IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

MICHAEL NEVAIL PEARSON,
Defendant and Appellant.

S058157

CAPITAL CASE

Contra Costa County Superior Court No. 9517012
The Honorable Richard S. Flier, Judge

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Constitutional Provisions

Statutes

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Court Rules

Other Authorities

TABLE OF AUTHORITIES (continued)

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STATEMENT OF THE CASE

On September 26, 1995, the Contra Costa County District Attorney filed a two count information charging appellant with the April 25, 1995, murders of Lorraine Talley and Barbara Garcia (Pen. Code, § 187). The information also alleged personal use of a firearm as to each count (Pen. Code, § 12022.5, subd. (a)), and special circumstance allegations for multiple murder under Penal Code section 190.2, subdivision (a)(3). Appellant pleaded not guilty. (2 CT 615.)

Jury selection commenced on September 4, 1996. (2 CT 674.) The jury found appellant guilty of first-degree murder on both counts on October 16, 1996, and found the special circumstance and firearm use allegations true. (3 CT 899-901.)

After a penalty phase trial, the jury returned death verdicts for each count on October 31, 1996. (3 CT 1052.) The court denied motions for new trial, for modification of the verdict, and to continue sentencing. (3 CT 1054-1063, 1072.) The trial court sentenced appellant on December 18, 1996. (3 CT 1095.)

STATEMENT OF FACTS

Introduction

On the afternoon of April 25, 1995, appellant murdered two of his former coworkers, Lorraine Talley and Barbara Garcia. He had just been fired from his job at the Richmond Housing Authority (RHA) minutes earlier, ironically enough, because he had repeatedly threatened to do exactly what he had just done -- "another 101 California," referring to the infamous 1993 murders of numerous employees in an office building at 101 California Street in San Francisco by Gian Luigi Ferri, a disgruntled client of the law firm where the shootings took place. In a further twist of fate, victim Lorraine Talley may have hastened the demise of herself and her friend Barbara Garcia when she tried to protect appellant's feelings by choosing not to have the police present inside the building at the time appellant was fired.

However, quite unlike the spontaneous nature of the 101 California massacre, appellant had planned these killings well in advance. He ordered the handgun from a legal retailer and waited the mandatory 15 days before it arrived. He went to the shooting range on the night before the killings and even gloated about it at work. In the days leading up to the killings, appellant even assured one employee that she would be spared, and again reminded her of this as he passed by her after killing one of his victims. This case was by no means a whodunnit – appellant fired point blank into his two victims, who were located in different rooms, and then unsuccessfully went looking for a third. All in full view of his stunned and frightened former coworkers.

Appellant had even walked around the office all morning telling coworkers, "Today is the day." Although his coworkers may have thought this to be an innocent comment, they did not realize that appellant had brought a gun to work with him – for the first time -- on that morning. Nor did they know that the same day, appellant had talked of soliciting a Hitchcock-like pact with

a former acquaintance who also was complaining about his job. Nor did his coworkers know that when appellant locked his apartment and left for work that morning, he had secured the place in such a manner as to make conventional reentry virtually impossible.

The only thing the employees at the RHA knew about appellant's grand scheme was the sound of gunfire and screaming once the shooting started. Appellant stood over Lorraine Talley and exclaimed "I ain't no joke. I ain't no joke," before he shot her in the head. After shooting Barbara Garcia three times, he turned to his friend Janet Robinson and said, "Janet, baby, I told you I wasn't going to shoot you." When it was over, two women, formerly appellant's coworkers, were dead.

Police found appellant calmly seated at a desk inside the building. He directed them to the murder weapon. His smug nod as he sat in the back of the police car was followed by a two-and-a-half-hour recorded confession in which he repeatedly attempted to justify his actions by suggesting that he had killed those who had "screwed" him, while selectively leaving others alive.

At trial, appellant did not seriously dispute his guilt, with counsel portraying appellant only as someone who acted impulsively and suggesting some sort of organic brain impairment. However the medical evidence was quite to the contrary, as was the plethora of circumstantial evidence showing lengthy premeditation and deliberation. During the penalty phase the jury was asked to look back at appellant's life for some explanation of why this may have happened, but all they really saw was the wretched impact of the killings on the lives of those who survived the victims.

The People's Case

A. Prelude.

On the morning of the killings, Art Hatchett, the Director of the RHA, was approached by appellant's supervisor at the RHA, Lorraine Talley, who told Hatchett that it was necessary to terminate appellant's probationary period immediately. Appellant, after having bounced around other sections of the RHA in non-permanent positions for several years, had been a receptionist for the Conventional Housing unit of the RHA for almost six months. His probationary period was scheduled to end the following Friday and if he received a favorable final review, he would attain a permanent position. (XI RT 2279-2281.)

Hatchett was surprised by the termination request. (XI RT 2267.) But Talley explained that an employee had overheard appellant threatening to commit a shooting in the office. (XI RT 2267-2268.) Talley consulted with manager Pat Jones the day before and they collectively made the decision. There was a degree of seriousness in appellant's threat that warranted the action. Appellant had military experience and knowledge of weapons and, given appellant's "101 California" threats, Talley was fearful that appellant was actually capable of doing "something of that nature." Hatchett concurred that there was certainly a valid reason to terminate appellant's employment. (XI RT 2269-2270.)

Talley informed Hatchett about the precautions that should be taken to ensure employee safety at the time appellant was terminated, including having Richmond police officers available in case there was any trouble. (XI RT 2270.) The consensus was that posting an officer outside the building when appellant was terminated would be sufficient. (XI RT 2272-2273.)

Appellant's termination was precipitated by a series of conversations he had with coworker Janet Robinson. On the Friday before the shootings,

Robinson was filling out an application for another position when appellant began telling her that he would miss her if she left. Appellant told her that she was the only person in the office who was keeping him sane. The exchange that followed was startling:

> "Sometimes, you know, I feel like doing a 101 California Street here." [¶] And at that point I jumped up and I said, "No, no, you wouldn't do that Michael. You know, you wouldn't do that." [¶] I said, "If you do that, I'll lock myself in the safe." . . . [¶] And he said "Oh, no, Janet, I wouldn't do that, you know I wouldn't shoot you, you know."

(XIII RT 2538-2539.) Although appellant was dismissive of the implied threat and told Robinson it was "just a joke," he also told Robinson not to share this comment with anybody. (XIII RT 2555.) Robinson was quite fearful of disobeying appellant's request (XIII RT 2545) but told her friend Barbara Garcia about appellant's threat. Garcia was terrified. (XIII RT 2542-2543.)

Robinson and Garcia had previously discussed fears of appellant and, in fact, this was also not the first time that Barbara Garcia had expressed concern that appellant wanted to kill her. Garcia first met appellant when they were in the Employment and Training Department. When appellant began working at Conventional Housing, Garcia mentioned her previous work experience with appellant to Robinson, telling her that he was "a trip." (XIII RT 2541) At one point Garcia mentioned that she was going to purchase some mace because she feared that appellant wanted to kill her. Robinson joked that mace would not stop a bullet, and the two women "laughed it off." (XIII RT 2551-2552.) It did not help that on the morning of the shootings, Garcia and appellant also had a minor vehicle accident in the parking lot. (XIII RT 2549-2551.)

Robinson and Garcia were not the only co-workers who heard appellant threaten to commit another "101 California." After receiving a poor performance evaluation two months earlier, appellant told co-worker Leonza Morris that he felt the negative evaluation was unjustified and that he was

concerned about losing his job. He even made references to being "railroaded." (XIII RT 2655-2656.) During another conversation where appellant told Morris he wanted to be transferred back to Section 8, appellant stated that they (referring to his supervisors at Conventional Housing) better not mess with him or there would be another "101 California." (XIII RT 2659-2660.)

Another co-worker, Leona Kelly, described a conversation she had while commuting with appellant and another co-worker. She overheard appellant say, "Well, I know one thing, she [Talley] tries to get rid of me or they [Talley and Burton] try to get rid of me, it's going to be another 101 California." (XIV RT 2751-2752.)

Ronald Keeton, a housing project manager at Conventional Housing, described having a conversation with appellant where appellant was complaining about how he was being mistreated by Talley and Burton and appellant "jokingly" said, "I ought to pull a 101 . . . ." (XVII RT 3336.) During cross-examination, Keeton testified that appellant made this comment at the end of a "downbeat" conversation and that appellant actually said he could see why the person, "pulled a 101 . . . something to that effect." He later recalled telling a detective he heard appellant say that if he was made to quit, or if he lost his job, there was going to be another "101 California." (XVII RT 3338-3339, 3343-3344.)

Neither Garcia nor Robinson mentioned appellant's threat to anyone else that day, but Robinson spent the weekend worrying about what she had heard. She realized that it was a serious matter and feared "that he was capable of doing it." (XIII RT 2544-2545.) When she returned to work on the following Monday morning, Robinson again discussed the threat with Garcia. They decided to tell Lorraine Talley, appellant's supervisor, about the threat.

On the day before the murders, April 24, 1995, at 10 a.m., Robinson and Garcia gathered their courage and went to supervisor Lorraine Talley's office

to discuss appellant's threats. Robinson began crying. Garcia told Talley about the threatening comment appellant made to Robinson that previous Friday—that he would commit another "101 California." (XIII RT 2545-2546.)

Talley immediately went to her supervisor, Pat Jones. (XIII RT 2459, XIV RT 2807.) When Talley relayed the threatening contents of appellant's "101 California" statement, Jones became concerned. She knew the matter was serious and that they needed to find out more about appellant's background. (XIV RT 2807-2808.) When Jones and Talley reviewed appellant's personnel file, they learned of his military experience. (XIV 2808.) Jones felt it necessary to inform the personnel department of the possible threat, which was sufficient cause for immediate termination. (XIV RT 2808-2809.) In fact, one of the reasons appellant was so stressed about his job was that he did not enjoy the same civil service protection that permanent employees have and, as a probationary employee, could be terminated "at will." (XIV RT 2809-2810.)

During their meeting with personnel, Jones insisted that the police be contacted. She wanted appellant terminated immediately. (XIV RT 2810.) However, because it would take personnel time to prepare appellant's final paychecks, it was decided that appellant's employment would be terminated the next day at 4 p.m. (XIV RT 2812-2813.)

The next day, April 25, 1995, appellant and subsequent victim Barbara Garcia had a minor vehicle accident in the parking lot. (XIII RT 2549-2551.) Robinson then had a rather alarming conversation with appellant. The conversation began innocently enough, with appellant mentioning he had a good evening the night before. The tenor changed quickly, however, when Robinson asked appellant whether he went to dinner or to a movie, and appellant replied, "no," that he had been to "the rifle range." When Robinson said she did not even know appellant owned a gun, appellant boasted, "Yeah, I'm a legal or licensed handgun owner . . . ." (XIII RT 2553.)

Robinson then told Barbara Garcia how appellant bragged about owning a handgun. This, in conjunction with appellant's prior statements, put them in fear for the rest of the day, even though they knew appellant was due to be terminated at 4 p.m. (XIII RT 2553-2555.) Robinson was particularly concerned because she was the one who informed management about appellant's threats. As Robinson described it, "we were there waiting to die." (XIII RT 2554). Shirail Burton was talking about how the next day would be her birthday, joking that she would be dead on her birthday. (XIII RT 2554.) Garcia was just "terrified." (XIII RT 2554.)

B. Appellant's Termination.

On the afternoon of April 25, 1995, just before the murders occurred, Talley brought appellant into Director Art Hatchett's office. Hatchett told appellant that a decision had been made to terminate his employment and, although it would not be effective until the following Friday, he was being requested to leave immediately. Hatchett told appellant that continuing his probationary period was not warranted because there had been no substantial improvement seen in his performance. Hatchett saw no reason to bring up the true reason for the termination -- appellant's threatening "101 California" comments -- because he did not want to cause any alarm. (XI RT 2280.) Because appellant was a probationary employee, there was no real need to go into details or justifications for his termination. (XI RT 2278-2779.) Appellant was very upset about being terminated and came close to tears. (XI RT 2281-2282.)

The meeting ended with Hatchett asking appellant to turn in his keys. Hatchett offered to talk with appellant about other possible employment at a more convenient time. Appellant was then given his final paycheck. (XI RT 2285-2286.) Appellant did not appear to be enraged and was fully in control of himself. (XI RT 2287.) Hatchett walked over to Pat Jones's office to let her

know appellant was no longer employed at RHA.

When Hatchett returned to the receptionist area, appellant asked to speak with Talley again. (XI RT 2889-390, 2292-2293.) Hatchett continued observing appellant as he gathered all his personal items. Hatchett was not overly concerned about the safety of the other employees at this point because appellant had not done anything to indicate he was ready to "go off." Hatchett did not observe any look of rage or emotional instability in appellant's eyes, nor was there any hint of the potential for violence. (XI RT 2297.)

When appellant got up and went into the hallway, Hatchett followed. Appellant then went to Mary Martinez's office, where Talley had remained after the meeting. Appellant confronted Talley, demanding a "one-on-one" meeting with her. Hatchett interceded, telling appellant that would not be possible. He told appellant that he was willing to go back in his office with appellant and Talley to continue the discussion. (XI RT 2298, see XIV RT 2717-2718.)

Back in Hatchett's office, appellant asked Talley whether "that was it." Talley responded that, if appellant was referring to his former position as receptionist, then yes, that was all. (XI RT 2298-2299.) Appellant continued to question Talley about his termination, asking her whether she thought it was fair. (XI RT 2299-2300.) Talley refused to directly answer, telling appellant that she had something else to do, and referred to her vacation plans. (XI RT 2301.) Talley's remark was firm but made without anger. She was definitely not being snide or disrespectful. (XI RT 2301-2302.)

C. The Murder Of Lorraine Talley.

After that final meeting, Lorraine Talley went back into Martinez's office, and Hatchett walked with appellant back to the reception area. (XI RT 2302.) Hatchett now wanted to keep an eye on appellant while he was still in the office. (XI RT 2303.) He watched as appellant began moving items around

his desk. Hatchett again offered to help appellant, but his offer was refused. (XI RT 2304-2305.) Appellant appeared hurt and looked sad, but Hatchett did not observe any physical manifestations showing appellant was on edge. (XI RT 2305-2306.)

When appellant left the reception area, Hatchett believed appellant was heading toward the restroom and did not feel the need to follow him. (XI RT 2306.) Hatchett was standing with housing project manager Ronald Keeton when he heard someone yelling that appellant had a gun. (XI RT 2308, 2309-2311.) He saw Arlene Reed screaming and trying to get other employees out of the building. He looked back and saw appellant running down the hallway holding a gun in his right hand. (XI RT 2311-2312.) Hatchett had not yet heard any gunshots.

It was only when Hatchett ran to the other side of the parking lot fence that he heard the first shots. (XI RT 2313-2314.) Janet Robinson ran out of the building hollering and screaming. Hatchett ran up behind her and tried to calm her down. (XI RT 2319-2320.) Shirail Burton and another employee were also outside. Both were quite upset. (XI RT 2321.)

Officer James Merson was already in the vicinity on another call when he heard the report of gunfire. (X RT 2067-2068.) He radioed in a request for assistance, which drew a large response of officers. (X RT 2071.)

Meanwhile, Hatchett realized that there were still employees inside the building with appellant and asked the police to let him back in the building to find the other employees, but they refused. (XI RT 2322- 2323.) Hatchett was standing with the City Manager Isiah Turner when he saw appellant being led out of the building by police. Turner asked appellant what happened, and appellant responded, "it just wasn't right" and "indicated he was sorry by the way it happened." (XI RT 2323.)

Pam Kime and Eric Spears were working in the conference room when they heard loud noises coming from the hallway. (XIII RT 2587-2588, 2613-2614.) They turned, looked out in the hallway, and saw appellant arguing with Lorraine Talley. (XIII RT 2589, 2616.) Kime heard appellant telling Talley that he wanted to talk to her again, to which Talley replied she had said everything she wanted to say and that they had nothing further to talk about. Appellant's voice became louder as he asked, "You mean all of this work I've done is for nothing?" (XIII RT 2589-2590.) Talley told appellant that she did not have anything more to say, but appellant kept asking her, "So are you saying that all of the time I've spent here has been for nothing?" (XIII RT 2619.) Talley opened the conference room door and yelled for someone to go get Art Hatchett. (XIII RT 2589-2590, 2618.)

Kime more felt than saw Talley rushing by behind her. (XIII RT 2591-2592.) Talley was in such a hurry that Kime felt the air move. (XIII RT 2592.) That is when Kime heard the first shot. (XIII 2592.) Kime next saw appellant standing over Talley pointing gun at her and saying, "I ain't no joke. I ain't no joke." (XIII RT 2592.) Appellant then fired an additional shot at Talley's head. (XIII RT 2592-2594, see XV RT 2997.)

Eric Spears witnessed the event from almost the same perspective. As Talley ran around the table toward Spears, he saw that appellant had a gun in his hand and was pointing it at Talley. (XIII RT 2619-2620.) Spears tried to get appellant's attention by yelling, "No, Michael, no, no!" Appellant just looked at Spears for a second then fired at Talley. (XIII RT 2621-2622.) After the first shot, appellant again looked at Spears, shrugged his shoulders, and then shot Talley a second time. (XIII RT 2622-2623.)

As appellant began to leave the conference room, Kime stood up. Appellant came back in, pointed the gun at her, and warned her that she better get back "because he wasn't no joke." Kime sat down. (XIII RT 2594-2595.)

Kime watched appellant lower his gun as he left the conference room. As soon as appellant turned and went out the door, she went over to Spears and told him to dial 911.

Kime then went over to check on Lorraine Talley. Talley was slumped over in a chair, still clutching some keys in her hand. There was blood spurting from Talley's neck, but she was still alive. When Spears could not get the phone to work, he grabbed Kime and told her they needed to get out of there. (XIII RT 2596, 2627.)

Kime got as far as the conference room door before she turned around and, seeing that blood was still coming from Talley's neck, went back to help her. Kime did not want Talley to die "by herself." (XIII RT 2596-2597.)

While holding onto Lorraine Talley's neck, Kime began waving out the window to get the attention of the police. Eventually, other employees started coming into the conference room. Someone gave Kime a sweater, which she used as a tourniquet around Talley's neck in an attempt to stop the bleeding. (XIII RT 2597-2598.) Unfortunately, the damage to Talley was too great.

D. The Murder of Barbara Garcia.

Moments before appellant shot and killed Lorraine Talley, Janet Robinson was on the phone with Barbara Garcia -- who was seated only ten feet away -- asking why appellant was still in the building. (XI RT 2560.) They were concerned that appellant might hear them, so they talked quietly on the phone. Garcia reassured her that everything would be alright when Robinson heard Talley's voice in the hallway. As soon as she hung up the phone, Robinson heard two shots. (XI RT 2560-2561, 2570.)

Robinson and Garcia ran to Pat Jones's office, with Shirail Burton right behind them. Once in Jones's office, Robinson grabbed the phone to call 911, with Garcia right behind her. (XI RT 2561.) Burton climbed over a table and went out a window, followed by another employee. (XI RT 2561-2564.)

Robinson was having trouble dialing 911 because she kept forgetting to dial "9" to get an outside line. Appellant came into the office. Robinson knocked Jones out of her chair and told her to get under the desk. Robinson also hid underneath Jones's desk. (XI RT 2564.)

Garcia, who was behind Robinson, scrunched down but could not really get under the desk. She was trapped in the corner by the computer table. (XI RT 2564, 2824.) "I saw [Garcia's] feet . . . . she was so afraid that she was running in place." (XIV RT 2824-2825.) Jones heard Garcia whimpering and then gunshots. (XIV RT 2825.)

Robinson feared that appellant was going to shoot her next. (XI RT 2565.) Robinson remained hidden under the desk, counting the bullets that appellant was firing, and fearing that the next bullet would strike her. At some point, she pleaded with appellant, "Michael, please don't shoot me." Appellant replied, "Janet, baby, I told you I wasn't going to shoot you." Robinson knew appellant was referring back to the conversation they had that past Friday. Robinson thanked appellant for sparing her life. (XI RT 2565-2566, 2827.) Jones heard appellant say, "'See, Janet, I told you I wouldn't hurt you." (XIV RT 2827.) Appellant left.

Robinson heard Barbara Garcia breathing heavily. It sounded as if Garcia was taking her last breath. (XI RT 2566.)

Jones, very much in fear of appellant, remained huddled under the desk after he left. When she came out, she saw Garcia's body sprawled out on the floor. Garcia had suffered at least one visible bullet wound. She tried talking to Garcia, telling her she would try to go get help. Garcia's only reply was a gurgling sound. (XIV RT 2828-2830.)

Jones tried to call 911, but could not get an outside line. Jones left her office and tried opening doors to other offices, but found them locked. She heard people screaming and ran down the hallway to the conference room.

When she walked in to the conference room, Jones saw Pam Kime standing over Lorraine Talley. Kim had blood all over her hands and was hysterical. (XIV RT 2830-3831.)

Jones tried calming Kime down to find out whether anyone had called for help. (XIV RT 2830-2831.) Jones was leaving the building to look for the police when she saw them coming in. A few moments later, Jones watched as the police took appellant out of the building in handcuffs. (XIV RT 2831.) Jones saw an expression on appellant's face that was a "very smug kind of, yes-I-did-it look." (XIV RT 2832.).

E. The Conversation With Rodney Ferguson.

Rodney Ferguson, an acquaintance of appellant, witnessed a similar smugness when he saw appellant handcuffed in the back of the police car after the shooting. They had seen each other only a couple of hours earlier (XII RT 2477), and appellant had mentioned that he was really on the ropes with his job; that he thought he was going to be fired. (XII RT 2474.) Appellant then stated – with an accompanying stabbing motion – of how his boss was trying to do him in. (XII RT 2470-2474.) Appellant said something to the effect that he could "shoot his boss" (XII RT 2470) and later, although Ferguson did not make the connection, something about having gone to the "range." (XII RT 2476.) Ferguson jokingly responded, with reference to a Hitchcock film, "Tell you what, man, I'll do yours and you do mine." (XII RT 2475-2476.)

Little did Ferguson know that appellant was already armed and actually intended to follow through with his threat to kill his boss. Ferguson realized this only when he subsequently saw appellant turn and nod to him – as if he had a sense of satisfaction from what he had accomplished – when Ferguson saw appellant silhouetted in the back of the patrol car after the shooting. (XII RT 2480-2481.)

F. Evidence Of Premeditation And Deliberation Found At Appellant's Apartment And Other Incriminating Evidence From The Crime Scene.

On April 8, 1995, appellant purchased a .380 caliber handgun from a pawnshop in downtown Oakland. (XIV RT 2702-2703.) On April 24th, the day before the murders and 15 days after its purchase, appellant returned to the pawnshop and picked up the gun. (XIV RT 2704-2705.) Appellant also purchased 50 rounds of .380 caliber ammunition. (XIV RT 2706-2707.) Later that evening, appellant went to a firing range and purchased some targets to practice shooting accuracy. Appellant also purchased more ammunition. (XII RT 2456-2459.)

When appellant was taken into custody, an officer pat-searched him for a weapon and found none. After handcuffing appellant, the officer asked him where he put the gun. Appellant told the officer that he placed the gun on the ledge outside the window. (X RT 2078-2080.) The gun was found in a planter-box outside the window. It had a bullet jammed in the ejection port. A single unfired PMC .380 round was also recovered from the magazine clip. (X RT 2081-2084.) Three expended .380 shell casings were found in Pat Jones's office. One was a spent projectile and casing found near Barbara Garcia's head. (X RT 2091.) In the conference room two expended PMC .380 shell casings were found on the floor underneath the conference table. (XI RT 2149-2150.) While appellant was at the police station being processed for gunshot residue, an unexpended .380 caliber bullet was recovered from his coat pocket. (X RT 2050.)

On the day after the killings, officers conducted a search of appellant's apartment at 1428 Alice Street in Oakland. (XI RT 2168.) The front door was secured in such a way that appellant must have left out the rear window. (XI RT 2168; see also XXVII RT 5027.) During the search officers found an empty box of .380 caliber ammunition and targets with several bullet holes in

them. A book titled, "Madness in Criminal Law" by Norval Morris, was found on a bookshelf inside appellant's bedroom closet. (XI RT 2168-2169, 2171-2174.) In one of the empty ammunition boxes, a receipt was found with appellant's name and other identifying information, indicating he purchased a Lorcin .380 semi-automatic firearm from United Jewelry Mart on April 24, 1994. (XI RT 2174-2176.)

G. The Coroner's Report.

Lorraine Talley suffered two gunshot wounds. One gunshot entered the small of her back on the left side, exiting the right side of her stomach just above her navel. A second shot entered behind Talley's left ear, exiting the right side of her neck. (XV RT 2994-2996.) Based on the amount of blood that was found in Talley's abdominal cavity, the coroner opined that the gunshot wound to Talley's abdomen occurred first, since blood circulation and breathing would have ceased if the first shot had been in the head. (XV RT 2997.) After the bullet entered the back wall of Talley's stomach, it tore through the membrane covering the spleen, went through her liver, then exited out the front of her stomach. (XV RT 2998.) The gunshot wound entering Talley's head caused a small hole behind the left ear, while creating a larger exit wound to the base of the right side of her neck. (XV RT 2998-2999.) The cause of Talley's death was brain destruction due to the gunshot wound she sustained to her head, with the contributory cause being the gunshot wound to her abdomen. Absent the shot to the head, the wound that Talley suffered to her abdomen would have been survivable if she had received immediate medical attention. (XV RT 3000-3001.)

Barbara Garcia suffered three separate gunshot wounds. One bullet entered behind her left ear, then exited out of her right check. The second bullet went through Garcia's left arm at the elbow, entered her stomach, and ended up beneath the skin of the abdomen on the right side, where the bullet

was recovered. The third bullet entered a little behind the second, passing through the back and going through the abdominal aorta, ending up on the right side of the abdominal wall, where that bullet was later recovered. (XV RT 3008-3009.) Due to the amount of blood found in Garcia's stomach, either one or both of the abdominal shots occurred before the fatal head shot. The final shot was the one to Garcia's head, destroying the left temporal lobe and a large part of the midbrain, which controls breathing and heart function. (XV RT 3009-3010, 3013.) The cause of Garcia's death was the gunshot wound to her head, with the contributory cause of death being the gunshots she suffered to her abdomen. (XV RT 3017.)

The Defense

A. Appellant's Relations With Coworkers At Section 8.

Appellant's defense counsel conceded early on that appellant was the shooter, and that, at least to some degree, appellant fired the shots with intent to kill. (See X RT 1938, 1995.) The defense both blamed the victims and incorporated appellant's alleged "neuropsychological" deficit. First, the defense brought before the jury witnesses who testified to the animosity that existed at the Housing Authority between Lorraine Talley and her co-workers, as well as bringing into question Talley's curt nature as a supervisor and accusations that she showed favoritism toward certain employees. Then the defense expert on neuropsychology delved into how appellant's psychological test scores, in conjunction with an MRI image indicating white fossa and an "arachnoid cyst," were apparently significant enough to be interpreted as causing severe physical damage affecting appellant's mental health and, perhaps, a reason why appellant lost control and committed these murders.

Antoinette "Toni" Lawrence supervised the Section 8 Department of the Housing Authority when appellant worked there. She had been working at the

Housing Authority since 1981. Before becoming the supervisor of Leased Housing (Section 8), she worked with both Shirail Burton and Lorraine Talley, when the latter was the secretary to the Director of Housing. (XVI RT 3072, 3075.) On occasion Lawrence observed Talley supervising others and considered Talley incompetent as far as her managerial skills. (XVI RT 3097-3098.) Lawrence saw that Talley had a special relationship with Burton that she did not have with any of the other employees she supervised. (XVI RT 3103.)

Lawrence's relationship with Burton, on the other hand, was "strained." Lawrence described Burton as a "liar" and "mean spirited," a person with no integrity who instilled fear in people who got on her bad side. (XVI RT 3105.) Lawrence testified that in the years prior to the shootings there was favoritism at the Housing Authority with regard to obtaining positions, specifically referring to Burton's promotion to Housing Specialist III when she was not qualified for the position. (XVI RT 3118-3119.)

Lawrence first met appellant when he interviewed for a temporary office assistant position. (XVI RT 3108.) Appellant was rough around the edges "once in a while," and Lawrence had observed an incident where she found appellant engaged in a yelling match with a client. Lawrence advised appellant not to take such things so personally, then counseled him on the importance of avoiding any confrontations with clients. (XVI RT 3109-3112.) Lawrence did not consider appellant to be a "ticking time bomb," nor did she consider him an evil person. (XVI RT 3123.)

Talley boasted to Lawrence that she was taking appellant away from her by offering him a permanent position at Conventional Housing. Lawrence knew that appellant was looking for a permanent position, but she could not offer him one with Section 8. (XVI RT 3123.) It was a very hard decision for appellant to leave Section 8 and go over to Conventional, especially given all

the terrible things he had heard about Talley and Burton. When appellant asked if he was making the right decision, Lawrence told him he had to look at his future and his need for a permanent work situation. (XVI RT 3124-3125.)

Lawrence warned appellant that a former receptionist at Conventional had complained of having to do Burton's work, as well as her own, but figured that, based on appellant's performance of the complex duties at Section 8, it would be relatively simple for him to handle any task assigned. (XVI RT 3128.)

Lawrence kept in touch with appellant after he began working at Conventional Housing. He would tell her that people at Conventional "are too much," but he was hanging in there because he needed the benefits. Lawrence told appellant to just do the best he could. However, appellant called Burton a "real witch" and said that Talley talked down to him and disrespected him. (XVI RT 3129-3130.)

Art Hatchett, RHA Director, also knew appellant previously, when appellant began working for the City of Richmond Training and Development Department. (XI RT 2231-2232.) When Hatchett was approached by Toni Lawrence for permission to offer appellant employment in her section, she told Hatchett that appellant had mentioned his name. (XI RT 2235-2236.) It was Hatchett who ultimately authorized both appellant's temporary employment at Section 8 and transfer to Conventional Housing. (XI RT 2236, 2241.) After appellant started working at Conventional Housing, he mentioned to Hatchett the differences that he saw between the management styles of the supervisors of Section 8 (Lawrence) and Conventional Housing (Talley). (XI RT 2243-2244.) Hatchett offered his own observation of the differences between Lawrence's and Talley's management styles, describing Lorraine Talley as a "[v]ery-lively person" who was very vocal, who "called it as she saw it." But Hatchett also recognized that Talley would sometimes rub people the wrong

way. (XI RT 2245-2246.) He found Toni Lawrence to be more of a "mother" type in terms of a management style. (XI RT 2246-2247.)

Connie Taylor was a Housing Program Specialist II when appellant was hired as a temporary office assistant with Section 8. (XVII RT 3249, 3253.) Taylor was concerned when appellant accepted the receptionist position at Conventional Housing because she knew that Lorraine Talley would be his supervisor and that he would have to learn to get along with both her and Shirail Burton if he wanted to successfully complete his probation. (XVII RT 3258-3259.) Taylor knew about the favoritism at Conventional Housing, though her knowledge predated appellant's time working there. Taylor learned from co-workers that the atmosphere of favoritism at Conventional Housing remained the same as when she first began working for the Housing Authority. (XVII RT 3260-3263.) Taylor described appellant as being extremely energetic and cheerful to be around when he worked at Section 8, but his demeanor became more subdued after he began working at Conventional Housing. Although appellant expressed concerns about Talley, he focused more on Burton because she was going to Talley and telling Talley what appellant was doing wrong. (XVII RT 3269-3270.) "One time I remember him saying that if it hadn't been for Janet Robinson he wouldn't have been able to be sane there." (XVII RT 3271.)

Francine Williams was a housing inspector with Section 8 who also knew appellant. She would pass by his desk every day when he opened the door to let her in the office. (XVII RT 3348, 3350-3351.) Her familiarity with the atmosphere at Conventional Housing was based only on what others had told her, although in the past, long before appellant worked there, Williams had personally observed Burton and Talley mistreating the people they worked with on more than one occasion. (XVII 3356-3358.) Conversely, Williams found the atmosphere at Section 8 to be "very pleasant" and Lawrence to be very good

supervisor. (XVII RT 3352, 3355.)

B. The Atmosphere Of Favoritism At Conventional Housing.

Mary Louise Frisby worked for the Finance Department of the Housing Authority preparing checks for landlords in the Section 8 program. (XVI RT 3227-3229.) She knew appellant, and found him to be a very "mannerable" person, who was respectful and helpful. (XVI RT 3231-3232.) She also knew both Shirail Burton and Lorraine Talley. (XVI RT 3234.) Frisby recognized that there was favoritism going on at Conventional Housing during the year prior to the murders, of which a "chosen few" were the beneficiaries, with Burton being the primary beneficiary of preferential treatment from Talley. (XVII RT 3235-3236.)

Frisby spoke to appellant early on the day of the murders. Appellant said to her, "Well, Ms. Frisby, today is the day." Frisby, not knowing appellant had brought his gun to work, understood this to mean that appellant thought he was going to be hired. (XVII RT 3241-3242.)

Throughout the day Frisby kept asking appellant if he had heard anything. Between 3:30 and 4:00 p.m., Frisby was coming out of the ladies room and saw appellant. She asked if he had heard anything yet and appellant told her, "No." (XVI RT 3242.) She then went to her supervisor's office, at which point she heard screaming and thought the office was being robbed. She then heard appellant say, "You're not going to do that to me." (XVI RT 3243.) Frisby believed that appellant was trying to catch the robber. (XVI RT 3242-3243.)

Sylvia Gray-White, a Housing Project Manager for Conventional Housing, met appellant when he began working there. Gray-White found the atmosphere at Conventional Housing in 1994 and 1995 to be very tense and confusing and the morale to be very low. Gray-White observed a degree of favoritism among certain employees at Conventional Housing (XVII RT

3288-3289) and felt that if you did not stay friendly with the people there and get along with those in charge -- particularly Burton, Talley, and Jones -- your chances of remaining employed at Conventional Housing would be in jeopardy. (XVII RT 3288-3289.)

Burton coveted Gray-White's position as Housing Manager, which was paid a higher salary than Burton's position as a Housing Specialist. On more than one occasion Burton told Gray-White that if she messed up once more she would have her job. (XVII RT 3289-3290.) To Gray-White it seemed that the chain of command was thrown "out the window," since she was not sure who to report to, or even the proper lines of communication. (XVII RT 3294-3295.) While Talley was the supervisor, it was Burton "who ran the show." (XVII RT 3300.)

When asked about working under Talley's supervision, Gray-White described how Talley "always talked very loud" to people who worked for her. Talley was "mean" and, on more than one occasion, spoke in an inappropriate tone to people. (XVII RT 3297-3300.) Gray-White knew that appellant was worried about losing his job because he talked about how Burton and Talley were giving him a hard time. She encouraged appellant to hang in there because a change would come as soon as the new assistant director had been hired. (XVII 3301-3302.)

Ronald Keeton was a Housing Manger along with Gray-White and Donnie Bell. (XVII RT 3321-3322.) Keeton first met appellant while appellant was working at Section 8. They began working together after appellant transferred over to Conventional Housing. Keeton saw that appellant was taking most of his instruction from Shirail Burton, though she was not his direct supervisor. (XVII RT 3321-3323.) Keeton described the atmosphere around Conventional Housing in the year prior to the murders as very tense, and it seemed to him that someone was always unhappy about something. (XVII RT

3323-3324.) Keeton observed inappropriate discussions between Burton and appellant, where Burton was degrading him in front of both co-workers and the public. (XVII RT 3324-3325.)

Keeton recalled that two or three months prior to the murders he was having a conversation with appellant about appellant's workload and treatment, when appellant said, "I ought to pull a101 . . . ." Since both he and appellant laughed, Keeton believed, "[i]t was like primarily a joke," and that "[n]obody took it seriously." (XVII RT 3336.) At the time, appellant had been complaining about how Talley and Burton were riding him, giving him more assignments than he could actually handle and which were outside of his job description. Keeton felt that, since appellant was a probationary employee, things were being "dumped" on him. Appellant also complained about not being treated as an adult and as an equal. (XVII RT 3336-3337.)

Donnie Bell was another one of the housing managers who felt confused about who was in charge at Conventional Housing. Although Burton was not the supervisor, she acted, and unofficially gave direction, in that capacity to everyone who worked at Conventional Housing, including appellant. (XVIII RT 3645.) Bell did not feel he could talk to Patricia Jones, who was his supervisor, because of the friendship or "clique" that existed between her, Lorraine Talley, Shirail Burton and Janet Robinson. He felt their friendship superseded policy and procedure and affected the operation of the agency. (XVIII RT 3468-3470.) When he attempted to voice his concerns that certain managers were receiving preferential treatment, both Jones and Talley took offense. (XVII RT 3470.) He did not feel that Talley was soliciting preferential treatment and he didn't think there was anything Talley could do to stop it, "but it was happening big time." To Bell it was obvious that Burton had been receiving preferential treatment for years. (XVII RT 3471.)

Bell did not think that appellant was singled-out in any unusual way, because it was common for people to be ill treated at Conventional Housing. (XVII RT 3473.) Appellant did not seem too comfortable at the front counter, which Bell found unprofessional. (XVII RT 3474-3476.) Bell did not recall telling the defense investigator that appellant was "targeted," but he did vaguely remember Burton telling him that she did not like appellant and that he would not be there long. (XVII RT 3476-3477.) Likewise, Bell would not say that appellant was treated like a "whipping boy" while working at Conventional Housing, but appellant was not liked and got a lot of pressure from his co-workers. (XVII RT 3482-3483.)

Celia Gardner never met appellant. (XVII RT 3373.) She worked at the Conventional Housing Authority from February 1990 until October 1994, prior to the murders and appellant's employment there. She held the receptionist position prior to appellant and was supervised by Lorraine Talley.

In 1992, Talley began assigning Gardner Housing Specialist work, even though she was an Office Assistant. (XVII RT 3360-3361.) After a person was hired to fill the receptionist position, Gardner started working on tenant caseloads full-time. (XVII RT 3363-3364.)

Gardner believed there was a "conflict of interest" at Conventional Housing because Talley had a close relationship with Burton. Talley was the godmother of Burton's children, which resulted in a lot of favoritism, to the point that if you did not get along with Burton she made sure that Talley got rid of you. (XVII RT 3365.) At one point Gardner and Burton were friends, but then Burton began to complain to Talley about her. (XVII RT 3365-3366.) Gardner testified how Talley had something personal against her, harassing her both as a housing employee and tenant. (XVII 3367-3368.)

Gardner described Talley as a person who would "smile in your face and stab you in the back." (XVII RT 3372.) Gardner admitted she was suspended

for giving family members priority on the waiting list for housing, and ultimately terminated because she was found in possession of stolen laundry tokens. (XVII RT 3377-3379, 3387-3388.) She stated that Talley was smiling when she terminated her.

Betty Walther was the cashier for Conventional Housing. She had been working for the Housing Authority for over 20 years before appellant started working at Conventional Housing. (XVII RT 3412-3413.) She had never had any problems with any co-workers while working at Conventional Housing. (XVII RT 3414.) She thought Conventional Housing was managed "good enough," though opined it could have been better or worse. She did see some favoritism where some people were allowed to come in late or take a late lunch, while others would be reprimanded -- like herself and appellant. (XVII RT 3415, 3420.) But she could not say whether people were given certain positions based on favoritism. (XVII RT 3415-3416.)

Walther had no problems with Talley's supervision, but had seen occasions Talley got upset and expressed her displeasure in a way that she felt was inappropriate. She found "talking down to people" was Talley's way, though it was not apparent every day. (XVII RT 3419, 3421.)

Walther never had any problems with appellant after he had transferred over from Conventional Housing. She could not recall ever seeing Talley upbraid appellant in front of the public. (XVII RT 3423.) She had observed appellant called upon to deal with an angry client in the past and had never seen him conduct himself in a manner that was inappropriate. (XVII 3425.) Walther did not feel she was in a position to describe the atmosphere at Conventional Housing because she never got "caught up in other people's problems." (XVII 3425.)

C. The Defense Expert Witness.

Appellant presented part of his defense through the testimony of Dr. Carol Walser. Dr. Walser was qualified, over some objection, as an expert in neuropsychology, as well as psychology and clinical psychology. (XVII RT 3508-3509, 3530-3532.) Although she had been hired in the past by defense counsel Veale to testify in the penalty phase of a different capital case, she had never qualified to testify in the guilt phase. (XIX RT 3766-3768.) Nor had she specifically qualified to testify in neuropsychology in any other criminal case. (XVII RT 3517-3518.) She quite candidly admitted to diagnosing a "full blown mental disorder" in every criminal case to which she had been referred. (XIX RT 3765-3766.)

Dr. Walser was the Chief Psychologist at Davies Medical Center. (XVII RT 3508-3509, 3532.) However, she had not published at all in the field of neuropsychology (XVII RT 3520), and was not aware of any recognized certification for her specialty. (XVII RT 3512, 3516, 3522.) Because she was not a medical doctor (XIX RT 3786-3789, 3791-3794), she was not qualified to render certain opinions during trial regarding brain anatomy and functioning.

Dr. Walser could not find a recognized disease or disorder for which she could blame appellant's rampage, and thus diagnosed him with a cognitive disorder "not otherwise specified." (XIX RT 3688, see XXI RT 4215.) She was not the first psychologist hired by the defense to opine about appellant's mental health (see XVII RT 3540-3541, 3580), and was not even hired until a full year after the murders. (XVII RT 3541, 3535.) She had not spoken with those who had (see XXI RT 4138-4143), had not consulted with a doctor who interviewed appellant within 24 hours of the shooting -- or even bothered to read his report (XXI RT 4137) -- and did not review the video tape of appellant's confession taken only a couple of hours after the shooting until after she started her testimony. (XXI RT 4198, but see XX RT 3939). Despite these

failings, Dr. Walser still determined that appellant was delusional at the time he killed two people (XIX RT 3703), and that he was suffering from a brief psychotic episode with "marked stressors." (XIX RT 3689-3690.) She tied appellant to a litany of potential psychological impairments including depression, post-traumatic stress disorder, a coping deficit with "disorganized functioning," impulse control disorder, obsessive compulsive, and even paranoid schizophrenia, but could not pin any of these down beyond the "borderline impaired range." (XIX RT 3647-3660, 3689-3690, 3757.) In contrast, appellant, when admitted to the V.A. in 1989 for cocaine addiction, had previously been diagnosed as an "immature personality," with emphases on antisocial/passive aggressiveness and grandiosity. (XXI RT 4073-4074.) Much of the basis for Dr. Walser's opinion of delusion came from a statement that victim Lorraine Talley made to her mother, saying she (Talley) thought appellant was crazy because he had been talking to himself. (XIX RT 3783-3786.) Her only corroboration for this came well after the preliminary hearing, when appellant had been able to observe witness who testified to "laughing" at a suspicion about appellant's sexuality. Although appellant had told Dr. Walser he was "truly remorseful" for his actions (XVII RT 3560), he had exhibited numerous signs of manipulative behavior including lying to his doctors, and asking for a "favorable" evaluation. (XX RT 3925-3927; XXI RT 4087, 4185-4186.)

Dr. Walser attempted to correlate this opinion and excuse appellant's behavior with the forensic evidence showing some minor abnormalities on appellant's MRI and that appellant had suffered seizures as a child. (XVII RT 3605-3606, 3610, 3615-3616.) However, she did not even consult with the radiologist who had performed appellant's MRI (XIX RT 3811-3816), dismissing the idea because they were "diagnosticians" (XIX RT 3819) and, even though she recognized that interpreting brain scans called for neurologists

and radiologists rather than psychologists (XX RT 3888-3889), that she "could tell through my own interview and testing . . . I had what I needed to know." (XIX RT 3814.) Notwithstanding the directly contrary opinion of Dr. Hoddick, a noted radiologist who later opined that any abnormalities were "clinically silent" and could not have had any physical impact on appellant (see XXII RT4310-4311), Dr. Walser pressed on in an effort to excuse appellant's behavior. But her testimony as to any potential biological impairments was significantly limited in this area by her own lack of expertise. She admitted that she was not a medical doctor (XIX RT 3786-3789), that she had no personal expertise in diagnosing seizures (XIX RT 3748), that she did not consult with either a neurologist or a radiologist in rendering this opinion (XIX 3786-3789, 3791-3794, 3815-3816, 3820-3821, 3888-3889), and did not even know which side of the brain would have been impacted if her theory of "temporal lobe epilepsy" was indeed accurate. (XIX RT 3748.) She had not even mentioned this theory in her report, as the idea occurred to her only after the report was submitted and passed on to the prosecutor for discovery. (See XX RT 3887-3888.) Dr. Walser was unable to determine the specific physical cause of appellant's psychological disorder. (XX RT 3862.)

Dr. Walser was aware that appellant had made the numerous "101 California" threats (see, e.g., XIX RT 3779-3780), that he had denied making them to other mental health professionals (XIX RT 3779-3780), that appellant blamed Lorraine Talley for his predicament, that he had said he was going to "get those bitches" (XXI RT 4083-4084), and that he had remarked to Talley, "I ain't no joke," as he killed her. Dr. Walser was also aware that appellant claimed he had "made history" by his killings, and claimed vindication because things at the RHA were "not right." (XXI RT 4077-4078.) Appellant did, however, know enough to ask "Where was God that day?" (XXI RT 4144.) Dr. Walser was further aware that appellant had previously told doctors that

Barbara Garcia "should have got the fuck out the window" (XXI RT 4151), that she "should have taken me seriously kind of like Lorraine" (XXI RT 4151) and that he shot her because "she uses precious time to say something to me" (XXI RT 4151), and that "I just pulled it out and shot her I smoked the bitch just like that, bang and bang . . . ." (XXI RT 4150.) Yet she still maintained her opinion that appellant was somehow delusional throughout the rampage. She was paid $7000 for her testimony. (XIX RT 3820-3821.)

People's Rebuttal

Dr. William Hoddick, a radiologist from the John Muir Medical Center located in Walnut Creek, reviewed appellant's MRI at the request of the prosecution. (XXII RT 4307.) The MRI showed tiny fossa in the paraventricular and subcortico white matter of appellant's brain. This is commonly seen in people over 50, and also in those under that age if there is a history of diabetes, cigarette smoking or drug abuse. (XXII RT 4309.) There was nothing in Dr. Hoddick's observation that suggested to him that this would have any affect on appellant's behavior. (XXII RT 4310.) Dr. Hoddick described that, in appellant's left temporal lobe, there was a small area of cerebral spinal fluid, which is consistent with an arachnoid cyst, but "[t]here was no mass effect or pressure associated with it." (XXII RT 4310.) Dr. Hoddick explained "no mass effect" means the fluid was not creating any pressure on the brain at all and thus would not likely have any neurological impact on appellant. (XXII RT 4311.) This sort of cyst fill was "a relatively common finding that is present in many individuals," which "in the absence of clinical symptomology . . . has no consequence to the patient." (XXII RT 4310-4311.) There was nothing about this particular type of finding that would cause a person's behavior to be adversely altered, or cause them to kill two people. (XXII RT 4311.)

On April 27, 1996, at the request of the prosecution, psychologist Dr. Paul Berg interviewed appellant. This was two days after the murders, while appellant was incarcerated, but before he was arraigned. Dr. Berg did not find appellant to be psychotic. (XXII RT 4351-4352, 4354.) Dr. Berg disagreed with Dr. Walser's diagnosis that appellant suffered a brief psychotic disorder on the day of the murders. (XXII RT 4356-4357.) Appellant's behavior when he shot Talley and Barbara was not consistent with the behavior of a psychotic person. (XXII RT 4357.)

Dr. Berg was concerned about a number of facets of Dr. Walser's opinion, as well as the other defense reports, and in particular, the supposedly "low stress" conditions under which appellant's psychological tests were given. Dr. Berg questioned how a person facing capital murder charges who is given a test while in jail can be considered to be in "low stress conditions," as opposed to conducting tests in an otherwise serene office setting. (XXIII RT 4359-4360.) Dr. Berg explained that the results of both of appellant's MMPI tests, which were interpreted by the defense experts as showing "paranoid schizophrenia," were artificially elevated because those tests were conducted under the extreme stressor of a jail environment, and such results are "characteristically elevated in jail and prison populations." (XXIII RT 4363-4364.) Not surprisingly, people housed in a jail environment are commonly diagnosed with depression. (XX RT 4365.) Dr. Berg added, "And I think generally interpreting tests people have taken under unusual extraordinary stressful situations raises questions about how you interpret it." (XXII RT 4364.) Although Dr. Kincaid's interpretation of appellant's Rorschach test results was "generally reasonable," if there was any deficiency in appellant's perception of reality, it was very minor, and "[appellant] was not described as perceptionally distorted on the Rorschach by Dr. Kincaid." (XXII RT 4364-4365.)

