In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **THOMAS POTTS,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S072161

Kings County Superior Court Case No. 97CM2167
The Honorable Louis F. Bissig, Judge

RESPONDENT'S BRIEF

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STATEMENT OF CASE

On June 1, 1998, the district attorney filed an amended information in Kings County Superior Court charging appellant, Thomas Potts, with two counts of murder (Penal Code[1] § 187, subd. (a)), one count of robbery (§ 211), and one count of grand theft. (§ 487.) With respect to the murders charged in counts one and two, the district attorney alleged two special circumstances, that each murder was committed during the commission of a robbery (§ 190.2, subd. (a)(17)), and that there were multiple murder victims within the meaning of section 190.2, subdivision (a)(3). The information also alleged that the victims, Fred and Shirley Jenks, were over 65 years old (§ 667.9, subd.(a).) The information further alleged that appellant suffered two serious or violent felony convictions within the meaning of sections 667, subdivision (d) and (e) and 1170.12. (1 CT 196-198.)

Appellant pled not guilty and jury selection commenced on June 3, 1998. (1 CT 16; 9 CT 1693.) On June 8, the guilt phase of the trial began. (9 CT 2618.) The jury began deliberating on June 17 and reached a verdict the following day, finding appellant guilty as charged. (9 CT 2648-2650; 10 CT 2710-2715.) Both appellant and the district attorney waived jury trial on appellant's two alleged prior offenses and the court found the offenses to be true. (10 CT 2882.)

On June 19, 1998, the penalty phase of appellant's trial began. (10 CT 2716.) On June 23, the jury began deliberating and reached a decision the following day. (10 CT 2884.) The jury found that death was the appropriate penalty for both counts of murder. (10 CT 2884, 2898-2899.)

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[1]All statutory references are to the Penal Code unless otherwise indicated.

On July 23, 1998, the court considered modification of the verdict of death. (10 CT 2924.) The court determined that the death sentence was warranted and denied the application for modification. (10 CT 2927, 2931-2935.)

At sentencing, the court ordered that appellant should suffer the death penalty on counts one and two. On count three, the court sentenced appellant to 25 years to life pursuant to section 667, subdivision (d)(e) but stayed this sentence pursuant to section 654. On count four, appellant received a sentence of 25 years to life. The court also added two years for the section 667.9(a) enhancement associated with counts one and two. Appellant was also ordered to pay a restitution fine of $10,000 pursuant to section 1202.4. (10 CT 2935.)

Appellant's appeal from the judgment of death is automatic. (§ 1293 subd. (b).) On April 30, 2009, after 31 extensions of time, appellant filed his opening brief.

STATEMENT OF FACTS

A. GUILT PHASE

1. Prosecution Case

a. The Jenks House

Elizabeth Crose, a florist at King Floral in Kings County, went to deliver a bouquet of flowers to Fred and Shirley Jenks at their house at 300 West Adrian, in Hanford, on August 5, 1997, at about 11:00 a.m. (5 RT 1070-1072.) Finding no one home at the Jenks residence and concerned that the flowers would wilt in the summer heat, Crose delivered the flowers to the Jenks' neighbor, Susan Jennings, with the understanding that Jennings would give the flowers to the Jenks when they arrived home. (5 RT 1072-1074, 1079.) Later that day, at about 7:00 p.m., Jennings went next door to see whether Fred or Shirley Jenks were home. (5 RT 1080.)

She noticed a couple of newspapers lying on the front porch. The paper usually arrived daily between 4:00 and 6:00 p.m. (5 RT 1080, 1089.) When no one answered the door, Jennings peered through the beveled glass into the front entryway and saw the body of Fred Jenks, lying on the floor in a pool of blood. (5 RT 1080-1081.) Disturbed and alarmed, Jennings immediately called 9-1-1. (5 RT 1081.) A few moments later, her husband, Neil Jennings arrived home. (5 RT 1087.) After hearing from his wife that something was "seriously wrong next door," Mr. Jennings went to the Jenks residence himself. (5 RT 1088-1089.) Mr. Jennings also saw the body of Fred Jenks lying on the floor surrounded by blood. (5 RT 1090.) Mr. Jennings was CPR certified and trained on giving First Aid in emergency situations through his job as a pilot. Not knowing whether his neighbor was dead, Mr. Jennings opened the unlocked door and went inside. (5 RT 1089-1090.) Still wearing his flight boots since he had just returned from work, Mr. Jennings walked in very carefully, so as to not disturb the crime scene. (5 RT 1092.) He could tell that Mr. Jenks was not breathing and that there was nothing he could do, so he turned and left the Jenks' house. (5 RT 1092.) Within a few minutes, the police arrived. (5 RT 1094.)

Officer Jeff Truschel with the Hanford Police Department was the first officer to arrive to the scene. (5 RT 1101-1102.) He observed the body of Fred Jenks, lying face-down in the entryway with multiple wounds. (5 RT 1103.) Since it was obvious to Officer Truschel that Mr. Jenks could not be resurrected, he secured the crime scene and called his supervisor, Sergeant Smith. (5 RT 1103-1104.) When Sergeant Smith arrived, they went through the house together, systematically checking each room to see if there was anyone else who may need help or if the killer was still inside. (5 RT 1104.) In the master bedroom, they found the lifeless body of Shirley Jenks on the bed with multiple stab wounds to her back and a slash

mark across her throat. (5 RT 1105-1106, 1112.) The officers secured the crime scene and waited for Detective Darrel Walker to arrive. (5 RT 1114.)

Detective Walker, an experienced homicide investigator, was assigned as lead investigator for the case. (5 RT 1149-1140, 1154.) He arrived to the house at 8:19 p.m. and began a thorough inspection of the exterior and interior. (5 RT 1155.) Detective Walker found two newspapers on the front porch, from August 4 and August 5. (5 RT 1172.) He noticed that there were no broken windows or other signs of forced entry into the home and that all windows and doors, except for the front door, were locked. (5 RT 1173-1174.) Before any evidence was moved, Detective Walker assigned another officer to videotape and photograph each room of the house and any items of evidentiary significance.[2] (5 RT 1183.)

Detective Walker observed that the victim in the entryway, Mr. Jenks, was lying face down, wearing a blue robe. (5 RT 1195.) Next to him were his flip-flop shoes, eye glasses, a clot of hair, some droplets of blood and a tiny metallic pin that looked like a watch pin. (5 RT 1190, 6 RT 1246.) Mr. Jenks was wearing a watch that was fully intact with the pin inside. (5 RT 1196, 6 RT 1246-1247.) When Mr. Jenks was lifted from the floor, Detective Walker observed another watch that was underneath his body. This watch was detached from the buckle on one side, where the pin had fallen out. (6 RT 1248.) Four blood-soaked one dollar bills were sticking out of the pocket of Mr. Jenks's robe. (5 RT 1196.) There was a bloody shoe print and hand print on Mr. Jenks's back. (5 RT 1197.) There was also blood splatter up the wall behind Jenks' body and bloody shoe prints down the hallway and into the kitchen, which looked the same as the footprint on Mr. Jenks's back. (5 RT 1194, 1197-1198, 6 RT 1261-1262.)

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[2]The video tape of the crime seen was played for the jury at trial. (5 RT 1184, People's Exh. 3.)

The shoe prints contained the letters "NIKE" in the center. (6 RT 1243, 1269.) Detective Walker examined each shoe print throughout the house and observed that they all contained the same tread pattern and that the only shoe prints inside the Jenks' house were those of the Nike shoes. (6 RT 1245-1251.)

Inside the kitchen there was an open cutlery drawer, an open can of beans on the counter, a knife sharpener, and a short bladed paring knife in the sink covered by a bloody rag and surrounded by diluted drops of blood. (5 RT 1195, 6 RT 1252-1253.) The office room also appeared disturbed. Papers were strewn about, there were drops of blood, and the facing of one of the file cabinet drawers had been torn off. (5 RT 1201.)

The master bedroom appeared to be ransacked. (5 RT 1205.) Numerous boxes of jewelry were missing and items were displaced and strewn about. (5 RT 1205, 6 RT 1270.) Detective Walker estimated that there were at least 30 empty jewelry boxes and dozens of empty slots in the larger jewelry cases. (6 RT 1309.) There was a long bladed boning knife with a wooden handle on the dresser which matched the knives in the open kitchen drawer. (6 RT 1270.) The night table drawers and dresser cabinets had been opened and empty jewelry boxes were on the floor. (6 RT 1272.) Lying on the bed was the T.V. program guide for Sunday, August 3. (6 RT 1273-1274.)

b. How Mr. and Mrs. Jenks Were Killed

An autopsy of the victims was performed by Dr. Armand Dollinger on August 6, 1997. (6 RT 1395.) Mr. Jenks suffered from multiple abrasions, contusions, and stab wounds to his face, head, and back. (6 RT 1398-1405.) Twenty-eight separate stab wounds were inflicted on the top portion of Mr. Jenks's head and resulted in depressed fractures to his skull and internal bleeding. (6 RT 1402, 1407-1413.) Dr. Dollinger opined that the injuries to Mr. Jenks were inflicted with a hatchet since the wounds were a

mixture of round bruising made with a hammer and "chop wounds" made with a sharp edge hatchet blade. (6 RT 1403, 1428.) The "chop wounds" were consistent with a hatchet, rather than a knife because of the bruising and fractures to the underlying bones. A knife would not have the weight and force to create the type of fractures suffered by Mr. Jenks. (6 RT 1404-1406.) One of the bruises on Mr. Jenks's cheek appeared to be made by the rounded hammer edge of a hatchet. (6 RT 1403, 1428.) Mr. Jenks also suffered from multiple stab wounds on his hand, which were consistent with being hit by a hatchet, since the wounds went through his skin and several of his finger bones were broken. (6 RT 1410.) It appeared from the wounds on his hands that Mr. Jenks was being hit while attempting to protect his head. (6 RT 1410.) Internal bleeding and fractures to Mr. Jenks's ribs were consistent with the killer stomping on him after he was lying face down. (6 RT 1414.) Some of the wounds were inflicted after Mr. Jenks had already died. It appeared that the killer first inflicted the 28 wounds to the back of Mr. Jenks's head, and then, when he fell face down on the floor and was on the verge of death, the killer used a knife and stabbed him in the back multiple times until and after Mr. Jenks's heart stopped beating. (6 RT 1414, 1424-1426.)

