IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

FLOYD DANIEL SMITH,

Defendant and Appellant.

S065233

CAPITAL CASE

San Bernardino County Superior Court No. FWV08607
Honorable John W. Kennedy, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

In order to avenge the murder of Manuel Farias, Floyd Daniel Smith, who had previously been convicted of first-degree murder, gunned down an innocent 19-year-old boy named Joshua Rexford who had recently graduated from high school. The killing was thoroughly planned out, premeditated, and deliberated. Smith spent several days asking about the victim, and tracking down the victim's whereabouts. On the morning of the killing, Smith had the apartment the victim was in under surveillance. The killing was committed by Smith while "lying in wait" as the victim was gunned down ambush-style, completely unaware that Smith had him under surveillance. Smith gunned down the surprised victim in cold-blood with numerous shots from a 9 millimeter automatic handgun loaded with hollow point ammunition. Smith's numerous gunshots nearly struck two of the victim's companions as well. But for the quick evasive reactions of those two individuals (diving to the floor, and jumping out of a window), this matter could easily have been a triple homicide. In the end, the killing of Rexford was completely senseless, as there was never any evidence that the victim, Joshua Rexford, had anything to do with the death of Manuel Farias.

STATEMENT OF THE CASE

On February 18, 1997, an amended indictment was filed in San Bernardino County Superior Court charging Smith with nine felony offenses. In count 1, Smith was charged with murder, in violation of Penal Code section 187, subdivision (a). In counts 2 and 3, Smith was charged with attempted murder, in violation of Penal Code sections 664 and 187, subdivision (a). In counts 4 and 5, Smith was charged with first degree residential burglary, in violation of Penal Code section 459. In count 6, Smith was charged with assault with a firearm, in violation of Penal Code section 245, subdivision (a)(2). In count 7, Smith was charged with false imprisonment by violence, in violation of Penal Code section 236. In count 8, Smith was charged with dissuading a witness by force or threat, in violation of Penal Code section 136.1, subdivision (c)(1). In count 9, Smith was charged with being a convicted felon in possession of a firearm, in violation of Penal Code section 12021, subdivision (a)(1). It was further alleged, as to counts 1 through 9, that Smith had previously been convicted of murder (in Riverside County Superior Court case number CR-22000 on July 13, 1984) within the meaning of Penal Code sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i). With regard to count 1, two special circumstances were alleged, namely, that Smith had previously committed murder in the first degree within the meaning of Penal Code section 190.2, subdivision (a)(2), and that the instant murder was committed by "lying in wait" within the meaning of Penal Code section 190.2, subdivision (a)(15). With regard to counts 1 through 8, it was alleged that Smith personally used a firearm within the meaning of Penal Code section 12022.5, subdivision (a). (2 CT 310-317.)

On March 11, 1997, a motion filed by Smith to dismiss the indictment was heard and denied. (1 CT 357.)

On March 17, 1997, opening statements and trial testimony began in the guilt phase. (2 CT 361-362.) On March 31, 1997, Smith brought a motion for mistrial. (2 CT 381.) Smith's mistrial motion was granted, and the jurors were excused. (2 CT 371.) On April 28, 1997, selection of a new jury began. (2 CT 392.) On May 14, 1997, after a new jury was sworn, opening statements from both the prosecution and defense were given, and trial testimony began anew. (2 CT 412.) On July 16, 1997, the jury found as follows: Count 1, guilty of murder in the first degree; Counts 2 and 3, guilty of the lesser included offense of attempted voluntary manslaughter; Counts 4 and 5, guilty of first degree burglary; Count 6, guilty of assault with a firearm; Count 7, guilty of false imprisonment by violence; Count 8, not guilty of dissuading a witness by force or threat; Count 9, guilty of possession of a firearm by a convicted felon. (2 CT 465-481.) Additionally, the jury found the "lying in wait" special circumstance attached to Count 1 to be true, and found the firearm use allegations true for all convictions. (2 CT 465-481.)

On July 21, 1997, after a bifurcated trial before the same jury, the "prior murder" special circumstance allegation regarding count 1 was found to be true. (2 CT 484-486.)

On July 22, 1997, Smith's penalty phase began. (2 CT 487.) On July 29, 1997, the jury returned a verdict of death. (2 CT 498-500.)

On October 14, 1997, Smith was sentenced. (2 CT 521.) The court denied Smith's Penal Code section 190.4, subdivision (e) motion to modify the death verdict to life without the possibility of parole. (19 RT 6141.) The court sentenced Smith to death for the first-degree murder conviction (count 1) with special circumstances ("lying in wait" and "prior murder"). (2 CT 521, 530, 539-544.) The court imposed a 57-year determinate prison sentence for the remaining counts as follows: 12 years for count 4, the principal count (first-degree burglary), one year and four months consecutively for count 2

(attempted voluntary manslaughter), one year and four months consecutively for count 3 (attempted voluntary manslaughter), two years and eight months consecutively for count 5 (first-degree burglary), two years consecutively for count 6 (assault with a firearm), one year and four months consecutively for count 7 (false imprisonment by violence), and one year and four months consecutively for count 9 (possession of a firearm by a convicted felon). Additionally, two terms of 10 years each were imposed consecutively for the firearm enhancements attached to counts 1 and 4. Three terms of three years and 4 months were imposed consecutively for the firearm enhancements attached to counts 2, 3, and 5. The remaining enhancements were stayed. (2 CT 521-530.)

The appeal to this Court is automatic pursuant to Penal Code section 1239, subdivision (b).

STATEMENT OF FACTS

I.

GUILT PHASE

Prosecution's Case In Chief

1. Motive For The Killing Of Rexford

Manuel Farias was murdered on October 30, 1994, and he was buried on November 23, 1994 (three days prior to the shooting of Joshua Rexford). (11 RT 3431-3432.) Smith had been a friend of Manuel's, and Smith attended Manuel's funeral. (11 RT 3428, 3431.) Right after Manuel's burial, Linda Farias,[1/] Manuel's sister, overheard Smith talking to Jake Carroll, Jesse Valarde, and Shawn Flores. (11 RT 3428.) Smith was doing most of the talking. (11 RT 3431.) Smith said that "they were going to get whoever did this" to

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1. To avoid confusion, members of the Farias family, Linda Farias, Raymond Farias, and Manuel Farias are all referred to by their first names.

Manuel. (11 RT 3431.) The conversation included mention that "Josh" [Rexford] was "Brian's" cousin, and "They would get through him to find Brian" [i.e., suggesting that a person named "Brian," who was Rexford's cousin, was responsible for Manuel's death]. (1 RT 3431.)

Christina Hogue had known Manuel Farias for several years and had gone to school with him since junior high school. (12 RT 3564.) She was also in attendance at Manuel's funeral. (12 RT 3566.) She saw Smith at the funeral, and she overheard parts of a conversation about who was responsible for Manuel's killing. (12 RT 3566.) According to Hogue, the people conversing were Victor Ledbetter, Jake Carroll, and one other person (possibly Manuel's cousin). (12 RT 3566.) Hogue was not sure if Smith participated in the conversation. (12 RT 3566.) The concept of "revenge" was discussed. (12 RT 3567.) The name "Brian" was mentioned, and one person said, "No, we'll do it the right way." (12 RT 3567.)

Troy Holloway knew Josh Rexford, as they had played football together at A.B. Miller High School in Fontana. (11 RT 3441-3443.) Holloway also knew Smith, as he had been introduced to Smith by Patrick Wiley at a football practice.[2/] (11 RT 3443-3444, 3453-3454.) Between three and five days prior to the shooting of Rexford, Smith went over to Holloway's house with Bennett Brown. (11 RT 3445-3447.) Smith then drove Holloway (along with Brown) to his apartment in Rialto (for reasons unknown to Holloway).[3/] (11 RT 3447.) Smith was asking Holloway questions about Rexford. (11 RT 3445.) Smith was asking "How was he. What's he like." (11 RT 3445.) Smith said he was asking because he heard Rexford was on the A.B. Miller football team, and he

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2. Patrick Wiley referred to Holloway as a cousin because they had grown up together. (11 RT 3454.)

3. Along the way they stopped at a Circuit City so Holloway could turn in a job application. (11 RT 3455-3456.)

[Smith] played too. (11 RT 3446.) Holloway told Smith that Rexford was "Fine" and that "He's cool." (11 RT 3446.) Holloway's conversation with Smith lasted three or four hours. (11 RT 3448.) Smith wanted to know "About where he [Rexford] hung out, how - - what type of person he was." (11 RT 3456.) Smith did not tell Holloway why he wanted the information. (11 RT 3456.) Smith just said that he wanted to talk to Rexford. (11 RT 3456.) Holloway did not tell Smith where Rexford was living. (11 RT 3458.) While he was in Smith's apartment, Holloway saw two guns. (11 RT 3468-3469.) One of the guns, a 9 millimeter pistol, was on Smith's person. (11 RT 3468-3469.) The other gun was possessed by Smith's friend, Jake Carroll. (11 RT 3543.) Carroll's gun was "like a rifle, almost." (11 RT 3543.) It was about 16 inches in length. (11 RT 3543.)

2. Events Occurring In Michael Honess's Apartment Just Prior To The Shooting

Michael Honess was in his apartment on the morning of the shooting. (10 RT 2974-2978.) At 9:15 a.m., Honess went downstairs to purchase a newspaper from a newspaper stand. (10 RT 2978-2979.) On his way to get the newspaper, Honess saw Smith and another male (whom he had never seen in the apartment complex before) sitting on a wall. (10 RT 2979-2980.) When Honess returned with his newspaper, they were still sitting on the wall. (10 RT 2981.) Smith asked Honess for a cigarette, and Honess gave one to him and one to his companion. (10 RT 2981-2982.) The person sitting with Smith was lighter-skinned than Smith, and Honess thought he was white, but later found out he was Hispanic. (10 RT 2981-2982.)

After giving cigarettes to Smith and his companion, Honess went back to his apartment. (10 RT 2983.) At 9:30, Honess left his apartment a second time to walk his girlfriend to her car. (10 RT 2983-2984.) When Honess returned to his apartment, he again saw Smith, but not Smith's companion. (10

RT 2984.) Smith had climbed the stairs of the complex and was now sitting next to Honess's apartment. (10 RT 2984-2985.) Smith complained to Honess that there were no telephones in the complex and he needed to use one to call his mother. (10 RT 2985.) Honess told Smith he could use his telephone. (10 RT 2986.) Smith accepted the offer and entered Honess's apartment and began using Honess's telephone. (10 RT 2986.)

Instead of calling his mother, however, Smith called directory assistance and requested the number for the "Church of God in Christ" in the City of Highland. (10 RT 2986.) Smith wrote a number down on a piece of paper, and then dialed the number. (10 RT 2987.) Smith did not appear to talk to anyone after dialing the number. (10 RT 2987.) After a short period of time, Smith left Honess's apartment. (10 RT 2988-2989.) He did not take the number he had written down with him. (10 RT 2988-2989.) While Smith was in Honess's apartment he never said anyone was threatening him, nor that he was in any danger. (10 RT 2989.) Smith was calm, pleasant, and did not appear nervous. (10 RT 2990.) He told Honess that his name was "Jerry." (10 RT 2988.)

Ten minutes later, Smith knocked at Honess's door. (10 RT 2990.) Honess opened the door assuming that Smith wanted to use his telephone again, and he allowed Smith to enter his apartment again. (10 RT 2990-2991.) However, this time, Smith put a hand on Honess's shoulder and pushed him down to the floor. (10 RT 2991-2992.) Honess then noticed that Smith's other hand was holding a gun; a dark gray or black automatic pistol. (10 RT 2991.) Smith was wearing a wool cap with no bill. (10 RT 2995.)

Honess was on his hands and knees with his back to Smith as two other male individuals entered Honess's apartment. (10 RT 2992-2993.) One of the two was the person Honess saw sitting with Smith earlier (to whom Honess had given a cigarette). (10 RT 2993.) The third person appeared to be a 19 to 21 year-old Caucasian. (10 RT 2993-2994.) Smith referred to this person as

"Jay." (10 RT 2997.) Jay was carrying a sawed-off shotgun, but the Hispanic male did not appear to have a firearm. (10 RT 3013.)

Smith said words to the effect of "Jay, go look out the window." (10 RT 2997.) Jay complied with Smith's command. (10 RT 2998.) The Hispanic male also peeked through the blinds. (10 RT 2999-3000.) At one point, Smith directed Jay to look for other telephones in the apartment. (10 RT 3001.) Although Honess had a second telephone in the apartment, Jay did not find it. (10 RT 3001.) However, the Hispanic male found Honess's wallet. (10 RT 3002.) Smith opened it, removed Honess's driver's license and said, "I know who you are now." (10 RT 3003.)

The Hispanic male frisked Honess and pulled some bills (money) out of Honess's pockets. (10 RT 3004-3005.) Smith said words to the effect of "Put the money back. We don't need that." (10 RT 3005.) The three individuals were in Honess's apartment 15-20 minutes. (10 RT 3000, 3018.) At one point, Smith told Jay to "go wait in the car." (10 RT 3018.) Jay left the apartment, and took his sawed-off shotgun with him. (10 RT 3018, 3026.)

While Smith and the Hispanic male were still in Honess's apartment, Smith cut Honess's telephone line with a knife. (10 RT 3007.) He then wiped the telephone with paper towels. (10 RT 3011.) Smith told the Hispanic male to wipe anything he might have touched. (10 RT 3011.) Honess was sitting in a chair and Smith told him that he wanted to be able to see Honess's hands. (10 RT 3016.) Smith then told Honess, "When you talk to the police tell the truth." (10 RT 3017.) Smith was talking in a normal, non-threatening voice, and did not seem nervous. (10 RT 3015, 3017.) Likewise, the Hispanic person also did not appear to be afraid or nervous. (10 RT 3015.) Smith never put his gun down. (10 RT 3005.)

After Smith and the Hispanic male left Honess's apartment, they ran down the stairs. (10 RT 3024.) Honess then heard knocking at one of the

downstairs apartments. (10 RT 3025.) After two or three knocks, Honess heard gunshots. (10 RT 3025.) Honess heard a total of five gunshots within a span of about 2-5 seconds. (10 RT 3025.)

3. The Shooting

In November of 1994, Maikolo Pupua[4] was renting an apartment with Nani Wilhelm in the Mountain View Apartments in Rancho Cucamonga, California. (9 RT 2839-2840.) Each had their own bedroom within the apartment. (9 RT 2847.) However, Wilhelm had been staying at her parent's house, and was not currently at the apartment. (9 RT 2846-2847.) Two of Pupua's friends from high school, Joshua Rexford and Freddie Badibanga, often spent the night at Pupua's apartment. (9 RT 2845-2846; 10 RT 3074-3075.)

On Friday night, November 25, 1994, Pupua and Badibanga went to a high school football game with Badibanga's ex-girlfriend, Audrey Black. (10 RT 3076-3077.) The game was where Pupua, Badibanga, and Rexford had all recently graduated from high school. (10 RT 3076-3077.) After the game, a fight between 15 and 20 individuals from both schools that played in the football game broke out. (10 RT 3078.) Rexford was involved in the fight. (10 RT 3079.) The fight lasted about three minutes, and was broken up by the police. (10 RT 3079.)

On Saturday night, November 26, 1994, Pupua, Rexford, and Badibanga went to a party at Erin Devose's house.[5] (9 RT 2848; 10 RT 3081.) Audrey Black drove the three of them to the party in her car. (9 RT 2849.) Later, the

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4. Pupua's middle name is "Walter," and he is referred to as "Walter" in various parts of the record (including when he was called as a defense witness). (9 RT 2840; 14 RT 4603.)

5. In Pupua's testimony, he referred to Erin as "Erin Write." (9 RT 2848.) Badibanga referred to her as "Erin Devose." (10 RT 3081.)

four of them returned to Pupua's apartment (between 1:30 and 2:00 a.m., on Sunday November 27, 1994). (9 RT 2850.) Shortly thereafter, Rexford walked back to the party by himself. (9 RT 2850.) Badibanga and Black spent the night at Pupua's apartment. (9 RT 2850.) At about 5:30 a.m., Pupua received a "hang-up phone call." (9 RT 2859.) At approximately 6:00 a.m., Rexford called Pupua's apartment asking for a ride back to Pupua's apartment.[6] (9 RT 2851; 10 RT3089.) Pupua and Badibanga used Black's car to pick up Rexford. (9 RT 2851.) Pupua, Badibanga, and Rexford then drove to Rexford's mother's house (4 or 5 miles away) to get some food and Rexford's Nintendo game. (9 RT 2852-2853; 10 RT 3094.)

Dawn Hall, Rexford's mother, had two other sons, and she had a nephew named "Brian."[7] (12 RT 3877-3878, 3881.) That morning, Rexford, Pupua, and Badibanga all stopped over at her house. (12 RT 3881.) They visited with Ms. Hall, her husband, and her son, Matthew, who had just turned six the day before. (12 RT 3881.) They did not mention any type of trouble. (12 RT 3881.) They picked up some food so Rexford could cook breakfast for his friends. (12 RT 3881.)

Pupua, Badibanga, and Rexford returned to Pupua's apartment between 9:00 and 9:30 a.m. (9 RT 2853.) An acquaintance named "Pam" was in the parking lot when they arrived, and they talked to her for about 3-5 minutes. (9 RT 2853-2855.) She had brought Kini Tuavao to Pupua's apartment, so he could take a shower. (9 RT 2854.) When they entered Pupua's apartment, Audrey Black was still asleep, and Tuavao was in the shower. (9 RT 2855-

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6. According to Badibanga, Rexford called twice asking for a ride back to Pupua's house (once between 4:30 and 5:00 a.m., and once between 6:00 and 7:00 a.m.). (10 RT 3090.)

7. At the time of Rexford's death, Hall's nephew, Brian Heich, was living in Ontario, California, with his grandmother. (12 RT 3878-3879.)

2856.)

At some point that morning (Sunday morning, November 27, 1994), both Black and Tuavao left Pupua's apartment. (9 RT 2860.) Rexford fixed breakfast with the food he had brought from his mother's house. (9 RT 2861.) As he was cooking, a man called asking to speak with "Josh." (9 RT 2862.) Pupua handed the telephone to Rexford, and Rexford spoke with the man for about 10 minutes. (9 RT 2863.) Thereafter, Rexford, Pupua, and Badibanga ate breakfast in the living room while playing Nintendo video games on the television. (9 RT 2863-2864; 10 RT 3104.) All three were seated next to each other. (9 RT 2870.) During this period of time, Pupua received another "hang-up phone call." (9 RT 2871.) About 10 minutes later, somebody knocked at the front door about 3 times really loud. (9 RT 2871; 10 RT 3110-3111.) The door was not locked. (9 RT 2872.) Pupua and Badibanga were expecting their friend Sean Garcia to come over and watch a football game with them that day. (9 RT 2872; 10 RT 3109.) Badibanga said "come in." (9 RT 2874; 10 RT 3111, 3120-3121.)

Smith[8/] entered the apartment with a gun pointed at Rexford, Pupua, and Badibanga. (9 RT 2874-2876, 2881.) He was wearing either a beanie or a baseball cap with the bill turned backward. (9 RT 2890.) His gun looked like a 9 millimeter pistol. (9 RT 2879.) Smith immediately started shooting his gun. (9 RT 2882.) Numerous shots were fired. (9 RT 2882.) During the shooting, Pupua dove to the floor next to a speaker. (9 RT 2882.) Badibanga noticed that Smith was accompanied by another individual. (10 RT 3125.) The person with Smith was a male, possibly 20 years of age and possibly a light-skinned Caucasian or Hispanic. (10 RT 3126, 3139.) During the shooting, Badibanga

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8. At several places in the record, Smith is referred to as "Sugar Ray" and/or "Raylon Green," which are other names he was known by. (11 RT 3328, 3388, 3405, 3428; 12 RT 3631.)

fell while trying to get up. (10 RT 3127.) He then crawled to Pupua's bedroom as shots were still being fired. (10 RT 3127.) Badibanga then jumped out of a closed bedroom window (shattering the glass in the process). (10 RT 3129.) He suffered "big cuts" as a result. (9 RT 2884; 10 RT 3129.) After the shooting, Smith and his companion left the apartment. (9 RT 2891; 10 RT 3135.) During the entire incident, Smith never said a word. (9 RT 2891; 10 RT 3123.) Neither Pupua nor Badibanga knew Smith and had never seen him before. (9 RT 2875; 10 RT 3122.) Pupua and Badibanga avoided being struck by any of the bullets fired, but Rexford was struck several times. (9 RT 2884.)

Pupua got up from his position on the floor and noticed there were 3 or 4 bullet holes in the area where he had been seated. (9 RT 2883.) He could hear Rexford yelling "Freddie." (9 RT 2884.) Rexford appeared to have been shot several times, and Pupua could see food coming out of a wound in Rexford's abdomen area. (9 RT 2884.) Rexford told Pupua to call 9-1-1 and Pupua did so. (9 RT 2888.) Meanwhile, Badibanga, who was outside of the apartment, could see Smith running (a slow jog) from Pupua's apartment accompanied by another person. (10 RT 3138-3139, 3141.) They approached a third person who was standing by a Ford Thunderbird. (10 RT 3139-3141, 3144.) The person standing by the car and the person running with Smith got into the car on the passenger side, and Smith got in on the driver's side. (10 RT 3143-3144.) Badibanga then saw the car drive off on Civic Center Drive, and turn right on Haven. (10 RT 3144.)

The police and an ambulance arrived at the scene of the shooting within 5 to 10 minutes of Pupua's 9-1-1 call. (9 RT 2888.) Deputy Sheriff Carlos Quezada was the first officer to arrive (at approximately 10:20 a.m.). (12 RT 3868.) Deputy Quezada found Rexford "in pretty bad shape." (12 RT 3868.) Rexford appeared to have numerous injuries. (12 RT 3868.) There was a lot of blood and Rexford was moaning and groaning as if in a lot of pain. (12 RT

3868-3869.) Rexford was semiconscious and Deputy Quezada attempted to get information from him, but was unsuccessful. (12 RT 3869.) Rexford managed to state his name to Deputy Quezada, but nothing more. (12 RT 3869.) Pupua was hysterical. (12 RT 3869.) He was running back and forth out of the apartment, and was out of control. (12 RT 3869.) Pupua was stating that his friend had been shot, and was mumbling incoherently. (12 RT 3869.) Badibanga was also hysterical. (12 RT 3870.) He was also yelling that his friend had been shot. (12 RT 3870.) Quezada noticed that Badibanga had a large laceration and was bleeding from his left arm. (12 RT 3870.)

Rexford died as a result of gunshot wounds to his chest and abdomen. (10 RT 3202.) Rexford had been struck a total of five times from the gunfire.[9/] (10 RT 3202.) During an autopsy of Rexford's body, three 9 millimeter copper jacketed bullets were recovered. (10 RT 3197-3198.) There were abrasions on his forehead and bridge of his nose that were inflicted within 24 hours of Rexford's death. (10 RT 3201.)

Karen Rice, a forensic specialist with the San Bernardino County Sheriff's Department, reported to the scene of the shooting and took photographs and collected evidence. (12 RT 3681-3690.) Rice recovered a total of seven fired cartridges (shells). (12 RT 3702.) Six of the fired cartridges were 9 millimeter cartridges, and one was a .25 caliber cartridge. (12 RT 3702.) In addition to the fired cartridges, one unfired .25 caliber cartridge was also at the scene. (12 RT 3702.) Six bullet holes were found inside the apartment. (12 RT 3701-3702.) Rice dusted for fingerprints in Mr. Honess's apartment and lifted one print from Honess's telephone. (12 RT 3707.) The fingerprint was later determined to be Smith's fingerprint. (12 RT 3743-3744.) Rice also attended Rexford's autopsy. (12 RT 3703.) She collected three bullets that

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9. The body had a total of 7 wounds, but two of the wounds were exit-wounds. (10 RT 3198-3201.)

were still in Rexford's body, but could not determine their caliber. (12 RT 3703.)

4. Observations Of Other Witnesses In And Around The Apartment Complex

At the time of the shooting, Esau Boche, who lived in a nearby apartment, went outside to warm up his car. (10 RT 3223-3225.) As he walked toward his car, he heard a round of gunshots. (10 RT 3225.) He then saw a white male (in his late teens or early 20's) walking toward a car. (10 RT 3227.) Boche said, "What's up," and the individual responded "What's up" back to Boche. (10 RT 3228.) The person got into a car just ahead of Boche's vehicle. (10 RT 3228-3229.) Boche then saw Smith and a light-skinned male with dark clothes running side by side. (10 RT 3229, 3231.) Smith was carrying a gun. (10 RT 3229, 3231.) Boche hid his car keys because he thought they were going to take his car. (10 RT 3230.) Smith lifted his gun up and said to Boche, "don't look at us." (10 RT 3233, 3235.) Smith then put his gun back down and kept running. (10 RT 3233.) He seemed out of breathe. (10 RT 3235.) Smith was wearing either a beanie, or a hat that was on backwards. (10 RT 3231.) Both Smith and the person running with him got into the car Boche had seen the white male get into moments earlier. (10 RT 3235.) The car then drove off fast. (10 RT 3237.)

Sebrina Smith[10/] was also a resident of the apartment complex at the time of the shooting. (10 RT 3552.) She left her apartment to get the newspaper for her father at approximately 9:00 on the morning of the shooting. (10 RT 3254.) As Sebrina was on her way downstairs to get the newspaper, she was passed by Smith who was going upstairs. (10 RT 3255.) Smith was dressed in dark baggy clothes and was wearing a knit cap. (10 RT 3255.) Sebrina did not

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10. To avoid confusion, since appellant's last name is also Smith, Sebrina Smith will be referred to by her first name hereinafter.

know Smith, however Smith commented to her that it was cold outside (referring to the fact that she was barefoot and in a dress), and he said, "Oh, by the way, if you see my grandmother's white car, could you come and tell me?" (10 RT 3254-3255.)

Sebrina proceeded to get the newspaper. (10 RT 3257.) On the way back to her apartment, she encountered Smith again, leaning against a stairwell landing. (10 RT 3258.) Sebrina told Smith that she "didn't see his grandmother's car." (10 RT 3260.) Smith responded, "Oh, okay. Thank you." (10 RT 3260.) He appeared to be smoking a cigarette. (10 RT 3260.) He was not accompanied by anyone. (10 RT 3260.) Smith did not appear to be fearful or nervous. (10 RT 3261.)

Sebrina went outside a second time that morning to retrieve some baby clothes and baby toys from her sister, Jody, who was waiting outside in her car. (10 RT 3262-3264.) Sebrina took two trips to transport the items to her apartment. (10 RT 3264.) She then made a third trip to the car to go with her sister to Wal-Mart. (10 RT 3264.) She sat with her sister while they waited for their mother, Nancy Smith,[11/] who was also going shopping with them. (10 RT 3266.)

Nancy, who lived in the same apartment complex, exited her apartment to meet Sebrina and Jody at the car. (12 RT 3826-3827.) Smith was by himself five or six feet away. (12 RT 3826-3827.) He did not appear anxious, and did not appear to need any help. (12 RT 3851.) Smith was leaning over a stray cat that the neighbors called "Frat." (12 RT 3828.) Nancy fed up to 20 stray cats in the area, so it wasn't unusual to see a lot of cats around the complex. (12 RT 3828.) However, "Frat" was the only cat present at the time. (12 RT 3828.) Neverthless, Smith said to Nancy, "You have a lot of cats." (12 RT 3828.)

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11. Hereinafter, Nancy Smith is referred to by her first name to avoid confusion with Sebrina Smith, Jody Smith, and appellant.