Appellant's results were not indicative of psychosis or severe chronic depression, "meaning a long-term preexisting depression." Dr. Berg pointed out that Dr. Kincaid's report emphasized appellant's immaturity and that some of the findings on his Rorschach Test may reflect what happened during the shootings. (XXII RT 4365-4366.) The Rorschach test results were not accurate indicators of appellant's psychological status at or near the time of the murders because these tests occurred at a significantly later period of time, and moreover, the killing of two people -- itself a significant psychological event -- would likely be reflected in the results. Dr. Kincaid's report indicated that appellant shows passive/aggressive behavior, "which means [a person] who shows his aggression usually in passive ways . . . . They grumble and mumble as opposed to typically doing it in the most aggressive way." (XXII RT 4366.) Although appellant may indeed have had some minor distortion of reality, the context under which Dr. Kincaid diagnosed this was long after the fact. Additionally, while Dr. Kincaid's report "said the Rorschach results were consistent with cognitive deficits," such results would not be truly reflective of appellant's state of mind at or near the time of the murders since the testing was conducted well after the murders, in a stressful environment, with the murders being incorporated into appellant's psyche. In other words, the results of the tests were not able to separate appellant's awareness of the murders from the desired results which attempted to excuse or explain the murders through the tests themselves. (XXII RT 4366)

In Dr. Berg's opinion, appellant suffers from a diagnosable personality disorder, which was fully supported by appellant's Rorschach results. (XXII RT 4366.) Dr. Berg explained that a review of "what [appellant] was doing on April 25th, 1995," would be much more indicative of appellant's mental state at the time of the murders than "would be . . . what [appellant] saw on an inkblot a year later." (XXII RT 4367.)

In Dr. Berg's opinion, appellant's remark to Talley, "I ain't no joke," as he fatally shot her, showed appellant was acting out of anger, retribution and revenge, rather than any type of disorientation. (XXII RT 4367-4368.) Given the fact that appellant thought that his job was in jeopardy in the weeks before the murders, there was nothing delusional in appellant's behavior, "both in terms of what he knew in advance and . . . in terms of being told he was going to get his evaluation early because Ms. Talley was going on vacation, and because he was in fact discharged a little after 4:00 p.m. on April 25th." Dr. Berg opined that appellant was "absolutely" oriented in reality when he killed Talley. (XXII RT 4370.) "When it became apparent to him that he could not talk to her, she didn't even want to talk to him without Mr. Hatchett present, and he shot her and then after the first shot delivered a lethal shot to her head, indicates organized behavior. His telling Ms. Robinson that she was safe and that he was not going to do it to her was organized behavior." (XXII 4377.)

Dr. Berg found appellant's explanation to Janet Robinson why she was left alive, made immediately after he shot Barbara Garcia, showed that appellant was selective in who he shot, was able to give reassurance to those he did not shoot, and had the ability to refer back to a previous conversation. This indicated not only that appellant's "orientation was okay, but his memory is pretty good, too." (XXII RT 4370-4731.) Considering all the people appellant talked to in the days and weeks prior to the murders expressing his concern about getting fired, and his telling three different people that, "I'll do another 101 California," appellant knew, understood and remembered exactly what he was doing at the time of the murders. Nor was appellant's question of officers about "where Lorraine Talley was at" during his videotaped confession evidence of memory problems or disorientation. (XXIII RT 4710-4711.) Instead, Dr. Berg returned to appellant's actions during the murder; bringing a gun into work and hiding it, suggested "organization . . . in case he got fired."

(XXII RT 4376-4377.) Rather than any type of neuroligic, organic, problem, appellant suffers only from a personality disorder; "obsessive compulsive and schizoid paranoid." (XXII 4377.)

On cross-examination, Dr. Berg opined that appellant was malingering on at least some of the tests. He described how scales were recently developed to help determine whether a person is faking on the Halstead-Reitan tests, a neuropsychological battery of tests designed to detect neurological or brain damage. (XXII RT 4387-4388.) Dr. Walser administered these tests to appellant and appellant exhibited severely impaired results. (See XVIII RT 3524, 3548; XIX RT 3659-3660.) Dr. Berg consulted with neuropsychologist Dr. Kim McKenzie, who reviewed Dr. Walser's work and found that appellant had been faking: "Dr. McKenzie told me that the results of the neuropsychological testing given by Dr. Walser were equivocal, that depending upon which norms you used – because there are some norm choices – [appellant] either had some mild damage or didn't. And that applying the faking formula, that Mr. Pearson faked it." (XXII RT 4396.) Dr. Berg explained that, "[y]ou fake those tests by not doing as well as you're able to do." (XXII RT 4397.)

Dr. Berg stated that, "Disorganized thinking is not a separated diagnostic category. It's a quality that can be related to diseases." (XXIII RT 4416.) There was no evidence from any of the various documents Dr. Berg examined that appellant was suffering from disorganized thinking on the day of the murders. (XXIII RT 4431.) Appellant's statement, "I ain't no joke," to Lorraine Talley as he fatally shot her was not evidence of hallucination because it was not consistent with anything else in appellant's history. Nor was there evidence that Talley was laughing at appellant before he fatally shot her. (XXIII RT 4546-4547, see XXIV RT 4655-4664.) Dr. Berg did not believe that these murders were an impulsive act: "The behavior is suggestive of someone who

got angry, who expected to be angry, who got the means to carry out an assassination twice and did so." (XXIII RT 4632.)

Penalty Phase

A. People's Witnesses

Lorraine Talley's mother, Gladys Dean, learned of her daughter's death from a friend who had been listening to the news and heard there had been a shooting at the Richmond Housing Authority. (XXVII RT 5124-5125.) Mrs. Dean called her granddaughter, Nakia Talley, at work and asked her to come home immediately. (XXVII RT 5125-5126.) Mrs. Dean later learned from family friend Harriette Langston that Lorraine had been shot, and was later told by someone else that Lorraine "didn't make it." (XXVII RT 5126-5127.)

Lorraine was her only child. (XXVII RT 5127.) Lorraine had two daughters and a son of her own, and, after Lorraine separated from her husband, Mrs. Dean took care of her grandchildren while Lorraine went to work at the Housing Authority. (XXVII RT 5133-5134.) Lorraine had a "bubbly" personality, she tried to make people laugh, and wanted people happy around her. Even when Lorraine was sad herself, no one ever knew. (XXVII RT 5137.) Lorraine spoke and laughed in a loud and expressive way. (XXVII RT 5137-5138.) When Ms. Dean learned Lorraine had not made it, "something just left me . . . . I was empty." (XXVII RT 5139.) Mrs. Dean described how she still feels alone without her daughter because they were very good friends. (XXVII RT 5139.)

Lorraine Talley's daughters Nakia and Tenika Talley also testified. Nakia knew that something was wrong when she received a call from her grandmother at work, so she asked a co-worker to drive her home. She recalled her grandmother was crying as they drove down to the Housing Authority. When they arrived, her grandmother told the police officers at the scene that she

needed to see Lorraine, but was told no one could go in the building.

Nakia started praying as she and her grandmother walked over to City Hall where their mother's friend, Harriette Langston, worked. When they were told that Lorraine did not make it, her grandmother, who was a "lively" and "upbeat" person, looked "dead" and "hollow." Nakia tried to console her grandmother but, "she just looked up at me and her eyes were all glassy and she was just crying and shaking and I couldn't stop that. I couldn't make it go away. I could not make her not hurt." (XXVII RT 5158-5160.)

Nakia's older sister, Tenika could not believe it when she heard her mother had been shot. It was her mother's last day at work before going on vacation. Her mother was going on a trip and "had all her stuff packed for weeks . . . ." (XXVII RT 5146-5147.) Tenika described how her family was "close knit," and if they had any problems, her mother knew how to take care of them. (XXVII RT 5150-5151.)

She described how her world "has been turned upside down, inside out" since her mother was killed. Her mother supported her financially, so after Talley's death Tenika found it "a great struggle" taking on the responsibility of her 14-year-old brother in addition to her own 3-year-old daughter, as well as her 20-year-old sister, and taking on the role as the "responsible mother figure" for the entire family. Her mother had taken care of everything so they did not have to worry. But now with her mother gone, Tenika had to change her whole life. (XXVII RT 5153-5154.)

Tenika also described how her grandmother had changed after Lorraine's death, becoming "more of a cold person" and "not very happy." "[S]he wakes up every day and knows she doesn't have a daughter to talk to. She can't go over and see Lorraine. She can't hear Lorraine's voice any more." (XXVII RT 5154.) She shared her sentiment that you never get used to someone being gone, and how her own daughter tells her that she misses her

grandmother. (XXVII RT 5154-5155.)

Harriette Langston had been a close friend of Lorraine Talley's since they were in elementary school together. (XXVII RT 5163.) She described how Lorraine as a child was "funny" and "full of life"; someone who could always make you laugh and would try to "lighten the mood" in even the most serious circumstance. (XXVII RT 5164.)

Langston was working for the City of Richmond planning department when Lorraine began working for the Housing Authority as a clerk at the Community Center in the Easter Hill housing projects. (XXVII RT 5165.) She described how their families were close, and shared holidays and birthdays together. (XXVII RT 5166-5167.)

Langston was on the phone with Lorraine having conversation about the fact she had to fire appellant, when appellant walked in and shot her. The irony was that Lorraine was actually concerned about *appellant's* well-being at the time she was murdered. When Langston told Lorraine that she should have the police be there, Lorraine replied, "Harriette, I don't want to embarrass him. That would just be awful for him to be carted out of here by the police. You know he would never be able to get another job." (XXVII RT 5167-5168.) Lorraine told her that she thought things would be okay. As they talked, Langston heard a knock on the door and Lorraine asked her to hold on. Langston could hear voices in the background, but could not distinguish what was being said. She then heard gunshots and started screaming Lorraine's name into the phone. She hung up and tried calling Lorraine back, but the line was busy. She then tried calling Pat Jones, but there was no answer. She was about to walk over to the Conventional Housing office when Pat Jones called her and told her that Lorraine had been shot. (XXVII RT 5169-5170.)

Langston was to take Lorraine and Lorraine's friend, Maurice Mims, to the airport for a trip that Friday. Langston and Lorraine had planned to take a

trip together that June. (XXVII RT 5170.) Langston described how she and Lorraine would exercise together by walking every Saturday, and how they talked almost every day. She described how Lorraine was an easy person to talk to, who would always find something positive to say in a bad situation. (XXVII RT 5170.) "She was like a sister to me. She was so much a part of my life and I miss her very much." (XXVII RT 5170-5171.)

Sam Burns, a deputy sheriff with the Contra Costa County Sheriff's Department, was formerly married to Lorraine Talley and became the stepfather to her two daughters, in addition to their having a child together, their son, Kajari. (XXVII RT 5172.) Deputy Burns learned of Lorraine's death while he was coaching Kajari at a track meet. Deputy Burns's sister came out to the track "quite upset" and told him there had been a shooting at the Housing Authority and that Loraine had been killed. Deputy Burns recalled watching his son running as it occurred to him that he would have to tell his son his mother was dead. (XXVII RT 5176-5177.) Later, as they were driving home, he and Kajari were looking at Kajari's track photos, since Kajari was planning to give one to his mother. Deputy Burns pulled the car over and told Kajari that his mother was dead. Kajari started crying and asked if it "was the man at work." (XXVII RT 5177-5178.)

Deputy Burns described seeing appellant in the courtyard of the county jail with other inmates: "[H]e was laughing and smiling . . . . I just kind of looked at him and it was only a week ago [since Lorraine's murder] and I couldn't imagine anybody laughing or smiling at that point. I hadn't. But there he was . . . laughing and smiling." (XXVII RT 5179.)

Maurice Mims had been romantically involved with Lorraine Talley since 1990 and was her boyfriend at the time of the murder. He described Lorraine as a "jolly" and "happy" person, who made people happy even when they were down. If he needed anything or was down, she was always there for

him. Mims shared his insight that you did not want to be untruthful or cross Lorraine because "[s]he was very outspoken." (XXVII RT 5182.) The weekend before her murder,. Mims and Lorraine talked about appellant's comments to coworker's about committing another "101 California." The night before her murder, Lorraine told Mims that she was going to fire appellant. (XXVII RT 5191.) Mims' life has been "totally hell" since Lorraine has been gone. (XXVII RT 5191.)

Since the murders, Pamela Kime had to leave her job at the Housing Authority. She is no longer able to go to places with noisy crowds because they scare her. She described how there were times when she was afraid to leave her house and she had to arrange for somebody to pick her daughter up from school. (XXVII RT 5194.) Before the shootings, Kime always considered herself a "very strong person," who had gone through a lot and was able to "shake it" and move on. "But to see what I saw that day – ," Kime obviously has not been able to "shake" that. (XXVII RT 5195.)

Since Lorraine's murder, Shirail Burton has been "walking around with a broken heart that you know that's never going to get mended . . . ." (XXVII RT 5198.) And there has not been a minute she has not thought about Lorraine. Burton and Lorraine's lives were "very much" mixed together. Lorraine was her labor coach and saw both of her children born. (XXVII RT 5198-5199.) When asked what she would say to Lorraine now, Burton replied, "I would tell her how much I loved her, I would hold her, I would kiss her, tell her thank you for so much that she did for me and my family, the things that I have learned from her. From her I truly learned the meaning of friendship and what friends mean to each other." (XXVII RT 5199.)

Patricia Jones described emerging from under her desk after the shooting, her ears ringing from the gunshots and wondering where appellant was. She saw Barbara Garcia lying on the floor and realized she needed to try

and help her. When Jones could not get an outside line on the telephone, she took the chance that appellant was gone and ran out of the office and down the hallway looking for help. When she got to the conference room she knew something had happened and suspected that appellant had shot Lorraine. Jones saw people "hysterically standing around screaming." Then she saw Pam Kime "with blood all over her hands, and then I saw Lorraine." (XXVII RT 5200-5201.) Jones described how she broke down before going to Barbara Garcia's memorial service from the "horror of the whole episode, the thought of being crouched there under the desk, not knowing what was going to happen . . . ." (XXVII RT 5201.)

Janet Robinson described Barbara Garcia as a person who was "funny" and "full of life," and who had a lot of hopes and dreams for the future. Garcia had planned to go back to school and then travel. (XXVII RT 5203-5204.) In the past 17 months, Robinson's whole life has "completely stopped." (XXVII RT 5204.) She can no longer go to school because that was the last place she had been with Lorraine and Barbara the Monday night before the shootings. She has been a "recluse" for over a year, literally staying in her home and only leaving for appointments with her psychologist and chiropractor. She has tremendous amounts of fear, and now fears for her husband and children because "if this could happen once, it could happen again." (XXVII RT 5204.) Robinson never experienced a death before, let alone seeing people being shot and murdered. She now carries this fear around with her. Everyday she tries to get rid of the memories the day of the murders and hopes someday she will not be so fearful. (XXVII RT 5205.)

Robinson was terminated from her job at the Housing Authority when she could not go back to work. When she tried to go back to work she found it impossible to return to the place where he friends had been killed. She described how, when she went back to work, "an employee told us that he

understood why Michael tried to murder us, because we treated people like shit." (XXVII RT 5206.) Robinson had already been suffering physical symptoms from the shootings prior to the employee's statement, but that comment pushed her "over the edge," so she decided she would never go back to the Housing Authority again. (XXVII RT 5206-5207.) Robinson feels guilt because her friends are dead and wishes she could have done more to protect them. (XXVII RT 5207-5208.)

Irma Abarca, Barbara Garcia's aunt, had known Barbara since her she was a child. (XXVII RT 5220.) She described Barbara as "a happy person, real loving" who always "cared about everybody except herself." (XXVII RT 5221.) Abarca learned of the shootings at the Housing Authority when a friend called and asked if she had heard the news that Barbara had been shot. Abarca called Barbara's father, Guillermo Garcia, to report the news and learned from Barbara's sister that Barbara was in the hospital. (XXVII RT 5221-5222.) Abarca described how Barbara's father became angry when the police would not let him see his eldest daughter who lay dead. (XXVII RT 5225.) Abarca's daughter, Celia, also testified. She talked about how her cousin Barbara was a "very caring" and "very intelligent" person who was always thinking of others. Barbara was like her big sister. Celia described how hard it has been to realize Barbara was dead because she could not believe it happened. (XXVII RT 5226-5227.)

Genoveva Calloway, Barbara's aunt, was working down the street from the Housing Authority office on the day Barbara was murdered. Calloway was leaving work when she saw a crowd of people and police cars surrounding the Housing Authority building and someone told her something was going on. (XXVII RT 5230.) She knew that Barbara worked there, but never thought anything would happen to her and figured when she got home she would call Barbara and find out what happened. When Calloway arrived home, Barbara's

mother Rosa called and told her that Barbara had been killed. Calloway went over to her brother's home and found the family "distraught" because her family could not see Barbara's body until the next day at the mortuary. Calloway described how Barbara's father was very emotional during the ceremony and cremation of his daughter's body, and Barbara's family "still have the ashes in the house in the living room. They talk with her. And they're still in a lot of pain." (XXVII RT 5231.) It was several months before Barbara's parents could go back to work, but they finally tried to get their lives back together. (XXVII RT 5231.) Mrs. Calloway described seeing her brother holding the urn with Barbara's ashes and crying, "[A]ll he can do is just cry and cry and just talk with her . . . . He cannot let go of her." (XXVII RT 5232.) She explained that Barbara's father could not come to court because, "It was too painful for him. He's got a lot of pain, a lot of anger. And he said that his coming here would no bring her back, which is what he wants, but he knows he can't have her back." (XVII RT 5234.)

B. Defense Witnesses.

Gary Reynolds was an unemployed crack addict living off general assistance when he met appellant. (XXVIII RT 5273-5274.) Reynolds described how appellant played a major role in his going into a drug rehabilitation program, though he would relapse a year later. Reynolds saw appellant as an example that he did not have to use drugs, and appellant would tell him he was better than that and his life was more than drugs. (XXVIII RT 5274.)

Appellant was working for the City of Richmond when they met. Appellant told Reynolds that he wanted to be promoted, but appellant also mentioned getting a lot of aggravation from co-workers. Becoming a permanent employee was important to appellant. (XXVIII RT 5277-5278.) Reynolds believes that he is a better human being thanks to appellant because

appellant helped him believe in himself. He believed that if it were not for appellant, he would not have gone into drug rehabilitation. (XXVIII RT 5278.)

Appellant's uncle, Charles Thomas, has known appellant's mother since their childhood together living in the Hunter's Point area of San Francisco and has known appellant since the day he was born. (XXVIII RT 5283-5286.) He knew appellant's father by the name "Junior." He described how appellant's parents stayed together only a year after his birth, then "Junior" left and how they never talked about him much after he was gone. (XXVIII RT 5286-5288, 5290.) He could not recall any unusual events in appellant's childhood, and, to him, appellant seemed like a "normal kid." (XXVIII RT 5291.) He recalled when appellant was about four or five years old he went to visit Junior's family and how, during a conversation with appellant's mother, she said she was planning to go get appellant. (XXVIII RT 5291-5292.) He described how appellant's mother remarried and had two more sons whose father abused her. They eventually broke up when appellant was around six or seven years old. (XXVIII RT 5293, 5296-5297.)

Mr. Thomas described appellant as "a very nice kid" and "[t]here was nothing unusual about him." He added how appellant has "always been very respectful" towards him. (XXVIII RT 5298.) After his older brother (Bay Area Blues legend, Lafayette Thomas) married appellant's mother in 1963, and they moved to Oakland, he kept in touch with the family. He still occasionally saw appellant, and he found him to be very respectful. (XXVIII RT 5302.) Mr. Thomas heard about the murders on the television news. It was either the same day or the next morning that appellant's mother called him and told him what happened. (XXVIII RT 5314.) He was totally surprised, adding: "I figured somebody must have really shoved Michael over the cliff.... He's never been a violent person." (XXVIII RT 5314-5315.)

Appellant's mother, Mary Jane Thomas, started her testimony by saying she did not want to be on the stand because she had already been through enough stress and did not feel she had much input at this point. (XXVIII RT 5323-5324.) Appellant was her first child and she described him as being a "normal, happy, playful" little boy. (XXVIII RT 5325.) Appellant was a good kid, but she believed he was somewhat of a "loner" because he stayed to himself. (XXVIII RT 5325.) She described how appellant once went to live with his father's parents in Louisiana, and she had to go there to get him back. She did not think that had any effect on appellant. (XXVIII RT 5327-5235.) Appellant never showed any violent behavior at home with his brothers. Appellant showed his anger by pouting, mumbling, and going to his room. (XXVIII RT 5341.) She described how appellant had seizures in his early childhood years, but it was not when he was 12 or 13 years old. (XXVIII RT 5343-5347.) There was never any type of testing done to see if there was any abnormal brain activity or to determine if his seizures would cause him any mental health problems. (XXVIII RT 5347-5348.)

Mrs. Thomas recalled how when appellant returned from the Army she noticed he would often talk to himself, but she did not consider it peculiar or odd. She just ignored it. (XXVIII RT 5362-5363.) She thought it was "kind of strange," but did she not think her son had some sort of mental disorder. (XXVIII RT 5363-5364.) Mrs. Thomas remembered when appellant got his first temporary position with the City of Richmond and that it meant a lot to him because he had made "great strides" after being addicted to drugs and homeless. (XXVIII RT 5365-5369, 5370-5371.) Appellant wanted a permanent position so he could get dental coverage and afford to buy her a house. But appellant was having some discontent with the supervisor over his job. (XXVIII RT 5373-5374.) Mrs. Thomas pointed out that appellant did not have a criminal record, that she knew of, and that she had never seen him display violence in

any way. (XXVIII RT 5379.) She could not say if there was anything that happened in appellant's life that could explain how he could have killed two people. (XXVIII RT 5379.)

Robert Young was the head chef at the Contra Costa County Jail located in Martinez and in charge of the kitchen where appellant worked as a trustee. (XXVIII RT 5387-5386.) Young described how appellant would "stare" or look "kind of strange" when he did not understand the orders he was given. Young warned appellant if he did not like the orders, he would have to be moved from the kitchen. (XXVIII RT 5388.) Appellant had a tendency to do things his own way. Eventually he began to perform his kitchen work as instructed, but Young still had to check up on appellant's work every now and then to make sure it was being done right. (XXVIII RT 5389-5390.) While appellant was working in the kitchen, he talked with Young about the crime he had committed and appeared to be sorry for what had happened. (XXVIII RT 5391.)

Appellant's brother, William Keith Pearson, described how appellant was about 12 or 13 when he had a seizure while playing in the park. (XXVIII RT 5396). By the time William got to the park the ambulance and fire department were already there. (XXVIII RT 5396-5397.) Appellant was "up and conscious" and did not want to be taken to the hospital. (XXVIII RT 5367.) As they were growing up he never thought of his brother as peculiar or that he had a funny way of doing things. (XXVIII RT 5403-5404.) Appellant did well in school, graduating from high school. (XXVIII RT 5404.) There was no discord or unpleasantness in their family. There were arguments, but if there were any problems the family would straighten it out. (XXVIII RT 5404.) Their mother was strict and they would get whipped every now and again, but appellant would get less than his brothers. (XXVIII RT 5404-5405.)

Mr. Pearson recalled that appellant did have a problem with drugs at one point. They were sharing an apartment in Oakland and appellant went to rehabilitation to beat his problem. (XXVIII RT 5410-5411.) At one point appellant was homeless and rejected his brother's offer of a place to live solely out of pride. Mr. Pearson believed that appellant did not want to burden his family and found that something to be admired. (XXVIII RT 5412-5413.) Mr. Pearson knew his brother was on the right track when appellant got a job working for the Housing Authority. He became aware that his brother was having problems when appellant complained about a poor performance review he received and expressed his fear of being terminated. (XXVIII RT 5415-5416.) Appellant never mentioned any specific individual who was mistreating him. (XXVIII RT 5416.)

When he heard about the shooting on the news, Mr. Pearson was surprised and felt for his brother because he had known appellant all his life and that was not like him; "I didn't understand it at all." (XXVIII RT 5416.) During cross-examination Mr. Pearson discussed how he spoke with his brother in jail and appellant "told me he was very sorry about what he did and he had to disappoint the people and he had to put us through what he put us through and he was sorry two people were dead." (XVIII RT 5419.) Appellant talked about how he was being unfairly treated by his boss and was going to lose his job for no reason, and that he felt he would be fired if his next review did not go well. (XVIII RT 5420-5421.) Appellant told his brother he was sorry to his family and hated bringing them through this, "and he was sorry that two people ended up dead over it." (XXVIII RT 5422.)

Finally, defense counsel Veale testified about an incident in jail where appellant, who was generally polite during their conversations, walked out screaming and yelling because he was asked to talk about the events leading up to the shooting. (XXIX RT 5466-5467.) Veale described a meeting soon after

with Drs. Wilkinson and Kincaid and how they discussed ways to recreate appellant's behavior. They developed a strategy where they would "push" appellant to see if they could get him to a point where he would express the same emotions he previously displayed. (XXIX RT 5468-5470.) Veale described how, as appellant was being pressed about the conversation he was having with Lorraine Talley just before he fired the shots, appellant blurted out, "I smoked the bitch." (XXIX RT 5470-5471.)

ARGUMENT

I.

THE TRIAL COURT HAD NO DUTY TO FURTHER CLARIFY "MITIGATING CIRCUMSTANCES" OR CONDUCT MORE CASE SPECIFIC VOIR DIRE

Appellant contends the court conducted inadequate death qualifying voir dire by refusing to "clarify . . . the meaning of the term 'mitigating circumstances'" and refusing to let counsel ask detailed, case specific questions to determine whether a juror would understand the relationship between the specific facts of this case and the statutory factors in mitigation under *People v. Cash* (2002) 28 Cal.4th 703 and *Morgan v. Illinois* (1992) 504 U.S. 719, 729. (AOB 88.) This Court has rejected appellant's argument on numerous occasions, distinguishing the extreme facts from *Cash*, and upholding the cases (*People v. Visciotti* (1992) 2 Cal.4th 1, 47; *People v. Ghent* (1987) 43 Cal.3d 739, 767, both citing *Wainwright v. Witt* (1985) 469 U.S. 412) upon which the trial court relied (see II RT 298-299). (See, e.g., *People v. Zambrano* (2007) 41 Cal.4th 1082, 1122-1123; *People v. Roldan* (2005) 35 Cal.4th 646, 693-694; *People v. Coffman* (2004) 34 Cal.4th 1, 47.) The claim fails.

A trial court conducting voir dire in a capital case has broad discretion "over the number and nature of questions concerning the death penalty." (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1316.) Code of Civil Procedure section 223, more specifically governs voir dire as follows:

> In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause,[1/] to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it

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1. The statute has subsequently been amended to eliminate the good cause showing for attorney voir dire. (See § 223 (2000) (A.B. 2406).)

> deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases.

As the Supreme Court has stated, "The Constitution . . . does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury." (*Morgan v. Illinois, supra*, 504 U.S. at p. 729.) Moreover, this Court has repeatedly explained the standards required for capital case voir dire:

> As we have observed before, "[t]he only question the court need resolve during this stage of the voir dire is whether any prospective juror has such conscientious or religious scruples about capital punishment, in the abstract, that his views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*People v. Mattson* (1990) 50 Cal.3d 826, 845.) The *Hovey* "voir dire seeks only to determine if, because of his views on capital punishment, any prospective juror would vote against the death penalty without regard to the evidence produced at trial." (*Ibid.; People v. Clark* (1990) 50 Cal.3d 583, 597. See also, *Wainwright v. Witt, supra*, 469 U.S. 412, 416.)

(*People v. Visciotti, supra*, 2 Cal.4th at p. 47.)

Initially, we note that appellant did not utilize all of his peremptory challenges, nor did he contest the makeup of his jury in general, and thus, cannot raise the issue here. (*People v. Coffman, supra*, 34 Cal.4th at p. 47; *People v. Burgener* (2003) 29 Cal.4th 833, 866 [finding no possibility of prejudice in defendant's general challenge to voir dire process because he did not utilize all peremptories].) Nor did he raise a specific constitutional challenge to voir dire. (See *ibid.*; see also *People v. Partida* (2005) 37 Cal.4th 428, 434-435 [appellant must make specific challenge to preserve all but the barest of due process claims].) In fact, appellant points to nothing in support of his claim outside of the court's initial cautionary comment against using the specific facts of the case to "prejudge the factors that way" (V RT 1013). (See *Coffman, supra*, 34 Cal.4th at p. 47 [noting that "the trial court merely cautioned Coffman's counsel not to recite specific evidence expected to come

before the jury in order to induce the juror to commit to voting in a particular way."].)

Even assuming appellant's claim has been preserved for review, it fails because the voir dire included sufficient case specific examples which allowed the court to determine whether a juror's views regarding the death penalty -- either for or against -- were such that they would substantially impair the juror's ability to impartially hear the case. The question posed by appellant included a reference to all of the statutory factors in mitigation which had just been listed by the court, and then went on to ask the following: "Did any of those [factors] say, gee, yeah, I guess if that were the case then maybe somebody shouldn't die for killing two people, one of whom in one situation where it was absolutely premeditated. Does anything like that occur to you?" (V RT 1013.) The court, on its own motion, precluded the answer: "Excuse me, Counsel, I am not going to allow the juror to prejudge factors that way. We're dealing with challenge for cause." (V RT 1013.) Appellant then rephrased the question in which he point blank asked the juror whether she would vote for death. (V RT 1013-1014.) Appellant did not ask another question along these lines, nor does appellant point to any other instances in which such case specific fishing was even attempted.

As this Court stated in *People v. Cash, supra* 28 Cal.4th at page 703:

> Our decisions have explained 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 as jurors 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. (*See People v. Jenkins* (2000) 22 Cal.4th 900, 990-991 [not error to refuse to allow counsel to ask juror given "detailed account of the facts" in the case if she "would impose" death penalty].) In deciding where to strike the balance in a particular case, trial courts have considerable discretion.

(*Id.* at pp. 721-722.) In *Cash*, the lower court had irreconcilably given up its discretion in favor of a per se rule that precluded asking about any general fact or circumstance not expressly pleaded in the information. This Court reversed because the excluded question -- whether the jurors' views would have been substantially impaired by knowledge that the defendant had been convicted of previously killing his grandparents -- was a general fact or circumstance that was essential to ensuring the impartiality of the jury.

Although the Court thus offered some leeway for considering the factual circumstances of a case, the facts in *Cash* were extreme. As the Court stated,

> Because in this case defendant's guilt of a prior murder (specifically, the prior murders of his grandparents) was a general fact or circumstance that was present in the case and that could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances, the defense should have been permitted to probe the prospective jurors' attitudes as to that fact or circumstance. In prohibiting voir dire on prior murder, a fact likely to be of great significance to prospective jurors, the trial court erred.

(*Id.* at p. 721.)

The Court was not, however, opening the door to a plethora of fact specific voir dire questions. Instead, consistent with constitutional principles, the Court was merely affirming that a court was required to exercise its discretion in certain cases to ensure that a juror's ability to sit was not substantially impaired when faced with a particularly disturbing set of facts. (*Ibid.*)

Jenkins, cited with approval by the Court in *Cash*, had also recognized limitations on a defendant's right to ask a series of case specific questions during voir dire. This Court upheld the trial court's exercise of discretion in precluding the questions:

> Under the law in effect at the time of trial, the court could prevent counsel from questioning the jury with an improper purpose, such as to "educate the jury panel to the particular facts

> of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law." (*People v. Williams, supra*, 29 Cal.3d at p. 408; see also *People v. Ashmus*, *supra*, 54 Cal.3d at p. 959.)

(*People v. Jenkins* (2000) 22 Cal.4th pp. 990-991 [footnote omitted].)

This Court has further recognized limitations on case specific voir dire following *Cash*. For example, *Roldan* lacked any sensational factual aspect that would have required case specific voir dire: "[D]efendant identifies no fact about his case that is comparable in relevance to the prior murders in . . . *Cash* . . ., facts that could potentially have prejudiced even a reasonable juror. There were in this case no prior murders, no sensational sex crimes, no child victims, no torture." (*People v. Roldan*, *supra*, 35 Cal.4th at p. 694 [footnote omitted], quoted in *People v. Zambrano*, *supra*, 41 Cal.4th at pp. 1122-1123 [recognizing that while condition of dismembered murder victim's body might invoke emotional reaction in jurors, it was not the type that would require additional exposure during voir dire to ensure jurors could fulfill their obligations].)

Similarly, in *People v. Coffman*, *supra*, 34 Cal.4th at page 47, this Court found no abuse of discretion where the defendant was not categorically prohibited from asking about "the other murder," but only cautioned against reciting "specific evidence expected to come before the jury in order to induce the juror to commit to voting in a particular way." (*Ibid.*) Indeed, the trial court even asked counsel to draft a proposed question regarding a juror's attitude towards multiple murder.

As in *Jenkins*, the trial court in this case properly precluded defense counsel from going into a "detailed account of the facts" and then asking if a particular juror would or would not impose the death penalty under those facts. (*Jenkins*, *supra*, 22 Cal.4th at pp. 990-991.) As in *Coffman*, the court permitted counsel to ask about multiple murder. (*Coffman*, *supra*, 34 Cal.4th at p. 47.)

Appellant -- by his own admission -- was simply an "office worker" who executed two colleagues. (See *Zambrano*, *supra*, at p. 1122-1123 [upholding trial court's discretion to exclude even abstract questions about dismemberment during voir dire].) Furthermore, none of the concerns expressed by appellant regarding mitigators, such as self-defense or accident, ever arose in the context of this case, in which appellant planned, executed, and then confessed to a premeditated, deliberate, double murder of two former coworkers. Although just about any juror would likely be affected to some degree by the evidence showing appellant's actions (see *Zambrano*, *supra*, at p. 1125), there was nothing particularly inflammatory about appellant's crime that differentiated this from the effect of any other brutal circumstance of a criminal homicide. There was no child victim, no rape, no torture, and no dismemberment. (See *Zambrano, supra*, at p. 1123.) There was nothing here that would "transform an otherwise death-qualified juror into one who could not deliberate fairly on the issue of penalty." (*Ibid.*)

Here, the court remained consistent with these principles and precluded counsel only from setting forth the litany of mitigating factors that might apply and then asking for a jurors' particular reaction to those factors. (See, e.g., *Roldan*, *supra*, 34 Cal.4th at p. 47.) Counsel was not entitled to pretry the case in front of Juror No. 4 and then ask him to commit his vote either way. Although the juror had briefly mentioned that he might give more weight to things such as self-defense or accident, the court properly found under its discretion that this was neither an exhaustive list, nor an attempt to categorize things that would move the juror to vote either way. (See V RT 972, 1017.) In fact, the court read a series of instructions to the jury (CALJIC Nos. 8.20, 8.10, 8.11 and 8.85) (see V RT 991-996) and made sure that the juror knew that self-defense or accident were not going to be factors that would come into play during the penalty phase. Finally, in accord with the *Witt* standard, the court

made sure that Juror No. 4 would start from a neutral perspective before accepting him on the panel. (See V RT 1017.)

Similarly, the court did not abuse its discretion in questioning other jurors, including Alternate Jurors No. 2, No. 9, and Prospective Jurors A.C. and G.M.[2/] Regardless of opinions expressed in their questionnaires, these jurors were readily willing to consider the evidence and begin deliberations from a neutral frame of mind. (See VII RT 1320, 1339 [Juror No. 2]; V RT 989 [Juror No. 9]; V RT 1013 [A.C.]; VI RT 1179 [G.M.].) In fact, Juror Number 2 expressed the sentiment required of the perfect juror in any capital trial: "I would listen to whatever you could present to win the sympathy of the jury over to life imprisonment. I would certainly listen to it. I would weigh it as carefully as I possibly could." (VII RT 1320-1321.) The constitution requires no more.

At no time did the court preclude an entire category of general fact, such as asking about the defendant's prior convictions, or questions about multiple murder. Instead, the court prohibited counsel from setting forth a detailed account of the facts and then fishing for jurors who would be favorable to him. The court was not required to permit counsel to indoctrinate the jurors through overly specific questions, nor was it required to instruct the jurors that they *must* give mitigating effect to all statutory factors. Instead, the court need only instruct the jurors that they *can* give mitigating effect to particular pieces of evidence that fall within the statutory scheme. (See *People v. Crandell* (1988) 46 Cal.3d 833, 884.) It is always the jury's purview to determine what weight, if any, a particular piece of evidence should carry. As long as a juror begins

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2. This Court has previously precluded a defendant from appealing challenges to jurors not seated on the actual panel when the case was tried, particularly where no peremptory challenge was employed. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 736; *People v. Visciotti*, *supra*, 2 Cal.4th at pp. 48-49.) To the extent appellant is challenging these particular prospective jurors, rather than the process itself, appellant has failed to preserve this claim.

deliberations from a point of neutrality, and is willing to listen to all of the evidence and consider both punishments with an open mind, voir dire has successfully served its purpose. Appellant cannot ask for anything beyond that.

II.

THE TRIAL COURT WAS UNDER NO OBLIGATION TO INSTRUCT ON THE PRESUMPTION OF A LIFE SENTENCE

Appellant contends the trial court erred in its "mid voir dire" instructions which permitted, rather than mandated, a sentence of life without parole if the jury found that the mitigating factors outweighed the aggravating factors. (AOB 123.) Even assuming the claim was preserved for review by appropriate objection, and that the trial court's comments and questions to certain prospective jurors could be considered an "instruction," the claim fails because the trial court's statements, taken in their full context, were not a misrepresentation of the law. California law does not impose a presumption in favor of either life or death during the penalty phase, and here, the court's comments, questions, and statements accurately reflected the initial neutrality required of a penalty phase jury. In short, there simply is no burden of proof during the penalty phase and the trial court's statements did not state otherwise. Furthermore, even assuming the comments could be considered ambiguous regarding a penalty phase juror's role, the jury was repeatedly and correctly instructed on its duties throughout the proceedings and again, prior to deliberations. The contention fails.

A. Waiver

Initially, appellant has failed to preserve the issue for appellate review. A defendant wishing to challenge a ruling on appeal is obligated to make a timely and specific objection, calling the court's attention to both the nature of

the specific evidence and the basis on which its exclusion is sought. (*People v. Partida, supra*, 37 Cal.4th at p. 435; see *People v. Carey* (2007) 41 Cal.4th 109, 126 [§ 352 objection insufficient to preserve relevance (§ 210) claim]; see also *People v. Barnett* (1998) 17 Cal.4th 1044, 1130 [same]; *People v. Geier* (2007) 41 Cal.4th 555, 608-609 [defendant's general objection to admission of any DNA evidence insufficient to preserve claim regarding population frequency calculations]; but see also *Partida, supra*, 37 Cal.4th at p. 438 [defendant's timely objection to evidence on state law grounds sufficient to preserve "very narrow" federal due process claim where claim was merely an "additional legal consequence of existing objection" and no additional analysis would have been required]; Cal. Const., art. VI, § 13; Evid. Code, § 353. ["A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion."].)

As this Court has stated,

> The purpose of the rule requiring the making of timely objections is remedial in nature, and seeks to give the court the opportunity to admonish the jury, instruct counsel and forestall the accumulation of prejudice by repeating improprieties, thus avoiding the necessity of a retrial . . . . In the absence of a timely objection the offended party is deemed to have waived the claim of error through his participation in the atmosphere which produced the claim of prejudice.

(*People v. Brown* (2003) 31 Cal.4th 518, 553 (quoting *Horn v. Atchison, T. & S.F. Co.* (1964) 61 Cal.2d 602, 610.) A defendant is not allowed to sit silently through a trial he thinks is infected with prejudicial errors, gambling on the result, and then banking on the insurance of a reversal were he to receive an unfavorable verdict. (*People v. Coleman* (1988) 46 Cal.3d 749, 777; *People v. Vega* (2005) 130 Cal.App.4th 183, 193; see *People v. Geier, supra*, 41

Cal.4th at p. 609, quoting *People v. Partida, supra,* 37 Cal.4th at p. 435 ["What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling."]; see also *Partida, supra*, at 434 ["The objection requirement is necessary in criminal cases because a contrary rule would deprive the People of the opportunity to cure the defect at trial and would 'permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal."] (internal quotations omitted).)

This was not an instance in which the automatic reversal categories invalidating the voir dire itself would apply. (See *Mu'Min v. Virginia* (1991) 500 U.S. 415.) There was no categorical prohibition of inquiry during voir dire regarding a defendant's prior convictions or other evidence which would undoubtedly be presented at trial. (See *People v. Cash, supra*, 28 Cal.4th at pp. 720-722 [precluding counsel from asking about effect of defendant's priors during voir required reversal of penalty phase]; but cf. *People v. Coffman, supra*, 34 Cal.4th at p. 47 [reversal not mandated where defendant merely precluded from asking jurors about specific facts of case].) Nor was it a case in which the voir dire process itself was so fundamentally flawed that automatic reversal would be mandated, regardless of whether a proper objection made below. (*Morgan v. Illinois* (1992) 504 U.S. 519 [reversing because trial court refused to ask potential jurors whether they would vote for death rather than life following the conviction, regardless of the facts (reverse-*Witherspoon* error)].)

Here, appellant cites numerous instances of alleged error in the trial court's statements during voir dire. However, neither appellant nor counsel raised any objection on these ground at the time the statements were made, nor, for that matter, at any time during the proceedings. Counsel did object that

some of the court's questions were leading, and suggested that the court's treatment of both he and the prosecutor showed an implied bias against attorneys as advocates when both sides made emotional appeals to the jury (see, i.e., VI RT 1180), but these objections were on grounds different than he now raises and involved only his unsuccessful challenge of a particular juror who was never even seated on the panel (VI RT 1179-1180). (*People v. Green* (1980) 27 Cal.3d 1, 22 [objection on ground that questions were leading does not preserve appellate argument that the evidence was impermissible evidence of other crimes], cited in *People v. Seijas* (2005) 36 Cal.4th 291, 302; see *People v. Demetrulias* (2006) 39 Cal.4th 1, 21-22 [relevance objection not sufficiently specific to preserve 1103 claim, and subsequent motion to strike testimony on 1103 grounds was untimely]; cf. *People v. Freeman* (1994) 8 Cal.4th 450, 482-484 [finding waiver where defense counsel informed first jury panel about appellant's prior conviction for armed robbery even though defendant subsequently moved to strike jury panel and for mistrial].) This was exactly the type of situation in which the trial court could easily have clarified any possible misunderstanding from the comments, but was never asked to do so and thus, the claim has not been preserved. (*Freeman, supra*, 8 Cal.4th at p. 487.)

Nor were appellant's own comments sufficient to preserve the issue. (See AOB 129-130.) At one point during voir dire, the court permitted appellant to speak under the assumption that appellant was making a *Marsden*[3] motion. (VIII RT 1591-1592.) Once the court realized appellant was simply voicing general concerns about perceived unfairness in the process, the court permitted the prosecutor to reenter the room and continued the discussion with

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3. *People v. Marsden* (1970) 2 Cal.3d 118 [requiring trial court to give defendant sufficient opportunity to voice concerns about the quality of defense counsel's representation].

appellant. Appellant pointed to instances which he believed showed that the prosecutor was attempting to influence the jury against him. The court responded that it generally allowed a significant amount of latitude during voir dire and that appellant's counsel had undertaken the same role, as expected of an advocate, as did the prosecutor. (VIII RT 1591-1595.) Appellant discussed the possibility of making future unspecified motions, however the court informed him that any motions -- outside *Marsden* motions -- must be made by his counsel.[4/] Appellant never once complained about the lack of instruction on an alleged presumption for life in the court's own questions and commentary, and neither appellant nor counsel made any motions in this regard. There was nothing specific, or timely, about appellant's conduct that would have alerted the court to the alleged misstatements regarding a presumptive burden of proof. The claim is not preserved for appellate review.

B. The Claim is Not One of Instructional Error

Appellant attempts to sidestep the procedural requirements of making an objection to alerting the court to any perceived errors by claiming this is "instructional" error rather than one relating to jury selection. However, the alleged errors occurred only during voir dire and were not connected in any way to the jury's penalty phase deliberations. (See *People v. Medina* (1995) 11 Cal.4th 694, 743 ["[A]s a general matter, it is unlikely that errors or misconduct occurring during voir dire questioning will unduly influence the jury's verdcit in the case."].) As this Court has recognized, voir dire is a time early in the trial when "the jury's attention is not narrowly focused on its duty to select a penalty,

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4. We strongly disagree with appellant's insinuation that the court in any way denigrated appellant or "dismissed" his remarks due to an "inferior perspective." (AOB 130.) Here, the court merely explained that it was counsel's role, rather than that of the defendant, to make appropriate motions and objections. (See VIII RT 1595.)

and the potential for prejudice is slight." (*People v. Pinholster* (1992) 1 Cal.4th 865, 918, citing *People v. Walker* (1988) 47 Cal.3d 605, 627; *People v. Ghent* (1987) 43 Cal.3d 739, 769-770; see also *People v. Box* (2000) 23 Cal.4th 1153, 1198.) In fact, no error can be evident from a court's voir dire statements where the jury is later expressly instructed on the proper law that applies. (*Box, supra*, at p. 1198 [finding any voir dire comment regarding Governor's commutation power (i.e., a *Briggs* instruction) was cured by penalty phase instructions to the contrary].)

Here, the trial court instructed the jury on the law applicable to aggravating and mitigating circumstances prior to its penalty phase deliberations. (See 29 RT 5502.) The court specifically gave both CALJIC Numbers 8.88 and 8.84.2. Those instructions properly explained the use of aggravating and mitigating evidence and guided the jury in its penalty decision. (See, e.g., *People v. Moon* (2005) 37 Cal.4th 1, 40-41.) The court further instructed the jurors to rely on the court's penalty phase instructions rather than the arguments of counsel or other contradictory signals, where such contradictions existed. (See XXIX RT 5491-5492 ["You must accept and follow the law that I shall state to you. Disregard all other instructions that were given to you in other phases of this trial."].) As this Court has stated on countless occasions, "We presume that a jury follow[ed its] instructions." (*People v. Boyette* (2002) 29 Cal.4th 381, 436; *People v. Morales* (2001) 25 Cal.4th 34, 47.) The court did not encourage the jury to lie about any perceived racial bias (see, e.g., *People v. Mello* (2002) 97 Cal.App.4th 511, 516; see also *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 649-650 [*Mello* error reviewable without objection]), nor was this a case in which the statement was so plainly erroneous standing on its face, that it could not subsequently be cured as part of the court's overall charge to the jury. (See *People v. Fehrenbach* (1894) 102 Cal. 394, 402; see also *People v. Kainzrants* (1996) 45 Cal.App.4th

1068, 1075 ["[E]rror cannot be predicated on the fact verbal inaccuracies appear in some parts of the instructions, or that isolated phrases, sentences, or excerpts are open to criticism."].) As noted below, this Court's precedents could not be clearer in stating there simply is no presumption in favor of a life sentence. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1298.) Thus, even assuming the court's voir dire comments could be construed as completely eliminating any presumption in favor of a life sentence, there was simply no "clear" misstatement or misdirection that could not be "cured" by the court's subsequent instructions, and the later instructions eliminated any possibility for error in the court's prior voir dire comments. (*People v. Box, supra*, 23 Cal.4th at p. 1198.)

C. Legal Standard

Even considered on the merits, appellant's claim fails. A California penalty phase jury does not start from the presumption in favor of a life sentence, as appellant would suggest (see AOB 123). (*People v. Prince, supra*, 40 Cal.4th at p. 1298; *People v. Maury* (2003) 30 Cal.4th 342, 440.) Neither the State nor Federal Constitutions mandate any instruction about a "legal compulsion to impose life" (see AOB 126) under any circumstances. (*Ibid.*) Instead, the Court has stated that "capital sentencing is a moral and normative process . . . ." (*Maury, supra*, 30 Cal.4th at p. 440, quoting *People v. Holt* (1997) 15 Cal.4th 619, 684.) As this Court has said:

> [T]he focus of the penalty selection phase of a capital trial is more normative and less factual than the guilt phase. The penalty jury's principal task is the moral endeavor of deciding whether the death sentence should be imposed on a defendant who has already been determined to be 'death eligible' as a result of the findings and verdict reached at the guilt phase. In such a penalty selection undertaking, the Eighth Amendment's strictures are less rigid, more open-ended than the narrowing function of the capital sentencing scheme that has already occurred . . . . [W]ith respect to the process of selecting from among that class [of death eligible defendants] those defendants who will actually

> be sentenced to death, '[w]hat is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime.' (*Zant v. Stephens* (1983) 462 U.S. 862, 879.) It is not a mechanical finding of facts that resolves the penalty decision, ""but . . . the jury's moral assessment of those facts as they reflect on whether defendant should be put to death . . . ."" (*People v. Brown* (1985) 40 Cal.3d 512, 540.)" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1267-1268.) Thus, once a defendant is rendered death eligible by the jury having found true at least one special circumstance allegation (*People v. Boyette, supra*, 29 Cal.4th at pp. 439-440), "'the constitutional prohibition on arbitrary and capricious capital sentencing determinations is not violated by a capital sentencing "scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute." [Citation.]' (*California v. Ramos* (1983) 463 U.S. 992, 1009, fn. 22.)

(*People v. Moon, supra*, 37 Cal.4th at pp. 40-41, quoting *People v. Bolin* (1998) 18 Cal.4th 297, 342.)

