accordingly, the reasoning in *Hamilton* no longer applies in light of this Court's decision in *Alvarez*.

Appellant's reliance upon *Robertson* is even more misplaced than his reliance upon *Hamilton*. In *People v. Robertson*, a witness testified that appellant, during an attack in which he sexually assaulted her, stated that he had previously killed two other persons. (*People v. Robertson, supra*, 33 Cal.3d at pp. 32-33.) On appeal, the defendant argued that his trial counsel was ineffective for failing to object to that statement that he had killed two people.

(*Id.* at p. 41.) The *Robertson* court stated that the evidence was inadmissible on the ground that no independent evidence of the corpus delicti of the other crimes was ever introduced, but *did not* decide the issue based on the corpus delicti rule, but rather held the evidence should have been excluded pursuant to Evidence Code section 352 . (*Id.* at p. 42.)

In any event, appellant's statements regarding the two 1984 shooting incidents were properly admitted at the penalty phase regardless of whether the corpus delicti rule applies to such evidence. (See *People v. Sapp, supra*, 31 Cal.4th at pp. 303-304; *People v. Alvarez, supra*, 27 Cal.4th at p. 1180.) And, even assuming the corpus delicti rule is applicable such that the trial court should have given the jury a cautionary instruction regarding the use of appellant's statements, any such error was nonprejudicial on the facts of the instant case.

The jury already knew from the guilt phase that appellant was an "outlaw" who had no respect for human life and/or the laws of society. The circumstances of Deputy Blair's murder – an unprovoked shooting of a uniformed police officer attempting to discharge his lawful duties by a gang member armed with two handguns who was on parole and who did not want to return to prison for the rest of his life as a third-striker – demonstrate the height of appellant's lawlessness. Moreover, in addition to Deputy Blair's murder, the jury was well aware that appellant had a history of violence dating back to when appellant was barely a teenager (13 years old) and he shot Cristina Anthony. In

addition, the jury knew that appellant had suffered two prior convictions for assault with a firearm. The jury also knew through the testimony of Brooks that appellant instructed her to tell the police that if they came to her house looking for him she should tell the police that he was in the back of the house with a gun because "I'm not going back to jail." Given appellant's violent history, coupled with appellant's penalty phase testimony where he refused to express any remorse for his conduct, it can be said with confidence that the jury's possible consideration of the two additional 1984 shooting incidents at rival gang members was not the determinative factor in the jury's penalty determination.

Given the overwhelming aggravating evidence presented by the prosecution, coupled with appellant's lack of remorse, it is not reasonably possible the jury would have decided on a verdict of life without the possibility of parole rather than death had they not considered the two 1984 shootings incidents. (See *People v. Sapp, supra*, 31 Cal.4th at p. 304.) Indeed, appellant's statements regarding the two 1984 shooting incidents at rival gang members "was [on the facts of the instant case] nothing more than icing on a very rich cake." (See *People v. McDaniels* (1980) 107 Cal.App.3d 898, 905.)

XVIII.

THE TRIAL COURT DID NOT UNDULY RESTRICT THE AMOUNT OF TIME DEFENSE COUNSEL HAD TO CONSULT WITH APPELLANT PRIOR TO APPELLANT TESTIFYING ON HIS OWN BEHALF AT THE PENALTY PHASE

Appellant contends the trial court's "limiting to five minutes counsel's consultation with [appellant] concerning his proposed testimony at the penalty phase requires reversal of the judgment." (AOB 328-332.) Specifically, appellant claims

> By limiting consultation between [appellant] and his counsel to five minutes on the critical question of calling [appellant] as a witness on his own behalf as to the life-or-death decision, the court abused its discretion and deprived [appellant] of his constitutional right to counsel and to testify on his own behalf, as protected by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution as well as the correlative rights secured by the California Constitution.

(AOB 329.) Appellant has waived this contention by failing to preserve the issue in the trial court with an objection or a request for more time to consult with appellant prior to his penalty phase testimony. In any event, the record

simply does not support appellant's claim that he was given an inadequate amount of time to prepare his penalty phase testimony.

A. Relevant Proceedings

On the morning of July 29, 1996, after the prosecution rested its case in aggravation at the penalty phase (see RT 2622), appellant commenced to call defense witnesses in support of his case in mitigation (see RT 2623-2624). By early afternoon on July 29, nine defense witnesses had testified on appellant's behalf. (See RT 2624-2703.) At the conclusion of the ninth defense witness, the following appears in the record:

> [THE PROSECUTOR]: Thank you, I have no further questions.
>
> THE COURT: Mr. Hauser?
>
> [DEFENSE COUNSEL]: Nothing further.
>
> THE COURT: All right, thank you very much.
>
> [DEFENSE COUNSEL]: I need to approach.
>
> THE COURT: Okay.
>
> (The following proceedings were held at the bench:)
>
> [DEFENSE COUNSEL]: Your Honor, I haven't had a chance to talk to my client about testifying -- I mean, I talked to him before but not today. And he is telling me now that he wanted to testify so I need a chance to talk to him.

THE COURT: I will give you five minutes. I want to try to finish the this case today.

[DEFENSE COUNSEL]: I understand.

THE COURT: We'll take five minutes, ladies and gentlemen, I would ask to step in the back, please.

(Recess.)

(RT 2703-2704.) Following the recess, the following appears in the record:

THE COURT: All right, are we ready for the jury?

(No response.)

THE COURT: Bring out the jurors.

(The following proceedings were held in open court in the presence of the jury:)

THE COURT: All right, Mr. Hauser.

[DEFENSE COUNSEL]: Call Freddie Fuiava.

B. Legal Analysis

First, even though the trial court indicated it would take a five-minute recess (see RT 2703), the actual length of the recess before the court reconvened is not indicated in the record (see RT 2703-2704). Thus, contrary to appellant's assertion, the record does not indicate the actual length of the recess.

Second, regardless of the length of the recess, appellant should be precluded from raising this issue on appeal since he never raised it in the trial

court. Had defense counsel truly needed additional time in which to consult with appellant prior to appellant's penalty phase testimony, he surely would have objected or requested additional time from the trial court. Defense counsel had at least *three* opportunities where he could have made such a request. First, when the trial court indicated it would take a five-minute recess, defense counsel stated, "I understand." He could have easily objected or requested additional time from the trial court. He did not. Second, following the recess, and after defense counsel had an opportunity to talk with appellant, the trial court inquired, prior to the jury entering the courtroom, "All right, are we ready to proceed?" The record indicates there was "no response." Again, defense counsel could have indicated he was not ready to proceed and needed additional time in which to consult with appellant. He did not do so. Third, after the jury entered the courtroom, the trial court addressed defense counsel by stating, "All right, Mr. Hauser" and Mr. Hauser, defense counsel, rather than objecting or requesting additional time in which to consult with appellant, called appellant as a witness. (See RT 2703-2704.) Thus, the record is abundantly clear that appellant never raised this issue in the trial court when he could have easily done so and respondent therefore submits the issue is waived for appellate purposes.

Third, that defense counsel did not object is entirely reasonable for two reasons: (1) counsel indicated he had previously talked to appellant about testifying at the penalty phase "but not today" and he simply needed "a chance

to talk to [appellant]" before having him take the witness stand; and (2) appellant's direct testimony was very brief and consisted of an 11-line response to the sole question of "Why should this jury spare your life." (RT 2703, 2704, 2706-2707.) Given the straight-forwardness of appellant's direct testimony, it seems clear defense counsel had adequate time to consult with appellant before he testified. Absolutely nothing in the record indicates otherwise.

Finally, the record does not support several assertions made by appellant. Appellant speculates and surmises that the consultation was "hurried" and defense counsel was "obviously unprepared" for appellant's testimony. (AOB 331.) But, there is no record support for either proposition. And, there is no record support for any causal connection between the amount of time defense counsel and appellant consulted prior to appellant's testimony and the quality, or lack thereof, of the questions asked appellant by defense counsel. The fact defense counsel commenced direct examination of appellant with an objectionable question does not mean defense counsel had inadequate time to talk to appellant prior to appellant's testimony – it simply means defense counsel asked an objectionable question.

XIX.

THE TRIAL COURT DID NOT PROHIBIT APPELLANT FROM EXPRESSING REMORSE OR SYMPATHY FOR DEPUTY BLAIR'S FAMILY

Appellant contends the trial court's refusal to permit him to express his sorrow for Deputy Blair's family and limitation of his testimony to "what the sentence should be" amounts to a denial of his constitutional right to have the sentencer consider all relevant mitigating evidence in violation of the Eighth and Fourteenth Amendments. (AOB 333-338.) Appellant's claim lacks merit.

A. Factual Background

On direct examination, trial counsel's first question to appellant was: "Mr. Fuiava, do you have anything that you want to *say to Deputy Blair's family*?" (RT 2706, emphasis added.) The prosecutor objected on the grounds the question, as phrased, was "inappropriate." The trial court agreed, and stated that trial counsel should "confine yourself to the issue of whether or not he should be – what the sentence should be." (RT 2706.) At sidebar, the following colloquy took place:

> MR. HAUSER: Your Honor, if the prosecutor is going to be prevented from arguing remorse, then I will withdraw the question and have my client sit down.
>
> THE COURT: Are you planning to argue remorse?

MR. RICHMAN: No.

THE COURT: All right.

MR. HAUSER: Well, wait a minute. I am sorry. I should clear it with my client. He does have a right to testify.

THE COURT: He does have a right to testify. He has a right to plead for his life. At this point it would be inappropriate given the position that the People are taking that they are not going to argue the issue of remorse that he should make a public apology, for instance, to the Blair family. I don't think that that would be appropriate.

(RT 2706-2707.) After conferring with appellant, trial counsel asked appellant, "Why should this jury spare your life?" Appellant responded, but did not discuss any remorse or make an apology to Deputy Blair's family. (RT 2707-2708.)

In a motion for a new penalty phase, trial counsel argued the trial court's ruling prohibited appellant from introducing evidence of remorse. (CT 794.) The trial court denied the motion, stating:

One of the points you make in your motion is that the defendant was denied the chance to state remorse. In my view, that is not totally correct. He was asked a question while in the penalty phase as to what he would like to say to Mrs. Blair and the Blair family, and *I sustained an objection to that particular question and held it was not*

appropriate. [¶] *In my view, he could have made statements as to his general feelings of remorse had he wanted to, but I was sustaining the objection to addressing any family member or Mrs. Blair.* I thought that was inappropriate.