Nancy noticed that Smith was wearing baggy clothes that looked like what a 300 pound man should be wearing. (12 RT 3830.) He also had on what appeared to be a dark gray knit cap. (12 RT 3831.) Nancy was frightened when she saw Smith. (12 RT 3830.) She had left her apartment door unlocked as she was leaving, but decided to go back and lock it after seeing Smith. (12 RT 3830, 3832.) When she came back outside, she no longer saw Smith. (12 RT 3833.) However, she did see two sets of legs descending the nearby stairs. (12 RT 3834.)

Nancy walked out to the car where her daughters were waiting. (12 RT 3850.) The car was parked in front of Pupua's apartment (near his patio). (12 RT 3836, 3850.) As she walked toward the car, she leaned over Pupua's balcony and saw Rexford, Badibanga, and Pupua sitting in front of the television playing football Nintendo. (12 RT 3839.)

After Nancy got into her daughter's car and was putting her seat belt on, approximately six gunshots could be heard coming from Pupua's apartment. (12 RT 3841.) Nancy and Sebrina then saw Badibanga "fly through the window in the first bedroom, glass and all." (10 RT 3267; 12 RT 3841 [quotation].) Nancy described it as "the most horrendous thing" she had seen. (12 RT 3841.) Jody yelled out, "Oh my God, those are gunshots." (10 RT 3268; 12 RT 3843.) Jody started up the car and drove to the end of the complex, where she was able to use the telephone of one of the residents. (10 RT 3268; 12 RT 3843-3844.)

5. Facts Revealed By Post-Shooting Investigation

Bridgette Harris, Smith's sister, had called Smith on Thanksgiving Day (November 24, 1994), and invited him to attend Thanksgiving dinner. (12 RT 3603.) Smith was unable to attend because he was sick. (12 RT 3603.) On November 27, 1994 (the day Rexford was killed), Harris again contacted Smith to see how he was feeling. (12 RT 3603.) Smith told Harris that "He was

doing better." (12 RT 3603.) Smith made no mention of having been kidnapped, nor that he had witnessed a murder that day, nor that he had been involved in any crimes. (12 RT 3604.)

Carrol Anthony Green Jr., a middle school teacher and minister of the "Great I Am Church" in Pomona, had known Smith since 1985. (11 RT 3302.) Smith had been living in Green's household from 1991 until October of 1994, and Green considered Smith an adopted son. (11 RT 3303, 3350, 3363.) In October of 1994, Smith moved out of the Green household and into an apartment in Rialto. (11 RT 3312.) On an occasion when Green visited Smith's apartment, he saw bullets in the apartment. (11 RT 3347.)

On November 24, 1994 (Thanksgiving Day), Green went on a trip to New Orleans and flew out of Los Angeles International Airport (LAX). (11 RT 3303.) Smith drove Green to the airport that day in Green's 1994 Ford Thunderbird, which Green had lent to Smith.[12/] (11 RT 3304.) Smith was also due to pick Green up at LAX the following Monday upon his return (on November 28, 1994). (11 RT 3305.) On Sunday night, November 27, 1994 (the day of the shooting), Green called Smith to make sure Smith was still going to pick him up at the airport the next day. (11 RT 3309.) Smith said to Green, "Daddy man, I had a gun pointed at my face." (11 RT 3309-3310.) Smith did not give Green any details about what he meant by this statement. (11 RT 3309.)

When Green returned from his trip, Smith was not at the airport to pick him up, as planned. (11 RT 3305.) Green was eventually picked up at the airport by his son Anthony. (11 RT 3305.) Later that day, Smith called Green and said he was not at the airport because he had the flu and wasn't feeling

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12. According to Green, Smith probably drove the Ford Thunderbird as much as he [Green] did. (11 RT 3304.) It was the same car identified by Badibanga as the getaway car used by Smith and his companions. (10 RT 3144.)

well. (11 RT 3306.) Smith had returned the Ford Thunderbird to Green's wife earlier in the day. (11 RT 3306-3307, 3383.)

On the day Rexford was killed, Smith arrived at Troy Holloway's house late at night in the green Thunderbird. (11 RT 3390-3391, 3460.) He was accompanied by his friends Patrick Wiley and Bennett Brown.[13/] (11 RT 3390, 3460.) Smith told Brown that Rexford had been killed. (11 RT 3394.) He said a friend of Brown's, Wiley's, and Holloway's had been killed. (11 RT 3394.) Holloway already knew about Rexford's death and he talked to Wiley about it. (11 RT 3461.) During the visit, Smith gave a 9 millimeter automatic pistol to Holloway. (11 RT 3462-3463.) Wiley had seen this 9 millimeter pistol on previous occasions. (12 RT 3640-3641.) Smith kept the gun on the kitchen counter in his apartment. (12 RT 3640.) Smith gave the gun to Holloway because Holloway had previously asked Wiley if he knew someone who could get him a gun. (11 RT 3463.) Smith did not charge Holloway any money for the gun. (11 RT 3467.) He instructed Holloway not to show the gun to anyone because "A real man doesn't show his gun." (11 RT 3467.) The gun did not have a bullet in the chamber, but had four bullets in the clip. (11 RT 3464.) Wiley was shocked when he saw Smith handing his gun to Holloway on the night of November 27, 1994 (the day Rexford was killed). (12 RT 3637, 3641.)

Sometime after Holloway took possession of the 9 millimeter pistol, he fired it twice in a field at Walnut and Citrus. (11 RT 3504.) Nicole Barlow, Jessie Lawless, and Ernie Negrete, who were all friends of Holloway's, witnessed Holloway with the pistol and saw him shooting it. (12 RT 3595-3596, 3618-3619.) Later, Holloway got in trouble with his mother for

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13. Although Wiley and Brown, who were high school friends of Holloway's, were much younger than Smith, Smith was friends with them because they had all performed as dancers in Smith's dance group. (12 RT 3630-3632.)

possessing the pistol and Holloway returned it to Wiley. (11 RT 3473.) A few days later, Smith called Wiley and informed him that he wanted the gun back. (12 RT 3642.) Wiley drove the gun to Smith's apartment. (12 RT 3642-3643.) When Wiley handed the gun to Smith, Smith said, "Thank you. I feel insecure without my house gun." (12 RT 3643.)

On December 11, 1994, Green was contacted by San Bernardino County Sheriff detectives and informed that Smith was under suspicion of murder. (11 RT 3307, 3315.) The detectives also searched and photographed Green's car. (11 RT 3308, 3321; 12 RT 3910-3911.) The car was very similar to the description of the getaway car Esau Boche had given the officers. (12 RT 3911.)

After the contact with the detectives, Green paged Smith. (11 RT 3309.) Smith called Green, and Green informed him that detectives wanted to speak with him. (11 RT 3313.) Smith told Green that he would call the detectives. (11 RT 3314.) On the same day, Green was called by Nathaniel Green,[14] one of two sons of Green's first cousin. (11 RT 3314-3315.) Nathaniel was a deacon in the "Great I Am Church" where Green was a minister. (11 RT 3317.) Nathaniel informed Green that detectives had stopped by the church earlier that morning looking for him and Green's nephew "Jerry." (11 RT 3317-3318.) Later, that evening, Smith called Green a second time and said, "The less [Green] hear[d] about the whole situation, the better." (11 RT 3320.) Smith told Green that he didn't kill anybody. (11 RT 3320.) He did not mention anything about having been kidnapped, about being involved with a person that had a gun, nor that other persons had used Green's car in a kidnapping or murder. (11 RT 3320.) Green asked Smith, "Why do they want to see my car? Was it involved in this [matter]?" (11 RT 3321.) Smith answered, "Yes." (11

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14. To avoid confusion with Carrol Green, Nathaniel Green is referred to by his first name hereinafter.

RT 3321-3322.) Smith said he had set up a meeting with the sheriff's detectives and was planning to go meet with them, and he again stated, "The less you know about this, the better." (11 RT 3322.)

Later the same day, Smith had a third telephone conversation with Green in which he told Green that he wasn't going to talk with the detectives after all because he knew they would arrest him. (11 RT 3323.) Green asked Smith what he was going to do, and Smith said, "I don't know yet. I'll let you know later." (11 RT 3323.) In this conversation, Smith again repeated that the less Green knew "the better." (11 RT 3324.) A day or two later, Smith again called Green and informed him that "they" [the sheriff's department] were questioning his [Smith's] friends because they matched the identity of "[a] large Hispanic male and a large white male" that were suspected of involvement in the killing of Rexford. (11 RT 3325.)

Detective Scott Franks was assigned to supervise the investigation of the shooting. (12 RT 3892.) After Franks was notified that the fingerprint on Honess's telephone was Smith's fingerprint, he assembled a photographic lineup with a recent Department of Motor Vehicles photograph of Smith. (12 RT 3903-3904.) When shown the photographic lineup, Pupua and Badibanga both selected Smith as the shooter. (12 RT 3908-3909.) When Nancy Smith was shown the lineup, she identified Smith as the person she saw when she exited her apartment (just prior to the shooting), but said his face looked thinner than what was depicted in his photograph. (12 RT 3908.) When Sebrina Smith was shown the lineup, she was not able to identify anyone. (12 RT 3908.)

On December 11, 1994, Franks searched Smith's apartment pursuant to a search warrant. (12 RT 3914.) Live .25 caliber bullets and 12 gauge shotgun shells were found in his apartment. (12 RT 3918.) At approximately 5:25 on the same date, Franks was paged. (12 RT 3921.) He called the number on his pager, and Smith answered. (12 RT 3921-3922.) Franks and Smith had

a 10-minute conversation about the shooting of Rexford in which Smith admitted he was present when the shooting occurred. (12 RT 3922.) Smith told Franks that if the case Franks was investigating had to do with a "white guy" that got into an altercation at a football game, then he [Smith] was present when the shooting occurred. (12 RT 3922.) Franks told Smith that he needed to set up a meeting so they could talk about the case in person. (12 RT 3923.) Smith chose the location for the meeting. (12 RT 3923.) He selected a Carl's Jr. Restaurant near a shopping center in Rialto. (12 RT 3923.) Smith agreed to meet with Franks at that location between 6:00 and 6:30 that evening. (12 RT 3925.) Franks and another detective went to the Carl's Jr. at 6:15 p.m., and waited until 8:00 p.m., but Smith never showed up. (12 RT 3926-3927.) Franks then obtained a no-bail warrant for Smith's arrest. (12 RT 3927.) He informed Mr. Green that Smith needed to surrender himself. (12 RT 3927.) Green told Franks that he would not tell the police where Smith was even if he knew. (12 RT 3929.)

On December 12, 1994, Franks received a second telephone call from Smith. (12 RT 3933.) This conversation between Smith and Franks lasted about 30 minutes. (12 RT 3935.) Franks recorded the last 15 minutes of this conversation.[15/] (12 RT 3934.) A redacted copy of the tape was played for the jury.[16/] (12 RT 3943.) In the conversation, Smith again admitted that he was present when the shooting of Rexford occurred, but he claimed he had been kidnapped by a "Mexican guy" and a "tall white guy." [17/] (3rd Supp. CT vol. 3,

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15. Franks turned on his recorder as soon as he knew it was Smith. However, the recorder malfunctioned, and did not begin recording until Franks put a new tape in about half-way through the conversation. (12 RT 3934.)

16. A transcript of the portion that was played for the jury is at 3rd Supplemental CT vol. 3, 885-938.)

17. Smith refers to these two individuals as the "Mexican guy," and the "tall white guy" throughout his dialogue with Detective Franks, and thus, are

907-914.) Smith said that on the night before the shooting, he went looking for a friend named "Rock." (3rd Supp. CT vol. 3, 907.) He drove Mr. Green's Thunderbird to the apartment complex where Pupua lived. (3rd Supp. CT vol. 3, 907.) At that location, Smith could not find his friend "Rock."[18/] (3rd Supp. CT vol. 3, 908.) Instead, he was "jacked up by a white guy" and a "Mexican guy." (3rd Supp. CT vol. 3, 908.) The Mexican guy had a 9 millimeter gun out. (3rd Supp. CT vol. 3, 908.) According to Smith, the two individuals forced Smith to drive them, in Green's Thunderbird, to Smith's apartment. (3rd Supp. CT vol. 3, 908-909.) When they got to Smith's apartment, a second "white guy" showed up. (3rd Supp. CT vol. 3, 909.) They ransacked Smith's apartment. (3rd Supp. CT vol. 3, 909.) The Mexican guy was "calling the shots." (3rd Supp. CT vol. 3, 909.)

Smith told Franks that the following morning, the "Mexican guy," the "tall white guy," and Smith drove back to Pupua's apartment complex. (3rd Supp. CT vol. 3, 910.) The Mexican guy drove the Thunderbird. (3rd Supp. CT vol. 3, 910.) The three of them went up to the third floor of the complex where an older guy [Honess] talked with them and gave Smith a cigarette. (3rd Supp. CT vol. 3, 912.) Smith used Honess's telephone to call his Uncle Irwin Perry at the "In God and Christ" Church. (3rd Supp. CT vol. 3, 912.) Smith referred to himself as "Jerry" during his telephone conversation because he didn't want Honess to know "too much about" him. (3rd Supp. CT vol. 3, 913.)

According to Smith, he left Honess's apartment, and eventually met up again with the Mexican guy and the tall white guy. (3rd Supp. CT vol. 3, 914.) He then returned to Honess's apartment because it was "safe" for him there. (3rd Supp. CT vol. 3, 915.) The Mexican guy and the tall white guy knocked

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referred to as such here as well.

18. Smith did not know "Rock's" last name. (15 RT 4842.)

on Honess's door and entered his apartment as well. (3rd Supp. CT vol. 3, 915.) Smith tried to keep Honess calm because he thought he might have a health problem, and would have a stroke. (3rd Supp. CT vol. 3, 915.) They had Honess "proned out on the ground." (3rd Supp. CT vol.3, 916.)

Smith told Franks that eventually he went downstairs with the Mexican guy and the tall white guy, and the Mexican guy knocked at an apartment door. (3rd Supp. CT vol. 3, 919.) Somebody inside the apartment said "come in," and the Mexican guy, who had his 9 millimeter handgun out, opened the door and started shooting. (3rd Supp. CT vol. 3, 920-921.) Smith said the Mexican did all the shooting, and that he [Smith] was not even armed. (3rd Supp. CT vol. 3, 921.) After the shooting, the Mexican guy and Smith ran back to the Thunderbird. (3rd Supp. CT vol. 3, 921-922.) The white guy was already in the car. (3rd Supp. CT vol. 3, 922.) The three of them drove off and later stopped at a park in Jurupa. (3rd Supp. CT vol. 3, 924.) At that location, the Mexican guy and the white guy got out of the Thunderbird, and told Smith to "get the fuck out of here." (3rd Supp. CT vol. 3, 924.) The Mexican guy and the white guy left on foot, and Smith then drove the Thunderbird back to his apartment. (3rd Supp. CT vol. 3, 925.)

When Franks told Smith that he had found 9 millimeter ammunition in his apartment, Smith denied that he owned a gun, but said the ammunition was there because he "was gonna buy one." (3rd Supp. CT vol. 3, 930.) Smith said the .25 caliber bullets were in his apartment because he once had a .22 caliber firearm. (3rd Supp. CT vol. 3, 932.) After discovering that the .25 caliber bullets didn't work in it, Smith said he "tossed [the gun] on the way side." (3rd Supp. CT vol. 3, 931-932.) According to Smith, the shotgun shells were in his apartment because he once owned a shotgun that he sold. (3rd Supp. CT vol. 3, 931.)

Near the conclusion of his conversation with Detective Franks, Smith told Franks "I'm not running from you." (3rd Supp. CT vol. 3, 936.) Smith said he knew "a lot of things" and he wanted to tell what he knew so that Franks could arrest "those other guys." (3rd Supp. CT vol. 3, 937.)

In February of 1995, Smith called Green and told him he was at a bus station in Riverside. (11 RT 3365.) He asked Green to transport him to the police station in Fontana because there was a detective there that he knew, and he wanted to surrender to him. (11 RT 3365.) Smith said he didn't want to surrender to the San Bernardino Sheriff's Department because he didn't trust them. (11 RT 3365.) Green picked up Smith and drove him to the Fontana Police Department where he surrendered. (11 RT 3364.)

Officer Fred Flores of the Fontana Police Department was the officer that Smith surrendered to on February 13, 1995. (12 RT 3794.) Flores knew Smith from previous encounters with him when Flores was working gang detail, and Smith was a church youth program coordinator. (12 RT 3795.) Smith told Flores that he was surrendering to him instead of the San Bernardino County Sheriff's Department because he was afraid the sheriff's department would beat him up. (12 RT 3795.) Flores escorted Smith into his office and contacted the sheriff's department. (12 RT 3795.) While they were waiting for the sheriff's department personnel to pick Smith up, Smith told Flores that he didn't murder anyone, but that he knew who the shooter was in the Rexford case. (12 RT 3797.) Smith also told Flores that he knew who was responsible for the death of Manuel Farias. (12 RT 3797.)

During the month of February 1995, after Smith was incarcerated, Green visited Smith, and Smith explained his version of how the killing took place: Smith said that on the day of the killing he [Smith] was kidnapped by a Hispanic male and a large white male. (11 RT 3329.) They took him to Smith's apartment in Rialto and spent the night there. (11 RT 3329.) The

following morning they took him to the apartments where the shooting took place. (11 RT 3329.) The individuals made a telephone call in an apartment in the complex. (11 RT 3329.) The individuals then knocked on the door of another apartment (downstairs). (11 RT 3329.) Smith said he was between the door and the Hispanic male. (11 RT 3329.) According to Smith, the Hispanic male did the shooting. (11 RT 3329.) They then left in Green's car, and went to Jurupa Park in Fontana. (11 RT 3329.)

Green had previously heard Smith's version of events on a cassette tape that Smith mailed to Green after the shooting (prior to being arrested). (11 RT 3330-3332, 3366.) Smith mailed the cassette tape to Green with instructions that he give the tape to Wiley, who turned it over to Rob Monroe, a reporter for the Daily Bulletin Newspaper.[19] (11 RT 3337; 12 RT 3649.) Smith told Wiley that "the newspaper was trying to make him look bad," and he wanted his side of the story told. (12 RT 3644-3649; 15 RT 4992.)

When Green drove Smith to the police station to surrender, he did not tell the sheriff's detectives anything about the cassette tape mailed to him by Smith, nor that on the day of the shooting Smith said, "Daddy man, I had a gun pointed at my face." (11 RT 3366, 3309-3311.)

Raymond Farias, Manuel Farias' brother, had gone to Birch Continuation School with Smith, and learned about the killing of Joshua Rexford from reading newspapers. (11 RT 3408.) After learning about Rexford's death, Raymond spoke with Smith. (11 RT 3407-3408.) Smith told Raymond that he was the one who killed Rexford. (11 RT 3408.) Smith did not tell Raymond why he killed Rexford, however. (11 RT 3408.) When questioned by police officers, Raymond did not immediately tell them about

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19. This tape was later turned over to the sheriff's department, and portions of it were played for the jury. (12 RT 3972-3976, 3982.) A transcript of the tape is at 3rd Supplemental CT vol. 3 850-884.)

Smith's admission that he killed Rexford because Raymond was scared. (11 RT 3426.)

On February 22, 1995, after Smith was incarcerated for the murder of Rexford, he refused to participate in a live lineup with five other individuals (that would be picked from a group of 12-15 individuals selected by both Smith's attorney and the district attorney's office). (12 RT 3811-3813.) Smith was "very contemptuous and very adamant about not participating." (12 RT 3812.) On that same day, which was the date of Manuel Farias' birthday, Smith made a collect call from jail to Linda Farias. (11 RT 3432.) Linda accepted the call, and Smith said, "I wanted to wish your brother a happy birthday. I have friends going out to the cemetery to deliver flowers." (11 RT 3432.) Linda said, "Okay. I got to go. Bye." (11 RT 3432.)

Defense

The defense recalled several prosecution witnesses, both for purposes of impeachment and to extract evidence related to the defense's primary theory, which was that Smith was kidnapped and forced to be at the scene of the shooting by other individuals who were seeking to harm Rexford. Several non-prosecution witnesses were called as well to establish that Rexford had been involved in various altercations with "Mexican guys" who might have wanted to harm him. However, the main evidence of the defense's theory came from Smith himself. Smith testified on his own behalf, and expressed the following to the jury:

Smith testified that he did not kill Joshua Rexford. (15 RT 4789.) He admitted being at Pupua's apartment at the time of the shooting, as well as the night before the shooting. (15 RT 4789.) Smith was at the apartment complex the night before the shooting because he was looking for a friend named "Rock." (15 RT 4789.) He had seen "Rock" at the apartment complex before.

(15 RT 4789.) Smith drove there by himself in Green's 1994 green Thunderbird. (15 RT 4790.)

After being at the apartment complex for about 30 minutes on the night of November 26, 1994, Smith got tired of walking around and started walking back to his car to leave. (15 RT 4791-4792.) As Smith started to insert his car-key into the car door, he was approached by a Mexican male who had a gun in his hand. (15 RT 4791.) The Mexican male pointed his gun at Smith's face and asked Smith for his keys. (15 RT 4791.) Smith handed his car keys to the Mexican male, but kept the car's anti-theft chip. (15 RT 4791.) The car could not be started without the anti-theft chip. (15 RT 4791-4792.)

A large white male then approached from behind the Thunderbird and struck Smith on the head. (15 RT 4792.) Smith entered the Thunderbird when the white male "snatched [him] up by [his] shoulder." (15 RT 4792.) Smith and the white male got into the back seat of the Thunderbird. (15 RT 4793.) The Mexican male got into the driver's seat, but could not start the car. (15 RT 4793.) The white male stuck a gun in Smith's face and asked him why the car would not start. (15 RT 4793.) Smith then gave the anti-theft chip to the Mexican male and he started the car and drove off. (15 RT 4793.)

The Mexican male drove the Thunderbird to Smith's apartment in Rialto. (15 RT 4793-4794.) Smith told the Mexican male how to get to his apartment. (15 RT 4794.) When they got to Smith's apartment, the three of them went inside. (15 RT 4796.) The Mexican male and white male went through Smith's possessions and ransacked the apartment. (15 RT 4796.) The Mexican male used the telephone and called somebody, and asked to speak to "Walter." (15 RT 4796.) It was a short conversation and the Mexican male said "shit" when he put the phone down. (15 RT 4796.)

As the Mexican male and white male ransacked Smith's apartment, Smith sat on the floor by one of his speakers. (15 RT 4797.) During this

period of time, a cohort of the Mexican male and white male showed up at Smith's apartment. (15 RT 4797.) He was another white male (who was "pretending like he was a Mexican"). (15 RT 4797-4798.) All four individuals spent the night at Smith's apartment. (15 RT 4798.) In the morning, the Mexican male made a telephone call in which he mentioned something about a fight at a football game. (15 RT 4800.) All four individuals then left Smith's apartment. (15 RT 4799-4802.) The Mexican male still had his gun, and the white male who originally helped abduct Smith also had one. (15 RT 4801.) The Mexican male's gun was "a big black 9-mm." (15 RT 4801.)

The white male that showed up at Smith's apartment by himself (the day before) left in a dirty white truck that Smith noticed parked near his apartment. (15 RT 4802-4805.) Smith, the Mexican male, and the other white male (who originally abducted Smith), left in the green Thunderbird. (15 RT 4802.) The Mexican male was the driver. (15 RT 4802.) According to Smith, he was not "physically" forced to go with his abductors, but he did so because they had directions to where his son lived (which they saw while they were in Smith's apartment). (15 RT 4806.)

The Mexican male drove the Thunderbird to Pupua's apartment complex. (15 RT 4802-4808.) Once there, the white male walked into the apartment complex like "he knew where he was going." (15 RT 4807.) The Mexican male and Smith walked to a different part of the complex. (15 RT 4807.) Smith and the Mexican male sat on a wall just "loafing around." (15 RT 4804-4809.) Smith saw Honess and asked him for a cigarette. (15 RT 4809.) He also saw several other people. (15 RT 4809-4813.) Smith talked to everybody he saw, but it was difficult because he was afraid he would get "smacked up side the head or something" since his abductors were nearby. (15 RT 4810-4811.)

When Smith saw Honess a second time, he said, "I need to make a telephone call." (15 RT 4813-4814.) Honess allowed Smith into his apartment to use his telephone. (15 RT 4814.) Smith tried to call his Uncle Perry at "Solid Rock Ministries," but was unable to make contact with him. (15 RT 4815.) Smith did not call the police from Honess's telephone "because 911 is a joke to [Smith] and [his] people." (15 RT 4816.) Smith did not think the police would "believe a black ex-felon in a white man's apartment." (15 RT 4816.)

While Smith was leaving Honess's apartment, and still in Honess's doorway, he saw his two abductors approaching. (15 RT 4817.) Knowing that the white male had a sawed-off shotgun, Smith pulled Honess by the shoulder to "snatch him back" because Smith was afraid the white male would "start blasting." (15 RT 4818.) Smith thought his abductors would start shooting because he [Smith] was not sitting on the stairs where he was suppose to be. (15 RT 4818.) All four individuals (Honess, Smith, the Mexican male, and the white male) entered Honess's apartment, and the white male pumped his sawed-off shotgun and loaded a round into the chamber. (15 RT 4818.) A while later, Smith left Honess's apartment with the Mexican male. (15 RT 4820.) Smith never pointed any gun at Honess while he was in Honess's apartment. (15 RT 4819.) Smith did not have a gun. (15 RT 4816.)

Smith and the Mexican male walked downstairs to Pupua's apartment. (15 RT 4820.) The white male went to the car. (15 RT 4820.) The Mexican male knocked at Pupua's door. (15 RT 4821.) A voice inside the apartment said, "Come in," and the Mexican male opened the door and entered. (15 RT 4821.) When the Mexican male walked in the apartment, he had a .25 caliber handgun in one hand, and a 9 millimeter handgun in his other hand. (15 RT 4821.) The 9 millimeter handgun was black. (15 RT 4821.) The Mexican male started firing his guns. (15 RT 4821.)

Meanwhile, Smith, who was also in Pupua's apartment when the shooting began, started to run out of the apartment, but the door swung closed and blocked his exit. (15 RT 4822.) Eventually, Smith got out of the apartment and ran back to the car. (15 RT 4823.) As Smith was running, the Mexican male was running behind him. (15 RT 4823.) Smith never pointed a gun at anyone while he was running. (15 RT 4824.)

Smith, the Mexican male, and the white male got back in the Thunderbird and the Mexican male drove to Jurupa Hills. (15 RT 4824.) At that location, the Mexican male and the white male got out of the Thunderbird. (15 RT 4825.) Smith could see the white truck that had been parked at his apartment earlier that morning. (15 RT 4825.) Smith's abductor's gave him the "okay to get the fuck out of there." (15 RT 4825.) Smith drove away in the Thunderbird, and eventually went to his apartment. (15 RT 4826.)

Smith testified that he kept bullets in his apartment because he planned on buying a 9 millimeter handgun for himself. (15 RT 4829.) He never gave Troy Holloway a gun. (15 RT 4827.) He attended the funeral of Manuel Farias, but he never talked to anyone about retaliating for Manuel Farias's death. (15 RT 4828.) According to Smith, there was nothing that would have compelled him to hurt anyone in 1994. (15 RT 4829.) Smith eventually surrendered to the Fontana Police Department rather than the San Bernardino Sheriff's Department because he believed the sheriff's department was trying to kill him. (15 RT 4827.)

Rebuttal

Sheriff's Detective Frank Gonzales interviewed Walter Pupua on the day Rexford was killed. (16 RT 5152-5153.) Pupua told him that at 7:30 a.m. the morning Rexford was shot, he received a telephone call in which the caller immediately hung up when Pupua answered the telephone. (16 RT 5155.)