Mrs. Jenks also suffered multiple wounds to her head and neck, many of which were consistent with being hit with the sharp blade of a hatchet and causing underlying fractures because of the hatchet's weight. (7 RT 1442, 1446.) Mrs. Jenks suffered seven stab wounds across her chest and a wound on her right hand consistent with her trying to defend herself. (7 RT 1443, 1449-1450.) Two of the wounds on her chest penetrated her heart and lungs. (7 RT 1446.) Mrs. Jenks's throat was also slashed with a knife, but it appeared from the lack of bleeding that the slashing may have occurred after she was already dead. (7 RT 1445.) It also appeared that

some of the other stab wounds were inflicted with a sharp knife blade. (7 RT 1445.)

Mr. and Mrs. Jenks appeared to be 73 and 72 years old, respectively, consistent with what had been reported to Dr. Dollinger. (6 RT 1397, 7 RT 1440.) Dr. Dollinger could not determine with certainly the exact time either victim was killed but estimated that it was not earlier than early evening of August 3, nor later than August 4. His best estimate was that the bodies had been dead for about 24 hours when they were first discovered, which would have meant that they were killed on Monday evening, August 4. (6 RT 1419-1420, 1430.)

c. The Investigation

Diana Williams befriended appellant at her apartment complex in Hanford. For a five month period in 1997, appellant lived with Williams and her son, Quentin. (7 RT 1526, 1530-1531.) During this period, appellant was working for Mr. and Mrs. Jenks as a handy man and house cleaner. (7 RT 1533.) Mr. Jenks would call appellant periodically to come to their house and do work. (7 RT 1531, 1534.) Appellant was also doing similar work for other people. (7 RT 1533.) Appellant also received a monthly check from SSI for over $600. (7 RT 1529) Williams was the payee on this check and on the first of each month when she would receive it, she would cash it and give the money to appellant. (7 RT 1529-1531) Appellant moved out of Williams' apartment and into another apartment a few buildings down about two or three weeks before being arrested for the Jenks murders. (7 RT 1531-1532.)

Appellant, a handy man by trade, owned a wooden handled hatchet with a blade on one side and a hammer on the other. (7 RT 1546-1548.) Williams recalled appellant using the hatchet to hang speaker wire at his new apartment a couple of weeks before his arrest. (7 RT 1549.) Williams did not see the hatchet after August 4. (7 RT 1459.)

On August 6, 1997, two investigators went to appellant's apartment and asked him if he had a small axe or hatchet. (10 RT 2100-2101.) Appellant admitted that he used to have such an item and that he had been stopped with it by police, but that he no longer had the hatchet. He claimed he had recently lost it when moving from one apartment to another. (10 RT 2101-2102.) The investigators looked in his apartment for the hatchet but were unable to locate it. (10 RT 2102.) They did, however, find a small blue duffle bag inside of a suitcase. (10 RT 1202.)

Sergeant Smith recalled an incident about six months prior to finding the Jenks' bodies where he contacted appellant at an apartment complex in Hanford and appellant had an axe hatchet in his possession. (5 RT 1116.) Sergeant Smith recalled the hatchet being about 14 inches long with a wooden handle and a sharp blade on one side and a blunt edge on the other. (5 RT 1117.) The defendant claimed at the time that he used the hatchet for construction work and so Sergeant Smith did not confiscate it. (5 RT 1118.)

On March 10, 1997, Kings County Deputy Sheriff Bill Kunz stopped appellant and found him to be in possession of a small gym bag. (7 RT 1468-1471.) Inside the gym bag was a small axe or hatchet with a blade on one side and a hammer on the other. (7 RT 1471-1472.)

On August 1, 1997, Williams gave appellant the cash from his SSI check. (7 RT 1535.) Three days later, on Monday August 4, she had planned to go grocery shopping with appellant but he stated that he had no money and that he had lost it all at the casino. He accompanied her to the store nonetheless, in the early afternoon. (7 RT 1537.)

Deryle Hert, the owner and operator of a liquor store in Hanford testified that appellant had a running tab that he routinely paid on the 1st of each month. However, on August 1, 1997, appellant failed to pay it. He called and promised to pay the next week but never did. (9 RT 2054-2058.)

Even when appellant was not living with Williams she saw him almost every day. (7 RT 1541.) She recalled him always wearing a watch which was particularly memorable because the pin would fall-out, causing the watch to fall off his wrist. Williams helped appellant put it back together on a couple of occasions. (7 RT 1541-1542, 1565.) A couple of days after the day they had gone to the supermarket together, appellant and Williams were running some errands. Williams asked appellant what time it was as they were riding their bikes home, and noticed that appellant's watch was missing. (7 RT 1543-1544.) Williams identified the watch Detective Walker found underneath Mr. Jenks's body as the watch appellant always wore. (7 RT 1542-1544.) The day she noticed it was missing was Wednesday, August 6 1997, two days after the murders. (7 RT 1544.)

That same day, in the living room at Williams' apartment, a news report came on the television about the murder of Fred and Shirley Jenks. (7 RT 1553.) Appellant was watching the news report in the living room. Although the report said nothing about the murder weapon used to kill the Jenks, Quentin asked appellant what had happened to his hatchet. (7 RT 1553.) Appellant would not answer. (7 RT 1554.) Quentin asked appellant about the hatchet three times but appellant continued to ignore him. (7 RT 1596-1598.) Appellant stood up and went into the kitchen where Williams asked appellant why he was ignoring Quentin and what happened to the hatchet and appellant responded that he did not want to discuss it "because someone might be bugging the inside of our wall." (7 RT 1602.)

Quentin outgrew a pair of black high top Nike brand shoes which had the Nike label on the tread of the shoe. He gave these shoes to appellant in July or some time before July. (7 RT 1544-1545.) Williams never saw appellant wear these shoes after Monday, August 4. (7 RT 1546.)

After appellant was arrested, on August 8, 1997, Williams cleaned out appellant's apartment and noticed that a fairly new pair of Jeans that appellant "wore all the time" in the weeks before the murders were missing as well as a fairly new black "Wilson" T shirt. (7 RT 1550-1551.) She did not locate the Nike shoes that her son had given him. She also did not see appellant's hatchet. (7 RT 1550-1551.) When appellant was arrested by Detective Walker, he was not wearing any of these items. (10 RT 2112.)

Detective Walker arrested appellant on August 8, 1997. Appellant was wearing a pair of prescription glasses. (6 RT 1276-1277.) Detective Walker confiscated the glasses, noticing a possible rust or blood spot where the frame attaches to the lense on the right eye piece. (6 RT 1278.) After being arrested appellant was examined by a nurse. He had two scratches, one on his neck and the other on his arm. They were not fresh and appeared to be in the healing process. (7 RT 1622-1623.)

d. DNA Evidence

Short Tandem Repeat (STR) testing was perfromed on a sample of DNA extracted from appellant's eye glasses. (8 RT 1778-1784.) The DNA profiles extracted from appellant's eye glasses were consistent with a mixture of appellant's DNA and the DNA of Fred Jenks. (8 RT 1778-1784.)

Dr. Chakraborty, an expert in genetics and population statistics (9 RT 1963-1965) reviewed the DNA file from Cellmark and examined the DNA results for frequency within the human population. (9 RT 1970, 1994.) Dr. Chakraborty also confirmed that the DNA on the glasses was a mixture of appellant's DNA and Fred Jenks's DNA. (9 RT 1991.) Based on population statistics, Dr. Chakraborty was able to determine that assuming one DNA profile was explained by appellant's DNA, only one in 1.78 million Caucasians, at random, would account for the other DNA profile. (9 RT 2000-2004.) Assuming both persons on the DNA profile were

unknown the statistics for finding this profile would be extremely uncommon. (9 RT 2000-2013.)

e. Bettencourt Theft and Appellant's Dealings at the Pawn Shops

Viola Bettencourt had an intricate and valuable diamond ring, appraised at $1250, that she kept in a jewelry box on the dresser in her bedroom. She had owned the ring for over 30 years when it went missing sometime in the summer of 1997. (7 RT 1637-1638, 1646, 1657.) That summer, Bettencourt had hired appellant to clean her house. (7 RT 1640.) Appellant would come for a couple hours every other Thursday. (7 RT 1641-1642, 1650.) Bettencourt remembered wearing the ring on a Wednesday to the Salvation Army in Hanford to play Bingo. She put the ring back in a jewelry box with other pieces of jewelry on her dresser when she returned home. (7 RT 1645-1646.) The next day, appellant had been to her home to clean. Two days later, on Friday, she wanted to wear the ring and noticed that it was missing. (7 RT 1646-1647.) Bettancourt did not see her ring again until she identified it at the Hanford Police Department. (7 RT 1653.)

Transaction records at Hanford Pawn & Loan confirmed that appellant had sold jewelry to the pawn shop on July 1, 1997, and on August 5, 1997, at 1:50 p.m. (8 RT 1849, 1852.) A jade jewelry piece that appellant pawned on August 5, 1997, matched a single jade drop earring which was found on Mrs. Jenks's dresser the day that investigators discovered the murders. (8 RT 1835.) Appellant was identified on the pawnshop receipt slips which were turned over to the police by his name, signature, address, and thumb print. (8 RT 1838- 1847, 1860-1864.) The thumb print on the pawn slips matched appellant's known fingerprints. (8 RT 1854-1864, 1869.) Shirley Jenks's sister, Billie Lou Hazelum, recognized one of the items appellant had pawned on August 5, 1997, as a

ring which belonged to Mrs. Jenks and that Mrs. Jenks wore frequently on her right forefinger. (10 RT 2116.) Hazelum identified another item which appellant had pawned on August 5, 1997, as a jade medallion necklace which Mr. Jenks had given to Mrs. Jenks several years prior as an anniversary or birthday gift. (10 RT 2117-2118.) Mr. and Mrs. Jenks gave their daughter Deborah a similar style medallion which matched Mrs. Jenks medallion. Mrs. Jenks and her daughter would wear their matching jade medallions frequently. (10 RT 2119.) Mr. Jenks also gave Mrs. Jenks drop earrings which matched the necklace. (10 RT 2119.) Hazelum identified one of the earrings as the one which matched the necklace and which Mrs. Jenks wore frequently. (10 RT 2120, exh. 72.)

California Pawnship in Hanford also had records of transactions involving appellant. On June 26, 1997, a Thursday, at 3:00 p.m. a receipt showed that appellant pawned the ring that was missing from Ms. Bettancourt's house. (7 RT 1653; 8 RT 1852; 9 RT 2039, 2047-2048.) Appellant apparently bought the ring back and sold it to the other pawn ship for more money the following week, on July 1, 1997. (8 RT 1849, 1852.)

