In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **CHARLES E. CASE,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S057156

Sacramento County Superior Court Case No.
93F05175
The Honorable Jack Sapunor, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
ERIC L. CHRISTOFFERSEN
Supervising Deputy Attorney General
JENNEVEE H. DE GUZMAN
Deputy Attorney General
State Bar No. 197817
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 327-1145
Fax: (916) 324-2960
Email:
Jennevee.DeGuzman@doj.ca.gov
Attorneys for Respondent

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

CASES

CASES

CASES

CASES

CASES

CASES

CASES

CASES

CASES

STATUTES

Evidence Code

Government Code

Penal Code

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE

On June 23, 1993, the district attorney filed complaint number 93F05175 in Sacramento County Superior Court charging appellant Charles Edward Case with two counts of first degree murder in violation of Penal Code[1] section 187 (counts one [victim Val Lorraine Manuel] and two [victim Gary Duane Tudor]) and one count of robbery in violation of section 211 (count three).

It was alleged that appellant personally used a firearm during the commission of counts one and two within the meaning of section 12022.5, subdivision (a). It was also alleged as to counts one and two that appellant committed multiple murders within the meaning of section 190, subdivision (a)(3) in that he murdered both Manuel and Tudor on or about June 20, 1993, and section 190, subdivision (a)(17)(i) in that he was engaged in the crime of robbery during the murders of Manuel and Tudor. It was further alleged that count three was a serious felony within the meaning of section 1192.7, subdivision (c)(19). (1 CT 16-18.)

Appellant was also arraigned on June 23, 1993, and the court appointed the Indigent Criminal Defendant Program (ICDP) to represent him. ICDP assigned attorney Stacy Bogh to represent him. (I CT 1.) On August 19, 1993, appellant entered a plea of not guilty. (1 CT 2; 1 RT 13.)

On October 26, 1993, appellant was held to answer on all counts following a preliminary hearing. The complaint was deemed the information. (1 CT 3.) Appellant waived arraignment, entered a plea of not guilty, and denied the allegations. (1 CT 3, 127-129.) On December 1, 1993, attorney Hayes Gable was appointed to also represent appellant. (1 CT 4.)

---

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

On March 12, 1996, appellant filed a motion to exclude his pre-trial statements for all purposes. (2 CT 377-391.) The motion was heard on March 21, 1996, and concluded on March 25, 1996. (2 CT 377-391, 421-422.) Also on March 25, 1996, appellant filed a motion to exclude evidence of his hearsay statements made to Jerri Baker and Brian Curley. (2 CT 431-432.8.)

Jury selection commenced on March 26, 1996. (2 CT 433.) The jurors and alternates were impaneled and sworn to try the case on May 8, 1996. (2 CT 458.)

On May 9, 1996, the court denied appellant's motion to exclude his pre-trial statements. (2 CT 459.) Also on this day, a hearing was held on appellant's motion regarding his hearsay statements made to Jerri Baker and Brian Curley. (2 CT 451, 459.) The motion was granted and denied in part. (2 CT 459.) On May 13, 1996, appellant filed a motion to exclude statements of Mary Webster. (2 CT 460-461.) The hearing on the motion was held on that same day, and the court ruled as to each issue presented as stated on the record. (2 CT 462.)

The guilt phase began on May 14, 1996. (2 CT 464.) On June 5, 1996, a hearing was held to determine the admissibility of testimony from Ted Vourdouris, Brian Lee Curley, and Billy Joe Gentry regarding pre-offense conversations each had with appellant. With some restrictions, the trial court found the conversations admissible. (2 CT 485-486.)

The information was amended on July 2, 1996, to include the allegation pursuant to section 12022.5, subdivision (a) with respect to count three. (1 CT 16; 2 CT 501; 22 RT 7282-7283.) On July 8, 1996, the jury received its instructions and the case for deliberations. (2 CT 573.) On the following day, July 9, 1996, the jury found appellant guilty as charged and the allegations to be true. (1 CT 13; 2 CT 574-579.)

The penalty phase began on July 31, 1996. (2 CT 581.) On August 12, 1996, the jury received its instructions and the case for deliberations. (3 CT 719.) On August 13, 1996, the jury imposed a sentence of death. (3 CT 720.)

On October 21, 1996, appellant filed a motion to reduce the penalty to life imprisonment without the possibility of parole, and it was denied on October 25, 1996. (3 CT 722-727, 762-771.) The court imposed a sentence of death as to counts one and two and three years on count three. (3 CT 772-779, 785.) In addition, the court imposed two five-year enhancements pursuant to section 12022.5, subdivision (a) as to counts one and two for a total of ten years and stayed the four-year enhancement pursuant to section 12022.5, subdivision (a) as to count three. It further ordered appellant to pay a restitution fine in the amount of $10,000 and a $4,000 victim restitution fine pursuant to Government Code section 13967. (1 CT 15; 3 CT 773, 785.)

A notice of automatic appeal was filed on November 4, 1996. (3 CT 786.)

STATEMENT OF FACTS

A. Appellant's Relationship with Mary Webster and the Early Preparation of a Robbery

In June of 1992, Mary Webster placed a personal ad in the Sacramento Bee seeking male companionship. (14 RT 4959-4960.) Appellant responded with a three-page letter asking Webster to call him at McKenry's Drapery Service, his place of employment, where he pressed shirts. (14 RT 4961-4963; 12 RT 4500-4501; 13 RT 4562; 17 RT 6019.) Webster, along with a friend, ultimately visited appellant at his apartment where he explained that he was new to the area and lonely. (14 RT 4963-4964.) Two weeks later, appellant moved into Webster's duplex located at

5944 Bourbon Drive in Sacramento County. (14 RT 4964-4969, 4976; 17 RT 5974, 5999.)

Approximately one week after moving in with Webster, appellant was involved in a physical altercation with Webster's son Gregory Nivens. (14 RT 4981.) Nivens was at the duplex with friends and "was blasting the music too hard." (17 RT 5974.) Webster unsuccessfully asked Nivens to turn the volume down. She left the duplex and returned with appellant, who got out of the car, walked directly to Nivens, and hit him directly in the mouth.[2] (17 RT 5975.) Nivens called law enforcement, but Webster sided with appellant causing them to leave without making an arrest.[3] (14 RT 4981-4982; 17 RT 5976.)

One week later, appellant was involved in another physical altercation, this time with Randy Hobson, Webster's roommate. (14 RT 4982-4984; 15 RT 5273.) Hobson asked Webster about money she owed him, and appellant encouraged her not to pay him back. (15 RT 5277-5278.) Hobson reminded Webster that she owed him the money. Appellant again tried to interject, and Hobson told him "this [was] none of his business." Appellant struck Hobson's leg with a fireplace poker. (15

---

[2] On cross-examination, Nivens explained that Webster had later told him that appellant struck him because he failed to respect her. (17 RT 5988.) Also, because appellant did not have a car, Webster drove appellant to work and picked him up almost everyday. (14 RT 4980.)

[3] The trial court admonished the jury as follows:

> Ladies and gentlemen, this evidence is admitted for a limited purpose. It is not admitted to prove the defendant, Mr. Case's, disposition or his tendency to behave in a certain manner, but to establish the evidence as to the character of Mary Webster or her feelings toward Mr. Case. You can consider it for that purpose and for that purpose only.

(17 RT 5976.)

RT 5278; 17 RT 5959.) The two men began to wrestle, and Webster called law enforcement. (15 RT 5279-5280.) Appellant asked Webster to hide the poker in the garage and to tell law enforcement that it was not his fault. (17 RT 5958-5959.) A uniformed officer arrived at the duplex, and Webster told officers that Hobson struck appellant first. Because of the conflicting stories, the officer left stating that there was nothing he could do. (15 RT 5280-5282.) Hobson immediately moved out as a result of Webster's lies.[4] (14 RT 4984; 15 RT 5282.)

---

[4] The trial court admonished the jury as follows: "Again, ladies and gentlemen, it's admitted for the limited purpose of explaining the conduct of this witness." (15 RT 5285.) After receiving an additional defense request for further instruction regarding the fireplace poker incident, the trial court admonished the jury as follows:

> Ladies and gentlemen, that testimony is admissible for a limited purpose. It's admissible on certain issues and should not be considered by you for other purposes. For example, it may be considered by you on the issue of the credibility of Mary Webster. It may be considered by you in assessing the nature of the relationship between Mary Webster and Mr. Case. It should not be considered by you, for example, to say that if Mr. Case committed this act of violence, he, therefore, would commit other acts of violence, to wit, the offenses for which he is charged and, therefore, he's more likely to be guilty of those offenses or not because of testimony of this act or fight involving a fireplace poker. You can say it's admissible on some issues but not admissible on others.

(15 RT 5285-5286.)

The trial court continued:

> One last comment, courts are often accused of hiding evidence from jurors because jurors fear that it is – the jurors will misuse the evidence. You should not use this evidence to show that Mr. Case is likely to commit an act of violence but for the purpose of which it is relevant, that is, the credibility of

(continued...)

After moving in with Webster, appellant bragged that he was the best bank robber and shared robbery tales with her every night. (14 RT 4971, 4998.) Appellant, however, had never robbed a bank. (14 RT 4998.) Webster found his stories exciting and intriguing. (14 RT 4971, 4985, 4994.) She was very attracted to appellant. (14 RT 4994.) He talked about disguising himself by using Nu-Skin, to conceal fingerprints, wearing wigs and temporary tattoos, and layering his clothing to add weight. (14 RT 4972-4975.) During his stay with Webster, appellant received various instructional crime-related publications and purchased a wig and mustache, as well as a tube of glue, from a Halloween store. (14 RT 4976-4980.) Appellant enjoyed these publications because he could order parts, he could order guns. He could order parts and all kinds of stuff out of here. All kinds of – how you can do crimes, how you can do robberies, all the bad, bad stuff that you can ever imagine are in these. How you buy blow guns, guns in the house, weapons for women. . . .

(17 RT 5958.)

Also after moving in with Webster, appellant immediately wanted to purchase a gun so that he could "rob some stores, banks."[5] (14 RT 4992,

---

(...continued)

Mary Webster and the nature of the relationship between Mr. Case and Mary Webster.

(15 RT 5286.)

[5] At this point, appellant had already represented to Webster that he was a bank robber. The trial court admonished the jury as follows:

> Ladies and Gentlemen, sometimes evidence is admitted for a limited purpose, and you're instructed that you are to consider it only for the limited purpose for which it's offered. [¶] Here, the answer to the last question is not offered for the truth of the matter asserted, and that is that Mr. Case was, in
>
> (continued...)

4997.) Webster made arrangements for appellant to purchase a gun, loaned him the money for it, and purchased the ammunition for him.[6] (14 RT 4994-4997.) Appellant was very excited to have the gun. (14 RT 4995.)

In September 1992, appellant showed off the gun, which he kept in a shoe box, to co-worker and friend Billy Joe Gentry while at Webster's duplex. (17 RT 5831-5832.) Appellant seemed excited and acted as if he had just received a new toy. (17 RT 5832.)

In October 1992, Gentry, his wife, and children stopped at Webster's duplex so that appellant and Webster could look at their children's Halloween costumes. (17 RT 5833.) Appellant and Gentry then walked to the corner liquor store, and appellant asked him if wanted to earn extra money by being a "driver in a hold-up." (17 RT 5834-5836.) Gentry explained that he was not interested because he had a family, and appellant asked him to keep it a secret. (17 RT 5836.)

In late 1992, Sacramento County Sheriff's Sergeant Theodore Voudouris interviewed appellant, for reasons unrelated to this case, and followed up by contacting him at McKenry's. (17 RT 5807-5808.) After a brief discussion, they left the cleaners and talked at a fast food restaurant. Appellant stated that he had grown up hunting in Indiana, was experienced

---

(...continued)

> fact, a bank robber, but to explain that that is what he said and it's affect on the person who heard it, Miss Webster.

(14 RT 4993.) Pursuant to an additional defense request, the trial court further admonished the jury as follows:

> The same with ex-convict; not whether he was, in fact, an ex-convict, but that that is what he said to Ms. Webster and what affect it had on her and how it may explain her subsequent conduct.

(14 RT 4993.)

[6] Webster also bought appellant a pair of boots with money she had won while gambling in Reno. (14 RT 4999-5000.)

with firearms, and had a preference for either nine millimeter automatic handguns or sawed-off shotguns. (17 RT 5809-5810.) Sergeant Voudouris asked appellant if he would be interested in speaking at a law enforcement seminar designed to give insight to robbery investigators. (17 RT 5810.) Appellant later agreed. (17 RT 5810-5811.)

The seminar occurred in early 1993 in downtown Sacramento. (17 RT 5811.) The seminar was presented in a question and answer format, and a question posed to appellant involved what he would do during a robbery if he was met with resistance. Appellant replied, in a cold and calculating manner, "I would take somebody out."[7] (17 RT 5812-5813.)

Some weeks later, appellant spoke at a separate luncheon also attended by robbery investigators. (17 RT 5862-5863.) Appellant offered a few words and then opened up the floor for questions. (17 RT 5864.) Someone also asked what he would do if met with resistance during a robbery, and appellant replied, matter of factly, that "he would blow the person away." (17 RT 5864-5865.)

B. Appellant Ends His Relationship with Webster and Begins a New One with Jerri Baker

In March of 1993, appellant moved out of Webster's duplex after telling her that he wanted to date other women. (14 RT 4986, 4988.) Appellant took his belongings with him, including two wigs, but left a third wig behind. (14 RT 5000; 17 RT 5964.) Webster drove appellant to

---

[7] During cross-examination, Sergeant Voudouris explained that he recalled the statement because it struck him that appellant was willing to harm any individual who got in his way. "And as a law enforcement officer, I made a mental footnote of that, that this individual should be considered someone who might reoffend." (16 RT 5822.)

Baker's house, where he planned to live, even though she still loved him.[8] (14 RT 4985, 4988.)

Baker worked at McKenry's Drapery Service as the floor manager between 1992 and 1993. (18 RT 6073.) Baker and appellant started a romantic relationship after he moved in with her. (18 RT 6074-6075.) She was aware of appellant's background as a robber and that he was in possession of a gun.[9] (18 RT 6076-6080.) He liked having the gun and was "kinda giddy when he first got it." Appellant kept it in a brown box with the words "Columbia House." (18 RT 6081-6082.) He also spent time taking it apart, cleaning and oiling it, and "packed it with him everywhere he went," keeping it in the trunk of the car when he left the house. (18 RT 6082-6083.) It was his "baby." (18 RT 6082.) Despite this knowledge, she allowed appellant full access to her car, a Ford Probe, with or without her presence. (18 RT 6079-6080.)

Initially, things were good between Baker and appellant, but eventually the couple began to argue more, which resulted in him leaving the house overnight approximately every other weekend. (18 RT 6084.) Baker was aware that appellant maintained contact with Webster, but did not suspect they were having a sexual relationship. (18 RT 6084.) Baker considered Webster an acquaintance and was not otherwise "real friendly" with her. (18 RT 6085-6086.)

Webster and appellant remained in regular contact after he moved out. (14 RT 4989-4990.) Initially, appellant would call Webster after a fight with Baker, and Webster would pick him up. Eventually, the relationship

---

[8] On cross-examination, Baker testified that appellant continually complained about Webster and called her "stupid," "ding-a-ling," and "money hungry." (18 RT 6132.)

[9] Baker recognized appellant's gun at trial and described it as "all the bluing is all missing and it's really old." (18 RT 6080.)

became more romantic, and they began meeting for drinks or dancing, which they had never done before. (14 RT 4990-4991.) Although appellant always returned to Baker's house, Webster still loved him, "always tried to help him out," and had "always been there for him." (14 RT 4992.)

C. The Billingsleys

In 1993, Greg and Stacey Billingsley, husband and wife, worked with appellant at McKenry's Drapery Service.[10] (12 RT 4500-4501; 13 RT 4562; 17 RT 6019.) They lived in Fair Oaks, and Stacey's mother, Sue Burlingame, lived with them. (12 RT 4504, 4507.) Sean Billingsley, Greg's brother, occassionally stayed with them on a "revolving door" basis. (12 RT 4553-4554.)

Greg and appellant became friends. (12 RT 4502, 4522; 13 RT 4563; 17 RT 6019.) Appellant told Greg he was a bank robber, and Greg admitted that he too had been in and out of trouble with the law. (13 RT 4564.) Stacey was aware that appellant had just been released from prison and believed he was proud to be a bank robber. (12 RT 4503.)

In May of 1993, Greg had plans to go on a weekend camping trip and asked appellant if he could borrow his gun.[11] (13 RT 4566, 4568.) Appellant agreed, and Greg picked up the gun, which was kept inside a cardboard box, from Baker's residence. (12 RT 4512-4514; 13 RT 4567.) Greg returned the gun approximately two days later and watched appellant place the gun in the trunk of Baker's car. (13 RT 4568-4569, 4631.)

Some weeks later, appellant twice asked Greg if he was interested in robbing Crestview Lanes. (17 RT 6020-6021.) On one occasion, while

---

[10] For the purpose of clarity, respondent shall refer to each of the Billingsleys by their first name.

[11] On cross-examination, Burlingame confirmed that the camping trip was in May of 1993. (13 RT 4732.)

they smoked in the Crestview Lanes parking lot, where they bowled every Wednesday night, appellant asked if Greg wanted to "do a job" with him and that Greg only needed to drive.[12] (17 RT 6021-6023.) Appellant explained that he would rob the "lady that does the bank deposit on Sunday morning." (17 RT 6023.) Greg refused, and appellant "pretty much dropped the subject at that time." (17 RT 6024.) Appellant, however, brought it up again on a later occasion. While driving with Greg in Baker's car, appellant asked him if he was sure he did not "want to do this job with [him]," and Greg refused. (17 RT 6024-6025.) Appellant reminded him that all he needed to do was drive, but Greg again refused. The topic never came up again between them.[13] (17 RT 6025.) Appellant never stated that Webster was interested in robberies or committing crimes. (17 RT 5839.)

D. Appellant's relationship with Sue Burlingame and the days leading up to the Office robbery and murders

On or about June 12, 1993, appellant had gotten into an argument with Baker and slept on the Billingsley's couch.[14] (12 RT 4505.) At approximately 2:00 a.m., Burlingame returned home from a date and noticed someone on the couch, but did not recognize him. (12 RT 4508; 13 RT 4659-4660; 15 RT 5439-5440.) She walked to her bedroom and went to sleep. (13 RT 4660.)

Later that Sunday morning, Burlingame learned that it was appellant and struck up a long conversation with him over coffee. (13 RT 4660-

---

[12] On cross-examination, Greg testified that, although he could not recall the month, the conversation occurred in 1993. (17 RT 6039.)

[13] Following appellant's arrest, Brian Gentry, also appellant's friend, mentioned to Greg that appellant had approached him about committing a robbery, and Greg stated that appellant had also made the same offer. (17 RT 6060.)

[14] Greg testified that appellant had possibly stayed with them on both Friday and Saturday nights. (13 RT 4571.) He was aware that appellant had multiple girlfriends, including Baker and Webster. (13 RT 4576-4577.)

4661.) Later that day, while she vacuumed the house, Burlingame discovered a box[15] containing a gun underneath the couch.[16] (12 RT 4510; 13 RT 4667, 4745.) The gun had not been in the house prior to the day appellant spent the night. (12 RT 4511.) She returned the box underneath the couch and later asked Greg to remove it from the house. (12 RT 4510-4511.) Greg moved the gun to the garage. (12 RT 4514-4515.)

For the rest of the day, Burlingame and appellant talked and, at some point left the house together.[17] (12 RT 4514-4515.) Burlingame returned late that night. (12 RT 4515.) Stacey had a discussion with Burlingame about appellant and advised that Baker was his girlfriend. (12 RT 4516.) Stacey knew Baker well because they had worked together for approximately six years at McKenry's. (12 RT 4505-4506.)

Greg returned the gun to appellant at work approximately three days later.[18] (13 RT 4573, 4574-4575.) Appellant again put the gun in Baker's

---

[15] Greg did not notice appellant carry a box into the house, but could not "say for certain whether he carried it in or didn't carry it in ...." (13 RT 4633.)

[16] Burlingame initially believed she had discovered the gun on the day before, Saturday, and had given the box to Stacey, but realized she was mistaken and corrected her testimony during cross-examination and on re-direct by testifying that she had given the box to Greg. (13 RT 4663-4665, 4725-2726.) On cross-examination, she testified that also inside the box was a smaller box containing cartridges. (13 RT 4722-4723.) Additionally, the space underneath the couch was approximately ten inches deep and eight inches in height. (12 RT 4553.)

[17] On cross-examination, Burlingame testified that they left the house after dark and went to The Office to shoot some pool until about 1:00 a.m. (13 RT 4680-4681.)

[18] Greg testified that Stacey had told him that the gun was under the couch where appellant had slept, he retrieved the box and gun from under the couch, and placed them in the garage. The gun belonged to appellant. (13 RT 4573.)

car. (13 RT 4576.) Appellant explained that he had brought the gun to the house because "he didn't like leaving it around." (13 RT 4574-4575.)

Sometime that week, while at work, appellant stopped Stacey to discuss McKenry's new business relationship with Capital Power Federal Credit Union. (12 RT 4523.) Appellant was upset and complained of having been penalized for making a withdrawal from his savings account.[19] (12 RT 4524-4525, 4549.)

E. The day of The Office Robbery and Murders

On June 20, 1993, between approximately 3:00 p.m. and 4:00 p.m., Baker returned home with her sister after a day of shopping, and she found appellant waiting for her. (18 RT 6088.) He was in a hurry to play pool, "snatched" the keys from her, and said "bye." (18 RT 6088-6089.) He was dressed in a button down, rosey-red shirt with a stripe, which she had bought for him, and boots. (18 RT 6088, 6295.) In fact, appellant had a date with Burlingame to play pool at The Office that afternoon and a date with Webster later that evening to prepare her for an upcoming Social Security meeting. [20] (13 RT 4644-4645; 14 RT 5000-5001, 5145-5146.)

Appellant drove Baker's car and picked up Burlingame at approximately 4:00 p.m.[21] (12 RT 4504, 4515-4519; 13 RT 4641-4644.) After stopping to purchase cigarettes, the couple drove to The Office where they played seven or eight games of pool. (13 RT 4644-4645, 4649-4650.)

---

[19] On cross-examination, Stacey testified that the average presser earned approximately $5.50 to $6.00 an hour, but did not know appellant's hourly wage. (12 RT 4548.)

[20] On cross-examination, Baker testified that appellant had told her that Webster had been drawing Social Security illegally and encouraged her to report Webster. Baker reported Webster, but nothing came of it. (18 RT 6141.)

[21] Burlingame described appellant's clothing as cowboy boots, Levis, and a button-up shirt with a collar. (13 RT 4647-4649, 4741-4742.)

They had been at The Office the week before and returned because Val Manuel, the bartender, said she would have homemade cabbage rolls prepared for dinner. (13 RT 4646-4647.) Manuel typically prepared lunch for the customers every Sunday and had prepared enchiladas that day. (11 RT 4171-4172; 13 RT 4770.) Because Manuel did not bring cabbage rolls, appellant and Burlingame left The Office at approximately 6:30 p.m. to have dinner elsewhere. (13 RT 4655.) Appellant drove Burlingame to a Dairy Queen near the Billingsley residence, where they briefly discussed his resumed relationship with Baker and their continued friendship. (13 RT 4656.) He also mentioned he was upset because "the bank had stolen his money."[22] (13 RT 4666-4667.) Appellant left Burlingame at Dairy Queen because he had something to do with a woman named "Mary."[23] (13 RT 4656-4658.) Burlingame walked home and arrived at approximately 7:45 p.m. (12 RT 4521; 13 RT 4658.)

Tracy Grimes, a longtime patron of The Office, stopped there at approximately 8:30 p.m. to pick up his share of enchiladas. (11 RT 4164-4167, 4171-4172.) At the time, Manuel, Gary Tudor, a patron who regularly helped Manuel close the bar, and patron Peggy Tucker were present. (11 RT 4165-4166; 13 RT 4770.) Appellant, who was dressed in blue jeans, grayish brown cowboy boots, and a sport shirt, was also at the bar. (11 RT 4170-4171, 4176-4178.) Grimes specifically recognized appellant because he had seen him at The Office approximately three times

---

[22] Appellant and Burlingame split all the costs that night, and he did not offer to buy her dinner. (13 RT 4667.) On cross-examination, Burlingame testified that appellant had money and that he had just gotten paid. (13 RT 4728-4729.) She also recalled that The Office was unable to break appellant's twenty dollar bill. (13 RT 4732.)

[23] On cross-examination, Burlingame explained that appellant had discussed a woman named "Mary," that she had problems with Social Security, and that he planned to help her. (13 RT 4704.)

within the last two weeks.[24] (11 RT 4171.) Manuel, Tudor, and Tucker were at the bar, while appellant walked back and forth between the bar and the pool table. (11 RT 4170, 4174.) He seemed to be listening to their conversation. (11 RT 4176-4177.) He also had an unusual way of reracking the cue balls, placing one leg off to the side, which enabled Grimes to view appellant's pants and boots.[25] (11 RT 4177.) Manuel stated that she planned to close the bar in 15 minutes, and Grimes left approximately 10 minutes later at 8:40 p.m. (11 RT 4176.)

Meanwhile, between approximately 7:30 p.m. and 8:45 p.m., Anita Dickenson, who, together with her fiance Randy Pickens and seven-year-old twin boys, lived in a trailer behind The Office, went outside to move Pickens's car into the garage. (11 RT 4234-4236, 4238-4240.) She recognized all but one car in the parking lot and described it as a small compact.[26] (11 RT 4240-4245.) Dickenson then heard what sounded like a single gunshot and ducked in front of her car. (11 RT 4246-4247.) A "couple of minutes" later, Dickenson got up and, while attempting to return to her trailer, heard two additional consecutive gunshots. (11 RT 4247-4249.) Dickenson ran inside the trailer, turned off the lights, and advised

---

[24] On cross-examination, Grimes testified that appellant was alone during his prior visits to the Office. (11 RT 4206.)

[25] During the defense's case-in-chief, defense invesetigator Tony Gane testified that Grimes had told him, "I will never forget those cowboy boots." (20 RT 6896.)

[26] While she could not positively identify Baker's car, Dickenson testified that it looked similar to the unfamiliar vehicle parked at The Office. (11 RT 4244-4245.) Of the vehicles parked in the parking lot, the white truck belonged to Tudor and the red car belonged to Manuel. (11 RT 4255; 12 RT 4283-4284.) On cross-examination, Dickenson testified that the white Camero parked in the parking lot belonged to her brother and was driven by them. (12 RT 4264.) She also further identified a "mystery car" that was compact in size and silver-blue in color. (12 RT 4265-4269.)

Pickens of what she had heard.[27] (11 RT 4249-4250.) Pickens went outside to investigate and told Dickenson it was probably fireworks.[28] (11 RT 4250-4251; 12 RT 4281-4282.)

At approximately 9:20 p.m., Joe and Leslie Lorman[29] stopped at The Office after having seen Tudor's truck in the parking lot. (12 RT 4296-4299, 4314-4315, 4319.) The Lormans were close friends with Tudor and wanted to see him. (12 RT 4295-4296, 4299, 4315.) The Lormans tried to enter through the front door, but it was locked. (12 RT 4301, 4316.) After banging on the front door and calling out for Manuel and Tudor, Joe looked through a window and noticed a woman's purse and a half-filled glass of beer on the bar. He continued to call for Tudor, walked to the side of the bar, and discovered the side door was open. (12 RT 4301-4302, 4317-4318.) Joe told Leslie that he thought something was wrong, though Leslie did not believe it. (12 RT 4306, 4318.) The couple entered the bar through the side door and continued to call for Tudor and Manuel. (12 RT 4306.) Leslie had to use the restroom. She opened the door to the women's restroom, stood at the threshold, and saw the bodies of Tudor and Manuel on the restroom floor. (12 RT 4307.) Leslie ran from the bathroom and yelled at Joe to get out and call 9-1-1. (12 RT 4309, 4320-4321.) Leaving the scene undisturbed, Leslie ran to the truck and drove it to a corner gas station. Joe met her by foot at the payphone. (12 RT 4309, 4321.) They called 9-1-1 and later met law enforcement at The Office. (12 RT 4310, 4321-4322.)

---

[27] Pickens testified that Dickenson came in between 8:30 p.m. and 9:00 p.m. (12 RT 4278.)

[28] Later that night, at approximately 9:15 p.m., Pickens noticed heavy police activity at the bar and learned that Manuel and Tudor had been shot to death. (11 RT 4251-4253; 12 RT 4282-4283.)

[29] Respondent shall refer to the Lorman's by their first name for the purpose of clarity.

At 9:43 p.m., Sacramento County Sheriff's Deputy Craig Norris received a call regarding suspicious circumstances at The Office and was the first to respond at approximately 9:45 p.m. (12 RT 4336-4338.) Other law enforcement officers arrived shortly thereafter, formed a perimeter, and entered the bar through the side door. (12 RT 4338-4341, 4364-4367.) After the building was cleared, Deputy Norris entered the women's restroom and discovered two bodies, surrounded by a significant pool of blood, on the ground. (12 RT 4342-4344.) He also noticed shell casings, a bullet slug, and what appeared to be footwear prints, possibly from a smooth-soled shoe, on the ground. (12 RT 4346, 4349, 4361.) Crime scene investigators also noted smears of blood, .45 caliber casings, expended copper slugs, and a pair of glasses in the restroom. (13 RT 4826-4827, 4845-4847, 4852-4854; 15 RT 5380-5387.)

Without touching the bodies or otherwise disturbing the scene, Deputy Norris stepped out of the restroom and advised the others of what he had discovered. Paramedics later arrived, entered the restroom, and concluded Manuel and Tudor were dead. (12 RT 4344, 4370.) Law enforcement continued to preserve the crime scene and called out homicide detectives and crime scene investigators who processed and investigated the scene. (12 RT 4351, 4371; 13 RT 4812-4817; 14 RT 4921.) An expended .45 caliber shell casing was located on the floor to the right of the cash register, as well as some damage to the concrete area behind the bar indicating that someone had fired a round into it. (13 RT 4823, 4871-4872; 14 RT 4903.) The scene was locked, secured, and sealed on June 21, 1993, at 4:10 a.m., and the items booked into evidence. (12 RT 4372-4373; 14 RT 4888, 4928-4931.) Floyd West, the bar owner, was permitted to enter the bar a few days later, and he determined that $320 was taken from the register. (13 RT 4773-4774.)

F. After Robbing the Office and Murdering Manuel and Tudor, Appellant Drives to Webster's Duplex, Unloads Evidence Against Him, and Returns to Baker's Home

Appellant arrived at Webster's home at approximately 10:00 p.m.[30] (14 RT 5002.) Steve Langford, Webster's brother, was also there. (14 RT 5003-5004.) Appellant entered Webster's bedroom and removed his shirt and boots. He reached into his pants pocket, removed a large wad of cash "consistent with bar-type money," and gave Webster $125 as payment for a bet he had lost. (14 RT 5004-5005, 5012-5013.) Appellant returned the remaining cash in his pocket and washed his arms. (14 RT 5008.)

Because the lighting in her bedroom was brighter than in the living room, Webster noticed appellant's shirt was "full of blood," primarly on the left side, and that there was blood on his boots. (14 RT 5006-5007.) There was no blood on his jeans. (14 RT 5014.) She tried to wash off the blood from the boots because she had bought them for him, but appellant told her it would not come off. (14 RT 5006.) Webster did not ask about the blood because she was afraid of appellant and did not want to "get slapped." (14 RT 5008.) Appellant asked Webster to get rid of the shirt and boots and went to the dining room. (14 RT 5008-5009.)

Webster made a quick trip to the liquor store and noticed Baker's Probe parked in front of her duplex. (14 RT 5010.) She returned 15 minutes later and made appellant a drink. While doing so, appellant calmly explained that he had been at a card game in Del Paso Heights. There were eight men at the table, and he had won a hand. (14 RT 5011, 5014.) Two Black men denied him of his winnings, causing him to shoot each of them

---

[30] The quickest distance between Webster's home and The Office was 15 minutes. (18 RT 6351, 6353-6354.) The quickest distance between Webster's home to the Billingsley residence was four minutes. (18 RT 6352-6353.)

"a couple times . . . ."[31] (14 RT 5012-5013.) Webster asked if the men were moving when he left, and appellant replied "no" and that the others had ran away. (14 RT 5012.)

Appellant suddenly remembered that he had left the gun in Baker's car, asked Webster to get it, and gave her the car keys. (14 RT 5017.) Webster retrieved a box from the front passenger's seat. (14 RT 5017-5018.) Langford wanted to see the gun, but appellant refused. Webster gave the box to appellant. He unloaded the gun, removed the magazine, and placed everything back into the box. (14 RT 5018, 5143.) Appellant then asked Webster to put the box away, and she placed it in a closet. (14 RT 5019-5020.)

Webster changed the subject and asked appellant if he had a nice Father's Day because she was curious to know what Baker had done for him. (14 RT 5015.) Appellant stated that Baker had given him a pair of shorts and wanted to get married in Reno, but he refused. (14 RT 5015.) He then called Baker because it was getting late and knew he had to get home. Webster loaned appellant a long-sleeved shirt, but could not find any shoes. (14 RT 5015-5016.) Since moving out, appellant did not have any clothing at Webster's home. (14 RT 5141.) Appellant kissed Webster goodbye and whispered in her ear, "I probably will get caught because I left fingerprints." (14 RT 5015-5016.) He also instructed her to give the gun to a "Bill Williams" when he got out of jail in September. (14 RT 5017.) He left Webster's house at approximately 11:00 p.m. (14 RT 5020.) After he left, Webster placed appellant's shirt and boots in a paper bag, went to the

---

[31] Webster testified that appellant had showed her the gun as he told his story. (14 RT 5012-5013.) She also testified, however, that appellant had left the gun in the car and had asked her to retrieve it. (14 RT 5017.)

On cross-examination, Webster stated that appellant had also told her that he had fired a "shot into the table." (16 RT 5667.)

Hilltop Apartments, tossed the bag in a dumpster, and returned home. (14 RT 5020-5021.)

Appellant arrived home at approximately 11:30 p.m. (18 RT 6089.) Baker, who was awake, was in bed and smelled alcohol on him. (18 RT 6091.) Appellant casually told Baker that he had gone to a poker game in Del Paso Heights and killed two Black men who tried to steal the pot from him. Baker was "flabbergasted." (18 RT 6092.) He continued to tell Baker that he "deep-sixed" the gun, which she understood to mean that he had thrown it into the river. (18 RT 6107.)

G. June 21, 1993, the Morning After the Office Robbery and Murders

1. Appellant Instructs Baker to Clean Her Car

On the following morning, appellant told Baker he was going to Webster's house to help her with Social Security problems, but to instead tell his co-workers that he went to visit his ill mother. (18 RT 6094.) Appellant also instructed Baker to clean her car, paying close attention to the driver's seat, door handles, foot pedals, and steering wheel. (18 RT 6095.)

Before leaving for work, Baker saw "a glop of what appeared to be flesh or ... brain matter or something along those lines" inside of her car and wiped it off. (18 RT 6096.) Once at work, Baker cleaned the car with dry cleaning spotting chemicals, such as ammonia, and wiped the pedals and door panel.[32] (18 RT 6095.) The rag turned green, the color of blood when it is mixed with ammonia, where she wiped the car down. Later that morning, appellant called Baker at work to tell her that he had "taken care

[32] On cross-examination, Baker testified that she did not clean the car seats. (18 RT 6266.)

of the pants." (18 RT 6107.) She did not see appellant the rest of the day. (18 RT 6097.)

