IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

Plaintiff and Respondent,

v.

**MICHAEL RAYMOND JOHNSON,**

Defendant and Appellant.

**CAPITAL CASE**
S070250



Ventura County Superior Court No. 39376
The Honorable Steven Z. Perren, Judge

# RESPONDENT'S BRIEF

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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## STATEMENT OF THE CASE

The Ventura County District Attorney filed an information charging appellant in count 1 with murder (Pen. Code,[1/] § 187, subd. (a)), in count 2 with attempted murder (§§ 664/187, subd. (a)), in count 3 with kidnapping (§ 207, subd. (a)), in count 4 with spousal rape (§ 262, subd. (a)(1)), and in count 5 with felon in possession of firearm with five prior felonies (§ 12021, subd. (a)(1)). The information alleged two special circumstances with respect to count 1: the murder victim was a peace officer intentionally killed while engaged in the performance of his duties (§ 190.2, subd. (a)(7)) and the murder was committed while appellant was engaged in the commission of a kidnapping (§ 190.2, subd. (a)(17)). As to count four, spousal rape, the information alleged that the conduct fell within the meaning of section 667.61, subdivisions (a), (d)(2), and (e)(4), because appellant substantially increased the risk to the victim by kidnapping her and personally used a firearm. As to counts 1 through 4, the information further alleged that appellant personally used a firearm within the meaning of section 12022.5. Also as to counts 1 through 4, the information charged that appellant had two prior felony

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

convictions within the meaning of section 667, subdivision (a), and, as to all counts, within the meaning of section 667, subdivisions (b) through (i), and section 1170.12, subdivisions (a) through (d). As to counts 1, 2, and 4, the information alleged that appellant served two prior prison terms within the meaning of section 667.5, subdivision (a). (3CT 772-777.)

Appellant pleaded not guilty and denied all the allegations. The People represented that they would be seeking the death penalty. (3CT 784.)

Trial was by jury. (8CT 2212.) The jury found appellant guilty of all counts and found all allegations to be true. (10CT 2706-2722.)

After the penalty trial, the jury fixed the penalty in count 1 at death. (12CT 3105; 13CT 3258, 3260.) The trial court denied appellant's motions for a new trial and automatic modification of the penalty in count 1 from death to life in prison without the possibility of parole. (15CT 3736, 3745-3751.) As to count 1, the trial court sentenced appellant to death, in accordance with the jury's verdict. (15CT 3737-3738, 3752-3755.) The trial court imposed and stayed prison sentences for counts 2, 3, 4, and 5. (15CT 3738-3743, 3752.)

The appeal is automatic following the judgment of death. (15CT 3757; § 1239, subd. (b).)

## STATEMENT OF FACTS

## I. GUILT PHASE

### A. Prosecution Evidence

After kidnapping and raping his wife, Guillermina Alonzo, at gunpoint, appellant took her to her house while still armed. Deputy Peter Aguirre and other deputies responded to a 911 call from Alonzo's frantic daughter. Deputy Aguirre entered the house. Appellant came out of the bathroom, gun in hand, and shot Deputy Aguirre, who still had his firearm holstered. He then shot and killed Deputy Aguirre from close range, execution-style, in the head as Deputy

Aguirre lay prone. Attempting to flee, appellant got into a shootout with Deputy James Fryhoff outside the house. Deputy Fryhoff shot appellant, ending the bloodshed. Appellant later admitted to a police psychiatrist that he was fully aware of what he was doing that he wanted to commit "suicide by cop."

**1. Background**

Guillermina Alonzo had a daughter Doreyda, whose father was Mario Gomez. (36RT 6771-6772.) Later, in 1985, Guillermina Alonzo married appellant. (36RT 6756.) Appellant left Alonzo after he married her. (36RT 6772.) Alonzo did not remember at the time of trial whether she saw appellant anytime between 1985 and 1995. (36RT 6773-6774.)

In 1995, Guillermina Alonzo signed some papers for appellant. (36RT 6775-6776.) After meeting with appellant, Alonzo dated him and began an intimate relationship. At this time, Alonzo lived on Bole Street in Ojai. (36RT 6777.)

In about May 1996, Alonzo and her daughter Doreyda moved to 122 North Encinal. (36RT 6771, 6778-6779.) Alonzo's nephew owned the house there. Two or three weeks later, Doreyda's boyfriend moved in. (36RT 6779.) Alonzo slept in the house's only bedroom and Doreyda slept in the living room. (36RT 6780.) In July 1996, appellant began sleeping at the house. (36RT 6781.) Appellant also had another residence in Ventura. (36RT 6782.)

On July 14, 1996, appellant and Alonzo had breakfast in Ventura with appellant's parents. (36RT 6786.) After breakfast, Alonzo returned to the house. (36RT 6787.) Appellant and Alonzo then went "to make love" in the mountains. (36RT 6787-6788.) They drove for 20 minutes on Highway 33. (36RT 6787.) When they arrived, appellant and Alonzo took off all their clothing. (36RT 6788.) Appellant asked Alonzo how she knew about this place. Alonzo said that she had gone there with Doreyda's father when

Doreyda was little. Appellant got angry and wanted to go back to the house. Appellant did not want to go down to the river. Alonzo tried to calm appellant down by telling him that it had happened a long time ago. Appellant calmed down. (36RT 6789.) Appellant and Alonzo made love down by the river. (36RT 6790.)

On July 15, 1996, Alonzo went to work early in the morning. (36RT 6790.) When Alonzo returned home from work, it appeared that appellant had taken his few possessions in the house and moved out. That night, appellant did not come to the house to spend the night. (36RT 6791.)

On July 15 or 16, 1996, Alonzo and appellant conversed. (36RT 6792.) Appellant said that he wanted to get a divorce. Appellant said that Alonzo was not good enough for him, that his family was very special, and that she was "nothing." (36RT 6795.)

**2. Appellant Kidnaps And Sexually Assaults Alonzo**

On July 17, 1996, Guillermina Alonzo drove her car to her workplace, Mrs. Strauss's house, in Ojai. (36RT 6796; 37RT 6829-6830.) At about 2:45 p.m., appellant went to this house. (36RT 6796; 37RT 6830; 38RT 7088.) Appellant rang the doorbell of the main house. (37RT 6831-6832.) Alonzo answered the door. Appellant was wearing a green vest with a shirt underneath and a pair of shorts. (37RT 6831.) Alonzo asked what appellant was doing there and said, "In the conversation we had yesterday, you told me you didn't love me." Appellant said, "You understand what a .45 is?" Alonzo said, "Yes." (37RT 6832.) Alonzo believed that appellant's statement meant he was carrying a .45-caliber pistol. (37RT 6833.) Appellant showed her a gun and said, "Listen to me." (38RT 7088.)

Alonzo walked away but appellant followed her. (37RT 6832.) Alonzo stopped at the laundry room. (37RT 6832-6833.) Appellant and Alonzo argued. (37RT 6834.) Appellant said that he was going to take Alonzo to

Wisconsin or Mexico with him. (37RT 6834, 6852.) Alonzo said she would go with him. Alonzo did not believe appellant was going to Wisconsin. (37RT 6835.) Appellant said that they were going to rob a bank in Ojai to get money to go to Wisconsin because they did not have any money. (37RT 6835-6836, 6840, 6853.) Appellant was planning to rob the bank on Friday. (37RT 6839-6840.) Alonzo told appellant that she could not go with him. Appellant said that he would take Alonzo to Wisconsin by force. (37RT 6836.) Appellant also told Alonzo that if she refused to go to Wisconsin with him, he would kill her and himself. (37RT 6838, 6846-6847.) While appellant was talking about going away and robbing the bank, he was acting crazily and talking loudly. (37RT 6854.) While in the laundry room, Alonzo put the laundry into the washing machine and the dryer. (37RT 6839.)

Alonzo took appellant to the guest house because she was worried that someone in the Strauss house could get hurt. (37RT 6833, 6852.) Appellant removed the gun from the back of his shorts and threw it on top of the bed. (37RT 6838-6839, 6844.) The gun was an old, big, "kind of black" pistol. (37RT 6838.) Appellant wanted to sit with Alonzo on the sofa. (37RT 6834, 6845.) Alonzo stood up and then sat down on the bed. (37RT 6845.) Appellant was arguing. (37RT 6845, 6849.) Alonzo was asking appellant what was happening and what had happened to him. Appellant said that he did not want Doreyda's boyfriend at the house. Appellant said that he was jealous of Doreyda's boyfriend. Appellant said that he wanted "[t]o kick him out" and "[f]or them to leave." (37RT 6849.) Appellant told Alonzo that he wanted Francisco, Doreyda's boyfriend, to leave the house. (37RT 6850.) Alonzo had never seen appellant act like that. (37RT 6860.) In the guest house, appellant showed Alonzo the magazine of his gun, which was fully loaded with bullets. (37RT 6855-6856.) Alonzo many times asked to take the pistol away. (37RT 6857-6858.) Appellant said, "No." (37RT 6858.)

When appellant and Alonzo were conversing at the Strauss house, she did not want to leave with him, but he had a gun, so she said that she would go with him. (38RT 7090-7092.) Because appellant had a gun, Alonzo was very scared of appellant and listened to him. (38RT 7093.)

While in the guesthouse, Alonzo had a portable phone with her because she was expecting a call from Mrs. Strauss. (37RT 6858.) Sometime before 3:00 p.m., Alonzo called Doreyda and told her to permanently leave the house. (37RT 6859, 6862.) Alonzo made Doreyda and her boyfriend, Francisco, leave the house because appellant had told her to do so, and because appellant "was not reacting well" and could have hurt them. (37RT 6850, 6859.) When Alonzo told Doreyda to leave, Doreyda said, "Momma, why?" Alonzo said, "I don't know. Because this [sic] Michael, I don't know what happened to him. He doesn't want him here." Alonzo wanted Doreyda and her boyfriend to leave because appellant was carrying two pistols and she did not want them to get hurt. (37RT 6860.) Doreyda cried. The telephone call between Alonzo and Doreyda lasted one or two minutes. (37RT 6862.)

After Alonzo talked to Doreyda on the telephone, Mrs. Strauss called. (37RT 6862.) Mrs. Strauss indicated that Alonzo had completed her duties for the day and that she could leave. (37RT 6862-6863.) Mrs. Strauss said Alonzo did not have to pick up Mrs. Strauss's children from school in Ojai and return with them to the house because Mrs. Strauss would do that. (37RT 6863.) Alonzo believed that Mrs. Strauss would return soon. Alonzo decided that she and appellant should leave the residence. (37RT 6864.) Alonzo believed that she needed to get appellant out of the house. Alonzo did not believe that she could walk away from appellant at this time. (37RT 6865.) Alonzo and appellant stayed in the guesthouse for no more than 15 to 20 minutes. (37RT 6849.)

Appellant and Alonzo went out to the driveway of the Strauss residence. (37RT 6866; 38RT 7094.) Appellant's car was parked directly behind

Alonzo's car. (37RT 6866.) In response to Alonzo's suggestion that appellant and Alonzo each drive away in their respective cars, appellant said, "No." (37RT 6867; 38RT 7094.) Alonzo left her purse and wallet in her car. (37RT 6867-6868.) Appellant placed the gun into the back of his shorts. (37RT 6867.) Alonzo and appellant left together in appellant's car. (37RT 6864, 6866.) Appellant drove them back to her nephew's house at 122 North Encinal. (37RT 6867, 6872-6873.) While driving, appellant still had the pistol in the back of his shorts. Appellant stated that he had another pistol in his vest pocket. (37RT 6873.) Alonzo could see the outline of the pistol in his shirt pocket. (37RT 6874.)

During the drive to the house, appellant and Alonzo talked about "Crazy Love," which was a "story where he thought we were both crazy." (37RT 6874.) This was a story that appellant and Alonzo had discussed since they started dating, a story that appellant was going to write when he got out of school. (37RT 6874-6875.) During the 20-minute drive to the house, appellant told the story of "Crazy Love." (37RT 6876.) While driving, appellant would get mad when Alonzo tried to grab his pistol from him. (37RT 6855.) At some point, appellant said that if Alonzo went with him to Wisconsin, she would not get hurt. (37RT 6847.)

When they got to the house, appellant parked on the street near the driveway. Appellant said that he did not like Doreyda's boyfriend and that he was jealous of him. Doreyda and her boyfriend had not left yet. Appellant and Alonzo walked up to the house. At this point, Alonzo did not believe that she could have gotten away from appellant. (37RT 6877.) Appellant and Alonzo entered the house through the door near the driveway. Doreyda and her boyfriend were there. Alonzo's sister's three children were also there—Jose, who was 13, Juan, who was 11, and Alejandro, who was three and a half. (37RT 6878.) Alonzo and Doreyda were temporarily taking care of these boys because Alonzo's sister was away. (37RT 6878-6879.) Francisco and

Doreyda were not leaving. (37RT 6881.) Alonzo was afraid when Francisco and Doreyda were in the house because appellant had a pistol in his hand and they were refusing to leave, so he could have shot them. (37RT 6880.) As a result, Alonzo decided that they had to leave. (37RT 6881-6882.) Alonzo took appellant outside because she did not want him to be close to them. (37RT 6881.) Alonzo talked outside to Doreyda, Francisco, and the boys. Alonzo told them that they had to leave. When Alonzo said this, appellant was standing next to her side. (37RT 6879.) Appellant had one hand in each vest pocket. (37RT 6879-6880.) At the end, appellant said that everyone could stay except for Francisco. (37RT 6880.)

Alonzo said to appellant, "Let's go cruising." Alonzo and appellant got inside the car. (37RT 6882.) Appellant took Doreyda's little dog, which was about two months old. (37RT 6883.) This dog would bark if someone came to the door at 122 North Encinal and knocked. Appellant said that he took the dog because he knew that he was being followed. (37RT 6885.)

Alonzo and appellant drove on Highway 33. (37RT 6885-6887.) Appellant drove them to the river, the same one they had gone to the previous Sunday to make love. (37RT 6885-6889.) During the drive, the guns were in the same locations—one by appellant's waist, and one in his pocket. (37RT 6888.) When they got near the river, appellant and Alonzo got out of the car. Appellant or Alonzo took a blanket and two pillows. (37RT 6889.)

Appellant and Alonzo went down to the river and crossed it. (37RT 6891-6892.) They walked up the embankment on the other side of the river to a grassy area with trees. (37RT 6892.) Appellant and Alonzo tied up the dog on a tree, and retied it again after it got loose. (37RT 6889, 6893, 6992-6993.) Appellant took his clothes off. Alonzo took her clothes off. (37RT 6891.) They were standing. (37RT 6896.)

Appellant lay down. (37RT 6896.) Alonzo sat down and then lay down. (37RT 6896-6897.) Appellant placed one gun underneath his pillow

and kept the other one in his hand. (37RT 6895.) Appellant was moving the gun around from right to left while looking around. (37RT 6898-6900.) Appellant would look behind him to see if someone was following him. (37RT 6895.) After they took their clothes off, appellant got on top of Alonzo and tried to have sex with her. (37RT 6901, 6903.) During the time appellant was trying to have sex with Alonzo, he was holding the guns. (37RT 6904.) Appellant placed his penis on her vagina. (37RT 6907.) Appellant was unable to attain an erection. (37RT 6895, 6901, 6906.) They did not have sex. (37RT 6906.) Appellant and Alonzo had never before had sex when he had two guns. (37RT 6895.)

After being at that spot by the river for less than 20 minutes, Alonzo told appellant, "Let's go." (37RT 6910.) They put their clothes back on. (37RT 6912.) Appellant again put the large gun into the back of his shorts as they left. (37RT 6912-6913.) When they left the spot by the river, appellant took the dog with him. (37RT 6921.) They got back into his car. Appellant said that they were going back to the Strauss residence to pick up Alonzo's car because his car was breaking down. (37RT 6922.)

Appellant drove Alonzo and the dog toward the Strauss residence in Ojai. (37RT 6921-6923.) Mario Gomez, Doreyda's father, lived on McNell Road in Ojai. (37RT 6924.) On the way to the Strauss residence, while on McNell Road, they saw Doreyda and her boyfriend driving Alonzo's car on the road near the house where Mario Gomez lived. (37RT 6923-6924.) Appellant responded, "She's telling everything to her Dad." (37RT 6925.) Alonzo told appellant to go quickly so that Doreyda could not see them. (37RT 6923, 6925.)

### 3. Back At Alonzo's House Right Before The Shootings

Alonzo further testified that appellant and she then drove back to the house. Appellant parked on the road outside the house. Appellant and Alonzo

entered the house. (37RT 6925.) Appellant ate some food from the refrigerator. Alonzo received a telephone call from Doreyda. Doreyda asked Alonzo, "Mom, can I call the police?" Alonzo said, "Yes." (37RT 6926.) Alonzo said that appellant had two "things" in Spanish, using the word "things" rather than the word for "pistols" or "guns" because she did not want to alert appellant. (37RT 6927.)

After Alonzo hung up the phone, appellant said that he wanted to make love again. In response, Alonzo told appellant to go take a bath or a shower. (37RT 6929.) Alonzo told appellant this because she wanted to distract him and keep him busy. (37RT 6931.) Alonzo was worried about her family. (37RT 6932.) Appellant and Alonzo went into the bathroom. Appellant wanted to bathe with Alonzo. (37RT 6933.) Appellant and Alonzo showered together. (37RT 6930, 6933.) While appellant and Alonzo were in the shower, appellant's guns were on a ledge at the bottom of a bathroom window. (37RT 6933-6934.) These guns were close to appellant's hands while he was standing in the shower. Alonzo tried to open the window but she could not. (37RT 6934.)

As appellant and Alonzo showered, the telephone rang. Alonzo wrapped herself in a towel. Alonzo asked appellant for permission to answer the phone, which appellant gave. (37RT 6934-6935.) Alonzo answered the phone. It was the police. The police said, "Mrs. Alonzo, do you need help?" Alonzo said yes. Alonzo could not talk to the police because she "didn't want him to know because I wanted him to surrender, for him not to do anything." (37RT 6935.)

While Alonzo was on the phone with the police, appellant got out of the shower or bathroom. Appellant asked Alonzo who she was talking to. Alonzo said that there was no one there. Appellant took the phone away from Alonzo and hung it up. (37RT 6936.)

Appellant said that he wanted to go to bed. (37RT 6937.) Alonzo told appellant, "No, go back to the shower because you have soap on you." (37RT 6937-6938.) Alonzo was distracting appellant. (37RT 6938.) Appellant did not really have soap on him. (37RT 6937.) Appellant went back into the shower. Alonzo went back into the bathroom. From the beginning of her encounter with appellant on this day, Alonzo did not feel that there was any time she could have gotten away from appellant. (37RT 6938.)

When appellant and Alonzo were in the bathroom, the shower was still on. (37RT 6938-6939.) Appellant stepped into the tub. (37RT 6938.) Before appellant could go back into the shower water, there was a soft knock at the door. Alonzo had a towel wrapped around her and appellant was naked. (37RT 6938-6939.) Both appellant and Alonzo heard the knock. (37RT 6939.) Alonzo knew that it was the police that had knocked. (37RT 6943.)

While appellant stayed in the shower, Alonzo opened the side door. (37RT 6941-6942.) Alonzo did not see anything and closed the side door. Alonzo walked to the front door and opened it. (37RT 6944, 6947.) Alonzo saw two officers. (37RT 6947.) One of these officers was Mexican, dark-skinned, and in uniform, and was the officer depicted in a photograph of Deputy Peter Aguirre. (37RT 6948, 6951-6954; Peo. Exh. 26A.) In Spanish, the officer said, "Mrs. Alonzo, where is Mr. Johnson?" (37RT 6952.) Alonzo said that appellant was inside and made a motion over her left shoulder with her left hand, thumb extended, a hitchhiking gesture, to point to where appellant was. (37RT 6952-6953.) Alonzo told the Hispanic officer in Spanish, and the White officer behind him in English, that appellant had two pistols. (37RT 6953-6954, 6956-6957.) Alonzo was by the door. (37RT 6954.) While they were talking, Alonzo was stepping out onto the porch, and the Hispanic officer was coming into the house. (37RT 6955-6956.) When the Hispanic officer went in, Alonzo stayed by the porch. (37RT 6956.)

### 4. The Murder Of Deputy Aguirre And Attempted Murder Of Deputy Fryhoff

On Wednesday, July 17, 1996, at about 5:25 p.m., Doreyda Gomez made a 911 call. (32RT 6113-6115.) This call was tape-recorded. (32RT 6116-6120; Peo. Exh. 1 (tape); Peo. Exh. 2 (transcript).) The 911 call transpired as follows: Gomez, calling from 585 Santa Ana, reported that her mother was in danger. (7CT 1870, 1872.) Appellant was at the house with two guns. Gomez left the house at 122 North Encinal Avenue because appellant made her mother "kick me out" of there. (7CT 1870.) She described appellant. (7CT 1870-1871.) Gomez's mother, Guillermina Alonzo, and appellant, were not fighting. Appellant wanted to stay with Alonzo. Alonzo was doing what he said to do. Gomez called her mother five minutes earlier. Her mother said she was all right. Gomez said she was "gonna call the cops." Her mother said to go ahead but that appellant has two guns. (7CT 1871.) The call-taker said that she would send someone there immediately. (7CT 1872.)

In the 911 call, Gomez then said that "they're planning to stay there. He's making her stay there like till Friday. He's planning like to rob the bank. He has like a bad, um, record." The call-taker told Gomez to wait until she called Gomez back. (7CT 1872.)

The 911 operator, Jessica Prince, subsequently called Guillermina Alonzo at 122 North Encinal and asked for her. (32RT 6116, 6120-6121; 7CT 1874.) In the tape-recorded call, Prince asked whether there was a problem, and Alonzo said that there was. In response to Prince's questions, Alonzo said that she did need them to come over there. Prince asked whether Alonzo was on a speaker phone and there was no response. (7CT 1874.) Prince asked again whether Alonzo needed the police and there was no response. (7CT 1874-1875.)

Ventura County Deputy Sheriffs Steven Sagely and Peter Aguirre worked together on only one date, July 17, 1996. (32RT 6161-6162, 6166.)

That day, Deputies Sagely and Aguirre were uniformed partners. (33RT 6164-6166.) Shortly before 5:30 p.m., Deputies Sagely and Aguirre returned to the Ojai area from the shooting practice area and got dinner at a Taco Bell in Mira Monte. (33RT 6167.)

At about 5:29 p.m., Deputies Sagely and Aguirre received a dispatch call saying that there was a domestic disturbance at 122 North Encinal, that the disturbing party had made the reporting party leave the residence, that the disturbing party was wearing a Hawaiian shirt, that he was a tall White male with shorts and glasses, and that there were two guns in the residence. (32RT 6115, 6146; 33RT 6168.) They were not told that the suspect was armed. (33RT 6168.) One of the deputies acknowledged the call. (33RT 6168-6169.) Deputy Sagely asked Deputy Aguirre whether he knew the suspect. Deputy Aguirre said that he did not know the suspect. (33RT 6258.) They went directly to the residence at 122 North Encinal. (33RT 6169.)

While en route to 122 North Encinal, Deputies Sagely and Aguirre communicated by radio transmission with Deputies David Sparks and James Fryhoff, who were in another police car behind them. (33RT 6169-6170, 6301-6302; 34RT 6382-6383.) Deputy Fryhoff was in uniform. (33RT 6303.) Deputies Sparks and Fryhoff said that they would respond and back them up until the situation had stabilized. (33RT 6170, 6303-6304.) At about 5:36 p.m., Deputies Sagely and Aguirre arrived at 122 North Encinal and parked one house south of it. (32RT 6146, 6152; 33RT 6170; 33RT 6305.) Deputies Sparks and Fryhoff parked directly behind them. (33RT 6170.) Deputy Fryhoff was carrying his Sigsauer P220, a .45-caliber semiautomatic weapon, serial number G-186239, with eight bullets in the chamber, Black Talon ammunition. (33RT 6322-6323, 6330-6331; Peo. Exh. 5.) There were two closed chain-link gates to the house, one leading to the front porch, and a wider one on the driveway. There were one or two dogs. The four deputies got out of their vehicles. (33RT 6171.)

Deputy Sagely opened the gate to the front of the house. (33RT 6171, 6306.) In order to assess the situation, Deputies Sparks and Fryhoff immediately proceeded towards the southeast corner of the back of the house. (33RT 6171, 6174.) Deputy Fryhoff said that he would cover the back of the house in case someone went out of it. (33RT 6171-6172, 6306.) Deputies Sagely and Aguirre immediately went to southwest corner of the front of the house. (33RT 6171, 6174.) Deputy Sagely did not hear anything in the house. (33RT 6174.)

Deputy Fryhoff took a position behind a large oak tree at the southeast corner of the house. Deputy Sparks took a position nearer to the house than the southeast corner. (33RT 6307.) Deputies Fryhoff and Sparks were watching the rear door, the south door. (33RT 6308.)

Deputies Sagely and Fryhoff noticed the back door open about a foot for a split second and then close no more than two seconds later. (33RT 6175-6176, 6310-6311; 34RT 6392-6393.) Deputies Sagely and Aguirre made eye contact. Deputy Sagely thought this was strange. (33RT 6175.) Deputy Fryhoff looked at Deputies Sparks and Sagely to find out if they also saw it. (33RT 6311.) Deputy Fryhoff "thought that something bad was gonna happen" and that they "were being set up." (33RT 6313.) Deputy Sagely went to the side of the house to get a better view. (33RT 6175-6176.) Deputy Sagely could not see the front door from this view. (33RT 6177.) About 20 or 30 seconds after Deputy Sagely had gone to the side, he heard footsteps coming across the house towards the front door. (33RT 6177-6178.) Deputies Sagely and Aguirre walked to the front door. Deputy Aguirre went to the left side of the door, and Deputy Sagely went to the right side. (33RT 6178.)

Deputy Aguirre knocked on the door. He was in uniform, wearing a vest, with his badge prominently displayed on his chest over his heart. He had a gun and gun belt, and had patches on his sleeves. (33RT 6180.)

The front door immediately opened. (33RT 6180.) Deputies Sparks and Fryhoff approached the back door. (33RT 6312.) Deputy Sparks was crouching down below the window on the south side of the house so that he could not be seen through the windows. (33RT 6312-6313.) Guillermina Alonzo, a heavyset Hispanic woman wrapped only in a bath towel, came out of the door. (33RT 6181-6182.) Alonzo's eyes were watering, she was shaking a little, and it looked like she had been crying. She stepped to Deputy Sagely's left. Deputy Sagely made eye contact with Alonzo. Deputy Sagely wanted to determine what crime, if any, had been committed, who the suspect was, and the location of the weapons. (33RT 6181.)

Because the sun was glaring down on the front door, and it was very dark in the house, Deputy Sagely could not see into the house. (33RT 6181.) Deputy Sagely asked Alonzo what was going on. Alonzo was crying and trying to speak, in broken English. (33RT 6182.) Alonzo could not speak English well and was upset. (33RT 6261.) Finally, Deputy Sagely said, "Well, where is he?" (33RT 6182-6183.) Alonzo pointed over her shoulder with her thumb and mentioned something about the bathroom or shower. (33RT 6183.) Deputy Sagely had difficulty understanding Alonzo, but took this to mean that the suspect was in the house, probably in the bathroom or shower area. (33RT 6183-6184.) Deputy Aguirre was behind Deputy Sagely to Deputy Sagely's left. (33RT 6184.)

Right after Alonzo pointed with her thumb and said something about a bathroom, Deputy Aguirre went through the front door. (33RT 6185-6186.) Deputy Aguirre's gun was not drawn. (33RT 6186.) Deputy Sagely could not see what Deputy Aguirre was doing in the house. (33RT 6259.) Deputy Fryhoff said something to Deputy Sparks like, "It sounds like they made contact; let's go in." (34RT 6395.) Deputy Sparks moved to the back door. (34RT 6396.)

Deputy Sparks reached down and touched the doorknob of the back door. (34RT 6396.) Alonzo said something to Deputy Sagely to the effect of "he has guns." (33RT 6186.) At about the same time Alonzo said this, Deputy Aguirre said, "Hey, Mike." (33RT 6187.) There were three to five loud gunshots. (33RT 6188; 34RT 6396, 6398; 37RT 6956.) These gunshots were rapidly fired in succession. (33RT 6188; 34RT 6396, 6398.) Deputy Sagely looked into the house and could not see anything inside. (33RT 6188.) Deputy Sagely grabbed Alonzo's arm. (33RT 6188-6189.) There was another shot. Deputy Sagely told Alonzo to get out of the way. (33RT 6189.)

Deputy Sagely went to a cover position at the north side of the house where Deputies Fryhoff and Sparks were. (33RT 6189-6190.) Deputy Sagely grabbed his gun and pulled it out. (33RT 6189.) Deputy Sparks pulled his gun out of the holster. (34RT 6399.)

Deputy Fryhoff said, "Shots fired, request Code 3 backup." (33RT 6190, 6315-6316; 34RT 6398.) Deputy Fryhoff drew his gun. (33RT 6317-6318.) Deputy Sagely tried to look into the windows and said, "Where is he? Where is he?" (33RT 6191.) Deputy Fryhoff and Sparks did not know where Deputy Aguirre was. (33RT 6191; 34RT 6399.) Deputies Sparks and Fryhoff called for "Pete." (34RT 6399.) Deputy Sagely was concerned that the suspect would be somewhere in the house looking through the windows and have a clear shot at the deputies, or else that he might come back out the front door and ambush them in the back. Deputy Sagely moved back to the northeast corner of the house. (33RT 6191.) Alonzo was there. (33RT 6191-6192.) Deputy Sagely told Alonzo, for her safety, "Get out of the way. Get out of the area." Deputy Sagely wanted to get back into the house to check on the status of Deputy Aguirre and wanted to neutralize the situation with the suspect. Deputy Sagely went to the southeast part of the house. There was a detached garage there, and Deputy Sagely wanted to get to the southwest corner of that. (33RT 6192.) Deputy Sagely ran toward the garage. (33RT 6193.)

Deputy Fryhoff went back to the oak tree. (33RT 6315-6317.) Deputy Sparks retreated toward the back of the house. (33RT 6317.) Deputy Fryhoff looked through the window. (33RT 6318.) Deputy Fryhoff made eye contact with appellant for a split second. (33RT 6318-6319.) Appellant "made a beeline towards the front door." (33RT 6319.) Deputy Fryhoff ran to the front of the house to get there before appellant did. (33RT 6319-6320.) As Deputy Fryhoff was running, he yelled to Deputy Sparks, who was now at the southeast corner of the house, behind the house, "He's going to the front, he's going to the front." (33RT 6319; 34RT 6401.) As Deputy Fryhoff was running, he also yelled, "Where's Pete?" (33RT 6319-6320.) Deputy Fryhoff intended to use the oak tree in the front of the house as cover. (33RT 6320.)

Deputy Fryhoff came around the corner and stopped at the oak tree because appellant was already in the front yard. (33RT 6320, 6325.) As soon as Deputy Fryhoff rounded the corner, appellant faced Deputy Fryhoff, raised his arms up, and shot at Deputy Fryhoff five or six times. (33RT 6193, 6321-6322; 34RT 6401.) Deputy Fryhoff returned fire, shooting at appellant three times from 40 to 45 feet away. (33RT 6322; 34RT 6401.)

Deputy Fryhoff crouched behind the large oak tree for cover. (33RT 6323; 34RT 6401-6402.) There was another volley of gunshots fired from appellant's direction. Deputy Sparks or Sagely yelled, "Where is the suspect? Where is he?" Deputy Fryhoff said, "I can't see him, I'm behind a big tree." (33RT 6323.) Deputy Fryhoff quickly peeked from behind the tree to look for appellant. (33RT 6324.) Deputy Fryhoff went toward the front of the house. Because Deputy Fryhoff did this, Deputy Sparks believed it was safe to come out, so he started walking with him down the driveway toward the front of the house. (34RT 6402.) Appellant was lying down on his back with his hands in the air, in the front grass area south of the sidewalk. (33RT 6194-6196, 6324; 34RT 6402-6403.) There was nothing in appellant's hands. (33RT 6325.) There was a .32-caliber handgun lying next to appellant on the grass near the

walkway leading to the front door. (33RT 6325-6326; 34RT 6404, 6412.) The weapon was empty. (34RT 6404.) There was also a nickel-plated or chrome-plated Colt .45 further away from appellant to appellant's right. (33RT 6194, 6325-6326.) Deputy Fryhoff stood over appellant. (33RT 6194.) Deputy Fryhoff yelled to the other deputies, "He's down." (33RT 6324-6325.)

Deputy Fryhoff approached appellant and told him not to move. Deputy Fryhoff rolled appellant onto his stomach. (33RT 6325.) Deputy Fryhoff handcuffed appellant's hands behind his back. (33RT 6194, 6325.) Appellant had a gunshot wound to the left side of his chest. (33RT 6325.)

Deputy Sparks requested a deputy to help him "clear the house," which meant to check on Deputy Aguirre's condition and for any possible suspects, witnesses, or victims. (33RT 6196, 6326; 34RT 6405.) Deputy Sparks radioed for fire and ambulance assistance. (34RT 6405.) Deputies Sparks and Sagely entered the house with their weapons drawn. (33RT 6196, 6326; 34RT 6405.) They yelled, "Sheriff's Department." (33RT 6196; 34RT 6405.) Right when Deputy Sagely walked through the plane of the door, he could see better what was going on inside. (33RT 6260.)

About halfway through the room was Deputy Aguirre. (33RT 6260.) Deputy Aguirre was between the partition off the north wall and the wall on the north side that separates the bedroom from the dining room. (33RT 6196.) Deputies Sparks and Sagely went to him. (34RT 6406.) Deputy Aguirre was lying on his back, his head turned to the left. (33RT 6196; 34RT 6407.) Deputy Aguirre was bleeding from his face. Deputy Aguirre was trying to sit up and to breathe. (33RT 6197-6198.) It appeared Deputy Aguirre's airway was clogged with blood. (33RT 6198.) Deputy Aguirre's gun was in his holster. (33RT 6197.) There was blood on the walls, the floor, and on a house plant. (34RT 6407.) There was also blood on Deputy Aguirre's uniform. (34RT 6408.)

A deputy advised dispatch that there was an officer down. (33RT 6326-6327.) Deputy Jenkinson came out of the house. Deputy Fryhoff had Deputy Jenkinson stay with the suspect, and said, "Watch this guy, I'm gonna go in and help with Pete." (33RT 6327.) Deputy Sagely went outside to ensure that his portable radio was working, that the fire and ambulance personnel were en route as quickly as possible, and to request a field supervisor, the major crimes unit, and "B.I. people." (33RT 6198.)

Deputy Fryhoff went inside the house. Deputy Aguirre was lying in the dining room area with his head in the northwest corner of the room and his feet pointing southeast. (33RT 6327.) Deputy Aguirre was in uniform. (33RT 6328.) Deputy Aguirre's gun was in his holster, which was snapped to his side. (33RT 6329.) Deputy Aguirre was "in very bad shape." Deputy Aguirre "was covered in blood and spitting up blood and mucus and stuff coming out his nose and ears." Deputy Aguirre was having difficulty breathing, as he was choking on the blood that was going back into his mouth. (33RT 6328.) Deputies Sparks and Fryhoff moved Deputy Aguirre away from the wall so that if necessary, they could do CPR on him. (33RT 6328; 34RT 6408.) While being moved, Deputy Aguirre's head did not strike the wall or anything else. (33RT 6369; 34RT 6409.)

Deputies Sparks and Fryhoff took off Deputy Aguirre's gun belt, uniform shirt, and the front plate of his bulletproof vest. (33RT 6328-6329.) Deputy Sparks could not see Deputy Aguirre's face because there was a large amount of blood on it. Deputy Aguirre was gasping. (34RT 6409.) Deputy Aguirre was coughing, and blood was flowing from his mouth. (34RT 6409, 6432.) Deputy Aguirre had trouble breathing, so Deputy Sparks and another deputy rolled him onto his side to clear his airway so he could breathe more easily. (34RT 6408-6409.) Deputy Aguirre's breaths appeared to be getting farther and farther apart, so Deputy Sparks and another deputy rolled him back onto his back, ripped open his shirt, and removed his bulletproof vest. (34RT

6410, 6432.) They removed Deputy Aguirre's gun belt, which still had the gun in it, and the holster snapped. (34RT 6410-6411.)

Deputy Fryhoff told Deputy Aguirre to "hang in there" and that everything would be all right. Deputy Fryhoff stayed with Deputy Aguirre until the ambulance arrived. Deputy Fryhoff handed his knife to the paramedic, who used it to cut off Deputy Aguirre's shirt. (33RT 6329.) The ambulance personnel asked the officers to clear out in order to give them room to work on Deputy Aguirre. (33RT 6229-6330; 34RT 6411.)

**5. Appellant's Statements At The Hospital**

On July 16, 1996, Dr. Donald S. Patterson, a physician and psychiatrist, went to the Ventura County Medical Center at the request of the Ventura County District Attorney's Office. (39RT 7114-1115.) At about 10:15 p.m., Dr. Patterson met with appellant in the emergency room. Appellant was connected to machines recording his blood pressure and heart beat, and was receiving intravenous fluids. (39RT 7115.) The nurses were positioning appellant onto a gurney. The surgical resident was asking him some questions. (39RT 7116.)

Dr. Patterson had a conversation with appellant. (39RT 7116-7117.) During this conversation, appellant mentioned that he was in pain and requested more pain medication. Appellant accepted that he could not have any. Appellant did not appear to be showing physical distress, such as by wincing his face or wiggling his body. (39RT 7117.) During the time Dr. Patterson spent with appellant, appellant always appeared to be conscious, alert, and oriented to his surroundings. (39RT 7118.) Dr. Patterson recorded the entire conversation on a tape recorder. (39RT 7118; Peo. Exh. 20 [tape]; Peo. Exh. 21 [transcript].) The tape was played for the jury. (39RT 7119.)

In this recording, the following transpired between appellant and Dr. Patterson. Appellant said that for the last year, he was in an "emotional

relationship" and had "intense emotions that were kinda overwhelming." (Exh. 21, p. 1.) Appellant said that he "was an actor in a movie." (*Ibid.*) Appellant said that "we'd have conversations. I've done some writing in school and I got good grades. Well, you oughta write a movie." (*Id.* at pp. 1-2.) Appellant said that "it was going on and I was living life and that was a movie." (*Id.* at p. 2.)

Appellant said, "Dr. Patterson, I'm aware of everything that happened. . . . I know everything that happened. You know I had that tape in my head. . . . I can replay it, so I know exactly what happened." (Exh. 21, at p. 2.) Dr. Patterson asked, "No blank spots or anything like that?" (*Ibid.*) Appellant said, "Nope. No blank spots. Oh, I know what I did, yeah." (*Ibid.*) Dr. Patterson said, "The 'why' is the significant --," to which appellant replied, "You don't wonder why, it was just a reaction. . . . I was in a situation and I just reacted. . . . Somebody else could've reacted differently, but that was my reaction. But I was conscious of what I was doing." (*Id.* at pp. 2-3.)

Appellant said, "I think possibly this afternoon was a --," and Dr. Patterson said, "I was wondering about that." (Exh. 21, at p. 3.) Appellant said, "A passive suicide attempt. Cause I don't think I could kill myself, but I was hoping that the officers would kill me." (*Ibid.*)

Appellant said that about a week earlier, "I had some thoughts about my wife and I felt pretty strong feelings of jealousy, I accused her of cheating on me and she said there's no way I could do that." (Exh. 21, at pp. 3-4.) Appellant said that he began living with his wife about three weeks earlier. (*Id.* at p. 4.) Appellant said he "had limited sexual and emotional contact with her over the last few years." (*Ibid.*)

Appellant said that on this night, he kidnapped his wife. (Exh. 21, at pp. 5-6.) Appellant had lived with her "pretty intensively for three weeks." (*Id.* at p. 5.) Appellant and his wife "lived in the same house" in Ojai where the shooting occurred, and lived in "the same bed and slept together for three

weeks." (*Ibid.*) Appellant said, "And I became really jealous of her and then I left two days ago, I told her, you're cheating on me, I don't want nothing to do with you. I left, I took all my stuff and moved back to the house I lived at in Ventura." (*Ibid.*)

After two days of not seeing his wife, appellant "just felt such strong emotions for her, but you know, the separation was overwhelming . . . ." (Exh. 21, at p. 5.) Appellant decided that he would go back to the house in Ojai and that he was "never gonna be separated again." (*Ibid.*) Appellant kidnapped her from her work as a nanny in Ojai, and "pulled a gun on her" and said that "you're going with me and we're gonna live together . . . ." (Exh. 21, at pp. 5-7.) Appellant said, "I have to be with you, I love you so much, I have to be with you and then I just pulled the gun and I said we're never gonna be apart again." (*Id.* at pp. 7-8.)

As they were riding in the car, appellant's wife asked when he was going to write the movie. (Exh. 21, at p. 8.) Appellant said that he was "writing it this afternoon." Appellant said that they were "acting it out" and told her she was "in it right now." Appellant said that he "kept telling her isn't it exciting in the movie?" (*Id.* at p. 8.) Appellant said that he was going to be with her all the time "because I felt such strong love for her that I had to be with her." (*Id.* at p. 6.)

Appellant's wife "told her family and had her family leave the house . . . ." (Exh. 21, at p. 5.) Appellant thinks that her 15-year-old daughter "called the police, told them that I had a gun and that I had kidnaped her." (*Id.* at pp. 5-6, 8.) Appellant thinks that she called the police because she was afraid he was not "meaning good toward her mother." (*Id.* at p. 8.)

At the house, appellant's wife said that she was going to stay with him. (Exh. 21, at p. 8.) Appellant "was getting what I wanted, the movie was going the way I wanted it to." (*Id.* at p. 9.) Appellant and his wife were taking a shower. (*Id.* at pp. 6, 8.) Appellant heard a knock at the back door. (*Id.* at

p. 7) Appellant and his wife went to the back door. (*Ibid.*) There was a knock at the front door. (*Id.* at pp. 6-7.) Appellant looked at the front door. (*Id.* at pp. 6-7.) His wife went to the front door. (*Id.* at p. 7.) Appellant went to get a towel. (*Ibid.*) The police were pulling her out of the door. (*Id.* at pp. 6-8.) The officer came into the house. (*Id.* at p. 8.) The officer told appellant to put his hands where he could see them. (*Id.* at p. 6.) Appellant, naked, "just jumped out and shot him, like a reaction to that situation." (*Id.* at pp. 6-7.) Appellant said, "I couldn't even see him that well because I wear glasses and didn't have 'em on. He was like a blur, you know." (*Ibid.*)

At the hospital, appellant said he did not "know why they, why they say don't say nothing, because if you did something and people know you did it, there's people there and they know . . . you know, they saw me, right. How are you gonna say you didn't? I mean that, what are you accomplishing, you know, I think the situ- I think it's best to be honest, that way you get to the root of it." (*Id.* at p. 9.)

**6. Alonzo's Statements To The Police**

On July 17, 1996, Sergeant Robert Garcia of the Ventura County Sheriff's Department was assigned to interview Alonzo in connection with the investigation surrounding the death of Deputy Aguirre. (38RT 7083-7084.) On July 17, 1996, at about 8:38 p.m., Sergeant Garcia interviewed Alonzo at the Ojai Sheriff's substation for about an hour and a half. (38RT 7084.)

On July 18, 1996, at about 8:00 a.m., Sergeant Garcia returned to 122 North Encinal. Alonzo returned to the residence. Sergeant Garcia had a further conversation with Alonzo. (38RT 7084.) These conversations were tape-recorded. (38RT 7085-7086; Peo. Exh. 27A; Peo. Exh. 27B.)

Alonzo testified that she told Sergeant Garcia in the interview that appellant came to the Strauss residence on July 17, 1996. When appellant showed her one of the guns, he said, "Listen to me." (38RT 7088.) When

appellant and Alonzo were conversing at the Strauss house, she did not want to leave with him, but he had a gun, so she said that she would go with him. (38RT 7090-7092.) Alonzo listened to appellant and was very scared of him because he had a gun. (38RT 7093.) After the phone call from Mrs. Strauss, Alonzo got out of the house. Alonzo told appellant that she would ride in her car and he in his. Appellant did not want to do this. When back at her residence, appellant told Alonzo that she had to go into the bathroom and watch appellant urinate. Alonzo did that. Alonzo was scared at various points between the time that appellant arrived at the Strauss residence through the time of the shooting at 122 North Encinal. (38RT 7094.)

The prosecution played for the jury a portion of the tape-recorded interview. (38RT 7096-7097.) As reflected in the transcript of the tape-recorded interview, Alonzo further stated that the reason appellant wanted her to go to the river was to have sex with him. (Exh. 27A, at p. 117.) Alonzo did not want to have sex with him while he held the guns. When they were at the river, Alonzo told appellant, "I'm scared, please." (*Ibid.*) Appellant asked Alonzo to take off her clothes, so she did. (Exh. 27A, at p. 118.) They lay down on the sleeping bags. Appellant took off all his clothes. (*Ibid.*)

Alonzo said that the guns were "[i]n front of my head." (Exh. 27A, at p. 118.) The small gun was in his hand and the big one was underneath the blanket. (Exh. 27A, at p. 119.) Appellant inserted his penis inside of Alonzo. (*Id.* at p. 120.) While they were having sexual intercourse, appellant would put down the small gun and then pick it up and hold it again. (*Id.* at pp. 119-120.) Appellant did not ejaculate although "[h]e wanted to do it." (*Id.* at pp. 120-122.) Appellant needs a lot of time to ejaculate, and Alonzo had to do "the movement for him" but she "didn't feel comfortable." (*Id.* at p. 121.)

Alonzo did not want to have sex with appellant like that and was afraid. (*Id.* at p. 122.) Alonzo says she was raped "[w]ith the threat of a gun . . . ." (*Id.* at pp. 123-124.) Alonzo believed she was raped because "you know that

a woman and then with guns. . . . And I had to be stronger because if I did something wrong he was gonna kill me." (*Id.* at p. 124.) Alonzo is "afraid of him if he gets out." (*Ibid.*)

### 7. The Evidence At The Murder Scene

#### a. Joy Self - Technician That Collected Evidence At The Crime Scene

Joy Self was a field evidence technician with the Ventura County Sheriff's Department. (34RT 6436; 35RT 6515.) On July 17, 1997, at about 6:10 p.m., Self was called to 122 North Encinal at Meiners Oaks because of the officer-involved shooting there. (34RT 6441.) In the dining room area, in the corner, there was a blood spatter on the carpet and on the walls. (34RT 6445.) In this corner of the north wall of the dining area, there was a bone fragment. (34RT 6446.) Also, from an area underneath the floorboards in a corner, there was a bullet, the lead projectile fired from the weapon (No. 1). (34RT 6446-6447.)