Pupua also told Gonzales that the blinds to his apartment (on the sliding glass door) were closed on the day of the shooting. (16 RT 5155.) Pupua said that after Badibanga said, "come in" that morning, one person entered the apartment. (16 RT 5156.) That one person was the shooter, and he was a "black, male adult." (16 RT 5156.) Pupua later said to Gonzales that two people were involved, but he only did so because he had heard such from Badibanga. (16 RT 5156.) When Gonzales asked Pupua how many persons he had personally seen at the door, Pupua's response was "one." (16 RT 5157, 5161.)

II.

PRIOR MURDER SPECIAL CIRCUMSTANCE PHASE

On July 13, 1984, Smith pleaded guilty to first-degree murder, in violation of Penal Code section 187, in Riverside County Superior Court case number CR-22000. (17 RT 5566; 3rd Supp. CT vol. 3, 788; 3rd Supp. CT vol. 4, 1166-1182.) Smith was committed to the California Youth Authority. (3rd. Supp. CT vol. 3, 788.) On July 24, 1992, Smith was honorably discharged from the California Youth Authority. (3rd Supp. CT vol. 3, 789.) On May 18, 1993, the record was expunged pursuant to Welfare and Institutions Code section 1772. (3rd Supp. CT vol. 4, 1182.)

III.

PENALTY PHASE

Prosecution Evidence[20/]

1. Robbery And Sex Crimes Against Felton Manual

On the evening of January 27, 1984, Felton Manual, who lived in Banning, California, began walking to his church. (17 RT 5658.) Manual had lived in Banning for 28 years, and his church was about a mile from his house. (17 RT 5659.) Manual was carrying a bag of games in his hand, and when he was about half way to church, Smith walked up to him. (17 RT 5659-5660.) Smith had a gun. (17 RT 5660.) Smith asked Manual for money, and Manual said, "I don't have no money." (17 RT 5661.) Smith had his gun a foot away from Manual's head. (17 RT 5661-5662.) When Manual told Smith that he did not have any money, Smith said he wanted to go to Manual's house. (17 RT 5662.) Since Smith had a gun to his head, Manual began leading Smith to his house. (17 RT 5662.) Manual believed he would be killed if he did not take Smith to his house. (17 RT 5662.)

When they arrived at Manual's house, they went to the back room. (17 RT 5662.) While they were in the back room of Manual's house, Smith forced Manual (at gunpoint) to orally copulate Smith. (17 RT 5663.) At a certain point, Manual stopped orally copulating Smith and asked Smith "if it was enough." (17 RT 5663.) Smith said, "Okay." (17 RT 5663.) Smith then said he wanted to leave. (17 RT 5663.) Smith and Manual left Manual's house, and Smith took Manual up the street to a field. (17 RT 5663.) At that location, Smith told Manual to take all his clothes off. (17 RT 5663.) Since Smith still

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20. The penalty phase actually began with testimony from one of the defense witnesses, Dr. David Glasser. After his testimony, however, the prosecution presented its witnesses, and then the defense called four more witnesses.

had him at gunpoint, Manual complied. (17 RT 5663-5665.)

When Manual was completely nude, Smith took all his clothes and threw them over a fence. (17 RT 5664.) Smith then left the area with Manual's wallet. (17 RT 5664-5665.) As Smith was leaving, he told Manual not to saying anything "or I'll kill you." (17 RT 5665.) Several days after the incident, Manual identified Smith from a photographic lineup. (17 RT 5665.) Sometime later, Manual identified Smith in court as well. (17 RT 5665.)

2. Murder Of Virgil Dwight Fowler

On January 28, 1984, Bruce Rouse, a senior investigator with the Riverside County District Attorney's Office, assisted the Banning Police Department in the investigation of the murder of Virgil Dwight Fowler. (18 RT 5750-5751.) Rouse conducted interviews with several individuals regarding the homicide, including two interviews with Smith. (18 RT 5751-5758.) Smith was 16 years old at the time. (18 RT 5752.)

At the scene of the shooting, Rouse saw nine shell casings grouped together. (18 RT 5758.) Eight of the casings were .22 caliber casings, and one was a .25 caliber casing. (18 RT 5758.) A .22 caliber handgun was located in some bushes off of Almond Way. (18 RT 5759.) The gun was an RG revolver capable of holding six bullets. (18 RT 5759.)

In the first of two interviews with Smith (which lasted about 45 minutes), Smith initially told Rouse that Fowler had been killed by Latin Americans in a low-rider vehicle who drove by and shot Fowler. (18 RT 5753.) Smith told Rouse that the crime occurred at the northwest corner of Wilson and Almond Way in Banning. (18 RT 5753.) Later, in the same interview, Rouse confronted Smith with the fact that other witnesses (Orlando Hunt and Calvin Wade) had stated he [Smith] was the shooter, and Rouse told Smith about the gun that had been located at the scene. (18 RT 5756, 5759.) Smith then changed his story and explained how he was the one that shot Fowler. (18 RT

5753.)

Smith said he was at Wilson and Almond Way, where the shooting occurred, hanging out with Orlando Hunt and Calvin Wade (during nighttime hours). (18 RT 5755-5757.) Virgil Fowler came walking up Almond Way toward their location. (18 RT 5760.) Hunt told Smith to rob Fowler. (18 RT 5760.) According to Smith, he had never met Mr. Fowler before, and he asked Hunt why he should rob Fowler. (18 RT 5760.) Fowler got into a conversation with Wade. (18 RT 5761.) Smith then pulled a gun on Fowler and ordered Fowler to get on the ground because he thought Fowler and Wade were having an argument. (18 RT 5761.) Smith said he was also worried that Fowler might have a gun because he wouldn't take his hand out of his pocket. (18 RT 5761.)

While Fowler was getting on the ground, Smith told Hunt to check his pockets "for dope, money, or a gun." (18 RT 5761.) Fowler started to get down, but then got back up and started to run. (18 RT 5761.) Smith fired a shot in the air. (18 RT 5762.) Smith told Fowler a couple of times to get back down on the ground. (18 RT 5762.) Smith was yelling at Fowler as Fowler was running. (18 RT 5762.) Smith said he initially fired some shots over Fowler's head. (18 RT 5762.) He then fired at Fowler and Fowler fell down in the middle of the street. (18 RT 5762.) Smith and his companions ran to where Fowler had fallen. (18 RT 5762.) They then decided to make up a story about a carload of Latin males being the shooters. (18 RT 5762-5763.)

During the course of being interviewed by Rouse, Smith asked how many times Fowler had been hit. (18 RT 5763.) Rouse told Smith that Fowler had been hit twice. (18 RT 5763.) He was hit by one bullet in the neck, and one in the middle of the left shoulder. (18 RT 5764.) Smith responded that "the other bullet is missing," and that he "usually hits what he aims at." (18 RT 5764.) Smith also said that he couldn't believe Fowler thought he could outrun a bullet (stating "not even he could"). (18 RT 5764.) Smith also stated that

Fowler had seen his face and "he wasn't going to let him get away with it." (18 RT 5764.) Smith also told Rouse that during the incident he reloaded his handgun. (18 RT 5764.) After thinking about it, Smith changed his story and said he meant that he reloaded his gun two or three times earlier that day when he was target practicing. (18 RT 5765.) Smith said he had gone target practicing with Orlando Hunt and Calvin Wade earlier in the day, in a desert area near Florida and Wilson Street. (18 RT 5768.) After the target practice, the three individuals went to a liquor store, and Smith gave his gun to Wade because Smith was afraid he "would get trigger happy." (18 RT 5768.) Smith said that when he drinks he has a "tendency to get trigger happy." (18 RT 5768.) At one point, in talking to Rouse, Smith admitted that he did get "trigger happy" that night. (18 RT 5768.) Smith commented about how far Fowler had run. (18 RT 5769.) Smith said, "He must have real heart to run as far as he did before he finally collapsed." (18 RT 5769.)

Smith told Rouse that he threw his gun into some weeds after the shooting of Fowler. (18 RT 5768.) Smith said he had consumed "two long swigs" of white port wine. (18 RT 5769.) When Rouse asked Smith if the alcohol affected him, Rouse believed Smith said it did not affect him (but was not positive). (18 RT 5769.) Smith denied using any marijuana (saying he did not smoke marijuana). (18 RT 5769.)

On January 30, 1984, Rouse had a second interview with Smith in Riverside County Juvenile Hall. (18 RT 5770.) In this second interview, Smith stated that he remembered reloading his gun while he and his friends were at the scene of the shooting. (18 RT 5770.) He also recalled some of his conversation with Fowler. (18 RT 5770.) Smith remembered telling Fowler that he was serious about Fowler staying on the ground, that he wasn't kidding, and that he yelled at Fowler twice to get back down as he was running. (18 RT 5770.)

With regard to the "two big swallows of white port" Smith had taken that day, Smith said he took the two big swallows two or three hours earlier in the evening (before the shooting). (18 RT 5770-5771.)

Calvin Wade also testified about the killing of Fowler. (18 RT 5776.) At the time of the shooting, Wade had known Fowler for 15 years. (18 RT 5777.) He had known Hunt for 10 years. (18 RT 5778.) However, he had not even know Smith for 30 days. (18 RT 5778.) Wade knew Smith by the nickname "8-ball." (18 RT 5781.) According to Wade, he had been hanging out on the corner of Almond Way and Wilson Street with Hunt and Smith. (18 RT 5778.) They were all drinking wine. (18 RT 5778-5779.) A female named Judy Bell was also present. (18 RT 5780.) Smith was carrying a .22 caliber revolver that they had been firing earlier in the day. (18 RT 5781-5782.)

When Fowler walked up to them, Wade talked with him a couple of minutes. (18 RT 5779.) There was no argument. (18 RT 5780.) Smith drew his gun on Fowler because Judy Bell told them to rob Fowler. (18 RT 5782.) Smith told Fowler to lay on the ground. (18 RT 5783.) Fowler briefly got on the ground, but then took off running. (18 RT 5783.) Smith then began firing shots at Fowler. (18 RT 5783.) All the shots that Smith fired were while Fowler's back was turned. (18 RT 5783.) Smith never fired a shot at Fowler while Fowler was facing him. (18 RT 5783.) After Smith fired the shots, Smith stood there "like nothing ever happened." (18 RT 5784.)

Fowler made it about a block and a half down the street and then fell down. (18 RT 5784.) Wade ran to Fowler and found him bleeding in the middle of the street. (18 RT 5784.) The police eventually arrived. (18 RT 5784.) By that time, Hunt had discussed the story they were going to make up to tell the police. (18 RT 5784.)

3. Smith's Threat To Dawn Hall

On July 10, 1997, while Smith's guilt phase was still in progress, Ms. Dawn Hall (the mother of victim Joshua Rexford) left the courtroom at the conclusion of the guilt phase evidence accompanied by Freddie Badibanga, Nancy Smith, Diane Rexford, Laurie Rexford, and her ex-husband, Mark Rexford Sr. (18 RT 5799.) The jury had already left the courtroom. (18 RT 5799.) As Ms. Hall began to walk out of the courtroom, she turned back to look at Smith, and Smith raised his hand in the shape of a simulated pistol with Smith's finger representing the barrel of a gun. (18 RT 5800-5801.) Ms. Hall said, "Don't raise your hand at me like you're going to shoot me." (18 RT 5800.) She also said to Smith, "You're so disrespectful." (18 RT 5801.) Smith responded to her by calling her "a fucking bitch." (18 RT 5801.) He said it in a loud voice, and appeared to be "very, very angry." (18 RT 5802.) Smith started to come over the wood banister that was directly behind the counsel tables. (18 RT 5801.) Ms. Hall was "mortified" and "just couldn't believe it." (18 RT 5801-5802.) She took Smith actions and statement as a "very serious threat." Ms. Hall felt that if Smith had made it over the divider he would have done something to her. (18 RT 5802.) When she left the courtroom she broke down and started crying. (18 RT 5802.)

Defense Evidence

Brigette Harris, Smith's sister, lived with Smith during Smith's childhood years. (18 RT 5925.) There were six children in the household (three girls and three boys). (18 RT 5924.) Smith's father was never a part of the household. (18 RT 5925.) Smith's relationship with his mother was bad. (18 RT 5925.) Smith was treated like the "black sheep" of the family. (18 RT 5925.) He got the most "whoopings," was blamed for a lot of things, and was physically and sexually abused by their older brother George. (18 RT 5925.)

Harris witnessed her mother physically abuse Smith on several occasions. (18 RT 5925-5935.) On one occasion, Harris witnessed her mother beating Smith on the head with her purse. (18 RT 5929.) The beating caused a large gash on Smith's head. (18 RT 5930.) There was so much blood, Harris could not soak it up with a towel. (18 RT 5930.) On another occasion, Smith's mother pinned him up against the washer and dryer and poked him with a meat fork. (18 RT 5927.)

Harris also witnessed Smith receive several beatings by their older brother George. (18 RT 5936-5937.) On one occasion, George "wanted to beat on somebody" and he took Smith and tied his hands and feet and hung Smith upside down from the door. (18 RT 5937.) George tied a sock around Smith's mouth. (18 RT 5937.) George then heated a butter knife on the stove. (18 RT 5937.) He returned to Smith, unzipped Smith's pants, and burned the tip of Smith's penis with the hot knife. (18 RT 5937.)

George would also take Smith into a closed room and force him to engage in sex acts. (18 RT 5940-5943.) Harris could hear George saying "do it," "open it," and "suck it." (18 RT 5940.) Smith could be heard saying, "No, stop." (18 RT 5940.) The sexual abuse occurred about once or twice a week. (18 RT 5941.) Harris would not intervene on Smith's behalf because she would get hit by George. (18 RT 5942.)

David Glasser, a medical doctor who was board certified in psychiatry and neurology, testified for the defense at the penalty phase. (17 RT 5594-5595.) He spent over six hours interviewing Smith. (17 RT 5598.) Dr. Glasser also reviewed numerous reports pertaining to Smith (many of which pertained to Smith's criminal record as a juvenile, and some pertaining to the instant case). (17 RT 5598-5599.) He placed great emphasis on the materials[21] he

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21. The trial court admonished the jurors that the facts Dr. Glasser was relying on for his opinion were hearsay and were not being admitted for their

read because Smith was a "very, very difficult interview." (17 RT 5600.) Dr. Glasser said, "He was not a cooperative historian, despite the fact that I presented myself as somebody who could only help him and not hurt him." (17 RT 5600.) Nevertheless, Dr. Glasser was not able to gain much helpful information from Smith. (17 RT 5600.) However, in reviewing reports and materials pertaining to Smith, Dr. Glasser was able to gain an understanding of Smith's family background, and his character. (17 RT 5599.) Based on the information Dr. Glasser obtained, he formed the opinion that Smith's childhood was "full of neglect, physical abuse, sexual abuse, abandonment, [and] that there was no age-appropriate supervision." (17 RT 5625.)

Dr. Glasser gave various opinions based on several psychiatric concepts. With regard to the concept of "passive-active," Dr. Glasser opined that Smith is a chronic passive victim of sexual and physical abuse over a period of years. (17 RT 5634.) As a result, he victimizes people physically and sexually as well. (17 RT 5634.)

With regard to the concepts of "abandonment" and "displacement," Dr. Glasser said Smith harbors tremendous rage over being abandoned by his mother and father, which resulted in several foster home placements during Smith's teen years. (17 RT 5635.)

Smith was also described as "narcissistic." (17 RT 5635.) Dr. Glasser said, "He thought his live testimony here at his own murder trial would convince you the jury. To me, that is extremely narcissistic. He extremely over-evaluates his abilities."[22/] (17 RT 5635.) In Dr. Glasser's view, Smith's narcissism has led to profound difficulties in his life. (17 RT 5636.)

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truth, but solely as the basis for Dr. Glasser's opinion. (17 RT 5602.)

22. On cross-examination, Dr. Glasser admitted that Smith has lied, and said, "I think he thinks he is a terrific liar." (17 RT 5683.)

Lastly, Dr. Glasser discussed the effect of traumatic events that happened to Smith in his early years. (17 RT 5637.) Several acts of physical and sexual abuse by his older brother, George, as well as physical violence by his mother, Gertrude Stewart, led to incredible rage and inappropriate behavior by Smith. (17 RT 5637-5638.)

Willis Holman, Smith's younger brother, testified that when he was growing up, Smith never tried to sexually molest him. (17 RT 5808.)

Ruthie Justice was a middle school teacher who worked with Smith at New Life Ministries in an effort to establish a new community-based church that was youth oriented. (18 RT 5891.) They worked closely to bring African-American males into the church and get them involved in church activities. (18 RT 5891.) Smith's role was "basically recruitment and a driver." (18 RT 5891.) Smith would go out during the week and recruit persons through young people he knew. (18 RT 5891.) On Sunday mornings, Smith would drive the church van and make sure the newly recruited individuals would get to church. (18 RT 5891.)

Smith also worked in the church as part of the "praise team." (18 RT 5891.) After dropping the people off at church, Smith would enter the church and "start with the praises in the church." (18 RT 5892.) Smith also spoke to youth in the church about his background. (18 RT 5892.) He would tell the youth, "look, you guys, the things that you're doing on the streets, I've done it. I've seen it; been there; done that." The crux of Smith's message to the youth in the church was "Don't do it; it's not worth it' been there done it; seen it; that kind of thing." (18 RT 5892.)

Smith also did a musical stint with some of the local kids. (18 RT 5892-5893.) Smith had a musical group. (18 RT 5893.) He bought a DJ system and was doing performances and dances for some of the local schools. (18 RT 5893.) He also produced a musical tape called "Love You, Baby," by

"Extended Version," that was sold to some of the local neighborhood kids. (18 RT 5893.) The tape had a positive message for kids. (18 RT 5894.) The message was "Stay out of trouble; don't get into mischief kind of thing." (18 RT 5894.)

Smith's four-year-old son, Raylon Smith, had been to visit his father in jail often. (18 RT 5971-5972.) During his visits he would talk to his father about school and activities. (18 RT 5972.) He enjoyed visiting with his father. (18 RT 5972.)

ARGUMENT

I.

SMITH'S *BATSON/WHEELER* MOTIONS WERE PROPERLY DENIED AS SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT THE PROSECUTOR USED PEREMPTORY CHALLENGES TO EXCUSE THE JURORS AT ISSUE BASED SOLELY ON RACE-NEUTRAL REASONS

On two separate occasions during jury selection, Smith raised the issue of whether the prosecutor was systematically excusing African-Americans from the jury on the basis of group bias, in violation of the state and federal Constitutions.[23] (See *Batson v. Kentucky* (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).) On both occasions, the trial court found that a prima facie showing of exclusion based on group bias had been shown based on statistics. (8 RT 2593.) After considering the prosecutor's explanation for his peremptory challenges of four African-American jurors, the trial court made findings that the prosecutor's peremptory challenges were based on race-neutral reasons and denied Smith's *Batson/Wheeler* claims. Smith argues that the prosecutor's reasons for excusing the African-American jurors are not supported by the record, the trial court erred in reaching its findings and conclusions to the contrary, and that the judgment must be reversed in its entirety. (AOB 40-114.) Respondent disagrees. The argument is without merit as substantial evidence in the record supports the trial court's rulings.

The California and United States Constitutions prohibit using peremptory challenges to dismiss prospective jurors based solely on group bias.

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23. The first motion came after three African-American jurors had been excused by the prosecution, and the second motion came after a fourth African-American juror was excused. (8 RT 2591.)

(*People v. Guerra* (2006) 37 Cal.4th 1067, 1100-1101.) Initially, a defendant must make out a prima facie case by "showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (*Ibid.*) Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. (*Ibid.*) Third, if a race-neutral explanation is provided by the prosecutor, the trial court must then decide whether the defendant has proved purposeful racial discrimination. (*People v. Cornwell* (2005) 37 Cal.4th 50, 66-67; *Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129] (*Johnson*).) A defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. (*Johnson, supra,* 545 U.S. at p. 170, reversing in part *People v. Johnson* (2003) 30 Cal.4th 1302, 1318 [requiring the defendant to "show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias"].)

In analyzing whether the defendant ultimately has carried his burden of proving purposeful racial discrimination, the trial court must make "a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . ." (*People v. Reynoso* (2003) 31 Cal.4th 903, 919 .) The trial court need not make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine" (*Ibid.*) Inquiry by the trial court is not even needed. (*Id.* at p. 920.) What is required is that the prosecutor's reason(s) for exercising the peremptory challenge be sincere and legitimate in the sense

of being nondiscriminatory. (*People v. Reynoso, supra,* 31 Cal.4th at p. 924.) A reason that makes no sense is still "sincere and legitimate" as long as it does not deny equal protection. (*People v. Guerra, supra,* 37 Cal.4th 1067, 1100-1101.)

In the instant case, the defense was found to have made a prima facie showing in accordance with the first step of *Batson/Wheeler.* Thereafter, the prosecutor articulated race-neutral reasons for excusing the prospective jurors in question, and thereby satisfied step two of *Batson/Wheeler.* As the Supreme Court explained in *Purkett v. Elem* (1995) 514 U.S. 765 [115 S.Ct. 1769, 131 L.Ed.2d 834], "The second step of this process does not demand an explanation that is persuasive, or even plausible." (*Id.* at pp. 767-768.) What is required is a race-neutral explanation: "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.' [Citations.]" (*Id.* at p. 768.)

Since step two was satisfied, the trial court was obligated in step three to evaluate "all the circumstances of the case" to determine whether the prosecutor's race neutral reasons for excusing the prospective jurors were "sincere and credible," or whether the defendant instead sustained his burden of proving unlawful discriminatory intent in the exercise of peremptory challenges. (*People v. Stanley* (2006) 39 Cal.4th 913, 939; *People v. Reynoso, supra,* 31 Cal.4th at p. 925.) Here, the trial judge accepted each of the prosecutor's reasons for excusing the jurors in question and thus found that the defense had failed to prove purposeful racial discrimination. (13 RT 4413.) Smith now challenges the validity of those findings.

The standard of review applied after the trial judge has made a reasoned evaluation of explanations for peremptory challenges is one of great deference. "When a trial court has made a sincere and reasoned effort to evaluate each of

the stated reasons for a challenge to a particular juror, we accord great deference to its ruling, reviewing it under the substantial evidence standard. [Citations.]" (*People v. Jurado* (2006) 38 Cal.4th 72, 104-105.) "Since the trial court was in the best position to observe the prospective jurors' demeanor and the manner in which the prosecutor exercised his peremptory challenges, the implied finding, that the prosecutor's reasons for excusing [the prospective jurors], including the demeanor-based reason, were sincere and genuine, is entitled to 'great deference' on appeal. [Citations.]" (*People v. Reynoso, supra,* 31 Cal.4th at p. 926; see *People v. Stanley, supra,* 39 Cal.4th at p. 939.) As this Court has observed, the substantial evidence test is still appropriate even following the United States Supreme Court's decision in *Miller-El v. Dretke* (2005) 545 U.S. 231 [125 S. Ct. 2317, 162 L.Ed.2d 196]. (*People v. Huggins* (2006) 38 Cal.4th 175, 233.)

"We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges '"with great restraint."' [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]" (*People v. Burgener* (2003) 29 Cal.4th 833, 864.)

This deferential standard of review applies when "the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror." (*People v. Silva* (2001) 25 Cal.4th 345, 386; *People v. McDermott* (2002) 28 Cal.4th 946, 971; accord, *People v. Fuentes* (1991) 54 Cal.3d 707, 720.) Because the trial court in the present case made a sincere and reasoned effort in evaluating the prosecutor's explanations the deferential standard applies.

Prospective Juror Sandra D. [24/]

Sandra D. was the first African-America prospective juror excused by the prosecution with a peremptory challenge. (8 RT 2555.) During the defense's first *Batson/Wheeler* motion the prosecutor explained that he had tried to have Ms. D. excused for cause. (8 RT 2593.) The prosecutor had concerns about Ms. D.'s sympathetic views about O.J. Simpson, and her "weak opinions" about the death penalty. (8 RT 2594.) The prosecutor stated that Ms. D. indicated she would have a hard time judging a person in a death penalty case, and that she did not want the responsibility of making a decision in a death penalty case. The prosecutor also pointed out that Ms. D. was divorced and had only lived in the area for five months, and that he was concerned about her lack of stability in the community. (8 RT 2598.)

However, the prosecutor asked for an opportunity to review Ms. D.'s jury questionnaire before providing the court with more specific reasons for the excusal of Ms. D. (8 RT 2597-2600.) After reviewing Ms. D.'s questionnaire, the prosecutor stated that Ms. D.'s responses to questions regarding the death penalty indicated she would be very reluctant to vote for a sentence of death. (8 RT 2601-2602.) The prosecutor quoted from several of Ms. D.'s questionnaire responses. (8 RT 2601-2602.) The prosecutor's decision to use a peremptory challenge against Ms. D. is well-supported in said responses. Although Ms. D. initially wrote that she was for the death penalty (15 Supp. CT # 7, 4327), she later responded negatively to a question that asked her if she personally could reject life imprisonment and impose the death penalty. Ms. D. checked the box for "No," and wrote "I don't want to have to make that decision on anyone." (15 Supp. CT # 7, 4329.) In response to another question that asked about her feelings regarding the death penalty, Ms. D. wrote

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24. Out of respect for the jurors' privacy, respondent refers to them by their first names and last initials.

that a person who kills someone doesn't have a right to live, but she went on to say, "But I wouldn't want to be the one to make the decision about if they could get the death penalty." (15 Supp. CT # 7, 4329.) When Ms. D. was asked if she could impose the death penalty as a "realistic and practical possibility," she checked the box for "No," and she wrote, "I would feel like I killed them. It would bother me, but if he did it he deser[ves] the death penalty." (15 Supp. CT # 7, 4330.) In response to what type of person should get the death penalty, Ms. D. wrote, "Anyone who kills someone but I don't want to be the one to say that[']s what they get is the death penalty." (15 Supp. CT # 7, 4330.) In response to a question about whether Ms. D. had actively supported the initiative which reinstated the death penalty in California, Ms. D. wrote, "Don't know." (15 Supp. CT # 7, 4331.) Ms. D. was asked the following question:

> If you conclude that the defendant is guilty of first degree murder and that one or more of the special circumstances is true, and that a sentence of death is legally warranted in this case, would you be reluctant to personally vote for a sentence of death?

(15 Supp. CT # 7, 4334.)

Ms. D. responded by checking the "Yes" box, and she wrote, "Yes it would be hard for myself to be the reason why someone die *[sic]*." (15 Supp. CT # 7, 4334.) When asked why she would be reluctant to impose the death penalty, Ms. D. wrote, "I feel he will remember my name and have someone do something to me." (15 Supp. CT # 7, 4334.)

The prosecutor also pointed out that he did not see the type of community leadership with Ms. D. that he would hope for. Ms. D., in his view, was more of a follower and did not fit the "group dynamics" he was trying to assemble. (8 RT 2602.)

The prosecutor's reasoning was accepted by the trial court. The court stated:

> I think on Sandra D[....] - - with Sandra D[....], I certainly don't have any problem at all with accepting Mr. McDowell's statement that he saw this as a close statement on whether she should be excused for cause. I think he may have challenge[d] her for cause. I don't recall. I felt there was no problem with the non-racial basis for exercising the peremptory.

(8 RT 2613.)

The trial court's ruling should be accorded deference as the prosecutor's reasons were valid race-neutral reasons, and substantial evidence in the record supports the reasons. As the trial court correctly pointed out, the issue was close on whether Ms. D. should have been excused for cause, let alone the propriety of a peremptory challenge. (8 RT 2613.) At a minimum, Ms. D.'s answers pertaining to the death penalty were conflicting and/or ambiguous.

> On appeal, we will uphold the trial court's decision if it is fairly supported by the record, and accept as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has given conflicting or ambiguous statements.

(*People v. Ledesma* (2006) 39 Cal.4th 641, 669, quoting *People v. Farnam* (2002) 28 Cal.4th 107, 132; see also *People v. Chatman* (2006) 38 Cal.4th 344, 365.)