2. Webster has A Change of Heart and Retrieves the Evidence from the Dumpster

At approximately 8:00 a.m, while driving to work, Webster thought about what appellant had told her the night before, feared he would kill again, and called Sacramento Police Department Detective David Ford who she had known from a prior contact.[33] (14 RT 5021-5022, 5032-5033, 5069, 5073.) Webster, who seemed upset and shaky,[34] told Detective Ford everything that had happened the night before, and he advised her to return to the dumpster, retrieve the paper bag, and deliver it to the Sheriff's Department. (14 RT 5024-5025, 5073-5076.) He found Webster credible, but reluctant to comply. (14 RT 5127, 5129.) She also described the gun as a .45 caliber silver semi-automatic. (14 RT 5128.)

Webster returned home, took a footstool, went to the dumpster, retrieved the bag, and drove to the Sheriff's Department. (14 RT 5025.) On her way there, Webster pulled over approximately five times and called her friend Arlene Eshelman from various pay phone booths advising her of

---

[33] Webster was familiar with Detective Ford because she was the subject of an investigation involving the theft of a ring. (14 RT 5023, 5070.) She returned the ring and was never formally charged; however, Detective Ford advised her that she could call him if she had any problems related to physical abuse or generally needed to talk. (14 RT 5023-5024, 5071-5072.) Detective Ford was aware that Webster had been in an abusive relationship with a Dale Michaels where he controlled her "to do anything that he wanted for his desires." (14 RT 5124.) For example, Michaels and Webster would go to Tahoe, and he had her write bad checks with no intent of repaying her. (14 RT 5126-5127.) He opined that Webster simply wanted to be accepted and did things to help people in order to be accepted. (14 RT 5125.)

[34] Detective Ford described her demeanor on the telephone as "if a family member had that same demeanor, your heart would probably really drop and be worried." (14 RT 5073.)

what had happened the night before and seeking advice. (14 RT 5025-5026; 15 RT 5247-5251.) Webster seemed hysterical and in disbelief, and Eshelman told her to turn in both the bag and appellant. (14 RT 5026; 15 RT 5249-5250.) It appeared that Webster wanted to do the right thing.[35] (15 RT 5251.) Webster also called Hobson, who also advised her to immediately go to the Sheriff's Department.[36] (14 RT 5026; 15 RT 5284-5288.)

Webster continued driving to the sheriff's department and, while on H Street, she saw a sheriff's patrol car and waved down Sacramento Sheriff's Deputy Dennis Biederman. (15 RT 5027-5028, 5226-5227.) Although hesitant and reluctant, Webster asked him if there was a shooting in Del Paso Heights. (14 RT 5027-5028.) After checking his database, Deputy Biederman confirmed that there was not a shooting there last night. (15 RT 5227-5228, 5230.) Webster told Deputy Biederman what had happened last night, that she had the shirt and boots, and described the gun as a possible .45 caliber revolver with four empty shells. (14 RT 5029.) Deputy Biederman then escorted her to the sheriff's department. (15 RT 5227-5231.)

3. Webster's Interview with Detectives Reed and Edwards

At the Sheriff's Department, Webster was interviewed by Detectives Stan Reed and Darrel Edwards, the primary detectives assigned to

---

[35] On cross-examination, Eshelman described Webster as "weak" and who "needed advice from other people." (15 RT 5254.) Furthermore, although Webster sought advice, "in the long run, she'll end up doing what she wants to do, and that's kind of what, you know, a lot of people do." (15 RT 5255.)

[36] On cross-examination, Hobson described Webster as "vulnerable from the onset. And you put a few drinks in her, as anybody else would be, you become a little more vulnerable to a couple of other things like stupidity." (15 RT 5296.)

appellant's case. (18 RT 6335.) Webster explained that she had met appellant through a personal ad in the newspaper and that he had moved in with her a few weeks later. (23 ACT[37] 6612.) He moved out in March of 1993, and moved in with Baker, his "boss" at McKenry's. (23 ACT 6613.) Webster was "fascinated" by criminals, and appellant shared stories about his criminal past. (23 ACT 6614.)

Webster stated that appellant arrived at her home at approximately 10:00 p.m. on June 20, 1993, and had driven Baker's car. (23 ACT 6614-6615.) She did not initially notice the blood on appellant's clothing, but did so once he entered her bedroom. While appellant washed up, Webster tried to remove the blood from his boots, but he told her to get rid of them instead. He explained that he had just killed two people. (23 ACT 6615.) Webster then gave the detectives $100 of the $125 appellant gave her, keeping $25 for herself.[38] (23 ACT 6615-6616; 14 RT 5030-5031, 5036-5037; 18 RT 6338.)

She recounted that appellant had given her some money to purchase alcohol and cigarettes, which she did. (23 ACT 6616.) When she returned, appellant explained that he had been playing cards with five other men who denied him his winnings. (23 ACT 6617-6618.) He shot two of them, while the rest ran away. (23 ACT 6618.) Appellant then asked Webster to get the gun from the car, and she complied. (23 ACT 6618-6619.) He checked how many rounds he had fired, determined it was approximately seven, and asked Webster to keep the gun. (23 ACT 6619.)

Webster admitted she had the gun, but did not bring it with her and refused to turn it over because she feared for her life if it was not there upon

---

[37] ACT refers to the Augmented Clerk's Transcript.

[38] On cross-examination, Webster explained she needed gas money. (16 RT 5672.)

appellant's return. (14 RT 5034-5035; 23 ACT 6624.) She further explained that she feared for her life because appellant had gotten into fights with both her son and former roommate since moving in with her. (23 ACT 6612, 6620, 6625.) She described appellant as an "excellent" bank robber who was hired to speak at "big meetings." (23 ACT 6622-6623.)

The detectives told Webster about their investigation of The Office shootings, but she refused to believe appellant played a part. (14 RT 5035; 23 ACT 6626-6648.) The detectives made clear to Webster that they would collect the gun from her house, and she called home to see who was there.[39] (14 RT 5036-5037.) To her surprise, appellant answered the phone. Webster motioned to the detectives that appellant was on the phone, and they recorded the conversation. (14 RT 5038, 5149.) Appellant asked Webster if she had"got[ten] rid of the stuff" and confirmed that she "didn't put it all in the same place ...." (14 RT 5038; 23 ACT 6759.)

4. Appellant is Arrested Later that Day; Baker Turns in Evidence and Eventually Talks to Law Enforcement

Appellant arrived at Webster's duplex at approximately 11:00 a.m., was greeted by Nivens, and watched the news. (17 RT 5979-5980, 6008.) Nivens thought it unusual for appellant to be at the duplex because he usually worked on Mondays. (17 RT 5979.) Nivens later received a call from the Sheriff's Department confirming appellant's presence inside the duplex, and appellant was arrested without incident. (17 RT 5980-5981, 5999-6000.)

Additional deputies entered the duplex, temporarily restrained Nivens, but released him once they confirmed he was Webster's son. (17 RT 5981-

[39] Deputy Biederman had already given Detective Reed the boots and shirt. (15 RT 5229.)

5982, 6000-6001.) During a search of the master bedroom closet, Detective Reed recovered a box containing a gun, later identified as the murder weapon, a loose clip, a smaller box, an ammunition box containing 43 live rounds of CCI brand ammunition, a .45 caliber bullet of a different brand with a brass jacket, an empty magazine, and two loose rounds CCI brand .45 caliber Blazer ammunition. (16 RT 5536-5538, 5554-5567; 17 RT 6001-6006.) Detectives Reed and Edwards transported appellant to the detective division. (17 RT 6001.)

Later that day, Webster called Detective Reed because she was upset with how they had conducted the search and arrest. (14 RT 5040-5041.) She continued to question appellant's involvement with The Office murders, which she repeatedly expressed in subsequent calls to Detective Reed. (14 RT 5041, 5043.) She still loved appellant. (14 RT 5042.) She was also reluctant to testify because she feared for her life. Appellant once told her that he had gotten "rid" of a "former getaway driver who had snitched him off."[40] (14 RT 5044.)

At some point after appellant's arrest, Baker turned in a few items to the Sheriff's department, including "stuff from Franklin Fashions Corporation," an order form, an advertisement, hair net, and a wig. (18 RT 6108.) These were not items appellant had initially brought to Baker's home, but items dropped off at McKenry's by Webster after appellant moved out. Appellant brought them to Baker's house, which remained there though he never used them to her knowledge. (18 RT 6109-6110.)

---

[40] The trial court admonished the jury as follows:

> Again, Ladies and Gentlemen, that's not offered to prove the truth of the matter in the statement, that is, got rid of the [former] getaway driver; just that the statement was made to her and what effect it had on Ms. Webster.

(14 RT 5044-5045.)

The Sheriff's Department contacted Baker shortly after appellant's arrest because they wanted to inspect her car, but she did not want to get involved in the investigation and withheld information. (18 RT 6098-6099, 6100-6101.) She did, however, share a conversation she had with appellant in March or April of 1993. (18 RT 6101.) Appellant, while sitting in her backyard, seemed depressed. Baker assumed he was unhappy about their relationship. (18 RT 6102.) Rather, appellant explained that he wanted to commit robberies, feared getting caught, and would have to kill any witnesses to avoid incarceration. (18 RT 6103-6104.) This angered Baker because she potentially would never see him if he were ever caught. (18 RT 6106.) She also shared that appellant had told her about a speaking engagement during an officer training session. He told the audience that he would kill any witnesses. He seemed happy and proud about the speaking engagement and felt like he was "putting one over on the ... system." (18 RT 6105.)

H. Additional Evidence Collected During the Investigation

1. Autopsies

On June 21, 1993, expert forensic pathologist Gregory Reiber, M.D., conducted autopsies on Tudor and Manuel. (12 RT 4400, 4405.) Tudor was thirty-nine years of age, six feet and three and one-half inches tall, and weighed just over two hundred pounds at the time of his death. During his external examination, Dr. Reiber found two perforated gunshot wounds in Tudor's head, one of which was fatal, a half-inch bruise on the left elbow, a small abrasion on the left forearm, and a small scrape on the right side of the head. (12 RT 4407, 4426-4427.) Tudor had no defensive wounds and was most likely in a kneeling or crouching position at the time the wounds were inflicted. (12 RT 4407-4408, 4431-4432.)

Manuel was seventy-one years of age, five feet and five inches tall, and weighed one hundred and thirty-four pounds at the time of her death. (12 RT 4437.) Findings from Dr. Reiber's external examination also included two perforated gunshot wounds, both of which were potentially fatal, and a small bruise near her left wrist. (12 RT 4438, 4446-4447.) Manuel also did not have any defensive wounds and could have either been standing or crouching at the time the wounds were inflicted. (12 RT 4438, 4448.)

For both Tudor and Manuel, Dr. Reiber was unable to determine which of the two gunshot wounds came first, but opined that none of the wounds were inflicted post-mortem. (12 RT 4410-4411, 4440-4441.) The wounds were inflicted at close range, between one and six inches, and by a typical handgun of at least a .38 caliber. (12 RT 4413-4414, 4442-4443.) The wounds were consistent with having been inflicted with a .45 caliber semi-automatic handgun. (12 RT 4414.)

2. Latent Prints

On June 22, 1993, The Office was processed for latent prints. (15 RT 5328-5329.) Two latent prints were found on the left side of the cash register, one of which belonged to Manuel, and an additional two latent prints were found on the black register tray. (15 RT 5336, 5374.) The Remmington .45 caliber handgun, a box of ammunition, two live rounds, one metal magazine, one cardboard box with "Columbia House" printed on the side, and a paper bag were also processed for prints. (15 RT 5338-5339.) Eight latent prints were found on the brown Columbia House cardboard box and paper bag. (15 RT 5339-5341.) Webster's left thumb print and left palm print were found on the box. (15 RT 5377-5378, 5380.) Appellant's prints were not found on the handgun, boxes, paper bag, or other items associated with the gun. (15 RT 5379.) Six latent prints were

found in the women's restroom. (15 RT 5369.) None of the prints resulted in a positive comparison to appellant's prints. (15 RT 5373.)

3. Baker's Car

On June 23, 1993, Baker's Ford Probe was inspected for bodily fluids. (15 RT 5448-5450.) A small amount of human blood was detected on the gear shift knob and steering wheel. (15 RT 5451, 5453-5454, 5457-5458.) The remaining interior of the car was negative for the presence of human blood.[41] (15 RT 5458-5459.)

The gun and cowboy boots were positive for human blood. (15 RT 5477-5482.) The blood type on the boots was consistent with that of Manuel's and Tudor's assuming multiple sources for the blood. Appellant would be excluded as a source of the blood on the boots.[42] (16 RT 5482, 5493-5495.) The blood type on the boots was consistent with that of Manuel's assuming a single source for the blood. (16 RT 5482-5483.)

The shirt also tested positive for human blood. While numerous blood stains were present, the stains were confined mainly to the left side of the shirt. (16 RT 5483-5484.) Assuming a single source of blood, the samples taken from the left front of the shirt resulted in Manuel being a possible source of the blood. (16 RT 5485.) Assuming a dual source of blood, both Manuel and Tudor were possible sources of the blood. (16 RT 5485-5486.)

---

[41] Cleaning the area would remove the presence of human blood causing the inability to detect it. (15 RT 5461.)

[42] The parties stipulated the blood samples were taken from appellant, Manuel, and Tudor in a medically approved fashion and were received by criminalist Mary Hansen. (15 RT 5490-5491.) The autopsy revealed that, at the time of death, Manuel and Tudor had blood alcohol levels of .10 and .20, respectively. (15 RT 5490-5491.)

4. Additional Interviews

a. Sue Burlingame

Detective Edwards and Reed interviewed Burlingame on June 22, 1993. (17 RT 5871-5872, 5875.) Stacey Billingsley was also present. (17 RT 5872.) Burlingame explained that she first met appellant when she discovered him sleeping on the couch the Sunday before the murders. (Aug. CT of 11/10/09 Appendix B at pp. 5-6.) They spent most of the morning talking. (Aug. CT of 11/10/09 Appendix B at pp. 6-7.) Later that morning, Burlingame cleaned the house and found a box containing a gun and bullets underneath the couch. (Aug. CT of 11/10/09 Appendix B at pp. 22-23; 17 RT 5874.) She told Greg about the gun, and he took it. (Aug. CT of 11/10/09 Appendix B at pp. 24, 26, 32.) Burlingame described the gun as silver, with a black "triangle thing." (Aug. CT of 11/10/09 Appendix B at pp. 24-25; 17 RT 5877-5878.)

Burlingame and appellant went to The Office at approximately 7:00 p.m., and returned home by 1:30 a.m. (Aug. CT of 11/10/09 Appendix B at pp 6-7.) The following day, Burlingame learned that appellant had decided to reconcile with Baker. (Aug. CT of 11/10/09 Appendix B at pp. 7-8.) She talked to appellant later that week, and he wanted to keep their upcoming plans to play pool on Sunday. (Aug. CT of 11/10/09 Appendix B at p. 8.)

On Sunday, June 20, 1993, appellant picked her up in Baker's car, and they arrived at The Office 15 minutes later at approximately 4:00 p.m.[43]

---

[43] The quickest distance between the Billingsley residence and The Office was 14 minutes. (18 RT 6353.) The Chicago Bulls played the Phoenix Suns in game six of the NBA Championship Series on June 20, 1993. The scheduled broadcast was at 4:00 p.m. (18 RT 6362.)

(Aug. CT of 11/10/09 Appendix B at pp. 8-11.) When they left The Office approximately after 7:00 p.m., the only people left at the bar was the bartender and a "gentleman at the bar." (Aug. CT of 11/10/09 Appendix B at pp. 13-17.) Appellant seemed angry about being "broke" and stated that the bank "had ripped him off for thirty dollars cuz they said he was overdrawn and that he was taking all of his money out of the bank account." (Aug. CT of 11/10/09 Appendix B at pp. 29-30, 35-37.) Appellant dropped Burlingame off at a Dairy Queen near her house and left because he had "some things to do." (Aug. CT of 11/10/09 Appendix B at pp. 17-18.) Appellant dropped her off between 7:15 pm and 7:30 p.m., and Burlingame was home by 8:30 p.m. (Aug. CT of 11/10/09 Appendix B at pp. 19-20.)

Later that afternoon, after the interview, Detective Edwards called Burlingame and asked what appellant wore the evening of June 20, 1993. She stated that he wore a light maroon short-sleeved button down shirt, jeans, and tan leather boots. The call was made after having received the clothing from Webster. (17 RT 5879-5880.)

b. Tracy Grimes

On June 30, 1993, sheriff's deputies contacted Grimes by phone for additional information about the night of the murders. (11 RT 4180-4181, 4209.) He described appellant as having short, combed back gray hair, gray cowboy boots, jeans, and in his early fifties. (11 RT 4209.) Approximately eight or nine months later, Grimes saw a photograph of appellant in the Sacramento Bee and recognized him as the bar patron at the pool table from the evening of June 20, 1993.[44] (11 RT 4181-4182.)

---

[44] On cross-examination, Grimes testified that appellant's photograph appeared on the front page of the March 18, 1994, issue of the Sacramento Bee. (11 RT 4208.) Grimes was not shown any photographs (continued...)

I. Defense

1. Expert Testimony

Peter D. Barnett, expert consulting criminalist with an emphasis in blood spatter and ballistics analysis, became involved in the case on February 17, 1994. (19 RT 6381, 6384, 6405-6406.) He conducted a number of tests on behalf of the defense, including a ballistics experiment on the .45 caliber automatic weapon to determine how fast it cooled after having been fired. (19 RT 6410-6414, 6416.) Barnett fired five or six rounds within two or three seconds and concluded that it had reached ambient temperatures within fifteen or twenty minutes. (19 RT 6416-6417.)

Barnett also conducted an experiment using Nu-Skin, a first-aid preparation intended to be used for minor injuries. (19 RT 6420.) Barnett applied Nu-Skin over his fingertips in an attempt to conceal his fingerprints. (19 RT 6420-6421.) He opined that the use of Nu-Skin was not "a very good way of hiding your fingerprints." (19 RT 6424.) Even with the use of Nu-Skin, sufficient ridge detail was evident on the impressions. (19 RT 6423.)

In addition, Barnett conducted an experiment with blood with ammonia. When blood dissolved in the ammonia, the results were a reddish brown solution. (19 RT 6511.) The blood did not turn green. (19 RT 6512.)

Finally, Barnett reviewed the blood spatter patterns from the crime scene and on other items of evidence such as the clothing. (19 RT 6432-6433.) Blood may be left at a crime scene a number of different ways.

(...continued)
of appellant at the time he was contacted by the law enforcement. (11 RT 4210.)

First, blood may simply be released by the body as a result of the injury. Second, "blood may also be propelled from a bloody object as a result of forces that are applied to that object during the incident that's occurred." (19 RT 6434.) The rate at which blood can be propelled is characterized as high, medium, and low velocity blood spatter. (19 RT 6435-6436.) Third, "blood transfer" is where bloody objects come into contact with one another. (19 RT 6436.) Depending on the number of times an item is touched, it may result in primary and secondary transfers. (19 RT 6437-6438.)

Barnett opined that the shooting occurred in the restroom. (19 RT 6478.) He explained however, with respect to the source of the blood found in the women's restroom, the blood did not get there from the position that the bodies were found at the crime scene, but rather at some point the bodies were in "different position[s] after they were injured to cause the blood to get to that position."[45] (19 RT 6449-6450, 6455-6459, 6473, 6483.)

Barnett also examined appellant's cowboy boots and noted the right boot had more stains than the left. (19 RT 6493-6494.) There was a fairly large blood stain over the toe of the right boot with smaller spatters on the instep on the upper shoe and the heel block. (19 RT 6494.) The large stain was a transfer for which Barnett had no explanation for its presence. (19 RT 6495.) With the exception of the blood spatter on the upper area of the boot, he could not connect the blood spatter on the boots with anything he had observed from the crime scene.[46] (19 RT 6495-6496.) The left boot

---

[45] Barnett stated, "[t]he blood spatter just tells us quite clearly that that's what happened. I mean, I'm not sure I can say anything much more than that." (19 RT 6483.)

[46] Barnett testified that the blood spatter on the upper boot could have gotten there if someone stood near the trash can where spatter

(continued...)

had a few small blood spatters resulting from a medium velocity event, i.e., kicked, flung off a finger, etc., and not from a gunshot wound. (19 RT 6499-6500.) Barnett was unable to explain what, at the crime scene, could have accounted for the blood stains on the boots. (19 RT 6501.) He opined that blood stains were not found high on the upper part of the boots because it was covered by pant cuffs.[47] (19 RT 6505.) He also concluded that shoe impressions found in the blood were not created by appellant's boots. (19 RT 6454-6455.) Additionally, the length of a person's stride does not necessarily corrolate with the person's height. (19 RT 6482.)

With respect to the blood stains found on the shirt, a series of blood stains were along the left front of the shirt, including heavy bloodstains on the left sleeve. There was also a series of large bloodstains running down the left back of the shirt. Small stains were on the right front of the shirt, which he described as "projected" or "falling" blood. (19 RT 6488.) The bloodstain on the front pocket area "show a direction from left to right." (19 RT 6488-6489.) Other than being perpendicular to the shirt, the back bloodstain did not show much direction, which was typical of blood on garments, but it was clear that the blood hit the shirt "directly from behind." (19 RT 6489.) The bloodstain on the sleeve was a contact transfer with a "fairly bloody object and the blood basically soaked into this." (19 RT 6490.) A bloodstain extended all the way down to the shirt tail. (19 RT 6491.)

(...continued)
occurred, but he explained that there was no evidence to indicate that anyone was standing there. (19 RT 6496-6497.)

[47] On cross-examination, Barnett agreed that it may have been fortuitous that the blood simply did not go higher on the boot or get on the jeans. (19 RT 6539.)

Based on Barnett's understanding of the crime scene, its condition, and his analysis of the shirt, he could not account for the bloodstains on the shirt solely on the basis of the shooting of the two victims. At close range, Barnett explained that some blood spatter can be expected under certain conditions. (19 RT 6491.) He could neither account for the large transfer on the left sleeve nor the stains on the back of the shirt as far as it being caused by the shooting. (19 RT 6492.) He concluded, "there is nothing on the shirt that would allow you to conclude that the person wearing this shirt shot anybody." (19 RT 6492.) With respect to Barnett's observations of both the boots and the shirt, he concluded that the blood stains did not result from the shooting itself but rather after the victims were shot. (19 RT 6505-6506.)

Barnett would not be surprised to find blood on the pants of the person wearing the shirt and boots and could think of no reason why the blood stains would stop at the shirt tail. (19 RT 6503, 6505.) He found no physical evidence connecting the blood on the shirt with the blood on the boots. (19 RT 6503-6504.)

He also opined that he would not expect tissue from the victim to have contact with the shooter even in a contact shooting situation.[48] (19 RT 6510-6511.) He also would not expect the shooter to be covered in blood simply as a result from the shooting. (19 RT 6515.)

2. June 20, 1993

On June 20, 1993, Baker and her sister, Loureen Gilmore, had been shopping all day. (20 RT 6798.) Upon their return home, appellant, who

---

[48] On cross-examination, Barnett agreed that there was a reasonable possibility of a tissue transfer as a result of the individual's actions, i.e., being moved and/or touched by the shooter. (19 RT 6535-6536.)

lived with Baker, took the car and immediately left. [49] (20 RT 6799, 6800-6801.) Baker's Ford Probe was fourteen feet and seven inches (175 inches) in length.[50] (20 RT 6822-6823.)

Sacramento County Sheriff's Deputy Elizabeth Sawyer responded to The Office at approximately 9:50 p.m., and interviewed Dickenson. (21 RT 7137-7138.) She recounted that evening's events and then discussed the vehicles in the parking lot. (21 RT 7139-7140.) Dickenson did not affirmatively indicate whether she saw any unfamiliar vehicles. (21 RT 7140-7141.)

Langford testified for appellant. Later that evening, appellant arrived at Webster's duplex between 10:00 p.m. and 10:45 p.m.[51] (20 RT 6696-6697.) Langford was watching television and opened the door for appellant who looked for Webster.[52] (20 RT 6697.) Langford knocked on Webster's bedroom door and told her appellant was there to see her. She agreed.[53] (20 RT 6698.) Appellant wore light colored pants, a yellow shirt, and cowboy boots. He had "something plastered all over his clothes," including his pants. (20 RT 6699, 6713.) Appellant entered Webster's room and closed the door behind him. (20 RT 6700.) After approximately 15

---

[49] On cross-examination, Gilmore testified that, while living with Baker, appellant had bragged about his past robberies. (20 RT 6808.)

[50] A 1977 Camero measured 195 inches. (20 RT 6824-6825.)

[51] The distance between Webster's home at 5944 Bourbon Street and The Office measured 14.7 miles, and the locations were approximately 25 minutes away from each other. (20 RT 6835-6838.)

[52] Langford lived with Webster in June of 1993. (20 RT 6692-6693.) Appellant once lived with them as well. (20 RT 6693.) Langford did not notice any of appellant's clothes in the duplex after he moved out, and appellant never kept any clothing in his bedroom. (20 RT 6696.)

[53] On cross-examination, Langford clarified that appellant had followed him inside the duplex. (20 RT 6717.)

minutes, appellant emerged in different clothing, possibly blue jeans, a T-shirt, and tennis shoes. (20 RT 6700-6701.)

Appellant explained that he had shot two "colored people" at a card game in either Del Paso Heights or off Del Paso Boulevard. (20 RT 6701.) Appellant asked Webster to retrieve the gun from Baker's car, which she did. [54] (20 RT 6702.) Webster brought the gun inside the duplex, and Langford asked to look at it. He could feel the warmth radiating from the barrel, indicating to him that the gun had recently been fired, and decided against touching the gun. (20 RT 6704.) The gun was in a box, which also included a rag or newspapers. (20 RT 6707-6708.) Langford turned off the television and went to bed. (20 RT 6707.) He heard the front door open and then close approximately five or ten minutes after he went to bed. (20 RT 6708-6709.)

On the following morning, on June 21, 1993, Gilmore asked appellant if he wanted a ride to work, and he said that he was going to visit his mother. (20 RT 6803.) Instead, appellant went to Webster's house and watched the news.[55] Langford, his young son, and Nivens were home, but not Webster. (20 RT 6709-6711.) Later that morning, Webster called the duplex wanting to know if Langford was home and advised that he should leave. (20 RT 6712.) When Langford returned, no one was home. (20 RT 6713.)

---

[54] Langford explained that, at the time he was interviewed by Detective Reed, he mistakenly believed that he had retrieved the gun from the car on that date, but stated that he had once retrieved the gun for appellant on a different occasion prior to June 20, 1993. (20 RT 6703.) On cross-examination, he clarified that approximately one month before the shooting, he had picked up appellant from work, and appellant showed him the .45 automatic that he planned to purchase. (20 RT 6720-6721.)

[55] On June 21, 1993, there were no local news listings between the hours of 9:00 a.m. and 12:00 p.m. (20 RT 6825-6826.)

3. Appellant was Gainfully Employed and Allegedly not in Financial Need

Appellant was employed by McKenry's as a presser and counter help. He was typically at the cleaner's with Baker on Saturdays, but never worked alone. (20 RT 6757-6758.) The Saturday shift employee was paid $40 from that day's register. (20 RT 6758.) The employees, including appellant, had a key to the store and access to the safes. (20 RT 6759-6760.) At most, the safe contained $250 on a Saturday night assuming no deposits were made that day. (20 RT 6765.)

The parties stipulated that appellant's payroll checks from March 5, 1993, through June 21, 1993, were directly deposited into his bank account. (20 RT 6770-6771.)

On June 18, 1993, appellant withdrew $428.53 from his bank account. (20 RT 6785.) The account was closed on August 4, 1993, with just under $200 in the account. (20 RT 6786-6787.)

4. Evidence attacking Webster's credibility

In June of 1991, Sacramento County established a permanent conservatorship for Clyde Miller, an individual who received home care from Webster, prohibiting him from entering into any financial contracts over $50. (20 RT 6773-6774.) An attempt to cash two checks totaling $8,000 was made at Wells Fargo Bank on Miller's account, which was then reported to the County. (20 RT 6775, 6790-6795.) On June 21, 1991, Sacramento County Deputy Public Guardian Joan Cooney received a very angry and hostile call from a "Mary Webster." (20 RT 6775-6778.) Webster demanded that the stop payment be removed from the checks, but Deputy Cooney refused. Webster verbally abused Deputy Cooney and hung up on her. (20 RT 6777.)

Dale Michels[56] was Webster's long-time friend who once lived with her. (20 RT 6874-6875.) Michels also knew Miller because Miller was his grandfather's best friend. (20 RT 6875.) Webster took a wedding ring set from Miller, but Michels encouraged her to return the set. (20 RT 6875-6876.) He also went to Tahoe with Webster, and she wrote checks for her own personal use, but never for him. (20 RT 6878.)

J. Rebuttal

1. Appellant's Interview with Detectives Reed and Edwards

Detective Reed interviewed appellant on the afternoon of June 21, 1993. (Aug. CT of 11/10/09 Appendix A at p. 1; 21 RT 7251.) Appellant was aware of The Office double homicide because he had seen it on the news earlier that morning. (Aug. CT of 11/10/09 Appendix A at p. 5; 21 RT 7252.) He was at The Office with Burlingame a week before the murders. (Aug. CT of 11/10/09 Appendix A at pp. 6-7.) Appellant was again at The Office with Burlingame on the night of the murders until about 7:00 p.m. (Aug. CT of 11/10/09 Appendix A at p. 4; 21 RT 7252-7253.) He returned to The Office alone to play pool where he stayed until 9:00 p.m. when the "barmaid" announced she would be closing the bar soon. (Aug. CT of 11/10/09 Appendix A at pp. 4-5; 21 RT 7253-7254.) One other man, who seemed to know the bartender, sat at the counter. (Aug. CT of 11/10/09 Appendix A at pp. 5-6.) Appellant drove Baker's car that night. (Aug. CT of 11/10/09 Appendix A at p. 8; 21 RT 7255.) After leaving The Office, appellant drank a bottle of Kessler in the car, went to Webster's house where he drank and smoked, and returned to Baker's

---

[56] Michels suffered felony convictions for assault with the intent to rape and spousal abuse. (20 RT 6878.) On cross-examination, Michels admitted to also suffering a felony conviction for writing checks for nonsufficient funds. (20 RT 6881.)

house by midnight. (Aug. CT of 11/10/09 Appendix A at pp. 7-10.) Appellant missed work on Monday due to a hangover, but managed to walk to Webster's house because they planned to go to the Social Security office together. (Aug. CT of 11/10/09 Appendix A at pp. 10-11.)

When asked about the clothing delivered by Webster, appellant replied, "I guess you'll have to talk to Mary about that." (Aug. CT of 11/10/09 Appendix A at p. 11; 21 RT 7255-7256.) Appellant explained, however, that the blood on the shirt was his from shaving and that "the People were alive when I left the bar." The lack of marks or abrasions on his face was due to the fact that he "healed fast." (Aug. CT of 11/10/09 Appendix A at pp. 18-19, 23; 21 RT 7256-7257.) He denied that the gun found at Webster's house belonged to him or that he committed the murders. (Aug. CT of 11/10/09 Appendix A at pp. 11, 18, 22, 29.) He did, however, unload the gun for Webster because she told him it was "jammed." (Aug. CT of 11/10/09 Appendix A at pp. 30-31, 36.)

2. Other Rebuttal Evidence

William Gilmore, Brian Weber, Laureen Gilmore, and Jerri Baker did not sustain injuries that would have caused bleeding in Baker's car. (20 RT 7145, 7149, 7153, 7175, 7162-7163.) The solution used by Baker to clean the blood from her car consisted of two parts industrial strength ammonia , one part Streetex, a pre-spotting soap typically used by those in the dry cleaning industry, and one part water. (20 RT 7163-7166.) This solution was used to treat protein stains, including bodily fluids, and turns blood into an olive green color. (20 RT 7166-7168, 7172.)

Sacramento County Sheriff's Department identification technician Cantrell photographed Defense Exhibit FF-5 to depict where the evidence was recovered, including blood samples, shell casings, and projectiles in the women's restroom. Although a shoeprint was depicted in the photo, it was not intended to be the focus of the photograph and was left by a

morgue employee while moving the bodies. (21 RT 7179-7183.) The shoe print did not exist prior to the removal of the bodies. (21 RT 7194.)

K. Penalty Phase

1. Prosecution

a. The Victims

Lulu Manuel, Val's daughter-in-law, testified that Val worked at The Office to supplement her Social Security checks.[57] (23 RT 7727, 7729.) Val cared for her adult son, Steven, who was unhealthy and completely dependent on her. (23 RT 7729.) Val was a "very loving woman," who was "the first one to volunteer to put together impromptu parties [and] cook for friends who were ill." She checked on neighbors and made sure they always had food to eat. (23 RT 7730.) Her loss has resulted in Steven becoming dependent upon Lulu. Val's three other sons have withdrawn and suffered a deep loss. (23 RT 7732-7733.)

Gary was the third of four children to Elizabeth Tudor.[58] (24 RT 7894-7895.) At the time of his death, Gary lived with his parents, saw them everyday, and was very close to them. He was once married and had three children, but divorced approximately one year after the marriage. (24 RT 7895-7896.) At approximately 4:30 a.m. on the day after the murder, Elizabeth received a phone call asking her to meet officers outside her home. She was notified that Gary and Val had been murdered at The Office. Gary's death was devastating to his children, and they continue to receive counseling as a result of his death. (24 RT 7896-7897.) His death was especially hard for his oldest son, who was 15 years of age at the time

---

[57] Respondent shall refer to Lulu and Val by first name for the purpose of clarity.

[58] Again, Respondent shall refer to Gary and Elizabeth by first name for the purpose of clarity.

of trial, because he was close to Gary. (24 RT 7897.) The loss was also very hard for Gary's father who was already in poor health. (24 RT 7897.)

b. Appellant's Prior Convictions

Appellant suffered the following out-of-state prior convictions: (1) a 1958 second degree burglary; (2) a 1963 burglary; (3) a 1965 escape; and (4) a 1967 second degree burglary. (23 RT 7723.) In Sacramento County, appellant suffered the following prior convictions: (1) a 1975 first degree robbery for which he was released on parole on March 1, 1978; and (2) a 1979 assault with a deadly weapon, oral copulation, rape, robbery, and attempted rape (27 counts total) for which he received a sentence of approximately 34 years in state prison. (23 RT 7719-7721, 7724.) Appellant was paroled back to the Sacramento area on October 10, 1991, and discharged from parole on April 8, 1993. (23 RT 7726.)

i. Sally Gomez

On August 7, 1978, Sally Gomez and Dolores Cook worked as salesclerks at Stockmen's, a western store. (23 RT 7734-7737, 7750.) At the time, Gomez had been married for 20 years and had three teenaged children. (23 RT 7735.) At noon, appellant entered the store and told Gomez that he was interested in a pair of boots. (23 RT 7737, 7742-7743, 7751.) Appellant tried on a pair of boots, did not purchase them, and stated he would return later. Gomez began putting the boots away, but felt a "funny feeling because he was still standing there." (23 RT 7738.) After returning the boots to the shelf and making her way back to the front of the store, appellant "jerked" her by the hair and "shoved" a gun into her mouth, causing multiple cuts. (23 RT 7738-7739.) He pulled her to a secluded part of the store and warned that he would blow her head off if she made a sound. Appellant struck her over the eye with the gun causing her to fall. (23 RT 7739.) She pretended to be unconscious as he repeatedly ordered

her to stand up. He kicked her on the side with his boots. (23 RT 7740.) Cook called out for Gomez, and appellant got her. (23 RT 7741, 7752.) He threatened to "blow" Cook's head off, but Cook explained that she needed to help Gomez. (23 RT 7742, 7752-7753.)