There were a total of four cartridge casings inside the residence. (34RT 6470.) An expended cartridge casing was on the kitchen floor (No. 2). (34RT 6447.) Two expended .45-caliber cartridge casings were in the kitchen area near the refrigerator (No. 3). An expended .45-caliber cartridge casing was located in the carpet area of the living room (No. 4). (34RT 6448.)

There was a bullet recovered in a comforter on the bed in the living room (No. 33). (34RT 6448-6449.) There was a bullet strike at the end of the coffee table. (34RT 6449.) There was a hole in the shade on the window and also through the glass on the window. (34RT 6449-6550.) There was a black fanny pack on the floor between the kitchen and the dining room. (34RT 6451-6452.) In the front pocket of the fanny pack, there were two full magazines with ammunition. (34RT 6452.)

There was a .32-caliber semi-automatic Beretta handgun located on the grass area right next to the sidewalk. (34RT 6454-6457; Peo. Exh. 10A.) Its slide was locked to the rear, which means that the weapon was empty. (34RT 6456.) The magazine of a Beretta holds eight rounds. There were eight expended .32-caliber cartridges, all on the lawn south of the walkway. (34RT 6458.)

There was a Colt .45 semi-automatic handgun in the front yard on the south side of the walkway. (34RT 6454-6457; Peo. Exh. 10B.) The Colt .45 was loaded with one round in the chamber and one round in the magazine. (34RT 6455.) The hammer was cocked and the safety was in the "off" position, which meant the weapon could be fired. (34RT 6456.) The Colt .45 holds a total of eight rounds—seven in the magazine and one in the chamber. There was an expended .45-caliber cartridge casing on the north side of the lawn. There was also an expended .45-caliber cartridge casing on the south side of the walkway on the lawn. (34RT 6457.) There was a .45-caliber cartridge casing near the trees to the south of the driveway. (34RT 6459-6460.)

There were bullet fragments on Encinal Street and in the area south of the driveway. (34RT 6459; Peo. Exh. 8.) A bullet was recovered on the lawn south of the sidewalk of the residence. (34RT 6460.) Deputy Aguirre's duty weapon was fully loaded, and there was one round in the chamber. (34RT 6461.) There was a certificate of title for a 1983 Honda Civic registered to appellant, license number 2MHG591. (34RT 6462; Peo. Exh. 16.)

### b. Deputy Richard Hamilton - Collected Ammunition From Appellant's Honda

Ventura County Deputy Richard Hamilton searched the Honda, and found a brown briefcase in the center of the rear seat covered by a sleeping bag. (35RT 6498-6500; Exh. 15-A.) Inside the briefcase was a small green handgun case, two boxes of Remington factor ammunition, one for a .32-

automatic of 171 grain metal case. (35RT 6500-6501.) One of these boxes had 50 cartridges with three cartridges missing, making a total of 47 cartridges. The other box, half-full, contained about 26 rounds of .45-caliber automatic Remington ammunition. Both of these types of cartridges could be fired out of any .45-caliber automatic pistol. The .32-caliber automatic ammunition could have been fired out of a .32-caliber automatic Beretta. (35RT 6501.)

### c. Margaret Schaeffer - Blood Spatter Analyst That Explained Where The Gunshots Came From

Margaret Schaeffer was a supervising criminalist assigned to the serology/trace evidence section of the Ventura County Sheriff's Department Crime Laboratory. (35RT 6504.) On July 18, 1996, Schaeffer went to 122 North Encinal in Meiners Oaks for the purpose of conducting a crime scene evaluation. (35RT 6515.)

A blood spatter pattern was present on the west wall, "area A," at about seven inches from the doorway and about 13 or 14 inches above the floor, and it was traveling in a south-to-north direction. There was one high-energy or high-velocity event happening in this corner. (35RT 6527.)

In pattern or area B, there was high velocity spatter on top of a smear area on the doorway. (35RT 6527-6528.) There was also a swipe pattern, which is a location where the victim's head made contact with the wall. (35RT 6529.) The high-energy event, this gunshot, occurred in very close proximity to this wall. (35RT 6531-6532.) Gunshot means the high–velocity impact point. (35RT 6531.)

In pattern or area C, a west wall at four or five inches in from the doorway, there were three components: a higher swipe, a high-velocity spatter concentration, and a medium-velocity concentration. (35RT 6532.) There was a gunshot occurring in this area in very close proximity to the wall. A bloody hair made contact with this wall. (35RT 6534.) There was one high-velocity

spatter event, one gunshot event, involved in creating the blood spatter in this corner. (35RT 6534-6535.)

At the east end of the house, there were three expended cartridges or casings. (35RT 6559-6560.) In the living room area at the western part of the house, there was one expended cartridge or casing. (35RT 6560.) In the comforter around the bullets, there were wood chips in a couple of areas. (35RT 6558.) There were three east-to-west trajectories inside the house. There was one south-to-north trajectory inside the house. (35RT 6559.) The three east-to-west trajectories inside the house traced back to the east end of the house. (35RT 6560.)

Schaeffer also examined the carpeting. (35RT 6535; Peo. Exh. 11.) This area of carpeting extended from the floor of the doorway on the west wall, back to the corner where the north and west walls come together, and to the area laid against the north wall. (35RT 6535-6536.) There was heavy bloodstaining soaked into the carpet, a pool of blood. (35RT 6536.) There was a bullet hole in the carpeting. (35RT 6538.) The blood spatter originated from "this area, 13 to 14 inches." The blood was coming onto the north wall, down the west wall, onto the floor. The bullet went from south to north. This verified that one gunshot had occurred in this corner. (35RT 6539.)

There was blood spatter, tissue, and bone in the plant, and blood dripping into the pot. (35RT 6541.) This, again, verified the origin of the high-velocity event being about 13 or 14 inches away, coming onto the north wall, down the west wall, onto the floor. (35RT 6541-6542.) That there was tissue and bone in the plant showed that the point of impact was the south side of the west wall, over the plant. (35RT 6542-6543.) There was only one high-velocity spatter event. (35RT 6542.) Blood spatter on glasses on a table also confirmed that the spatter occurred in this area and that the blood had travelled in this direction. (35RT 6544-6545.)

There was a picture showing with probes the direction that the bullets traveled. (35RT 6545-6546; Peo. Exh. 19A.) These bullets travelled through Deputy Aguirre's head. (35RT 6546-6547.) There was a picture of the entrance wound in Deputy Aguirre's head, on the right-hand side above the eyebrow, the temple area. (35RT 6547; Peo. Exh. 19B.) There was a picture that depicts the paths of the various bullets through Deputy Aguirre's body. (35RT 6548; Peo. Exh. 19C.) These pictures confirm that the trajectory for the bullets at the crime scene was from a south to north direction, with Deputy Aguirre's head being between the gun and the floor. (35RT 6549.) These photographs and information further demonstrated that there was one gunshot, one high-energy event occurring in this corner. (35RT 6550.)

The gunshot traveled from the right side of Deputy Aguirre's head (to his right) to the left side of his head (to his left). (35RT 6552-6553, 6615.) The head was face up at the time of the impact. (35RT 6553.) There was one high-velocity impact spatter event causing the spatter on the uniform in the corner of the house. (35RT 6553, 6560, 6624; Peo. Exh. 11.) This spatter was caused from the exit wound on the left side of Deputy Aguirre's head. (35RT 6606.) At the time of the high-velocity event, Deputy Aguirre's head was about 13 to 14 inches from the floor, about six and a half to seven inches from the edge of the doorway in the dining room. (35RT 6560-6561.) Deputy Aguirre's head was slightly turned so that the left side of his head was facing toward the north wall. (35RT 6561.) This area was between the pot and the west wall. (35RT 6561, 6610.)

For the entrance wound on the right of Deputy Aguirre's head to be a source of spatter on the table, Deputy Aguirre would have to be facing the spatter. The source of the gunshot would have had to have come from the direction of the table in order for Deputy Aguirre to have been struck in the forehead and to have caused the spatter there. (35RT 6616.) Deputy Aguirre would have had to have been face down, or else on the ground with his head

facing toward the table for the wound on his left side to cause the spatter. To deposit the blood there, the gun would have had to have been directed toward Deputy Aguirre's head toward the floor in the area of the table. (35RT 6617.) The furthest that high-velocity spatter will travel is two to three feet. This means Deputy Aguirre's face would have had to have been within two to three feet of, and facing, that spatter on the corner of the table. (35RT 6618.)

There was no "cast-off" pattern consistent with Deputy Aguirre having been shot and then somehow having his head slammed in the wall. (35RT 6607-6608.) The exit wound in Deputy Aguirre's head was about 13 inches from the ground. (35RT 6610.)

There was a high-velocity spatter on Deputy Aguirre's right hand. (35RT 6548-6549.) The hand was in close proximity to a gunshot. (35RT 6550.) At the time the spatter was deposited, the hand was in a position consistent with a defensive gesture. (35RT 6551.) A bullet went through Deputy Aguirre's left sleeve. (35RT 6608.) This wound was not the source of the high-velocity spatter on Deputy Aguirre's right hand. One of the two face wounds was the source of the spatter. (35RT 6609.)

### d. James L. Roberts - Firearm And Toolmark Criminalist Expert Matching Bullets To Guns

James Roberts was a criminalist specializing in firearm and toolmark analysis for the Ventura County Sheriff's Department. (35RT 6633.) People's Exhibit 10B was a Colt .45-caliber, semi-automatic pistol, serial number 70G54228. (35RT 6635, 6641; Peo. Exh. 10B.) It fires a .45 automatic or .45 ACP cartridge. (35RT 6638.) People's Exhibit 10A was a .32-caliber, automatic Beretta pistol, serial number 601439. (35RT 6642; Peo. Exh. 10A.) Roberts performed various comparison analyses with this semi-automatic pistol and .32-caliber pistol. (35RT 6642; Peo. Exh. 10B; Peo. Exh. 10A.)

Roberts determined the following were fired from the Colt .45 automatic pistol: a .45-caliber automatic cartridge case found in the kitchen of the house at 122 North Encinal (36RT 6649-6650); two discharged, .45-caliber cartridge cases found at the corner of the refrigerator and wall in the kitchen (36RT 6650); a.45-caliber automatic cartridge case found lying in the living room (36RT 6650-6651); a .45-caliber automatic bullet, below the section of flooring in the corner of the dining room area (36RT 6651-6652); and a bullet located at the base of the comforter where it had fallen after entering the comforter (36RT 6652).

The type of ammunition in the two magazines in the fanny pack found on the floor between the kitchen and dining room was .45-caliber Remington Peters brand ammunition. (36RT 6652-6653; Peo. Exh. 9.) This ammunition was consistent with the type of ammunition found in the Colt .45 automatic pistol. (36RT 6653; Peo. Exh. 10B.) It was also consistent with the type of ammunition comprising the expended cartridges No. 2, No. 3, and No. 4, and with the bullets No. 33 and No. 34. (36RT 6653.)

Roberts performed examinations regarding various cartridge cases, bullets, and bullet fragments located and depicted on a diagram. (36RT 6653; Peo. Exh. 8.) A cartridge was located in a part of the yard, described in the diagram as No. 18, Property 53. (36RT 6654.) This cartridge was fired from the Colt .45 automatic pistol. (36RT 6654; Peo. Exh. 10B.) A cartridge case was located in another portion of the yard, described in the diagram as No. 11, Property 46. (36RT 6654.) This cartridge case was fired from the Colt .45 automatic pistol. (36RT 6654; Peo. Exh. 10B.) Eight .32-caliber expended cartridge cases were located in the yard. (36RT 6655-6656; Peo. Exh. 8.) These cartridge cases were all fired from the .32-caliber semi-automatic Beretta pistol. (36RT 6656; Peo. Exh. 10A.) This weapon can hold eight rounds. (36RT 6656.)

Roberts also examined bullets or bullet fragments found in the exterior of the house. (36RT 6656-6657.) There was a .32-caliber bullet fragment found in the road. (36RT 6657.) This bullet was fired from the .32-caliber semi-automatic Beretta pistol. (36RT 6656; Peo. Exh. 10A.) There were three .45-caliber automatic cartridge cases in the yard. (36RT 6659-6660.) These cartridge cases were fired from the Sigsauer semi-automatic pistol. (36RT 6659; Peo. Exh. 5.)

The briefcase contained a box of .45-caliber automatic cartridges, a partial box of .32-caliber automatic cartridges, a couple of packages for firearms magazines, a glove, a pen, and some other items. (36RT 6662; Peo. Exh. 15.) The .45-caliber ammunition was from the same manufacturer as, and of the same caliber used in, the Colt .45 that is People's Exhibit 10B. (36RT 6662; Peo. Exh. 10B.) The .32-caliber ammunition was from the same manufacturer as, and of same caliber used in, the Beretta that is People's Exhibit 10A, for one of the .32 automatic cartridge cases, but from a different manufacturer for the remaining seven. (36RT 6662; Peo. Exh. 10A.)

Roberts did powder pattern and ejection pattern tests on the Colt .45. (36RT 6664; Peo. Exh. 10B.) The .45-caliber ammunition was test-fired from various distances in order to allow the coroner to form a distance approximating the stippling pattern on the side of Deputy Aguirre's face. When the .45-caliber ammunition taken from the fanny pack was test-fired from a distance of three feet from a material called "Bench Coat," the pattern of the gunpowder was very sparse. (36RT 6666.) The coroner believed that the distance closest to approximating the stippling pattern on Deputy Aguirre's face was 12 inches, and the next closest distance approximating the pattern was 18 inches. (36RT 6666-6667.)

Roberts was requested to make an ejection pattern determination of this Colt .45. (36RT 6667; Peo. Exh. 10B.) This determination is done to see how a specific firearm ejects cartridge cases to permit one to conclude where a

shooter might be standing, based on where cartridge cases are located at a crime scene. (36RT 6667.) As to the .45-cartridge cases, No. 2 and No. 3, the firearm was ejecting as much as about 12 feet or a little further, and as little as four feet at other times. (36RT 6669-6670.) As to the cartridge, No. 4, from the living room area, the firearm had to either be very close to the west wall, or else the ejection port had to be turned in a fashion that would cause it to eject toward the living room. (36RT 6670.)

Of the four .45-caliber cartridge casings found in the house, three were in the kitchen in the corner near the refrigerator base and one was in the living room area. (36RT 6675, 6678-6679.) There were three west-to-east trajectories. (36RT 6676.) No. 1, the strike mark, was on the corner of the coffee table. (36RT 6676; Peo. Exh. 11.) Before the bullet hit the coffee table, there are indications that it travelled primarily from east to west. (36RT 6677, 6705-6706.) No. 2 began in the window area above the stove. (36RT 6677.) A string depicts the trajectory based on damage to the shade, glass, and screen of the window south of the front door in the living room area. (36RT 6677-6678.) No. 3 is on top of the kitchen counter. A string represents a line of trajectory of a bullet that exits out of the south wall of the house about a foot below the ceiling. (36RT 6678.) No. 4 represents the trajectory that passes down through the floor. (36RT 6680.) This shot is most consistent with being the final shot. (36RT 6707.) There was a hole in the pad beneath the carpet. (36RT 6681; Peo. Exh. 7.)

**8. The Coroner's Conclusions**

Dr. Ronald O'Halloran was Chief Medical Examiner of Ventura County. (39RT 7160.) On July 18, 1996, at about 9:00 a.m., Dr. O'Halloran performed an autopsy on the body of Deputy Aguirre. Deputy Aguirre had three gunshot wounds. One of these gunshot wounds was on Deputy Aguirre's left arm. (39RT 7162.) The direction of the wound was front to back, slightly

upward. (39RT 7165.)

Another of these gunshot wounds, gunshot wound #1, entered through Deputy Aguirre's left temple and exited through the left side of his head just above and behind his left ear. (39RT 7167-7168.) This direction of the wound was from front to back, parallel with the ground, and right to left at an angle about 30 degrees from a straight line running through Deputy Aguirre's nose to the back of his head. In between the entrance and exit wounds, there was "partial exit laceration." (39RT 7168.) This was a debilitating wound. (39RT 7175.) It went through the skull, fracturing it extensively, and through portions of the brain causing lacerations to the brain and bruising of the brain. (39RT 7175-7176.) It probably would have instantaneously caused a loss of consciousness and motor skills. It probably would have caused someone who lost their motor skills to go limp and collapse and lose mental awareness. This wound, by itself, could have caused Deputy Aguirre's death. (39RT 7176.)

Another of these gunshot wounds, gunshot wound #2, entered through the right side of the face near the eyebrow and exited through the right sideburn area. This gunshot wound had gunpowder stippling around its perimeter. Gunpowder stippling means injuries produced by the gunpowder after discharge. If a target is close enough to the muzzle at the time a bullet is discharged, some of the gunpowder can be deposited on that target. (39RT 7169.) As regards this gunshot wound, of the test shots fired by criminalist Jim Roberts, the 12-inch range most closely matched the stippling pattern on Deputy Aguirre's face, and the next closest range was 18 inches. (39RT 7170-7172.) At the time this gunshot was fired, the distance between the gun's muzzle and the entrance wound at the side of Deputy Aguirre's head was between six and 24 inches, and probably was close to 12 inches. (39RT 7175, 7178-7179.) The direction of travel of this gunshot was right to left, slightly front to back, and very slightly downward at an angle, 20 degrees downward, and 30 degrees from the frontal plane. (39RT 7175.) This wound was also

debilitating and would have caused a loss of consciousness, loss of awareness, and alone could have been the cause of death. (39RT 7177.)

Deputy Aguirre was alive at the time of both gunshot wounds (face and head) because there was bleeding from both wounds. (39RT 7176.) Because both gunshot wounds to the head could have and would have been fatal, the cause of Deputy Aguirre's death was both of them collectively. (39RT 7176-7177.) If the first shot was the one that hit Deputy Aguirre in his head, gunshot #1, he probably would not have had the mental capacity and motor skills to reach up defensively with his right hand to shield himself from another shot. (39RT 7192.)

### 9. Recidivism Evidence To Show Motive To Kill, Felon In Possession With Priors Charge, And Prior Conviction Enhancements

At trial, the prosecution elicited testimony from Robert Humphrey, who was appellant's parole agent in 1991. (36RT 6719.) One of appellant's conditions of parole was not to own, use, or have access to or control over any firearm. (36RT 6720-6722.) Humphrey advised parolees like appellant that Penal Code section 12021 made it a felony for a felon to be in possession of a firearm. (36RT 6725.)

Terence Kilbride was a Ventura County Senior Deputy District Attorney. (36RT 6727.) He explained documents showing that appellant was convicted by guilty plea on October 23, 1973, in the United States District Court for the Southern District of Illinois, of the felony of conspiracy to possess methyleneidioxy amphetamine (MDA). (36RT 6731-6732; Peo. Exh. 18A.) On January 14, 1986, appellant pleaded guilty in Los Angeles County Superior Court to the felony of second-degree burglary. (36RT 6733-6734; Peo. Exh. 18B.) On February 11, 1987, appellant was convicted in Los Angeles County Superior Court of the felonies of robbery and assault with a deadly weapon. (36RT 6734-6735; Peo. Exh. 18C.) These were "serious

felonies" under the Penal Code. (36RT 6742.) Once a person is convicted of "serious felonies," the potential sentence for any new felony is a minimum of 25 years to life. (36RT 6742-6743.) On September 17, 1987, appellant was convicted in Ventura County Superior Court of the felony of second-degree burglary. (36RT 6735; Peo. Exh. 18D.) Appellant served prison terms for each of the three Los Angeles County and Ventura County convictions. (36RT 6735-6736; Peo. Exh. E.)

### B. Defense Evidence

Appellant's defense was that the murder was not in the first degree and that the peace officer special circumstance was not true. Appellant offered evidence to show that he had an impaired mental condition during the shootings, and that the order of shots was not possible to determine and did not bear the marks of an execution-style murder. He also offered evidence to show that appellant was incoherent after the shootings. To show that Deputy Aguirre was not engaged in the performance of his duties, appellant elicited testimony that Deputy Aguirre may not have had training manuals regarding using force with mentally ill suspects and responding to domestic violence calls. Also, in defense of the peace officer special circumstance, appellant presented an optometrist's testimony that appellant had 20/400 vision to raise doubt about whether appellant saw Deputy Aguirre's badge.

#### 1. The Shots That Killed Deputy Aguirre

##### a. Dr. Martin Fackler, Wound Ballistics Consultant

Dr. Martin Fackler, a wound ballistics consultant, testified that gunshot wound #1, the wound in Deputy Aguirre's left forehead, would be immediately incapacitating. (40RT 7287, 7295.) There is well above a 95 percent chance that this wound would render a person immediately unconscious. (40RT 7295-

7296.) It would have had about a 90 percent chance of being fatal by itself. (40RT 7296.) A person who sustained such a wound would be highly unlikely, about 95 or 98 percent unlikely, to move his arm up to his head in a right-hand saluting motion. (40RT 7296-7298.)

As to gunshot wound #2, the wound in the right side of Deputy Aguirre's face, it also would likely result in an immediate loss of consciousness and be a fatal wound by itself. (40RT 7296.) It would not be possible for a person who sustained such a wound to move his arm up to his head in a right-hand saluting motion. (40RT 7298.)

Based upon the materials provided to Dr. Fackler in this case, it was not possible to determine in what order the three shots occurred. (40RT 7298-7299, 7304.) Dr. Fackler could not determine the position of Deputy Aguirre's head when he received gunshot wounds #1 and #2. (40RT 7299-7300.)

The evidence was consistent with the bullet in the floor causing gunshot wound #1, providing the gun was held at least three feet from the entrance in the forehead. (40RT 7300.) The evidence would be consistent with gunshot wound #2 being the last shot that Deputy Aguirre received. (40RT 7302.) Other explanations would be consistent too. (40RT 7302-7303.) It is rare for sequencing gunshot wounds to the body to be possible. (40RT 7303.) There is nothing to suggest whether Deputy Aguirre was in motion when he received gunshot wound #1. (40RT 7307.) The evidence only suggests the possibility that Deputy Aguirre was in motion when gunshot wound #2 was sustained. (40RT 7307-7308.) In all likelihood, gunshot wound #2 was most likely the last shot. (40RT 7309.) The evidence was also consistent with gunshot wound #2 being the first shot. (40RT 7312.)

Dr. Fackler based his opinions only on the physical evidence he was provided, not on any testimony received in the case. (40RT 7316.) Dr. Fackler also never received information about where appellant came from as he began shooting. (40RT 7324.) Dr. Fackler was not provided any information that

when appellant was stopped, he was found lying on his back, face up, .45-caliber gun to his right, .32-caliber gun to his left. (40RT 7367.) Given additional information about these and other facts, Dr. Fackler concluded that the three east to west trajectories were fired before the fourth one. (40RT 7331.) Further, gunshot wound #2 was most likely the last shot. (40RT 7334.) Gunshot wound #1 was from about three meters away, and at least three feet away. (40RT 7334, 7350.) After seeing additional evidence in this case, Dr. Fackler did not contest the trajectory coming through the head up from the floor. (40RT 7334-7335, 7338-7339.)

**b. John Thornton, Blood Analyst**

John Thornton was a director of an independent consulting laboratory called Forensic Analytical Specialities concerned with the analysis, identification, and interpretation of physical evidence. His primary responsibility was in the area of crime scene reconstruction. (40RT 7371.) Dr. Thornton reviewed materials provided by the defense in this case upon defense request. (40RT 7378-7381.)

The position of .45-caliber shell casings found inside the residence at 122 North Encinal does not precisely indicate the position of the firearm when the cartridge cases were ejected. (40RT 7380-7382; Peo. Exh. 7.) Based on the materials provided to him, Thornton believed there was no way of determining the sequence of shots with any certainty. The shot to Deputy Aguirre's arm was probably the first shot, but Thornton could not determine which of the head shots was next or last. (40RT 7383.) Thornton takes issue with the conclusion of Margaret Schaeffer, the prosecution's blood spatter analyst, that the stippling wound (gunshot wound #2) was the last shot. (40RT 7386-7388.) Thornton believes that gunshot wound #1 could have been the last shot. (40RT 7385, 7391.)

The stippling in this case was an important aspect of the evidence because it indicates the range of the distance between the deputy's head and the muzzle of the firearm. (40RT 7384.) There is no way to determine the position of the shooter based on the stippling pattern in this case. (40RT 7392.) The stippling pattern also does not give any information about the movement of the shooter or Deputy Aguirre. (40RT 7393.)

If the shot on Deputy Aguirre's left upper arm was received first, it would raise the possibility of an alternative explanation for the high-velocity distribution of blood on his right hand. (40RT 7393.) It could be that this distribution was caused by Deputy Aguirre coughing aspirated blood from his lungs. (40RT 7394.)

Based on the materials provided him, there is no way to determine whether the shooter and Deputy Aguirre were moving or static when Deputy Aguirre received either of the head wounds. Thornton believes that Deputy Aguirre was not on the ground, but was falling, when he received the last shot. Thornton believes that the deputy suffered all three shots within a very short period of time, a matter of seconds. (40RT 7397.) The materials are consistent with the shooter running by and shooting as Deputy Aguirre was falling to the ground. (40RT 7397-7398.) The evidence is consistent with the event being dynamic and rapid-moving with continual shifts in the position of and distance between appellant and Deputy Aguirre. (40RT 7397-7398.)

Thornton would disagree with the conclusion of Dr. Fackler, the prosecution's wound ballistics consultant, that three feet would be longer than the distance of the shot to the left forehead. (40RT 7410-7411.) The firearm was not held close to the head at the moment of discharge and certainly was not in contact with it. This did not have the characteristics of a typical execution-type wound. (40RT 7422.)

Regarding the hand spatter, Thornton did not review the transcripts of the officers' testimony regarding the way blood was coming from Deputy

Aguirre's mouth. (40RT 7399-7400.) Thornton also was not provided a copy of Dr. O'Halloran's trial testimony. (40RT 7405.) Thornton never went to the crime scene or examined the walls with the blood smear. (40RT 7408-7409.) Thornton's source of information for his conclusions about Schaeffer's report was the sheriff's photographs and her report. (40RT 7409.) Thornton never talked to Schaeffer, James Roberts, Joy Self, Deputy Hamilton, the criminalists, or Rod Englert, who worked on this case. (40RT 7409-7410.)

If Schaeffer saw spatter on top of the smear, that would change Thornton's opinion. (40RT 7409.) If it was high-velocity spatter on the hand, it came from one of the head wounds, gunshot wound #1 or #2. (40RT 7402.) Thornton never test-fired the .45-caliber gun in this case. (40RT 7411.) Dr. Fackler never saw the report of James Roberts, the criminalist, in this case. (40RT 7411-7412.)

Thornton was not provided any information about appellant's vision problems, or that his vision was 20/400. (40RT 7418.) Thornton never examined the bullet holes in the house walls or the windows, or the bullet strike on the coffee table, or the comforter where the bullet came to rest, or the floor. (40RT 7422.) Thornton was not aware of or provided with appellant's statement in this case. (40RT 7429, 7433.)

**2. Appellant's Mental State After The Shootings**

On July 17, 1996, Ventura County Sheriff Deputy Steven Jenkinson observed Deputy Sagely or Fryhoff handcuff appellant. Appellant repeatedly mumbled "Hare Krishna." (40RT 7436.)

**3. Deputy Aguirre's Conduct Before The Shootings**

**a. Deputy Aguirre's Training**

Bob Lemay worked in the personnel department of the Ventura County Sheriff's Department. (41RT 7476.) In response to a subpoena, Lemay

gathered from the Sheriff's Academy Personnel, and provided, copies of all training manuals, memoranda, directives, bulletins regarding officer use of weapons, officer handling of mentally ill suspects, and officer response to domestic violence calls. (41RT 7477-7478; Def. Exh. N.) Lemay does not know whether Deputy Aguirre ever saw any of these documents or used them in his training at the academy. (41RT 7481.)

**b. The Necessity Of Police Entry**

Roger Clark was a retired lieutenant of the Los Angeles County Sheriff's Department. (41RT 7492.) Based on hypothetical defense facts in this case, an objectively reasonable officer would not believe that immediate entry was necessary to prevent a threat of imminent danger to himself or others. (41RT 7573-7574, 7578-7583.) This is because there was nothing emanating from inside the house to indicate that a crime was being committed or that someone was in danger creating an emergency to cause the officer to go in. (41RT 7583.) There was also nothing leading a reasonable police officer to believe that immediate entry was necessary to protect the suspected victim from ongoing domestic abuse. (41RT 7583-7584.) In this regard, the identified party of the dispute was on the porch with the two officers and was no longer inside the house. Hearing from a dispatch that a suspect was inside the location with two guns would not lead a reasonable officer to believe that the suspect was armed. (41RT 7584.) Based on Alonzo's version of what happened on the porch, a reasonable police officer would not believe that immediate entry was necessary to prevent the threat of imminent danger to himself or others or to protect the suspected victim from ongoing domestic abuse. (41RT 7585-7586.)

When Clark retired as a lieutenant, he was little disappointed that he had not been made captain. (41RT 7591.) When Clark took the captain's exam for the final time, he filed an appeal for reconsideration. In that appeal, Clark

alleged that two persons in the Los Angeles County Sheriff's Department had retaliated against him for certain activities. Clark alleged that a superior to him had ordered another person to urinate on Clark's copy of the Code of Ethics. Clark's appeal was denied. About two years later, Clark left the sheriff's department. (41RT 7594.) In the approximately 24 times that Clark has testified as an expert on police practices since he retired, he never testified on behalf of the police or the district attorney's office. (41RT 7595.) Since he retired, Clark has never been retained to testify by any police agency or any attorney representing a police agency. (41RT 7596.)

After Clark left the sheriff's department, there was an audit of his "NORSAT" division, a special surveillance and apprehension team that attempted to control the circumstances of each arrest to maximize officer safety. (41RT 7598, 7602.) Clark also heard that this audit raised the issue of nepotism by Clark. (41RT 7598-7599.) Clark also heard that the audit document raised issues about improprieties in keeping overtime cards. Clark believes himself to be the victim of false allegations in this document. But Clark was not bitter toward the sheriff's department. (41RT 7599.) Since he retired from the sheriff's department, Clark has not been employed by any police agency, attended any POST training, or done any training for the sheriff's office. (41RT 7600-7601.)

Clark never personally made a decision about whether or not to make an exigent circumstances entry into a home on a domestic abuse case: while the commander of NORSAT from 1987 to 1993 (41RT 7601), while with the Reserve Forces Bureau from 1984 to 1987 (41RT 7604), while a lieutenant at the Crescenta Valley station from 1980 to 1984 (41RT 7606), while a lieutenant working the jail from 1978 to 1980 (41RT 7607), while a sergeant at the Federal Surplus Property division from 1976 to 1978 (41RT 7607-7608), while working in the patrol division assigned to personnel and logistics from 1974 to 1976 (41RT 7608), while working in the Civil Defense Bureau of the

patrol division from 1973 to 1974 (41RT 7608-7609), and while working in the Detective Services Division of the Communications Bureau, from 1971 to 1972 (41RT 7609-7610). The last time that Clark personally stood before a door and had to make a split-second decision about whether to enter was in about 1971 or 1972, when he was a patrol sergeant. (41RT 7630-7631.)

Assuming certain hypothetical facts based on the evidence of the information available to Deputy Aguirre, Clark testified that a reasonable officer would consider that there was a possible felony false imprisonment with the use of guns. (41RT 7619.) A reasonable officer also would have heightened concern for his safety and the safety of his other officers. (41RT 7619-7620.) A reasonable officer would also feel it necessary to determine whether or not the suspect had guns and was moving in the direction of his partners. (41RT 7620.) A reasonable officer would not feel it was necessary to enter into the house to go in foot pursuit of the suspect to protect his partners but should notify his partners that there was a man with a gun inside the house. (41RT 7620-7621.) If an officer heard the door open and close, a reasonable officer would be concerned for his partners. (41RT 7623.) A reasonable officer would feel the need to take immediate action to protect his partners. (41RT 7628.)

**4. Appellant's Vision**

Dr. Rodney Gilliland was an optometrist. (41RT 7544.) On April 20, 1994, Dr. Gilliland performed an eye examination on appellant. (41RT 7544-7545.) Dr. Gilliland gave appellant a prescription for eyeglasses. Appellant's uncorrected vision was 20/400. A person with this vision has to stand at 20 feet to see what someone with normal vision would see standing at 400 feet. (41RT 7545.) The further the person is away from an object, the more blurry the object is. (41RT 7547.) Movement or adverse lighting would affect visual acuity. (41RT 7548.)

Squinting can help someone see better. (41RT 7553.) Dr. Gilliland never tested appellant to determine how much better his vision could be by squinting. Another way people compensate for their bad vision is by getting closer. (41RT 7554.) At two and a half feet away, a person who had 20/400 vision would be seeing the object at 20/50. (41RT 7555-7556.) At about three to four feet, the person would be seeing at about 20/60 or 20/70. (41RT 7556.) If a person was lying about 13 inches off the ground, and another person with this vision stood over him, this other person would be able to see that it was a human being. (41RT 7558-7559.) He could discern where the human being's head was, that the human being had a badge on his chest, that he had a gun belt on him, and that blood about the size of a nickel was coming out of his head. (41RT 7559-7562.)

At 10 feet away, a person with 20/400 vision could see someone standing that was six feet, one inch tall, and see that it was a human being. (41RT 7563.) If the human being was walking quickly toward the person with 20/400, the person could see that the human being was moving. (41RT 7564.) To see someone perfectly who was 13 inches off the ground, a person that was six feet one would have to lower his head to 26 inches. (41RT 7568.) The closer the person got, the better he would see. (41RT 7568-7569.)

**C. Rebuttal Evidence**

In rebuttal, the prosecution offered expert police testimony that under the same hypothetical facts depicted by the prosecution evidence, a reasonable police officer in Deputy Aguirre's position would have entered the house.

From November 1993 to present, Sergeant Mike De Los Santos was the supervisor in the Special Enforcement Detail, a gang unit in Thousand Oaks. (43RT 7800-7801.) This assignment includes entries into homes, exigent circumstance entries to protect officers, victims, and civilians, and exigent circumstance entries to prevent the destruction of evidence. Sergeant De Los

Santos has also been a Special Weapons and Tactics (SWAT) team member for 18 years, and a team leader and in charge of several emergency activations in the team captain's absence. (43RT 7801-7802.) Sergeant De Los Santos was an instructor on SWAT. (43RT 7801-7802.) In 18 years on SWAT, Sergeant De Los Santos made at least 100 entries where a person is known to be armed or has a potential or propensity towards violence. (43RT 7802.) He personally made entries on domestic violence or abuse calls about two to three times a month from 1989 until 1993 as a watch commander. (43RT 7802-7803.)

"POST" is the Commission of Peace Officer Standards and Training. (43RT 7814.) There is nothing in the "California Peace Officers Legal Sourcebook" about POST standards. (43RT 7817.) In the POST training on family disturbance, there were significant changes in the standards in 1994. (43RT 7818.)

Sergeant De Los Santos taught Deputy Aguirre in 1994 at the Sheriff's Academy, including about family disturbances. (43RT 7820-7821.) The family disturbances class was about seven hours, consisting of lecture and practical training. (43RT 7821.) In an article provided to Deputy Aguirre during his training, there was an FBI statistical study finding that between 1979 and 1988, 841 officers were killed—69 in domestic quarrels or disturbances and 52 in family quarrels. (43RT 7822, 7830-7831.) In these cases, 74 percent of these officers were killed outdoors. (43RT 7831.) Some of these incidents were described as ambushes, sudden immediate attacks against unsuspecting victims. (43RT 7831-7832.) In these cases, 41 percent were killed during the approach phase, the time arriving at the call until the situation was controlled. (43RT 7832.) Also, 46 percent were killed during the contact-and-approach phase. The contact-and-approach phase is the period before the situation is brought under control. Only 10 percent of the officers were killed in the arrest phase. (43RT 7833.) Only three percent were killed during the departure phase, after the arrest. (43RT 7834.) Officers are trained to listen for various

types of sounds, such as footsteps, voices, and doors opening and closing. (43RT 7840.)

If a door is opened, an officer is trained to walk in and observe all conditions of the house, to investigate whether domestic abuse or violence is occurring, and to locate the persons involved. Locating these persons is important in order to personally control the suspect and his movements. (43RT 7833-7844.) So that the officer is not silhouetted, making the officer an easy target, the officer is trained to change the light difference by stepping into the house in order to be at the same light level, allowing the officer to see. (43RT 7844.) Officers are taught that they may seize weapons in plain view, including firearms. (43RT 7845.) This is not a time when the officer should be making a lot of noise, yelling and screaming. An officer does not want the subject inside to know he is there before the officer is ready. (43RT 7846.)

The term "block and cover" is the most significant principle in police work and was taught to Deputy Aguirre. (43RT 7847-7848.) Under "block and cover," one officer is the contact officer and the other is the cover officer. (43RT 7847.) The contact officer is focused on interviewing and talking to the subject. (43RT 7847-7848.) The cover officer defends the contact officer. (43RT 7848.) In a situation where an officer were to move to a position of block and cover where he did not believe retreat could be safe, and where he was backlit at the door of a house, the officer's responsibility to protect the safety of his fellow officer and the victim would be to step into the residence. Without doing so, the officer could not see where the threat was and protect his fellow officer, the victim, and himself. (43RT 7848-7849.)

A reasonable police officer is expected to use his own body to block and cover his own partner and any victim in domestic violence cases and any other police work. An officer is trained to physically separate the people involved in order to de-escalate any kind of violence or threat of violence. This is because the longer the violence is occurring, the more potential for violence

there is towards the officer and everyone involved. (43RT 7850.) Sergeant De Los Santos teaches that if the dispute is outside, take it inside. (43RT 7850-7851.) This is done in order to control the actions of the people involved, to prevent neighbors from being involved, and to have people react differently because they are being contacted by a police officer in adverse conditions in front of a neighborhood. Also, statistics indicate it is safer inside than outside because it is easier to control a person inside. (43RT 7851.) If an officer observes conditions that suggest someone might be under the threat of injury, even if not having received injuries, the officer may enter a residence to investigate. (43RT 7854.) "Control" is the main goal until the officers can defuse the situation. Control means to locate, contain, and position a person that you are dealing with so that you are in a position of advantage and the person is in a position of disadvantage. (43RT 7855.)

Sergeant De Los Santos taught Deputy Aguirre that a reasonable police officer responding to a domestic violence or abuse situation would believe that the two principles—control, and block and cover—were necessary to protect the lives of the victim, the other officers, himself, and the suspect. (43RT 7856.) A reasonable peace officer trained like Deputy Aguirre would listen for footsteps, a door opening and closing, voices, and anything else he could hear. (43RT 7863-7868.) He would listen for these things to give him very valuable information that he needs—who is in the house and where any persons are located. (43RT 7868.)

Given a hypothetical scenario under the prosecution's evidence, a reasonable officer would believe that he could enter. (43RT 7868-7871, 7878-7879.) A reasonable police officer would believe that immediate entry was necessary to protect Deputies Sagely, Fryhoff, and Sparks, as well as Alonzo, the officer himself, and possibly the suspect. (43RT 7879-7881.) A reasonable police officer would believe that it was necessary to block and cover, to put his body between the threat, and Alonzo and Deputy Sagely. (43RT 7881-7882.)

A reasonable police officer would believe that because of the lighting conditions, immediate entry was necessary to view the surroundings in order to protect these people. A reasonable police officer under these circumstances would believe that retreat to the street or anywhere else was not a safe alternative. (43RT 7882.) The "fatal funnel" of vulnerability would run to the entire area of the backyard, depending on where the suspect was and his spatial relationship to the officers. (43RT 7883.)

Assuming Alonzo was right by the door, Deputy Sagely was next to her as the contact officer, and Deputy Aguirre was behind him and to his left, a reasonable police officer would not believe that it was safe to simply stand there and not block and cover for the possibility of a dangerous suspect inside. (43RT 7884-7885.) Once a reasonable officer has entered into the darkened house, the reasonable officer's responsibility is to locate where the person is and therefore locate the threat. Once he has located that person, the reasonable officer's responsibility is to control the situation. (43RT 7885.)

A reasonable officer would be very concerned about the fact that the windows provided an opportunity for viewing the officer's approach. A reasonable officer would be concerned about the fact that the side door opened and closed. (43RT 7967.) In the hypothetical, when Deputy Sagely stepped toward and began talking with Alonzo, he became the contact officer. (43RT 7968.) Under the department's general orders, an officer is allowed to draw his gun when he believes that the use of deadly force is imminent. (43RT 7970.)

A reasonable officer that heard a call for service on a domestic disturbance, and then, by contacting a person, arrived and visually confirmed that the person might be subject to domestic abuse and to threats of ongoing domestic violence, would believe that it was permissible to enter and investigate in response to the call for service. (43RT 7975.)

## II. PENALTY PHASE

### A. Prosecution Evidence

In the penalty phase, the prosecution submitted evidence about the devastating impact of Deputy Aguirre's death on his family, friends, and fellow police deputies. There was also evidence about appellant's prior criminal activity, including his vengeful hit and run of a gang member with his car and his carjacking of a woman at gunpoint after the robbery of a McDonald's restaurant.

#### 1. Victim Impact Evidence

##### a. The Effect Of Deputy Aguirre's Murder On His Wife, Enedina Aguirre, And Their Five-Year-Old Daughter Gabriela

Enedina Aguirre was Deputy Aguirre's wife. (47RT 8639.) They had a daughter in September 1992. (47RT 8641.) His daughter Gabriela was an infant when he decided to join the Sheriff's Department. (47RT 8641, 8645.) When Gabriela was born, Deputy Aguirre was the primary caretaker for her because Enedina Aguirre worked days, and Deputy Aguirre worked the night shift. (47RT 8641.) In the evenings, after Deputy Aguirre got transferred to Ojai, he would wake up Gabriela, have popcorn, and watch "I Love Lucy" between 11:00 and 12:00 p.m. (47RT 8642.) Deputy Aguirre did this because he spent less and less time with Gabriela once she started school. (47RT 8641-8642.) Deputy Aguirre took videos of himself and Gabriela, setting the camera up, and shooting scenes such as of him feeding her and teaching her to walk. (47RT 8642-8643.)

When Enedina Aguirre got to the hospital after Deputy Aguirre was killed, she saw a chaplain. That is when she knew Deputy Aguirre had been killed. Enedina Aguirre screamed. (47RT 8644.) Deputy Aguirre had left Gabriela with Enedina Aguirre's mother at about 12:30 or 12:45 p.m. that day.

He gave her a kiss and said, "I'll see you tonight." (47RT 8645.)

When Deputy Aguirre was killed, Gabriela was almost four. Gabriela still does not understand that Deputy Aguirre is not coming back. (47RT 8645.) Gabriela wishes every night and every morning, on stars, chicken bones, and everything she can get her hands on, for Deputy Aguirre to come back. (47RT 8645-8646.) Gabriela watches the videotapes of her and Deputy Aguirre to hear his voice. Because Deputy Aguirre had taught Gabriela how to use the videotape machine, Gabriela operates it on her own. Enedina Aguirre will come downstairs and see the videos already on, and Gabriela watching them all day just to hear his voice. (47RT 8646.)

Since Gabriela started kindergarten, she has had emotional problems that were too hard for her to deal with. On one occasion, a fireman walked into school with a badge and a walkie-talkie. Gabriela disrupted the class and said her father had these. (47RT 8646.) When the fireman looked at her name, he figured out who she was and said that "yes, your daddy does have that, but your daddy has a big heart." Gabriela said, "No, he's working in Ojai. He's working overtime. He's very tired. He's coming home soon." After this incident, Gabriela got taken out of kindergarten. Gabriela will never be the same. When her mother cries, Gabriela questions her about when her daddy is coming home, and they look into cars and patrol units to see if he is inside. Enedina Aguirre tells Gabriela that her daddy is in heaven looking over them, but she does not understand. (47RT 8647.)

Not a day goes by that Enedina Aguirre does not think about her husband. Gabriela reminds her every day, so it is impossible to let it slip by. Enedina Aguirre knows that her husband loved her. (47RT 8648.)

### b. Monica Elisarraraz, The Sister Of Enedina Aguirre, On Deputy Aguirre's Care For Her Son

Monica Elisarraraz was the sister of Enedina Aguirre, Deputy Aguirre's wife. (47RT 8651.) Deputy Aguirre helped take care of Elisarraraz's son when she was a teenager on drugs. (47RT 8654-8655.) He also gave her a bible and told her that she should have more respect toward her parents. (47RT 8653.) Elisarraraz misses seeing Enedina Aguirre happy; Enedina Aguirre is not the same now since Deputy Aguirre died. (47RT 8655.)

### c. The Effect Of Deputy Aguirre's Murder On Leonard Mata, His Best Friend: Losing Everything

Leonard Mata was Deputy Aguirre's best friend. (47RT 8660.) After Deputy Aguirre died, Mata lost everything: his family, children, home, job, and his best friend. Emotionally, he became too unstable to cope with his family. Having grown up together with Deputy Aguirre, Mata had hoped that they would be together their whole life. Mata could never handle Deputy Aguirre's death and was still getting over it. (47RT 8665.)

### d. The Effect Of Deputy Aguirre's Murder On Deputy Sheriff James Fryhoff: How Deputy Aguirre Was Like A Brother To Him

In March 1996, Deputy James Fryhoff became Deputy Aguirre's training officer. (47RT 8672.) Deputies Fryhoff and Aguirre became very close and Deputy Fryhoff felt like Deputy Aguirre was his brother. (47RT 8673.) Deputy Aguirre was "the most giving person on the face of the earth," cared a great deal about his family, and was a very religious man. (47RT 8673-8674.) When they carpooled to work, Deputy Aguirre talked a lot about his family and bragged about his daughter. (47RT 8674.) Deputy Fryhoff is upset with himself that he did not kill appellant. (47RT 8678.) It makes Deputy

Fryhoff feel that he was a failure as an officer. (47RT 8678-8679.) It is something that he has to live with every day. (47RT 8678.) Deputy Fryhoff was crying after Deputy Aguirre was killed. (47RT 8682.)