Furthermore, a prospective juror must be able to do more than simply consider imposing the death penalty at the penalty phase; he or she "must be able to . . . consider imposing the death penalty *as a reasonable possibility.*" (*People v. Ashmus* (1991) 54 Cal.3d 932, 963, disapproved on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

Ms. D.'s lack of leadership characteristic was also a valid race-neutral reason for her excusal. As this Court has pointed out in prior capital case opinions, leadership and the overall dynamics of the jury are valid considerations in assembling a jury. (*People v. Ledesma, supra,* 39 Cal.4th

641, 679; *People v. Johnson* (1989) 47 Cal.3d 1194, 1220.) Often when the printed record is unclear, a prospective juror's demeanor, tone of voice, and overall attitude in the courtroom can be decisive factors in determining the prospective juror's true state of mind, and actual ability to impose the death penalty as a "reasonable possibility." Such factors do not appear in a cold record, and therefore:

> despite "lack of clarity in the printed record . . . there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror." (*Witt, supra,* 469 U.S. at pp. 425-426, 105 S.Ct. 844; *id.* at p. 428, 105 S.Ct. 844 [a trial court's finding concerning a prospective juror's state of mind "is based upon determinations of demeanor and credibility that are peculiarly within a trial court's province. Such determinations [are] entitled to deference . . . on direct review . . . ." (fn.omitted)].)

(*People v. Schmeck* (2005) 37 Cal.4th 240, 263.)

Prospective Juror Regina S.

Regina S. was the second African-American prospective juror excused by the prosecution with the use of a peremptory challenge. (8 RT 2578.) The prosecutor pointed to the fact that Ms. S. had a brother who was a juvenile delinquent. (8 RT 2594.) The prosecutor also pointed out that Ms. S. had come to court in a T-shirt (with various printing on it), open-toed sandals, and modified sweat pants. (8 RT 2594.) He also stated that Ms. S. had very little college and that he did not feel she was stable in the community based upon her housing history and job history. (8 RT 2594.) In discussion about the "O.J. Simpson Trial" the prosecutor felt Ms. S. was sympathetic toward Mr. Simpson. (8 RT 2594.) Ms. S. had stated in her juror questionnaire that the jury's verdict in the O. J. Simpson case did not upset her. (17 Supp. CT # 7, 4966.) He also felt her views about the death penalty were "extremely

scrambled," and her opinions about the death penalty were either undefined or weak. (8 RT 2594.) Ms. S. said in her juror questionnaire that she could impose the death penalty if guilt was proved "absolutely" and "without a doubt." (17 Supp. CT # 7, 4972, 4974.) Ms. S. had also said she could see herself rejecting the death penalty and imposing a life term, "Because if there's one thing we may not be able to prove, but we still feel he is guilty, w/reasonable doubt." (17 Supp. CT # 7, 4974.)

Later, after being given an opportunity to re-read jury questionnaires, the prosecutor reiterated that Ms. S.'s manner of dress was "completely different from the attire of all the other jurors that we presently have in the box." (8 RT 2602.) The prosecutor pointed out that Ms. S. indicated she was for the death penalty, but said "we must absolutely prove guilt." (8 RT 2603.) When asked about imposing the death penalty or life in prison, the prosecutor pointed to Ms. S.'s statement that it might be appropriate "if we can prove without a doubt that the crime was committed." (8 RT 2603.) The prosecutor was concerned that Ms. S. felt the death penalty had been randomly imposed and that some criminals seem to get charged more harshly than others. (8 RT 2603.)

With regard to Ms. S.'s brother being involved in the juvenile justice system, the prosecutor pointed out that Ms. S.'s brother had committed some misdemeanors. (8 RT 2604.) However, Ms. S. felt her brother had been treated fairly by the system. (8 RT 2604.)

The trial court indicated that it did not share the prosecutor's concerns regarding Ms. S., however the court was not going to substitute its judgment for the prosecutor's. (8 RT 2614.) The court said, "I'm not the lawyer trying this lawsuit." (8 RT 2614.) The court stated that it accepted the prosecutor's reasoning that Ms. S. would be unwilling to impose the death penalty unless there was "no doubt" about guilt. (8 RT 2615, 2617.) The court said, "I agree with it, I do not have to accept it just because you say it. I accept it because I

believe it to be true. (8 RT 2617.)

The trial court's finding that the prosecutor's reasoning concerning Ms. S.'s inability to impose the death penalty absent *any doubt*, is supported by substantial evidence in the record. It is a credibility finding that should be deferred to by this Court because the trial court was in the best position to make such a finding. (*People v. Calvin* (2008) 159 Cal.App.4th 1377, 72 Cal.Rptr.3d 300, 309-310.)

Many of the prosecutor's reasons for excusing Ms. S., which were not discussed by the trial court, are confirmed in the record, such as his concern about Ms. S.'s feelings about the O.J. Simpson case (see 17 Supp. CT # 7, 4966), and her brother's juvenile delinquency (see 17 Supp. CT # 7, 4985-4986).[25/] However, the reason ultimately accepted by the trial court as a valid reason for excusing Ms. S. was her requirement that guilt be proved to an absolute point before she would impose the death penalty. (8 RT 2615, 2617.) Ms. S.'s answers to questions in her jury questionnaire about the death penalty provide substantial evidence in support of the court's ruling. When asked about her general feeling regarding the death penalty, Ms. S. wrote, "I'm for it, but we must **absolutely prove guilty** *[sic]*." (17 Supp. CT # 7, 4972; emphasis added.) When asked if she could choose the death penalty over life imprisonment in an appropriate case, Ms. S. wrote, "If it can be proven **without a doubt** by evidence the crime was committed. We must be very careful to listen." (17 Supp. CT # 7, 4974; emphasis added.) These answers indicated that Ms. S. lacked the ability to impose the death penalty *as a reasonable possibility.*" (*People v. Ashmus, supra,* 54 Cal.3d at 963.) No case can ever be proved without any doubt. Accordingly, had the prosecutor left Ms. S. on the

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25. Ms. S.'s manner of dress was also a reason for her excusal, however it was likewise not mentioned by the court when the court denied Smith's motion. (8 RT 2594, 2602.)

jury, he would have started the trial with a juror who was not going to impose the death penalty under any circumstances. The trial court stated that it found the prosecutor's concern in the this regard believable, and it properly found Ms. S. to have been excused on race-neutral grounds. (8 RT 2617.)

However, even the prosecutor's reasons which were not discussed by the court were sufficient for Ms. S.'s excusal. An unconventional manner of dress, as was described by the prosecutor for Ms. S., was a valid reason for the use of a peremptory challenge. (*People v. Wheeler, supra,* 22 Cal.3d at p. 275 [prosecutor may fear bias on the part of a juror simply because his clothes or hair length suggest an unconventional lifestyle].) Likewise, having a brother who had been involved with the juvenile justice system for the commission of crimes was a valid reason for the excusal of Ms. S. The use of peremptory challenges to exclude prospective jurors whose relatives and/or family members have been involved with the criminal justice system is not unconstitutional. (See *People v. Garceau* (1993) 6 Cal.4th 140, 172; *People v. Cummings* (1993) 4 Cal.4th 1233, 1282; *People v. Walker* (1988) 47 Cal.3d 605, 626; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690.) ""[A] prosecutor may reasonably surmise that a close relative's adversary contact with the criminal justice system might make a prospective juror unsympathetic to the prosecution."" (*People v. Cleveland* (2004) 32 Cal.4th 704, 733, quoting *People v. Farnam, supra,* 28 Cal.4th at p. 138.) "[S]keptisim about the fairness of the criminal justice system is a valid ground for excusing jurors [Citations omitted]." (*People v. Calvin, supra,* 159 Cal.App.4th 1377, 72 Cal.Rptr.3d 300, 307.)

Ms. S.'s feelings about the O.J. Simpson case were a further valid reason for her excusal. Ms. S. stated in her questionnaire that she was not upset about the O.J. Simpson verdict because "If they couldn't prove he murdered Nicole, then the verdict was fair. We should keep race out of it." (17 Supp. CT # 7, 4966.) Ms. S.'s answer suggested that she would require a much higher level

of proof to convict an individual than the law requires. Any prosecutor would have understandably been concerned by it. The prosecutor's genuine belief that Ms. S. would be less likely to follow the law based on her answer about the O.J. Simpson case was a valid race neutral reason excusing her. (*People v. Howard* (1992) 1 Cal.4th 1132, 1208.)

Smith complains that one of the reasons the prosecutor gave for excusing Ms. S. was that she had very little college or higher education, when in reality, Ms. S. had a bachelor's degree. (AOB 47.) Smith states that this demonstrates the prosecutor's reasons for using a peremptory challenge against Ms. S. were pretextual. Smith is incorrect. With numerous jurors having been part of the jury selection process in this case, it was inevitable that at some point the prosecutor would make a mistake in his recollection about some juror. Here, while Ms. S.'s questionnaire did indicate that she had a bachelor's degree from Pepperdine University, the prosecutor simply made a genuine mistake in his recollection about her education. Smith has not established otherwise. And, as this Court has made clear, a genuine "mistake" is a race-neutral reason for exercising a peremptory challenge. (*People v. Williams* (1997) 16 Cal.4th 153, 189, see also *People v. Phillips* (2007) 147 Cal.App.4th 810, 819.)

Prospective Juror Huey D.

Huey D. was the third African-American prospective juror excused by the prosecution with a peremptory challenge. (8 RT 2590.) After he was excused the defense raised the first of its two *Batson/Wheeler* motions. (8 RT 2591.) The court indicated that a prima facie showing (within the meaning of *Batson/Wheeler*) had been made. (8 RT 2593, 2607.) The prosecutor immediately pointed out that defense counsel had already emphasized some problems with Mr. D. (8 RT 2595.) Mr. D. was 70 years old and on medication for hypertension. (8 RT 2579-2581, 2595.) Earlier, while examining Mr. D., defense counsel had expressed concerns about Mr. D's

health and his overall stamina and his ability to sit through a long case. (8 RT 2579.) Defense counsel asked to voir dire Mr. D. in private because defense counsel did not want to appear to be challenging Mr. D's intelligence in front of the other prospective jurors. (8 RT 2579.) The court allowed defense counsel to voir dire Mr. D. in private, and during examination by defense counsel, Mr. D. stated "Yes, sure," when asked if he was fine. (8 RT 2581.) After Smith's initial *Batson/Wheeler* motion, the prosecutor pointed out that with regard to Mr. D., "Well, quite frankly, defense counsel emphasized all the problems we had with Mr. D." (8 RT 2595.)

The prosecutor also went on to point out that Mr. D's opinions regarding the death penalty were "extremely weak." (8 RT 2595.) The prosecutor stated that Mr. D. had a "no doubt" standard for imposing the death penalty. (8 RT 2595.) The prosecutor was concerned that Mr. D., a person with a master's degree, had no opinion about various high profile crimes committed in the previous two years. (8 RT 2604.) The prosecutor went on to state various other reasons for excusing Mr. D., as follows:

> He was asked what did he learn about these cases? He said, I learned that I - - what I already knew. There are many sides to a story. Again, rather unusual answer to what basically deals with the OJ case.
>
> In your opinion what are the biggest problems with our criminal justice system, and how it can be improved? I cannot think of a better way to solve serious problems and I have no suggestions on how to improve it. Again, I'll state this is an ex-school administrator and teacher. Then he was asked whether or not he was upset with the jury's verdict in the OJ Simpson case? He said, no, I felt that there was doubt.
>
> When asked his general feelings concerning the death penalty. He went through various statements ending with, I also felt that care should be used in sentencing someone to death. There should be **no doubt**.
>
> Are your feelings about the death penalty such that if a juror in a murder case you would never been able to vote for the penalty of death for the defendant *[sic]*? He left that unanswered. He wrote. I really have problems as to how this question is asked.
>
> I would always *[sic]* indicate that the majority of the jurors had no problems or were able to answer that question.

He was also asked, do you have negative or positive feelings about the death penalty? He answered I feel the death penalty should be used in extreme cases where there is **no doubt**.

(8 RT 2605; emphasis added.)

The prosecutor then pointed out that he was picking people from the panel who would work together well as leaders and followers. (8 RT 2616.) He wanted people who would work as a group. (8 RT 2616.) He did not want people who would conflict with each other. (8 RT 2616.) The prosecutor concluded his discussion of Mr. D. by saying:

I went through his particular questions. It is not difficult to see why he is no longer in this group. He is not a person involved in the community. He is not involved in any community activity. He is completely devoid of opinions concerning some of the hot issues in the community today. He is a person who showed confusion by defense counsel's own admittance, that he was not too aware of what was going on. I don't know if that was a result of his age, which is 70 years old, and I don't know. Again, why take that risk when there are other people whom I've evaluated who are a better fit within the total group?

(8 RT 2616-2617.)

With regard to the prosecutor's reasons, the trial court stated "I will accept the truthfulness of your statement. I don't - - I don't question the truthfulness." (8 RT 2617.)

Conclusion of First *Batson/Wheeler* Motion

The prosecutor concluded the first *Batson/Wheeler* motion by voicing his displeasure over being accused of something "terribly obnoxious." (8 RT 2620.)

I always find it personally upsetting to be accused of something I find frankly terribly obnoxious. In terms of jury group dynamics you look for one leader. At the most, you look for one leader and some lieutenants. I'm sure counsel is aware of the sociology in forming the appropriate group.

The Court did ask about Regina [S]. She's devoid of community or social activities in groups with children or some type of charitable organization that many of the people do. She has very, very limited

> newspaper contact, if any. Her contact with this community is extremely limited and, again, I'm going by the standard formed by the group of jurors here. We have many, many people who are involved in particular community group efforts, that are charitable in nature or involving children. That's the type of person I want involved in this case, quite frankly.
>
> And then, the particular excerpts that I quoted from her questionnaire, those weren't my interpretations. Those were exact quotations as they were in all three, and I don't feel counsel went through and said, so, know *[sic]*, they never said. Yes, they did say some alternative things. I fully admit that. But when you compare them to other people I consider stronger as possible jurors in terms of the scoring and so forth, and there are people who were less confused or had less conflict in their various answers.

(8 RT 2620.)

The trial court accepted the prosecutor's reasons for the use of his peremptory challenges against three African-American prospective jurors. The court said, "And I think the ultimate question whether there's purposeful discrimination, I don't at this point find that there has been. I don't believe that your motivation has been racial motivation." (8 RT 2621.) As pointed out *supra,* the court's ruling was supported by substantial evidence in the record. While there were some areas of the excused juror's answers that were ambiguous, conflicting, or appeared to be favorable to the prosecution, the prosecutor certainly was able to point to factors that made his reasons believable, palpable, and genuine. As the prosecutor pointed out, he was looking for "group dynamics" that would include some leaders and some followers that could all work together, and not be in conflict. (8 RT 2620.) Such reasoning has been accepted by this Court as proper reasoning for the use of peremptory challenges. (*People v. Johnson, supra,* 47 Cal.3d at 1220.) Accordingly, Smith's first *Batson/Wheeler* motion in this matter was properly denied.

Prospective Juror Elizabeth K.

At a later point in the jury selection process, after the prosecution had twice accepted the jury as constituted, the prosecution asked to approach the bench and indicated to the trial court that it planned to exercise a peremptory challenge on an African-American prospective juror named Elizabeth K. (9 RT 2696.) The defense indicated that it would raise another *Batson/Wheeler* motion if the prosecution carried through with its stated plan. (9 RT 2696.) The trial court deemed a *Batson/Wheeler* motion to have been made (even though Ms. K. had not been actually excused), found a prima facie showing had been made, and requested that the prosecutor state his reasons for excusing Ms. K. (9 RT 2696-2719.)

Ms. K. was a college educated woman (B.S. degree in management) who worked as a regional personnel director for Target Stores. (20 Supp. CT # 75724-5725.) She had served on a committee for a battered women's shelter, and had chaired other volunteer committees. (20 Supp. CT # 7, 5728.)

The prosecutor pointed out that he had accepted the jury as constituted multiple times with Ms. K. on the jury. (9 RT 2697.) But meanwhile, due to the peremptory challenges the defense had been exercising, "the character of the overall panel ha[d] changed dramatically." (9 RT 2697.) The combination of leaders and followers that the prosecutor had hoped would remain in place did not remain in place due to the defense's use of peremptory challenges. The prosecutor viewed Ms. K. as a leader and someone who was likely to become the jury foreperson if left on the jury. (9 RT 2697.) The prosecutor believed that some of the answers in Ms. K.'s questionnaire demonstrated a "feeling against the use of the death penalty." (9 RT 2697.) Because Ms. K. was an executive with a corporation, and a person with considerable leadership experience, the prosecutor was worried because there were "no other jurors left to counter her position or to interact with her or reason with her on the level of

sophistication that she ha[d] in her capacity or likely capacity as the foreperson or the foreperson in actual practice." (9 RT 2697.) The prosecutor said, "I believe that the weakest person on the panel would follow her lead, and I think she would take them down to her level of feeling concerning the death penalty." (9 RT 2697-2698.) The prosecutor felt Ms. K. had the lowest opinion about the death penalty of the jurors on the panel at the time, and he indicated that he would have removed her earlier, but the initial *Batson/Wheeler* motion had created a "chilling effect" on his use of peremptory challenges. (9 RT 2699.)

The prosecutor graded Ms. K. as a C- juror based solely on her questionnaire answers pertaining to the death penalty. (9 RT 2699-2700.) He pointed out that a supervisor in his office (Mr. Kochis) had also given Ms. K. a C- based on the same criteria. (9 RT 2699.) At the time of the second *Batson/Wheeler* motion, Ms. K. was the prosecutor's only C- person left on the jury. (9 RT 2699.) While the prosecutor liked the fact that Ms. K. had a "tremendous amount of group ability," he did not feel that her interactions with the remaining jurors would work well for the prosecution. (9 RT 2698.)

During the prosecution's voir dire examination of Ms. K. it was revealed that Ms. K.'s husband knew O.J. Simpson and had played on the same team with him in Buffalo. (9 RT 2585.) However, Ms. K. did not have strong feelings about the Simpson case. (9 RT 2585.) Ms. K.'s husband found the Simpson charges "hard to believe." (9 RT 2586.) Neither Ms. K. nor her husband followed the Simpson case on a daily basis, and at some point the two of them "stopped talking about it." (9 RT 2586.) The prosecutor found it very strange that under the circumstances Ms. K. and her husband would not have continued to have intelligent conversations about the case. (9 RT 2700.) The prosecutor felt Ms. K. was either "being disingenuous with [him] or with [them], or there [was] something else at play there." (9 RT 2700.)

There was a point during the jury selection process when the prosecutor felt Ms. K. "could be a good member of the panel," but this changed based on the peremptory challenges exercised by the defense. (9 RT 2699.) The prosecutor went on to recite many of Ms. K.'s jury questionnaire answers pertaining to the death penalty which he believed demonstrated she held negative views about the death penalty. (9 RT 2701-2707.)

While the prosecutor readily pointed out that none of Ms. K.'s answers would have supported a challenge for cause, her death penalty answers, in general, were simply the weakest of any of the prospective jurors that were currently on the panel. (9 RT 2702.) For example, in response to a question asking Ms. K. if she believed in an eye for an eye, she checked the box for "no"and she wrote, "Two wrongs do not make a right." (20 Supp. CT # 7, 5750.) When asked, "How strong is your belief in "an eye for an eye," Ms. K. wrote, "Not very." (20 Supp. CT # 7, 5750.) Ms. K. stated in her questionnaire that it "would be difficult" for her to face the defendant and state that her verdict was death, but she could do so if she had to. (20 Supp. CT # 7, 5753.) In answer to a question asking Ms. K. about her general thoughts on the death penalty and the benefit of imposing a death sentence on a person convicted of first degree murder with special circumstances, Ms. K. wrote, "I don't see a benefit in sentencing someone to death. I just don't think of it in those terms." (20 Supp. CT # 7, 5753.) In answer to a question asking Ms. K. if her position on the death penalty had changed in the previous ten years, she checked the box for "no," and wrote, "I have never taken a position on it one way or the other." (20 Supp. CT # 7, 5751.) The prosecutor found it difficult to believe that Ms. K. would not have taken a position on such an important issue such as the death penalty, and he felt "very uncomfortable" and like "there's a hidden agenda here." (20 Supp. CT # 7, 2704.)

After listening to the defense, the trial court concluded that the prosecutor's concerns about Ms. K.'s views on the death penalty were valid and approved of his use of a peremptory challenge to excuse her. (9 RT 2715-2716, 2720.) Even though none of Ms. K.'s answers would have supported a challenge for cause, as the primary leader left on the jury (with no one of "leader" caliber to neutralize her views) she would have been in a position to heavily influence the other jurors with her less than strong stance regarding the death penalty, and the prosecutor understandably had reason to be concerned with the overall structure of the jury just prior to the excusal of Ms. K. Furthermore, Ms. K.'s strong leadership skills as well as her less than genuine answers regard the O. J. Simpson case rendered her, as the prosecutor put it - - a "C-" juror - - and a prospective juror that most prosecutors would have had concerns about. As this Court has stated in the past: ""[A] party may decide to excuse a prospective juror for a variety of reasons, finding no single characteristic dispositive."" (*People v. Ledesma, supra,* 39 Cal.4th at 678, quoting *People v. Gray* (2005) 37 Cal.4th 168, 189, 33 Cal.Rptr.3d 451, 118 P.3d 496.)

This Court has recognized that the overall structure of a jury's makeup, as well as the stage of the jury selection, and the amount of peremptory challenges remaining, are all valid factors that play a role in the use of peremptory challenges. (*People v. Ledesma, supra,* 39 Cal.4th at 678.) Smith, however, argues that, "the most obvious indicator that the prosecutor's stated grounds for excusing [Ms. K.] was pretextual is that, before striking her, the prosecutor accepted the jury with Ms. [K.] on it three times." (AOB 101.) Quite to the contrary, respondent submits that this confirms the genuineness of the prosecutor's reasons in excusing Ms. K. As the prosecutor had been stating, Ms. K. *was acceptable* to the prosecution because she had a "tremendous amount of group ability." (9 RT 2698.) However, once the defense removed

the prosecutor's other leaders from the panel with its peremptory challenges, the prosecutor was left with Ms. K. as the primary leader on the panel with no one left to counter her "C-" view of the death penalty. A person with a "C-" view of the death penalty who was likely to become the jury foreperson (due to her leadership abilities) was simply not acceptable for the prosecution in a death penalty case. As this Court stated in *Ledesma, supra*:

> The prosecutor believed Irene H. might have been an acceptable juror under some circumstances, but she was not a leader, and at the time he excused her the group appeared to be lacking in leadership. We recognized the validity of this type of strategic decision in *People v. Johnson, supra,* 47 Cal.3d at page 1220, 255 Cal.Rptr. 569, 767 P.2d 1047: ""If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain.""

(*People v. Ledesma, supra,* 39 Cal.4th at 679.)

This Court Should Not Engage In Comparative Analysis for the First Time On Appeal

Smith's argument engages in a great deal of "comparative analysis" and encourages this Court to do so as well. Smith compares the dismissed jurors in question with other jurors, applies the reasoning given by the prosecutor with other jurors, and consistently faults the trial court for not likewise making the comparisons that Smith conveniently finds appropriate after his years of analyzing the cold record on appeal (which fails to disclose appearance, facial expressions, demeanor of the jurors, and strategy of the prosecutor to achieve a balance of leaders and followers on the jury). (AOB 76-95.) The comparisons Smith makes for the first time on appeal must be deemed forfeited,

inappropriate, and unfair. Had these concerns been raised below they could have been addressed by the prosecutor and the trial court could have ruled on them after having observed the jurors in-person.

Throughout Smith's engagement of comparing jurors in his brief, he continually cites to *Miller-El v. Dretke, supra,* 545 U.S. 231 as authority. (AOB 69-74, 88-89, 93.) Without specifically stating so, Smith is implicitly arguing that *Miller-El v. Dretke* requires comparative analysis, even when no such analysis was requested or conducted at the trial court level. However, since the United States Supreme Court decided *Batson*, this Court has consistently ruled that a reviewing court need not engage in comparative juror analysis for the first time on appeal. (*People v. Johnson, supra,* 47 Cal.3d at 1220-1221; *People v. Fuentes, supra,* 54 Cal.3d at 715; *People v. Johnson, supra,* 30 Cal.4th at 1320-1321.) This Court has explained that comparative juror analysis on a cold record is of questionable value because it does not account for certain key factors, including: a prosecutor's desire to maintain a certain mixture of attitudes or personalities on the jury; the changing threshold for juror acceptability as peremptory challenges are used up; and subtle nuances in prospective jurors' attitude, tone of voice and facial expression. (*Ibid.*)

Recently, the United States Supreme Court decided *Snyder v. Louisiana* (2008) 552 U.S. ___, 128 S.Ct. 1203, 2008 WL 723750,[26] an opinion in which the High Court used two juror comparisons that "reinforced the implausibility of [the prosecutor's] explanation" for excusing an African-American juror. (*Snyder v. Louisiana, supra,* 128 S.Ct. 1203, 1211-1212, 2008 WL 723750.) However, nothing in *Snyder v. Louisiana* requires this Court to abandon its well-established rule that comparative analysis is not proper when it is

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26. *Snyder* was published on March 19, 2008, during the preparation of respondent's brief and substantially after Smith's opening brief was filed.

conducted for the first time on appeal.[27/]

In *Snyder*, to begin with, the United States Supreme Court cautioned that "a retrospective comparison of jurors based on a cold appellate record ***may be very misleading when alleged similarities were not raised at trial.***" (*Snyder v. Louisiana, supra,* 128 S.Ct. 1203, 1211, 2008 WL 723750, 7; emphasis added.) More importantly, the *Snyder* opinion strongly implied that the issue of comparative analysis is one that state reviewing courts can deem procedurally barred:

> The Louisiana Supreme Court ***did not hold that petitioner had procedurally defaulted reliance on a comparison of the African-American jurors*** whom the prosecution struck with white jurors whom the prosecution accepted. On the contrary, the State Supreme Court itself made such a comparison. See 942 So.2d 484, 495-496 (2006).

(*Snyder v. Louisiana, supra,* 128 S.Ct. 1203, 1211, fn. 2, 2008 WL 723750; emphasis added.)

The guidance the United States Supreme Court is providing with this language is that state courts are free to develop their own procedural rules for preserving the cognizability of comparative analysis issues on appeal. Clearly, this Court has done precisely that with its long line of opinions, beginning with *People v. Johnson, supra,* 47 Cal.3d 1194, pointing out the unfairness of allowing comparative analysis for the first time on appeal, and refusing to engage in it. (*People v. Johnson, supra,* 47 Cal.3d at 1220-1221.)

Furthermore, it must be emphasized that the Court, in *Snyder,* engaged in thorough analysis of the facts in the record and concluded that the prosecutor's proffered justification for excusing the juror in question was "suspicious" *before* making any juror comparisons. (*Snyder v. Louisiana,*

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27. The issue of whether comparative analysis must be engaged in for the first time on appeal is currently pending in this Court. (Review granted in *People v. Lenix* (S148029), January 24, 2007.)

supra, 128 S.Ct. 1203, 1211, 2008 WL 723750.) Without the need for any juror comparisons, the *Snyder* opinion established that the appellate record did not support the prosecutor's reasoning (i.e., the record demonstrated that the juror in question, a university student, would not have missed a significant amount of his academic requirements due to jury service). (*Ibid.*) The two juror comparisons that were made in *Snyder* merely "reinforced" the invalidity of a prosecutor's reasoning that was devoid of support in the record to begin with. (*Id.* at p. 1211.) They were not the primary reason for finding *Batson* error.