2. Defense Case

Throughout the presentation of evidence, the defense vigorously attacked the credibility of the witnesses and the integrity of the crime scene. The defense attempted to undermine the importance of the Nike shoes by implying that several different people walked through the house during the investigation. However, none of the personnel who walked through the house had been wearing Nikes. (5 RT 1093, 1102, 1112.) The defense also tried to imply that Detective Walker was responsible for getting blood on appellant's glasses since he took them from appellant after being at the crime scene; however, Detective Walker testified that he had showered in

between and cleaned his hands. He was also wearing gloves each time he touched an item of evidence. (6 RT 1284-1286, 1356-1358.)

Appellant called Tom Scheeringa, one of the police officers present at the crime scene and in charge of collecting evidence. Officer Scheeringa was also present when a search warrant was executed at appellant's apartment on August 13, 1997. (10 RT 2131-2134.) Appellant's counsel elicited the fact that no items of evidentiary significance were found during that search, nor did anything in appellant's apartment link him to the crime. (10 RT 2139.)

Appellant also called Detective Walker, who had also searched appellant's apartment when he was arrested. (10 RT 2149.) Appellant's counsel highlighted the fact that detective Walker found nothing linking appellant to the crime. (10 RT 2153.)

Appellant also recalled Diana Williams, who testified that appellant's apartment was not in disarray the week of August 4, 1997 and that she could not remember whether he had his watch on August 4 or August 5. She confirmed seeing him in the early morning on Monday August 5 and then going shopping with him in the early afternoon even though he had no money. (10 RT 2163-2174.) Appellant also asked Williams questions about the newscast discussing the Jenks murders and attempted to discredit her credibility by highlighting details which conflicted with previous statements and with her son's account of the conversation about appellant's hatchet. (10 RT 2175-2178.) Appellant also re-asked Quentin Williams about the conversation. (10 RT 1088-1092.)

Appellant recalled criminalist Iqbal Sekhon, to make the point that no blood was found anywhere on appellant's bicycle. The bike was confiscated from appellant's apartment for examination after the murders. (10 RT 2195-2195.)

3. Rebuttal

The Jenks' postal carrier, Michael Dent, testified to seeing Mr. Jenks on August 4, 1997 between 1:00 and 2:00 in the afternoon. (10 RT 2200-2203.)

Oscar Galloway, who was undergoing chemotherapy at the time of trial, vaguely remembered giving appellant a ride to the casino but could not remember when. (10 RT 2207-2216.) He remembered being interviewed by Detective Walker about appellant. (10 RT 2213.)

Detective Walker stated that the interview took place on August 9, 1997. (10 RT 2236.) Galloway told Walker that he had given appellant a ride to the casino on August 5, 1997, and that appellant had a blue duffle bag with him. (10 RT 2237.) On the way to the casino, appellant asked Galloway to stop downtown, which he did. (10 RT 2237.) Galloway talked to a friend at the Cottage Inn until appellant returned. (10 RT 2237.) They then went to the casino for a short while. (10 RT 2237.) The next day, August 6, 1997, appellant went to Galloway's house and asked if he had left his bag in Galloway's car. Sure enough, the blue duffle bag was on the seat of the car, but appeared to Galloway to be a lot emptier than it was when he first saw it, when he had picked appellant up the day before. (10 RT 2237.)

B. Penalty Phase

1. Aggravation

a. Prior Felony Convicitons

The prosecution introduced appellant's prior felony convictions through certified documents, showing that appellant had been convicted of robbery on two separate occasions, and also had convictions for perjury, car theft, and statutory rape. (13 RT 2528-2530, 2533-2537.)

b. Rape of Carol Tonge

Carol Tonge testified that she moved to the Los Angeles area with her boyfriend when she was 16 years old. (13 RT 2541-2542.) She was out job hunting and waiting at a bus stop by herself when appellant pulled over and offered her a ride. (13 RT 2544.) Appellant drove her around town picking up job applications while they drank beer together that he had purchased. (13 RT 2545-2546.) Eventually, Tonge asked that appellant to take her home but instead he drove her to his apartment claiming to be running an errand. Scared to wait in the car, Tonge waited outside in the front yard. (13 RT 2548-2549.) While outside, a dog bit Tonge and appellant convinced her to go inside his apartment. (13 RT 2549.) Tonge heard the door shut behind her and turned to see appellant, between her and the door, wielding a straight razor with the blade exposed. (13 RT 2551-2552.) Appellant held the razor to her throat, demanded that she take off her pants, and forced himself on top of her. (13 RT 2553-2555.) Tonge was terrified, thinking that she was going to be killed as appellant forcibly raped her with the razor still held to her neck. (13 RT 2556.) Appellant flipped her on her stomach and attempted to penetrate her anally as she wiggled around, trying to fight him off. (13 RT 2557-2558.) She was able to convince appellant that she needed to use the bathroom. (13 RT 2558-2560.) Tonge locked the bathroom door behind her and jumped out of the second story window to escape. (13 RT 2560-2562.) She was eventually able to get help. (13 RT 2565.)

Tonge left California and never wanted to return. Although she called the police and reported the rape, she did not testify against appellant. The rape occurred on May 10, 1979. (13 RT 2564-2567.)

c. Rape of Diane Hill

Diane Hill was friendly with the parents of Lori Potts, the former wife of appellant. (13 RT 2573-2574.) Hill hired Lori to babysit her two young children and through that relationship, she was introduced to appellant. (13 RT 2573.) One night in February of 1980, Hill was home alone with her two babies when appellant came by late in the evening. (13 RT 2575.) She let appellant in through the window since the door was jammed. (13 RT 2576.) Appellant was drunk and Hill offered him coffee so that he could sober up and drive home. (13 RT 2577-2578.) At some point, appellant forced Hill to the ground and began raping her. She was screaming and he put his hands around her throat, choking her so that she would be quiet. (13 RT 2579-2580.) Hill's two and a half year old daughter awoke and entered the living room while appellant was on top of Hill. (13 RT 2581.) Appellant stopped, the daughter went back to bed, and then appellant raped her again. Hill felt that there was nothing she could do; the phone was not working and she couldn't leave her two babies. (13 RT 2580-2582.) Hill did not go to the police, she was too afraid for herself and afraid for Lori. (13 RT 2584-2585.)

d. Victim Impact

Georgeanne Green, a nurse at Hanford Community Center specializing in examining sexual assault victims attended the autopsy of Shirley Jenks on August 6, 1997. (13 RT 2594.) Green conducted a sexual assault examination and found evidence of forced penetration based on injuries to her vaginal area. (13 RT 2596-2597.) Dr. Thomas Bennett, a very experienced medical examiner out of Iowa, also reviewed the autopsy and photographs of Shirley Jenks. (13 RT 2668.) Dr. Bennett concluded that Mrs. Jenks had been subjected to forced vaginal penetration based on three distinct areas of injury. (13 RT 2674.) Dr. Bennett found a laceration

and two abrasions, which showed deep tearing of tissue, consistent with her being sexually assaulted. (13 RT 2678-2688.)

Clarence Washington, the son-in-law of Fred and Shirley Jenks was also a distant relative of appellant. (13 RT 2605.) Washington had not seen appellant since the 1960's and did not associate with him. (13 RT 2605.) Washington and his wife, Debra, spoke with the Jenks frequently and last saw them at a family get together in Sacramento over the 4th of July holiday. (13 RT 2606.) On August 4th and 5th, Washington and his wife had called the Jenks repeatedly and were starting to worry when they did not get an answer. (13 RT 2608-2610.) Washington and his wife then learned of the murders through a friend who had seen the news report and recognized the Jenks'house and the car. (13 RT 2608.) Washington drove to Hanford from their home in Sacramento to try and find out what happened. (13 RT 2612.) He had to take his wife Debra to a psychiatric care unit, as she suffered a break down after hearing about the murder of her parents. (13 RT 2613.) Washington went into the Jenks house to help police identify missing items. He was completely traumatized, seeing the blood and trying not to imagine how his parents-in-law must have suffered. (13 RT 2615-2622.)

Washington and his wife were very close with the Jenks. (13 RT 2623.) They vacationed together every year and had planned a trip to Lake Tahoe the weekend after the Jenks were killed. (13 RT 2624.) Debra Washington talked to her mother two to three times every day. (13 RT 2624.) As a result of her parent's brutal murders, Debra had been under constant psychiatric care and was still heavily medicated at the time of trial, taking more than 10 different medicines a day. (13 RT 2626, 2635.) Debra was incapable of caring for herself, had no will to live, and needed to be cared for 24 hours a day. (13 RT 2627-2631.) Washington was also in outpatient therapy and on medication. (13 RT 2626.) He attempted to go

back to work but was unable to do so. (13 RT 2628.) Fred Jenks was like a father to Washington and counseled him in different ways. (13 RT 2634.) The brutal slayings of the Jenks created a terrible void that could never be filled. (13 RT 2638.)

Billie Lou Hazelum, the sister of Shirley Jenks also testified about the horrendous impact of the murders on the family. (13 RT 2698.) Hazelum enjoyed speaking with her sister Shirley at least once a week. (13 RT 2700.) When they spent time together, it was wonderful, they would "go shopping, talk about old times. Dance in the morning when we'd get up to music." (13 RT 2700.) Hazelum testified that the family was planning a cruise for the Jenks, who would have been celebrating their 48-year wedding anniversary if appellant had not murdered them. (13 RT 2701-2702.) Hazelum was in disbelief at what had happened and could not accept the cruel way in which her sister and brother-in-law were killed. (13 RT 2705.) Shirley Jenks's birthday and Christmas were usually joyous family celebrations, but that year, nobody had celebrated and even Christmas felt "very, very, very sad." (13 RT 2706.) Hazelum testified that the Jenks were people who everybody loved and that they had a very loving marriage. (13 RT 2707.) Their home was a haven where they loved spending time and had enjoyed the process of having it built for them. (13 RT 2707.)

Hazelum recalled Debra Washington calling her late at night when she first heard of the murders, and screaming, "My mother and father were murdered." (13 RT 2703.) Hazelum had been very close with Debra, but had not been able to see her since August because of Hazelum's close resemblance of Shirley Jenks. (13 RT 2709.) Hazelum knew that Debra was not doing well and badly wanted to see her, but Debra could not handle seeing someone who reminded her so much of her mother. (13 RT 2709.)