After Deputy Aguirre was killed, Deputy Fryhoff did not sleep for almost two weeks. Deputy Fryhoff did not eat any substantial food for at least a month. Deputy Fryhoff cried a lot. Deputy Fryhoff went to three counselors but could not tolerate them. Deputy Fryhoff hates the third counselor more than anyone except for appellant. (47RT 8685.)

The murder of Deputy Aguirre drastically changed Deputy Fryhoff. (47RT 8687.) He used to enjoy his work thoroughly, but now he handles his calls, "and that's about it." The murder changed Deputy Fryhoff emotionally, in that he is angry all the time, snaps for no apparent reason, and yells at his fiancee and then says he does not know why. (47RT 8688.)

**e. The Effect Of Deputy Aguirre's Murder On Deputy Sheriff David Sparks: How He Has Become An "Emotional Wreck" Because Of The Killing**

Deputy David Sparks became a close friend of Deputy Aguirre when they worked patrol together and at the station. (47RT 8692.) The murder of Deputy Aguirre affected Deputy Sparks's two older children, who repeatedly express fears to Deputy Sparks that he will not come home. It also has affected Deputy Sparks in that he has become cold to people. (47RT 8697.) It made Deputy Sparks an emotional wreck, and he thinks about getting another job because sometimes he does not think it is worth it. (47RT 8699.)

**f. The Effect Of Deputy Aguirre's Murder On The Psychological Well-Being Of Sheriff's Captain James Barrett**

At the time Deputy Aguirre was killed, Captain James Barrett was the manager of the Ojai Valley Sheriff's Station and the Acting Chief of Police for

the City of Ojai. Deputy Aguirre was professional, unassuming, and quiet, a team player. (47RT 8701.) Deputy Aguirre's death has completely changed the way Captain Barrett views being in law enforcement. (47RT 8702.) When Captain Barrett went into the squad room and told the shift that their partner was dead, there was audible crying, shaking of heads, and people breaking down. (47RT 8708.) Captain Barrett was concerned about the psychological well-being of his command. (47RT 8708-8709.) Captain Barrett feels like he lost a son and says he could not go through this again. (47RT 8710-8711.)

### g. Deputy Aguirre's Positive Relationship With Ojai Teenagers

In 1996, Cody Murphy was a teenager living in Meiners Oaks. Murphy met Deputy Aguirre while skateboarding. (48RT 8782.) Deputy Aguirre was different than other police officers, in that he was honest, and had a passion for making everything better and a lot easier for teenagers around Ojai. (48RT 8783.) When Murphy found out that Deputy Aguirre had been killed, it broke his heart, and the town feels a lot emptier now. (48RT 8784-8785.)

### h. Marie Aguirre, Deputy Aguirre's Mother

Marie Aguirre was Deputy Aguirre's mother. (48RT 8791.) Deputy Aguirre played a lot on the living room carpet with his daughter, Gabby, and was happiest whenever she was around. (48RT 8792-8793.) When Deputy Aguirre was a child and his father was working, he took over caring for his baby sister Aileen by watching out for her, babysitting, and changing her. (48RT 8797.) Deputy Aguirre loved both his sisters a lot and Marie Aguirre never saw them bicker. (48RT 8799.) When he was a child, Deputy Aguirre was hard-working, and worked in his grandfather's store starting at age 11. (48RT 8800.)

When Marie Aguirre was taken to the coroner and learned that her son, Deputy Aguirre, had been killed, her pain was so great that she repeatedly hit

herself and cried to God for mercy. (48RT 8805-8806.) A deputy next to her said, "If you want to hit somebody, hit me. Don't hit yourself." (48RT 8806.) Since Deputy Aguirre was killed, Marie Aguirre has worked three jobs so that she could exhaust herself enough to go to sleep. (48RT 8814-8815.) Her husband sat and stared at the walls, and walked around with no sleep. Marie Aguirre has "totally neglected" her daughter Jeanine because of what happened to Deputy Aguirre. Marie Aguirre saw a psychologist, who said that her husband is "drowning," that she is "barely hanging on with a life ring," and that Jeanine is "just floating off." (48RT 8815.)

#### i. Videotapes Of Deputy Aguirre And His Daughter

The prosecution played a videotape of home video movies of Deputy Aguirre and his daughter. (48RT 8816-8817; Peo. Exh. 42C.) The videotape includes excerpts from the wedding ceremony of Deputy Aguirre and his wife Enedina Aguirre, Deputy Aguirre feeding his infant baby Gabriela, Gabriela's first and then second birthdays, and Gabriela's baptism. (Peo. Exh. 42C.)

### 2. Appellant's Prior Criminal Activity

#### a. The Hit And Run Of Johnny Reeves

On November 17, 1993, Ventura Police Officer Terry Medina went to the scene of an injury accident in the area of Empire and Preble where Johnny Reeves had his right leg injured after being struck by a vehicle and knocked to the ground. (47RT 8721, 8724-8726.) The vehicle had gone eastbound on Rexford, fishtailed, the back end sliding out of control, and collided with a parked vehicle on the north side of Rexford. The vehicle then continued eastbound at a high rate of speed, and then turned north of Sedonia out of Reeves's view. (47RT 8728.)

On May 25, 1995, appellant told Linda D'Ambra, a sheriff's department employee working in inmate services, that about a year earlier, he had looked for the gang members who had beat his brother up, and then rode around drinking a six pack of beer, bounced off a few cars, and hit, with his car, a person who looked like a gang member standing in or crossing the street. (47RT 8734-8737.) Appellant said that he then drove off and hit a car but was not sure if anyone was in it. (47RT 8737.) Appellant never said he was sorry for what he had done. (47RT 8751.)

#### b. The Robbery And Carjacking At McDonald's Restaurant

In December 1996, Jesus Lemus was a store manager at a McDonald's on Venice and Overland in Los Angeles. (52RT 9584.) A man came into the store and pointed a large, .357 magnum revolver at Lemus. (52RT 9584-9585.) Lemus opened up the cash registers for him, and the man took the money. (52RT 9585.) The man ran out the store. (52RT 9586.) In the parking lot, appellant pointed a gun at Josephine James and told her she was going to take him for a ride in her car. (48RT 8786-8787.) Appellant drove away in James's car. (48RT 8787.) When she testified later in that case, appellant looked at James in a "very evil" and "very mean" way, and she was frightened of him. (48RT 8788.)

### B. Defense Evidence

Appellant's penalty phase defense sought to mitigate appellant's culpability by providing expert testimony that he had organic delusional disorder at the time of the murder. There was also testimony about appellant's military service in Vietnam, which he received an undesirable discharge for, and about appellant's good character from his former supervisors, jailor, and professor. There was a stipulation that no drugs or alcohol were detected in appellant at the hospital after the murder. A correctional consultant opined that

appellant would make a positive adjustment in prison.

### 1. Expert Testimony On Organic Delusional Disorder

#### a. Marcia Miller, A Psychiatric Social Worker That Opined That Appellant Had "Organic Delusional Disorder"

Marcia Miller was a psychiatric social worker for the Ventura County Behavioral Health Department. (48RT 8822.) On July 14, 1994, Miller performed an admission and psychiatric assessment of appellant. (48RT 8830-8831.) Appellant had been referred there by Terry McCloud. (48RT 8832-8833.) Miller diagnosed appellant as suffering from "[o]rganic delusional disorder." (48RT 8837.) Appellant had a delusion that he belonged to a world of "organic eaters" made to "go underground to wage a defense against the vast majority of others, the non-organics, who attempted to poison the food, water, air, et cetera, by means of multi-media, TV, computers, et cetera, to brainwash the organics. This was a prominent belief system." (48RT 8839.) Appellant said that he was concerned about his ability to control his impulses and as a result was coming to "Mental Health." (48RT 8840.) Appellant believed that his mind was being controlled and that others could read his mind. (48RT 8842-8843.) Miller recommended that appellant receive psychological testing, and provided a plan for a 45-day extended period of evaluation. (48RT 8849.)

One criterion indicating someone is malingering is the person asking for help but also being under suspicion of having committed recent criminal activity. (48RT 8853.) Miller could not recall whether appellant was asked to seek mental health advice while facing criminal charges. (48RT 8857.) Miller also could not remember what delusion she concluded appellant had in relation to the incident where he hit someone he believed was a gang member in retaliation for an attack on his brother. (48RT 8863-8864.) If Miller knew that appellant had been written up while in prison for being intoxicated on alcohol,

then this would change her previous opinion that appellant was being truthful with her. (48RT 8868.) In making the diagnosis of appellant, Dr. Lance and Dr. Schrum relied entirely on Miller's summary. (48RT 8870-8871.)

### b. Diana Sandefur, A Drug Counselor Recounting That Appellant Sought Treatment And Sincerely Tried To Get Better

Diana Sandefur was an addictions treatment specialist for the Ventura County Behavioral Health Alcohol and Drug Programs. (48RT 8880.) She treated appellant between March 14, 1994 and September 7, 1994. (48RT 8882-8883.) When appellant first came in, he indicated that he believed he needed immediate mental health treatment for the safety of himself and others. (48RT 8883.) It appeared to Sandefur that appellant was a person that was sincerely trying to get better. (48RT 8889.) Appellant completed the alcoholism program that Sandefur set out for him. (48RT 8889-8890.)

When appellant went to see Sandefur, he gave her a letter about his life history saying that he would go long periods of time without drinking and then would go on binges. (48RT 8893-8895.) When Sandefur was in contact with appellant, appellant never showed any signs of violence or anger. Appellant enrolled in Oxnard College and began a program to earn his drug and alcohol certification to be a treatment specialist. (48RT 8890, 8895.)

### c. Dr. Lisa Kus, A Psychologist That Determined That Appellant Had Organic Delusional Disorder

Dr. Lisa Kus was a senior psychologist with East Ventura Behavioral Health. (48RT 8901.) After testing appellant beginning on July 25, 1994, Dr. Kus diagnosed appellant with organic delusional disorder. (48RT 8908-8909, 8911.) Appellant also had polysubstance dependence. (48RT 8924-8925.) Appellant's impairment was related to his long history of drug use, and the most important part of his treatment plan was to stay sober. (48RT 8913.) On

August 29, 1994, when Dr. Kus completed her testing of appellant, appellant had "faulty logic" but she could not determine from the testing results whether there was a mental illness beyond what he was experiencing from his drug abuse. (48RT 8919-8920, 8924.)

In December 1994, appellant came to see Dr. Kus again in order to get her professional opinion about what he was experiencing—paranoid and bizarre thinking—and to seek her opinion as to what to do about his fear of his 21-year-old son's substance abuse and gang-like appearance. (48RT 8926-8927, 8929, 8931-8932.) Some letters that appellant brought in for Dr. Kus were examples of psychotic thinking. (48RT 8934-8935.)

On January 3, 1995, Dr. Kus believed that appellant was suffering from a mental disease. Appellant agreed to take medication for his delusional thinking. (48RT 8938-8940.) At this time, appellant did not appear to be under the influence of any drugs or alcohol. (48RT 8939.) When Dr. Kus spoke on the telephone to appellant at the end of January 1995, she believed that appellant was still suffering from a mental disease or defect. (48RT 8942-8944.) Appellant had organic delusional disorder. (48RT 8947.)

Appellant never talked to Dr. Kus about the specific delusion he had conveyed to Miller regarding his fantasy world of the "organic people." (48RT 8948-8949.) In Dr. Kus's meeting with appellant in August 1994, and in appellant's letters he gave to Dr. Kus on January 3, 1995, appellant was immediately able to grasp the idea that he was making an incorrect assumption. (48RT 8954-8955.) If appellant told another person that the reason he struck the person with his car was simply to take revenge on any gang member, not necessarily associating the person he struck with the assault on his brother, this would be inconsistent with the information that Dr. Kus had. (48RT 8952.)

Dr. Kus's secondary diagnosis was antisocial personality disorder. (48RT 8968.) Dr. Kus was not comfortable with this secondary diagnosis at the time of her testimony because she did not have information about appellant

having conduct disorder prior to age 15 and because she did not know whether appellant fulfilled the other criteria in the DSM-III-R. (48RT 8969-8970.) Appellant would fit the criteria for adult antisocial behavior. (48RT 8970-8971.) It is often difficult to distinguish between a delusion and an overvalued idea. An overvalued idea occurs when a person has an unreasonable belief or idea but does not hold it as firmly as is the case with a delusion. (48RT 8978.) In August 1994, appellant told Dr. Kus that he did not want to go back to prison. (48RT 8966.)

### d. Dr. Dale Peace, Who Prescribed The Drug Haldol To Treat Appellant For Delusions

In January 1995, Dr. Dale Peace was a psychiatrist at Ventura County Mental Health. (49RT 9060.) On January 11, 1995, Dr. Peace filled in for Dr. Lance and evaluated appellant, forming the opinion that he was showing paranoid ideation and exhibiting ideas of reference, and that his thoughts appeared delusional. (49RT 9073-9075.) Because of this opinion, and because of Dr. Kus's diagnosis of organic delusional disorder, Dr. Peace prescribed a very low dose of the drug Haldol to appellant in order to treat his delusions. (49RT 9065-9067, 9074, 9079, 9082.) Haldol can have adverse side effects, including drowsiness, some dry mouth, muscle contractions like muscle spasms, shaking, and inability to breathe, but most of the time, with a low dose, not this inability to breathe. (49RT 9074.) Appellant fully understood his conversation with Dr. Peace on this day. (49RT 9081.)

### e. Stipulation That There Was Haldol In Appellant's Car After Murder

After the shooting of July 17, 1996, Ventura County Sheriff's Deputy Robert Garcia searched appellant's Honda outside of 122 North Encinal. In the glove box of that car, Deputy Garcia found an empty bottle of Haldol. (49RT 9085-9086; Def. Exh. V.)

### f. Dr. Charles Hinkin, A Neuropsychologist, Testifying That Appellant Was Delusional At The Time Of The Murder

Dr. Hinkin was a neuropsychologist. (49RT 9087.) Schizophrenia is a brain disease that affects the functioning of the brain. (49RT 9111.) It interferes with logical thoughts, decision processing, and information processing. (50RT 9180.) Delusions are false beliefs or thoughts that have no basis in reality. (49RT 9105.) Hallucinations are false perceptions. (49RT 9122.) Schizophrenia includes symptoms of delusional disorders. (49RT 9132.)

Dr. Hinkin opined that appellant has paranoid schizophrenia, and that he has had it ever since he was about 32 years old. (49RT 9094-9095; 50RT 9185.) Appellant's crimes on July 17, 1996, were a direct result of his paranoid schizophrenia. (49RT 9096; 50RT 9185-9186.) On the day of the shooting, appellant was experiencing extreme mental and emotional distress. Appellant's schizophrenia, affected his ability to conform his conduct to the requirements of the law. (50RT 9185.) For approximately the last 20 years, appellant has suffered from several delusional beliefs. Appellant "belongs to the world of organic eaters, who have been forced to go underground to wage a defense against the various majority of others, the non-organics, who attempt to poison the food, water and air by means of multimedia, TV, computers, et cetera, to brainwash the organics." (49RT 9113.) Appellant also hallucinated that his father had sexually assaulted his son and that his wife and daughter's boyfriend were having an affair. (49RT 9118-9119.) Appellant's behavior between July 14 and July 17 was symptomatic of a psychotic episode. (50RT 9180.)

Dr. Hinkin performed tests on appellant and determined that appellant had a high I.Q., in the 80th percentile. (49RT 9135-9136.) Appellant had some brain damage. (49RT 9138.) Drug use did not cause appellant's

neuropsychiatric disorder. (49RT 9140.) Dr. Hinkin further opined that antisocial personality disorder was not an appropriate diagnosis of appellant. (49RT 9148-9150.)

Dr. Hinkin had anticipated that appellant would be lying to him, malingering, in order to escape the death penalty. (49RT 9153.) Dr. Hinkin administered a series of tests on appellant to determine if he was malingering. (50RT 9162.) Appellant's problems existed in the 1970's, so he did not make them up after his murder. (50RT 9178.)

This is the first time Dr. Hinkin ever testified in a criminal case. (50RT 9188.) When appellant described his shooting of Deputy Aguirre to Dr. Hinkin, he recounted being in the shower with Ms. Alonzo, coming out of the shower, firing on Deputy Aguirre, and then running out the front door. (50RT 9192.) Appellant did not tell Dr. Hinkin that he was suffering from any delusion at the time he fired the shots. (50RT 9192-9193.)

Dr. Hinkin did not review any police reports in this case, ask appellant why he did what he did, or talk with Dr. Kormos, Dr. Reinharet, Dr. Patterson, or Dr. Kus. (50RT 9199-9200.) Dr. Hinkin tailored his opinions in this case to the factors in mitigation that the jury was to consider. (50RT 9203-9204.) Dr. Hinkin did not do any brain scans on appellant. (50RT 9211.) Appellant never told Dr. Hinkin that he had any "grandiose delusions" on July 17, 1996. (50RT 9217.) When Dr. Hinkin met with appellant, except for initially, when appellant was scared and apprehensive, appellant appeared relatively cogent and calm and did not appear actively psychotic at all. (50RT 9238-9239.) Dr. Hinkin did not observe any overly psychotic symptoms in appellant. (50RT 9239.)

On July 17, 1996, appellant was suffering from delusional jealousy and the delusion that he was in the movie "Crazy Love." Delusional jealousy is not considered a bizarre delusion. (50RT 9250.) If appellant was working as a drug and alcohol counselor in June and July and worked until 11:00 p.m. the

evening before the murder, this would change Dr. Hinkin's opinion in that "the exacerbation might not have been as acute if he was still able to go to work." (50RT 9257.) Dr. Hinkin does not know whether appellant had the intent to kill Deputy Aguirre when he held the .45-caliber Colt revolver about 12 inches from Deputy Aguirre's head and pulled the trigger. (50RT 9262.) A person can be a paranoid schizophrenic and a purposeful criminal at the same time. (50RT 9274.)

### g. Wilma Johnson, Appellant's Mother, Testifying That He Had Delusions About Pork

Wilma Johnson was appellant's mother. (50RT 9306.) After appellant got out of the army and returned home, he was more quiet and withdrawn. (50RT 9313.) Appellant used to tell his mother that when he ate pork, he had bad dreams, and one time made her take some bacon fat out of her refrigerator because he believed it was contaminating his food. (50RT 9316.) Wilma Johnson still loves her son and intends to try to maintain contact with him after the trial is over. (50RT 9322.)

In 1965, when appellant was 18, Wilma Johnson paid restitution after he was arrested for stealing beer. In 1993, when appellant was about 46, she paid $3,000 in restitution so charges against appellant could be dropped after he stole some property from some people in Wisconsin. (50RT 9342.)

### h. Jane Siemon, A Farmer Who Employed Appellant And Served Him Soup That He Said Was Meant To Poison Him

In 1981, appellant worked for Jane Siemon and her husband on a farm in Wisconsin. (51RT 9394.) At one point, appellant said that they worked too hard, and that if he ate less, he would not have to work as hard. (51RT 9397.) After this statement, appellant ate less and lost a lot of weight, becoming quite thin. (51RT 9397-9398.) On one occasion, appellant accused Siemon of trying

to poison him with spoiled soup. Appellant then lived at the farm for several more months. (51RT 9401-9402.)

### 2. Appellant's Service In The Vietnam War

#### a. William L. Clark, Who Had Charge Of Appellant's Battery In Vietnam

Appellant was part of Battery C, First Lieutenant William L. Clark's battery in Vietnam in 1966 and 1967. (49RT 9012, 9015.) While appellant was assigned to this battery, there were several mortar attacks and several sniper attacks on the camp. (49RT 9018-9019.) Appellant's battery was subject to various hazards and conditions during his time there. (49RT 9021, 9027.)

Appellant was as good at evaluating situations and danger as any other 18- or 19-year-old. (49RT 9041.) Appellant received an undesirable discharge. (49RT 9028.) Being absent without leave is considered a serious offense in a combat unit. (49RT 9037.) Since Clark left the military, he has not remained close to appellant. (49RT 9038.)

#### b. Stephen Gibson, Who Served In Appellant's Battery In Vietnam

Stephan Gibson was a second lieutenant that served with appellant in Battery C in Vietnam from 1966 to 1967 but does not specifically remember appellant other than his name. (49RT 9048-9049.) The defense played portions of a home video that Gibson took of Battery C in Tay Ninh in 1966-1967. (49RT 9050-9058; Def. Exh. W.) Appellant is not on any of this video. (49RT 9057.)

### c. William Waller, A Second Lieutenant Who Knew Appellant As His Radio Telephone Operator, A Stressful And Dangerous Job

In 1966 and 1967, William Waller was a second lieutenant at Tay Ninh in Vietnam. (53RT 9770.) Appellant served as Waller's radio telephone operator, or "RTO," when Waller was a forward observer. (53RT 9771, 9776.) Being an RTO was a very hazardous assignment at times and was a stressful job. (53RT 9774-9775.)

## 3. Appellant's Good Character

### a. Linda Oksner, A Sheriff's Captain Who Testified That Appellant Had No Violent Disciplinary Write-Ups In Jail

Captain Linda Oksner was with the sheriff's department. (50RT 9283.) From July 17, 1996, to February 24, 1998, at the time of Captain Oksner's testimony during trial, appellant did not have any disciplinary write-ups involving violent conduct while in jail. (50RT 9285, 9287.) While in jail, appellant was in administrative segregation, which lessened the chance that he was going to get into violent confrontations with other inmates. (50RT 9290.)

Appellant did have two non-violent disciplinary violations while in jail. (50RT 9287.) The first was on April 10, 1997, when appellant was in possession of contraband, having too many newspapers in his cell. The second was on January 15, 1998, when he was in possession of a "rat line." (50RT 9287.) This "rat line" was a newspaper fashioned in the manner of a rope, with a comb attached to the end of it, used to pass a newspaper from cells. (50RT 9288-9289.)

### b. Warren Gauvin, A Drug And Alcohol Counselor That Testified That Appellant Was The Best "House Manager" That He Had Ever Seen

On July 17, 1996, Warren Gauvin was the drug and alcohol counselor in charge of Tiber House, a sober living facility for mentally ill men. (50RT 9296.) For about the year before July 17, 1996, appellant was Tiber House's house manager, which involved relating with clients, counseling the residents, attending sobriety-related meetings, overseeing the house, and making sure it stayed in good repair. (50RT 9297-9298.) Appellant was caring with clients and interested in other people. He related well with them and was not distant or cold in any way. (50RT 9304-9305.) Appellant was the best house manager that Gauvin ever had. (50RT 9299.)

### c. William Shilley, A Professor That Gave Appellant A Certificate Of Achievement For Alcohol And Drug Studies

William Shilley was an instructor and professor of alcohol and drug studies at Oxnard College. (51RT 9403.) Appellant obtained a certificate of achievement in alcohol and drug studies, meaning that he successfully completed the school's program. (51RT 9407-9408.) Appellant received all "As" during his enrollment at Oxnard except for one "B" in "fundamentals of music." (51RT 9409.) Appellant was a very good student and writer, was quiet and controlled, and had virtually perfect attendance. (51RT 9418, 9421.)

### d. Robert Holts, The Director Of The Drug Program At The Salvation Army Where Appellant Interned, Testifying That Appellant Had The Highest Success Rate As A Drug Counselor

In about 1995 or 1996, appellant was an intern for Robert Holts, Director of Rehabilitation Services at the Salvation Army. (51RT 9425-9426.)

Appellant's duties were to counsel persons with alcohol and/or substance abuse problems and implement the rehabilitation program. (51RT 9426-9427.) Appellant had the highest success rates of the counselors whose caseload Holts was assigned. (51RT 9428.)

#### e. Aubrey Towler, Supervisor At Primary Purpose, Testifying That Appellant Performed Excellently As A Detox Specialist Shortly Before The Murder

In about 1995, Aubrey Towler was a supervisor at the detox unit of Primary Purpose, a recovery home for alcoholics and drug addicts. (51RT 9431-9432.) Appellant worked for Towler as a detox specialist. (51RT 9433.) Appellant performed excellently, and was a good listener, very dependable, and very friendly with other staff members. (51RT 9433-9435.)

Appellant was scheduled to work a shift on July 16, 1996, from 3:00 p.m. to 11:00 p.m. (51RT 9447; Peo. Exh. 49A [time cards].) For the two weeks ending on July 31, 1996, appellant was under arrest for murder and was incarcerated. (51RT 9449.)

### 4. Stipulation That No Drugs Or Alcohol Were Found In Appellant After The Murder

The parties stipulated to the following: On July 17, 1996, after appellant was shot, he was taken to the hospital. At about 7:30 p.m., samples of appellant's blood and urine were taken. Ventura County Sheriff's Department laboratory technicians tested appellant's blood and urine and did not detect the presence of drugs or alcohol. (51RT 9451.)

### 5. Consultant Predicting Appellant Would Make A Positive Adjustment While In Prison

James Park was a correctional consultant that has testified as an expert witness on whether a person would make a positive adjustment to confinement.

(51RT 9495.) Appellant would be a reasonably good prisoner, a good worker, and contributor to the work program at the prison. (51RT 9518.) The fact that appellant is an older, more settled prisoner, could have a positive effect on other prisoners. (51RT 9522.) After considering appellant's jail records, federal prison records and state prison records, Park is under the opinion that appellant would make a positive adjustment while in prison. (51RT 9528.)

After 1973, Park was not assigned to work in a particular prison. (51RT 9530.) In the more than a hundred times that Park has testified as an expert, he has never testified for the prosecution. (51RT 9532.) A person would be dangerous that would commit a dangerous act for the purpose of committing suicide by having a police officer kill him. (51RT 9557-9558.)

### C. Rebuttal Evidence

In the penalty phase rebuttal, the prosecution introduced a tape of a conversation with a psychiatrist that determined that appellant did not have an organic delusional order at the time of the murder. There was also testimony from a former classmate that said appellant used LSD in high school and never complained about the cafeteria food where he worked. Also, a sheriff's deputy testified about finding, in appellant's bedroom, a copy of the DSM-III and a psychology book on dual diagnosis. Finally, there was a stipulation about appellant's dishonorable army conduct.

#### 1. Forensic Psychiatrist Testifying That Appellant Did Not Have Organic Delusional Disorder

On July 17, 1996, at about 10:15 p.m., Dr. Donald Patterson, a forensic psychiatrist, interviewed appellant at the hospital for the purpose of determining his mental status as close as possible to the time of the shooting. (52RT 9591, 9595, 9598-9599.) Appellant was able to talk to Dr. Patterson without any difficulty. (52RT 9600.) There was no indication in appellant's speech that any mental disorder altered his consciousness. (52RT 9600-9601.)

Appellant's speech and responses were oriented, entirely appropriate, and there were no "indications of lapses in his contact with reality." (52RT 9601.)

Appellant did not appear delusional. Appellant did not appear to be experiencing any hallucinations. Appellant appeared to appreciate what was being done for him medically and to be able to interact appropriately with the staff treating him. (52RT 9601.) Appellant did not appear to be paranoid, fearful, or confused by the Dr. Patterson's questions. (52RT 9602.) Appellant did not express any hostility and was not nonresponsive. (52RT 9602-9603.) Appellant appeared to be reacting appropriately to the pain he was experiencing. Appellant made sense when he spoke to Dr. Patterson; his speech was well-organized. Appellant was not incoherent and had no loosening of association—skipping from one topic to another (56RT 9603, 9624.)

Dr. Patterson testified that during this conversation, appellant "was very keen upon" diagnosing himself. (52RT 9754-9755.) Appellant had studied the DSM-IV and was familiar with the terminology "schizophreniform" and "schizotypal." (52RT 9755) That appellant knew this terminology validated that he had been studying the DSM-IV or psychiatric terminology. (52RT 9757.) Appellant said that "it's my own personal diagnosis that I had some kind of thought disorder, either schizophrenia or schizo- -- what is it, schizo form." Dr. Patterson said, "Schizophreniform." (52RT 9756.) Dr. Patterson got the impression that appellant was trying to manipulate him during the interview. Appellant did this with complimentary comments, and talking about "the tape running in his head" and the movie he was making, "Crazy Love." (52RT 9757.) Appellant's acting out the movie with Alonzo on the day of the murder did not seem delusional, and possibly showed "grandiosity" in his thinking. (52RT 9759-9760.)

After reviewing further materials, Dr. Patterson ruled out that appellant had antisocial personality disorder. (52RT 9603-9608.) The biggest difference

between schizophrenia and delusional disorder is that with schizophrenia, the delusions are bizarre. (52RT 9615.) Generally, with a delusional disorder, a person can function fairly well in other areas of life except for the area of the particular delusion. (52RT 9617.) Appellant is not a paranoid schizophrenic. (52RT 9617, 9623.) This is because appellant's delusions are nonbizarre. (52RT 9621, 9749.) Also, appellant lacks hallucinations. (52RT 9621.) Appellant also was able to enjoy things. He was also functioning occupationally as a counselor. (52RT 9622.) Appellant also had good eye contact with Dr. Patterson. Appellant had no signs of affective flattening. Also, appellant had a good memory about the events of his life history and the day of the murder. (52RT 9623.)

From Dr. Patterson's contact with appellant on July 17, 1996, and his subsequent review of the record, he concluded that appellant did not have an organic delusional disorder. In all ways, appellant was able to conform himself to the requirements of the law on July 17, 1996. (52RT 9664.)

### 2. The Taped Conversation Between Appellant And Dr. Patterson At The Hospital On July 19, 1996, At 10:15 P.M.

The court played two tapes of Dr. Patterson's conversation with appellant on July 17, 1996. (52RT 9668; Peo. Exh. 54.) The jury also received transcriptions of these tapes. (52RT 9667; Peo. Exh. 55.) These tapes were about 50 minutes long together. (52RT 9668.)

In this conversation, appellant said that two years before, he had gone through the county mental health system because he believed he had some type of mental disorder. (Exh. 55, at pp. 10-11.) Appellant said that a diagnosis of him by "Dr. Morrison" was "organic delusional disorder." (*Id.* at p. 12.) Appellant lived with his parents at the time and believed that they were poisoning his food. Dr. Morrison told appellant that methamphetamines and marijuana caused his belief. Appellant "had a paranoid episode for three

months after that. (*Ibid.*) Dr. Morrison referred appellant to Dr. Lance, a psychiatrist. (*Id.* at p. 13.) Dr. Lance gave appellant a low dosage of Haldol. (*Ibid.*) Appellant stopped taking this drug because he did not like the side effects. (*Ibid.*) After going to Dr. Peace, another psychiatrist, appellant became very angry because Dr. Peace was confrontational. (*Id.* at pp. 13-14.)

Because appellant had taken classes and knew something about mental disorders, his "personal diagnosis" was that he had either schizophrenia or "[s]chizophreniform." (Exh. 55, at pp. 15-16.) Appellant's "delusional order" is "usually not that serious." (*Id.* at p. 19.) Appellant felt "emotionally shut down" but said, "I know what I did, yeah . . . . You don't wonder why, it was just a reaction. I was in a situation and I just reacted. . . . Somebody else could've reacted differently, but that was my reaction. But I was conscious of what I was doing." (*Id.* at pp. 23-24.) Since March 15, 1994, appellant has not drank alcohol or done any drugs. (*Id.* at p. 25.)

The day before Deputy Aguirre was killed, appellant went to an Alcoholic Anonymous meeting after a month of not attending, and "left the meeting." (Exh. 55, at p. 27.) Appellant believes that "probably on the subconscious level," the shootings were "[a] passive suicide attempt. Cause I don't think I could kill myself, but I was hoping that the officers would kill me." (*Id.* at p. 30.) About three months before July 17, 1996, appellant had a delusion where his father told appellant in a restaurant that he had molested appellant's son by saying something like, "Where's your son? Yeah, I screwed him." (*Id.* at pp. 37-38.)

On July 17, 1996, when appellant was driving in the car with Alonzo, he told her that they were acting out the movie. (Exh. 55, at p. 51.) When appellant was showering at the house, Alonzo was planning to stay with him. The police came to the door and pulled out Alonzo because her daughter had called them. (*Ibid.*) Appellant had told Alonzo's daughter and her daughter's boyfriend that they had to leave the house because appellant was jealous of

him. (*Id.* at p. 54.) Alonzo had then told her daughter and boyfriend that they had to leave, and her daughter started crying. Appellant does not know whether Alonzo told her daughter that he had a gun. (*Ibid.*) According to appellant, "At this point I don't have anything to lose by being honest and saying what happened . . . because if you did something and people know you did it, there's people there and they know." (*Id.* at p. 53.) Appellant continued, "[Y]ou know, they saw me, right. How are you gonna say you didn't? . . . I mean, it's not normal behavior. . . . It's not, you know the average person wouldn't consider doing something like that." (*Ibid.*) At the time of the interview, appellant was "not under the influence of any chemicals or drugs yet, they're gonna sedate me pretty soon. And it's fairly close to the time of the incident. . . . And the closer the better I would think. . . . You know, time can alter the way you see things." (*Id.* at p. 54.)

Before the interview ended, appellant told Dr. Patterson that "it's probably better if you write your report as quickly as possible so you can remember the whole thing." (Exh. 55, at p. 55.) Appellant also stated that there might be some additional lead in his body from another shotgun injury. (*Id.* at p. 56.) Appellant mentioned that Dr. Patterson had "a kind face," and that this was an "asset in your business." (*Id.* at p. 55.)

### 3. Kay O'Gorman, Appellant's Drug Counseling Classmate, Testifying About Appellant's LSD Use In High School And Not Complaining About The Cafeteria Food Where He Worked

From January 1995 to about May 1996, Kay O'Gorman was in the alcohol and drug studies program with appellant at Oxnard College, and worked together in a Salvation Army rehabilitation center. When talking about a client of O'Gorman, appellant said, "I have somebody in my life like that now and I need to stay away from her, too." (53RT 9789.)

Appellant said that he began using LSD in early high school. (53RT 9790.) At Oxnard College, appellant worked in the cafeteria. (53RT 9790.) Appellant never complained about the food or about any problems working with food there. (53RT 9790-9791.)

### 4. Deputy Michael Barnes, Testifying About Appellant Having A DSM-III And A Psychology Book On Dual Diagnosis

In the search conducted on July 17, 1996, Deputy Sheriff Michael Barnes found, in a bookcase in appellant's bedroom, a DSM-III and a psychology book on dual diagnosis. (53RT 9799-9802; Peo. Exh. 56 [photograph of bookcase in appellant's bedroom].)

### 5. Stipulation About Appellant's Dishonorable Army Conduct

The prosecution and appellant stipulated to certain facts about appellant's army conduct, consisting of the following:

> Between June 23, 1967 and June 25, 1967, at Chu Lai, Vietnam, the defendant was found to be absent without leave from his unit. His punishment for that offense was confinement at hard labor for one month and a forfeiture of $64 in pay for three months. . . .
>
> On September 6, 1968, the defendant received a discharge from the army, "under conditions other than honorable" based upon a recommendation that he be issued an undesirable discharge certificate.

(54RT 9948-9949.)

## ARGUMENT

### I.

### THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTIONS TO EXCUSE PROSPECTIVE JURORS FOR CAUSE

Appellant contends the trial court erred in improperly failing to excuse for cause 10 prospective jurors—eight of these automatically favoring capital punishment under *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841] and five of these as demonstrating actual bias against appellant or certain evidence in his case. (AOB 55-112.) Respondent will demonstrate below that appellant's claim is meritless since the record contains substantial evidence supporting each of the trial court's decisions not to excuse a juror for cause.

In *Wainwright v. Witt, supra*, 469 U.S. at page 424, the United States Supreme Court held that:

> the proper standard of determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

(Internal quotation marks omitted; see *People v. Riggs* (2008) 44 Cal.4th 248, 282.) The critical question in each challenge is "whether the juror's ability about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror*." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1318-1318, italics in original, internal quotation marks omitted.)

If a prospective juror provides conflicting or equivocal answers to questions concerning his or her impartiality, the trial court's determination as to that person's true state of mind, which may include an evaluation of the juror's demeanor, is binding on the appellate court. (See *People v.*

*Cunningham* (2001) 25 Cal.4th 926, 975; see *Wainwright v. Witt*, *supra*, 469 U.S. at pp. 425-426; *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522, fn. 1 [88 S.Ct. 1770, 20 L.Ed.2d 776].) An appellate court must uphold the trial court's decision whether to excuse a prospective juror if the decision is supported by substantial evidence. (*People v. Holt* (1997) 15 Cal.4th 619, 651.) An appellate court must defer to a trial court's findings of whether potential jurors possess disqualifying biases because such findings are "based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." (*People v. Martinez* (2009) 47 Cal.4th 399, 426; *People v. Boyette* (2002) 29 Cal.4th 381, 416.)

This Court recently explained that prospective jurors' views can justifiably change during the course of voir dire once they are informed of and understand their potential roles as capital jurors. In *People v. Riggs*, *supra*, 44 Cal.4th at pages 286 to 287, this Court upheld the trial court's decision not to excuse for cause a prospective juror that initially stated she would not take the defendant's background information into consideration in a penalty decision but then ultimately stated that she could reject the death penalty based on "all the evidence brought forth to support that he wouldn't deserve" it. This Court reasoned that the juror's initial "statements are properly understood as explaining her then-existing view of the relative weight of one particular type of mitigating evidence." (*Id.* at p. 287.) This Court reconciled the juror's later statements by contrasting her earlier ignorance of relevant legal principles:

> The fact, however, that during voir dire a juror expresses a negative opinion about the persuasive value - in theory - of a certain class of mitigating evidence, does not establish that the juror's performance of his or her duty will be substantially impaired. . . . [The juror's] statements concerning personal background evidence meant only that [the juror] - a layperson who had never before been involved in a capital trial - did not at that time see the relevance of such evidence in the

determination of the appropriate sentence. . . . "A per se disqualification is not required merely because a juror does not instantly embrace every legal concept presented during voir dire examination."

(*Id.* at pp. 287-288, quoting *Mabe v. Commonwealth* (Ky. 1994) 884 S.W.2d 668, 671.)

Similar standards apply to challenges for cause based on bias not relating to the prospective juror's death penalty views. As this Court recently put it, "[A] prospective juror is biased and disqualified to serve only if his state of mind will prevent him from acting impartially and without prejudice to any party." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1290.) "If the prospective juror's statements are equivocal or conflicting, the trial court's determination of his state of mind is binding on appeal." (*Ibid.*) "The trial court is in the best position to make this assessment, since it can observe demeanor and tone, and decide credibility firsthand." (*Ibid.*)

Bias does not automatically exclude potential jurors for cause. Such jurors are not disqualified so long as "they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*People v. Martinez, supra*, 47 Cal.4th at p. 427.) A juror's biases on capital punishment are not determinative. It is only if that "predilection would actually preclude him from engaging in the weighing process." (*Ibid.*)

### A. The Trial Court Properly Did Not Excuse Prospective Juror Kristen S. For Cause

Appellant contends that the trial court should have excused prospective juror Kristen S. for cause because she could not fairly and impartially consider and weigh the evidence in determining the appropriate penalty. (AOB 91-92.) Respondent disagrees because substantial evidence supported the trial court's decision not to excuse Kristen S. for cause.

As appellant points out (AOB 91-92), when defense counsel asked Kristen S. during voir dire whether a premeditated murder of a police officer "automatically calls for the death penalty," she replied in the affirmative. (23RT 4239.) But the prospective juror later clarified that she could meaningfully consider the penalty of life without the possibility of parole in such a situation if the defendant could never get out, and again later affirmed, "I could vote for life without the possibility of parole" in the case of a premeditated murder of a police officer. (23RT 4243-4244, 4255-4257.) She also assured the trial court that she could meaningfully weigh the various factors in aggravation and mitigation with an open mind in deciding between life without possibility of parole and death. (23RT 4235-4237.)

The trial court reasonably construed Kristen S.'s answers as a reflection of her "understanding of this evolution of the voting process." (23RT 4259.) Kristen S. appeared, at first, to possess a number of mistaken layperson's beliefs about the death penalty trial process. In between her first and last answers on the issue of an "automatic" death penalty for police officer murderers, defense counsel educated her that a life without parole sentence meant that there was no possibility of release, after which she stated that she would not have any difficulty returning such a verdict in this case if she believed it appropriate. (43RT 4242-4244.) She also affirmed that if the trial court instructed her to consider both death and life without parole as punishments, she would consider both of them. (43RT 4251.) The trial court then informed her about her potential role as a juror in the two-part procedure of the capital trial, and her duty to consider factors in mitigation and aggravation before making a penalty decision. (23RT 4256.) Given this sequence of events, substantial evidence supported the trial court's finding that despite Kristen S.'s conflicting answers, her true state of mind was reflected in her final, informed answer on this issue. (See *People v. Riggs*, *supra*, 44 Cal.4th at pp. 286-288.)

Appellant also argues that Kristen S.'s statement that the appeal processes were much too lengthy (23RT 4240-4241) demonstrated her "zealous support" for capital punishment. Not so. Whatever their views on capital punishment, many laypersons, attorneys, and courts agree that the process itself takes too long. Moreover, to the extent that the prospective juror's comments indicated her preference for capital punishment as a general matter, that did not mean she could not impartially make the decision whether or not to impose it in this case. As Kristen S.'s comments as a whole bear out, her views did not substantially impair the performance of her duties. Consequently, the trial court properly denied appellant's motion to excuse Kristen S. for cause. (23RT 4259-4260.)

### B. The Trial Court Properly Did Not Excuse Prospective Juror Barbara C. For Cause

As to prospective juror Barbara C. (later empaneled), appellant argues that "she harbored strong pro-death opinions" and "exhibited an inability to consider imposing a penalty other than death." He contends that "her equivocal and tentative responses following the court's instructions made it unreasonable to expect that she could actually give each potential punishment equal consideration as required by the law." (AOB 100-101.) Respondent disagrees. Barbara C. did indicate strong views in favor of the death penalty, and initially stated that she would not consider other factors besides appellant's guilt in determining the penalty. But later, once she was apprised of and understood her duties as a capital juror, she unequivocally stated that she would consider these other factors.

In her jury questionnaire, Barbara C. stated that she was strongly in favor of the death penalty (10 on a scale from 1 to 10), that if the death penalty "were used more there would be a reduction in murders," and that "[a]llowing years of appeals is a waste of resources, both human [and] financial." (1SCT

137, 159.) She also checked "no" on the questionnaire when asked, if appellant was found guilty of the premeditated murder of a peace officer in the performance of his duties, whether, in determining the appropriate penalty, she would be willing to consider any further information concerning the defendant's background or behavior as a factor in the penalty decision. (1SCT 161.)

But at voir dire, after the trial court explained the two phases of the penalty trial and after she saw appellant in person, Barbara C. stated that she then understood her role and agreed that she could properly carry out her duties. Specifically, Barbara C. stated that she could consider factors besides the offense, including factors pertaining to appellant and the victim, and their families. (24RT 4537.) When defense counsel asked whether she could be fair and impartial and could decide the penalty issue solely upon the evidence and court's instructions, disregarding any prior opinion, Barbara C. said that "yes, I could be." (24RT 4541.) Barbara C. said that on the questionnaire she had marked "unsure" about this because she had "had a preconceived notion that the death penalty was appropriate." (24RT 4541.) She explained:

> And then when we came in and when there were 100 of us sitting here and -- I really had no idea who Mr. Johnson was. I thought he was a third attorney sitting there. You introduced him and said who he was. I had a very strange reaction. Just the human element. I had never considered how I would, actually looking at somebody, apply this to them.

(24RT 4541.) Barbara C. had thought that she was "a hanging judge . . . [b]ut then when I was faced with him, then -- I could -- I would realize I'm not." (24RT 4542.)

Barbara C. further said that she could envision reaching a verdict of life without the possibility of parole. (24RT 4542.) Barbara C. said that she would have no problem following the court's direction to weigh factors in aggravation

and mitigation. (24RT 4543.) Barbara C. stated that she had been disturbed that after a death judgment, the appellate process went on for a long time. (24RT 4544.) After reading a newspaper article about a capital case, however, she became "more unsure about the death penalty being fair because if there is a mistake made, it's pretty final." (24RT 4545.) She explained that this was all the more reason to carefully weigh all the facts in the case. (24RT 4545.) Barbara C. stated that given her present state of mind, she believed that she could give appellant a fair and impartial trial in both the guilt and penalty phases. (24RT 4551.)

On the prosecutor's questioning, Barbara C. stated that she would vote for making death penalty automatic for all first-degree murders with special circumstances. (24RT 4551.) However, Barbara C. stated that after the trial court apprised her of the process, she realized that she could not automatically vote for the death penalty and that she had to follow the law in order to apply the death penalty. (24RT 4552.) Barbara C. stated that she was willing to follow the court's instructions and participate by weighing the aggravating and mitigating circumstances as a juror in a penalty trial. (24RT 4552.) Barbara C. stated that she could accept and honor that she would not consider the deterrent effect of the death penalty or the monetary cost. (24RT 4558.)

Under these circumstances, substantial evidence supported the trial court's agreement with the prosecutor that Barbara C. had "somewhat of an epiphany" upon understanding the trial court's explanation of the process and her role in it, and upon seeing appellant in person. (24RT 4557.) Barbara C.'s statements over the course of the questioning fully and adequately explained why, based on her earlier lack of knowledge about death penalty procedure, she had earlier stated that she could not consider other factors besides a defendant's guilt during the penalty phase, and why, based on her gained understanding, she could and would carefully weigh all the factors in making a penalty decision. (See *People v. Riggs*, *supra*, 44 Cal.4th at pp. 286-288.) Thus, the

trial court properly denied appellant's motion to excuse Barbara C. for cause.

### C. The Trial Court Properly Did Not Excuse Prospective Juror Marguerite S. For Cause

Appellant asserts that prospective juror "Marguerite S.'s state of mind was such that she could not fairly and impartially consider and weigh the evidence in determining the appropriate penalty" and "was unwavering in her personal view that appellant was already guilty." (AOB 96-98.) The record, however, contains substantial evidence supporting the trial court's conclusion that Marguerite S's pro-law-enforcement leanings would not "prevent or substantially impair her ability to fairly try the case." (21RT 3681-3682.)

In her jury questionnaire, Marguerite S. gave answers indicating that she was in favor of the death penalty. (12SCT 6749, 6771-6772.) She also expressed an uncertainty or doubt about whether she could be fair and biased in this case. Further, she checked "unsure" as to whether she could be fair and impartial in the penalty phase and decide the issue of penalty entirely on the evidence presented in court and the court's instructions, while disregarding any prior opinion she may have had prior to coming to court for jury selection. (12SCT 6773.)