There is no special burden of proof in the penalty phase, apart from the jury's normative decision. (*People v. Bonilla* (2007) 41 Cal.4th 313, 359, citing *People v. Demetrulias, supra*, 39 Cal.4th at p. 40; *People v. Moon, supra*, 37 Cal.4th at pp. 43-44; *People v. Stitely* (2005) 35 Cal.4th 514, 573; see *People v. Wilson* (2005) 36 Cal.4th 309, 360 [finding no error in prosecution's argument that "We don't have that burden here . . . [T]here's no burden one way or another."].) Finally, this Court has repeatedly held that CALJIC Number 8.88 is "not unconstitutional for failing to inform the jury that if it finds the circumstances in mitigation outweigh those in aggravation, it is required to impose a sentence of life without the possibility of parole[.]" (*Moon, supra*, 37 Cal.4th at p. 42, citing *People v. Dennis* (1998) 17 Cal.4th 468, 552.) Similarly, the jury need not be instructed "it has discretion to return a verdict of life even in the absence of mitigating circumstances" (*Moon, supra*, at p. 43, citing *People v. Ray* (1996) 13 Cal.4th 313, 355), or even that "death must be the appropriate penalty, not just the warranted penalty . . . ." (*Moon, supra*, at p.

43, citing *People v. Boyette, supra*, 29 Cal.4th at p. 465.) And again, there is simply no presumption in favor of any particular sentence. (*Ibid.*)

Thus, while this Court has approved tentative language instructing jurors "that to return a verdict of death they must be persuaded that the 'aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole'" (see *People v. Brown* (1985) 40 Cal.3d 512, 545, fn. 19, see also CALJIC No. 8.84.2), there is no need to additionally instruct on the converse, i.e., "that life without parole is the appropriate sentence if the mitigating circumstances outweigh the aggravating." (See *People v. Duncan* (1991) 53 Cal.3d 955, 978.) And in fact, such an instruction, tracking verbatim the language of Penal Code section 190.3,[5] has the potential to confuse the jurors. (See *People v. Duncan, supra,* 53 Cal.3d at p. 978.) Thus, it is not a question of "inferring" a duty to vote for a life sentence as appellant would contend (see AOB 123), since *Duncan* was actually considering a different legal proposition. This Court even cited *Blystone v. Pennsylvania* (1990) 494 U.S. 299, which upheld imposition of a mandatory death sentence upon the finding of a single aggravating factor and no mitigating factors, so long as jury was not precluded from considering all relevant mitigating evidence (*Blystone, supra*, 494 U.S. at pp. 306-307) in support of its opinion. (See *Duncan, supra*, 53 Cal.3d at p. 979.)

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5. "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and *shall* impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose the sentence of confinement in state prison for a term of life without the possibility of parole." (Emphases added.)

Appellant's summation of the court's concluding instructions is in fact, an accurate reflection of California and Federal law: "The final instructions said nothing about the circumstances under which jurors could, should, or must, vote for life. No matter how the jurors appraised the mitigating evidence, their instructions never required them to vote for life as individual jurors or to impose life as a sentencing body." (AOB 135 (emphasis in original).) No instruction of this sort is required, either sua sponte or upon request.

D. The Trial Court Correctly Stated the Law

The trial court's statements to prospective jurors, even absent the context of the full instructions which were later given, did not contravene established California precedent regarding the lack of any particular burden of proof in imposing capital punishment. Appellant focuses on several passages in which the trial court stated, either to an entire prospective panel or during examination of prospective jurors, that there is no particular burden of proof in the penalty phase. (See, e.g., 7 RT 1356 ["[A]s you can see there is no burden of proof in that particular portion of the case."], 6 RT 1215 ["[I]t isn't the duty of a juror to vote for death or life without the possibility of parole, but it's the obligation of the jury to at least be able to consider these things."].) From this, appellant draws the inference that the entire jury was instructed that there is no presumption in favor of a life sentence. (See AOB 123.) Then, by extending this reasoning, he extrapolates the likelihood that there was no possibility of obtaining a fair trial. Not only does appellant erroneously characterize the court's statement, but again, he erroneously infers that there is a presumption in favor of either a life or death sentence. (See *People v. Moon, supra*, 40 Cal.4th at pp. 40-41.) Additionally, appellant cannot show any possibility of prejudice because most of the testimony which he cites involved jurors that were never seated, and is thus not even subject to attack. (*People v. Visciotti*, 2 Cal.4th at pp. 48-49.)

Appellant specifically focuses on particular questions asked of Juror Number 11 as an example of the alleged problems in the court's questioning. (AOB 125.) However, nothing in that juror's answers suggested the juror would ignore mitigating evidence or afford undue weight to the aggravating evidence.[6] Although the trial court's questioning was not wholly symmetrical, and did not ask whether Juror Number 11 would "actually" vote for life if the circumstances warranted (see AOB 125), this Court has repeatedly rejected similar assertions in which a claim of error was raised because the trial court did not pose symmetrical hypotheticals. (See *People v. Freeman, supra*, 8 Cal.4th at p. 487.)

After repeatedly reminding Juror Number 11 that his duties and responsibilities as a juror would include consideration of both aggravating and mitigating evidence, and that he would be required to fairly consider both penalties in making his ultimate decision, the court repeatedly asked Juror Number 11 if he would be able to properly fulfill his responsibilities (see 6 RT

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6. To the extent appellant is also insinuating that his challenge for cause against Juror Number 11 was improperly denied, the claim would also fail. (*People v. Cash, supra*, 28 Cal.4th at p. 721 ["Prospective jurors may be excused for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as jurors."], citing (*Wainwright v. Witt, supra*, 469 U.S. at p. 424.) Although Juror 11's voir dire answers initially seemed to conflict with his questionnaire (see VI RT 1209-122), this was due to the inartful nature of the questions posed by the trial court rather than the juror's particular state of mind. (See VI RT 1209:13-24.) The juror had no reservations about voting for either penalty, appeared to disavow the seemingly hardline stance expressed in the questionnaire (see VI RT 1210) and specifically agreed that he could listen to and fully consider the mitigating evidence in determining the appropriate penalty. (VI RT 1210-1211.) A court has significant discretion in this area to determine whether a particular juror can fairly weigh the aggravating and mitigating evidence and render an unbiased decision. (See *People v. Cash, supra*, 28 Cal.4th at pp. 721-722.) Moreover, appellant did not use all of his peremptory challenges, and thus, such an argument is not even available to him on appeal. (See *People v. Coffman, supra*, 34 Cal.4th at p. 47.)

1210-1211), and each time the juror responded, "Yes." (VI RT 1209-1211.) Although one of the questions, to which Juror Number 11 responded "no problem," had been inartfully phrased by the trial court, the clear import of the juror's answers was that he could keep an open mind, that he could consider all of the evidence both for and against appellant, and that he was not predisposed to consider only one of the two penalties at the time he began hearing the penalty phase of the case. Thus, while Juror Number 11 did not fit the profile of an ideal defense juror, he was well within the realm of an ideal unbiased trial juror that the law requires to hear the case.

In other passages, in front of separate panels, the trial court stated that prospective jurors could choose life if mitigation outweighed aggravation. (See V RT 882-883; VII RT 1356, 1446.) The court further stated that there was no burden of proof during the penalty phase. (VII RT 1356.) From this, appellant complains that the trial court was obligated to also include an instruction requiring a vote for life in a scenario in which mitigation outweighed aggravation. (AOB 126.)

Again, there is no requirement of symmetry in the court's questions. (See *Freeman, supra*, at p. 487.) Moreover, the court's statement was actually in direct contrast with a prior question asking whether a juror would automatically vote for death, even in the face of other mitigating evidence. (See V RT 882-883.) More importantly, appellant's argument again confuses the qualitative nature of the decision in the penalty phase of a capital case with a quantitative decision in which, after determining the weight and measure of a particular piece of evidence, it is placed upon a particular side by the jury. Instead, in making the qualitative determination of which penalty is appropriate, the jury is simply asked to determine if the weight and substance of the aggravating evidence is such that, in comparison to the evidence submitted in mitigation, death would be the appropriate penalty. As this Court has

repeatedly stated:

> [T]he only question the court need resolve during this stage of the voir dire is whether any prospective juror has such conscientious or religious scruples about capital punishment, in the abstract, that his views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

(*People v. Visciotti, supra*, 1 Cal.4th at pp. 47-48.)

The court did not err in informing the jury that there was no presumption in favor of a life sentence, and the court had no obligation to "instruct" on any particular burden of proof during the penalty phase. Moreover, the court gave CALJIC Number 8.84.2. (XXIX RT 5502.) That instruction states: "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.84.2 (1986 rev.).) Any error was patently harmless. The claim fails.

III.

A PENALTY PHASE JURY IS NEVER PRECLUDED FROM USING THE FACTS AND CIRCUMSTANCES OF THE CRIME

Appellant contends the trial court erred in "instructing" the jury during voir dire that it could use "all the crime facts" as aggravating factors during the penalty phase.[7] (AOB 136.) The "instructions" were instead primarily statements to individual jurors, taken somewhat out of context, attempting to ensure the neutrality of jurors during the penalty phase. The language was permissive, not mandatory, spoke about the crime "facts" rather than the elements in the abstract, and properly permitted the jurors to consider all the

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7. Appellant's companion argument, that the trial court was obligated to give a sua sponte instruction expressly precluding use of facts to prove elements of the crime as factors in aggravation, is set forth in claim 18.

circumstances of the crime during the penalty phase.

A. Waiver

Like the previous claim, appellant has failed to preserve this issue for appellate review. And, like the previous claim, the focus does not appear to be one of instructional error, but instead, a claim attacking the voir dire process. In fact, appellant has done nothing more in this claim than block and copy several paragraphs from the previous argument in which he claimed the issue was preserved because he characterized it as instructional error, and both appellant and counsel, at separate times, challenged the trial court's neutrality. (Compare AOB 129-130 with AOB 142-143.) We will not repeat the steps underlying our assertion of waiver, other than to reiterate that if appellant wished to preserve this claim for review, he was obligated to make a timely and specific objection, calling the court's attention to both the nature of the alleged error and any appropriate curative measures. (*People v. Partida, supra*, 37 Cal.4th at p. 435; see *People v. Carey, supra*, 41 Cal.4th at p. 126; Cal. Const., art. VI, § 13; Evid. Code, § 353.)

We do, however, note one additional fact not presented in the previous argument -- that defense counsel even asked the jurors whether they were "tough enough" to handle this case -- thus, suggesting that there was no real dispute that the crime facts were not conducive to mitigation. (See VIII RT 1562.)

B. Merits

Putting aside the turgid double and triple negatives that attempt to frame ideas this Court has never contemplated (see AOB 138), the essence of appellant's argument is that the jury was not permitted to consider the facts used to prove the elements of first degree murder such as premeditation and deliberation, as aggravating factors. This Court has specifically and repeatedly

rejected various formulations of appellant's contention, expressly holding that a penalty phase jury cannot be precluded from using any fact properly admitted as a circumstance in the commission of the crime (Pen. Code, § 190.3, subd. (a)) as evidence in aggravation. Or, more plainly put, a penalty phase jury *is entitled to* consider all of the facts and circumstances of the offense. In *People v. Coddington* (2000) 23 Cal.4th 529, 640, this Court stated:

> Appellant next contends that the jury should have been instructed that it could not consider any aspect of the crimes that was part and parcel of the elements of first degree murder as aggravating. He derives authority for this proposition from this court's statement in *People v. Dyer* (1988) 45 Cal.3d 26, 77, that the following instruction was a useful framework within which a jury could consider the aggravating circumstances set out in section 190.3: "An aggravating circumstance is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the offense itself."
>
> Appellant's understanding of that instruction, which he complains was not given in this case, is faulty. *Dyer* did not say that the manner in which the elements of first degree murder were established could not be considered aggravating. It said only that additional circumstances attending the commission of the crime could also be considered.
>
> Were appellant's construction of section 190.3, factor (a) accepted, a jury could not consider the method of killing or evidence of extensive planning offered to establish premeditation as aggravating factors. That is not the law. All circumstances of the crime or crimes may be considered. (§ 190.3, factor (a); see, e.g., *People v. Ramos, supra*, 15 Cal.4th at p. 1170 [photographs showing execution-style form of killing, manner of inflicting wounds, also relevant to intent]; *People v. Proctor, supra*, 4 Cal.4th at p. 552 [fact that telephone line cut, and victim raped, beaten, stabbed, and intentionally tortured properly considered under § 190.3, factor (a)].)

(See also *People v. Earp* (1999) 20 Cal.4th 826, 900-901 ["'The argument to the contrary,' we stated, 'reveals' a 'basic misunderstanding' of the statutory scheme since, in order to perform its moral evaluation of whether death was the appropriate penalty, the facts of the murder 'cannot comprehensively be

withdrawn from the jury's consideration . . . ."].) The Court's reasoning was set forth comprehensively in *People v. Moon, supra*, 37 Cal.4th at pp. 40-41:

> Contrary to defendant's argument, we have explained that "the focus of the penalty selection phase of a capital trial is more normative and less factual than the guilt phase. The penalty jury's principal task is the moral endeavor of deciding whether the death sentence should be imposed on a defendant who has already been determined to be 'death eligible' as a result of the findings and verdict reached at the guilt phase. In such a penalty selection undertaking, the Eighth Amendment's strictures are less rigid, more open-ended than the narrowing function of the capital sentencing scheme that has already occurred . . . . [A]s this [C]ourt and the United States Supreme Court have pointed out, with respect to the process of selecting from among that class [of death eligible defendants] those defendants who will actually be sentenced to death, '[w]hat is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime.'" (*Zant v. Stephens* (1983) 462 U.S. 862, 879.) It is not a mechanical finding of facts that resolves the penalty decision, "but . . . the jury's moral assessment of those facts as they reflect on whether defendant should be put to death . . . ."

Similarly, the Court has rejected arguments regarding supposed "double-counting" and held that a court considering a motion to modify the verdict under section 190.4, subdivision (e), must take into account all of the circumstances in the commission of the offense, including the facts used to prove the elements:

> We also reject defendant's assumption that the court cannot consider or double-count the "bare elements" of the capital crime as an aggravating factor in ruling on the modification motion. Section 190.4(e) directs the court to take into account "the aggravating and mitigating circumstances referred to in Section 190.3." As explained earlier in the text, facts used to sustain the murder and special circumstance verdicts *may be considered* as a circumstance of the crime under section 190.3, factor (a). Thus, nothing prevented the court from relying on the "element" of premeditation in deciding whether to uphold the death verdict under section 190.4(e).

(*People v. Millwee* (1998) 18 Cal.4th 96, 167, fn. 38 [emphasis added].)

Even assuming, arguendo, a court could preclude the jury from considering the bare elements of the offense, appellant's claim still fails. (See *Areve v. Creech* (1993) 507 U.S. 463, 474 [upholding capital murder sentence because "cold-blooded, pitiless slayer" who killed with "utter disregard" has sufficient meaning to channel sentencer's discretion], see also *Lowenfield v. Phelps* (1988) 484 U.S. 231, 246 ["[T]he fact that the aggravating circumstance duplicated one of the elements of the crime does not make [the death] sentence constitutionally infirm . . . ."], cited in *People v. Millwee, supra*, 18 Cal.4th at p. 164; see also *California v. Ramos* (1983) 463 U.S. 992, 1009, fn. 22 ["[T]he constitutional prohibition on arbitrary and capricious capital sentencing determinations is not violated by a capital sentencing 'scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute.'"]). Here, the trial court did nothing more than properly advise the jury that the evidence it would be using to make its penalty phase determination would include the crime facts. (See *People v. Brown* (2003) 31 Cal.4th 518, 566 ["[T]he second sentence [of the proposed special instruction], prohibiting the jury from assigning aggravating effect to the circumstances of the offense without first considering the 'circumstances surrounding it,' was argumentative and also properly refused."].) Although the court occasionally told prospective jurors that the People's case in aggravation "can include things like the crime facts themselves" (VII RT 1445; see also VI RT 1234-1235 [suggesting the jury will likely receive "aggravating evidence which can include the crime facts themselves as well as mitigating evidence"]), the context of its statements was always permissive rather than mandatory (see V RT 881 [crime facts "may be" aggravating]; VII RT 1367 [discussing crime facts "you can consider"]; VI RT 1170 [noting that the jury is "entitled to consider" the crime facts as evidence in aggravation, but "that isn't the end all

of the penalty phase"]; VIII RT 1564 ["the law is not going to give you any guidance as to these facts"]), and the court never - not once -- told the jury that it could use the bare elements of the crime as factors in aggravation.

It was never suggested that jurors could impose death simply because this was a first degree murder, or even because it was premeditated. In fact, the court took great pains to emphasize just the opposite in attempting to rehabilitate several jurors who had mentioned that they would "always" vote for death in cases of premeditated murder. (See e.g., VI RT 1231.) Instead, the court simply informed the jurors of the common notion that the facts of this particular double-murder, including the extensive evidence showing premeditation and deliberation, could be considered in arriving at the appropriate sentence.

Appellant contends the prosecutor "exploited" the use of deliberation and premeditation as aggravating factors when he focused on appellant's plan to "send shockwaves" a la "101 California" (AOB 149, footnote 23, citing XXIX RT 5536), and his comparison to other special circumstance cases "where the killing was accidental or intentional, but it wasn't deliberate." (AOB 149, quoting 29 RT 5518.) Not only does appellant take the district attorney's quotes out of context, but he blatantly ignores the surrounding content in which the district attorney specifically recognized that not every fact or piece of evidence is a factor in either mitigation or aggravation; that there was some middle ground as well. (XXIX RT 5520-5521.) In fact, the district attorney specifically recognized that aggravating evidence is limited to those details that go beyond the bare elements of malice, premeditation, and deliberation (XXIX RT 5530), and that factors (a) and (d) through (k) do not represent an all or nothing choice, but can be neutral as well. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 509-510 [recognizing that prosecutor can argue for purpose of neutralizing factors as effectively as arguing in favor or

against some factors].) Appellant's deliberation, beyond that necessary to prove murder, was shown by his admitted choice not to kill Janet Robinson (XXIX RT 5530), appellant's decision to seek out a third victim -- Shirail Burton -- and the fact that Ms. Burton was doubly unfortunate in not only losing her best friend and maid of honor, but having to sit through evidence on which she learned that she was also a likely target and escaped the fate of her friend only through providence. (XXIX RT 5530-5531.)

Appellant even faults the prosecutor for failing to "correct" the statements of a prospective juror. (See AOB 144.) Although the State may have an obligation to correct material misstatements made by its witnesses (see, e.g., *Giglio v. United States* (1972) 405 U.S. 150, 154), appellant fails to cite any authority that requires either the prosecutor or the court to correct the opinions rendered by prospective jurors -- particularly those not even seated -- during the course of voir dire. Appellant similarly made no effort to correct the juror's statement, and thus, is no "less" at fault. To the extent appellant is attempting to attack the voir dire of a nonseated juror, his claim must fail. (*People v. Visciotti, supra*, 2 Cal.4th at pp. 48-49.)

Appellant would preclude the jury from considering any evidence that went to prove appellant's premeditation, deliberation, or specific intent to kill, as aggravation during the penalty phase. (See AOB 148 ["Even the guilt phase instructions fell short of attaching the label "element" to any mental state beyond malice aforethought."].) As noted above, this Court has completely rejected the notion that a penalty phase jury is precluded from considering evidence proving an element of the crime. (See *People v. Coddington, supra,* 23 Cal.4th at p. 640.) Indeed, even *Dyer*, the case spawning the definition of "aggravation" favored by appellant, rejected his claim outright. (See *Coddington, supra*, at p. 640 ["*Dyer* did not say that the manner in which the elements of first degree murder were established could not be considered

aggravating. It said only that additional circumstances attending the commission of the crime could also be considered."], citing *People v. Dyer* (1988) 45 Cal.3d 26, 77.)

Moreover, the court explicitly defined the term "aggravation" for the jury. In beginning its closing instructions, the court told the jurors that "you will now be instructed as to all of the law that applies to the penalty phase of the trial." (XXIX RT 5491.) The court then read CALJIC No. 8.88, which specifically defines "an aggravating factor as any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (XXIX RT 5501.) Although this language, originally taken from Black's Law Dictionary via *People v. Dyer, supra*, 45 Cal.3d at p. 77, has never been constitutionally required (see *People v. Hawkins* (1995) 10 Cal.4th 920, 966), this Court has repeatedly affirmed where the instruction has been given in cases with similar claims of instructional error involving definitions of aggravation and mitigation have been challenged. (See *People v. Millwee, supra*, 18 Cal.4th at p. 164 ["Although [CALJIC No. 8.88] was not required [citation], it appears to address defendant's concern that he was sentenced to death based solely on facts or "elements" no different from those found in every first degree murder case."].)

In addition to the court's repeated admonition during voir dire that the jury was required to follow the court's instructions as to the law (II RT 320), the court again admonished the jury during final pre-deliberation instructions -- some 50 days later -- that it was required to "accept and follow the law that [the court] state[s] to you[, and d]isregard all other instructions given to you in other phases of this trial." (XXIX RT 5491-5492.)

For the same reason, appellant fails to show prejudice. The challenged "instructions" were made only as part of the assessment and rehabilitative

process of voir dire. (See *People v. Box, supra*, 23 Cal.4th at p. 1198 [recognizing difference between statements made during voir dire and instructions given prior to deliberation].) Thus, they carried much less weight, particularly given the court's admonition that its final instructions controlled. (See XXIX RT 5491-5492.) The statements were understandable only within the individual context of each individual voir dire, were made primarily to prospective jurors that were never even seated, and were not highlighted in any manner.

Moreover, the aggravating factors in our case went well beyond the "bare" elements proving the crimes. Appellant not only spent weeks preparing for the murders, but repeatedly focused attention on his desire to "do a 101 California"; so much so that it even precipitated his termination from the RHA, which may in turn have been the "tipping point" in appellant's mind for the murders. In other words, it was the evidence of premeditation that directly contributed to, and even hastened, the murders. There was no evidence that the jury utilized any of the "elements" in the abstract, or even used the least significant of facts that could have proven each element. Indeed, appellant not only killed two people, but was proud of it. The evidence overwhelmingly supported the jury's penalty decision and went well beyond the bare elements proving the crime.

Appellant's claim fails.

IV.

THE TRIAL COURT PROPERLY CONDUCTED AN INDIVIDUALISTIC ASSESSMENT OF EACH JUROR'S ABILITY TO FOLLOW THE LAW

In claim four, appellant contends the trial court conducted a disparate death qualification voir dire, allegedly advising those initially biased in favor of death how to stay on the jury, while not offering the same opportunities to

those opposed to capital punishment. (AOB 152-153.) He does not appear to be challenging the inclusion or exclusion of a particular juror,[8/] but instead, relegates his claim to one of general due process in the jury selection procedure itself. Not only is appellant's characterization of the record itself a bit "skewed," but this Court has previously rejected similar due process claims (*People v. Thornton* (2007) 41 Cal.4th 391, 423; *People v. Navarette* (2003) 30 Cal.4th 458, 486), recognizing that the sina qua non of death penalty voir dire is not a mechanistic counting of questions asked of a particular prospective juror, but instead, an individualistic assessment of each juror's ability to follow the court's instructions as to the law, and make a decision based solely on the facts presented rather than any preconceived notions as to the morality of capital punishment. (*Ibid.*; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1318 ["More specifically, the determinant is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror."] [internal quotations omitted].)

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8. Nor could he, given the fact that he used only four of twenty peremptory challenges (IX RT 1830-1834) (see *People v. Maury*, 30 Cal.4th at pp. 379-380; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 487; see also *Ross v. Oklahoma* (1988) 487 U.S. 81, 89), and objected at the trial level only on grounds of general "unfairness" (see V RT 1180). We specifically point to the responses of Juror Number 4 (see AOB 162-163), who gave several equivocal answers during voir dire (see, e.g., V RT 916), but was fully rehabilitated under the standards annunciated in *Witt*, and on whom appellant did not exercise a peremptory challenge. The trial court had no obligation to instruct the jury of a presumption towards a life sentence (see *People v. Prince*, *supra*, 42 Cal.4th at p. 1298), or that the lack of mitigating factors *could not* be used in aggravation (see *People v. Stanley* (2006) 39 Cal.4th 913, 962), as appellant seems to imply (see AOB 163), and appellant's failure to exercise a peremptory challenge against this juror when he had numerous challenges remaining precludes him from showing any possibility of prejudice on appeal. (See *People v. Maury*, *supra*, 30 Cal.4th at pp. 379-380; see *Ross v. Oklahoma*, *supra*, 487 U.S. at p. 89.)]

A. Waiver

Initially, we note that appellant's minimal complaints were insufficient to preserve the issue for review. Like claims two and three, appellant points only to counsel's complaints about the court's use of leading questions, and the fact that a particular question may have permitted jurors to "disregard what the lawyers are saying." (See V RT 1180.) Similarly, appellant points to his own rambling complaints, in which he broadly argued that the voir dire was "skewed" and that the court was inducing the jurors by exhaustion into changing answers given on the written questionnaires. (See VIII RT 1591-1595.) Given that appellant did not make any specific objections to the voir dire he now challenges, did not utilize all of his peremptory challenges, and did not even challenge most of the prospective jurors for cause, he is not entitled to pursue this issue on appeal. (*People v. Maury*, *supra*, 30 Cal.4th at pp. 379-380; *People v. Navarette*, 30 Cal.4th at p. 489; *People v. Staten* (2000) 24 Cal.4th 434, 454.)

Furthermore, this case is quite unlike *People v. Sturm* (2006) 37 Cal.4th 1218, 1237, in which the lack of a proper objection was excused due to the open hostility apparent from the record between the court and defense counsel and even defendant's witnesses. Notwithstanding appellant's personal characterizations, the court here conducted voir dire in an even-handed manner, and its treatment of both defense counsel and appellant showed nothing but respect. There was no pattern of disparagement of counsel or defense witnesses. (See *id.* at p. 1238.) In sum, if appellant wished to preserve this issue for further review, he was required to make appropriate objections. (See *People v. Partida*, *supra*, 37 Cal.4th at pp. 434-435; *People v. Snow* (2003) 30 Cal.4th 43, 77-78 [additionally noting the distinction between impatient comments and true judicial bias].)

Nor does any federalized nature of appellant's claim assist him. Appellant's right to voir dire is statutory, not based in the Constitution. Thus, although the Sixth Amendment imposes some general obligations of fairness regarding jury selection, it does not extend to this situation, particularly where appellant has not used all of his peremptory challenges. (*People v. Maury*, *supra*, 30 Cal.4th at pp. 379-380; *People v. Ramos* (2004) 34 Cal.4th 494, 513 [recognizing that "Legislature may establish reasonable regulations or conditions on the right to a jury trial as long as the essential elements of a jury trial are preserved"]; see *People v. Vera* (1997) 15 Cal.4th 269, 279 [*rejecting* court of appeal conclusion that objection not required to preserve *Hicks* statutory claim regarding waiver of right to jury trial for priors]; see also *People v. French* (2008) 43 Cal.4th 36, 46 [recognizing that *Vera's* limitations abrogated following *Apprendi v. New Jersey* (2000) 530 U.S. 466].) Appellant had an obligation in this context to raise his federal claims in front of the trial court in order to preserve them here. (*People v. Partida*, *supra*, 37 Cal.4th at pp. 434-435 [distinguishing between specific and general due process claims for purposes of forfeiture, and permitting claim only to extent state law objection naturally encompassed companion federal "fairness" claim].)

B. Discussion

A trial court has broad discretion in the manner in which it conducts voir dire, and is never required to ask the same rote questions of each juror lest it be accused of exhibiting bias towards either side. (*People v. Thornton*, *supra*, 41 Cal.4th at p. 425.) The only limit is that "trial courts should be evenhanded in their questions to prospective jurors during the 'death qualification' portion of the voir dire, and should inquire into the jurors' attitudes both for and against the death penalty to determine whether these views will impair their ability to serve as jurors." (*People v. Champion* (1995) 9 Cal.4th 879, 908-909; see also *People v. Thornton*, *supra*, 41 Cal.4th at p. 425.)

But a trial court is never required to ask the same number -- or even quality -- of questions for each side. For example, in *Thornton*, *supra*, the defendant complained that the trial court asked fewer questions of prospective "defense oriented" jurors than of those expressing an unusually strong desire to impose the death penalty. (*Id.* at pp. 424-425.) Although the defendant had not actually focused on any mechanical counting in *Thornton*, this Court still analogized to *People v. Navarette*, *supra*, 30 Cal.4th at p. 487, where the Court rejected a similar claim, and held that "a numerical counting of questions . . . is not sufficient to establish a constitutional violation in this context." (*Navarette*, *supra*, at p. 487, cited in *Thornton*, *supra*, at p. 425.) As the *Thornton* Court reasoned, "A reviewing court should not require a trial court's questioning of each prospective juror in the *Witherspoon-Witt* context [citations] to be similar in each case in which the court has questions, lest the court feel compelled to conduct a needlessly broad voir dire, receiving answers to questions it does not need to ask." (*Thornton*, *supra*, at p. 425.)

A reviewing court must afford that same broad deference because the standard for assessing juror bias itself is one involving the exercise of discretion, which requires the trial court to make factual determinations in all but the most extreme of cases. (See *People v. DePriest* (2007) 42 Cal.4th 1, 21 ["Indeed, where answers given on voir dire are equivocal or conflicting, the trial court's assessment of the person's state of mind is generally binding on appeal."].) In fact, the standard for determining whether a person is qualified to sit on a capital case "is not limited to determining whether the person zealously opposes or supports the death penalty in every case." (*Ibid.*) The standard applies the same to prosecution challenges as it does to the defense. (*Ibid.*; see *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 728-729.) "Under federal and state law, a prospective juror may be excluded for cause where his views on capital punishment would 'prevent or substantially impair the performance

of his duties as a juror in accordance with his instructions and his oath.'" (*Ibid.*, quoting *Wainwright v. Witt*, *supra*, 469 U.S. at p. 424, clarifying *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522, fn. 21.) "At bottom, capital jurors must be willing and able to follow the law, weigh the sentencing factors, and choose the appropriate penalty in the particular case." (*DePriest*, *supra*, 42 Cal.4th at p. 20, citing *People v. Stewart* (2004) 33 Cal.4th 425, 446-447.)

Here, the trial court began the voir dire process by instructing the potential jurors that "there are no right answers other than truthful answers" (V RT 870:15-17), and that a juror's frame of mind when making the appropriate penalty decision must begin from a point of neutrality. (V RT 873:19-22.) In questioning Prospective Juror C.A., who was the first prospective juror examined in the first voir dire panel, the trial court made sure that the juror understood the penalty phase process before asking whether or not she could start from a position of neutrality.

Although Prospective Juror C.A. had initially expressed an opinion in her questionnaire that might appear biased in favor of death (see V RT 871-874, 979), her subsequent answers during voir dire clearly showed that her initial opinion expressed in the questionnaire was not an accurate reflection of her true feelings. (See V RT 976, 979.) After the court briefly explained the penalty phase process and the requirement that qualified jurors start from a position of neutrality, C.A. explained that she would be able to start from a position of neutrality (V RT 874-875, see also 979-980), and that she had an open mind and would be able to follow the court's instruction. (V RT 876.) For example, in response to the court's question, "Do you think because you have already determined in phase one the person is guilty of murder that regardless of what the evidence is in phase two you would always vote for the death penalty?" Juror C.A. replied, "No, I don't think I would. I would have to get it all in first." (V RT 875.)

Appellant does not seem to complain about the process of qualifying C.A. up to this point.[9/] However, he does complain that she was not asked whether she "could ultimately vote for life in the absence of mitigating evidence in the penalty phase . . . ." (AOB 155.) Yet appellant cites no legal basis showing that such a question was required, nor are we aware of any. (See *People v. Prince*, *supra*, 42 Cal.4th at p. 1298 [no presumption of life in penalty phase].) In fact, in response to the court's question of whether the prospective juror had an open mind and would follow the court's instruction to vote for life if it was clearly warranted by her balancing of the aggravating and mitigating evidence, C.A. stated that she would not have any predisposition to vote either way – that she "could put [her] mind in neutral" – before deliberating in the penalty phase. (V RT 876-877.) In short, the court was taking what it found – fully within its discretion -- to be an equivocality and probing that opinion to see whether the juror would "be willing and able to follow the law, weigh the sentencing factors, and choose the appropriate penalty in the particular case." (*DePriest*, *supra*, 42 Cal.4th at p. 20, citing *People v. Stewart, supra,* 33 Cal.4th at pp. 446-447.)

Similarly, in questioning another Prospective Juror, A.C., who had initially expressed a belief that the state should impose death upon everyone who "intentionally kills another human being" (V RT 888, see AOB 158), the judge informed the juror "what we are dealing with here in this courtroom is going to be what the law is rather than what any of use personally feels it should be" (see V RT 889), and then asked the prospective juror whether she could put her "personal feelings aside and deal with the law as I give it to you." (V RT 889.) The prospective juror responded that after being informed of the

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9. We note that in later, extended, individual questioning, C.A. even responded that she thought the death penalty was imposed much too often. (V RT 977-978.)

process, she now "understood [her role] a little better" (V RT 890), and would not automatically vote for the death penalty, but "would have to hear the circumstances." (V RT 890.) In sum, again, the court was simply exercising its discretion to properly rehabilitate a prospective juror who had initially expressed an answer in her questionnaire that was rendered without a true understanding of her role in the process or knowledge of her obligation to begin from a point of neutrality. The court did not abuse its discretion.

Appellant vehemently attacks the voir dire of Prospective Juror S.B. (AOB 155-158), who initially expressed a firm belief in imposing the death penalty on those who intentionally kill with premeditation and deliberation. (See V RT 879.) However, S.B. -- like A.C. -- was equivocal in his answers, stating "I don't know" several times when asked whether he would "always" vote for the death penalty in case of premeditation (see, e.g., V RT 881), and then conceding he would start from "a neutral frame of mind" in the penalty phase.[10/] (V RT 882.) Although S.B.'s answers may have rendered him a prime candidate for a peremptory challenge from the defense, and he was ultimately excused for hardship with the stipulation from both counsel (see V RT 976), S.B. expressed exactly that type of neutrality that affords a trial court discretion in choosing to keep him on the panel. (See *People v. DePriest, supra*, 42 Cal.4th at p. 20.) The court did not abuse its discretion here.

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10. Appellant complains that the court gave a "circuitous" answer when S.B. asked for a definition of "overwhelming" evidence. (See AOB 157.) As the court fully recognized, it was not able to define this term (see V RT 883 ["I cannot tell you what quantum of evidence that is going to be . . . ."]), and properly informed S.B. that it was the jury's role to weigh and assess the quality of the penalty phase evidence, and make a determination based on that evidence. (See V RT 883.) To go beyond that would quantify an exclusively qualitative determination in derogation of this Court's precedent. (See *People v. Prince, supra*, 42 Cal.4th at p. 1298 [no presumption in penalty phase]; *People v. Moon, supra*, 40 Cal.4th at pp. 40-41 [permitting jury to use penalty phase evidence as it sees fit].)

In contrast, Prospective Juror E.E. expressed a staunch opposition to the death penalty in her questionnaire: "I oppose the death penalty. I do not believe the state has a right to kill." (V RT 907.) When the judge asked whether the juror's opinion would "prevent [her] from sitting on this jury," Prospective Juror E.E. again responded, "I do not believe in the death penalty and I know that I could not -- I just can't be a part of it." (V RT 907.) The court asked several more questions in an effort to determine whether Prospective Juror E.E. could be rehabilitated, but the prospective juror repeated her answer that she "just can't be a part of it," (V RT 908), and asserted that she would automatically vote for life regardless of the evidence. (V RT 908.) Unlike Prospective Juror C.A., E.E. continuously and repeatedly expressed unequivocal disqualifying answers. In contrast to other properly rehabilitated prospective jurors, such as L.D. (see V RT 901-902) or M.V. (see V RT 940), both of whom expressed the ability to be "neutral" at the start of the penalty phase,[11] E.E. was a staunch opponent of the death penalty who would not consider voting for anything but life, and did not wish even to be a part of the process. (See V RT 907.) Regardless of the questions asserted by the trial court, there was simply nothing the court could do that would even bring her within the range of equivocality that would permit the court to exercise discretion in attempting to rehabilitate her further. She expressed a significantly stronger sentiment against the death penalty than did any of the other prospective jurors who had been examined and rehabilitated, and the court did not abuse its discretion, either in its questions to rehabilitate her, or ultimately, in choosing to excuse her for cause.

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11. We note that a third prospective juror. R.H., was examined at length individually and subsequently excused after he voiced concerns of his own racism. (See V RT 909, 945-950.)

Similarly, Prospective Juror M.K. was a staunch opponent of the death penalty. Prospective Juror M.K. belonged to the ACLU and believed the state should "never" impose the death penalty, even on those who kill intentionally, with premeditation and deliberation. (See 3 ACT 1173-1175.) Given the strength of determination against capital punishment expressed on her questionnaire, the court was well within its discretion in asking only a few questions and then moving on; whether she could "perceive a situation where [she] would be able to vote for the death penalty," to which she responded "no," (V RT 916-917) and whether she was "communicating with [him]" that she would "automatically" vote for life and never "be able to vote for the death penalty," to which she responded yes. (V RT 917.) This was not a case in which the juror would be able to look at the facts starting from a point of neutrality, but one in which the prospective juror had maintained an established moral opposition to capital punishment and would render the same decision regardless of the evidence. (See *Thornton, supra,* at p. 423; *Bradford, supra*, 15 Cal.4th at p. 1318.)

The court was not obligated to conduct lengthy voir dire for other prospective jurors who expressed similarly staunch and unyielding opposition to capital punishment, such as Prospective Jurors F.M. (see V RT 921 ["would automatically vote for life"]), D.M. (V RT 923 ["I would never" vote for the death penalty]), L.U. (V RT 935 [noting jurors "strong feelings" about death penalty and that juror responded "No way," when asked whether she could ever impose the death penalty]). Likewise, the court had no obligation to conduct lengthy voir dire for jurors who said they could "sometimes" vote for death, depending on the circumstances. (See V RT 920; see also V RT 926-927 [Juror No. 12]; V RT 928-929 [P.P.]) Or, for that matter lengthy voir dire of a juror who was "not receptive" to imposing a life sentence under any circumstances, would "automatically" impose death regardless of the circumstances, and

refused to follow the court's instructions on the law.[12] (V RT 930-931; see also V RT 931-933 [juror who had unchangeable, preconceived disposition towards particular verdict in guilt phase].)

In sum, appellant has failed to show any legitimate disparity, let alone disparate treatment sufficient to constitute a due process violation. The court appropriately spent extra time with the jurors it felt it could rehabilitate, and had no reason to spend an inordinate amount of time with other prospective jurors. Due to its factual nature, a court has extremely broad discretion in conducting voir dire and the court did not abuse that discretion here.

V.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN PERMITTING INDIVIDUALIZED VOIR DIRE ONLY ON A LIMITED CASE BY CASE BASIS

Appellant contends the trial court failed to properly exercise its discretion in denying his "request" for individualized, *Hovey*[13] voir dire. Although he recognizes that this Court's opinion in *Hovey* was abrogated by Proposition 115 (see *People v. Hoyos* (2007) 41 Cal.4th 872, 899; *Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1183), he claims the trial court's comments suggested it "simply thought group voir dire was superior to individual sequestered voir dire in general, and was unclear as to [its] power to sequester jurors for death qualification under current law," and that the court labored under the allegedly false belief that trial courts could give credence to *Hovey* only under certain circumstances not present in appellant's case. (AOB

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12. We note that Prospective Juror E.N. was ultimately excused for hardship due to vacation plans. His answers may have been slightly less candid than those of other jurors due to his self-interest.

13. *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80.

178.) Thus, appellant contends, because the court did not understand the scope of its discretion the court could not properly have exercised its discretion and his case must be reversed. (See AOB 188.)

Appellant's claim fails for several reasons. Even assuming he gets past the hurdle that the claim was not properly preserved for review, he fails to show either that the court misunderstood its discretion or would have exercised its discretion in any different manner had its knowledge been improved. Moreover, he fails to put forth sufficient evidence of the single overriding test for individualized voir dire, the requirement under Code of Civil Procedure section 223 that group voir dire was not "practicable" because of clearly identified actual, rather than potential, bias. (See *People v. Vieira* (2005) 35 Cal.4th 264, 289.) Here, appellant fails to set forth evidence showing that even a single prospective juror was negatively impacted by the group voir dire (cf., *ibid.* [suggestion that two seated jurors may have been negatively impacted by the court's comments to other prospective jurors amounted, at most, to *prospective* bias not justifying reversal]), let alone a showing that a seated juror was actually biased by a discussion conducted during the group voir dire. The claim fails.

A. Waiver

Appellant has failed to preserve the issue for appellate review. Appellant never actually objected to the court's proposed procedures and never broached the subject he now offers on appeal – the same argument made in *Hovey* -- that group voir dire somehow unfairly contributes to an atmosphere of guilt and death. Appellant had plenty of opportunity to raise this issue, as the court repeatedly opened up discussions about the best voir dire process at several times prior to trial. (See I RT 50-51, 55.) Although appellant initially expressed a preference for individualized voir dire, he did so only because he did not like things that were "new and different" (see I RT 55), and because he

did not think that group voir dire was "productive of full disclosure." (I RT 55-56.) In fact, appellant even recognized there may be some merit to the court's statement that group voir dire might encourage some jurors to be more forthcoming with their answers. (See I RT 60, 61.) Even when given the explicit opportunity, appellant did not put forth any legitimate legal reason requiring individualized voir dire (see I RT 53), and his limited complaints did not focus on bias or unfairness, but because "doing it one at a time . . . makes me [] feel like I'm getting more what I'm looking for." (I RT 61.) Appellant never specified any reasons not already rejected by the voters in enacting Code of Civil Procedure section 223, he never made any sort of motion to disqualify the jury on this basis, never offered to present any evidence in support of his current claim, and essentially did nothing to put the trial court on notice of reasons why there would be "actual" rather than potential bias. (See *People v. Vieira, supra*, 35 Cal.4th at p. 289 [finding waiver where defendant objected to repetitive questioning of death qualifying voir dire but never proposed individualized voir dire as a solution to this problem]; but see *People v. Ramos, supra*, 34 Cal.4th at p. 513, fn. 6.) Appellant's failure to raise this specific issue below precludes hearing it on appeal.

B. Factual Background Behind The Decision to Limit Any Individualized Voir Dire

The trial court was very receptive to ideas from both counsel concerning the voir dire selection process. Discussions as to death qualification voir dire began early in the pretrial stages. (See I RT 50.) The judge also approached voir dire from a neutral, inquisitive perspective, rather than from a commanding, close-minded approach. For example, in beginning the discussions regarding death qualification, the court simply informed both counsel of his past experience using a modified *Hovey* voir dire of six jurors at a time. (I RT 50-51.) After recognizing the implicit reasons why sequestered

voir dire may sometimes be necessary (I RT51:3-7), he solicited suggestions from counsel regarding voir dire for death qualification. (I RT 51.)

In contrast to the court's proposed distinction in sizes of panels for hardship and death qualification voir dire (I RT 51), the prosecutor simply suggested "that the death qualification should be asked in the same fashion as all the other questions that are asked sa[v]e and except hardship." (I RT 51:23-25.) The prosecutor was also concerned about coming up with an accurate time estimate in order to properly accommodate the scheduling of numerous witnesses and subpoenas, and recognized that a death qualification voir dire using the modified *Hovey* approach of questioning only six jurors at a time would likely take three weeks, rather than one week, to pick a jury. (I RT 51-52, 59 [noting the large number of witnesses that needed to be managed].)

After further discussion involving both counsels' recent experiences in capital case jury selection, the court again solicited input, specifically from defense counsel, regarding his proposed method of picking a jury. (I RT 55.) Defense counsel's only stated disagreement was that he did not "like things to be new and different," (RT 55: 22-23) and then reiterated his suggestion that any group voir dire may not be "productive of full disclosure." (I RT 56:2.)

The court recognized that the decision did not have to be made immediately, and suggested that he would talk to other judges in the building who had done death qualification voir dire more recently. (I RT 58) The court specifically mentioned Judge Merrill (I RT 58) and had previously referenced Judge Merrill's method of talking with numerous jurors at one time. (I RT 52-55.) This method had apparently reduced the time it took jury selection to only three days. (I RT 56.) After the defense counsel stated that he'd never picked a jury in a week and a half, the court again reiterated that it was not "committing anything in stone," and for the fourth time, explicitly solicited

more comments from defense counsel. (I RT 60:3-5 [" I want you both to feel comfortable in submitting your comments to me about how the procedure should go."].)

It was only at this point that the district attorney reminded the court of the requirements of group voir dire under the Code of Civil Procedure, and suggested that the only exceptions were the limitations and logistics of the courtroom. (I RT 60.) Although the court recognized that it was still entitled to give some credence to *Hovey* under certain circumstances, the court stated those concerns had not been met, and focused particularly on the fact that there had not been enough publicity to generate concerns. (I RT 60-61.)

The court proposed sending each counsel his suggested procedure in selecting the jury during the next seven to ten days, and allowing them to comment before such procedure was instituted. (I RT 62-63.) The court recognized, again, that its procedure was going to be instituted only after discussing the issue with other judges who had tried capital cases in the last year and a half and finding out "what has become the community standard in Contra Costa County." (I RT 63.) And finally, the court again closed with an offer that its proposed procedure "will be open to your suggestions and criticisms," and was even willing to meet in an additional session to finalize things if necessary, so as to give counsel an opportunity to voice more criticisms and concerns. (I RT 63.)

C. Legal Standard

Code of Civil Procedure section 223 requires that in all criminal cases, including those involving the death penalty, the trial court must conduct the voir dire of "any prospective jurors . . ., where practicable, . . . in the presence of the other [prospective] jurors." (See *People v. Waidla* (2000) 22 Cal.4th 690, 713; see also *Covarrubias v. Superior Court, supra*, 60 Cal.App.4th at p. 1178.) Although the trial court still possesses some "discretion in the manner in which

voir dire is conducted" (*id.*), this Court has explicitly recognized that the Electorate, in enacting section 223, abrogated the Court's prior holding of *Hovey*, wherein the Court "'declare[d], pursuant to [its] supervisory authority over California criminal procedure, that in future capital cases that portion of the voir dire of each prospective juror which deals with' his views on the death penalty 'should be done individually and in sequestration[.]'" (*Hovey v. Superior Court, supra*, 28 Cal.3d at p. 80, quoted in *People v. Waidla, supra*, 22 Cal.4th at p. 713 [second and last brackets added]; see also *People v. Vieira, supra*, 35 Cal.4th at pp. 287-288.) In short, group voir dire is the rule in capital cases, not the exception. (See Code of Civ. Proc., § 223; *Waidla, supra*, at p. 714 ["We shall assume that the superior court might have conducted [individualized] voir dire as requested. But we cannot conclude that it had to do so."].)

As the Court has recognized, "The right to voir dire the jury is not constitutional, but is a means to achieve the end of an impartial jury." (*People v. Ramos, supra*, 34 Cal.4th at p. 512, citing *People v. Estorga* (1928) 206 Cal. 81, 84; see also *Morgan v. Illinois, supra*, 504 U.S. at p. 729 ["The Constitution . . . does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury."].) As the Court has explained, "[T]here is no constitutional right to any particular manner of conducting the voir dire and selecting a jury so long as such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries are not transgressed.] (*Ramos, supra*, 34 Cal.4th at p. 512 [internal quotations omitted].) Nor is there a constitutional "right" to a peremptory challenge. (*Ramos, supra*, 34 Cal.4th at p. 513 ["[T]he peremptory challenge is not a constitutional necessity but a statutory privilege."], citing *People v. Wheeler* (1978) 22 Cal.3d 358, 381, fn. 28.) A court abuses its discretion in conducting voir dire only "if the questioning is not reasonably sufficient to test the jury for

bias or partiality." (*People v. Box, supra*, 23 Cal.4th at pp. 1180-1181, quoting *People v. Chapman* (1993) 15 Cal.App.4th 136, 141.)

In *Box, supra*, the trial court conducted group voir dire pursuant to the mandates of section 223 and refused a written questionnaire, even though the victim in that case included a very young child. This Court upheld the voir dire procedure, noting that the trial court afforded counsel an opportunity to present questions for the court to ask, had recognized its discretion to conduct individualized voir dire where necessary, conducted some individualized voir dire where it found a prospective juror to be sensitive in discussing issues, and specifically asked prospective jurors "whether anyone would automatically vote for death on a particular set of findings or on any set of findings." (*Box, supra*, at pp. 1180-1182.) The Court found no concerns of actual bias, and thus did not need to define or discuss the concept of practicability.

Subsequently, in *Ramos, supra*, the trial court again followed the rule of conducting group voir dire pursuant to section 223. This time the trial court employed a lengthy written jury questionnaire, permitted the attorneys to ask questions, and conducted some individualized voir dire where necessary. Although the trial court had made statements regarding the efficiency and convenience of group voir dire, and there were assertions of significant pretrial publicity, this Court found no abuse of discretion in conducting group voir dire, particularly where the trial court had taken numerous steps to ensure that the jury was not biased. The Court gave little credence to the defendant's argument that group voir dire would contribute to desensitization and found no actual bias, even though the defendant had submitted declarations from both a retired judge and a jury consultant that eschewed the problems supposedly inherent in statutory group voir dire. (*People v. Ramos, supra*, 34 Cal.4th at pp. 514-515.) As the Court held, "The trial court's approach to group voir dire, and its thoughtful questioning on specific points, were reasonable, and we find no

abuse of discretion in the court's conduct." (*Ibid.*)

Finally, in *People v. Vieira*, *supra*, 35 Cal.4th 264, this Court further defined the type of "actual, rather than merely potential, bias" that would render group voir dire impracticable as a matter of law. (*Id.* at p. 288.) The phrase "where practicable" in section 223 means "when, in a given case, [group voir dire] is shown to result in actual, rather than merely potential, bias." (*People v. Vieira, supra*, 35 Cal.4th at p. 288.) A showing of actual bias requires more than just a mere possibility suggested post-trial by experts opining about the so-called "Hawthorne effect, a phenomenon observed in social science research whereby the active observation changes the behavior of the subjects observed . . . ." (*Id.* at p. 289.) "The possibility that prospective jurors may have been answering questions in a manner they believed the trial court wanted to hear identifies at most potential, rather than actual, bias and is not a basis for reversing a judgment." (*Ibid.*; see *People v. Ramos, supra*, 34 Cal.4th at p. 514 [general declarations pointing out the "potentially unfair effect" of group voir dire as suggested in *Hovey* insufficient to show prejudice in normal employment of CCP, section 223.)