2. Mitigation Evidence

Appellant called Dr. Norberto Tauson, a psychiatrist who testified that four months before the murders appellant sought help because he claimed he was hearing voices. (13 RT 2717-1720.) Appellant had previously been diagnosed as a paranoid schizophrenic and Dr. Tauson thought his complaints in April 1997, were symptomatic of the same condition and re-diagnosed him as a paranoid schizophrenic. (13 RT 2721.) Dr. Tauson recommended follow-up care, but when appellant returned two months later, on June 19, 1997, he reported that his symptoms had gone away and he was no longer hearing voices. (13 RT 2724.)

Dr. Tauson admitted on cross-examination that the symptoms were also consistent with appellant abusing alcohol and it was possible that he did not suffer from Schizophrenia. (13 RT 2773-2784.) Records showed that appellant appeared normal, logical, and goal oriented when he went to the clinic on June 19, 1997. (13 RT 2787-2788.) Appellant was also seen on August 10, 1997 and reported no hallucinations or other mental problems. (13 RT 2788-2790.)

Lula McCowan, appellant's mother, testified that appellant was born in Hanford in 1948. (13 RT 2805) She was a single parent for 12 years of his childhood and worked hard to support him and his sister. (13 RT 2806-2807.) Appellant was a good son who loved his family. (13 RT 2808-2810.) McCowan testified that she loves her son and that he was not responsible for the murders and that he "wouldn't do this." (13 RT 2811, 2813.) She also stated that appellant is the father of a son who loves him very much and that appellant "has a heart" and should not get the death penalty. (13 RT 2813.) She also testified that appellant was reading the Bible and praying while in jail. (13 RT 2813.)

ARGUMENT

I. SUFFICIENT EVIDENCE SUPPORTS THE JURY'S CONCLUSION THAT APPELLANT HAD THE REQUISITE MENTAL INTENT FOR FIRST DEGREE MURDER

Appellant argues that the evidence to convict him of first degree murder is insufficient in two regards: First, appellant claims that there is no evidence to support that either murder was premeditated and deliberate rather than "a rash, unconsidered attack." (AOB 42-45.) Secondly, he claims that there is insufficient evidence with which a rational trier of fact could conclude that appellant intended to rob the victims and thus first degree murder on a felony murder theory as well as the special circumstance of robbery, must be reversed. (AOB 37-59.) Appellant's claim lacks merit.

A. Standard of Review

"To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 790-791 [same standard of review applies to determine the sufficiency of the evidence to support a special circumstance finding].) "Where, as here, the jury's findings rest to some degree upon circumstantial evidence, we must decide whether the circumstances reasonably justify those findings, 'but our opinion that the circumstances also might reasonably be reconciled with a contrary finding' does not render the evidence insubstantial." (*People v. Earp* (1999) 20 Cal.4th 826, 887-888.)

B. Premeditation and Deliberation Theory of Murder

In *People v. Anderson* (1968) 70 Cal.2d 15, a case on which appellant's argument heavily relies, the Court outlined various categories of evidence which would be sufficient to establish premeditation and deliberation. They are: "(1) facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing-what may be characterized as 'planning' activity; (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citations omitted]; (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*Id.*, at pp. 26-27; see also *People v. Mayfield*, *supra*, 14 Cal.4th at p. 768; *People v. Mincey* (1992) 2 Cal.4th 408, 434-435.) These factors are not the exclusive means, however, to establish premeditation and deliberation; for instance, "an execution-style killing may be committed with such calculation that the manner of killing will support a jury finding of premeditation and deliberation, despite little or no evidence of planning and motive." (*People v. Lenart* (2004) 32 Cal.4th 1107, 1127; *People v. Hawkins* (1995) 10 Cal.4th 920, 957.) In identifying categories of evidence bearing on premeditation and deliberation, the Court in *Anderson* "did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and

deliberation." (*People v. Perez* (1992) 2 Cal.4th 1117.) Furthermore, the court has never required that there be extensive time to premeditate and deliberate. (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 767; *People v. Perez*, *supra*, 2 Cal.4th at p. 1127.) Premeditation and deliberation do not require much time (*People v. Hughes* (2002) 27 Cal.4th 287, 371), for " '[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.' " (*People v. Mayfield*, *supra* 14 Cal. 4th at p. 767.)

Viewing all of the facts presented at trial in the light most favorable to the prosecution, sufficient evidence supports the jury's guilty verdict. The multiple wounds that appellant inflicted with his hatchet on Fred Jenks's head show that appellant clearly was trying to kill him. (6 RT 1398-1404.) The fact that several of Mr. Jenks's finger bones were broken from being hit while trying to protect his head, further evidence a struggle in which appellant affirmatively set out to kill the victim. (6 RT 1398-1406.) It is not as if appellant randomly hit Mr. Jenks all over his body; the wounds were concentrated on his head and vital organs, the places on a human body where injury is most likely to be fatal.

But even more telling, was appellant's mid-murder trip to the kitchen, where he tracked Fred Jenks's blood and retrieved a paring knife from the cutlery drawer. Finding this knife insufficient to stab through Mr. Jenks's dying body, appellant went back to the kitchen, took a filet knife from the drawer, sharpened it, and returned to continue stabbing him. Appellant's use of multiple weapons, his act of sharpening the filet knife, and his decision to use his weapons on the head, neck, and chest of Mr. Jenks, as opposed to his legs or feet, show that the murder was intended and calculated.

Appellant's murder of Shirley Jenks showed the same type of calculated, decisive reasoning. He began with the hatchet, hacking at her

head and neck, but ultimately used the long bladed filet knife to stab through her chest and directly into her heart and lungs. (7 RT 1442-1445.) While she was most likely dead by the time he slashed her throat, there was no evidence that appellant was aware that she was already dying or dead so his act of deeply cutting the front of her neck from ear to ear is certainly demonstrative of appellant's efforts to kill her, and had intent to hasten her death so that he could pillage her belongings without consequence.

Appellant's execution of an extensive robbery after the killings indicates that this was a pre-planned attack, where appellant went to the Jenks house with the plan of killing and robbing them. The jury endorsed this theory by specifically finding the special circumstance of robbery, i.e. that "the murder was committed in order to carry out or advance the robbery or to facilitate escape therefrom or to avoid detection" (CALJIC No. 8.21, 12 RT 2355.)

In his argument, appellant attempts to characterize circumstantial evidence as evidence that should be re-weighed by this Court and thereby convince this Court to draw inferences adverse to the prosecution. (AOB 40-43.) However, the same standard of review on appeal applies to all cases regardless of the types of evidence the prosecution relied on in securing a conviction. (*People v. Perez supra,* 2 Cal.4th at p. 1117.) As discussed above, evidence must be sufficient for a rational trier of fact to conclude the defendant is guilty, but a court's conclusion that the facts could be consistent with a contrary finding "does not render the evidence insubstantial." (*People v. Earp supra* 20 Cal.4th 887-888.) While appellant postulates that the crime scene reflects a man who went into a sudden rage, the prosecution's theory, that appellant was a motivated killer who planned to kill the Jenks and then rob them is also supported by the evidence and should therefore be accepted by the Court.

The facts supporting premeditation and deliberation here are akin to those found sufficient by the Court in *People v. Perez, supra,* 2 Cal.4th at p. 1117. There, the victim was found dead with multiple stab and puncture wounds inflicted by the defendant with two different knives, one of which was found under the victim's body with a broken handle. (*Id.* at 1121.) The knives matched the kind of knives in the victim's kitchen. (*Id.* at 1122.) The pathologist testified that some of the stab wounds were inflicted after the victim was dead and that the injuries to her hands and forearms were most likely caused when she was defending herself. There were no eye witnesses to the murder and the defendant never confessed to anyone or testified at trial. (*Id.* at 1121-1123.) He was linked to the crime through fingerprints and DNA. (*Ibid.*) The appellate court reduced the defendant's first degree murder conviction to second degree murder finding insufficient evidence of premeditation and deliberation. (*Ibid.*) However, this Court reversed, highlighting the standard of appellate review and using the evidentiary inferences that could have reasonably supported the jury's verdict. (*Id.* at 1125-1126.) The Court noted, "Even if we may have made contrary factual findings or drawn different inferences, we are not permitted to reverse the judgment if the circumstances reasonably justify those found by the jury." (*Id.* at 1126.) The Court analyzed the evidence finding premeditation and deliberation by the fact that the defendant did not park in the driveway and surreptitiously entered the residence, and that regardless of his motive for entering the house, one could reasonably conclude that he "determined it was necessary to kill" the victim "to prevent her from identifying him." (*Id.* at 1126-1127.) The Court also noted that "the manner of the killings is also indicative of premeditation and deliberation. The evidence of blood in the kitchen knife drawer supports an inference that defendant went to the kitchen in search of another knife after the steak knife broke." (*Id.* at 1127.) In rejecting the defendant's argument, the

Court stated: "It is difficult to characterize the defendant's conduct as a 'mere rash and unconsidered impulse.' Some period of time must have necessarily elapsed between the first and second set of wounds." (*Id.* at 1127.) The defendant's act of switching weapons after the first weapon was rendered ineffective was significant to the Court as it reflected the defendant's thought process.

Here, at least as much evidence shows that appellant committed first degree murder. Appellant left a trail of blood to and through the kitchen while searching for the perfect weapon to finish the murders. The fact that he bothered to sharpen the knife and left the bloody knife sharpener in the sink shows that he wanted a weapon sharp enough to pierce through the victims, and reach their vital organs, thus ensuring their death and excluding the possibility of them being alive to identify him as the attacker. The fact that he robbed the Jenks shows further motive to kill them, so that he could take what he wanted without disruption or consequence. Thus, the evidence shows that appellant had multiple motives for killing the Jenks and that he carried out the murders with premeditation and deliberation. While appellant argues that there was no evidence that he specifically went to the house to rob and kill the Jenks, the *Perez* Court was not concerned with why the killer entered the residence, but focused its analysis on what happened when he got there. (See *Id.* at 1125.) Here, various theories can be argued about when appellant decided he was going to rob and kill the Jenks; the important point, however, is that a reasonable trier of fact can certainly conclude from the evidence, that appellant made that premeditated and deliberated decision, rather than killing them in a reactive fit of rage. Appellant's reliance on opposing inferences is contrary to the law of appellate review. Moreover, the inferences he now argues, were already argued to the jury and squarely rejected by their first degree murder and special circumstance verdicts. Sufficient evidence was presented at

appellant's trial for a reasonable jury to conclude that appellant murdered the Jenks with premeditation and deliberation.