During defense counsel's questioning, Marguerite S. later explained that this "unsure" answer in the jury questionnaire was based on her bias in favor of the prosecution because her "best friends are in law enforcement." (21RT 3663-3664.) She also initially characterized herself as "biased" against appellant and opined that because of her views, it "would be difficult" for her to be fair to appellant or any defendant accused of the first-degree murder of a police officer and it was "not the right kind of case for [her] to sit on as a juror." (21RT 3664, 3666.)

Marguerite S. further revealed during voir dire that in the last two years she had lost three members of her family (daughter, father and mother) and did

not "think it's right for someone who has committed a crime like [the one in this case] to continue." (21RT 3667, 3668-3669, 3675-3676.) And, based on that feeling, Marguerite S. preliminarily indicated that as a juror in a case of first-degree murder of a police officer she would be inclined to vote for the death penalty. (21RT 3667-3668.) She confessed a concern that based on her friendship with persons in law enforcement and the deaths in her own family she did not know if she could meaningfully consider information regarding appellant's background or behavior as a factor in determining penalty. (21RT 3669-3670.)

Upon questioning by the prosecutor and trial court, however, Marguerite S. clearly indicated that because of her strong belief and regard for the law, she would ultimately obey the law, follow the court's instructions, and properly consider all the circumstances in deciding whether to vote for life in prison without the possibility of parole or death. During questioning by the prosecutor, Marguerite S. acknowledged a strong belief in the law and believed she could and would follow the law as instructed by the judge in this case. Specifically, Marguerite S. indicated that, if instructed at a penalty phase to consider both life without possibility of parole and the death penalty, she would consider both options. (21RT 3673.) She told the prosecutor that her friendship with police officers would not make her vote in a manner unsupported by the evidence or do something other than what the judge instructed her to do. Marguerite S. reiterated that she would follow the law. (21RT 3672-3675.)

In response to questioning by the trial court, Marguerite S. confirmed that she could approach her task at a penalty phase of weighing the aggravating and mitigating evidence with an "open mind" and set aside her personal feelings "based on your directions." She acknowledged that she had strong feelings but that her "strongest feeling" is to obey the law and that whatever the law mandates, she will do. (21RT 3678.) Marguerite S. stated that she "would

consider the circumstances" and that she would "give due and proper consideration to all aspects before I vote for either life without the possibility of parole or death." (21RT 3678-3679.)

To the extent that Marguerite S. had previously stated otherwise, this Court should defer to the trial court's finding that Marguerite's later responses on these issues "were truthful, honest, and the best estimate of the expression of her thinking at the time." (21RT 3682.) Especially given Marguerite S.'s high regard for the law, substantial evidence supported the trial court's finding that her views on the death penalty would not prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and her oath.

Appellant also argues that Marguerite S.'s close friendships with members of law enforcement caused bias rendering her unable to be a fair and impartial juror. (AOB 106.) But in fact, Marguerite S.'s responses during voir dire demonstrated that these friendships would cause her to obey the law and, if appropriate, vote against a death sentence because of her friendships with law enforcement. She specifically stated that she would not render a guilty verdict just because she had friends that were highway patrol officers. (21RT 3674.) She also indicated that she would abide by the presumption of innocence and apply the reasonable doubt standard "even if it was something that might not seem to be supportive of your friends . . . ." (21RT 3675.) Perhaps most tellingly, she stated that her law enforcement friends would not want her to fail to obey the law, and that she was "sure" that her law enforcement friends would want her to follow the law "even if it meant that [she] might vote for a verdict that they didn't like . . . ." (21RT 3673.) And, again, unequivocally, she ultimately affirmed that she could vote for life without the possibility of parole giving due and proper consideration to all the circumstances. (21RT 3679.) Consequently, there was substantial evidence that Marguerite S.'s friendship with law enforcement members did not

demonstrate any bias that mandated excusal for cause.

### D. The Trial Court Properly Did Not Excuse Prospective Juror Ernest M. For Cause

Appellant contends that the trial court should have granted his motion to excuse prospective juror Ernest M. for cause because of his "unwavering preference for death" and his expressed difficulty in voting for life without the possibility of parole if given a choice. (AOB 99-100.) In denying appellant's motion, the trial court found that despite Ernest M.'s philosophical favoring of the death penalty, he was truthful in his answers that he could follow the trial court's instructions and was not prejudging this case. (26RT 5011-5012.) Because substantial evidence supported the trial court's decision, this Court should reject appellant's claim.

Near the beginning of voir dire, Ernest M. expressed to the court that he felt strongly about the death penalty and that he would like to vote for it. (26RT 4988-4989.) He stated that he had "strong feelings . . . about a peace officer . . . doing his duty." (26RT 4991.) He stated that he was "kind of leaning toward death," and that he would "feel very strongly that he was doing his duty, and that law is in place for a reason." (26RT 4991.) Ernest M. also indicated that because of his strong feelings for police officers, if the officer was killed in the performance of his duties, "that ends the discussion [about penalty] and there's nothing more to talk about." (26RT 4992.)

But Ernest M. also represented that he could consider all the circumstances in determining an appropriate penalty. To wit, he stated that in deciding the appropriate punishment at a penalty phase, he could consider appellant's background and mental state and treatment, as well as the impact of the loss of the victim on the victim's family. (26RT 4989-4990.) He specifically stated that he would consider life without the possibility of parole as one of the two punishments he could impose. (26RT 4990.)

On defense counsel's questioning, Ernest M. again made it clear that despite his views in favor of the death penalty, he would try to be fair and would consider all the circumstances. Ernest M. said "No" in response to the question, "Now, as you sit here right now, have you formed an opinion as to the guilt or innocence of Mr. Johnson?" (26RT 4996.) He stated that if appellant's prior convictions were proven at trial, he would not automatically vote for the death penalty; instead, the prior convictions would "just be part of [his] decision." (26RT 4997.) When defense counsel asked if he would always vote for the death penalty for a murderer of a police officer, he stated, "I have real strong feelings towards that, but I would try to be fair and weigh, like the judge said, the different background and how it affected the people involved and so forth." (26RT 4997.) And significantly, Ernest M. answered, "Yes," to defense counsel's question, "Well, in your honest opinion, sir, do you feel you could give both sides in this case a fair and impartial trial if you were selected as a juror." (26RT 5005.)

The prosecutor's colloquy with Ernest M. further supports the trial court's finding that appellant could be fair and impartial in a penalty phase. Ernest M. stated that he wanted to be fair to appellant and that he would have no trouble following the law as the trial court instructed him. (26RT 5006.) Ernest M. further indicated that if so instructed by the judge, he would weigh certain factors, and conscientiously consider life without the possibility of parole. (26RT 5006.) He would also follow the instruction that if mitigating factors outweigh aggravating factors, or if they are equal, he must return a verdict of life without the possibility of parole. (26RT 5006-5007.) This Court should defer to the trial court's determination that these answers reflected Ernest M.'s true state of mind.

Appellant also argues that the trial court should have excused Ernest M. because he was personally biased against appellant due to his strong pro-law-enforcement feelings and due to his friends and relatives that were police

officers. (AOB 108-109.) Appellant did clearly express strong feelings in favor of law enforcement, but also clearly expressed an ability to follow the law and weigh the circumstances in making his decision.

As indicated, Ernest M. was strongly in favor of and had friends in law enforcement. He explained that his response on the questionnaire regarding his opinion on the death penalty, "Yes. I believe in the execution of people found guilty," reflected his belief "that law is in place because of peace officers just performing their duty. And I agree with that law." (26RT 5000.) Somewhat equivocally, Ernest M. initially stated, "I sure hope so," in response to a question whether he could meaningfully weigh aggravating and mitigating factors, adding, "I feel real strong. I have friends and relatives who are police officers, and part of my job is also that. So I know the situation, why they're there and what happens. And I have strong feelings that way. . . . I must admit that." (26RT 4997-4998.) And, at one point, in response to defense counsel's questioning, he even stated that he was biased or prejudiced in favor of the prosecution because of his many law enforcement contacts. (26RT 4999.)

But Ernest M. clarified that his "bias" was not so strong that appellant could not get a fair trial if he were selected as a juror, and added, "I think I would do my best just to listen to the evidence and not just make a decision out of my own feelings." (26RT 4999.) He affirmed that he would not ignore evidence because he was in favor of the police. (26RT 5008.) And he stated that he would not simply believe the police officers that testified at trial just because they were police officers. (26RT 4999.) Ernest M. stated in sum that even though he had strong feelings regarding police officers, he would judge this case on the evidence presented in the courtroom. (26RT 5006.) Thus, substantial evidence supported the trial court's determination that Ernest M.'s views in favor of law enforcement would not prevent him from carrying out his duties as a juror in a capital case. (See *People v. Riggs*, *supra*, 44 Cal.4th at p. 287 ["The fact that this preexisting view might have made it more difficult

for defendant to *convince* juror A.M. of the relative strength of a mitigation case that included evidence of defendant's background does not prove that she would automatically vote for the death penalty"].)

### E. The Trial Court Properly Did Not Excuse Prospective Juror Robert G. For Cause

Appellant contends that the trial court erred in denying his motion to excuse prospective juror Robert G. for cause because he "repeatedly demonstrated his inability to remain impartial and to follow the law with regard to the presumption of innocence and the prosecution's burden of proof." (AOB 103-106.) Respondent disagrees. The trial court properly denied the motion, reasonably finding that, like all people, Robert G. had biases, but that Robert G. candidly expressed them, and then honestly stated that he "will put them aside and fairly judge this case based upon the factors presented and he can consider life without the possibility of parole . . . ." Substantial evidence therefore existed to support the trial court's finding that Robert G. was "sincere" and "honest" in his statements that he would be fair and impartial. (21RT 3835-3836.)

Appellant focuses on statements by Robert G. indicating his general sympathy for police officers and concludes that this meant that he could not be a fair juror. (AOB 103-104.) He points to Robert G.'s response to defense counsel's questioning that he knew "quite a few policemen," and that "personally," he believed that "the death penalty should automatically be applied in the case of the first-degree murder of a police officer." (21RT 3819.) Robert G. explained, in support of this view, "I think that they're people that place their lives in jeopardy every day and I think that as a citizen, one of my responsibilities is to afford them all the protection that I can." (21RT 3819.) On further questioning by defense counsel, Robert G. also stated that as a juror, police officers would "start with an advantage in your mind in

terms of weighing their believability as witnesses simply because they are police officers . . . ." (21RT 3821.) Robert G. also indicated that he did not think appellant could receive a fair trial from him because he believed it was hard not to be biased in favor of the prosecution in a case of a police officer shot and killed while in the line of duty. (21RT 3822-3833.) He admitted his bias in favor of the prosecution and that appellant would "probably not" get a fair trial from him. (21RT 3822-3823.)

But although Robert G. forthrightly confessed his biases, and his doubts about his fairness as a juror, he promised that he would set aside his biases if chosen as a juror and would follow the law. In the initial questioning, Robert G. told the trial court that he would keep an "open mind" with respect to the two alternatives of death and life without the possibility of parole. (21RT 3812, 3817-3818.) Robert G. later told the prosecutor that his feelings that the death penalty should be automatic for someone who murders a police officer did not mean he would not listen to the evidence or factors explained by the court. He would follow the law and his views would not make him fail to consider life without possibility of parole. Robert G. agreed that his belief in an "automatic death penalty" for police officer murderers was as a "citizen," as, for example, if he were voting on an initiative. In the courtroom, by contrast, he would not "automatically apply the death penalty in a case involving as a juror the first-degree murder of a police officer," because, "That's not the law, no." (21RT 3829-3831.)

In his final exchange with the trial court, Robert G. further demonstrated his ability as a capital juror to follow the law:

> THE COURT: Now, in listening to you, I have heard -- I recited for you a page, actually two pages of factors you may consider -- you shall consider, excuse me -- in deciding whether or not to impose death or life without possibility of parole.

Going into that, you have been asked to assume that the defendant is convicted of a premeditated murder of a police officer and now you are being presented with factors in aggravation and factors in mitigation.

Would you consider those factors as I have instructed you?

PROSPECTIVE JUROR [ROBERT G.]: I would consider them, yes.

THE COURT: Would you automatically vote for the death penalty of a person who stands convicted as I have described it to you or would you consider those factors and consider life without the possibility of parole?

PROSPECTIVE JUROR [ROBERT G.]: I would have to consider the factors and imprisonment.

THE COURT: Is that a realistic assessment of your state of mind at this time, that you would follow the law in that regard?

PROSPECTIVE JUROR [ROBERT G.]: Of course, yes.

(21RT 3833.)

Taken in context, Robert G.'s answers demonstrate his evolving understanding of his political views as a citizen in favor of automatic capital punishment versus his role as a potential juror to follow the existing law. (See *People v. Riggs*, *supra*, 44 Cal.4th at pp. 286-288.) As a result, this Court should not disturb the trial court's determination that Robert G. was honest and sincere in stating that he could weigh the aggravating and mitigating factors and could consider both penalties as options.

Appellant also argues that Robert G. was biased by media coverage. (AOB 104.) When challenging Robert G. for cause, however, appellant did so only on the grounds that he was biased in favor of the prosecution and that he had a "stressful situation at work to deal with." (21RT 3834.) Appellant never asked that the trial court excuse Robert G. on the ground of pretrial publicity.

As a result, he has forfeited this claim on appeal. (See *People v. Hinton* (2006) 37 Cal.4th 839, 860 [to preserve a claim of error based on the trial court's failure to excuse a juror for cause, the defendant must challenge the juror for cause]; *People v. Mickey* (1991) 54 Cal.3d 612, 664 ["A defendant may properly raise in this court a point involving an allegedly improper excusal for undue personal hardship only if he made the same point below"].)

Appellant's pretrial publicity claim, even if cognizable, would lack merit. In response to defense counsel's questioning about whether he could judge the case solely on the evidence presented, Robert G. did state that what he had heard in the media "would still be in the back of [his] mind" as a juror and that it would be "kind of hard to edit things from your mind." (21RT 3823.) But Robert G. later assured that he would "determine what the evidence is based on the testimony in court," would "follow the law," and would not "do anything other than what the Court instructs [him] to do in terms of [his] duties as a juror." (21RT 3831.) Robert G. also stated that he would have an open mind about the case. (21RT 3812, 3817-3818.) Under these circumstances, this Court should give deference to the trial court's credibility determination. (See *People v. Carasi*, *supra*, 44 Cal.4th at p. 1290 [after a prospective juror stated that based on newspaper accounts he read, he believed that the codefendants were directly involved in the murder for financial gain, this Court upheld the denial of the prosecution's challenge for cause where the trial court believed the juror's later statements "insisting that he remained open minded and fair about the case"]; *People v. Wallace* (1936) 6 Cal.2d 759, 764-765 [the trial court properly rejected a challenge for cause where the juror indicated that "it would require evidence to remove impressions she received as to matters she read in the newspapers and which she believed to be the truth," but then, upon further examination, the juror demonstrated an ability to follow the applicable law].)

Appellant also argues that Robert G. "demonstrated an inability to be impartial on the issue of mental illness." He relies on statements Robert G. made during defense counsel's questioning at voir dire that he would take mental health testimony "with a grain of salt," and that "mental health" was not a "hard science," unlike a "mathematician, physicist, that's pretty hard science; there's right and wrong answers, black-and-white." (AOB 104-105; 21RT 3828-3829.) Again, however, appellant forfeited this claim because he did not challenge Robert G. for cause on this specific ground below. (See *People v. Hinton*, *supra*, 37 Cal.4th at p. 860; *People v. Mickey*, *supra*, 54 Cal.3d at p. 664.)

Moreover, his claim fails on the merits. At the end of this line of inquiry about mental health testimony, Robert G. answered "Of course I would" to defense counsel's question, "Well, if the judge so instructed you, would you consider the mental health of a person accused of first-degree murder?" (21RT 3829.) Given this statement as well as his other statements demonstrating that he could be fair and impartial, this Court should defer to the trial court's resolution of the issue. In sum, the trial court acted well within its discretion in denying appellant's motion to excuse Robert G. for cause.

### F. The Trial Court Properly Did Not Excuse Prospective Juror Robert C. For Cause

Appellant contends that the trial court improperly denied his motion to excuse prospective juror Robert C. for cause because "his personal feelings in favor of the death penalty would make him inclined to vote for death should be appellant be found guilty of murder with special circumstances." (AOB 89-91.) Respondent disagrees. Substantial evidence supported the trial court's finding that although Robert C. had opinions or feelings favoring the death penalty, Robert C. agreed that he would follow the law to consider applicable factors in determining whether to impose the death penalty or life without the

possibility of parole. (20RT 3634-3635.)

In support of his argument that Robert C. could not follow the law, appellant points to Robert C.'s initial statements to the trial court during voir dire. (AOB 89-90.) At the outset of voir dire, the trial court asked Robert C., if the jury found appellant guilty of special-circumstance murder, whether he always would vote for the death penalty and not consider life without parole. (20RT 3609.) Robert C. responded, "I've never been in that situation before. I've always felt that if a person was definitely guilty of murder, that they should be subject to the same thing that they did to the person they killed. That they should die for what they did." (20RT 3609.)

On the trial court's further questioning, however, Robert C. acknowledged that this was "not the law" but was "just the way I feel." (20RT 3609.) And, after the trial court informed him of the two phases of a capital trial, and a juror's role in it, Robert C. stated that he did not know whether he would always vote for the death penalty because he had "never been in that position before." (20RT 3611.) The trial court then explained that it would be instructing Robert C. on rules that he would follow. (20RT 3611-3612.) When the trial court asked whether Robert C. could follow rules that he should "weigh it before you make a decision," and that "there are circumstances which you vote for life without the possibility of parole and circumstances where you would vote for death," he responded, "Yes, I suppose so." (20RT 3612.) Ultimately, Robert C. affirmed that he could follow the law and could consider extenuating circumstances not related to the crime even if he did not believe it was "right in my heart." (20RT 3630.) Thus, the trial court reasonably concluded that Robert C. could follow the law. (*People v. Riggs*, *supra*, 44 Cal.4th at p. 287 [a prospective juror's "strong skepticism at the abstract suggestion that the personal background of a defendant could mitigate the seriousness of having committed murder" is insufficient to warrant overruling a trial court's credibility determination that the juror would not "automatically

vote for the death penalty or that her belief prevented or substantially impaired the performance of her duties as a juror to follow the trial court's instructions to weigh the evidence to be offered"].)

Appellant also appears to argue that Robert C.'s pre-existing preference for the death penalty would have impermissibly put the burden on appellant to convince Robert C. that appellant should live. (AOB 89-90.) Robert C. answered, based on his views, "Yes, exactly," to defense counsel's question, "So, in other words, you would expect the defense to come forward and persuade you why death wasn't the appropriate punishment." (20RT 3615.) As the trial court found, however, every time Robert C. was instructed that the law mandated that he consider certain factors in making his decision, Robert C. indicated that he could do as the trial court instructed. (20RT 3612, 3621, 3629, 3636.) That it might have been harder to convince Robert C. of a mitigation case did not mean that he should be excluded from serving. (See *People v. Riggs*, *supra*, 44 Cal.4th at p. 287.)

Appellant also challenges the trial court's refusal to excuse Robert C. for cause on the ground that Robert C. believed that the death penalty is not utilized enough, that it should always be imposed for murder, and that it saves taxpayer money. (AOB 90.) During voir dire, Robert C. affirmed his view on the questionnaire that the death penalty would save taxpayers money. (20RT 3618-3619.) Robert C. also stated that he believed the death penalty was given out too seldom and that he had taken notice of cases where a person had committed a premeditated murder but had only received a life sentence. (20RT 3614.) But after the trial court explained the law relating to his role as a capital juror, Robert C. responded that if the law provided that he may not consider the monetary cost to the state of execution or life imprisonment, he would not consider it. (20RT 3624-3625.) Furthermore, he answered, "Yes," that he understood that he could not consider the deterrent or non-deterrent effect of the death penalty or the monetary cost to the state of execution or life

imprisonment. (20RT 3636.) Thus, the trial court properly exercised its discretion in not excusing Robert C. for cause on this basis.

### G. The Trial Court Properly Did Not Excuse Prospective Juror Gregory D. For Cause

Appellant contends that the trial court should have excused prospective juror Gregory D. because he harbored a "pro-death bias" and "a premature certainty that appellant must have been guilty." (AOB 94-96.) Respondent disagrees. Although Gregory D. clearly demonstrated a philosophical agreement with the death penalty, he just as clearly demonstrated an ability and willingness to follow the law in this case and consider all the circumstances in making guilt and penalty decisions. Thus, substantial evidence supported the trial court's findings that "[h]e has strong views, I believe he'll do his very best to consider them [(these circumstances)], and I believe that he understands his obligation and will meet it." (23RT 4179-4180.)

Gregory D. was a civil-law attorney that strongly believed in the death penalty, rating his views as 10 out of scale of 1 to 10. (5SCT 4526; see also 23RT 4174-4175.) He had never practiced criminal law and never served on a jury, and confessed to having limited experience in this area. (23RT 4165-4166.) When first asked whether he would vote for the death penalty if the jury found appellant guilty of special-circumstance murder, regardless of the evidence, Gregory D. answered, "It would be highly unlikely that I would not vote for the death penalty under that circumstance." (23RT 4155.) Gregory D. also stated that there was a "high likelihood" that he would return the death penalty and that the death penalty was "appropriate" once there is a conviction of special-circumstance murder. (23RT 4156-4157.) When the trial court asked whether, accepting this principle, and assuming that appellant was convicted of first-degree special circumstance murder, Gregory D. could consider returning a verdict of life without parole, Gregory D. responded, "It

is possible but highly unlikely." (23RT 4158; see also 23RT 4162.)

But after the trial court instructed Gregory D. on his duty to not pre-judge appellant's guilt based on news reports, Gregory D. demonstrated he could fulfill this duty. Gregory D. stated that he understood it to be his obligation to base any judgment in this case upon the evidence presented in court, not on matters contained in news articles or on statements of the court or counsel. (23RT 4156.) Keeping this principle in mind, Gregory D. stated that he did not harbor any opinion on appellant's guilt or innocence or on what punishment should be imposed. (23RT 4156.) Later Gregory D. affirmed that given his present state of mind, he could give appellant a fair and impartial trial. (23RT 4173.) Gregory D. further stated that he would not be biased towards one side or the other. (23RT 4173-4174.) Thus, appellant's claim that Gregory D. prematurely found appellant guilty must fail.

There was also substantial evidence that Gregory D. understood that he would consider all the circumstances in making a penalty decision. The trial court instructed Gregory D. that he would consider all the evidence in determining the penalty, and specifically instructed him on all the factors that he would consider. (23RT 4159-4162.) Gregory D. then stated that he could consider the mitigating circumstances. (23RT 4162.) Further, Gregory D. indicated that after hearing the trial court's recitation of factors to consider, he could foresee returning a verdict of life without the possibility of parole. (23RT 4163.)

Contrary to appellant's argument, Gregory D.'s testimony was consistent. Gregory D. repeatedly expressed that he would probably vote for the death penalty for a first-degree murder with special circumstances. (23RT 4162, 4165-4168.) But he also repeatedly expressed that in making a penalty decision, he would consider all other factors, including the life and background of appellant, and that he would consider and could see himself voting for life without parole. (23RT 4165, 4168, 4170-4172, 4175.) Notably, at the end of

voir dire, Gregory D. answered "Yes" to the prosecution's question, "Do you feel as an attorney you have the intellectual discipline to be able to follow the instructions of the judge on the law and put your opinions aside in terms of what your duties are?" (23RT 4177.) Based on this substantial evidence, this Court should uphold the trial court's denial of appellant's motion to excuse Gregory D. for cause.

### H. The Trial Court Properly Did Not Excuse Prospective Juror Michael S. For Cause

Appellant contends that the trial court improperly failed to excuse prospective juror Michael S. because he "repeatedly demonstrated his inability to remain impartial and to follow the law with regard to the presumption of innocence and the prosecution's burden of proof." (AOB 106-108.) Respondent disagrees. Substantial evidence supported the trial court's determination that although Michael S. had a pre-existing inclination toward the death penalty for the first degree murder of a police officer, he demonstrated an ability and willingness to set that aside and remain open to all the circumstances affecting both the guilt and penalty determinations. (24RT 4370-4372.)

In support of his argument of impermissible bias as to Michael S., appellant first observes statements that Michael S. made in his questionnaire. Michael S. indicated there that he had "sometimes unfavorable" feelings towards defense attorneys "since a defense attorney may have to represent a client who is 'guilty' yet pleads 'not guilty' for whatever reasons." (AOB 106-107, citing 12SCT 6594.) Because appellant never asked that the trial court excuse Michael S. on the ground that he was biased toward defense attorneys, he has forfeited this claim on appeal. (See *People v. Hinton*, *supra*, 37 Cal.4th at p. 860; *People v. Mickey*, *supra*, 54 Cal.3d at p. 664.) In any event, appellant does not explain on appeal how Michael S.'s apparent distaste at the

thought of defending guilty persons made him unable to act impartially in this case. His claim should therefore be rejected on the merits as well.

Appellant complains that Michael S.'s questionnaire also demonstrated that this prospective juror formed the opinion beforehand that appellant was guilty. (AOB 107.) In the questionnaire, appellant stated that he had formed an opinion or had impressions about the case because, in the newspaper article that he had read, "[t]here was not presented any other explanation for Mr. Johnson's murder/shooting of the Deputy Aguirre that would explain away guilt." (12SCT 6603.) Significantly, however, appellant responded affirmatively in the questionnaire that he could be a fair and impartial juror in a penalty phase trial and decide the issue of penalty entirely on the evidence presented in court and the court's instructions, while completely disregarding any prior opinion he may have had prior to coming to court for jury selection. (12SCT 6607-6608.) Thus, there was no reason to excuse Michael S. based on his earlier impressions or opinions from reading the newspaper.

Appellant also cites Michael S.'s statement in the questionnaire "that this trial and the 'not guilty' plea are to avoid a harsher penalty - probably the death penalty" in support of his argument that Michael S. had a "limited ability to consider appellant's background or behavior when reaching an appropriate penalty decision." (AOB 107, citing 12SCT 6604.) But Michael S. wrote in the questionnaire that he believed that appellant's not guilty pleas were to avoid a harsher penalty, probably the death penalty, again, based on what he had read in the newspaper. (24RT 4355.) And his oral statements later showed that he did not have a pre-existing notion of a penalty decision beforehand, stating during questioning that before he came to court, he had not considered whether death was the appropriate punishment in this case. (24RT 4351.) Further, he unequivocally stated that he would consider evidence about a defendant's life and background in deciding the penalty for premeditated murder. (24RT 4358-4359.)

Appellant asserts that Michael S. only was capable of considering aggravating circumstances and not mitigating circumstances, singling out his response in the questionnaire, "There may be evidence of other crimes (as listed before) that indicate the evil nature of Mr. Johnson." (AOB 107; 12SCT 6608.) However, the voir dire as a whole belies appellant's assertion. Michael S. indicated that he would have an open mind, not harboring any opinion concerning what punishment should be imposed. (23RT 4339.) He stated that he could consider a person's mental health in determining the penalty. (24RT 4360.) And, directly on point, he stated that he could envision there being circumstances in a premeditated killing of a police officer where he could vote for life without parole, and others where death would be appropriate. (24RT 4368.)

Lastly, appellant urges that Michael S.'s views on drug usage "made him unable to be fair and impartial in considering substance abuse evidence in deciding an appropriate punishment." (AOB 112.) On defense counsel's questioning, Michael S. set forth his belief that if someone intentionally takes drugs and commits a crime, the person is still responsible for the crime. (24RT 4361.) He further stated, however, that if that person is taking drugs because of a dependency or addiction, this may be mitigating, but he "would still take a harsh view on that." (24RT 4361-4362.) Thus, Michael S. showed that he would be able to consider voluntary drug usage as a mitigating factor. That appellant would want Michael S. to be more sympathetic to voluntary drug usage as a mitigating factor at the penalty phase does not constitute a ground for excusal.

In sum, Michael S. made clear that he could vote for life without parole in a case of first-degree murder of an officer in the line of duty, that he would keep an open mind, that he did not harbor any opinion concerning appellant's guilt or innocence or what punishment should be imposed, and that he would consider evidence about a defendant's life, background, and mental health in

deciding the penalty for premeditated murder. (24RT 4339, 4358-4360, 4366-4367.) The trial court thus reasonably found that despite Michael S.'s general tendency in favor of the death penalty for a police-officer-murderer, Michael S. would be able to keep an open mind and consider only the evidence presented at trial in making guilt and penalty determinations in this case. Substantial evidence therefore supported the trial court's decision not to excuse Michael S. for cause on the ground of juror bias.

## I. The Trial Court Properly Did Not Excuse Prospective Juror Shirley J. For Cause

Appellant contends that the trial court should have excused prospective juror Shirley J. for cause because her "unmitigated preference for the death penalty revealed that given a choice she could not equally consider both punishments in determining appellant's sentence." (AOB 92-94.) Respondent disagrees, as the trial court reasonably found that Shirley J. would follow the law and adequately consider both alternatives in making a penalty determination. (21RT 3807-3809.)

As he did in making a motion to excuse at trial, appellant relies on Shirley J.'s statements on the questionnaire and during voir dire reflecting her agreement with the death penalty and her initial belief that the premeditated murder of a police officer in the line of duty automatically called for the death penalty. But her oral and written statements ultimately demonstrated her ability and willingness to consider all the circumstances and to equally consider both penalties in this case. Shirley J. is yet another example of a prospective juror that did not have legal "briefing by lawyers prior to taking the stand" on death penalty procedure, but who, upon examination, showed the ability to fulfill her duties. (See *People v. Riggs*, *supra*, 44 Cal.4th at pp. 287-288.)

Although appellant focuses on Shirley J.'s statement in the questionnaire, "As much as it would grieve me to vote for the death penalty,

I believe justice could not be served if someone takes the life of another without suffering the same fate," he neglects to mention the rest of her sentence, "but I would have to have heard all the facts and circumstances involved and be sure in my own mind and hear the person willingly and maliciously took a life." (7SCT 5287, underscoring in original.) As later revealed, Shirley J. understood and indeed emphasized her duty to consider all the circumstances in making a penalty decision.

Shirley J. indicated on the questionnaire: that she would *not* automatically vote for life without parole or the death penalty but rather would consider all the evidence and vote for either penalty depending on the evidence; that she did not have an opinion as to what the penalty should be for the person who killed Deputy Aguirre ("I have never thought about it"); if appellant was found guilty of the premeditated murder of a police officer engaged in the lawful performance of his duties, in determining the appropriate penalty she would be willing to consider any further information concerning the defendant's background or behavior as a factor in determining the appropriate penalty ("I would have to consider all the information and then make a decision based on it"); and in considering evidence relating to the personal characteristics of the decedent and the impact of the decedent's death on his family, she would be able to give appropriate weight to both evidence that appeals to the emotions and that which is factual in nature ("Facts have to rule over emotions"). She also responded affirmatively that she could be a fair and impartial juror in a penalty phase trial and decide the issue of penalty entirely on the evidence presented in court and the court's instructions, while completely disregarding any prior opinion she may have had before coming to court for jury selection in this case. (7SCT 5288-5289.)

Shirley J.'s responses during voir dire confirmed her ability to weigh all the circumstances in making a penalty decision. In response to questioning by defense counsel, Shirley J. stated she believed in the death penalty "depending

on the circumstances" (21RT 3796) and "[e]verything depends on the circumstances, on the facts . . . ." (21RT 3797). It is true that, under questioning by defense counsel, Shirley J. responded affirmatively to a question of whether, in a case of premeditated murder, without lawful excuse or justification, she believed that case "automatically" called for the death penalty. (21RT 3799-3801.) However, when asked if she would not consider mitigating factors at the penalty phase, Shirley J. responded, "No, that's not true," and that she would consider the person's background before deciding the appropriate penalty. As Shirley J. explained, "I think you'd have to consider everything. That's what I understand to be circumstances -- mitigating circumstances" and "[y]ou have to weigh them [the aggravating and mitigating factors]" and that she was "free to assign whatever moral or sympathetic value [she] deem[ed] appropriate to each and all of the various factors . . . ." (21RT 3802-3803.)

It is noteworthy that, in later explanation of her response as to whether she would, in defense counsel's words, "automatically" vote for the death penalty, Shirley J. stated that she did not have any legal training and understood various words used by defense counsel ("premeditation," "without justification or excuse") in common terminology. (21RT 3806-3807.) Thus, given her explicit willingness to consider all the circumstances in making the penalty decision, when Shirley J. agreed that the death penalty would be automatic, she likely understood defense counsel's phrase "without lawful excuse" in his question to mean "absent any circumstances warranting a life without parole verdict."

Appellant also singles out Shirley J.'s deterrence rationale for favoring the death penalty as showing her inability to consider both penalties. (AOB 93-94.) It is unclear what other valid rationale appellant would prefer Shirley J. had used in support of the death penalty (retribution? recidivism?). On the other hand, if appellant is contending that the mere fact that Shirley

favored the death penalty disqualified her, this contention would be contrary to law. (*People v. Riggs*, *supra*, 44 Cal.4th at p. 282, quoting *Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) And, importantly, Shirley J. never indicated that she would consider deterrence in reaching a penalty decision in this case. She merely wrote on the questionnaire, in response to the question as to what the death penalty accomplishes, "I would hope it is a signal to everyone to think before they commit such a crime what the penalty they will be required to pay will be. I think it would be a deterrent. I know it would be to me." (7SCT 5287; accord, 21RT 3797 [at voir dire, Shirley J. indicated that her main reason in support of the death penalty was "the hope the death penalty may work as a deterrent to others"].) Moreover, in response to a question from the trial court, Shirley J. indicated she understood she could not consider the deterrent or non-deterrent effect of the death penalty in determining the appropriate penalty. (21RT 3807.) Thus, the trial court properly exercised its discretion in finding that Shirley's views on the death penalty would not substantially impair her duties as a juror.

### J. The Trial Court Properly Did Not Excuse Prospective Juror Raymond L. For Cause

Appellant contends that the trial court abused its discretion in failing to excuse prospective juror Raymond L. for cause. He argues that Raymond L. was biased in favor of the death penalty and also that he could not be fair and impartial. (AOB 98-99, 102-103.) But appellant has forfeited both of these arguments on appeal by failing to make them below. In any event, substantial evidence supported the trial court's decision not to excuse Raymond L.

Appellant never made any argument to the trial court why Raymond L. should be excused for cause. When the trial court asked whether there was any challenge for cause, defense counsel stated only, "Yes, we challenge for cause. . . . Submit it." (20RT 3465.) The trial court summarily denied the

summary challenge. (20RT 3465.) Because appellant never asked that the trial court excuse Raymond L. on either ground that he now raises, let alone any ground, he has forfeited his claim. (See *People v. Hinton*, *supra*, 37 Cal.4th at p. 860; *People v. Mickey*, *supra*, 54 Cal.3d at p. 664.)

Moreover, on the merits, the trial court properly exercised its discretion in denying the unexplained challenge for cause. Appellant asserts that Raymond L. was impermissibly biased towards the death penalty based on his statements in the questionnaire and during voir dire. (AOB 98-99.) But although Raymond L. was in favor of the death penalty, he made clear that he would be fair toward appellant, would consider all the circumstances in making a penalty decision, and would be impartial.

Preliminarily, Raymond L. did not appear to have longtime, entrenched views on the death penalty. Rather, the record indicates that Raymond L. apparently had not given the death penalty much consideration before this case. On the trial court's questioning, Raymond L. stated that he understood that in determining the penalty he could not consider the deterrent or non-deterrent effect or the monetary cost of the death penalty. (20RT 3462.) But when defense counsel followed up on this question by the trial court, asking whether Raymond L. had ever thought about these issues before, Raymond L. answered, "The cost? Not any -- no, not really." (20RT 3462-3463.) Similarly, Raymond L. earlier noted that he had not given the death penalty much thought before coming to court in this case. (20RT 3446-3447.)

Appellant nonetheless points to Raymond L.'s statement that "the police represent authority" (20RT 3456) as exhibiting impermissible bias toward the death penalty for murderers of police officers, as well as a bias against appellant. (AOB 98, 102-103.) But Raymond L.'s statement was objectively true—police do represent authority. Furthermore, his statement came in response to defense counsel's question about why the murder of a police officer is more deserving of the death penalty than other murders, a judgment

that the Legislature agreed with when it made it a special circumstance. After explaining that he had difficulty articulating the reason, Raymond L. stated:

> Murder on a police authority? Well, it probably is an attack on the society at large if the police officer represents the -- the society, representative o[f] what they want done or at least enforcing their opinion.

(20RT 3456.) Raymond L.'s answer to defense counsel's abstract question was quite reasonable and evidenced no indication that he would categorically vote for the death penalty. Additionally, on defense counsel's follow-up questioning on this point, Raymond L. indicated that he would consider a broad spectrum of information about a person's background in deciding what the punishment should be. (20RT 3457-3458.)

As alleged evidence both of Raymond's impermissible bias towards the death penalty and bias against appellant, he next cites a portion of Raymond L.'s questionnaire. There, Raymond L. checked the "Unsure" response when asked if he could be fair and impartial in the penalty phase and decide the issue of penalty entirely on the evidence presented in court and the court's instructions, completely disregarding any prior opinion he may have had prior to coming to court for jury selection. (AOB 98-99, 102-103, citing 8SCT 5486.) During voir dire, however, Raymond L. gave a reasonable explanation for why he wrote this in the questionnaire. When the court read appellant's prior crimes, this confused him about whether he was allowed to consider matters besides the evidence of the crime in this case. (20RT 3451-3453.) After the trial court explained during voir dire that Raymond L. could not use this prior crime information as proof that appellant was a bad person, Raymond L. indicated that he would not let that past history interfere with his ability to be fair and impartial. (20RT 3452-3453.) As a layperson, Raymond L. was understandably confused on this point, and this explained why he earlier answered that he was unsure whether he could be fair and

impartial. (*People v. Riggs*, *supra*, 44 Cal.4th at pp. 287-288.)

Raymond L.'s statements during voir dire consistently demonstrated an ability and willingness to be fair and impartial and to not automatically impose the death penalty. Raymond L. stated that whether the death penalty should be imposed "depends on the circumstances" and that it should not "apply blanketly." (20RT 3445.) Raymond L. understood and agreed with the law that in a criminal case, a person accused of a crime is innocent unless proven guilty beyond a reasonable doubt. (20RT 3449-3450.) Given this substantial evidence that Raymond L. was not biased, including his reasonable explanation about his earlier, equivocal statement on the questionnaire, this Court should defer to the trial court's crediting of his later statements that he could be fair and impartial.

### K. Moreover, As To All But Juror Barbara C., There Could Be No Prejudice

At the close of voir dire, defense counsel expressed dissatisfaction with the panel as constituted, noting that it had exhausted its peremptory challenges, and that one of the jurors that it had unsuccessfully moved to exclude for cause, Barbara C., was seated on the panel. (31RT 5991.) Under these circumstances, appellant's claim of error is properly before this Court, except in those instances noted above where he failed to specifically object. (*People v. Yeoman* (2003) 31 Cal.4th 93, 114.) Further, assuming arguendo the trial court erroneously failed to excuse Barbara C. based on a bias regarding the death penalty, a point which respondent refutes above, it appears that no further prejudice would need be shown to vacate the punishment. But as to the allegedly improper failure to excuse the nine prospective jurors that were not empaneled, appellant cannot show prejudice because they were not "forced upon him." (*Ibid.*; accord, *People v. Alfaro* (2007) 41 Cal.4th 1277, 1314.) He is therefore unable to "actually show that his right to an impartial jury was

affected" by any of these nine prospective jurors. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1087-1088.) Accordingly, even if the trial court abused its discretion in failing to excuse any or all of these nine prospective jurors, such error was harmless.

## II.

## THE TRIAL COURT PROPERLY REFUSED TO GRANT APPELLANT ADDITIONAL PEREMPTORY CHALLENGES

Appellant contends that he was denied a fair trial on the ground that the trial court improperly denied his request for "additional peremptory challenges" (31RT 5991-5992) after the he had used up his allotment of peremptory challenges. (AOB 113-117.) The trial court, however, correctly denied appellant's request for more peremptories because there was no demonstration that the jury was biased.

In *People v. Bonin* (1988) 46 Cal.3d 659, 679, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1, this Court noted:

> We are of the opinion that to establish the constitutional entitlement to additional peremptory challenges argued for her, a criminal defendant must show at the very least that in the absence of such additional challenges he is reasonably likely to receive an unfair trial before a partial jury.

In *People v. Pride* (1992) 3 Cal.4th 195, 231, this Court, quoting the above language from *Bonin*, stated, "Logic dictates that no more lenient standard applies to non-constitutional claims of error in denying additional peremptory challenges." More recently, in *People v. DePriest* (2007) 42 Cal.4th 1, 23-24, the Court rejected this species of claim on the basis that "the trial court did not erroneously deny defense challenges for cause against [the jurors]."

Appellant has failed to meet the standard of "likely partiality" that this Court has established. Appellant has not demonstrated that the trial court

improperly denied any challenges for cause, nor, moreover, that the jury as constituted was impartial. (See Arg. I., *ante*.) Since appellant has failed to make the requisite showing, respondent submits that the trial court properly denied his request for additional peremptory challenges.

## III.

## THE TRIAL COURT PROPERLY EXCUSED PROSPECTIVE JUROR ANN I. FOR CAUSE

During voir dire for the penalty phase retrial, the trial court excused prospective juror Ann I. for cause. Appellant contends that under *Wainwright v. Witt*, *supra*, 469 U.S. 412 and *Witherspoon v. Illinois*, *supra*, 391 U.S. 510, the trial court erred in excusing this prospective juror on the ground that her opinion on the death penalty would prevent or substantially impair her from performing her duty as a juror. (AOB 118-132.)[2/] Respondent disagrees. The trial court properly exercised its discretion in excusing prospective juror Ann I. because the record amply supports the trial court's conclusion that her views on the death penalty would prevent or substantially impair the performance of her duties as a juror.

### A. Applicable Law

A prospective juror may be excused for cause if that juror's views on the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright*

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2. Appellant argues that this Court should reverse not only the death penalty, but the conviction itself, based on the trial court's alleged error in excusing prospective juror Ann I. on the basis that her death penalty views would substantially interfere with her duties as a juror. (AOB 130-132.) However, this Court has found this type of error does not impact the guilt phase. (*People v. Stewart* (2004) 33 Cal.4th 425, 455 ["error under *Witt*, *supra*, 469 U.S. 412, 424, 105 S.Ct. 844, does not require reversal of the guilt judgment or special circumstance finding"].)

*v. Witt*, *supra*, 469 U.S. at p. 424, internal quotation marks omitted; accord, *People v. Phillips* (2000) 22 Cal.4th 226, 233.) A trial court's ruling that a prospective juror's views on the death penalty would substantially impair the performance of his or her duties as a juror comes within the trial court's wide discretion to determine the qualifications of jurors. (*People v. Carpenter* (1997) 15 Cal.4th 312, 358.)

This Court defers to the trial court's assessment of the juror's state of mind, particularly where the juror gave conflicting or ambiguous answers on voir dire. (*People v. Millwee* (1998) 18 Cal.4th 96, 146; *People v. Cain* (1995) 10 Cal.4th 1, 60; *People v. Cummings* (1993) 4 Cal.4th 1233, 1279; see also *People v. Holt*, *supra*, 15 Cal.4th at pp. 650-651.)

> On review, if the juror's statements are equivocal or conflicting, the trial court's determination of the juror's state of mind is binding. If there is no inconsistency, we will uphold the court's ruling if it is supported by substantial evidence.

(*People v. Phillips*, *supra*, 22 Cal.4th at p. 233.) Where voir dire fails to elicit a clear answer, a trial court may determine, based upon a prospective juror's demeanor and tone, that he or she cannot be impartial; such a determination must be given deference. (*People v. Millwee*, *supra*, 18 Cal.4th at p. 146; see *Wainwright v. Witt*, *supra*, 469 U.S. at pp. 425-426.) "There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity." (*People v. Jones* (2003) 29 Cal.4th 1229, 1246.)

### B. The Trial Court Properly Exercised Its Discretion In Excusing Prospective Juror Ann I.

During voir dire and on the jury questionnaire, Ann I.'s responses ran the gamut from stating that despite her religious convictions she would do her best to follow the law on determining a penalty, to stating that she did not know whether she could do so, to stating that she believed that she could not

do so. One key point remained consistent: Because of her religious convictions, she could not envision herself imposing a sentence of death in a case of a death of a single police officer. There was no ambiguity in the record on this point for the trial court to resolve. Ann I. was manifestly unsuitable to serve as a capital juror in this case.

Initially, in her jury questionnaire, prospective juror Ann I. laid out her uncertainty about whether she could personally vote for the death penalty, and her view that it should be reserved for only "extreme cases":

> I feel the death penalty may be a last resort solution for the state when faced with a violent criminal. However, I am not sure I could personally recommend the death sentence for another human being. I feel life without possibility of parole is my punishment of choice for all but the most extreme cases.

(7SCT 5121.) Specifically, she noted that she had a religious affiliation with the Catholic Church, which "is against the death penalty, except in cases of most heinous crimes." (7SCT 5122.) She frankly admitted that she was "unsure" whether she could be a fair and impartial juror in a penalty phase trial and whether she could decide the issue of penalty entirely on the evidence she heard in court and the court's instructions, completely disregarding any prior opinion that she may have had before coming into court. (7SCT 5123.)

Ann I.'s statements during voir dire also demonstrated her inability to serve as a juror in a capital case. In response to the trial court's question whether she would always vote for life without parole and refuse to vote for death, Ann I. stated, "I don't believe so." (20RT 3586.) Then, Ann I. definitively averred that this case was *not* the type of case she could vote for the death penalty in. In this regard, defense counsel asked Ann I. whether the murder of a police officer with special circumstances was "the type of extreme case in which [she] would be willing to consider the death penalty," and Ann I. answered, "No." (20RT 3588.) She continued, "I feel that the death penalty

should be reserved for somebody who is a habitual criminal in a serious way, such as someone who has murdered many times, who is a danger not only to one person but to many people. And that's about the only time I think I could vote for it." (20RT 3588.) Ann I. stated that as a Catholic, she adopted the Church's position against the death penalty except in cases of the most heinous crimes. (20RT 3589.) Defense counsel asked Ann I. if she could set aside her personal feelings about the death penalty and follow the trial court's instructions about the relevant factors in determining the appropriate sentence, and Ann I. stated weakly, "I hope so." (20RT 3589.) She indicated that she would make "an honest effort to do so." (20RT 3589-3590.)