Appellant asked Cook if there was any money in the store, and she stated it was in the register. (23 RT 7753-7754.) Cook opened the register and gave appellant all the bills. He reached in and also took the coins. (23 RT 7754.) A car with customers pulled up as Cook tried to help Gomez from the ground. Appellant ordered Cook to get rid of them and took Gomez into another room. (23 RT 7743, 7757.) With the gun pointed at Gomez's temple, appellant ordered her to be silent and made her kneel on the floor. (23 RT 7744.) He threatened to blow her head off if she did not orally copulate him. She complied, but he stopped her and made her pull her pants down. He stated that "if [she] didn't do it right, [she] wasn't going to see another F'ing day." Appellant raped her and had her pull her pants back up. (23 RT 7745.) After helping the customer and secretly asking her to call the police, Cook returned to the room, and appellant made them sit down. (23 RT 7745-7746, 7757-7759.) He told them if they identified or testified against him, he would look for them and then left the store. (23 RT 7746, 7760.) Gomez was hysterical. She vomited and spat on the ground. (23 RT 7759-7760, 7762.) Gomez received medical treatment, including a rape examination. (23 RT 7747-7748.) Her marriage ended in divorce as a result of the rape. (23 RT 7748.) Cook was unable to be alone and was petrified for six months. (23 RT 7760.)

ii. Bettie Hershey

On August 15, 1978, Bettie Hershey worked as the store manager at Groth's, a shoe store located in the Southgate Shopping Center. (23 RT 7764-7765.) Hershey was divorced at the time and supported her four children. (23 RT 7766.) While working at the store alone, appellant

entered and asked to try on a pair of shoes. Hershey walked to the back room to retrieve the shoes and felt him following her. She turned around, and appellant showed her a gun. He grabbed her by the hair, put the gun to her head, and threatened to blow her head off if she screamed. (23 RT 7767, 7769.) Appellant ordered Hershey to lock the front door, but she was unable to keep a steady hand due to her fear and asked appellant to lock it. He attempted to lock it, but unbeknownst to him, did not successfully do so. Hershey was unable to stand, and appellant held her up by her ponytail. (23 RT 7768.) He dragged her to the register, and she placed the money into a paper bag dropping some of the pennies. Appellant wanted the pennies and made her pick them up. Appellant took $35. (23 RT 7770.)

Hershey asked him what he was going to do to her, and he said, "pussy or blow job." He "made [her] undo his belt and his trousers, and [she] had to orally copulate him." Appellant poked Hershey with the gun and seemed to enjoy the pain it caused her. He seemed impatient, turned her over, and raped her. (23 RT 7771.) He taped her hands, legs, and feet together, took her to the back room, and she fell to the floor. (23 RT 7772.) He taped her mouth shut and orderd her to close her eyes. Hershey believed appellant was going to kill her and refused to close her eyes. Appellant stomped on her face with his cowboy boots, told her that he had her wallet and address, and would kill her children if he saw this on the news. He took a dollar from Hershey's wallet and her keys. (23 RT 7773-7774.) After appellant left, Hershey freed herself and called the sheriff's department. (23 RT 7774.) She received medical treatment, including a rape examination. (23 RT 7774-7775.) Hershey underwent therapy, had anxiety attacks, could not be alone, and lost her job as a result of appellant's attack. (23 RT 7775-7776.)

iii. Virginia Parker

On August 22, 1978, Virginia Parker owned Morebeck's flower shop, located in downtown Sacramento, and had two children. (23 RT 7789-7790.) At 2:00 p.m., appellant entered her shop stating that he needed a plant for his wife. (23 RT 7791-7792.) Appellant left the store, but returned and announced that "this [was] a robbery." (23 RT 7792-7793.) Appellant had a gun and ordered her down to the ground. (23 RT 7793.) He taped her legs and ankles together and asked her what kind of watch she wore. (23 RT 7794-7795.) She could not remember, and appellant hit her face and threw her across the room. (23 RT 7795.) Appellant took her watch and rings. Appellant reached underneath Parker's dress and gave her a choice between rape or oral copulation. (23 RT 7796.) Parker warned of customers entering the store, and he asked her where she kept the money. She told him, and he took the money. He put the gun to her head, told her not to scream or he would kill her, and left the store. (23 RT 7797.) Parker was able to get help and police officers arrived shortly thereafter. (23 RT 7798-7799.) As a result of the attack, Parker learned how to shoot a gun and slept with one under her pillow for approximately two years. (23 RT 7799-7800.)

iv. Dolores Ogburn

On August 15, 1974, Dolores Ogburn worked as a waitress and cashier at Little Joe's, an all night steak house in Sacramento. (23 RT 7801-7802.) Ogburn arrived at the restaurant at approximately 10:00 p.m., and appellant was already there with another man. (23 RT 7803-7804.) Appellant's party left around midnight, but he stayed behind. At approximately 4:20 a.m., appellant approached Ogburn with a steak knife and stabbed her in the arm when she tried to get around him. (23 RT 7804-7805.) He punched her on the head causing her to fall to the floor. (23 RT

7805.) Appellant went to the register, removed some money, grabbed and threw around the other employee working that night, and left the store. (23 RT 7805-7807.)

v. Patricia Jones

On September 6, 1978, at approximately 10:00 a.m., Patricia Jones was employed at Willow Tree, a ladies dress shop, located in Sacramento County, and opened the store for business. (23 RT 7808, 7810.) At the time, Jones was married to a California Highway Patrol officer and had three children. (23 RT 7809.) She noticed two men sitting in a parked car, which she thought was "odd at that time in the morning." (23 RT 7810.) Within a minute of opening the store, appellant walked in and asked to see a pair of ladies slacks. (23 RT 7811-7812.) Appellant followed her as she went to get the slacks, placed a gun to the back of her head, and ordered her to walk to the back room. (23 RT 7812-7813.) He ordered Jones to get on the floor and tied her hands behind her back and also tied her feet together. Appellant stated that "he wanted to have some pussy" or for Jones to "suck his dick." (23 RT 7813.) Jones did not want appellant touching her, so she choose oral copulation. Appellant propped her up against the wall. "Nothing" happened, and appellant, who was upset, hit Jones on both sides of her face with his hands causing her to lose her balance and hit her head against the door. (23 RT 7814-7815.) Appellant took her jewelry, including her wedding rings which she had never removed for 25 years, and billfold which contained personal and identifying information. (23 RT 7815.) He also took money from the cash register. (23 RT 7816.) Appellant left, and Jones called for help and received medical assistance. (23 RT 7817-7818.)

vi. Tennye Pettinato

On August 30, 1978, Tennye Pettinato owned Andrea's Casuals, a women's clothing store, located in Sacramento, and was there alone that afternoon. (24 RT 7884-7885.) At approximately 2:00 p.m., appellant entered the store and asked to look at a women's jumpsuit in a particular size. (24 RT 7886-7887.) Pettinato believed appellant was a transvestite who had asked for the wrong size. (24 RT 7887-7888.) As she showed him various jumpsuits, appellant pulled out a gun and ordered her to the back room. She offered him all the money in the register, but he refused and tied her up with rope he had in his pocket and gagged her. (24 RT 7888-7889.) Appellant took her jewelry and the money from the register and left. (24 RT 7890-7891.) Eventually, the shopkeeper next door came to her aid and officers were at the scene within five minutes. (24 RT 7891.) The incident frightened her family and caused her to stop trusting men. She also did not renew her commercial lease. (24 RT 7892.) Pettinato was very nervous about testifying and developed shingles prior to trial. (24 RT 7892-7893.)

2. Defense

In 1960, Dode Hall got to know appellant while both were incarcerated at the Indiana State Reformatory. (24 RT 7928-7929.) At the time, Caucasian inmates had problems at the Reformatory and faced sodomy or rape. (24 RT 7930.) Hall was released from the Reformatory in 1966 and reconnected with appellant in Indiana during the following year. (24 RT 7931.) In 1974, Hall assisted appellant in a robbery by driving the getaway car. (24 RT 7932.)

Appellant was a "braggart" who "always liked to be the star, okay, the show, point of attention." (24 RT 7934.) Appellant had a reputation of being a "hood." (24 RT 7927-7928.) Hall never met appellant's father, but

described his mother as an elderly and religious, but very likeable, woman. He met two of appellant's other brothers while in the penitentiary. (24 RT 7934-7935.) Appellant came from a poor family. (24 RT 7935.) Appellant was a heavy drinker and sometimes got into trouble while drunk. (24 RT 7937.) Appellant seemed to get along with his first wife, Diane, and they committed crimes together. (24 RT 7939.) Hall heard again from appellant in the late eighties or early nineties, while appellant was in California. (24 RT 7940.) Appellant explained that he worked at a dry cleaning business, was living with someone, and was tight on money. (24 RT 7941.)

Jerry Stokes first met appellant at Knox County Orphanage in Vincennes, Indiana in 1954, when they were approximately 13 years old. (24 RT 7970.) The oprhanage was "hell," and they often times ran away together. (24 RT 7971-7972.) The owners, Mr. and Mrs. Summers, beat the children and would throw them in hot water. (24 RT 7973.) Their son, Billy Jack, visited the orphanage and physically and sexually abused appellant and another boy. (24 RT 7973-7975.) Appellant's mother was "fanatically religious," but a good woman. (24 RT 7977.) Appellant's father, a truck driver, was largely absent from the home and sexually abused appellant when he was there. (24 RT 7978- 7979.) Appellant began drinking at an early age and was "two different people" when sober versus drunk. (24 RT 7980-7981.) Appellant was mean while drunk. (24 RT 7981.) When sober, however, appellant did kind things such as give away all the money he had stolen. (24 RT 7982-7983.) Stokes and appellant were incarcerated together at the Pendleton Correctional Facility as young adults. (24 RT 7984-7985.) Appellant was known as "Tweetie Bird" and sexually assaulted by other Pendleton inmates. (24 RT 7985-7986.)

Dennis Barnes, an inmate at Folsom State Prison for attempted murder, first met appellant there in 1984. (24 RT 8051-8052.) Appellant

worked in the laundry facility and was considered a good worker who never caused problems. (25 RT 8225, 8230, 8236, 8238-8239, 8242.) At the time, the prison experienced high racial tensions, which resulted in violence, and appellant was known as someone who directed others in the right direction and helped with day-to-day survival. (24 RT 8053-8055.) Appellant assisted inmate William Mayfield in acclimating to prison life. (24 RT 8073-8079.)

Gretchen White, a licensed clinical psychologist, opined that appellant's personality, or his inability to perform outside of a penitentiary, was formed as a result of growing up in a multi-problem family and the fact that he had been institutionalized since the age of 12. (24 RT 8083, 8091-8092.) First, appellant's family had both physiological and psychological problems to an extraordinary degree. (24 RT 8091.) His mother had a third grade education, while his father had a fifth grade education at best, and there was "tremendous conflict between the parents." (24 RT 8092, 8099.) A source of conflict was the fact that his mother was an avid Jehovah's Witness, while his father was an atheist and known womanizer. (24 RT 8099.) Appellant's father drank heavily when he was at home, which resulted in physical fights with his mother. (24 RT 8100.) His family was "pretty isolated," and appellant had a "love/hate relationship" with his father. (24 RT 8093, 8100.) His father provided neither financial nor psychological support. (24 RT 8102.) Consequently, appellant's mother held two jobs leaving the children, including appellant, completely unattended. (24 RT 8103-8104, 8108.)

Appellant's mother was "inept at controlling the children" and failed to provide them with structure. (24 RT 8106-8107.) Over time, his siblings were either incarcerated or sent to various facilities for care. (24 RT 8105.) White concluded that appellant's family "basically wasn't a family," but rather "a bunch of people that sometimes lived there and sometimes

didn't." (24 RT 8105.) White understood that appellant's father was not physically abusive on an ongoing basis, but remained a "disastrous role model." (24 RT 8108-8109, 8110-8111.)

Second, institutionalization at such a young age has profound effects on psychological development. (24 RT 8092.) The Knox County Orphanage was a "fairly brutal cold place to be housed" and did not foster any of the things that "ideally we have families give us ...." (24 RT 8117-8118.) From the orphanage, appellant was sent to Pendleton Reformatory at the age of 17. (24 RT 8121.) It was a dangerous and frightening place for someone coming directly from a foster home. (24 RT 8122.) Appellant's "right of passage into adulthood" occurred "within that institutional setting" and included sexual experiences that "replicated previous sexual experiences that he had had in that regard." Research indicated that institutionalization plays a serious and large role in terms of "how they eventually turn out." (24 RT 8123-8126.)

Generally, appellant functioned "very well within a structured setting. He [was] a hard worker." While in prison, he had few write-ups and sick calls. However, because he never developed internal controls, appellant moved from "impulse to impulse" when not incarcerated. (24 RT 8128.) Appellant's history of heavy alcohol was not surprising given his family history. (24 RT 8130.)

James Park, a prison expert, explained that older and long-term prisoners were stabilizing elements at the prisons. He opined that a prisoner who was appellant's age was generally less problematic than prisoners under the age of 25 because they tended to "settle in for life." (25 RT 8278.) He further opined, with a high degree of confidence, that appellant "is going to be a good prisoner" and worker. "He's going to be a useful prisoner in terms of promoting the objectives of the prison which is to keep it running and keep it safe." Appellant would not be a problem and

do fine despite the fact he would no longer have the opportunity to earn parole. (25 RT 8289.)

ARGUMENTS

I. APPELLANT'S STATEMENTS WERE PROPERLY ADMITTED BECAUSE HIS LIMITED INVOCATION OF HIS MIRANDA RIGHTS DID NOT PRECLUDE DETECTIVES FROM ALL OTHER QUESTIONING

Appellant first claims the statements he made to Detectives Reed and Edwards on June 21, 1993, were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436. He argues that he fully invoked his right to remain silent and was therefore subject to an unlawful interrogation. He further argues his statements, including the additional evidence discovered as a result of the interrogation, should have been suppressed by the trial court. (AOB 52-120.) Respondent disagrees. Appellant only partially invoked his right to remain silent when he told detectives that he did not wish to discuss the "robbery/murder[s]." Consequently, Detectives Reed and Edwards were free to discuss anything other than the actual crime with appellant.

A. Background

On March 12, 1996, appellant filed a notice of motion and motion to exclude the pre-trial statements he made during the interrogation on June 21, 1993, as well as the "tainted fruits thereof," including all statements made by Susan Burlingame, Stacey Billingsley, and Greg Billingsley, on the ground that the statements were the product of police coercion. (2 CT 377-391.) On March 21, 1996, a hearing was held regarding appellant's motion to exclude his pre-trial statements. (2 CT 377; 1 RT 1155.)

The following is the evidence gathered from the hearing:

On June 20, 1993, at 10:16 p.m., Sacramento County Sheriff's Department Homicide Detective Darryl Edwards and his partner, Detective

Stan Reed, were dispatched to The Office to initiate a homicide investigation. (1 RT 1160-1161.) Following their initial investigation, Detectives Edwards and Reed took appellant into custody, transported him to the Sacramento County Sheriff's Department, and conducted a videotaped interview in a Sheriff's Department interview room. (1 RT 1225-1226.) Appellant was handcuffed to a table ring, but appeared relaxed and amiable. (1 RT 1228-1229.)

Detective Reed, the primary interviewing officer, explained to appellant what he was investigating and why, advised appellant of his *Miranda* rights, and asked appellant if he wanted to talk to him. (1 RT 1226.) Appellant responded, "[n]o, not about a robbery/murder." (1 RT 1226-1227.) Detective Reed understood this to mean that, while appellant did not wish to speak about the specific details of the "robbery/murder[s]," he was willing to discuss other topics. Accordingly, Detective Reed asked appellant questions about other topics such as his living arrangements. A few minutes later, Detective Reed asked appellant, "I don't suppose you would care to tell us what you were doing last night?" (1 RT 1227.) Without any hesitation, appellant agreed and told Detective Reed about his whereabouts. (1 RT 1228.) Appellant also disclosed the identities of Stacey and Greg Billingsley, as well as Susan Burlingame, during the interview. Detective Reed, however, explained that he would have collected this information during the course of his normal investigation.[59] (2 RT 1273.)

During cross-examination, the following collequy occurred between defense counsel and Detective Reed:

---

[59] On recross-examination, Detective Reed speculated that he would have, at a minimum, contacted the owner, but could not be sure. (2 RT 1273.)

Q Okay. And the next thing you said after that, after he said no, he didn't own any guns was do you care to tell us where you were at last night; is that right?

A Yes.

Q And after that, the whole focus of the interrogation reverted back to the incident at The Office bar in which two people had been murdered the night before; is that right?

A I'd say the line of questioning paralleled that, yes.

Q And paralleled it to the effect that Mr. Case offered the fact that he had been, indeed, at The Office bar the previous evening; is that right?

A Yes.

Q And paralleled being that he did – while he didn't admit that he participated in the robbery/murder, he did admit to having been there, and you were interrogating him as to his story regarding what he did there at the night before?

A That's correct.

Q And what was your purpose in interrogating him in that fashion; in other words, to get his side of the story.

A To get admissions that would be held against him at a later time.

Q Okay. [¶] And this was something that you realized couldn't be used because – in the prosecution's case in chief if this case were to go to trial because of the fact that he had obviously invoked his *Miranda* rights; is that right?

A Well, I disagree with that, but it's up to the Court to make that ruling.

(2 RT 1252-1253.) Defense counsel continued by asking Detective Reed about his knowledge of *Miranda*. (2 RT 1253-1254.) The colloquy continued as follows:

Q Okay. [¶] For instance, are you aware that in California, subsequent to the enactment of Proposition 8 in

1982, a statement made by a defendant in violation of his Miranda rights can be admitted if he were to take the stand for the purpose of impeaching his statement from the stand, his testimony?

A It's not a hard and fast rule, but I'm aware that, in some cases, if the judge is not offended by the conduct, it can be admissible.

Q All right. [¶] And is it your habit in questioning individuals who invoke their right to remain silent to continue to question them after they have invoked their right to remain silent in order to obtain those sorts of admissions that might be used if a person were to take the stand for purposes of impeaching that person?

A Is your question in this particular case or in general?

Q In general.

A In general, yes.

* * *

A What I'm saying is he didn't invoke his right to an attorney. He didn't invoke his right not to talk to me. He just didn't want to talk about a robbery/homicide which, in my experience, that's the case with all these people. That's why they call it an interrogation. In my opinion, we got past that without a problem. [¶] And the fact that he discussed things that paralleled that doesn't change it. He still talked freely and voluntarily. That's my opinion, sir.

(2 RT 1254-1255.) Detective Reed later continued as follows:

A What he did was in some way is a partial invocation of his rights; however, he did not invoke his right not to speak to me. [¶] And I frequently during an interrogation have somebody tell me, for example, I don't want to talk about that. [¶] And that, in itself, is not an invocation of his right to remain silent. It's a particular area of the interrogation that he doesn't want to discuss; i.e., in this case the robbery/homicide; however, as the interrogation continued, they for whatever the reason began to talk about it. And in those cases, that information has been admissible. And that's my opinion in this particular case.

Q All right. [¶] And, in other words, you felt that Mr. Case's statement, no, not – not on a robbery/homicide or robbery/murder, Jesus Christ, was a limited invocation of his right not to talk to you and that he was more than willing to talk to you about everything else that you might want to talk about; is that right?

A I'm not even sure it was an invocation. [¶] He made it clear that he did not want to talk about the robbery/homicide. That's what he was saying to me.

Q Uh-huh.

A But it was not an invocation not to speak to me. [¶] So during that interrogation, regardless in my opinion if I cross over and he begins talking about things that parallel such as his alibi, those things are all admissible. [¶] The only question that was in my mind – it's not a question in my mind, but I understand what you're saying – is that the whole invocation would have to just be that I don't want to talk to you, period. [¶] But that's not the case. That's what I'm saying, sir. That's not the way I understand it.

(2 RT 1256-1257.)

Following the hearing, the trial court ruled as follows:

And turning to the next two issues, whether the statements were coerced and whether they were taken in violation of the defendant's *Miranda* regarding the allegation that the statements were coerced, the Court has reviewed the videotape, and the Court has observed the testimony. The Court has in mind a setting of the interrogation, the style of the interrogator, Mr. Case's past, which was alluded to and Mr. Case's conduct during the time that he was in the interview room undergoing questioning. All of those things lead the Court to believe that the statements were not the product of coercion. The thorny question is whether the statements were taken in violation of Miranda.

As I recall the evidence, when he was asked if he wanted to discuss the matter with the sheriff's detectives, he said no, not about the robbery/murder, Jesus Christ. [¶] The Court has reviewed the cases that have been cited by both the People and the defense and finds that Clark and Silva are on point here.

> Clark holding that a defendant may indicate an unwillingness to discuss certain subjects without manifesting a desire to terminate an interrogation already in progress. [¶] In the Silva case, he said I really don't want to talk about that. And that was found not to be an invocation. [¶] Here Mr. Case didn't invoke his right to all subjects, only as to one. The scenario here is similar to the scenario in People vs Ashmus, A S H M U S, 1991, 54 Cal 3d, 932.

(11 RT 4067-4068.) The court continued:

> In that case, the defendant evidently sought to alter the course of questioning but didn't attempt to stop it altogether. And that appears to be what the situation was, absent an invocation of the right to remain silent, law enforcement officers may continue interrogation. The Court finds that they did so and they did so in a manner that was acceptable and not in violation of Mr. Case's Miranda rights. Because of these rulings, the Court does not reach the proven poisonous tree argument, since it does not feel it is inevitable based on the Court's ruling thus far.

(11 RT 4068.)

On appeal, appellant augmented a transcript of the interrogation to the record. (Aug. CT of 11/10/09 "Appendix A.") Based on that transcript, the following exchange occurred between Detective Reed and appellant:

> REED: Do you know what this is all about?
>
> CASE: No (shakes head).
>
> REED: Okay. Sorry we had to meet under such rude circumstances like that but I'm sure you'll understand why. Ah, we're investigating a homicide that occurred out on Jackson Highway and Bradshaw Road. Occurred last night. You may have seen it on the news.
>
> CASE: Yeah.
>
> REED: Okay. It's a robbery/murder. Two people were killed out there. In the process this morning of investigating this, we ran into a lady who had some clothing in her possession that had blood on it. And, ah, in the process of asking where it came from, ultimately she told us, reluctantly, but she told us. So that's why we came out to have a talk with you. Ah, we'd

like to talk to you about it, but because of the circumstances of the robbery and the murder out there and the bloody clothing and all that, ah, I'm going to have to advise you of the rights first. Okay? So you have the right to remain silent. Anything you say can and will be used against you in a court of law. Have the right to an attorney, have him present with you while you're being questioned, if you wish. If you cannot afford to hire an attorney, one will be appointed to represent you before any questioning. Do you fairly understand each of those rights?

CASE: Yeah.

REED: Having those rights in mind, will you talk to me now?

CASE: (Unintelligible) robbery/murder. Jesus Christ.

REED: Okay. [¶] Okay. As far as, um, any questions about where you're living and stuff, we'd like to get some of that information from you so we can get you identified and everything. What's your -- your full name?

(Aug. CT of 11/10/09 "Appendix A" at pp. 1-2.) Detectives Reed and Edwards then asked appellant approximately 15 additional questions pertaining to his identification, address, living conditions, employment, and whether he possessed any weapons. (Aug. CT of 11/10/09 "Appendix A" at pp. 2-4.) Detective Reed then asked the following questions:

REED: Care to tell us where you were at last night?

CASE: I was at the Office last night with my girlfriend.

***

REED: Oh, you were there with your girlfriend?

CASE: Yeah. Damn near all night until about 9:00 o'clock.

(Aug. CT of 11/10/09 "Appendix A" at p. 4.)

B. Relevant Law

This Court has summarized the general law as follows:

> The basic rules applicable to defendant's claims are well settled. The high court has stated in summary that to counteract the coercive pressure inherent in custodial surroundings, "*Miranda* announced that police officers must warn a suspect prior to questioning that he has a right to remain silent, and a right to the presence of an attorney. [Citation.] After the warnings are given, if the suspect indicates that he wishes to remain silent, the interrogation must cease. [Citation.] Similarly, if the suspect states that he wants an attorney, the interrogation must cease until an attorney is present. [Citation.]"

(*People v. Williams* (2010) 49 Cal.4th 405, 425.)

"Critically, however, a suspect can waive these rights." (*People v. Williams* (2010) 49 Cal.4th 405, 425.) To stop the questioning, the suspect "must articulate his desire to [remain silent] sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be [an invocation of the right to remain silent]." (*Davis v. United States* (1994) 512 U.S. 452, 459; see also *Berghuis v. Thompkins* (2010) ___ U.S. ___ [130 S.Ct. 2250, 2259–2260].) A suspect may exercise his right against self-incrimination by "refus[ing] to sign a waiver of his constitutional rights[,] ... refus[ing] to continue an interrogation already in progress[,] or ... [by] ask[ing] for an attorney." (*People v. Silva* (1988) 45 Cal.3d 604, 629, citing *People v. Ireland* (1969) 70 Cal.2d 522, 535.) "[T]he question of waiver must be determined on the 'particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' [Citations.]" (*People v. Williams*, *supra*, 49 Cal.4th at p. 425; see also, e.g., *In re Shawn D.* (1993) 20 Cal.App.4th 200, 209 [relevant factors include the suspect's age, sophistication, prior experience with the criminal justice system, and emotional state].)

> The inquiry has two distinct dimensions. [Citations.] First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [Citations.]

(*Moran v. Burbine* (1986) 475 U.S. 412, 421; see also *People v. Cruz* (2008) 44 Cal.4th 636, 668.)

> Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

(*Id.* at pp. 422-423, fn. omitted; see also, *People v. Sully* (1991) 53 Cal.3d 1195, 1233.)

A defendant, however, has not unambiguously and unequivocally invoked his right to remain silent when his statements are merely expressions of passing frustration or animosity toward the interrogating officer or amount only to a refusal to discuss a particular subject. (*People v. Williams*, *supra*, 49 Cal.4th at p. 433; see also *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238.) Indeed, "[a] defendant may indicate an unwillingness to discuss certain subjects without manifesting a desire to terminate "an interrogation already in progress." (*People v. Silva*, *supra*, 45 Cal.3d at p. 630, citing, e.g., *People v. Watkins* (1970) 6 Cal.App.3d 119, 124; see also *People v. Clark* (1992) 3 Cal.4th 41, 122.)

"The prosecution bears the burden of demonstrating the validity of the defendant's waiver by a preponderance of the evidence." (*People v. Williams*, *supra*, 49 Cal.4th at p. 425, citing *People v. Dykes* (2009) 46 Cal.4th 731, 751; see *Berghuis v. Thompkins* (2010) 560 U.S. ___, ___ [130

S.Ct. 2250, 2261].) "On appeal, we conduct an independent review of the trial court's legal determination and rely upon the trial court's findings on disputed facts if supported by substantial evidence." (*People v. Williams*, *supra*, 49 Cal.4th at p. 425, citing *People v. Dykes*, *supra*, 46 Cal.4th at p. 751.)

C. Appellant's Limited Invocation of His Right to Remain Silent as to the Subject of the "Robbery/Murder[S]" did not Preclude Detectives from Questioning Him about Other Topics Such as His Whereabouts on the Evening of the Crimes

Appellant is mistaken when he argues that he had fully invoked his right to remain silent during his interrogation with Detectives Reed and Edwards on June 21, 1993. He argues that, because the robbery-murder was the only topic of interest to the detectives, his refusal to discuss it was tantamount to a full invocation of his right to remain silent and the detectives deliberately violated his *Miranda* rights when they continued to question him. (AOB 66-79.) The well-established case law does not support appellant's argument.

Appellant refused to discuss only the "robbery/murder[s]," which amounted to a limited invocation of his right to remain silent as to the details of the crime. The trial court correctly found the cases of *Silva*, *Clark*, and *Ashmus* controlling in the instant case. In *People v. Silva, supra*, 45 Cal.3d at p. 629, the defendant was interrogated by a sheriff's deputy shortly after his arrest. He waived his *Miranda* rights and answered the questions posed to him. (*Ibid.*) After answering several questions, the defendant stated "I don't know. I really don't want to talk about that[]" when asked whether he had driven the truck. (*Ibid.*) The deputy then discussed areas other than the identity of the driver of the truck. (*Ibid.*) On appeal, the defendant argued that his statement, "I don't know. I really don't want to talk about that[,]" was an invocation of his right to remain

silent and that all further questioning was in violation of *Miranda*. (*Ibid.*) This Court rejected the claim as follows:

> Having obtained defendant's consent to the questioning, Callegari was free to interview defendant until he exercised his privilege against self-incrimination. A suspect may do so by "refus[ing] to sign a waiver of his constitutional rights[,] ... refus[ing] to continue an interrogation already in progress[,] or ... [by] ask[ing] for an attorney." A defendant may indicate an unwillingness to discuss certain subjects without manifesting a desire to terminate "an interrogation already in progress."
>
> Here, the trial court listened to the tape recording and found that "[I]n this case ... [defendant] does not claim that he had invoked his constitutional rights directly, but indirectly. And if you listen to the portion of the tape to which I listened, it is clear from the inflection that he was not even intimating that he wished to terminate the interrogation when he said, "I don't know, I really don't want to talk about that." In light of the court's finding and our independent review of the tape recording, we find these statements were admissible and were not obtained in violation of his *Miranda* rights.

(*People v. Silva*, *supra*, 45 Cal.3d at pp. 629-630, internal citations omitted.)

Similarly, in *People v. Clark*, *supra*, 3 Cal.4th at pp. 119-120, the defendant had waived his right to remain silent, wondered how long it would take to get an attorney, and stated that he wished to talk to the detective during the interim. There was some further discussion as to whether the defendant wanted to invoke his right to counsel, but the defendant stated he was willing to talk to the detective in the meantime. (*Id.* at p. 120.) He ultimately waived his right to counsel and stated that he would tell the detective when he wanted an attorney present. (*Ibid.*) On appeal, this Court rejected the defendant's claim that he had effectively invoked his right to counsel and that the detective should have stopped questioning him. (*Id.* at pp. 120-121.) This Court reasoned as follows:

> However, defendant never expressed a desire not to talk until he had an attorney. The detectives repeatedly made clear to him that if he wanted an attorney now, they would stop right then, and that he could stop the interview at any time by merely saying he wanted an attorney. Although he expressed the desire to have the process of getting an attorney started, he never showed the slightest reluctance to talk in the meantime. A desire to have an attorney in the future, coupled with an unambiguous willingness to talk in the meantime, is not an invocation of the right to counsel requiring cessation of the interview.

(*Ibid.*, internal citation omitted)

Finally, in *People v. Ashmus* (1991) 54 Cal.3d 932, 968, overruled on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117, the defendant also waived his *Miranda* rights during a police interview following his arrest and answered a line of questions. In response to one question, he stated, "you're gonna try to con-, now I ain't saying no more." (*Id.* at pp. 968-969.) The defendant argued that everything following that statement should have been suppressed because they were taken after he had invoked his right to remain silent. (*Id.* at p. 969.) In upholding the trial court's finding that the defendant had not invoked his right to silence, this Court noted that the defendant

> spoke to his interrogators; he uttered the words in question; and without hesitation he proceeded to speak to them further. He evidently sought to alter the course of the questioning. But he did not attempt to stop it altogether.

(*Id.* at p. 970.)

Appellant argues the above three cases relied upon by the trial court are inapposite because the defendants in those cases first expressly waived his right to remain silent and only later in the interrogation "expressed an unwillingness to answer a particular question posed or discuss a particular area of inquiry." (AOB 73-76.) While it is true those defendants first expressly waived their right to remain silent, that fact is not fatal to this

case and is nothing more than a distinction without a difference. A review of the facts and circumstances surrounding this case supports the trial court's finding that appellant selectively invoked his *Miranda* rights.

Appellant, in his mid-50s at the time of the interrogation, was a sophisticated long-term career criminal who was highly experienced with the criminal justice system, understood his *Miranda* rights, and immediately defined for the detectives what he was unwilling to discuss when he said he did not wish to discuss the "robbery/murder[s]." (Aug. CT of 11/10/09 "Appendix A" at pp. 1-2; see *North Carolina v. Butler* (1979) 441 U.S. 369, 374-375, quoting *Johnson v. Zerbst* (1938) 304 U.S. 458, 464 ["the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'"].) To be sure, throughout the course of the interrogation, appellant neither gave any indication that he wanted the detectives to cease their questioning nor told detectives that he no longer wished to speak to them. Instead, he instantaneously unleashed an alibi when simply asked, "[c]are to tell us where you were last night?" (Aug. CT of 11/10/09 "Appendix A" at p. 4; see *Terrovona v. Kincheloe* (1990) 912 F.2d 1176, 1180 ["Terrovona gave the detectives no indication that he wished to remain silent. Rather, he offered an alibi to explain his whereabouts on the evening in question, indicating a willingness to talk."]; *People v. Davis* (1981) 29 Cal.3d 814, 825 ["Moreover, although defendant's subsequent silence was clear evidence of his unwillingness to speak to the test administrator, the surrounding circumstances show that his reluctance was related only to the polygraph examination."].) Like the defendant in Ashmus, appellant simply "sought to alter the course of the questioning. But he did not attempt to stop it altogether." (*People v. Ashmus*, *supra*, 54 Cal.3d at p. 970.) Thus, appellant only partially invoked his right to remain silent.

Appellant's argument that his refusal to discuss the "robbery/murder[s]" was tantamount to a full invocation of his right to remain silent because it was the sole topic of interest to the detectives is flawed. Appellant's definition of "robbery/murder[s]" is far too broad, and this Court should reject it. Appellant argues that the refusal to discuss the "robbery/murder[s] includes the refusal to discuss an alibi because "an alibi exists only in relation to, and thus implicitly concerns, a particular crime." (AOB 70.) Rather, "[a]n alibi consists of evidence that the defendant was not at the scene of the crime when it was committed and did not otherwise participate in its commission." (*People v. Gilbert* (1965) 63 Cal.2d 690, 710, emphasis added, distinguished on other grounds in *People v. Gonzales* (1967) 66 Cal.2d 482, 493.) Accordingly, asking appellant where he was that night necessarily is not the same as discussing the actual details of the crimes. Appellant therefore did not fully invoke his right to remain silent. As discussed above, he was eager to discuss his alibi and clear his name. Under the totality of the circumstances, the trial court correctly concluded that appellant selectively waived his right to remain silent during his interview with the detectives.

Equally flawed is appellant's argument that Detective Reed deliberately violated his right to remain silent in an attempt to obtain statements to be used against him at trial. He makes much of the fact that Detective Reed continued to question him about his identity and employment despite already being in possession of such information. (AOB 68-69.) This is of no significance. As set forth above, because appellant only selectively invoked his right to remain silent, the detectives were permitted to question appellant about anything else regardless of their subjective feelings. (See, e.g., *People v. Carrington* (2009) 47 Cal.4th 145, 168 ["The existence of an ulterior motivation does not invalidate an officer's legal justification to conduct a search."]; see also *United States v.*

Van Dreel (7th Cir. 1998) 155 F.3d 902, 905 ["That the ... officer may have hoped to find evidence [not listed in the warrant] is irrelevant to the Fourth Amendment analysis under Whren, because once probable cause exists, and a valid warrant has been issued, the officer's subjective intent in conducting the search is irrelevant."].)

In addition, based on an isolated portion of Detective Reed's testimony on cross-examination, appellant incorrectly argues that Detective Reed recognized his statement as a full invocation of his right to remain silent and deliberately violated this right by his continuing the interrogation. (AOB 68-70.) Not so. A review of the entire relevant portion of Detective Reed's cross-examination, as set forth above, reveals that he in fact understood appellant's invocation was limited to the crimes itself and that he was free to question appellant about any other topics. To be sure, Detective Reed's concluding testimony on this subject was as follows:

> But it was not an invocation not to speak to me. [¶] So during that interrogation, regardless in my opinion if I cross over and he begins talking about things that parallel such as his alibi, those things are all admissible. [¶] The only question that was in my mind – it's not a question in my mind, but I understand what you're saying – is that the whole invocation would have to just be that I don't want to talk to you, period. [¶] But that's not the case. That's what I'm saying, sir. That's not the way I understand it.