(RT 2813, emphasis added.)

B. Analysis

A capital defendant has the federal constitutional right to present relevant mitigating evidence to the sentencer. (*Payne v. Tennessee* (1991) 501 U.S. 808, 822 [111 S.Ct. 2597, 115 L.Ed.2d 720]; *Skipper v. South Carolina* (1986) 476 U.S. 1, 4 [106 S.Ct. 1669, 90 L.Ed.2d 1]; *People v. Bemore* (2002) 22 Cal.4th 809, 855-856.) Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. (*People v. Frye* (1998) 18 Cal.4th 894, 1016.) A defendant's statements of remorse is a relevant mitigating factor. (*People v. Hovey* (1988) 44 cal.3d 543, 580.)

Here, the trial court did not bar appellant from testifying regarding any remorse he had for killing Deputy Blair or sympathy he had for Deputy Blair's family. Rather, the trial court ruled that the phrasing of the question posed to appellant, whether he had anything to say *to* Deputy Blair's family, was inappropriate, and stated that trial counsel should confine himself to the issue of what appellant's sentence should be. (RT 2706.) The trial court's ruling did not

in any manner bar appellant from expressing any remorse or sympathy *for* Deputy Blair's family. Indeed, the trial court made clear that appelalnt had "a right to plead for his life" to the jury. The trial court only precluded appellant from directly making statements to Deputy Blair's family. Appellant could have expressed his remorse in his testimony to the penalty jury. He chose not to.

Further, any alleged error was harmless. Error in excluding a defendant's mitigating evidence in a penalty phase proceeding is governed by the beyond-a-reasonable-doubt test set forth in *Chapman v. California, supra,* 386 U.S. at p. 24. (*People v. Frye, supra,* 18 Cal.4th at pp. 1015-1017; *People v. Whitt* (1990) 51 Cal.3d 620, 647-648.) Here, appellant and trial counsel did not inform the trial court about what appellant would have testified to regarding remorse or sympathy for Deputy Blair's family. In these circumstances, appellant failed to make a record that permits a finding that he was prejudiced by the loss of any testimony regarding sympathy or remorse. (See, e.g., *People v. Whitt, supra*, 51 Cal.3d at p.648-650 [where record failed to show substance or content of defense penalty phase mitigation evidence, any error harmless]; see also *People v. Anderson* (2001) 25 Cal.4th 543, 580-581.)

XX.

THE TRIAL COURT PROPERLY RESTRICTED EVIDENCE OF LAWSUITS FILED AGAINST LYNWOOD DEPUTIES

Appellant contends the trial court erroneously excluded evidence during the penalty phase regarding alleged misconduct by Lynwood deputies and a resulting civil lawsuit. Appellant specifically complains that he was not able to ask Deputy Westin regarding his characterization of the lawsuit as "little" and that the trial court excluded defense witness Terri Clark's testimony that appellant and others in the community were afraid of the deputies due to the deputies' alleged criminal activities. Appellant further contends the trial court improperly instructed the jury to disregard Clark's testimony. Appellant maintains that the actions of the trial court denied him his federal constitutional right to present all mitigating evidence in violation of the Eighth and Fourteenth Amendments to the federal Constitution. (AOB339-345.) Appellant's claims lacks merit.

A. Factual Background

During cross-examination of Deputy Westin, trial counsel elicited evidence that in 1990 or 1991, Deputy Blair shot Anthony Shelton, who was carrying a spear. Trial counsel also asked whether Deputy Westin knew that there were allegations that Deputy Blair beat Feliciano Gonzalez in 1993 and

kicked Vincent Brown in 1991. (RT 2478-2479.) Trial counsel elicited Deputy Westin's testimony that "flashlight therapy" was a term that was "made up" in a civil lawsuit. Trial counsel asked Deputy Westin whether he was aware that there were allegations that Deputy Blair struck Randy Brown with a flashlight in 1991 and beat Raul Gonzales in 1990. (RT 2481.)

Trial counsel asked whether Deputy Westin was aware that there was a lawsuit filed filed against Deputy Blair alleging excessive use of force. Deputy Westin responded that there was a lawsuit against all of the deputies at the Lynwood Sheriff's station, and that he believed the lawsuit was "frivolous." (RT 2483.) Trial counsel asked whether Deputy Blair was a member of the Vikings. (RT 2483-2485.) On redirect, Deputy Westin testified that the Vikings was a multi-ethnic group of deputies who were good friends and the Vikings was the Lynwood Station's mascot which was "not made infamous until this lawsuit where the plaintiffs . . . created this sinister motivation behind getting a tattoo." (RT 2485-2490.)

On recross examination, trial counsel asked Deputy Westin to explain the lawsuit. The trial court stated:

> No, we're not going . . . into . . . the lawsuit. 352 grounds, we're not going to get into details. [¶] I will take judicial notice that the lawsuit was filed in 1990, ladies and gentlemen. I have ruled it is remote. We're not going to get into it.

(RT 2490.) At sidebar, trial counsel argued that Deputy Westin mischaracterized the lawsuit as "little," stating that it had in fact settled for seven and a half million dollars. The trial court responded:

> The problem with it, if you get into that, then they [the prosecution] are entitled to get into the fact that [Deputy] Blair paid no particular role in the lawsuit. We get into all the 352 issues that we identified at a hearing that we had.
>
> The fact that he calls it a little lawsuit, and you want to say, well, gee it settled for 7 million, you know lawsuits settle for different reasons and things that I don't want this jury to be focused on. I am going to let it go. I just think that the ruling I made before is the appropriate ruling.
>
> We're not going to get into it. I let you go a long ways with him with the Vikings. I think it has been explained to my satisfaction. I think both sides have had an opportunity to delve into it. To go further is just going to take us off down the road.
>
> It really isn't appropriate for this particular penalty phase where we are trying to determine whether [appellant] should live or die. That is where I want to stay with the focus on this.
>
> So I am going to sustain the objection that I made to that.

(RT 2491-2492.)

During direct examination of Clark, she testified that appellant was afraid of the deputies, that others were afraid of them, and that the deputies engaged in criminal activity. Clark added, "[i]f I am wrong, then why did we win over 700 million or 7 million." The following colloquy took place:

> THE COURT: No, you don't understand –
>
> THE WITNESS: I do understand.
>
> THE COURT: Ms[.] Clark, I am going to stop you now. This is not appropriate in this proceeding. [¶] I am very disappointed that you did not respond to the question.
>
> MR. RICHMAN: I move to strike all of her answer –
>
> THE COURT: Ladies and gentlemen, you must not consider anything she said in response to the last question. It is not relevant here and it gets us off into areas that I have ruled are not appropriate for this jury to consider.
>
> So don't speculate as to what motivation the witness might have had or what she said or why she said what she said. [¶] But it was inappropriate. And I want you to disregard it.

(RT 2691-2692.)

B. Analysis

As set forth above, a capital defendant has a federal constitutional right to present relevant mitigating evidence. (See Arg. XXIX, *ante.*) However,

the United States Supreme Court has never suggested that this right precludes the state from applying ordinary rules of evidence to determine whether such evidence is admissible. [Citations.]

(*People v. Smithey* (1999) 20 Cal.4th 936, 995.)

Specifically, in a penalty phase proceeding, a trial court still has the authority to exclude irrelevant evidence which "has no bearing on the defendant's character, prior record, or the circumstances of the offense." (*People v. Frye, supra*, 18 Cal.4th at p. 1015; *People v. Fauber* (1992) 2 Cal.4th 792, 856.) Further, a trial court in a penalty proceeding "retains discretion to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury. [Citations.]" (*People v. Fauber, supra*, 2 Cal.4th at p. 856.)

Appellant first contends that evidence of the lawsuit should have been admitted to foster lingering doubt. (AOB 341-342.) This contention should be rejected. "Evidence intended to create a reasonable doubt as to the defendant's guilt is not relevant to the circumstances of the offense or the defendant's character and record." (*In re Gay* (1998) 19 Cal.4th 771, 813-814.) Further, though jurors at the penalty phase may consider any lingering doubts regarding a defendant's guilt

"this does not mean that the defendant may introduce evidence, not otherwise admissible at the penalty phase, for the purpose of creating a doubt as to the defendant's guilt."

(*People v. Zapien* (1993) 4 Cal.4th 929, 989.)

Appellant further contends that evidence of the lawsuit and the community's fear of deputies due to their misconduct should have been admitted as evidence that "extenuated" his crimes. (AOB 342.) The claim is meritless.

Here, the trial court did not abuse its discretion by prohibiting appellant from eliciting further details from Deputy Westin regarding the civil lawsuits filed against the Los Angeles County Sheriff's Department because such evidence had little, if any, relevance to the question at issue during the penalty phase: whether appellant should receive life imprisonment or a death sentence. The trial court already had permitted appellant, during the penalty phase, to introduce evidence that a civil lawsuit had been filed against deputies, that the lawsuit included allegations of "flashlight therapy," and that there were additional lawsuits or complaints filed by persons alleging Deputy Blair used excessive force. (RT 2481-2483.) The trial court merely prohibited appellant from presenting additional details regarding the series of lawsuits filed against the Los Angeles County Sheriff's Department in federal court. (RT 2490-2492; see RT 1415-1419.) The details of the federal civil lawsuits were not relevant to any issue at the penalty phase. Specifically, the fact that those lawsuits

allegedly settled for millions of dollars did not establish, as fact, that deputies at the Lynwood Station engaged in wrongdoing, and had little, if any, probative value regarding appellant's character, prior record, or circumstances of the murder of Deputy Blair.

Moreover, any probative value of the details of the federal civil lawsuits was outweighed by Evidence Code section 352 factors. As set forth more fully above (see Arg. II, *ante.*), such evidence involved the risk of confusing the jurors by shifting their focus away from the issues involved in the penalty phase to facts and allegations involved in the federal civil lawsuits, would have caused undue consumption of time in explaining the nature, result, and details of those lawsuits, and involved allegations that of wrongdoing that took place before 1990 or 1991, which were remote in time from the instant crimes which occurred in 1995.

Further, any error in excluding the details of the lawsuit was harmless beyond a reasonable doubt. (*People v. Frye, supra,* 18 Cal.4th at pp. 1015-1017; *People v. Whitt, supra,* 51 Cal.3d at pp. 647-648.) As set forth above, the trial court permitted evidence that a civil lawsuit had been filed against all the deputies at Lynwood Station, and that several persons alleged in complaints or other lawsuits that Deputy Blair used excessive force. Thus, any error in excluding details regarding the federal civil lawsuit was harmless.