Additionally, the *Snyder* opinion was careful to point out, before engaging in any comparisons, that "the shared characteristic, *i.e.,* concern about serving on the jury due to conflicting obligations, was ***thoroughly explored by the trial*** court when the relevant jurors asked to be excused for cause. [Fn. omitted.]" (*Snyder v. Louisiana, supra,* 128 S.Ct. 1203, 1211, 2008 WL 723750; emphasis added.) During the first phase of the jury *voir dire* in *Snyder*, the prospective jurors were personally screened *by the trial court.* More than 50 prospective jurors reported obligations that would interfere with jury service. "In each of those instances, the nature of the conflicting commitments was explored, and some of these jurors were dismissed." (*Snyder v. Louisiana, supra,* 128 S.Ct. 1203, 1206, 2008 WL 723750) Under such circumstances, the overall similarities and differences were "thoroughly explored" by the trial court prior to the *Batson* motion being ruled upon. They were not facts that were being examined for the first time on appeal, nor were they facts that were lacking development in the record.

Three years after *Batson*, this Court rejected attempts to use comparative juror analysis for the first time on appeal to evaluate a prosecutor's motivation in striking prospective jurors. In *People v. Johnson, supra,* 47 Cal.3d 1194, this Court explained that a comparison analysis "does not properly take into account

the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar." (*People v. Johnson*, 47 Cal.3d at p. 1220.) Among those factors are the desire to have a certain mix or combination of jurors at all times, and the tendency to more freely use peremptory challenges when many are still available. (*Ibid.*)

> Thus at the beginning of voir dire the lawyer may exercise his challenges freely against a person who has had a minor adverse police contact and later be more hesitant with his challenges on that ground for fear that if he exhausts them too soon, he may be forced to go to trial with a juror who exhibits an even stronger bias.

(*People v. Johnson*, *supra*, 47 Cal. 3d at p. 1220.)

Thus, while a prospective juror who has been excused by peremptory challenge may appear "on paper" to be "substantially similar" to one retained, "the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record" to compare the two. (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1221.)

This Court subsequently noted that comparative juror analysis on a cold record cannot account for a lawyer's assessment of "prospective jurors' body language or manner of answering questions," which are legitimate race-neutral factors. (*People v. Fuentes, supra,* 54 Cal.3d at 715; see also *People v. Arias* (1996) 13 Cal.4th 92, 136, fn. 16 [comparative juror analysis is "largely beside the point, because it ignores the legitimate subjective concerns" that go into jury selection].)

In *People v. Montiel* (1993) 5 Cal.4th 877, this Court stated that if a trial court makes a "sincere and reasoned effort" to evaluate the prosecutor's reasons for striking minority prospective jurors, "an appellate court will not reassess good faith by conducting its own comparative juror analysis." (*Id.* at p. 909; see also *People v. Burgener, supra*, 29 Cal.4th at p. 864 [as long as a trial court makes "a sincere and reasoned effort to evaluate the nondiscriminatory

justifications offered, its conclusions are entitled to deference on appeal"].)

In *People v. Johnson, supra,* 30 Cal.4th 1302, this Court re-iterated the principle that comparative juror analysis is "unreliable when divorced from the context of trial." (*Id.* at p. 1320.) But it added that such analysis might be appropriate in the trial court, provided that defense counsel points to relevant prospective jurors for the court to evaluate. (*Id.* at pp. 1320-1321.) This Court concluded:

> Accordingly, we maintain our long-standing practice. When the objecting party presents comparative juror analysis to the trial court, the reviewing court must consider that evidence, along with everything else of relevance, in reviewing, deferentially, the trial court's ruling. When such an analysis was not presented at trial, a reviewing court should not attempt its own comparative juror analysis for the first time on appeal, especially when, as here, the record supports the trial court's finding of no prima facie case. While we declined to prohibit the practice outright, we are hard pressed to envision a scenario where comparative juror analysis for the first time on appeal would be fruitful or appropriate.

(*Id.* at pp. 1324-1325.)

In that same case, this Court analyzed *Miller-El v. Cockrell* (2003) 537 U.S. 322 [123 S.Ct. 1029, 154 L.Ed.2d 931], the forerunner to *Miller-El v. Dretke*, and found that it did not require an appellate court to engage in comparative juror analysis for the first time on appeal. (*People v. Johnson, supra*, 30 Cal.4th at p. 1322.) This Court continued:

> Other courts may certainly adopt different procedures than we. But we do not believe that comparative juror analysis for the first time on appeal is constitutionally compelled. The *Batson* court itself stated that in deciding whether the defendant has made the necessary showing, "the *trial court* should consider all relevant circumstances." (*Batson, supra,* 476 U.S. at pp. 96-97 [106 S.Ct. at p. 1723], italics added.) It relies heavily on "trial judges, experienced in supervising *voir dire*," to make this determination. (*Id.* at p. 97 [106 S.Ct. at p. 1723].)

(*People v. Johnson, supra*, 30 Cal.4th at p. 1324, italics in original.)

The related principle that deference is owed to a trial court's credibility determination in assessing the genuineness of a prosecutor's stated reasons for peremptorily challenging a prospective juror was restated in *Rice v. Collins* (2006) 546 U.S. 333 [126 S.Ct. 969, 163 L.Ed.2d 824]. Justice Breyer, in a concurring opinion joined by Justice Souter, wrote:

> The trial judge is best placed to consider the factors that underlie credibility: demeanor, context, and atmosphere. And the trial judge is best placed to determine whether, in a borderline case, a prosecutor's hesitation or contradiction reflect (a) deception, or (b) the difficulty of providing a rational reason for an instinctive decision. Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation. These circumstances mean that appellate courts will, and must, grant the trial courts considerable leeway in applying *Batson*.

(*Rice v. Collins*, 5466 U.S. at 343, Breyer, J., concurring, citation omitted.)

Thus, over a period of several years, the U.S. Supreme Court has made clear that a trial court's evaluation of a prosecutor's stated reasons for striking a minority prospective juror is entitled to great deference. That is because much of the determination rests on a first-hand evaluation of the prosecutor's credibility, which is difficult to assess outside of the courtroom. And although the prosecutor may be required to provide race-neutral reasons for striking certain prospective jurors, the burden regarding proving racial motivation rests with, and never shifts from, the defendant.

Likewise, nothing in *Miller-El v. Dretke* requires this Court to abandon its well-established rule precluding comparative analysis for the first time on appeal. *Miller-El v. Dretke* involved extraordinary procedural and factual circumstances that prompted the United States Supreme Court to conduct a detailed comparative juror analysis for the first time in the federal habeas context. (*Miller-El v. Dretke, supra,* 545 U.S. at p. 253-254.) Such an extraordinary step was warranted because the record showed that the trial court

failed to conduct a good-faith effort to root out racial discrimination in jury selection. Such circumstances are not present in this case. (*Miller-El v. Dretke, supra,* 545 U.S. at p. 253-254.)

In *Miller-El v. Dretke*, the U.S. Supreme Court employed detailed comparative juror analysis as part of its evaluation into the reasonableness of the Texas state courts' determination that the prosecutors did not engage in purposeful discrimination in jury selection. However, *Miller-El v. Dretke* involved extraordinary procedural and factual circumstances that justified such an analysis for the first time on habeas corpus review. In *Miller-El v. Dretke*, the defendant was tried before the Supreme Court rendered its decision in *Batson*. (See *Miller-El v. Dretke, supra*, 545 U.S. at p. 236.) And, although there was a post-*Batson* evidentiary hearing in the matter (two years *after* the actual trial), the state of the record by the time the case reached the Supreme Court was such that the conclusions and findings reached by the Texas court, as well as the reasons provided by the prosecutor, were themselves based on comparisons of the jurors. The difficulties in the case were compounded by a unique system of "jury shuffling" that takes place in Texas. (*Miller-El v. Dretke, supra*, 545 U.S. at p. 253-254.)

The trial court in *Miller-El v. Dretke* could not appreciate its duties under *Batson* at the time of voir dire, did not seem to understand the standards even at the time of the *Batson* hearing, and offered no support for its written findings that comparisons among prospective jurors failed to show discriminatory intent. Under those circumstances, the trial court's findings were not entitled to deference. As this Court has noted, *Miller-El v. Dretke* "is an extreme case, in which the evidence of the Dallas County, Texas, District Attorney's Office's practice of improperly challenging African-American prospective jurors on the basis simply of race was overwhelming." (*People v. Huggins, supra,* 38 Cal.4th at 232.) Accordingly, *Miller-El v. Dretke* is best viewed as an example of

"highly case-specific error correction." (See *Montana v. Egelhoff* (1996) 518 U.S. 37, 52 [116 S.Ct. 2013, 135 L.Ed.2d 361] [citing *Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297]].) It was not a decision that requires this Court to abandon its well-established rule that comparative analysis is not permitted for the first time on review.

Likewise, *Snyder v. Louisiana, supra,* 128 S.Ct. 1203, 2008 WL 723750, as discussed above, does not change the law in California. The U.S. Supreme Court cautioned that comparative analysis can "be very misleading when alleged similarities were not raised at trial." (*Snyder v. Louisiana, supra,* 128 S.Ct. 1211, 2008 WL 723750.) The U.S. Supreme Court made comparisons in *Snyder* because the Louisiana Supreme Court had not ruled comparative analysis to be procedurally defaulted (implying that it could have done so), and because the Louisiana Supreme Court had engaged in such analysis itself. (*Snyder v. Louisiana, supra,* 128 S.Ct. 1211, fn. 2, 2008 WL 723750.) The comparisons made in *Snyder* were only used to *reinforce* a determination that the prosecutor's reasoning was not supported in the record. And, the comparisons were made with facts that had been "thoroughly explored" by the trial court itself. (*Ibid.*)

The numerous comparisons made by Smith all involve individual characteristics and/or opinions that fail to take into account the prosecutor's stated jury selection strategy of balancing "group dynamics." (8 RT 2602, 2616, 2620.) The prosecutor clearly expressed to the trial court that he was attempting to achieve a particular mixture of leaders and followers that would work together well as a group. (8 RT 2616, 2620.) Under this strategy, a leader with somewhat of a weak stance on the death penalty might be acceptable at an early stage of jury selection if there were one or two leaders with strong death penalty stances on the panel to counter-balance the leader with the weak death penalty view. (9 RT 2697-2700.) However, the overall composition and

dynamics of the jury panel was constantly changing. Every time the defense used a peremptory challenge to exclude one of the prosecutor's leaders or followers, the dynamics of the jury changed and the prosecutor had to reassess the overall mixture of the panel. Under the prosecutor's jury assembling strategy, a leader or follower once found to be acceptable, might suddenly become unacceptable based on peremptory challenges exercised by the defense. (9 RT 2697-2699.)

With the prosecutor's primary focus during jury selection being "group dynamics" and the "sociology in forming the appropriate group," Smith's comparisons of individual characteristics or opinions (being made for the first time on appeal) are unfair on their face. (8 RT 2620.) Isolating numerous individual characteristics (i.e., divorced vs. married; healthy vs. unhealthy; educated vs. not educated; pro law enforcement vs. anti law enforcement) as Smith does in his opening brief (AOB 76-85), does not account for the prosecutor's clearly stated strategy. Hence, Smith's comparisons are manifestly unfair comparisons being made for the first time on appeal when the trial prosecutor can no longer address them.

On a cold record, jurors that shared individual characteristics (such as being divorced or having health problems, etc.) were not necessarily similar individuals when compared to how they would mix with the jury panel as a whole. The prosecutor's stated reasons for the use of his peremptory challenges must not be isolated, as Smith does, but rather, must be viewed with the prosecutor's stated strategy in mind (something comparative analysis does not do). Accordingly, comparative analysis has no place in this appeal, and this Court should not engage in it.

In summary, this Court should continue to apply its rule of two decades that comparative analysis is procedurally barred when raised for the first time on appeal. The U.S. Supreme Court has done nothing to change this rule, and

neither has Smith given this Court a viable reason for a change.

Statistical Analysis

Smith contends that the statistical evidence alone demonstrates that the prosecutor was acting in a purposely discriminatory fashion. (AOB 69.) This is clearly incorrect. To begin with, the exact amount of African-American prospective jurors that were in the jury pool is uncertain from the record. Smith excludes some jurors from his analysis who may have been African-American. (See AOB 61, fn. 51.) He excluded them because they did not provide racial identification on their questionnaires. (*Ibid.*) Smith's trial counsel represented that there were a total of seven African-Americans in the jury pool. (8 RT 2591.) Again, the record is unclear on the exact figure, but for the sake of argument, seven will be used.

Among the prosecutor's many peremptory challenges, four were African-Americans (4 of 13 peremptory challenges). Of the remaining African-American prospective jurors, one African-American juror, Mr. C., was excused at the request of the defense because he had an apparent hearing problem. (9 RT 2725-2728.) The prosecutor wanted to examine prospective juror Mr. C. in an attempt to possibly retain him on the jury, but was not given that opportunity. (9 RT 2727-2728.) The prosecutor stated: "I would have to say, that, obviously, I like Mr. [C.] a great deal, in terms of his background, his leadership, his education, and he specifically works in youth groups, and with racial issues. I think, I'm beating a dead horse, but would the Court mind if at this [time I] asked a few questions?" (9 RT 2727.) While the court may have correctly determined that Mr. C.'s hearing problem necessitated removing him from the jury, the prosecutor's comment nevertheless demonstrated a clear willingness on the part of the prosecutor to have African-Americans on the jury. Indeed, it appears from the prosecutor's comment that but for Mr. C.'s hearing problem, the prosecutor would have kept him on the jury.

While it does not appear that any African-Americans ultimately served on Smith's jury, such did not occur as the result of any purposeful discrimination. The fact that four of the five African-American jurors to reach the jury panel were excused by the prosecution does not establish otherwise. While statistics may serve, in some instances, to establish a prima facie showing, they do not serve as a basis to ultimately infer discrimination. (*People v. Bonilla* (2007) 41 Cal.4th 313, 344.) Nothing in the prosecutor's explanation shows that he *chose* for the jury to ultimately end up without African-American jurors on it. (*Hernandez v. New York* (1991) 500 U.S. 352, 360-363 [111 S.Ct. 1859, 114 L.Ed.2d 395].) Even if the prosecutor's criteria for excluding jurors would have resulted in a "high percentage" of African-Americans being excluded, "that fact alone would not cause the criterion to fail the race-neutrality test." (*Ibid.*) Moreover, had Mr. C. (an African-American) not been excused from the jury (something that occurred contrary to the prosecution's stated desire), the percentage of African-American's on the jury (1 of 12; approximately 8%) would have nearly mirrored the percentage of African-American's in the jury pool (7 out of 106; approximately 8.5%). (8 RT 2591.) This near mirroring of the jury pool is a factor that works against Smith's claim of purposeful discrimination. (See *People v. Bonilla, supra,* 41 Cal.4th at 344-346.)

Conclusion

In conclusion, substantial evidence in the record supports the trial court's determination that the prosecutor's reasons for the use of peremptory challenges against four African-American prospective jurors were race-neutral, and were genuine reasons. Smith attempts (throughout much of his argument) to engage in comparative analysis with a cold record must not be allowed for the first time on appeal by this Court. Such analysis does not allow for consideration of the numerous strategic factors that enter into the structuring of a jury. And, such

analysis is unfair to both the trial court and the prosecution because it fails to give them an opportunity to address the cold-record manipulating that Smith is now engaging in.

Smith's *Batson/Wheeler* motions were handled by the trial court in a fair, thorough, and proper manner, and they were handled in accordance with established caselaw. There is a presumption that a prosecutor uses his or her peremptory challenges in a constitutional manner. (*People v. Clair* (1992) 2 Cal.4th 629, 652.) And, this Court gives great deference to the trial court in distinguishing bona fide reasons from sham excuses. (*People v. Fuentes, supra,* 54 Cal.3d at p. 714; *People v. Wheeler, supra,* 22 Cal.3d at p. 282.) The trial court spent a great deal of time addressing Smith's *Batson/Wheeler* motions, and saw to it that a thorough record was made of the prosecution's reasons for the peremptory challenges in question. The trial court was in the best position to observe the prospective jurors, and to observe the prosecutor and his demeanor and determine whether his reasons were genuine. (*People v. Calvin, supra,* 159 Cal.App.4th 1377, 72 Cal.Rptr.3d 300, 309-310.) At this point, the trial court's credibility findings must be deferred to by this Court as they were based on substantial evidence in the record, and after full inquiry into the jurors' questionnaires, the jury voir dire examination, and the prosecutor's race-neutral reasoning.

II.

THE TRIAL COURT DID NOT HAVE A SUA SPONTE DUTY TO INSTRUCT THE JURORS ON LESSER INCLUDED OFFENSES OF FIRST DEGREE MURDER

Smith argues that the trial court committed reversible error by failing to instruct the jury sua sponte on the following lesser included offenses of first degree premeditated and deliberated murder: (1) express malice second degree murder, (2) implied malice second degree murder, (3) heat of passion voluntary

manslaughter, and (4) imperfect self-defense voluntary manslaughter. (AOB 115-200.) Smith is not entitled to raise this argument on appeal as he invited any error with regard to lesser included offenses of first degree premeditated and deliberated murder by expressly telling the trial court that he did not want any such instructions to be given. If Smith is entitled to raise the argument, it is without merit as the evidence pertaining to the killing of Joshua Rexford overwhelmingly established that the killing was well-planned out, well-thought out, and was nothing less than murder with premeditation and deliberation. The lesser offenses Smith refers to were not supported by substantial evidence, and the trial court certainly had no sua sponte duty to instruct on them in view of Smith's defense that he was not even the killer.

A. Invited Error

Pursuant to the doctrine of invited error, Smith is barred from raising this contention on appeal because both defense counsel and Smith expressly stated to the court that they did not want the jury instructed on lesser forms of homicide. (14 RT 4563-4564, 4566.)

During discussion of jury instructions, the following colloquy took place between the trial court, both counsel, and Smith. (14 RT 4563.)

> THE COURT: ..... So now we need to talk about what offense I'm going to instruct on. Does everybody agree there's no manslaughter here?"
>
> MR. FAAL [Defense Counsel]: Yes.
>
> THE COURT: Do you want me to instruct on second degree?
>
> MR. FAAL: No. No. And the record should reflect that I've discussed that with my client.
>
> THE COURT: I don't know that you have a veto on it, but is that - - is that also your request not to instruct on second degree?

DEFENDANT SMITH: Yes, it is, your Honor.

THE COURT: And Mr. McDowell?

MR. McDOWELL [The Prosecutor]: Yes.

THE COURT: I - - I think I - - I think that even apart from any tactical issues I can't think of a theory upon which anybody could second-guess your decision, Mr. Faal, because I just cannot think of - - of any theory other than a first degree, whoever did it, that it was a first degree and - - and I would not want anyone to perceive - - to sit around and try and second-guess your wisdom or your judgement because I don't see a theory there.

(14 RT 4563-4564.)

As the record clearly establishes, defense counsel thoroughly thought out the matter of whether the jury should be instructed on lesser forms of homicide, and discussed the issue with Smith. Both defense counsel and Smith expressly informed the court that it was their desire not to have the jury instructed with lesser offenses. (14 RT 4563-4564.) Accordingly, any error in not providing the lesser offense instructions Smith now claims should have been given to the jury was forfeited as "invited error" by counsel's express, reasoned, tactical decision to refuse such instructions. (*People v. Duncan* (1991) 53 Cal.3d 955, 969-970; *People v. Cooper* (1991) 53 Cal.3d 771, 831.)

> [A] defendant may not invoke a trial court's failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence. [Citations.] In that situation, the doctrine of invited error bars the defendant from challenging on appeal the trial court's failure to give the instruction.

(*People v. Horning* (2005) 34 Cal.4th 871, 905, quoting *People v. Barton* (1995) 12 Cal.4th 186, 198.)

Smith contends that the doctrine of invited error does not apply because defense counsel "merely accepted" the trial court's stated assessment that the

evidence did not support lesser offenses, and because no tactical purpose was stated on the record. (AOB 164-171.) These arguments are without merit. Defense counsel did not "merely accept" the trial court's assessment. He agreed with the court that the evidence did not support manslaughter instructions, and then when asked ***if he wanted*** instructions on second-degree murder to be given, defense counsel stated, "No. No. And the record should reflect that I've discussed that with my client." (14 RT 4563; emphasis added.) This statement demonstrates defense counsel was acting affirmatively to prevent the court from instructing on the lesser offenses, and it demonstrates that defense counel's decision was not a spur of the moment decision, nor was it a mere acceptance of the trial court's assessment. Rather, the decision was one that was discussed with Smith, and both defense counsel and Smith decided they did not want to invite a compromise verdict in the case. Later, when the trial court suggested that second degree murder instructions would be "to invite a compromise verdict," defense counsel agreed. (14 RT 4566.) The decision made by Smith and his counsel could not have been anything other than a strategic decision to pursue an "all-or-nothing" verdict based on Smith's defense that he was not the shooter (and did not know that a shooting was going to take place), and the People's evidence that the shooting was well-planned out by Smith (up to Smith's final telephone calls that were made in Mr. Honess's apartment minutes before the shooting).

Furthermore, to demonstrate that defense counsel's decision was well-thought out and tactical in nature, when it came to the counts pertaining to victims Pupua and Badibanga, defense counsel openly requested lesser included offense instructions for those counts. (14 RT 4583-4584.) Defense counsel stated:

> MR. FAAL: Your Honor, for the record I'll state that I believe that, given the state of the evidence, I fully agree with the Court that a jury could conclude that it was an assault with a deadly weapon against

Walter and Freddie. Therefore, I think that I have an obligation to request ***those lessers***.

(14 RT 4583-4584; emphasis added.)

The trial court then agreed with defense counsel and reiterated that the giving of lesser offense instructions was contrary to Smith's desire that the jury not be able to compromise:

THE COURT: I think I just have to, Mr. Faal - - I appreciate ***Mr. Smith wants the jury not to compromise on this case, and I understand that loud and clear.*** I just think on that one, I really have to - - if the jury accepts your position, I don't think that that invites them to come in in between. But I think off these facts, that a jury could absolutely conclude that the killer came in intending to kill Joshua, and it was just random shots that happened to coincidentally be near Freddie and Walter.

And, of course, one real strong reason why I think the evidence supports that is from that close distance, neither one of them were hit. I think one could certainly conclude that from that close distance, if the shooter wanted to hit them, it wasn't that hard to hit them.

(14 RT 4584; emphasis added.)

As the record demonstrates, the issue of lesser included offense instructions was well-thought out by the court as well as by defense counsel and Smith. Defense counsel had discussions on the subject with Smith. Defense counsel was of the view that the evidence did not support a lesser offense of the first degree murder count, and did not want the jury to have a way of compromising.[28/] Moreover, such instructions were inconsistent with Smith's defense that he did not commit the murder of Rexford. (See *People v. Horning*

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28. On pages 167-168 of Smith's opening brief, Smith contends that defense counsel actually wanted lesser-included offense instructions to be given, and that the record shows he actually disagreed with Smith's desire for no lesser-include offense instructions. This is misleading. The portions of the record Smith cites to pertained to counts 2 and 3 (regarding victims Pupua and Badibanga) and not to the murder count. (See 17 RT 5394-5395.)

(2004) 34 Cal.4th 871, 904-906.) The decision made in this case by the defense counsel and Smith himself was a tactical decision, and it was a decision that Smith is now bound by. (*Ibid.*) It was clearly not a decision made "by accident or mistake." (See *People v. Coffman* (2005) 34 Cal.4th 1, 49.) And, in cases such as the instant case, "involving an action affirmatively taken by defense counsel, [this Court has] found a clearly implied tactical purpose to be sufficient to invoke the invited error rule." (*People v. Coffman.* 34 Cal.4th at p. 49.) In a virtually identical situation in *Horning, supra,* a capital case, this Court made abundantly clear that the doctrine of invited error must be invoked and stated:

> The record here shows that defendant's ""lack of objection to the proposed instruction was more than mere unconsidered acquiescence."" (*People v. Avalos* (1984) 37 Cal.3d 216, 229, 207 Cal.Rptr. 549, 689 P.2d 121.) Rather, defendant did not want the instructions because they were inconsistent with his defense that he did not commit the crime at all. (*People v. Hardy* (1992) 2 Cal.4th 86, 184, 5 Cal.Rptr.2d 796, 825 P.2d 781.) Indeed, although it was not required, the court obtained defendant's personal agreement that he did not want the instructions. (See *People v. Cooper, supra,* 53 Cal.3d at pp. 827-828, 281 Cal.Rptr. 90, 809 P.2d 865.) Accordingly, he cannot complain on appeal of the court's failure to give the instruction.

(*People v. Horning, supra,* 34 Cal.4th at 905-906.)

Accordingly, the invited error doctrine should likewise be invoked with regard to Smith's contention that lesser included instructions should have been given for the first degree murder count.

B. The Trial Court's Sua Sponte Duty Regarding Lesser Included Offenses

A trial court must instruct the jury sua sponte on an uncharged offense that is lesser than, and included in, a greater offense only if there is substantial evidence that, if accepted, would absolve a defendant from guilt of the greater but not the lesser offense. (*People v. Waidla* (2000) 22 Cal.4th 690, 737; *People v. Breverman* (1998) 19 Cal.4th 142, 154-155; *People v. Montoya*

(1994) 7 Cal.4th 1027, 1047.) The obligation to instruct on lesser included offenses exists even when, as a matter of trial tactics, a defendant not only fails to request the instruction but expressly objects to it being given.[29] (*People v. Barton, supra,* 12 Cal.4th at p. 195; *People v. Marshall* (1996) 13 Cal.4th 799, 846; *People v. Breverman, supra,* 19 Cal.4th at p. 155.) An offense is a lesser included offense if the charged offense, either by statutory definition or as described in the accusatory pleading, cannot be committed without also committing the lesser offense. (*People v. Lohbauer* (1981) 29 Cal.3d 364, 368-369; *People v. Stewart* (2000) 77 Cal.App.4th 785, 795.) There is no obligation to instruct sua sponte on lesser included offenses, however, when there is no evidence the offense was less than that charged. (*People v. Breverman, supra,* 19 Cal.4th at p. 154; *People v. Noah* (1971) 5 Cal.3d 469, 479.)

C. Lesser Forms Of Homicide Were Not Supported By The Evidence

1. Second Degree Murder

Murder is the unlawful killing of a human being with either express or implied malice. (Pen. Code §§ 187, 188; see *People v. Whitfield* (1994) 7 Cal.4th 437, 450.) Malice is express "when there is manifested a deliberate intention unlawfully to take the life of a fellow creature." (Pen. Code, § 188; *People v. Hansen* (1994) 9 Cal.4th 300, 307-308; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.) Malice is implied, "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (Pen. Code, § 188; *People v. Hansen, supra,*

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29. However, "[d]espite the circumstance that it is the court that is vested with authority to determine whether to instruct on a lesser included offense, the doctrine of invited error still applies if the court accedes to a defense attorney's tactical decision to request that lesser included offense instructions not be given." (*People v. Prince* (2007) 40 Cal.4th 1179, 1265.)

9 Cal.4th at p. 308; *People v. Nieto Benitez, supra*, 4 Cal.4th at pp. 102-103.) Implied malice requires the performance of "'an act, the natural consequences of which are dangerous to life'" and that the "'the defendant knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life.'" (*People v. Hansen, supra*, 9 Cal.4th at p. 308, quoting *People v. Patterson* (1989) 49 Cal.3d 615, 626, and *People v. Watson* (1981) 30 Cal.3d 290, 300.) "Murder that is committed with malice but is not premeditated is of the second degree." (*People v. Prince, supra,* 40 Cal.4th at 1266, quoting *People v. Ramirez* (2006) 39 Cal.4th 398, 464, see also Pen. Code § 189.)

First degree murder includes all murder which is perpetrated by "any . . . kind of willful, deliberate, and premeditated killing, ..." (Pen. Code § 189.) The mental state required is "a deliberate and premeditated intent to kill with malice aforethought." (*People v. Hart* (1999) 20 Cal.4th 546, 608, citing *People v. Berryman* (1993) 6 Cal.4th 1048, 1085 and citing Pen. Code §§ 187, subdivision (a) and 189.)