On the prosecutor's questioning, Ann I.'s responses further verified that she would not be able to follow the trial court's instructions because of her beliefs. First, the prosecutor questioned Ann I., asking her whether her conscience would allow her to set aside her religious beliefs and seriously consider the death penalty involving the death of a police officer. (20RT 3590.) Ann I. stated that the question "was very hard to answer. I feel if -- if this is a very serious crime and it would seem like it's a series of serious crimes, then I might be able to do it. . . . I'm just -- no, I can't be positive that I could just blank it out." (20RT 3591.) On the prosecutor's further questioning, Ann I. indicated that she would have to follow her conscience "in spite of [her] best efforts and instructions of the judge . . . ." (20RT 3591.) The prosecutor asked whether, "in general, would your belief system cause you substantial difficulty in maintaining that open mind which is necessary to make a weighing decision on a case involving one murder?" (20RT 3593-3594.) Ann I. stated, "I would say yes." (20RT 3594.)

On the trial court's follow-up questioning, Ann I. again expressed her view that her religious beliefs would override her duty to follow the law. The trial court asked, "Should you find the principles of law conflict in some way with what you've described as your conscience, do you believe that

nonetheless you'd be able to consider the rules of law or you would find that your religious scruples and your conscience would overbear those?" (20RT 3599.) Ann I. stated, "I think the religious scruples are going to become foremost, uh-huh." (20RT 3599.) The trial court then read Ann I. the list of factors that a juror would consider in determining the penalty, and then asked whether she could adhere to these rules of law and apply them to the facts of the case. (20RT 3599-3601.) Ann I. stated, "I don't know. I honestly don't know. I mean, it seems like something from another world to me. It's not -- not something I would deal with or even think about. . . . I really don't know whether I could do it or not. I have a feeling it would be something that would weigh on me terrible. . . . The decision itself would. . . . And -- and if I made that decision, having to live with that decision for the rest of my life. I think it would be very difficult." (20RT 3601-3602.)

In response to defense counsel's questioning, Ann I. then stated that it was unknown what effect a defendant's prior history of violence or her conscience would have on the case. (20RT 3603-3604.) But Ann I. again confirmed the primacy of her religious beliefs when the prosecutor asked her whether she would be thinking about and relying on her religious belief system when making a penalty decision. (20RT 3604.) Ann I. stated, "My religion is part of my life. I don't know that that's something I can just shove over to the side and ignore." (20RT 3604.)

Lastly, and significantly, Ann I. declared an inability to ever return a verdict of death in this type of case. The prosecutor asked Ann I., "Can you realistically envision yourself in a case involving a single murder walking back into a courtroom and looking at the person accused and announcing a verdict of death?" (20RT 3604.) Ann I. stated, "No." (20RT 3604.) The trial court therefore accurately summarized Ann I.'s testimony as showing a "willingness to make every effort to make an attempt and then follow it up with statements that make it clear that she couldn't do it." (20RT 3605-3606.) Because the

record demonstrated that Ann I.'s religious convictions would prevent her from returning a verdict of death in a case involving a murder of a single police officer, the trial court properly found that her views would prevent or substantially impair the performance of her duties as a capital juror. (*People v. McWhorter* (2009) 47 Cal.4th 318, 341-342 [upholding excusal of juror on the basis that he stated that "his church was opposed to the death penalty and that he would feel 'uncomfortable' trying to set aside his faith in voting to impose death"]; *People v. Friend* (2009) 47 Cal.4th 1, 61 [upholding excusal of juror on the basis that "he was unwilling to consider the death penalty for a defendant who had committed only one murder"].)

## IV.

## THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S STATEMENT TO DR. PATTERSON BECAUSE THERE WAS NO *MIRANDA* VIOLATION

Appellant contends that his statements to Dr. Patterson while in the hospital room after the shooting violated his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] and *Edwards v. Arizona* (1981) 451 U.S. 477 [101 S.Ct. 1880, 68 L.Ed.2d 378]. Specifically, he argues that members of the sheriff's and district attorney's offices, as well as Dr. Patterson, the forensic psychiatrist, failed to honor his request for counsel and to remain silent. Appellant further argues that appellant did not initiate these statements and that, in any event, Dr. Patterson never obtained a valid waiver of his *Miranda* rights. Appellant concludes that the erroneous admission of these statements was not harmless beyond a reasonable doubt. (AOB 133-183.)

Respondent disagrees. Appellant's statements fall outside the strictures of *Miranda* because he "initiated" the conversation with Dr. Patterson under *Edwards* and because the prosecutors and law enforcement officers in no way coerced these statements. Appellant, through his words and conduct,

demonstrated a desire to open, both directly and indirectly, a discussion of the investigation. Moreover, given the overwhelming other evidence at the guilt and penalty phases, any error in introducing these statements was not prejudicial to appellant.

**A. Background**

On July 17, 1996, at about 7:01 p.m., Ventura County Sheriff's Sergeant Robert Young contacted appellant in the emergency room of Ojai Hospital. (2CT 334.) Sergeant Young read appellant his *Miranda* rights. Sergeant Young asked appellant if he understood those rights. Appellant said, "Yes." (2CT 333.) Sergeant Young said, "Having these rights in mind, do you wanna talk to me about what happened out there on Encinal this afternoon?" Appellant said, "No." Sergeant Young said, "No, okay," and ended the interview. (2CT 334.)

At 7:05 p.m., Ventura County District Attorney Michael Bradbury arrived. (12RT 2002.)

At about 7:18 p.m., Investigators Fitzgerald and Richard Haas arranged for a psychiatrist. (12RT 2002-2005.)

At 7:20 p.m., Sergeant Young advised District Attorney Bradbury that appellant had refused to waive his *Miranda* rights and discuss the shooting but had not yet requested legal counsel. (2CT 270; 11RT 1883.) District Attorney Bradbury contacted appellant to make sure that appellant knew that if he wished to discuss the matter with them he would have to initiate it. (11RT 1884, 1911.) Bradbury believed that Detective Young had not told appellant this as part of the complete advisement of rights. (11RT 1911-1912.) Bradbury wanted to make sure that the protocol for investigating homicide cases was being followed. (11RT 1911.)

District Attorney Bradbury then spoke to appellant. Bradbury told appellant that he was with the District Attorney's Office and asked whether he

understood him. Appellant said, "Yes." Bradbury said that he understood that appellant was advised of his rights to remain silent. Appellant said, "Yes." Bradbury asked, "Did you understand everything you were told regarding your rights?" Appellant said, "Yes." Bradbury said, "And I understand that you do not want to talk to us. Is that correct?" Appellant said, "Yes, I feel a little bit in shock right now. I may want to talk to you later." (2CT 270.) Bradbury said, "If you decide to want to talk to us later, you should bring that to our attention, okay?" Appellant said, "Okay." The interview ended. (2CT 271.)

At about 7:20 p.m. or 7:25 p.m., District Attorney Bradbury was exiting the hospital as Investigator Haas was entering it. District Attorney Bradbury told Investigator Haas that he had spoken to appellant and that appellant had advised him that he might be willing to talk later. (12RT 2019-2021, 2052.)

At about 7:28 p.m., Investigator Haas and Sergeant Young again contacted appellant. (2CT 338-339.) Investigator Haas did this to clear up whether appellant was a resident at the residence where the shooting occurred and to find out whether he would agree to consent for the police to search the residence. Investigator Haas did not intend to interrogate appellant. (12RT 2018.) Sergeant Young asked appellant for permission to search his house at 122 North Encinal. Appellant said that it was not his house, but that he slept there for the past three weeks. (2CT 338.) Appellant gave permission to search the house. (2CT 338-339.) Appellant talked about having been a residential manager and a mental health patient with chemical dependency and mental problems at "Tyber House." Haas said, "If we had someone come out and talk to you like a psychiatrist, would you be willing to talk to him?" (2CT 339.) Haas's awareness that appellant had said he might be willing to talk later, affected Haas's determination that it was appropriate to ask him whether he wanted to see a psychiatrist. (12RT 2054.) Appellant said, "Yes, the last time I talked to one was probably a year and a half ago." (2CT 339.) Haas asked, "[D]o you have a regular one or anything or [sic]?" Appellant said,

"No. A year and a half ago it took me nine months to see a psychiatrist (UNINTELLIGIBLE) I saw a counselor and th[e]n a psychologist (UNINTELLIGIBLE) psychiatrist." (2CT 340.)

At 7:35 p.m., District Attorney Bradbury told Sergeant Young that appellant said that he might want to talk later. (2CT 251; 11RT 1889.)

At about 7:44 p.m., Chief Deputy District Attorney Ronald Janes contacted Dr. Patterson by telephone. Janes asked Dr. Patterson to participate in an interview of a suspect at the hospital concerning an officer killing, and to examine the suspect for his mental status. (13RT 2184.)

At about 8:25 p.m. or 8:30 p.m., Sergeant Young again contacted appellant. (2CT 336; 10RT 1629; 12RT 2006.) Young asked appellant, "Remember talkin' to Mr. Bradbury a little while ago?" Appellant said, Yeah." Young said, "You indicated to him that you might be willing to talk after you felt a little more comfortable." Appellant said, "Uhhh." Young said, "Did you wanna give me a statement?" Appellant said, "Uh, no." Young said, "You don't wanna give me a statement?" Appellant said, "I think [I] told him that, uh, I think I'm in a state of shock right now and I'm kinda confused so I'd rather wait to talk to a lawyer, I think that'd be a good idea." Sergeant Young said, "Okay, you wanna talk to a lawyer?" Appellant said, "I think so. I well-well, I think that'd be a good idea." The discussion ended. (2CT 336.)

About 15 minutes later, Sergeant Young returned to make a statement to appellant. (10RT 1631.) Sergeant Young said that

> he hadn't just shot a uniform or a -- or a representative of the establishment. I told him words to the effect that he killed a living, productive human being, unlike himself. [¶] I told him I wanted to know -- wanted him to know the name of the deputy he had murdered. I told him his name was Peter Aguirre, that he was 26 years old, that he had a wife and child. [¶] I told him that I wanted him to remember Peter Aguirre and his family every minute of every day for the rest of

his life.

(10RT 1633-1634.) Appellant said, sarcastically, "Detective, I sense a little anger." (10RT 1634.)

Chief Deputy District Attorney Ron Janes told Deputy District Attorney Holmes to try to contact a psychiatrist. (12RT 2071; 13RT 2180.)

Investigator Haas made telephone calls to Investigator Robert Briner and Dr. Patterson on the telephone. (12RT 2026; 13RT 2208.) At about 7:30 p.m., Haas asked Briner to go to the hospital to meet with Dr. Patterson. (13RT 2209.) Haas told Dr. Patterson that appellant was willing to talk to a psychiatrist and that he had not waived his rights. (12RT 2026.) Deputy District Attorney Richard Holmes also called Dr. Patterson at his home. (10RT 1665.) Holmes also said that appellant would be willing to talk to Dr. Patterson. (10RT 1665-1667.)

At 9:45 p.m., Dr. Patterson arrived at the hospital. (13RT 2210.) When Dr. Patterson arrived at the hospital, Deputy District Attorney Holmes told him that he had been told that appellant had been advised of his rights and had said something to the effect of "not now, maybe later." (12RT 2075.) Holmes gave Dr. Patterson a *Miranda* card and asked him to go in, advise appellant about his rights, tell him who he (Dr. Patterson) was, see if he wanted to talk, and observe appellant's demeanor. (12RT 2076-2077.) About a minute or two after 9:45 p.m., Dr. Patterson went into appellant's treatment room, believing that he had the right to contact and *Mirandize* appellant. (10RT 1668-1669; 13RT 2213.)

At 10:04 p.m., Dr. Patterson introduced himself to appellant and said that he was a psychiatrist. (2CT 273, 278.) Appellant said, "I heard you were going to come here." Dr. Patterson said, "Yeah, the DA's Office asked me to come and talk with ya." Appellant said, "Great." Dr. Patterson advised appellant of his *Miranda* rights. Dr. Patterson asked, "So the next thing then in knowing these things, are you willing to talk with me about yourself?"

Appellant said, "Uh, I don't think so. I'm facing very serious charges and I think I'd rather talk to a lawyer first." Dr. Patterson said, "Okay." Appellant said, "That be okay? I think right now I'm in a state of shock and kind of confused and I don't know that the information I'd give you would be that accurate." Dr. Patterson said, "I see. Well that's your decision, you have to make that --[.]" Appellant said, "[T]hat's the decision I've made." (2CT 279.) Dr. Patterson said, "I'm gonna just stay around here with you and let you get back from x-ray and see how you're getting along and see if you still feel, feel that way or -- [.]" (2CT 279-280.) Appellant said, "Yeah." Dr. Patterson continued to say that "cause at some point you did say that you would be willing to talk with me and so -- [.]" Appellant said, "Yeah." Dr. Patterson said, "And it's up to you, you can still refuse it, but you did say that at one time." Appellant said, "I did say that, yeah." Dr. Patterson said, "Yeah. So I, I'll wait a little bit and they're gonna take you over to x-ray and get going and get these other things, your medical condition taken care of. But I'll be around for a little while." Appellant said, "Alright." (2CT 280.)

At 10:21 p.m., appellant said, "Still here, huh?" Dr. Patterson said, "Yeah, just in case you're - I can, I can, whatever." Appellant said, "Yeah, you seem like you have a kind face." Dr. Patterson said, "Um, thank you." Appellant then asked Dr. Patterson the name of the last psychiatrist he talked to. Dr. Patterson said, "Dr. Peace," and appellant said, "Um-hum." Appellant said, "I saw two psychiatrists, one was Dr. Lance in Santa Barbara." (2CT 281.) After discussing these names, appellant stated that two years ago, he had gone through the mental health system in Ventura. (2CT 282.) Appellant then asked Dr. Patterson, "You wanna talk about it?" (2CT 282; 10RT 1662.) Dr. Patterson said, "Sure. (UNINTELLIGIBLE) Cause you, you don't mind and we could just talk about what has happened or something." (2CT 282; 10RT 1663.) Appellant said, "Yeah." Dr. Patterson said, "Yeah." Appellant continued, "So anyway I was talking about the psychiatrist that I saw." (2CT

282.) Appellant and Dr. Patterson then discussed his mental health history and his experiences with the mental health system. (2CT 283-291.) Appellant then began to turn the discussion towards his relationship with Alonzo and the events leading up to the killing, initially by saying "But I think this emotional relationship that I've been in for the last year . . . stirred things up . . . ." (2CT 291-292.)

Dr. James briefly interrupted and talked to appellant about his medical treatment. (2CT 292-293.) Appellant then steered the conversation with Dr. Patterson toward the crimes in this case by saying, "[Y]ou know I, about this afternoon, I'm aware of everything that happened[.]" (2CT 293.) They then discussed appellant's level of consciousness during the crimes. (2CT 293-294.)

Appellant then stated, "I think I'd be better off talking to you about emotional states than about actual specific facts." (2CT 295.) Dr. Patterson said, "Okay." Appellant said, "I'm sure my lawyer wouldn't appreciate it, you know?" (2CT 295.) Dr. Patterson and appellant then discussed appellant's medical and criminal history, and his relationship with Alonzo. (2CT 296-318.) At one point during this discussion, after appellant recounted part of the history of his relationship with Alonzo, Dr. Patterson asked, "Was she involved in this thing tonight, if I may ask that question?" (2CT 318.) Appellant replied, "She was there," and stated that he had "kidnaped her." (2CT 318.) Appellant then set out to Dr. Patterson the sequence of events from the kidnapping of Alonzo to the shooting of Deputy Aguirre, and his reasons for doing these acts. (2CT 318-321.)

While recounting the details of the crime, appellant said:

> And then I, I started out by just not wanting to tell you exactly what happened . . . but it ended up that way. . . . At this point I don't have anything to lose by being honest and saying what happened. . . . And I understand my lawyer's really going to be pissed and so forth.

Dr. Patterson said, "You can certainly talk and he'll get what we're talking about." Appellant said, "I'm sure he will, yeah." (2CT 323.) Appellant said, "And I don't know why they, why they say don't say nothing, because if you did something and people know you did it, there's people (UNINTELLIGIBLE) . . . ." Dr. Patterson said, "They saw you." (2CT 324.) Appellant continued that

> you know, they saw me, right. How are you gonna say you didn't? I mean that, what are you accomplishing, you know, I think the situ - I think it's best to be honest, that way you get to the root of it. . . . You know, I mean it's not normal behavior. . . . It's not, you know the average person wouldn't (UNINTELLIGIBLE) something like that. . . . Yeah, after I'd talked to you a little bit I though[t] well, it's probably more beneficial to me to give him as much information as I can while I'm uh - . . . not under the influence of any chemicals or drugs yet, they're gonna sedate me pretty soon.

(2CT 324.) Dr. Patterson said that he was going to let appellant rest before his surgery. Appellant said, "Yeah, it's probably better if you write your report as quickly as possible . . . ." (2CT 326.) At about 11:18 p.m., Dr. Patterson left appellant's room. (13RT 2217.)

On July 28, 1997, before trial, the court held a hearing on appellant's motion to exclude appellant's statements to Dr. Patterson as violating *Miranda.* (10RT 1575.) At this hearing, Dr. Patterson testified that he considered his purpose in contacting appellant to determine his mental state at the time of the homicide. (10RT 1652, 1655.) Dr. Patterson was not attempting to elicit incriminating information for the District Attorney. (10RT 1655.) At no point did Dr. Patterson "insert any strong injunction for him to talk to me about the crime . . . ." Dr. Patterson did not at any time direct the conversation into incriminating areas. In Dr. Patterson's opinion, appellant was completely alert and very cognizant of what he was talking about to him. There was no

evidence that appellant had any mental confusion or disorientation. (10RT 1675.) Appellant's physical condition did not impair his participating in the interview. (10RT 1676.) After appellant said that he wanted an attorney, Dr. Patterson did not believe it was unethical to observe him because he had said that he was willing to talk to a psychiatrist. (11RT 1868-1869.) Appellant's statements to Dr. Patterson were "very free-flowing." (11RT 1870.) Dr. Patterson believed that appellant's invocation of counsel was equivocal. (11RT 1876.)

After hearing argument from counsel, the trial court denied appellant's motion. In doing so, the trial court found that based on Dr. Patterson's testimony in court, he "was up front" and "went there for the purpose of evaluating the defendant for purposes of a determination concerning the defendant's mental state post-incident and I think the District Attorney's office has no alternative but to pursue a line of that nature, certainly in a case such as this." (16RT 2713.) The trial court found that the discussion on the tape was a "low-key, very, very calm, rational -- perhaps unnervingly so -- discussion of what transpired." (16RT 2716.) The trial court also found that appellant "picked the topic; he started the conversation." (16RT 2717.) As to appellant's waiver of his *Miranda* rights, the trial court noted that appellant said, "I'm sure my lawyer wouldn't appreciate it, you know." (16RT 2715.) The trial court also noted that appellant made a reference to the tapes, which reflected an eagerness to talk and to tell everything that he could. (16RT 2719.) The trial court found appellant to have no "outward sign of stress, just a straight account of what happened"; the statements were "un[e]xcited, unforced, and voluntary . . . ." The trial court found significant that Dr. Patterson was "sitting in a room making observations concerning the defendant's demeanor and manner for purposes of a psychological or psychiatric report presumably at the time of trial, should the mental state be placed in issue, as inevitably in homicides it is." (16RT 2720.)

The trial court further found that appellant's statements to Investigator Haas regarding where he lived and his permission to search, were properly elicited. But the remainder of his statements to Haas were inadmissible because they were not for booking purposes. (16RT 2722-2723.) The trial court found that in the second interview with Sergeant Young, appellant invoked his right to counsel when he thought it would be a "good idea" to talk to a lawyer. The trial court found that given appellant's response, Dr. Patterson acted reasonably by coming in and giving advisements to appellant. (16RT 2724.) The trial court found that Dr. Patterson did not violate the *Edwards* rule of not interrogating a suspect after he requests counsel because appellant initiated the conversation with Dr. Patterson. (16RT 2715, 2720.) The trial court found that appellant knew and understood the nature of the *Miranda* rights, and knowingly and intelligently waived them. (16RT 2717, 2720.)

In the guilt phase, the trial court admitted only a portion of the discussion between appellant and Dr. Patterson, which was over an hour long. (39RT 7131.) In this portion, appellant stated that he was "an actor in a movie," that he was conscious of what he was doing, that he did the shooting because he was hoping the officers would kill him, that he had been jealous about his wife and suspected her of adultery, that he had kidnapped her, that he ultimately jumped out and shot the officer "as a reaction to that situation," and that he believed it "best to be honest" because people saw him and if "people know you did it," then "[h]ow are you gonna say you didn't?" (Exh. 21, at pp. 1-9.)

At the penalty phase, the trial court admitted about 50 minutes of the taped statement. (52RT 9668.) In this recording, appellant also discussed his psychiatric history, his killing the officer as a "passive suicide attempt," and his thinking during the events leading up to the shootings. (Peo. Exh. 55, at pp. 10-56.)

## B. Appellant Initiated The Conversation With Dr. Patterson

"In *Miranda v. Arizona*, the Court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney." (*Edwards v. Arizona* (1981) 451 U.S. at pp. 481-482.) An accused, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Id.* at pp. 484-485.) Once the accused has initiated communication, the police may question him if he validly waives his *Miranda* rights. (*People v. Waidla* (2000) 22 Cal.4th 690, 727-728.)

"The finding of 'initiation' in and of itself is 'reviewed for substantial evidence.'" (*People v. Waidla*, *supra*, 22 Cal.4th at p. 731.) Evidence is "substantial" if it is "credible and of solid value." (*People v. Jennings* (1991) 53 Cal.3d 334, 364.) Initiation is established when the accused "speaks words or engages in conduct that can be fairly said to represent a desire on his part to open up a more generalized discussion relating directly or indirectly to the investigation." (*People v. Waidla*, *supra*, 22 Cal.4th at p. 727, internal quotation marks omitted.) As examples, defendants in custody have been held to have initiated further questioning by asking, "'Well, what is going to happen to me now?'" (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1045 [103 S.Ct. 2830, 77 L.Ed.2d 405]), and "'What do you want from me?'" (*People v. Waidla*, *supra*, 22 Cal.4th at p. 731). Not all conduct constitutes initiation, however, and "inquiries or statements, by either the accused or a police officer, relating to routine incidents of the custodial relationship, will not generally 'initiate' a conversation in the sense in which that word was used in *Edwards*."

(*Oregon v. Bradshaw*, *supra*, 462 U.S. at p. 1045.)

Here, substantial evidence supported the trial court's finding that appellant initiated the conversation with Dr. Patterson. Dr. Patterson contacted appellant at 10:04 p.m. in order to determine his mental state at the time of the homicide. (10RT 1652, 1655.) After appellant invoked his right to counsel to Dr. Patterson in the hospital, Dr. Patterson told him that he would stay around there, and appellant said, "Alright." (2CT 280.) At about 10:21 p.m., appellant began a conversation by saying to Dr. Patterson, "Still here, huh?" (2CT 281.) Dr. Patterson said, "Yeah, just in case you're - I can, I can, whatever." (2CT 281.) Appellant said, "Yeah, you seem like you have a kind face." (2CT 281.) Patterson said, "Um, thank you." (2CT 281.) Appellant then started a conversation about his psychiatric history, asking Dr. Patterson the name of the last psychiatrist he talked to. (2CT 281.) Patterson said, "Dr. Peace," and appellant said, "Um-hum." (2CT 281.) Appellant volunteered, "I saw two psychiatrists, one was Dr. Lance in Santa Barbara." (2CT 281.) After discussing these names, appellant stated that two years before, he had gone through the mental health system in Ventura. (2CT 282.)

Without any prompting from Dr. Patterson, appellant said, "You wanna talk about it?" (2CT 282; 10RT 1662.) Dr. Patterson said, "Sure. (UNINTELLIGIBLE) Cause you, you don't mind and we could just talk about what has happened or something." (2CT 282; 10RT 1663.) Appellant said, "Yeah." (2CT 282.) Dr. Patterson said, "Yeah." (2CT 282.) Appellant said, "So anyway I was talking about the psychiatrist that I saw." (2CT 282.) Appellant and Dr. Patterson then discussed appellant's mental health history and his experiences with the mental health system. (2CT 283-291.) On his own initiative, appellant then began to discuss how his marital problems with Alonzo resulted in the events leading up to the killing, initially saying "But I think this emotional relationship that I've been in for the last year . . . stirred things up . . . ." (2CT 291.) Appellant stated, "I think I'd be better off talking

to you about emotional states than about actual specific facts." (2CT 295.) Dr. Patterson said, "Okay." (2CT 295.)

These circumstances amply support the trial court's finding that appellant initiated the conversation. First, Dr. Patterson made no attempt to begin a conversation with appellant during the several minutes after appellant's invocation to counsel, and before appellant struck up a conversation with him. Second, appellant manifestly desired to talk to Dr. Patterson, using conversation-assisting phrases like "Still here, huh," and "Yeah, you seem like you have a kind face." Third, appellant steered the conversation to its first topic of his psychiatric history by saying "I saw two psychiatrists, one was Dr. Lance in Santa Barbara," and "You wanna talk about it?" Finally, appellant changed the topic to the events preceding the homicide by saying, "But I think this emotional relationship that I've been in for the last year . . . stirred things up . . . ." Thus, substantial evidence supported the trial court's finding that appellant initiated the conversation with Dr. Patterson within the meaning of *Edwards v. Arizona*. (See *People v. Mickey*, *supra*, 54 Cal.3d at pp. 643-646, 652 [a defendant may initiate a conversation even though the police have taken the action of coming into his cell].)

Appellant nonetheless avers that it was Dr. Patterson, not appellant, that initiated the conversation. He alleges that this interview was "planned, staged, and initiated by the District Attorney." Yet appellant's brief argues that he evidently believed that Dr. Patterson "was a clinical psychiatrist and not an arm of the state." (AOB 166-171.) If it were so that appellant did not believe that Dr. Patterson was an agent of the state, there would be no *Miranda* violation. (*Illinois v. Perkins* (1990) 496 U.S. 292, 296-300 [110 S.Ct. 2394, 110 L.Ed.2d 243].)

But in fact, appellant did know that Dr. Patterson's statements could be used against him. In this regard, Dr. Patterson advised appellant of his *Miranda* rights immediately after introducing himself to appellant. (2CT 279.)

Further, appellant refused to waive them on the ground that he was "facing very serious charges and I think I'd rather talk to a lawyer first." (2CT 279.) Furthermore, as the trial court found, Dr. Patterson's visit to appellant served the legitimate "purpose of evaluating the defendant for purposes of a determination concerning the defendant's mental state post-incident and I think the District Attorney's office has no alternative but to pursue a line of that nature, certainly in a case such as this." (16RT 2713.) Given that mental defenses are frequently raised in murder trials, the District Attorney and Sheriff's deputies properly enlisted Dr. Patterson's aid in observing appellant and gathering information relevant to his mental state, whether or not appellant wished to speak to him.

Appellant argues that Dr. Patterson initiated the "true interrogation" by asking, "You know who it was?" (AOB 170.) Not so. Dr. Patterson's question was in response to appellant's question, "The last psychiatrist I talked to, maybe you know him?" (2CT 281.) There was no way for Dr. Patterson to answer appellant's question without asking this clarifying question. Dr. Patterson's question therefore did not initiate this line of inquiry; appellant's did. And, in initiating conversation with Dr. Patterson about "the last psychiatrist I talked to," appellant opened up the discussion concerning other mental health professionals he had seen and mental health history and marital problems. This, in turn, prompted appellant to suggest on his own that "I think this emotional relationship that I've been in for the last year . . . [s]tirred things up." (2CT 291.) Because appellant initiated the conversation with Dr. Patterson, and indeed, specifically steered it toward a discussion of the events before and during the crimes in this case, Dr. Patterson was permitted to interrogate appellant providing that appellant waived his right to counsel.

### C. Appellant Waived His Right To Counsel

Although appellant initiated the discussion with Dr. Patterson, "the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation." (*Oregon v. Bradshaw*, *supra*, 462 U.S. at p. 1044.) The waiver must be voluntary, knowing and intelligent, and "[o]nly if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (*Moran v. Burbine* (1986) 475 U.S. 412, 421 [106 S.Ct. 1135, 89 L.Ed.2d 410].) "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." (*Id.* at pp. 422-423.)

The trial court correctly found that appellant knew and understood the nature of his *Miranda* rights and waived them. (16RT 2717.) Appellant had invoked his *Miranda* rights, specifically refusing to talk to police and the District Attorney and later requesting counsel. (2CT 270, 279, 334, 336.) And later, during his conversation with Dr. Patterson, appellant demonstrated his awareness of the consequences of talking to Dr. Patterson when appellant explained, "I understand my lawyer's really going to be pissed and so forth" about him talking to Dr. Patterson. (2CT 323.) And appellant agreed with Dr. Patterson's statement, "You can certainly talk and he'll [his attorney will] get what we're talking about." (2CT 323.) Thus, appellant was aware of his right to speak without counsel and that the statements would be used against him, yet voluntarily chose to do so anyway.

Appellant also demonstrated that he was aware that he did not have to speak at all, and indicated his waiver of his right not to speak. Appellant stated

that he "started out by just not wanting to tell you exactly what happened," but that "[a]t this point I don't have anything to lose by being honest and saying what happened." (2CT 323.) Along these same lines, appellant told Dr. Patterson, "And I don't know why they, why they say don't say nothing, because if you did something and people know you did it, there's people (UNINTELLIGIBLE) . . . ." (2CT 324.) Thus, the record fully supports the trial judge's finding that appellant's waiver satisfied the constitutional standard.

Appellant argues that this case is like *People v. Neal* (2003) 31 Cal.4th 63, where this Court found use of the defendant's statements as impeachment evidence to be impermissible. But in *Neal*, the police admitted to intentionally violating the suspect's rights. (*Id.* at p. 78.) That defendant invoked his right to counsel nine different times during questioning and still the police continued the interrogation. (*Id.* at p. 68.) There were other factors at play in *Neal* as well, including "defendant's youth, inexperience, minimal education, and low intelligence; the deprivation and isolation imposed on defendant during his confinement; and a promise and a threat made by the [interrogating] officer . . . ." (*Ibid.*) Combined, these circumstances led this Court to find that the defendant's confessions were involuntary under the Fourteenth Amendment. (*Id.* at pp. 80-85.)

The present case does not involve such circumstances. None of the law enforcement conduct in this case involved deception or any attempts to obtain statements against appellant's will. In the initial contact, Sergeant Young immediately ended questioning after appellant said that he did not wish to talk to him. (2CT 334.)

Next, District Attorney Bradbury, believing that appellant had not been told that any further discussion with police would have to be initiated by him, permissibly advised him of this because appellant had not requested an attorney. (See *Michigan v. Mosley* (1975) 423 U.S. 96, 100-104 [96 S.Ct. 321, 46 L.Ed.2d 313].) Appellant said that he did not want to talk but also stated,

"I may want to talk to you later." (2CT 270.) Again, District Attorney Bradbury ended the interview immediately after this. (2CT 270;11RT 1884, 1911.)

After District Attorney Bradbury ended the interview, Investigator Haas and Sergeant Young permissibly attempted to get appellant's consent for a search of the house. (2CT 338-339; 12RT 2018; see *People v. Ruster* (1976) 16 Cal.3d 690, 699-701, disapproved on other grounds in *People v. Jenkins* (1980) 28 Cal.3d 494, 503-504, fn. 9.) Investigator Haas, knowing that appellant had been a mental health patient and that he said he might be willing to talk later, then asked if he would be willing to talk to a psychiatrist. Appellant said, "Yes, the last time I talked to one was probably a year and a half ago." (2CT 338-340; 12RT 2018.)

Sergeant Young later contacted appellant again to find out if he wanted to give a statement because he had said he might be willing to talk later, and appellant said that he did not and wanted to talk to a lawyer. After this, Sergeant Young properly ended the interview. (2CT 336; 10RT 1629; 12RT 2006.) Sergeant Young did not seek out any information when, out of anger, he returned to recriminate appellant for killing his fellow officer. (10RT 1633-1634.)

Finally, appellant was apparently happy to see a psychiatrist when he said "Great," in response to Dr. Patterson's coming in and introducing himself. And Dr. Patterson was very cautious about appellant's decision whether to talk to him, saying, "Well that's your decision, you have to make that --[.]" (2CT 279.)

The police, prosecutor, and Dr. Patterson each ended questioning immediately after appellant's invocation of his rights. Further attempts at interrogation were appropriate here because appellant stated that he might want to talk later and that he said he did wish to speak to a psychiatrist. Thus, unlike the situation in *Neal*, law enforcement did not repeatedly and intentionally

interrogate the suspect in the face of requests to speak with an attorney.

Moreover, there is no evidence that appellant's level of intelligence, treatment at the hands of the police, or circumstances in this hospital impaired his ability to handle himself during the discussion with Dr. Patterson. Dr. Patterson testified at the hearing that appellant was completely alert and very cognizant of what he was talking about. Further, appellant's physical condition did not appear to impair his participation in the interview. (10RT 1675-1676.) This distinguishes the case from *Neal* even further. Thus, the *Neal* decision is not sufficiently similar to the case at bar to warrant the conclusion that appellant's statements were involuntary.

Appellant next relies on *Michigan v. Mosley*, *supra*, 423 U.S. 96 in arguing that appellant's statements must be excluded because his invocations of his *Miranda* rights were not honored. (AOB 154-164.) *Mosley*, however, does not aid appellant. The defendant in *Mosley* was arrested in connection with two robberies, advised of his *Miranda* rights, and declined to discuss the robberies. The detective promptly ended the interrogation. Later that same evening, after again giving the defendant *Miranda* warnings, another detective questioned him about an unrelated murder. This time the defendant made an inculpatory statement, which the prosecution later used in his murder trial. (*Mosley*, *supra*, 423 U.S. at pp. 97-98.)

The *Mosley* Court rejected the defendant's contention that the second interrogation was unconstitutional. Although *Miranda* requires that police end interrogation once a suspect in custody indicates a desire to remain silent, it does not "create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." (*Mosley*, *supra*, 423 U.S. at pp. 102-103.) In evaluating the constitutionality of a subsequent interrogation the Court stated that it considered whether law enforcement authorities "scrupulously honored" the suspect's decision to cut off the earlier questioning.

(*Id.* at p. 104.) Concluding that the defendant's second interrogation was proper, the Court stressed that, after he invoked his right to remain silent, the police "immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation." (*Id.* at p. 106; see also *People v. Martinez* (S074264, Jan. 14, 2010) ___ Cal.4th ___ [2010 WL 114933, *26].)

Here, as described above, law enforcement did not interrogate appellant within the meaning of *Miranda* after he invoked his rights. Rather, appellant initiated the conversation with Dr. Patterson without any prompting. "This is not a case . . . where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." (*Mosley*, *supra*, 423 U.S. at pp. 105-106.)[3/] First, it is uncontroverted that Sergeant Young scrupulously honored appellant's right to remain silent after he invoked it during the first interview. (2CT 334.) Further, District Attorney Bradbury's subsequent questions were not designed to elicit an incriminating response—simply to ensure that appellant understood his rights. And again, District Attorney Bradbury immediately ended the interview once appellant stated that he did not wish to speak to him (but might want to talk to him later). (11RT 1884, 1911; 2CT 270-271.) Investigator Haas and Sergeant Young's subsequent contact with appellant merely involved

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3. Appellant's initiation of the conversation with Dr. Patterson after several minutes of not conversing also distinguishes this case from *People v. Harris* (1989) 211 Cal.App.3d 640, 645-649 (see AOB 164-166), where the Court of Appeal found *Miranda* error after the police elicited an incriminatory response by making statements leading the defendant to believe that if he had cleared up the matter, he might not have been booked for murder. Unlike the sergeant in *Harris*, neither Dr. Patterson nor any law enforcement personnel in this case did anything that "had the effect of loosening appellant's tongue." (*Harris*, *supra*, 211 Cal.App.3d at p. 649.)

the request for permission to search appellant's residence, not interrogation. (2CT 338-339; 12RT 2018.) Only after appellant offered unsolicited statements about having been a mental health patient did Investigator Haas ask whether appellant wished to talk to a psychiatrist, and neither he nor Sergeant Young questioned appellant about the offense. (2CT 339.)

Given appellant's statements to District Attorney Bradbury that he might want to talk later, Sergeant Young then reasonably followed up with him about 45 minutes later by asking whether he wanted to give a statement. After appellant said no and that he wanted to talk to a lawyer, Sergeant Young properly immediately ended the interview. (2CT 336.) Sergeant Young's defensibly emotional lecture to appellant 15 minutes later about killing a fellow police officer did not elicit, and was not reasonably likely to elicit, any incriminating response. (10RT 1631, 1633-1634.) And once again, Dr. Patterson was entirely respectful in observing appellant and did nothing to wear down his resistance. Significantly, too, Dr. Patterson had given appellant "a fresh set of *Miranda* rights." (*United States v. Hsu* (9th Cir. 1988) 852 F.2d 407, 411 [considering this the most important factor in the *Mosley* inquiry].) Appellant's volunteered statements at 10:21 p.m. also occurred well after his last contact with law enforcement at about 8:45 p.m. (*Hsu, supra*, 852 F.2d at pp. 408-409, 411-412 [upholding admission of confession obtained in second interview that concerned same subject matter and which took place within 30 minutes of initial invocation].) Thus, the application of the *Mosley* standard demonstrates the propriety of the actions of law enforcement and Dr. Patterson in this case.

**D. Any Error Was Harmless**

Even assuming the trial court erroneously admitted appellant's statements as involuntary or under *Miranda/Edwards*, however, such error was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S.

279, 306-310 [111 S.Ct. 1246, 113 L.Ed.2d 302]; *People v. Cunningham, supra*, 25 Cal.4th at p. 994; see generally *Chapman v. California* (1967) 386 U.S. 18, 24 [87 L.Ed.2d 824, 17 L.Ed.2d 705].) The evidence against appellant, even aside from his own inculpatory statements, was extremely strong, and in key respects, undisputed. Alonzo's testimony and, particularly, her recorded statements, established that appellant raped and kidnaped her at gunpoint. (37RT 6901, 6903; 38RT 7088, 7090-7094; Exh. 27A, at pp. 117-124.) She also testified that while in the house right before the shootings, she saw the victim's uniform. (37RT 6951-6952.) Police testimony also demonstrated that Deputy Aguirre, the victim, was wearing a uniform with his badge prominently displayed when he knocked at the door of the house that appellant and Alonzo were in. (33RT 6180.) Appellant's intent and awareness that Deputy Aguirre was a law enforcement officer when he killed him was also demonstrated by the fact that after appellant ran out of the house, he faced Deputy Fryhoff and shot at him five or six times. (33RT 6193, 6321-6322; 34RT 6401.) The deputies also testified that gunshots were fired in rapid succession in the house. (33RT 6188; 34RT 6396, 6398.) Forensic and coroner's testimony presented at trial showed that one of appellant's fatal shots was directed downward at the victim's head while the victim was on the floor, from about a foot away. (35RT 6549, 6618; 39RT 7170-7172.) Finally, uncontradicted evidence was submitted to show that appellant had suffered prior felony convictions. (36RT 6720-6722, 6727, 6731-6736; Peo. Exhs. 18A, 18B, 18C, 18D.) This evidence persuasively proved all of the charges against appellant: the kidnapping, the first-degree murder under either a kidnapping-felony-murder or premeditated-murder theory, the special-circumstance allegations of murdering a police officer and murdering in the commission of a kidnapping, the attempted murder, the kidnapping, the spousal rape, the felon in possession of firearm, and the firearm and prior conviction enhancements.

Furthermore, nothing in the defense evidence undermined this prosecution evidence. Appellant's wound ballistics consultant testified that he had not previously been provided any testimony in the case or any information about where appellant came from as he began shooting. And, once he saw additional evidence from this case, the consultant abandoned his conclusion that the position of Deputy Aguirre's head when shot could not be determined. (40RT 7316, 7324, 7334-7335, 7338-7339.) Appellant's blood analyst testified that there was no way to determine whether the shooter and Deputy Aguirre were moving or static when Deputy Aguirre received the head wounds, but also acknowledged not reviewing the trial testimony in this case, going to the crime scene, or talking to the prosecution's forensic analysts. (40RT 7397, 7399-7400, 7405, 7408-7410.) And after being told a set of hypothetical facts consistent with the prosecution evidence, even appellant's police expert (a retired lieutenant who had only once personally decided whether to make an exigent circumstances entry) acknowledged that a reasonable officer in Deputy Aguirre's position would believe it necessary to take immediate action to protect his partners.[4/] Appellant's vision expert testified that if a person was lying on the ground, a person with appellant's uncorrected vision standing over him about 13 inches away would be able to see where the lying person was, that the person had a badge on his chest, and that he had a gun belt on him. (41RT 7559-7562.) Thus, if anything, the defense evidence further proved that appellant murdered Deputy Aguirre at close range with knowledge that he was a peace officer.

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4. Also, the prosecution's rebuttal expert (a police sergeant who had made at least 100 entries in SWAT based on a suspect's potential violence and who had taught officers about responding to family disturbances) testified that a reasonable officer would believe he could enter the house under these circumstances. (41RT 7601, 7604, 7606-7610, 7623, 7630-7631; 43RT 7868-7871, 7878-7879.)

At the penalty phase, the jury also would have returned the same death verdict even absent appellant's statements to Dr. Patterson. The prosecution evidence at the penalty phase mainly focused two subjects: victim impact evidence and appellant's recidivism. Regarding the former, the prosecution presented compelling evidence on the devastating and debilitating effects of his shooting death on his wife and their young daughter, his sister-in-law and nephew, his best friend, his fellow deputies and close friends, his captain, and his mother and father. Deputy Aguirre's daughter Gabriela still believes that he is coming back and, after his death, had emotional problems so severe that she had to be taken out of kindergarten. (47RT 8646-8647.) His best friend Leonard Mata lost everything after he died—his family, children, home, job, and best friend, because he became too emotionally unstable. (47RT 8665.) Deputy Fryhoff was so upset that he did not kill appellant that he is now angry all the time and yells at his fiancee and says he does not know why. (47RT 8678, 8688.) When Captain James Barrett told the deputies that Deputy Aguirre had died, there was crying and deputies breaking down. (47RT 8708.) Deputy Aguirre's mother neglected her daughter because of her son's death, worked three jobs in order to exhaust herself enough to go to sleep, and described her husband as "drowning." (48RT 8814-8815.) As to his past crimes, in 1993 appellant drove his car into a pedestrian's foot and then fled. (47RT 8721, 8724-8726, 8728.) He also robbed a McDonald's restaurant in 1996 and then carjacked a woman in order to escape. (47RT 8734-8737, 8751.)

Appellant points to the reliance by prosecution rebuttal witness Dr. Patterson on his conversation with appellant in determining that he did not have organic delusional disorder or delusional order at the time of the crime. (AOB 180-183.) But Dr. Patterson also based this conclusion on his review of the record. (52RT 9664.) Furthermore, appellant's defense evidence on this issue was weak in any event. In this regard, the psychiatric social worker who

initially opined he had organic delusional disorder testified that she would change her opinion that appellant was being truthful with her if she had known that appellant had been written up in prison for being intoxicated on alcohol. (48RT 8868.)

Additionally, the psychologist Dr. Lisa Kus, who believed appellant had organic delusional disorder in December 1994 and January 1995 based on appellant's professed paranoid and bizarre thinking and his letter, acknowledged that appellant was immediately able to grasp his delusions as being based on incorrect assumptions. (48RT 8926-8927, 8929, 8931-8932, 8934-8935, 8947, 8954-8955.) Similarly, the psychiatrist Dr. Dale Peace, who had diagnosed appellant with organic delusional disorder on January 11, 1995, testified that appellant fully understood his conversation with him on this day. (49RT 9081.)

Furthermore, defense psychological expert Dr. Hinkin testified that appellant had paranoid schizophrenia, but also testified that he appeared relatively cogent and calm and not actively psychotic at all when he met with him. (49RT 9094-9095; 50RT 9185, 9238-9239.) Dr. Hinkin also acknowledged that he did not know that appellant had been working at the time of the murder, and that this would change his opinion in that "the exacerbation might not have been as acute if he was still able to go to work." (50RT 9257.) Finally, Dr. Hinkin testified that a person can be a paranoid schizophrenic and a purposeful criminal at the same time. (50RT 9274.) Thus, whether or not appellant suffered from a mental illness, there is no doubt he was a purposeful criminal, and the jury would have reached the same result at the penalty phase given this. This Court should therefore conclude that, beyond a reasonable doubt, the result of appellant's penalty trial would not have been more favorable to appellant had his own statements to Dr. Patterson not been admitted.

## V.

## THE TRIAL COURT PROPERLY REFUSED TO ADMIT THE ENTIRETY OF APPELLANT'S STATEMENT TO DR. PATTERSON

Appellant next contends that the trial court should have permitted him to introduce his entire taped statement to Dr. Patterson rather than the prosecution offer of only that part relating to the crimes. He argues that under Evidence Code section 356 and due process principles, he was entitled to submit to the jury the other portions because they bore on appellant's state of mind at or near the time of the crimes. He also argues that excluding the remaining portions of his statement improperly "allowed the jury to use appellant's affect" at the time of his statement to find that he acted with premeditation and deliberation. (AOB 184-198.) Respondent disagrees. There was no state law or federal constitutional violation from the trial court's exclusion of irrelevant and hearsay evidence in appellant's statement. And the jury and prosecution were entitled to make judgments and arguments, respectively, about appellant's guilt based on his demeanor or "affect" when making his statements to Dr. Patterson.

At trial, the jury heard a redacted tape of the conversation between Dr. Patterson and appellant, after denying appellant's motion for the jury to hear the entire conversation. (29RT 5472, 5721-5724, 5744, 5749; 39RT 7119; Peo. Exh. 20 [tape]; Peo. Exh. 21 [transcript of tape].) The trial court later denied appellant's request for the tape to be played to the jury during cross-examination. (39RT 7126.) The trial court explained that although it had allowed appellant's statements recounting his existing state of mind, it would not allow appellant's "subjective psychoanalytic theory concerning what moves him in times past . . . ." (39RT 7124-7126.) The trial court stated that "it's a very clear, almost bright line distinction between his evaluative thinking reflectively and his declarative thinking about what in fact occurred." (39RT

7126.)