Also, the trial court did not bar appellant from presenting evidence regarding his fear or the fear of others in his community of the deputies due to their alleged misconduct. The most reasonable reading of the record shows the trial court ruled that Clark's testimony regarding the lawsuit was inadmissible. (RT 2691-2692.) Moreover, any error in excluding the portion of Clark's testimony regarding the fear in the community of the deputies due to their alleged misconduct, and any related instructional error in this regard, was harmless because the jurors were presented with extensive evidence during the guilt phase that Lynwood deputies, and in particular Deputy Blair, engaged in alleged misconduct including beatings and shootings (see RT 1205, 1318. 1334-1335, 1531-1532, 1595-1612, 1652-1654, 1879-1885, 1908-1911) and that Avila carried a gun for protection from the other gangs and the police (RT 1596). The jurors were instructed that they could consider evidence received from the entire trial. (RT 2725). Further, trial counsel argued in closing that, at the time of the crimes, appellant and other Young Crowd members "felt that they were being abused, that they were getting flashlight therapy, that they were beaten, that people were shot unjustified by the sheriffs." (RT 2783-2784.) In light of the extensive evidence of alleged misconduct, instructions to the jury, and the argument of trial counsel, the jury was well aware that an "extenuating" circumstance of the crime was the alleged misconduct by deputies which caused appellant and other people in his community to be afraid.

XXI.

THE TRIAL COURT PROPERLY LIMITED TESTIMONY REGARDING THE IMPACT THAT APPELLANT'S EXECUTION WOULD HAVE ON HIS FAMILY

Appellant contends the exclusion of evidence of the "deleterious" impact his death would have on his family and friends denied him his federal constitutional right to present all mitigating evidence in violation of the Eighth and Fourteenth Amendments of the federal Constitution. (AOB 345-349.) Appellant's claim lacks merit.

A. Factual Background

Trial counsel asked appellant's sister Sasa Fuiava how it would affect her if appellant was executed. The prosecutor objected that the question called for inappropriate penalty phase evidence. The trial court agreed, stating that "I don't think that is appropriate technically." The trial court stated Sasa could testify about "the love for her brother and good things in his life and why she would not want the death verdict in this case." (RT 2631-2632.) Sasa then testified that she did not want a death verdict "Because no one knows him like we do. Because he . . . is a friend." She also testified that appellant protected himself and a friend, and did not deserve the death penalty. (RT 2632.)

B. Analysis

> A jury must decide whether a defendant deserves to die, not whether the defendant's family deserves to suffer the pain of a member's execution, but may consider the positive qualities of his background or character that would be illuminated by the impact his execution would have on his family.

(*People v. Carter* (2003) 30 Cal.4th 1166, 1205; *People v. Ochoa, supra*, 19 Cal.4th at p. 456 ["sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation, but that family members may offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character."].)

The trial court's ruling that appellant's sister could not testify regarding the impact of appellant's execution on her was proper to the extent it was ruling that such evidence was inadmissible solely to prove sympathy for appellant's family. To the extent appellant asserts the evidence should have been admissible as indirect evidence of his character, appellant has waived that contention by failing to press the trial court to explain its ruling below.

Moreover, any error in precluding Sasa from testifying regarding the impact of appellant's execution on her as indirect evidence of his character was harmless, since it is not reasonably possible the jury would have decided the penalty differently. The trial court permitted Sasa to testify regarding her love

for appellant, the good things in appellant's life, and why she did not want a death verdict. Additionally, three other members of appellant's family were permitted to testify regarding the effect of appellant's execution on them. (RT 2644-2645, 2652, 2665.)

XXII.

THE TRIAL COURT PROPERLY REFUSED APPELLANT'S REQUESTED INSTRUCTIONS ON LINGERING DOUBT

Appellant contends the trial court's refusal to give his requested instructions on lingering doubt violated his rights under the Sixth, Eighth and Fourteenth Amendments to the federal Constitution, as well as state law which "obligates the court to give an instruction requested by the defense that pinpoints a basis for the jury to return a verdict that favors the defendant." (AOB 349-358.) Respondent submits the trial court properly refused to give appellant's requested instructions on lingering doubt.

A. Relevant Proceedings

1. Appellant's Requested Instructions

Appellant requested two instructions on lingering doubt. The first appears at page 745 of the Clerk's Transcript:

> Each individual juror may consider as a mitigating factor residual or lingering doubt as to whether the defendant had premeditation when he killed the victim. Lingering or residual doubt is defined as the state of mind between beyond a re[a]sonable doubt and beyond all possible doubts.

Thus if any individual juror has a lingering or residual doubt about whether the defendant had premeditation when he killed the victim, he or she must consider this as a mitigating factor and assign to it the weight you deem appropriate.

The second requested instruction appears at page 746 of the Clerk's Transcript:

Although proof of guilt beyond a reasonable doubt has been found, you may demand a greater degree of certainty for the imposition of the death penalty. The adjudication of guilt is not infallible and any lingering doubts you entertain on the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that at some time in the future, facts may come to light which have not yet been discovered.

2. The Trial Court's Ruling

The trial court refused to give either requested instruction, stating:

As to the lingering doubt instruction, there is a special instruction B that is pled in different language. My feeling on lingering doubt, Mr. Hauser, you are clearly entitled to argue it but I think I have been persuaded by more recent cases that the defendant has no federal or state constitutional right to have the penalty phase jury instructed to consider any residual doubt about the defendant's guilt, referencing Franklin versus Lynaugh, L-Y-N-A-U-G-H, 487 U.S. 164 at 173,

People versus Johnson, 3 Cal.4th, 1183 at 1252, People versus Cox, 53 Cal.3d 618, 667, and People versus Medina at 11 Cal.4th 694 at 743.

So I am saying there is no restriction on you arguing it. I just think that given the authority that I cited, that it's not necessary in my view, it is not appropriate to give on the facts of this case.

I think that the emphasis should be on the emotional and other factors in the arguments.

I will say this, that certainly, People versus Zapien, Z-A-P-I-E-N, 4 Cal.4th, 929 says the jury may consider any lingering doubts about the defendant's guilt and that the D.A., of course, may remind the jury in the penalty phase that it is not to redetermine guilt.

But I will leave that up to both of you to argue, as you say, as you see fit. But as far as giving the instruction, I don't find it appropriate and both special instructions will be refused.

(RT 2713-2714.)

3. Appellant's Argument To The Jury

Although appellant advised the penalty jury that "we accept your verdict" (RT 2785-2786), he effectively argued lingering doubt when he told the jury the following:

[The prosecutor] predicted that I was going to talk to you about lingering doubt. Sure. That's because he sees it. He knows that it is

in this case because he doesn't have concrete, solid absolute 100 percent proof of what happened in this case.

And he plead with you don't let me change your mind. Well, hopefully your minds aren't made up yet because you haven't heard my argument.

(RT 2792.) Defense counsel also urged the jury to look at the evidence of the crime to determine if the death penalty was warranted:

Now, I'm not going to stand here and reargue the case. I already did that. But I am standing here before you and I'm asking you do you really know what happened that night for absolute certainty?

And I am asking you, ladies and gentlemen, before we execute [appellant] I think we should know absolutely what happened that night.

(RT 2785; see RT 2783.) Defense counsel also told the jury "We don't know" what happened on the evening Deputy Blair was killed:

And I'm asking you not to take a chance. Because if we execute [appellant], there's no bringing him back, and if we're wrong about what really happened that night, it's too late.

(RT 2786.) Defense counsel also told the jury that the facts of the underlying murder were "too vague" on which to execute appellant. (RT 2795.)

B. Legal Analysis

Appellant's claim that the trial court erred in refusing to give the requested instructions on lingering doubt was squarely rejected by this Court in *People v. Hines* (1997) 15 Cal.4th 997, 1068:

> "Special Instruction No.8" would have instructed the jury that it could consider "lingering doubt" regarding defendant's guilt in determining the appropriate penalty. The proposed instruction was unnecessary. The trial court instructed the jury that in making its penalty determination, it could consider "the circumstances of the crime of which defendant was convicted in the present proceeding and the existence of any special circumstance found to be true" (§190.3, factor (a)), and "any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial" (see *id.*, factor (k)). These instructions sufficiently encompassed the concept of lingering doubt, and the trial court was under no duty to give a more specific instruction. (*People v. Osband* (1996) 13 Cal.4h 622, 716 [55 Cal.Rptr.2d 26, 919 P.2d 640]; *People v. Sanchez* (1995) 12 Cal.4th 1, 78 [47 Cal.Rptr.2d 843, 906 P.2d 1129]; *People v. Price, supra*, 1

Cal.4th at p. 489.) The court properly permitted defendant to argue to the jury that it should not impose the death penalty if it had "lingering doubts" regarding defendant's guilt.

Here, as in *Hines*, the trial court instructed the jury that in making its penalty determination it could consider the "circumstances of the crime" (factor (a)) and "any other circumstance which extenuates the gravity of the crime" (factor (k)). (CT 773-774.) And, as noted above, defense counsel effectively argued "lingering doubt" to the jury in argument. (See RT 2783, 2785, 2786, 2792, 2795.) Thus, the trial court did not err in refusing to give the requested instructions on "lingering doubt."

This Court has also rejected appellant's claims that the trial court's refusal to give the requested instructions on lingering doubt violated the federal Constitution. In *People v. Staten* (2000) 24 Cal.4th 434, 464, this Court stated:

> Defendant raises additional claims under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution. They, too, are meritless. The federal constitutional provisions are not implicated. The United States Supreme Court has held that capital defendants have no federal constitutional right to such an instruction. (*Franklin v. Lynaugh* (1988) 487 U.S. 164, 173-174 [108 S.Ct. 2320, 2327, 101 L.Ed.2d 155].)

(See also *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219; *People v. Millwee, supra*, 18 Cal.4th at p. 166.) Appellant's contention must be rejected.

XXIII.

APPELLANT WAIVED MOST OF HIS CLAIMS OF PROSECUTORIAL MISCONDUCT DURING THE PENALTY PHASE; IN ANY EVENT, THERE WAS NO SUCH MISCONDUCT AND/OR ANY MISCONDUCT WAS HARMLESS

Appellant contends that prosecutorial misconduct in the penalty phase requires reversal of the judgment. (AOB 358-386.) Appellant has waived most of his specific claims alleging prosecutorial misconduct by failing to object and seek an admonition.[20/] Even assuming appellant properly preserved any or all of his prosecutorial misconduct claims for appellate review, the claims lack merit and were harmless.