This Court, in *Vieira*, further recognized that *Hovey* was adopted only under its supervisory authority (*Vieira, supra*, at p. 288) and found no abuse of discretion in refusing the defendant's request for individualized voir dire. The failure of two seated jurors to give "the same unqualified affirmative response" as two prospective jurors who had given responses that were deemed "inappropriate," thereby permitting defendant to speculate that the seated jurors had been influenced by the court's responses to the prospective jurors, identified at most only "potential, rather than actual, bias and is not a basis for reversing a judgment." (*Id.* at p. 289.) Group voir dire as the rule, rather than the exception in California, was clearly upheld.

D. Discussion

Here, the trial court was well-aware of its discretion to conduct individualized voir dire, having discussed the matter with both counsel on numerous occasions. (See I RT 51, 55, 60, 63.) The court recognized that *Hovey* style voir dire was still available in certain circumstances, and particularly pointed to the potential for pretrial publicity in the case (see I RT 60-61). (See *People v. Ramos, supra*, 34 Cal.4th at p. 513.) In fact, the court did conduct individualized voir dire of several jurors who expressed concerns regarding either appellant or the death penalty. (See V RT 945-952, 976-982, 1098-1099, VIII RT 1511-1524). Thus, appellant's claim that the court did not understand the nature of its discretion is unfounded. (*People v. Alfaro, supra*, 41 Cal.4th at p. 1315; see *People v. Box, supra*, 23 Cal.4th at p. 1180 [no abuse of discretion where trial court recognized ability to order individual voir dire where group voir dire impracticable]; *People v. Ramos, supra*, 34 Cal.4th at pp. 513-514 [trial court's "thoughtful questioning on specific points," as well as its recognition of potential pretrial publicity problems and discretion to order individual and sequestered voir dire, sufficient to show no abuse of discretion].)

Furthermore, unlike other situations, the trial court here even allowed the attorneys to ask questions, which permitted the attorneys to explore numerous areas that had already been developed in a lengthy written questionnaire filled out by the prospective jurors. (Cf. *People v. Box, supra*, 23 Cal.4th at pp. 1179-1180 [no questionnaire permitted]; but see *People v. Ramos, supra*, 34 Cal.4th at p. 514 [recognizing written questionnaire helpful in assessing jurors' bias].)

Appellant further suggests that individualized voir dire was required were a juror to make an affirmative response that began to discuss sensitive topics involving death or life qualifying matter. (AOB 178, citing *People v. Box, supra*, 23 Cal.4th at pp. 1180-1181.) Although we do not contest the trial

court's discretion to conduct voir dire in this matter (see *Box, supra*, at pp. 1180-1181), there is again no legal requirement to do so. (See *ibid.*; see also *People v. Waidla, supra*, 22 Cal.4th at p. 714 ["We shall assume that the superior court might have conducted the voir dire as requested. But we cannot conclude that it had to do so."].) Such individualized voir dire would be required only were group voir dire found to be impracticable; in other words, it would be required only where appellant could show actual, as opposed to potential bias, which was certainly not present here. (See *People v. Vieira, supra*, 35 Cal.4th at p. 289.) Neither did appellant suggest such a requirement existed in this case, either as a matter of law, or a matter of fact. And in fact, the trial court specifically recognized its discretion to conduct such individualized voir dire where concerns of practicability might make it necessary (see I RT 60; V RT 945-952, 976-982, 1098-1099, VIII RT 1511-1524). (See *Box, supra*, 23 Cal.4th at pp. 1180-1181.)

Appellant suggests the trial court was required to postpone its final decision to conduct group voir dire until it was aware of all of the private information disclosed via the questionnaires. (AOB 178.) Although we acknowledge the general principle that the better practice for a trial court is to gather as much information as possible prior to making a discretionary decision, appellant's suggestion was neither legally nor factually required in this case. Again, individualized voir dire is required only where practicability concerns -- a showing of actual bias -- render group voir dire impossible. (*People v. Vieira, supra*, 35 Cal.4th at p. 289.) Here, not only did appellant fail to make such a suggestion, he has now failed to show any actual bias to justify his prior suggestion. He cannot show how even a single juror was actually a negatively impacted by the group voir dire process.

In the same vein, appellant insinuates that "[t]he prosecutor insisted that sequestered voir dire was 'in fact' prohibited . . . ." (AOB 178.) However,

appellant provides no factual citation supporting this assertion, perhaps because the assertion itself is incorrect. Although the district attorney did cite the requirements of Code of Civil Procedure section 223 to the court (I RT 60), and asserted that the only exceptions involved logistic limitations, the district attorney never even insinuated that individualized voir dire was "prohibited." In fact, in the very next sentence, the trial court recognized it still had some discretion to order individualized *Hovey* voir dire where necessary. (I RT 60.)

This Court has, in the past, turned a deaf ear to an appellant's unspecified empirical studies, that were never even introduced to the trial court below. Appellant, citing numerous "research" studies, suggests that the "composition of the trial record would be different from what it is now" had the court chosen an unspecified alternative approach, albeit one that involved individual sequestered *Hovey* voir dire. (AOB 192.) Although we do not doubt that the development of additional information regarding possible juror bias -- whether for or against the death penalty -- is a desirable goal, we question whether individual, sequestered voir dire would fulfill this goal any more so than would an elaboration of the voir dire process itself. Indeed, even *Hovey* suggested that the research was not conclusive on the subject.

Moreover, appellant submitted absolutely nothing in the trial court to suggest that the process mandated by the electorate would not result in a fair and impartial jury. Appellant cannot now overcome the presumption of a fair and impartial jury that followed the court's instructions through the injection of "empirical assertions to the contrary based on research that is not part of the present record and has not been subject to cross-examination." (*People v. Welch* (1999) 20 Cal.4th 701, 773 ["The presumption that the jurors in this case understood and followed the mitigation instruction supplied to them is not rebutted by empirical assertions to the contrary based on research that is not part of the present record and has not been subject to cross examination. (See *Hovey*

v. Superior Court, supra, 28 Cal.3d at p. 26.) We accordingly reject defendant's claim."].)

Moreover, even assuming appellant had introduced such empirical evidence below, it would still not meet any possible standards for mandating individualized voir dire. "The possibility that prospective jurors may have been answering questions in a manner they believed the trial court wanted to hear identifies at most potential, rather than actual, bias and is not a basis for reversing a judgment." (*People v. Vieira, supra*, 35 Cal.4th at p. 289.) Thus, while such evidence – if believed – could partially form the basis upon which the trial court may exercise its discretion to hold individualized voir dire, such empirical evidence could never itself mandate indivualized voir dire in any case, nor, given the clear and constitutional expression of the voters in enacting legislation focusing on the preference for group voir dire under section 223, could it even form the basis for a rule that returns us to *Hovey* and requires a trial court always start from the standpoint of individualized voir dire.

Appellant's citation to *Irvin v. Dowd* (1961) 366 U.S. 717, 728 (AOB 192, fn. 32) is equally unavailing. *Dowd* does not in any way stand for an endorsement of individual, sequestered voir dire, but instead, simply recognizes that, if the state offers a criminal defendant the right to jury trial, there exists a fundamental due process requirement that the jury be impartial. In that case, the defendant was charged with a series of highly publicized murders, to which he confessed. During voir dire, two thirds of the jurors expressed an awareness of the facts of the case and had already formed an existing opinion as to the defendant's guilt. Although the defendant had received one change of venue, a local statute prohibited any further venue change. This, according to the Supreme Court, violated due process and justified granting a habeas petition, particularly where the neighboring county in which the case was tried was no less partial to the facts than the original venue. Nowhere in the opinion, and

particularly at the cited page (see *id.* at p. 728), does the Court discuss the concept of individual, sequestered voir dire.

Finally, in what appears to be a five-sentence afterthought, appellant contends that, even if the court exercised its discretion in choosing to conduct group voir dire, that discretion was abused. He essentially contends that any group voir dire in a capital case would be an abuse of discretion because it inevitably results in a jury that is "'less than neutral' with respect to the choice of penalty." (AOB 194, quoting *Hovey*.) Notwithstanding that the claim has not been properly preserved for review, and our disagreement with the underlying merits of appellant's argument, his claim is nothing more than a reassertion of the principles of *Hovey* that were explicitly rejected by the voters in amending Code of Civil Procedure section 223. That rejection was explicitly recognized in *Covarrubias v. Superior Court, supra*, 60 Cal.App.4th at p. 1179, a proposition that has subsequently been expressly endorsed by this Court on numerous occasions. (See, e.g., *Vieira, supra*, 35 Cal.4th at pp. 287-88; *People v. Hoyos, supra*, 41 Cal.4th at p. 899.) Appellant's claim fails.

VI.

THE PROSECUTOR DID NOT COMMIT *WHEELER/BATSON* ERROR IN USING HIS SECOND PEREMPTORY CHALLENGE

Appellant contends the prosecutor committed *Batson/Wheeler* error in excluding Prospective Juror S.G., , an African American woman, with one of its first two peremptory challenges. Although appellant pressed only the limited statistical evidence below, he now posits the length of the voir dire and the fact that S.G. would not have been subject to a challenge for cause. (AOB 205-206.) The court further compounded this error, according to appellant (AOB 199), by finding there was no prima facie showing of "systematic exclusion" sufficient to require the prosecutor to justify his actions. (IX RT

1831.) The claim fails. This Court has repeatedly rejected similar claims (see *People v. Bonilla, supra*, 41 Cal.4th at p. 342; *People v. Latimer* (2007) 41 Cal.4th 50, 73-74; *People v. Cornwell* (2005) 37 Cal.4th 50, 70) even in light of the Supreme Court's opinion in *Johnson v. California* (2005) 545 U.S. 162, 168.

This Court recently set forth the operative standard for adjudicating *Wheeler/Batson* claims following *Johnson*:

> Both the state and federal Constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on race or gender. (*People v. Wheeler* (1978) 22 Cal.3d 258, 276-277; *Batson v. Kentucky* (1986) 476 U.S. 79, 97; *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127, 130-131.) Such a use of peremptories by the prosecution "violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.] Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution." (*People v. Avila, supra*, 38 Cal.4th at p. 541.)
>
> There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination. (*Purkett v. Elem* (1995) 514 U.S. 765, 768; *People v. Griffin* (2004) 33 Cal.4th 536, 554; *People v. Johnson* (2003) 30 Cal.4th 1302, 1309, overruled on other grounds in *Johnson v. California* (2005) 545 U.S. 162.) To do so, a defendant must first "make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial [or gender] exclusion' by offering permissible race-neutral [or gender-neutral] justifications for the strikes. [Citations.] Third, '[i]f a race-neutral [or gender-neutral] justification is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful . . . discrimination.' [Citation.]" (*Johnson v. California*, at p. 168, fn. omitted.) The same three-step procedure applies to state constitutional claims. (*People v. Bell* (2007) 40 Cal.4th 582, 596.)

> Ordinarily, we review the trial court's denial of a *Wheeler/Batson* motion deferentially, considering only whether substantial evidence supports its conclusions. (*People v. Avila, supra*, 38 Cal.4th at p. 541.) However, the United States Supreme Court recently concluded that California courts had been applying too rigorous a standard in deciding whether defendants had made out a prima facie case of discrimination. (See *Johnson v. California, supra*, 545 U.S. at pp. 166-168, 125 S.Ct. 2410 [holding the requirement a defendant show a "strong likelihood," rather than a "reasonable inference," of discrimination was inconsistent with *Batson* and the federal Constitution].) In cases where the trial court found no prima facie case had been established, but whether it applied the correct "reasonable inference" standard rather than the "strong likelihood" standard is unclear, "we review the record independently to 'apply the high court's standard and resolve the legal question whether the record supports an inference that the prosecutor excused a juror' on a prohibited discriminatory basis." (*People v. Bell, supra*, 40 Cal.4th at p. 597; accord, *People v. Williams* (2006) 40 Cal.4th 287, 310; see *People v. Avila, supra*, 38 Cal.4th at pp. 553-554.)

(*People v. Bonilla, supra*, 41 Cal.4th at pp. 341-342.)

The Supreme Court's opinion in *Johnson* has not provided much guidance for determining whether lower courts did or did not use the appropriate "reasonable inference" standard. In *Johnson*, an African-American defendant was charged with murdering his girlfriend's 19-month-old child. The prosecutor exercised peremptory challenges against all three African-Americans that appeared on the defendant's jury. The trial court denied appellant's *Wheeler* motion, finding no prima facie case had been shown, and did not request justification from the district attorney, because the prosecutor's strikes could be justified by race neutral reasons apparent in the trial record. After contrasting decisions from the California Courts of Appeal and Supreme Court, the United States Supreme Court reversed and remanded, finding that the defendant need prove only "the totality of the relevant facts gives rise to an inference of discriminatory purpose" in order to invoke the rebuttable presumption of group bias. (*Id.* at p. 168.) The Court rejected the "strong

likelihood" or "more likely than not" standard that had previously been employed in California (see, e.g., *People v. Johnson* (2003) 30 Cal.4th 1302, 1306, on remand, 38 Cal.4th 1096, 1098) and defined the term "inference" as "a 'conclusion reached by considering other facts and deducing a logical consequence from them.'" (*Id.* at p. 168, fn. 4.)

Johnson's rejection of the "more likely than not" standard has little impact on our case for several reasons. Although the trial court used the phrase "systematic exclusion" in denying the motion (IX RT 1831), that term has been interpreted to be synonymous with *Wheeler* error. (See *People v. Reynoso* (2003) 31 Cal.4th 903, 927.) Thus, where a court has found no "systematic exclusion" (see IX RT 1831), the court is not employing an inappropriate standard, but instead, is finding that the defendant has failed to show a prima facie case. (*Ibid.*) Although the phrase may not be perfectly suited to challenges involving the jury panel, as opposed to the venire (see *People v. Fuentes* (1991) 54 Cal.3d 707, 716 fn. 4 [noting that the phrase "systematic exclusion" is not apposite in the *Wheeler* context, for a single discriminatory exclusion may violate a defendant's right to a representative jury]), it is does not, by itself, present grounds to challenge the trial court's ruling. (See *Reynoso, supra*, 31 Cal.4th at p. 927, fn. 8.)

Furthermore, appellant's motion was based solely on the exclusion of a single African-American juror. Appellant even seemed to be arguing systematic exclusion, as his alleged justification for bringing the motion so early, without other cause, was because there were "so few" African-Americans on the venire. However, unlike *Johnson, supra*, 545 U.S. at page 173, there was no "suspicious" appearance, as the prosecutor had not removed all of the members of a specific group. (See *People v. Lancaster* (2007) 41 Cal.4th 50, 66.) Our case, on the other hand, involved a challenge only to a single African-American juror, where two other African-American jurors remained on

the panel. One of them – L.B. – was ultimately excused by appellant (IX RT 1832), and the other -- Juror Number 11 -- was eventually seated to try the case. (See *id.* at p. 74 [upholding denial of challenge where three of four African-American women seated on panel at time of motion were ultimately seated on jury].)

This Court has upheld the use of peremptory challenges in several cases following *Johnson*. For example, in *People v. Bonilla, supra*, 41 Cal.4th at p. 341, the trial court was faced with a situation in which the defendant's motions were based only on alleged "statistical disparity." There, like here, the trial court denied the first of the motions with the only finding being that no "systematic exclusion" had been shown. Although the prosecution had struck both African-Americans from the jury pool in that case, this Court recognized that "the small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible." (*Id.* at p. 343, quoting *People v. Bell* (2007) 40 Cal.4th 582, 598; *People v. Harvey* (1984) 163 Cal.App.3d 90, 111.) "As a practical matter, . . . the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion." (*Ibid.*) Although the defendant in *Bonilla* was not African-American, the Court went on to reject his companion claims that the prosecution's exclusion of all three Hispanic women in the jury pool also established a prima facie case of discrimination. The Court recognized that "given numerous (increasingly small) subcategories and cross categories of individuals, one is increasingly likely to find, somewhere, a particular category for which one side or the other happens to have stricken most or all of the (few) members of the group -- not for reasons of discrimination, but as a simple consequence of the laws of probability. In such circumstances, the force of any corresponding inference of discrimination will necessarily be weakened." (*Id.* at p. 344.) Finally, the Court looked at all of the challenges and found that the record disclosed race neutral reasons justifying

each challenge. (See *id.* at p. 347.)

Similarly, in *People v. Cornwell, supra*, 37 Cal.4th at page 70, the prosecutor exercised his second peremptory challenge against one of two prospective African-American jurors. The defendant, who was also African-American, contested the challenge under *Wheeler*, focusing on statistical bases and lack of reasons to excuse the juror for "cause" as the grounds for the motion. This Court found that neither reason, alone or in combination, constituted sufficient grounds to establish a prima facie case. As the Court stated, "[T]hat the prosecutor challenged one out of two African-American prospective jurors does not support an inference of bias, particularly in view of the circumstance that the other African-American juror had been passed repeatedly by the prosecutor from the beginning of voir dire and ultimately served on the jury." (*Id.* at pp. 69-70; see *People v. Adandandus* (2007) 157 Cal.App.4th 496 [rejecting claim that striking three of three African-Americans from jury was sufficient, "alone," to show prima facie case of bias]; see also *People v. Box, supra*, 23 Cal.4th at pp. 1188-1189 ["[T]he only basis for establishing a prima facie case cited by defense counsel was that the [three] prospective jurors-like defendant-were Black. This is insufficient."]; *People v. Farnam* (2002) 28 Cal.4th 107, 136-137 ["[D]efendant's only stated bases for establishing a prima facie case were that (1) four of the first five peremptory challenges exercised by the prosecution were for Black prospective jurors, and (2) a very small minority of jurors on the panel were Black[,] . . . fall short of a prima facie showing."]; see generally *People v. Yeoman* (2003) 31 Cal.4th 93, 115 [finding insufficient "defense counsel's cursory reference to prospective jurors by name, number, occupation and race" to support attack on prosecutor's strike of three prospective jurors].) The Court further rejected any notion "that the juror was not subject to exclusion for cause" would support an inference that the exercise of a peremptory challenge was motivated by group

bias. (*Cornwell, supra,* at p. 70.)

In the present case, defense counsel tendered only statistics – that the prosecutor had used one of his first two challenges to remove one of only three African American jurors on the panel – in support of his motion. (IX RT 1831.) In fact, he recognized that it was "probably too early" in the process to succeed in showing a prima facie case, but he felt the challenge had to be brought at that point because "we only have so few" on the panel.[14/] (IX RT 1831.) Although counsel on appeal now tacks on the fact that Juror Givens would not have been subject to a challenge for cause (see AOB 204-205), that additional fact was not argued below, and moreover, those same reasons – even in combination -- provide no more support than was found lacking in *Cornwell.* (*Id.* at p. 70.)

In fact, appellant's motion could not be supported by statistical basis alone (see *People v. Bonilla, supra*, 41 Cal.4th at p. 343) because the prosecutor had excused only a single member of the group, while leaving another member -- Juror Number 11, who ultimately served in the jury -- on the panel.[15/] (See *People v. Cornwell, supra*, 37 Cal.4th at p. 70 [rejecting challenge to single juror without further support, particularly where another juror of same race left on panel].) Like *Bonilla* and *Cornwell*, the challenge was made too early in the process to have any statistical validity by itself. In our case, this was only the prosecutor's second peremptory challenge. Thus, although 50 percent might normally be considered a significant statistic, the fact that the motion was made so early in the process, removes any numerical significance. (See *People v.*

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14. Appellant had previously tried to make an oral motion challenging the entire venire. The motion, however, was denied as untimely and without notice. (II RT 366.)

15. We note that appellant used a third peremptory challenge on the third and final African American, L.B., that was on the panel. (See IX RT 1832.)

Bonilla, supra, 41 Cal.4th at p. 343.) Likewise, the fact that a cause challenge against S.G. would not have been successful provides no legal justification for making a prima facie case. (*People v. Hoyos, supra*, 41 Cal.4th at p. 890; *Cornwell, supra*, 37 Cal.4th at p. 70.)

Finally, although the court never attempted to justify the challenge on the basis of the record (see *Johnson, supra*, 545 U.S. at 168), and never asked the district attorney to do so, the record contained several race neutral reasons, any of which would have been sufficient to support the court's ruling. First and foremost was S.G.'s express difficulty in imposing the death penalty. She said in her questionnaire it would be "hard" to sentence someone to death (12 ACT 4651), and explained that her reluctance was borne out of religion (12 ACT 4651). (See *People v. Hoyos, supra*, 41 Cal.4th at pp. 902-903 [recognizing that equivocality about the death penalty and the existence of strong religious beliefs against capital punishment provide race neutral reasons].) Furthermore, although her answers were relatively innocuous, she was in a similar employment position to appellant; a "governmental" employee, and "responsible to a supervisor." (12 ACT 4645.) She even had a neighbor, employed by the City of Richmond, who had first informed her about the case. (12 ACT 4652.) She made a special point of stating that psychologists and psychiatrists "are good," that they "would have a good opinion" in court, and that either herself, or someone in close relation, had seen a psychologist or psychiatrist. (12 ACT 4653-4654.) Given the anticipated defense, this answer alone would be sufficient to support the prosecutor's challenge. Furthermore, she knew the prosecutor from prior employment in which she had cleaned his office (see VII RT 1406-1407), and also knew Connie Taylor, who later testified for the defense. (IX RT 1786; see XVII RT 3248.) Lastly, although we have been unable to glean the nature of this, S.G. stated in the questionnaire that she wished to discuss certain unspecified matters privately, outside the

presence of the other jurors.[16/]

Any of these assertions listed in the questionnaire would be sufficient by themselves, let alone collectively, to support the prosecutor's exercise of a challenge here. Thus, even assuming the trial court employed an erroneous standard in assessing an exclusively statistical challenge, and that this Court feels it must revert to an independent assessment of the record to review appellant's contention, the claim fails.

VII.

THE TRIAL PROPERLY GRANTED *APPELLANT'S* CHALLENGE FOR CAUSE TO PROSPECTIVE JUROR K.T.

Appellant contends the trial court erred in granting *his* challenge for cause of Prospective Juror K.T. (AOB 207.) Although the trial court expressed concern about several of K.T.'s potentially racially biased responses in granting the motion, appellant's challenge was premised solely on K.T.'s statements that "everyone who intentionally kills another human being or kills with the liberation and premeditation" should always receive the death penalty. Because this was appellant's challenge, he is estopped from raising this issue on appeal. (*People v. Hill* (1998) 3 Cal.4th 959, 1003; see also *People v. Pride* (1992) 3 Cal.4th 195, 228 [finding defendant estopped from raising *Witherspoon/Witt* issue on appeal where trial court allegedly adopted appellant's erroneous position below].) Moreover, even viewed on the merits, appellant's claim would fail because viewed deferentially, K.T.'s responses evidenced both racial

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16. We note that the trial record, which we received from opposing counsel rather than the superior court, does not list the speaker in the vast majority of record citations allegedly involving S.G. We have been unable to correlate these assertions with the voluminous record correction proceedings and, although we do not dispute counsel's assertions, we are also unable to independently confirm them.

bias and an inability to fairly impose a life sentence under *Witherspoon/Witt*.

A. Waiver

Initially, we note that this was appellant's challenge, and that it was not joined in by the People. (See VII RT 1341-1342.) This Court has found similar claims waived on appeal, even where defense counsel merely joined in the motion to excuse a juror for cause. (*People v. Hill*, *supra*, 3 Cal.4th at p. 1003, disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046); see *People v. Pride*, *supra*, 3 Cal.4th at p. 228 [defendant estopped from arguing *Witt* error when he had erroneously caused trial court to adopt older *Witherspoon* standard below]; see also *People v. Richards* (1977) 72 Cal.App.3d 510, 514 [defendant who requested erroneous ruling cannot complain about ruling on appeal].)

To the extent appellant implies K.T.'s answers tainted the entire prospective jury pool, this claim is also waived because appellant never moved to strike the entire venire. (See *People v. Cleveland, supra*, 32 Cal.4th at p. 736 ["Defendants cannot proceed with the jury selection before this same panel without objection, gamble on an acquittal, then, after they are convicted, claim for the first time the panel was tainted."].) Moreover, K.T.'s comments did not give prospective jurors information about the case and exposed them only to one person's opinion regarding the fairness of the judicial system, which was not prejudicial. (*Ibid.*) Appellant has failed to preserve the claim for review.

B. Merits

Furthermore, even if appellant preserved the issue, the claim fails on the merits. Whether K.T. was excused on *Witherspoon/Witt* grounds as appellant requested (see Code of Civ. Proc., § 229, subd. (h)), or sua sponte on grounds of being racially biased (see Code of Civ. Proc., § 229, subd. (f); see generally *People v. Memro* (1995) 11 Cal.4th 786 [permitting trial court to excuse biased

jurors sua sponte]), her answers were, at the very least, equivocal on both subjects. When a juror posits equivocal answers and the trial court finds cause for removal, the trial court has made a factual finding deserving of a substantial amount of deference. (*Wainwright v. Witt, supra*, 469 U.S. at pp. 428-430; *People v. Moon, supra*, 37 Cal.4th at pp. 15-16; *People v. Schmeck* (2005) 37 Cal.4th 240, 263; *People v. Harris* (2005) 37 Cal.4th 310, 329; *People v. Cunningham* (2001) 25 Cal.4th 926, 975; *People v. Lewis* (2001) 25 Cal.4th 610, 631; *People v. Bradford, supra*, 15 Cal.4th at p. 1319; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1147.) As this Court has suggested, it is not surprising that a juror gives "less than consistent" answers on voir dire:

> In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected. Under such circumstances, we defer to the trial court's evaluation of the prospective juror's state of mind, and such evaluation is binding on appellate courts.

(*People v. Moon, supra*, 37 Cal.4th at pp. 15-16, quoting *People v. Fudge* (1994) 7 Cal.4th 1075, 1094; see *People v. Schmeck, supra*, 37 Cal.4th at p. 263 [noting deference to trial court's determinations of demeanor and credibility in resolving "equivocal" cases].)

That deference should not be overturned here. Prospective Juror K.T. twice stated in her questionnaire that she would *always* impose the death penalty on those convicted of first degree murder. (See 7 ACT 2664, 2665.) Although she may later have qualified her answers regarding first degree murder (see VI RT 1277), the trial court, in excusing her for cause (VII RT 1342),[17] implicitly found her efforts at qualification to be insincere, or at the

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17. The trial court *granted* appellant's challenge on *Witherspoon/Witt* grounds, but then added an additional explanation involving K.T.'s racial concerns: "*Part* of my concern does not deal with her statement about the death

very least, her answers were equivocal, thus, justifying the court's exercise of discretion. (*People v. Moon*, *supra*, 37 Cal.4th at p. 14.)

Likewise, her numerous references to race suggest she may have been racially biased in favor of African-Americans, or the very least, thought that African Americans did not receive fair treatment in our criminal justice system. (See *People v. Cornwell, supra,* 37 Cal.4th at p. 70 [upholding prosecution's use of peremptory challenge against juror who had voiced "express distrust of the criminal justice system and its treatment of African-American defendants"]; see also *People v. Pride, supra*, 3 Cal.4th at p. 230 [upholding "mistrust of legal system" as sufficient reason to support prosecutor's exercise of 3 peremptory challenges in response to defendant's Wheeler claim]; *People v. Farnam, supra,* 28 Cal.4th at p. 138 [same]; *People v. Adanandus, supra*, 157 Cal.App.4th at p. 504 [finding prosecutor properly exercised peremptory challenge against juror who expressed "the opinion that there is an inherent bias in the criminal justice system against young African-American men [and] acknowledged that she has "biases"].) For example, K.T. expressly stated in her questionnaire that "Murder should get death penalty (sic), but I am concerned about the inequity between Africans and Caucasians." (7 ACT 2664; see VI RT 1277.) She followed up on this during voir dire, repeatedly stating that race would play at least some significance in her function as a juror. (See VI RT 1278-1280.)

Although she claimed the ability to fairly evaluate the mitigating and aggravating evidence, she qualified this claim on virtually every occasion, usually with a combination of references to both racial inequities and the evidence in the case. (See VI RT 1277-1278.) For example, K.T. claimed she could properly perform the function of a juror, evaluating the mitigating and

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penalty. It deals with her statement that she couldn't quantify in any way just about that race would be a factor in her decision. She couldn't tell me how it would be a factor, but it was a close case. So she said she would vote according to certain feelings she had about race." (VII RT 1342 [emphasis added].)

aggravating evidence (VI RT 1277:27), but only a few lines later, admitted that racial inequities will play "some significance" in her function as a juror, depending "upon the evidence." (VI RT 1278:1-9.) She further explained this by stating that, although she would not impose a different standard because appellant was African-American (VI RT 1278:20-24), race would definitely play a factor "if [she] did not find the evidence to be precise or very specific." (VI RT 1279:12-13.) When the judge again asked her whether race would play a factor in her function as a juror, she responded, "I would only hope the evidence was very clear, very specific, that would -- if it were in the gray area then race might be a factor . . . [b]ecause I know that sometimes the court system is not fair to African Americans." (VI RT 1279:14-19.) About the most definitive answer the court could get was, "Race alone is not going to be the sole factor in [her] decision." (VI RT 1280.)

Appellant contends that this Court has an obligation to treat K.T.'s claims differently because she is an African-American concerned with inequities in the legal system.[18] (See AOB 211.) He cites no authority for this, nor are we aware of any that would require deviation from the court's normal discretionary standard. While we laud K.T.'s ultimate goals of fairness and the elimination of inequity, our system should not tolerate unfairness and inequity in achieving those goals. Nor should it allow leeway for a single juror -- any

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18. Although the court recognized K.T.'s race as an African American in explaining its decision to grant appellant's *Witherspoon/Witt* challenge, the court acknowledged this only in the context of K.T.'s strongly held, but still unquantifiable, views that race would somehow play a role in her deliberations. To the extent appellant now argues some sort of judicial *Wheeler/Batson* type of claim in the court's actions, he had an obligation to raise this particular issue below. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 193 [noting that a prosecutor is presumed to have properly exercised peremptory challenges]; see also Evid. Code, § 664.) Given that it was *his* challenge for cause, the record does not support a challenge being made.

juror -- to singlehandedly impose his or her own set of values onto our legal system in an effort to moderate their own perception of the system's inequity.

Prospective Juror K.T.'s answers reflect a clear bias -- an inability to follow the court's instructions regarding true neutrality -- that would impact her deliberative abilities. Even were the answers deemed equivocal, the judge's credibility determination deserves deference and should not be disturbed. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1199-1200 [expressing strong deference and upholding trial court's *denial* of defendant's challenge for cause of allegedly racially biased juror because juror gave equivocal answers]; see also *People v. Pride*, *supra*, 3 Cal.4th at p. 229 [affording great deference to trial court's determination that jurors were not biased even where answers were equivocal].) Appellant's claim fails.

VIII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS GENERAL EVIDENTIARY RULINGS AND THUS, COULD NOT HAVE RENDERED THE TRIAL FUNDAMENTALLY UNFAIR

Appellant levels a series of challenges to the trial court's miscellaneous evidentiary rulings in the guilt and penalty phases. (AOB 215 et seq.) Although he alternatively argues that, in many of the instances, either the prosecutor committed misconduct or the court's erroneous ruling violated his fundamental due process rights, he never raised either of these issues below, and, in fact, would not have preserved many of these arguments even on a purely evidentiary basis. Given that he does not attempt to show any sort of prejudice from the actions, his global claim appears more an effort to sidestep the contemporaneous objections requirements (Evid. Code, § 353; *People v. Carter* (2003) 30 Cal.4th 1166, 1207 [finding prosecutorial misconduct claim of *Doyle* error waived even though defendant objected at outset that prosecutor

was misstating evidence]) than a true due process challenge under *People v. Hill* (2003) 17 Cal.4th 800, a case that is truly sui generis and as far from our circumstances as night is from day. Nevertheless, we address the court's evidentiary rulings seriatim.

A. The Prosecutor Was Properly Permitted To Ask Jurors, During Voir Dire, Whether They Would Be Able To Utilize Circumstantial Evidence

Appellant initially contends the court erred by permitting "argumentative prosecutorial questioning of a prospective juror" concerning whether ballistic evidence, or circumstantial evidence in general, could be useful to "establish a shooter's 'state of mind.'" (AOB 217.) Notwithstanding that this question came directly on the heels of a truly objectionable argumentative statement by appellant's trial counsel that "the questions that you will be confronted with in this case do not have to do with ballistics . . . ." (IX RT 802), appellant failed to claim prosecutorial misconduct, did not argue that this was a due process error, and did not even object on the grounds that the question was argumentative. Thus, the claim is waived. (*People v. Carter, supra*, 30 Cal.4th at p. 1207; *People v. Partida, supra*, 37 Cal.4th at p. 435; Evid. Code, § 353.)

The claim also fails on the merits because the question, although it might have been leading, was not argumentative. The question asked whether a particular alternate juror remembered defense counsel's prior statement that "You don't have to know anything about ballistics," and whether, "[I]t might make a difference if somebody got shot in the head and died of arterial damage, shot in the head, back of the head, execution style. It might tell you somebody's [] state of mind at the time he pulls the trigger, right?" (IX RT 1892.) Defense counsel's objection was phrased in the following manner: "Objection. That doesn't sound like ballistics to me. It has to do with medical evidence." (IX RT 1892.) The objection was overruled. (IX RT 1892.)

A trial court has broad discretion to permit foundational and leading questions on voir dire. (*People v. Ah Lee Doon* (1893) 97 Cal. 171, 179; see *People v. Tafoya* (2007) 42 Cal.4th 147, 168 [trial court given considerable discretion in conducting voir dire of capital case].) Unlike defense counsel's long-winded, sanctimonious speech decrying any need for ballistic evidence (IX RT 1802), the prosecutor simply asked a series of questions relating to the use of ballistic evidence. (IX RT 1892.) He asked whether the prospective juror remembered defense counsel's prior statement, and then he asked whether the prospective juror would be willing to use ballistic evidence as circumstantial proof of intent. In other words, he was asking the juror whether the juror would be willing to follow the law and apply an undisputed proposition of law to the facts. Granted, the prosecutor's question could have been articulated better and may have been a bit leading – in that he was asking for assent to an asserted inference (see Evid. Code, § 764), but that was due to its foundational nature. For over 100 years, this Court has permitted a trial court extremely broad discretion to permit leading questions on voir dire. (*People v. Ah Lee Doon, supra*, 97 Cal. at p. 179; see *People v. Tafoya, supra*, 42 Cal.4th at p. 168.) Indeed, the purpose of voir dire – to root out potential bias – is much closer to cross-examination than it is to direct examination. This not the same as protecting a trial witness from badgering or harassment. (See Evid. Code, § 765.) In fact, the Evidence Code does not even per se include a section precluding "argumentative" questions. Here, unlike defense counsel, the prosecutor was not pontificating on an issue or asking the witness a rhetorical question for purposes of making the witness look bad. He was essentially asking if the juror would follow the law.

Finally, even assuming error, appellant fails to show prejudice. It has never even been suggested by this Court that a juror is precluded from using circumstantial evidence to prove intent. Furthermore, the court explicitly

instructed the jurors that statements of counsel are not evidence. Moreover, as this Court has stated, "[A]s a general matter, it is unlikely that errors or misconduct occurring during voir dire questioning will unduly influence the jury's verdcit in the case." (*People v. Medina, supra*, 11 Cal.4th at p. 743; see *People v. Pinholster, supra*, 1 Cal.4th at p. 918.) The claim fails.

B. The Court Properly Permitted Leading Questions To Establish Foundational Points

Appellant next contends the prosecutor committed misconduct by asking a number of leading questions during the guilt and penalty phases of the trial. (AOB 219.) Appellant did not object to a great number of these questions, and thus, those claims are waived. Moreover, the entire claim of prosecutorial misconduct is waived in this instance because at no time, even in connection with the objections that were made, did appellant raise the specter of prosecutorial misconduct. (*People v. Williams* (1997) 16 Cal.4th 635, 673 ["[D]efendant failed to object to the prosecutor's question as misconduct and did not request a curative admonition from the trial court. Therefore, he has not preserved the claim."], citing *People v. Mayfield* (1997) 14 Cal.4th 668, 753; *People v. Cain* (1995) 10 Cal.4th 1, 48.) Furthermore, appellant's claim fails on the merits because even where proper objections were made, the court did not abuse its broad discretion in permitting the prosecutor to ask leading questions. Finally, appellant makes no effort at showing prejudice. After setting forth this Court's recent statement of the law on leading questions, we address each of the subparts seriatim.

In *People v. Williams, supra*, 16 Cal.4th at page 762, this Court set forth the following discussion on claims involving leading questions:

> Evidence Code section 767, subdivision (a)(1), provides that leading questions "may not be asked of a witness on direct or redirect examination" except in "special circumstances where the interests of justice otherwise require." Trial courts have broad discretion to decide

when such special circumstances are present. (See *Estate of Siemers* (1927) 202 Cal. 424, 437; *People v. Garbutt* (1925) 197 Cal. 200, 207.)

A question is "leading" if it "suggests to the witness the answer the examining party requires." (Evid. Code, § 764; see also 3 Witkin, Cal. Evidence (3d ed. 1986) § 1820, p. 1779 et seq.; 1 McCormick on Evidence (4th ed. 1992) § 6, p. 17; 3 Wigmore, Evidence (Chadbourn ed. 1970) § 769, p. 154.)

One treatise on evidence offers this explanation on leading questions: "A question may be leading because of its form, but often the mere form of a question does not indicate whether it is leading. The question which contains a phrase like 'did he not?' is obviously and invariably leading, but almost any other type of question may be leading or not, dependent upon the content and context . . . . The whole issue is whether an ordinary man would get the impression that the questioner desired one answer rather than another. The form of a question, or previous questioning, may indicate the desire, but the most important circumstance for consideration is the extent of the particularity of the question itself." (1 McCormick on Evidence, *supra,* § 6, pp. 17-18.) Another treatise says that a question is leading if it "'instructs the witness how to answer on material points, or puts into his mouth words to be echoed back, . . . or plainly suggests the answer which the party wishes to get from him.'" (3 Wigmore, Evidence, *supra*, § 769, p. 155, quoting *Page v. Parker* (1860) 40 N.H. 47, 63.) And in his treatise, Justice Bernard Jefferson states that "A question calling for a 'yes' or 'no' answer is a leading question only if, under the circumstances, it is obvious that the examiner is suggesting that the witness answer the question one way only, whether it be 'yes' or 'no.'" (1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 27.8, p. 762.) Justice Jefferson adds this caution, however: "When the danger [of false suggestion] is present, leading questions should be prohibited; when it is absent, leading questions should be allowed."

(*Ibid.*)

Appellant's first contention (AOB 219) is to an objection that was actually sustained. In the context of a discussion of appellant's ability to weigh decisions that had to be made as part of his job duties, the prosecutor asked of Housing Director Art Hatchett, one of appellant's supervisors: "So at least in terms of his performance on the job, Mr. Pearson had no difficulty

premeditating and deliberating?" (XI RT 2265:19-21.) As noted above, the objection to the form of the question was sustained and the question was properly rephrased. No possible prejudice could have ensued.

Appellant's next contention (AOB 220) is to a question asked of the same supervisor involving a letter appellant wrote to Lorraine Talley describing his "improvement goals" and whether Hatchett "perceive[d] any kind of defect, mental or otherwise, in the mind of Michael Pearson that would prevent him from thinking about things in the future?" (See XII RT 2448.) No objection was raised and thus the point is waived. (*People v. Williams, supra*, 16 Cal.4th at p. 763.) Furthermore, the question does not ask for Hatchett's mere agreement to a particular point, but instead, offers Hatchett an opportunity to supply information regarding appellant's mental state at the time he committed the murders. In that way, the question is not leading and not improper. (See *People v. Williams, supra*, 16 Cal.4th at p. 762.)

Appellant next contests the "leading" form of a question asked of former Housing Authority employee Janet Robinson regarding appellant's perceptions of reality while employed at the Housing Authority. The prosecutor asked Ms. Robinson, "And during these conversations did you ever detect any kind of defect or oddity that enabled [appellant] to not really perceive reality at all . . .?" (XIII RT 2515-2516.) Although appellant unsuccessfully objected on the grounds that the answer was nonresponsive (XIII RT 2516), appellant did not object to the form of the question or otherwise raise the specter of prosecutorial misconduct, and thus the claim is waived. (*People v. Williams, supra,* 16 Cal.4th at p. 763; *People v. Carter, supra*, 30 Cal.4th at p. 1207.) Moreover, the question did not suggest a particular answer, rather, it offered Ms. Robinson the opportunity to impart to the jury her observations made at the Housing Authority while both she and appellant were employed there. (See *Williams,*

supra, at p. 762.) It was merely the answer -- "No" (XIII RT 2516) -- with which appellant disagreed.

Later in the same passage, after appellant had successfully raised a leading objection to one of the prosecutor's questions, the prosecutor rephrased and asked Ms. Robinson about her perceptions of appellant's ability to conduct himself appropriately in the office atmosphere: "Did he seem to be speaking with you in an appropriate way about these issues that you talked about?" (XIII RT 2517.) The court exercised its discretion and permitted the prosecutor to ask the question in that particular form, and the witness's affirmative answer to stand, "based upon the earlier comment made by the witness." (XIII RT 2517.) This Court has particularly recognized that a trial court possesses broad discretion to pose leading questions under certain circumstances. (*Williams, supra,* at p. 762.) Here, we doubt whether the form of the question was improper, as it asked for the witness's individual observations, rather than "suggest[ing] to the witness the answer that the examining party desires." (Evid. Code, § 764.) Nevertheless, the court did not abuse its discretion in permitting the answer. The witness had previously stated, without objection, that she did not observe anything in appellant's actions or demeanor at work that prevented him from communicating with her in a rational manner. (XIII RT 2516.) The question to which appellant objected was simply following up, confirming this same answer, and the court did not abuse its discretion in permitting the answer. (See *Williams, supra*, at p. 762.)

Appellant next contends (AOB 221) the trial court improperly allowed the prosecutor some degree of latitude in asking leading questions to clarify prior statements or to provide foundation for further questions. Specifically, the court, after explaining its plan to permit the attorneys some latitude during examination, sustained a defense objection on leading grounds and even encouraged defense counsel to continue making objections where appropriate.

(XIII RT 2519.) The court's encouragement of future appropriate objections would seem to defeat any claim of futility.

Appellant further faults the court for failing to "admonish the prosecutor or otherwise act to discourage him from persisting in using leading questions outside the stated parameters." (AOB 221.) Appellant fails to show any authority for this proposition -- that the court was required to instruct a seasoned prosecutor on the ways to conduct proper examination -- and further, fails to show how the court's alleged failure constitutes prejudicial prosecutorial misconduct.

Appellant further chides the prosecutor for using leading questions to suggest that appellant violated office protocol by inviting visitors into a secure work area. (AOB 221.) The court initially sustained defense counsel's objections to questions in this area (XIII RT 2526), but ultimately allowed the prosecutor to ask, "Were there times when Mr. Pearson called you to tell you that there was somebody there waiting?" The court inferentially agreed with the prosecutor that his question did not actually suggest the answer. (XIII RT 2526.) And it did not. Again, appellant fails to show how the form of this question is improper, as it allowed the witness the freedom to answer in whatever way she chose. (Evid. Code, § 764; see 1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 27.8, p. 762.)

Appellant next contends (AOB 222) the trial court improperly permitted the prosecutor to lead a witness by asking: "Can you tell us whether or not there was some unnecessary work that was being done as a result of the way Mr. Pearson was doing his job?" (XIII RT 2532.) As appellant recognizes (AOB 222), he did not object nor suggest any assignment of prosecutorial misconduct. He thus has waived the claim. (*People v. Williams*, *supra*, 16 Cal.4th at p. 763; *People v. Carter, supra*, 30 Cal.4th at p. 1207.) Furthermore, the prosecutor had to rephrase the question following appellant's successful objection on

leading grounds, thus, contrary to appellant's insinuation (AOB 222, 225), the futility doctrine could not possibly apply.

Moreover, the question simply does not suggest a particular answer. (Evid. Code, § 764.) Although the context of the "unnecessary work" had been provided in prior questions, to which objections had successfully been made (see, e.g., XIII RT 2531-2532), the question, at most, simply asked the witness to expound upon appellant's work habits. In fact, it was the subsequent questions, to which objections were not made, that provided the expositive context. For the same reasons, given that the question was, at most, foundation for further discussion, it was not prejudicial. (*Williams, supra*, at p. 763.)

Next appellant contends (AOB 222) that the prosecutor improperly led a witness when he suggested that appellant was leaning over Lorraine Talley's body in a particular position and said "I ain't no joke." (XIII RT 2594.) However, prior to asking this question, the prosecutor had already elicited evidence that appellant shot Talley, leaned over her body still pointing the gun, and said "I ain't no joke." (XIII RT 2593-2594.) Thus, the question, at most, asked only for clarification, an area the trial court suggested would permit some degree of leading questions. (XIII RT 2519.) Appellant did not make any assignment of prosecutorial misconduct here, nor could he, given the limited amount of additional information sought in the context of the question here. (*People v. Carter, supra*, 30 Cal.4th at p. 1207.) Moreover, for the same reason, there simply is no prejudice. (*People v. Williams, supra*, 16 Cal.4th at p. 763.)

Appellant next contends the prosecutor committed misconduct by asking whether a witness was aware of the impact of the "101 California" shootings, and, in the context of appellant's statements referencing the shootings, the large number of people that could be affected. (AOB 223, citing XVII RT 3342-3343.) Although appellant objected to the form of the prosecutor's

question, he admitted "it's not leading" because he felt it was not a question at all. (XVII RT 3342.) Although we agree that the form of the question, even as rephrased by the prosecutor -- "I ask you it's harmed a lot of people, publicity was great because it affected a lot of people, the 101 California?" (XVII RT 3343) -- could have been more artfully phrased, and may in fact have been leading, the court had considerable discretion in this area to permit clarification, because the focus of the entire area of questioning was not whether the incident at 101 California "affected a lot of people," but whether appellant's plan to commit a similar massacre might also have had the same impact. In fact, these -- his coworkers -- were the very people whom appellant attempted to affect -- to send "tremendous shock waves" that lingered like "radiation" -- by his own carnage. The witness was thus, a direct victim of appellant's violence, not just a vehicle through whom the prosecutor could echo a message. (See AOB 223.) Appellant fails to show how introduction of the foundational material was either an abuse of discretion on the trial court's part, or prejudicial prosecutorial misconduct.

Appellant next contends the prosecutor committed misconduct by asking numerous leading questions of the People's mental health expert Dr. Paul Berg (AOB 223-224). Although appellant objected -- oftentimes successfully -- on several alternative grounds to various parts of Dr. Berg's testimony,[19] he did not object on the basis that the questions were leading, nor did he ever argue that the prosecutor had knowingly and intentionally committed any sort of misconduct. (*Carter, supra*, at p. 1207; *Williams, supra*, at p. 762.)

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19. Many of appellant's objections had to do with the scope of Dr. Berg's testimony as a workplace violence expert, and the ability of an expert to offer a proper opinion under Penal Code sections 28 and 29. (See XXII RT 4367.) We believe these constitute the "restrictions the court previously set down" referred to in appellant's Opening Brief. (See, e.g., AOB 224, fn. 42.) In fact, some of the questions cited by appellant were asked during Dr. Berg's voir dire. (See, e.g., XXII RT 4368, 4374.)

The prosecutor was entitled to ask leading questions of an expert witness. (See Witkin, *supra*, §§ 166-167.) Oftentimes, question and answer in the narrative form is extremely time consuming and inefficient when working with an expert who is generally not offering evidence related to historical facts, but instead, is offering opinions based on his or her knowledge of those facts. Thus, even were some of the questions suggestive of an answer, a proposition which we dispute here, the trial court would have had broad discretion in permitting the expert to answer. In fact, the abstract and present tense language suggest that the vast majority of these questions involved an applied diagnosis to hypothetical, rather than actual, situations. (See, e.g., XXII RT 4374 ["In your expert opinion, would a person who engages in an act of workplace violence necessarily be delusional or psychotic?"]; XXII RT 4368 ["Is there anything delusional or hallucinatory in a crime like that in your judgment?"]; see also XXII RT 4370 [asking whether expert's opinion took into account police reports showing appellant's expressed desire to shoot his boss]; XXII RT 4378 ["[W]ould any of those personality disorders [discussed immediately above] in any way prevent a person from committing deliberate and premeditated murder?"].) Thus, the prosecutor did not commit misconduct, let alone past improper questions during examination of the expert. The claim fails.