> In this context, "'premeditated'" means "'considered beforehand,'" and "'deliberate'" means "'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.'" (CALJIC No. 8.20 (5th ed. 1988), quoted with approval in *People v. Perez* (1992) 2 Cal. 4th 1117, 1123 [9 Cal. Rptr. 2d 577, 831 P.2d 1159].) The process of premeditation and deliberation does not require any extended period of time. "'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .'" [Citations.]

(*People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

In this case, the jury was presented with overwhelming evidence of Smith's investigating, plotting, planning, premeditating, and deliberating the killing of Joshua Rexford. From the time shortly after Manuel Farias was killed, Smith was saying that "they were going to get whoever did this" for Manuel. (11 RT 3431.) Smith began asking people questions about Rexford,

such as "How was he. What's he like." (11 RT 3445.) Smith asked Holloway, "[a]bout where he [Rexford] hung out, how - - what type of person he was." (11 RT 3456.) On the night before the shooting of Rexford, Smith was at the apartment complex where the shooting occurred. (3rd Supp. CT vol. 3, 907.) On the morning of the killing, Smith surveilled the apartment for a considerable amount of time, and was observed within the apartment complex by several witnesses. (10 RT 2981, 3255, 3826-3827.) During much of the surveillance period, Smith was by himself. (12 RT 3827.) He did not appear anxious, and did not appear to need any help. (12 RT 3851.) Two "hang-up calls" were placed to Pupua's apartment on the morning of the shooting. (9 RT 2859, 2871.) While in Mr. Honess's apartment, Smith clearly possessed a gun, he used Mr. Honess's telephone (then cut the telephone lines), he appeared to be in charge of the individuals who entered Mr. Honess's apartment, and he demanded that one of his cohorts keep watch through Honess's window. (10 RT 2986-3017.) When Smith ultimately left Honess's apartment and entered Pupua's apartment, he entered firing his 9 millimeter handgun without any interaction or communication with the victims. (9 RT 2874-2882.) All in all, the prosecution's evidence clearly and unequivocally demonstrated that the killing of Rexford was premeditated and deliberated murder and nothing less.

Smith, on the other hand, testified that he did not kill Joshua Rexford. (15 RT 4789.) Rather, according to Smith, he was kidnapped by some individuals, he did not have a gun, he never pointed a gun at anyone, and he did not know that anybody was going to be killed. (15 RT 4791-4816.) When, according to Smith, another individual opened fired in Pupua's apartment, Smith claimed he was not part of the shooting, and in fact, he ran away from the apartment. (15 RT 4823.) Thus, under the state of the evidence, Smith was either guilty of first-degree premeditated and deliberated murder, or he was not guilty of any form of homicide at all.

Accordingly, if Smith was the person who gunned down Joshua Rexford (and the jury in this case clearly found that he was) there was absolutely no conceivable way that the killing was anything other than first-degree premeditated and deliberated murder. Thus, under the state of the evidence, the trial court did not have a sua sponte duty to instruct the jury on second-degree murder as Smith contends.[30/]

2. Manslaughter

A defendant who intentionally and unlawfully kills lacks malice only in limited, explicitly defined circumstances: either when the defendant acts in a "sudden quarrel or heat of passion" or when the defendant kills in "unreasonable self-defense." (*People v. Barton, supra,* 12 Cal.4th at p. 199.)

The factor which distinguishes the "heat of passion" form of voluntary manslaughter from murder is provocation. (*People v. Lee* (1999) 20 Cal.4th 47, 59.) The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*People v. Lee, supra,* 20 Cal.4th at p. 59.)

> Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as

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30. Smith also argues that he could have been found guilty of second-degree murder based on "aider and abettor" and/or "felony-murder" (based on negligent discharge of a firearm) theories. (AOB 135-140.) These contentions require little, if any, response. The evidence provides no support whatsoever for these theories. The prosecution's evidence plainly showed Smith as the shooter, not an aider and abettor. And, there was nothing remotely demonstrating a "negligently" discharged firearm. Rather, Smith carried out a well-planned premeditated and deliberated murder. As for Smith's testimony, it indicated that Smith was not aiding and abetting his supposed kidnappers in any manner, and he could not have been guilty of felony-murder (via negligent discharge of a firearm) because he testified he did not even have possession of a gun during the shooting. (15 RT 4816.)

> would cause the ordinary reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.'

(*People v. Lee, supra,* 20 Cal.4th at p. 59, quoting *People v. Barton, supra*, 12 Cal.4th at p. 201; see *People v. Breverman, supra,* 19 Cal.4th at p. 163.)

Thus, the heat of passion theory of voluntary manslaughter involves both objective and subjective elements. (*People v. Wickersham* (1982) 32 Cal.3d 307, 326-327.) While the subjective element requires that the defendant be under the actual influence of strong passion at the time of the homicide, the objective or reasonable person element of sufficient provocation must also be met. (*Ibid.*)

Smith speculates that somehow Pupua and/or Badibanga might have provoked Smith into shooting because there was evidence that Pupua might have a gun in his apartment, because Pupua was impulsive and known for violence, and because of furtive movements (i.e., dropping to the floor) when Smith entered the apartment. (AOB 146-147.) Plain and simple, there was absolutely no evidence that Smith was provoked into gunning down an unarmed victim who was doing nothing other than eating his breakfast and playing a video game with his friends. Indeed, Smith entered the apartment firing his gun before any possible provocation could have occurred. Neither the objective nor subjective elements of heat of passion were present in the evidence, and instructions on heat of passion manslaughter would not have been warranted even had the defense requested them.

As for voluntary manslaughter based on "unreasonable self-defense," such a theory was likewise not supported by substantial evidence. The so-called "imperfect self-defense" doctrine will reduce an intentional killing from murder to manslaughter, but only "when a person kills under an honest but unreasonable belief in the necessity to defend against *imminent* peril to life or great bodily injury." (*People v. DeLeon* (1992) 10 Cal.App.4th 815, 822, citing

People v. Flannel (1979) 25 Cal.3d 668, 674-680.) Where substantial evidence of an honest belief in imminent peril is lacking, the instruction is not proper. (*People v. DeLeon*, *supra*, 25 Cal.3d at p. 825.)

"Imminent" peril means a danger that is "immediate and must be instantly dealt with," or must appear that way to the defendant. (*People v. Aris* (1989) 215 Cal.App.3d 1178, 1187, disapproved on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088; *In re Christian S.* (1994) 7 Cal.4th 768, 783.) Here, there was no evidence Smith believed (reasonably or otherwise) that he was in imminent peril from the occupants of the apartment. Indeed, the occupants of the apartment did not even know who was at the door when Smith knocked (believing that it was their friend Sean Garcia who was coming over to watch a football game). (9 RT 2872; 10 RT 3109.) Nevertheless, Smith argues that the "aggressive physical movements of the occupants" once Smith entered the apartment, could have led Smith to believe he needed to defend himself. (AOB 148.) Suffice it to say that the "aggressive physical movements" of Pupua and Badibanga are what saved their lives from Smith's rapid-discharge gunfire. Their "aggressive physical movements" were ***caused*** by Smith's gunfire, and were a reaction to it. Their actions certainly did not precede the gunfire, as Smith somehow seems to suggest. There was no evidence to suggest that the occupants of the apartment did anything remotely threatening to Smith prior to the shooting, and neither "unreasonable self-defense" instructions, nor manslaughter instructions were supported by ***any*** evidence in this case, let alone substantial evidence.

D. Smith Was Not Prejudiced By The Failure To Provide Lesser Offense Instructions

Smith argues at length that pursuant to *Beck v. Alabama* (1980) 447 U.S. 625 [100 S.Ct. 2382, 65 L.Ed.2d 392], failing to instruct the jury on lesser offenses was reversible per se. (AOB 149-164, 171.) Smith misconstrues the

Beck holding. As this Court previously pointed out:

> [T]he Supreme Court clarified, the constitutional infirmity of the law invalidated in Beck was partly the result of the "artificial barrier" erected in capital cases prohibiting instructions on any lesser included offenses, even though such instructions were available in noncapital cases. (See *Hopkins v. Reeves, supra*, 524 U.S. at pp. 97-98, 118 S.Ct. 1895.) But as we have previously explained, California does not preclude a trial court from giving instructions on lesser included offenses in capital cases. (See *People v. Waidla* (2000) 22 Cal.4th 690, 736, fn. 15, 94 Cal.Rptr.2d 396, 996 P.2d 46.) We also explained in *People v. Waidla* that "the *Beck* rule [was] not implicated in its purpose" in that case because the "jury was not forced into an all-or-nothing choice between a conviction of murder that would legally compel it to fix the penalty at death, on the one side, and innocence, on the other: Even if it found [the defendant] guilty of [felony murder under the special circumstance allegations], it was not legally compelled to fix the penalty at death, but could fix it instead at a term of imprisonment for life without possibility of parole.

(*Ibid.*, italics added.) The same is true in this case. (*People v. Valdez* (2004) 32 Cal.4th 73, 118-119.)

In a noncapital case, the erroneous failure to instruct on a lesser-included offense must be reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Breverman, supra,* 19 Cal.4th at p. 178.) In other words, a conviction of the charged offense may be reversed in consequence of this form of error only if, after an examination of the entire cause, it appears reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred. (*Ibid.* [citing *People v. Watson, supra,* 46 Cal.2d at p. 836]; see *People v. Sakarias* (2000) 22 Cal.4th 596, 621.)

The United States Supreme Court has held that, in a capital case, the failure to instruct on a given lesser-included offense does not constitute federal constitutional error if the trial court did instruct the jury on another lesser offense supported by substantial evidence. (*Schad v. Arizona* (1991) 501 U.S. 624, 647 [111 S.Ct. 2491, 115 L.Ed.2d 555].) In *Schad*, the United States

Supreme Court held that the principles of *Beck v. Alabama, supra*, 447 U.S. 625, were satisfied if the jury was provided some non-capital, third option between the capital charge and acquittal. (*Schad v. Arizona, supra,* 501 U.S. at p. 647; see *People v. Breverman, supra,* 19 Cal.4th at p. 167.)

The instant case was not one in which the jury was presented with an all-or-nothing choice between capital murder and innocence of the type discussed in *Schad* and *Beck*. Rather, the jury was given the option of two special circumstances, namely, that Smith had previously committed murder in the first degree within the meaning of Penal Code section 190.2, subdivision (a)(2), and that the instant murder was committed by "lying in wait" within the meaning of Penal Code section 190.2, subdivision (a)(15). The jury found both special circumstances to be true. (2 CT 465-481, 484-486.) While both of these findings removed this matter from the concerns of *Schad* and *Beck*, the lying-in-wait finding clearly demonstrated that this jury believed the killing was premeditated and deliberated and rendered any lack of lesser offense instruction unquestionably harmless. (See *People v. Edelbacher* (1989) 47 Cal.3d 983, 1028.)

Smith appears to recognize that this Court has previously held contrary to his argument that the "third option" of providing the jury with a non-capital conviction choice satisfies *Beck*. Nevertheless, Smith argues that this Court's prior holdings to said effect in *People v. Horning, supra,* 34 Cal.4th 871, 906, *People v. Valdez, supra,* 32 Cal.4th at p. 119, *People v. Sakarias, supra,* 22 Cal.4th at 621 fn. 3, and *People v. Waidla*, *supra*, 22 Cal.4th at p. 736 fn. 15, are all either inapplicable to his case, or are simply incorrect holdings. (AOB 149-162.) Smith, however, has not provided this Court with any viable reason to veer from its prior holdings, nor has he demonstrated that they do not apply to his case. While Respondent strongly submits that no error occurred with regard to lesser included offenses (assuming the issue is even cognizable), any

error that might have occurred would have to be deemed state court error requiring a showing that there was a reasonable probability the error affected the verdict. (*People v. Sakarias, supra,* 22 Cal.4th at p. 621.) Smith cannot do so because they jury found that he murdered Joshua Rexford while lying in wait. (*People v. Edelbacher, supra,* 47 Cal.3d at 1028.) And, even if the lack of lesser offense instructions somehow violated Smith's federal constitutional rights, any error was harmless beyond a reasonable doubt based on the overwhelming strength of the evidence of premeditation and deliberation in this case. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

III.

TROY HOLLOWAY'S TESTIMONY AND STATEMENTS TO THE POLICE WERE NOT COERCED, DID NOT VIOLATE SMITH'S DUE PROCESS RIGHTS, AND WERE NOT PREJUDICIAL IN ANY EVENT

Smith argues that he was denied his "rights to due process, a fair trial, and a reliable determination of guilt" under both the state and federal constitutions because Troy Holloway's trial testimony, as well as some of his out-of-court statements, were involuntary and coerced. (AOB 201-240.) The coercion Smith primarily points to involves a March 21, 1997 telephone interview that Detective Scott Franks conducted with Troy Holloway (who was then in the U. S. Navy, stationed aboard a ship in Virginia). Smith essentially contends that Detective Franks coerced Holloway into providing false testimony by falsely telling him that the trial court would hold him in contempt and he would be jailed unless he testified that Smith gave him a gun the same day Rexford was killed, and that Smith had been asking about Rexford in the days preceding his death. (AOB 201-240.) The argument is without merit as Detective Franks never told Holloway how to testify or what to say at Smith's

trial. Furthermore, Holloway's testimony took place over two months after the alleged "coercion" by Detective Franks. And moreover, Smith had a full opportunity to cross-examine Holloway about the alleged "coercion," and indeed, did exactly that. Additionally, the defense called Detective Franks as its own witness and fully examined him on his interrogation tactics with Holloway. (14 RT 4668-4671.) Accordingly, the issue was a factual one for the jury. The jury was well-aware of the alleged "coercion" and was fully able to assess its impact on Holloway's trial testimony.

A. Chronology Of Events

On March 8, 1995, Holloway lied to the police about the gun he came to possess shortly after Rexford's death, by telling them that an individual named Steven Blackshear had sold him the gun for $80.00.[31] (11 RT 3500, 3525-3526; 15 RT 4741; 3rd Suppl. CT, vol. 4,1139.) He also lied by telling the police that he had "ditched the gun in the wash because [he] knew it would be washed away to the ocean." (11 RT 3529.) Holloway later explained he lied because he was in fear that he would be in trouble with his mother if she found out he had accepted a gun from Smith. (11 RT 3506.) An edited tape-recording of Holloway's 1995 interview with Detective Frank Gonzales was played for the jury. (15 RT 4741.)

In April of 1996, Holloway enlisted in the U.S. Navy. (11 RT 3521.) On March 21, 1997, over two months prior to his testimony at Smith's trial, Holloway was interviewed over the telephone by Detective Franks as Holloway was on board a Navy ship in Virginia. (11 RT 3529; 14 RT 4668; 3rd Suppl. CT, vol. 3, 801.) During the telephone interview, Detective Franks informed Holloway that other witnesses had contradicted Holloway's statement about the

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31. In Holloway's interview with Detective Frank Gonzales on March 8, 1995, he stated that he purchased the gun from Blackshear for $70.00. (3rd Suppl. CT, vol. 4, 140-1142.)

gun he possessed immediately after Rexford's death. (3rd Suppl. CT, vol. 3, 804.)

During the telephone interview, Franks told Holloway that the judge was going to order him to pick up Holloway so Holloway could "stand tall in front of him." (3rd Suppl. CT, vol. 3, 804.) Franks exhorted Holloway to tell the truth because he had his "whole career" and his "whole life" ahead of him. (3rd Suppl. CT, vol. 3, 804.) Franks told Holloway that the judge was "really P.O.'d about what's been going on." (3rd Suppl. CT, vol. 3, 804.) Franks said Holloway would be held in contempt of court if he did not tell the truth. (3rd Suppl. CT, vol. 3, 804.) When Holloway continued insisting that he had purchased the gun from an individual named Blackshear, and that he had thrown it away shortly after purchasing it, Franks reiterated that if the judge didn't believe Holloway, he would be held in contempt. (3rd Suppl. CT, vol. 3, 815.) Franks also expressed that he believed Holloway knew more than he was telling, but that Holloway was not revealing what he knew because he was scared. (3rd Suppl. CT, vol. 3, 816, 819.)

Holloway told Franks "I don't want to go to court, period . . . point-blank. (3rd Suppl. CT, vol. 3, 820.) Holloway said to Franks, "Cause it . . . man . . .you . . . you don't understand." (3rd Suppl. CT, vol. 3, 804.) Franks responded, "Well I do understand." (3rd Suppl. CT, vol. 3, 804.) Holloway said, "No you don't. (Laugh.) No you don't." (3rd Suppl. CT, vol. 3, 804.) Franks then advised Holloway he should go to a telephone "where there's nobody around, and let's talk about this." (3rd Suppl. CT, vol. 3, 821.) Franks told Holloway that he was going to give him a telephone number where he could be reached and that Holloway should reverse the charges (suggesting that they would be better off talking in private since naval police were present as Holloway was talking). (3rd Suppl. CT, vol. 3, 822.) Holloway said, "Wait, hold on" and he asked the military personnel accompanying him if he could be

alone for a minute. (3rd Suppl. CT, vol. 3, 822.) Holloway then informed Franks that he was still accompanied by the military police. (3rd Suppl. CT, vol. 3, 822.)

Eventually, after a period of back and forth conversation, Holloway informed Franks that in the days preceding Rexford's death, Smith had been inquiring about where Josh Rexford lived and where he hung out. (3rd Suppl. CT, vol. 3, 830-832.) Shortly thereafter, the following colloquy took place:

> TROY HOLLOWAY: I'll put it like this Detective, I'm gonna stop fuckin' with you. I'm gonna stop bullshitting you and I'm about to straight-up tell you.
>
> DET. FRANKS: Okay.
>
> TROY HOLLOWAY: Sugar Ray [Smith] did give me the gun.
>
> DET. FRANKS: How do you know that?
>
> TROY HOLLOWAY: What?
>
> DET. FRANKS: Sugar Ray did kill the guy?
>
> TROY HOLLOWAY: No, he gave me the gun.
>
> DET. FRANKS: Sugar Ray . . . which gun?
>
> TROY HOLLOWAY: The nine millimeter. Steve had nothing to do with it. I said Steve came over to try to cover my ass, 'cause I knew that I was stupid. But I was scared, like you said. How do you know I was scared?
>
> DET. FRANKS: I could tell it in your voice, man.
>
> TROY HOLLOWAY: He did give me a gun.
>
> DET. FRANKS: He gave you the nine millimeter?
>
> TROY HOLLOWAY: Yeah. And I gave it back to Sugar Ray. I just (INAUDIBLE) I just fuckin' throw it in the trough I gave it back to Sugar Ray, like . . . like the next fuckin' . . . two days.

DET. FRANKS: He . . . uh.

TROY HOLLOWAY: 'Cause I was scared my mom find that fuckin' gun in my house and I'd get my ass in trouble.

DET. FRANKS: So this nine mill . . . did Sugar Ray tell you about this . . . what happened with this nine millimeter?

TROY HOLLOWAY: No, he didn't.

(3rd Suppl. CT, vol. 3, 836-837.)

B. Applicable Law

When a defendant seeks to exclude a third party's testimony on the ground the testimony is somehow coerced or involuntary, the defendant must allege that the trial testimony is coerced and that its admission will deprive him of a fair trial. (*People v. Badgett* (1995) 10 Cal.4th 330, 344, citing *People v. Douglas* (1990) 50 Cal.3d 468, 500-503.) It is not enough for a defendant to allege that coercion was applied against the third party, producing an involuntary statement before trial. "In order to state a claim of violation of his *own* due process rights, a defendant must also allege that the pretrial coercion was such that it would actually affect the reliability of the evidence to be presented at trial." (*People v. Badgett, supra*, 10 Cal.4th at p. 348; emphasis in the original.)

A defendant bears the burden of proving a witness's testimony was involuntarily obtained. (*People v. Douglas, supra*, 50 Cal.3d at p. 500.) There is only a limited exclusion for coerced third-party testimony. (*Ibid.*, citing *People v. Leach* (1985) 41 Cal.3d 92, 104 [There is no need for "prophylactic rules directed at our fear of convicting the innocent . . . by means of evidence obtained in violation of due process, when the victim of the violation is not the defendant."].) Because the exclusion is based on the idea "coerced testimony

is inherently unreliable, and that its admission therefore violates a defendant's right to a fair trial, this exclusion necessarily focuses only on whether the evidence actually admitted was coerced." (*Ibid.*) There is a significant difference between suppression of reliable trial testimony following an earlier coerced statement and suppression of the coerced statement itself. (*Id.* at p. 501, citations omitted.) "[F]ew, if any [courts] have ordered suppression of trial testimony that was not itself shown to be unreliable or coerced." (*Ibid.*)

C. Analysis

Smith relies substantially on authorities pertaining to involuntary or coerced confessions from the defendant who is on trial. Such authorities have no place in the analysis of this issue. When a confession or admission from a defendant that is on trial is at issue, the burden is on the People to demonstrate voluntariness. (*People v. Badgett, supra*, 10 Cal.4th at p. 348.) Likewise, in the case of successive confessions and/or statements, the People must prove that "taint" of a first, involuntary statement has been attenuated. (*Ibid.*) However, "[w]hen the defendant seeks to exclude the fruit of the coerced statement of another . . . the policy of protecting the defendant from being compelled to aid the state in convicting him is not at stake. There is no danger that through the testimony of a third party, the burden of proof imposed on the state will be lightened." (*People v. Badgett, supra*, 10 Cal.4th at p. 347.)

With the instant issue, Smith bears the burden of demonstrating that somehow Mr. Holloway was coerced into providing false testimony ***at Smith's trial***, rendering the reliability of his trial proceedings in doubt. (*People v. Douglas, supra,* 50 Cal.3d at 500.) Smith has not remotely established that such occurred in this case.

The defense cross-examined Holloway extensively about his trial testimony that Smith had given him a gun the day Rexford was killed, and that Smith had been asking about Rexford's whereabouts in the days preceding his

death. (11 RT 3497, 3512, 3522, 3524-3525.) Holloway never wavered in the least that Smith had given him a gun despite the fact that he was repeatedly asked about his March 21, 1997 telephone interview with Detective Scott Franks. (11 RT 3496-3497, 3521-3522, 3528-3535, 3548-3559.)

The defense also examined Detective Franks about telling Holloway he would be held in contempt. (14 RT 4667-4669.) Franks admitted telling Holloway "several" times that he could be held in contempt, and that at some point thereafter, Holloway did change his story. (14 RT 4669.) However, he never told Holloway what to say, nor that he had to testify in any particular manner. Although Franks might have resorted to telling Holloway falsehoods about the possibility of being held in contempt and about the trial court being "P.O.'d, " Franks's pressure on Holloway was for Holloway to be "truthful," and nothing more. Holloway, on his own, finally said, "I'll put it like this Detective, I'm gonna stop fuckin' with you. I'm gonna stop bullshitting you and I'm about to straight-up tell you." (3rd Suppl. CT, vol. 3, 836.) This statement is indicative of an individual who knew he had been playing games with the police, and who finally decided it was time to "stop bullshitting" them and be "straight-up" with them. (*Ibid.*) In the end, Holloway told the truth not because he had been threatened with jail, but because "it was time to tell the truth." (11 RT 3533.)

Moreover, any pressure that might have been placed on Holloway was clearly not upon him over two months later when he testified at Smith's trial. This was "an ample period for reflection" that "ameliorated[d] any effect of [his] confrontation with the police." (*People v. Boyer* (2006) 38 Cal.4th 412, 445.) Initially, when cross-examined by defense counsel, Holloway did not even remember being threatened with incarceration or with being held in contempt. (11 RT 3511.) And, although Smith makes a great deal of the coercive atmosphere that Holloway was under during his *telephone*

conversation with Franks because military police personnel were with Holloway during the interview (AOB 212-213), there is no indication in the record that any military police were present when Holloway testified ***at Smith's trial.***

Smith also complains that Holloway was promised leniency if he changed his story. (AOB 216-217.) However, there were never any charges pending against Holloway, and hence no need for leniency. Moreover, the record does not demonstrate any promises of leniency. And, even if there had been a promise of leniency, there is nothing wrong with an offer of leniency in return for cooperation with the police by simply telling the ***truth***. (*People v. Badgett, supra,* 10 Cal.4th at 354.) Furthermore, when cross-examined by the defense, Holloway did not even remember being offered any protection by Franks. Holloway testified, "If that's what he [Franks] said, I don't remember him telling me that . . ." (11 RT 3532.)

In summary, the question of Holloway's credibility was for the jury to decide. Both Holloway and Franks were thoroughly examined by the defense regarding the alleged "coercion." The jury was fully apprized of the circumstances surrounding Holloway's prior statements and interviews, and Smith has certainly not met his burden of demonstrating either that his due process rights were violated, nor that the reliability of his trial proceedings were placed in doubt. (*People v. Douglas, supra,* 50 Cal.3d at 500.)

D. There Was No Prejudice

Smith cannot demonstrate prejudice with this issue in any event. Holloway was not an eyewitness to the events surrounding the shooting, and he was not even one of the prosecution's primary witnesses. The most useful testimony provided by Holloway was that: (1) he was given a 9 millimeter handgun by Smith shortly after Rexford was gunned down, and (2) Smith had been asking Holloway questions about Rexford's whereabouts just days before

the shooting. However, there was other testimony that covered both of these matters aside from Holloway's testimony. With regard to the gun, Smith's friend, Patrick Wiley, was also present when Smith gave the gun to Holloway. (12 RT 3636-3640.) Wilely testified that he saw Smith give Holloway a 9 millimeter handgun during the evening hours on the day Rexford was gunned down. (12 RT 3636-3640.) It was the same gun Wiley had previously seen in Smith's apartment. (12 RT 3639.)

With regard to Smith's inquiries about Rexford, the inquiries were probative on the issue of *planning* and there was certainly an abundance of evidence that Smith *planned* the shooting. From the time shortly after Manuel Farias was killed, Smith was engaging in conversations about Joshua Rexford and discussing the topic of revenge for Manuel's death. (11 RT 3431.) At Manuel's funeral Joshua Rexford was a topic of discussion between Smith and others at the funeral, with Smith "doing the most talking." (11 RT 3428, 3431.) Smith was heard saying that "they were going to get whoever did this . . ." (11 RT 3431.) On the night before the shooting of Rexford, Smith was at the apartment complex where the shooting occurred. (3rd Supp. CT vol. 3, 907.) On the morning of the killing, Smith surveilled the apartment for a considerable amount of time, and was observed within the apartment complex by several witnesses. (10 RT 2981, 3255, 3826-3827.) During much of the surveillance period, Smith was by himself. (12 RT 3827.) He did not appear anxious, and did not appear to need any help. (12 RT 3851.) Two "hang-up calls" were placed to Pupua's apartment on the morning of the shooting. (9 RT 2859, 2871.) While in Mr. Honess's apartment, Smith clearly possessed a gun, he used Mr. Honess's telephone (then cut the telephone lines), he appeared to be in charge of the individuals who entered Mr. Honess's apartment, and he demanded that one of his cohorts keep watch through Honess's window. (10 RT 2986-3017.) The evidence that Smith *planned* the shooting in this matter

was simply overwhelming, and withstands harmless error scrutiny under any standard.

IV.

AFTER SMITH HAD BEEN REPRESENTED BY COUNSEL AT ALL PHASES OF HIS TRIAL, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING SMITH'S REQUEST TO PERSONALLY PRESENT CLOSING ARGUMENT AT THE CONCLUSION OF HIS PENALTY PHASE

Smith argues that the trial court committed reversible error by not allowing him to personally present closing argument at the conclusion of his penalty phase. (AOB 224-240.) The contention is without merit. Smith was represented by counsel throughout the entire case, and his request to represent himself in propria persona at the very conclusion of the proceedings so he could present his own closing argument was properly denied. Smith has not established that the court abused it's discretion in denying his request.