A. Relevant Law

The relevant legal principles regarding claims of prosecutorial misconduct were summarized by this Court in *People v. Gurule, supra*, 28 Cal.4th at p. 657:

> "Under state law, a prosecutor who uses deceptive or reprehensible methods to persuade either the court or the jury has

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20. To the extent appellant asserts the prosecutor's alleged misconduct violated his rights under the First, Sixth, Eighth, and Fourteenth Amendments of the federal Constitution (see AOB 360-361), those claims have been waived since appellant never asserted those claims in the trial court. (See *People v. Williams, supra*, 16 Cal.4th at p. 250; *People v. Jackson, supra*, 13 Cal.4th at p. 1231, fn. 17; *People v. Raley, supra*, 2 Cal.4th at p. 892.)

committed misconduct, even if such action does not render the trial fundamentally unfair. [¶] Nevertheless, as a general rule, to preserve a claim of prosecutorial misconduct, the defense must make a timely objection and request an admonition to cure any harm. The rule applies to capital cases. [Citations.]" "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]"

(Citations omitted.)

B. Claims Of Improper Question And Courtroom Behavior

Appellant first contends that the prosecutor committed misconduct by eliciting testimony from Detective Kaono at the penalty phase regarding the 1984 shooting of Cristina Anthony that appellant's nickname was "Devil" and, while questioning the detective, repeating appellant's reference to rival gang members as "faggot" gang members as the reason for why he shot into the car. (AOB 361-362.) Appellant has waived these claims by failing to raise specific objections and request admonitions. Specifically, appellant did not object to the

"Devil" testimony and did not object to the prosecutor's questions incorporating appellant's "faggot" reference on grounds that such questioning was inflammatory. (RT 2421-2423, 2428-2430.) (See, e.g., *People v. Sapp, supra*, 31 Cal.4th at p. 279; *People v. Navarette , supra,* 30 Cal.4th at p. 507.)

In any event, the prosecutor's questions were based on evidence before the jury. The jury was aware that appellant had the nickname "Devil" based on Avila's testimony during the guilt phase. (RT 1641.) Further, the jurors were aware that appellant called rival gang members "faggots" based on Detective Kaono's penalty phase testimony that appellant shot into the car was because he believed the passengers were "faggot Segundo gang members." (RT 2428-2429.)

Appellant also contends that the prosecutor committed misconduct by eliciting evidence that Detective Kaono had at least ten interviews with appellant. (AOB 362.) Appellant objected on the ground that any evidence regarding additional contacts Detective Kaono had with appellant were irrelevant. The trial court sustained the objection, but appellant did not seek an admonition that the jurors disregard Detective Kaono's testimony. (RT 2438-2441.) Appellant's failure to seek a curative admonition constitutes waiver of this claim. (*People v. Sanders, supra*, 11 Cal.4th at p. 549; *People v. Miller* (1990) 50 Cal.3d 954, 1001.) Moreover, any error was harmless, as the trial court sustained appellant's objection. (*People v. Pinholster, supra*, 1 Cal.4th at

p. 943 [generally, a party is not prejudiced by a question to which an objection has been sustained].)

Appellant next contends the prosecutor's tone in questioning him and his mother constituted misconduct. (AOB 362-363.) Appellant waived any claim regarding the prosecutor's tone in questioning his mother because he did not object. (RT 2701.) Further, any alleged error regarding the prosecutor's tone during questioning of appellant's mother was harmless because the trial court sustained objections to questions which were argumentative (RT 2701, 2710-2711) and the jury was instructed that the attorneys' statements were not evidence and that they were not to be influenced by sentiment, conjecture, or prejudice (RT 2726-2727; CT 768).

Finally, appellant contends the prosecutor committed misconduct by wearing a Viking pin during the guilt phase and by eliciting testimony from Deputy Westin during the penalty phase regarding the meaning of the pin and Viking symbol. (AOB 363-364.) Appellant has waived these claims by failing to raise a specific objection and to seek an admonition. The record reflects appellant made no objection regarding the prosecutor's wearing of the pin, and sought no admonition. (RT 2488-2491.)

Further, appellant has not demonstrated that this conduct by the prosecutor was reprehensible or deceptive, or that it was so egregious that it resulted in a denial of due process. In this regard, appellant has not even

demonstrated that Deputy Westin's testimony regarding the pin was inadmissible. Also, appellant has not shown that the wearing of the pin was deceptive, reprehensible, or egregious. Moreover, in light of the fact the trial court ordered the prosecutor to take the pin off (RT 2507), and the instructions that the jurors were to decide the case based on the evidence presented during the entire trial, and that they were not to be "influenced by bias or prejudice against the defendant, nor swayed by public opinion nor public feelings" (RT 2725; CT 766), any alleged prejudice from the prosecutor's wearing of the pin was harmless since the jury would not have reached a different penalty result absent the alleged misconduct. (See *People v. Cunningham, supra*, 25 Cal.4th at p. 1019.)

C. Claims Of Misconduct During Closing Argument

As set forth above more fully (see Arg. XII, *ante*), a prosecutor's remarks to the jury do not constitute misconduct unless there is a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. (*People* v. *Berryman, supra,* 6 Cal.4th at p. 1072.) Specifically, in closing argument, a prosecutor is entitled to wide latitude and may comment on the evidence, reasonable inferences drawn from the evidence, and matters of common knowledge drawn from common experience, history, or literature. (*People v. Hill, supra*, 17 Cal.4th at p. 819; *People v. Farmer* (1989) 47 Cal.3d 888, 922.)

1. Claims That The Prosecutor Referred To Facts Not In Evidence And Misstated The Evidence

Appellant raises several contentions alleging that the prosecutor misstated the evidence or argued facts not in evidence. First, appellant contends the prosecutor committed misconduct by arguing that appellant was a "killing machine," that the evidence showed appellant shot three people, and then asking the jurors how many other persons appellant had shot. (AOB 368, 375.) Appellant waived this claim by failing to object to this argument. (RT 2763.) Moreover, the prosecutor was properly drawing a reasonable inference, based on evidence that appellant had been convicted of three shootings and admitted two others, that appellant may have shot at other persons. Prosecutors have broad latitude to argue reasonable inferences based on evidence presented at trial. (*People v. Fierro, supra*, 1 Cal.4th at p. 242; *People v. Edwards* (1991) 54 Cal.3d 787, 839.)

Appellant also contends the prosecutor committed misconduct by arguing that appellant "enjoyed" prison, would have access to movies, a gym, and conjugal visits, and would be considered a "hero" for having killed a police officer. (AOB 371, 375; RT 2764, 2775-2776.) Appellant objected only to the prosecutor's comments regarding the gym and conjugal visits (RT 2775-2776), and as such, has waived his claims regarding the other complained-of comments. Moreover, the prosecutor, in arguing about the conditions of prison that

appellant would face, was merely pointing out matters of common knowledge, which he was entitled to do.

Appellant further contends that the prosecutor improperly speculated that appellant would engage in misconduct while in prison, including possible joining a prison gang and posing a threat to prison staff. (AOB 370, 375; RT 2774-2775.) Appellant made no objections to these comments and thus has waived the claim. Further, the prosecutor's argument that appellant might join a prison gang was based on a matter of common knowledge, that there are such prison gangs, and was a reasonable inference based on evidence that appellant was already a member of a street gang. Moreover, the prosecutor's argument that appellant could pose a threat to prison staff was properly based on evidence of appellant's past violent crimes. (*People v. Michaels* (2002) 28 Cal.4th 486, 540-541; see also *People v. Danielson, supra*, 3 Cal.4th at pp. 720-721 [prosecutor committed no misconduct by asking jurors whether they would like their husbands or sons to be a prison guard or transportation officer handling defendant]; *People v. Fierro, supra,* 1 Cal.4th at p. 249 ["we have consistently held that it is not misconduct for a prosecutor to argue at the penalty phase that if a defendant were sentenced to prison he might kill another prisoner"].)

Appellant also contends the prosecutor improperly referred to facts not supported by the evidence at trial by: (1) referring to the bombing at the 1996 Olympics and stating that six Georgia policemen and a federal agent were

injured (RT 2756); (2) referring to a newspaper article indicating a CHP officer had been killed (RT 2781); (3) arguing that Deputy Blair saved lives every day, and appellant should be put to death because of the lives that Deputy Blair would be unable to save (RT 2757); (4) arguing that people who lived on Walnut Avenue (the street where the shooting took place) were afraid of appellant and his "homeboys" (RT 2750-2751); and (5) arguing that appellant's parole officer told him not to carry a gun (RT 2769). (AOB 365, 367, 372.)

Appellant did not object to the comment regarding the 1996 Olympics, the argument that Deputy Blair saved lives every day, or the comment that appellant's parole officer told him not to carry guns (RT 2755-2757, 2769) and, as such, has waived those claims of misconduct. In any event, the claims were meritless and/or harmless. The prosecutor mentioned the 1996 Olympics to illustrate his point that police officers risked their lives to protect society, and there is no reasonable likelihood the jurors understood that comment in any erroneous manner. Moreover, the prosecutor properly drew a reasonable inference from the evidence that Deputy Blair saved lives based on testimony regarding Deputy Blair's commendations for his police work. (RT 2466-2475.) Similarly, the prosecutor's comment that appellant's parole officer told him not to carry guns was based on evidence at the guilt phase that the parole officer told appellant about his conditions of parole, one of which was not to own, use, or have under his control a firearm. (RT 1011-1021, 1030-1040.)

Also, because the trial court sustained appellant's objection to the prosecutor's reference to the newspaper article about the killing of a CHP officer and admonished the jury to disregard it (RT 2781), there was no prejudice from that remark. (*People v. Pinholster, supra*, 1 Cal.4th at p. 943.) Similarly, there was no prejudice from the remark about people on Walnut Street being afraid of appellant and Young Crowd because the trial court sustained appellant's objection to that comment. (RT 2751.)

2. Miscellaneous Claims Of Misconduct In Closing Argument

a. Description Of Appellant

Appellant contends the prosecutor improperly repeatedly referred to him by his nickname "Smokey." (AOB 366.) Appellant has waived this contention by failing to raise objections to the prosecutor's use of appellant's moniker. (RT 2744-2745, 2749, 2755, 2766, 2768, 2771, 2773-2774, 2778.) Moreover, the prosecutor's use of appellant's nickname was proper, because the evidence at trial showed that was appellant's gang moniker. (RT 1641.)