Evidence Code section 356 provides, in pertinent part: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party." "This provision permits the introduction of statements that are necessary for the understanding of, or to give context to, statements already introduced." (*People v. Lewis* (2008) 43 Cal.4th 415, 458.) To gain admission of additional statements under Evidence Code section 356, the statements must "have *some bearing upon, or connection with,* the admission or declaration in evidence." (*People v. Zapien* (1993) 4 Cal.4th 929, 959; see also *People v. Breaux* (1991) 1 Cal.4th 281, ["[t]he section permits introduction only of statements 'on the same subject' or which are necessary for understanding of the statements already introduced"].) "Statements pertaining to other matters may be excluded." (*People v. Williams* (1975) 13 Cal.3d 559, 565.)

Here, the trial court properly admitted appellant's statements to Dr. Patterson recounting the events on the night of the shooting and describing his state of mind because they tended to prove that appellant committed the charged offenses and allegations. (See Peo. Exhs. 20, 21.) However, the trial court properly did not allow appellant to introduce appellant's statements regarding a narration of his criminal history, educational and mental health background, and family history. (See 8CT 1999, 2003, 2005, 2023-2024, 2033, 2035, 2040.) These other statements were either irrelevant to what appellant was thinking or doing at the time of the shootings and/or were inadmissible hearsay. Additionally, his self-diagnoses regarding his mental health were inadmissible as opinions on his mental state at the time of the crime. (See § 28.) Nor did appellant's statements regarding Dr. Kus's diagnosis of organic delusional disorder have any nexus between that earlier diagnosis and his conduct at the time of the crime. (See 8CT 1998-1999.) Because appellant's proffered statements had no bearing or connection with the

evidence in admission, the trial court properly excluded them under Evidence Code section 356.

Appellant argues that excluding his additional statements also violated his due process right to present evidence. (AOB 192-193.) But, as this Court explained in rejecting a similar claim:

> As we have done in similar cases, "[w]e . . . reject defendant's various claims that the trial court's exclusion of the proffered evidence violated his federal constitutional rights to present a defense, to confront and cross-examine witnesses, and to receive a reliable determination on the charged capital offense. There was no error under state law, and we have long observed that, '[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [state or federal constitutional] right to present a defense.'" (*People v. Prince* (2007) 40 Cal.4th 1179, 1243.)

(*People v. Williams* (2008) 43 Cal.4th 584, 630, fn. 27.) Similarly, here, because the trial court complied with the rules of evidence, including relevance, hearsay, and section 28, in excluding appellant's proffered statements, there was no due process violation.

Appellant further argues that the trial court erred by allowing the jury to hear appellant's statements because it permitted the prosecution to argue, without any basis, appellant's "affect," namely that he was cold-blooded and thus premeditated the killings. (AOB 195-198.) But appellant supplies no authority for the proposition that the jury is not allowed to consider the manner that a defendant makes statements in assessing his credibility or culpability, or that a prosecutor may not argue this to a jury. To the contrary, this Court has long held that a prosecutor may permissibly comment on the manner or demeanor of a witness in making his argument for guilt. (See *People v. Ochoa* (1991) 26 Cal.4th 398, 443; *People v. Gates* (1987) 43 Cal.3d 1168, 1187; *People v. Perez* (1962) 58 Cal.2d 229, 245, abrogated on another ground in

*People v. Green* (1980) 27 Cal.3d 1, 32-34.) No special psychiatric expertise was necessary to make arguments about the declarant's demeanor on the tape. Thus, this Court should reject appellant's argument regarding the inadmissibility of appellant's "affect."

In any event, contrary to appellant's argument (AOB 194-197), any errors in refusing to include appellant's additional statements during the interview and in allowing the jury to make conclusions about appellant's demeanor based on the redacted interview were not prejudicial. Appellant's cold-blooded demeanor was manifest from the transcript itself, without the jury even hearing the tape or the prosecution's argument. And even assuming appellant's post-homicide statements regarding his mental health were admissible, their sophisticated, self-serving nature would have caused the jury to discard any notion that appellant did not premeditate his cold-blooded murder of Deputy Aguirre.

Moreover, these statements did nothing to contradict another of the alternative bases for first-degree murder—felony murder—or either of the special circumstances charged—murder of a peace officer and murder in the advancement of the kidnapping or to avoid detection. Thus, the admission of appellant's additional statements would have had no reasonable probability of yielding a more favorable result, and the exclusion of these statements was harmless beyond a reasonable doubt. Consequently, any error was nonprejudicial under state law or federal constitutional law. (See Arg. IV.D; *Chapman*, *supra*, 386 U.S. at p. 24; *People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

## VI.

## THE TRIAL COURT PROPERLY ADMITTED APPELLANT'S PRIOR CONVICTIONS AS EVIDENCE OF HIS MOTIVE AND INTENT

Appellant contends that the trial court prejudicially erred in allowing the prosecution to introduce evidence of his prior convictions to show his motive and intent to murder. Relatedly, he contends that the trial court should not have allowed the prosecutor's statements during argument that amounted to an assertion that appellant had the disposition to commit murder. He further contends that the trial court improperly refused to permit defense counsel to argue against the prosecutor's inferences regarding this prior conviction evidence. (AOB 199-240.) Respondent disagrees. Because the prior conviction evidence was probative to show that appellant's reason for committing the murder was to avoid returning to prison, the trial court properly admitted it to show his motive for killing a police officer, and the prosecutor properly could argue accordingly. And, although the jury was ultimately instructed only to consider the evidence as to motive, it would have been relevant to show that appellant had the intent and premeditation to kill. Further, the trial court correctly prohibited defense counsel from mentioning the Three Strikes Law because, at defense counsel's request, the trial court had prohibited the use of the term during the trial. Finally, any error was clearly harmless.

### A. Background

The trial court ruled that the prosecution, to show appellant's motive, could offer evidence that he suffered prior convictions that, upon commission of a later felony, would subject him to a 25-year-to-life sentence. (18RT 2994-2995.) The prosecution then elicited testimony from appellant's parole agent and a prosecutor that appellant suffered prior felony convictions exposing him

to a potential life sentence. (36RT 6719-6722, 6725, 6727, 6731-6736, 6742.) After this testimony, the trial court gave a limiting jury instruction that the evidence could not be used to show appellant's disposition to commit the crimes, and later give a similar cautionary jury instruction before deliberations. (36RT 6745; 44RT 8083-8084; 10CT 2600.)

In appellant's motion for new trial that he filed on April 1, 1998, he argued that the trial court improperly allowed evidence, and the prosecution to argue, that appellant killed Deputy Aguirre because he knew that he was facing a sentence of 25 years to life for being a felon in possession of a gun. Appellant further argued that the trial court erred by preventing appellant from responding to the prosecution's suggestion that appellant was aware of this potential sentence when he killed Deputy Aguirre. (13CT 3272-3276.)

In the prosecution's opposition to appellant's motion for new trial, the prosecution argued that the trial court correctly permitted the inference that appellant was aware of the potential Three Strikes sentence because "everyone" had heard about the Three Strikes Law. The prosecution argued that defense counsel had prevailed on the limitation that counsel not refer to the Three Strikes Law, but then tried to contravene that ruling while arguing to the jury. (13CT 3299, 3304-3305.) The trial court denied appellant's motion for a new trial. (55RT 10268.)

### B. The Prior Conviction Evidence Was Probative To Show That Appellant's Motive To Shoot Deputy Aguirre Was To Avoid Going Back To Prison

Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is that which has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Even relevant evidence, however, may be excluded if a trial court in its discretion finds that "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of

time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

A trial court retains broad discretion in determining the relevance of evidence. (*People v. Sanders* (1995) 11 Cal.4th 475, 512.) Its determination will not be reversed on appeal where there is no showing of an abuse of discretion. (*People v. Edwards* (1991) 54 Cal.3d 787, 817.) Likewise, a trial court is vested with wide discretion in weighing the prejudicial effect of proffered evidence against its probative value. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) The trial court's ruling will not be overturned on appeal absent an abuse of that discretion. (*Id.* at pp. 1124-1125.)

Evidence of prior misconduct is not admissible to establish criminal disposition but may be admitted to prove, among other things, that the defendant had a motive to commit the crime. (Evid. Code, § 1101, subds. (a), (b); *People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1017.) Specifically, evidence that appellant was convicted of previous crimes may be relevant to establish that a defendant committed the present crime to avoid a return to prison or avoid apprehension. (*People v. Daniels* (1991) 52 Cal.3d 815, 856-859; *People v. Heishman* (1988) 45 Cal.3d 147, 168; *People v. Robillard* (1962) 55 Cal.2d 88, 100, overruled on another ground in *People v. Satchel* (1971) 6 Cal.3d 28, 35-38, and disapproved on another ground in *People v. Morse* (1964) 60 Cal.2d 631, 637-649 & fn. 2; *People v. De La Plane* (1979) 88 Cal.App.3d 223, 246; *People v. Powell* (1974) 40 Cal.App.3d 107, 155; see also *People v. Cummings*, *supra*, 4 Cal.4th at p. 1289 [the trial court properly admitted evidence that defendant threatened to kill any police officer that got in his way to show his motive for shooting the officer]; *People v. Durham* (1969) 70 Cal.2d 171, 186-188 [the trial court properly admitted evidence that the defendant had been convicted of previous crimes, spent time in prison, and was on parole, to show motive for shooting the officer].)

As this Court has explained:

> Evidence that a defendant committed crimes other than those for which he is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive, intent, preparation or identity. [Citations.] The trial court judge has the discretion to admit such evidence after weighing the probative value against the prejudicial effect. [Citations.]

(*People v. Daniels*, *supra*, 52 Cal.3d at p. 856.)

In *People v. Heishman*, *supra*, 45 Cal.3d 147, a capital case, the defendant was charged with first degree murder with the special circumstance that he killed the victim to prevent her from testifying against him in a rape case. This Court determined that no error resulted from the admission of an abstract of judgment showing that the defendant had a prior conviction for attempted rape. This Court held that under Evidence Code section 352, the trial court did not abuse its discretion in finding that the evidence's probative value was not substantially outweighed by the danger of undue prejudice. (*Heishman*, *supra*, 45 Cal.3d at pp. 167-171.) This Court explained:

> Here, defendant was not charged with rape or attempted rape and the prior was not admitted for the purpose of showing defendant had a propensity to commit rape but to show his motive for committing murder - to avoid having to return to prison. This evidentiary purpose is not within the prohibition of Evidence Code section 1101, subdivision (a), under which "evidence must be excluded . . . if the inference it directly seeks to establish is solely one of *propensity* to commit crimes in general, or of a particular class" [citation]. . . . [D]efendant's motive to kill Lugassy to prevent his being sent back to prison as a result of her testifying against him in the pending Lugassy rape charge, was central to the prosecution's case.

(*Id.* at p. 168.)

Contrary to appellant's assertion, the challenged evidence had substantial probative value. Appellant was a convicted felon, and his possession of the firearms that he held that day meant a certain return to prison upon apprehension. Furthermore, his prior convictions for two serious felonies meant that he would be subject to a minimum prison sentence of 25 years to life. This evidence tended to show *why* appellant shot Deputy Aguirre from close range upon seeing him: to avoid returning to prison for a life sentence for possessing a gun and kidnapping Alonzo. Without this evidence, the jury would be left to wonder why appellant would have premeditated the death of Deputy Aguirre upon seeing him in his house. (See 18RT 2993.) The testimony that appellant knew he would violate his parole upon possessing a gun, and that he was subject to a third-strike sentence upon committing another felony, was central to the prosecution's case. In addition, the trial court avoided any prejudice by giving the jury a cautionary instruction that the evidence could be considered to show that appellant had a motive to murder Deputy Aguirre, but not to show criminal propensity. (36RT 6745; 44RT 8083-8084; 10CT 2600.) The trial court therefore properly exercised its discretion in permitting this motive evidence and in overruling appellant's objection that this evidence was substantially more prejudicial than probative. (18RT 2994.)

Appellant nonetheless argues that this evidence was inadmissible because there was no evidence that he was aware that he would be subject to a sentence of 25 years to life under the Three Strikes Law. (AOB 214-221.) But given appellant's extensive experience with the criminal law system—his five prior felony convictions, his two prior prison terms, and his work as a drug counselor—it was quite reasonable to infer that he was aware that he would be subject to a three-strike sentence for a new felony conviction. And, as the trial court's comments accurately reflect, the Three Strikes Law and its consequences are well known to the public, and it has continued to be a subject

of public discussion and controversy. (See 18RT 3102 [where the trial court noted that the law "was advertised, promoted, and sold to the public"]; 45RT 8226-8227 [where the trial court remarked "that everybody and his brother has read about or heard about" the Three Strikes Law].) Thus, it was reasonable to infer that appellant would be aware that he was risking a third-strike sentence upon possessing the gun and kidnapping Alonzo.

Appellant next argues that the prior convictions and parole evidence were inadmissible to prove intent. (AOB 221-225.) But although the jury was initially instructed after the evidence that it could consider the evidence to show motive *and* intent, it was ultimately instructed before deliberations that it should only consider the evidence to show motive. (36RT 6745; 44RT 8083-8084; 10CT 2600.) As the jury was presumed to follow this instruction, it did not consider the evidence to show appellant's intent. (See *People v. Boyette*, *supra*, 29 Cal.4th at p. 436.) In any event, just as the evidence was relevant to show motive to avoid penal consequences, it would have been relevant to show intent to kill, and premeditation and deliberation, for the same reason. (See *People v. Daniels*, *supra*, 52 Cal.3d at pp. 856-857; *People v. Robillard*, *supra*, 55 Cal.2d at p. 100.)

Appellant asserts that the trial court "conceded that the evidence concerning appellant's criminal history was 'terribly prejudicial' and speculative," and that given the extensive litigation after the Three Strikes Law, there was no reason to believe that appellant knew that he would be subject to it. Appellant argues that this demonstrates that under Evidence Code section 352, the trial court should have excluded the evidence. (AOB 225-228.) The trial court, however, never found the prior convictions to be speculative; its comments reflect that it found the prior convictions to be very probative and vital to the People's case. And the trial court's reference to "terribly prejudicial," taken in context, was a correct acknowledgment of the potentially unfair prejudicial value of prior convictions generally, followed by

an explanation of why in this case they were admissible and important to the People's case:

> But in any event, the point is that in the space of but moments, the defendant, it is alleged, shot and killed a police officer with premeditation and deliberation.
>
> Operating in a vacuum, it is arguable that makes little, if any, sense. The district attorney's correct. The Court is also mindful that if it admits evidence concerning the defendant's criminal history, it's terribly prejudicial.
>
> The role -- the status of the defendant as a person who just happens to be taking a shower when police arrive and sees them, arms himself and shoots and kills a police officer on its face makes little, if any, sense in and of itself.
>
> There is a total package here that the jury is entitled to consider. The Court has to weigh how you put that together, understanding that the People's theory is this is a motive-driven killing, if I understand Mr. Hardy's position.
>
> The Court therefore is of the opinion that to deny the People the opportunity to show something about the defendant's history would be to disable the People from arguing significant circumstantial evidence that runs to motive, which would otherwise be completely absent, and that would be a misrepresentation of the picture of the facts as they existed at the time.
>
> The Court therefore is of the opinion that the People will be permitted to show that the defendant had suffered unspecified convictions.

(18RT 2993-2994.) Thus, the trial court's comments demonstrate that it did not find that in *this* case, the prior convictions were unfairly prejudicial.

Further, appellant's reasoning, that his status as a layman (albeit a repeatedly imprisoned felon) would not have allowed him to "navigate through this [legal] morass" to realize that he was subject to the Three Strikes law, is inconsistent. If appellant were savvy enough to realize, as he now relates on appeal, that our appellate courts would someday consider (and reject) arguments such as that the Three Strikes Law violated ex post facto provisions and that prior convictions must be brought and tried separately, he was savvy enough to know that he was potentially subject to a third strike sentence in this case.

Appellant also appears to contend that the trial court improperly denied his motion to bifurcate his prior convictions. He argues that the trial court's ruling to admit these prior convictions as motive evidence "was a de facto denial of appellant's motion to bifurcate." (AOB 230.) It is true that defense counsel made a motion to bifurcate his prior convictions. (18RT 3028, 3033-3034.) However, defense counsel later withdrew this motion, making a tactical decision that he wanted the jury to hear what appellant was convicted of rather than have the jury speculate about this. (18RT 3099.) In accordance with defense counsel's request, the trial court ruled that "any previous orders of the Court limiting the district attorney with respect to sanitizing its reference to the nature of the offenses upon which inquiry will be made is now vacated." (18RT 3103.) Although sanitized evidence of appellant's priors would have been admitted as motive evidence, no specific evidence of these crimes would have been admitted *had appellant not withdrawn his bifurcation motion.* Hence, his claim that the trial court effectively denied his bifurcation motion by allowing the prior convictions as motive evidence lacks merit.

### C. The Trial Court Properly Allowed The Prosecution To Argue That Appellant Killed Deputy Aguirre To Avoid Returning To Prison

Appellant next argues that on two occasions, the trial court improperly permitted the prosecution to argue that because of his prior convictions, he had the propensity to commit the murder of Deputy Aguirre. (AOB 230-231.) Appellant, however, did not object at trial to these alleged instances of propensity argument. (32 RT 6062; 54RT 10061.) Thus, he has forfeited his right to challenge the trial court's permitting them. (*People v. Clair* (1992) 2 Cal.4th 629, 662.)

In any case, the prosecution did not forward any argument relating to improper character evidence. Appellant first cites the prosecution's statements during the penalty phase that appellant killed Deputy Aguirre because he was not willing to "suffer the consequences for being a felon in possession of firearms" and "made that self-centered decision to cause all this harm because he is simply a self-centered, cold-blooded, rotten human being." (54RT 10061.) But these statements were part of the prosecution's rebuttal of appellant's argument that in mitigation, the jury should consider that appellant committed the offense while under the influence of extreme mental or emotional disturbance. (54RT 10060-10063.) The prosecution's argument that appellant decided to avoid going back to prison for possessing firearms was not "character evidence," but instead went to show that appellant was acting rationally when he premeditated to kill Deputy Aguirre. (See *People v. Avena* (1996) 13 Cal.4th 394, 439 [aggravating evidence irrelevant to an aggravating factor is admissible if it is submitted as rebuttal].) Moreover, the prosecution's reference to appellant's prior convictions would also have been permissible as a comment on the recidivism aggravating factor enumerated by statute. (See § 190.3, subd. (c) ["the trier of fact shall take into account . . . [t]he presence or absence of any prior felony conviction"].)

Nothing about the other statements that appellant cites were designed to show appellant's bad disposition either. The prosecution argued during the trial phase that appellant was carrying a loaded gun and ammunition when he kidnapped Alonzo and was prepared to use it to avoid apprehension and imprisonment. In doing so, the prosecution stated:

> That's how Michael Johnson, that man, went courting to see his wife on July 17, 1996. Armed and ready. Ready, knowing the consequences of having a gun. Ready to react with deadly force to any situation that posed a threat to his freedom.

(32RT 6062-6063.) These statements were consistent with the trial court's ruling that this evidence could be used to show appellant's motive in killing Deputy Aguirre—namely to ensure that he did not go back to prison. The trial court properly allowed the prosecutor's argument because it was based on reasonable inferences from the evidence and was fair comment. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819.)

Appellant argues that the prosecution's subjective aim was to use this evidence to show appellant's disposition to commit crimes generally. In support, appellant points to the prosecution's statement to the court, during discussion of the admissibility of this evidence and of the appropriate cautionary jury instructions: "We are introducing the evidence of the fact of his felony convictions leading to a 25-to-life potential sentence for the purpose of proving his motive and *disposition* to commit the crime of murder in this case." (18RT 3069, italics added; see AOB 230.) But given that the prosecutor repeatedly asked for this evidence to be used for motive and intent, and not disposition to commit crimes generally, the prosecutor presumably meant "disposition" not as "tendency," but instead in the alternative sense of appellant's "state of mind" at the time of the offense. (See http://dictionary.reference.com/browse/disposition.) In any event, as explained above, none of the prosecutor's statements to the jury amounted to an argument

about propensity.

### D. The Trial Court Properly Sustained An Objection To Appellant's Mentioning The Three Strikes Law

Appellant contends that the trial court erred in sustaining an objection during his closing argument because it prevented him from refuting the prosecution's argument that appellant killed Deputy Aguirre to avoid going to prison for 25 years to life. (AOB 231-235.) Respondent disagrees.

Before trial, defense counsel requested that no one refer to his prior convictions "as a third strike." (18RT 3101-3102.) The trial court ruled that the phrase "three strikes" or "third strike" was not to be used during the course of the trial. (18RT 3102-3103.) The trial court later emphasized this point during the testimony of Senior Deputy District Attorney Kilbride. (36RT 6739.) During closing argument, defense counsel extensively argued that the jury should not infer that appellant's motive to kill Deputy Aguirre was to avoid imprisonment:

> The prosecution has argued to you that Michael Johnson was armed that day in July because of old decisions and because of a new decision of returning to a life of crime.
>
> That's not what happened, ladies and gentlemen. That's not why he was armed. He was armed that day because of his jealousy and because of his paranoia and because of his unusual behavior as testified to by Guillermina Alonzo. . . .
>
> The prosecution has advanced, ladies and gentlemen, the theory that Michael Johnson's motive for killing Deputy Aguirre on July 17, 1996 was because as a previously convicted felon who was in possession of firearms that he knew that he could go back to prison for 25 years to life. So what they say, then, is that Michael Johnson killed Deputy Aguirre and attempted to murder Deputy Fryhoff to avoid that

consequence of 25 years to life in prison.

But again, all that really is is just a theory, ladies and gentlemen. It was never established that is what Michael Johnson thought. There was never any evidence that that was his motive.

Where was the evidence, I ask you, that Michael Johnson knew of that consequence of 25 to life? Does it say on that parole form he signed when he last got out of prison with regards to being unable to possess firearms that "If you do possess those firearms, you're going back to prison for 25 to life?" Does it say that on the document? Did anybody get up on the witness stand –

(45RT 8224-8226.)

The prosecution then objected based "on a prior ruling of a court," stating at a sidebar, "It's improper to refer to the evidence we had of the three strikes or the use of the term 'three strikes' from which an inference would be anybody would know it or to argue the absence of that evidence." (45RT 8226.) The trial court agreed with the basis for the prosecution's objection, noting that it had "deliberately kept out the issue of the three strikes, that everybody and his brother has read about or heard about that, so I will sustain the objection and ask you to move to another area on that basis." (45RT 8226-8227.)

It appears from the parties' and trial court's comments that defense counsel had started to refer in some way to the Three Strikes Law or was about to. And defense counsel never objected to the trial court's limitation of his argument on this ground or suggested that he was not referring to or about to refer to "three strikes" in violation of the court's order. As a result, appellant has forfeited his contention on appeal by failing to object on this ground. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1011 [a defendant is estopped from challenging a trial court ruling granting his own motion], disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22.)

In any event, the trial court properly limited appellant from using the term "three strikes," and this was all the trial court did. In other words, nothing in the trial court's ruling prohibited defense counsel from continuing to argue that the jury should not conclude that appellant committed a murder of a police officer to avoid returning to prison for 25 years to life. In any event, as set forth above, defense counsel had ably fleshed out that argument, and appellant does not offer any other point that the trial court's ruling prevented defense counsel from making to the jury. (See *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1184 ["a judge in a criminal case must be and is given great latitude in controlling the duration and limiting the scope of closing summations," internal quotation marks omitted].) As the trial court later explained in denying the motion for a new trial:

> [T]he defense did argue the absence of evidence, the defendant's knowledge of the possible sanction that might await him. The argument of Mr. Boles on this issue was not stricken, conference at bench related to three strikes language, language the defense sought to have excluded and which motion was granted.

(55RT 10245-10246.) Under these circumstances, the trial court acted well within its broad discretion in sustaining the prosecution's objection to using the terminology of the Three Strikes Law in front of the jury.

**E. Any Error Was Harmless**

Appellant argues that the alleged errors of admitting the prior conviction evidence, allowing the prosecution to argue character evidence, and disallowing defense counsel from countering the prosecution's argument regarding character evidence, led to prejudice in both the guilt and penalty phases under the federal Constitution and under state law. Respondent disagrees.

Error in admitting prior crimes evidence is subject to the *Watson* state law standard of harmlessness. (*People v. Malone* (1988) 47 Cal.3d 1, 22.) Here, there was overwhelming evidence of premeditation regardless of what appellant's motive for the shootings was. And, to the extent that the error only involves the evidence that appellant was subject to 25 years to life in prison, as opposed to just an unspecified duration in prison, from his kidnapping, rape, and firearm possession, the jury would likely have found anyway that a return to prison was the motive for appellant's shooting. Furthermore, this motive evidence was not even related to the strong evidence that appellant also committed first-degree felony-kidnapping murder with the special circumstance of murder of a peace officer or of murder in the advancement of the kidnapping or to avoid detection. (See Arg. IV.D, *ante*.)

Additionally, in the penalty phase, the jury also heard testimony from defense witness Dr. Lisa Kus that in August 1994, appellant told her that he did not want to go back to prison. (48RT 8966.) Thus, even without any further recidivism evidence and argument, there was a strong basis for the jury finding that appellant killed not out of a mental defect, but because he did not want to be incarcerated again. Under these circumstances, any error in the guilt and penalty phases was harmless under state law or federal constitutional law. (*Chapman*, *supra*, 386 U.S. at p. 24; *People v. Abilez* (2007) 41 Cal.4th 472, 525-526 ["state law error occurring at the penalty phase must be assessed on appeal by asking whether it is reasonably possible the error affected the verdict," a standard functionally equivalent to the *Chapman* standard]; *People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837.)

## VII.

## THE PROSECUTION DID NOT COMMIT MISCONDUCT

Appellant contends that the prosecution committed misconduct in this case, violating his rights to due process under the federal and state Constitutions. (AOB 241-306.) Appellant has forfeited several of his claims from failing at trial to make timely objections and request admonitions. Moreover, none of the prosecution's actions and statements that appellant cites rise to the level of prosecutorial misconduct, let alone to reversible prejudice.

Ordinarily, "a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion - and on the same ground - the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Hill*, *supra*, 17 Cal.4th at p. 820, internal quotation marks omitted.) This rule does not apply if it would have been futile for the defendant to object and request an admonition, if an objection and admonition would not have cured the harm that the misconduct caused, and if the defendant cannot ask for an admonition because the trial court has overruled his objection. (*People v. McDermott* (2002) 28 Cal.4th 946, 1001.)

When resolving such claims on the merits, this Court has applied the following standard for prosecutorial misconduct:

> A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.

(*People v. Abilez*, *supra*, 41 Cal.4th at p. 494, internal quotation marks and citations omitted.)

What is crucial to a claim of prosecutorial misconduct is the potential injury to the defendant. (*People v. Williams* (1997) 16 Cal.4th 153, 252-253; *People v. Sanders*, *supra*, 11 Cal.4th at p. 526.) If prosecutorial misconduct is found to have occurred, then it must be determined whether it was "reasonably probable that a result more favorable to the defendant would have occurred" absent the prosecutorial misconduct. (*People v. Welch* (1999) 20 Cal.4th 701, 753; *People v. Gionis* (1995) 9 Cal.4th at 1196, 1220; *People v. Bryden* (1998) 63 Cal.App.4th 159, 183; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) California courts "have generally assumed that prosecutorial misconduct is error of less than federal constitutional magnitude." (*People v. Bolton* (1979) 23 Cal.3d 208, 214, fn. 4.)

### A. There Was No Misconduct From The Prosecution's Statements Regarding Defense Counsel's Conduct

Appellant argues that the prosecution, specifically, Deputy District Attorney Matthew Hardy, committed five instances of misconduct in unfairly accusing defense counsel of wrongdoing and in acting intemperately and abusively during pretrial and penalty hearings. (AOB 242-253.) Neither separately nor cumulatively, however, did the prosecution's actions constitute misconduct. In any event, because all of the allegedly improper statements occurred outside the presence of the jury, there could be no effect on the jury's verdicts in this case.

Appellant's first alleged instance of abuse involves a pre-trial proceeding on appellant's motion for a complete copy of the grand jury transcript. (10RT 1550.) The prosecution opposed this motion because the trial ultimately proceeded after a preliminary hearing, so the grand jury transcript was irrelevant. In doing so, the prosecution argued:

> That is obviously completely -- it's actually specious. There is actually no basis for making any honest argument. That California Constitution provision applies in the situation where we have two separate -- we're not proceeding by indictment here. [¶] There was no post-indictment preliminary hearing here within the meaning of that section. There is simply no basis for that at all.

(10RT 1551.) The trial court denied appellant's motion, agreeing with the prosecution, stating that "there's no identifiable product that will be realized if the Court" grants the motion. (10RT 1551-1553.)

Appellant never objected to this alleged misconduct and thus has forfeited his claim. Appellant nonetheless argues that no objection was necessary because the trial court, in denying the motion, also ruled that the prosecution had committed misconduct by stating, "I will add as a footnote: I don't doubt your bonafides in making the motion. You represent your client, you brought your motion, and that's not an issue. I take the motion at face value that's presented to me." (10RT 1553.) But the transcripts reflect that the trial court was not responding to the prosecution's earlier statements; it was instead expressing its own view about the merits of appellant's motion, without any comment about the propriety of the prosecutor's statements. Thus, the forfeiture rule should apply here.

On the merits, appellant's claim would fail in any event. In addressing a claim of misconduct that is based on the denigration of opposing counsel, this Court views the prosecutor's comments in relation to the remarks of defense counsel, and inquires whether the former constitutes a fair response to the latter. (*People v. Frye* (1998) 18 Cal.4th 894, 978, disapproved on another ground in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421 & fn. 22.) Here, it is true that the trial court, in ruling on motion for new trial, ultimately found that the prosecution's argument that defense counsel's "argument was specious was not an honest argument by Mr. Hardy in my opinion." (55RT 10258.) But

even assuming arguendo the prosecutor's choice of words to describe his view of appellant's argument was unfortunate, taken in context, the prosecution was merely disagreeing with defense counsel about the motion, and was just trying to vehemently make the substantive point that there was "no basis" for the motion because "[t]here was no post-indictment preliminary hearing here within the meaning of that section." (10RT 1551-1552.) These comments did not rise to the level of misconduct.

In any event, as the trial court correctly noted in denying the motion for new trial, these comments were outside the presence of the jury. (55RT 10267-10268.) As this Court has explained in a similar situation, "the comments were not made in the presence of the jury, and defendant fails to demonstrate how these comments outside the jury's presence, which were of the sort one might expect to encounter during a vigorously contested capital trial, prejudiced the proceedings below." (*People v. Carter* (2005) 36 Cal.4th 1215, 1265.) Thus, appellant cannot show prejudice.

Appellant secondly argues that the prosecution's comments at a pre-trial hearing on the admissibility of evidence under *Miranda* was admissible. In the hearing, appellant sought to question the testifying officer as to his motivation for not allowing the Public Defender's Office from seeing him prior to the arraignment. (11RT 1794-1795.) Over the prosecution's objection, the trial court initially allowed the inquiry but after another objection asked defense counsel why the officer's motivation would make any difference in the *Miranda* inquiry, and if the only issue was whether the officer lawfully prevented the Public Defender's Office from seeing appellant. (11RT 1796-1797.) After nonetheless allowing a few more questions on this topic, the trial court finally halted the inquiry as "just irrelevant." (11RT 1797-1800.) In the midst of this line of questioning, the prosecution interjected an objection under Evidence Code section 352, and stated,

Your Honor, I just want to make a comment and interject a 352 objection here. I suspect that we will have the integrity of every law enforcement person who testifies in this case attacked by Mr. Howeth.

If we want to talk about agendas, I think there's one going on here along that line as well. They have been called. They're here. A lot of people are going to be testified -- testifying in the next -- God knows how long, who are subject to some pretty cheap shots. . . . I'm sorry.

(11RT 1798.) The trial court stated, "I have nothing from [defense counsel] yet that has been any cheap shot or even approaching one. If it comes up, it will be the first, it will be the last. And I'm sure that you'll be quick to point out to me that we've hit that level." (11RT 1798.)

Again, appellant's claim is forfeited because he failed to object at the hearing on the ground that the prosecution committed misconduct by using the term "cheap shots." And appellant's attempt to excuse his nonobjection based on the trial court's rejection of the prosecutor's comment about "cheap shots" must fail because the trial court's statements, again, did not relate to the issue of whether the prosecution had committed misconduct, only to the issue of whether the prosecutor's characterization was correct.

Moreover, as to appellant's claim regarding Deputy District Attorney Hardy's use of "cheap shots," the trial court correctly found that this did no more than "evince his antipathy towards the defense" outside the presence of the jury. (55RT 10251-10252.) Furthermore, the prosecutor immediately apologized for characterizing his argument in this fashion. (11RT 1798.) Again, the trial court properly rejected this prosecutorial misconduct argument at the motion for new trial because the comment was not in front of the jury. (55RT 10251; *People v. Carter*, *supra*, 36 Cal.4th at p. 1265.)

Appellant thirdly asserts prosecutorial misconduct occurring during another pre-trial *Miranda* hearing. During this hearing, Deputy District Attorney Hardy was questioning another prosecutor in his office regarding his

reason for preventing the Public Defender from having contact with appellant, specifically asking whether it was because of his belief that the Public Defender's Office had previously intimidated witnesses not to talk to the District Attorney's Office. Appellant argues that by doing this, the prosecutor was actually trying to convince the court that the Public Defender's actions had "played out in this case." (AOB 245-249; see 12RT 2096-2100.) As appellant acknowledges, however, he only objected to the prosecution's questioning on relevance grounds. (12RT 2097-2098.) And although appellant maintains that the court's overruling his relevance objection means that a prosecutorial misconduct objection would have been futile (AOB 248), this Court has refused to accept "the premise that the court's treatment of unrelated objections shows that all objections would have been futile." (*People v. Arias* (1996) 13 Cal.4th 92, 159-160.)

Additionally, the prosecution's line of questioning was entirely proper, given that appellant had put into issue the District Attorney's actions in preventing the Public Defender from seeing appellant. Moreover, there is nothing in the prosecutor's questioning suggesting that he had any other aim than to justify the actions of the District Attorney's Office on that occasion. And despite the trial court's later finding that the transcript of an earlier, "*Bolo*" trial, did not by itself justify the prosecution's allegation that defense counsel had committed misconduct, the trial court ultimately stated that it had no opinion on the "*Bolo*" case. (55RT 10252, 10260.) Furthermore, the relevant issue at this *Miranda* hearing was whether the supervising deputy district attorney that sought to exclude the Public Defender *believed* this to be the case, not whether the Public Defender actually did these acts. (See 12RT 2097-2098; 55RT 10252.) In any event, like the earlier contested comments discussed above, the prosecutor's questioning was outside the presence of the jury. (See *People v. Carter*, *supra*, 36 Cal.4th at p. 1265.)

Fourth, appellant challenges the prosecutor's comment, during the hearing on the motion to exclude officer uniforms from the trial, that "[t]here were some pretty nasty attacks on Judge O'Neill in this case." (AOB 249; 18RT 3074.) The trial court stated that it knew "nothing about that." (18RT 3074.) Appellant did not interject any objection to the prosecution's argument, let alone one regarding prosecutorial misconduct. As a result, he has forfeited his claim on appeal.

Moreover, there was no misconduct. The prosecutor was simply using an example of the earlier proceedings to support his argument that the police should be permitted to wear uniforms to watch the trial. The prosecutor was stressing the importance

> that the law enforcement community trusts that what happens here isn't going to exist in an atmosphere of prejudice, an atmosphere of pressure, an atmosphere that's inappropriate and that the 12 people chosen from this community to decide what happens to the killer of Peter Aguirre really got a fair shake at what they had a right to hear.

(18RT 3074.) Contrary to appellant's allegation, the trial court never ruled at the motion for new trial that the prosecutor's allegation regarding attacks on Judge O'Neill was incorrect, only that it did not "know what he was talking about . . . ." (55RT 10260.) Although the trial court described the prosecutor's comment as "improper," a point that respondent does not concede, the trial court correctly rejected the misconduct claim on the ground that the prosecutor's comment was outside the presence of the jury. (55RT 10260; see *People v. Carter*, *supra*, 36 Cal.4th at p. 1265.)

Appellant lastly assigns as error in this subargument an incident where the prosecutor, out of the presence of the jury, stated, "I smell a rat." (AOB 249-250.) During the penalty phase, defense counsel examined appellant's mother regarding appellant's army service. As appellant's mother approached the witness stand, she carried with her an eight-by-ten photograph of appellant

in uniform standing next to the American flag. (50RT 9345.) At one point, the following dialogue occurred between defense counsel and appellant's mother:

Q. In fact I noticed when you walked to the witness stand you were carrying a picture. Is that –

A. I do have my favorite picture.

Q. That's his official army photo?

Q. That picture is important to you, is it not?

A. Oh, very much so. [¶] Can I make a statement about that?

Q. Well. --

A. Or not?

Q. Well, you can tell us why the picture is important.

A. Well, okay. Over the years there have been times we've not had a lot of contact with Michael but since he's been incarcerated this time we've become very, very close and this picture sets [sic] beside my chair where I read and I say good morning to it and good night. [¶] This is Michael to me right here (indicating). He was 18, innocent, went to Vietnam.

(50RT 9312-9313.)

After further questioning regarding appellant's army service, the prosecutor asked to approach. The following occurred between the prosecutor ("Mr. Hardy"), defense counsel ("Mr. Boles"), and the trial court:

MR. HARDY: I want to know if counsel was aware that photograph was gonna be shown in front of the jury and whether or not -- why we haven't been shown a copy of it first if he did know it was coming.

MR. BOLES: I knew she was, um -- she intended to bring a photo with him [sic].

THE COURT: I'd like her to take it down.

MR. HARDY: I don't want to make a scene --

THE COURT: So why don't you --

MR. HARDY: I want to know whether or not he knew she had it when she went up there and she was gonna flash it. I want to know that.

MR. BOLES: I did not know she was going to prop it up like she's had it propped up.

MR. HARDY: Did he know she was gonna show it to the jury?

MR. BOLES: I did not know she was gonna show it to the jury. I knew --

MR. HARDY: Why didn't you think she was gonna show it when she's carrying it with her?

MR. BOLES: Because she wanted to hold onto it while she testified.

MR. HARDY: I smell a rat. Nothing I can do about it.

THE COURT: Stop. I will have it --

MR. HARDY: There's nothing to do about it now. It's been done.

(50RT 9314-9315.) Later, the trial court affirmed that appellant's mother had shown the photograph to the jury. (50RT 9345.)

As a threshold matter, appellant forfeited his claim of misconduct from the use of the term "I smell a rat" by failing to object. And contrary to appellant's claim, just because the trial court interrupted the prosecutor did not excuse appellant from not objecting at all, nor, particularly, from specifically objecting on the ground that the prosecutor committed misconduct. This Court should therefore reject appellant's claim.

Moreover, taken in context, the prosecutor was not calling defense counsel a rat or saying that defense counsel smelled like a rat. Instead, the prosecutor was reasonably arguing that under the circumstances, it was implausible that defense counsel did not intend that appellant's mother might display appellant's army photograph to the jury, knowing that she had brought it up to the witness stand, and having asked her questions about it beforehand. Since the trial court had not yet ruled on whether this photograph could be displayed, the prosecutor's colorful expression was not inappropriate. (See,

e.g., *People v. Pinholster* (1992) 1 Cal.4th 865, 948 [under the circumstances, referring to a defense witness as a "weasel" was not error].) In any event, it was outside the presence of the jury, so there was no prejudice.

Appellant argues that the prosecutor's "*ad hominem* attacks served no purpose other than to denigrate defense counsel in the eyes of the trial court" and that "[i]n virtually every instance, the trial court recognized that the prosecutor's conduct above was improper." (AOB 251-252.) As this Court determined in *People v. Carter*, *supra*, 36 Cal.4th at page 1265, however, "the comments were not made in the presence of the jury, and defendant fails to demonstrate how these comments outside the jury's presence, which were of the sort one might expect to encounter during a vigorously contested capital trial, prejudiced the proceedings below." This was certainly a highly contested trial and none of the prosecutor's spirited comments rose to the level of misconduct, let alone prejudiced appellant under these circumstances. (See also *People v. Friend*, *supra*, 47 Cal.4th at p. 65 ["while we cannot condone the prosecutor's occasional sniping remarks, we conclude they do not amount to prejudicial misconduct"].)

### B. There Was No Misconduct From The Prosecutor's Argument At A *Miranda* Hearing

Appellant next contends the prosecutor committed misconduct by arguing during a *Miranda* hearing that granting appellant's motion to suppress his statements would "operate a fraud upon the jury." Appellant argues that the prosecutor's statement "was an attempt to intimidate the trial court," resulting in the trial court erroneously denying the motion to suppress. (AOB 253-255.) Respondent disagrees, as there is no basis to find that the prosecutor's statements were meant to intimidate, or that the trial court was intimidated by them.

At the hearing on appellant's motion to suppress his statements to Dr. Patterson, the prosecutor argued that this hearing involved possibly "suppressing evidence that will permit and operate a fraud upon the jury." The prosecutor argued that the trial court should not prohibit this evidence because it was relevant to rebut appellant's claims that he could not see that Deputy Aguirre was a police officer because appellant was not wearing his glasses. (10RT 1576-1577.) The prosecutor then stated, "That fraud is a pretty serious thing to do. In what is supposed to be a search for the truth --," at which point defense counsel objected, stating, "I object to the comments by making a legal motion to suppress statements that we are attempting to commit some kind of fraud upon the jury. We make a motion to strike these comments as inappropriate to this motion." The trial court stated, "It would appear to me the issue is the validity or invalidity of the statements under the law. [¶] Proceed." (10RT 1577.) At the motion for new trial, the trial court stated, as to this issue, "Mr. Hardy argued it would be a fraud on the Court. I told Mr. Hardy the defendant was behaving properly. I said I perceived no fraud and I sustained the defense objection, I believe." (55RT 10258-10259.)

As an initial matter, appellant never specifically objected on the ground that he raises here, that the prosecutor's statements worked to intimidate the trial court. Consequently, he has forfeited that contention on appeal. (See *People v. Arias*, *supra*, 13 Cal.4th at pp. 159-160.)

Moreover, the prosecutor's argument clearly and properly was meant to emphasize the relevance of the statements to the People's case. In the context of the prosecutor's lengthy (10RT 1575-1601) legal argument that these statements were admissible under *Miranda*, this introductory characterization of these statements was important as an explanation of why the prosecution was seeking to admit them at all. Moreover, the trial court clearly understood that "the issue is the validity or invalidity of the statements under the law" (10RT 1577) and showed zero indication of being intimidated by the

prosecutor's somewhat colorful preliminary language during argument. In any event, the trial court properly denied the *Miranda* motion (see Arg. IV., *ante*), so there could be no prejudice from the prosecutor's statements during argument at the hearing.

### C. The Prosecution Did Not Attempt To Intimidate The Trial Court In Arguing That Uniformed Police Officers Could Be Present At Trial

Appellant next contends that, during the hearing on the motion to exclude officer uniforms from the trial, Deputy District Attorney Hardy also attempted to intimidate the trial court. (AOB 255-259.) Respondent disagrees, as the prosecutor's comments constituted proper argument, and did not even resemble a threat.

In arguing that the trial court should not limit police officers from being present at trial or from wearing their uniforms, the prosecutor emphasized

> that the law enforcement community trusts that what happens here isn't going to exist in an atmosphere of prejudice, an atmosphere of pressure, an atmosphere that's inappropriate and that the 12 people chosen from this community to decide what happens to the killer of Peter Aguirre really got a fair shake at what they had a right to hear.

(18RT 3074.)

The trial court cautioned that "[i]t would be improper to have 56 uniformed deputy sheriffs sitting in this courtroom" because it would be "coercive in its nature and effect," but recognized that interested police officers had "an absolute right to be in the courtroom." (18RT 3076-3077.) The trial court ultimately did not allow the showing of any armbands or signs of mourning on police officers or others in the courtroom and stated that it would consider before convening each day whether there were too many uniformed officers in the courtroom. (18RT 3077-3078.)

Despite the balanced nature of the trial court's ruling, appellant takes issue with the prosecutor's explanation of its position that law enforcement, like other interested citizens in a case, had the right to attend a court proceeding, and that this was necessary so that the officers could be confident that justice would be done. (See, e.g., 18RT 3073 ["I don't want to get into it today, but the fact of the matter is that I think that it is wholly appropriate for officers to be here to make sure that the atmosphere in this courtroom is such that is conducive to the ascertainment of justice"], 18RT 3074 ["I think the atmosphere is such that the need -- that we have to make sure that the law enforcement community trusts what happens here isn't going to exist in an atmosphere of prejudice"].) But appellant did not object below on the ground that the prosecutor was trying to threaten the trial court, nor on any other ground for that matter. Therefore, he has forfeited his contention on appeal. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.)

In any event, there was nothing in these comments that suggested a threat; the prosecutor was only making the point that police officers interested in a murdered comrade have the same interest in attending a public trial as any other person close to a victim. (See *Waller v. Georgia* (1984) 467 U.S. 39, 46 [104 S.Ct. 2210, 81 L.Ed.2d 31] [the purpose of the public trial right is to ensure that the defendant "is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions"].) Indeed, the trial court appropriately did not perceive the comments as a threat, as demonstrated by its willingness to impose restrictions on the number of officers present and displays of support or mourning.

Appellant nonetheless complains about the prosecutor's subsequent comments, as the trial court was explaining its order to exclude symbols of mourning, that he would communicate this order to the victim's family and to the police:

> For the record, we also, so you know, communicate with the various law enforcement agencies consistently about -- and we do it frankly and we do it honestly because we consider -- at least I consider law enforcement personnel to be family for me -- exactly how we think this case is going on. We'll continue to do that as well.

(18RT 3078.) The trial court stated, "I'm not sure what the intention of that was, but my only response is that to the extent anything is presented in court which appears to -- might influence the jury in its decisions, the Court would not allow it. I do not make any orders limiting who can attend my courtroom, and I'll leave it at that." (18RT 3078.)

Once again, appellant failed to object to the prosecutor's statements; thus he has forfeited his claim of error on appeal. His excuse for non-objection, that the trial court immediately responded to the prosecutor's comments, rings hollow. Someone was going to respond, given this was a hearing, and the trial court did not condemn the prosecutor's comments.