(2 RT 1256-1257.) The record, therefore, belies appellant's claim that Detective Reed deliberately violated his right to remain silent.

D. Appellant's Statement was Voluntary

As similarly argued above, appellant claims his statement was the product of psychological coercion and therefore involuntary because the detectives "continued to interrogate him" despite the fact he "emphatically stated to his interrogators that he did not want to talk about the robbery-

murder at hand." He also argues that his statement was involuntary as a result of the alleged violation of his right to remain silent coupled with the detectives "threats" of the death penalty. (AOB 79-83.) Again, respondent disagrees.

"An involuntary confession may not be introduced into evidence at trial." (*People v. Carrington* (2009) 47 Cal.4th 145, 169, citing *Lego v. Twomey* (1972) 404 U.S. 477, 483.) "The prosecution has the burden of establishing by a preponderance of the evidence that a defendant's confession was voluntarily made." (*Carrington*, at p. 169, citing *Twomey*, at p. 489; see also *People v. Williams* (1997) 16 Cal.4th 635, 659.) A statement is deemed voluntary if it is "the product of a rational intellect and free will." (*People v. Maury* (2003) 30 Cal.4th 342, 404, citing *Mincey v. Arizona* (1978) 437 U.S. 385, 398.) Thus, "[i]n determining whether a confession was voluntary, the question is whether defendant's choice to confess was not essentially free because his or her will was overborne." (*Carrington*, at p. 169, citing *People v. Massie* (1998) 19 Cal.4th 550, 576, internal quotations omitted; see also *People v. Maury*, *supra*, 30 Cal.4th at p. 404.) This determination involves a totality of the circumstances approach, examining both the individual characteristics of the defendant and those of the specific interrogation or interview. (*People v. Maury*, *supra*, 30 Cal.4th at p. 404, citing *People v. Thompson* (1990) 50 Cal.3d 134, 166; see also *Withrow v. Williams* (1993) 507 U.S. 680, 693–694; *People v. Massie*, *supra*, 19 Cal.4th at p. 576.) On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence. (*People v. Carrington*, *supra*, 47 Cal.4th at p. 169.) The trial court's findings as to the voluntariness of the confession is, however, subject to independent review. (*Ibid.*; see also *People v. Holloway* (2004) 33 Cal.4th 96, 114.)

For the reasons set forth above, appellant only partially invoked his right to remain silent; therefore, Detectives Reed and Edwards rightfully continued the interrogation. Additionally, as acknowledged by appellant, the "thinly-veiled threat of the death penalty if he did not tell his side of the story" standing alone, is not enough to render his statement involuntary. (AOB 82-83.) To be sure, this Court's decision in *People v. Williams* is illustrative. The following occurred between the defendant and interrogator:

> Salgado stated: "This is your chance now, right here before it gets any ... farther outside of this room ... in front of any district attorney[.] In front of any judge or jury. Cause you know how the system works." Defendant acknowledged: "I know how the system works," adding: "If I got found guilty on the murder I'm goin' anyway." Knebel interjected: "You're gone." Salgado said, "That's not true." He added: "I'll tell you why.... It's because when the jury and judge looks at these things they look for the truth." Knebel added: "They look for remorsefulness on the part of the guy that did the crime." Knebel added: "[I]f from jump street you deny it and we go through and prove it the jury's gonna say, you ain't worth saving...." Defendant stated: "Kill me." Knebel added: "give him the gas chamber." Salgado asked: "Is that what you want?" Defendant replied: "[They're] gonna have to kill me." Knebel responded: "They will." Salgado asked whether defendant wanted to die, and when defendant responded he did not, Salgado said: "Then tell me the truth." Defendant denied killing the victim.

(*People v. Williams*, *supra*, 49 Cal.4th at p. 438.) This Court found as follows:

> In the present case, it is evident that neither the mention of the death penalty nor the deception overcame defendant's will. He exhibited no sign of distress in response to references to the death penalty, and remained able to parry the officers' questions. Defendant had experience with the criminal justice system, having been convicted of rape and burglary and having served a prison term in consequence. The deception practiced by the officers was not of a sort likely to produce unreliable self-

> incrimination. [¶] Significantly, moreover, defendant did not incriminate himself as a result of the officers' remarks. Rather, defendant continued to deny responsibility in the face of the officers' assertions.

(*Id.* at pp. 443-444, citations omitted.)

Similary, it cannot be argued that appellant's will was overborne. He appeared relaxed throughout the interrogation, did not confess when faced with the fact that he could face the death penalty, and continued to maintain his innocence. (1 RT 1228-1229.) Indeed, given his extensive criminal history, appellant certainly was no stranger to the interrogation process and attempted to use it to his advantage. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1096 ["The sole cause appearing in the record for defendant's cooperation during the interview was his desire to exculpate himself"]; *People v. Coffman* and *Marlow* (2004) 34 Cal.4th 1, 58 ["His resistance, far from reflecting a will overborne by official coercion, suggests instead a still operative ability to calculate his self-interest in choosing whether to disclose or withhold information"]; see also *People v. Jablonski* (2006) 37 Cal.4th 774, 815–816, 38 Cal.Rptr.3d 98, 126 P.3d 938.) The detectives merely encouraged appellant to tell the truth and made no impermissible threats of punishment or promises of leniency. To the extent they suggested appellant may get a lesser punishment by telling his side of the story, this was no more than an advisement of the benefit that might flow naturally from a truthful and honest course of conduct. "'Homicide does possess degrees of culpability, and when evidence of guilt is strong, confession and avoidance is a better defense tactic than denial.'" (*People v. Holloway*, *supra*, 33 Cal.4th at p. 116.) This claim is meritless.

E. The Trial Court Properly Admitted the Testimony of Greg Billingsley, Stacey Billingsley, and Sue Burligame

Appellant further argues that the testimony of Greg Billingsley, Stacey Billingsley, and Sue Burlingame were inadmissible for the

following reasons: (1) the evidence was obtained as a result of his involuntary statement; (2) it was derivative of an interrogation strategy of deliberately ignoring his invocation of his rights in order to circumvent Miranda; and (3) it was not inevitably discovered. (AOB 83-96.) For many of the reasons set forth above, this argument fails.

1. Appellant's Statements were Voluntary

For the reasons set forth above, appellant's statements were voluntarily obtained. Consequently, the testimony of Greg Billingsley, Stacey Billingsley, and Sue Burlingame were properly admitted into evidence.

2. Detectives Reed and Edwards Honored Appellant's Limited Invocation of His Right to Remain Silent as to the Topic of the "Robbery/Murder[s]"

Appellant urges this Court to create a new remedy where law enforcement has deliberately ignored a defendant's invocation of his *Miranda* rights. Appellant urges as follows:

> If appellant's statement is found to have been voluntary, this Court should hold that derivative evidence, whether it be physical evidence or the testimony of a witness, is inadmissible where it is obtained as a result of a custodial interrogation in which the interrogating officers, for the purpose of evading *Miranda*'s safeguards, deliberately ignore the suspect's invocation of the right to remain silent.

(AOB 85.) Sadly for appellant, his case does not warrant such a remedy because this case does not involve deliberate misconduct by law enforcement. His argument rests solely on his mistaken interpretation of Detective Reed's testimony regarding his general interrogation practices. Appellant represents that

> the lead interrogating officer admitted that it was his practice to continue interrogating a suspect who invoked his rights because the suspect's desire not to talk is often overborne by continued

> questioning and that his aim in employing this strategy was to obtain investigative leads and impeachment material.

(AOB 91, emphasis in original.) A review of the colloquy between Detective Reed and defense counsel reveals that Detective Reed meant no such thing. As set forth in more detail above, it is true that Detective Reed answered in the affirmative when asked this leading question by defense counsel:

> All right. [¶] And is it your habit in questioning individuals who invoke their right to remain silent to continue to question them after they have invoked their right to remain silent in order to obtain those sorts of admissions that might be used if a person were to take the stand for purposes of impeaching that person?

(2 RT 1254.) Detective Reed, however, subsequently clarified his answer. He clearly explained that, in situations where there has been a limited invocation of the right to remain silent, it was his practice to discuss other topics and that in some cases "they for whatever the reason began to talk about it." (2 RT 1254-1257.) He then clarified:

> But it was not an invocation not to speak to me. [¶] So during that interrogation, regardless in my opinion if I cross over and he begins talking about things that parallel such as his alibi, those things are all admissible. [¶] The only question that was in my – that's in my mind – it's not a question in my mind, but I understand what you're saying – is that the whole invocation would have to just be that I don't want to talk to you, period. [¶] But that's not the case. That's what I'm saying, sir. That's not the way I understand it.

(2 RT 1257.) Contrary to appellant's representation of this exchange, it was not Detective Reed's practice "to continue interrogating a suspect who invoked his rights because the suspect's desire not to talk is often overborne by continued questioning ...." (AOB 91.) In fact, it was his practice to continue interrogating a suspect when he or she has only partially invoked his right to remain silent. As set forth above, the fact that he had

subjectively hoped to obtain admissions during his lawful continued interrogation about different topics is irrelevant for the reasons set forth above. (2 RT 1252-1253; see *Whren v. United States* (1996) 517 U.S. 806, 813 ["The existence of an ulterior motivation does not invalidate an officer's legal justification to conduct a search."].) Plainly, there was no deliberate misconduct on Detective Reed's part.

Additionally, this Court should decline appellant's invitation to expand the *Miranda* rule because, as he himself acknowledges, the United States Supreme Court has repeatedly declined to apply the fruit of the poisonous tree doctrine in non-deliberate failures to provide the warnings. (AOB 87-89; see *United States v. Patane* (2004) 542 U.S. 630, 639-642; *Oregon v. Elstad* (1985) 470 U.S. 298, 306-309; *Michigan v. Tucker* (1974) 417 U.S. 433, 444.) The *Patane* court reasoned as follows:

> It follows that police do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial. And, at that point, "[t]he exclusion of unwarned statements ... is a complete and sufficient remedy" for any perceived *Miranda* violation. [Citation.]
>
> Thus, unlike unreasonable searches under the Fourth Amendment or actual violations of the Due Process Clause or the Self–Incrimination Clause, there is, with respect to mere failures to warn, nothing to deter. There is therefore no reason to apply the "fruit of the poisonous tree" doctrine of *Wong Sun*, 371 U.S., at 488, 83 S.Ct. 407. [Citations.] It is not for this Court to impose its preferred police practices on either federal law enforcement officials or their state counterparts.

(*Pantane*, *supra*, 542 U.S. at pp. 641-642, footnote omitted.)

Again, as set forth above, this case does not involve deliberate misconduct on the part of Detective Reed, and appellant's statements were

voluntarily obtained. The facts of this case, therefore, do not warrant the construction of a new remedy as requested by appellant.[60]

3. The Evidence would have been Inevitably Discovered

Assuming arguendo the statements were inadvertantly, yet voluntarily, obtained in violation of *Miranda*, Detective Edwards would have inevitably spoken with the Billingsleys and Burligame as part of his investigation.

> Under the inevitable discovery doctrine, illegally seized evidence may be used where it would have been discovered by the police through lawful means. As the United States Supreme Court has explained, the doctrine "is in reality an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered." The purpose of the inevitable discovery rule is to prevent the setting aside of convictions that would have been obtained without police misconduct. The burden of establishing that illegally seized evidence is admissible under the rule rests upon the government.

(*People v. Robles* (2000) 23 Cal.4th 789, 800-801, internal citations omitted; see also *Murray v. United States* (1988) 487 U.S. 533, 539; *Nix v. Williams* (1984) 467 U.S. 431, 443, fn. 4.) "The government can meet its burden by establishing that, by following routine procedures, the police would inevitably have uncovered the evidence." (*United States v. Ramirez-Sandoval* (9th Cir. 1989) 872 F.2d 1392, 1399, citing *United States v. Martinez–Gallegos* (9th Cir. 1987) 807 F.2d 868, 870; *United States v.*

---

[60] Appellant cites *Missouri v. Seibert* (2004) 542 U.S. 600, 617, for the proposition that suppression of the deliberately obtained *Miranda*-violative statement was warranted for police deterrence purposes. (AOB 89.) Seibert, however, did not involve an application of the "fruit of the poisonous tree" doctrine. Rather, the plurality concluded that the manner that the warnings were given was not effective. (*Seibert*, at p. 617.)

Andrade (9th Cir. 1986) 784 F.2d 1431, 1433; see also *U.S. v. Ankeny* (9th Cir. 2007) 502 F.3d 829, 835, fn. 2; *United States v. Polanco* (9th Cir. 1996) 93 F.3d 555, 561-562.)

During the suppression hearing, Detective Edwards testified that he had learned of appellant's place of employment during his interview with Webster. (1 RT 1218-1219.) He further testified that, during the normal course of investigation, he would have contacted the place of employment to gain appellant's "background [information] and his activities." (1 RT 1219.) Detective Edwards answered, "Yes, that's true," when asked, "And would you attempt to also contact any other employees who worked there who knew the defendant and might know his activities?" (1 RT 1219-1220.)

Given these facts, it is certain that Detective Edwards would have visited McKenry's as part of his initial investigation. In his attempt to contact "other employees who worked there who knew the defendant," Detective Edwards would have inevitably met the Billingsleys. Not only did the Billingsleys work with appellant, but Greg and appellant were close friends who bowled together every Wednesday night. (12 RT 4502, 4500-4501, 4522; 13 RT 4562-4563; 17 RT 6019, 6021-6023.) Undoubtedly, speaking to the Billingsleys would have ultimately led him to Burlingame. Appellant notes that Detective Reed, during cross-examination, stated he speculated that he would have, at a minimum, contacted the owner of McKenry's and would have eventually become aware of Sue Burlingame, but agreed with defense counsel that he did not know if he would have done so. (AOB 96; 2 RT 1273.) This testimony, however, does not discount Detective Edwards' representation that he would have visited McKenry's to investigate more about appellant's background and activities. Appellant's life was heavily intertwined with his job – most of his friends were also his co-workers, he dated Baker who was his boss, and he used his place of

employment as his contact information because he did not have a telephone. Thus, Detective Edwards inevitably would have collected the same evidence without appellant's statement. This claim also fails.

F. The Admission of Appellant's Statement was not Prejudicial

Appellant argues that introduction of the alleged "*Miranda*-violative" statements was prejudicial because they were crucial for the prosecution to secure a conviction against him. He further argues that the importance of his statements was highlighted in the prosecutor's closing argument

> which made repeated references to appellant's statement that blood on the shirt came from a shaving injury [citations], appellant's admissions that the clothes in evidence were his [citations] and his admission that he was at The Office at 8:55 p.m. on the night of the killings [citations].

(AOB 97.) He further argues that without these post-arrest statements, "the evidence of [his] guilt was marked by significant gaps and inconsistencies." (AOB 98.) Respondent disagrees. The above statements, while possibly helpful to the prosecution's case, were by no means crucial to its case-in-chief. As set forth in more detail in Argument VI below, the statements were offered merely to rebut portions of the defense's case-in-chief. In addition, error, if any, was harmless given the overwhelming evidence of appellant's guilt.

The erroneous admission of extrajudicial statements obtained in violation of Miranda is not per se reversible error. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306–310.) It is not reversible if the error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Thomas* (2011) 51 Cal.4th 449, 498.)

The prosecution presented overwhelming evidence of appellant's guilt. First, appellant had the strong desire and intended to commit a robbery, and he took preliminary steps toward achieving this goal. As early

as June of 1992, appellant purchased wigs and a mustache to conceal his identity during a robbery, as well as instructional publications about crime. (14 RT 4976-4980, 18 RT 6108.) In addition, he knew how to disguise his features using temporary tattoos, extra clothing, and, in his own mind, Nu-Skin. (14 RT 4972-4975.) With Webster's help, he also purchased a gun, the murder weapon, for the purpose of "rob[bing] some stores, banks." (14 RT 4992-4997.) In October of 1992, appellant unsuccessfully solicited Gentry's help to commit a robbery by being the getaway driver. (17 RT 5824-5836.)

In early 1993, appellant quite clearly twice expressed his intent to kill witnesses or anyone causing resistance during a robbery. (17 RT 5812-5813, 5864-5865.) In March or April of 1993, appellant, who appeared depressed, also expressly told Baker that he wanted to commit a robbery, but feared incarceration and acknowledged that he would have to kill any witnesses if caught. (18 RT 6102-6104, 6108.) In late May or early June of 1993, appellant twice solicted Greg Billingsley to be the getaway driver during a robbery of Crestview Lanes. (17 RT 6020-6021.) Appellant had already cased the establishment and had a plan in mind. (17 RT 6021-6023.) Billingsley refused, causing appellant to abandon his plan to rob Crestview Lanes and to rob The Office instead. (17 RT 6024-6025.)

Second, appellant had the opportunity and means to rob The Office. Appellant was familiar with The Office and had recently cased the establishment multiple times with Burlingame and alone on other occassions. (11 RT 4171; 13 RT 4644-4647, 4649-4650.) On the evening of The Office robbery and murders, he had full access to Baker's car giving him the ability of unrestricted travel. (18 RT 6088-6089.) When he arrived at The Office with Burlingame on the night of the robbery/murders, appellant learned that Manuel was the sole bartender that evening. Appellant surely knew he could complete these crimes alone. He drove

Burlingame to Dairy Queen, but did not stay with her and instead returned to The Office where he remained until it closed as witnessed by patron Grimes. (Aug. CT of 11/10/09 Appendix B at pp. 19-20; 11 RT 4170-4171, 4176-4178, 4181-4182.) Gunfire was heard just minutes later. (11 RT 4246-4249.)

Appellant argues there was room for doubt as to whether he was at The Office near the time of the robbery and murders. (AOB 102-104.) Namely, he attempts to attack Grimes' credibility by pointing to his "palpable" bias because he "planned to exact justice himself if appellant were not convicted." (AOB 102.) True, Grimes was infuriated with appellant because Tudor was his friend. This fact, however, did not undermine his positive identification of appellant at The Office minutes before the robbery and murders. Grimes had very specific reasons for recognizing appellant at The Office that evening. He had seen appellant at the bar multiple times within two weeks of the murders, was aware that appellant had been listening to their conversation, and noticed appellant's unusual way of reracking the balls giving him a clear view of appellant's cowboy boots. (11 RT 4176-4177.)

Third, the physical and other evidence pointed to appellant. Appellant wore the shirt and boots, that were covered with both Tudor's and Manuel's blood, on the evening of the robbery and murders. (14 RT 5006-5007; 16 RT 5482, 5485-5486, 5493-6495; 18 RT 6088, 6295.) Baker recognized the shirt because it was a gift from her. (18 RT 6088-6089.) Webster recognized the boots because they were a gift from her. (14 RT 5006.) To be sure, appellant instructed Webster to dispose of the shirt and, on the following day, he confirmed with Webster that she had placed the items in different containers. (14 RT 5006-5009, 5038.)

In addition, appellant argues there was doubt as to whether the murder weapon belonged to him and was in his possession on the night of the

murders. (AOB 105-110.) His argument, however, is nothing more than an improper request for this Court to reweigh the evidence and reevaluate Webster's credibility. The chain of events on the night of the murder is clear. Appellant arrived at Webster's home with the murder weapon in Baker's car, asked Webster to retrieve it, and instructed her to give it to a friend who was scheduled to be released from jail. (14 RT 5017-5020.) Webster placed the weapon in a closet, where it was retreived by sheriff's detectives on the following day. (14 RT 5019-5020; 16 RT 5536-5538, 5554-5567; 17 RT 6001-6006.) This gun was positively identified as the murder weapon. (16 RT 5554-5567.)

Appellant also argues that the physical evidence did not match the prosecutor's theory of the crime. (AOB 110-115.) First, he relies on the lack of blood evidence in Baker's car, but this again ignores the fact that he ordered Baker to clean her car and she did so using professional cleaning agents. (17 RT 5979-5980, 6008; 18 RT 6094-6095; 18 RT 6095.) Appellant also relies on the defense expert's testimony that the blood stain patterns on the shirt was inconsistent with the prosecution's theory of the crime, the prosecution's failure to connect the bloody footprints to his boots, the lack of fingerprint evidence, and the discrepancy in the amount of money appellant had in his possession. Simply put, there is no explanation as to why appellant's fingerprints were not found on the cash register or murder weapon. There is no explanation as to why his shoeprints were not found at the crime scene. There is no explanation for the discrepancy in the amount of money appellant had in his possession at the time of his arrest and what was taken from the cash register. What was clearly established by the prosecution, however, was appellant's fascination with disguises and paranoia of getting caught. He was undoubtedly cognizant of the consequences of his apprehension.

Appellant further argues that the evidence of motive pointed as strongly to Webster as it did toward himself. (AOB 115-117.) Not so. Appellant was a sophisticated career criminal who both craved committing crimes and was in financial need. Just prior to The Office robbery and murders, he complained repeatedly of problems with the imposition of credit union fees and being "broke." (Aug. CT of 11/10/09 Appendix B at pp. 29-30, 35-37; 12 RT 4524-4525, 4549, 13 RT 4666-4667.) Even defense evidence established that appellant had told his good friend Hall that, while in California, he was "tight on money." (24 RT 7941.) Webster may have been in financial need, but there was no evidence linking her to The Office robbery. Rather, appellant used her to his advantage during his preparation of the robbery and attempt to dispose of the evidence afterwards. This was easy for appellant because he had complete control over Webster, who was described as someone who "did things to help people in order to be accepted." (14 RT 5125.)

Lastly, appellant argues that both Webster and Baker lacked credibility. (AOB 117-120.) It is elementary, however, that this Court may not re-evaluate their credibility.

> If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.

(*People v. Catlin* (2001) 26 Cal.4th 81, 139, internal quotations omitted.) Appellant largely focuses on Webster and points to various inconsistencies in her testimony. (AOB 117-119.) Any inconsistencies in her testimony, however, were resolved by the jury in favor of the prosecution. (*People v. Lee* (2011) 51 Cal.4th 620, 632, quoting *People v. Maury* (2003) 30 Cal.4th 342, 403 ["Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness

and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence."].)

In sum, any error was harmless given that appellant's statements were largely cumulative of other prosecution evidence. Additionally, any error in admitting the statements was harmless beyond a reasonable doubt in light of the overwhelming evidence of his guilt.

II. THE TRIAL COURT PROPERLY ADMITTED RELEVANT EVIDENCE OF WEBSTER'S FEAR OF APPELLANT AS WELL AS THE REDACTED TRANSCRIPT OF HER POLICE INTERVIEW

Appellant next contends that the trial court abused its discretion when it admitted evidence of his past crimes and acts of violence as relevant to Webster's fear of him and her credibility. Specifically, he challenges the following items of evidence: (1) his altercations with Greg Nivens and Randy Hobson; [61] (2) his statements to Webster that he was an ex-convict, a bank robber, and had committed past robberies while using Nu-skin; [62] (3) his statements to Webster that he had hurt and killed people in the past; [63] and (4) portions of Webster's taped interview. He further argues the limiting instructions were ineffective; therefore, the jury considered such evidence as an indication of his criminal propensity. (AOB 121-195.) Respondent disagrees.

A. Background

On May 13, 1996, appellant filed a motion to exclude statements made by Webster pertaining to 24 topics on the ground that the evidence

---

[61] These are item numbers 17 and 18 from appellant's motion to exclude statements. (2 CT 460-461.)

[62] These are item numbers items 1, 8, and 13 from appellant's motion to exclude statements. (2 CT 460-461.)

[63] These are item numbers items 8 and 15 from appellant's motion to exclude statements. (2 CT 460-461.)

was irrelevant and more prejudicial than probative pursuant to Evidence Code sections 210 and 352, respectively. (2 CT 460-461; 10 RT 3872.) Later that morning, the trial court entertained argument from counsel. (11 RT 4075-4122.) Addressing the challenged items of evidence in numerical order, the prosecutor argued as follows:

> **1. Item No. 1 ("Any reference to [appellant] being an ex-convict")**
>
> The relationship between Mary Webster and Charles Case is to a great extent founded upon what the defendant told Mary Webster about his prior life, that he was a bank robber, almost a Jessie James-type bank robber. As she has said, she was intrigued by people with – guys with tattoos, and guys with like an outlaw past.
>
> And the defendant gave her the impression that he was a bank robber and he was one of the best, and used to talk to her all the time about that. She knew, in fact, that he was an ex-convict. He told her that, and that she met at least one or more occasions his parole officer who came out to her residence where Case was living at the time to check on the defendant. If she can't testify to that relationship, then the various things that occur during the course of the relationship are really bizzare.
>
> For example, she is with him when he buys some stuff called Nu-skin. He tells her on at least one occasion, if not more, that he wants to get a wig and does, in fact, have a couple of wigs, one of which is hers, and sends away for some things through the mail []. And the reason he wants these things is because, as he explains to her, they will be good for a disguise.
>
> If she can't testify that she knows that the defendant is an ex-con, then it all kind of, for example, sits out there in a vacuum.
>
> I know I have said this before. But it just doesn't make sense except that the defendant is telling her these things and convincing her of his sincerity and his background in that way.

(11 RT 4076-4077.) The trial court asked if Webster would testify to the reason why appellant purchased the Nu-skin and wigs, and the prosecutor

explained she would testify that the "reason would be the Nu-skin, that the defendant told her that he would use it so that he wouldn't leave any fingerprints. He can put the Nu-skin on the tips of his fingers and commit robberies and not leave fingerprints." (11 RT 4077.) He continued as follows:

> In the course of her relationship, he discussed using wigs to change his appearance using the [Nu-skin] so he wouldn't leave fingerprints. Using temporary tattoos so that it would cause someone to have their attention drawn to what appears to be a tattoo that he could then get rid of and make their identification a week [sic] one or a false one. All of those things, from the People's standpoint, show the defendant's planning his deliberation and premeditation to ultimately commit robberies. So that he is truly thinking about all of the different ways to do it. In fact, Mary Webster would testify, if permitted to do so, that the defendant went out on one or more occassions and actually did dry runs when out, as if he was going to commit a robbery. And then came back and said that no, he didn't do it, he changed his mind or chickened out or something like that.

(11 RT 4078.)

2. Item No. 8 ("Any reference to [appellant's] prior record and/or references to hurting people in prior criminal activities")

> Again, this goes - - this establishes why she was afraid of him and, at the same time, why she was somewhat intrigued by him and his outlaw mystique as he told his stories and regaled her with his escapades in the past - - the bank robberies and hurting people in robberies, pistol whipping victims. And I believe she said on at least one interview, bumping people off.

(11 RT 4083.)

3. Item No. 13 ("Any reference to how he has used 'Nu-skin' in prior robberies")

> And I would add, or planned to use [Nu-skin] in new robberies. I would submit, again, goes to his planning, his degree of commitment, if you will, to robberies. But it's not just

a degree of commitment. It's actually the mental process that he's going through.

(11 RT 4085.)

4. Item No. 15 ("Any reference to how he did something to someone who turned him into the police"):

Specifically, this is in reference to a comment the defendant made that his friend and getaway driver in the 1978 robberies squealed or snitched on him and he, Mr. Case, had him killed or taken care of. [¶] And that information imported to Mary Webster is part and parcel of her fear of him because she has, in fact, if you will, turned him in.

(11 RT 4086.)

5. Item Nos. 17 ("Any reference to how he tried to kill three people, including strangling her son's girlfriend") and 18 ("Any reference to a physical assault on Greg Nivens"):

Seventeen and Eighteen relate, are tied together. And that is Mary Webster on one occasion, her son Greg Nivens, was doing something towards her, not necessarily physical, but smarting off to her verbally or something. And Greg Nivens is an adult who is developmentally disabled. At any rate, Greg Nivens did or said something towards Mary.

The defendant got mad about that and hit him in the face. And there was some – I don't know if it was a bloody nose as a result of that. I believe police may have been called, but the defendant did not get arrested at the time. And Mary Webster stood up for him at the time.

On another occasion, the defendant got in a fight with and beat up a roommate who was a person who was a [housemate] of Mary Webster at the time, first name of Randy Hobson.

And he, the defendant, hit Mr. Hobson with a fireplace poker in the course of that altercation.

All of these things add to Mary Webster's knowledge that the defendant is capable of violence and has a short temper,

although he has never been harmful, directly harmful towards her. She knows that he can do harm. She's seen it, and he's certainly told her about it. That covers seventeen and eighteen.

(11 RT 4087-4088.)

Defense counsel argued that Webster never testified that she feared appellant and that she failed to immediately report the incident because she still loved him. (11 RT 4092-4094.) The trial court noted:

> Didn't she say pretty much straight out in that interview with the detectives how afraid she was? [¶] It wasn't that she was driving around looking for a policeman to turn these bloody clothes over to.
>
> The testimony, as I recall it, is that well, he comes home and he's got all of these clothes that are covered with blood and gives them to her to get rid of. And she doesn't leave immediately or even the following morning when she is on her way - - is driving with this stuff in the back of her car.
>
> She doesn't go to someplace and call the police to tell them she's - - it appears that she's undecided about what she's going to be doing with these clothes. She's either going to get rid of them or she's going to turn them over. She's not sure what she's going to do. That's based on two things:
>
> One is she's afraid of Mr. Case, and the other one is she still loves him and doesn't want to believe that he would do something like this, even when he has all of these bloody clothes that he's given her. He's told her the story about how he killed two men in the poker game or the card game.

(11 RT 4092.)

Defense counsel argued that the fear obviously created under the circumstances of having someone appear at one's front door, announcing that he has just killed two people, and producing bloody clothing was sufficient evidence of Webster's fear of appellant. (11 RT 4092-4093.) It was therefore unnecessary to introduce additional evidence, including the fact that he had committed crimes in the past, of her fear of appellant.

Counsel further argued that the prejudicial value of the evidence outweighed its probative value. (11 RT 4093.) The trial court responded as follows:

> The defense problem is he introduced it himself because it's his method of getting her to do what he wants her to do. He's impressing her with what he says in his past, whether it's all proved or true in part or mostly untrue, whatever it is, whether it's true or not, he's telling her this. She's believing it. She's impressed by it and intrigued by it. And because of that, she does some of these other things. And when the critical moment arrives, when he hands her the bloody clothes and tells her to get rid of it and tells her how to dispose of the gun, the gun was to be – the clothing was to be disposed of right away and the gun was to be hidden and held for somebody else. That's pretty much the way she was going about doing it.
>
> She had the clothing with it, but she didn't have the gun when she was driving around. The gun was back at the house. She was going to get rid of the clothing and seal that. Once that was accomplished, worry about the gun later. And that is what it looked like. That's I think a reasonable inference to be drawn from her actions based on what the testimony has been from her.

(11 RT 4094.)

Defense counsel argued that Webster's fear was "generated primarily" by the detectives when they suggested appellant would possibly kill her in his attempt to eliminate witnesses. (11 RT 4094.) The prosecutor pointed out that, at the beginning of the interview, Webster told the detectives that she was reluctant to be "honest" with detectives because she was "afraid, to. My life might be in danger." (11 RT 4095.) The prosecutor further argued that she refused to produce the gun because appellant may return for it, learn that she turned him in, and that her life would be in danger. The prosecutor additionally argued that Webster's credibility was in issue. (11 RT 4096.)

Defense counsel again argued that Webster's fear of appellant based on what he had done in the past was inadmissible, and the trial court replied:

> Well, that's the relevance of it. He wants to put himself in a bad light to Mary Webster because that's good for him. And now that we're at the trial, putting himself in a bad light with Mary Webster can be bad for him. Unfortunately, putting himself in a bad light with Mary Webster is what motivated her to do some of the things that she did.
>
> And it's obvious from the passage that Mr. Druliner has just read into the record and from the tape itself that's been admitted in evidence of a previous in limine motion, she harbors a substantial and signficant fear of the defendant in this case. And she was afraid that her own life would definitely be in danger unless she followed his instructions to the letter.

(11 RT 4097.) The trial court then ruled as follows:

> **1. Item No. 1**
>
> Number one, reference to Mr. Case being an ex-convict. [¶] And Mr. Druliner's explanation included [Nu-skin], buying [Nu-skin] with her so that he can do robberies, that he had a wig, another way to do robberies and he would provide temporary tattoos to undermine any identifications that were made of him and making dry runs on robberies.
>
> Regarding the [Nu-skin], the wigs and the temporary tattoos, that appears to the Court to be particularly relevant and the probative value would outweigh any prejudicial effect there. Because at the time he's talking to Mary Webster, which is before his relationship with Jerri Baker, his plan is to commit robberies, at least as stated to her, commit robberies and foil identifications by disguising himself.
>
> The evolution of his plans reaches its independent point when he's talking to Jerri Baker in that conversation in the back yard where his complaints have evolved from undermining eyewitness identification to eliminating eyewitness identification by eliminating eye witnesses by killing them during the course of a robbery.

So this is evidence of premeditation and deliberation, so far as how this plan with the gun, how it's formed and how to carry it out.

As far as his being an ex-convict is concerned, that's interwoven with the rest of these statements and the Court is going to admit that with a limiting instruction.

Insofar as specific acts that Mr. Case engaged in with Mary Webster such as the buying of a [Nu-skin], buying the gun, buying the bullets, that will be admitted without the admonition of the limiting instruction.

(11 RT 4104-4105.) Following a defense objection, the trial court excluded any references to a "dry run," but would admit evidence relating to appellant associating with ex-convicts. (11 RT 4105-4106.)

2. Item No. 8

Number eight, references to his prior record or reference to him killing people in prior criminal activity. [¶] That's going to be admitted. But, again, with a limiting instruction, that Mr. Case's allegations of his past are offered not for the truth of the matter asserted therein. It is not to show that his is, in fact, what he's done in the past but to explain why Mary Webster was impressed and intrigued with him and why she followed his instructions after he gave her the bloody clothes and the gun.

(11 RT 4108.) The trial court clarified that such references shall be general, rather than specific, references. (11 RT 4109.)

3. Item No. 15

Number fifteen, how he did something to someone who turned him into the police, that will be admitted. Again, not for the truth of the matter asserted but to show its effect on Webster. (11 RT 4112.)

The court continued as follows:

Unfortunately, for the defense, that's a statement that whether it's true or not, let's assume that it's not true. But still in the context of all of the rest of this and in the context of their relationship explains her actions on the date that she's driving him around with these bloody clothes in the car because, again,

she's not decided that she's going to drive directly to the police department or sheriff's department and turn these things in. She's still turning over in her mind what she is going to do with it.

Doesn't make the decision to turn them in until she sees that police officer on H Street. And so, again, it's not admitted for the truth of the matter asserted. It's, again, to show its effect on the hearer. And I don't expect there is going to be – the prosecution will not be permitted to present evidence of someone who was allegedly killed at Mr. Case's direction some other time some other place. But, again, this is something that he told her, which the context of their relationship becomes more meaningful when compared with the event that occurred later on.

(11 RT 4112-4113.)

5. Item Nos. 17 and 18

Then we have number seventeen. The Court will allow Mary Webster to say that she has seen Mr. Case in two physical altercations. That would be the extent of it. No details about weapons, specifically, the fireplace poker. [¶] She has seen him in two physical altercations which would presumably support her belief that he was a man of his words. [¶] Eighteen is the same.

(11 RT 4114.)

At trial, during Webster's cross-examination, the prosecutor offered a redacted tape of her initial detective interview on June 21, 1993. (17 RT 5801-5802; Augmented CT 6650-6740 [Exhibit 93-A].) Although the prosecution had already editted portions of the tape, the defense wished to edit additional portions of the interview. (18 RT 6159-6160.) The objections were as follows:

1. Del Paso Heights

Reed: It's a card room. We got two dead people.