In related contentions, appellant asserts the prosecutor committed misconduct by calling him an "animal," a "predator," and a "killing machine." (AOB 367; RT 2757.) Appellant did not object to the "predator" or "killing machine" comments and thus has waived those claims. (RT 2757.) Further, the claims lack merit. The use of epithets does not, in of itself, constitute

misconduct. (*People v. Hawkins, supra*, 10 Cal.4th at p. 961.) Epithets are within the range of permissible comment if they are based on the defendant's egregious conduct. (*People v. Thomas* (1992) 2 Cal.4th 489, 537.) The prosecutor's descriptions of appellant in the instant case were properly based on his conduct of repeatedly shooting at people. Additionally, there was no prejudice from the "animal" comment, as the trial court sustained appellant's objection to that remark. (RT 2757.)

b. Arguments To "Back Up" The Police; Appeals To Emotion

Appellant asserts the prosecutor committed misconduct by telling the jury to sentence appellant to death to "back up" the police and send a message that the killing of an officer would not be tolerated. (AOB 366, 372.) Appellant did not object to these comments and thus has waived any claim of error related to those comments. (RT 2753-2755, 2780.) (See, e.g., *People v. Boyette* (2002) 29 Cal.4th 381, 456 [failure to object to prosecutor's comments regarding murders in society in general and the jury's duty to stop the violence constitutes waiver].)

Moreover, isolated, brief references during argument to "retribution" and "community outrage," and argument that imposing the death penalty would restore confidence in the criminal justice system, though potentially inflammatory, are not misconduct as long as they do not form the principal basis

for advocation of the death penalty. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1222; *People v. Wash, supra*, 6 Cal.4th at pp. 261-262; *People v. Ghent* (1987) 43 Cal.3d 739, 771.) Here, the prosecutor's comments were not particularly inflammatory, because the Legislature has determined that the death penalty is appropriate for those who kill law enforcement officers. (See § 190.2, subd. (a)(7).) Moreover, the prosecutor argued other grounds for imposition of the death penalty other than retribution and sending a message that killing police officer would not be tolerated, including the circumstances of the crime, and appellant's past violent acts. (RT 2741-2781.) In these circumstances, the comments did not constitute prejudicial misconduct.

c. Reference To Parole

Appellant further contends that the prosecutor improperly referred to parole as a privilege, asserting that parole actually is "simply an additional measure of control the state imposes following imprisonment." (AOB 364.) Appellant has waived this claim by failing to object in the trial court. (RT 2744-2745.) Further, the claim is meritless. The prosecutor did not mischaracterize the purpose of parole. The essence of parole is release from prison before a prisoner completes his sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence, and during parole, a prisoner is free to work and to be with friends and family. (*Young v. Harper* (1997) 520 U.S. 143, 147-148 [117 S.Ct. 1148, 137 L.Ed.2d 270].) Here, the prosecutor,

in arguing that appellant abused the "privilege" of parole, properly pointed out that appellant, while on parole, enjoyed more freedoms than he would have had if he remained in prison, and violated the law while enjoying those freedoms on parole.

d. Photographs

Appellant also complains that the prosecutor, in closing argument, referred to the photo of the shot-up mock sheriff's patrol car and displayed a portrait-style photograph of Deputy Blair. (AOB 364-365.) Appellant raised no objection to the complained-of comments and thus has waived this claim. (RT 2745-2748.) Moreover, the claim is meritless. As demonstrated above, the photographs of the truck and Deputy Blair's uniform were properly admitted during the guilt phase, and thus the jury was familiar with those photographs. (See Arg. VIII, *ante.*) Appellant has also not demonstrated that the photograph "portrait" of Deputy Blair in full uniform was inadmissible. As such, the prosecutor's references to the photographs was not improper or unduly prejudicial. (See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 989-990; *People v. Frank* (1990) 51 Cal.3d 718, 733-734 [the admission of, and the prosecutor's reference to, portrait-style photographs of victims while alive not erroneous because such photographs were relevant as circumstances of the crime to "'put the victims in the proper setting'" and any error was harmless in light of other aggravating evidence].)

e. Alleged References To Marital Privilege

Appellant further asserts that prosecutor improperly commented on appellant's exercise of his marital privilege. (AOB 368, 384.) Appellant has waived this claim by failing to raise a specific objection and by failing ot seek an admonition. (RT 2767-2768.) Further, the claim is meritless. Contrary to appellant's assertion, the record reflects the prosecutor did not refer to appellant's exercise of the marital privilege to keep his wife from testifying, but rather, as pointed out above, simply argued that the appellant failed to present a logical witness in his case in mitigation. (RT 2767-2768; see Arg. XII, *ante.*)

Appellant further complains that the prosecutor referred to facts not in evidence by arguing that the defense was afraid to present appellant's wife's testimony because "they couldn't argue lingering doubt when I asked what he told her." (RT 2768; AOB 384.) Any such error was nonprejudicial as the trial court sustained appellant's objection. (RT 2768.)

Appellant also asserts the prosecutor argued an unreasonable inference, that appellant's wife did not testify because she could offer no mitigating evidence. (AOB 384.) Appellant did not object to this comment and thus has waived this claim. (RT 2768.) Further, to the extent the prosecutor's inference was unreasonable, appellant still had the opportunity to "correct" or otherwise respond to that statement in his closing argument.

Further, appellant's claim that the prosecutor "deterred" appellant's wife from testifying is meritless. (AOB 368, fn. 29.) Here, *appellant* decided not to present his wife as a witness for a tactical purpose; specifically, to prevent the prosecutor from questioning appellant's wife about his incriminating statements to her regarding his involvement in the murder of Deputy Blair. (RT 2578-2581.) Appellant also has not alleged, let alone demonstrated, that the trial court's ruling that appellant waived his marital privilege and that the prosecutor could question appellant's wife regarding his statement to her, was erroneous or improper.

f. References To Bible And Religion

Appellant contends that the prosecutor improperly referred to the Bible and to religion. (AOB 369-370, 372, 379.) Appellant specifically complains about two series of comments. First, the prosecutor stated:

> Okay, that's what they're trying to do, get your sympathy and compassion. [¶] There is an expression that I took out of the Bible. I'm not really a religious person, but this sort of played in: "Blessed are the merciful for they shall obtain mercy." [¶] And the reason why I threw it in – and the comment underneath was, "Yours or his?" [¶] I don't know whose mercy we are supposed to be looking at here. One of the ironies of the criminal justice system – and there are a lot of them, but I have had a lot of time to think about it over the years – is

that they come before a jury of twelve people that they select from the community, and they ask them to apply their morals, to apply their religious standards, their sympathies, their compassions for humanity to Smoky.

Okay, how many of you killed somebody? How many of you go around shooting people in the jaws and creasing their heads and stuff like that? [¶] You don't do that because you have higher morals. You have higher values, religious and otherwise. You have higher sympathies, higher compassions. [¶] You are useful members of our society, and they come in here and they prey upon you. Don't execute him. Use your religious values. Use your morals.

What would happen if he asked you to apply his morals? [¶] How long would your decision take to execute him? Two seconds? Three seconds? [¶] "Blessed are the merciful for they shall obtain mercy." [¶] Are you the merciful? Are you looking for mercy, or is he because he hasn't shown any mercy? [¶] So why should he expect mercy? He's never shown any mercy. [¶] Whose morals, whose values are we going to apply here, yours or his?

(RT 2771-2772.)

Appellant did not object to these comments, and requested no admonition. As such, these claims have been waived. (*People v. McDermott,*

supra, 28 Cal.4th at p. 1001 [failure to object and seek admonition regarding prosecutor's religious references constitutes waiver]; *People v. Hill, supra*, 3 Cal.4th pp. 1011-1012.) Even assuming the claim is cognizable on appeal, it lacks merit.

References to religious doctrine or biblical passages are improper to the extent that they undermine the principle that jurors, in determining the appropriate penalty, should rely upon the instructions given by the court and the evidence presented by the parties. (*People v. Wash* (1993) 6 Cal.4th 215, 261.)

> The primary vice in referring to the Bible and other religious authority is that such argument may "diminish the jury's sense of responsibility for its verdict and . . . imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions."

(*People v. Wash, supra,* 6 Cal.4th at p. 261, quoting *People v. Wrest* (1992) 3 Cal.4th 1088, 1107; see also *People v. Hughes, supra*, 27 Cal.4th at p. 389.)

Here, the prosecutor's comments were not improper. "The prosecutor did not imply or suggest that another, higher law should be applied instead of the court's instructions." (*People v. Hughes, supra*, 27 Cal.4th at p. 392.) Rather, the prosecutor's comments were part of a straightforward argument that they appellant deserved no mercy because he showed none (see *People v. Ochoa, supra*, 19 Cal.4th at p. 465 [proper to urge jurors to show defendant the same

amount of mercy he showed the victim, none]), and that they should not permit appellant to manipulate their religious convictions to save his life.

Appellant also complains about the prosecutor's comments in the following colloquy:

> [MR. RICHMAN]: Again, some of you may have your own religious concerns for imposing the death penalty. Your own religious concerns. Remember, he doesn't have any religious concerns.
>
> MR. HAUSER: Objection, that is speculation.
>
> THE COURT: It's argument. Overruled.
>
> MR. RICHMAN: Thank you. [¶] But some of you may have religious concerns. So what I did was I looked in the Bible a little bit and in Genesis: "Who so shedeth man's blood by man shall his blood be shed. For in the image of God he made man."
>
> MR. HAUSER: Object to Bible references.
>
> THE COURT: Yes, I agree. [¶] I'm going to strike that last argument, ladies and gentlemen. We are not going to be referring to the Bible.
>
> MR. RICHMAN: Don't let your religious convictions save his life. [¶] Don't let him use your morals and your values as a sword or as his shield to prevent you from acting as society's consciousness and doing the right thing.

(RT 2779-2780.)