C. Felony Murder Theory and Special Circumstance of Robbery

Robbery is "the felonious taking of personal property in the possession of another, from his or her person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Under the felony-murder rule, a murder "committed in the perpetration of, or attempt to perpetrate" one of several enumerated felonies, including robbery, is first degree murder. (§ 189.) The robbery-murder special circumstances apply to a murder "committed while the defendant was engaged in . . . the commission of, [or] attempted commission of" robbery. (§ 190.2, subd. (a)(17).) "[T]o prove a felony-murder special-circumstance allegation, the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely incidental to an intended murder." (*People v. Mendoza* (2000) 24 Cal.4th 130, 182.)

"[A] felony that is merely incidental to the murder cannot serve as the basis for a felony-murder special circumstance" (*People v. Gurule* (2002) 28 Cal.4th 557, 628), for the Legislature's goal in implementing the death penalty law by enacting the special circumstance scheme would not be achieved if a criminal defendant could be made eligible for the death penalty where his intent is not to commit an enumerated felony but is instead simply to kill, and the associated felony was "merely incidental to the murder." (*People v. Green* (1980) 27 Cal.3d 1, overruled on other points by *People v. Hall* (1986) 41 Cal.3d 826, 834, footnote 3, and *People v. Martinez* (1999) 20 Cal.4th 225, 241.) For example, a killer who takes the victim's clothes so as to forestall later identification of the victim and thus avoid responsibility for the murder or a rapist-killer who takes a letter

from his victim as a remembrance of his rape (*People v. Marshall* (1997) 15 Cal.4th 1, 41.) have not committed murder "while engaged" in the requisite felony. However, "we need not discern their various mental states in too fine a fashion." (*People v. Abilez* (2007) 41 Cal.4th 472, 511.) A "concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1068.)

Appellant claims that insufficient evidence establishes that he formed the intent to steal before committing the murder. (AOB 44-53.) Instead, he postulates that the robbery could have been a mere "opportunistic theft" after the victims were dead. (AOB 44-50.) Appellant's contention underestimates the evidence against him. Williams testified that appellant frequently worked for Fred Jenks in his home, establishing that appellant was familiar with the layout of the house and the Jenks' possessions. Furthermore, when appellant went to the Jenks residence, he needed money. While as appellant notes evidence of poverty is not admissible to show motive for robbery, the fact that appellant had gambled his meager monthly income away, was overdue on his beer tab, and could not even buy groceries, certainly showed that he needed money. None of this evidence was objected to. Moreover, the blood-soaked dollar bills sticking out of Mr. Jenks' robe pocket imply that there was some sort of demand for money with which Mr. Jenks was trying to comply when appellant hacked him to death with the hatchet. Appellant's motive of robbing the Jenks was also re-enforced by the fact that he pawned Mrs. Jenks's jewelry less than 24 hours after brutally slaying her. Moreover, the trail of blood he tracked through the Jenks' house and into their office shows that he was searching for valuables. He tore through the office, looking for money or checks and ransacked the Jenks bedroom drawers and closet to rob them of their jewelry and other valuables. "Although the evidence is circumstantial, the

intent required for robbery is seldom established with direct evidence but instead is usually inferred from all the facts and circumstances surrounding the crime." (*People v. Lewis* (2001) 25 Cal.4th 610, 643.) The evidence was sufficient to show that appellant intended to deprive the Jenks of their property, and he clearly used force to accomplish this objective.

Appellant also suggests that the taking of property occurred after the Jenks were dead which he claims bolsters his theory that "theft" was an afterthought. "[I]t is settled that a victim of robbery may be unconscious or even dead when the property is taken, so long as the defendant used force against the victim to take the property." (*People v. Jackson* (2005) 128 Cal.App.4th 1326, 1330, *citing People v. Frye* (1998) 18 Cal.4th 894, 956.) Clearly it was easier to ransack the Jenks' bedroom and steal their valuables after they were dead and unable to scream for help, call the police, or otherwise create an obstacle for him. The fact that appellant murdered the Jenks before robbing them in no way mitigates the robbery to a theft; instead, it bolsters the prosecution theory that the murder was committed with the motive of committing a successful robbery.

Finally, the fact that the jury separately convicted appellant of robbery as charged in count III of the information confirms that the jury believed, beyond a reasonable doubt, that appellant intentionally took property from Mr. and Mrs. Jenks using force or fear. The jury was instructed not only on the elements of robbery, but on the lesser included theft crimes. (11 RT 2357-2361.) The jury rejected the opportunity to find appellant guilty of any lesser crime, and instead unanimously agreed that appellant was guilty of robbery.

D. If Either Theory Is Supported by Sufficient Evidence the Verdicts Should Be Affirmed

Even if the evidence were insufficient to show either premeditation and deliberation or intent to rob the Jenks, reversal is not required so long as one valid ground for the verdict remains, "absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) The verdict shall be affirmed unless "a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*Ibid.*) "[I]nstruction on an unsupported theory is prejudicial only if that theory became the sole basis of the verdict of guilt; if the jury based its verdict on the valid ground, or on both the valid and the invalid ground, there would be no prejudice, for there would be a valid basis for the verdict." (*Ibid. See also People v. Johnson* (1993) 6 Cal.4th 1, 42; *People v. Chatman* (2006) 38 Cal. 4th 344, 389; *People v. Kelly* (2007) 42 Cal.4th 763, 789.) Nothing in the record here affirmatively demonstrates that the jury only believed one of the prosecution theories. No questions were asked by the jury during deliberations that would indicate they were focused on one theory or the other. Contrary to appellant's argument advanced in part XVII of appellant's opening brief, the jury is not required to communicate which theory it relies on or even be unanimous. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 394-395.) Here, all jurors agreed beyond a reasonable doubt that appellant was guilty of two counts of first degree murder. Since nothing in the record affirmatively shows that they relied on an insufficiently established theory of first degree murder, appellant's convictions should be affirmed. The fact that appellant was also convicted of the special circumstance of robbery and of a robbery as charged in count 3, showed the jury at least believed the felony-murder theory.

II. THE TRIAL COURT PROPERLY DEFINED REASONABLE DOUBT AND DID NOT DILUTE THE PROSECUTION'S BURDEN OF PROOF DURING PRE-INSTRUCTIONS

Appellant insists that all of his convictions must be reversed because the trial court made pre-instruction, pre-trial comments during vior dire which undermined the prosecution's burden of proof. (AOB 63-86.) Specifically, he claims that the court gave "a homely and inapt metaphor" to define circumstantial evidence. (AOB 63-68, 76-77.) Appellant concludes that this error cannot be viewed as harmless and thus all convictions must be reversed. (AOB 87-98.) Appellant's rambling, disorganized argument is devoid of merit. He has also forfieted this claim on appeal.

A. Background

On June 2, 1998, the initial groups of jurors were brought to the courtroom for the selection process. Before distributing questionnaires, the court read the prospective jurors the charges, gave a brief overview of the trial process in a capital case, the history of the death penalty and some basic pre-instructions regarding the jury's role in evaluating evidence. (2 RT 360-381.) Included in this brief overview was the presumption of innocence, the prosecution's burden of proof, and the definition of reasonable doubt. (2 RT 368-369.) The court reiterated, towards the end of its summary, that "the defendant may not be convicted of any offense charged against him unless all 12 jurors are convinced beyond a reasonable doubt of his guilt." (2 RT 374.) This same overview was given each time a new group of prospective jurors were empanelled. (2 RT 427-450, 476-497.) With regard to reasonable doubt and the presumption of innocence, the court stated the following each time a new panel of prospective jurors was sworn:

A defendant in a criminal case is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt is satisfactorily shown he is entitled to an acquittal.

The effect of this presumption is to place upon the state the burden of proving him guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

The fact that the defendant is in court for trial or that charges have been made against him is no evidence whatsoever of his guilt. You are to consider only evidence properly received in this courtroom in determining the guilt or innocence of the defendant.

The defendant has been arraigned and has pleaded not guilty, which is a complete denial making it necessary for the People acting through the District Attorney to prove beyond a reasonable doubt the case against the defendant. Until and unless this is done the presumption of innocence prevails. (2 RT 368-369.)

At a later point during jury selection, after questionnaires had been reviewed by the court and counsel, the court told the prosecutor and defense that he intended to generally voir dire each group of jurors and ask some general questions and explore potential biases. (3 RT 532.) The prosecutor requested that the court discuss burden of proof with the jury again and noted that "a number of jurors in the questionnaires have expressed opinions regarding the burden of proof. And it appears that a number of these jurors, notwithstanding the Court having already instructed that the burden of proof is beyond a reasonable doubt for the guilt phase, have expressed opinions that because it's a death penalty case it would require

guilt beyond a shadow of a doubt. . ." (3 RT 524.) The court responded that this issue would be discussed with the jurors and appellant made no objection. (3 RT 524-529.) In the same discussion, appellant objected to a different request by the prosecutor, and the court agreed with appellant's objection and declined the prosecutor's request. (3 RT 525-528.) The court gave the following information concerning the prosecutor's burden of proof and circumstantial evidence:

> The first question I want to talk about or first issue I want to talk about is circumstantial evidence. There are several specific jury instructions that deal with how your are to treat circumstantial evidence and how you are to evaluate it, but the general rule is that circumstantial evidence is just like any other evidence, and if it is considered within the parameters of the instructions, the circumstantial evidence can support a jury verdict and is perfectly acceptable as evidence in a capital case or any other case. There's nothing different about a capital case with regard to the consideration of circumstantial evidence. Some people have some questions about that, and I want to disabuse you of that misconception.
>
> Since I'm talking about circumstantial evidence, let me simply and very briefly tell you what it is: Circumstantial evidence is evidence that proves a fact by indirection. And the best way to talk about this is to give you an example: If a – if you've – have baked a pie or your spouse has baked a pie and you've told your child that that pie is for the company that you're planning to be entertaining that evening and they're not to get into it. And the pie is left on the kitchen counter, and then an hour later you come back into the room and there's a – it's obvious that someone has taken a scoop out of the edge of that pie and then you go confront your nine-year-old and the nine-year-old has raspberry residue on his or her lower lip, you don't need any other evidence in a case like that to conclude that your child got into the pie. That's circumstantial evidence, yes, the fact that someone got into the pie and that the child has evidence of having recently consumed raspberry pie, but it is perfectly good evidence and would support an inference, a reasonable inference that in fact your child has disobeyed your instructions. That's a pretty simplistic example, but that's circumstantial evidence.