C. The Trial Court Did Not Violate Due Process By Permitting Objections That Properly Precluded Irrelevant Hearsay

Appellant next argues the court erred by permitting the prosecutor to make a series of speaking objections when counsel tried to admit evidence regarding the "poisonous" atmosphere that existed at the RHA before appellant was hired. (AOB 227.) Appellant does not contend that the trial court made erroneous evidentiary rulings, most of which precluded him from presenting prejudicial, irrelevant, and unreliable hearsay that concerned events usually

occurring well before appellant was hired. (See, e.g., XII RT 2362, 2368, 2375, 2378, 2381.) Indeed, appellant even admitted "reluctance" on several occasions to offer such irrelevant hearsay, but pressed on anyway. (See XII RT 2375-2376.) This Court has rejected similar claims in the past.

In *People v. Price* (1991) 1 Cal.4th 324, this Court found no prejudicial misconduct in the "occasional" speaking objections of the prosecutors, even though those speaking objections violated very specific guidelines set down by the court prior to trial. The Court even recognized, and to some degree excused, "the argumentative propensities of attorneys generally" (*id.*, at p. 448), suggesting that the prosecutors' good faith was shown by their briefly successful attempts to abide by the courts restrictions from time to time. (*Ibid.*) As this Court reasoned: "[I]t is not misconduct to challenge the propriety of opposing counsel's question to a witness or prospective juror, for this is the purpose of virtually all trial objections. Objections constitute misconduct only if they go beyond the charge of legal or procedural violation and directly or by clear inference, question the motives or integrity of opposing counsel." (*Id.* at p. 448.)

Here, as in *Price*, the prosecutor's good faith was shown by his repeated respect for the court's admonitions regarding speaking objections. For example, after defense counsel initially asked the court to control the district attorney's "speaking objections" (XII RT 1362), the prosecutor rephrased his original complaint that appellant was being "disingenuous" when he claimed not to be offering a certain piece of evidence for its truth, and again, simply stated that it was "hearsay." (XII RT 2362.) The court sustained his objection, inferentially agreeing with the prosecutor that the evidence had indeed been offered for the truth rather than its effect on the speaker. (XII RT 2362.) The prosecutor then made numerous non-speaking objections, many of which were sustained. (See XII RT 2364, 2365, 2378 [three times], 2379, 2381 [two

times], 2382 [three times], 2385, 2386, 2390.) In fact, in those pages listed above, the prosecutor rendered only one other "speaking objection," which was done to explain the reasons underlying his claim of speculation (see XII RT 2380). The objection was sustained and counsel did not make any further request. (XII RT 2380.) Furthermore, following defense counsel's requests to limit speaking objections, the prosecutor did exactly that every time – he restated his objections in terms limited only to the reason for the objection. (See, e.g., XII RT 2362, 2368.) The objection was usually sustained, and everybody moved on. Defense counsel asked for no further action, and did not even ask that the district attorney be admonished in front of the jury.

Appellant has failed to show misconduct. There is no bad faith where the bulk of the objections, which properly precluded irrelevant hearsay, were sustained, and the prosecutor subsequently respected counsel's concerns by limiting his complaints to non-speaking objections. (See *Price, supra*, 1 Cal.4th at p. 448; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1304.) In essence, like *Price*, this was nothing more than attorneys being attorneys -- displaying their "argumentative propensities" from time to time, but respecting the court by attempting to rein in their conduct where noticed. (*Ibid.*) This was not a case in which the prosecutor's conduct showed an effort to intentionally demean counsel (see, e.g., *People v. Hill, supra*, 17 Cal.4th at p. 832), nor was this a case in which the prosecutor was making any obvious effort to "persuade" the jury of defense counsel's lack of integrity. (See *Price, supra,* 1 Cal.4th at p. 448.)

In considering the propriety of a prosecutor's remarks or argument, this Court must assess the entire record to see if it was reasonably likely that the jury would interpret the comments as an attack on the integrity of defense counsel or, instead, as an attempt to interpret the evidence. For example, in *People v. Cummings, supra*, 4 Cal.4th 1233, even where the prosecutor blatantly accused

defense counsel of using "tricks" to hide the true nature of the evidence, and employed the "ink and the octopus" metaphor "to get his man off," the Court found no misconduct, as the argument was urging the jury to do no more than not be misled and to focus on the evidence. (*Id.* at p. 1302.) Likewise, this Court upheld more egregious statements in *People v. Cunningham, supra,* 25 Cal.4th 926: "'They are extremely fine. And what is their job? Their job is to create straw men. Their job is to put up smoke, red herrings. And they have done a heck of a good job. And my job is to straighten that out and show you where the truth lies. So let's do that.' . . . ¶ . . . As the People have observed, defense counsel failed to object. Moreover, the prosecutor's comments are not so extreme that an admonition would not have cured any harm. (See, e.g., *People v. Gionis* (1995) 9 Cal.4th 1196, 1216-1217 [prompt admonition corrected any jury misconceptions caused by statement, 'You're an attorney. It's your duty to lie, conceal and distort everything and slander everybody'].) Therefore, the claim is waived." As this Court has stated, "An argument which does no more than point out that the defense is attempting to confuse the issues and urges the jury to focus on what the prosecution believes is the relevant evidence is not improper." (*Price, supra*, 1 Cal.4th at p. 448, quoting *People v. Bell, supra*, 49 Cal.3d 502, 538.)

Moreover, it is only the deliberate conduct of the prosecutor in asking questions that are knowingly designed to introduce inadmissible material before the jury that constitutes misconduct. (*People v. Pitts* (1990) 223 Cal.3d 606, 734, citing *People v. Bell, supra*, 49 Cal.3d at p. 532.) In *Pitts*, the prosecutor repeatedly asked questions designed to bring completely inadmissible evidence before the court, knowing the evidence had no basis for admission after being repeatedly warned by the judge. As the court described it, *Pitts* was a unique case, filled with "abusive extremes." (*Id.* at p. 734.) On the other hand, "When supported by the evidence and inferences drawn therefrom, argument

that testimony or a defense is 'fabricated' may not, without more, be properly characterized as an attempt to impugn the honesty and integrity of defense counsel." (*People v. Cummings, supra*, 4 Cal.4th at p. 1302, fn. 49, citing *People v. Adcox* (1988) 47 Cal.3d 207, 237.)

One passage, involving appellant's attempts to confirm rumors from RHA employee Toni Lawrence, is particularly exemplary of the problems the trial court faced. Defense counsel repeatedly tried to inquire of the witness whether certain employees received favorable treatment, depending on their section of the RHA. However, he was unable to establish that the witness had any personal knowledge of this, and was unable to show proper foundation. The witness suggested that Shirail Burton had received favorable treatment from her friend, supervisor Lorraine Talley, but never explained the basis for her knowledge. Counsel then asked:

> Q. How do you know that Shirail Burton wasn't doing any work from April of `94 to April of `95?
>
> A. Employees for the Conventional program would occasionally talk to me about problems they were having --
>
> MR. JEWETT: Objection; hearsay. Gossip. Rumor.
>
> THE COURT: Okay. Sustained. Ladies and gentlemen, you will disregard the previous answer regarding Shirail Burton.

(XIV RT 3101.) The objection was properly sustained on hearsay grounds. The question almost certainly required a hearsay answer, and the answer showed that Lawrence had not learned of this information through direct observation, but had learned it through the grapevine. In other words, as the prosecutor correctly surmised, the witness was relying on "gossip" and "rumor" to form the basis of the information she was relating to the jury. To the extent the prosecutor was "embellishing" his objection, such embellishment was necessary to frame the objection itself. Two words of explanation do not necessarily constitute an argument, and even if they technically exceeded the scope of that necessary for the objection, they did not constitute prejudicial

misconduct, as the witness's answer was based on exactly what the prosecutor feared, gossip and rumor. Furthermore, appellant never objected on the grounds that the prosecutor's objection constituted misconduct, nor does he now contend that the trial court erred in sustaining the objection and admonishing the jury to disregard the answer. (See *Price, supra,* 1 Cal.4th at p. 447.)

To the extent appellant broadens his attack and attempts to include the court's rulings on his repeated attempts to offer inadmissible hearsay as fodder for his discussion, the claim also fails. Appellant repeatedly ignored the court's efforts to limit his character assassination of the employees at the RHA, and, when he openly questioned the court's rulings, the court was justified in "lecturing defense counsel in front of the jury" (AOB 230): "[You] continue to do something after an objection has been sustained on a topic that has already been ruled upon, so to the extent that I feel you need the correction and need the clarification, I will do so to make sure you understand what the court's ruling was." (XII RT 2409-2410.) The court had significant discretion in this area and did not abuse it here.

D. Cecilia Gardner's Rap Sheet And Subsequent Statements Provided The Prosecutor A Good Faith Basis To Ask Gardner About Her Existing Warrant On A Prior Welfare Fraud Case

Appellant next contends the prosecutor committed misconduct by attempting to impeach defense witness Cecilia Gardner with the existence of a current felony bench warrant for her arrest for grand theft, perjury, and check fraud. (AOB 233.) More specifically, appellant contends that the prosecutor committed misconduct by asking Ms. Gardner whether she was *aware* of the existence of the warrant without later attempting to admit proof of the warrant or of the underlying charges for which Ms. Gardner failed to appear. (See AOB 223, citing XVII RT 3380.) Notwithstanding appellant's waiver for failing to

specifically object on these grounds below, the claim lacks merit. The record suggests that the prosecutor was reading the charges from a computer printout (i.e., a "rap sheet"), and, although the witness denied awareness of the warrant, her unsolicited comments during the hearing at least implicitly recognized the existence of the charges. (See XVII RT 3385 ["WITNESS: "Wasn't they suppose to notify me or something? I mean, I didn't know nothing about it because I never been in trouble with the law."].)

Initially, we note that appellant has failed to preserve the issue for appellate review because he did not make a timely and specific objection on these grounds below. (See *People v. Carter, supra*, 30 Cal.4th at p. 1207 [evidentiary objection insufficient to preserve prosecutorial misconduct claim]; but see *People v. Young* (2005) 34 Cal.4th 1149, 1185-1186 [under the circumstances, relevance objection preserved prosecutorial misconduct claim for review].) Although counsel objected on the ground that introduction of the warrant itself constituted improper impeachment (XVII RT 3380 ["The fact that there is a warrant out for her arrest is not conduct -- I object."]), counsel never raised the specter of prosecutorial misconduct, nor did he ever suggest the prosecutor was acting in bad faith by asking an unsupported question. Nor did counsel raise an objection under Evidence Code section 352. He has failed to preserve this issue for review. (See *People v. Price, supra* 1 Cal.4th at p. 481 ["[I]f the defense does not object, and the prosecutor is not asked to justify a question, a reviewing court is rarely able to determine whether this form of misconduct has occurred. Therefore, a claim of misconduct on this basis is waived absent a timely and specific objection during the trial."]; quoting *People v. Bittaker* (1989) 48 Cal.3d 1046, 1098.)

Under *People v. Wheeler, supra*, 4 Cal.4th at page 300, footnote 14, moral turpitude conduct not amounting to a felony may be admitted to impeach a witness. (See also Evid. Code, § 788.) The proponent of the impeachment

must have a good faith basis for asking the question, although counsel need not be certain that the witness will admit the conduct. (*People v. Young, supra*, 34 Cal.4th at pp. 1185-1186; *People v. Bolden* (2002) 29 Cal.4th 515, 562.) The conduct need not even have been adjudicated to be relevant. (See *People v. Ramos* (1997) 15 Cal.4th 1133, 1173; see also *People v. Martinez* (1998) 62 Cal.App.4th 1454; *People v. Braun* (1939) 14 Cal.2d 1.)

A showing of good faith can be satisfied with a significantly lower quantum of evidence than would be required to prove the conduct at trial. For example, in *Young, supra*, the prosecutor attempted to impeach the defendant's cousin by showing that the defendant admitted prior murders to him. The trial court was uncertain there was a factual basis for the question, as the witness denied the admissions and, in fact, had been asked only whether the defendant admitted prior "shootings," as opposed to "killings." The court precluded the question on "relevance" grounds and admonished the jury to disregard it. This Court subsequently found no prosecutorial misconduct, as there existed a good faith basis to ask the question. The Court distinguished its prior opinion in *People v. Wagner* (1975) 13 Cal.3d 612 as the prosecutor in that case had alleged prior, similar, criminal conduct by the defendant, but did not offer anything to substantiate the allegations. (*Ibid.*)

Here, in contrast to both *Young* and *Wagner*, the impeachment did not involve allegations of misconduct by the defendant, but rather, allegations only against a witness. Furthermore, the witness was one of many who testified to the same allegations regarding a "poisonous" atmosphere at the RHA, and this witness did not even work there at the time appellant committed his crimes. (See XVII RT 3373.)

Furthermore, the prosecutor was not necessarily attempting to impeach the witness with her prior welfare fraud conduct (see *People v. Chatman* (2006) 38 Cal.4th 344, 372 [recognizing trial court had discretion to exclude

misdemeanor welfare fraud conviction]; see also *People v. Cloyd* (1997) 54 Cal.App.4th 1402, 1408 [recognizing that the existence of a misdemeanor bench warrant for failure to appear does not, by itself, constitute moral turpitude conduct]), but instead, was attempting to show that she might be biased against the prosecution due to the existence of the warrant itself. (XVII RT 3385-3386.) Although we recognize that the mere existence of a felony bench warrant for failure to appear, particularly one in which notice to the witness has not been shown, may not be particularly probative, such evidence – going to the witness's state of mind – would be relevant, and admissible unless shown to be outweighed by the potential for prejudice.[20/] Here, appellant did not raise the issue of preclusion under Evidence Code section 352, and thus, the only question is whether the prosecutor had a good faith basis to ask the question.

In fact, the record shows that the prosecutor had a good faith basis for asking the question, both from a rap sheet he was holding (see XVII RT 3385-3386), and through the witness's own statements. (See XVII RT 3385.) A rap sheet provides sufficient evidence to show a good faith basis for impeachment. (*People v. Steele* (2000) 83 Cal.App.4th 212, 223.) Unlike appellant's attempted impeachment of Dr. Berg with conduct for which he had a legal adjudication of factual innocence,[21/] the prosecutor had a rap sheet

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20. We further note that once the witness invoked her Fifth Amendment rights to speak with an attorney regarding the subject (see XVII RT 3383), the prosecutor chose not to unduly consume the jury's time and confuse the jury by waiting to hear collateral evidence involving impeachment, and did not pursue the matter further. Nor did appellant, which likely explains why the prosecutor never actually tendered the evidence he claimed would have substantiated the allegations. (See XVII RT 3382, 3385-3386.)

21. To the extent appellant was attempting to impeach Dr. Berg with his efforts to obtain a declaration of factual innocence through completely unsupported allegations of collusion with the court and/or prosecution (see AOB 292), the claims diverge even further.

showing the prior conduct, which the witness corroborated. Thus, "[t]he present case is not a situation where an attorney is attempting to assassinate the credibility of a witness through unfounded innuendo." (*People v. Steele, supra*, 83 Cal.App.4th at p. 223.)

Finally, even were the court to have erred in permitting the prosecutor to initially ask the question, any error – as an evidentiary matter or as prosecutorial misconduct -- would be harmless. Gardner "did not come before the court as a model of rectitude." (See *People v. Chatman, supra*, 38 Cal.4th at p. 372.) She was impeached by other evidence, including her admission that she was suspended from the RHA for giving family members priority on the waiting list for housing, and ultimately terminated because she was found in possession of stolen laundry tokens. (XVII RT 3377-3379, 3387-3388.) And the court ultimately ruled for appellant on the impeachment issue and admonished the jury to disregard the impeachment evidence. (XXV RT 4851; see XXV RT 4824-4825.) Thus, there could not have been any prejudice. (See *People v. Young, supra,* 34 Cal.4th at pp. 1185-1186 [court's admonition to disregard allegations that the defendant had confessed to other murders sufficient to alleviate prejudice].)

E. The Prosecutor's Accusatory Questions To Dr. Walser Were Based On Reasonable Inferences Supported By The Record And Did Not Constitute Misconduct

Appellant next contends that the trial court erroneously permitted such argumentative cross-examination of his expert, Dr. Walser, that it somehow denied him a fair trial. (AOB 238.) He focuses on two areas of the prosecutor's questioning in which: (1) in an admittedly accusatory manner, the prosecutor asked Dr. Walser whether she and appellant's other two mental health experts had corroborated their findings before writing their reports (see XXI RT 4149), and (2) in the context of Dr. Walser's opinion that appellant

was mentally "disorganized" at the time of the killing, whether appellant actually killed in an "efficient" manner. (XXI RT 4216.) Although appellant objected to the form of the questions, he did not claim either prosecutorial misconduct or that the questions caused a fundamental breakdown in the trial process, and thus the claims are not preserved for review. (See *People v. Carter, supra*, 30 Cal.4th at p. 1207; *People v. Partida, supra*, 37 Cal.4th at p. 435.)

Furthermore, even considered on the merits, the claim fails. The prosecutor's questions regarding the expert's reports, while somewhat blunt and accusatory, were not out of line, given Dr. Walser's inconsistent and amorphous responses concerning the findings of the other doctors (see, e.g., XIX RT 3772, 3779, 3811-3813, 3816), lack of discovery provided by the defense (see II RT 272), and Dr. Walser's unbelievable opinions that contradicted both medical science and common sense. (Compare XIX RT 3819, 3862, 3887-3888, with 4311-4312.) A prosecutor has wide leeway to ask questions that raise reasonable inferences on cross-examination, even if those inferences are not favorable to the defense. (See *People v. Bonilla, supra*, 41 Cal.4th at pp. 337-338.)

Even were the court to have erred in permitting the questions, appellant fails to show the type of prejudice required to succeed on a claim of either misconduct or a fundamental miscarriage of justice. Evidence that Dr. Walser collaborated with Drs. Kincaid and Wilkinson before submitting any reports was also presented through other testimony. (XIX RT 3779, 3840.) And Dr. Walser's credibility had already been assailed, both by her refusal to investigate evidence of appellant's condition at or near the time of the murders (XIX RT 3773-3775, 3818-3819), and by the rebuttal testimony of the prosecution experts (XXI RT 4311-4312), who completely undercut any theory that the fossa and arachnoid cyst appearing in the MRI results could have any impact

on appellant's behavior. They were, as the prosecution's noted radiologist testified, "clinically silent." (XXI RT 4344-4345.) The fact that the prosecutor asked a relevant question in a less than polite manner does not prove misconduct.

Similarly, the prosecutor was entitled to ask Dr. Walser whether appellant had killed his victims in an "efficient" manner. Dr. Walser had previously tried to excuse appellant's conduct by claiming that he had "disorganized" functioning at the time of the murders. (XIX RT 3590.) On cross-examination, the prosecutor was entitled to explore this opinion, and test its validity. The question did not suggest a particular answer, and thus appellant's objection as argumentative was properly overruled. (See *People v. Williams, supra*, 16 Cal.4th at p. 672.) Furthermore, the question was relevant and quite probative. Were Dr. Walser to agree, then she would be required to further defend her opinion that appellant was "disorganized." Were she to disagree, the prosecutor would have been entitled to argue that the facts – showing the wealth of premeditation evidence – would themselves have undercut Dr. Walser's opinion. Either way, the topic was not one in which the jury would be swayed only by sympathy, emotion, or revulsion.

A defendant has no right to present only favorable testimony. If he presents testimony from a witness, our adversary system requires that such testimony be tested in "the crucible of cross-examination" (see *Crawford v. Washington* (2004) 541 U.S. 36, 61; see also *People v. Lewis* (2006) 39 Cal.4th 970, 1028), the "greatest legal engine ever invented for the discovery of truth." (*People v. Chatman, supra*, 38 Cal.4th at p. 384, quoting 5 Wigmore on Evidence (Chadbourne rev. ed. 1974) § 1367, p. 32.) The prosecutor had the right to ask tough questions of the defense expert. That those questions were difficult to answer in a way that was flattering to appellant does not require their preclusion. Appellant has failed to show prejudice and the claim fails.

F. The Prosecutor's Remarks At The Bench, Even If Heard By The Jury, Did Not Result In A Fundamentally Unfair Trial

Appellant next contends that the court "permitted the prosecutor to make inappropriate remarks in earshot of the jury." (AOB 240.) Although we acknowledge that appellant has preserved this claim by making an appropriate objection, appellant has failed to show that the jury ever heard the comment, or was prejudiced in any way.

The remark in question occurred at the end of a bench conference, in the middle of Dr. Walser's redirect examination. There was a question of whether defense counsel may have to testify due to the nature of Dr. Walser's claims, and this opened up the further specter that such testimony might waive the attorney client privilege. Counsel conceded that his testimony might be necessary and the prosecutor declared "I look forward to the opportunity to cross-examine [defense counsel] because I assume he will be laying a foundation." (XXI RT 4156.)

Outside the presence of the jury, counsel complained that the prosecutor had spoken too loudly, and insinuated that the prosecutor had intentionally made the remark in a way that it could be heard by the jury. As appellant called it, "what he's doing is trial lawyering, but he's not doing it fairly." (XXI RT 4157-4158.) Appellant then went on to complain of other unspecified instances

of similar conduct,[22] but did not provide any details, nor did he ask the jury be admonished regarding the prosecutor's remark. (XXI RT 4158.)

Although both the court and the prosecutor recognized that the remark could have been made in a more inconspicuous manner (XXI RT 4159-4160), the prosecutor denied raising his voice (XXI RT 4159), and the court made no finding that suggested the jury had heard the remark. (XXI RT 4159-4160.) Moreover, the court did not corroborate counsel's claim regarding any other instances and refused to reprimand the prosecutor or otherwise express concern with his conduct. (XXI RT 4160.)

A prosecutor is not entitled to argue to the jury outside of the appointed time and place, but the prosecutor need not fret over every word that the jury hears outside of the context of proper questioning, particularly where there is no evidence the jury heard anything in the first place. Appellant did not request a hearing below, nor did he present any evidence that the jury actually heard the prosecutor's remark. He thus, cannot show prejudice.

Moreover, the remark itself was relatively innocuous and did not suggest any unfairness to the defense. Assuming the jury heard the entirety of the remark, all the jury learned was that the prosecutor would appreciate the opportunity to examine the defense attorney on the stand. This is hardly a novel proposition; there was obviously a bit of competitive spirit shown in this trial, but, as in most trials, the adversarial nature is expected and anticipated.

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22. To the extent appellant attempts to raise these instances on appeal, he has failed to make an adequate record for adjudication. Although he claims there were other unreported instances of prosecutorial misconduct, and even insinuates that the reporters may have harbored hidden reasons for not reporting these (see AOB 241, fn. 45), he fails even to reference any particular offer of proof in the record correction proceedings that could assist the Court in determining whether such unreported conferences actually occurred, and any way in which they could have prejudiced him. He has thus failed on appeal to carry his burden of showing prejudice in the record.

Furthermore, a reasonable juror would likely not understand the context of the "foundation" part of the comment, nor in fact, do we. All counsel would be doing, like any other witness, would be providing evidence that was fodder for closing arguments down the road. And counsel ultimately testified, albeit not until the penalty phase. (See XXVIII RT 5466-5470.) Appellant fails to show how he was prejudiced, even were the prosecutor's remark actually overheard by the jurors. The claim fails.

G. The Court Did Not Render Appellant's Trial Fundamentally Unfair By Permitting Relevant And Credible State Of Mind Evidence

In claim 8G, appellant argues that the prosecutor committed misconduct by asking irrelevant questions of three percipient witnesses; and that this rose to the level of fundamental due process error because it was permitted by the court. (AOB 242.) Two of the witnesses were permitted to testify that they feared appellant on the day of the shooting, and the third, to testify that his interpretation of a motion made by appellant after the shooting was consistent with their prior conversation. The claim fails. Notwithstanding that there was never an assignment of prosecutorial misconduct or due process error, the court did not abuse its discretion in admitting relevant and probative evidence. Thus, the prosecutor could not have been guilty of misconduct.

1. Appellant's Non-verbal Communication To Rodney Ferguson

On the day of the shooting, at approximately 2:00 or 2:30 in the afternoon, Rodney Ferguson, an employee of a neighboring Richmond literacy program (LEAP), ran into appellant as Ferguson was returning from City Hall. Appellant commented on how things were not going well and that he might be fired. He expressed frustration, stating that "[he] could shoot his boss" (XII RT 2473), even commenting "almost in the same breath" that he had been to the

range recently. (XII RT 2476.) Ferguson initially thought appellant was joking and responded with a line from a Hitchcock film, "Tell you what, man, I'll do yours and you do mine." (XII RT 2476.) Unfortunately, Ferguson did not immediately make the connection between the shooting range and the threat, and thus did not understand that appellant was serious until after the shooting unfolded. (XII RT 2476.)

At some point later in the afternoon, Ferguson observed a person later determined to be Eric Spears, running across the street in a delirium, frantically crying out, "It's an emergency. Emergency. I need to make a phone call." (XII RT 2478.) Ferguson then observed the shoeless Janet Robinson yelling hysterically at him while waving her hands in the air. (XII RT 2479.) At this point, Ferguson began to notice the presence of police officers. An officer briefly interviewed Robinson, as well as Ferguson and another person, and then left for other parts of the scene. At this point, Ferguson had remembered something Robinson said he felt was important for the officers to know, and began trekking back towards the Housing Authority looking for the officer. (XII RT 2480.)

As he did so, he saw the silhouette of Michael Pearson in custody in the backseat of a police car. (XII RT 2480.) Apparently, Pearson saw him as well. (XII RT 2480.) Pearson turned his head and gave Ferguson a "kind of" nod, which Ferguson interpreted to mean, "[Y]ou know, I said I was going to do it and I did it." (XII RT 2480.) Defense counsel successfully objected to Ferguson's interpretation of the nod as speculative (XII RT 2481), but did not claim the prosecutor committed misconduct in asking the question. (XII RT 2480.) The prosecutor then asked, "Was it your sense in your mind that the nodding of the head referred back to the conversation that you had with him before?" Ferguson, over a relevance objection, was permitted to testify that

"That was what was in my mind, and I can't really describe how I felt." (XII RT 2481.)

The evidence was properly admitted to show the context of appellant's non-verbal communication to Ferguson. Evidence Code section 210 defines "relevant evidence" as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." By his plea of not guilty, appellant put his mental state at issue during the trial. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1243-1244.) Although he admitted killing the victims, and even having premeditated doing so, the People were entitled to present evidence that appellant thought about the killing in advance, talked with Ferguson about it, executed it, and then later smugly gloated about it in a non-verbal communication to Ferguson. Whether appellant's act constituted a non-verbal communication to Ferguson, or was just a coincidence, was a question for the jury. Either way, the court did not err in permitting the question, and even if the question was improper, appellant's failure to raise the issue of prosecutorial misconduct waives the claim. (See *People v. Carter, supra*, 30 Cal.4th at p. 1207 [prosecutorial misconduct claim waived where defendant made only evidentiary objection]; see *People v. Partida, supra*, 37 Cal.4th at p. 435.)

Moreover, even if the court erred in its evidentiary ruling, any error was harmless. Appellant conceded that he killed the victims, that he did so with specific intent, and that he premeditated the murders. Numerous witnesses saw him kill the victims, and several testified that appellant looked "smug" after the killings. Appellant had threatened to kill for weeks in advance, and then, in a lengthy confession immediately after the crimes, boasted about leaving those alive who did not "screw with" him. (See Defense Exh. 41 at time marker 9:35:35.) In the face of this evidence, the admission of testimony from a single

witness to an incident that was virtually uncontested cannot constitute prejudice. For the same reasons, any error in "permitting" the prosecutor to ask the question was patently harmless. The claim fails.

2. The Trial Court Properly Admitted Evidence Of Percipient Witnesses' Fears

As noted previously, appellant had several conversations with Janet Robinson in which he referred to "doing a 101 California Street" if he was fired. (See XIII RT 2539.) During the conversations, however, appellant always assured Robinson that he would not kill her. (See, e.g., XIII RT 2539-2540.) Robinson, without objection, was allowed to testify that she had related appellant's threats to Barbara Garcia, and that Garcia was terrified. (XIII RT 2540.) This discussion actually precipitated appellant's termination, as it took Garcia's fear of appellant to convince Robinson that appellant may have been more serious about the threat than he initially claimed.

When the prosecutor asked whether Garcia had ever related any prior fears about appellant to Robinson, counsel objected on hearsay grounds. The court overruled the objection, as it went to Garcia's state of mind, but the court gave a limiting instruction regarding use of the statement. (See XIII RT 2540-2541.) When the prosecutor rephrased the question, Robinson gave a rambling hearsay answer, to which counsel's hearsay objection was sustained. (XIII RT 2541.) Counsel did not make any further hearsay objections along this line, and Robinson was allowed to testify as to why Garcia was afraid of appellant. (XIII RT 2542.)

Except for a few objections made as non-responsive, most of which were sustained (see, e.g., XIII RT 2542), the prosecutor then asked Robinson a series of questions relating to Barbara Garcia's comments to Robinson that she was afraid of appellant. (XIII RT 2542 ["Q. Did Barbara make any statement to you that indicated her fear of Michael Pearson? A. Yes. . . .¶ . . . Sh[e] told me

more than once that Michael was going to kill her."].) The prosecutor was subsequently allowed to clarify the timing of Garcia's comments. (XIII RT 2544 ["Q. After April 21st did she also express a concern that Michael Pearson would kill her? A. Yes."].) Appellant never objected on either relevance or hearsay grounds, and objected only as non-responsive when Robinson – as she was prone to do – volunteered additional information after the answer. (See XIII RT 2544.)

Similarly, Shirail Burton was permitted to testify without objection that she was "very afraid, very nervous" around 4 o'clock on the date of the murders. (XIV RT 2875.) It was only when the prosecutor asked a multi-part question relating to what she did to cope with that fear that appellant interposed an objection. (XIV RT 2875:16.)

Appellant contends that the evidence was not relevant and further, that it's admission violated his due process guarantee. (AOB 243.) Appellant is wrong. Initially, appellant has failed even to preserve the evidentiary claims (*People v. Valencia* (2008) 43 Cal.4th 268, 302), let alone preserve a claim of federal due process error that was never raised below. (See *People v. Carter, supra*, 30 Cal.4th at p. 1207 [prosecutorial misconduct claim waived where defendant made only evidentiary objection]; see *People v. Partida, supra,* 37 Cal.4th at p. 435.) Furthermore, even assuming for sake of argument either claim was preserved, it fails. The evidence was relevant to show both a percipient witness's fear (see *People v. Valencia, supra* 43 Cal.4th at p. 302 ["Evidence of fear is relevant to the witness's credibility."]; *People v. Lancaster, supra*, 41 Cal.4th at p. 180), and to further explain the factual circumstances and witnesses' states of mind that led to appellant's termination in the first place. (See Evid. Code, § 210; *People v. Guerra* (2006) 37 Cal.4th 1067, 1114 [victim's fear of defendant relevant to rebut claim of consensual sex]; *People v. Waidla, supra*, 22 Cal.4th at p. 723 [no abuse of discretion to

admit victim's fear of defendants because it showed lack of consent to underlying burglary].) Furthermore, even where appellant's objections were unsuccessful (see XIII RT 2540-2541), the court gave a limiting instruction. We presume the jurors followed their instructions and did not consider that evidence for its truth. (*People v. Mendoza* (2007) 42 Cal.4th 686, 699.)

Moreover, appellant fails to show prejudice. The evidence against appellant was both overwhelming and virtually uncontested. This was not a case in which the prosecutor attempted to play on the jurors' sympathies (see *People v. Kipp* (2001) 26 Cal. 4th 1100, 1129 [prosecutor's direct, though brief, appeal for sympathy during closing argument was nonprejudicial misconduct]), or one in which a defendant is tried through character assassination rather than evidence. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1385 [erroneous admission of numerous pieces of character evidence, including knives and "Death is His" writing, rendered trial fundamentally unfair]; but see *Estelle v. McGuire* (1991) 502 U.S. 62, 69-70 [finding no federal due process violation from the admission of evidence relevant under state law]). Even assuming for sake of argument that the witness's heightened sensitivity was not relevant, this was, at the very least, a close call and not one that showed intentional prosecutorial misconduct or even negligent fundamental due process error.

H. The Prosecutor Did Not Misstate The "Deliberation" Requirement During Closing Argument When He Paraphrased The Requirement To Ask, "Am I Going To Do It? Am I Not Going To Do It?

Appellant next contends the trial court "silently permitted" the prosecutor to commit misconduct by misstating the deliberation requirements in guilt phase closing argument. (AOB 244.) He argues the prosecutor's paraphrase of the definition to ask "Am I going to do it? Am I not going to do it?" (XXVI RT 4883) misstated the requirements of Penal Code section 189 by failing to consider the reasons against killing. (AOB 244-245, citing CALJIC

No. 8.20.) The claim was waived by failure to object, and moreover, the prosecutor did not misstate the law.

Initially, as even appellant recognizes (AOB 247), he did not object below, and even invited any error by making the same "mistake," arguing a definition of "deliberation" similar to that he claims the prosecutor erroneously argued (see XXVII RT 5036-5037, 5041). (*People v. Partida, supra*, 37 Cal.4th at p. 435.) Although he claims this was "black letter law familiar to every law school graduate" (AOB 248), he fails to show how an admonition would not have "cured" any misstatement in the trial court, particularly where proper instructions were given below. (*People v. Price, supra*, 1 Cal.4th at p. 447.) The fact that he now adds a federal constitutional component, or that this is a capital case, does not aid him, nor does the fact that appellant joined in the error. (*Partida, supra*, at p. 435; see *People v. Young, supra*, 34 Cal.4th at p. 1203.) He thus should not be allowed to press the claim here.

The claim also fails on the merits. First, the basis for his argument is primarily the instruction itself rather than the statute. (Compare CALJIC No. 8.20 and Pen. Code, § 189.) That instruction defines "deliberate" as a verb; "formed or arrived at as a result of careful thought and weighing of the considerations for and against the proposed course of action." (CALJIC No. 8.20; see Merriam Webster's Cal. Dict., 10th ed. 1994.) While we do not think the instruction misleads the jury, and may constitute a useful aid in understanding the concept, the statute defining first degree murder itself uses the term "deliberate" in context as an adjective, in conjunction with the terms "willful," and "premeditated." (See Pen. Code, § 189 ["All murder which is perpetrated . . . by any other kind of willful, deliberate, and premeditated killing . . . is murder of the first degree."].) In fact, other cases have even omitted the "for and against" language, defining the term "deliberation" as a "careful weighing of considerations in forming a course of action . . . ." (*People v.*

Young, supra, 34 Cal.4th at p. 1182; see also *People v. Halvorsen* (2007) 42 Cal.4th 379, 419; *People v. Cole* (2004) 33 Cal.4th 1158, 1224.) The Court has further defined the term by what it is not. As the Court suggested long ago, the term "deliberate" is simply "an antonym of 'Hasty, impetuous, rash, impuslive' (Webster's New. Int. Dict. (2d ed.)) and no act or intent can truly be 'premeditated' unless it has been the subject of actual deliberation or forethought . . . ." (*People v. Hilton* (1946) 29 Cal.2d 217, 222; see also *People v. Thomas* (1945) 25 Cal.2d 880, 901.)

The prosecutor's argument regarding the term deliberation did not, in context, mislead the jury. When considering the conduct and remarks of the prosecutor during closing argument, the Court must view them in the entire context of the trial. (See *People v. Taylor* (2001) 26 Cal.4th 1155, 1167 [prosecutor's comment regarding the "tricks" played by defense counsel in general was not, when considered in context of trial, misconduct as it was not an improper attack on this defense counsel's integrity], citing *People v. Medina, supra*, 11 Cal.4th at p. 759.) For example, it is not misconduct for the prosecutor to provide the jury with a "simplified explanation of the law," particularly where the jury is otherwise properly instructed. (See *People v. Cunningham, supra*, 25 Cal.4th at p. 1022 [prosecutor's argument that jury must weigh "good and bad" during penalty phase not misconduct when considered in context of other statements and instructions]; see also *People v. Staten, supra*, 24 Cal.4th at p. 465 [argument regarding lack of remorse not improper when taken in context]; *People v. Welch, supra*, 20 Cal.4th at p. 760; *People v. Gionis, supra*, 9 Cal.4th at pp. 1215-1216.)

Here, the prosecutor defined "deliberation" in terms of considerations both for and against killing. His statement, "It's the thinking about am I going to do it? Am I *not* going to do it?" (XXVI RT 4883, emphasis added), is the epitome of considerations "for and against." Although appellant contends this

is "misleading," and constitutes only evidence of premeditation (AOB 245), the prosecutor's inclusion of the language "thinking about," particularly in conjunction with both positive and negative alternatives described, is an apt analogy to a concept that merely requires "a careful weighing of considerations in forming a course of action." (See *People v. Young, supra*, 34 Cal.4th at p. 1182.) Furthermore, although appellant claims the argument precluded consideration of the reasons against killing (see AOB 245), he fails to explain how a person can think about both taking and not taking a certain action – "Am I not going to do it?" – without considering the reasons against taking the action. The prosecutor's paraphrase of the term did not constitute a deliberate attempt to mislead the jury. This Court has noted that such allegations of improper attacks on the part of the prosecutor have resulted in reversal only in a single case: "We observe that, with the exception of *People v. Hill, supra*, 17 Cal.4th 800, involving pervasive and egregious prosecutorial misconduct affecting all phases of trial, none of the "personal attack" cases cited by defendant found reversible misconduct." (*People v. Taylor, supra*, 26 Cal.4th at p. 1167.)

Whether argument or comments, everything must be considered in the entire context. For example, this Court rejected a similar contention in *People v. Welch, supra*, 20 Cal.4th at p. 460, where the trial court added superflous language to CALJIC No. 8.20 stating: "In other words, ladies and gentlemen, . . . deliberation means that you think about it. It's a reasoning process. It can either be good or bad reasoning. You think of what you're going to do before you do it instead of acting upon a sudden impulse or something else which precludes the idea of thought." (*Id.* at 756.) The Court rejected the argument that this blurs the line between first and second degree murders: "Taken in context, the trial court's instruction merely clarifies the basic concept that deliberate and premeditated murder requires some quantum of reflection greater

than a mere intent to kill." (*Ibid.*; see also *People v. Smithey* (1999) 20 Cal.4th 936, 980-981 [inclusion of statutory language saying that mature and meaningful reflection not required did not mislead jury and imply opposite – that jury could find deliberation even though reflection was immature and frivolous].)

Finally, even assuming arguendo that the prosecutor erred in failing to parrot the language of either the statute or the instruction, any error was patently harmless. This part of the argument constituted a small portion of the prosecutor's overall summation of evidence, and the jury was subsequently – and correctly – instructed on the law. Moreover, the evidence showing that appellant deliberated – that he carefully weighed the considerations for and against killing – was overwhelming. Notwithstanding that appellant committed two separate murders almost five minutes apart, that he planned and threatened the murders for weeks in advance and went to the shooting range on the night before, that he left numerous potential victims alive while he still had ammunition, and that he confessed to the murders immediately after and explained how he picked and chose among his victims depending on who "screwed" with him (see Defense Exhibit 41 at time marker 9:35:35), appellant – after just having brutally executed Barbara Garcia – specifically reminded Janet Robinson that he had remained true to his previous promise not to kill her. A clearer picture into the mind of a double murderer a jury will not often see. Appellant's contention fails.

I. The Prosecutor Did Not Commit Misconduct During The Guilt Phase Closing Argument And Appellant's Claims Were Waived By Failure To Object

1. The Prosecutor Was Entitled To Remind The Jury Of The Testimonies of RHA Employees Who Had Witnessed The Tragedy

Appellant initially argues that his due process rights were violated during the prosecutor's closing argument, when he summarized the testimonies of the various RHA employees who had witnessed appellant's carnage. (AOB 253.) Although appellant claims the prosecutor was doing nothing more than appealing to the jury's emotions when he discussed testimony from the numerous victims (see XXVI RT 4983), the sentence immediately preceding appellant's quotation was a plea from the prosecutor to resolve the case without emotions, with a verdict based only on the evidence. (See XXVI RT 4983.)

Furthermore, the context of the prosecutor's statements belies appellant's argument. For example, appellant points to the prosecutor's argument regarding the shoes that were left behind. (AOB 254, citing XXVI RT 4917.) However, the prosecutor had used the shoes simply as an example of the type of person the witness was; to remind the jury of her demeanor on the stand. (XXVI RT 4921.) In fact, the prosecutor went through the testimonies of numerous witnesses in the same way, attempting to remind the jury of various stories told by those who lived through appellant's attack. If his summary appeared to humanize the witnesses, this was only fitting, given appellant's "slanderous" attacks on the RHA and the credibility of some of the prosecution's witnesses. (See XXVI RT 4926.) In fact, the prosecutor would have been entitled to go much further in his argument, using a picture of the shoes left behind not just to show a witness's "quiet style" (XXVI RT 4921), but to corroborate the testimony of other witnesses (see XII RT 2479), and even to show the chaos that ensued the minute appellant began his rampage. Not

only has appellant failed to show due process error, but he has failed to show error at all.

Moreover, appellant failed to object to any of this evidence, and in fact, fully utilized it in his own closing argument. (AOB 254.) As appellant recognizes, counsel told the jury that the prosecutor "has every right" to say what he did, but – in derogation of the principles set out in his own argument (see AOB 255) – attacks the prosecutor's argument rather than the evidence by suggesting the prosecutor was trying to "drive the engine" with emotions. (XXVI RT 5006.) The claim was truly waived. The claim fails.

2. The Prosecutor Was Entitled To Point Out The Flaws In Appellant's Mental Health Evidence

Appellant next contends the trial court "silently permitted" the prosecutor to "demean" defense counsel during the guilt phase closing argument. (AOB 254.) He argues the prosecutor was not entitled to point out that appellant called only one of the three doctors that worked with him in preparing his defense, and that Dr. Walser, the witness who was called, was not qualified to read the MRI and thus, not as qualified to render an opinion that tried to correlate the MRI results with appellant's behavior. (AOB 255.) Appellant failed to preserve this argument, failed to show prejudice, and has failed to show any way in which the argument was even improper.

Initially, we note that appellant did not object during the argument and thus the claim is not preserved on appeal. (See Evid. Code, § 353.) As noted above, appellant cannot sit silently by, listening contently to what he considers errors and then gamble on the jury's verdict, thinking all the while that he has a trump card up his sleeve when the verdict is not in his favor. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 665; *People v. Kipp, supra*, 26 Cal.4th at p. 1129-1130.) "To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition;

otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." (*People v. Price, supra*, 1 Cal.4th at p. 447; see *People v. Carter, supra*, 30 Cal.4th at p. 1207.) Here, appellant did neither. He made no objection, and fails to show how this is anything other than a garden variety statement by an attorney that – if even arguably erroneous – could have been cured by a prompt admonition. (*Ibid.*; see also *People v. Kipp, supra*, 26 Cal.4th at pp. 1129-1130 [noting that although defendant objected to prosecutor's sympathy argument, he did not request admonition].) The claim was not preserved.

Moreover, appellant fails even to show that the prosecutor committed misconduct during argument, let alone that this cost him a fair trial. A "prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account." (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) As this Court said in *People v. Arias* (1996) 13 Cal.4th 92, 162:

> Argument may not denigrate the integrity of opposing counsel, but harsh and colorful attacks on the credibility of opposing witnesses are permissible. (*People v. Sandoval* (1992) 4 Cal.4th 155, 180, 184; *People v. Cummings, supra*, 4 Cal.4th 1233, 1302.) Thus, counsel is free to remind the jurors that a paid witness may accordingly be biased and is also allowed to argue, from the evidence, that a witness's testimony is unbelievable, unsound, or even a patent "lie." (*Sandoval, supra,* at p. 180; see *People v. Price, supra*, 1 Cal.4th 324, 457.)

(See also *People v. Farnam, supra*, 28 Cal.4th at p. 171.)

Here, the prosecutor was entitled to direct the jury's attention to Dr. Walser's lack of credibility when it came to opining about the results of the MRI, and pointing out that her opinions were in direct contrast to those of the People's experts, Drs. Hoddick and Berg. The prosecutor was further entitled to argue that her results were not corroborated by other testimony, and suggest to the jury the common sense conclusion that if there was indeed other favorable evidence to support Dr. Walser's opinion, that it would have been

presented. The prosecutor was not limited to arguing his own evidence, and was entitled to draw reasonable inferences from the existing evidence, such as the possibility that the opinions of appellant's experts may not have been unanimous, or that appellant may indeed not have called someone more qualified to testify about the MRI results because such testimony could not be credibly obtained. This was a far cry from the "ink and the octopus metaphor" which was upheld by this Court (see *People v. Cummings, supra*, 4 Cal.4th at p. 1302), nor did the prosecutor blatantly argue that appellant was trying to "hide the truth." (*Ibid.*; see *People v. Cash, supra*,28 Cal.4th at p. 732 ["[W]e accord counsel great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence."].) As the Court has repeatedly stressed, this is argument, not evidence; "[a] prosecutor may vigorously argue his case and is not limited to Chesterfieldian politeness." (*People v. Harrison* (2005) 35 Cal.4th 208, 244, quoting *People v. Wharton* (1991) 53 Cal.3d 522, 567-568; see *People v. Hayes* (1971) 19 Cal.App.3d 459, 470.) The claim fails.

J. The Trial Court Did Not Violate Appellant's Fundamental Rights By Permitting The Prosecution To Keep Pictures Of The Victims Face Down On A Chair Underneath Counsel Table

Appellant contends the prosecutor committed misconduct by repeatedly exposing the jury to the sight of picture frames which ostensibly contained pictures of the murdered victims. (AOB 255.) He does not contend that the jury was actually – or even erroneously -- shown the contents of those picture frames, but rather, that the mere sight of the frames somehow invoked images of the murder victims.[23/] (AOB 256.) The claim fails.

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23. The prosecutor showed the pictures in the frames to the jurors, on occasion, as part of proper argument and questioning of witnesses. Appellant does not contest the use of the pictures as demonstrative evidence, but only

Initially, appellant failed to request the jury be admonished as to its consideration of the contents of the photographs or, for that matter, the frames. To the extent the prosecutor's use of the photographs was objectionable, an admonition to the jury would easily have cured any error. Appellant's failure to request such an admonition forfeits the claim. (See *People v. San Nicolas, supra*, 34 Cal.4th at p. 665.)

Even if preserved, the claim fails on the merits. This Court has expressly upheld admission of the "photograph of a murder victim while alive," finding it "relevant at the penalty phase of a capital trial as a 'circumstance of the crime,' because it portrays the victim as seen by the defendant before the murder." (*People v. Lucero* (2000) 23 Cal.4th 692, 714-715; see also *People v. Lucero* (1988) 44 Cal.3d 1006, 1021-1022 [admonition cured incredibly prejudicial "screaming" comment from victim's mother who was removed from audience].) The Court expressly distinguished cautionary language from *People v. Osband* (1996) 13 Cal.4th 622, 677, where the offending picture was introduced during the guilt phase, rather than the penalty phase. (*Lucero, supra*, 23 Cal.4th at p. 715.) Similarly, this Court has upheld use of an "in life" photograph of a victim during a prosecutor's penalty phase argument. (See *People v. Cox* (1991) 53 Cal.3d 618, 688.) Unlike guilt phase photographs, "[t]his evidence visually depicted a "circumstance of the crimes," portraying the victims as defendant saw them seconds before he killed them." (*Ibid.*)

Appellant has failed to show prejudice in either the trial court's rulings or the prosecutor's conduct. To the extent appellant's claim is premised on evidentiary rulings, the trial court properly permitted the prosecution to utilize

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contests their allegedly "unnecessary" presence at other times in the case. Although appellant suggests the pictures may have been visible during other portions of the trial (see AOB 256, citing XXVIII RT 5265, AOB 259, citing XXIX RT 5487), there is no evidence supporting his claim. (See XXIX RT 5488.)

the photographs during the cross-examination of defense witness Charles Thomas, and as demonstrative evidence during closing argument of the penalty phase. During the penalty phase, Thomas attempted to explain appellant's job-related rage as a common, understandable, experience, in which bosses "can put you in a state of mind [in which] it's very hard to contain yourself." (XXVIII RT 5316.) The prosecutor was entitled to single out a particular boss during cross-examination – appellant's particular boss – to see if Thomas felt the same way towards her now that she is dead. Likewise, the prosecutor was entitled to utilize the photographs of the victims during the penalty phase to depict the victims as appellant "saw them seconds before he killed them." (*People v. Cox, supra*, 53 Cal.3d at p. 688.) The prosecutor was entitled to illustrate the humanity and vulnerability of the victims; to show that appellant chose to intentionally murder two relatively defenseless human beings. (*Ibid.*)

Nor did the prosecutor commit any misconduct involving the frames of the photographs. Although the prosecutor admittedly put up a limited resistance to placing the photographs elsewhere, he fully abided by the court's requests to place the photographs on the chair under the table (see XXVIII RT 5271), and even to turn them face down during a portion of the defense argument. (See XXIX RT 5584.) The prosecutor acted in good faith before initially showing the photographs to witnesses during the penalty phase, even acknowledging that he had case authority, in anticipation of a defense objection that never came. (See XXVIII RT 5266.) In fact, at one point appellant even dared the prosecutor to admit the photographs as an exhibit. (See XXVIII RT 5268.) The trial court fully authorized the prosecutor to utilize the photographs during closing argument (see XXVIII 5267-5268, 5270) and the only true objections to the prosecution's use were heard and overruled outside the jury's presence. (See, e.g, XXVIII RT 5263.)