The prosecutor's comments that the jurors should not let their religious convictions save appellant's life were not improper because, as set forth above, those comments did not imply or suggest that the jurors should apply some higher law other than the court's instructions in determining whether appellant should receive the death penalty. Moreover, the prosecutor's quotation of the Biblical passage indicating that those who shed blood should have their blood shed was nonprejudicial, as the trial court sustained appellant's objection and struck the statement. Finally, to the extent that appellant claims the prosecutor committed misconduct by stating that appellant had no religious convictions, that claim is meritless because the prosecutor was simply drawing a reasonable inference from the evidence, which showed appellant was no longer active in the Mormon church when he was 11 or 12 years old. (RT 2626.)

g. Arguments Regarding Life Without Possibility Of Parole

Appellant contends the prosecutor improperly argued that a sentence of life without the possibility of parole would not constitute any significant punishment for appellant. (AOB 370, 372; RT 2774, 2780.) Appellant did not object to these comments or request any admonition, and thus has waived these claims. Moreover, the comment was a fair inference based on the record, which showed that appellant expected to be sent back to prison for life had he been

detained by Deputies Blair and Lyons because he believed he had two strikes. (RT 1249-1254, 1278, 1332-1334.)

h. Emotional Appeals To Passion/prejudice

Appellant asserts that "much of the prosecutor's conduct during the penalty phase and almost all of his closing argument" violated the rule that counsel may not use arguments that appeal primarily to passion or prejudice. (AOB 374.) The claim should be rejected. As set forth above, appellant raised no objection and sought no admonitions for most of the complained-of misconduct and thus has waived those claims. Moreover, "at the penalty phase ... considerable leeway is given for emotional appeal so long as it relates to relevant considerations.'" (*People v. Sanders, supra*, 11 Cal.4th at p. 551, quoting *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35.) Here, as demonstrated above, the prosecutor's arguments were grounded on the evidence. Moreover, appellant has not demonstrated that any of the prosecutor's argument or conduct was not related to any relevant penalty-phase considerations.

D. Harmless Error

The applicable principles regarding prejudice arising from a claim of prosecutorial misconduct at the penalty phase was summarized by this Court in *People v. Cunningham, supra*, 25 Cal.4th at p. 1019:

> When misconduct has occurred, the defendant must demonstrate that it was prejudicial. To be prejudicial, prosecutorial misconduct

must bear a reasonable possibility of influencing the penalty verdict. In evaluating a claim of prejudicial misconduct based upon a prosecutor's comments to the jury, we decide whether there is a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner.

(Citations omitted.)

Applying the principles to the instant case, any alleged misconduct was nonprejudicial. First, as noted by the trial court, there was extensive aggravating evidence, including: (1) the circumstances of the offense involved the "unjustified, unprovoked shooting at sworn law enforcement officers attempting to discharged their duties [which] is the height of lawlessness and must not be tolerated in a civilized society"; (2) appellant's history of violence, including shooting a woman when he was 13 and incurring two subsequent convictions for assault with a firearm; and (3) appellant was carrying two handguns at the time of the offense, in knowing violation of a parole condition. (RT 2817-2818.) Further, the jury deliberated less than one full day before reaching its penalty verdict (RT 2799-2802), a fact tending to show there was no reasonable possibility that the jury would have reached a more favorable verdict had the purported misconduct not occurred.

Moreover, the jurors were instructed that the statements of the attorneys were not evidence, that they were to decide the evidence based on the evidence,

and that they were not to be influenced by bias or prejudice against the defendant, or swayed by public opinion or public feelings . (RT 2725-2727; CT 766, 768.) In light of these instructions, it was not reasonably possible the jurors misunderstood or misapplied any of the alleged improper statements, arguments, or questions of the prosecutor in an erroneous or improper way. Accordingly, in light of the overwhelming aggravating evidence, the instructions to the jury, and the short length of the jury deliberations, it is not reasonably possible that appellant would have received a better result had that alleged prosecutorial misconduct not occurred. (See *People v. Cunningham, supra*, 25 Cal.4th at p. 1019.)

XXIV.

THE SPECIAL CIRCUMSTANCES IN SECTION 190.2 ADEQUATELY NARROWS THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY

Appellant contends the failure of the California's death penalty law to meaningfully distinguish those murders in which the death penalty is imposed from those in which it is not requires reversal of the death judgment. Specifically, appellant contends his death sentence is invalid because section 190.2 is impermissibly broad and fails adequately to narrow the class of persons eligible for the death penalty. (AOB 386-398.) This contention is meritless.

The United States Supreme Court has found that California's requirement of a special circumstance finding adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 871, 79 L.Ed 29].) Likewise, this Court has repeatedly rejected, and continues to reject, the claim raised by appellant that California's death penalty law contains so many special circumstances that it fails to perform the narrowing function required under the Eighth Amendment or that the statutory categories have been construed in an unduly expansive manner. (*People v. Barnett, supra*, 17 Cal.4th at p. 1179; *People v. Arias, supra*, 13 Cal.4th at pp. 186-187; see also *People v. Burgener, supra*, 29 Cal.4th at p. 884 ["Section 190.2, despite the number of special circumstances it includes,

adequately performs its constitutionally required narrowing function."]; *People v. Kraft* (2000) 23 Cal.4th 978, 1078 ["The scope of prosecutorial discretion whether to seek the death penalty in a given case does not render the law constitutionally invalid."]; *People v. Ray* (1996) 13 Cal.4th 313, 356; *People v. Crittenden* (1994) 9 Cal.4th 83, 152, 155-156; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 468.) Appellant claim must be rejected.

XXV.

CALIFORNIA'S DEATH PENALTY LAW DOES NOT REQUIRE FINDINGS BY A UNANIMOUS PENALTY JURY BEYOND A REASONABLE DOUBT OF THE PRESENCE OF ONE OR MORE AGGRAVATING FACTORS THAT OUTWEIGHED MITIGATING FACTORS

Appellant contends his death judgment must be reversed because it was not premised on findings by a unanimous jury beyond a reasonable doubt of the presence of one or more aggravating factors that outweighed mitigating factors. (AOB 398-410.) Appellant claims his constitutional rights under the Eighth and Fourteenth Amendments to the federal Constitution were violated because the penalty jury

> was not told that it had to find the presence of any of the aggravating factors specified by section 190.3 beyond a reasonable doubt that those factors outweighed the mitigation. Nor was the [penalty] jury told that it needed any agreement on these findings, let alone unanimity, before determining whether or not to impose the death sentence. Furthermore, [the penalty jury] was not required to specify in any way how it arrived at its death sentence.

(AOB 398-399). Appellant's contentions have been rejected by this Court.

Unlike the determination of guilt, the sentencing function at the penalty phase of the trial is inherently moral and normative, not functional, and thus not susceptible to a burden-of-proof qualification. (*People v. Burgener, supra*, 29 Cal.4th at pp. 884-885; *People v. Anderson, supra,* 25 Cal.4th at p. 601; *People v. Welch*, (1999) 20 Cal.4th 701, 767; *People v. Sanchez, supra*, 12 Cal.4th at p. 81; *People v. Daniels, supra*, 52 Cal.3d at p. 890.) This Court has repeatedly rejected claims identical to appellant's claim regarding the burden of proof. (*People v. Burgener, supra*, 29 Cal.4th at pp. 884-885; *People v. Anderson, supra*, 20 Cal.4th at p. 601; *People v. Welch*, *supra*, 20 Cal.4th at pp. 767-768; *People v. Ochoa, supra*, 19 Cal.4th at p. 479; *People v. Holt, supra*, 15 Cal.4th at pp. 683-684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"].)

Neither the state nor federal Constitutions require the penalty jury to agree unanimously as to aggravating factors. (*People v. Jones* (2003) 29 Cal.4th 1229, 1267; *People v. Fairbanks* (1997) 16 Cal.4th 1223, 1255; *People v. Osband* (1996) 13 Cal.4th 622, 710; *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["We have consistently held that unanimity with respect to aggravating factors is not required by statute or as a constitutional safeguard"].)

And, this Court has held, and should continue to so hold, that the penalty jury need not make written findings disclosing the reasons for its penalty determination. (*People v. Burgener, supra*, 29 Cal.4th at pp. 884-885; *People*

v. Anderson, supra, 25 Cal.4th at p. 601; *People v. Hughes* (2002) 27 Cal.4th 287, 405; *People v. Welch, supra*, 20 Cal.4th at p. 772; *People v. Ochoa, supra*, 19 Cal.4th at p. 479; *People v. Fairbanks, supra*, 16 Cal.4th at p. 1256.) The above decisions are consistent with the Supreme Court's pronoucment that the federal Constitution "does not require that the jury specify the aggravating factors that permit the imposition of capital punishment." (*Clemmons v. Mississippi* (1990) 494 U.S. 738, 746, 750 [110 S.Ct. 144, 108 L.Ed. 2d 725] citing *Hildwin v. Florida* (1989) 490 U.S. 638 [109 S.Ct. 2055, 104 L.Ed. 2d 728].)

Appellant argues, however, that this Court's decisions are invalid in light of *Ring v. Arizona* (2002) 536 U.S. 584 and *Apprendi v. New Jersey* (2000) 530 U.S. 466. (AOB 399-406.) This Court has considered and rejected appellant's argument by finding that neither *Ring* nor *Apprendi* affect California's death penalty law. (*People v. Prieto* (2003) 30 Cal.4th 226, 262-263, 271-272; *People v. Snow, supra*, 30 Cal.4th at p. 126, fn. 32; see *People v. Smith, supra*, 30 Cal.4th at p. 642.)

XXVI.

CALIFORNIA'S DEATH PENALTY LAW IS CONSTITUTIONAL

Appellant raises several issues regarding the constitutionality of the California death penalty law. None of these contentions have merit.

A. Section 190.3, Factor (a), Is Not Impermissibly Overbroad

Section 190.3, factor (a), states:

> In determining penalty, the trier of fact shall take into account any of the following factors if relevant: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

Appellant contends the death penalty is invalid because section 190.3, factor (a), as applied, allows arbitrary and capricious imposition of death in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (AOB 410-422.) Specifically, appellant claims section 190.3, factor (a), is unconstitutional in two respects: (1) it permits artificial inflation by double-counting a fact related to the crime that also constitutes a special circumstance; and (2) it has been applied in a "wanton and freakish" manner that almost all features of every murder have been found to be "aggravating" withing the meaning of the statute. (AOB 413-422.) The issue is without merit.

The Supreme Court has specifically addressed the issue of whether section 190.3, factor (a), is constitutionally vague or improper. In *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750], the Supreme Court commented on factor (a), stating,

> We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

(*Id.* at p. 976.)