Webster: Why would he tell me it was Del Paso Heights?

Reed: Why would he come and tell you anything? That whole thing was stupid. What we're telling you is, is that's what it looks like to us.

Webster: You – are you serious right now?

Reed: Absolutely.

(Augmented CT 6668.) The trial court admitted this portion of the transcript into evidence. (18 RT 6171.)

2. Boasting about the killings

Edwards: He wanted to get – boast the fact that he killed somebody, but didn't want to tell you the facts so you could put two and two together. But, you're a smart enough woman that you started putting things together even though he lied to you.

(Augmented CT 6669.) Defense counsel argued as follows:

> The officer – and it appears the officer is speculating as to why he would tell her this story. It's like almost an argument you can make to the jury. Well, here's the reason why he told the story, he had – like, to boast about it. [¶] I don't see how this would affect her state of mind. It's just the officer offering some theory as to why he would tell this story; and, certainly, speculation on his part.

(18 RT 6172-6173.) The prosecutor replied:

> What Mary Webster is demonstrating to the officers here is resistance to what they had presented to her. And, as it goes on through this statement, Mary Webster actually, until the very end, doesn't concede that she should give up the gun nor that Case is responsible for The Office. And so this shows the degree to which she is resistant. And the comments by Detective Edwards here are certainly not harmful or prejudicial to the defendant in the legal sense of prejudicial. And I would submit that they show the context of what's going on and the degree of resistance of Mary Webster.

The trial court ruled as follows:

> I think it's admissible for that purpose, and I think the probative value outweighs any possible prejudice. I don't see that there is that much, if any, prejudice from those lines. I will

overrule the defense objection to that portion. I think it definitely shows the efforts of the detectives to convince Mary Webster to cooperate, and it provides a good look at her state of mind at that time, which was an unwillingness to believe and an unwillingness to cooperate.

(18 RT 6173.)

3. Detective Reed's reasons for believing appellant committed the murders

Reed: The caliber of the weapon, number one. All the blood on his boots. I can't go into great detail about the scene, but because of the way the blood is on those boots and stuff, it all just fits. Okay, the time –

Webster: But, how do you know?

Reed: The time fits.

Webster: Okay. What about the time that the -- you know, these people suppose to --

Reed: Some time between 8:00 and 10:00 – and 9:30. 8:30 and 9:30. Right in that area.

Webster: (Whispering) He was at my place at 10:00.

Reed: See what I'm saying? You're talking about a thirty-minute drive.

Webster: Yea. I'm (unintelligible).

Reed: (Unintelligible).

Webster: (Unintelligible).

Reed: So, Mary, that's neither here nor –

Webster: Yeah, but –

Edwards: Suddenly wanted to get rid of the clothes. Boastin' about doing two people.

Webster: Well, it's two people, but he told me they was Black.

Reed: Okay. Well, he's lying to you, Mary.

Edwards: He's lying about certain things, because he doesn't want you to try and put things together. But, you're a smart enough woman that you can.

(23 Augmented CT 6670-6671.)

Defense counsel argued as follows:

Correct. And what this consists of is the officers again making their argument to convince Ms. Webster that the defendant is guilty of the crimes that occurred at The Office bar and it is not admissible for the truth of the matter simply because it's hearsay and the fact is that it does not further demonstrate Ms. Webster's state of mind, which has already been demonstrated that she's resistive of giving up the gun. And that's basically what they are trying to get at this point is the gun.

The purpose for which or one of the purposes for which the prosecution is offering this statement is to show her state of mind at the time, which was that she was in disbelief. I think that that's amply demonstrated without having to bring in this inadmissible hearsay from the police officers, which is, in essence, nothing more than argument that Mr. Case committed these crimes. Under 352, the prejudicial effect far outweighs any probative value. The probative value in this case would be the state of mind and, as indicated, there is example after example in this statement that her state of mind is as the prosecution argues, resistant to efforts on the part of the police to obtain evidence that would implicate Mr. Case.

(18 RT 6174-6175.)

The prosecution responded:

The conversation and the interview with Mary Webster on the 21st of June was longer thus than this transcript is right now. [¶] What counsel would like to have happen would be to say okay, you've got a couple of examples of Mary Webster's resistance. Let's cut it off at this point in time.

But the degree of her resistance is demonstrated both by the length of the conversation, the interview and the amount of information provided to her by the detectives. [¶] I'm not

offering the detectives' comments to her for the truth of what they are saying. They are significant only to the extent that what her reaction is to them. So they are not being offered for hearsay purposes. And the depth of her resistance is of signficance both as to what it is and how long she holds on to it, and what is contained in this portion is not prejudicial.

What the Court pointed out, I think in one of the earlier parts that you ordered deleted, had information concerning Val Manuel and things about Val Manuel's background that actually have not come into evidence yet. And thus the prejudice was more obvious in that situation. Here, I don't see the prejudice at all.

(18 RT 6175-6176.)

The trial court ruled as follows:

I'm going to overrule the defense objection to this section. I believe that it does, as Mr. Druliner points out, shows the resistance as that was offered by Mary Webster, that is, her strong desire not to believe that what the officers were saying was true and her desire not to cooperate with them. So I think this is a good example of that.

(18 RT 6176.) In light of the ruling, defense counsel requested the trial court give a cautionary instruction prior to playing the tape to the jury, and the court agreed. (18 RT 6176-6177.) While the trial court stated such an instruction was fair, it noted that the evidence was "important to show the effort it took to get Mary Webster to cooperate." (18 RT 6177.)

4. Appellant lied to Webster

Webster: Why would he tell me Del Paso Heights when it was in Rancho Cordova?

Edwards: I don't know.

Webster: Shit. I hate a liar.

Reed: *Well, he lied to you. That's for (Unintelligible).*

Webster: Maybe you better check your records. I'm sure you found someone for these two people.

Edwards: No.

(23 Augmented CT 6674 [emphasis added].)

Defense counsel objected to the statement, "[w]ell, he lied to you." He argued as follows:

> I think it's been well enough communicated to her by these officers that Mr. Case wasn't telling the truth. Just to keep saying he's a liar, he's lying to you – that's her opinion, certainly, more hearsay. I don't think that helps her state of mind by them keep repeating that.

(18 RT 6178.) The trial court overruled the objection:

> I think it shows the efforts they went through and it shows her state of mind as well because the previous line, Mary Webster says quote, "Shit. I hate a liar" close quote. [¶] Next line, "Well, he lied to you, that's for (unintelligible.) [¶] I'm going to overrule the objection. [¶] I think it shows Mary Webster's state of mind and I think it also shows at some point, she begins to come around. And this may be where it begins.

(18 RT 6178-6179.)

5. Explanation that the evidence points to appellant

Immediately after Webster suggested that others were responsible for the Rancho Cordova shooting, the following colloquy occurred:

Reed: We were out there, Mary. There is no other two.

Webster: Who was out there?

Reed: Both of us.

Edwards: He and I –

Reed: All night.

Edwards: -- were out there.

Reed: All night long working on the crime scene. And I'm telling you that all this fits. I mean, he lied to you about the circumstances, but it's cards, ah – kinds of money ...

Webster: What was the deal?

Reed: We don't know why he did it, except robbery maybe.

Webster: He don't need money that bad.

Edwards: But, he had money.

Reed: He did.

Webster: And he gave me money.

Edwards: Suddenly he had money.

Webster: It was only a lousy hundred bucks.

(23 Augmented CT 6674-6675 [emphasis added].) Defense counsel argued as follows:

> The problem is she asks the question: Well, who was out there? [¶] And then Reed says both of them. [¶] Then Edwards joins in and he says, "He and I." [¶] And Reed finally volunteers this. We worked all night long working on the crime scene. I don't have a problem with that. [¶] But then he is saying, okay, I am telling you this all fits. He might as well be saying look, Mr. Case is guilty. It all fits. That's the inference. He lied to you, but it's cards, kind of money. [¶] Mr. Case is guilty. That's exactly what Reed is conveying to Webster through this. And she simply asked well, were you guys out there.

(18 RT 6180-6181.) The trial court ruled as follows:

> I think the point of this evidence here is that in the face of all of the facts that she is given by the detectives, she still stubbornly refuses to believe that Mr. Case could have any involvement whatsoever in the Rancho Cordova shootings. I think what I am going to do is admit it. However, same cautionary instruction applies to this because it's not offered for the truth of the matter asserted. That is, that it all fits, that this evidence is this or this evidence is that. But this is what the detectives were using to attempt to overcome Mary Webster's resistance to them so that she would give them a gun. Because it's obvious later on here in the transcript that they desperately wanted that next one.

(18 RT 6181.)

6. Explanation as to why appellant lied to Webster

After Webster stated that appellant had only given her $100, she stated to the detectives as follows:

> Webster: I can't believe this one. Wasted two people just for – you know, that's what I've been trying to figure out. A lousy hundred bucks. He don't need the money that bad.
>
> Edwards: Yes, you do. You feel he lied to you, Mary.
>
> Webster: But wait. But, what – you know, what reason (Unintelligible).
>
> Edwards: What reason? Probably to cover up a little bit? Probably hopefully that you wouldn't put the one out in Rancho Cordova with the one in Del Paso.
>
> Webster: Oh, I'm sure --
>
> Edwards: And he could look like a big man and – and throw fear into you, thinking –

(23 Augmented CT 6675.)

Defense counsel argued Edwards's speculation was inadmissible hearsay and irrelevant as to Webster's state of mind. (18 RT 6181-6182.) The prosecutor replied that this was simply part and parcel of the detectives attempt to convince Webster to give them the gun, and the statements related to Webster's fear of appellant and her reluctance to turn over the gun. (18 RT 6182-6183.) The trial court ruled as follows:

> I think the cautionary instruction will cover this is as well, that the officers are expressing certain theories of the case which they believe or may not believe. [¶] But, again, the jury is the final – makes the final determination as to what the facts are and that I think they'll see that the primary purpose of what the officers are saying here is to get her to cooperate and give them the gun and any other evidence that she might have. So that's the purpose of these efforts and whether the things they say turn out to be true or not is really secondary. It does show a continued resistance here. [¶] This will be admitted over the defense objection but with the cautionary instruction.

(18 RT 6183.)

7. Further assertion that appellant killed two people

Edwards: You're fearful of him. You're afraid. That's the reason you want to keep the gun.

Webster: Right. He could change his mind.

Edwards: But, he killed two people, Mary.

Webster: By the time I get back home, he might say he wants it.

Edwards: He killed two people. Let us look at the gun and prove that.

Webster: All right. Well, wait. Wait. Explain this to me one more time. That he – you was at the – is this for real? This is not no, um, --

Reed: I'll show you some pictures if you want to see them.

Webster: I want to see something.

Reed: They're not very pretty.

(23 Augmented CT 6676 [emphasis added].)

Defense counsel argued that the statements were cumulative of other statements expressing their belief that appellant was responsible for The Office murders. (18 RT 6184.) The trial court admitted the evidence over defense objection and ruled as follows:

> At this point though, they are right down to the real issue here. [¶] She's reluctant to give up the gun because she's afraid and she doesn't want to believe it and they are countering with he killed two people. Give us this evidence. It's the moral dilemma that she faces, really, she has information and evidence which could link her former boyfriend to the death of these two individuals. And, yet, she still doesn't want to give evidence against him.

(18 RT 6184.) The trial court stated that it would give a limiting instruction stating that the detectives were using certain interrogation and persuasive techniques. (18 RT 6184.) The court further stated that the evidence was admitted to show its effect on Webster's state of mind and the "lengths to which the officers had to go in order to convince her that she should cooperate. They are pulling out all the stops here." (18 RT 6185.)

8. Further statements that appellant was responsible for The Office murders

> Edwards: Believe me. Everything that he told you we're telling you, right? They match, don't they?
>
> Webster: You haven't told me nothing yet.
>
> Edwards: We agreed with everything that he said.
>
> Webster: Yea, but why? Why does it have to be Casey? Why?
>
> Edwards: Because he did it, that's why.
>
> Webster: Why you telling me it was two Black men, for one?
>
> Edwards: Why did he?
>
> Reed: Is that Mr. Casey? Okay. You got a strong stomach? You sure you want to look at these pictures? You sure? Here's another picture.

(23 Augmented CT 6678.)

Defense counsel argued that this was cumulative evidence of the belief that appellant committed the murders at The Office. The prosecutor noted that the significance was Webster's continued resistance despite the efforts to convince her otherwise. (18 RT 6185.) The trial court admitted the portion for the same reasons as set forth above: it was merely an attempt to have Webster cooperate. (18 RT 6185-6186.)

9. Further statements that appellant was responsible for The Office murders

During the inteview, Webster expressed her concern of appellant killing her if she failed to produce the gun following his request for it. (23 Augmented CT 6682.) Edwards explained that he needed the gun to get appellant off the street, and Webster suggested that he find another way to do so. (23 Augmented CT 6682-6684.) Defense counsel then objected to the following:

> Reed: We're going to have to take him off the street. He's not going to come after you because I am convinced he's the one that did this. We need the gun with your coop --
>
> Webster: You're convinced.
>
> Reed: We need the gun –
>
> Webster: What happens if you're wrong?!

(23 Augmented CT 6684.) The objection was overruled and the trial court ruled as follows:

> I think the Court is going to exclude lines 14 through 18 inclusive and admit the balance of applying the 352 balancing test. I think it is probative that I think it shows that she is at this point, she's beginning to – resistance is beginning to crumble.

(18 RT 6188.)

10. Detectives' opinions

> Reed: He's not going to get out.
>
> Webster: That's what I'm afraid of.
>
> Reed: He's not going to get out. Not from this type of crime.
>
> Webster: Bank – you going to tell me right now?
>
> Reed: (Unintelligible).
>
> Webster: That I can have a good night sleep.

Reed: Yes. I wouldn't sleep with him on the street, if I were you, under the circumstances.

Webster: If. If he did this. If –

Reed: I'm telling you, Mary, he did –

Edwards: Mary, you're still hanging on to that thought.

Reed: You don't want to believe it, but it's true.

Webster: Well, this is a – a—

***

Webster: And how'd he get – how'd he get the blood on his shoes? He must have been –

Reed: From underneath here.

Webster: Where – where do you think he was?

Reed: He was probably standing right here. See the blood came under here. See that, that – that's probably footprints in blood, which lead out into (Unintelligible) bar.

Webster: Oh, that's the floor?

Reed: Yeah that's the floor.

(23 Augmented CT 6685-6686.) The court again found the evidence admissible because the detectives were attempting to "confirm[] with the evidence over and over again to try to get her to cooperate." (18 RT 6190.)

During the testimony of Detective Reed, the redacted version of Webster's June 21, 1993, interview with Detective Edwards and him was played for the jury. (18 RT 6338-6341 [Exhs. 94, 94-A].) Prior to playing the tape, the jury was admonished as follows:

> During the interview, Detective Edwards and Detective Reed will tell Mary Webster certain facts about the investigation. [¶] You should keep in mind at all times that the jury determines what the facts are. And that at the time that this interview was conducted, June 21st, 1993, first, the investigation

was no where near complete. Second, the purpose of this interview was to persuade Mary Webster to cooperate with law enforcement. And, for that reason, the detectives are permitted to shade the facts, if that is necessary, in their judgment to persuade the individual to whom they are speaking in this case, Mary Webster, to cooperate.

So you should not believe that Detective Reed or Detective Edwards at that time had any special knowledge of what the truth is in as far as this case was concerned. [¶] Again, you will be the ultimate finders of the facts in this case. [¶] And, finally, this tape and the statements of Mary Webster are not offered for the truth of the matter asserted in those statements but to explain and demonstrate for you Mary Webster's state of mind at the time the interview was conducted. So that you may consider that if you find it relevant in resolving other issues in this trial.

(18 RT 6340-6341.)

B. Law on Prior Criminal Conduct

Evidence Code section 1101 governs the admissibility of uncharged criminal conduct. Evidence of misconduct other than current charges is not admissible to prove that the defendant has a bad character or criminal disposition. (Evid. Code, § 1101, subd. (a).) However, this evidence is admissible to prove a disputed material fact, such as motive, opportunity, intent, preparation, common plan or scheme, knowledge, identity, and absence of mistake or accident. (Evid. Code, § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.)

To be admissible, the uncharged misconduct ordinarily must be sufficiently similar to the current charges to support a rational inference concerning a material fact at trial. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393.) The degree of similarity needed to show relevance varies depending upon the type of fact that the uncharged misconduct is offered to prove. (*Id.* at pp. 402-403.) "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity." (*Id.* at

p. 403.) "A lesser degree of similarity is required to establish relevance on the issue of common design or plan." (*People v. Kipp* (1998) 18 Cal.4th 349, 371, citing *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402.) And, "[t]he least degree of similarity is required to establish relevance on the issue of intent. For this purpose, the uncharged crimes need only be sufficiently similar [to the charged offenses] to support the inference that the defendant probably harbor[ed] the same intent in each instance." (*Id.* at p. 371, quoting *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 403, internal quotation marks and citations omitted.)

This Court has set out three factors for a trial court to consider when deciding the admissibility of evidence of other offenses: "(1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant." (*People v. Hawkins* (1995) 10 Cal.4th 920, 951, abrogated on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110-111.) An appellate court reviews the trial court's determination of admissibility under Evidence Code section 1101 for abuse of discretion. (*People v. Gray* (2005) 37 Cal.4th 168, 202.) Under the abuse of discretion standard, where "a discretionary power is inherently or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

With respect to uncharged misconduct, it is well-recognized that, even if prior uncharged conduct evidence satisfies the *Ewoldt* requirements for admission, it is still subject to a prejudice argument under Evidence Code section 352. Thus, relevant evidence of uncharged misconduct is admissible if its "probative value ... is 'substantially outweighed by the

probability that its admission [would] ... create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*Ewoldt*, at p. 404, quoting Evid. Code, § 352; see also *People v. Kipp*, *supra*, 18 Cal.4th at p. 371.)

In *People v. Doolin* (2009) 45 Cal.4th 390, 439, this Court explained the concept of "prejudice" as the term is used in Evidence Code section 352 as follows:

> 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." [¶] The prejudice that section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.

(See also *People v. Jablonski* (2006) 37 Cal.4th 774, 805; *People v. Waidla* (2000) 22 Cal.4th 690, 717–718; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.) Thus, 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." (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Evidentiary

rulings under Evidence Code section 352 "will not be disturbed, and reversal ... is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Foster* (2010) 50 Cal.4th 1301, 1328-1329; see also *Rodrigues*, at p. 1124.)

C. The Trial Court Properly Admitted Relevant Evidence of Appellant's Uncharged Prior Bad Acts and Webster's Taped Interview with Sheriff's Detectives

The nature of appellant's relationship with Webster was an overarching fact of critical relevance. The foundation of this relationship was appellant's incessant representations of his criminal past as a highly sophisticated and dangerous bank robber. To say that Webster found this impressive and intriguing, yet fearful, would be an understatement. Appellant used these tales to control Webster, which was plainly relevant to her credibility.

1. Evidence of Appellant's Altercations with Nivens and Hobson had Substantial Probative Value because it caused Webster Fear, which was Highly Relevant to Her Credibility

Appellant argues this evidence was of minimal probative value because he did not dispute Webster's fear of him or the nature of their relationship, the evidence did not establish that the altercations caused Webster's fear, and was cumulative of other evidence of her fear of him. He further argues that the evidence of his "assaultiveness" was inflammatory and therefore prejudicial because he had not been prosecuted for those uncharged acts. Lastly, he argues that the limiting instruction was insufficient. (AOB 150-166.) He is wrong. While Webster's general fear of appellant may have been undisputed, the basis of her fear was fiercely contested as it was a crucial factor for the jury's consideration in determining her credibility.

"Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible." (*People v. Burgener* (2003) 29 Cal.4th 833, 869, citing *People v. Malone* (1988) 47 Cal.3d 1, 30; see also Evid. Code, § 780; *People v. Valencia* (2008) 43 Cal.4th 268, 302 ["Evidence of fear is relevant to the witness's credibility."]; *People v. Warren* (1988) 45 Cal.3d 471, 481.) "An explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court." (Burgener, at p. 869, citing *People v. Feagin* (1995) 34 Cal.App.4th 1427, 1433; see also *People v. Guerra* (2006) 37 Cal.4th 1067, 1141-1142; *People v. Avalos* (1984) 37 Cal.3d 216, 232.)

Appellant first presents the specious argument that Webster's adoration and fear of him were undisputed at trial and thus irrelevant. Defense counsel initially argued that Webster never testified that she feared appellant and that she failed to immediately report the incident because she still loved him. (11 RT 4092-4094.) After the trial court reminded defense counsel that Webster directly told detectives that she feared appellant during her interview, he instead argued that the basis of her fear was one that naturally flowed from the circumstance of having someone appear at one's home with a bloody shirt and boots. (11 RT 4092-4093.) Defense counsel attempted to argue that Webster's fear was also caused by the detectives when they suggested appellant would kill her. (11 RT 4094.) At odds with defense counsel's various theories was the prosecution's evidence of appellant's prior acts of violence and tall crime tales which caused Webster's fear.

While appellant may not have disputed Webster's general adoration and fear of him, the basis of these feelings, to wit appellant's self-portrayal as a dangerous outlaw, was in fact fiercely contested. The basis of

Webster's feelings for appellant was relevant in determining her credibility. As acknowledged by appellant himself,

> ...a central question at trial was Webster's credibility. The prosecutor argued that Webster was a scared former lover who turned appellant to the authorities out of fear (22 RT 7371), while the defense suggested that Webster was a scorned former lover who framed appellant for the crimes because he left her for another woman. (16 RT 5636-5637; 22 RT 7404.)

(AOB 153-154.) Given the discrepancies for the basis of Webster's fear, the prosecution was entitled to put on its evidence because "[a]n explanation of the basis for [her] fear is likewise relevant to her credibility ....(Burgener, at p. 869.) Accordingly, it was crucial for the jury to understand the basis of Webster's feelings for appellant in order to make a credibility determination.

In any event, assuming arguendo appellant did not dispute the nature of their relationship, the prosecution retained the right to present evidence in support of its case. Webster was a crucial prosecution witness, and her credibility was very much in issue. (See *People v. Jones* (2011) 51 Cal.4th 346, 372 ["Defendant argues that only identity was actually disputed at trial, and he did not dispute the perpetrator's intent to rob.... Even if this is so, it is not dispositive. '[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense. '"]; *People v. Burney* (2009) 47 Cal.4th 203, 245 ["Even if defendant conceded at trial his guilt of criminal homicide, '"the prosecution is still entitled to prove its case and especially to prove a fact so central to the basic question of guilt as intent."'"]; *People v. Steele* (2002) 27 Cal.4th 1230, 1243 ["Defendant's not guilty plea put in issue all of the elements of the offenses. [Citation.] Defendant argues that he conceded at trial the issue of intent to kill. Even if this is so, the

prosecution is still entitled to prove its case and especially to prove a fact so central to the basic question of guilt as intent."].)

Appellant's physical altercations with Nivens and Hobson are of particular significance because they occurred within one to two weeks of him moving in with Webster, she personally witnessed the altercations, and they immediately alerted her that appellant was indeed capable of violence and had a short temper. As found by the trial court, this made Webster aware that appellant "was a man of his word." (11 RT 4114.) Appellant argues the evidence failed to "establish that the incidents ... were causally connected to those feelings [of fear]." (AOB 157-158.) The strong and reasonable inference flowing from this evidence was that it was a contributing factor to Webster's fear of appellant. To be sure, Webster testified that she initially did not ask appellant about the blood on his clothing because she was afraid of appellant and did not want to "get slapped." (14 RT 5008.) Logically, her fear of "get[ting] slapped" resulted from, inter alia, personally witnessing appellant attack her son and roommate.

Unlike the other evidence introduced to establish Webster's fear of apellant, the altercation evidence was unique in that she personally witnessed these incidents. (AOB 158-161.) While there was plenty of evidence demonstrating her general fear of appellant as highlighted in the opening brief at pages 158-159, these altercations provided the jurors with an explanation of an actual basis for her fear. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 869.) This was compelling evidence establishing the basis of Webster's fear. Thus, the evidence of the physical altercations were not at all cumulative.

Additionally, the evidence was neither inflammatory nor had its prejudicial effect heightened because he was not prosecuted for those incidents as suggested by appellant. (AOB 161-163.) When evaluating

prior uncharged acts pursuant to Evidence Code section 352, it is important to consider whether "[t]he testimony describing the defendant's uncharged acts ... was no stronger and no more inflammatory than the testimony concerning the charged offenses." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405.) Such a circumstance decreases the potential for prejudice. (*Ibid.*)

Appellant cannot seriously contend that these incidents were inflammatory. Neither incident came close to the testimony concerning The Office murders where the victims, including an elderly woman, were marched into the ladies restroom and callously shot execution style. Instead, both altercations involved appellant essentially defending Webster against Nivens, who appellant perceived to be disrespectful to Webster, and Hobson, who appellant perceived to be unreasonable in his demands for repayment on a loan. The altercations were tantamount to barroom brawls. Thus, it cannot also seriously be argued that the prejudicial effect was exacerbated by the fact that appellant was not prosecuted for the altercations.

If there was any prejudicial effect, it was mitigated by the trial court's limiting instruction to consider the evidence only as it related to Webster's character or her feelings toward appellant:

> Ladies and gentlemen, this evidence is admitted for a limited purpose. It is not admitted to prove the defendant, Mr. Case's, disposition or his tendency to behave in a certain manner, but to establish the evidence as to the character of Mary Webster or her feelings toward Mr. Case. You can consider it for that purpose and for that purpose only.

(17 RT 5976.)

"The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions." (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17, citing *Francis v. Franklin* (1985) 471 U.S. 307, 325, fn. 9.) Thus, in the absence

of evidence to the contrary, it is presumed that jurors abide by limiting instructions. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

The instant limiting instruction clearly admonished the jurors to consider this evidence as to Webster's character only and specifically not to consider it to show appellant's propensity to commit crime. (17 RT 5976.) As argued above, appellant has failed to offer any evidence demonstrating that the jury was unable to understand or follow the trial court's instruction limiting the altercation evidence. This claim is without merit.

2. Evidence that Appellant told Webster that He was an Ex-Convict and Bank Robber who had Committed Past Robberies while using Nu-Skin and Various other Disguises had Substantial Probative Value because it Demonstrated the Nature of their Relationship and Her State of Mind at the Time of Her Interview with Detectives

Appellant next argues that the evidence that he had told Webster that he was an ex-convict and bank robber who had used Nu-skin and disguises was of scant probative value because (1) he did not dispute the nature of their relationship, (2) there was no showing these statements caused Webster fear, (3) these statements were not evidence of planning for a future robbery, and (4) these statements were not interwoven with his other statements regarding the use of disguises and further statements to Baker about feeling pressure to commit a robbery. (AOB 167-171.) This argument is similarly flawed for the reasons set forth above.

Again, both the nature of their relationship and the basis for the nature of the relationship were relevant and necessary for the jury's determination of Webster's credibility. Appellant's actual statements to Webster were highly relevant because his self-portrayal as a highly sophisticated and dangerous ex-convict and bank robber was the tool that he used to control her. His self-portrayal caused Webster fear, which she made clear to detectives throughout her interview.

Additionally, appellant argues that his statements about his past use of disguises did not indicate a plan to commit a future robbery and that such disguise techniques were not probative because there was no evidence that such techniques were used during the crimes. (AOB 168-169.) Viewed in isolation, a statement regarding the past use of disguises may not tend to prove a future intent to commit a crime; however, it gave meaning to the other evidence, e.g. purchase of the gun, of his plan to commit a future robbery. Moreover, while there may not have been evidence of the actual use of such disguise techniques, the actual use mattered very little as the significance was that it demonstrated his formulation of a plan to commit a future robbery.

Lastly, appellant argues that this evidence was highly inflammatory and not cured by the trial court's limiting instruction. For the reasons set forth above, the evidence was relevant and highly probative. Although references to a defendant's prior criminal acts have the potential to prejudice the jury, the fact that such a reference has been made does not automatically render a trial unfair. (See *People v. Jennings* (1991) 53 Cal.3d 334, 375 [rejecting argument that "testimony revealing [defendant's] ex-convict status, and his prior arrest, is so prejudicial that its admission must always result in reversal of the judgment"].) "As the [United States Supreme Court] has recognized, 'it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' [Citation.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 683 [on retrial, references to fact that defendant previously had been convicted of murder and sentenced to death were not incurably prejudicial].)

Although appellant attempted to represent himself as a tough "bank robber" to the unsuspecting Webster, the jury was aware that he, in fact, had never robbed a bank. (14 RT 4971, 4998.) Thus, the jurors were aware

that appellant greatly exaggerated his criminal jaunts. Additionally, the jurors were instructed as follows:

> Ladies and Gentlemen, sometimes evidence is admitted for a limited purpose, and you're instructed that you are to consider it only for the limited purpose for which it's offered. [¶] Here, the answer to the last question is not offered for the truth of the matter asserted, and that is that Mr. Case was, in fact, a bank robber, but to explain that that is what he said and it's affect on the person who heard it, Miss Webster.

(14 RT 4993.) For the reasons as set forth above, appellant has failed to demonstrate the jury's inability to follow the limiting instruction. The claim is meritless.

3. Appellant's Reference to Having Hurt and Killed People in the Past was Substantially Probative

Similarly, appellant argues that his statements of having harmed people in the past were of little probative value, extremely inflammatory, and prejudicial despite the trial court's limiting instruction. (AOB 173-178.) For all the same reasons set forth above, statements that appellant had "bumped a couple people off," "knocked people off," "slapped people," and had gotten rid of a snitch were properly admitted because they were relevant and highly probative to establish Webster's fear. Appellant made these statements to impress Webster by convincing her that he was a cold-blooded ex-convict who had no problems eliminating or harming those who interfered with him in some fashion. As correctly stated by the trial court:

> Well, that's the relevance of it. He wants to put himself in a bad light to Mary Webster because that's good for him. And now that we're at the trial, putting himself in a bad light with Mary Webster can be bad for him. Unfortunately, putting himself in a bad light with Mary Webster is what motivated her to do some of the things that she did.

(11 RT 4097.) To be sure, Webster expressly told detectives that his representation of getting rid of a snitch directly caused her fear. (14 RT 5044.)

> Moreover, the jury received the following limiting instruction:
>
> Again, Ladies and Gentlemen, that's not offered to prove the truth of the matter in the statement, that is, got rid of the [former] getaway driver; just that the statement was made to her and what effect it had on Ms. Webster.

(14 RT 5044-5045.) There is nothing in the record to indicate the jury was unable to follow this limiting instruction; therefore, the jury presumably carefully followed it. This claim is also without merit.

4. The Trial Court Properly Admitted the Challenged Portions of Webster's Interview

Appellant acknowledges that Webster's resistance to the idea that appellant was responsible for The Office murders was relevant to the extent it tended to show that she did not attempt to frame him. (AOB 179.) He argues, however, that the challenged portion of Webster's interview was inflammatory and highly prejudicial and unnecessary because there was cumulative evidence in the unchallenged portion of the Webster's interview. (AOB 179-184.) Again, appellant is wrong. The challenged portions were necessary to establish the degree to which Webster resisted the idea of appellant's involvement in The Office murders, which was highly probative of her credibility. The degree to which Webster resisted could only be realized by presenting a complete picture to the jury. As argued by the prosecutor, "the degree of her resistance is demonstrated both by the length of the conversation, the interview and the amount of information provided to her by the detectives." (18 RT 6175.) As further argued by the prosecutor, the significance of the comments made by the detectives were not the actual comments, but Webster's reaction to the

comments. (18 RT 6175.) The trial court agreed. (18 RT 6177, 6181, 6185.)

Similarly, the evidence was not cumulative in the sense that it was offered to demonstrate Webster's resistance over a period of time. In response to defense counsel's argument that the statements were cumulative, the trial court responded:

> At this point though, they are right down to the real issue here. [¶] She's reluctant to give up the gun because she's afraid and she doesn't want to believe it and they are countering with he killed two people. Give us this evidence. It's the moral dilemma that she faces, really, she has information and evidence which could link her former boyfriend to the death of these two individuals. And, yet, she still doesn't want to give evidence against him.

(18 RT 6184.) Thus, the statements were highly probative of Webster's state of mind and credibility.

Appellant claims the statements made by the detectives were highly inflammatory. (AOB 181-183.) The trial court, however, admonished the jury as follows:

> During the interview, Detective Edwards and Detective Reed will tell Mary Webster certain facts about the investigation. [¶] You should keep in mind at all times that the jury determines what the facts are. And that at the time that this interview was conducted, June 21st, 1993, first, the investigation was no where near complete. Second, the purpose of this interview was to persuade Mary Webster to cooperate with law enforcement. And, for that reason, the detectives are permitted to shade the facts, if that is necessary, in their judgment to persuade the individual to whom they are speaking in this case, Mary Webster, to cooperate.
>
> So you should not believe that Detective Reed or Detective Edwards at that time had any special knowledge of what the truth is in as far as this case was concerned. [¶] Again, you will be the ultimate finders of the facts in this case. [¶] And, finally, this tape and the statements of Mary Webster are not offered for the truth of the matter asserted in those statements but to explain

> and demonstrate for you Mary Webster's state of mind at the time the interview was conducted. So that you may consider that if you find it relevant in resolving other issues in this trial.

(18 RT 6340-6341.) Appellant argues this limiting instruction was ineffectual because it was "unlikely the jury was able to disregard the content of the assertions that the officers made to Webster." (AOB 183-184.) As argued above, appellant again has failed to provide any evidence that the jury was unable to follow the trial court's limiting instruction. The instruction specifically advised the jurors that the purpose of the interview was to persuade Webster to cooperate with them and not to believe that the detectives had any special knowledge of the case as it was very early in the investigation. The trial court instructed the jury to only consider the evidence as it related to Webster's state of mind at the time of the interview. (18 RT 6341.) Thus, the evidence was properly admitted pursuant to Evidence Code section 352.

D. Any Error was Harmless; there was no Federal Constitutional Error

In any event, appellant argues the admission of the above challenged evidence resulted in a miscarriage of justice and rendered his trial fundamentally unfair in violation of the Due Process Clause of the Fourteenth Amendment. (AOB 184-195.) Respondent disagrees. In the absence of a violation of federal rights, reviewing courts evaluate whether "it is reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error." (*People v. Page* (2008) 44 Cal.4th 1, 37-38, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Even assuming arguendo the challenged evidence was erroneously admitted by the trial court, there was no reasonable probability that a result more favorable to appellant would have been reached given the overwhelming evidence of his guilt in this case. As more thoroughly

argued in Argument I.G, above, the prosecution presented an abundance of other evidence that substantially proved appellant's guilt beyond a reasonable doubt. Additionally, the trial court also properly admonished the jury with the limiting instructions as set forth above.

Consequently, appellant received a fair trial. He maintains the evidence was improperly admitted and only served "to inflame the jury's emotions and hinder its ability to carefully and rationally assess the prosecution's case for guilt." (AOB 192.) But this argument ignores the purpose for which the evidence was admitted: to determine Webster's credibility. While there may be a violation of due process where there are "no permissible inferences a jury may draw from erroneously admitted evidence," this is not such a case for the reasons set forth above. (*McKinney v. Rees* (9th Cir.1993) 993 F.2d 1378, 1384, italics and internal quotations omitted.) As explained by this Court, a defendant's federal due process rights are not implicated when the disputed evidence is relevant, material, and admissible on the grounds provided for in section 1101, subdivision (b). (*People v. Catlin* (2001) 26 Cal.4th 81, 123.) Because the evidence was relevant and permitted the jury to determine Webster's credibility, due process was not offended. The claim is meritless.

III. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE THAT, PRIOR TO THE OFFICE MURDERS, APPELLANT HAD SOLICITED GREG BILLINGSLEY AND BILLY JOE GENTRY TO ASSIST IN A ROBBERY

Appellant next contends that the trial court erroneously admitted evidence that he had previously solicited Greg Billingsley and Billy Joe Gentry to commit a robbery prior to The Office robbery and murders because it failed to establish design or plan pursuant to Evidence Code section 1101, subdivision (b). (AOB 196-215.) Respondent disagrees. The evidence was not only admissible as evidence of design and plan, but also to establish motive and intent.

A. Background

During the afternoon break on May 16, 1996, Greg Billingsley contacted the prosecutor at the District Attorney's Office. (18 RT 4599.) During their walk back to the courthouse, Billingsley was upset with the way he was cross-examined by defense counsel and complained that he had "so much more" that he wanted to say. Specifically, he wanted to share that appellant had once asked him to commit a robbery with him. (18 RT 4600.) Billingsley then testified during a 402 hearing as follows:

In April or May of 1993, while standing in the parking lot of the bowling alley, appellant stated that he "had something going on" and asked Billingsley if he wanted "to make some money with [him]."[64] (13 RT 4600-4601.) Appellant explained he had a good "scam" because he was aware of when the bowling alley employee made the bank deposit and what time she would have the "bag of money."[65] (13 RT 4601.) Billingsley told appellant that he could not get involved in "anything like that," and appellant "dropped" it. (13 RT 4601-4602.)

Approximately two weeks later, after bowling, appellant repeated the offer to Billingsley while they were driving around in Baker's car. (13 RT 4602-4603.) The two men were searching for Baker's ex-boyfriend who had been "terrorizing the family" by slashing tires, breaking windows, and making threatening phone calls. (13 RT 4603-4604.)

---

[64] On cross-examination, Billingsley explained that the first encounter occurred approximately six weeks prior to the murders at The Office. (13 RT 4607.) He also explained that, during this time, he met appellant and other co-workers at Manzanita Bowl every Wednesday night. (13 RT 4608.)

[65] On cross-examination, Billingsley stated that appellant told him that he had cased the bowling alley and knew that the deposits were made on Sunday mornings. (13 RT 4614-4615.)

Following the hearing, the trial court entertained initial arguments. The court, however, deferred ruling on its admissibility. (13 RT 4616, 4621.)

On May 28, 1996, after the parties had an opportunity to further investigate the issue, defense counsel announced that it had obtained further discovery pertaining to an offer appellant had also made to Billy Joe Gentry regarding participation in a robbery. (14 RT 4955-4956.)

On June 5, 1996, Billy Joe Gentry testified at the hearing on the in limine motion. (16 RT 5721.) Gentry worked with appellant at McKenry's, and they became friends. (16 RT 5722-5723.) On October 31, 1992, Gentry and his family stopped at Webster's house so that appellant and Webster could see his children's Halloween costumes. (16 RT 5726-5727.) Appellant and Gentry later walked to the liquor store, and appellant asked Gentry if he wanted to "make extra money being a driver in a hold-up, and he'll go in and do all the work and everything and I'll just drive." Gentry declined, and appellant told him not to mention the offer to anyone. He did so until the day after appellant's arrest for murder. Gentry had read an article in the newspaper about the murder, and told Billingsley about appellant's offer. Billingsley replied that appellant had made him the same offer. (16 RT 5727.)

Following the hearing, the prosecutor argued that appellant's intent and motive near the time of the robbery/murders was in issue and relevant pursuant to Evidence Code section 1101, subdivision (b). (16 RT 5746, 5749.) He noted that defense counsel's opening statement indicated that Webster was essentially the mastermind behind the robberies, appellant wanted nothing to do with the crimes, and that he had plenty of money. (16 RT 5747.) The prosecutor argued the evidence was also relevant to demonstrate appellant's preparation and deliberation towards doing the robbery. (16 RT 5748.) He argued:

It is not at all cumulative. Its probative value is extremely high, in that the subjects are the intent and motive of the defendant and his deliberation and premeditation, which the People talked about premeditation. But as the Court knows, that's just a timing description.

We're focusing on deliberation, and this defendant over a prolonged period of time is making preparation for deliberation for committing a robbery and is expressing around that same period of time his familiarity with guns, his desire to get guns and his willingness to eliminate opposition if, in fact, he runs into it in a robbery, and I would submit it on that.

(16 RT 5750.)

He later argued:

Essentially we would be offering the solicitation to commit robbery on the intent, common design and plan and motive as Ewoldt points out in the application of Evidence Code Section 1101 (b). [¶] The evidence, when offered for intent purposes, actually requires the least degree of similarity between the uncharged acts and the charged acts. And all that has to really be shown is similarity to support the inference that the defendant probably harbored the same intent or motive in the same instances.

With regard to common design or plan, as Ewoldt points out, the need for similarity between the uncharged and charged act is somewhat higher. The evidence is not, however, being offered to prove the criminal disposition or bad character of the defendant, but rather to prove that the defendant committed the charged offenses pursuant to the same design or plan used in the uncharged acts. [¶] And the People would submit that the defendant has established, and we would be able to establish through this evidence that the defendant had a general plan and scheme, that is, to commit robberies. And, if so, as the other evidence relates to this, what he would do in dealing with the problem of witnesses at the robbery scene, or any resistance or any problems at the robbery scene, or any resistance or any problems at the robbery scene, what action, if any, he would take.

And we would submit that the evidence of our uncharged act, that being the solicitations, don't simply demonstrate a mere

similiarity in result but such a concurrence of the common features that the various acts are naturally to be explained as caused by the general plan of which they are the individual manifestation.

And I think the evidence clearly shows that this defendant was simply planning to commit a robbery or robberies and was going about it in a fairly methodical way. He needed a gun. He talked about needing a gun. He needed a getaway driver. For example, he solicited two people to be his getaway driver.

He was unable to have a getaway driver, so then went to the ultimate step. That is, he gave himself the biggest head start he could. He eliminated any and all witnesses and he eliminated his witnesses so he can walk out to his car and take –with regard to the evidence at this time under Ewoldt, the court in Ewoldt points out that the factual similaries have to be established. We believe that they have.

Then the Court has to go through a 352 analysis, and that analysis involves identifying if there is a principal factor in determining how strong it is, the tendency between that factor to demonstrating a common design. [¶] And, as I pointed out, I think it's extremely strong through the repetition of the events, any actions by the defendant with various people. Also, with regard to probative value, the Court must determine what extent the source of these uncharged acts evidence as independent of the charged acts evidence. And I would submit that it's entirely independent. [¶] You have Greg Billingsley who has nothing to do with the charged acts, other than reference to the gun which he's already testified to. [¶] You have Billy Gentry who has nothing to do with the charged act, and he is obviously being solicited by this individual.

And we already have evidence that will be presented through Jeri Baker with regard to this defendant's statements to Ms. Baker concerning his desire to commit a robbery and not wanting to spend the rest of his life in prison. And, therefore, he would eliminate all witnesses.

The contract then as to the prejudicial effect, and, as the Court knows, in order for 352 to actually bar evidence which has probative value, once the court finds that probative in order to

keep it out under 352, that probative value has to be substantially outweighed by the prejudicial effect.

I would submit that it's not outweighed at all. The prejudicial effect is actually what would be a defense recitation of the probative value, that is, that it hurts the defendant in the presentation of the evidence that it is so right to the point that he would it to be quote "prejudicial or hurtful." [¶] But, otherwise, it's not prejudicial in the sense that it would cause bias or prejudice or some other reaction by the jury.

One of the questions actually Ewoldt brings up is this, that is, whether this evidence of the uncharged acts is more inflammatory than the testimony of the charged acts. And, in this instance, obviously, it's not. It is evidence of mere preparation. And, likewise, as far as the 352 prejudicial effect, how remote in time is it? [¶] All of these solicitations are near in time to the crimes that the defendant is being charged with within and only a few months period of time, and all tied to this general plan and scheme that he has. ...

(17 RT 5767-5770.)

Defense counsel argued that the prosecution's true reason for introducing the evidence was for the purpose of identity. (17 RT 5773-5774, 5778-5779.) He further argued that, assuming the uncharged act amounted to the solicitation to commit robbery, that crime was not similar to the crimes, robbery and murder, for which appellant stood trial and also that such evidence was inadmissible to prove intent. (17 RT 5775.) Consequently, he further argued that the prejudicial effect of admitting evidence of similar or uncharged acts would outweigh the probative value. (17 RT 5776.)

The trial court ruled as follows:

There are also the statements of Billy Joe Gentry and Greg Billingsley that the defendant solicited them to commit robberies. The statement of the testimony from Billy Joe Gentry would be somewhat more elaborate than just that. It was that defendant told him that he was going to get a gun. The defendant was very pleased when he showed him the gun that he

had obtained. And on the 31st of October 1992, the defendant asked him to be a get away driver in a robbery.

(17 RT 5789.)

And then Gary or rather Greg Billingsley stating that he was solicited I believe on two occasions, to commit a robbery or do a job at the Crestview Lanes or the Crestview bowling alley. [¶] These statements taken in context with the real state of the evidence, which is going to be admitted and some of which has already been repesented to the jury, take on a new and different meaning. For example, the testimony of Mary Webster that while the defendant lived with her, he said he was a robber, purchased disguises, tattoos, would wear bulky clothing in order to thwart an identification, purchased Nu-Skin so that fingerprints would not be left during a robbery.

The testimony of Jeri Baker, the defendant said he felt compelled to commit a robbery, would leave no witnesses, all of this tends to prove that the defendant intended to commit a robbery and intended to avoid apprehension when he did it.

This robbery of The Office was apparaently not the result of a sudden impulse, but was the result of planning engaged in by the defendant, a great deal of deliberation. And while the target of the robbery, The Office may be something that was decided on the spur of the moment, the idea of doing a robbery, it appears it's something that was present in Mr. Case's mind for a long time. And it was an idea that finally culminated in the act which took place on the 20th of June 1993. They are also admissible to show that this is a design or plan that the defendant had begun to think about early on and had done his best to put together until he finally succeeded in doing so by this evidence here, if the jury believes it.

The question under 352, is the evidence of the solicitation to Billy Joe Gentry and Greg Billingsley so prejudicial that it should not be admitted and it outweighs the probative value, and the same would hold true for the testimony of Detective Voudouris and Brian Curley.

And here, this evidence, the Court finds is highly probative. And that the probative value of it outweighs any

possible prejudice that might be drawn from it. The Court would therefore allow the evidence to be presented.

(17 RT 5789-5791.) The trial court also agreed to give a limiting instruction as to the grounds on which it found the evidence admissible. (17 RT 5791-5792.) The prosecutor added that the evidence was also offered to demonstrate appellant's motive to eliminate the witnesses and that he needed the money. (17 RT 5793.) The trial court further found the evidence admissible for this additional purpose. (17 RT 5794-5795.)

At the time of the final instructions, the jury was instructed as follows:

> The following evidence was admitted for a limited purpose. The defendant's statements to Greg Billingsley and Billy Joe Gentry concerning "doing a job" or making some "quick money." This evidence is not admitted to establish that defendant has a criminal disposition or bad character, and you are not to consider it for that purpose. You may consider it on the issue of whether the defendant committed the charged offenses pursuant to an evolving or continuing scheme or plan, referred to in his comments to Billingsley and Gentry relating to those uncharged acts.

(23 RT 7615.)

B. The Trial Court Properly Admitted Evidence of Appellant's Prior Solicitations to Commit A Robbery as Evidence of Design or Plan, as Well as Motive and Intent, Pursuant to Evidence Code Section 1101, Subdivision (B); any Error was Harmless

Evidence Code section 1101, subdivision (a) "prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 393.) Thus, evidence of other crimes or bad acts is inadmissible when it is offered to show that a defendant had the criminal disposition or propensity to commit the crime charged. (Evid.Code, § 1101, subd. (a).)

Evidence Code section 1101, subdivision (b) "clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393, fn. omitted.) Specifically, Evidence Code section 1101, subdivision (b), provides that nothing in that section "prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident ...) other than his or her disposition to commit such an act."

For evidence of uncharged misconduct to be admissible under Evidence Code section 1101, subdivision (b) to prove such facts as motive, intent, identity, or common design or plan, the charged offenses and uncharged misconduct must be "sufficiently similar to support a rational inference" of these material facts. (*People v. Kipp*, *supra*, 18 Cal.4th at p. 369.) "The least degree of similarity ... is required in order to prove intent." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402.) The uncharged misconduct need only be "sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same [or similar] intent in each instance."'" (*Ibid.*; see *People v. Memro* (1995) 11 Cal.4th 786, 864–865 [defendant's uncharged conduct of possessing sexually explicit photographs of young males ranging from prepubescent to young adult admissible to show intent to sexually molest a young boy].)

If the trial court determines that uncharged misconduct is admissible under Evidence Code section 1101, subdivision (b), it must then determine whether the probative value of the evidence is "'substantially outweighed by the probability that its admission [would] ... create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404; Evid.Code, § 352.)

A trial court's rulings under Evidence Code sections 1101 and 352 are reviewed for an abuse of discretion. (*People v. Carter* (2005) 36 Cal.4th 1114, 1149; *People v. Lewis* (2001) 25 Cal.4th 610, 637.) An evidentiary ruling shall not be reversed unless the appellant demonstrates a manifest abuse of that discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.) A court abuses its discretion when its ruling "falls outside the bounds of reason." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226.)

Appellant argues that the solicitation evidence was inadmissible to show design or plan because there was "no question that the acts which formed the basis of the charged offenses had occurred." (AOB 201.) Respondent disagrees.

This Court found as follows:

> To be relevant, the plan, as established by the similarities between the charged and uncharged offenses, need not be distinctive or unusual. Evidence that the defendant possessed a plan to commit the type of crime with which he or she is charged is relevant to prove the defendant employed that plan and committed the charged offense. "For example, evidence that a search of the residence of a person suspected of rape produced a written plan to invite the victim to his residence and, once alone, to force her to engage in sexual intercourse would be highly relevant even if the plan lacked originality. In the same manner, evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense. [Citation.]" (*People v. Ewoldt, supra*, 7 Cal.4th at p. ——, 27 Cal.Rptr.2d at p. 659, 867 P.2d at p. 770.)

(*People v. Balcom* (1994) 7 Cal.4th 414, 424.)

Likewise, the solicited robberies and The Office robbery were subject to a similar plan designed by appellant. The common features shared

between the solicited robberies and The Office robbery involved appellant's methodical approach of planning the crimes. The solicited robberies and The Office robbery both involved (1) appellant alone committing the actual robbery; (2) of a business establishment; (3) of which appellant had some familiarity; and (4) thus allowing him to case the establishment in order to study the employee routines and general patterns of the establishment. (11 RT 4171, 4206, 17 RT 5834-5836, 6021-6023.) In addition, the solicited Crestview Lanes robbery as well as The Office robbery involved female victims. (12 RT 4437; 17 RT 6023.) While this pattern may not have been unusual, the circumstances were sufficient to support an inference that appellant used the same plan in committing the charged offense. The fact that he ultimately abandoned his plan and commit The Office robbery/murders alone is irrelevant. "These similarities support the inference that defendant['s] [solicited robberies were] pursuant to a design or plan that he either employed or developed in committing the charged offense[]." (*People v. Balcom*, *supra*, 7 Cal.4th at p. 424.) The offenses were therefore sufficiently similar that the prior uncharged offenses had substantial probative value, despite the differences between the offenses.

Alternatively, the trial court found the evidence also admissible to show motive. (17 RT 5793-5795.) In a criminal case, "[p]roof of the presence of motive is material as evidence tending to refute or support the presumption of innocence." (*People v. Beyea* (1974) 38 Cal.App.3d 176, 194-195.) Motive has been described as "an intermediate fact which may be probative of such ultimate issues as intent, identity, or commission of the criminal act itself . . . ." (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1017-1018.) "[E]vidence of motive makes the crime understandable and renders the inferences regarding defendant's intent more reasonable." (*People v. Roldan* (2005) 35 Cal.4th 646, 705, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The California Supreme Court has instructed that "the probativeness of other-crimes evidence on the issue of motive does not necessarily depend on similarities between the charged and uncharged crimes, so long as the offenses have a direct logical nexus." (*People v. Demetrulias*, *supra*, 39 Cal.4th at p. 15, italics added.) However, "that a defendant previously committed a similar crime can be circumstantial evidence tending to prove his identity, intent, and motive in the present crime." (*People v. Roldan*, *supra*, 35 Cal.4th at p. 705, italics added.)

Motive was a material fact in dispute in this case and was made relevant by the defense when it theorized that Webster had the motive and was the mastermind behind The Office robbery. (*People v. Sykes* (1955) 44 Cal.2d 166, 170 ["Motive is a material fact."]; *People v. Perez* (1974) 42 Cal.App.3d 760, 767 ["Motive is always relevant in a criminal prosecution."].) It did so by presenting considerable evidence of Webster's history of financial struggles, thereby causing the solicitation evidence to be highly probative of appellant's motive to commit a robbery. (*People v. Kovacich* (2011) 201 Cal.App.4th 863, 893, citing *People v. Argentos* (1909) 156 Cal. 720, 726 ["[i]n a case where the identity of a person who commits a crime is attempted to be proven by circumstantial evidence, ... , evidence of a motive on the part of a defendant charged is always a subject of proof, and the fact of motive particularly material."].) Thus, as set forth in more detail above, these uncharged solicitations were sufficiently similar to the charged offense to support the inference that appellant probably harbored the same motive in each instance. (See *People v. Davis* (2009) 46 Cal.4th 539, 604 [in a capital murder case, the trial court properly admitted evidence of two prior sex crimes on other children to show that the defendant had a motive to sexually assault his victim]; *People v. Demetrulias* (2006) 39 Cal.4th 1 [in a capital murder case, the trial court properly admitted evidence of a prior recent assault and robbery on

another victim to show that the defendant had a motive to rob his murder victim]; *People v. Gallego* (1990) 52 Cal.3d 115, 171 [in a capital murder case, the trial court properly admitted evidence of the defendant's prior murder occurring under similar circumstances as the charged murder to show the defendant's same motive]; *People v. Walker* (2006) 139 Cal.App.4th 782, 802-805 [in a defendant's trial for murdering a prostitute, the trial court properly admitted evidence of three prior sexual assaults in order to show the defendant's "'common motive of animus against prostitutes resulting in violent battering interrupting completion of the sex act'"]; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518 ["Cases have repeatedly held that it is proper to introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent"]; *People v. Pertsoni* (1985) 172 Cal.App.3d 369, 375 [evidence of a prior incident where the defendant shot a person leaving the Yugoslav Consulate in Chicago was relevant to show that the defendant's same passionate hatred of the Yugoslav government impelled him to kill another man affiliated with the Yugoslav government in a club].)

The solicitation evidence was also admissible to show intent under Evidence Code section 1101, subdivision (b).

> Evidence of intent is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.

(*People v. Balcom* (1994) 7 Cal.4th 414, 422, internal quotations omitted, citing *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2.)

> We have long recognized that if a person acts similarly in similar situations, he probably harbors the same intent in each instance, and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent. The inference to be drawn is not that the actor is disposed to commit such acts; instead, the inference to be drawn is that, in light of

> the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution.

(*People v. Thomas* (2011) 52 Cal.4th 336, 356, internal quotations omitted, citing *People v. Gallego* (1990) 52 Cal.3d 115, 171; see also *People v. Roldan* (2005) 35 Cal.4th 646, 706.)

For the reasons set forth above, the similarity in the planning stages of the solicited robberies and The Office robbery was highly probative of appellant's intent to commit The Office robbery.

In any event, error, if any was harmless. For the reasons set forth in Argument I.G, above, there was overwhelming evidence of appellant's guilt. The evidence was properly admitted for some other purpose than propensity as set forth in Evidence Code section 1101, subdivision (b). (See Argument I.D.) Thus, there was no federal constitutional error. The claim is without merit.

IV. THE TRIAL COURT PROPERLY ADMITTED STATEMENTS MADE BY APPELLANT DURING SEMINARS FOR ROBBERY INVESTIGATORS

Appellant also challenges the admission of his statement to robbery investigators that he would harm or kill anyone who interfered with his robbery. (AOB 216-238.) Respondent disagrees. Appellant's statements amounted to "generic threats" and were highly relevant to show his state of mind and intent to kill.

A. Relevant Proceedings

Prior to trial, defense counsel filed a motion excluding two statements made by appellant: (1) a February 23, 1993, statement made during a luncheon hosted by the Sacramento Sheriff's Department where, in response to the question "If you were committing a robbery and if somebody resisted, what would you do?" Appellant replied, "I'd blow them away"; and (2) a statement made in between March and June of 1993 to

Baker that he would have to kill any witnesses because he was a career criminal and would die in prison if caught. (2 CT 432.) Defense counsel argued that the evidence was irrelevant, inadmissible hearsay, and excludable pursuant to section 352. (2 CT 432-432.4.)

On June 5, 1996, the trial court held a 402 hearing. Sergeant Vourdouris testified that he first met appellant in the fall of 1992, during a meeting with ex-convicts of high-risk sex offenders who were recently released on parole. (16 RT 5682-5683.) Sergeant Vourdouris was part of the interview panel responsible for interviewing appellant. (16 RT 5683-5684.) Following the interview, Sergeant Vourdouris and appellant's parole agent visited appellant at McKenry's. (16 RT 5684.) Sergeant Vourdouris asked appellant about his past crimes, including the 1979 robberies and rapes for which he was imprisoned, and appellant confirmed that he had committed those crimes. (16 RT 5685.) The men left the cleaners and continued their discussion at a fast food restaurant across the street. Appellant discussed his preference for nine millimeter automatics and for sawed-off shotguns, and how he had grown up in Indiana and was accustomed to hunting and being around guns.[66] (16 RT 5686.) During his contacts with appellant, appellant admitted that he was a "robber by trade" and that he committed the 1978 rapes and other sex-related offenses, but that those were crimes of opportunity. He was drunk and under the influence of cocaine at the time.[67] (16 RT 5691.)

Sergeant Vourdouris asked appellant if he would be interested in participating in a seminar with investigators. After some consideration,

---

[66] Trial counsel did not object to this statement. (16 RT 5751.)

[67] During cross-examination, Sergeant Vourdouris clarified that appellant made these admissions during their meeting at the fast food restaurant across the street from McKenry's. (16 RT 5704.)

appellant later expressed his interest in participating in the seminar. (16 RT 5687.)

In January or February of 1993, Sergeant Vourdouris set up a seminar with various investigators at the metro office downtown, which appellant attended. (16 RT 5687-5688.) Appellant made himself available to answer any questions. (16 RT 5688.) A question posed to him involved his willingness to use force during a crime. Appellant stated that "if somebody tried to stop him, he would be willing to use whatever force that it took." (16 RT 5688-5689.) Another question posed to appellant involved what he would do if faced with resistance or interference during a robbery, and appellant stated, in an "extremely calm" and "very matter of fact" manner, that he was "willing to take them out."[68] (16 RT 5689-5690.) After appellant left the forum, "most of the investigators that were present were extremely worried about Mr. Case being on the streets." (16 RT 5689.) Approximately four to six weeks later, Sergeant Vourdouris learned that appellant had previously spoken at a different robbery investigator's luncheon. (16 RT 5690.)

Brian Curley also testified at the 402 hearing. From 1992-1993, Curley was a member of Bank of America's corporate security team and attended a robbery investigator's luncheon at Jose's Restaurant, located on Fair Oaks Boulevard, in late 1992 or early 1993. (16 RT 5713.) Appellant gave a 20-minute presentation about his life experiences, including his robberies, and answered questions from the audience. (16 RT 5714-5715.) Someone asked if he had ever robbed banks, and appellant stated that he did not rob banks because of the security cameras. (16 RT 5715.)

---

[68] During cross-examination, Sergeant Vourdouris testified that appellant understood he would be questioned about his prior crimes. (16 RT 5698.) He did not indicate any future plans of committing robberies. (16 RT 5702.)

Someone else asked what he would do if during the course of a robbery someone resisted, and he replied, in a matter-of-fact manner and without emotion, that he "would blow them away."[69] (16 RT 5715-5716.) Curley recalled these three-year old statements because they were "most associated with my interests, which was banking, and then the comment which I thought was extremely cold." (16 RT 5716.)

The prosecutor argued the testimony was relevant to demonstrate appellant's knowledge "with regard to doing robberies" and the "need to use force if the situation came up, his willingness to use force if the situation came up, and not just any force but the force that is equivalent to the phrase 'take them out' or 'blow them away' which is deadly force." (16 RT 5747-5748.) Specifically, the prosecutor argued that Vourdouris's testimony was relevant because it established the following: (1) appellant liked guns; (2) was a robber by trade; and (3) that if faced with resistance, appellant would "take them out." (16 RT 5748.) With respect to Curley, the prosecutor found relevant the facts that appellant indicated that he had never committed bank robberies because of the security cameras and that he would "blow away" anyone who resisted. (16 RT 5748-5749.) This was all relevant to appellant's motive, intent, and preparation and deliberation towards commiting a robbery. (16 RT 5747-5748.) He further submitted that the statements were admissions within the meaning of Evidence Code

---

[69] During cross-examination, the following colloquy took place:

[Defense Counsel]: And do you recall the actual question that was asked?

[Curley]: As I recall, the question was that in situations in the course of a robbery, if you encountered someone who resisted you, what would you have done?

[Defense Counsel]: ... That was talking about what he would have done in the past; is that correct?

[Curley]: That was the nature of the question, yes.

(16 RT 5720.)

section 1220, as well as statements indicating his present state of mind as to a future act. (17 RT 5771.)

The trial court noted that appellant made the statement that he was a "robber by trade" at around the time he recruited Billingsley and Gentry to assist with a robbery. (16 RT 5752.) It then ruled as follows:

> Specifically, as Detective Voudouris testified, the defendant was asked about his willingness to use force. His response was he would use whatever force it took. He would be willing to take them out.
>
> And the statement by Mr. Curley, which accounts Mr. Case's response to the question of what he would do if during a robbery the victims resisted, the response was he would blow them away.
>
> It appears that these are statements under 1270 of the – 1250 of the Evidence Code, and they reflect an existing state of mind. It doesn't appear that these statements were directed to what the defendant did or had done in the past had he encountered the situation where the victims resisted or how much force he was prepared to use during the prior robberies.
>
> From the testimony, it appears that they were speaking of what he would do if, in a robbery, he encountered resistance. [¶] If 1250 allows such evidence, if it's relevant to prove the declarant's state of mind at the time subsequent to the statements, and the Karis case, K A R I S, at 46 Cal 3d, 612, at 636 and 637, the court talks about the admissibility of generic threats and states a defendant's threat against the victim is relevant to prove intent in the prosecution for murder. The statements here in question did not specify a victim or victims but were aimed at any police officer who would attempt to arrest appellant.

(17 RT 5785-5786.) The trial court continued as follows:

> Such a generic threat is admissible to show the defendant's homicidal intent where other evidence brings the actual victim within the scope of the threats, hence, the statements were relevant and not excludable under Evidence Code section 1101.

The same reasoning leads to a conclusion that statements of intent of this nature reflecting intent to kill a particular category of victims in specific circumstances fall within the state of mind exception to the hearsay rule, Evidence Code Section 1250. The evidence is therefore admissible unless the circumstances in which the statements were made, the lapse of time or other evidence suggests that the state of mind was transitory and no longer existed at the time of the charged offense.

Anything subject to a 1250 analysis is also subject to review by 1252, which states that the statement must be made under circumstances such as to indicate its trustworthiness. [¶] Actually, the court has just stated the Code Section in reverse. [¶] Basically, the exact language, evidence of a statement is admissible if the statement was made under circumstances such as to indicate its lack of trustworthiness.

The question must be asked here about how trustworthy are these statements. That is, are they made under the circumstances or in a situation where the defendant might perhaps be trying to impress the people for whom he was speaking to gain some benefit for himself, either real or perceived.

Here this evidence has to be taken in the context of the statement to Jeri Baker in her back yard when she discovers the defendant in a depression and response to her inquiry. He said compelled to commit a robbery and would not leave any witnesses because he would go back to prison, he would never get out if he was caught. That statement takes place some time I believe she testified in the in limine motion in the early spring of 1993, she tesitified.

When all of these things are taken into account, these statements appear to be trustworthy. They appear to be an accurate statement of the defendant's state of mind at a time that he made those statements, and they constitute a generic threat which unforunately came to pass.

(17 RT 5786-5787.) The court continued:

The Court will also take anaysis under Section 352 of the Evidence Code which it's required to do in these situations. It's

> required to do, first of all, the specific statements to Voudouris. There is no defense objection to the statement that defendant liked nine millimeter automatic and sawed-off shotguns. He liked guns and said he was used to being around guns. That would be admissible. The January or February 19, 1993 meeting/seminar at the Metro office on 19th Street in the state building where various investigators were invited and the defendant was available to answer questions, asked about his willingness to use force. Said he would use whatever force it would take the quote "would be willing to take them out" close quote, would be admissible.

(17 RT 5788.) The court excluded the testimony that appellant was a "robber by trade." (17 RT 5791.)

At the conclusion of trial, the jury was instructed with the following limiting instruction:

> Evidence was also admitted relating to defendant's statement on two occassions to law enforcement officers and private security personnel regarding what defendant would do or would have done if he met with resistance during a rubbery. [¶] Reference to his reaction to a certain situation that might occur during a robbery may be considered by you on the issue of the existence of a specific intent or mental state which is a ncessary element of the crimes charged. The evidence would be relevant and admissible regarding the defendant's mental state or intent or premeditation and deliberation. None of the evidence is admissible to show defendant's bad character or disposition to commit crime.

(23 RT 7615-7616.)

B. The Trial Court Correctly Admitted the Statements Appellant Made to Robbery Investigators as Evidence of His State of Mind

Appellant argues the trial court erroneously admitted his statements because (1) his statements were not present threats but rather hypothesizing about what he would have done in the past; (2) the victims did not belong in the category of individuals of the purported threats; (3) the statements were remote; and (4) they were irrelevant as to motive. He is incorrect.

As appellant acknowledges, there is an established body of law permitting the admission of generic threats—statements of intent that do not name a particular victim or time and place of the intended crime. When a defendant makes generic threats against a definable category of persons, the defendant's threats are admissible to show his or her state of mind, intent, and motive if the evidence brings the victim within the threatened category. (*People v. Karis* (1988) 46 Cal.3d 612, 636.) For example, in *People v. Rodriguez* (1986) 42 Cal.3d 730, the defendant was charged with killing two police officers when they stopped him for driving a stolen vehicle, and the trial court properly admitted evidence of a generic threat that he had made in the preceding months that he would kill any officer who attempted to arrest him. (*Id.* at pp. 756-758.) In *People v. Karis*, *supra*, 46 Cal.3d 612, the defendant was charged with kidnapping two women, raping one, and shooting them both, one of whom died, and the trial court properly admitted a statement that the defendant had made three days before the abduction that he would not hesitate to eliminate witnesses if he committed a crime. (*Id.* at pp. 626, 635-638.) In *People v. Lang* (1989) 49 Cal.3d 991, the defendant was prosecuted for murder but claimed he acted in self-defense. The court properly admitted a statement that the defendant had made a month earlier that he would "waste any mother fucker that screws with me." (*Id.* at pp. 1013-1016; and see, e.g., *People v. Cruz* (2008) 44 Cal.4th 636, 651, 671; *People v. Cartier* (1960) 54 Cal.2d 300, 311; *People v. McCray* (1997) 58 Cal.App.4th 159, 172.)

At the same time, the court in *People v. Karis*, *supra*, 46 Cal.3d 612, also observed that a threat of future harm has "as great a potential for prejudice in suggesting a propensity to commit crime as evidence of other crimes," a purpose for which such evidence is not admissible. (*Id.* at p. 636.) "Therefore, the content of and circumstances in which such statements are made must be carefully examined both in determining

whether the statements fall within the state-of-mind [hearsay] exception, as circumstantial evidence that defendant acted in accordance with his stated intent, and in assessing whether the probative value of the evidence outweighs that potential prejudicial effect." (*Ibid.*) But where the evidence establishes that the victim comes within the scope of some previous threat, the evidence is generally admissible "unless the circumstances in which the statements were made, the lapse of time, or other evidence suggests that the state of mind was transitory and no longer existed at the time of the charged offense." (*Id.* at p. 637.)

Here, even assuming arguendo appellant's statements are characterized as acts he would have taken in the past, his statements still formed "generic threats" that were relevant to his intent to commit The Office robbery. Appellant represented to robbery investigators that, if anyone interfered with his robbery in the past, he would have "blown them away," which is no different in meaning than having made a past threat to the same category of individuals. Whether the statement is "I would have blown them away" or "I will blow them away," the import is the same: appellant would harm any future person who interfered with his robbery. This is a generic threat. (See, e.g. *People v. Cruz* (2008) 44 Cal.4th 636, 641, citing *People v. Rodriguez*, *supra*, 42 Cal.3d 730, 757 [prior threat made in an unrelated incident three months earlier to "kill a deputy by shooting him in the back of the head was 'manifestly admissible to show defendant's state of mind' at the time he fatally shot Deputy Perrigo in the back of the head."].)

Additionally, respondent asserts that the trial court correctly ruled that the generic threat appellant made to Sergeant Vourdouris's group was, at

the time, in the present tense.[70] His testimony at the hearing made clear that the hypotheticals posed were couched in terms of the present tense: "if somebody tried to stop him, he would be willing to use whatever force that it took." (16 RT 5688-5689.) The other question involved what he would do if faced with resistance or interference during a robbery, and appellant stated, in an "extremely calm" and "very matter of fact" manner, that he was "willing to take them out." (16 RT 5689-5690.) The fact that the statement was made in the future tense is apparent from the reaction by the investigators in attendance, namely feeling worried about having appellant on the streets. (16 RT 5689.) The fact that appellant was aware that the seminar would focus on his criminal past is of no consequences. The hypotheticals were couched in the present tense, and appellant responded accordingly.

Appellant uses Sergeant Vourdouris's clarification during his trial cross-examination testimony that appellant "was relating to what he would have done in the past had there been resistance." (AOB 227.) This, however, is inappropriate. The trial court's ruling can only be reviewed by what it considered at the in limine hearing. (See, e.g., *People v. McKim* (1989) 214 Cal.App.3d 766, 768, fn. 1 [in reviewing a trial court's ruling on a suppression motion, reviewing courts are confined to the facts presented at the hearing]; *People v. Flores* (1979) 100 Cal.App.3d 221, 226, fn. 2; *People v. Hubbard* (1970) 9 Cal.App.3d 827, 832.) Taking only into consideration Sergeant Vourdouris's testimony during the in limine hearing, which is all the trial court had before it at the time of its ruling, it

---

[70] Given Curley's testimony on cross-examination, it is clear appellant's statements represented what he would have done in the past. Respondent, as argued above, still maintains that the statement was a "generic threat."

cannot be argued that the trial court erroneously admitted the generic threats appellant made before the robbery investigators.

Appellant also argues that Manuel and Tudor did not fall within the category of individuals who were subject to the generic threat because there was no evidence of resistance. (AOB 229-230.) His definition of "resistance" only includes physical resistance, but that is too narrow. Resistance is "the refusal to accept or comply with something." (http://oxforddictionaries.com/definition/resistance?q=resistance.) Thus, a victim who simply refuses to comply with appellant's orders would be in resistance, thus falling within the category of individuals who were subject to the generic threat.

He further argues that his "state of mind 15 years earlier" for crimes he had committed in 1979 were too remote and inadmissible. (AOB 230.) But the lapse of time is just one factor to consider in the ultimate inquiry of whether the declarant's "state of mind was transitory and no longer existed at the time of the charged offense." (*People v. Karis*, *supra*, 46 Cal.3d at p. 637.) Appellant made the statements just prior to The Office robbery, indicating a very recent intent to commit a robbery.