A. Facts

At the conclusion of all penalty phase evidence and just prior to the defense's penalty phase closing argument, one of Smith's two defense lawyers, Edi Faal, informed the court that Smith wanted to personally present the penalty phase closing argument. Mr. Faal expressed to the court that he objected to the request, and he had informed Smith that the only way he could present closing argument is if he [Smith] fired his lawyers first. (18 RT 6040.) Mr. Faal made clear that "as long as we remain attorneys of record, I'm saying he will not do it, and we are ready to proceed." (18 RT 6040.) The court heard from Smith, and told the court that he was relieving his counsel of their duties as his representatives. (18 RT 6041.) The court asked Smith for his reason and Smith stated:

THE DEFENDANT: I want this jury to understand the significance of every piece of evidence that was presented to them in this phase, not the guilt phase. I want to show, not to prove, but to show, that I personally accept their verdict because of the evidence that they were given. And I want to show them an outline of - - I have documented every iota of information I want this jury to hear before they deliberate.

I believe that I can best - - since I'm the expert on myself, I would be best in representing myself because that is the position I have taken throughout every instance in my life, which has been very few, I've had to defend myself, my whole life.

It's my judgment. It's my call. This is my life, and it is a decision that I've made.

I want to clarify some issues between my mother, myself, and not using any of those things as an excuse, at any point, because what this jury is hearing right now is I'm making a big excuse because of all these things that happened to me and all that. These issues have been rectified between my brother and my mom, and the reason why they saw the flow of tears wasn't because I was so hurt by the situation, no. There was some open wounds that had occurred in my life, and hearing that stuff kind of - - it kind of shook me up a little bit.

And the situation with Dawn Hall and me being this and that, I don't have any beef, judge, or gripe - - I really want to look at these people in their faces, in their eyes, and address them to the best of my ability before they go in that jury room and deliberate on my life.

(18 RT 6041-6042.)

The court pointed out that time after time defense counsel had to "unravel the mess [Smith] created with some of [his] judgments. . ." (18 RT 6043.) The court said, "[c]ontrary to your statement, I believe you have demonstrated 30 years of breathtakingly bad judgment." (18 RT 6044.) The court stated that it was concerned Smith would generate constant objections by the prosecution which, in turn, would be "extremely difficult" for Smith, and it would just be a matter of time before Smith would "lose [his] temper." (18 RT 6044.)

The trial court told Smith he had received "wonderful lawyering" and that his two counsel were "two of the finest attorneys, [the court has] ever seen,

and that's based upon 34 years in the criminal justice system." (18 RT 6043.)

After the trial court denied Smith's request, Smith confirmed the trial court's fears as he lashed out with, "I don't want these people to represent me any fucking longer." (18 RT 6045.) The court stated that it's decision had been made. (18 RT 6045.) Then, when defense counsel (Mr. Faal) asked the court for three minutes to put his materials together (prior to bringing the jury in for the defense's closing argument), Smith again lashed out with, "I don't need three minutes. I don't need three minutes for shit. Just bring them in here - - ." (18 RT 6045.)

B. Applicable Law

A defendant has a right to represent himself under the federal Constitution if he voluntarily and intelligently elects to do so. (*Faretta v. California* (1975) 422 U.S. 806, 819 [95 S.Ct. 2525, 45 L.Ed.2d 562]; *People v. Marshall* (1997) 15 Cal.4th 1, 20.) This right is unconditional if it is invoked *within a reasonable time before the start of the trial.* (*People v. Burton* (1989) 48 Cal.3d 843, 852.) But *Faretta* motions made *after* this time are addressed to the trial court's sound discretion. (*People v. Burton, supra*, 48 Cal.3d at p. 852.) The timeliness requirement is to preclude a defendant from misusing the motion to unjustifiably postpone trial or frustrate the orderly administration of justice. (*People v. Windham* (1977) 19 Cal.3d 121, 128, fn. 5; *Burton, supra*, at p. 852.)

Where a request to proceed pro per is not made "within a reasonable time prior to the commencement of trial," the court is not obligated to grant the motion. (*People v. Windham, supra*, 19 Cal.3d at p. 128.) "[F]or purposes of assessing the timeliness of a motion for self-representation, the guilt and penalty phases in a capital prosecution are not separate trials but parts of a single trial . . ." (*People v. Mayfield, supra*, 14 Cal.4th at p. 810.)

In *People v. Barnett* (1998) 17 Cal.4th 1044, 1104-1105, this Court stated the factors to be considered are the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay that might reasonably be expected to follow the granting of such a motion. (*Id.*, at pp. 1104-1105; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 959; *People v. Marshall*, *supra*, 13 Cal.4th at p. 827.) These are factors that were originally set out by this Court in its *Windham* decision. (See *Windham*, *supra*, 19 Cal.3d at p. 128.) And, this Court has held that a trial court acted within its discretion in denying a *Faretta* motion where two of the *Windham* factors weighed strongly against a grant of pro per status. (*People v. Mayfield, supra,* 14 Cal.4th at 809.)

A trial court's discretion in making a *Faretta* ruling is "broad." (*People v. Hardy* (1992) 2 Cal.4th 86, 196.) "[A] reviewing court must give 'considerable weight' to the court's exercise of discretion and must examine the total circumstances confronting the court when the decision is made. [Citation omitted.]" (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1397-1398.) A disagreement over trial tactics is "an insufficient reason to grant an untimely *Faretta* request." (*People v. Wilkins* (1990) 225 Cal.App.3d 299, 309, fn.4.)

C. Analysis

Smith argues his "request for self-representation came at a unique juncture; a time when lawyering may be the least significant factor to be considered." (AOB 234.) This statement could not be more wrong. Smith's request came after all penalty phase evidence had been presented and before the defense's penalty phase closing argument. As defense counsel (Mr. Faal) stated to the trial court, "we had a strategy of how to go about the closing, who goes first, what is said, and what is said in rebuttal." (18 RT 6040.) Clearly, the evidence presented by defense counsel in the penalty phase was presented with

a particular strategy in mind, and accordingly, defense counsel was in the best position (if not the only position) to carry out said strategy and tell the jury the meaning of said evidence. There is no indication in the record that defense counsel's level of representation had been anything other than highly competent up to that point. Indeed, in describing the performance of defense counsel to Smith, the court stated, "[a]bsolutely without a doubt, ***wonderful lawyering***, despite the fact that time after time after time after time they've had to unravel the mess you've created with some of your judgments, Mr. Smith." (18 RT 6043; emphasis added.) In *People v. Marshall, supra,* 13 Cal.4th 799, this Court upheld a trial court's *Faretta* denial where the trial court relied heavily on the absence of any evidence that counsel was in any way incompetent (i.e., the first of the *Windham* factors). (*People v. Marshall, supra*, at p. 828.)

Another of the *Windham* factors addressed by the trial court in denying Smith's request was the likelihood that the proceedings would be disrupted. The court was concerned that Smith would use closing argument as a vehicle for testifying[32/] (even though the court accepted Smith's statement that such was not his "intention"). (18 RT 6044.) The court's concern was a valid one. In make his request, Smith stated "I have documented every iota of information I want this jury to hear before they deliberate," he stated, "I'm the expert on myself," and he also stated, "I want to clarify some issues between my mother, [and] myself . . ." (18 RT 6041-6042.) These statements suggested that Smith would be commented in closing argument on matters that had not come before the jury through evidence. By doing so, Smith would have been generating considerable objection by the prosecution. (18 RT 6044.) That, in turn (from what the court stated it knew about Smith's personality), would have caused Smith to "lose [his] temper." (18 RT 6044.) Indeed, Smith confirmed for the

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32. Smith testified at his guilt phase, but did not testify at his penalty phase.

court that it was correct in its assessment of his personality. As soon as the court denied Smith's request, Smith began using profanity in the courtroom. Smith lashed out with, "I don't want these people to represent me any fucking longer." (18 RT 6045.) The court stated that it's decision had been made. (18 RT 6045.) Then, when defense counsel (Mr. Faal) asked the court for three minutes to put his materials together (prior to bringing the jury in for the defense's closing argument), Smith again lashed out with, "I don't need three minutes. I don't need three minutes for shit. Just bring them in here - - . (18 RT 6045; emphasis added.) Smith's outburst confirmed his volatile temper and justified the court's decision.

Smith's request to represent himself during penalty phase closing argument was because, as he stated, he was the "expert" on himself and he could clarify matters that his counsel could not clarify. (18 RT 6041-6042.) His reasoning amounted to a difference in trial tactics and a disagreement over trial tactics is "an insufficient reason to grant an untimely *Faretta* request." (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1206; *People v. Wilkins, supra*, 225 Cal.App.3d at 309, fn.4.)

The trial court pointed out that two of the *Windham* factors weighed heavily against Smith's *Faretta* request, and such was sufficient to justify the court's ruling (*People v. Mayfield, supra,* 14 Cal.4th at 809 [held that a trial court acted within its discretion in denying a *Faretta* motion where two of the above factors weighed strongly against a grant].)[33/]

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33. "[T]he length and stage of the proceedings," although not addressed by the trial court, was also a *Windham* factor that worked heavily against Smith. Indeed, the request could not have come any later in the case. The proceedings were virtually complete by the time of Smith's request. It should be noted that in *Windham*, this Court upheld a *Faretta* denial when the trial court relied almost entirely on the fact that the request came late in the proceedings. (*People v. Windham, supra*, 19 Cal.3d at pp. 125-129.) Here, although the trial court did not expressly rely on "timeliness" in making its ruling, "timeliness"

In conclusion, Smith has not demonstrated an abuse of discretion by the trial court for denying his untimely request to represent himself.

V.

SMITH'S COMMISSION OF FIRST DEGREE MURDER AT THE AGE OF SIXTEEN WAS PROPERLY USED TO PROVE THE PRIOR MURDER SPECIAL CIRCUMSTANCE ALLEGED PURSUANT TO PENAL CODE SECTION 190.2, SUBDIVISION (A)(2)

Smith argues that it was reversible error to allow his 1984 first-degree murder conviction to satisfy the Penal Code section 190.2, subdivision (a)(2)[34/] prior murder special circumstance. (AOB 241-262.) Smith contends that since he was a juvenile (16 years old) when he committed first-degree murder, *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1] precludes use of his prior conviction to render him eligible for the death penalty. Smith also argues that even if *Roper* does not bar use of his prior conviction, it was still unconstitutional to allow use of his prior conviction because his equal protection rights were violated (since juvenile murder "convictions," but not juvenile murder "adjudications," are allowed to prove special circumstances).

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indirectly played a role in the court's decision. Smith's request was made after the defense's penalty phase evidence had already been presented, and defense counsel's strategy was based on said evidence. Since defense counsel knew the strategy for its evidence, defense counsel was in the best position to present the closing argument. Smith was not as likely to understand the defense strategy (i.e., the purpose for the evidence), and hence, he was more likely to generate the objections and disruption envisioned by the trial court. (18 RT 6044.)

34. The special circumstance of Penal Code section 190.2, subdivision (a)(2) reads:

> (2) The defendant was convicted previously of murder in the first or second degree. For purposes of this paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree.

Smith also argues that "California's juvenile transfer policies permit the exercise of arbitrary prosecutorial and juvenile court discretion that turns a juvenile homicide into an adult trial, with no guarantees of due process or jury trial to protect the minor's constitutional interests." (AOB 247.) There is no merit to any of these contentions as Smith was clearly an adult (27 years old) at the time he cold-bloodedly and without warning gunned down the victim in this case. (15 RT 4833.)

A. Facts

On July 13, 1984, Smith pleaded guilty to first-degree murder, in violation of Penal Code section 187, in Riverside County Superior Court case number CR-22000. (17 RT 5566; 3rd Supp. CT vol. 3, 788; 3rd Supp. CT vol. 4, 1166-1182.) Smith was committed to the California Youth Authority. (3rd. Supp. CT vol. 3, 788.) On July 24, 1992, Smith was honorably discharged from the California Youth Authority. (3rd Supp. CT vol. 3, 789.) On May 18, 1993, the record in said matter was expunged pursuant to Welfare and Institutions Code section 1772. (3rd Supp. CT vol. 4, 1182.)

On February 19, 1997, Smith moved to preclude the prosecution from using the expunged 1984 first-degree murder conviction to prove a Penal Code section 190.2, subdivision (a)(2) special circumstance against him. (2 CT 321-324.) The trial court denied the motion. (4 RT 787-796.)

B. Forfeiture

None of Smith's current arguments were made in the trial court. In his moving papers, and orally, Smith argued that his 1984 first-degree murder conviction should not be available for proving Penal Code section 190.2, subdivision (a)(2), because the prior conviction had been expunged and Welfare and Institutions Code section 1772 "did not provide an exemption for the prosecution to rely on the expunged conviction to prove the special

circumstance allegation." (2 CT 324.)

While the United States Supreme Court's decision in *Roper v. Simmons, supra,* 543 U.S. 551, had not yet been decided at the time of Smith's trial, and hence he could not have presented his argument with regard to that holding, his "equal protection" argument and his argument that it is unconstitutional for death eligibility to be based upon California's "unreliable and arbitrary" procedures for transferring minors from juvenile to adult court could have easily been made in the trial court, but were not. These latter two arguments must therefore be deemed forfeited.[35/] Smith did not give either the trial court nor the trial prosecutor the opportunity to address them.

Having failed to timely and specifically articulate his current arguments below, Smith has forfeited his ability to do so now on appeal. (*People v. Alvarez* (1996)14 Cal.4th 155, 186 [requiring "specific and timely objection" to preserve evidentiary issue]; Evid. Code, § 353 [requiring timely objection stating specific ground]; see also *People v. Smith* (2003) 30 Cal.4th 581, 629-630 [finding new theory of admissibility as prior consistent statement to be forfeited on appeal where defendant failed to offer theory below].)

C. Merits

Smith's contention that *Roper v. Simmons, supra,* 543 U.S. 551, precludes the use of his prior conviction to prove the special circumstance set out in Penal Code section 190.2, subdivision (a)(2) is without merit. In *Roper v. Simmons*, the United States Supreme Court held that the prohibition against cruel and unusual punishment of the Eighth Amendment precludes imposition

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35. Although the loss of the right to challenge a ruling on appeal because of the failure to object or pursue the matter in the trial court is often referred to as a "waiver," the correct legal term is "forfeiture." In contrast, a waiver is the "'intentional relinquishment or abandonment of a known right.'" (*People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9.)

of the death penalty for those who were under the age of 18 when their capital crimes were committed. (*Roper v. Simmons, supra,* 543 U.S. at 578-579.)

The defendant in *Roper v. Simmons* was 17 years old at the time of his "capital murder." The analysis in *Roper v. Simmons* focuses on the "less culpable mentality" of a juvenile when he/she commits the offense *for which the death penalty is imposed*, and ultimately precludes execution of individuals who were less than 18 years of age when they committed the ***capital offense*** for which they received the death penalty. Said opinion did not involve, nor even mention the notion that an adult offender's prior conviction sustained as a juvenile could not be used as either a special circumstance and/or an aggravating factor, as in the instant matter.

Smith was 27 years old when he committed the capital murder in this case. (15 RT 4833.) And, he committed the capital murder completely undeterred by the fact that he had previously committed and been convicted of an earlier first-degree murder. Accordingly, *his mentality* at the time he committed the "capital murder" was no different than the mentality of any other 27-year-old who commits first-degree premeditated and deliberated murder, while knowing that (1) he has committed precisely such conduct in the past (whether it was as an adult or a juvenile), and (2) he was convicted for such conduct. Smith's reliance on *Roper v. Simmons* is misplaced as the holding of said case pertains to the less culpable mentality of a juvenile who commits a ***capital*** offense, not the mentality of a 27-year-old who commits a capital offense knowing full-well that he has committed the same offense before.

By way of analogy to ex post facto analysis pertaining to increased punishment for recidivist offenders, this Court long ago pointed out that the increased punishment is for the current offenses, not the prior offenses:

> And a law is not objectionable as ex post facto which, in providing for the punishment of future offenses, authorizes the offender's conduct in the past to be taken into the account, and the punishment to be graduated

> accordingly. Heavier penalties are often provided by law for a second or any subsequent offense than for the first, and it has not been deemed objectionable that in providing for such heavier penalties the prior conviction authorized to be taken into account may have taken place before the law was passed. ***In such cases it is the second or subsequent offense that is punished, not the first.***

(*People v. Hainline* (1934) 219 Cal. 532, 536, quoting from *Ex Parte Gutierrez* (1873) 45 Cal. 429, 432; emphasis added.)

Courts have regularly rejected ex post facto challenges to statutes that increase penalties for recidivism. Opinions have routinely pointed out that the sentence imposed upon a habitual offender is not an additional punishment for the earlier crime, but a ***punishment for the later crime***, which is aggravated because of its repetitive nature. (*Gryger v. Burke* (1948) 334 U.S. 728, 732 [68 S.Ct. 1256, 92 L.Ed. 1683]; *People v. Snook* (1997) 16 Cal.4th 1210, 1221; *People v. Forrester* (2007) 156 Cal.App.4th 1021, 1024-1025; *People v. Eribarne* (2004) 124 Cal.App.4th 1463, 1469 [three strikes law]; *People v. Wohl* (1991) 226 Cal.App.3d 270, 273 [rejecting ex post facto contention where DUI conviction is elevated to felony on fourth conviction]). Here, similarly, Smith was not punished for his 1984 first-degree murder conviction. Rather, he was punished more severely for his 1994 first-degree murder which was aggravated because of its repetitive nature.

Juvenile murder convictions have long been used to prove Penal Code section 190.2, subdivision (a)(2) special circumstances. (*People v. Trevino* (2001) 26 Cal.4th 237, 244; *People v. Andrews* (1989) 49 Cal.3d 200, 221.) Additionally, it is well established that even expungement of a conviction will not eliminate all consequences associated with that conviction. (*People v. Jacob* (1985) 174 Cal.App.3d 1166, 1173.) Even in capital cases, expunged juvenile convictions can and should play a role in the imposition of the appropriate penalty:

> It is settled that Welfare and Institutions Code section 1772 does not eradicate a conviction for all purposes. (See, e.g., *People v. Bell* (1989) 49 Cal.3d 502, 542-546, 262 Cal.Rptr. 1, 778 P.2d 129.) The Youth Authority Act is intended to benefit the public by providing youthful offenders with rehabilitative programs such as education, vocational training, work furloughs, and supervised parole. (*Bell, supra,* at pp. 543-544, 262 Cal.Rptr. 1, 778 P.2d 129.) Expungement of the criminal record rewards an honorable discharge, encourages continued success, and protects a rehabilitated adult from the lifelong stigma of a youthful mistake.
>
> However, such rehabilitative goals are not at stake in a subsequent criminal proceeding. As a result, convictions otherwise forgiven or expunged under Welfare and Institutions Code section 1772 may be used to enhance a sentence imposed for a subsequent criminal offense. (*People v. Shields* (1991) 228 Cal.App.3d 1239, 1243, 279 Cal.Rptr. 403, rev. denied June 19, 1991; *People v. Jacob* (1985) 174 Cal.App.3d 1166, 1171-1172, 220 Cal.Rptr. 520.) ***"[T]he enhancement is not an added punishment for the prior serious felony conviction, but instead 'is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one.' [Citations.]"*** (*Jacob, supra,* at p. 1172, 220 Cal.Rptr. 520; emphasis added.)
>
> Analogous reasoning applies here. The penalty jury was entitled to know that ***defendant committed the capital crime undeterred by a prior successful felony prosecution***.

(*People v. Pride* (1992) 3 Cal.4th 195, 256-257; emphasis added.)

With regard to Smith's argument that allowing the use of juvenile murder convictions to prove the prior murder special circumstance set forth in Penal Code section 190.2, subdivision (a)(2) violates the equal protection clause, there is likewise, no merit. Smith contends that it violates the equal protection guarantees of the Fourteenth Amendment to allow juveniles convicted of murder in adult court, such as himself, to later become death eligible under Penal Code section 190.2, subdivision (a)(2), whereas juveniles who have suffered murder adjudications in juvenile court are not subject to said section. (AOB 254-258.)

In order to establish an equal protection violation, Smith must initially demonstrate that these two groups are similarly situated, but are being treated differently. (*In re Eric J.* (1979) 25 Cal.3d 522, 530; *In re Roger S.* (1977) 19 Cal.3d 921, 934; *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1211.)

However, the two classes of juveniles described by Smith are equally subject to the adult court transfer procedures set forth in Welfare and Institutions Code section 707. (See *People v. Manduley* (2002) 27 Cal.4th 537, 568.) Some type of "invidious" or "unequal treatment" in the manner that section 707 discretion is carried out must be demonstrated to establish an equal protection violation. (*Ibid.*) Smith has not demonstrated any invidious or unequal treatment, and consequently, has not shown a violation of the Equal Protection Clause. (*People v. Manduley, supra,* 27 Cal.4th at 568.) "The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause." (*U.S. v. Batchelder* (1979) 442 U.S. 114, 125 [99 S.Ct. 2198, 60 L.Ed.2d 755].)

Smith's contention that "California's juvenile transfer policies permit the exercise of arbitrary prosecutorial and juvenile court discretion that turns a juvenile homicide into an adult trial, with no guarantees of due process or jury trial to protect the minor's constitutional interests" (AOB 247), likewise, does not present a valid ground for attacking his prior murder special circumstance. In 1984, when Smith's murder charge for the murder of Virgil Fowler was transferred to adult court, the pertinent sections of the version of Welfare and Institutions Code section 707 that was then in existence read:

> (b) The provisions of subdivision (c) shall be applicable in any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of one of the following offenses:
>
> (1) Murder.
>
> [Nineteen other offenses omitted.]

(c) With regard to a minor alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any of the offenses listed in subdivision (b), upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for a determination of fitness. Following submission and consideration of the report, and any of the relevant evidence which the petitioner or the minor may wish to submit the minor shall be presumed to be not a fit and proper subject to be dealt with under the juvenile court law unless the juvenile court concludes, based upon evidence, which evidence may be of extenuating or mitigating circumstances, that the minor would be amenable to the care, treatment, and training program available through the facilities of the juvenile court based upon an evaluation of each of the following criteria:

(1) The degree of criminal sophistication exhibited by the minor.

(2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.

(3) The minor's previous delinquent history.

(4) Success of previous attempts by the juvenile court to rehabilitate the minor.

(5) The circumstances and gravity of the offenses alleged to have been committed by the minor.

A determination that the minor is a fit and proper subject to be dealt with under the juvenile court law shall be based on a finding of amenability after consideration of the criteria set forth above, and findings therefor recited in the order as to each of the above criteria that the minor is fit and proper under each and every one of the above criteria. In making a finding of fitness, the court may consider extenuating or mitigating circumstances in evaluating each of the above criteria. In any case in which a hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing and no plea which may already have been entered shall constitute evidence at the hearing.

(Welfare and Institutions Code section 707, in pertinent part, as it existed in 1984.)

Several modifications to section 707 have taken place since 1984. (See *People v. Manduley, supra,* 27 Cal.4th at 548-550.) However, the above-listed factors for determining fitness to be dealt with in the juvenile court in subdivision (c) survived the changes and remain in section 707 as of this

writing. In 1984, Smith would have come within the provisions of subdivisions (b) and (c) and would have undergone a fitness hearing prior to his transfer to adult court. Said factors, for the determination of juvenile court fitness, have never been held to be "unreliable" or "arbitrary," as Smith now contends, and consequently, Smith provides no such authority, and his argument must be rejected.

Lastly, as Smith points out, the record on appeal does not contain documentation on the juvenile court transfer proceedings that took place in 1984 in juvenile court. (AOB 250.)[36] Smith, thus, makes the assumption that the prosecutor "went directly to superior court with the charges against Smith arising from the Virgil Fowler homicide." (AOB 250.) Smith's assumption is not legally supportable. In 1984, Welfare and Institutions Code section 707 did not allow for such a direct filing. As set forth above, the version of section 707 that was in effect in 1984 would have required a fitness hearing. Absent any indication to the contrary, it must be presumed that the court regularly followed the law that was in effect at the time of Smith's 1984 murder and properly determined that Smith was not fit to be dealt with under the juvenile court law. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114; Evid. Code § 664.)

D. Harmless Error

Even if Smith has somehow established error with regard to his prior murder special circumstance, Smith's other special circumstance of "lying in wait" (Pen. Code § 190.2, subd. (a)(15)), was clearly established in the evidence and would render any error harmless.

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36. Smith does not appear to be seeking relief based on these materials not being part of the record on appeal. However, *if* Smith is making such an argument, respondent would submit that he has forfeited the contention by not raising it during his trial in 1997 when such materials would have been much more readily available.

Smith contends that if either of his two special circumstances are reversed, this Court must reverse the penalty of death. Smith is mistaken. This Court may uphold a death sentence where one of the special circumstances is invalid, as long as there are other valid special circumstances. A determination of an invalid special circumstance is subject to harmless error analysis. (*Clemons v. Mississippi* (1990) 494 U.S. 738, 745-750 [110 S.Ct 1441, 108 L.Ed.2d 725]; *Zant v. Stephens* (1983) 462 U.S. 862, 890-891 [103 S.Ct. 2733, 77 L.Ed.2d 235] [fact that one aggravating factor may be found invalid does not mean a death penalty may not stand where there are other valid aggravating factors]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 512 [invalid conviction for kidnapping for robbery, felony-murder theory, and felony-murder special circumstance did not require reversal of penalty]; *People v. Roberts* (1992) 2 Cal.4th 271, 327 [appellate court examines whether there is a reasonable possibility that the jury would have recommended a sentence of life without the possibility of parole]; *People v. Mickey* (1991) 54 Cal.3d 612, 703 [subject to harmless error analysis]; *People v. Benson* (1990) 52 Cal.3d 754, 793 [same]; *People v. Sanders* (1990) 51 Cal.3d 471, 520; *People v. Silva* (1988) 45 Cal.3d 604, 632 [death penalty upheld where three of four special circumstances were found invalid].)

Moreover, the jurors made the required determinations as to the applicable aggravating factors pursuant to Penal Code section 190.3, and Smith's prior murder would have been admitted at the penalty phase as an aggravating factors (just as it was) even had it not been used as a special circumstance pursuant to Penal Code section 190.2, subdivision (a)(2). It was fully admissible as an aggravating factor even though it had been expunged. (*People v. Pride, supra,* 3 Cal.4th at 256-257.) Thus, in Smith's penalty phase, the same aggravating factors would have been before the jury, including Smith's prior first-degree murder. Reversal of the prior murder special

circumstance would "not alter the universe of facts and circumstances to which the jury could accord aggravating weight." (*People v. Bonilla, supra,* 41 Cal.4th at p. 334.) Consequently, if this Court were to reverse either of Smith's special circumstances, reversal of the death penalty is not compelled. (*People v. Morgan* (2007) 42 Cal.4th 593, 628.)

VI.

THE JURY WAS PROPERLY INSTRUCTED AT THE CONCLUSION OF THE PENALTY PHASE, INCLUDING THE INSTRUCTION TO DISREGARD ALL PREVIOUS INSTRUCTIONS (CALJIC NO. 8.84.1)

Smith claims the trial court committed error by instructing the jury with CALJIC No. 8.84.1 during the penalty phase, to disregard all previous instructions and then failing to reinstruct the jury with the various guilt phase instructions pertaining to the evaluation of evidence. (AOB 263-271.) Smith invited any error with regard to CALJIC No. 8.84.1 by agreeing to its wording (as given). There is no merit to his argument that the trial court was required to reinstruct the jurors with the guilt phase evidentiary instructions. And, any lack of instruction at the penalty phase was harmless in any event.