This Court has been presented with ample opportunity to revisit the issue raised by appellant since the holding in *Tuilaepa*. However, this Court has consistently rejected the claim and followed the ruling by the Supreme Court. (See, e.g., *People v. Ochoa, supra*, 19 Cal.4th at p. 478, fn. 13; *People v. Milwee, supra*, 18 Cal.4th at p. 164; *People v. Ray, supra*, 13 Cal.4th at p. 358; *People v. Arias, supra*, 13 Cal.4th at p. 187; *People v. Sanchez, supra*, 12 Cal.4th at p. 81; *People v. Medina* (1995) 11 Cal.4th 694, 788; *People v. Sanders, supra*, 11 Cal.4th at pp. 563-564.)

Indeed, just recently, this Court stated that

a jury's finding of aggravation based on circumstances of a crime under section 190.3, factor (a), does not impermissibly permit consideration of a factor that is vague and overbroad, or allow guilt phase crimes to be counted more than once as aggravating factors, thereby unfairly weighing sentencing deliberations in favor of death.

(*People v. Maury* (2003) 30 Cal.4th 342, 439; see also *People v. Hughes, supra*, 27 Cal.4th at pp. 404-405; *People v. Crittenden , supra,* 9 Cal.4th at p. 156.)

There is no need for this Court to revisit the issue. Appellant's claim must be rejected.

B. The Trial Court Was Not Required To Delete Inapplicable Factors From The Statutory List Of Sentencing Factors

Appellant contends the trial court precluded a fair and reliable penalty verdict by failing to delete assertedly "inapplicable" factors from the statutory list of sentencing factors. Appellant maintains that since no evidence was presented as to certain factors (i.e., factors (e), (g), and (j)) there "was a source of confusion, capriciousness, and unreliability [in] the capital decision-making process in violation of the Sixth, Eighth and Fourteenth Amendments." (AOB 422-424.) Appellant correctly notes, this Court has previously rejected this identical claim. (AOB 422-423.)

This Court has consistently rejected claims similar to appellant's claim and held that the failure to delete assertedly inapplicable mitigating factors from

the instructions does not violate the federal Constitution. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1138; *People v. Reil* (2000) 22 Cal.4th 1153, 1225; *People v. Earp, supra*, 20 Cal.4th at p. 899; *People v. Frye, supra*, 18 Cal.4th at pp. 1026-1027; *People v. Osband , supra*, 13 Cal.4th at p. 704.) As noted by this Court in *People v. Ghent, supra* , 43 Cal.3d at pp. 776-777: "The problem with defendant's analysis is that deletion of any potentially mitigating factors from the statutory list could substantially prejudice the defendant." This Court has repeatedly rejected the claim that a trial court violates the Eighth and Fourteenth Amendments to the federal Constitution by failing to delete assertedly inapplicable mitigating factors from the instructions. (*People v. Anderson, supra,* 25 Cal.4th at p. 600; *People v. Osband, supra,* 13 Cal.4th at p. 705; *People v. Memro* (1995) 11 Cal.4th 786, 880; see also *Williams v. Calderon* (9th Cir. 1995) 52 F.2d 1465, 1481.) Failure to delete assertedly inapplicable factors in this case was not error.

C. The Trial Court Did Not Err In Refusing To Label The Statutory Factors As Aggravating Or Mitigating Factors

Appellant contends the trial court's failure to designate the statutory sentencing factors as aggravating and mitigating factors deprived him of his "state and federal constitutional rights to due process, an impartial jury, equal protection, and a reliable determination of penalty in violation of the Sixth, Eighth, and Fourteenth Amendments." (AOB 424.) Appellant is mistaken.

Sentencing factors are not unconstitutional simply because they do not specify which are aggravating and which are mitigating. (*People v. Bradford, supra*, 15 Cal.4th at p. 1383.) As this Court has stated, "the trial court's failure to label the statutory sentencing factors as either aggravating or mitigating [i]s not error." (*People v. Williams, supra*, 16 Cal.4th at p. 269, citing *People v. McPeters, supra*, 2 Cal.4th at p. 1192.) Moreover, in this case, contrary to appellant's assertion (AOB 510-512), the jury was specifically instructed that it should consider appellant's age solely as a mitigating factor and that it should "not under any circumstances consider [his] age as an aggravating factor." (CT 941.)

In addition, the Supreme Court has held that "[a] capital sentencer . . . need not be instructed how to weigh any particular fact in the capital sentencing decision." (*Tuilaepa v. California, supra*, 512 U.S. at p. 979.) Thus, contrary to appellant's claim (AOB 510), the trial court is not constitutionally required to instruct the jury that certain sentencing factors are relevant only in mitigation. (*People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079.) Accordingly, "[a]lthough [labeling the factors] would be a correct statement of law [citation], a specific instruction to that effect is not required, at least not until the court or parties make an improper or contrary suggestion." (*People v. Livaditis , supra*, 2 Cal.4th at p. 784; see also *People v. Carpenter, supra*, 15 Cal.4th at p. 420 [although some factors may be only aggravating or mitigating, because it is self-

evident, the trial court need not identify which is which]; *People v. Samayoa, supra*, 15 Cal.4th at p. 862 ["[t]he jury need not be instructed as to which sentencing factors are aggravating and which are mitigating"], citing *People v. Davenport, supra*, 11 Cal.4th at p. 1229.) Under this well-established authority, the trial court properly instructed the jury.

D. Adjectives Used In Conjunction With Mitigating Factors Did Not Act As Unconstitutional Barriers To Consideration Of Mitigation

Appellant contends the inclusion in potential mitigating factors of such descriptions as "substantial" in factor (g), "reasonably" in factor (f), and "extreme" in factors (d) and (g), acted as barriers to the consideration of mitigation in violation of the Sixth, Eighth, and Fourteenth Amendments. (AOB 425.) Appellant's contention is without merit.

This Court has previously held that the words "extreme" and "substantial" as set forth in the death penalty statute have common sense meanings which are not impermissibly vague. (*People v. Arias, supra*, 13 Cal.4h at pp. 188-189; *People v. Stanley, supra*, 10 Cal.4th at p. 842.) The same is true of the words "reasonably believed" and "moral."

Significantly, the trial court instructed the jury pursuant to factor (k):

> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant

offers including his mental state, any evidence of mental illness or personal background as a basis for a sentence less that death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(CT 938.) As this Court has noted:

> The catch-all language of section 190.3 factor (k), calls the sentencer's attention to "[a]ny other circumstance which extenuates the gravity of the crime," and therefore allows consideration of any mental or emotional condition, even if it not "extreme." Similarly, factor (k) allows consideration of duress that is less than "extreme" and domination that is less than "substantial."

(*People v. Arias, supra*, 13 Cal.4th at p. 189, citations omitted.) Thus, appellant's claim that the jury was inhibited from considering mitigating factors should be rejected.

E. The Jury Instruction Regarding Life Without Possibility Of Parole Was Proper

Appellant contends the instruction advising the jurors that the alternate to death was life imprisonment without the possibility of parole was "insufficient to guard against the possibility that the jurors believed that life without the possibility of parole did not actually mean 'without possibility of parole.'" (AOB

425, 425-427.) This Court recently noted in *People v. Maury, supra,* 30 Cal.4th at page 440: "The trial court is not required to give an instruction that the meaning of 'life without possibility of parole' actually means life in prison without possibility of parole, since such an instruction would be inaccurate." (See *People v. Arias, supra*, 13 Cal.4th at pp. 172-173.)

F. The Trial Court Was Not Required To Instruct On The Presumption Of Life

Appellant urges this Court to reconsider its holding in *People v. Arias, supra*, 13 Cal.4th 92, and hold that a presumption of life, similar to the presumption of innocence at the guilt phase, is "a constitutional necessity at the penalty phase of a capital trial." (AOB 428.) Appellant presents no reason for this Court to reconsider its prior decisions. And, it must be noted, that just recently this Court stated in *People v. Maury, supra*, 30 Cal.4th at page 440: "Because the appropriate penalty is not presumed and is a question for each individual juror, no presumption exists in favor of life or death in determining penalty in a capital case. (*People v. Samayoa, supra*, at pp. 852-853; see also *People v. Holt, supra*, at p. 684 ['capital sentencing is a moral and normative process'].)"

G. There Is No Burden Of Proof At The Penalty Phase

Appellant contends the trial court's failure to instruct the jury on any penalty phase burden of proof violated appellant's constitutional rights to due process, equal protection, and freedom from cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. (AOB 429.) Respondent has thoroughly addressed this issue in Argument 25. Suffice it to say here, that the federal Constitution does not require the jury be instructed as to any burden of proof in selecting the penalty to be imposed. (*People v. Burgener, supra*, 29 Cal.4th at p. 885; *People v. Jenkins, supra*, 22 Cal.4th at pp. 1053-1054.)

H. The Jury Is Not Required To Base A Death Sentence On Written Findings Regarding Aggravating Factors

Appellant contends California law violates the Eighth and Fourteenth Amendments to the federal Constitution by failing to require the jury base its death sentence on written findings regarding aggravating factors. (AOB 430-431.) This issue was likewise addressed in Argument 25. But, suffice it to say, written findings and reasons for the jury's death verdict are not constitutionally required. (*People v. Hughes, supra*, 27 Cal.4th at p. 405; *People v. Anderson, supra*, 25 Cal.4th at p. 601; *People v. Kraft, supra*, 23 Cal.4th at p. 1078.)

I. Intercase Proportionality Review Is Not Required By The Federal Or State Constitutions

Appellant contends the failure of California's death penalty statute to require intercase proportionality review "guarantees arbitrary, discriminatory, and disproportionate impositions of the death penalty." (AOB 432-433.)

Intercase proportionate review is not constitutionally required in California (*Pulley v. Harris, supra*, 465 U.S. at pp. 51-54; *People v. Wright, supra*, 52 Cal.3d 367), and this Court has consistently declined to undertake it (*People v. Welch, supra*, 20 Cal.4th at p. 772; *People v. Majors* (1998) 18 Cal.4th 385, 432; *People v. Milwee, supra*, 18 Cal.4th at p. 168; *People v. Mayfield , supra*, 14 Cal.4th at p. 812; *People v. Marshall* (1996) 13 Cal.4th 799, 865-866; *People v. Ray, supra*, 13 Cal.4th at p. 360; *People v. Champion* (1995) 9 Cal.4th 879, 950-951.)

J. Miscellaneous Alleged Constitutional Defects

Appellant raises four alleged "miscellaneous" constitutional defects in the death penalty law and the instructions implementing the death penalty law. (AOB 434-435.) Each has previously been rejected by this Court.