Even if there was evidentiary error, there was no prosecutorial misconduct, and the court could not have violated appellant's fundamental trial rights. Contrary to appellant's characterization (see AOB 257), the trial court was not shy about ordering the prosecutor to place the photographs face down under the table, although out of respect for the professionalism of the attorneys, he did so only as a "request" rather than as an order, because he felt the photos and "the frames of (sic) these photographs are in does not constitute a constant reminder" (XXVIII 5269), and that the defense counsel should not be distracted during presentation of his case or argument. The prosecutor complied. And the court found that the photographs were not "openly displayed" (XXIX RT 5584.) Appellant further fails to show that the frames were even visible or viewed by the jurors let alone, show any way in which the jury's verdict was slanted due to observation of mere frames of photographs it had already seen.

Nor do appellant's cases support his claim. In *Carey v. Musladin* (2006) 549 U.S. 70, 127 S.Ct. 649, the Court recently considered a related topic, whether a defendant's right to a fair trial was prejudiced where several jurors wore buttons containing small pictures of the victim, in plain sight of the jury. The court, citing *Estelle v. Williams* (1976) 425 U.S. 501, and *Holbrook v. Flynn* (1986) 475 U.S. 560, upheld the state appellate court's ruling that the "buttons had not branded defendant with an unmistakable mark of guilt in the eyes of the jurors because the simple photograph of [the victim] was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member." (*Id.* at 127 S.Ct., p. 652 [internal quotations omitted]; see also *People v. Houston* (2005) 130 Cal.App.4th 279, 316 [admonition to jury cured any possible prejudice from spectator's use of buttons bearing picture or name of murder victim].) *Estelle v. Williams, supra*, 425 U.S. 501, cited by appellant (AOB 261), is readily distinguishable as it involved only a defendant's right to wear non-prison clothing at trial. Although *Norris*

v. Risley (9th Cir. 1990) 918 F.2d 828, reversed a case because numerous spectators wore visible buttons bearing "Women Against Rape" in an effort to influence the jury, that case did not involve the properly admitted evidence, which appellant does not challenge here. The court had broad discretion to control its courtroom and to prohibit unfairness on either side. Appellant fails to show how the jury was influenced by seeing, assuming it did, the mere frames of photographs, photos that it had already seen, placed face down on a chair under a table. The court did not abuse its discretion, let alone violate appellant's right to a fair trial.

K. The Trial Court Was Under No Duty To Define Certain Specific Evidence In The Penalty Phase As Mitigating

Lastly, appellant argues that the court permitted the prosecutor to get away with misconduct in closing penalty phase argument by allegedly misstating the law and by demeaning counsel. (AOB 261.) Appellant sets forth several examples of objections that were sustained, but where the court did not specifically rebuke the prosecutor for his conduct. Notwithstanding that this was argument, and that the court immediately instructed the jury as to the correct law that applies, appellant failed to request an admonition that could have cured this, and thus, has waived the claim.

Later during the prosecutor's argument, after the defendant had successfully raised a few scattered objections to the prosecutor's argument that appellant's emotional state was not a mental disease or impairment, and thus, that factor (h) did not apply (XXIX RT 5549, XXX RT 5570), appellant contended that the court had a greater duty to presciently correct any perceived wrongs, and to inform the jury that evidence in mitigation under factor (h) did indeed exist. Counsel explained that "something else goes on in a moment like that, beyond the simple words now written on a page and that is that the defendant here and his lawyer are wrong about a certain issue. It then actually

provides impetus and strength to the prosecution's argument." (XXX RT 5576.) The court, however, correctly responded that it was "unable to tell a jury that this evidence is aggravating, this evidence is mitigating." (XXX RT 5576.)

Although we agree that impairment of a person's ability to conform his behavior to the requirements of the law under Penal Code section 190.3, subdivision (h), cannot be used as aggravation, the court also cannot instruct the jury that a particular piece of evidence – here, appellant's emotional state – actually constitutes mitigation. Whether a piece of evidence is or is not mitigating is solely a determination for the trier of fact. The court is not obligated to instruct, nor is the defendant even entitled to an instruction, labeling the mitigating and aggravating evidence in a capital case. (See *People v. Cunningham, supra,* 25 Cal.4th at p. 1041.) Appellant was entitled to argue that certain evidence could be considered mitigating under factor (h), but the court was under no obligation to instruct that such evidence must be considered so, nor was the prosecutor required to refrain from arguing that such evidence was not mitigating. Here, the prosecutor did not argue that the evidence showed aggravation; only that it did not have the force of mitigation that appellant claims. Contrary to appellant's insinuation, appellant was by no means retarded. (See AOB 269.) He knew exactly what he did and gave a lengthy and detailed confession afterward, at least part of which was viewed by the jury. Although appellant's "expert" may have tried to put a different spin on the evidence, the record clearly showed that appellant did not suffer from any type of mental disease or defect at the time he committed his crime that somehow reduced his culpability. The prosecutor's argument, in conjunction with the court's proper instruction, did not prejudice appellant's right to a fair trial. The claim fails.

L. Conclusion

This case is not *People v. Hill*, *supra*, 17 Cal.4th 800. Even a cursory review of the record in this case reveals how far removed from the genre of "example" cases that opposing counsel has strayed in attempting her analogy. Our case involved a temperate professional district attorney who has dedicated his life to fighting crime. That our adversarial system requires him to "fight the good fight" from time to time is as much a credit to the system as it is a fault. Appellant has failed show misconduct, and cannot even approach a showing of unfairness. The claim fails.

IX.

THE TRIAL COURT PROPERLY PRECLUDED APPELLANT'S MENTAL HEALTH EXPERT FROM RENDERING AN OPINION ON PREMEDITATION AND DELIBERATION – ULTIMATE ISSUES THAT SHOULD BE LEFT FOR THE JURY

Appellant contends the trial court erred in sustaining the prosecutor's objections to two questions asked of appellant's expert regarding whether appellant had actually thought about "doing a 101 California" at the time he made the "101 California" threats[24] to his coworkers. (AOB 272; see XIX RT 3710; XXI RT 4207.) He argues a distinction between "thoughts" about murder and the "elements" of premeditation and deliberation, and contends that based on this distinction, the trial court erroneously precluded the testimony

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24. We recognize that appellant's argument does not actually contemplate the words as threats, and instead, suggested below that appellant was not serious -- on at least one occasion (see XIX 3709-3710) -- when he made these statements. The context of the statements, as well as appellant's subsequent actions, suggest otherwise. Given the verdicts, and the usual presumptions on appeal, the People are entitled to presume appellant's statements were not idle chatter.

under Penal Code section 29. Appellant recognizes that the existence of homicidal thoughts in a defendant's mind can evince premeditation of an intent to kill, and he does not dispute that premeditation is an element of murder. (AOB 274.) The trial court did not abuse its discretion in prohibiting the expert from opining about appellant's state of mind at the time of the crime -- a conclusion that is supposed to be made by the jury, not the expert -- and further, he fails to show how the court's ruling resulted in reversible prejudice.

Penal Code section 29 limit's the permissible testimony of a mental health expert in a criminal case:

> In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged.

(Emphasis added.) A trial court has broad discretion to admit or exclude evidence, including the testimony of an expert. (See *People v. McAlpin* (1991) 53 Cal.3d 1289, 1299; *People v. Ramos* (2004) 121 Cal.App.4th 1124, 1205.)

Here, appellant contends that the "elements" of premeditation and deliberation consist of more than just a defendant's thoughts. He argues that just because a defendant has thought about committing a murder ahead of time, that is not "dispositive" on the issue of whether he committed a willful, deliberate, and premeditated killing. However, appellant provides no support for his proposed distinction. Moreover, the very definition of "premeditation" encompasses the idea that a defendant thought about or considered the act beforehand. (See *People v. Halvorsen, supra,* 42 Cal.4th at p. 419 ["'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance."], quoting *People v. Koontz* (2002) 27 Cal.4th 1041, 1080; *People v. Stitely, supra,* 35 Cal.4th at p. 543 ["An intentional killing is premeditated and deliberate if it

occurred as the result of preexisting thought and reflection rather than an unconsidered or rash impulse."]; see also CALJIC No. 8.20.) To the extent appellant argues that more is required, he fails to offer any examples, nor does he include any authority suggesting that premeditation and deliberation means anything other than thinking about the killing in advance.

Here, the expert was asked to opine whether appellant could actually have been thinking about killing when he made the prior "101 California" comments. The court properly prohibited the expert from offering an opinion as to an ultimate issue in the case -- appellant's premeditation and deliberation -- as proscribed under section 29.

Appellant then argues that the concept of deliberation is a separate mental state that is not encompassed in the defendant's prior thoughts about committing a murder, or in this case, "doing a 101 California." (AOB 274.) Regardless of whether they are separate principles, appellant was not just asking his expert for an opinion about deliberation, but for an opinion about deliberation and premeditation, which, he already has conceded, could be proven by appellant's thoughts of committing murder (AOB 274). (See *People v. Lenart* (2004) 32 Cal.4th 1107, 1127 [finding sufficient evidence of premeditated attempted murder from defendant's act of killing first victim]; see also *People v. Stitely*, *supra*, 35 Cal.4th at p. 543.) That the prosecutor included the term "deliberation" as part of his objection is thus irrelevant for purposes of this claim, as is any similar statement by the trial court, because the trial court properly precluded the expert's opinion as going to appellant's premeditation.

Appellant alternatively contends that, even if the trial court properly sustained the objection, the court's reiteration of the grounds for that objection constituted an erroneous "instruction" that contradicted his theory of the case. (AOB 276-277.) We question how the court could have correctly sustained the

objection without also making a correct statement of law, but regardless, the court's statement did not prejudicially impact appellant's theory of defense.

A court has discretion to comment on the evidence, so long as those comments are "accurate, temperate, nonargumentative, and scrupulously fair." (Cal. Const., art. VI, § 10, quoted in *People v. Sturm*, *supra*, 37 Cal.4th at p. 1231.) Here, the court did not -- as a "matter of law" (see AOB 276)-- "equate" homicidal thought with proving the elements of premeditation and deliberation, but instead, simply affirmed that, if the appellant indeed thought about committing a "101 California," the jury could use this information as proof of premeditation and deliberation. Thus, this was not a case in which the court blatantly -- and quite erroneously -- informed the jury that premeditation would not be an issue during the penalty phase (see *People v. Sturm, supra*, 37 Cal.4th at p. 1231 [court's voir dire comments to second penalty phase jury that premeditation was not a contested issue were both erroneous, as jury could have found guilt on a felony murder theory, and prejudicial, as lack of premeditation was central issues in the case]; but see *People v. Slaughter* (2002) 27 Cal.4th 1187, 1218 [trial court was entitled to inform jury that self-defense was not at issue in penalty phase]) and this was definitely not a case in which the trial court vouched for the credibility of the expert. (See *People v. Coddington*, *supra,* 23 Cal.4th at p. 615 [no prejudice where trial court's explanation that experts were appointed by court could also be interpreted as vouching when witnesses were called by prosecution].) Moreover, the jury was properly instructed later in the case (see XXVI RT 4867 [CALJIC No. 8.20]), and would not have misconstrued the court's comments as precluding the issue of premeditation and deliberation.

Lastly, appellant argues that the court's comment in sustaining the objection violated his federal constitutional rights because it somehow removed the question of deliberation from the jury's purview. (AOB 277.) Initially, we

note the court's comment was brief and correctly stated the law. In sustaining the objection, the court stated, "Right now I am going to sustain the objection. It calls for one of the elements that is within the jury's province and not within the base of the expert to testify." (XXI RT 4207-4208 (emphasis added).) As noted above, an expert is not entitled to render an opinion about an ultimate issue in the case, such as premeditation and deliberation. (Pen. Code, § 29.) The question here was essentially whether appellant's prior references to "doing a 101 California" were evidence that he actually thought about killing. The operative word is "thought" about, which, in conjunction with the fact that this occurred prior to the killing, was sufficient to show premeditation, an element of the crime. (*People v. Stitely, supra*, 35 Cal.4th at p. 543.)

Furthermore, even assuming the issue was preserved, that the court's comment could be construed as an instruction, and that the "instruction" was somehow erroneous, the court's comment was sufficiently ambiguous regarding the overall issue of premeditation and deliberation that it was easily and obviously cured during the court's later overall charge to the jury. The court's brief comment did not tell the jury that appellant's "101 California" itself constituted deliberation, but instead, informed the jury that it was their obligation to determine from the evidence whether deliberation had been proven. (XXI RT 4207.) The court did not even comment that appellant's thoughts about "doing a 101 California" could have been used as evidence showing premeditation and deliberation, a remark which would have been fully within its discretion (see Cal. Const., art. VI, § 10).

Indeed, appellant does not dispute that a defendant's "homicidal thoughts" could constitute evidence showing a premeditated intent to kill. (See AOB 274.) Although the court did not disabuse the jury from the notion that homicidal thoughts alone could suffice for premeditation and deliberation, the court never specifically instructed the jurors on this. Instead, the court

explicitly instructed under CALJIC No. 8.20, which informs the jury of the definitions of premeditation and deliberation, and instructs the jury how to go about determining mental state. And again, the subject matter of the court's comment itself -- informing the jurors that it was their responsibility to determine the ultimate issues of premeditation and deliberation, rather than that of an expert (XXI RT 4207) -- shows why it did not remove an issue from their deliberations and thus could not have prejudiced appellant.

Appellant simply presumes that the jury disregarded its other instructions and took the court's comment as an irrefutable command to presume the element of deliberation existed. He argues prejudice because the facts did not show that appellant weighed considerations against killing. (AOB 276.) Even assuming arguendo that appellant has properly defined "deliberation," the evidence showed abundant deliberation, in addition to the plethora of "101 California" comments.

Appellant planned this murder over a long period of time, getting the gun, going to the range, and even securing his apartment in a manner that precluded conventional reentry. Appellant told Janet Robinson he would not kill her, and then repeated this statement as Robinson cowered under the desk after she watched appellant execute Barbara Garcia. He made a similar comment to Pamela Kimes, telling her that he wasn't "no joke," and then, although he had the opportunity, expressly chose to leave her alive. Appellant's decision to pick and choose among his victims itself showed that he was deliberating whom to kill. (See *People v. Lenart*, *supra*, 32 Cal.4th at p. 1127.)

Finally, the fact that his expert was not legally permitted to confirm or deny appellant's premeditation did not preclude him from making an argument that the jury should disregard appellant's thoughts and actions in determining whether the People had proven the mens rea of the crime. Perhaps, instead, it was counsel's own common sense that precluded the argument. Indeed,

appellant even used this opportunity to make the argument -- via admissibility of the evidence -- to the jury. (See XXI RT 4207.)

Indeed, to the extent appellant's expert would have answered "yes" to his proposed question, as appellant suggests (see AOB 275), then there is absolutely no prejudice, as appellant's expert would be proving the People's case. To the extent she was not permitted to testify in this respect, appellant was not precluded from making an argument about the relation between thoughts and elements, only precluded from using the expert's opinion as to his mental state to do so. There was plenty of evidence showing premeditation and deliberation in this case, in addition to the "101 California" threats.

Appellant was not precluded from making his argument. He carefully planned this murder, bragged about it for weeks beforehand, and then picked and chose among his victims. His claim fails.

X.

THE COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING DR. HODDICK, A BOARD CERTIFIED RADIOLOGIST, FROM OFFERING AN OPINION ABOUT THE RESULTS OF APPELLANT'S MRI

A. Merits

Appellant contends the trial court erred in permitting radiologist and medical imaging expert Dr. William Hoddick to opine that particular minute abnormalities[25] detected during an MRI of appellant's brain were insignificant

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25. Although appellant did not describe the particular type of abnormality of which he complains, he cited XXII RT 4309 in support of his argument, which pertains only to the "fossa" or minute white spots of dead tissue that exist in the brains of 50 percent of those over the age of 50. Although Dr. Hoddick also testified as to the possible existence of another abnormality – an "arachnoid cyst" – he similarly opined, without objection that this cyst was "clinically silent"; that it had no possible impact on appellant's behavior. (XXII RT 4310-4311.) Because appellant did not object to the latter

and had no effect on appellant's behavior. (AOB 281.) Dr. Hoddick, a board certified radiologist who had testified as an expert on more than a dozen occasions (XXII RT 4306), opined that the abnormalities were "not clinically significant," and that they exist in the brains of half the population over the age of 50 and people younger than that age who have a history of diabetes, cigarette smoking, or drug abuse. (XXII RT 4317, 4319.) Dr. Hoddick consistently summarized the minimal spots on the MRI as an "incidental finding of no consequence" and, after repeated attack by defense counsel, again excluded them as a possible cause of appellant's behavior. (XXII RT 4332, see also 4319.) His testimony, which contradicted that of appellant's neuropsychologist -- who admittedly was unqualified to interpret an MRI -- regarding the fossa, was properly admitted to assist the jury in understanding both the medical images, and their correlation – or more particularly, the lack thereof -- to appellant's behavior.

The standard for reviewing claims involving the competency of expert witnesses is well-settled:

> The qualification of expert witnesses, including foundational requirements, rests in the sound discretion of the trial court. (*Huffman v. Lindquist* (1951) 37 Cal.2d 465, 476; cf. Evid. Code, § 802.) That discretion is necessarily broad: "The competency of an expert "is in every case a relative one, i.e. relative to the topic about which the person is asked to make his statement." [Citation.]" (*Huffman v. Lindquist, supra*, 37 Cal.2d at pp. 476-477.) Absent a manifest abuse, the court's determination will not be disturbed on appeal. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1115; *People v. Ashmus* (1991) 54 Cal.3d 932, 971.)

(*People v. Ramos, supra*, 15 Cal.4th at p. 1172.) Error will be found only where the "evidence shows that witness *clearly lacks* qualification as an

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testimony, we will assume for purposes of his argument that his focus is on the fossa rather than the cyst.

expert." (*People v. Farnam, supra*, 28 Cal.4th at p. 162 [emphasis in original; internal quotations omitted].)

The trial court's discretion in admitting the testimony of an expert is governed by Evidence Code section 720:

> (a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.
>
> (b) A witness' special knowledge, evidence, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.

Complaints regarding the degree of an expert's knowledge or training go more to the weight of evidence than its admissibility. (*People v. Combs* (2004) 34 Cal.4th 821, 849; see *People v. Bolin, supra*, 18 Cal.4th at p. 322 ["Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility."].)

It is hardly disputable that a fully licensed general medical practitioner possesses "special knowledge, skill, experience, training, [and] education" beyond the experience of an ordinary layperson such that the doctor's testimony would "assist the trier of fact" in resolving medical questions that are before the jury. (Evid. Code, § 720, see also § 801 ["If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is *[r]elated* to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . ."] (emphasis added); see *People v. Catlin* (2001) 26 Cal.4th 81, 132 [recognizing pathologist qualified to testify as to wide range of clinical findings as well as laboratory results]; see also *Miller v. Silver* (1986) 181 Cal.App.3d 652, 660 [permitting psychiatrist

to testify as expert regarding use of prophylactic antibiotics in plastic surgery but not as to surgical techniques themselves].) In fact, even a person not licensed to practice medicine can testify as to medical conditions if they have the type of expertise that could assist the trier of fact in understanding the evidence. (See *Cloud v. Market St. Ry. Co.* (1946) 74 Cal.App.2d 92; *People v. Villarreal* (1985) 173 Cal.App.3d 1136; *People v. Robinson* (2005) 37 Cal.4th 592, 632 [pathologist with extensive experience in gunshot wounds properly permitted to testify to relative position of bodies, although such testimony could also be introduced through crime scene reconstruction expert]; *People v. Prince, supra*, 40 Cal.4th at pp. 1219-1220 [court did not abuse discretion in admitting testimony of FBI crime scene investigator regarding signature crimes even though agent was not a psychologist].) Thus, a person trained not only as a general medical doctor but also in the specialty of radiology would be qualified to opine about both the workings of the human brain, as well as its representation shown on medical images. Such testimony would further require a level of basic functional knowledge as to the impact on human behavior that a particular medical condition would cause. (See XXII RT 4316.)

Here, Dr. Hoddick was offered as an expert in "medical imaging" without objection (XXII RT 4307 [Defense Counsel: "I have no objection."]). (See *People v. Farnam, supra*, 28 Cal.4th at p. 162 [finding challenge to scope of expert's testimony waived where defendant challenged only other qualifications]; Evid. Code, § 353.) He has been in practice since 1979, specializing in diagnostic radial or medical imaging (i.e., radiology) (XXII RT 4312), and board certified since 1983. (XXII RT 4305-4306.) Besides being the Medical Director of Contra Costa County MRI in Pleasant Hill, he has been on the faculty of the renowned UCSF medical center since 1984, he has published widely in the area of radiology, and his research has won national

prizes. More importantly, he has testified as an expert in this area -- for both the prosecution and defense -- over a dozen times. (XXII RT 4306.) (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 949, fn.4 [noting gang expert's previous testimony as an expert in support of his present qualifications to testify]; *People v. Doss* (1992) 4 Cal.App.4th 1585, 1595; *People v. Farnam, supra*, 28 Cal.4th at p. 162 [acknowledging peer review publications and extensive practical experience as part of expert's qualifications].)

Dr. Hoddick initially explained how an MRI works, and how appellant's MRI showed signs of some the premature fossa that commonly occurred in half of the people over 50, or earlier in people who smoked, abused drugs, or had diabetes. (XXII RT 4309.) It was only when the prosecution asked whether the premature existence of the fossa "would suggest any effect on human behavior" that appellant first objected to Dr. Hoddick's qualifications.[26] (XXII RT 4309.) The court accepted the prosecutor's assertion that a medical doctor was sufficient qualification to render this opinion (XXII RT 4310). (See Evid. Code, § 720, subd. (b) [recognizing that the witness's qualifications "may be shown by any otherwise admissible evidence, including his own testimony."].)

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26. Specifically, Dr. Hoddick testified that the MRI showed "a couple of findings that [he] thought [he] should mention:"

> In the periventricular and subcortico white matter there's tiny fossa of tiny, what we call increasing instances which are seen in people over 50, but generally not unless there's a history of diabetes, cigarette smoking. Abuse that would be things such as speed, crank, methamphetamine and cocaine would lead to this finding.¶ So there were a couple tiny fossa that were seen premature --

(XXII RT 4309.) The prosecutor then asked, "[I]s there anything about the whitening . . .¶ . . .[t]hat would suggest any effect on human behavior based on the existence of this? (XXII RT 4309.) It was at this point that appellant raised his objection. (XXII RT 4309.)

At numerous points that followed during cross-examination, however, Dr. Hoddick actually explained the qualifications of a radiologist to opine about the correlation – or lack thereof – between any alleged abnormality in the MRI and appellant's abhorrent behavior. He stated that the job of a radiologist was to look at images from inside the human body, determine whether those images showed something normal or abnormal, and to explain the "significance of the finding" in terms of "what things may be (sic) manifest clinically[, and what] the referring doctor may want to look for and establish may or may not be present." (XXII RT 4312.) Although Dr. Hoddick's specialty was not "taking histories" of patients a la "Marcus Welby," he has performed that role in the past, and in fact, his current specialty still requires an evaluation of the patient to determine whether an MRI is even the appropriate tool. (XXII RT 4314-4315.) After the patient makes complaints to the referring doctor such as headache or dizziness, the radiologist then correlates the findings from the MRI "to explain the symptoms that are present." (XXII RT 4315.)

Appellant's initial complaint was that Dr. Hoddick was not qualified to make any correlations between the medical tests and appellant's behavior. (See XXII RT 4310.) Yet that is exactly what Dr. Hoddick's job entailed. We are unaware of any published case reversing because a medical doctor was improperly permitted to offer his or her opinion regarding a particular medical diagnosis. Nor has appellant even cited a case in which a doctor was properly precluded from offering an opinion concerning a medical diagnosis. (See *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 38-39 [permitting surgeon to testify as expert regarding X-rays].)

In fact, it was defense counsel's own question that most poignantly revealed Dr. Hoddick's qualifications: "[I]t sounds like [you] are responsible for knowing more than what appears on the film; is that right? You are responsible for knowing what that thing on the film there is going to mean to

this person's health or behavior?" As Dr. Hoddick responded, "[W]e need to know a lot of the medicine to be able to do medical images. We have to." (XXII RT 4315; see also XXII RT 4316 [Q: "[B]ased on your answer to the prosecutor's questions, is not only do you say there's this thing, but you also say and that's going to mean this to this person's behavior or health?" A: Yes, that's true."].)

In fact, the passage above exposes the basic flaw in appellant's premise. The issue was not one of predicting appellant's behavior based on the results of the MRI, but explaining whether appellant's behavior was consistent with those results. (XXII RT 4315.) Thus, were a patient to appear before Dr. Hoddick complaining of pain when they walk, such pain could easily be explained by the existence of a broken ankle. (See RT 22 RT 4316.) The issue is no different when applied to the human brain. (XXII RT 4316.) Although Dr. Hoddick did not claim to have the same "encyclopedic" knowledge as that of a neurologist, he has sufficient "working knowledge" to render a proper medical opinion about the correlation, or lack thereof, between the symptoms and the pictures. (XXII RT 4316.) In essence, their specialties are complimentary, and in fact, none "pretend to have a monopoly on the information." (XXII RT 4321.) As Dr. Hoddick stated, "You don't want to treat the MRI, you want to treat the patient." (XXII RT 4318.)

However, as Dr. Hoddick repeatedly pointed out, there was still nothing in the MRI's to explain appellant's "symptoms." (XXII RT 4319.) It is that lack of correlation that appellant is unwilling to accept, even in the face of the expert's repeated testimony that his job was specifically to look for exactly that type of correlation. (XXII RT 4317.) Although the MRI showed minute sections of dead brain tissue, this was not the type of abnormality that would impair function, let alone explain why a person would plot, execute, and then gloat over a "101 California" style killing spree. There was no way to excuse

appellant's murder spree on a physical anomaly and appellant was not entitled to make it appear so by isolating certain parts of an expert's opinion that would have suited his cause.

The court did not abuse its discretion by permitting a licensed medical doctor, specializing in radiology, to opine that minor abnormalities that appear in 50 percent of persons over the age of 50 had absolutely no correlation to appellant's behavior. Appellant's claim fails.

B. Harmless Error

Even assuming the court abused its discretion in admitting the testimony, any error was harmless. Initially, we note that appellant did not raise any federal constitutional objections below, and thus, the only level of due process error that could possibly have been preserved (see *People v. Partida, supra*, 37 Cal.4th at pp. 436-437) is premised on a standard even more difficult for him to meet than our state evidentiary standard of harmless error annunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836. Here, appellant has failed to meet that standard.

Appellant's own expert testified that she was not a medical doctor, and had no particular training in either neurology or medical imaging. (XVIII RT 3610.) Thus, although she claimed some experience in correlating physical abnormalities to behavior, at least once they were properly diagnosed, she was still dependent on others, whom she had not consulted here (see XIX RT 3814), to make the initial diagnosis regarding those abnormalities.

Dr. Hoddick was not the only person to opine about the results of the MRI and EEG and determine there was no evidence of irregularity that would explain appellant's conduct. For example, Dr. Berg testified that "minor findings are usually not correlated with significant behavioral differences . . . ." (XXII RT 4393.) Dr. Berg, like Dr. Hoddick, recognized that a neurologist would likely have a better encyclopedic knowledge of physical brain

abnormalities; Dr. Berg even deferred to the knowledge of a qualified radiologist to better analyze the MRI results. (XXII RT 4393-4394.) In fact, Dr. Berg recognized that it would take a combined effort of various specialists to properly assess whether a medical finding would impact a subject's behavior. (XXII RT 4394.)

Moreover, appellant's conduct was not consistent with a diagnosis of any type of seizure or impulse control disorder. Appellant planned, threatened, discussed, and prepared for, the murder weeks in advance. His threats to "do another 101 California," which actually precipitated both his firing and thus, the murders themselves, began weeks before the incident. He had to order the weapon 15 days in advance, and boasted of how he went to the shooting range on the night before the murders.

Appellant knew that on the day of the murders he would either be fired or would be hired permanently. Thus, he presaged the violence by repeatedly stating to Mary Frisby, "Today's the day." (XVII RT 3241-3242.) Although she thought it was an innocent statement, she did not know that appellant had brought a gun to work and concealed it in his lunch box. She did not know he had gone to the range the night before, and was likely unaware that he had previously threatened to "do a 101 California." Nor did she know that he had locked his apartment from the inside in such a manner as to make it impossible to reenter in a conventional manner.

This was not a case such as *People v. Hogan* (1982) 31 Cal.3d 815, 852, in which the prosecution expert opined that certain blood stains appeared as the result of "spatter" as opposed to being directly wiped. Although the witness in that case was an experienced criminalist, he had no special training in the particular subject matter, had never conducted any scientific experiments to validate his prior observations at other crime scenes, had no reference standards as to the present opinion, and testified that the pattern was obviously visible to

anyone based on "general principles of physics and chemistry." (*Id.* at p. 853.) In short, the witness was only able to "assist" the jury because he had seen numerous bloodstains in the past and thus, absent more specific testimony regarding training, skill and experience, the witness's testimony was no more than a lay opinion.

In our case, on the other hand, Dr. Hoddick had years of training, practice, and experience as a radiologist, and was testifying as to an area that the typical layperson would not generally understand – whether the existence of certain anomalies exhibited on an MRI would have the ability to manifest themselves in a person's behavior. Although he may not have possessed the level of "encyclopedic" knowledge he ascribed to some neurologists, he was still able to ascertain with reasonable certainty from his numerous years of medical study and experience that any "abnormalities" in appellant's MRI were not actually abnormal; they would show up in about half the population over the age of 50 and that there was no correlation between the findings and any behavior. He further explained that while a neurologist could offer complimentary information, it would be information of a different sort, and that a radiologist was fully qualified – as part of his or her practice – to opine as to any correlation between abnormalities and behavior. (See Evid. Code, § 720, subd. (b).) In fact, in response to appellant's questioning, he opined that he had some obligation to learn about the general area of neurology in offering this opinion, the same as he would have some obligation to learn about the anatomy of the leg if he were opining that this were a broken ankle, and how that would impact a person's ability to walk. (XXII RT 4316.) Dr. Hoddick's testimony was properly admitted, and any error was patently harmless. The claim fails.

XI.

THE TRIAL COURT APPLIED THE SAME EVIDENTIARY RULES TO THE TESTIMONY OF EXPERTS FROM BOTH SIDES

In claim 11, appellant appears to level a series of challenges at the trial court's evidentiary rulings involving both his expert, Dr. Walser, and several of the People's experts, Dr. Berg, Dr. Hoddick, and Dr. Peterson. (AOB 285.) Although appellant ostensibly raises these challenges under a claim of uneven treatment from the trial court (see AOB 285), he fails to support this assertion with any specific legal authority and proceeds instead by simply citing the Sixth Amendment and juxtaposing the trial court's various rulings against each other. For the Court's convenience, we address the evidentiary nature of each of these rulings seriatim. The trial court did not abuse its discretion in making any of the challenged rulings, and even if error were shown, appellant fails to make any showing – let alone a sufficient showing – that he suffered reversible prejudice.

A. Dr. Hoddick's Qualifications/Dr. Walser's Lack Of Qualifications, To Opine About The Physiology Of Brain Tissue Abnormalities

Appellant first contends the trial court somehow applied different standards when qualifying his expert, Dr. Walser, and the People's medical imaging expert, Dr. Hoddick, to opine on the subject of appellant's alleged "brain tissue abnormalities." (AOB 285.) Initially, we note that the focus of each of their testimonies was in a different area, Dr. Walser's in "neuropsychology," whereas Dr. Hoddick was a "radiologist," qualified as a "medical imaging expert," who, as part of his practice, was required to utilize his medical training to become a "mini-expert" on whatever condition he was

called upon to observe. Thus, while there may have been some overlap in their knowledge, their areas of expertise were quite different.

Furthermore, the court actually qualified Dr. Walser in all three offered areas; psychology, clinical psychology, and neuropsychology. (XVIII RT 3532.) In fact, it was only in the latter area, neuropsychology, a field which offered no board certification, did not require a medical degree, and has been described by at least one expert as a group employed more by lawyers than medical centers (XXII RT 4325), to which the prosecutor even raised an objection. (See XVIII RT 3532.) Nevertheless, the court not only permitted Dr. Walser to testify as an expert in those areas, but it allowed her to testify as to the MRI and EEG findings (XIX RT 3637), even though she specifically denied any expertise regarding either neurology or seizures. (XVIII RT 3609, 3610 ["I'm not a medical doctor. It's really a little bit out of my field . . . ."].) Indeed, defense counsel even withdrew his question on this point. (XVIII RT 3611-3612.) Although counsel then attempted to elicit her "lay" expertise of seizures, such evidence was properly excluded as irrelevant (XVIII RT 3612). (Compare *People v. Hogan*, *supra*, 31 Cal.3d at p. 853 [criminologist who had merely seen numerous crime scenes in the past not entitled to give expert opinion on blood splatter] with *People v. Farnam*, *supra*, 28 Cal. at p. 162 [distinguishing *Hogan* where criminologist had lengthy history and experience in seralogy].) And even then, counsel was successfully able to elicit pages of transcript involving Dr. Walser's "lay" experience with seizures to bolster her opinion regarding appellant's alleged brain disorder. (See XVIII RT 3614-3617.) It was only when Dr. Walser again casually ventured back into the areas of neurology and radiology – for which she had already admitted no expertise (XVIII RT 3609-3610, 3626) – that the court sustained objections to her testimony. (XVIII RT 3617-3618.) And again, the court eventually permitted

most of the testimony. (XIX RT 3637.) The court even permitted her to testify as to the extent of the information "she did *not* know." (XVIII RT 3613.)

On the other hand, as noted previously in Argument 10, Dr. Hoddick was an eminently qualified radiologist whose expertise included not only medical imaging, but a sufficiently high level of understanding of the human brain to enable him to converse with other experts, and to render an opinion that recognized both the existence of, and potential impact caused by, physical abnormalities in the human brain. (See XXII RT 4305-4307, 4312-4315.) In short, reviewing MRI results and rendering medical opinions based upon those results was his specific area of expertise – it was what he did every day – and his knowledge could provide helpful guidance to the jury on the subject of "brain tissue abnormalities." He was properly qualified to testify as an expert. (Evid. Code, §§ 720, 801; see also *People v. Catlin, supra*, 26 Cal.4th at p. 132 [pathologist qualified to testify as to wide range of clinical findings as well as laboratory results].) Moreover, the only possible prejudice to appellant was Dr. Hoddick's well-corroborated testimony that appellant did not suffer from any true brain abnormality that could possibly effect his behavior. Appellant succeeds here only by showing that Dr. Hoddick's testimony was, in fact, accurate; that prejudice equals truth. The court's rulings were correct.

B. The Pathologist's Proper Substitution/Limits On Information From Non-Testifying Experts

Additionally, appellant contends the trial court erred by "preclude[ing]" testimony from Dr. Walser that she relied on the opinions of other experts, specifically the analysis of appellant's MMPI results by Dr. Alex Caldwell, after previously having permitted a new forensic pathologist to testify for the People regarding the autopsy reports. (AOB 285-286.) The trial court properly differentiated between two different levels of reliability in precluding the

former as hearsay, while admitting the latter. In fact, the court actually admitted much of both.

Contrary to appellant's contention (AOB 286), Dr. Walser was not actually precluded from testifying as to either her reliance on Dr. Caldwell's results, or as to many of the specifics of those results themselves. (See, e.g., XIX RT 3665 et seq.; but see XXV RT 4754-4760.) Although the court discussed limits on her proposed testimony, ambiguities in the court's ruling permitted Dr. Walser to express much of the hearsay opinion from other doctors otherwise forbidden by the Evidence Code. (See 19 RT 3665.) The trial court permitted Dr. Walser to testify to much of what appellant complains was precluded and the prosecutor did not even object. (XIX RT 3665.) As the court stated:

> My sense is that she can express an opinion if the opinion is based upon some other findings. I will allow it to that extent. So to that extent, I will allow the opinion to be expressed to the extent that it had any affect upon this doctor's opinion. If it had no affect, she should not express it.

(XIX RT 3665.)

Technically, the court erred in admitting testimony of even this breadth under *People v. Campos* (1995) 32 Cal.App.4th 304, 308 [expert psychological opinions are not an observation of an "act, condition or event" and thus, not a business record under Evidence Code section 1271]. *Campos* held that an expert may testify that he or she *relied on* the opinions of other experts, but may not relate the *content* of those opinions -- to the extent they are not his or her own -- to the jury. (*Ibid.*) Those opinions, to the extent they are not offered by the person testifying, are simply inadmissible hearsay, not subject to cross-examination, and thus, unreliable. (*Ibid.*) Here, the court allowed the actual substance of "the opinion to be expressed to the extent that it had any affect upon this doctor's opinion." (XIX RT 3665.) The court should have precluded the entire contents of Dr. Caldwell's MMPI analysis of appellant.

Thus, even assuming such limits were placed upon Dr. Walser's hearsay testimony, those limits were well within the restrictions properly set forth in *Campos*.[27] This correctly limited the scope of Dr. Walser's testimony regarding the contents of Dr. Wilkinson's report and precluded Dr. Walser from relating details that Dr. Wilkinson supposedly found no evidence of malingering after appellant concluded the "Ray 15-Item Test." (See XXV RT 4754-4755.) The court also correctly precluded Dr. Walser from relating the details of Dr. Caldwell's opinion supporting the validity of his own conclusions regarding the MMPI results. (XXV RT 4754-4755.) Unlike Dr. Walser's permitted testimony -- that her opinion of the validity of the tests had not changed after communicating with other doctors (see XXV RT 4755-4760) -- the hearsay opinions of other doctors that appellant specifically *chose* not to call (see XIX RT 3673-3674) and were thus not available for cross-examination, involved far too many opinions rather than observations and went well-beyond the scope of any permissible testimony.

Conversely, this Court has specifically said that the cause of death from an autopsy report is an observation of an act, condition, or event, and thus, a reliable exception to the hearsay rule constituting a business record under Evidence Code section 1271. (*People v. Beeler* (1995) 9 Cal.4th 953, 981.) Here, the trial court correctly permitted a different pathologist, Dr. Peterson, to testify as to the autopsy results of the victims after the original pathologist, Dr. Logan, who prepared the autopsies, left employment of the County and became unavailable. Although appellant raised a general hearsay objection to Dr. Peterson's testimony, he did not claim that the requirements of section 1271 were not met, did not contest Dr. Logan's unavailability, nor did he ever argue that his confrontation rights had been violated. (But see *People v. Geier*, *supra*,

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27. Appellant does not suggest *Campos* was incorrectly decided, nor does he cite any authority from this Court suggesting a different rule.

41 Cal.4th 555, [recognizing that not all hearsay implicates Sixth Amendment and that *Crawford v. Washington, supra*, 541 U.S. 36 is not applicable to business records].) Nor could he, given that such claims were expressly rejected in *Beeler, supra*, 9 Cal.4th at pp. 979-980. Although some parts of an autopsy may contain medical *opinion* evidence that should otherwise be excluded (see *People v. Reyes* (1974) 12 Cal.3d 486, 503 [holding inadmissible a subjective psychiatric opinion]), determining the cause of death is simply a direct observation of an act, condition or event, and – unless the cause of death is at issue -- is not the type of evidence for which trustworthiness is an issue. (*Beeler, supra*, 9 Cal.4th at p. 981 [recognizing that any error was harmless because, even if the medical opinion of a nontestifying expert was improperly admitted, there was no dispute that the victim died from a gunshot wound]. The autopsy reports showing that both victims died from gunshots, admittedly fired by appellant, were properly admitted.

C. Leading Questions And Cumulative Testimony From Dr. Walser

Appellant next contends the court erred in sustaining the prosecutor's objections to leading and cumulative questions involving appellant's Rorschach test results. (AOB 287.) The question, "And on the Rorschach test Michael Pearson actually, let me say, tested positive for disorganized thinking; is that –" (XXV RT 4764), was obviously leading, as it contained the suggested answer in addition to the question. As appellant's counsel clearly recognized, the entire area had already been developed on direct, and thus, was also cumulative. (See XXV RT 4765 [The Court: "Counsel, is this testimony that was already received last week?" . . . ¶ . . . Defense Counsel: "I certainly hope I went through it. I think that I did."].) Indeed, counsel spent ten pages in direct testimony of the transcript specifically asking Dr. Walser about appellant's Rorschach results and any correlation to disorganized thinking. (VIII RT 3580-

3590.) Even assuming arguendo a court does not have discretion to preclude leading questions of experts, the testimony was cumulative by counsel's own admission and thus, properly precluded.

D. Dr. Berg Was Properly Allowed To Testify As An Expert In Workplace Violence

Appellant next argues that Dr. Berg should not have been permitted to testify as an expert in workplace violence. (AOB 287.) His objection below was almost entirely relevance (XXII RT 4372-4374); he did not claim that Dr. Berg exceeded the scope of his expertise, nor did counsel attempt any voir dire or try to bolster his limited foundational claims, even when expressly offered the opportunity. (XXII RT 4374.) In fact, the court initially sustained objections to Dr. Berg's testimony (XXII RT 4371-4372), permitting him to testify as an expert only after the prosecution laid a proper foundation. (See XXII RT 4371-4374.)

Dr. Berg's qualifications as an expert in workplace violence were beyond question (see XXII RT 4353, 4372-4374); this was not his first workplace killing. (See XXII RT 4375.) Given appellant's numerous statements about "doing a 101 California," appellant's refusal to voir dire, and Dr. Berg's opinion that this was the precise type of workplace violence with which he had dealt numerous times in the past (see Evid. Code, § 720, subd. (b)), the court did not abuse its discretion in finding Dr. Berg's testimony "relevant," and permitting Dr. Berg to testify in this capacity.

E. Testimony Regarding The "Dynamics" Of The Homicide And Opinions That Replicated The Ultimate Question For The Jury Under Penal Code Sections 28 And 29

Appellant next contends the court unfairly permitted the People's expert, Dr. Berg, to opine about ultimate facts relating to appellant's mental state, while precluding his own expert, Dr. Walser, from providing similar testimony.

(AOB 287-289.) Not only did the character of the experts' qualifications and testimonies differ substantially, most of the claims were not preserved. The trial court's rulings were correct.

Penal Code section 29 precludes an expert from offering an opinion on the mental state of a defendant that goes to the ultimate issue to be decided by the trier of fact. That section reads:

> In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have, the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.

Penal Code section 28 precludes evidence showing diminished capacity, although – subject to other preclusions – it permits evidence of mental disease to be admitted "solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." However, subdivision (d) specifically references outside limitations: "Nothing in this section shall limit a court's discretion, pursuant to the Evidence Code, to exclude psychiatric or psychological evidence on whether the accused had a mental disease, mental defect, or mental disorder at the time of the alleged offense." (Pen. Code, § 28.)

On several occasions, Dr. Walser offered opinions that went to appellant's state of mind at the time of the offenses. For example, when counsel asked her what was "disorganized" about appellant's desire to have an additional conversation with victim Lorraine Talley, Dr. Walser responded: "Well, that's not. It's probably an appropriate thing to do." (XIX RT 3708.) However, Dr. Walser then gratuitously added, "But he was – I think he was escalating in terms of the stress he was experiencing. When that was not fulfilled and he didn't have that opportunity and he felt very wrong, then he –

then it tipped the balance and he became –" (XIX RT 3708.) It was only at this point, after the expert began speculating as to appellant's ultimate state of mind at the time of the offense, that the prosecution's objection was sustained. (XIX RT 3709.)

Similarly, in a passage directly following, counsel asked whether appellant was "laughing" when he talked about "doing a 101 California," but an objection again was sustained as asking for an opinion on appellant's premeditation and deliberation at the time of the offense. (XIX RT 3710.) Both questions asked the expert to opine directly about appellant's state of mind at the time of the offense; both questions went specifically to an ultimate issue to which an expert is precluded from testifying under Penal Code section 29. (See *People v. San Nicolas, supra*, 34 Cal.4th at pp. 662-663 [trial court did not abuse discretion in precluding expert from linking abstract concept of "spillover rage" to defendant's mental state at time of offense]; see generally *People v. Saille* (1991) 54 Cal.3d 1103, 1111.)

Similarly, the court did not abuse its discretion in limiting Dr. Walser's testimony to appellant's subsequent description of his own mental state at the time of the killings (XIX RT 3706-3707) and prohibiting Dr. Walser from testifying that appellant was "psychotic" at the time of the killing, that he seemed "not to be in full awareness of his own actions"; and that appellant's mental state "seemed to be a reactive kind of state, rather than . . . cold and calculated." (XIX RT 3706.) Not only were Dr. Walser's comments speculative, but they, again, were efforts to opine as to the ultimate issue – appellant's mental state at the time of the murders. (*People v. San Nicolas, supra*, 34 Cal.4th at pp. 662-663; see *People v. Smithey, supra*, 20 Cal.4th at p. 958.)

Likewise, the court properly struck Dr. Walser's suggestion that appellant "didn't seem to know what he was doing" at the time of the murders

or that it was "his intention or plan . . . to kill himself" after executing the murders. (XIX RT 3719.) In addition to the fact that there simply was no evidence that appellant intended to commit suicide as part of his grand scheme--and appellant supplies none here -- counsel's question specifically included the words "intention" and "plan" and linked them directly to appellant's mental state at the time of the killing. The court properly exercised its discretion in excluding this testimony.

Conversely, Dr. Berg was entitled to interpret appellant's comment, "I ain't no joke," made before and after shooting Lorraine Talley, as expressing "anger," "retribution," and "revenge." (XXII RT 4368.) Dr. Berg's testimony did not equate appellant's mental state with any of the contested ultimate issues in the case, and, furthermore, appellant waived the issue by failing to object.

Dr. Berg was also entitled to opine that there was nothing "delusional or hallucinatory" in appellant's acts, as Dr. Berg's opinion was based not on speculation as to appellant's mental state, but on appellant's actions on the day of the murders and knowledge leading up to the crime. (See XXII RT 4368.) Contrary to appellant's suggestion (AOB 288), counsel never referenced any specific rulings involving Dr. Walser, but instead, made only a vague reference to the general ongoing discussion regarding the permissible scope of expert testimony. (See RT XXII 4368 ["[I]t wanders to an area of which I believe the Court does not want the psychiatrist/psychologist to go under section 28 and 29."].) Furthermore, the court admitted the testimony subject to a motion to strike which never came. In fact, counsel was even amenable to opening up this area, suggesting, "If you want to go there, that's all right with me . . . ." (XIX RT 4368.)

The court did not abuse its discretion in allowing Dr. Berg to offer the abstract opinion that the general personality disorders of which appellant suffered would not "in any way prevent a person from committing deliberate

and premeditated murder." (XXII RT 4378.) As the court recognized, Dr. Berg's opinion was merely "descriptive of the condition that has been diagnosed." (XXII RT 4378.) The court accurately interpreted Dr. Berg's comments as going not to the actual condition of appellant's mental state at the time of the events but, rather, of an abstract description of that condition that the jury could ultimately employ when reaching the issue of whether appellant premeditated, deliberated, and killed intentionally. Dr. Berg's testimony, both in description and in diagnosis, was diametrically different than that offered by Dr. Walser. Unlike Dr. Walser, Dr. Berg was never asked to opine as to appellant's mental state at the time of the offenses. The court properly permitted the testimony.

Finally, appellant contends that the court erred by precluding "leading" questions asked of Dr. Walser. (AOB 289.) Although the court did, indeed, suggest it might begin sustaining the prosecutor's objections on these grounds (XVIII RT 3579-3580), appellant was able immediately thereafter to successfully derive her intended answer from Dr. Walser. (XVIII RT 3580) In fact, even though the prosecutor objected as "leading" on several subsequent occasions (XIX RT 3714, 3718), those objections were overruled. Thus, appellant cannot show any possible prejudice from the court's actions, even were the court to have abused its discretion in limiting counsel from asking leading questions of experts, which it did not.

In sum, appellant has failed to show any way in which the trial court acted in an uneven manner. The court was confronted with numerous experts on different subjects having differing qualifications, and being asked to opine as to different questions. The court did not abuse its broad discretion in making any of its rulings, let alone substantially interfere with appellant's right to a fair trial. And appellant does not even offer a showing of prejudice. His claim fails.

XII.

THE TRIAL COURT PROPERLY PRECLUDED APPELLANT FROM ASKING DR. BERG ABOUT A PRIOR ARREST FOR WHICH THE DOCTOR HAD RECEIVED A FINDING OF FACTUAL INNOCENCE

Appellant next contends the court erred in precluding him from cross-examining Dr. Berg concerning Medi-Cal fraud allegations that were subsequently dismissed years before appellant's trial[28], at the request of the district attorney, and for which Dr. Berg was subsequently determined to be "factually innocent" under Penal Code section 851.8. (AOB 292.) This Court rejected a nearly identical claim involving the same charges in *People v. Sapp, supra*, 31 Cal.4th at p. 290.