A. Factual Background

On July 23 and July 24, 1997, penalty phase jury instructions were discussed among the trial court and counsel for both sides. (18 RT 5817-5844, 5904-5919.) At one point on July 23, 1997, the trial asked counsel for both sides if there were any problems with the wording of CALJIC No. 8.41.1, which explained to the jurors that they were to "Disregard all other instructions given to you in other phases of this trial." (18 RT 5818; 3rd Suppl. CT vol. 1, 526.) Defense counsel stated there were no problems with CALJIC No. 8.41.1. (18 RT 5818.)

B. Invited Error

Since the defense agreed to the language of 8.41.1 when given an opportunity by the trial court to dispute it, Smith must not be heard to complain about the instruction on appeal. "Because defendant *expressly agreed* to this instruction, he is barred from challenging it on appeal under the doctrine of invited error. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135, 36 Cal.Rptr.2d 235, 885 P.2d 1; *People v. Cooper* (1991) 53 Cal.3d 771, 830-831, 281 Cal.Rptr. 90, 809 P.2d 865.)" (*People v. Davis* (2005) 36 Cal.4th 510, 539; emphasis in original.)

C. Merits

While Smith only points to two specific CALJIC instructions that he contends the court should have given in his penalty phase (CALJIC Nos. 2.20 and 2.92; see AOB 268-269), he goes on to argue generally that the trial court should have reinstructed the jury on all general principles of law that affected evaluation of the evidence. Assuming Smith is arguing that all guilt phase instructions pertaining to the evaluation of evidence should have been given in his penalty phase, Smith is incorrect.

At the penalty phase, not reinstructing the jury with general evidentiary instructions stands to actually benefit a capital defendant "because the effect could be, for example, to 'cabin less strictly the jury's consideration of mitigating evidence' or to 'avoid an unfavorable focus on the aggravating evidence.'" (*People v. Brasure* (2008) 42 Cal.4th 1037, 107 P.3d 632, 704.) A "trial court normally must, even in the absence of a request, instruct on general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case." (*People v. Carter* (2003) 30 Cal.4th 1166, 1219.) In *Carter*, however, this Court found no prejudice in a situation identical to the one presented in this case: where the trial

court instructed the penalty jury to disregard the guilt phase instructions and then failed to re-instruct the jury with instructions relating to the credibility of witnesses. (*People v. Carter*, 30 Cal.4th at pp. 1218-1220.) As in *Carter*, any alleged instructional error here was harmless. For instance, "the jury expressed no confusion or uncertainty . . . and never requested clarification" "as to how to evaluate [the] testimony" of the penalty-phase witnesses. (*Id.* at p. 1221; see also *People v. Holt* (1997) 15 Cal.4th 619, 685 [jury "surely" would have requested further explanation of the reasonable doubt standard had it been confused as to the meaning of reasonable doubt during the penalty phase].) Moreover, Smith "fails to suggest how the jury, lacking [applicable guilt-phase instructions], might have misunderstood or misused that evidence." (*People v. Carter, supra,* 30 Cal.4th at p. 1221.) Although Smith asserts that CALJIC Nos. 2.20 and 2.92 were applicable to the evidence taken from Felton Manuel and would have given guidance in determining witness credibility, he does no more than speculate that their absence somehow prejudiced him. (*Ibid.*) "In the absence of anything in the record indicating the jury was confused or misled by the court's failure to reinstruct [on guilt phase instructions during the penalty phase] . . . defendant's argument must be rejected." (*People v. Danielson* (1992) 3 Cal.4th 691, 722, overruled on another ground by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; see *People v. Hamilton* (1988) 46 Cal.3d 123, 153 ["Having reviewed the record of the penalty phase in its entirety, we are of the opinion that in the absence of the claimed [instructional] error the outcome would have been the same"].)

In Smith's penalty phase, the testimony was not complex testimony. It was simple and straightforward. The prosecution's testimony revolved primarily around the crimes committed against Felton Manuel, whom the jury either believed or disbelieved, the prior murder of Virgil Fowler, for which Smith's guilt had already been established in 1984, and the testimony of Dawn

Hall regarding Smith's in-court threats to her. Moreover, at the start of the penalty phase, the jury already knew Smith had been convicted of a prior murder (having already found the prior murder special circumstance to be true) and was merely given details of the Fowler murder from the prosecution's witnesses. (2 CT 484-486.)

It should be noted the jury was instructed that, it should "not be influenced by bias nor prejudice against defendant,"and that "In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case." (18 RT 5987.) In addition, the jury was instructed that to use the crimes committed against Felton Manuel as aggravating factors, the jurors had to find beyond a reasonable doubt that the crimes occurred, and that the prosecution carried this burden. (18 RT 5991.) Furthermore, the jurors were instructed on all the elements for the crimes committed against Felton Manuel and Ms. Dawn Hall (CALJIC No. 9.02 - - Assault With a Firearm; CALJIC No. 9.40 - - Robbery; CALJIC No. 9.50 - - Kidnapping; CALJIC No. 10.10 - - Unlawful Oral Copulation by Force or Threats; CALJIC No. 9.94 - - Terrorist Threats). (18 RT 5991-5996.)

The jury presumably had the common sense to accomplish its task. (See *United States v. Scheffer* (1998) 523 U.S. 303, 313 [118 S.Ct. 1261, 140 L.Ed.2d 413] ["Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men'"]; *Conservatorship of Early* (1983) 35 Cal.3d 244, 253 [jurors are "presumed to be intelligent" and "capable of properly assessing the evidence" since "'[a] juror is not some kind of dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box'"].) "There is no realistic

possibility that jurors were misled about how to evaluate the testimony of penalty phase witnesses, or that the absence of general instructions at the penalty phase induced arbitrary and capricious deliberations." (*People v. Melton* (1988) 44 Cal.3d 713, 758.)

The evidence in Smith's penalty phase was " entirely straightforward" and Smith "fails to demonstrate that the instructions given in his case, to a reasonable likelihood, precluded the sentencing jury from considering any constitutionally relevant mitigating evidence." (*People v. Moon* (2005) 37 Cal.4th 1, 39.) Any instructional error was therefore harmless.

VII.

ANY ERROR IN THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY TO VIEW SMITH'S ORAL ADMISSIONS WITH CAUTION WAS HARMLESS

Smith argues that his first-degree murder conviction (i.e., guilt phase verdict) must be reversed because the trial court failed to instruct the jury, *sua sponte*, to view with caution the pre-offense statements of intent or planning that he made to Linda Farias and Troy Holloway, as provided in CALJIC No. 2.71.7. (AOB 272-283.) Smith's claim fails, because the omission was clearly harmless.

A. Applicable Law

It is well-established that a trial court must *sua sponte* instruct the jury to view a defendant's oral admissions with caution. (*People v. Dickey* (2005) 35 Cal.4th 884, 905; *People v. Carpenter* (1997) 15 Cal.4th 312, 392; *People v. Beagle* (1972) 6 Cal.3d 441, 455). Although, as noted by this Court, the risk of conviction because of a false pre-offense statement alone is less than the risk of conviction upon a false confession or admission, the Court applies the same rule to pre-offense statements. (*People v. Carpenter, supra*, at p. 392; *People v. Beagle, supra*, at p. 455, fn. 5.) Here, the trial court did not instruct the jury

with CALJIC No. 2.71.7, which tells the jury to view the defendant's oral admissions with caution. Although the trial court erred in failing to instruct the jury to view Smith's pre-offense statements of intent or planning to Linda Farias and/or Troy Holloway with caution, the error was harmless.

The applicable standard of review for prejudice is whether it is reasonably probable that the jury would have reached a result more favorable to Smith had the instruction been given. (See *People v. Dickey, supra,* 35 Cal.4th at p. 905; *People v. Carpenter, supra,* 15 Cal.4th at p. 393.) Because the primary purpose of the instruction is to help the jury determine whether the statements attributed to the defendant were made, the reviewing court examines the record to determine whether there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately, in assessing whether prejudice resulted from the omitted instruction. (*People v. Dickey, supra*, at pp. 905-906; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1268; *People v. Stankewitz* (1990) 51 Cal.3d 72, 94.) Where there is no conflict, but simply a denial by the defendant that he made the statement(s) attributed to him, this Court has found the omission of the cautionary instruction harmless. (*People v. Dickey, supra*, at p. 906; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1225-1226.) Similarly, when the testimony about the defendant's statements is uncontradicted, this Court has found that no prejudice results. (See *People v. Stankewitz, supra*, at p. 94 [no prejudice found where "[t]he testimony concerning defendant's oral admission was uncontradicted; defendant adduced no evidence that the statement was not made, was fabricated, or was inaccurately remembered or reported" and "[t]here was no conflicting testimony concerning the precise words used, their context or their meaning"].)

Likewise, when the jury has otherwise been thoroughly instructed on judging witness credibility, this Court has found that the jury was adequately

alerted to view the testimony with caution, and any omission of the additional cautionary instruction harmless. (See *People v. Dickey, supra*, 35 Cal.4th at p. 906; *People v. Carpenter, supra*, 15 Cal.4th at p. 393; *People v. Stankewitz, supra*, 15 Cal.3d at p. 94.)

B. The Omission Of CALJIC No. 2.71.7 Was Harmless

Here, Smith claims that the omitted instruction applied to the testimony of Linda Farias and Troy Holloway regarding his pre-offense statements that indicated he was planning and premeditating the murder of Rexford. However, Smith simply denied ever making the statements attributed to him by Linda Farias and Troy Holloway. (15 RT 4828-4829.) There was no conflict in the wording or the language actually used by Smith. The statements were either made by Smith or they weren't. This lack of conflict rendered any error in the failing to instruct with CALJIC No. 2.71.1 harmless. (*People v. Dickey, supra*, at 906; *People v. Bunyard,* 45 Cal.3d at 1225-1226.) Particularly so, where as here, the jury was instructed on how to evaluate the credibility of witnesses generally. The jury in Smith's case was instructed with CALJIC No. 2.20 [Credibility of Witness], CALJIC No. 2.21.1 [Discrepancy in Testimony], CALJIC No. 2.21.2 [Witness Willfully False], CALJIC No. 2.22 [Weighing Conflicting Testimony], and CALJIC No. 2.70 [Confession and Admission Defined] among other instructions on evaluating evidence. (3rd Suppl. CT vol. 1, 407-510; 16 RT 5190-5253.) "These instructions adequately alerted the jury to view the testimony of [the witnesses] with caution." (*People v. Dickey, supra*, 35 Cal.4th at 906; see *People v. Carpenter, supra*, 15 Cal.4th at 393.)

Moreover, defense counsel, in closing argument, spent an inordinate amount of time and energy attacking the credibility of both Troy Holloway and Linda Farias. (See16 RT 5318-5369, 5382-5385.) Defense counsel called Holloway a "liar" numerous times during his argument. (16 RT 5318, 5341, 5345, 5353, 5360, 5362.) The vast majority of defense counsel's argument to

the jury was consumed with defense counsel attacking Holloway's credibility. (16 RT 5318-5369.) Defense counsel also argued that Linda Farias should not be believed. (16 RT 5382-5385.) He argued that Linda Farias' mind had been "poisoned." (16 RT 5382, 5384.) Counsel argued that after her mind was "poisoned" she started "making all these allegations. It's not credible. It's not reliable." (16 RT 5384.) When this argument to the jury is combined with the instructions that were given in this case (regarding the evaluation of witness credibility), it is clear the jury would have carefully analyzed and weighed the testimony of Troy Holloway and Linda Farias regarding Smith's pre-offense statements. It was simply a matter of believing these witnesses or not believing them, and CALJIC No. 2.71.1 would not have changed the outcome of this case.

In summary, because the pre-offense statements testified to by Linda Farias and Troy Holloway were simply denied by Smith, and the jury was otherwise thoroughly instructed on witness credibility, it is not reasonably probable Smith would have received a more favorable verdict had the jury been instructed that Smith's pre-offense statements should be viewed with caution, as set forth in CALJIC No. 2.71.7. (*People v. Dickey, supra*, 35 Cal.4th at 906.) This is particularly so in light of the extensive attack mounted by defense counsel on the credibility of the witnesses in closing argument. Furthermore, even had the statements of Linda Farias and Troy Holloway been disbelieved, the evidence of guilt, which included the testimony of eye-witnesses to the shooting, was very strong, and hence a more favorable result for Smith was simply not reasonably probable. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

Because no prejudice resulted from the omission of CALJIC No. 2.71.7, Smith's argument for reversal of his first-degree murder conviction must be rejected.

VIII.

THE GUILT PHASE INSTRUCTIONS DID NOT IMPERMISSIBLY UNDERMINE THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT, NOR DID THEY INFRINGE UPON SMITH'S RIGHTS TO DUE PROCESS AND TRIAL BY JURY

Smith contends that several of the standard guilt phase jury instructions impermissibly reduced the prosecution's burden of proof and prejudicially violated his constitutional rights to due process and trial by jury. (AOB 284-296.) The instructions Smith complains about are CALJIC Nos. 2.02, 2.21.2, 2.22, 2.27, 2.51, 2.62, and 8.20. Smith's claims have been rejected by this Court in the past and should be rejected now as well.

Smith contends that CALJIC No. 2.02, regarding circumstantial evidence, lessened the prosecution's burden of proof and also created an impermissible mandatory inference that required the jury to accept "any reasonable incriminatory interpretation of the circumstantial evidence unless Smith rebutted it by producing a reasonable exculpatory interpretation." (AOB 285-288.) In *People v. Nakahara* (2003) 30 Cal.4th 705, this Court rejected the identical arguments raised by Smith and noted ". . . we have recently rejected these contentions and we see no reason to reconsider them. [Citing *People v. Riel* (2000) 22 Cal.4th 1153, 1200; *People v. Millwee* (1998) 18 Cal.4th 96, 160; *People v. Crittenden* (1994) 9 Cal.4th 83, 144.)" (*People v. Nakahara, supra,* 30 Cal.4th at 714.) This Court has repeatedly held that the former standard CALJIC instructions on circumstantial evidence do not negate or dilute the presumption-of-innocence or reasonable-doubt requirements. (*People v. Jurado, supra*, 38 Cal.4th at pp. 126-127; *People v. Guerra, supra,* 37 Cal.4th at pp. 1138-1139; *People v. Hughes* (2002) 27 Cal.4th 287, 346-347; *People v. Wilson* (1992) 3 Cal.4th 926, 942-943.) *Jurado* and *Guerra*, as well as cases cited therein, addressed and expressly rejected the same arguments and

reasoning Smith makes. Smith presents no persuasive reason to revisit the matter.

Smith attacks CALJIC Nos. 2.21.2, 2.22, 2.27. 2.51, and 8.20 on the ground that each of them "in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence." (AOB 288.) Smith thus contends that the instructions "implicitly replaced the 'reasonable doubt' standard with the 'preponderance of the evidence' test, and vitiated the constitutional prohibition against the conviction of a capital defendant upon any lesser standard of proof." (AOB 288-293.) This Court in *Jurado* and *Guerra* also rejected arguments attacking CALJIC No. 2.21.2, CALJIC No. 2.22, and CALJIC No. 8.20. (*People v. Jurado*, *supra*, 38 Cal.4th at pp. 126-127; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1139; accord, *People v. Millwee*, *supra*, 18 Cal.4th at pp. 158-159 [specifically rejecting attack on CALJIC No. 2.21.2].) Thus, Smith's identical arguments attacking these instructions are without merit.

With regard to CALJIC No. 2.27, this Court has previously reviewed and rejected Smith's argument. (*People v. Noguera* (1992) 4 Cal.4th 599, 633-634). Likewise, other reviewing courts have rejected Smith's argument as well. (*People v. Wade* (1995) 39 Cal.App.4th 1487, 1496-1497.)

This Court has determined that CALJIC No. 2.51, likewise, neither lessens the prosecution's burden of proof (*People v. Brasure, supra,* 42 Cal.4th 1037, 175 P.3d at 647 fn. 15; *People v. Nakahara, supra,* 30 Cal.4th at 714, citing *People v. Frye* (1998) 18 Cal.4th 894, 957-958), nor shifts the burden of proof to the accused (*People v. Cleveland*, *supra*, 32 Cal.4th at p. 750). With regard to CALJIC No. 2.51, this Court recently stated: "We have repeatedly rejected these arguments [citing *Cleveland, supra*] and defendant gives us no reason to reconsider our views." (*People v. Howard* (2008) 42 Cal.4th 1000, 175 P.3d 13, 71 Cal.Rptr.3d 264, 283.)

In summary, each of Smith's instructional claims against standard CALJIC instructions have been repeatedly rejected by this Court and no valid reason for revisiting these instructions has been provided by Smith.

IX.

THIS COURT HAS CONSIDERED AND REJECTED SMITH'S VARIOUS CHALLENGES TO THE CONSTITUTIONALITY OF CALIFORNIA'S DEATH PENALTY LAW AND IMPLEMENTING INSTRUCTIONS

Smith challenges the constitutionality of California's death penalty law and implementing instructions on a variety of grounds. (AOB 297-312.) These same claims have been presented to, and rejected by this Court many times. Because Smith fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims should all be rejected without additional legal analysis. (*People v. Schmeck, supra,* 37 Cal.4th at pp. 303-304; *People v. Welch* (1999) 20 Cal.4th 701, 771-772; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256.)

Initially, Smith contends that his death sentence is illegal and unconstitutional because Penal Code section 190.3 fails to adequately narrow the class of persons eligible for the death penalty in violation of the state and federal Constitutions. (AOB 297-298.) This Court has repeatedly rejected identical arguments and should do so again in the present case.

California's death penalty scheme clearly satisfies the constitutionally mandated narrowing function. This Court has repeatedly rejected the claim that California's death penalty statutes are unconstitutional because they fail sufficiently to narrow the class of persons eligible for the death penalty. (*People v. Schmeck, supra,* 37 Cal.4th at 304; *People v. Wilson* (2005) 36 Cal.4th 309, 361-362; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Monterroso* (2004) 34 Cal.4th 743, 796; *People v. Michaels* (2002) 28 Cal.4th

486, 541; *People v. Ochoa* (2001) 26 Cal.4th 398, 459, 462; *People v. Catlin* (2001) 26 Cal.4th 81, 179; *People v. Cunningham* (2001) 25 Cal.4th 926, 1041; *People v. Welch, supra,* 20 Cal.4th at p. 767; *People v. Arias, supra,* 13 Cal.4th at p. 187.)

The United States Supreme Court summarized the constitutional prerequisites which a state must satisfy before imposing a sentence of death in *McCleskey v. Kemp* (1987) 481 U.S. 279 [107 S.Ct. 1756, 95 L.Ed.2d 262]. The United States Supreme Court explained:

> In sum, our decisions since *Furman* [*v. Georgia* (1972) 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346]] have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstances that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

(*McCleskey v. Kemp, supra,* 481 U.S. at pp. 305-306.)

If these limits are satisfied, "the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 309 [110 S.Ct. 1078, 108 L.Ed.2d 255].)

While a state must narrow the class of death-eligible defendants, there is no exclusive "right way" for a state to implement its capital sentencing mechanism. (*Spaziano v. Florida* (1984) 468 U.S. 447, 464 [104 S.Ct. 3154, 82 L.Ed2d 340].) Accordingly, the United States Supreme Court has found that the narrowing function described in *McClesky* may be performed at either the guilt or penalty phase of a capital case. (*Lowenfield v. Phelps* (1988) 484 U.S.

231, 244-245 [108 S.Ct. 546, 98 L.Ed.2d 568].)

In California, the narrowing function occurs at the guilt/special circumstances phase of a capital trial. Before a defendant can become death-eligible, he must be convicted of first degree murder and at least one special circumstance must be found true beyond a reasonable doubt. The latter requirement, the United States Supreme Court has held, adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 871, 79 L.Ed.2d 29].) The statute thus survives any federal constitutional claim advanced by Smith.

Smith next contends the death penalty statute and pertinent jury instructions fail to set forth the appropriate burden of proof, which Smith submits is the beyond a reasonable doubt standard. (AOB 299.) Smith submits a variety of sub-categories of this argument which all deal with either the standard and manner to be employed in the penalty selection process, and Smith's contention that there is a need for unanimity by the jurors. (AOB 299-308.) However, all of Smith's contentions have been resolved contrary to his arguments, many times over. (*People v. Dunkle* (2005) 36 Cal.4th 861, 939; *People v. Stitely* (2005) 35 Cal.4th 514, 573; *People v. Panah, supra,* 35 Cal.4th at p. 499; *People v. Monterroso, supra,* 34 Cal.4th at p. 796; *People v. Morrison* (2004) 34 Cal.4th 698, 730; *People v. Welch, supra,* 20 Cal.4th at pp. 767-768.) Moreover, the decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] and its progeny, do not change that conclusion. (*People v. Stitely, supra*, 35 Cal.4th at p. 573 [*Blakely*,[37] *Ring*,[38] and *Apprendi* "do not require reconsideration or modification of our long-

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37. *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403].

38. *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556].

standing conclusions in this regard"]; *People v. Gray, supra,* 37 Cal.4th at p. 237; *People v. Morrison, supra*, 34 Cal.4th at pp. 730-731; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263, 271-272; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; see *People v. Smith, supra,* 30 Cal.4th at p. 642.) Likewise, because of the individual and normative nature of the jury's sentencing determination, the trial court need not instruct that the prosecution has the burden of persuasion on the issue of penalty. (*People v. Combs* (2004) 34 Cal. 4th 821, 868; *People v. Lenart* (2004) 32 Cal. 4th 1107, 1135-1136; *People v. Steele* (2002) 27 Cal 4th 1230, 1259; *People v. Bemore* (2000) 22 Cal.4th 809, 859.)

Continuing with Smith's laundry list of previously rejected constitutional complaints about the death penalty (AOB 302-307): (1) This Court has rejected Smith's arguments (1) that jury unanimity is required for the determination of factors in aggravation (*People v. Hoyos* (2007) 41 Cal.4th 872, 926); (2) that *no* unanimity was required for mitigating factors (*People v. Cook* (2007) 40 Cal.4th 1334, 1365); and (3) that no instruction was required telling the jurors they could impose a life sentence even if the aggravating factors outweighed the mitigating factors (*People v. Smith* (2005) 35 Cal.4th 334, 337).

This Court has also repeatedly rejected Smith's contention that the trial court was constitutionally required to instruct the jury that there is a presumption favoring a sentence of life in prison (AOB 307). (See, e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1233; *People v. Combs, supra*, 34 Cal.4th at p. 868; *People v. Pollock* (2004) 32 Cal.4th 1153, 1196; *People v. Lenart, supra*, 32 Cal.4th at p.1137; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064; *People v. Arias, supra*, 13 Cal.4th at p. 190.) Because Smith provides no compelling reason for reconsideration, his argument should be rejected.

Smith invites this Court to reconsider its previous rulings that a capital jury is not required to submit written findings for its death verdict. (AOB 308.) This Court has repeatedly declined such an invitation, and should do so again here. (See *People v. Hoyos, supra,* 41 Cal.4th at 926; *People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Yeoman, supra,* 31 Cal.4th at pp. 164-165; *People v. Martinez* (2003) 31 Cal.4th 673, 701; *People v. Smith, supra,* 30 Cal.4th at pp. 641-642.)

Smith contends that the lack of intercase proportionality review violates the Eighth and Fourteenth Amendments. (AOB 310-311.) This Court has repeatedly rejected this contention and should do so here. (See, e.g., *People v. Elliot, supra,* 37 Cal.4th at p. 488; *People v. Panah, supra,* 35 Cal.4th at p. 500; *People v. Smith, supra,* 35 Cal.4th at p. 374; *People v. Burgener, supra,* 29 Cal.4th at p. 885; *People v. Anderson* (2001) 25 Cal.4th 543, 602.)

Smith contends the use of "restrictive" adjectives in the list of mitigating factors created a barrier to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 309.) He also argues that inapplicable sentencing factors should have been deleted from penalty phase instructions, and that the jurors should have been told mitigating factors are relevant solely for purposes of mitigation. (AOB 309-310.) These claims have likewise been consistently rejected and are also therefore meritless. (*People v. Geier* (2007) 41 Cal.4th 555, 619-620; *People v. Elliot, supra,* 37 Cal.4th at p. 488 ["extreme," "substantial"]; *People v. Panah, supra,* 35 Cal.4th at p. 500; *People v. Smith, supra,* 35 Cal.4th at p. 374.)

Smith contends California's sentencing scheme violates the Equal Protection Clause because it denies certain procedural safeguards to capital defendants that are afforded non-capital defendants. (AOB 311.) This Court has previously rejected this contention and should also do so here. (*People v. Brasure, supra,* 42 Cal.4th at 1069 ["Because capital and noncapital defendants

are not similarly situated in the pertinent respects, equal protection principles do not mandate that capital sentencing and sentence-review procedures parallel those used in noncapital sentencing"]; *People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Panah, supra*, 35 Cal.4th at p. 500; *People v. Smith, supra*, 35 Cal.4th at p. 374; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.)

Lastly, Smith contends that California's death penalty scheme violates international law. (AOB 312.) This Court has also rejected this contention and has specifically rejected the argument that California's scheme violates the International Covenant of Civil and Political Rights. (See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646, 744; *People v. Ramos* (2004) 34 Cal.4th 494, 533-534; *People v. Brown* (2004) 33 Cal.4th 382, 404.) Therefore, Smith's claim must be rejected here, as well.

In summary, the lengthy list of constitutional attacks on the California death penalty put forth by Smith involves contentions that have been continually raised and rejected by this Court over the past two decades. The principle of *stare decisis* dictates the same result here. Smith has not given this Court any reason to abandon its multitude of opinions pertaining to these claims.

X.

THE LYING IN WAIT SPECIAL CIRCUMSTANCE FULFILLS ITS NARROWING FUNCTION AND IS CONSTITUTIONAL

Smith's last argument is that the lying in wait special circumstance (Pen. Code § 190.2, subd. (a)(15)) is unconstitutional because it does not fulfill a narrowing function. (AOB 313-314.) Smith contends that as applied to his case the lying in wait special circumstance did not serve to narrow him into a class of persons calling for a more severe sentence because "any surprise that existed in this case flowed from a factor common to all murders." (AOB 314.) This Court has repeatedly rejected the argument that the criteria for the lying-in-

wait special circumstance fail to provide a meaningful basis for narrowing the class of murder that qualifies for the death penalty. (*People v. Bonilla, supra,* 41 Cal.4th at p. 333; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148-1149; *People v. Sims* (1993) 5 Cal.4th 405, 434; *People v. Edwards* (1991) 54 Cal.3d 787, 824; *People v. Morales* (1989) 48 Cal.3d 527, 557-558; *People v. Edelbacher, supra,* 47 Cal.3d at p. 1023.) As applied to Smith, it likewise provided a constitutional narrowing function.

In Smith's case, his conduct of killing the victim while lying in wait was a particularly egregious form of murder. Smith engaged in numerous activities on the morning of the killing to insure the victim was in Pupua's apartment (completely unaware of the fate that was about to befall him). The victim and his companions were under Smith's surveillance for a considerable period of time. Even while Smith was in Mr. Honess's apartment, he had his cohorts peering out the window. (10 RT 2997-3000.) Eventually, when the victim and his friends were eating breakfast and playing videos games on the television, Smith entered their apartment and immediately began firing from his 9 millimeter handgun. (9 RT 2863-2864, 2882.) Rexford had absolutely no chance to save himself. He was caught by surprise and he was in a confined space where Smith could easily continue firing one bullet after another into his body. Under these circumstances, the murder was particularly heinous and the lying in wait special circumstance clearly accomplished its narrowing function within the Eight and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment be affirmed.

Dated: May 28, 2008

Respectfully submitted,

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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 41532 words.

Dated: May 28, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Floyd Daniel Smith**

No.: **S065233**

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 May 29, 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 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, 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 May 29, 2008, at San Diego, California.

Monica E. Seda
Declarant

Monica L. Seda
Signature

70125460.wpd