The use of the phrases "so substantial" and "warrants" in CALJIC No. 8.88 are not vague or misleading. (*People v. Gurule, supra*, 28 Cal.4th at p. 662; *People v. Ochoa, supra*, 26 Cal.4th at p. 452; *People v. Breaux* (1991) 1 Cal.4th 281, 316; see *People v. Boyette, supra*, 29 Cal.4th at p. 465.)

The death penalty law is not unconstitutional because it permits the consideration of nonstatutory aggravating factors. (*People v. Weaver, supra*, 26 Cal.4th at p. 993; see *People v. Boyette, supra*, 29 Cal.4th at p. 466.)

The death penalty law is not unconstitutional because it fails to inform the jury it need not be unanimous in relying on a mitigating factor. (See *People v. Weaver, supra*, 26 Cal.4th at p. 988; see also *People v. Boyette, supra*, 29 Cal.4th at p. 466.)

The death penalty law is not unconstitutional because it gives prosecutors, according to appellant, "unbounded" discretion in deciding when to charge a murder case as a capital case. (*People v. Weaver, supra*, 26 Cal.4th at p. 992; see *People v. Boyette, supra*, 29 Cal.4th at p. 467.)

K. Alleged Insufficiency Of Post-conviction Relief In Federal And State Courts

Appellant contends his death judgment must be reversed because of insufficient post-conviction relief in federal and state court. (AOB 433-435.) To the extent appellant complains about the procedural barriers to obtaining federal habeas corpus relief under AEDPA (see AOB 433-434), he is obviously in the wrong forum. Appellant is also utilizing an inappropriate legal vehicle to challenge state procedures relating to the filing a collateral habeas corpus petition in state court. This is, after all, an *appeal* from a judgment of death

which seeks to ensure appellant received a fair trial and that the death verdict is reliable.

Appellant's only complaint with regard to the appeal process is the conclusionary statement that this Court's "manner of review on direct appeal" has "increasingly rendered state post-conviction remedies ineffectual to protect against unreliable judgments of death, and thereby aggravated the unreliability of California's death judgments." (AOB 434.) Without further explanation, respondent cannot respond to appellant's claim other than to indicate the following: This is an automatic appeal in this state's highest court where appellant is represented by counsel. Appellant has filed a 446-page opening brief raising 29 issues. Appellant will be afforded the opportunity to file a Reply Brief following the filing of Respondent's Brief. The case will at some point in the future be placed on calendar where appellant will be give up to 45 minutes to orally present his case to all seven members of this Court. Appellant will be provided a written opinion issued by this Court discussing the claims raised in the opening brief. And, if appellant is not satisfied with the outcome of the appeal, he can petition this Court for a rehearing. To the extent appellant suggests the direct review process of capital cases in California is insufficient, it overlooks the reality of what occurs in a capital appeal in this state and the guarantee that appellant received a fair trial and that the death verdict is reliable.

XXVII.

RACE WAS NOT A FACTOR IN APPELLANT'S TRIAL

Appellant contends that impermissible race factors influenced the prosecution's decision to seek the death penalty, as well as the jury's decision to impose the death penalty. (AOB 435-440.) Appellant argues that the presence of "polarizing racial issues in the trial made . . . prejudice manifest, and deprived [appellant] of his federal constitutional rights to equal protection and due process under the Fourteenth Amendment, to a fair trial under the Sixth and Fourteenth Amendments, and to a reliable verdict under the Eighth and Fourteenth Amendments." (AOB 440.) This contention is meritless.

Appellant maintains that "the record supports the inference that race played an improper role in [appellant's] case from the initial charging decision to the penalty sentencing." (AOB 436.) Appellant relies on the following in support of his claim: appellant is a member of a minority community; victim Blair was White; appellant is a gang member; victim Blair was a deputy sheriff; deputies in the Sheriff's Department desired the maximum sentence for Deputy Blair's death; and there was no voir dire on race. Appellant also argues the prosecutor used race as a factor in presenting the victim impact evidence at the penalty phase. As can be seen, none of the grounds relied upon by appellant demonstrate, directly or circumstantially, that race was a factor in the

prosecutor's decision to seek, or in the penalty jury's decision to impose, the death penalty. (See *People v. Lewis* (2001) 25 Cal.4th 610, 677; *People v. Box* (2000) 23 Cal.4th 1153, 1218; *People v. Keenan, supra*, 46 Cal.3d at p. 506.)

Appellant also maintains that allowing the jury to consider the circumstances of the crime in making the penalty determination permitted the jury to make its "penalty determination based on racial grounds." (See AOB 436-439.) This Court has previously rejected this contention. (*People v. Box, supra,* 23 Cal.4th at pp. 1218-1219.)

Appellant seeks to support his claim of the use of impermissible race factors with speculation and matters not supported by the record. For example, appellant asserts that appellant's "minority community . . . had long been victimized by a predominantly white force of deputy sheriffs" (AOB 436); the request of the deputies in the Sheriff's Department for a maximum sentence "sprung from the war on crime which the deputies waged in [appellant's] neighborhood, fueled by a history of racial animosity" (AOB 436); "racial polarization was the subtext of the entire prosecution" (AOB 436); and "the confrontation on Walnut Avenue was the culmination of a history of police oppression against the minority citizens of Lynwood" (AOB 440). Appellant presents no record support for any of these claims. And, respondent submits, there is no record support for any of these baseless assertions.

Respondent submits that the record in this case "contains no evidence, direct or circumstantial, that race was a factor in the death sentence [appellant] received." (*People v. Melton* (1988) 44 Cal.3d 713, 772; see *People v. Lewis, supra*, 25 Cal.4th at p. 677; *People v. Box, supra*, 23 Cal.4th at p. 1218.) Appellant's claim must be rejected.

XXVIII.

THERE WAS NO CUMULATIVE ERROR AT THE PENALTY PHASE WHICH REQUIRES REVERSAL OF THE DEATH JUDGMENT

Appellant contends the cumulative effect of the errors at the phase requires reversal of the death judgment. (AOB 441-442.) Respondent disagrees because, as demonstrated in this Respondent's Brief (see Args. 15-27), there was no error at the penalty phase, and, to the extent there was error, respondent has demonstrated in this Respondent's Brief that appellant has failed to demonstrate prejudice.

Moreover, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Navarette, supra*, 30 Cal.4th at p. 523; *People v. Jones* (2003) 29 Cal.4th 1229, 1267-1268; *People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692; *People v. Ochoa, supra*, 26 Cal.4th at pp. 447, 458; *People v. Catlin* (2001) 26 Cal.4th 81, 180; *People v. Staten, supra*, 24 Cal.4th at p. 464.) Even a capital defendant is only entitled to a fair trial, not a perfect one. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1009; *People v. Box, supra,*) 23 Cal.4th at pp.1214, 1219.) The record shows appellant received a fair guilt phase and penalty phase. His claims of cumulative error must, therefore, be rejected.

XXIX.

APPELLANT HAS FAILED TO DEMONSTRATE HE WAS DENIED AN IMPARTIAL TRIAL JUDGE

Appellant contends the judgment must be reversed because the trial court judge was partial to the prosecution in its rulings and "jaded" toward the defense. Appellant maintains that because of bias, the trial court judge "rush[ed] to impose a death judgment" in violation of the Eighth and Fourteenth Amendments to the federal Constitution such that there is no reliability in the death judgment. (AOB 443-446.) This contention is meritless.

Under the due process clauses of the federal and state Constitutions, appellant is entitled to an impartial trial judge. And, an appellant may raise on appeal a claim of the denial of due process right to an impartial trial judge. (See e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [113 L.Ed.2D 302, 331, 111 S.Ct.1246 [trial judge who is not fair or impartial constitutes "structural defect[] in the constitution of the trial mechanism" and resulting judgment is reversible per se]; *People v. Brown* (1993) 6 Cal.4th 322, 332; see also *People v. Kipp, supra*, 26 Cal.4th at p. 1140; *People v. Jenkins, supra*, 22 Cal.4th at p. 1050; *People v. Mayfield, supra*, 14 Cal.4th at p. 811.)

Appellant has failed to demonstrate that the trial judge was partial toward the prosecution and "jaded" toward the defense in its rulings. His challenge is, in essence, a restatement of the previous 28 issues discussed in the

Appellant's Opening Brief. Appellant simply rehashes the previous contentions raised in the opening brief and concludes that because he was on the adverse end of various rulings (i.e., voir dire, evidentiary rulings, rulings on motions, etc.) that the trial court was partial toward the prosecution. Respondent, however, has demonstrated in the previous arguments in the Respondent's Brief that the trial court did not err in any of the particulars challenged by appellant. And, to the extent the trial court may have erred, there is absolutely nothing in the record, or Appellant's Opening Brief, which "demonstrates that the [trial] court lost its impartiality" (*People v. Jenkins, supra*, 22 Cal.4th at p. 1050), or engaged in bias against the defense, such as to call into question the reliability of the death judgment. This claim must be rejected. (*Id.*; *People v. Brown, supra*, 6 Cal.4th at p. 332.)

CONCLUSION

Based on the foregoing arguments, respondent urges the judgments of convictions and sentence of death be affirmed.

Dated: November 4, 2003.

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

DEATH PENALTY CASE

Case Name: People v. Freddie Fuiava
California Supreme Court Case No.: S055652
Los Angeles Superior Court Case No.: BA115681

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

On **November 4, 2003**, I placed two (2) copies for service of defense counsel and copy (1) for service on the Court of Appeal of the attached:

RESPONDENT'S BRIEF ON DIRECT APPEAL

in the internal mail collection system at the Office of the Attorney General, 300 South Spring Street, Suite 1702, Los Angeles, California 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Mr. Michael Satris **Attorney at Law** **Post Offic Box 337** **Bolinas, California 94924**	**Ms. Diana Samuelson** **Attorney At Law** **506 Broadway** **San Francisco, California 94133**

Counsel of record for Defendant/
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and that I caused a copy of the above document to be deposited with the Clerk of the Court from which the appeal was taken, to be by said Clerk delivered to the Judge who presided at the trial of the cause in the lower court; and that I also caused a copy to be delivered to the appropriate District Attorney.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on **November 4, 2003** in Los Angeles, California.

ADRIENNE DANIELLE MAYR
Declarant

Signature

TCH/adm
00002215LA1996XS0004