> And there are specific instructions as to how you're to treat the evidence, and I won't go into those right now, but I want you at the beginning to understand that that rule – – those rules are – – that you'll be instructed on in this case are the same as the rules that apply in any other trial.
>
> There's also some concern that is frequently expressed in a capital case that the burden of proof should be something different than the burden of proof that applies in other trials. That is not the law. The burden of proof is proof beyond a reasonable doubt, you've been previously pre-instructed on that, you'll receive further instructions later, but the general rule is that evidentiary standard is the same on the issues to which it applies. And, again, that's true of this case as is true in any other trial that we – – that we conduct.
>
> Does anybody have any questions or any problem in applying the same standards of proof or the same burden of proofs, when appropriate, to this type of trial as opposed to a noncapital case?
>
> All right, for the record no one is responding. (3 RT 549-551.)

This same information, though not recited verbatim, was given to each group of prospective jurors. At the end of trial, the jury was instructed with a complete panorama of instructions, including circumstantial evidence, circumstantial evidence related to special circumstances, and reasonable doubt. [3] (11 RT 2331-2365.) Appellant apparently finds the following portion of the court's pre-instruction objectionable: "There's nothing different about a capital case with regard to the consideration of circumstantial evidence. Some people have questions about that, and I want to disabuse you of that misconception. . . ." (3 RT 549.) "I think a lot of jurors are confused about circumstantial evidence and think it's more complicated

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[3] For the Court's convenience in addressing this claim and appellant's numerous other instructional error claims, respondent has attached as Appendix B, a complete copy of the instructions given to the jury at the close of the guilt phase.

concept than it really is. The instructions on circumstantial evidence are very- are somewhat complex and I will read those to you at the appropriate time, but let me at this time just generally tell you. . ." The court went on to give the raspberry pie story that appellant also criticizes. (3 RT 694; AOB 63-77.)

B. Forfeiture

Preliminarily, this claim is not cognizable on appeal because appellant has failed to preserve it by objecting to the trial court. A defendant "may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156.) "It is of course true that a defendant need not object to preserve a challenge to an instruction that incorrectly states the law and affects his or her substantial rights." (§ 1259; *People v. Hillhouse* (2002) 27 Cal.4th 469,]505-506; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) While appellant will undoubtedly argue as he already has that the pre-instructions violate his "substantial rights", they were not a misstatement of the law, even under his reasoning. Thus, to preserve his claim that the instructions needed to be amplified or balanced by more focused language on the presumption of innocence, appellant should have objected. Because he did not object, despite numerous opportunities, this claim should be deemed forfeited. Appellant failed to request appropriate clarifying or amplifying language as he must to preserve this issue on appeal. (*People v. Palmer, supra,* 133 Cal.App.4th at p. 1156.)

C. Legal Analysis of Appellant's Flawed Claim

Appellant's claim is premised on an extreme exaggeration of the trial court's comments. He argues, the trial court erred when it "dramatically telegraphed to the jurors his concern that they might short-change the

prosecution. This gross breach of impartiality . . . invalidated their subsequent verdicts." (AOB 68.) The first problem with this argument is appellant points to no place in the record where the court expresses "concern" about the prosecution being short-changed. Instead, throughout the proceedings, the court approached jury instruction and selection in an open-minded, fair, and impartial manner, always inviting both parties to participate. When appellant's characterization of the court's comments is unwrapped and the comments themselves are actually considered, appellant's argument falls flat.

Appellant initially relies on *People v. Brown* (1993) 6 Cal.4th 322, 332 for his themed proposition that he was denied a fair and impartial judge. (AOB 68.) *Brown* deals with the court's denial of a motion to disqualify a judge, and like most of the cases appellant cites, is completely inapplicable to the present situation where appellant was not denied an impartial judge. It is axiomatic that all defendants are entitled to a fair and impartial judge. (See, e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [trial by judge who is not fair or impartial constitutes "structural defect in the constitution of the trial mechanism" and resulting judgment is reversible per se]; see also *Gomez v. United States* (1989) 490 U.S. 858, 876; *Gray v. Mississippi* (1987) 481 U.S. 648, 668] ["impartiality of the adjudicator goes to the very integrity of the legal system"]; *Rose v. Clark* (1986) 478 U.S. 570, 579, fn. 7; *Tumey v. Ohio* (1927) 273 U.S. 510, 535 ["No matter what the evidence was against him, he had the right to have an impartial judge."].) However, appellant fails to show how the court in this case acted partially or affected his right to due process and a fair trial.

Appellant suggests, for the first time on appeal, that the court ought to have spent more time on reasonable doubt and presumption of innocence issues during pre-instruction to balance its "over 3 minute" explanation of circumstantial evidence. (AOB 72-74.) However, as quoted above, the

court did appropriately define these other legal concepts. The court's "example" of circumstantial evidence came after a legitimate concern was raised, that jurors might think, based on many fictional television shows, that *mere* circumstantial evidence could never be sufficient to convict a defendant, especially in a capital case. The court's explanation properly disabused jurors of this misconception.

Appellant claims that the court "fell far short of even handedness" and endorsed the prosecution's theory, amounting to a "biased comment on the evidence," (AOB 73-76) but he fails to find support for this rhetoric in the record. Appellant cites multiple cases to support this proposition but none are particularly analogous to the court's comments here. For example, in *People v. Sturm* (2006) 37 Cal.4th 1218, this Court reversed the penalty phase on a multiple murder-robbery case because of the trial court's "inaccurate" and biased comments on the evidence. (*Id.* at 1232.) There, on a re-trial of a previously hung penalty phase, the court referred to the issue of premeditation as a "gimme", when in fact it was a felony murder case where the defense strategy at the penalty trial was to mitigate the crimes by claiming a lack of premeditation. (*Ibid.*) Additionally, the court made repeated disparaging remarks about the defense experts, interrupting the defense case 30 times and constantly insinuating to the jury that the experts were "unreliable" and a waste of time. The court also criticized the defense attorney multiple times in open court. (*Id.* at 1240-1243.) This Court noted that not one of these comments on its own would require reversal, but that the cumulative effect of the court's comments injected extreme prejudice into the case. (*Id.* at 1243-1244.) "Throughout defendant's second penalty phase trial, beginning with voir dire, and continuing through defense counsel's presentation of mitigating evidence, the trial court interjected itself unnecessarily and inappropriately into the adversary process." (*Ibid.*)

The same cannot be said about the court's conduct in the case at bar. Here, even appellant cannot stretch the record enough to claim that the court said anything inaccurate. Moreover, the court never criticized or showed disdain for the defense attorney or any witness. Appellant also fails to cite multiple, aggregate comments throughout trial, and bases his argument solely on the court's explanation of circumstantial evidence during pre-instruction, before a jury was even selected. The court's explanation of circumstantial evidence in no way amounted to misconduct or a showing of judicial bias, especially when compared to the judicial conduct condemned by this Court in *Strum*.

Also notable in *Sturm*, defense counsel objected to some, although not all, of the court's misconduct. (*Id.* at 1236.) The *Sturm* Court recognized that, generally, "judicial misconduct claims are not preserved for appellate review if no objections were made on those grounds at trial" (*Id.* at 1237, citing *People v. Snow* (2003) 30 Cal.4th 43, 77-78; *People v. Fudge*, *supra*, 7 Cal.4th at p. 1108; *People v. Anderson* (1990) 52 Cal.3d 453, 468), but evaluated the defendant's claims, nonetheless, because of the apparent "hostility" between the defense attorney and the court, making further objections futile. (*People v. Sturm supra* 37 Cal.4th at 1237.) The same cannot be said here, where appellant made no objection to the court's explanation of circumstantial evidence whatsoever. In fact, the record shows that the court was otherwise receptive to appellant's objections. In the very same discussion where the prosecutor requested clarification of the burden of proof, the prosecutor also requested that the court voir dire the jurors regarding potential bias against the prosecution because there were two attorneys and an investigator on the prosecution's side of the table, compared to only one defense attorney and no investigator in court on the defense side. (5 RT 524-526.) Appellant objected to the court discussing this issue at all, and the court stated that it "agreed" with appellant's

attorney and that his "objection is a legitimate one." (5 RT 527.) The court's comment shows that it did not harbor "hostility" towards the defense and was open-minded in making its decisions, unlike the trial court in *Sturm* who repeatedly rejected defense objections and chastised the defense attorney in open court. (*Id.* at 1237.)

D. The Court's Remarks Did Not Amount to a Biased Comment on the Evidence

Appellant's claim that the court's discussion of circumstantial evidence amounted to a "biased comment on the evidence" (AOB 75-77), should also be rejected. Preliminarily, respondent submits that the court's explanation of circumstantial evidence did not constitute a comment on the evidence as no evidence had even been presented yet, but was a mere simplification of a complicated legal concept. In any event, if viewed as a comment on the evidence, it was not improper. In fact, the California Constitution itself provides that "The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." (Article VI, section 10.) In *People v. Slaughter* (2002) 27 Cal.4th 1187, a case cited by appellant (AOB 75) the Court found the trial court's comment that the evidence would not show self-defense appropriate during jury selection for the penalty phase. (*Id.* at 1218.) The Court noted its previous discussion in *People v. Rodriguez* (1986) 42 Cal.3d 730, 766, stating:

> On its face, the constitutional language imposes no limitations on the content or timing of judicial commentary, deferring entirely to the trial judge's sound discretion. The appellate courts have recognized, however, that this powerful judicial tool may sometimes invade the accused's countervailing right to independent jury determination of the facts bearing on his guilt or innocence. Hence, the decisions admonish that judicial comment on the evidence must be accurate, temperate, non-argumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence

> from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate fact-finding power. [Citations Omitted.]

(See also *People v. Hawkins* (1995) 10 Cal.4th 920, 948 ["In the present case, the trial court's questions and comments were within the bounds of propriety. Its role was one of clarification rather than advocacy."].) Here, the court's limited discussion of circumstantial evidence was not argumentative at all, and cannot be interpreted by a reasonable individual to have distorted the record, directed a verdict, or usurped the jury's fact finding power. Thus, the court's discussion of circumstantial evidence should not be deemed improper. Additionally, at the conclusion of the trial, the court instructed the jury with CALJIC No. 17.30, stating that the court did not intend to insinuate or suggest what the jury should find the facts to be, and instructed the jury to "form your own conclusions." (11 RT 2468.)

E. Court's Remarks Did Not Denigrate the Prosecution's Burden of Proof

Appellant also attempts to reclassify the circumstantial evidence explanation as a comment on the prosecution's burden of proof and under this theory, he complains that the court diluted the burden of proof and lowered the standard. (AOB 76-87.) Appellant's viewpoint is contradicted by the record.