In any event, if the reference is from the time he committed his past robbery, he remained incarcerated for those crimes until he was paroled in 1991. Upon his discharge from parole in 1993, he met Webster and immediately began planning a robbery. Indeed, the other trial evidence of appellant's immediate purchase of a gun upon his release and statement to Baker about eliminating witnesses demonstrated the sincerity of his general threat and his "state of mind was [not] transitory and [still] existed at the time of the charged offense." (*People v. Karis*, *supra*, 46 Cal.3d at p. 637; see, e.g., *People v. Spector* (2011) 194 Cal.App.4th 1335, 1396-1397 ["As to both statements, Spector complains about the long period of time, approximately 10 years, between the threats testified to by Tannazzo and

Clarkson's death. . . . But, as the trial court pointed out when it admitted Tannazzo's testimony, other evidence to be presented at trial would show a decades-long 'history of acts that indicate ... violence toward women,' and therefore this threat was part of a 'continuing pattern.' We agree this long history tends to demonstrate the sincerity with which Spector uttered these words, and the fact that his 'state of mind was [not] transitory and [still] existed at the time of the charged offense.'].) Thus, while there was a lengthy gap in between the time period within which he committed his prior crimes and when he committed The Office robbery and murder, the removal of his period of incarceration considered with his immediate plans to commit a robbery upon his release from prison was an almost continuous thread of his willingness to eliminate anyone who resisted during the course of a robbery. Under these circumstances, the trial court acted well within its discretion in determining that the time between appellant's statements and The Office robbery and murders did not render his state of mind transitory. (Cf. *People v. Davis* (2009) 46 Cal.4th 539, 602 [upholding admission under Evidence Code section 1101, subdivision (b) of prior acts committed 17 years before charged crimes]; *People v. Steele* (2002) 27 Cal.4th 1230, 1245 [same].)

Appellant's argument that his statements were inadmissible because they were irrelevant also fails. (AOB 230-232.) Appellant's statement was relevant to intent.

Only relevant evidence is admissible. (Evid. Code, § 350.) "'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts such as identity, intent, or motive." (*People v. Wallace* (2008) 44 Cal.4th 1032, 1058.) Further, under the state-of-mind

exception to the hearsay rule, "evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant." (Evid. Code, § 1250.)

This case involved the death of two individuals who were killed during the course of a robbery. Appellant stated he would kill anyone who resisted during the course of a robbery. Appellant's statement explained his particular conduct in particular circumstances with a particular type of person, anyone who resisted during the course of a robbery. Ultimately, appellant's statement evidenced his intent and motive on the night that Manuel and Tudor died from gunshot wounds to the head and tended to prove that he acted in conformity with this state of mind.

Appellant contends that the trial court erred by allowing the introduction of his statements because they were not relevant to any material fact in dispute. (AOB 230 230-232.) Intent to kill and premeditation were material to this case. Appellant's not guilty plea put in issue all of the elements of the offenses, including intent. (*People v. Daniels* (1991) 52 Cal.3d 815, 857-858.) Criminal intent is seldom proved by direct evidence and often must be inferred from a defendant's conduct. (*People v. Lewis* (2001) 25 Cal.4th 610, 643.) Statements by a defendant frequently are relevant to show intent for the charged crime. (See e.g., *People v. Lang* (1989) 49 Cal.3d 991, 1013 [first-degree murder defendant's habit of carrying a gun and statements he would "waste" anyone who interfered with him were relevant to his state of mind]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 756–757 [in murder prosecution

defendant's threat against victim is relevant to prove intent and a generic threat is admissible to show defendant's homicidal intent where other evidence brings actual victim within scope of threat].)

For these same reasons, the probative value of appellant's statements were not outweighed by the risk of prejudice. Appellant argues the statements were cumulative of other evidence of intent to kill, such as the circumstances surrounding the killings themselves and his statements to Baker. (AOB 232-234.) Baker's credibility, however, was also severely attacked by the defense. She, like Webster, was portrayed as a scorned ex-lover. Thus, appellant's statements to the robbery investigators and the surrounding circumstances further bolstered the reliability and accuracy of appellant's similar statement to Baker around the same time. Thus, even if not specifically admissible as a "generic threat," this statement was relevant to show the seriousness in which he made the similar statement to Baker.

Because the statements were made close to the time of The Office robbery and murders, it "enhanced its probative value, and because at the time of the ruling the identity of the perpetrator appeared to be the principal issue, the court concluded that as a statement of motive, plan, and design the probative value of the statement was great. The court therefore concluded that the highly probative nature of the evidence substantially outweighed the danger of undue prejudice from its admission." (*People v. Karis, supra*, 46 Cal.3d at p. 637.) The statements were, therefore, properly admitted into evidence. Consequently, there was no federal constitutional error.

C. There was no Prejudice

As set forth above, the prosecution presented overwhelming evidence of appellant's guilt. (See Arg. I.G, ante.) Thus, it is not reasonably probable that appellant would have received a more favorable result absent the admission of the prior act evidence. For the same reasons, any federal

constitutional error was harmless beyond a reasonable doubt. (*People v. Watson*, *supra*, 46 Cal.2d at p. 835.)

V. THE JURY WAS AWARE THAT DETECTIVE REED WAS UNAWARE OF LANGFORD'S STATEMENT THAT HE HAD RETRIEVED THE GUN FROM BAKER'S CAR ON THE NIGHT OF THE MURDER

Appellant argues the trial court excluded relevant defense evidence when it precluded defense counsel from questioning Detective Reed about inconsistent statements made by Webster and Langford regarding who retrieved appellant's gun from Baker's car on the night of the murders and whether he was aware of Langford's version. He is incorrect.

A. Background

During his direct testimony on behalf of the defense, Langford testified that appellant had asked Webster to retrieve the gun from Baker's car on the night of the murders. (20 RT 6702.) He acknowledged that he had made a previous statement to the prosecution that appellant asked him to retreive the gun, but explained that he was mistaken and had retrieved the gun on a different occasion. (20 RT 6703.) He further acknowledged that he had also told the prosecution that he found the box containing the gun on the floor in front of the backseat and that heat came from the barrel. (20 RT 6704-6705.)

On cross-examination, the prosecutor asked Langford:

> You told Reed on June 22nd, 1993 that the defendant brought the gun in the duplex.
>
> You told Carli on March 25, 1994 that your sister went out and got the gun and then you told Carli on February 26, 1996 that you, in fact, went out to the car and got the gun.

(20 RT 6738.) Langford had no explanation for the variation in his story other than he read over Webster's notes about the incident and relied on her accounting that she had retrieved the gun on the night of the murders. (20 RT 6738.)

Detective Reed was subsequently called as a witness by the defense. Defense counsel questioned him about Langford's statement regarding the heat emanating from the gun. The following colloquy took place:

> Q Well, I said, prior to court today, were you ever aware that Mr. Langford had been telling people that he felt heat emanating from the gun?
>
> A Yes.
>
> Q Okay. [¶] And when did you become aware of that?
>
> A At some point, I spoke to Mr. Druliner, and he had told me that's what Mr. Langford had said.
>
> Q Well, at some point. [¶] That's between what dates; if you can recall?
>
> A It would have been after his testimony in court and within the last – probably a day before I last testified, whenever that was.
>
> Q So it wouldn't have been during the course of your investigation in this case?
>
> A No. It was definitely after he had testified.
>
> Q All right. [¶] And when, if ever prior to today, were you made aware that Mr. Langford had stated that he, as opposed to Mary Webster had or, for that matter, Mr. Case himself had –
>
> [Prosecutor]: Objection, your Honor. [¶] One, as to relevance and the other is that it's a compound question.
>
> The Court: Sustained.
>
> Mr. Gable: On both grounds or one ground, your Honor?
>
> The Court: Both grounds.
>
> Mr. Gable: All right. [¶] Well, could I finish the question before we have a ruling on the relevancy?

The Court: Well, why don't you try it again since i[t] was compound to begin with?

Mr. Gable: That's a point well-taken.

Q. (By Mr. Gable): Okay. [¶] Did you ever hear from Mr. Langford, that he was the one that went out and got the gun out of the car?

A No.

Q. Okay. [¶] And, I mean, this would have been important, I assume, in the course of your investigation of this case, is to know who handled the gun; is that correct?

A Absolutely

Q Okay. [¶] And were you ever made aware of this by anyone prior to court?

[Prosecutor] Objection as to the relevance.

Mr. Gable: It goes to his investigation and whether or not it's a complete investigation of this case, your Honor, as to whether or not he ever had any knowledge that there's more than one story about who got the gun.

The Court: Sustained.

[Prosecutor]: Thank you.

Q (By Mr. Gable): So you never knew that Mr. Langford had made a statement that he had obtained that gun from the car –

[Prosecutor]: Objection.

Q -- is that right?

[Prosecutor]: Same objection, your Honor.

The Court: Sustained.

Q (By Mr. Gable): Did you know Mr. Langford also indicated that Mr. Case had changed his clothes at Mary Webster's house, changed into a new set of clothing there?

[Prosecutor]: Same objection, your Honor.

The Court: Sustained.

Mr. Gable: I'd like to be heard on these, your Honor.

The Court: All right. [¶] It's about time for the jury's first break.

(21 RT 6971-6974, emphasis added.)

Outside the presence of the jury, trial counsel argued as follows:

> There can be more than one reason for calling a witness, your Honor. And the fact of the matter is that we should have an opportunity to call this investigator and find out what he did with regard to the investigation. [¶] It's certainly relevant to the jury in determining whether Mr. Case is guilty or not whether a complete investigation is made of this case. [¶] If, in fact, the other law enforcement officials had knowledge of various inconsistencies in the statements of various key witnesses and failed to inform the investigating officer who has said that, by golly, if I'd known that, that would have been important to me, that's certainly relevant for the jury's consideration, and that's exactly all we're asking at this point in time. [¶] I don't see how Mr. Druliner can say that that's irrelevant to the jury's consideration of whether or not Mr. Case is guilty or not.
>
> The Court: Well, you're asking this particular detective what he considers to be important insofar as the investigation is concerned. That's really irrelevant to what the jury considers important as what is relevant. This case has to be decided on what was done and what evidence has been presented. [¶] If there are inconsistencies in that evidence or there are gaps in that evidence, then that's the state of the evidence and that's the facts upon which the jury must rely in reaching their decision.

(21 RT 6974-6975.) Trial counsel continued:

> If I might – I don't mean to interrupt the Court – but the other thing is, when there's inconsistencies presented between two witnesses and the investigator is aware of those inconsistencies, it is fair, certainly, to ask whether the investigator took any steps or what steps were taken, if any, to resolve those inconsistencies.

> And if he says none, fine, that's as far as you go. I'm not going to sit there and criticize him at this point for not doing anything. We'll save that for argument, where it belongs. [¶] But we certainly have the right to lay the foundation that nothing was done, and that's all we're trying to do here.
>
> The Court: All right. [¶] I think the objection and the Court's previous ruling sustaining the objection is approporiate as it stands, and that closes the issue.

(21 RT 6976, emphasis added.)

B. The Jury Knew Detective Reed was not Made Aware of Langford's Statements to Carli until after Langford's Trial Testimony; Therefore, Appellant was not Precluded from Impeaching His Credibility

As with all relevant evidence, the trial court retains broad discretion to admit or exclude evidence offered for impeachment. (Evid.Code, § 352; *People v. Hartsch* (2010) 49 Cal.4th 472, 497; *People v. Brown* (2003) 31 Cal.4th 518, 534; *People v. Rodriguez*, *supra*, 20 Cal.4th at p. 9.) "A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*Rodriguez*, at pp. 9-10.)

Although the trial court sustained the objections on relevance grounds, the facts defense counsel wished to elicit had already been established. The trial court sustained the prosecutor's objections to two questions asked by defense counsel which are of relevance here. First, as part of a series of questions involving Langford's statement about personally retrieving the gun from Baker's car, defense counsel asked Detective Reed whether he had ever directly heard from Langford that he retrieved the gun from Baker's car to which he replied, "[n]o." Drawing a relevance objection by the prosecution, defense counsel then asked, "...

And were you ever made aware of this by anyone prior to court?" Defense counsel argued it was relevant as to the adequacy of the investigation and whether Detective Reed was aware that there were multiple stories as to who retrieved the gun from the car, and the trail court sustained the objection. Defense counsel attempted again by asking, "So you never knew that Mr. Langford had made a statement that he had obtained that gun from the car -." The prosecutor made the same objection, which was also sustained by the trial court. (21 RT 6973.)

These questions, therefore, had been "asked and answered" and were objectionable on those grounds. (See *People v. Vera* (1997) 15 Cal.4th 269, 272 [correct decision but wrong reason upheld]; *People v. Zapien* (1993) 4 Cal.4th 929, 976 [a ruling or decision correct in the law based on wrong reason upheld if supported by any applicable legal theory].) In a preceding line of questions, defense counsel elicited from Detective Reed that Langford had never told him that he retrieved the gun from the car and that it would have been important for him to have known this fact during his investigation of the case. (21 RT 6973.) In other words, Detective Reed was completely unaware of this version at the time of his investigation. These facts were in the record, and defense counsel could have "argued his characterization of their investigation to the jury ...." (AOB 243.) Because appellant's premise is incorrect, his argument is groundless.

Second, defense counsel asked, "[d]id you know that Mr. Langford also indicated that Mr. Case had changed his clothes at Mary Webster's house, changed into a new set of clothing there?" (21 RT 6973-6974.) The prosecutor again made the same objection, which was also sustained by the trial court. Outside the presense of the jury, defense counsel argued that whether a complete investigation was completed or not was relevant for the juror's consideration of appellant's guilt. (21 RT 6974.)

Similarly, the fact that appellant had changed his clothes at Webster's home had already been established by Webster's testimony. (14 RT 5015-5016.) Thus, with the exception that Langford believed appellant changed into tennis shoes while Webster testified that appellant wore only socks, the fact that appellant had changed his clothing was consistent in their statements. (20 RT 6700-6701.) Thus, to the extent defense counsel wished to challenge the adequacy of the investigation based on the fact that Webster was in possession of appellant's clothing and question the origin of the bloodstain, it had the available facts to do so.

Consequently, appellant was not deprived of his state and federal constitutional rights to present a defense and a fair trial. The claim is meritless.

VI. THE PROSECUTION PROPERLY INTRODUCED APPELLANT'S INTERROGATION STATEMENTS DURING ITS CASE IN REBUTTAL

Next, appellant argues that the trial court abused its discretion when it permitted the prosecution to introduce his interrogation statements during rebuttal. He argues his statements did not "actually rebut any evidence presented by the defense" and was instead nefariously introduced by the prosecutor for sandbagging purposes. (AOB 252-270.) Appellant's argument misses the mark. The record is devoid of any such conduct by the prosecutor, and as will be set in more detail below, appellant's statements were introduced as proper rebuttal to the evidence presented as part of appellant's case-in-chief. His argument is unavailing.

A. Background

Prior to calling Detective Stan Reed as a rebuttal witness, the prosecution sought to introduce the following portions, *inter alia*, of appellant's interrogation:

1. Appellant's statement that he had seen coverage of the killings on the news

During the prosecution's case in chief, Nivens testified that appellant had arrived at Webster's duplex at approximately 11:00 a.m. and watched the news, which he typically did not do. (17 RT 5979-5980.) During the defense's case-in-chief, defense Investigator Gane testified that, on July 21, 1993, there were no listings for local news between the hours of 9:00 a.m. and 12:00 p.m. (20 RT 6825-6826.) In rebuttal, the prosecution sought to offer the following statement made by appellant:

> Reed: ... Ah, we're investigating a homicide that occurred out on Jackson Highway and Bradshaw Road. Occurred last night. You may have seen it on the news.
>
> Case: Yeah.

(Augmented CT of 11/10/09 Appendix A, p. 1.) In addition, the prosecutor sought to introduce the following in rebuttal:

> Reed ... as you know that the homicide happened at the Office bar.
>
> Case: I seen it on TV this morning.

(Augmented CT of 11/10/09 Appendix A, p. 4.)

Following defense counsel's objection that the statement was improper rebuttal, the trial court ruled as follows:

> And with regard to the first offer of rebuttal evidence on behalf of the Prosecution relating to the fact that the defendant was watching the news, the Court finds that these assertions in the defense case were not implicit in his denial of guilt, and, therefore, this is proper rebuttal and the Court will allow this section to be used.

(21 RT 7217.) The trial court later added:

> [The court]: Not to revisit the last ruling, but, for example, the Defense put on evidence that nobody could have been watching the news at the time that this witness said they were watching the news.

[Defense counsel]: Correct.

The Court: And the evidence that rebuts that is your client's statement that he was watching the news.

[Defense counsel]: And the fair inference being it could have been at that time, I guess.

The Court: Right.

(21 RT 7226.)

2. Appellant's Statement that he was at the Office on the night of the Robbery/Murders

During the prosecution's case in chief, Grimes testified that appellant was at the Office on June 20, 1993, when he arrived at approximately 8:30 p.m. (11 RT 4166-4167, 4171.) He further testified that appellant wore blue jeans, cowboy boots, and a sport shirt. (11 RT 4176, 4178.) During cross-examination, trial counsel immediately questioned Grimes about the accuracy of what time he had arrived at The Office and about The Office's lighting conditions near the pool tables. (11 RT 4186-4193.) Defense counsel further attacked Grimes by asking him what appellant wore that night and pointed out the inconsistencies in his description at trial versus what he provided to sheriff's deputies during the investigation. (11 RT 4200-4201.)

The defense, as part of its case in chief, called Investigator Gane and Detective Reed to testify about Grimes' inconsistent description of what appellant wore that night. Investigator Gane testified that Grimes had told him that appellant wore a pale Levi material shirt. (20 RT 6895-6896.) Detective Reed testified that Grimes had told him that appellant wore gray cowboy boots and jeans, but did not provide a description of the shirt. (20 RT 6919-6920.)

As part of its rebuttal, the prosecution wished to offer appellant's statements that he was at The Office with Burlingame, took her home

between 6:00 p.m. and 7:00 p.m., that he had returned to The Office between 7:30 p.m. and 8:00 p.m. to shoot some pool, and left at approximately 8:55 p.m. (Augmented CT of 11/10/09 Appendix A, pp. 4-5, 8-9.)

Following a defense objection and arguments, the trial court ruled as follows:

> Well, let's just say that it seems like a logical argument to make. [¶] Sure, they chose to make it. And should they choose to make it, it would be supported by the evidence that they introduced during their cross-examination and during their case in chief. Because the value or the weight of that identification, the validity of that identification has certainly been challenged implicitly. [¶] And I believe that this evidence does go to rebut the assertion that Tracy Grimes is identifying Mr. Case for some other reason than the fact that he actually saw him there, so it will be admitted.

(21 RT 7232.) Defense counsel asked the trial court whether the Burlingame evidence was admissible, and the trial court ruled as follows:

> Burlingame comes in but not on the bootstrap. The Court will exercise its discretion under the Evidence Code and the Penal Code as provided for in Bunyard, Muniz and Carter and allows that because it does tend to give more meaning to the testimony of Grimes.

(21 RT 7232.)

3. Appellant's Statement that He was Driving Baker's Ford Probe on the Night of the Robbery/Murders

During the prosecution's case in chief, Dickenson testified that just before she heard shots being fired, she was outside and recognized all but one car in the parking lot and described it as a small compact. (11 RT 4240-4245.) She was unable to positively identify Baker's car, but testified that it looked similar to the one she saw in the parking lot. (11 RT 4244-4245.)

On cross-examination, Dickenson provided more details about the unfamiliar car. She was unable to note any details because it was parked next to a Camero, which was "set up a little higher than that vehicle." She stated that the color was "silverish, bluish, light color." (12 RT 4268.) She explained that she was able to see the front end, the top of the hood, and windshield and again described it as a compact car similar to a two-door Honda or Hyundai. (12 RT 4269-4270.)

During the defense's case in chief, Investigator Gane testified that Baker's Ford Probe was 175 inches in length, while a 1977 Camero was 195 inches in length. (20 RT 6822-6825.) The defense also called Deputy Sawyer who interviewed Dickenson and testified that Dickenson did not affirmatively indicate that she did not notice any of the vehicles. (21 RT 7137-7138, 7140-7141.)

In rebuttal, the prosecution sought to introduce appellant's statements as follows:

> Reed: And obviously you must have been in a car. Where were you parked at?
>
> Case: Ah, right in front of that – I guess it's a house trailer there next to the bar.
>
> Reed: Oh, there's a –
>
> Case: Parking lot.
>
> Reed: -- white Camaro over there?
>
> Case: Yeah.
>
> Reed: You were parked on the other side of the white Camaro?
>
> Case: (Inaudible).
>
> Reed: What kind of car were you in?
>
> Case: Ah, Jerry's gray Ford Probe.

(Augmented CT of 11/10/09 Appendix A, pp. 4-5, 8-9.)

The following colloquy occurred:

[Prosecutor]: The defense's last witness, in fact, was one of the attacks on Dickinson's ability or testimony concerning the car, scene of the car and its location. [¶] The other witness was Tony Gane who, I believe, interviewed Anita Dickenson he said three times.

The Court: And she said that the car that she saw was half the size of a Camaro.

[Prosecutor]: Right.

The Court: But the statement offered here is that the defendant was there in Jerri's gray Ford Probe.

[Prosecutor]: Yes.

The Court: All right. [¶] Well, that would seem to directly rebut that. [¶] That testimony would be allowed.

(21 RT 7232-7233.)

4. Appellant's Statement Regarding the Clothes and the Blood on the Clothes

On rebuttal, the prosecution sought to introduce the following statements made by appellant:

Reed: How can we explain the clothing that Mary got from you?

Case: I guess you'll have to talk to Mary about that.

Reed: You have no idea what she's talking about?

Case: No.

Reed: Clothing, and a pair of boots with the blood on 'em? Is that blood going to match the people over there in the Office bar?

Case: I have no idea.

(Augmented CT of 11/10/09 Appendix A, p. 11.) He also sought to introduce the following:

> Case: Well, the clothes are mine. I got the blood on 'em from shaving. And the people were alive when I left the bar.
>
> Reed: The blood on the clothes, if it's blood, you got if from shaving?
>
> Case: (Unintelligible).
>
> Reed: Okay. Well –
>
> Edwards: (Unintelligible) shaving, Casey, but I don't see any marks on you from shaving.
>
> Case: Well.
>
> Edwards: Who were you shaving? I don't see any marks on you from shaving.
>
> Case: Heal fast.
>
> Edwards: Okay
>
> Reed: You heal real quick, huh? Okay. Any questions, Darryl?

(Augmented CT of 11/10/09 Appendix A, pp. 18-19.)

The prosecutor intended to offer this evidence to rebut the blood testimony from defense expert Peter Barnett and the defense claim that the blood was planted by someone else. (21 RT 7243, 7246-7247.) The following collequy occurred:

> [Prosecutor]: And one of the ways which was constantly – not constantly – but was set up by Counsel's questions with Peter Barnett as to the possibilities was that it was planted on the shirt.
>
> [Defense Counsel]: And I don't know how this particular facetious response because we know it isn't Mr. Cases's blood that's on that shirt sheds any light on how the blood got on the shirt.

The Court: I'm intrigued by the planted on the shirt possibility which was raised in the defense case. [¶] So, then, the question is does this rebut that? [¶] Because obviously, it's not offered for the truth of the matter asserted. I don't mean that in a hearsay sense.

[Defense Counsel]: No.

[Prosecutor]: Exactly.

[Defense Counsel]: No.

The Court: But it's not offered for the truth of the matter asserted, because if one had knicked oneself shaving to the extent that they would let that much blood on the shirt –

[Defense Counsel]: Does that diminish from the assertion there's blood planted? [¶] I don't even see where it even remotely touches on that issue.

The Court: Well, it's certainly not a denial or a statement. I have no idea.

[Defense Counsel]: Well, you already said that earlier.

The Court: It's an inconsistent explanation, really.

[Defense Counsel]: Well, it's a – [¶] Well, it's definitely that, to put it mildly. [¶] But is that proper rebuttal? [¶] If the defendant had got on the stand and testified as to how the blood got on the shirt and it was inconsistent from what he said in his statement, then certainly that would be rebuttal evidence.

(21 RT 7247-7248.) The trial court noted:

Well, what it is the Prosecution there contends and has contended that the blood on the shirt came from the victims and that the shirt was on Mr. Case when he shot them to death. [¶] The Defense has seemed to indicate in its case in chief through Mr. Barnett that another possible source of the blood would be someone dipping the shirt in the blood or the boots in the blood.

(21 RT 7248.) The court concluded, "And, so, that's the evidence that this would have to rebut." Defense counsel agreed. (21 RT 7248.) Defense counsel added, "the only issue is whether he was wearing them [the

clothes] on the night in question." The Court replied, "[a]nd this would tend to rebut that, because if he was wearing them on the night in question, they could not have been smeared through the victims' blood by someone perpetrating a frame-up." (21 RT 7249.) The court concluded the evidence was admissible for the above-stated purposes. (21 RT 7250.)

B. Appellant's Statements were Properly Introduced as Rebuttal Testimony

The People's rebuttal evidence must relate to the subject matter of evidence offered by the defense. (*People v. Lancaster* (2007) 41 Cal.4th 50, 98.)

> [P]roper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt.

(*People v. Young* (2005) 34 Cal.4th 1149, 1199; see Pen. Code, § 1093, subd. (d).) Testimony that reiterates or reinforces a part of the prosecution's case that has been impeached by the defense properly may be admitted in rebuttal. (Young, at p. 1199.)

"The order of proof rests largely in the sound discretion of the trial court, and the fact that the evidence in question might have tended to support the prosecution's case-in-chief does not make it improper rebuttal." (*People v. Coffman* (2004) 34 Cal.4th 1, 68, citing *People v. Mosher* (1969) 1 Cal.3d 379, 399, disapproved on another ground in *People v. Ray* (1975) 14 Cal.3d 20, 29–30; Evid. Code, § 320; Pen. Code, §§ 1093, subd. (d), 1094.)

> It is improper for the prosecution to deliberately withhold evidence that is appropriately part of its case-in-chief, in order to offer it after the defense rests its case and thus perhaps surprise the defense or unduly magnify the importance of the evidence. Nevertheless, when the evidence in question meets the

> requirements for impeachment it may be admitted on rebuttal to meet the evidence on a point the defense has put into dispute.

(Coffman, at p. 68, citing *People v. Harrison* (1963) 59 Cal.2d 622, 629.) The admission of rebuttal evidence is reviewed for an abuse of discretion. (*People v. Harris* (2005) 37 Cal.4th 310, 335; *People v. Young* (2005) 34 Cal.4th 1149, 1199.)

First, appellant's statement that he had watched television news coverage of The Office murders rebutted Investigator Gane's testimony that there were no listings for local news between the hours of 9:00 a.m. and 12:00 p.m. on July 21, 1993. (20 RT 6825-6826.) Appellant argues his statement that he had watched the morning news did not rebut Investigator Ganes testimony because his admission to having watched the morning news could have also covered the period between 12:01 a.m. and 11:59 a.m. (AOB 257-258.) He is splitting hairs. When appellant was interviewed on the afternoon of July 21, 1993, his reference to have "seen it on TV this morning" appears to have referred to the morning news as commonly understood by the television viewing public. (Augmented CT of 11/10/09 Appendix A, p. 4.) When he recounted that evening's events, he did not include down time watching television. Rather, he explained that got home just before midnight, had a discussion with Baker, and woke up the following morning with "a hell of a hangover." (Aug. CT of 11/10/09 Appendix A at p. 10.)

Second, appellant's statement that he was at The Office on the night of the murders until 8:55 p.m. rebutted the defense evidence attacking the testimony of Grimes regarding what appellant wore the night of the murders and inference that Grimes fabricated appellant's presence at The Office due to bias. Appellant argues that he did not challenge his presence at The Office with Grimes, but rather challenged Grimes' description of appellant's clothing to the extent it was consistent with the defense theory

that the blood had been planted on the clothes and boots in evidence. (AOB 2610-261.) Even assuming this is true, the defense tactic, as found by the trial court, could reasonably have been understood by the juror's as one accusing Grimes of lying about appellant's presence at The Office at closing time.

Appellant further argues that it was in fact the prosecution who elicited from Grimes that he "and his friends would see that justice was done," yet in the same breath, acknowledges "defense counsel elicited from the defense investigator that Grimes showed some animosity toward appellant." (AOB 261.) As stated above, the jury could have understood this as defense evidence of Grimes' bias and intentional misidentification of appellant at The Office on the night of the murders as found by the trial court.

He also argues that his statement was a material part of the prosecution's case in chief in that it established his commission of the crime. (AOB 262.) Not so. The prosecution had put on sufficient evidence of appellant's presence at The Office through Grimes' testimony, as well as the testimony from Burlingame and Dickenson. Grimes' testimony, however, was impeached by the defense causing the prosecution to rebut the defense evidence with appellant's statement. "[T]he fact that the evidence in question might have tended to support the prosecution's case-in-chief does not make it improper rebuttal." (*People v. Coffman*, *supra*, 34 Cal.4th at p. 68.) Indeed, testimony that reiterates or reinforces a part of the prosecution's case that has been impeached by the defense properly may be admitted in rebuttal. (*People v. Young*, *supra*, 34 Cal.4th at p. 1199.)

Third, appellant argues that his statement that he had driven Baker's car on the evening of the murders was not proper rebuttal evidence because it was not inconsistent with evidence he presented to attack Dickenson's

credibility. (AOB 263-266.) Appellant is again mistaken. During her direct testimony, Dickenson testified that she recognized all but one car in the parking lot and that Baker's car looked similar to the one she saw although she could not positively identify it. (11 RT 4240-4245.)

During the defense's case in chief, Investigator Ganes testified that Baker's Ford Probe was 175 inches in length, while a 1977 Camero was 195 inches in length. (20 RT 6822-6825.) The defense also called Deputy Sawyer who interviewed Dickenson and testified that Dickenson did not affirmatively indicate that she did not notice any of the vehicles. (21 RT 7137-7138, 7140-7141.) This evidence was designed to attack Dickenson's description of the unfamiliar car in the parking lot. Appellant acknowledges that "Sawyer's testimony tended to undermine Dickenson's credibility regarding when she saw the unfamiliar vehicle that she described in her testimony ...." (AOB 265.) This is precisely why it was necessary for the prosecution to put on appellant's statement in rebuttal. Consequently, appellant's statement properly rebutted the defense evidence attacking the presence of Baker's car at The Office on the night of the murders.

Lastly, appellant argues his explanation for how the blood got onto the shirt and boots, i.e., shaving, did not rebut the defense expert's testimony that the blood was planted on the shirt and boots. (AOB 266-270.) Appellant's explanation that the blood on his shirt and boots were caused by a shaving incident indicated that he wore the shirt and boots on the day of the murders. To be sure, his entire statement was as follows: "Well, the clothes are mine. I got the blood on 'em from shaving. And the people were alive when I left the bar." (Augmented CT of 11/10/09 Appendix A, p. 18.) Defense counsel acknowledged that in issue was whether appellant wore the clothing on the night of the murders, and the trial court properly found, "[a]nd this would tend to rebut that, because if he

was wearing them on the night in question, they could not have been smeared through the victims' blood by someone perpetrating a frame-up." (21 RT 7249.) Appellant's claim that the presentation of his "statement in rebuttal vastly magnified its dramatic effect" is fruitless. Again, testimony that reiterates or reinforces a part of the prosecution's case that has been impeached by the defense properly may be admitted in rebuttal. (*People v. Young*, *supra*, 34 Cal.4th at p. 1199.) The prosecution had already put into evidence Baker's and Webster's testimony that appellant wore the blood-stained clothing on the night of the murders. The defense, however, presented evidence suggesting that the blood was planted on the clothing, causing the prosecution to present appellant's statement in rebuttal.

Thus, the trial court properly admitted appellant's statements as rebuttal evidence. Error, if any, was not prejudicial for the reasons set forth in Argument I.G, above. This claim is meritless.

VII. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT LIMITED DEFENSE COUNSEL TO ASKING PROSPECTIVE JURORS WHETHER THEY WOULD CONSIDER APPELLANT'S BACKGROUND AND EXTENUATING CIRCUMSTANCES IN MITIGATION

Appellant argues that the trial court's ruling prohibiting trial counsel from inquiring into a juror's ability to consider specific mitigating factors, such as poverty or abuse violated his state and federal constitutional rights to trial by an impartial jury. (AOB 271-295.) Respondent disagrees. In requiring defense counsel to reference mitigating factors such as "poverty" and "abuse" by instead using the terms "background" and "extenuating circumstances," the trial court properly exercised its discretion and prevented the jurors from prejudging the case.

A. Background

During the voir dire of prospective juror Payne, defense counsel asked her if she would be able to carefully consider factors in mitigation such as

the defendant's background during the penalty phase of the trial. The prosecutor objected and asked that the juror not be asked to inappropriately prejudge the evidence. (6 RT 2543.) Defense counsel argued as follows:

> [Defense Counsel]: I'm not asking her to assign or make any decision. I'm just simply asking her if she could meaningfuly consider certain factors in mitigation.
>
> The Court: Well, in the abstract, that's permissible; but we give her specific facts in mitigation and ask her if she could meaningfully consider those. And that's in effect asking her to prejudge evidence, and also it's incomplete as to what evidence about those factors is going to be. And it's impermissible to try the case here at this point.
>
> [Defense Counsel]: I'm giving her a hypothetical situation, if such factor of a person's background; if she would consider something like that.
>
> The Court: Well, again, if you throw in the factor of a person's background, for example, one particular thing and ask if they would consider that, then -- ... [¶] -- With the instructions and what type of – the general type of evidence can be considered rather than specific type of evidence; and ask the juror if her mind wouldn't be completely closed to that type of evidence, or if that type of evidence would be something that she could consider.

(6 RT 2543-2544.)

The argument continued outside of the presence of prospective juror Payne:

> [Prosecutor]: Your Honor, my point is that the instructions do stand for themselves. I think it's unfair to ask a juror to prejudge specific forms of evidence.
>
> The questions that have been asked in the past, and I didn't object to them, but they are, they ask the prosective juror to prejudge specific forms of evidence. And they are also, in their form, vague, compound, and confusing.
>
> The questions contain words such as meaningfully consider. What do we mean by that? Obviously they will

consider and they will be open minded enough to consider the types of evidence that are otherwise described in the instructions.

But both Counsel like to go into greater depth. And I think that is – I know that's improper.

[Defense counsel]: Your honor, I think that the proof in the pudding is the tasting. And I think the Court has been able to observe this careful probing of the jury which revealed biases that would never ever have been discovered had it not been for asking them if they could meaningfully consider.

When you ask someone if they could listen to the evidence; well, they have to listen to the evidence. The only way they are not going to listen to the evidence is if they physically stick their fingers in their ears. Will they take that in and give weight to it and consider it, that's what the law requires.

I don't think we're asking them to prejudge this in any way. We're not asking how much weight are you going to give the defendant's background. We're asking them can you consider it in a meaningful[] manner, will it mean anything to you.

And I don't see how that is an improper question to ask. Frankly, I've asked that question in every voir dire that I've ever done in a capital case and never had an objection for asking the question.

I find it quite startling that Mr. Druliner half way through the voir dire process in this case now suddenly comes to the conclusion that that is an improper area to go into.

(6 RT 2545-2546.) The trial court replied as follows:

The Court:I have to disagree that it revealed hidden biases. The manner in which those questions have been phrased, I think, creates situations in which the answer is almost predetermined. You ask jurors to weigh a multiple murder committed during the commission of a robbery against the mitigating factor that the defendant was impoverished as a child

When asked to compare just those two things without any further evidence of what impoverished means, and perhaps how it might have led him to do what he did, or why, at least, why the penalty should be something less than the death penalty; but you are not allowed to do that in as great detail in voir dire as you are at the penalty determination phase.