Without any prior warning or notice, appellant's trial counsel asked Dr. Berg during cross-examination if he had "been a thief" in his "time." (XXIII RT 4570.) The prosecutor's "argumentative" objection was immediately sustained. (XXIII RT 4570.) Defense counsel then followed up with a question insinuating that Dr. Berg stole "in the neighborhood of $10,000" in a Medi-Cal fraud case during the "early 1980s." (XXIII RT 4570-4571.) The prosecutor objected and requested a hearing outside the presence of the jury.

During the hearing, the prosecutor complained that defense counsel's line of inquiry was inappropriate and unethical because "he knows that there's been a finding of factual innocence." (XXIII RT 4572.) Defense counsel conceded awareness of the factual innocence finding, but argued that such a finding "means nothing about the reality of fraud" and insinuated that the

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28. Although our record does not indicate the year the allegations were filed, details from this Court's opinion in *People v. Sapp* (2002) 31 Cal.4th 240 show that the allegations involved conduct between 1982 and 1987, and that a finding of "factual innocence" occurred on March 1, 1993. (See *id.* at pp. 292 and 293, fn. 3.)

finding itself suggested some type of collusion, because it allowed Dr. Berg to maintain credibility and continue testifying for the prosecution in criminal cases. (XXIII RT 4572-4576.) At the very least, according to defense counsel, the sequence of events leading to the finding "goes to his bias and goes to his desire to do what he can keep into the system, to keep his viability as a product for the District Attorney's Office and for the criminal defense bar." (XXIII RT 4576.) After additional argument on both sides, the court refused to permit any further inquiry in this area in front of the jury. The court found this to be a collateral matter under Evidence Code section 352, that it necessitated an undue consumption of time, and that it simply did not establish any sort of bias that would be permissible for impeachment purposes. (XXIII RT 4577.) The court subsequently instructed the jury:

> Ladies and gentlemen, with regard to the last two questions that were posed by Mr. Veale, I will tell you they were inappropriate questions. There was no factual basis for those questions. And I would ask you to erase that from your mind as not having been said at all.

(XXIII RT 4585.)

In *People v. Sapp, supra*, 31 Cal.4th at pp. 289-290, this Court rejected a nearly identical claim involving the same allegations against Dr. Berg:

> Although [*People v.] Wheeler* [(1992)] 4 Cal.4th 284, allows for impeaching a witness in a criminal case with evidence of moral turpitude, it cautions that trial courts should consider with "particular care" whether to allow such evidence. (*Id.* at p. 296.) Here, the trial court acted within its discretion in precluding defense cross-examination of Dr. Berg about Medi Cal claims that he submitted years before petitioner's trial and that were never proven to be fraudulent.

The Court further explicitly rejected the defendant's corollary argument under the federal Constitution:

> Defendant asserts that even if proper under state law, the trial court's ruling violated his federal constitutional right to confront a witness testifying against him. We disagree. The federal Constitution's confrontation right is not absolute; it leaves room for trial courts to

> impose reasonable limits on a defense counsel's cross-examination of a witness. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679; *People v. Box* (2000) 23 Cal.4th 1153, 1203.) We discern no violation of defendant's right to confront and cross-examine Dr. Berg in the trial court's ruling here. Whether Dr. Berg had or had not filed false claims with Medi Cal was, at most, nominally relevant to the subject matter of his testimony: expert opinion that defendant's criminal behavior was attributable to antisocial personality disorder, not brain abnormalities or family dysfunction.

(*Sapp, supra*, at p. 290.)

As this Court has recognized, the general principles of confrontation and fundamental fairness discussed *Davis v. Alaska* (1974) 415 U.S. 308, 316, "do not . . . prevent the trial court from imposing reasonable limits on defense counsel's inquiry based on concerns about harassment, confusion of the issues, or relevance." (*People v. Box*, *supra*, 23 Cal.4th at p. 1203 [trial court did not abuse its discretion under section 352 by precluding impeachment involving details of charges of unprofessional conduct pending against codefendant's expert witness].) In fact, unlike *Davis*, even were Dr. Berg considered a "crucial" prosecution witness (see *id.* at p. 312), ours is not a case in which the conduct was proven, admitted, or even adjudicated. (See *Davis*, *supra*, 415 U.S. at p. 311 [defense entitled to impeach crucial prosecution witness with prior juvenile burglary adjudications that otherwise would have been prohibited by Alaska statute protecting anonymity of minors].)

Notwithstanding appellant's attempt to shift the basis for any type of impeachment to completely unsupported allegations of collusion (see AOB 298), *Sapp* is still the controlling authority here. Given that both cases involved the exercise of discretion on the part of a trial court ruling on the same underlying collateral impeachment evidence, we question how the result could be any different. In fact, unlike *Sapp*, in our case there was a legitimate finding of factual innocence prior to the time the impeachment evidence was proffered. (Cf., *Sapp, supra*, at p. 293, fn. 3 [refusing to take judicial notice of the factual

innocence finding because it occurred "about one and one-half years" *after* the defendant's trial].)

Appellant, however, contends that it was the "remarkable success in obtaining suppression of the fraud evidence, dismissal of fraud charges, and a finding of factual innocence," that constituted the impeachable bias. (AOB 298.) Appellant argues that these actions "could well be linked -- in [Dr. Berg's] mind if not the minds of the prosecuting agency and the courts that provided the relief he sought -- to his service as a witness for the prosecution." (AOB 298.) He further claims, citing a newspaper article in which Dr. Berg professed only his innocence, the doctor was specifically biased "against public defenders whose clients opposed him." (AOB 294.)

Appellant supplies no basis in fact for his libelous insinuations, either here, or in the court below. In fact, his only factual support is Dr. Berg's assertion of a Fifth Amendment privilege, his later, successful motion to suppress, and his subsequent finding of factual innocence. (See XXIII RT 4574-4575.) There is no evidence that Dr. Berg has expressed hostility towards public defenders, either specifically or in general, no evidence that he has falsified testimony to spite the defense, and certainly no evidence – not even an offer of proof – showing collusion with the courts, the District Attorney's Office, or the Office of the Attorney General that initially instituted the proceedings against him -- in obtaining a finding of factual innocence. In short, there is simply nothing to support the incestuous allegations leveled against the prosecution or its witness.

Although we are not aware of any case specifically precluding evidence showing a finding of factual innocence, Penal Code section 851.8 provides that where a determination of factual innocence has occurred, the arrestee shall be deemed to have been "exonerated," the arrest "deemed not to have occurred," the records destroyed, and the arrestee can "answer accordingly" without fear

of prosecution. (Pen. Code, § 851.8, subd. (f).) In other words, without the explicit acquiescence of the witness, the incident cannot legally be proven, and counsel cannot even ask the question in good faith. (See *People v. Ramos, supra*, 15 Cal.4th at p. 1173.) Unlike a case in which charges have been sustained (see *People v. Steele, supra*, 83 Cal.App.4th at p. 223 [recognizing that rap sheet and witness's admission of conduct to district attorney provided good faith basis for *Wheeler* impeachment]), here, appellant is doing nothing more than "attempting to assassinate the credibility of a witness through unfounded innuendo." (*Ibid.*) In fact, given that the burden for proving factual innocence is actually on the arrestee/witness, a challenge to such a finding may even be subject to concerns of collateral estoppel. (But see *Tennison v. California Victim Comp. and Gov't Claims Bd.* (2007) 152 Cal.App.4th 1164 [suggesting that collateral estoppel does not apply to claims regarding restitution for wrongful conviction under section 4900, but alternatively noting that expungement under section 851.8 would not control restitution claim under section 4900 due to public policy concerns].)

Section 788 of the Evidence Code states that a witness cannot be impeached with priors for which the witness has been pardoned, rehabilitated, or an accusatory pleading against the witness has been dismissed as part of the successful completion of probation under Penal Code section 1203.4. Although section 788 omits findings of factual innocence, and the term "conviction" has been broadly construed, it cannot possibly encompass its antithesis -- an acquittal -- which requires an even lesser burden of proof than a finding of factual innocence. Whether "conviction" refers to an adjudication of guilt, or a final judgment that is appealable, either way a finding of the opposite is precluded. This Legislative "omission" was probably not even an oversight, but a common sense recognition that a court is not going to readily interpret its words to mean their opposites. (See *People v. Field* (1995) 31 Cal.App.4th

1778, 1789 [conviction expunged under Oklahoma law is inadmissible for impeachment purposes, even under Prop.8, as it no longer shows moral turpitude and is thus irrelevant]; but see *People v. Martinez* (2002) 103 Cal.App.4th 1071 [refusing to decide issue, but noting that expunged priors must still be provided under *Brady*].) Nor was this a case in which charges were at least pending. (See *People v. Martinez, supra*, 62 Cal.App.4th 1454 [defendant can be impeached with prior felony conviction although sentencing has not yet occurred]; see *People v. Braun, supra*, 14 Cal.2d 1 [defendant can be impeached with prior felony conviction that was not yet final on appeal].) Given the requirements of Penal Code section 851.8, that, upon a successful petition, the arrest and documenting records must be sealed and/or destroyed, the case must be treated as if it never even existed.

Although appellant's claim that the process of dismissal is what may have caused the bias, he asserts no evidence in support of this. And in fact, his claim is directly contrary to the express language of the statute permitting the prosecutor to concur in the dismissal. (See, e.g., Pen. Code, § 851.8, subd. (d).) Significantly more evidence would be required to transform this claim from one of mere speculation into one of fact, particularly given the Legislature's expression of faith in our procedures (Evid. Code, § 664 [official duty presumed to be regularly performed]) and our court systems (Evid. Code, § 666 [judicial duty presumed to be regularly performed]).

Appellant's claim is no different than making unsupported allegations against any other witness who has no criminal history whatsoever. In fact, preventing such claims is exactly what the Legislature intended here. As the court recognized in *Fields*, the Legislative purpose of expungement is to restore the status of a person who has successfully completed a term of probation. Although it is to some degree seen as a reward for good behavior following a grant of probation, we question how a person who has been found

not to have committed the underlying charges – who is factually innocent and has been found to have committed no legal wrongdoing whatsoever – can have greater moral turpitude than one who has actually committed the crime but has been rehabilitated. Similarly, how can the fact that the person *employed* a legitimate, favorable procedural mechanism made available to him through our Legislature, itself be considered an act of moral turpitude. Whether this be the exercise of Fourth or Fifth Amendment rights, or the employment of a procedural mechanism to assure the continued existence of one's good name, these actions are in no way legally relevant to show bad moral character any more than the prosecution can assert Mr. Pearson's invocation of the Fifth Amendment privilege to prove his guilt.

Even assuming arguendo that conduct leading to a finding of factual innocence is not specifically covered by statute, appellant has still failed to show how the trial court abused its discretion in precluding any reference to the allegations under Evidence Code section 352. Here, the allegations – both as to Dr. Berg's conduct, and those relating to some sort of collusion involving either the courts or the prosecution -- were completely unfounded, and appellant offered no evidence supporting his accusations. Notwithstanding the confusion and undue consumption of time that would be required for appellant to prove such scandal, proof of such a collateral matter that lead so far astray of a finding in appellant's favor would simply not establish the sort of bias that would require admission of the evidence for impeachment purposes. At best, appellant could only cause a mini-trial of the allegations against Dr. Berg that would permit the jury to do no more than speculate as to the charges. Given that all of the evidence against Dr. Berg had already been suppressed and that both the prosecution and courts had afforded him the equivalent of mea culpa apologies, it is questionable whether appellant could even substantiate his claim to a level that the jury could consider it for impeachment purposes. Appellant may have

been hoping, through introduction of this evidence, to delay the inevitable result of the trial and hopelessly confuse the jury as to his own guilt, but such are not reasons mandating the admission of evidence under the constitution. Like *Sapp*, the trial court here properly exercised its discretion under section 352 in excluding the evidence. (See *Sapp, supra,* at pp. 289-290.)

Finally, even assuming the evidence was wrongly excluded, the error was harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18.) The evidence showing appellant premeditated *and deliberated* the murders was overwhelming, particularly given appellant's explanation to Janet Robinson why he selectively left her alive (XI RT 2565-2566, 2827) and his subsequent confession to police in which he fully admitted his conduct but attempted to justify the morality of his actions. (See XXIV RT 4695-4710; Defense Exh. 41.) Furthermore, Dr. Berg was not the only expert to testify for the prosecution (see XXII RT 4310-4311), and, even though his testimony did cast some doubt on the credibility of appellant's expert, Dr. Walser, it was Walser's own unbelievable testimony, along with the prosecution's pointed cross-examination, that represented the downfall of the defense case. Dr. Walser's testimony showed very little basis in medical science and even less in fact. Any reasonable jury would have reached the same conclusion regardless of whether appellant had been able to sidetrack the trial by moving it along a collateral path that had little relevance to the mental health claims in the first place.

XIII.

THE TRIAL COURT PROPERLY LIMITED THE GUILT PHASE TESTIMONY REGARDING COMPLAINTS ABOUT RHA MANAGEMENT THAT CIRCULATED BEFORE APPELLANT WAS HIRED, APPELLANT'S FAILURE TO RAISE THE ISSUE DURING THE PENALTY PHASE WAIVES ANY CLAIM INVOLVING ITS USE AS MITIGATION SHOWING "MORAL JUSTIFICATION," AND APPELLANT FAILS TO SHOW PREJUDICE BECAUSE MUCH OF THE SOUGHT AFTER EVIDENCE WAS INDEED ADMITTED

Appellant contends the trial court erred in excluding complaints about Housing Authority managers circulating before appellant was hired. (AOB 302.) Although all of the evidence cited by appellant was offered only during the guilt phase (see AOB 302-305), appellant now contends that the evidence was particularly probative as to the penalty phase, because it showed what appellant "reasonably believed to be a moral justification or extenuation of his conduct." (AOB 305, quoting Pen. Code, § 190.3, subd. (f).) This claim, however, was never even made during the guilt phase, and the court did not abuse its discretion by excluding the evidence as hearsay, lacking in relevance, and under section 352 grounds. In short, the rumors that appellant heard prior to being employed at the Conventional Housing unit of the RHA were not probative as to appellant's guilt or innocence. Moreover, to the extent such rumors would be relevant to show "moral justification" during the penalty phase, appellant was permitted to put on numerous witnesses who testified to the poisonous atmosphere existing at the RHA before, during, and after appellant's tenure. In fact, much of his evidence was represented even during the guilt phase. Thus, he cannot show prejudice and the claim fails.

A trial court has broad discretion to exclude evidence under Evidence Code section 352 where its probative value "is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or

(b) creates substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (See also Evid. Code, § 350 [only relevant evidence is admissible].) Hearsay, "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated" (Evid. Code, § 1200), lacks significant probative value and is inadmissible unless it fits within an enumerated exception or its exclusion would work such a manifest undue hardship to the defendant so as to violate Due Process. (See, e.g., *People v. Minifie* (1996) 13 Cal.4th 1055, 1071 [evidence of third party threat extremely probative of defendant's state of mind in self-defense case]; see *People v. Geier, supra*, 41 Cal.4th at pp. 584-585 [acknowledging court's power to preclude declarations against penal interest even where found to be reliable.)

Here, the probative value of the asserted evidence in this particular case diverged somewhat at the guilt and penalty phases.[29/] Each of the examples he cites were from guilt phase witnesses, most pertained to inadmissible character evidence or disputes that occurred before appellant was employed at Conventional Housing, and involved nothing but rumor, innuendo, and speculation. (See, e.g., XII RT 2358, 2375-2376, 2378; XVII RT 3260-3266; see XIV RT 2773-2774 [rejecting appellant's analogy between "character trait" evidence and self-defense].) Counsel even recognized the difficulty in admitting much of the evidence for its truth (see XII RT 2375-2376), and instead, offered the evidence only to show the "poisonous atmosphere" that existed when appellant began his brief tenure at Conventional. (XII RT 2375.) However, the incidents occurring prior to appellant's tenure were not very probative to appellant's mental state during the guilt phase, particularly since

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29. Appellant never, not once during any of the cited passages, raises a federal constitutional claim, and thus, except in the most general of sense, it is waived. (*People v. Partida, supra*, 37 Cal.4th at p. 435.)

he admitted both specific intent to kill and premeditation (see XXVII RT 5025:15-18), and the court excluded much of the evidence under its discretionary power via Evidence Code section 352. (See, e.g., XII RT 2375-2378.)

On the other hand, evidence showing the poisonous authority at the RHA could have been presented, as appellant contends, to show some sort of "moral justification" for the murders. (See Pen.Code, 190.3, subd. (f).) Yet appellant never offered this particular evidence during the penalty phase, nor, like the excluded video tape of his confession (see Arg. 14, AOB 307), did he suggest any link when the evidence of which he complains was excluded during the guilt phase. Although the broader definition of relevance in the penalty phase would have entitled the jury to consider such evidence -- at least to the point that it satisfied other concerns related to the proper admission of evidence -- the evidence was simply not that favorable to appellant. The portions of the videotape actually seen by the jury, in addition to those not seen, show more of a vindictive, vengeful, and manipulative killer boasting about his conquests and feeling sorrow for his personal plight, rather than for the lives he extinguished. Similarly, there was little mitigation to be gained from the premeditated murder of two co-workers. Although the prosecutor did not argue that the absence of any legitimate moral justification constituted aggravation (see *People v. Riel* (2000) 22 Cal.4th 1153, 1223), appellant's vindictive and manipulative attitude towards his actions still constituted circumstances of the crime that could be considered by the jury under section 190.3, subdivision (a). (See *ibid.* [trial court's consideration of financial motive for murder as a circumstance of the offense (subd. (a)) was not the same as using the absence of moral justification (subd. (f)) as aggravating evidence].) This was not an instance in which appellant felt obligated to protect a child, to hold true to some biblical imperative, or even to slay a partner's paramour. This was not an accident, an

unwitting felony murder, or some type of misguided self-defense claim. Appellant plotted and executed the murders of two co-workers whom he felt had interfered with his career plans or otherwise disrespected him at work. Ironically, the only type of "moral justification" the jury could reasonably have considered here was that appellant erroneously thought he was being fired because of his poor performance at work, when, in fact, appellant was really being fired for making the very threats that he later carried out. The evidence, even considered in mitigation, was simply not that powerful.

Moreover, contrary to appellant's claims (AOB 306), there was no shortage of evidence admitted for appellant to argue that such a poisonous atmosphere existed. For example, appellant was permitted to introduce evidence of a "dispute" between housing managers and Pat Jones that occurred approximately six months before the shooting. (XII RT 2378.) Appellant was precluded only from asking about the specifics of the dispute, on the grounds that the evidence was hearsay, and that appellant was asking the witness to substantiate rumors. (XII RT 2378.)

The court permitted appellant to ask Director Art Hatchett whether he had spoken with Shirail Burton about her alleged desire to be promoted to management, in spite of counsel's previous awkward attempts to get Mr. Hatchett to speculate that there was "some talk about Shirail Burton actually having that position." (See XII RT 2358-2359.) Similarly, while Toni Lawrence was not permitted to testify to the perceived work habits of Lorraine Talley and Shirail Burton (see XVI RT 3100), Lawrence was permitted to testify that Talley was an "incompetent manager" (see XVI RT 3098-3099) and was allowed to relate times when she observed Burton "not" working during work hours. (XVI RT 3101.) Likewise, although Connie Taylor was not allowed to elaborate as to the nature of some specific instances of favoritism shown Shirail Burton (see XVII RT 3261), Taylor was permitted to testify that

favoritism "absolutely" existed at the Conventional Housing Authority, that such favoritism existed before Taylor began there in 1994, that it involved Talley and Burton, and that it interfered with her ability to do her job. (XVII RT 3260-3266.) Appellant was even allowed to ask Learinza Morris whether Talley and Burton were vindictive, and whether they treated people in an inappropriate manner, although the court did not allow them to list specific details. (See XIV RT 2690-2692.)

This was not a case where appellant was offering a third party witness to show residual doubt (see, i.e, *Green v. Georgia* (1979) 442 U.S. 95, 97; but see *Oregon v. Guzek* (2006) 546 U.S. 517, 526 [calling *Green* into doubt where evidence had not already been presented during guilt phase]), or even offering evidence of a third party threat to bolster claims regarding the defendant's state of mind in a self-defense case. (See *People v. Minifie, supra*, 13 Cal.4th at p. 1071.) Instead, appellant was merely offering evidence of rumors of things concerning office politics that may or may not have occurred. At most, he was only another cog in the rumor mill; the excluded evidence would not have given him moral justification to do anything other than circulate more rumors. The claim fails.

XIV.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN LIMITING APPELLANT'S VIDEOTAPED CONFESSION BECAUSE IT WAS ESSENTIALLY BEING OFFERED FOR ITS TRUTH AND WOULD HAVE ALLOWED APPELLANT TO TESTIFY WITHOUT BEING SUBJECT TO CROSS-EXAMINATION

Appellant contends the court erred in permitting the jury to view only a limited portion of his lengthy two-and-a-half-hour interview with police investigators. Appellant did not advance any constitutional theories below, and

has failed, both at trial and here, to set forth a cogent theory of admissibility for the evidence. Moreover, even had the court been required to admit the evidence, appellant cannot show prejudice. The omitted portion of the videotaped confession shows a coherent, determined double murderer bent on boasting about his actions rather than a confused, disorganized sympathetic person whose actions simply resulted in the deaths of two people.

A. Factual Background

Prior to the resumed cross-examination of Dr. Berg during the guilt phase, the prosecution noticed that appellant had set up a system for playing back a videotape. Outside the presence of the jury, the prosecutor correctly surmised appellant was going to attempt to show the videotape of his confession. (XXIV RT 4589-4597.) The prosecutor objected on the grounds that the evidence was not relevant, that it was unreliable hearsay, and that counsel's primary purpose for putting forth the videotape was an effort to put appellant's story in front of the jury, in appellant's own voice, but without opportunity for cross-examination. (XXIV RT 4589-4597, 4698-4699.) Although defense counsel requested that the entire 2 ½ hour confession be played to the jury, he readily admitted that appellant's hearsay statement would not be admissible for its truth (XXIV RT 4590), and instead, suggested that the evidence was relevant and admissible to "test" Dr. Berg's opinions regarding appellant's mental health. (XXIV RT 4590.) The court agreed that portions of the videotape would be admissible to test Dr. Berg's opinion, even though Dr. Berg had never seen the videotape (XXIV RT 4590), but the court specifically prohibited appellant from showing the entire 2 ½ hour videotape because it was not particularly relevant, and due to its length, any probative value was substantially outweighed by prejudice to the prosecution both in the form of undue time consumption and on the lack of opportunity for cross-examination, under Evidence Code section 352. (XXIV RT 4695-4700.)

Appellant ultimately agreed to show a seven minute excerpt from the videotape to both the jury and Dr. Berg, with an instruction that the jury was not to consider appellant's statements for the truth of the matter asserted. (XXIV RT 4595-4596.) The portion that was shown to the jury depicted appellant as a rational person engaged in an ordinary conversation, who also happened to have just killed two people. (See XXIV RT 4709-4710, Defense Exh. 41 [time markers 9:27-9:33:15].) Although appellant claimed to be "sorry" for what he had done, his expression of remorse was rather hollow when the jury subsequently learned that he intentionally picked and chose among his victims, and even seemed to be gloating about that. (XXIV RT 4698, Defense Exh. 41 [time markers 9:33:15-9:35:15].)

During rebuttal, the prosecutor, who had objected to the specific parts shown on the grounds that they were chosen only to evoke sympathy from the jury, showed the final two minutes of the seven minute segment again, and added an additional few seconds of time so that the jury would understand the full context in which appellant's statements were made. The additional portion, beyond that which had been shown by defense counsel, showed a bitter, vindictive person who intentionally, and with premeditation and deliberation, killed two people because they "screwed with him." (See XXIV RT 4678, Defense Exh. 41 [time marker 9:33:45-9:35:45].) The remainder of the videotape that was not shown to the jury contained much of the same, alternating between a calm Michael Pearson, remorseful of either the acts, or, more likely, the consequences of those actions, and a "bad" Michael Pearson, who killed two colleagues and went hunting for a third because they stemmed his career advancement and caused his termination from the RHA. What appellant fails to recognize, however, is that the video also displays a person who knew exactly what he was doing, who planned and executed a double

murder with no hint of remorse until after his arrest, and who made the very deliberative and malicious choices that were the antithesis of his defense.

On recross, appellant again asked to show the entire 2 ½ hour videotape, or in the alternative, another 15 minute segment starting from the point where the tape left off. (XXIV RT 4694-4699.) Both requests were denied, with the court commenting that it appeared as if appellant was indeed attempting to simply set forth his own story in front of the jury without the opportunity for cross-examination. (XXIV RT 4694-4700.) The court acknowledged that in its previous ruling, it had offered the defense great leeway to show significant portions of the tape that could be proven relevant, and that appellant had not taken advantage of the full extent of the court's offer. (XXIV RT 4696-4697.) After a further offer of proof, the court agreed to let defense play two additional brief excerpts from the confession that allegedly evidenced disorganized thinking.[30/]

Initially, we note that appellant has waived any constitutional claims by failing to raise those grounds below. In *People v. Partida*, this Court readily distinguished between specific constitutional claims, for which a specific objection or motion was required (see *Partida, supra*, 37 Cal.4th at pp. 436-437), and general due process claims of fundamental fairness which were virtually always encompassed with the state law objection, needed no further

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30. These two snippets involved only appellant's questions to the investigating officers regarding the whereabouts of his two victims, Lorraine Talley and Barbara Garcia. Appellant contends these were "suggestive of a memory problem," and that the prosecutor "concurred" in their admission. (AOB 307.) The full context of appellant's statement shows that he had full knowledge of his actions and memory at the time he gave the statement, and at most, that he was only attempting to confirm the success of his killing spree. Moreover, any concurrence on the part of the prosecution to play those parts of the tape went only to the addition of four seconds at the end of the first tape which gave the statements greater context. (See XXIV RT 4706-4707.)

objection or argument to alert the court to the claim, and were preserved regardless of whether or not a separate argument was made. (*Ibid.*)

Furthermore, appellant has failed to set forth the contents of the entire video tape[31], or even make an offer of proof in this Court as to its content. Appellant's Opening Brief simply asks the Court to assume that the contents would be helpful to appellant, without actually describing what those contents were. (See AOB 307-308.) This omission means appellant has utterly failed in his burden to prove prejudice on appeal. (See *People v. Young, supra* 34 Cal.4th at p. 1170.)

To the extent this Court were to reach the merits of the claim, it fails. First, the evidence was cumulative to that already admitted at trial. To the extent appellant focuses on its impact on Dr. Berg's opinion, the reason offered for its admission, Dr. Berg had already testified at length about his interview with appellant on the day after the murder. (See XXII RT 4351-4360.) Furthermore, even to the extent appellant offers it for its hearsay content -- to show his own remorse -- similar evidence was admitted through Dr. Walser. (See XVII RT 3560.) Appellant's claim of remorse was similarly repeated during the penalty phase, through the testimony of Robert Young, who was the head cook at the county jail where appellant was housed awaiting trial. (XXVIII RT 5391.) Admittedly, Dr. Walser's testimony is not quite a direct substitute for appellant's own comments, but appellant has offered no exception that would permit him to get around the hearsay rule. The purpose of excluding hearsay is because of its inherent untrustworthiness, and appellant's self-serving statement -- offered without an opportunity for cross-examination -- shows no indicia of reliability. As this Court has stated, "[A] capital defendant has no

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31. The video tape was admitted as Defense Exhibit 41. (See XXIV RT 4595.) To the best of our knowledge, a transcription of the tape was not offered or marked for identification at the time of admission (see XXIV RT 4592-4593). (See Cal. Rules of Court, Rule 2.1040.)

federal constitutional right to the admission of evidence lacking trustworthiness, particularly when the defendant seeks to put his own self-serving statements before the jury without subjecting himself to cross-examination." (*People v. Jurado* (2006) 38 Cal.4th 72, 130; see also *People v. Livaditis* (1992) 2 Cal.4th 759, 777-778.)

In *People v. Avila* (2006) 38 Cal.4th 38 Cal.4th 491, 592, this Court found videotaped evidence that a third party had lied to police about being present at the murder scene was properly excluded because it was cumulative to that already admitted through other witnesses. Although the jury may have been aided in its credibility determination by viewing the witness's demeanor, the trial court acted well within its discretion in excluding the tape because the defendant's point had already been established. (*Ibid.*; see also *People v. VonVillas* (1992) 10 Cal.App.4th 201, 275 [trial court properly excluded tape showing third party's knowledge of murder plan].) Like *Avila*, appellant had already adduced much of the evidence he claims would have been shown on the video. The court did not abuse its discretion in excluding the tape as cumulative.

Furthermore, appellant could have produced the same evidence by testifying but chose not to (see XXIV RT 4625). (*Jurado, supra*, 38 Cal.4th at pp. 128-129.) As this Court has suggested, the federal Constitution's right to present evidence on one's behalf "is not absolute; it leaves room for trial courts to impose reasonable limits" on the evidence and requires that the evidence conform to the requirements of state law. (*People v. Sapp, supra*, 31 Cal.4th at p. 290; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679; *People v. Box, supra*, 23 Cal.4th at p. 1203.) Indeed, even in the penalty phase, a capital defendant's right to present evidence is subject to the strictures of a state's evidentiary rules. (*People v. Livaditis, supra*, 2 Cal.4th at p. 780 ["[A] state is generally not required to admit evidence in a form inadmissible under state

law."]; *People v. Phillips* (2000) 22 Cal.4th 226, 238 [affirming trial court's discretion to exclude defendant's self-serving hearsay in penalty phase], quoting *People v. Edwards* (1991) 54 Cal.3d 787, 837 ["N]either this [C]ourt nor the high court has suggested that the rule allowing all relevant mitigating evidence has abrogated the California Evidence Code."].)

Appellant could have taken the stand and testified had he wished the jury to hear him say he was sorry for killing Talley and Garcia. He did not. His prior recorded statement, which was not even seen by the experts until the trial itself, was not admissible for its truth. And even if it were, the jury had already seen the two most expositive parts; the part where he said he was sorry, and the part where he explained why he chose certain victims, because they "screwed with him." (See Defense Exh. 41 at time marker 9:35:35.) The court did not commit prejudicial error in excluding the videotape. Appellant's claim fails.

XV.

THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT TESTIMONY SHOWING CIRCUMSTANCES OF THE CRIME UNDER PENAL CODE SECTION 190.3

Appellant contends the court erred in admitting an "excessive" amount of victim impact testimony. (AOB 309.) He claims that the "massiveness and emotionalism" of the evidence, "coupled with calls for comparison between the value of the defendant's life and that of his victims, and testimony from a victim's former partner who saw the defendant experience some pleasure in life in jail," exceeded that permitted by the Due Process Clause of the Fourteenth Amendment under *Payne v. Tennessee* (1991) 501 U.S. 808 and a line of this Court's precedents including *People v. Clark* (1993) 5 Cal.4th 950, 1034, and *People v. Fiero* (1991) 1 Cal.4th 173, 235. (AOB 321.) Appellant's claim manifestly misses the mark. Although the prosecution admittedly presented a

greater number of witnesses in this case than in *Payne*, the testimony here carried little of the massive emotional appeal shown by the young child crying out at night for its mother described in *Payne*. Our case falls right in line with this Court's precedents concerning the admission of victim impact testimony. Appellant's claim fails.

The Supreme Court has expressly upheld the admission of victim impact evidence. (*Payne v. Tennessee, supra*, 501 U.S. at p. 826; overruling *Booth v. Maryland* (1987) 482 U.S. 496 and *South Carolina v. Gathers* (1989) 490 U.S. 805.) The Court recognized that such evidence is necessary to "balance" the scales of fairness and counteract the "parade of witnesses . . . and good deeds of Defendant" admitted without limitation to relevancy as mitigation in the penalty phase of the capital case. (*Id.* at p. 826; see also *id.* at p. 833 [Scalia, J., concurring] [observing "the injustice of requiring exclusion of relevant aggravating evidence during capital sentencing, while requiring the addition of all relevant mitigating evidence"].) In holding that "evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed," the Court concluded, "there is no reason to treat such evidence differently than other relevant evidence is treated." (*Id.* at p. 827.) The Court, quoting Justice Cardozo, reasoned: "Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." (*Ibid.*, quoting *Snyder v. Massachusetts* (1934) 291 U.S. 97; see also *People v. Brown* (2004) 33 Cal.4th 382.

Although the prosecution in *Payne* put on only a single victim impact witness during the penalty phase, the testimony of that witness was both presented, and ultimately utilized by the prosecutor, in an extremely powerful manner. There, the defendant stabbed to death a 28-year-old woman and her

two-year-old daughter while the woman's three-year-old son watched, after being stabbed repeatedly himself. During the penalty phase of the case, the state presented the testimony of the children's grandmother, who was asked how the three-year-old survivor had been affected by the murders of his mother and sister:

> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.

(*Id.* at pp. 814-815.)

The Court found that this evidence, in conjunction with the prosecutor's argument, was not barred by the Eighth Amendment, as it was "simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question . . . ." (*Id.* at p. 825.) The Court recognized that, "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." (*Id.* at p. 825.)

Here, the prosecution put on witnesses to show that the victims were valuable members of the community in which they lived, and were missed by a multitude of persons, including family members and friends. (See *Payne, supra,* at p. 825.) However, none of that testimony – singly or collectively – began to approach the power of the evidence presented by the lone witness in Payne describing a small child crying in the night for his mother. (*Id.* at pp. 814-815.) Although the witnesses in our case were greater in number, their testimonies were in no way extraordinary.

Lorraine Talley's mother testified how Lorraine was a "happy child." (XXVII RT 5130.) One of Talley's grown daughters described how Talley's

death had required her to exercise much more responsibility for the care and upbringing of her other family members. (See XXVII RT 5150-5154.) Other witnesses spoke of the personal loss of Talley's companionship or their vacation plans together. (See XXVII RT 5182-5184.) The most emotionally charged moment during the penalty phase was not the account of a victim or even an eyewitness to the shootings (see *Payne, supra*, 501 U.S. at p. 824), but instead, the hearsay reference from Talley's former boyfriend that when he told their son about Talley's death, the boy asked whether it "was the man at work." (XXVII RT 5177-5178.)

Ironically, the entire incident may have been prevented had Talley not been so concerned with trying to protect appellant's feelings. One witness testified that even though there was some concern about security, Talley did not ask the police to be present inside the RHA office at the time appellant was fired, because it would be too great an embarrassment to him. Talley told her, "Harriette, I don't want to embarrass him. That would just be awful for him to be carted out of here by the police. You know he would never be able to get another job." (XXVII RT 5167-5168.) The same witness, Harriette Langston, was on the telephone with Talley at the time appellant walked in and shot her. (XXVII RT 5169-5170.)

Like Langston, several other witnesses, such as Pat Jones, Pamela Kine, Janet Robinson and Shirail Burton, gave eyewitness accounts of appellant's violence and of the deaths of their colleagues, and thus, in some ways were victims themselves. Pat Jones crawled out from under her desk, ears still ringing from the gunshots, and tried to administer aid to Barbara Garcia. Pamela Kine was present in the conference room of the RHA at the time of the shooting (XVII RT 5192), and Shirail Burton heard the shots. (XXVII RT 5197.) Janet Robinson, who had been spared as part of appellant's "moral justification," described her constant fear that something like this "could happen

again" (XXVII RT 5204), and her guilt for hiding under the desk when she thought she might have protected Talley or Garcia. (XXVII RT 5207.)

Barbara Garcia's relatives described how she was "Cinco de Mayo queen" and how she helped other people get into college. (XXVII RT 5233, see also XXVII RT 5542.) All tolled, this "massive display" (see AOB 318) took up less than 125 pages in the record, constituting less than half of a single volume of transcript. (See RT 27.) The evidence – collectively -- was much more like the "quick glimpse of life which a defendant chose to extinguish" than was the emotional reaction of the child/victim described in *Payne*. (*Id.* at 822 [internal quotations omitted].) There was nothing in the testimonies of the People's victim impact witnesses that was unduly prejudicial or fundamentally unfair such that a jury would act irrationally or ignore other evidence presented during the trial.

This Court has repeatedly accepted a broad range of victim impact testimony under Penal Code section 190.3 following Payne.[32] (See, e.g., *People v. Lewis, supra*, 39 Cal.4th at pp. 1056-1057; *People v. Taylor, supra*, 26 Cal.4th at p. 1172 [prosecution entitled to present evidence of surviving spouse's invalid condition as victim impact evidence in aggravation because victim would otherwise have been alive to care for him were it not for her murder].) For example, permissible "victim impact testimony is not limited to the victims' relatives or to persons present during the crime . . . ." (*Lewis,*

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32. Appellant seems to confuse the basis underlying admission of victim impact testimony. (See AOB 312-313.) Appellant cites Penal Code section 1191.1 as authority for the introduction of such testimony, rather than section 190.3. Section 1191.1, enacted as part of the Victims Bill of Rights (see Proposition 8 (1982)), confers on *victims* and their *next of kin* an additional *right* to be present and testify in sentencing proceedings. It does not, however, govern the scope of admissible aggravating evidence that the *prosecution* can present during the penalty phase, which is instead regulated under section 190.3. (*People v. Fierro, supra*, 1 Cal.4th at pp. 235-236.)

supra, at p. 1057, citing *People v. Pollock* (2004) 32 Cal.4th 1153, 1183.) The prosecution is also entitled to present evidence regarding a murder victim's interests and activities, such as charitable and church functions (see *Pollock, supra*, 32 Cal.4th at pp. 1180-1181; *People v. Huggins* (2006) 38 Cal.4th 175, 238 [rejecting defendant's analogy to out-of-state authority, including *Cargle v. State* (Okl.Cr. 1995) 909 P.2d 806, 829-830) (see AOB 316); see also *People v. Robinson, supra*, 37 Cal.4th at p. 652 [not reaching the issue because the specific point was not raised below]), or even business interests. (See *People v. Fierro, supra,* 1 Cal.4th at p. 235 [evidence that victim's wife observed the murder and would have to live with it the rest of her life, and that the victim was killed in front of a business he had owned for 40 years, were simply factual circumstances of the crime].)

Similarly, "victim impact evidence is not limited to circumstances known or foreseeable to the defendant at the time of the crime . . . ." (*People v. Lewis*, *supra*, 39 Cal.4th at p. 1057; see *People v. Pollack*, *supra*, 32 Cal.4th at pp. 1180-1181 [rejecting argument that victim impact testimony must be limited to a single witness or to facts known by the defendant].) As this Court recognized in *Pollock*,

> The purpose of victim impact evidence is to demonstrate the immediate harm caused by the defendant's criminal conduct. This harm is not limited to the effect of the victims' deaths on the members of their immediate family; it extends also to the suffering and loss inflicted on close personal friends. . . . ¶ . . . We have [also] approved victim impact testimony from multiple witnesses who were not present at the murder scene and who described circumstances and victim characteristics unknown to the defendant.

(*Id.* at p. 1183, citing *People v. Boyette, supra*, 29 Cal.4th 440-441; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1017 [prosecutor's comments about likely suffering of victims' friends was "well within the boundaries of permissible victim impact argument"].) Likewise, this Court has never prohibited surviving

victims from describing "their physical injuries and other effects of the crime" (*People v. Lewis, supra*, 39 Cal.4th at p. 1058, citing *People v. Brown, supra*, 33 Cal.4th at p. 397), even when a defendant has yet to be charged for inflicting those injuries. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 401.)

In fact, it is under those circumstances – where a defendant intends by his actions to inflict damage on a broader range of victims beyond those killed – that victim impact evidence is most probative. For example, in *People v. Lewis, supra*, 39 Cal.4th at pages 1056-1057, this Court upheld admission of testimony from numerous friends and family members of the victims expressing "how they missed having the victims in their lives." (*Id.* at p. 1057.) There, the defendants knew the victims and were attempting to "inflict maximum damage" on specific friends and family members of the victims through the killings. This Court held: "Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a)." (*Id.* at pp. 1056-1057; see also *People v. Brown, supra*, 33 Cal.4th at pp. 397-398; see generally, *People v. Smith* (2005) 35 Cal.4th 334, 353 [upholding admission of prosecution mental health expert under 190.3(a) to show that revenge against victim who had him fired was motivated in part by sadistic sexual fantasy].)

Here, as in *Lewis*, appellant was attempting, through the murders, to maximize the impact on specific persons whom he believed wronged him. (See XXIV RT 4678; see Defense Exh. 41.) He repeatedly threatened his coworkers that he would "do another 101 California" if he was fired (see XIII RT 2542-2543; XIV RT 2659-2660, 2751-2752; XVII RT 3338-3339, 3343-3344), and in fact, it was these very threats that hastened his termination from the RHA. (See XIII RT 2459, 2545.) He confessed to police that he chose his victims because they were the ones "that screwed with him" (see Defense Exh. 41 at

time marker 9:35:35) and let it be known in no uncertain terms that his actions were meant to send a shockwave to the community. (See XXIX RT 5529, 5533, 5536, 5542.) In short, although Lorraine Talley and Barbara Garcia were the ones laying on cold slabs in the morgue at the end of the day, it was the remaining employees at the Housing Authority -- the other victims -- who would have to relive this day forever. Thus, it was their testimony – the words of friends and family members of Talley and Garcia concerning "how they missed having the victims in their lives" – that was absolutely relevant to provide the jury with complete evidence surrounding the circumstances of the case, and moreover, to balance the scales of justice. (See *Payne*, *supra*, 501 U.S. at p. 827.)

Moreover, any effects of the victim impact evidence have to be balanced against appellant's mitigating evidence. (See *People v. Lewis*, 39 Cal.4th at p. 1056-1057 [recognizing that under *Payne*, *supra*, 501 U.S. at p. 825, "prosecution has a legitimate interest in counteracting the relevant mitigating evidence"].) Appellant presented significant evidence regarding his own personal characteristics. The defense presented witnesses to show that appellant had not enjoyed the same opportunities as other children and yet had remained respectful (see XXVIII RT 5298), how he had "never been a violent person" (XXVIII RT 5314-5315), how he had no criminal record (XXVIII RT 5379), and how there was nothing – absent a couple of seizures suffered as a child (XXVIII RT 5396-5397) -- to explain why this happened. (See XXVIII RT 5379.) The defense further put on evidence that appellant had helped others in need in the past (see RT XXVIII RT 5273-5274), and that he thought his conduct morally justified because of the poor treatment he had received from others in the Housing Authority. (See XXVIII RT 5415-5416.) Appellant also presented evidence showing how he had supposedly made a successful

adjustment to life in incarceration, how he was able to work in the jail kitchen, and how he had expressed sorrow for what he had done. (XXVIII RT 5391.)

To counter, the People were entitled to show the jury exactly what the defendant, through his own personal actions, had taken from the world. (*People v. Lewis, supra*, 39 Cal.4th at pp. 1056-1057.) As noted above, several friends and family members gave brief descriptions of their interactions with Lorraine Talley and Barbara Garcia and what the victims' absence would mean to the lives of others. In addition, several witnesses described their own experiences and observations during the shooting, and many testified to their continued fear and sense of loss. But there was nothing that would have provoked the sort of biased, unduly prejudicial reaction that could scale the lofty heights of due process. "The testimony, though emotional at times, fell far short of anything that might implicate the Eighth Amendment. It was traditional victim-impact evidence, 'permissible under California law as relevant to the circumstances of the crime, a statutory capital sentencing factor.'" (*People v. Huggins, supra,* 38 Cal.4th at p. 239, quoting *People v. Cole* (2004) 33 Cal.4th 1158, 1233.) Appellant's claim fails.

XVI.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ADMIT THE UNRELIABLE HEARSAY CONTENT OF 33 LETTERS OFFERED BY APPELLANT DURING THE PENALTY PHASE

Appellant contends the trial court erred in refusing to admit the hearsay contents of 33 character reference letters offered during the penalty phase. (AOB 322.) Although the *existence* of the letters was admitted without objection through the testimony of his mother (see XXVIII RT 5377-5378), and the trial court suggested that the testimony of the authors – most, if not all, of whom exhibited Bay Area addresses – would have been admissible (XXIX RT

5454), the court, citing this Court's opinion in *People v. Livaditis*, *supra*, 2 Cal.4th at pp. 779-780), excluded the *content* of the letters as unreliable hearsay (Evid. Code, § 1200), lacking in both trustworthiness and substantial probative value under Evidence Code section 352. (XXIX RT 5454.) On appeal, as below, appellant does not offer the evidence under a specific exception to the hearsay rule (see 28 RT 5435-5436 ["I would offer them . . . simply for their existence, not as hearsay."]), but instead, argues the letters themselves should have been admitted to prove their very existence (AOB 325), rather than for their truth, and, regardless, that their preclusion in the penalty phase of a capital case violated federal constitutional law. (AOB 323, 325.) The trial court's lawful exclusion of the content of the letters as unreliable hearsay under state law did not violate the Constitution.

Although a criminal defendant has the right to put on "all relevant mitigating evidence" in the penalty phase of a capital case, "a state is generally not required to admit evidence in a form inadmissible under state law." (*Livaditis, supra,* 2 Cal.4th at p. 780 [internal quotations omitted].) "[N]either this [C]ourt nor the high court has suggested that the rule allowing all relevant mitigating evidence has abrogated the California Evidence Code." (*People v. Phillips*, *supra*, 22 Cal.4th at p. 238 [affirming trial court's discretion to exclude defendant's self-serving hearsay in penalty phase], quoting *People v. Edwards, supra*, 54 Cal.3d at p. 837.)

The rationale precluding unreliable hearsay is particularly sharp where a defendant's proffer would sidestep the normal rigors of cross-examination. For example, in *Livaditis, supra*, a defendant convicted of special circumstance murder offered expressions of remorse made during a postarrest interview. The trial court sustained the prosecutor's hearsay objections to the evidence, including statements the defendant made to family members and letters he wrote while in jail, although the prosecutor never asked that the answers be

stricken. (*Livaditis, supra*, 2 Cal.4th at pp. 777-778.) The defendant made no effort below to show that the testimony came within an exception to the hearsay rule, to otherwise lay a proper foundation for any such unstated exception, or to admit the contents of the statements through a different procedural form that would have satisfied either evidentiary concerns or the prosecution's concomitant right to confront the witnesses. (*Id.* at p. 778.)

On appeal, the defendant argued the statements were admissible to show his state of mind under Evidence Code section 1250. This Court, however, found that the issue was not properly preserved because the defendant failed to assert that theory below, further failed to provide sufficient foundation for the exception, and, finally, that the court below "would have had discretion to find a lack of trustworthiness on the claims of remorse, and thus to exclude the evidence if asked to rule on the question." (*Livaditis, supra*, at p. 780; see Evid. Code, § 1252.) In essence, the defendant was trying to do nothing more than introduce evidence that would not have been subject to cross-examination. This, the Court recognized, was not permissible even in the penalty phase of a capital case. (*Id.* at p. 779 ["A defendant in a criminal case may not introduce hearsay evidence for the purpose of testifying while avoiding cross-examination."], quoting *People v. Harris* (1984) 36 Cal.3d 36, 69 (plurality opinion by Broussard, J.); see also *People v. Stanley* (1995) 10 Cal.4th 764, 839-840 [noting that even in the penalty phase of a capital case, a criminal defendant is not entitled to "give self-serving testimony free from cross-examination as to its validity"].)

Moreover, this same lack of reliability that "makes the statements excludable under state law makes them excludable under the federal Constitution." (*Livaditis, supra*, at p. 779; accord *People v. Jurado, supra*, 38 Cal.4th at p. 130 [rejecting "the argument that exclusion of this sort of hearsay evidence violates a capital defendant's right to a fair trial and a reliable penalty

determination under the federal Constitution."].) This by no means precludes a capital defendant from offering the evidence; it simply prohibits the information from being presented to the jury in a particularly untrustworthy form. (See *People v. Stanley, supra*, 10 Cal.4th at pp. 839-840 [recognizing that the defendant's live testimony would have been an acceptable way to present evidence of remorse otherwise precluded as unreliable hearsay via appellant's prior videotaped statement].)

The trial court recognized these concerns in precluding the evidence in this case. Although, as the court posited, appellant would have been entitled to call the authors of those letters to the stand to testify on his behalf (see XXIX RT 5453-5454), the letters themselves, written during the pendency of litigation, were unreliable hearsay and properly precluded. (*Livaditis, supra*, at pp. 779-780; see *Stanley, supra,* 10 Cal.4th at p. 840; accord *People v. Jurado, supra*, 38 Cal.4th at p. 130 ["[A] capital defendant has no federal constitutional right to the admission of evidence lacking trustworthiness, particularly when the defendant seeks to put his own self-serving statements before the jury without subjecting himself to cross-examination."]; see also *Oregon v. Guzek, supra*, 546 U.S. at p. 526 [finding no constitutional right to present new evidence of residual doubt because "the Eighth Amendment does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted."], disapproving in part *Green v. Georgia, supra*, 442 U.S. 95.)