Moreover, on the merits, there was nothing coercive or threatening about the prosecutor's comments. The prosecutor apparently was assuring the trial court that he would be able to convey its orders regarding symbols of mourning to these persons because of his closeness to them. This closeness was understandable given the stakes of this case and the working relationships between police and prosecution.

In any event, there was no prejudice. The comment was outside the presence of the jury. (See *People v. Carter*, *supra*, 36 Cal.4th at p. 1265.) Further, the trial court was apparently confused, but in no way threatened, by the prosecutor's comments. (See 18RT 3078 ["*I'm not sure what the intention of that was*, but my only response is that to the extent anything is presented in court which appears to -- might influence the jury in its decisions, the Court would not allow it. I do not make any orders limiting who can attend my courtroom, and I'll leave it at that," italics added].) Indeed, the trial court later

confirmed at the motion for new trial that it had not taken the prosecutor's comment, made out of the presence of the jury, "as any threat to me . . . ." (55RT 10251.) Additionally, the trial court properly allowed police officers to attend the trial, without any symbols of mourning, and subject to there being too many in a particular proceeding. In so ruling, the trial court appropriately balanced the interests of a fair trial and a public trial. This Court should reject appellant's claim.

### D. There Was No Misconduct From The Prosecutor's Conduct Toward The Assistant County Counsel

Appellant contends that Deputy District Attorney Hardy committed misconduct by intimidating Assistant County Counsel Patricia McCourt in the courtroom. (AOB 259-266.) Respondent disagrees, and in any event, the prosecutor's anger about being given an incomplete mental health file of appellant occurred outside the presence of the jury, and counsel acknowledged that the confrontation had no effect on her representation.

At the hearing on the People's motion to compel the Department of Mental Health to turn over its file of appellant, Assistant County Counsel McCourt, who represented the Department, also appeared. (18RT 2923.) Deputy District Attorney Hardy stated that after Deputy Aguirre was killed, appellant's psychologist looked through the records, pulled some raw data, and "then wrote a report, basically covering her butt," but that the prosecution was never advised that these documents were taken out until a week before this hearing. (18RT 2926.) The prosecutor stated that this was "disgraceful" and that it "allowed people to get their stories straight and we're never going to get to the truth." (18RT 2926-2927.) Defense counsel stated, "I don't have any comment on this particular issue. As to the other one, I do." (18RT 2927.) The trial court ordered that the Department furnish its entire file on appellant to the prosecution. (18RT 2928-2931.)

Later, at the motion for new trial, appellant argued that before the hearing on the motion to compel, while in the courtroom, the prosecutor told Assistant County Counsel McCourt that she was "sleazy and unethical, [and] suggested that she coached her witnesses to lie" and that this behavior was "threatening." (55RT 10209.) At the hearing on the motion for new trial, appellant called McCourt to testify regarding his allegations.

McCourt testifed that in the courtroom before the hearing, Deputy District Attorney Hardy leaned over and said to her, "'Well, is it your intention to bring in perjured testimony like you always do?'" (55RT 10215.) For several times over the next five to seven minutes, in a loud and angry tone of voice, the prosecutor came up to McCourt and accused her of being sleazy, unethical, and obstructing justice by conspiring with her client to hide and not to disclose information to the People and the trial court. (55RT 10215-10216.) After a series of these incidents, McCourt "merely looked at [the prosecutor] straight in the face and said, 'Matt, get out of my face.'" The prosecutor turned around and walked away. The bailiff walked over and stood between them. The bailiff went to McCourt and suggested it might be best if she sat in the audience until the judge arrived. (55RT 10219.) McCourt did not bring this incident to the attention of the trial court but her supervisors conversed several times about it with the administration of the District Attorney's office. (55RT 10217.) McCourt did not change her advice to her client because of the prosecutor's conduct because this "would be contrary to [her] oath as a sworn professional." (55RT 10218.)

In response to defense counsel's argument at the new trial motion that Deputy District Attorney Hardy's accusations of defense counsel as unethical "had in some way seeped into the Court's consciousness," the trial court found that defense counsel "suffer[ed] no despoilage" from Hardy's conduct. (55RT 10227.)

As a threshold matter, appellant has forfeited his claim that the prosecutor committed misconduct by threatening Assistant County Counsel McCourt in the courtroom before the hearing. After these threats allegedly occurred, McCourt did not alert the trial court. In fact, defense counsel later acknowledged that they "were seated at counsel table in a position to hear" the incident, yet they, too, did not bring the matter to the trial court's attention. (18RT 2920; 55RT 10209.) Further, at the in camera hearing where the trial court addressed the incident by admonishing counsel to treat each other and the court with respect, defense counsel did not make any statements at all. (18RT 3022-3024.) As the trial court later found at the motion for new trial, appellant's pleadings "make evident that the defense was concerned about Mr. Hardy's behavior but never so advised the court." (55RT 10249-10250.) Because appellant did not timely raise this issue at trial, he is precluded from raising it on appeal. (*People v. McDermott*, *supra*, 28 Cal.4th at p. 1001.)

Moreover, there was no prosecutorial misconduct. The trial court later found that the prosecutor had "antipathy for the defense" (55RT 10252), and the prosecutor's alleged conduct with McCourt would bear this out. But none of the prosecutor's actions, even assuming McCourt's account was accurate, constituted threats, but merely allegations on the prosecutor's part that she had acted improperly. Furthermore, this apparent rancor between counsel was outside of the presence of the jury. (See *People v. Carter*, *supra*, 36 Cal.4th at p. 1265.) The prosecutor's conduct was far from the prejudicial trial conduct that this Court has found reversible error, such as where a prosecutor was "standing in [defense counsel's] line of sight, staring at him and making faces at him" in front of the jury. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 834.)

In any event, there was no prejudice from the prosecutor's conduct. Assistant County Counsel McCourt herself emphatically denied that the prosecutor's conduct had any effect on her own representation, testifying that she did not change her advice to her client because of the prosecutor's conduct

because this "would be contrary to [her] oath as a sworn professional." (55RT 10218.) And McCourt rebuffed the prosecutor in that she "merely looked at [the prosecutor] straight in the face and said, 'Matt, get out of my face,'" at which point the prosecutor walked away. (55RT 10219.) McCourt's successful countering of the prosecutor demonstrated that she did not carry out her duties differently because of him. Further, there is not a single documented instance of defense counsel's performance being lessened by the prosecutor's conduct. In this regard, the trial court found properly found that "it's clear at no time was the defense ever dissuaded from making an argument or contesting a point of law or fact by virtue of his conduct or demeanor." (55RT 10252.)

Nor did the trial court in any way kowtow to the prosecutor. In response to defense counsel's argument that Deputy District Attorney Hardy's accusations of defense counsel as unethical "had in some way seeped into the Court's consciousness," the trial court stated that defense counsel "suffer[ed] no despoilage" from his conduct, and assured defense counsel, "You just don't have that as a point to make because it isn't there." (55RT 10227.) Appellant's surmise, that McCourt's client, Dr. Kus, testified as she did only because McCourt might have told her about the prosecutor's conduct, is utter speculation and should be summarily disregarded.

### E. There Was No Misconduct From The Prosecutor Opining, "This Case May Get Very Ugly"

Appellant contends that the prosecutor's comment, "I anticipate this case may get very ugly before it's over," during a hearing about counsel's conduct toward each other, was a threat to the trial court that caused it to make erroneous rulings. (AOB 266-272.) Respondent disagrees, as there is no basis for appellant's speculative claim about the prosecutor's defensible comment.

In the afternoon after the apparent altercation between Deputy District Attorney Hardy and Assistant County Counsel McCourt (see Arg. VII.D, *ante*),

the trial court held a short session to admonish counsel that they must treat each other and the court with respect. The trial court stated,

> My bailiff advised me of some unpleasantness that occurred this morning. I choose neither to go into detail or to pursue the matter further, other than to say this courtroom will be a sanctuary for all who appear here, whether counsel, defendant, witness, or spectator.
>
> You will be by me treated with respect and without angst or hostility, whether I'm present in the courtroom or not. I expect counsel to adhere to that.
>
> I address it to no one in particular, but that is the standard I want set forth and understood from this point on.

(18RT 3022.) The trial court asked, "Is there anything further from either side? [¶] Mr. Hardy? Ms. Fox?" (18RT 3023.) After Deputy District Attorney Fox said no, Deputy District Attorney Hardy stated, "I anticipate this case may get very ugly before it's over." (18RT 3023.) The trial court stated, "I sincerely hope not." (18RT 3023.) Deputy District Attorney Hardy stated, "There are standards of integrity that I expect of counsel that I will not compromise on." (18RT 3023.) The trial court stated,

> Mr. Hardy, I have absolutely no quarrel with you telling me that you feel counsel have shortcomings in what they have done, in your opinion. Not only do I invite that, I expect nothing less of you.
>
> So that you have an understanding of my view, I consider you to be as ethical a lawyer as anyone I have encountered, who esteems the highest of ethical values of court and counsel.
>
> I have no quarrel with your substance. Absolutely none. But in this courtroom it will be presented so that no one feels intimidated by it. And I ask counsel to respect each one in that regard. If you feel there are shortcomings, absolutely bring it to my attention.

There is no more difficult case than the one in which we're confronted. I swear to you I understand that. I think the rulings and the time we've all spent here reflect that.

And I will respect everything that counsel does, and I will give you every opportunity to present what you believe to be the evidence as you believe it should be presented.

And if you feel somebody is doing something wrong, absolutely tell me. There's nothing wrong with saying that you feel somebody fell short of the mark. Never doubt that, please. I'll just leave it at that.

(18RT 3022-3024.)

Once again, as the transcript reflects, appellant did not timely object to the prosecutor's statement, "I anticipate this case will get very ugly before it's over." (18RT 3023.) He is therefore barred from raising this claim on appeal. (*People v. Clair*, *supra*, 2 Cal.4th at p. 662.)

Moreover, there was nothing objectionable, let alone threatening to the trial court, about the prosecutor's statements. Based on the apparent rancor between counsel throughout the trial, the prosecutor's statement that the case might get ugly (with respect to their professional relationship) was, unfortunately, an accurate prediction. In addition, the trial court could hardly find daunting the prosecutor's statement that he did not want to compromise his own integrity. Further, as to the incident between the prosecutor and the assistant county counsel, any prosecutor in a death penalty case would be understandably taken aback if he or she believed that the defendant's mental health file was deliberately incomplete. Under these circumstances, appellant's characterization of the prosecutor's statements as threatening to the trial court is a stretch.

Further, the trial court found at the hearing on the motion for new trial that none of the prosecutor's allegations against counsel had affected its rulings. (55RT 10227, 10229.) In support of his speculative claim of

prejudice, however, appellant cites to several alleged instances after the prosecutor's comment where the trial court made erroneous rulings. (AOB 269-272.) All these rulings, however, were correct, and, moreover, in no way affected the result of the guilt or penalty proceedings. (See Arg. VI., VII.F, G, H, I.) And even if any of these rulings were incorrect, there just is no reason to believe that the prosecutor's "ugly" comment bullied the trial court into making any of these decisions. This Court should reject this claim of prosecutorial error.

### F. There Was No Misconduct Based On The Prosecutor's Cross-Examination Of And Argument Regarding Appellant's Police Practices Expert

Appellant contends that the prosecutor committed misconduct in cross-examination and argument by accusing appellant's police practices expert witness of falsifying documents. (AOB 272-276.) Respondent disagrees. There is no indication that the prosecutor intended, or that the jury would have construed, the prosecutor's questioning or argument to be an accusation that the witness falsified documents. Rather, the prosecutor was seeking to show, consistent with the trial court's ruling, that the expert was biased because of his animus toward the sheriff's department after it accused him of doing this. The prosecutor's questioning and argument was appropriate as impeachment.

In his defense at trial, appellant elicited testimony from a retired sheriff's lieutenant, Roger Clark, to rebut the special circumstance that Deputy Aguirre was acting in the performance of his duties. Clark testified that based on hypothetical defense facts, an objectively reasonable officer would not believe that immediate entry was necessary to prevent a threat of imminent danger to himself or others. (41RT 7573-7574, 7578-7583.)

On cross-examination, the prosecutor asked questions to show that Clark did not have sufficient experience to determine whether it was appropriate to make an exigent circumstance entry into a home in a domestic

abuse case. (41RT 7600-7604, 7606-7610, 7630-7631.) The prosecutor also brought out testimony on cross-examination to show that Clark was a dissatisfied former member of the Los Angeles County Sheriff's Department. (41RT 7591, 7594-7596.) Further, the prosecutor sought to show that Clark was aware of timekeeping improprieties in his unit while he was employed with the sheriff's department. The trial court permitted this questioning, and instructed the jury, that this evidence should not be used for the truth or falsity of whether these irregularities occurred. This evidence was only relevant "a, if the witness has heard of any allegations made against him; [and] b. what, if any, feelings he harbors as a result of hearing those matters as it may bear upon your decision concerning his testimony . . . ." (41RT 7596-7598.)

Clark then further testified in response to the prosecutor's questioning that after he left the sheriff's department, there was an audit of his NORSAT division. (41RT 7598.) Clark also read the audit indicating that he was guilty of nepotism. (41RT 7598-7599.) Clark also heard that the document raised issues about improprieties in keeping overtime cards. Clark believed himself to be the victim of false allegations in this document. But Clark was not bitter toward the sheriff's department. (41RT 7599.) On redirect examination, Clark testified that he was also aware that in those same auditing materials, there were very favorable reviews of his performance. (41RT 7634-7635.)

At closing argument of the guilt phase, the prosecutor argued that Clark's expert testimony was unreliable and that the jury should accept the rebuttal witness on this issue, Sergeant Mike De Los Santos, rather than that of Clark. During this argument, the prosecutor stated:

> Let's compare those two theories. We have Mr. Clark. What do we know about Mr. Clark? He's bitter, he's passed over for captain five times. When he was passed over, he appealed his test and he failed. There's some group called the Vikings out to get him. They did an audit of his department and found things like nepotism and irregularities

in overtime cards.

(44RT 8179.) The prosecutor later stated, in this same line of argument:

> Mr. Clark said nothing about the threats, nothing about the danger of retreat. It never crossed his mind 'cause he's never done it. He's too busy falsifying records --

(44RT 8182.) Appellant objected on the ground that the prosecutor was misstating the evidence. The trial court overruled the objection. (41RT 8182.)

As to the prosecutor's cross-examination, and the first instance of misconduct at argument, appellant has again forfeited his appellate claims of error by failing to specifically object at trial. Although objecting to the cross-examination as hearsay, vague, argumentative, and assuming a fact not in evidence, appellant never objected on the ground he raises here, that it was prosecutorial misconduct. (41RT 7596-7599.) And appellant did not object at all to the prosecutor's argument that the audit revealed nepotism and irregularities. (44RT 8179.) As a result, this Court should reject these two contentions as procedurally barred. (*People v. McDermott*, *supra*, 28 Cal.4th at p. 1001.)

Moreover, there was no error in the prosecutor's cross-examination or argument. The trial court explicitly admonished the jury that the evidence regarding the audit's findings of irregularities only were relevant to Clark's knowledge, not to whether the irregularities happened. The prosecutor's phrasing in his questions about the audit in no way suggested how the jury should use this evidence. The questions were a patent attempt to specifically elicit what Clark knew. Upon the trial court's direction as to each general question, the prosecutor immediately rephrased each question to specifically ask what Clark read, rather than what the document stated. (41RT 7596-7599.)

As to the prosecutor's argument, "They did an audit of [Clark's] department and found things like nepotism and irregularities in overtime cards," Clark admitted this to be the case during his testimony. (41RT 7598-

7599.) Furthermore, the prosecutor was not raising these points to show that Clark was guilty of these things; rather, they were raised in the context of the argument that he was "bitter" about the sheriff's department. The prosecutor used this evidence to show why Clark "has never testified on the side of peace officers since he left the Sheriff's Department," and thus to show that his testimony should be discredited. (44RT 8179.)

Similarly, taken in context, there was no impropriety from the prosecutor's reference in argument to Clark being "too busy falsifying records." Given the trial court's jury admonition about the use of this evidence, this argument, if inexactly articulated, was apparently meant to convince the jury that Clark was motivated to testify against the prosecution in this case because of his dissatisfaction with the sheriff's office, based in part on the audits that he believed to be falsely accusatory. The prosecutor prefaced this comment with a statement that Clark had "said nothing about the threats, nothing about the danger of retreat. It never crossed his mind 'cause he's never done it." (41RT 8182.) These statements were consistent with the prosecutor's dual approach of assailing Clark's qualifications and motivation. There is no reason to believe that they were a suggestion to the jury that it should disregard the trial court's instructions and reject Clark's testimony because he had actually falsified documents.

In any event, there was no prejudice from the prosecutor's comments. As to the cross-examination, on the two occasions that the prosecutor asked Clark about the document's contents, the prosecutor immediately rephrased the questions as to what Clark knew. Thus, the jury was reminded of the proper purpose of this evidence. And, to the extent that the document's irregularities suggested biased testimony, the attacks on Clark's credibility were appropriate. Furthermore, at argument, the prosecutor's comment in question was brief and clearly not the main thrust of his argument about Clark—a reliability comparison of Clark's testimony and De Los Santos's testimony. (41RT 8179-

8185.) Further, the trial court instructed the jury both at the time of the cross-examination and before deliberation that this evidence should only be considered for the limited purpose that it was admitted for. (41RT 7597-7598; 10CT 2591.) The trial court also instructed the jury that it should not consider statements made by attorneys during the trial as evidence. (10CT 2585.) The jury is presumed to have followed these instructions. (See *People v. Boyette*, *supra*, 29 Cal.4th at p. 436.)

Moreover, even if the jury had improperly concluded that Clark had falsified documents, it would have had no net effect on their deliberations, because the prosecutor thoroughly refuted Clark's testimony in other ways. First of all, Clark acknowledged that the last time that he had personally stood before a door and had to make a split-second decision about whether to enter was about 27 years earlier, in 1970, when he was a patrol sergeant. (41RT 7630-7631.) These scant qualifications contrasted with the unassailable qualifications of the prosecutor's expert, Sergeant De Los Santos, who, in 18 years in SWAT, made at least 100 entries where a person was known to be armed or had a potential or propensity for violence. (43RT 7802.) Sergeant De Los Santos also personally made entries on domestic violence or abuse calls about two to three times a month from 1989 until 1993 as a watch commander. (43RT 7802-7803.)

And, significantly, when given a hypothetical construct consistent with the prosecution's evidence in this case, even Clark recognized that a reasonable officer would consider that there was a possible felony false imprisonment with the use of guns. (41RT 7619.) According to Clark, a reasonable officer also would have heightened concern for his safety and the safety of his other officers. (41RT 7619-7620.) Further, a reasonable officer would also feel it necessary to determine whether or not the suspect had guns and was moving in the direction of his partners. (41RT 7620.)

It is true that Clark never backed down from his insupportable claim that a reasonable officer would not feel it was necessary to enter into the house to go in foot pursuit of the suspect to protect his partners. (41RT 7620-7621.) But he had to acknowledge that a reasonable officer hearing the door open and close in this situation would be concerned for his partners. (41RT 7623.) Also, he conceded that a reasonable officer would feel the need to take immediate action to protect his partners. (41RT 7628.) Examining all the expert testimony on this issue, it is incredible that the jury would have done anything other than find that Deputy Aguirre was acting in the lawful performance of his duties when appellant murdered him.

### G. There Was No Misconduct In The Prosecution's Examination Of Appellant's Prison Expert

Appellant contends that during cross-examination, and in statements to the trial court at the penalty phase, the prosecutor committed misconduct by making unsubstantiated accusations against appellant's prison expert, James Park. (AOB 276-281.) Respondent disagrees as there is no support for the charge that these accusations were unsubstantiated and because the prosecutor properly pursued this area of impeachment.

At the penalty phase, appellant introduced expert testimony of James Park, a correctional consultant, to predict that appellant would make a positive adjustment while in prison. (51RT 9495, 9518, 9522, 9528.) Before this testimony, the prosecution objected on the ground that Park had not worked in a prison at a time where there was a punishment of life without the possibility of parole and that Park had allowed George Jackson into San Quentin without being searched, which resulted in Jackson smuggling a gun to an inmate, Stephen Bingham, who, in turn, killed four guards with the gun. (51RT 9466-9467.) Defense counsel argued that the prosecutor should not be permitted to raise an issue about an incident that occurred in the 1970's. (51RT 9467-

9469.) The trial court ruled that the prosecutor could ask on cross-examination about "what Mr. Park's career was and what promotions and demotions he had." The trial court precluded questioning about the Bingham incident. (51RT 9472.)

On cross-examination, after Park testified that he got a promotion after leaving San Quentin and was responsible for dealing with "activist attorneys," the prosecutor, at a bench conference, renewed his request to the trial court to be allowed to ask him about George Jackson in order to refute the jury's misconception regarding these facts. (51RT 9536-9537.) The trial court denied the prosecutor's request. (51RT 9537.) The prosecutor later asked Park about whether, with regard to the photographs of San Quentin that he took and were admitted as defense exhibits (see 51RT 9492, 9513-9517; Def. Exh. A-L), there were rules prohibiting taking photographs of Level 4 facilities, and Park stated that he was not aware of any such rules. (51RT 9549-9550.) The prosecutor asked whether photographs of prison facilities could aid in escapes. (51RT 9550.) Park said that this was "nonsense." (51RT 9550.)

At the hearing on appellant's motion for new trial, the trial court later called the prosecutor's behavior in dealing with Park to be "vitriolic, unnecessary and pointless" (55RT 10233) and "inappropriate" (55RT 10252).

As an initial matter, appellant forfeited his claim that the prosecutor improperly confronted the defense expert because appellant failed to object to the prosecutor's questioning on this ground at trial. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.) This Court should therefore reject appellant's claim.

Moreover, on the merits, despite the trial court's later criticism of the prosecutor's dealings with Park, the record does not indicate any impropriety.[5/]

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5. At the motion for new trial, the trial court ruled that none of the prosecutor's conduct justified finding reversible error. The trial court stated, "Be clear: Notwithstanding the acrimony which Mr. Hardy made very clear he felt for Mr. Howeth, I don't believe he ever misrepresented a fact to the

The prosecutor's questioning was pertinent to Park's credibility and reliability as a witness, focusing on Park's career, promotions, and demotions, including whether Park was promoted after he left San Quentin in 1973, whether he then took a stress leave, whether he received a stress retirement, whether he ever worked in a specific prison after San Quentin, whether he was transferred after San Quentin, and whether he ever had direct security responsibilities in any particular prison. (51RT 9529-9530.) All of this questioning was entirely consistent with the trial court's ruling and was relevant to Park's ability to make an accurate prediction at the penalty phase about whether appellant would make a positive adjustment if given a prison sentence of life without parole.

Furthermore, the prosecutor properly renewed his request to introduce evidence of Park's participation in the incident where an inmate killed prison officers due to Park allowing someone in the prison without searching him. This inquiry would have undermined Park's allegation that he got a promotion upon leaving San Quentin and explained why he never worked in a particular prison again or had any direct security responsibilities, facts that impeached his credibility as a prison expert.

Additionally, the prosecutor did not act improperly by asking Park whether, with regard to the photographs of San Quentin that he took and were admitted as defense exhibits (see 51RT 9492, 9513-9517; Def. Exh. A-L), there were rules prohibiting taking photographs of Level 4 facilities. In response to this inquiry, Park stated that he was not aware of this. (51RT 9549-9550.) This inquiry properly sought to establish that Park risked the safety of the prison by not following prison protocol in taking these photographs and therefore was not well-qualified to make safety predictions about appellant.

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Court or to the jury nor did he but with one exception argue improperly before the jury." (55RT 10252.)

Nor is there any support for appellant's claim that the prosecutor's questioning was "unsubstantiated." This Court has repeatedly rejected such an attack on the prosecutor's relevant impeachment on cross-examination, and it should do so again here. (See, e.g., *People v. Navarette* (2003) 30 Cal.4th 458, 512; *People v. Steele* (2002) 27 Cal.4th 1230, 1247-1249; *People v. Clark* (1993) 5 Cal.4th 950, 1016, disapproved on another ground in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421 & fn. 22.) Furthermore, the infamous Bingham incident was a subject of great notoriety. And Park's suspected involvement in the incident was well-documented. (See http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2001/08/19/CM145760.DTL&hw=prison&sn=045&sc=432 ["Ironically, it is Park himself who comes in for a scathing dressing down by one of the correctional officers working at the prison that day, the man who eventually, against his desire but following direct orders from Park, allowed Jackson to meet with his attorney, Stephen Bingham"].)

Moreover, even assuming error, there was no prejudice from the prosecutor's line of questioning. No evidence of the Bingham incident was admitted. Furthermore, Park acknowledged that in the more than a hundred times that he has testified as an expert, he never testified for the prosecution. (51RT 9532.) This diminished Park's credibility as an unbiased expert. In any event, Park's testimony ultimately aided the prosecution. Park testified that a person would be dangerous who would commit a dangerous act for the purpose of committing suicide by having a police officer kill him. (51RT 9557-9558.) The factual underpinnings of this hypothetical are reflected in the prosecution evidence that the jury accepted in finding appellant guilty; thus, even under Park's testimony, the jury would have found that appellant *would* be dangerous in prison. (See, e.g., Peo. Exh. 55 at p. 30 [where appellant states, during his conversation with Dr. Patterson, that he believes that "probably on the subconscious level," the shootings were "[a] passive suicide attempt. Cause I

don't think I could kill myself, but I was hoping that the officers would kill me"].)

Indeed, given appellant's conduct, from the kidnapping and rape of Alonzo, to the cold-blooded, execution-style killing of Deputy Aguirre, the jury would not reasonably believe that appellant was the type of person that would make a positive adjustment in prison. And aside from the issue of appellant's future dangerousness in prison, given appellant's vicious and unrepentant conduct in this case, and the profoundly destructive effect of appellant's murder on Deputy Aguirre's family, friends, and fellow officers, the jury still would have found the death penalty appropriate.

## H. There Was No Misconduct From The Prosecutor's Argument Regarding Appellant's Motive For Committing The Murder

Appellant contends that the prosecution falsely argued that appellant had a motive to kill because he had signed a parole form that advised him that he would be facing a sentence of 25 years to life for his next felony. (AOB 281-288.) Respondent disagrees as none of the prosecution's statements alleged that appellant's parole form advised him of this.

Initially, appellant did not object to any of the cited statements by the prosecutor at argument, or ask for a jury admonition. (32RT 6060-6061; 44RT 8144; 54RT 10022-10023, 10054, 10061.) He has therefore forfeited his claim on appeal. (*People v. Clair*, *supra*, 2 Cal.4th at p. 662.)

Moreover, as respondent explained in Argument VI, the trial court properly admitted evidence of appellant's prior convictions and parole to show that appellant's reason for committing the murder was to avoid returning to prison. As also explained in Argument VI, the prosecution could properly argue that the jury should infer from this evidence that appellant knew he would be subject to a sentence of 25 years to life, given appellant's recidivism and extensive experience in the penal system, and, moreover, given the

widespread awareness of the Three Strikes Law and its consequences.

Furthermore, contrary to appellant's argument, the prosecutor *never* stated the parole form explicitly informed him that he would be subject to 25 years to life. Instead, in his opening statement, after indicating that appellant was convicted of five felonies, the prosecutor stated,

> What did that mean for Michael Johnson? [¶] The next time up, the next felony, is 25 to life. On his parole he signed a piece of paper saying you can't possess firearms, because that's the next felony.

(32RT 6060.) The first of these statements, that appellant's next felony would mean he would be subject to a 25-year-to-life sentence, would ultimately be supported by the evidence at trial that because appellant's prior felonies were serious, the potential sentence for a new felony would be a minimum of 25 years to life. (36RT 6742-6743.) The other of these statements, that appellant signed a parole document that it would be a felony for him to possess a firearm, would be supported by testimony of appellant's former parole agent that testified to this. (36RT 6720-6722, 6725.)

Similarly, there was nothing inaccurate in the prosecutor's follow-up statement regarding this evidence, "The decision for Michael Johnson to possess firearms meant that if he was caught by the police, he was going back to prison, 25 to life" (32RT 6061). Nor did the prosecutor's statements suggest that the parole form explicitly informed appellant of this. Rather, the prosecutor made a reasonable inference from the evidence that would be elicited at trial. Thus, these statements in the prosecutor's opening statement were not improper.

The prosecutor's statements during the guilt phase closing argument also did not misstate the evidence. In this regard, the prosecutor argued:

> 1991 His parole agent notified him that he couldn't possess firearms. He signed something saying -- [¶] I knew this was going to happen. [¶] He signed something saying: I know I can't possess the firearms.

> The consequence is to go back to prison, *a consequence of 25 to life.* [¶] He knew that he could not -- that it was a felony to possess firearms; but still knowing that consequence, that merely having guns in his possession meant go back to prison, he decided to arm himself during July of 1997. Mr. Longobardi, if you could -- and this wasn't a rash decision to arm himself either. Again, when he decided to arm himself, it was knowing that that meant going back to prison. He did that weighing and decided that the need for those guns to shoot it out with the police or at least to commit crimes where he knew that that was a definite possibility, that decision was made with those consequences in mind.

(44RT 8144, italics added.) In context, the italicized phrase in the argument, "a consequence of 25 to life," was not referring to what appellant signed, i.e., a parole form stating that he knew he could not possess firearms. Rather it was an inference from the evidence that appellant knew that the "consequence" of possessing firearms would be a potential prison sentence of 25 years to life.

Likewise, there was nothing in the prosecutor's closing argument in the penalty phase leading the jury to believe that the evidence had been that the parole form itself stated that appellant would receive a sentence of 25 years to life. The prosecutor's statement that appellant "did not want to return to prison, where he knew that he was going to spend the rest of his life if he were even caught with those guns in his possession" (54RT 10022-10023), was, again, simply a reasonable inference from the evidence, as explained above. The same goes for the prosecutor's statement during argument, "In 1991 his parole agent told him you can't possess guns or you're going back to the joint. Twenty-five to life." (54RT 10054.) This statement was in the middle of a discussion of appellant's lengthy felony history, which, again, supported the inference that *at the time of appellant's current crimes in 1997*, he was well aware that possessing a gun meant that he would be subject to 25 years to life

in prison. (54RT 10052-10555.) And, as explained in Argument VI, it was entirely proper for the prosecutor to ask the jury to infer from the evidence that appellant's motive to kill Deputy Aguirre was to avoid the penal consequences arising from his possession of a gun (as well as from his kidnapping and rape of Alonzo). (554RT 10061.) The prosecutor's argument was therefore fair comment based on reasonable inferences from the evidence and in no way argued facts not in evidence.

Finally, as explained in Argument VI, even assuming impropriety, there was no prejudice. Contrary to appellant's argument (AOB 286-288), any error was not aggravated by the trial court's prohibiting defense counsel from mentioning the Three Strikes Law, as defense counsel had already made his argument to the jury that it not infer that appellant committed the murder in order to avoid returning to prison for 25 years to life. (45RT 8224-8227.) And, even assuming arguendo that it was improper for the jury to infer from the prosecutor's argument that appellant was seeking to avoid a 25-year-to-life sentence, rather than to avoid an unspecified (presumably lengthy) prison sentence from his felon firearm possession, rape, and robbery, this would not have made a tangible difference in the jury's evaluation of appellant's motive. Furthermore, there was overwhelming evidence of felony murder, an alternative theory of first degree murder in this case. Also, as to the penalty phase, the prosecution introduced evidence that appellant stated that he did not want to go back to prison (48RT 8966), independently evincing that he killed because he did not want to be incarcerated again, not because of any mental illness.

## I. There Was No Prosecutorial Misconduct As To Deputy Fryhoff's Testimony

Appellant contends that the prosecutor committed misconduct during the penalty phase by questioning Deputy Fryhoff regarding his feelings about

not having killed appellant, and then by convincing the trial court to allow testimony and argument regarding Deputy Fryhoff's feelings about not having killed appellant. (AOB 288-297.) Respondent disagrees as the prosecutor properly pursued this line of inquiry and argument.

As set forth in Argument X, below, the trial court properly permitted Deputy Fryhoff's testimony that he was upset that he did not kill appellant and that he had to live with this feeling everyday, because it demonstrated the specific harm that Deputy Aguirre's killing had on Deputy Fryhoff, and because the trial court expressly admonished the jury not to consider this testimony as an opinion on the verdict it should reach. The prosecutor's closing argument was consistent with this admonition, touching only on the guilt that Deputy Fryhoff experienced from this incident. (54RT 10058.)

Appellant's contention that the prosecutor managed to intimidate the trial court into allowing this evidence (AOB 291-297) is procedurally barred by his failure to object on this ground at trial (47RT 8675-8678). (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.)

His contention is also meritless. In discussing this issue with the trial court and defense counsel, the prosecutor complained about defense counsel's accusation of misconduct and said that he would not be "threatened" by defense counsel's accusations. But the prosecutor did not threaten the trial court regarding its potential ruling. The prosecutor merely made a persuasive, legally sound argument that the trial court ultimately agreed with:

> And if this jury doesn't know about how guilty this young man feels about the fact that he didn't kill Michael Johnson and why he didn't kill Michael Johnson and how he felt about that and how other officers feel about that, they're not gonna get a sense of the real impact here.

(47RT 8676-8677.) The prosecutor also explicitly acknowledged that "we're not to get into an opinion as to what should happen to Michael Johnson . . . ." (47RT 8675.) After considering this issue, the trial court made a sober,

reasoned decision that bore no sign of being the result of any intimidation by the prosecutor. (47RT 8677-8678.)

For similar reasons, there was no prejudice from the prosecutor's actions because the trial court made a correct ruling. Furthermore, the jury was properly instructed on the proper and improper use of Deputy Fryhoff's statement. And even without Deputy Fryhoff's statement at issue, the jury still would have heard the rest of his powerful testimony. (See Arg. X., *post.*)

### J. There Was No Prosecutorial Misconduct In Arguing Against The Admissibility Of Testimony From Appellant's Mother That She Did Not Want Appellant To Receive The Death Penalty

Appellant contends that the prosecutor, during the penalty phase, committed misconduct by vociferously objecting to appellant's mother's testimony that she did not want appellant to receive the death penalty, and by claiming defense misconduct from this questioning. (AOB 297-303.) Respondent disagrees, as the prosecutor's objection was correctly sustained by the trial court, and because the prosecutor reasonably suggested that defense counsel had committed misconduct.

Appellant's mother, Wilma Johnson, testified in the penalty phase on his behalf. During this testimony, defense counsel asked appellant's mother, "Would you or do you want to see him receive the death penalty?" Appellant's mother testified, "Of course not." The prosecutor stated, "Objection," and appellant's mother repeated, "Of course not." (50 RT 9316.) The prosecutor asked, "May we approach?" (50RT 9317.) The trial court, stated, "Mr. Hardy, please have a seat." (50RT 9317.)

Outside the presence of the jury, the prosecutor argued that defense counsel should be cited for misconduct for asking, despite the question's impropriety, whether appellant's mother wanted appellant to receive the death penalty. (50RT 9318.) Defense counsel apologized "if I asked the question in an improper manner," and the court fashioned a cautionary instruction

informing the jury that the decision in this case was theirs and to disregard the last question and answer as to appellant's mother. The court then instructed the jury accordingly. (50RT 9320-9322.)

At the motion for new trial, appellant argued that the prosecutor had committed misconduct by objecting in an inappropriate manner. The trial court described this objection as follows: "Mr. Hardy shouted, 'Objection.' It was clear to everybody in this courtroom he was very upset, which is exactly why I told him to immediately sit down. And thankfully he did. And the jury left." (53RT 9834.) The trial court also stated that the prosecutor "came up very loudly." (55RT 10237.) The trial court also stated that "in front of this jury, with but one exception that comes to mind -- and that's been raised in the Points and Authorities, with the rocket-like incandescence that he objected to the question posed to Mrs. Johnson -- his deportment has been just fine." (55RT 10171.) The trial court stated, "With respect to the Mrs. Johnson issue, it did not appear to me Mr. Hardy charged Mrs. Johnson at any time. He came straight up out of his chair and I immediately ordered him to straight back into his chair, which he did. . . . He did not go into the well; he just didn't. His behavior was intemperate when he came up. He immediately went down and then what ensued ensued. We have a record of that and I won't further explore it." (55RT 10263.)

To begin with, appellant forfeited his contention that the prosecutor committed misconduct in the manner that the prosecutor stated his objection and in arguing that defense counsel had committed misconduct by asking appellant's mother this question in front of the jury. Appellant did not timely object to the prosecutor's conduct and thus is barred from raising this objection on appeal. (*People v. Carasi, supra*, 44 Cal.4th p. 1315.) Indeed, the trial court emphasized that it would have been open to the possibility of an appropriate admonition in this situation if defense counsel had requested one. (See 53RT 9834 [where the trial court later stated, "But I want it to be clearly

stated that no doors were slammed, no gates closed to either side with respect to an appropriate admonition and/or further argument. And if somebody had said, 'Judge, I'm not sure about this, let's take a moment,' there are life's lessons that suggest I may have done just that"].)

In any event, the prosecutor's conduct, in objecting in an "intemperate" manner by standing up with "rocket-like incandescence," did not rise to the level of misconduct. As explained in Argument XI, below, defense counsel's question about appellant's mother's opinion regarding whether appellant should be executed was manifestly inappropriate and potentially prejudicial. It was thus proper for the prosecutor to object and understandable that in the face of the People's case being wrongly and blatantly undermined by defense counsel's question, the prosecutor would react with some vigor. (See *People v. Parson* (2008) 44 Cal.4th 332, 362 [a prosecutor is entitled to argue vigorously]; 53RT 9833 [where the trial court notes in mitigation that "one can suspect the hackles of a prosecution's neck rising when an exhibit is shown to the jury that no one said anything about. It's just there it is, shown to the jury. That wasn't proper"].) Additionally, the prosecutor immediately followed the court's direction and sat down after objecting. (55RT 10263.) Thus, the momentary burst of zealousness was not extreme, as appellant now paints it to have been. (55RT 10263.)

Further, given that defense counsel ought not to have asked a clearly improper question, the prosecutor was entitled to ask outside the presence of the jury that defense counsel be cited for misconduct. (Cf. *People v. Earp* (1999) 20 Cal.4th 826, 862 ["A prosecutor's suggestion or insinuation that defense counsel fabricated the defense is misconduct only when there is 'no evidence to support that claim'"].) Subsequently, when defense counsel asserted that he had not intentionally asked an improper question, the prosecutor reasonably decided not to continue pursuing this remedy, and assented to the trial court instructing the jury to disregard the question and

answer. (50RT 9320-9322.)

In any event, there was no prejudice from the prosecutor's manner of objecting. As the trial court found, with this one exception, the prosecutor comported himself properly in front of the jury. (55RT 10171.) This isolated instance of emotion before the jury does not warrant reversal. (*People v. Carter*, *supra*, 36 Cal.4th at p. 1277 ["For the most part, the prosecution's handling of its penalty phase responsibilities fell within the range of appropriate behavior. . . . Even were we to assume that the isolated incidents of which defendant now complains constituted misconduct, they were trivial in the context of defendant's trial and did not resemble or even approach the sort of misconduct that we have held to be prejudicial," citing *People v. Hill*, *supra*, 17 Cal.4th 800]; see also *People v. Friend*, *supra*, 47 Cal.4th at p. 31 ["it is not reasonably probable that the prosecutor's occasional intemperate behavior affected the jury's evaluation of the evidence or the rendering of its verdict," internal quotation marks omitted].)

Nor, contrary to appellant's argument, is there any reason to suppose that the trial court was threatened or intimidated by the prosecutor's actions. The trial court, after all, was the one that ordered the prosecutor to "have a seat" after his objection. (50RT 9317.) The trial court on its own fashioned the instruction and did not cite defense counsel for misconduct, despite the prosecutor's initial request. And, as more fully explained in Argument XI, the trial court's rulings and instructions were proper, and thus the prosecutor's spirited argument outside the presence of the jury could not have been prejudicial. Moreover, the jury heard emotional expressions of love for appellant from his mother during her testimony and there is no reason to believe appellant would have received a more favorable verdict had the jury also considered appellant's mother's opinion about whether he should live or die. Accordingly, any error was harmless under state or federal constitutional law.

## K. There Was No Misconduct From The Prosecutor's Reaction To The Defense Mental Health Expert's Testimony

Appellant contends that the prosecutor, Deputy District Attorney Hardy, committed prejudicial misconduct by rolling his eyes during the penalty phase testimony of defense witness Dr. Charles Hinkin, a neuropsychologist, who testified that appellant was delusional at the time of the murder. (AOB 303-306.) Respondent disagrees as there was no indication that the prosecutor meant to influence the jury in an improper manner. In any event, given Dr. Hinkin's unfounded testimony, the jury would have rejected it anyway.

In his written motion for a new trial, appellant attached declarations from two jurors that stated, "During testimony by defense expert witness Dr. Charles Hinkin, I observed Deputy District Attorney Matthew Hardy make eye contact with some of the jurors in the jury box and he was smirking and rolling his eyes at the testimony of Dr. Hinkin." (13CT 3290-3291.) Appellant argued that this was misconduct. (13CT 3277.)

In the responsive papers, the People argued that the juror affidavits were hearsay and should be stricken. (13CT 3307.) The People also argued, "Dr. Hinken's effeminate mannerisms and weak testimony, limited as it was by his failure to ask basic questions of the defendant during his interview of him, caused understandable reaction from the prosecution." (13CT 3308.) The People further argued, "Significantly, the jurors who alleged that eye contact was made [d]o not allege which jurors that eye contact was made with and how they could have seen both the prosecutor's actions and the jurors with whom this contact was made." (13CT 3308.)

At the hearing on the motion for new trial, appellant argued that the prosecutor rolled his eyes during Dr. Hinkin's testimony. (55RT 10233.) The trial court stated, "I did not see the business with Dr. Hinkin. Mr. Hardy's acknowledgement of it and explanation of why, which I'll also comment on later, established that something happened there but I was not aware of it,

nobody in the courtroom that I was aware of it at the time knew it so I can't reconstruct it." (55RT 10233-10234.)

In ultimately denying the motion for new trial, the trial court stated, in pertinent part:

> His behavior towards James Park and the allegation not denied by Mr. Hardy that he rolled his eyes during the testimony of Dr. Hinkin was inappropriate. . . . The conduct of the prosecutor during testimony by Dr. Charles Hinkin. I have commented on the incident of the eye-rolling. Clearly counsel should not so react. Mr. Hardy has acknowledged what he did. However, the Court cannot remain silent as with respect to his comment alluding to Dr. -- I quote -- Dr. Hinkin's "effeminate mannerisms," end quote, justifying his conduct. This is simply wrong-headed and unacceptable.

(55RT 10252-10253.)

Assuming that the prosecutor smirked and rolled his eyes at Dr. Hinkin's testimony, this would not appear to be suitable conduct for a prosecutor in a capital case. (See American Bar Association Project on Standards for Criminal Justice, Standards Relating to The Prosecution Function and The Defense Function (Approved Draft 1971) 5.2 Courtroom Decorum ["The prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to the rules of decorum and by manifesting an attitude of professional respect toward the judge, opposing counsel, witnesses, defendants, jurors and others in the courtroom"], cited in *People v. Hill, supra,* 17 Cal.4th at p. 832.) But there was no evidence that the prosecutor's apparent reaction to the defense expert's testimony was calculated to influence the jury or to demean defense counsel, that it was anything but a visceral reaction inadvertently experienced in a public setting, not intended to be witnessed by two jurors.

Further, the prosecutor's reaction was markedly less offending than the actions found to be misconduct in *People v. Williams* (2006) 40 Cal.4th 287, 322-323, where the prosecutor "slammed down" a notepad "in disgust" in addition to rolling his eyes. Slamming down a notepad would have a more jarring effect on a jury and is more of an authoritative and influential gesture by the prosecutor than a facial expression. And the prosecutor's response did not nearly rise to the egregious conduct recounted in *Hill*, where the prosecutor was

> audibly laughing in the middle of Blum's [defense counsel's] examination of both victim Ronald Johnson and witness Robbie Ventura, and getting out of her chair during Blum's examination of witnesses, standing in his line of sight, staring at him and making faces at him.

(*People v. Hill*, *supra*, 17 Cal.4th at p. 834.)

In any event, even if there was misconduct, it was not prejudicial. In *Williams*, where the prosecutor slammed down his writing pad in disgust and rolled his eyes, this Court held that the trial court did not abuse its discretion by denying the motion for new trial:

> The trial court was in the best position to gauge the exact nature of the prosecutor's conduct and its likely effect on the jury. Nothing in the record undermines the trial court's implicit conclusion that the prosecutor's brief episode of inappropriate conduct did not irreparably damage defendant's chance of receiving a fair trial.

(*People v. Williams*, *supra*, 40 Cal.4th at p. 323.)

Similarly, here, the trial court properly exercised its discretion in denying the motion for a new trial. The trial court acknowledged that the prosecutor should not have reacted in this manner to Dr. Hinkin's testimony, but implicitly concluded that this brief episode of impropriety in front of the jury did not prejudice the jury's verdict. (55RT 10252-10253.) The trial court

also properly distinguished the prejudicial error found in *People v. Hill*, which unlike this case, involved the prosecutor making affirmative misrepresentations and demeaning defense counsel before the jury. This Court found prejudicial error in *Hill* in large part because of the prosecutor's "pervasive campaign to mislead the jury on key legal points, as well as her unceasing denigration of defense counsel before the jury." (*People v. Hill*, *supra*, 17 Cal.4th p. 845.) No such repeated and flagrant misconduct was present here, only a momentary and minor lapse in decorum.

Moreover, there was no danger that without the prosecutor's reaction, the jury would have accepted Dr. Hinkin's weak testimony for the defense. Dr. Hinkin testified that appellant had paranoid schizophrenia, but also testified that he appeared relatively cogent and calm and not at all actively psychotic when he met with him. (49RT 9094-9095; 50RT 9185, 9238-9239.) Dr. Hinkin also acknowledged that if he had known that appellant had been working at the time of the murder (which he was), it would change his opinion in that "the exacerbation might not have been as acute . . . ." (50RT 9257.) Finally, Dr. Hinkin testified that a person can be a paranoid schizophrenic and a purposeful criminal at the same time. (50RT 9274.) Whether or not appellant suffered from a mental illness, he undoubtedly was a purposeful criminal, and the jury would have so concluded regardless of the prosecutor's reaction to Dr. Hinkin's testimony.