Citing *People v. Brannon* (1873) 47 Cal. 96 and its progeny, appellant likens the trial court's raspberry pie story to cases where the burden of proof has been diluted by reference to daily decision making. (AOB 83-87.) In *Brannon*, the Court evaluated the trial court's instruction to the jury that it use the same standard it uses "in the important affairs of life." (*Id.* at 97.) The Court reversed the conviction because "[t]he judgment of a reasonable man in the ordinary affairs of life, however important, is

influenced and controlled by the preponderance of evidence." Courts have repeated this principle over the years and maintained that beyond a reasonable doubt is a standard that should not be equated to decisions made in people's everyday lives. (See *People v. Nguyen* (1995) 40 Cal.App.4th 28, 35-36 [prosecutor improperly suggested reasonable doubt standard applied to daily life decisions such as changing lanes or getting married, however issue was waived because of defendant's failure to object]; see also *People v. Johnson* (2004) 119 Cal.App.4th 976, 985 [trial court improperly altered statutory reasonable doubt definition by equating proof beyond a reasonable doubt to everyday decision making]; *People v. Johnson* (2004) 115 Cal.App.4th 1169 [same].)

The court's raspberry pie story was not meant to demonstrate the concept of guilty beyond a reasonable doubt. Instead, it was geared towards explaining how inferences can be drawn from facts, and thus proof can occur through circumstantial evidence. The court never commented to the jury that it uses the reasonable doubt standard in everyday life or that the reasonable doubt standard is applicable to their important decisions, such as travel, marriage, or finances. Appellant's attempt to couch the raspberry pie example as a story the court used to illustrate reasonable doubt and the criminal justice process (AOB 85) is like trying to jam a square peg into a round hole. It does not fit and should be rejected.

The trial court repeatedly told the jury that the standard of proof was beyond a reasonable doubt and never used any other language when defining the burden of proof. The court gave CALJIC No. 2.90 both at the close of the jury trial and as part of general pre-instruction. Emphasizing the definition of circumstantial evidence and attempting to simplify what the court considered to be a "somewhat complex legal concept" did not dilute the prosecution's burden of proving its case beyond a reasonable doubt.

Similarly, the court's comment that the same standard of proof applies in all criminal cases is a true statement of law and did not denigrate the prosecution's burden. Instead, the court was merely telling the jury that the same burden of proof applies in capital and non-capital cases, a clarification that was necessary given that some of the jury questionnaires reflected the belief that a higher burden of proof applies in capital cases than in other criminal cases. (5 RT 523-524.)

F. The Court Did Not Omit "Crucial Legal Concepts;" It Completely and Accurately Instructed the Jury

Finally, appellant's argument that the court "omitted crucial concepts" when explaining reasonable doubt and circumstantial evidence is belied by the record. (AOB 86-87.) Other than the one paragraph raspberry pie example, which the court told the jury was "pretty simplistic," the court's pre-instruction tracked standard CALJIC No. language and included important and relevant introductory topics. Most importantly, the jurors who were actually selected, sworn, and present for the nearly two weeks of evidence, received all of the appropriate instructions relating to circumstantial evidence, burden of proof, and reasonable doubt. (11 RT 2331-2365; IX CT 2655-2679.) The court included CALJIC No. 2.01, which cautioned the jury that "a finding of guilt as to any crime cannot be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion." (9 CT 2662; 11 RT 2336.) The special circumstance instructions the court gave also included similar protective language concerning circumstantial evidence. (11 RT 2355.) By so doing, the court instructed the jury with all of the appropriate legal explanations and definitions, ensuring that appellant's rights to due process were vitiated. His convictions should therefore be affirmed.

Appellant suggests that since the court discussed circumstantial evidence during pre-instruction, it should have read CALJIC No. 2.01[4]. (AOB 84-87.) An appellate court recently rejected this exact contention in a well-reasoned opinion. (*People v. Smith* (2008) 168 Cal.App.4th 7.) In *Smith*, the court pre-instructed the jury with the definition of circumstantial evidence but did not give CALCRIM 224 (the equivalent of CALJIC No. 2.01) until the close of evidence, when the court gave complete instructions. (*Id.* at 18.) The court in *Smith* rejected the defendant's claim that this reduced the prosecution's burden of proof stating that the defendant's contentions were at odds with statutory and case law. (*Id.* at 18.) The court concluded that the defendant

> ignores not only the basic principles of review recited above regarding looking at the entire charge when reviewing claims of instructional error and claims that an instruction violates due process, but also the body of case authority that recognizes that '[i]nstruction at the conclusion of the trial, rather than before, tends to ensure emphasis and prevent confusion.'

(*Ibid.* citing *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. Musselwhite, supra*, 17 Cal.4th at p. 1248, and quoting *People v. Elguera* (1992) 8 Cal.App.4th 1214, 1223.)

This Court recently addressed the failure of a trial court to instruct on evaluating circumstantial evidence at any point in the trial and found that the error did not rise to the level of federal constitutional error since the court had instructed on reasonable doubt. (See *People v Rogers* (2006) 39 Cal.4th 826, 886.) In rejecting a claim that the omission of CALJIC No. 2.01 violated several of the defendant's federal constitutional rights, the Court stated that,"[t]he federal Constitution itself does not require courts to

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[4]CALJIC 2.01 is equivalent to CALCRIM 224, discussed by the court in *People v. Smith* (2008) 168 Cal.App.4th 7.

instruct on the evaluation of circumstantial evidence where, as here, the jury properly was instructed on reasonable doubt." (*Id.* at pp. 886-887.)

Here, the trial court did not omit the instruction on the sufficiency of circumstantial evidence from its entire charge to the jury. Instead, the jury was given the full panorama of instructions, including reasonable doubt both during pre-instructions and at the close of evidence, evaluating circumstantial evidence, and circumstantial evidence being used to find special circumstances true. Failure to give CALJIC No. 2.01 to prospective jurors during pre-instruction did not constitute error.

G. Appellant's Harmless Error Analysis is Flawed

Respondent submits, first that appellant has forfeited this issue by failing to object, and second that the court clearly did not commit misconduct during pre-instruction. In an abundance of caution however, respondent briefly responds to appellant's baseless claim that the court's comments amounted to reversible error either under the federal or state law. (AOB 87-98.)

The United States Constitution does not require jury instructions to contain any specific language, but they must convey two concepts: the accused is presumed innocent until proven guilty and the accused may be convicted only on proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 5; *Taylor v. Kentucky* (1978) 436 U.S. 478; *Coffin v. United States* (1895) 156 U.S. 432; *People v. Flores* (2007) 153 Cal.App.4th 1088, 1092-1093.) When reviewing such an instruction, the relevant inquiry is "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet" the constitutional standard. (*Victor v. Nebraska, supra,* 511 U.S. at 6.) The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights. (*People v. Smith* (2008) 168 Cal.App.4th 7, 13.) The correctness of the jury

instructions is determined from the entire charge of the court, not from considering only parts of an instruction or one particular instruction. (*Ibid.* citations omitted.) The absence of an essential element from one instruction may be cured by another instruction or the instructions taken as a whole. Further, in examining the entire charge we assume that jurors are "intelligent persons and capable of understanding and correlating all jury instructions which are given." (*Ibid.* citations omitted.) The United States Supreme Court applies these same standards in reviewing claims that an instruction has violated a defendant's right to due process. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Smith, supra,* 168 Cal.App.4th at pp. 13-14.)

The jury here was correctly instructed on the presumption of innocence and the standard of proof. The challenged statement which appellant failed to object to occurred roughly two and a half weeks before the close of evidence and deliberation began, before the jury had even been selected. Prior to deliberations, the court properly instructed the jurors about the standard of proof, presumption of innocence, and circumstantial evidence. Moreover, the court instructed the jury just before deliberations that it had

> not intended by anything it had done, or by any questions I may have asked, or by any ruling I have made, to intimate or suggest what you should find to be the facts . . . If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusions.

(11 RT 2468; 9 CT 2677.)

Appellant never complained that the jury was confused as to these legal concepts to require any re-instruction or clarification. Viewing the instructions as a whole, it is not reasonably likely the jury understood the challenged statement to mean that the prosecutor had a burden less onerous than proving the case beyond a reasonable doubt. (*People v. Osuna* (1969)

70 Cal.2d 759, 767-768.) Because the trial court gave the appropriate instructions to the jury there is no basis for reversal. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1157.) Appellant cannot credibly maintain that despite all of the appropriate instructions given, the court's preliminary remarks impacted his right to a fair trial. His argument should be rejected.

III. THE PROSECUTOR'S ARGUMENT TO THE JURY CONCERNING REASONABLE DOUBT DID NOT AMOUNT TO PROSECUTORIAL MISCONDUCT

A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Morales* (2001) 25 Cal.4th 34, 44.) "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 trial court or the jury." (*Ibid.*) When a misconduct claim focuses on arguemnt to the jury, the question is "whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*Ibid.*)

Appellant argues that the prosecutor committed misconduct in closing argument by misstating the law with respect to the people's burden of proof. (AOB 99-109.) He complains that statements in both the closing summation and rebuttal caused confusion to the jury and resulted in a violation of appellant's constitutional rights. (AOB 102-109.) Appellant's claim lacks merit.

A. Background

During the first closing argument, the prosecutor stated the following with respect to the jury instructions:

> Lastly, on the idea of these instructions and the law, I know they may have sounded like the instructions on how to do - - how to program your VCR or stereo. They get rather complicated and

convoluted. But at the core of them, they're really based on common sense. And if you're going back there and you find yourself going against your common sense, you say something like, well, we know he's guilty, but the instructions say this, so does that mean that we have to find him not guilty? If you find yourself going against your common sense, going off on places where you really don't think common sense tells you you should be going, stop. Come back, ask the Judge to clarify them. Don't go down too far a road because you may be misreading or reading too much into the instructions. They really are based on common sense, and, again, if you're violating your common sense, you're going against something you just think, hey, this don't sound right, ask the Judge. That's very common to do. Be sure you understand the instructions...

(11 RT 2380-2381.)

During defense close, appellant's attorney outlined the different legal standards of proof, highlighting that reasonable doubt is the highest, and that if the jury was "pretty sure" appellant was guilty, then they must acquit because pretty sure is not sufficient under the law. (11 RT 2420.)