Unlike *Livaditis, supra,* where the jury was alerted to the evidence only through the form of a properly sustained hearsay objection, here, defense counsel was permitted to actually prove the existence of the 33 letters, which -- at least according to appellant -- was their only relevant, stated, purpose for admission. (See AOB 325; see also XXVIII RT 5436.) Thus, while the contents of those letters were not directly made known to the jury, the jury

learned of their existence. (XXVIII RT 5377.) In other words, appellant was not precluded from presenting the evidence, only precluded from presenting the evidence in the form -- unreliable hearsay not subject to cross-examination -- he chose. (*Livaditis, supra*, at pp. 779-780 ["The court did not prevent defendant from presenting evidence of remorse, but only evidence in the form of inadmissible hearsay not subject to cross-examination."]; see also *People v. Jurado, supra*, 38 Cal.4th at pp. 128-129 [trial court noting that defendant could have, but did not, proffer the substance of the evidence through his own testimony]; *People v. Phillips, supra*, 22 Cal.4th at p. 238.)

Unlike *Green, supra,* our case did not involve evidence showing a third party committed the crime. (*Green, supra*, 442 U.S. 95.) Nor did the evidence fit the two narrow categories which this Court has suggested may permit a trial court to dispense with traditional state-law-based rules of evidence. The evidence was not critical to punishment, as appellant called numerous live witnesses who gave much more compelling testimony on his behalf, nor did it bear significant indicia of reliability, given that it was solicited by an interested party – appellant's mother – on the eve of, and for the express purpose of, litigation. (See *People v. Weaver* (2001) 26 Cal.4th 876, 980-981.) And again, appellant was not precluded from presenting this evidence (XXIX RT 5454), only from presenting it in a way that did not conform to the state's rules of evidence and was not subject to cross-examination. (*People v. Livaditis, supra*, 2 Cal.4th at p. 778.)

The trial court's preclusion of the evidence under section 352 addressed similar concerns. The trial court listed four reasons for sustaining the prosecutor's objection: first, the evidence was cumulative, as appellant had already presented a substantial amount of character evidence (XXIX RT 5453); second, the court noted that several of the people submitting letters had also either testified or were listed as potential witnesses, thus the same evidence

could have found a proper avenue for admission, while still satisfying the prosecution's right to test the credibility of the evidence through cross-examination (XXIX 5453); third, appellant had laid an inadequate foundation for necessitating adoption of an alternate form of the evidence, because all of the letters were authored by people who had local Bay Area addresses (XXIX RT 5454); and finally, the court found "substantial reasons to doubt the reliability" of the evidence because the great majority of the letters were solicited by appellant's mother, for the purpose of supporting appellant during the pendency of a trial in which appellant's "character is called into question in the actual heat of litigation." (XXIX RT 5454.)

The court did not abuse its discretion under section 352 in precluding the proffered letters. Again, we note that appellant does not claim a hearsay exception that would permit the jury to consider the content of the letters. Without content from the letters, the probative value of the letters is significantly diminished because there is nothing from which the jury could reasonably infer mitigating value. The fact that 33 people would be moved to write letters about appellant is irrelevant as mitigation unless at least some of the content is favorable to appellant. The authors could have been writing to suggest a particular penalty, to ask why appellant committed these two murders, or for a completely unrelated purpose whatsoever. However, to establish this would require knowledge of the content – in other words, admission of a statement for its truth rather than its existence -- thereby violating the hearsay rule.

The fact that the evidence is offered as "character" evidence similarly provides appellant no support. Contrary to appellant's assertion that the drafters of the Evidence Code sought admission of character evidence "without restriction" (see AOB 328, fn. 54, citing Evid. Code, § 1100 (2008 ed.) Law Revision Commission Comments, ¶ 6), section 1100 expressly begins in a

restrictive manner: "*Except as otherwise provided* by statute, any otherwise admissible evidence . . . ." (See *People v. Reeder* (1978) 82 Cal.App.3d 543 [finding evidence of codefendant's prior drug dealing to be inadmissible hearsay against codefendant even though it would otherwise have been admissible under section 1101] (Jefferson, J.).) In fact, the remaining comments from the Law Revision Commission recognize that the section is meant as a limitation (["Section 1100 applies without restriction *only* when character or a trait of character is an *ultimate fact in dispute* in the action."] (initial emphasis added)) and is subservient to other sections of the Evidence Code, and even suggest that section 1100 is "technically unnecessary because section 351 declares that all relevant evidence is admissible." (§ 1100, Law Rev. Comm. ¶ 2.) In other words, under both the express language of the statute, and the intent of its drafters, a criminal defendant does not get to sidestep the hearsay rule, even in the penalty phase of a capital case, simply by claiming that the evidence was offered to show character.

Nor were the statements themselves sufficiently reliable to justify admission. (See AOB 32.) As the trial court recognized, most of the statements were solicited by appellant's mother, in anticipation of the upcoming penalty trial. (See XXIX RT 5454.) Although the prosecution did not question the authenticity of the letters, the circumstances under which the letters were written remained somewhat suspicious, particularly given their self-serving nature and the fact that appellant expressly declined the court's offer to permit the authors to testify, thus, precluding any sort of cross-examination. (See *People v. Jurado, supra*, 38 Cal.4th at pp. 129-130 [rejecting self-serving postarrest statements as unreliable, even though defendant did not know he was being recorded]; *People v. Stanley, supra*, 10 Cal.4th at pp. 838-840; *People v. Livaditis, supra*, 2 Cal.4th at p. 780; *People v. Edwards, supra*, 54 Cal.3d at pp. 820-821; *People v. Whitt* (1990) 51 Cal.3d 620, 644.)

This Court has repeatedly rebuffed the attempts of capital defendants to introduce untrustworthy, self-serving hearsay statements, made in preparation for litigation. Here, appellant was not precluded from offering the substance of the evidence, only the present hearsay form. Appellant refused the court's invitation to specify a hearsay exception under which the content of the letters could be admitted, made no attempt to call the authors, and offered no explanation as to why the letters were particularly trustworthy or why their proponents could not be brought forth and placed on the stand. The evidentiary purpose of the letters – to show their existence rather than their content – was fully satisfied through the testimony of appellant's mother. Thus, for the same reasons that appellant's Due Process rights were not violated, he has also failed to show prejudice. The claim fails.

XVII.

THE TRIAL COURT PROPERLY LIMITED TRIAL COUNSEL'S OPEN-ENDED PENALTY PHASE TESTIMONY CONCERNING UNRELIABLE HEARSAY STATEMENTS WHERE COUNSEL HAD FAILED TO PROVIDE ANY DISCOVERY TO THE PROSECUTOR AND HAD KNOWN ABOUT THE POSSIBILITY OF TESTIFYING FOR WEEKS IN ADVANCE

Appellant contends the trial court erred in limiting defense counsel's penalty phase testimony to observations made during two pretrial conversations and to his knowledge of a plan to provoke an emotional outburst from appellant. (AOB 330.) He argues counsel's further testimony – in which counsel's proffer was that appellant had expressed remorse on other occasions -- was improperly precluded by the court as a discovery sanction for failing to put his own name on the witness list and to create a written description of their communications to assist the prosecution in preparing for trial. Defense counsel's open-ended testimony was properly limited by the trial court, both

under its discretionary powers in fashioning a justiciable remedy for counsel's failure to comply with the discovery rules, and, further, in its proper role of controlling the evidence and precluding unreliable hearsay. Moreover, contrary to appellant's assertion, counsel did, in fact, testify to much of the information of which appellant now complains, thus the exclusion of whatever evidence that was otherwise admissible is harmless error.

Penal Code section 1054.3, the section governing a defendant's obligation to provide discovery in a criminal case, states the following:

> The defendant and his or her attorney shall disclose to the prosecuting attorney:
>
> The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case . . . .

Courts have interpreted the discovery provisions liberally to accord the electorate's expressed intent of furthering the ascertainment of truth in criminal trials. (See *In re Littlefield* (1993) 5 Cal.4th 122, 133.) Thus, courts have interpreted the phrase "written or recorded statements . . . or reports of those statements" to include oral representations made to the defense. (*Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 166.) Employment of the phrase "reports of the statements of those persons" expected to be called as witnesses by the defense imposes upon counsel "an obligation to report any relevant statements made by those intended witnesses, including oral statements made directly to defense counsel" (*Roland, supra,* 124 Cal.App.4th at p. 166 [emphasis in original]), or at the very least provide an oral summary of the witnesses' statements to the prosecutor. (*Id.* at p. 161.)

A contrary interpretation, as the *Roland* court suggested, would "permit defense attorneys and prosecutors to avoid disclosing relevant information by

simply conducting their own interviews of critical witnesses, instead of writing down or recording any of those witnesses' statements." (*Id.* at p. 167.)

Furthermore, while this Court has suggested in dicta that a party does not have the obligation to go out and "obtain a written statement from a witness, even if the witness is ready and willing to give such a statement" (*Littlefield, supra,* 5 Cal.4th at page 136), there is a considerable difference between investigating and obtaining information not previously known, and a situation where counsel was already aware of the information, but had simply not reduced it to a writing. (See *Roland, supra*, 124 Cal.App.4th at p. 165 [distinguishing *Littlefield*].) In the latter situation, counsel's obligations as an officer of the court require that the information be disclosed. Thus, "[w]hile the defense does not have a duty to obtain written statements from witnesses . . ., counsel is not entitled to withhold any relevant witness statements from the prosecution by the simple expedient of not writing them down." (*Id.* at p. 165 [distinguishing L*ittlefield*].) "[S]uch gamesmanship is inconsistent with the quest for truth, which is the objective of modern discovery." (*Id.* at p. 165, quoting *Littlefield* at p. 136 [brackets in *Roland*].)

The *Roland* court further recognized that the intent of the electorate, in enacting the discovery provisions of section 1054, et seq., was "to 're-open the two-way street of reciprocal discovery'(*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372, and 'restore balance and fairness to our criminal justice system.' (Prop. 115, § 1(a).)" (*Roland, supra,* 124 Cal.App.4th at p. 162.)

> Section 1054 expressly states that the discovery chapter "shall be interpreted" to "promote the ascertainment of truth in trials by requiring timely pretrial discovery" and "save court time in trial and avoid the necessity for frequent interruptions and postponements." (§ 1054, subds. (a), (c).) "These objectives reflect, and are consistent with, the judicially recognized principle that timely pretrial disclosure of all relevant and reasonably accessible information, to the extent constitutionally permitted, facilitates 'the true purpose of a criminal trial, the ascertainment of the facts.'" (*In re Littlefield, supra*, 5 Cal.4th at pp.

130-131; see generally Pipes and Gagen, Cal.Crim. Discovery (3d Ed. 2003) Disclosure by Prosecutor, §§ 3.23-3.24.3, pp. 298-301 (Pipes and Gagen).)

(*Roland, supra,* at p. 162.) In short, there is no balance in a system that allows one side to "sandbag" the other by producing evidence at the last minute and claiming, through a technicality, that admission of the evidence is mandatory. This is not a case in which the same information was still conveyed to the opposing party even though the raw data was destroyed (see *People v. Coles* (2005) 134 Cal.App.4th 1049, 1055 [police not obligated to retain raw interview notes used to prepare discoverable police reports]; see also *Thompson v. Superior* Court (1997) 53 Cal.App.4th 480, 485-487 [raw notes of defense investigator are discoverable where preserved]), or in which rebuttal testimony could not have been anticipated until after the defense's case. (See *People v. Hammond* (1994) 22 Cal.App.4th 1611, 1622.) Instead, this is a case in which the information was known to defense counsel long in advance of the expected testimony, but not disclosed to the prosecutor until the morning the witness – defense counsel -- attempted to take the stand.

As the Supreme Court has stated:

> One of the purposes of the discovery rule itself is to minimize the risk that fabricated testimony will be believed. Defendants who are willing to fabricate a defense may also be willing to fabricate excuses for failing to comply with a discovery requirement. The risk of a contempt violation may seem trivial to a defendant facing the threat of imprisonment for a term of years. A dishonest client can mislead an honest attorney, and there are occasions when an attorney assumes that the duty of loyalty to the client outweighs elementary obligations to the court.
>
> We presume that evidence that is not discovered until after the trial is over would not have affected the outcome. It is equally reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed.

(*Taylor v. Illinois* (1987) 484 U.S. 400, 413-414 [upholding preclusion sanction for willful discovery violation], quoted in *Hammond, supra*, at pp. 1623-1624; see also *Michigan v. Lucas* (1991) 500 U.S. 145, 150-151 [preclusion of evidence as discovery sanction under rape-shield law does not per se violate Constitution].)

The trial court had discretion here to limit the scope of the witness's testimony under Penal Code sections 1054.5 and 1054.7. Section 1054.5 states, "Upon a showing that a party has not complied with section 1054.1 or 1054.3 and upon a showing that the moving party complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order." Section 1054.7 requires disclosure of discoverable items be made 30 days prior to trial, or "immediately" if the party comes into possession of the information after that time, unless "good cause" is shown. "Good cause," however, is "limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." (§ 1054.7.)

Although outright preclusion of a witness under section 1054.5 for a discovery violation is considered an "extreme" sanction and warranted "only if all other sanctions have been exhausted" (§ 1054.5, subd. (c)), the mere limitation on the scope of a witness's testimony does not necessarily require the exhaustion of all other options. (See *People v. Lamb* (2006) 136 Cal.App.4th 575, 581 [trial court properly precluded surrebuttal testimony from defense expert due to counsel's failure to comply with discovery].)

For example, in *People v. Lamb, supra*, 136 Cal.App.4th at page 582, the defendant failed to reduce the oral statements of its accident reconstruction

expert to writing and thus, claimed there was no discovery to provide under section 1054.3. The court upheld a preclusion sanction under Penal Code section 1054.5, as well as under Evidence Code section 352, denying the defendant the right to present surrebuttal testimony from the expert. As the court noted, "this type of gamesmanship constitutes a discovery violation." (*Id.* at pp. 581-582.) "The purpose of the discovery rules under Proposition . . . 115 as specified in Section 1054 is to promote the ascertaining of truth in trial by requiring timely pretrial discovery and also to save the Court time in trial and avoid the necessity for frequent interruptions and postponements." (*Id.* at p. 581.) Furthermore, although section 1054.5, subdivision (c), cautions against prohibiting the testimony of a witness unless "all other sanctions have been exhausted," the witness was not precluded from testifying. Instead, the court's sanction only limited the scope of the witness's testimony and thus was proper. (*Id.* at pp. 581-582.)

Here, the trial court did not abuse its discretion either in requiring trial counsel to create a written description of his communications with appellant (Pen. Code, § 1054.3, subd. (a); *Roland, supra*, 124 Cal.App.4th at p. 166), in limiting the scope of counsel's testimony when such written description was not provided (§ 1054.5, subd. (b); *People v. Lamb, supra*, 136 Cal.App.4th at p. 582), or in sustaining the prosecutor's hearsay objection to appellant's previously unreported statements concerning remorse. (Evid. Code, § 1200.) In fact, appellant's counsel conceded that appellant's statements constituted inadmissible hearsay at trial, and limited his offer to mere physical observations. (See XXIX RT 5457 [Defense Counsel: "I think Mr. Jewett has a good point, Judge. I will just testify about what I saw and I won't --" (omission in original transcript)]).

Like *Lamb*, defense counsel was not precluded from testifying; the court's sanction merely limited the scope of defense counsel's testimony.

(*People v. Lamb, supra*, 136 Cal.App.4th at pp. 581-582.) Like *Lamb*, defense counsel had failed to reduce the proposed testimony to writing, or otherwise alert the prosecution as to its contents. (See *ibid.* [noting expert's statement that "written reports are sometimes not prepared in order to avoid discovery."].)

Furthermore, once defense became aware of the information, counsel – if he wished to call himself as a witness -- was under an affirmative obligation as the attorney specified in section 1054.3 to reduce the statements to writing, or to otherwise inform the prosecutor of their content in order to permit the prosecution to investigate the circumstances under which the statements were made and to thoroughly prepare for cross-examination and rebuttal testimony. (*Roland v. Superior Court, supra*, 124 Cal.App.4th at p. 166.) The interviews occurred well before the 30-day cutoff for disclosure of information (see Pen. Code, § 1054.7), and thus sanctions were appropriate. (Pen. Code, § 1054.5.) Although counsel may not have made the final decision to testify until the last morning of trial – the same time he gave his proffer – this was not a case in which his testimony had been necessitated only by an unexpected chain of events or change of evidence during trial.

As the trial court noted, it was permitting defense counsel to testify to his observations on two days as counsel had initially proffered. Every thing else appeared to be "last minute," which the court recognized, would result in an unwelcome "free flowing state of consciousness type of testimony" that could have been prevented had counsel given the prosecutor adequate discovery. (XXIX RT 5458-5459.) As the court recognized, to broaden the testimony beyond counsel's original offer of only the two incidents that were slated to be admitted would have obstructed the court's ability to control and circumscribe the scope of evidence, implicating concerns that the scope of evidence would become too large and require allowing the district attorney to examine numerous other protected conversations between appellant and trial counsel.

(See XXIX RT 5456.) Given the lateness of the offer, the fact that counsel had never put his name on any witness list or otherwise provided discovery of the evidence to the prosecution (XXIX RT 5458), the unusual procedure involved when an attorney becomes a witness in his own case, the fact that counsel had expressly refused to contact other witnesses who had been party to some of the conversations, and the unreliable nature of the self-serving hearsay statements in general (see XXIX RT 5456-5457), the trial court did not abuse its discretion in limiting the scope of counsel's testimony.

Furthermore, appellant fails to provide any more context to show what evidence was actually precluded. Counsel stated only that appellant was "unable to continue the conversations" because he would break down and cry "and talk about how he is (sic) so tore up" during the meetings. (XXIX RT 5455.) However, counsel never described the context of the conversations or meetings in any greater detail, and thus appellant's alleged "remorse" may have been nothing more than the same type of despair over his present predicament exhibited by any other defendant in a murder case. (See *People v. Jurado, supra*, at pp. 128-130 [upholding preclusion of post-arrest statements and conduct -- made "when [the defendant] ha[d] a compelling motive to minimize his culpability for the murder and to play on the sympathies of his investigators, indicat[ing] a lack of trustworthiness"].) Again, as this Court has explained,

> [A] capital defendant has no federal constitutional right to the admission of evidence lacking trustworthiness, particularly when the defendant seeks to put his own self-serving statements before the jury without subjecting himself to cross-examination.

(*Id.* at p. 130.)

A hearsay declarant bears the burden of creating a record sufficient to show not just the contents of the statement but the existence of any prejudice that may have occurred. (See *People v. Young*, *supra*, 34 Cal.4th at p. 1170; see also *People v. Alvarez, supra*, 14 Cal.4th at p. 196, fn. 8.) Here, the missing

prejudice is the same type of missing evidence that the district attorney needed to cross-examine defense counsel regarding the context within which appellant's alleged remorse occurred. To the extent appellant argues error predicated on lack of remorse in the transcript (AOB 335), that lack of remorse cannot be taken in a vacuum but must be tempered by whatever legitimate cross-examination could have been conceived to minimize the persuasiveness of the testimony. Thus, the bare suggestion that "remorse" could have been part of the equation cannot be argued without further consideration that appellant's statements and actions could be considered to have shown the lack of remorse, and concern for his own predicament. (See *People v. Jurado, supra,* 38 Cal.4th at pp. 128-130.)

Furthermore, the court permitted defendant to testify as to "the two meetings initially described by counsel" (AOB 332), and appellant does not explain (at least in the AOB) what more there was out there or why it prejudiced him not to get it in. The court had every right to preclude the sort of "free-flowing state of consciousness" testimony (see XXIX RT 5459) that the prosecutor feared.

Defense counsel who wishes to testify at the last minute to statements allegedly made by his client should not get to hide behind the cloak of his status as an attorney in the action. Defense counsel, as witness to the action, is now a third-party, who has communicated information to defense counsel, as an attorney and officer of the court. In that sense, he has an even greater obligation to provide discovery of the information in order to further the true purpose of the discovery statutes -- the ascertainment of truth. Appellant has failed to show prejudice and the court properly precluded the evidence under discovery and section 352 grounds.

A. No Federal Constitutional Error

To the extent appellant may have preserved his right to argue either a due process or other federal constitutional violation, the claim fails on the merits.[33] As this Court has repeatedly recognized, "a state is generally not required to admit evidence in a form inadmissible under state law." (*People v. Livaditis, supra,* 2 Cal.4th at p. 780, quoting *People v. Edwards, supra,* 54 Cal.3d at pp. 837-838; see also *People v. Jones* (1998) 17 Cal.4th 279, 305 [finding no constitutional violation where defendant was precluded from introducing "time-consuming hearsay and character evidence" because he was still offered the opportunity to prove his case through other means]; *People v. Cudjo* (1993) 6 Cal.4th 585, 611 [permitting complete preclusion of defense witness found to be not credible].) Here, the offer of proof was for "expressions of remorse" (see XXIX RT 5451); clearly assertive, as opposed to nonassertive, conduct and precluded under the Evidence Code. (Evid. Code, § 1200; see *People v. Jurado, supra,* 38 Cal.4th at p. 129 [distinguishing pure "emotive conduct" from statements surrounding such conduct].) Even assuming statements surrounding such emotive conduct would otherwise be admissible to show a defendant's state of mind under section 1250, the post-arrest nature of the statements and conduct, made "when [the defendant] had a compelling motive to minimize his culpability for the murder and to play on the sympathies of his investigators' indicated a lack of trustworthiness" that

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33. Appellant did not raise federal constitutional concerns below and has thus waived the issue. He further does not mention either of the two United States Supreme Court cases that have discussed discovery preclusion, *Taylor v. Illinois, supra,* 484 U.S. 400, or *Michigan v. Lucas, supra,* 500 U.S. 145, but instead, relies only on the general due process rights asserted under *Green v. Georgia, supra,* 442 U.S. 95, 97. (See AOB 334.) Only the latter line of argument is generally preserved when no specific reference is made below (see *People v. Partida, supra,* 37 Cal.4th at pp. 436-437), but it is a more difficult standard by which to obtain relief.

could properly have been excluded under Evidence Code section 1252. (*Jurado, supra*, 38 Cal.4th. at p. 129-130.) Thus, because the statements were likely unreliable or otherwise violative of the Evidence Code, they would be similarly excludable under the federal Constitution. (*Ibid.*)

Moreover, appellant was not prevented "from presenting evidence of remorse, but only evidence in the form of inadmissible hearsay not subject to cross-examination." (*Ibid.*) Like *Livaditis, supra*, 2 Cal.4th at pages 777-780, the jury heard appellant's explanation to police shortly after his arrest, which included his expression of sorrow. (See Defense Exh. 41.) Admittedly, that expression was quickly undercut by the prosecution's presentation of the statement in its true context, but nonetheless, appellant at least had a basis for arguing remorse.

Even assuming the trial court erred in precluding defense counsel's testimony regarding appellant's emotional reactions during their initial meetings, appellant fails to show prejudice. (See *People v. Cudjo, supra*, 6 Cal.4th at p. 611. As this Court noted,

> [T]he mere erroneous exercise of discretion under such "normal" rules does not implicate the federal Constitution. Even in capital cases, we have consistently assumed that when a trial court misapplies Evidence Code section 352 to exclude defense evidence, including third-party-culpability evidence, the applicable standard of prejudice is that for state law error, as set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243] (error harmless if it does not appear reasonably probable verdict was affected)

(*Ibid.*) Initially, we note that it was appellant's burden below, as here, to demonstrate why preclusion of the evidence prejudiced him. (See *Livaditis, supra*, 2 Cal.4th at p. 778; Evid. Code, § 354.) He failed to set forth any specifics of the claim either here or below, arguing only that this would have showed appellant felt remorseful for what he had done. However, without the specific details underlying the context of the conversation, it would be "more

likely that [appellant's emotional reaction] was caused entirely by concern for his own predicament." (*People v. Jurado*, *supra*, 38 Cal.4th at p. 129.) In fact, the prosecutor recognized that appellant's remorse was more of a ploy, and that appellant thought his actions were justified, when the prosecutor discussed appellant's videotaped confession made shortly after the murder. (See, e.g., XXIX RT 5552-5553.) In appellant's very next breath, after he described his own alleged sorrow, he expressed his feelings of justification for his actions. He proclaimed that the victims "had it coming" – that he did not kill certain people when he had the opportunity because "they never fucked with [him.] They never tried to do [him]." (See Defense Exh. 41, at time marker 9:35:30.) Thus, any claims of remorse – taken in context – would have lacked any potency. Appellant's claim fails.

XVIII.

THE TRIAL COURT HAD NO SUA SPONTE DUTY TO INSTRUCT THE JURY TO DISREGARD THE FACTUAL CIRCUMSTANCES SURROUNDING THE CRIME IN CONSIDERING EVIDENCE IN AGGRAVATION

Appellant contends the trial court erred in failing to sua sponte instruct the jury that it was not permitted to consider the facts proving the elements underlying appellant's first-degree murder conviction -- i.e., premeditation and deliberation -- as proof of aggravating circumstances.[34/] (AOB 336.) Notwithstanding that appellant's argument is premised on an overbroad, faulty

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34. To the extent appellant premises any part of his argument on statements *made* by either the court or prosecutor (see, e.g., AOB 337-338, citing XXIX RT 5531), appellant has failed to preserve this part of the claim by not making any appropriate objections below. Although none are required to preserve a claim of sua sponte instruction, appellant's argument seems more focused on what the court and prosecutor *said*, rather than what they did not say.

interpretation of California's death penalty law that has explicitly been rejected by this Court (see *People v. Moon, supra,* 37 Cal.4th at p. 40), and that this Court has expressly found that a request for such an instruction was not required because it was covered under CALJIC Number 8.88 (*People v. Earp, supra*, 20 Cal.4th at p. 902), appellant fails to show how he suffered any prejudice from the instructions that were actually given. In light of the instructions given, and the prosecutor's consistent reminder to the jury to only consider facts beyond those that prove the bare elements (see, e.g., XXIX RT 5530), appellant's claim fails.

Penal Code section 190.3, subdivision (a), states that the trier of fact "*shall* take into account . . . ¶ . . . [t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1." (Emphasis added.) This Court has interpreted "circumstances of the crime" to include all "facts" proving the murder, regardless of whether they would not otherwise transcend that basic level necessary to prove the crime itself. (*People v. Moon, supra*, 37 Cal.4th at p. 40.) As even appellant recognizes (see AOB 337, fn. 55), the basic facts of a murder cannot "comprehensively be withdrawn from the jury's consideration" if the jury is to properly perform the moral evaluation

of whether death is the appropriate penalty.[35] (*Ibid.*; see *People v. Hawkins*, *supra*, 10 Cal.4th at pp. 965-966.)

Indeed, any argument for precluding a jury's use of the circumstances of the murder "reveals a basic misunderstanding of the statutory scheme . . . ." (*People v. Moon, supra*, 37 Cal.4th at p. 40 (internal quotations omitted).)

> Contrary to [appellant's] argument, [the Court has] "explained that 'the focus of the penalty selection phase of a capital trial is more normative and less factual than the guilt phase. The penalty jury's principal task is the moral endeavor of deciding whether the death sentence should be imposed on a defendant who has already been determined to be 'death eligible' as a result of the findings and verdict reached at the guilt phase. In such a penalty selection undertaking, the Eighth Amendment's strictures are less rigid, more open-ended than the narrowing function of the capital sentencing scheme that has already occurred.'"

(*Ibid.*, quoting *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1267-1268.) Thus, this Court has repeatedly rejected similar claims in which the defendant claimed error for failing to give a *requested* instruction that precluded the jury's consideration of the circumstances proving either the murder or the special

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35. We note the potential for confusion between the terms "facts" and "elements." Appellant uses the terms interchangeably throughout the argument, and even seems to begin from the premise that those *facts* used to prove the most basic *elements* of the crime are forbidden from the jury's consideration as aggravating evidence. (See AOB 337.) The People's premise, which is very much in line with this Court's opinions in *Moon* and its progeny, is that the jury can use any historical *fact* that proves an element of the crime, as proof of aggravation. (*Moon*, *supra*, 37 Cal.4th at p. 40.) There is no "double-counting" limit which would preclude use of the same historical fact to prove both a special circumstance and an aggravating circumstance. (See *People v. Millwee, supra,* 18 Cal.4th at p. 164.) Similarly, the jury is not being asked to use an "element" of the crime, such as the bare existence of premeditation, since an "element" is nothing more than a theoretical construct defining the means by which the jury assesses the sufficiency of the proof. That proof however, is made up of facts, not elements. Regardless, we note that the jury here was not asked to use bare elements, and in fact, was specifically told by the prosecutor that it must *not* use only the bare elements, but must base its decision on the facts. (See XXIX RT 5530.)

circumstances. (See *Moon*, *supra*, at p. 40, *People v. Earp*, *supra*, 20 Cal.4th at p. 902.) Appellant's claim involves a putative *sua sponte* obligation, and thus, carries with it even less possibility for error than the rejection of a requested instruction.

This Court has expressly found no reason to further define the terms "aggravating" and "mitigating" (see *People v. Millwee*, *supra*, 18 Cal.4th at p. 163; *People v. Hawkins, supra*, 10 Cal.4th at p. 965), nor has it given undue emphasis to the language of CALJIC No. 8.88. (See *ibid.*) While that instruction might provide some "additional" guidance, the terms "aggravating" and "mitigating" are "sufficiently familiar to lay jurors and reflect matters of common understanding." (*Ibid.*) Furthermore, although it is commonly given, this Court has never found CALJIC No. 8.88 to be constitutionally compelled. (See *People v. Dyer, supra*, 45 Cal.3d at pp. 77-78 [holding only that giving a special instruction similar to that in 8.88 was *not* error]; see also *People v. Hawkins*, *supra*, 10 Cal.4th at p. 966 ["There is no constitutional or statutory requirement that the penalty phase jury be instructed that, in considering the circumstances of the crime, it must factor out those constituent parts of the crime that are common to all first degree premeditated murders, or to all first degree felony murders, to properly arrive at its verdict."].) Instead, the clarification expressed in that instruction is simply an incorporation from Black's Law Dictionary that, this Court has suggested, may provide a helpful framework "in aiding the jury's understanding of its precise task . . . ." (*Hawkins, supra*, at p. 966, citing *Dyer, supra*, at pp. 77-78; see Black's Law Dictionary, 6th Ed. (1990) ["**Aggravation**. Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself."].) And in fact, to the extent that the instruction precludes consideration of a *fact*, as opposed to an element, it would

seem at odds with this Court's rationale in *Moon,* that a penalty phase jury could not be precluded from considering any circumstance of the crime under section 190.3.

However, any error in giving CALJIC No. 8.88 – erroneously precluding evidence that could be used *in aggravation* -- would obviously inure in a defendant's favor. Furthermore, even assuming this Court were to change its course and require an additional instruction precluding use of facts that proved elements, any error was harmless. As noted above, the court provided a definition of "aggravating" circumstances under CALJIC No. 8.88 that was already quite favorable to appellant. (See XXIX RT 5502 [defining aggravating factor as "any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.") Additionally, the prosecutor expressly told the jury not to use the bare elements, but to use only "those aggravating circumstances beyond the element of the offense itself." (XXIX RT 5530.)

Thus, the jury was aware that a circumstance in aggravation was not just that appellant had killed, or even that he had thought about the killing beforehand. The jury, instead, understood that it was the *way* in which appellant went about killing; the fact that he had spent so much time planning, talking about, and threatening, to wreak his vengeance upon his former colleagues. The fact that appellant had to wait for weeks to obtain the murder weapon (XIV RT 2704-2705) and that he had gone to the shooting range – and even boasted about it – the night before the murders. (See XIII RT 2553.) It may even have been the fact that appellant seemed to derive some satisfaction from leaving Janet Robinson alive, as he had promised. (See XI RT 2565-2566, 2827.) That appellant seemed to have gotten some feeling of moral superiority or justification by deliberating the killing of some human beings

while leaving others alive. Or conversely, that appellant had gone looking for another victim – Shirail Burton – after he had completed his business of murdering Lorraine Talley and Barbara Garcia.

Admittedly, appellant spared some lives, and that may have been worth something as mitigation. But, as the prosecutor recognized, this case was far beyond the accidental killing in the course of a felony murder that did not carry the same level of culpability, and yet could still theoretically be prosecuted as a capital murder. (See 29 RT 5518.) Here, the prosecutor asked the jury only to look at those facts that went beyond the level qualifying someone for a penalty trial, and, instead, to focus on the facts showing why this particular defendant -- Michael Pearson, who had premeditated and deliberated the murder of two people for weeks; who had acted with the malicious intent to send "tremendous shockwaves" by his actions; who was not satisfied with killing only two people, but went looking for a third – deserved the harshest punishment which the jury could impose under the law.

XIX.

THERE IS SIMPLY NO REQUIREMENT IN A CALIFORNIA CAPITAL CASE THAT AGGRAVATING CIRCUMSTANCES BE PROVED BEYOND A REASONABLE DOUBT

Appellant contends the trial court erred in failing to require that the aggravating circumstances be proved beyond a reasonable doubt. (AOB 340.) Although he recognizes that this Court has previously rejected such a requirement (see, e.g., *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255 ["[N]either the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that the aggravating factors exist, [or] that they outweigh mitigating factors . . . ."]), he argues that the United States Supreme Court's recent pronouncements in

Apprendi v. New Jersey, *supra*, 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, *Blakely v. Washington* (2004) 542 U.S. 296 and *Cunningham v. California* (2007) 549 U.S. 270, have undercut the basis for the Court's prior holding. (AOB 343-344.) His argument, which was, theoretically, not even preserved for review,[36] lacks merit and has been repeatedly and soundly rejected by this Court.

Subsequent to the Supreme Court's pronouncements in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, this Court has repeatedly held that there is no unanimity requirement or mandate of proof beyond a reasonable doubt for the penalty phase of a capital case. (*People v. Lewis* (Apr. 28, 2008) (S031603) ___ Cal.4th ___, 75 Cal.Rptr.3d 588, 2008 WL 1848785, *78 ["[T]here is no constitutional requirement that the trial court instruct the jury that it must find beyond a reasonable doubt that aggravating circumstances exist, that the aggravating circumstances outweigh the mitigating circumstances, or that death is the appropriate penalty."].) "Indeed, the trial court need not and should not instruct the jury as to any burden of proof or persuasion at the penalty phase." (*Ibid.*, quoting *People v. Blair* (2005) 36 Cal.4th 686, 753.) As the Court has reasoned, the penalty phase properly focuses on a "moral," "normative judgment" rather than any particular quantitative burden of proof (*People v. DePriest, supra*, 42 Cal.4th at p. 59; *People v. Mendoza, supra*, 42 Cal.4th 686; *People v. Abilez* (2007) 41 Cal.4th 472, 535-536; *People v. Bonilla, supra*, 41

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36. We recognize that this Court has rejected our position regarding whether a defendant in a non-capital case is required to raise this issue in the lower court where the trial and sentencing occurred prior to the high court's opinions in *Apprendi*, *Blakely* and *Cunningham*. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 837 fn. 4, citing *People v. Black (II)* (2007) 41 Cal.4th 799.) To the extent the Court's reasoning extends to capital cases, we acknowledge that objection in the lower court would not have been required because counsel could not have had the foresight to anticipate the change in the law.

Cal.4th at p. 358 [rejecting application of *Apprendi* and *Ring*, and stating that "The trial court is not constitutionally required to instruct the jury on a burden of proof; in California, at the penalty phase there is no burden of proof, only a normative judgment for the jury."]; *People v. Carey, supra*, 41 Cal.4th at p. 136; *People v. Lancaster, supra,* 41 Cal.4th at p. 106; *People v. Jurado, supra,* 38 Cal.4th at p. 143; *People v. Cornwell, supra*, 37 Cal.4th at p. 104; see also *People v. Geier*, *supra*, 41 Cal.4th at p. 592 [rejecting *Apprendi* as to unanimity]; *People v. Lewis*, *supra*, 39 Cal.4th at p. 1068 [same]; *People v. Stevens* (2007) 41 Cal.4th 182), and that the jury's findings of first degree murder with at least one special circumstance render a capital defendant already eligible for the "prescribed statutory maximum" (*DePriest, supra*, at p. 60; *People v. Prince, supra*, 40 Cal.4th at pp. 1297-1298), and would permit a trial court to use additional facts during the course of sentencing that were not found by the jury. (*People v. Black, supra*, 41 Cal.4th at p. 812 ["[W]e agree with the Attorney General's contention that as long as a single aggravating circumstance that renders a defendant eligible for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial."].) Thus, even reached on the merits, appellant's claim fails.

Furthermore, even assuming, arguendo, the People were required to prove to a particular level the evidence referenced in the prosecutor's closing argument and highlighted by counsel on appeal (see AOB 348), including appellant's racial bias against Hispanics, his desire and efforts to murder a third victim during the killing spree, and his intent to send "shockwaves" by perpetrating the murders, that evidence was overwhelming. Appellant's racist disdain for Mexicans and Latinos – whom he described as "those people" – was

well documented in the record. Appellant claimed not to like "working with poor minority low income people," and expressly informed Janet Robinson that he did not like "those people," specifically referring to "Wetbacks, Mexicans, Latinos." (XIII RT 2523.)

Similarly, the evidence strongly suggested that appellant went outside the Housing Authority during his murderous rampage specifically seeking to kill a third victim, Shirail Burton. Appellant's animosity towards Burton was as strong as that directed against Talley and Garcia, his other two victims. Although Talley was officially his supervisor, appellant presented numerous penalty phase witnesses who all stated that Burton was the driving force behind the clique at Conventional Housing that was destroying appellant's career. (See e.g., XIII RT 2635; XVII RT 3235-3236, 3288-3289, 3336-3337; XVIII RT 3468-3471, 3476-3477.) There was even specific evidence that Burton had treated appellant with disrespect while at the RHA. (See XVII RT 3324-3325.) The evidence further showed that appellant briefly left the building during the incident, and, that just before he emerged, a shoeless, screaming Burton emerged from the building. (See X RT 2011.) Appellant, still brandishing the gun, looked around briefly, but did not find what he was looking for and went back inside. (See X RT 2012-2017.)

Finally, there was little dispute that appellant wanted to send "tremendous shock waves" that lingered like "radiation" through his murderous efforts. Appellant repeated his "101 California" comments to numerous witnesses on numerous occasions. (See XIII RT 2538-2539, XIV RT 2659-2660, 2751-2752; XVII RT 3338-3339, 3343-3344; see also XII RT 2470.) The motivation for appellant's killing spree, while not an element of the crime itself, was just as clearly shown. Appellant wanted the world to know how unfairly he had been treated at the RHA, and he was willing to go to extraordinary lengths – two premeditated murders – to get his message across.

Even after killing Talley and Garcia, appellant was intent on morally justifying his conduct to the police. In fact, appellant did not even resist his arrest and then proceeded to give a 2½ hour confession explaining his actions and seeking some sort of moral acceptance for killing only those who "screwed" with him. (See Defense Exh. 41 at time marker 9:33:45-9:35:45.)

In sum, this Court has repeatedly rejected appellant's efforts to impose a more lenient interpretation of Penal Code section 190.3. California's death penalty scheme does not contemplate a separate reasonable doubt requirement in the penalty phase because prior to making its moral, nominative determination, the jury has already found sufficient facts beyond a reasonable doubt to qualify a capital defendant for the penalty of death. Finally, even were such a requirement imposed, appellant's efforts to send "tremendous shock waves" that lingered like "radiation" by murdering two of his coworkers and searching for a third victim was overwhelmingly proven. The claim fails.

XX.

THE DOCTRINE OF CUMULATIVE ERROR DOES NOT APPLY WHERE APPELLANT FAILED TO SHOW ERROR INDIVIDUALLY

In what seems little more than an afterthought, appellant contends that, even if the alleged errors do not individually warrant reversal, their cumulative effect undermined the fundamental fairness of his trial and the reliability of his sentence. (AOB 349.) His reliance on *Taylor v. Kentucky* (1978) 436 U.S. 478 is somewhat misplaced as *Taylor's* holding that an instruction on the presumption of innocence is constitutionally compelled in that case was significantly limited by the Court's subsequent opinion in *Kentucky v. Whorton* (1979) 441 U.S.786, where the Court found such an instruction compelled only on a case by case basis. (*Id.* at p. 789.) Here, the instructions were far from

"Spartan" (see *Whorton*, *supra*, 441 U.S. at p. 789), and the evidence of guilt was overwhelming.

It is true, as appellant contends, that prior to his crimes he was simply a 37-year-old office worker who had no history of violence. (See AOB 349.) However, appellant planned the murders for weeks in advance, and even talked about and threatened them long before they happened. He executed his plans with a vengeful violence and then gloated about it in his confession afterward. There was nothing in the actions of court or counsel that interfered with the fundamental fairness of appellant's trial. The jury was entitled to, and did, see appellant exactly as he was: a vengeful murderer who felt a strange sense of moral superiority for his crimes. As this Court has held, "Whether considered independently or together, any errors or assumed errors are nonprejudicial and do not undermine defendant's conviction or sentence." (*People v. Watson* (May 8, 2008 (S024471)) 2008 WL 1970206, *35.)

XXI.

THIS COURT HAS REPEATEDLY REJECTED APPELLANT'S CONSTITUTIONAL ATTACKS ON CALIFORNIA'S DEATH PENALTY SCHEME

In claim 21, appellant reiterates the litany of arguments claiming the death penalty is unconstitutional for various reasons. (AOB 351.) He recognizes this Court has rejected each of the individual claims, and adds to this only a broad assertion that it is the cumulative nature of the claims and the failure to address "the functioning of California's capital sentencing scheme as a whole" which renders the scheme unconstitutional. (AOB 351.) His only support for this is a footnote in *Kansas v. Marsh* (2006) 126 S.Ct. 2516 (see *id.* at p. 2527, fn. 6.), a case in which the Supreme Court reversed the Kansas

Supreme Court's finding that its own death penalty scheme was unconstitutional.[37/]

Although we do not dispute that a State's statutes should be viewed in context rather than individually here, however, this Court has rejected each and every claim he posits individually. He offers nothing more to show why the collective impact of a valid statutory sentencing scheme is any more violative of the constitution than the sum of its constituent parts. This Court has specifically held that "[t]he claimed flaws in our state's death penalty statute. . .whether considered individually or together, do not make it unconstitutional." (*Demetrulias, supra*, 39 Cal.4th at p. 45.) This claim fails. However, for the Court's convenience, we set forth the remainder of his admittedly abbreviated claims, and our abbreviated response, below. We further note that this Court has most recently rejected the bulk of appellant's claims in *People v. Watson* (S024471) (May 8, 2008) 2008 WL 1970206.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Appellant asserts that Penal Code Section 190.2 is constitutionally defective, as it fails to properly narrow the class of death-eligible defendants. This Court has repeatedly rejected such claims, and appellant offers nothing to distinguish his case from those previously decided. (See, e.g., *People v. Perry* (2006) 38 Cal.4th 302, 322; *People v. Stanley, supra*, 39 Cal.4th at p. 958 [and cases cited therein]; *People v. Demetrulias, supra*, 39 Cal.4th at p. 43 [and cases cited therein].)

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37. We note that the Kansas statutory scheme at issue in that case had a presumption in favor of *death* if the aggravating and mitigating evidence was in equipoise. (*Id.* at p. 2520.)

B. Penal Code Section 190.3(a) Does Not Allow For The Arbitrary And Capricious Imposition Of The Death Penalty

Appellant asserts that Penal Code Section 190.3(a) fails to adequately guide the jury's deliberations, thereby resulting in arbitrary and capricious imposition of the death penalty. This Court has repeatedly rejected such claims, and appellant offers nothing to distinguish his case from those previously decided. (See, e.g., *People v. Guerra, supra*, 37 Cal.4th 1067, 1165, 40 Cal.Rptr.3d 118, 129 P.3d 321; *People v. Hinton* (2006) 37 Cal.4th 839, 913, 38 Cal.Rptr.3d 149, 126 P.3d 981; *People v. Kennedy* (2005) 36 Cal.4th 595, 641, 31 Cal.Rptr.3d 160, 115 P.3d 472.); *Stanley, supra*, 39 Cal.4th at p. 967 [and cases cited therein]; *People v. Harris, supra*, 37 Cal.4th at p. 365 [and cases cited therein]; see also *Tuilaepa v. California* (1994) 512 U.S. 967.)

C. California's Death Penalty Provides Appropriate Safeguards To Avoid Arbitrary And Capricious Sentencing

In addition to the above two provisions, appellant asserts that other aspects of California's death penalty statute deprive him of necessary safeguards to avoid arbitrary and capricious sentencing. These include: lack of written findings or unanimity regarding aggravating circumstances; no requirement that aggravating circumstances be proved beyond a reasonable doubt; no requirement that the jury find beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances and that death is the appropriate punishment; no instruction as to burden of proof except for other criminal activity and prior convictions; and no inter-case proportionality review. All of these claims have been previously rejected by this Court, and appellant offers nothing specific to his case that would justify a departure from those holdings. (See, e.g., *Demetrulias, supra*, 39 Cal.4th at pp. 39-45 [and cases cited therein]; *Harris, supra*, 37 Cal.4th at p. 365 [and cases cited therein].)

D. California's Death Penalty Statute Does Not Need To Require Written Findings Or Unanimity Under The Constitution

As this Court has held, "A jury in a capital case need not make written findings or achieve unanimity as to aggravating circumstances. (*People v. Kennedy, supra*, 36 Cal.4th at p. 641; *People v. Morrison, supra*, 34 Cal.4th at p. 730.) California's death penalty statute does not violate equal protection by denying capital defendants certain procedural safeguards, such as jury unanimity and written jury findings, while affording such safeguards to noncapital defendants. (*People v. Blair* (2005) 36 Cal.4th 686, 754.)" (*People v. Watson supra*, 2008 WL 1970206, at *34.)

E. California's Death Penalty Statute Does Not Violate the Constitution For Failing To Require Unanimity And Proof Beyond Reasonable Doubt For Unadjudicated Criminal Activity

This Court has further stated that: "The jury properly may consider a defendant's unadjudicated criminal activity at the penalty phase and need not agree unanimously that the defendant committed those acts. (*People v. Smith* (2003) 30 Cal.4th 581, 642; *People v. Michaels* (2002) 28 Cal.4th 486, 541-542.)" (*People Watson, supra,* 2008 WL 1970206, at p. *34.)

F. There Is No Constitutional Requirement To Label Aggravating And Mitigating Factors Or To Avoid The Terms "Extreme" And "Substantial"

As this Court has held: "The use of restrictive adjectives, such as ""extreme"" and ""substantial,"" in the sentencing statute and instructions do not render either unconstitutional. (*People v. Kennedy, supra*, 36 Cal.4th at p. 641.)" (*People v. Watson, supra*, 2008 WL 1970206, at p. *34.) Nor does "failing to require a jury instruction as to which factors are aggravating and which are mitigating, or an instruction that the absence of mitigating factors

does not constitute aggravation. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1041.)" (*Watson, supra*, at p. *34.)

G. California's Death Penalty Statute Does Not Violate The Equal Protection Clause

Appellant asserts that the California death penalty statute violates the Equal Protection Clause of the Constitution, due to its failure to require a specific burden of proof or unanimous findings for aggravating circumstances. This claim has previously been rejected by this Court and appellant offers nothing specific to his case that would justify a departure from that holding. (See, e.g. *Harris, supra,* 37 Cal.4th at p. 365 [and cases cited therein].)

H. California's Death Penalty Statute Is Not An Unconstitutional Violation of International Law

Finally, this Court has held rejected appellant's claim that California's statutory scheme violates international law:

> Defendant contends that the use of capital punishment as an assertedly "regular" form of punishment for substantial numbers of crimes, rather than as an extraordinary punishment for extraordinary crimes, violates international norms of human decency. He also argues that the use of the death penalty as a ""regular"" form of punishment violates the law of nations and is therefore unconstitutional "because international law" is part of our law. We have rejected both of these arguments (see, e.g., *People v. Blair, supra*, 36 Cal.4th 686, 754-755), and defendant presents no reason to reconsider our conclusion.

(*People v. Watson, supra*, 2008 WL 1970206, at *34.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: June 2, 2008

Respectfully submitted,

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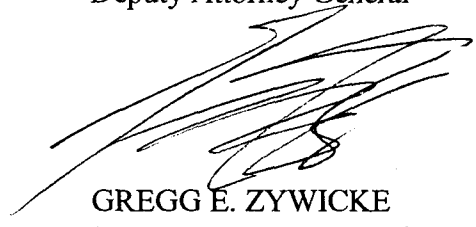

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Attorneys for Plaintiff and Respondent

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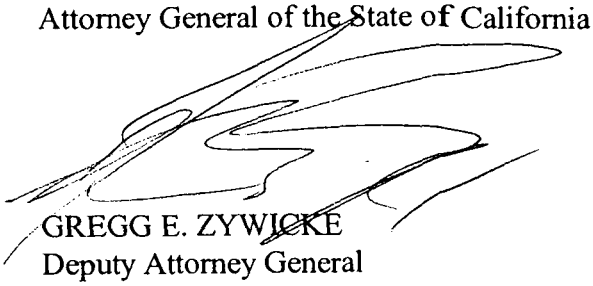
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 76627 words.

Dated: June 2, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Michael Nevail Pearson**

No.: **S058157**

I declare:

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

On June 3, 2008, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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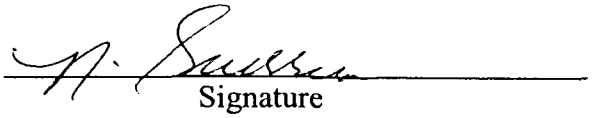
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 3, 2008, at San Francisco, California.

Nelly Guerrero
Declarant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