So, what happens is you present the jurors with just two things which most jurors would and have said that: Well, if you have multiple murder during the commission of a robbery and it was committed by somebody who was poor, then I think that's probably going to be a death penalty for him. I'm not sure that reveals bias. I think that's a problematical response to that type of question.

(6 RT 2546-2547.) After further argument, the court further stated:

We can get to that with permissible questions. I think we get skewed results when we ask the question and throw in specific factors and ask them to engage in a weighing process right here and now with nothing more than specific factors.

(6 RT 2549.) It then concluded:

All right. The Court will permit questions along the lines of the Instruction CALJIC 8.88, third paragraph. I think the jurors need to be educated to the fact that mitigating circumstances is any fact, condition, or event. Obviously, we don't have to use this language because it's a bit cumbersome. Any fact, condition or event which as such does not constitute justification or excuse for the crime, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

I think that puts it in the proper light and that's why they should consider it. It's not a justification, it's not an excuse, it may be an extenuating circumstance which extends beyond the offense and also encompassing the character or the background of the defendant, and allows the jurors to choose the appropriate penalty, considering both of those things, and whatever evidence is submitted on that subject.

(6 RT 2550-2551.) The matter was further discussed by the parties. (6 RT 2551-2559.) At the conclusion, defense counsel asked, " ... I cannot ask

questions that: will you be able to carefully consider such things as a person growing up in poverty, I can't get that specific." The court clarified as follows:

> Right. Because I think that has a tendency to be misleading. It also, I think, asks them to prejudge the fact: Does poverty outweigh or could it possibly outweigh mulitple murder and murder committed during the course of robbery.
>
> The question is: Can they carefully consider evidence in mitigation; or if you've already found as Mr. Gable points out, coming into the penalty determination phase you have already found Mr. Case guilty of a couple counts of murder and one or two special circumstances, let's say two counts of murder and both special circumstances, does that mean that the issue to be determined in the penalty phase has already determined in your mind, or can you carefully consider the evidence that we're going to present in reaching that decision.
>
> Because if they can't do that, if their mind is closed because of the enormity of the offense, then they shouldn't be on the jury. They have to be able to listen to what you present and whether they give it any weight or not is what they're going to be doing, and they should do so carefully.
>
> ...
>
> I don't think we should go into specifics on poverty or abuse evidence. Evidently, you can go into victim impact evidence, that can be very, very powerful, and you have asked before how they might consider that, and that's appropriate.

(6 RT 2559-2560.)

B. The Trial Court, during Voir Dire, Properly Limited the Defense to Question Potential Jurors Generally about Mitigating Circumstances Rather than the Specific Factors of Poverty and Abuse Which Would Have Been Misleading and Caused Them to Prejudge the Penalty Issue

This Court has summarized the law governing the restriction of voir dire as follows:

> [T]he trial court has considerable discretion ... to contain voir dire within reasonable limits[.] This discretion extends to the process of death-qualification voir dire established by *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776], and *Wainwright v. Witt* [(1985)] 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841]. Limitations on voir dire are subject to review for abuse of discretion.

(*People v. Butler* (2009) 46 Cal.4th 847, 859.)

> Moreover, as we have said on many occasions, [d]efendant ha[s] no right to ask specific questions that invite[ ] prospective jurors to prejudge the penalty issue based on a summary of the aggravating and mitigating evidence (*People v. Cash* (2002) 28 Cal.4th 703, 721–722 [122 Cal.Rptr.2d 545, 50 P.3d 332]), to educate the jury as to the facts of the case (*People v. Sanders* (1995) 11 Cal.4th 475, 538–539 [46 Cal.Rptr.2d 751, 905 P.2d 420]), or to instruct the jury in matters of law (*People v. Ashmus* (1991) 54 Cal.3d 932, 959 [2 Cal.Rptr.2d 112, 820 P.2d 214]).' (*People v. Burgener* (2003) 29 Cal.4th 833, 865 [129 Cal.Rptr.2d 747, 62 P.3d 1]; see also, e.g., *People v. Mason* (1991) 52 Cal.3d 909, 939–941 [277 Cal.Rptr. 166, 802 P.2d 950] (*Mason*).)
>
> We have explained that '[t]he *Witherspoon–Witt* ... voir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract.... The inquiry is directed to whether, without knowing the specifics of the case, the juror has an "open mind" on the penalty determination.' (*People v. Clark* (1990) 50 Cal.3d 583, 597 [268 Cal.Rptr. 399, 789 P.2d 127]....)

(*Ibid.*)

> On the other hand, we have indicated that because [a] prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances, is ... subject to challenge for cause, the death qualification process must probe prospective jurors' death penalty views as applied to the general facts of the case, whether or not those facts [have] been expressly charged. (*People v. Earp* (1999) 20 Cal.4th 826, 853 [85 Cal.Rptr.2d 857, 978 P.2d 15]....)

> Reconciling these competing principles dictates that death-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. [Citation.] In deciding where to strike the balance in a particular case, trial courts have considerable discretion. [Citations.] (*People v. Cash*, *supra*, 28 Cal.4th 703, 721–722 [122 Cal.Rptr.2d 545, 50 P.3d 332].) (*People v. Zambrano*, *supra*, 41 Cal.4th at pp. 1120–1121, 63 Cal.Rptr.3d 297, 163 P.3d 4; see also *People v. Carasi* (2008) 44 Cal.4th 1263, 1285–1287, 82 Cal.Rptr.3d 265, 190 P.3d 616.)

(*Id.*, at p. 860.)

Here, the trial court properly exercised its discretion during the death-qualification voir dire and struck the right balance between questions too abstract in nature and those which are so specific as to cause a potential juror to prejudge the case. Appellant argues that the trial court's order "restricting inquiry into questions about his 'background' or 'extenuating circumstances' and prohibiting mention of specific mitigating factors severely limited defense counsel's ability to ferret out prospective jurors whose ability to follow the law on mitigation was substantially impaired." (AOB 282.) He argues too much.

As this Court stated in Butler, "'[t]he *Witherspoon–Witt* ... voir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract.... The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination.'" (*People v. Butler*, *supra*, 46 Cal.4th at p. 859.) Thus, in its attempt to strike the balance, the trial court correctly found that by asking the potential jurors about poverty and abuse without more did not "tell the jurors much of anything." (6 RT 2555.) Indeed, this was

misleading as it asked the potential jurors to determine whether poverty and abuse in general, without knowing anything else about these circumstances, could mitigate against a penalty of death for a double murder and robbery. Without knowing anything else about those mitigating circumstances, the jurors were essentially asked to prejudge the case by weighing poverty and abuse, in the abstract, against a double murder and robbery. (6 RT 2543-2544.) As found by the trial court, this would result in "skewed" results. (6 RT 2549.)

While factors such as poverty and abuse are mitigating factors for a juror's consideration (§ 190.3, subd. (k)), merely listing the factors without providing any additional details is tantamount to asking the jurors whether they would consider appellant's "background" and "extenuating circumstances" in mitigation which is what was done in this case. Appellant argues that such a limited inquiry would lead prospective jurors "who wishes to seem fair-minded" 'to parrot a response that they think is socially acceptable." (AOB 284-285.) It appears, however, equally likely that a juror who wished to seem fair-minded would answer questions identifying a specific mitigating circumstance in a similar fashion and would more likely be prone to do so as not to appear biased against factors such as poverty and abuse. Appellant relies on the voir dire of prospective juror Warren to illustrate the alleged effectiveness of a more fact-specific voir dire regarding mitigating circumstances; however, prospective juror Warren's responses essentially indicated that he was "absolutely closed" to all mitigating evidence. (5 RT 2433, 2437.)

In support of his claim that inquiring about specific mitigating factors such as poverty and abuse was just as proper as inquiring about victim impact evidence, appellant relies on *People v. Noguera* and *People v. Cash*. (AOB 287-291.) These cases are inapposite. In *Noguera*, the trial court permitted the prosecutor to ask the prospective jurors whether the fact that a

capital defendant was "18 or 19 at the time of the killing ... [would] automatically cause you to vote for the lesser punishment of life imprisonment without possibility of parole?" (*People v. Noguera* (1992) 4 Cal.4th 599, 645.) The prosecutor was also permitted to ask each juror whether "you would be able to consider imposing the death penalty ... if we have one victim as opposed to requiring that the defendant kill two or more people?" (*Ibid.*) On appeal, the defendant argued these questions "had the impermissible effect of inducing the jurors to 'prejudge' the evidence to be offered against him at trial." (*Ibid.*) The *Noguera* Court disagreed, finding "that the prosecutor's questions were entirely proper because they were directly relevant to whether a juror would be subject to a challenge for cause." (*Ibid.*)

This case is distinguishable because, unlike *Noguera*, defense counsel's questions were too abstract and potentially misleading. (*People v. Butler*, *supra*, 46 Cal.4th at p. 860.) Although appellant wished to ask the prospective jurors about specific factors such as poverty and abuse, his questions were too general in the sense that there were no accompanying facts to give these factors any meaning. As stated above, the trial court correctly noted that "we get skewed results when we ask the question and throw in specific factors and ask them to engage in a weighing process right here and now with nothing more than specific factors." (6 RT 2549.)

Likewise in *Cash*, the defendant claimed the trial court erroneously refused to allow defense counsel to ask prospective jurors whether they would automatically vote for death if the defendant had previously committed another murder. (*People v. Cash* (2002) 28 Cal.4th 703, 719.) During jury selection, the court had imposed a blanket rule restricting voir dire solely to the facts appearing on the face of the charging document. (*Ibid.*) The *Cash* Court reversed the death sentence as follows:

> The restriction on questioning was impermissible for two reasons. First, a trial court cannot absolutely bar mention of any fact or circumstance solely because it is not expressly pleaded in the charging document. Second, and relevant to the evidence in that particular case, a prior murder was "a general fact or circumstance that ... could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances...."

(*People v. Solomon* (2010) 49 Cal.4th 792, 840, internal citations omitted.)

As explained in more detail above, neither of these reasons apply in the instant case. First, the trial court did not apply a blanket rule restricting any mention of mitigating circumstances during voir dire. Rather, it allowed the defense to question the prospective jurors in a manner that would not cause them to prejudge the case, yet determine whether they would consider factors such as appellant's background and other extenuating circumstances in mitigation. Second, the challenged factors involved mitigating circumstances and not a general fact or circumstance that would cause jurors to vote for the death penalty. These cases do not support appellant's contention.

Thus, the trial court's approach to determine whether the prospective jurors generally would consider appellant's background and extenuating circumstances was consistent with "determin[ing] only the views of the prospective jurors about capital punishment in the abstract.... The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination." (*People v. Butler*, *supra*, 46 Cal.4th at p. 859, citing *People v. Clark*, *supra*, 50 Cal.3d at p. 597.) Contrary to appellant's claim, the trial court did not impermissibly restrict voir dire. Consequently, for these same reasons, there was no federal constitutional error.

C. Error, if any, did not Prejudice Appellant

Assuming, for the sake of argument, that the trial court improperly restricted voir dire, appellant is not due the reversal of the penalty judgment he requests. (AOB 292-295.) In *People v. Cash*, *supra,* this Court stated that errors in restricting death-qualification voir dire do not invariably require reversal of a judgment of death. (*People v. Cash*, *supra*, 38 Cal.4th at p. 722; citing *People v. Cunningham* (2001) 25 Cal.4th 926, 974.) "In particular, we have suggested that such error may be deemed harmless if the defense was permitted 'to use the general voir dire to explore further the prospective jurors' responses to the facts and circumstances of the case' or if the record otherwise establishes that none of the jurors had a view of about the circumstances of the case that would disqualify that juror." (*Ibid.*) Although general voir dire was not used to explore further the issue of mitigating circumstances, appellant was afforded the opportunity to ask each prospective juror whether they would consider appellant's background, character or extenuating circumstances. (6 RT 2578, 2668; 7 RT 2797, 2833; 9 RT 3553.) These questions were tantamount to asking generally about poverty or abuse, but without asking the jurors to prejudge the case. Because defense counsel was not completely precluded from asking about mitigating circumstances, any error was harmless.

VIII. APPELLANT'S CHALLENGES TO CALIFORNIA'S DEATH PENALTY STATUTE HAVE ALL BEEN REPEATEDLY REJECTED BY THIS COURT AND ARE OTHERWISE LACKING IN MERIT

Appellant alleges numerous aspects of California's 1978 death penalty sentencing scheme violate the United States Constitution. (AOB 296-316.) As appellant himself concedes (AOB 296), many of these claims have been presented to, and rejected by, this Court in prior capital appeals. Further, the 1978 death penalty law has been repeatedly upheld as constitutional by the United States Supreme Court. (*Brown v. Sanders*

(2006) 546 U.S. 212; *Brown v. Payton* (2005) 544 U.S. 133; *Tuilaepa v. California* (1994) 512 U.S. 967; *Boyde v. California* (1990) 494 U.S. 370; *California v. Brown* (1987) 479 U.S. 538; *California v. Ramos* (1983) 463 U.S. 992.) As long as the state narrows the class of defendants eligible for the death penalty, and the state provides a means for the individualized penalty determination that permits the sentencer to consider all mitigating evidence relevant to the defendant's record, personal characteristics, and circumstances of his crime, there are few restrictions on the state's statutory scheme for carrying out this punishment. (*Kansas v. Marsh* (2006) 548 U.S. 163, 174; *Buchanan v. Angelone* (1998) 522 U.S. 269, 275; *Tuilaepav. California*, *supra*, 512 U.S. at pp. 971-979; *McCleskey v. Kemp* (1987) 481 U.S. 279, 305-306.)

Because appellant fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims should all be rejected. Moreover, as this Court has observed in the past, it is entirely proper to reject his complaints by case citation, without additional legal analysis. (*People v. Harris* (2008) 43 Cal.4th 1269, 1322-1323; *People v. Page* (2008) 44 Ca1.4th 1, 60-61; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1058-1059.)

A. California's Death Penalty Adequately Narrows the Class of Offenders that are Death Eligible

Appellant contends that California's death penalty statute is unconstitutional because section 190.2 is impermissibly broad and fails to adequately narrow the class of offenders that are eligible for the death penalty. (AOB 296-297.) This Court has repeatedly rejected this contention. (*People v. Harris*, *supra*, 43 Ca1.4th at p. 1322; *People v. Barnwell*, *supra*, 41 Cal.4th at p. 1058; *People v. Bonilla* (2007) 41 Cal.4th 313, 358.) He provides no basis for this Court to revisit its decisions rejecting this claim,

especially in this case, where he committed multiple murders by shooting the victims in the head at close range.

B. Penal Code Section 190.3 is Constitutional

Appellant contends that section 190.3 is unconstitutional because factor (a) does not sufficiently narrow those circumstances under which the death penalty is imposed. (AOB 297-298.) The United States Supreme Court and this Court have rejected this contention. (*Tuilaepa v. California*, *supra*, 512 U.S. at pp. 975-980; *People v. Harris*, *supra*, 43 Cal.4th at p. 1322; *People v. Erasure* (2008) 42 Cal.4th 1037, 1066.) He does not provide any basis for this Court to revisit its prior decisions rejecting this contention.

C. The Death Penalty Statute and Accompanying Jury Instructions Adequately Set Forth the Appropriate Burden of Proof

1. There is no Requirement for Findings Beyond A Reasonable Doubt at the Penalty Phase

Appellant argues that he had a Due Process and Eighth Amendment constitutional right to a jury determination beyond a reasonable doubt of all facts essential to the imposition of the death penalty based on *Blakely v. Washington* (2004) 542 U.S. 296, *Ring v. Arizona* (2002) 536 U.S. 584, and *Apprendi v. New Jersey* (2000) 530 U.S. 466.AOB 299-300.) This Court has rejected this contention. (*People v. Eubanks* (2011) 53 Cal.4th 110, 153-154; *People v. Horvater* (2008) 44 Cal.4th 983, 1030.) He does not provide any basis for this Court to revisit its prior decisions rejecting this contention.

2. Capital Sentencing is not Susceptible to Burdens of Proof or Persuasion; Appellant was not Entitled to an Instruction on the Presumption of Life

Appellant also contends that the jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor

in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence. (AOB 301-302.) This Court has rejected these contentions. (*People v. Eubanks*, *supra*, 53 Cal.4th at p. 154; *People v. Horvater*, *supra*, 44 Cal.4th at pp. 1029-1030.) He does not provide any basis for this Court to revisit its prior decisions rejecting this contention.

3. Unanimity with Respect to Aggravating Factors is not Required by Statute or as a Constitutional Safeguard

Next, appellant argues the death verdict was not premised on unanimous jury findings with respect to the aggravating factors and unadjudicated criminal activity. (AOB 302-305.) This Court has rejected these contentions. (*People v. Eubanks*, *supra*, 53 Cal.4th at p. 153.) He does not provide any basis for this Court to revisit its prior decision rejecting this contention.

4. CALJIC No. 8.88 is Clear

Appellant argues that the phrase "so substantial" in CALJIC No. 8.88 is an impermissibly broad phrase that failed to limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary or capricious sentencing. (AOB 305.) This Court has rejected this contention. (*People v. Dement* (2011) 53 Cal.4th 1, 56.) He does not provide any basis for this Court to revisit its prior decision rejecting this contention.

5. CALJIC No. 8.88 Informed the Jury that the Central Determination was whether Death was an Appropriate Sentence

Appellant argues that the phrase "warrants" as referred to in CALJIC No. 8.88 failed to make clear that the ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (AOB 305-

306.) This Court has rejected this contention. (*People v. Dement*, *supra*, 53 Cal.4th at p. 56.) He does not provide any basis for this Court to revisit its prior decision rejecting this contention.

6. CALJIC No. 8.88 Is Not Constitutionally Flawed because It Fails to Inform the Jury That If It Determines the Mitigating Factors Outweigh the Aggravating Factors, It Is Required to Return a Sentence of Life Imprisonment Without the Possibility of Parole

Appellant argues that CALJIC No. 8.88 only informed the jury of the circumstances that permitted the rendition or a death verdict and failed to direct them to impose a sentence of life imprisonment without parole when the mitigating circumstances outweighed the aggravating circumstances as required by section 190.3. (AOB 306-307.) This Court has rejected this contention. (*People v. Dement*, *supra*, 53 Cal.4th at p. 56.) He does not provide any basis for this Court to revisit its prior decision rejecting this contention.

7. The Instructions Do Not Impermissibly Fail to Inform The Jurors Regarding The Standard of Proof and Lack of Need For Unanimity as to Mitigating Circumstances

Next, appellant argues that the failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (AOB 307-308.) This Court has rejected this contention. (*People v. Low* (2011) 52 Cal.4th 46, 78.) He does not provide any basis for this Court to revisit its prior decision rejecting this contention.

8. During The Penalty Phase of a Capital Prosecution, The Court Need Not Instruct on a Presumption of Life.

Appellant also argues that the penalty jury should be instructed on the presumption of life. (AOB 308-309.) This Court has rejected this contention. (*People v. Low*, *supra*, 52 Cal.4th at p. 78.) He does not provide any basis for this Court to revisit its prior decision rejecting this contention.

D. Written Findings of the Factors in Aggravation are Not Required

Appellant contends he was denied his Sixth, Eighth, and Fourteenth Amendment rights to the federal constitution, as well as to meaningful appellate review from an absence of written findings by the jury showing the aggravating factors relied on to impose death. (AOB 309-310.) This Court has repeatedly rejected this contention. (*People v. Low*, *supra*, 52 Cal.4th at p. 78; *People v. Harris*, *supra*, 43 Ca1.4th at p.1322.) He provides no basis for this Court to revisit its decisions rejecting this claim.

E. The Jury was Properly Instructed on Mitigating and Aggravating Factors

1. The Use of Restrictive Adjectives "Extreme" and "Substantial" in Defining Some of The Statutory Mitigating Factors is Permissible

Appellant argues that the use of restrictive adjectives as referenced in CALJIC No. 8.85 acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 310.) This Court has repeatedly rejected this contention. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1098; *People v. Jennings* (2010) 50 Cal.4th 616, 690.) He does not provide any basis for this Court to revisit its prior decisions rejecting this contention.

2. The Trial Court Was Not Required to Delete Inapplicable Factors From The Instruction

Appellant argues the trial court failed to omit sentencing factors that were inapplicable to his case as listed in CALJIC No. 8.85 in violation of his constitutional rights. (AOB 310-311.) This Court has rejected this contention. (*People v. Dement*, *supra*, 53 Cal.4th at pp. 56-57.) He does not provide any basis for this Court to revisit its prior decision rejecting this contention.

3. The Trial Court Was Not Required to Instruct That The Jury Can Consider Certain Statutory Factors Only in Mitigation

He also argues that CALJIC No. 8.85 failed to advise the jury which of the sentencing factors were aggravating, mitigating, or both in violation of his Eighth and Fourteenth Amendment rights. (AOB 311.) This Court has rejected this contention. (*People v. Dement*, *supra*, 53 Cal.4th at pp. 56-57.) He does not provide any basis for this Court to revisit its prior decision rejecting this contention.

F. Appellant is not Entitled to Inter-Case Proportionality Review

Appellant contends inter-case proportionality is necessary to ensure constitutional implementation of California's death penalty. (AOB 312.) This Court and the United States Supreme Court have rejected the contention that inter-case proportionality review is constitutionally required. (*Pulley v. Harris* (1984) 465 U.S. 37, 51-54; *People v. Eubanks*, *supra*, 53 Cal.4th at p. 154.) He does not provide any basis for this Court to revisit its prior decision rejecting this contention.

G. Differences in Sentencing Procedures for Non-Capital Defendants Do Not Create a Denial of Equal Protection for Capital Defendants

Appellant complains that he is being denied equal protection because as a capital defendant he was not afforded the same procedural safeguards as non-capital defendants, i.e. a unanimous jury finding on a sentencing enhancement and proof of the aggravating factors beyond a reasonable doubt. (AOB 312-313.) This Court has repeatedly rejected this contention that the death penalty law denies capital defendants equal protection because it provides a different method of determining the sentence than is used in noncapital cases. (*People v. Eubanks*, *supra*, 53 Cal.4th at p. 154; *People v. Hovarter* (2008) 44 Cal.4th 983, 1030.) He cites no basis for this Court to revisit its prior decisions rejecting this claim.

H. Appellant's Death Sentence Does not Violate International Norms of Decency, Due Process, or The Eighth Amendment

Appellant complains that his death sentence violates international norms of decency, due process and the Eighth Amendment. (AOB 313.) These contentions have already been rejected by this Court. (*People v. Eubanks*, *supra*, 53 Cal.4th at pp. 152-153; *People v. Hovarter*, *supra*, 44 Cal.4th at p. 1029.) He presents no reason for this Court to revisit its decisions rejecting the claim that the death penalty violates international norms of decency, due process and the Eighth Amendment.

IX. THERE WERE NO ERRORS AT TRIAL; THUS, THERE WAS NO CUMULATIVE EFFECT

Appellant contends numerous errors considered cumulatively denied him from receiving a fair trial. (AOB 314-316.) No individual errors occurred during appellant's trial. Moreover, even if errors are assumed, as discussed herein, they do not require reversal of his convictions or sentence, either individually or cumulatively. (*People v. Eubanks*, *supra*,

53 Cal.4th at p. 152; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1099; *People v. Guerra* (2006) 37 Cal. 4th 1067, 1165; *People v. Slaugher* (2002) 27 Cal.4th 1187, 1223; *People v. Koontz* (2002) 27 Cal.4th 1041, 1094; *People v. Cooper* (1991) 53 Cal.3d 771, 830.) He received the fair trial to which he was entitled, even if it may not have been a perfect trial. (See *People v. Stewart* (2004) 33 Cal.4th 425, 522.) Appellant's claim of cumulative error should be denied.

X. THE TRIAL COURT PROPERLY IMPOSED THE RESTITUTION FINE PURSUANT TO GOVERNMENT CODE SECTION 13967

In his final contention, appellant argues that the trial court erroneously imposed the restitution fine pursuant to Government Code section 13967 because it was based on an insufficient finding of his ability to pay. He further argues that even if the fine was lawful, he was entitled to have the amount reduced by the amount of direct restitution. (AOB 317-326.) Respondent disagrees in part. The claim regarding the erroneous imposition of the restitution fine was forfeited for failure to raise it in the trial court. In any event, there is no merit to appellant's claim. Respondent, however, agrees that the fine should be reduced by the amount of direct restitution.

A. Appellant Has Forfeited This Claim

The right to appeal procedural errors in the trial court is forfeited by failing to object. (*People v. Scott* (1978) 21 Cal.3d 284, 290.) In *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1467, the defendant challenged the imposition of a $2,200 restitution fine pursuant to Government Code section 13967, subdivision (a), as recommended by the probation report. The appellate court found that because defendant did not raise the issue in the trial court, the issue was forfeited. (*Id.* at pp. 1468-1469; see also *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [defendant failed to object below and forfeited challenge to imposition of a section 1202.5,

subdivision (a) restitution fine (crime prevention fine and penalty) on the ground that the court did not make a finding of his ability to pay and nothing in the record showed that he had the ability to pay; *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072 [defendant forfeits right to appeal probation fees imposed pursuant to Penal Code section 1203.1b without a hearing on ability to pay if he did not first object]; *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1836 [imposition of Government Code, § 13967 forfeited where no objection below].)[71]

Appellant, relying on *People v. Butler* (2003) 31 Cal.4th 1119, attempts to avoid this result by framing his contention as one of insufficiency of evidence. (AOB 320-322.) His reliance on *Butler* is misplaced because it dealt with the trial court's obligation under section 1202.1 to make a finding and note that finding when ordering a defendant to submit to HIV testing. The court held that the defendant did not forfeit a challenge to the sufficiency of the evidence to support such an order because "involuntary HIV testing is strictly limited by statute and Penal Code section 1202.1 conditions a testing order upon a finding of probable cause." (*Id.* at p. 1123.) This case, on the other hand, involves the belated challenge to the imposition of a fee. *Butler* is therefore distinguishable.

In effect, the deficiency alleged was that the statutory procedure was not followed, not that there was insufficient evidence. Had appellant objected to the imposition of the fee on the basis that the court had not determined his ability to pay, the court could have either made the finding, held a hearing, or set a hearing on ability to pay. Because of appellant's failure to object, no such finding or hearing was held. It is therefore

---

[71] The issue of whether the claim of inability to pay a fee is forfeited by failure to object at sentencing is pending before this Court. (*People v. McCullough*, S192513.)

unjustified for appellant to assert that there was insufficient evidence of ability to pay, when no such evidence was presented because of his failure to object. The reason objections are required is so that that trial courts can address and efficiently remedy any deficiency. Indeed, the following is elementary:

> As a matter of fairness to the trial court, a defendant should not be permitted to assert for the first time on appeal a procedural defect in imposition of a restitution fine, i.e., the trial court's alleged failure to consider defendant's ability to pay the fine. (*People v. Saunders* (1993) 5 Cal.4th 580.) Rather, a defendant must make a timely objection in the trial court in order to give that court an opportunity to correct the error; failure to object should preclude reversal of the order on appeal. (*Ibid.*; *Story v. Nidiffer* (1905) 146 Cal. 549, 552-553 [80 P. 692]; *People v. Spinks* (1961) 190 Cal.App.2d 366, 368 [11 Cal.Rptr. 923]; cf. *People v. Lilienthal* (1978) 22 Cal.3d 891, 896 [150 Cal.Rptr. 910, 587 P.2d 706]; *People v. Newlun* (1991) 227 Cal.App.3d 1590, 1604 [278 Cal.Rptr. 550].)

(*People v. Gibson*, *supra*, 27 Cal.App.4th at p. 1468.)

In addition, this Court's decision in *People v. Gamache* (2010) 48 Cal.4th 347, 409, held that a defendant forfeited an "ability to pay" objection to the trial court's assessment of a $10,000 restitution fund fine under section 1202.4, by failing to raise the claim during sentencing. If an ability-to-pay objection to a restitution fund fine under section 1202.4 is forfeited by failing to raise it at trial, then the failure to object, or alternatively, the failure to produce evidence of the defendant's inability to pay a fine recommended in the probation officer's report, should also forfeit the contention that the defendant lacks the ability to pay a fine under Government Code section 13967, subdivision (a). This is especially true when, as here, the fine is recommended in the probation report. (3 CT 747.) The claim has been forfeited.

B. The Sentencing Court Fulfilled Its Duty to Make The Requisite Determination of Appellant's Ability to Pay

Before appellant was sentenced in 1993, Government Code section 13967 required the court to impose a restitution fine in an amount ranging from $100 to $10,000, without any consideration to a defendant's ability to pay. (*People v. McGhee* (1988) 197 Cal.App.3d 710, 715.) In 1992, an amendment to this section raised the minimum amount of the fine from $100 to $200, and added the language: "subject to the defendant's ability to pay." (Stats.1992, ch. 682, § 4). The applicable restitution statutes in effect at the time of appellant's 1993 crime were section 1202.4 and former Government Code section 13967, which provided as pertinent:

Section 1202.4:

> (a) In any case in which a defendant is convicted of a felony, the court shall order the defendant to pay a restitution fine as provided in subdivision (a) of Section 13967 of the Government Code. Such restitution fine shall be in addition to any other penalty or fine imposed and shall be ordered regardless of the defendant's present ability to pay. However, if the court finds that there are compelling and extraordinary reasons, the court may waive imposition of the fine. When such a waiver is granted, the court shall state on the record all reasons supporting the waiver.

(Historical and Statutory Notes, 50D West's Ann. Pen. Code (2004 ed.) foll. § 1202.4, pp. 175-176.)

Former Government Code section 13967:

> (a) Upon a person being convicted of any crime ..., the court shall ... order the defendant ... to pay restitution to the victim in accordance with subdivision (c). In addition, if the person is convicted of one or more felony offenses, the court shall impose a separate and additional restitution fine of not less than ... $200 ..., subject to the defendant's ability to pay, and not more than ... $10,000.... Except as provided in Section 1202.4 of the Penal Code and subdivision (c) of this section, under no circumstances shall the court fail to impose the separate and additional restitution fine required by this section.... [¶] ... [¶]

> (c) In cases in which a victim has suffered economic loss as a result of the defendant's criminal conduct, and the defendant is denied probation, in lieu of imposing all or a portion of the restitution fine, the court shall order restitution to be paid to the victim.... Notwithstanding subdivision (a), restitution shall be imposed in the amount of the losses, as determined. The court shall order full restitution unless it finds clear and compelling reasons for not doing so, and states them on the record. A restitution order imposed pursuant to this subdivision shall identify the losses to which it pertains, and shall be enforceable as a civil judgment.... [¶] Restitution ordered pursuant to this subdivision shall, to the extent possible, be of a dollar amount that is sufficient to fully reimburse the victim ... for all determined economic losses incurred as the result of the defendant's criminal conduct.... [¶] For any order of restitution made pursuant to this subdivision, the defendant shall have the right to a hearing before the judge to dispute the determination made regarding the amount of restitution.

(Stats.1992, ch. 682, §§ 4, 12, pp. 2922-2923, 2928, urgency provision eff. Sept. 12, 1992.) The two statutes were harmonized by requiring the trial court to consider a defendant's ability to pay in imposing the minimum restitution fine. (*People v. Frye* (1994) 21 Cal.App.4th 1483, 1487.)

People v. Hennessey is instructive. In *Hennessey*, the defendant asserted the sentencing court failed to determine his ability to pay the $4,000 restitution fine pursuant to Government Code section 13967 and argued the record failed to support such a finding. (*People v. Hennessey*, *supra*, 37 Cal.App.4th at p. 1836.) In rejecting this claim, the *Hennessey* court first noted that the language of Government Code section 13967 made no requirement that the trial court make an express finding in the record that a defendant has the ability to pay. "Absent a showing to the contrary, we presume the trial court fulfilled its duty to make the requisite determination." (*People v. Hennessey* (1995) 37 Cal.App.4th at p. 1836, citing *People v. Frye* (1994) 21 Cal.App.4th 1483, 1485.)

The *Hennessey* court continuted that it was "necessary only that the record contain evidence supporting an implied determination of ability to pay." (*People v. Hennessey*, *supra*, 37 Cal.App.4th at p. 1837.) It noted:

> [I]n determining whether a defendant has the ability to pay a restitution fine, the court is not limited to considering a defendant's present ability but may consider a defendant's ability to pay in the future. This included the defendant's ability to obtain prison wages and to earn money after his release from custody.

(*Id.* at p. 1836.)

Here, the record supports the implied finding of ability to pay. When not incarcerated, appellant was steadily employed as a presser at McKenry's and possessed skills in that field. To be sure, when incarcerated at Folsom Prison in the mid-1980's, appellant worked in the laundry facility and was considered a good worker who never caused problems. (25 RT 8225, 8230, 8236, 8238-8239, 8242.) Because of these skills, appellant has the ability to obtain prison wages and earn money during his incarceration. Hence, the court properly found appellant had the ability to pay the restitution fine.

C. The Restitution Fine Should be Reduced by The Amount of Victim Restitution

Appellant argues that the sentencing court was required to offset the $10,000 restitution fine pursuant to Government Code section 13967, subdivision (a), when it also entered an order for victim restitution in the amount of $4,000. (AOB 323-325.) It appears he is correct. Government Code Section 13967, subdivision (c), permitted direct restitution, in lieu of all or a portion of the restitution fine under subdivision (a) for a maximum of $10,000. (Stats. 1992, ch. 682, § 4, p. 2922, emphasis added; see also *People v. Forshay* (1995) 39 Cal.App.4th 686, 690 [Attorney General concedes any amount of restitution payable directly to the victim's family under Government Code section 13967, former subdivision (c) should be

offset against any fine ordered under former subdivision (a)]; *People v. Zito* (1992) 8 Cal.App.4th 736, 743 [trial was prohibited from imposing a $10,000 restitution fine in light of its order for $300,000 in direct restitution]; *People v. Cotter* (1992) 6 Cal.App.4th 1671, 1677 .) Thus, the restitution fine should be reduced by $4,000, the amount of victim restitution imposed by the sentencing court.

CONCLUSION

Accordingly, for all of the foregoing reasons, respondent respectfully asks this Court to reduce the restitution fine imposed pursuant to Government Code section 13967, subdivision (a), and to otherwise affirm the judgment in full.

Dated: March 15, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
ERIC L. CHRISTOFFERSEN
Supervising Deputy Attorney General

JENNEVEE H. DE GUZMAN
Deputy Attorney General
Attorneys for Respondent

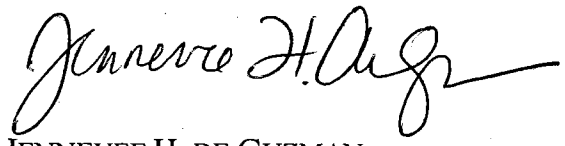
SA1996XS0012
31420204.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 53,828 words.

Dated: March 15, 2012

KAMALA D. HARRIS
Attorney General of California



JENNEVEE H. DE GUZMAN
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Case*** No.: **S057156**

I declare:

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

On March 19, 2012, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Robin Kallman
Deputy State Public Defender
State Public Defender's Office - San Francisco
221 Main Street, 10th Floor
San Francisco, CA 94105
Counsel for Appellant Charles E. Case

Sacramento County District Attorney's Office
P.O. Box 749
Sacramento, CA 95814-0749

Hayes H. Gable, III
Attorney at Law
428 J Street, Suite 350
Sacramento, CA 95814

Stacy R. Bogh
2617 K Street, Suite 225
Sacramento, CA 95816

Sacramento County Counsel's Office
700 H Street, Suite 2650
Sacramento, CA 95814

California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3647

Court of Appeal
Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 19, 2012, at Sacramento, California.

_____

Declarant

SA1996XS0012
31425229.doc