**L. Any Error Was Harmless**

In addition to the specific reasons listed above why each of the instances of alleged prosecutorial misconduct, if error at all, were harmless, they were also harmless because of the weighty evidence against appellant both at his guilt and penalty phases. (See Arg. IV.D, *ante*.) Given this overwhelming evidence, it is not reasonably probable that any of the alleged prosecutorial misconduct would have led to a more favorable result for appellant at the guilt

or penalty phases. Moreover, any such error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Welch*, *supra*, 20 Cal.4th at p. 753.)

## VIII.

## THE TRIAL COURT PROPERLY PERMITTED THE PROSECUTION TO CROSS-EXAMINE APPELLANT'S EXPERT USING A DEMONSTRATION

Appellant contends that the trial court prejudicially erred during the guilt phase by permitting the prosecution, during cross-examination, to have the defense wound ballistics expert participate in a demonstration. (AOB 307-318.) Respondent disagrees as the trial court properly exercised its discretion in determining that the demonstration had a proper foundation.

### A. Background

As part of his defense case, in order to rebut the prosecution evidence and show that the order of shots was not possible to determine and did not bear the marks of an execution-style murder, appellant called Dr. Martin Fackler, a wound ballistics consultant. (40RT 7287.) Dr. Fackler testified that based upon the materials provided to him in this case, it was not possible to determine in what order the three shots occurred. (40RT 7298-7299.) Dr. Fackler could not determine the position of Deputy Aguirre's head when he received gunshot wounds #1 and #2. (40RT 7299-7300.) On direct examination, Dr. Fackler concluded that sequencing the shots was not possible in this case. (40RT 7304.)

During cross-examination, the prosecutor had Dr. Fackler participate in a demonstration. Dr. Fackler held the murder weapon, the .45-caliber Colt 45, and stood in front of a manikin representing the victim, with Dr. Fackler's right arm bent slightly at a 90-degree angle, pointing the gun downward from about 12 inches away, in order to simulate the shot into the victim's forehead. (40RT

7339-7340.) The prosecutor asked Dr. Fackler, "Could you line it [the gun] up so that it not only lines up with the trajectory line but also lines up with an ejection pattern that would throw the casing into the living room?" (40RT 7343.) The trial court sustained appellant's objection for lack of foundation. (40RT 7343.) After a sidebar discussion, the trial court stated that it would allow the prosecutor to ask a hypothetical by having Dr. Fackler assume an ejection pattern. (40RT 7344-7345.)

The prosecution then asked Dr. Fackler to assume a pose based on the ejection pattern that criminalist James Roberts testified to, and the trajectory at 12 inches as demonstrated by a trajectory rod. (40RT 7345-7346.) After appellant objected for lack of foundation, the trial court asked, "Can you do that based on the hypothetical that has been given to you, Doctor?" (40RT 7346.) Dr. Fackler stated, "Yes, I can try and give what I think is -- knowing that this is not my field of expertise, and I'll give it a try. . . . Fine." (40RT 7346.) The trial court admonished the jury that in this hypothetical, Dr. Fackler was to assume earlier testimony of criminalist James Roberts to be true. (40RT 7347.)

Dr. Fackler then took a position where he was "standing bent over slightly at the shoulders. [¶] His right arm, the upper portion of it, is coming out in an angle to the ground of about 45 degrees. Then the front portion of his arm now goes down to the point where the gun is held, in what looks -- pointed downward along the trajectory rod." (40RT 7347.) Dr. Fackler elaborated on this position as follows:

> I took this position because I -- this is a position that I think with absolute certainty we could say it would go into the living room. But I think there are a range of positions. [¶] If I moved around to even -- even this position, I think it would still go into the living room. Or if I moved to this position. So I think there is a range of angles over which this gun could be moved that would put it into the living room. And I

was just showing one of them when I did this. This doesn't mean the only one.

(40RT 7348.)

The prosecutor again had Dr. Fackler assume the same general ejection pattern and trajectory and take a position in which the ejection port would be directed into the living room. (40RT 7348-7349.) Dr. Fackler took a position where he "stepped over the manikin, has now positioned the gun again on the 12-inch part of the trajectory probe, placed the gun in position such that his body was in fact positioned in what -- in the area of what would be the living room . . . [a]nd immediately adjacent to what would be the right side of the manikin as it is positioned on the floor at or about the -- between the position of the wrist and elbow of the right arm." (40RT 7349.)

The prosecutor then had Dr. Fackler take a position relating to the shot in the left side of the victim's forehead. (40RT 7351-7352.) Dr. Fackler, as described by the prosecutor, "had . . . taken the gun, placed it in a position up consistent with 36 inches and held his hand over his head -- I'm sorry, higher than his head, with his wrist crooked so that the gun could go downward." (40RT 7352.)

**B. Analysis**

"It is settled that a trial court has discretion to admit 'experimental' evidence." (*People v. Bradford, supra*, 15 Cal.4th at p. 1326.) This Court has set forth the standard for admitting experimental evidence:

> Admission of such evidence depends upon proof of the following foundational items: (1) The experiment must be relevant [citations]; (2) it must have been conducted under at least substantially similar, although not necessarily absolutely identical, conditions as those of the actual occurrence; (3) the qualifications of the individual testifying concerning the experimentation must be demonstrated with some

particularity; and (4) evidence of the experiment will not consume undue time, confuse the issues, or mislead the jury.

(*People v. Turner* (1994) 8 Cal.4th 137, 198, citing *People v. Bonin* (1989) 47 Cal.3d 808, 847, abrogated on another ground by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

As a preliminary matter, although appellant objected at trial to the contested evidence as lacking adequate foundation, he did not object on the additional, constitutional grounds he summarily raises under the "Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the state constitutional counterparts . . . ." (AOB 307.) Consequently, he had forfeited these constitutional claims on appeal. (*People v. Riggs*, *supra*, 44 Cal.4th at p. 292.)

Further, applying this Court's four-part foundational test shows that the trial court acted well within its discretion in permitting Dr. Fackler to participate in the demonstration and give his opinion based on the demonstration. First, the experimental evidence was relevant to show that appellant shot Deputy Aguirre at close range after Deputy Aguirre had already been shot and was on the ground. This tended to show that appellant premeditated the murder. Although appellant argues that Dr. Fackler's testimony added nothing to the prosecution expert testimony (AOB 312-314), the point of cross-examining this defense witness was not to present prosecution evidence, but to rebut Dr. Fackler's testimony that it was not possible to determine the sequencing of shots and that he could not determine the position of Deputy Aguirre's head when he received gunshot wounds #1 and #2. (40RT 7299-7300, 7304.)

Second, the experiment was done under substantially similar conditions as the actual occurrence. The prosecutor had Dr. Fackler assume for his hypothetical the same ejection and trajectory patterns that prosecution expert witnesses James Roberts and Margaret Schaeffer had testified to regarding the

shooting. (40RT 7345.) The trial court also specifically admonished the jury that the gun was being positioned according to this assumption and that this was just a hypothetical. (40RT 7347.)

Appellant contends that the difference in height between appellant and Dr. Fackler rendered him unable to do the demonstration, based in part on Dr. Fackler's statement that this was "an awkward position." (AOB 314 & fn. 55; 40RT 7352.) But Dr. Fackler accounted for this height difference by having "taken the gun, placed it in a position up consistent with 36 inches and held his hand . . . higher than his head, with his wrist crooked so that the gun could go downward." (40RT 7352.) Thus, the demonstration substantially conformed to the prosecution testimony regarding the conditions of the shootings.

Third, Dr. Fackler's qualifications were demonstrated with particularity. The trial court allowed Dr. Fackler to testify for the defense as a wound ballistics consultant after he extensively described his experience and training. (40RT 7287-7293.) Although Dr. Fackler stated during the prosecutor's hypothetical that he did not know whether the gun was a "right-ejecting .45" because "[e]jection patterns are not something in my field of expertise," the prosecutor then simply asked him to assume that it was right-ejecting (40RT 7341-7343); thus, ultimately, he was not asked to go beyond his expertise. (40RT 7341-7343.) Therefore, contrary to appellant's contention (AOB 315-316), the prosecution did not cast Dr. Fackler as an expert on ejection pattern and trajectory. Dr. Fackler properly rendered an opinion in his specific area of expertise about the position of the gun based on the hypothetical facts presented to him. (40RT 7345-7350; see *People v. Ward* (2005) 36 Cal.4th 186, 209 [an expert may render opinion testimony on the basis of facts given in a hypothetical question, as long as the question is rooted in facts shown by the evidence].)

Fourth, the evidence of the experiment did not consume undue time, confuse the issues, or mislead the jury. The experiment was brief, recorded in only 13 pages of cross-examination by the prosecutor (40RT 7339-7352), and further explored in four pages of redirect examination by defense counsel (40RT 7362-7366). It did not confuse the issues; instead it properly focused the jury's attention on the core factual dispute regarding premeditation—whether appellant discharged the final shot in an execution-style manner. And the evidence did not mislead the jury, as the trial court specifically admonished the jury that the demonstration was based solely on a hypothetical derived from prosecution evidence. Further, defense counsel had the opportunity to, and did, attack the validity of this hypothetical on redirect examination. Under these circumstances, appellant's allegation that the prosecution's demonstrations "were likely to inflame the passions of the jurors" (AOB 316) falls flat.

Even assuming the trial court abused the discretion by admitting this experimental evidence, it is not reasonably probable that this evidence by itself changed the outcome of the guilt phase. (*People v. Bonin*, *supra*, 47 Cal.3d at p. 848, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The trial court admonished the jury that Dr. Fackler was basing his opinion solely on hypotheticals. Further, defense counsel's line of redirect examination clearly reminded the jury that Dr. Fackler did not have expertise in ejection patterns. (40RT 7362.)

Moreover, even without this demonstration, Dr. Fackler's testimony for the defense was still severely undermined. On cross-examination, Dr. Fackler testified that he based his opinions only on the physical evidence he was provided, not on any testimony received in the case. (40RT 7316.) Dr. Fackler also never received information about where appellant came from as he began shooting. (40RT 7324.) Dr. Fackler was not provided any information that when appellant was stopped, he was found lying on his back face up, .45-

caliber gun to his right, .32-caliber gun to his left. (40RT 7367.)

Once given additional information about these and other hypothetical facts rooted in the evidence, Dr. Fackler made conclusions consistent with the prosecution theory that the murder was in an execution style. In this regard, Dr. Fackler concluded that the three east to west trajectories were fired before the fourth one. (40RT 7331.) He further concluded that gunshot wound #2 was most likely the last shot. (40RT 7334.) Also, he opined that gunshot wound #1 was from about three meters away, and at least three feet away. (40RT 7334, 7350.) Ultimately, after seeing additional evidence in this case, Dr. Fackler did not contest the trajectory coming through the head from the floor. (40RT 7334-7335, 7338-7339.) In light of Dr. Fackler's modified opinion based on this additional information, it is unlikely that the jury would have believed his earlier testimony that it was not possible to sequence the shots.

Finally, other prosecution evidence of appellant's premeditation was overwhelming, and the defense evidence was weak. (See Arg. IV.D, *ante*.) Also, any defense evidence that appellant's shots were not from close range did not undermine the weighty evidence supporting the alternative ground of first degree, special circumstance murder in this case of murder in the commission of a kidnapping. Accordingly, any error was harmless.

## IX.

## THE TRIAL COURT PROPERLY PERMITTED EXPERT TESTIMONY ON APPELLANT'S PRIOR CONVICTIONS

As part of its case in chief in the guilt phase, the prosecution called Terence Kilbride, a Ventura County Senior Deputy District Attorney. (36RT 6727.) Kilbride elucidated documents showing that appellant was convicted of five felonies, four of which were "serious felonies under the Penal Code." Kilbride explained that because of these convictions, appellant's potential

prison sentence upon committing another felony would 25 years to life. (36RT 6731-6736, 6742-6743; Peo. Exhs. 18A-E.) This prior conviction evidence was probative and admissible to show that appellant's reason for committing the murder was to avoid returning to prison. (See Arg. VI., *ante*.) This evidence was also admissible to prove that appellant committed count 5, felon in possession of a firearm with five prior felonies.[6/]

Appellant contends that the trial court violated his right to trial by jury by allowing the prosecution to introduce this expert testimony that he had prior convictions and was subject to a 25-year-to-life sentence upon commission of another felony. (AOB 319-328.) Respondent disagrees. There was no violation of appellant's right to jury trial because the jury decided whether appellant had suffered these priors. Further, the prosecution expert gave helpful and qualified testimony on this issue, and did not opine on any pure question of law.

First, contrary to appellant's argument, Kilbride's testimony did not usurp a constitutional requirement that the jury determine his prior convictions. (AOB 322-326.) In fact, a criminal defendant does not have a state or federal constitutional right to a jury trial regarding the truth of prior conviction allegations against him. (*People v. Wiley* (1995) 9 Cal.4th 580, 589.) Section 1025, subdivision (b), however, provides generally for such a right:

> Except as provided in subdivision (c), the question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty . . . .

Here, the jury found beyond a reasonable doubt that appellant suffered five prior convictions in finding him guilty of possession of a firearm with five prior felonies. (10CT 2708.) Indeed, the jury's verdict form specifically asked

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6. Defense counsel stated that he did not wish to bifurcate the proof of the prior convictions. (18RT 3099.)

the jury to check off whether each of these five prior convictions was true, and the jury did so. (10CT 2721.) To the extent that Kilbride's testimony embraced an ultimate issue of fact—the truth of these prior convictions—this did not make it objectionable. (*People v. Coffman* (2005) 34 Cal.4th 1, 77.)

Appellant further argues that during closing argument, "the prosecution encouraged the jury to do nothing other than follow Kilbride's instruction," in stating:

> "But I submit to you if you listen to Mr. Kilbride's testimony, which is uncontested in the case, you will find that every one of these priors and all the appropriate findings are laid out very, very well in that testimony."

(AOB 323, quoting 44RT 8137.) But this statement was not an appeal for the testimony to be treated as a "conclusive presumption," as appellant argues. The prosecutor instead was asking that the jury be guided by this testimony in helping it interpret the prior conviction documents that the prosecution submitted as evidence. (See Peo. Exh. 18.) In fact, the prosecutor explained that Kilbride's testimony should be used as an aid, and never argued it should act as a substitute for the jury's factfinding role, when he later argued, "And again, I submit to you that an examination of Mr. Kilbride's uncontested testimony in this will serve you well." (44RT 8195.) Further, in an earlier part of his argument, the prosecutor emphasized that it the jury's role to make this decision, arguing, "Finally, there are a number of findings you will have to make based on the findings of priors." (44RT 8137.)

The trial court's admonishment to the jury after Kilbride's testimony also informed them that they should not blindly accept Kilbride's testimony that appellant had prior convictions, but had to make their own decision based on the evidence:

> The evidence that has been introduced concerning the purported history of the defendant has been introduced for the purpose of showing

that the defendant has suffered certain felony convictions, to which you have now heard evidence. [¶] The evidence of prior convictions, if believed, may not be considered by you to prove that defendant is a person of bad character . . . . You are only permitted to use this evidence for the limited purpose of deciding the following issues. [¶] One, whether in fact the defendant did suffer the felony convictions. . . . And three, whether such felony convictions, if true, establish that the defendant was a convicted felon within the meaning of Count 5 of the Information, felon in the possession of a firearm.

(36RT 6744-6745.)

Appellant also claims that Kilbride's testimony usurped the trial court's role in instructing the jury by interpreting the Three Strikes Law. Essentially, he is arguing that it was improper expert testimony. (AOB 324-326.) But appellant never challenged Kilbride's testimony below on the ground that it was based on the law. Instead, he argued at trial that the admission of this evidence that appellant was subject to a 25-year-to-life sentence did not tend to establish motive and violated Evidence Code section 352. (7CT 1792-1815; 18RT 2991.) Because he did not object to the evidence as improper expert testimony below, he has forfeited his claim on appeal. (*People v. Lindberg* (2008) 45 Cal.4th 1, 47-48; *People v. Roberts* (1992) 2 Cal.4th 271, 298; Evid. Code, § 353.)

Moreover, the trial court properly exercised its discretion in permitting Kilbride to testify. "[T]he decision of a trial court to admit expert testimony will not be disturbed on appeal unless a manifest abuse of discretion is shown." (*People v. Roberts*, *supra*, 2 Cal.4th at p. 298.) "Such abuse of discretion will be found only where the evidence shows that a witness *clearly lacks* qualification as an expert . . . ." (*People v. Chavez* (1985) 39 Cal.3d 823, 828, internal quotation marks omitted.) "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient

to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) As a general rule, the opinion of an expert is admissible when it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . ." (Evid. Code, § 801, subd. (a).) "[T]he determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the jury in the search for the truth." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 38.)

Deputy District Attorney Kilbride was qualified to testify about whether appellant had prior convictions based on the section 969b packet and other documents that he reviewed, and about whether appellant would be subject to a 25-year-to-life sentence upon committing another felony. As a senior deputy district attorney, he had prosecuted a wide variety of misdemeanor and felony cases in his 23-year career as a prosecutor with the Ventura County District Attorney's Office. (36RT 6727-6728.) Furthermore, his testimony assisted the jury in determining whether appellant had prior convictions by interpreting these court and corrections documents. Similarly, his specific expertise as a felony prosecutor assisted the jury in the search for the truth of whether appellant was subject to a 25-year-to-life sentence for kidnapping Alonzo, a factual issue relating to his motive for murdering a police officer. These matters were beyond the experience of the average juror, and expert testimony on these topics assisted the trier of fact.

Appellant's citations of several cases for the proposition that an expert may not opine on questions of law (AOB 324-326) are readily distinguishable. These cases involve the prohibition against experts opining on pure questions of law and testifying "on matters which are essentially within the province of the court to decide." (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 266; see *People v. Gosset* (1892) 93 Cal. 641, 645-646 [definition of the illegal card game "faro"]; *People v. Rose* (1890) 85 Cal. 378, 382 [definition of the

legal term "bunco game"]; *People v. Carroll* (1889) 80 Cal. 153, 157 [definition of the legal term "banking game"]; *Adams v. City of Fremont, supra*, 68 Cal.App.4th at pp. 265-266 [whether "increasing the anxiety level at the scene or rushing the situation" implicates a duty of care]; *Williams v. Coombs* (1986) 179 Cal.App.3d 626, 638 ["opinion on the legal question of probable cause"], disapproved on another ground in *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 885-886; *Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841 [legal standard to use in determining whether the transfer was a gift or deferred compensation].) "The principle found in the above cases is that an expert may not attempt to define a statutory term when its definition is a matter of law on which the court should instruct." (*People v. Clay* (1964) 227 Cal.App.2d 87, 98.)

Whether appellant suffered prior convictions, by contrast, was an issue of fact, not of law. And whether appellant was subject to a 25-year-to-life sentence in July 1996, although an issue involving the application of the Three Strikes statutes, was not simply a pure question of law. As a key factual issue in the case, it was not improper that the jury decide it. Kilbride's opinions did not purport to define the law or set forth a legal standard for the jury to apply. It therefore did not invade the province of the court for Kilbride to express his opinion on the subject.

In any event, any error in permitting Kilbride to opine that appellant had these prior convictions, and that appellant would be subject to a 25-year-to-life sentence rather than having the trial court instruct the jury on the Three Strikes statutes, was manifestly harmless. There was no dispute at trial about these facts, which were established by the correctional and court documents. Appellant did not cross-examine Kilbride, challenge the prosecution's documentary evidence, or argue to the jury that appellant did not in fact have five prior felony convictions or that as a result he was not subject to a life sentence upon committing another felony. Under these circumstances, the

prosecutor quite rightly argued that the felon in possession of a firearm charge had effectively "been conceded by the defense" (44RT 8194) and that these priors were "not contested" (44RT 8195). Therefore, it is not reasonably probable that the jury would have reached a different result without the alleged infringement on the jury's statutory role in determining the validity of these priors, and without the allegedly improper expert opinion evidence on the future consequences of these priors. (*People v. Prieto* (2003) 30 Cal.4th 226, 247 [any improper admission of expert testimony harmless under *Watson* where there was other, overwhelming evidence of guilt]; *People v. Epps* (2001) 25 Cal.4th 19, 28-30 [failure to submit prior conviction allegations to jury harmless under *Watson* where "the prior conviction records were official government documents clearly describing the alleged convictions" and thus "the fact of the convictions was presumptively established"].)

## X.

## THE TRIAL COURT PROPERLY ALLOWED THE TESTIMONY OF DEPUTY FRYHOFF THAT HE WAS ANGRY THAT HE DID NOT KILL APPELLANT

Appellant contends that the trial court erred by permitting the introduction of Deputy Fryhoff's testimony during the penalty phase that he was angry that he did not kill appellant. (AOB 329-345.) Respondent disagrees, as Deputy Fryhoff's testimony was relevant victim impact evidence and did not state an opinion as to what the jury's verdict should be.

### A. Background

After appellant shot Deputy Aguirre, and then fired at Deputy James Fryhoff, Deputy Fryhoff shot appellant and apprehended him. Before Deputy Aguirre died, Deputy Fryhoff stayed with him until the ambulance came. At the penalty phase, Deputy Fryhoff testified that he had become Deputy Aguirre's training officer. As victim impact evidence, Deputy Fryhoff testified

about how he and Deputy Aguirre had become very close, and how his own life was drastically affected by Deputy Aguirre's killing.

During this penalty phase testimony, the prosecutor asked Deputy Fryhoff, "How do you feel about the fact you didn't kill him?" Defense counsel made an objection, which the trial court sustained. (47RT 8674-8675.) At sidebar, the prosecutor asked the trial court to reconsider its ruling because the guilt that Deputy Fryhoff felt for not killing appellant had a strong impact on his life. (47RT 8675-8676.) Defense counsel argued that it would be prosecutorial misconduct to allow this testimony because it would be commenting on the ultimate punishment in this case. (47RT 8676.)

The trial court ruled that the prosecutor would be allowed to ask Deputy Fryhoff, "'What are your emotions that have resulted from the events of that day?'" but not ask "'Do you wish you'd killed him?'" (47RT 8677-8678.) The trial court stated that in the context of his emotions resulting from that day, Deputy Fryhoff would be permitted to say that he wishes that he would have killed appellant. (47RT 8677-8678.) The trial court stated that it would admonish the jury that "the question of punishment is not as to any victim or person involved; it is divested in the jury to make a decision." (47RT 8678.) The trial court sustained defense counsel's objection to the prosecutor's question as framed. (47RT 8678.) The following colloquy then ensued:

Q. [THE PROSECUTOR] Describe your emotions for us regarding that part of the incident, the fact that you shot Michael Johnson.

A. [DEPUTY FRYHOFF] Um, I'm very upset with myself that I didn't kill him.

Q. Is that something that you think about often?

A. That's something I have to live with every day.

Q. Does it make you feel that somehow you were a failure as an officer?

A. Yeah. It makes me very hostile that I wasn't able to do it.

(47RT 8678-8679.)

### B. There Was No Error From The Admission Of Deputy Fryhoff's Testimony

Evidence showing the impact that a defendant's crime caused to victims can be admitted in a penalty phase of a capital trial so that the jury may assess the defendant's moral culpability. (*Payne v. Tennessee* (1991) 501 U.S. 808, 819 [111 S.Ct. 2597, 115 L.Ed.2d 720]; *People v. Salcido* (2008) 44 Cal.4th 93, 151.) Evidence that the defendant's acts caused specific harm to others is considered to be a circumstance of the crime and is therefore admissible pursuant to section 190.3, factor (a). (*People v. Kelly* (2007) 42 Cal.4th 763, 793; *People v. Edwards*, *supra*, 54 Cal.3d at pp. 833-836.) However, a prosecution witness may not testify as to his or her opinion on the appropriate punishment for the capital defendant. (*People v. Lancaster* (2007) 41 Cal.4th 50, 97; *People v. Smith* (2003) 30 Cal.4th 581, 622-623, 631-632.)

Here, the trial court properly admitted Deputy Fryhoff's testimony that he was upset with himself that he did not kill appellant, that he had to live with this feeling every day, that this made him feel like a failure as an officer, and that he became a very hostile person because he did not kill him. (47RT 8678-8679.) This was potent evidence that was very relevant to show the specific harm to Deputy Fryhoff that appellant's murder of Deputy Aguirre caused. This testimony also explained, in part, why, since Deputy Aguirre's killing, Deputy Fryhoff has been changed emotionally, in that he is now angry all the time, snaps for no apparent reason, and yells at his fiancee and then says he does not know why. (47RT 8688.) This expression of guilt regarding the man that killed his law enforcement "brother" (47RT 8673) and that attempted to kill him was probative to show the specific impact the killing continued to have on his life.

Contrary to appellant's contention, Deputy Fryhoff's testimony did not purport to inform the jurors that they should sentence appellant to death. It is true that the purpose of Deputy Fryhoff's testimony, as well as that of the other prosecution witnesses, was to help influence the jury's penalty decision. But, as with the other witnesses, it was for the right reason. Deputy Aguirre was a treasured member of the sheriff's department and a loving husband, father, son, and brother. Appellant's cold-blooded murder of Deputy Aguirre naturally had a profound effect on his family and the people he risked his life with and for every day.

Moreover, the trial court's admonitions and instructions to the jury regarding the purpose of this testimony removed any possible doubt that the jury would have somehow interpreted this evidence as an opinion as to what they should do, as opposed to an account of how Deputy Fryhoff was impacted. Soon after Deputy Fryhoff's testimony on this point, the trial court instructed the jury as follows:

> Ladies and gentlemen of the jury: I admonished you yesterday concerning the role that you play in this case. I have a further admonishment to give to you.
>
> You have heard an opinion by a witness concerning very strong feelings that he feels about what should happen to the defendant. That is not received as an opinion of what he feels ought to be done in this case. That is offered as what you have heard referred to as victim impact evidence as his subjective feelings.
>
> The decision concerning the punishment is exclusively yours and is to be measured by the criteria upon which you have been instructed and again will be instructed, that being specifically the factors in aggravation and mitigation that were dwelled on at great length yesterday by both counsel.

You must remember you are not instruments of one side or the other but, rather, of the law. It is incumbent upon you to apply the rule of law fairly and justly throughout the course of these proceedings.

(47RT 8690-8691.)

Appellant argues that this admonition was "confusing and equivocal" because the trial court "advised the jury that Fryhoff's testimony should be considered as his opinion of what he believed should happen to appellant but was not to be considered as opinion testimony of what Fryhoff believed appellant's sentence should be, which, arguably sounds very much like what he believed should happen to appellant." (AOB 342.) As an initial matter, appellant forfeited his right to object to this admonition on appeal because he failed to object when the trial court proposed it. Rather, in response to the trial court's proposed admonition, defense counsel stated, "Submitted." (47RT 8681.)

Appellant nonetheless maintains that he only was silent in the face of the trial court's proposal regarding "the form, not the substance of the admonition." (AOB 342, fn. 58.) But the record belies his assertion. Before Deputy Fryhoff's testimony completed, the trial court ordered a brief recess. Outside the presence of the jury, the trial court told counsel:

When the jury comes in, at the conclusion of the testimony of Deputy Fryhoff who remains upon the witness stand as I speak, once he has concluded his examination I intend to instruct the jury *substantially* as follows, and I have drafted a comment and I will certainly invite counsel's critique of it, if it conforms to your understanding of the comments at bench.

But I will tell the jury *in substance* that: [indented paragraph] "The opinion received from Deputy Fryhoff of what he thought ought to have occurred is just that: his opinion. The decision concerning punishment is yours and exclusively yours, to be measured by the criteria upon

which you have been and again will be instructed."

(47RT 8681, italics added.) The trial court thus did announce the substantive nature of the later admonition. And, perhaps most significantly, at the time of the admonition, appellant never objected to the language that he now complains about. (47RT 8690-8691.) He therefore has forfeited his claim on appeal. (*People v. Loker* (2008) 44 Cal.4th 691, 706.)

In any event, there was no danger that the trial court's instruction would be misconstrued. Deputy Fryhoff unambiguously testified that he wished that he had killed appellant at the time of the murder and attempted murder, and unambiguously did not testify about what should happen to appellant in the trial. (47RT 8678-8679.) Thus, the trial court's (or court reporter's?) apparent mistake in verb tense—"feels about what should happen to the defendant" rather than "feels about what should have happened to the defendant" would not have confused the jury in light of the entire admonition, which distinguished between the witness's feelings about a past event and the jury's exclusive role to determine what appellant's punishment should be, taking into account this "victim impact evidence . . . ." (47RT 8690-8691.)

Further, when giving the penalty phase instructions, the trial court reiterated this principle in more detail, also for the purpose of addressing testimony that was elicited by defense counsel from appellant's mother:

> At the time Mrs. Johnson testified you were instructed to disregard her opinion on the question of penalty or punishment. I wish to clarify that point: The question of penalty or punishment is yours to decide based upon the factors in aggravation and mitigation upon which you are now being instructed. Not included is any perception you may have of the feelings or desires of any witness on that question including the family of Deputy Aguirre and the family of Mr. Johnson, or, of any other witness. To the extent that you heard evidence of the impact of defendant's conduct upon others it was not offered and cannot be

considered by you as indicating the desires of the witnesses as to the proper punishment. Such evidence was received as a component of the "circumstances of the crime" relative to the harm caused by the crime and the blameworthiness of defendant. You are expressly instructed that you are not to in any way consider what you may believe or suspect to be a witness' desire for punishment.

(12CT 3223; see 54RT 9970-9971.) Thus, the jury was properly instructed to consider Deputy Aguirre's testimony for the proper purpose of evaluating the harm caused by the crime and not for the purpose of what it might suspect to be the witness's desire for punishment. This Court should presume that the jury followed these instructions. (*People v. Holt*, *supra*, 15 Cal.4th at p. 662.)

Finally, any error was harmless. Even without this alleged statement of opinion, the rest of Deputy Fryhoff's powerful victim impact testimony would still have been admitted. And, as set forth above, Deputy Fryhoff's testimony was only a part of an independently overwhelming prosecution case against appellant at the penalty phase. (See Arg. IV.D, *ante*.) Accordingly, it is not reasonably possible that appellant would have obtained a better result at the penalty phase if the trial court had excluded this one passage of Deputy Fryhoff's testimony. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232; *People v. Mickey*, *supra*, 54 Cal.3d at p. 682.)

## XI.

## THE TRIAL COURT PROPERLY EXCLUDED APPELLANT'S MOTHER'S TESTIMONY ON WHETHER HE SHOULD RECEIVE THE DEATH PENALTY

Appellant contends that the trial court should not have excluded testimony from appellant's mother at the penalty phase that she would not want him to receive the death penalty, and further erred in instructing the jury in strong terms that it should disregard the testimony. (AOB 346-362.)

Respondent disagrees. Appellant forfeited this claim by not objecting below to the court's ruling or to its subsequent admonition. Moreover, the trial court properly ruled that it was legally impermissible for appellant's mother to opine about whether the jury should reach a verdict of death, and properly instructed the jury to disregard this testimony. In any event, any error was harmless given appellant's mother's other testimony and the trial court's later instruction to the jury.

**A. Relevant Facts**

At the penalty phase, appellant called as a witness his mother, Wilma Johnson. She testified in support of his claim that he suffered from an organic delusional disorder, namely that he had delusions about pork. (50RT 9313.) Appellant used to tell his mother that when he ate pork, he had bad dreams, and one time made her take some bacon fat out of her refrigerator because he believed it was contaminating his food. (50RT 9316.)

After this testimony regarding appellant's views on pork, the following colloquy occurred between defense counsel and appellant's mother:

Q. You're acutely aware, I'm sure, of why we're here. Do you still love your son Michael?

A. Very much.

Q. Would you or do you want to see him receive the death penalty?

A. Of course not.

(50RT 9316.) The prosecutor stated, "Objection," and appellant's mother repeated, "Of course not." (50RT 9316.)

Outside the presence of the jury, the prosecutor argued that defense counsel should be cited for misconduct for asking whether appellant's mother wanted him to receive the death penalty in violation of the law. The trial court asked defense counsel whether he had any response. Defense counsel stated, "No, your Honor, I'll submit it." The trial court asked defense counsel what

remedy the prosecutor suggested. (50RT 9318.) The prosecutor suggested that the trial court give an instruction along the same lines as the one it gave to the jury after Deputy Fryhoff's testimony. (50RT 9319.) Defense counsel stated that he did not clearly understand "what's called reverse victim impact" and stated, "[I]f I asked the question in an improper manner, I apologize to the Court and counsel." The trial court stated that case law "expressly states that the opinion of family and friends of the defendant concerning the outcome of the penalty phase is inadmissible evidence." (50RT 9320.)

After a pause in the proceedings, the trial court announced that it had "fashioned an instruction which I think restores balance and I'll hear comment." The trial court then read to counsel its proposed jury admonition. The prosecutor stated, "That sounds very good." Defense counsel stated, "Submitted." (50RT 9321.) Accordingly, the trial court called the jury back in and gave a jury admonition to disregard the question and reply regarding whether appellant should receive the death penalty. (50RT 9322.) When giving the penalty phase instructions, the trial court reiterated the substance of its admonition to the jury regarding appellant's mother's testimony, and tied the instruction to the jury's duty to consider factors in aggravation and mitigation. (12CT 3223; see 54RT 9970-9971.)

**B. Forfeiture**

Initially, appellant forfeited his claim of error that the trial court erred in excluding appellant's mother's testimony, because, when asked if he had any response to the prosecutor's argument that this type of testimony was inadmissible, simply stated, "No, your Honor, I'll submit it." (50RT 9318.) Arguably, defense counsel even acknowledged the impropriety of the question at issue, stating, "[I]f I asked the question in an improper manner, I apologize to the Court and counsel." (50RT 9320.) Under these circumstances, appellant failed to make a sufficient offer of proof to preserve his claim on appeal.

(Evid. Code, § 354; *People v. Davis* (1995) 10 Cal.4th 463, 501, fn. 1, 533, fn. 31; *People v. Price* (1991) 1 Cal.4th 324, 448.)

### C. The Trial Court Properly Instructed The Jury Not To Consider Appellant's Mother's Testimony Opining On Whether He Should Receive The Death Penalty

This Court, in *People v. Smith* (2005) 35 Cal.4th 334, synthesized the law on when to admit defense testimony about whether the defendant should receive the death penalty: "[E]vidence that a family member or friend wants the defendant to live is admissible to the extent it relates to the defendant's character, but not if it merely relates to the impact of the execution on the witness." (*People v. Smith*, *supra*, 35 Cal.4th at p. 367.) Thus, for example, where an educational therapist, who had a three-year relationship with the defendant, testified that the death penalty was not appropriate for him "because she considered him the equivalent of a child, and killing a child was not appropriate," this was admissible because "her opinion was based on a feature of defendant's character that she had personally observed" and therefore lent "insight into the defendant's character." (*Ibid.*) By contrast, where a defendant's sister testified that she did not want the defendant executed, or where a defendant's former attorney testified on the appropriateness of the death penalty for the defendant's crime, this testimony was inadmissible because it was not, respectively, "'strictly relevant to the defendant's character, record, or individual personality'" or "'did not provide insight into the defendant's character.'" (*Id.* at pp. 366-367, quoting *People v. Sanders*, *supra*, 11 Cal.4th at p. 546 & *People v. Smith*, *supra*, 30 Cal.4th at p. 632.)

Here, appellant's mother's testimony "[o]f course not"—in response to the question, "Would you or do you want to see him receive the death penalty?" (50RT 9316)—in no way related to or provided insight into appellant's character. It merely related to the impact on her of appellant's potential execution. It only served as an improper recommendation to the jury.

And to the extent that it showed her affinity for him, this was already well-explored in her testimony that she still loved her son appellant "[v]ery much." (50RT 9316.) The trial court acted correctly in refusing to admit this evidence.

Along these same lines, given the potential prejudice from hearing a mother essentially express her desire for the jury to spare her son's life, the trial court properly instructed the jury to disregard this evidence:

> Ladies and gentlemen of the jury, you are admonished that the decision concerning the result of this case is exclusively yours, that is, that of the jury.
>
> You are specifically and in the strongest possible terms admonished to disregard the question last asked by defense counsel of this witness and the reply she made to it.
>
> The law of this state is clear: The expressed feelings of family of the defendant are not to be considered by you on the issue of penalty or punishment. The family of Deputy Aguirre did not and could not express its desires and respected that rule of law. You can do no less.
>
> It is not my nature to change tone or demeanor. I'm supposed to be invisible to you. Those are strong words that I have used and I hope you receive them in that way. Thank you.

(50RT 9322.)

Appellant argues that this instruction was "inflammatory" because of the language "in the strongest possible terms" and the implication that defense counsel and appellant's mother had not respected the law. (AOB 354-357.) Again, this claim is subject to forfeiture because appellant did not object. (*People v. Loker*, *supra*, 44 Cal.4th at p. 706.) In fact, the trial court had asked for input from counsel on a substantially similar admonition before giving it to the jury, and defense counsel said only, "Submitted." (50RT 9321.)

Moreover, the instruction was entirely proper. The United States Supreme Court has warned that a prosecution witness opining about the

appropriate sentence in a capital case violates the Eighth Amendment. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 830, fn. 2.) The same chance for undue influence on the jury is present when a defense witness's testimony on this subject is inappropriately elicited, which is presumably why this Court has prohibited it, absent an external purpose involving the defendant's character. (*People v. Smith*, *supra*, 35 Cal.4th at pp. 366-367.) Thus, the trial court properly emphasized its instruction by stating, "You are specifically *and in the strongest possible terms* admonished to disregard the question last asked by defense counsel of this witness and the reply she made to it" and by stating, "Those are strong words that I have used and I hope you receive them that way." (50RT 9322, italics added.)

Nor did the trial court, as appellant contends, imply that defense counsel and appellant's mother did not respect the rule of law when it stated in the admonishment:

> The law of this state is clear: The expressed feelings of family of the defendant are not to be considered by you on the issue of penalty or punishment. The family of Deputy Aguirre did not and could not express its desires and respected that rule of law. You can do no less.

(50RT 9322.) In this admonishment, the trial court noted that the victim's family could not and did not comment on the ultimate punishment in this case. By use of contrast, this worked to help cure the potential unfairness from the jury considering only the view about penalty from the affected family members of appellant, and not of the victim.

Further, the trial court did not make a comparison between who followed the law and who did not. Rather, the trial court immediately followed its reference to Deputy Aguirre's family respecting the rule of law with the comment to the jury, "You can do no less." Thus, the trial court apparently used Deputy Aguirre's family as an example to impress upon the jury that they should do the same in this area, i.e., not consider the witness's opinion of the

appropriate punishment in making its decision. Taken in context, the trial court's phrasing did not suggest that defense counsel and appellant's mother were not following the rule of law.

In any event, even if the trial court's statements implied that appellant's mother and defense counsel did not respect the law, this actually would have been an accurate statement. First, it appears that appellant's mother did not respect the law. After the prosecutor objected to her statement "Of course not," appellant's mother, rather than wait for the court's ruling, again repeated "Of course not." (50RT 9316.) In addition, defense counsel did not follow the law by asking this inappropriate question. Thus, as a matter of fact, Deputy Aguirre's family did follow the law in this area while defense counsel and appellant's mother did not. And in this limited area, it would have aided the jury's understanding of its duties to be apprised that what defense counsel and appellant's mother did was not in accordance with the law. But again, the jury would not have reasonably inferred this from the trial court's admonition, nor was this the focus of it.

**D. Any Error Was Harmless**

Even assuming an error in handling a small part of appellant's mother's testimony, it would not have been prejudicial, simply due to the compelling prosecution case at the penalty phase. (See Arg. IV.D, *ante*.) Moreover, the trial court's closing jury instruction on this particular subject would have prevented any misunderstanding from the trial court's earlier admonition:

> At the time Mrs. Johnson testified you were instructed to disregard her opinion on the question of penalty or punishment. I wish to clarify that point: The question of penalty or punishment is yours to decide based upon the factors in aggravation and mitigation upon which you are now being instructed. Not included is any perception you may have of the feelings or desires of any witness on that question including the

family of Deputy Aguirre and the family of Mr. Johnson, or, of any other witness. To the extent that you heard evidence of the impact of defendant's conduct upon others it was not offered and cannot be considered by you as indicating the desires of the witnesses as to the proper punishment. Such evidence was received as a component of the "circumstances of the crime" relative to the harm caused by the crime and the blameworthiness of defendant. You are expressly instructed that you are not to in any way consider what you may believe or suspect to be a witness' desire for punishment.

(12CT 3223; see 54RT 9970-9971.)

This instruction re-emphasized that the jury should not consider any witness's desires as to the proper punishment in this case as a guide in making its decision, and cast no blame on the prosecution or defense for any such opinions at trial. Under these circumstances, given the length of the trial and given that this impartial instruction was one of the last the jury heard, it is highly unlikely the jury would have held any ill will toward appellant as a result of an implication that defense counsel and appellant's mother had not followed the rules as well as the prosecution and Deputy Aguirre's family in this area.

Furthermore, the jury heard testimony that appellant's mother still loved him very much, that she still viewed him as part of her family, and that after the trial she intended to attempt to maintain contact with him. (50RT 9316, 9322.) Thus, appellant's mother's testimony effectively informed the jury that she hoped to continue to have a loving relationship with appellant after the penalty trial, which, of course, could only happen if he were not executed. Consequently, it is not reasonably possible that appellant would have obtained a better result at the penalty phase if the trial court had permitted the jury to consider appellant's mother's opinion about the proper penalty for appellant. (*People v. Smith*, *supra*, 35 Cal.4th at p. 368 ["[t]here is no reason to believe

that Foster's opinion that defendant's immaturity made the death penalty inappropriate would have affected the verdict"].)

## XII.

## THE DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant alleges many aspects of the 1978 death penalty sentencing scheme violate the federal Constitution. (AOB 363-403.) As appellant acknowledges (AOB 363-364), this Court has already rejected these claims in other cases. Because appellant fails to raise anything new and significant to make this Court depart from its earlier holdings, this Court should again reject these claims here.

Appellant contends that under the Sixth and Fourteenth Amendments, beyond-a-reasonable-doubt is the appropriate burden of proof for the jury to use in finding aggravating factors at the penalty phase. (AOB 368-375.) This Court has repeatedly rejected this claim because this standard is not required by the Constitution in this context. (*People v. Carasi*, *supra*, 44 Cal.4th at p. 1317, citing *People v. Boyer* (2006) 38 Cal.4th 412, 485 (and cases cited therein).)

Appellant next contends that California death penalty law violates the Sixth, Eighth, and Fourteenth Amendments by failing to require unanimous jury agreement on aggravating factors. (AOB 375-385.) This Court has held, however, that "[n]ot requiring jury unanimity on an aggravating factor does not render our capital sentencing scheme unconstitutional . . . ." (*People v. Crew* (2003) 31 Cal.4th 822, 860; accord, *People v. Carasi*, *supra*, 44 Cal.4th at p. 1317.)

Appellant contends that the California death penalty law violates the Sixth, Eighth, and Fourteenth Amendments by failing to require that the jury base its death sentence on written findings regarding aggravating factors.

(AOB 385-388.) But "the jury need not make findings on aggravating factors . . . ." (*People v. Crew*, *supra*, 31 Cal.4th at p. 860; accord, *People v. Bolden* (2002) 29 Cal.4th 515, 566.)

Appellant further contends that this Court's interpretation of California's death penalty statute forbids proportionality review, thereby guaranteeing arbitrary, discriminatory, or disproportionate impositions of the death penalty. (AOB 388-391.) But "[c]omparative proportionality review, which requires a comparative or intercase proportionality review of other murder cases to determine the defendant's relative culpability, is not required by the United States Constitution." (*People v. Cox* (2003) 30 Cal.4th 916, 970, citing *Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [104 S.Ct. 871, 79 L.Ed.2d 29], disapproved on another ground in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421 & fn. 22; *People v. Romero* (2008) 44 Cal.4th 386, 429.)

Next, appellant contends that his death penalty is invalid because section 190.2 is impermissibly broad. (AOB 391-394.) This Court has rejected this claim, however, explaining that the death penalty "law is not unconstitutional because it fails to sufficiently narrow the class of defendants eligible for the death penalty . . . ." (*People v. Crew*, *supra*, 31 Cal.4th at p. 860; accord, *People v. Harris* (2008) 43 Cal.4th 1269, 1322.)

Appellant also contends that the death penalty is invalid because section 190.3, factor (a), as applied, allows arbitrary and capricious imposition of death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.[7] (AOB 394-401.) This Court has already rejected such a contention, finding this factor to be a traditional and proper

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7. Section 190.3, factor (a), states:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

subject for consideration by the jury, and in no way vague. (*People v. Romero*, *supra*, 44 Cal.4th at p. 428; *People v. Ochoa* (1998) 19 Cal.4th 353, 478, fn. 13.)

In his final contention, appellant argues that the death penalty statute violates equal protection principles by providing different procedural protections to capital defendants than to noncapital defendants. (AOB 401-403.) But this Court has consistently rejected the claim that equal protection requires that capital defendants be provided with the same sentence review afforded felons subject to noncapital sentences, because these two groups are not similarly situated. (*People v. Harris*, *supra*, 43 Cal.4th at p. 1315 (and cases cited therein).)

## CONCLUSION

Accordingly, for all of the foregoing reasons, respondent respectfully requests that this Court affirm the judgment of conviction and sentence.

Dated: February 8, 2010

Respectfully submitted,

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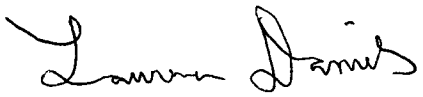

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## CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 70,209 words.

Dated: February 8, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

LAWRENCE M. DANIELS
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Attorneys for Respondent

## DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Michael Raymond Johnson***
No.: **S070250 (Super. Ct. No. 39376) CAPITAL CASE**

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 February 10, 2010, 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 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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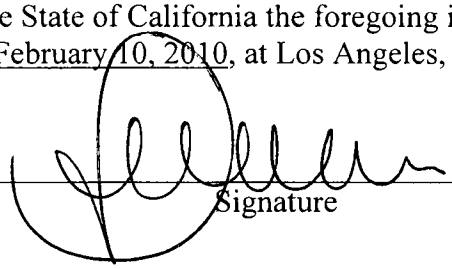
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 10, 2010, at Los Angeles, California.

Frances Conroy
Declarant



Signature

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