In rebuttal close, the prosecutor responded as follows:

Defense has spent much time telling you that this case does not meet beyond a reasonable doubt. Defense tried to do this, I don't know, hierarchy of reasonable doubt, and boy, when the defense does the hierarchy it just sounds like preponderance is way down here, and clear and convincing is kind of here, and beyond a reasonable doubt is clear up here, high as Mt. Everest. That's sort of what the inference is, kind of like a bar chart or something. Well, you know, we could do a bar chart the other way, and let's start with beyond a reasonable doubt right down here, and then you could go beyond a shadow of a doubt right there, and beyond any doubt right here, and absolutely certain up here, and then way up here is one hundred percent certain. So you see that that's not really very helpful. You can kind of manipulate bar charts any way you want to and that's not helpful.

But in your consideration of reasonable doubt don't ever come back and tell a prosecutor gosh, you know, we believed he was guilty, but don't do that. If you believe he's guilty today and

you'll believe he's guilty next week then that's that abiding conviction that's going to stay with you. And "beyond a reasonable doubt" is defined in the jury instructions it's not a mere possible doubt; anything open to being human has some possible or imaginary doubts. It's what's reasonable.

(11 RT 2447-2448.)

No objection was ever made.

B. Forfeiture

Courts have consistently held that in order to preserve a claim of prosecutorial misconduct for appellate review, an objection must be made at the trial court level. (*People v. Ledesma* (2006) 39 Cal.4th 641, 740; *see People v. Medina* (1995) 11 Cal.4th 694, 761; *People v. Barnett* (1998) 17 Cal.4th 1044, 1156; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 35-37; *People v. Jasmin* (2008)167 Cal.App.4th 98, 115.) "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." (*People v. Hill* (1998) 17 Cal.4th 800, 820; see *People v. Harrison* (2005) 35 Cal.4th 208, 243-244.)

Appellant claims that objection would have been futile and a curative instruction could not have "unrung the bell" (AOB 104-106) but respondent disagrees. Appellant's trial counsel could have easily objected and requested the court to reinforce the jury's understanding of the reasonable doubt standard and the prosecutor's burden of proof. (See *People v. Jasmin, supra,* 167 Cal.App.4th at 98, 115-116.) Appellant's claim that enforcing the forfeiture doctrine in the face of "alarming unfairness" would be "at the price of justice" (AOB 104) is equally unavailing. Only a cursory look at the prosecutor's argument and the court's instruction to the jury shows that there was no "unfairness" to appellant. Because appellant failed to object below, respondent submits that this claim is forfeited under governing law. Appellant's suggested exceptions to the forfeiture doctrine

do not apply to this misconduct claim. In any event, respondent welcomes the opportunity to defend the prosecutor's appropriate comments concerning reasonable doubt.

C. Analysis

Appellant claims that the prosecutor's statement, "Gosh, you know we believed he was guilty, but . . ." conveyed a subliminal message to the jury that it must disregard the reasonable doubt standard. Not only has appellant taken this statement out of the context of the prosecutor's argument, but he has disregarded multiple references by the prosecution, the defense, and the court, to the reasonable doubt standard and the people's burden of proof.

The beyond-a-reasonable-doubt standard does not require the jury to have no doubt at all, even if unreasonable, because given the limits on human knowledge there can always be some "possible or imaginary doubt." (§ 1096; see *Victor v. Nebraska* (1994) 511 U.S. 1, 17.) While comparing reasonable doubt to basic decisions people make in their daily lives has been proscribed by courts as discussed above in argument II c, (see *People v. Nguyen*, *supra*, 40 Cal.App.4th at pp. 35-36; *People v. Johnson* (2004) 119 Cal.App.4th 976, 985; *People v. Johnson* (2004) 115 Cal.App.4th 1169), focusing on the language of the instruction and telling the jury that in order to convict appellant, they needed to "believe" in his guilt, and that the belief could not be a fleeting one, did not impair or denigrate the reasonable doubt standard. Moreover, when looking at the prosecutor's closing argument as a whole, both the opening and rebuttal close urged the jury to follow the law, which was properly given by the court and read again by the prosecutor. (11 RT 2380-2381.) The prosecutor even encouraged jurors to ask questions to the court if any of the instructions confused them. (*Ibid.*) During rebuttal, the statement that appellant finds so objectionable for the first time on appeal, was coupled with an accurate reading from, and reference to the reasonable doubt instruction. (11 RT

2447-2448.) Thus, appellant's out of context rebuke of the prosecutor's rebuttal close should be rejected.

D. No Basis for Reversal

Appellant also complains that the "court's acquiescence" to the prosecutor's remarks constituted an instruction to the jury which lowered the burden of proof and thus automatic reversal is required. (AOB 107.) Appellant's claim ignores the fact that the jury was properly instructed with the reasonable doubt instruction and given a copy. (11 RT 2345.) In *People v. Anderson* (1990) 52 Cal.3d 453, the prosecutor used the "tie goes to the runner" analogy in describing the state's burden of proof. The defendant complained that the jury may have interpreted that remark as meaning that the defendant would prevail only if the evidence were closely balanced, but would lose, despite a reasonable doubt, if the prosecution's case slightly outweighed the defense. This Court first deemed the claim waived because of the defendant's failure to object, but, nevertheless, found that "defense counsel amply clarified the matter during his own closing argument, and thereafter the court correctly instructed on the subjects of reasonable doubt and burden of proof." (*Id.* at p. 472.) Likewise, in *People v. Barnett, supra*, 17 Cal.4th at p. 1157 the Court rejected a claim that the prosecutor's argument denigrated the reasonable doubt standard noting that "the trial court . . . admonished the jurors . . . after closing arguments, that they were required to follow the law and base their decision solely on the law and instructions as given to them by the court. Those admonishments were sufficient to dispel any potential confusion raised by the prosecutor's argument." (*People v. Barnett, supra,* 17 Cal.4th at p. 1157.) Similarly here, if any confusion was created by the prosecutor's argument, it was adequately remedied by multiple references to the reasonable doubt standard, the court properly instructing the jury and giving them copies of the instructions, and the prosecutor encouraging the jury to follow the law

and ask the court if it had any confusion about the instructions. The presumption is that the jury "treat[ed] the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (*People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8.) There is no reasonable likelihood that the prosecutor's comments caused the jury to misunderstand its duty to find guilt based on an abiding conviction and beyond a reasonable doubt. (See *People v. Harrison* (2005) 35 Cal.4th 208, 244; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) Appellant's claims should therefore be rejected.

IV. BY GIVING CALJIC NO. INSTRUCTION 2.90, THE COURT CORRECTLY EXPRESSED REASONABLE DOUBT AND THE PROSECUTION'S BURDEN OF PROOF

Appellant claims that the standard reasonable doubt instruction given by the trial court both orally and in writing at the close of evidence did not clearly define reasonable doubt and subjected appellant to conviction with a lesser standard of proof. (AOB 110-118.) Specifically, appellant claims that the instruction defines reasonable doubt in terms applicable to the clear and convincing standard, causing confusion. (AOB 111-112.) Appellant claims this incorrect instruction was exacerbated by the prosecutor's argument and that his conviction must therefore be overturned. (AOB 114-118.) Appellant's claim lacks merit.

A. CALJIC No. 2.90 Properly Defines Reasonable Doubt

As appellant admits, CALJIC No. 2.90 has been repeatedly approved by multiple courts. (See, e.g., *People v. Brown* (2004) 33 Cal.4th 382, 392; *People v. Hearon* (1999) 72 Cal.App.4th 1285, 1286-1287, and cases cited therein.) Likewise, claims that the elimination of the term "moral evidence" or "moral certainty" from CALJIC No. 2.90 requires reversal have been soundly rejected: "An instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states

the government's burden of proof." (*Brown*, at p. 392, *quoting Victor v. Nebraska* (1994) 511 U.S. 1, 5]; *see also People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1207-1208, and cases cited therein.)

Appellant's claim that the definition of "reasonable doubt" improperly confuses evidentiary standards and that "abiding conviction" suggests the lesser burden of "clear and convincing evidence" has also been considered and rejected. (See, e.g., *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1299; *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1207-1209; *People v. Tran* (1996) 47 Cal.App.4th 253, 262-263; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 815-816.) No reasonable juror could, especially in the absence of any language invoking the clear and convincing evidentiary standard, confuse it with the entirely dissimilar notion of "abiding conviction." Nor could a juror reasonably be confused about the level of convicition they must have (AOB 112-113) given the clear language of the isntruction. Appellant's claim that CALJIC No. 2.90 inadequately defined reasonable doubt fails.

B. The Prosecutor's Argument Did Not Undermine the Reasonable Doubt Burden of Proof

Appellant insists that the prosecutor's argument "exploited the instruction's inadequacy." (AOB 114.) As discussed previously, appellant failed to object to the prosecutor's argument, thus forfeiting review of prosecutorial misconduct issues. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) In any event, the prosecutor's argument describing abiding conviction was not improper. The prosecutor defined "abiding" as a belief in guilt which would last, a description with endorsement from multiple courts. (*People v. Pierce* (2009) 172 Cal.App.4th 567, 573.) The United States Supreme Court, and this Court, have described "an abiding conviction" as one that is "settled and fixed" (*Hopt v. People of Utah* (1887) 120 U.S. 430, 439) and one that is "lasting [and] permanent"

(*People v. Brigham* (1979) 25 Cal.3d 283, 290). The prosecutor's remark that an "abiding conviction . . . is going to stay with you" certainly portrayed the type of permanence and lasting effect contemplated by the instruction. Coupled with the trial court's correct charge to the jury regarding reasonable doubt, there is no "reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa, supra*, 15 Cal.4th at p. 841; *People v. Ayala* (2000) 23 Cal.4th 225, 284.)

C. CALJIC No. 2.90 Does Not Pre-Suppose Guilt When Interpreted Contextually

Finally, appellant challenges use of the word "until" in the reasonable doubt instruction, claiming that it presupposes appellant's guilt. (AOB 116-118.) This contention was rejected in *People v. Lewis* (2001) 25 Cal.4th 610, 652, where the Court observed that the reasonable doubt instruction, as a whole, could not be reasonably interpreted to mean that the defendant's guilt was presupposed. There is

> no reasonable likelihood that the jury in defendant's case would understand the instruction to mean that to convict defendant, the state could sustain its burden without proving his guilt beyond a reasonable doubt. Here, the instruction first informed the jury that 'a defendant in a criminal action is presumed to be innocent until the contrary is proved' and that if there is a reasonable doubt as to his guilt, he must be acquitted. The next sentence stated that the just-described presumption of innocence 'places upon the People the burden of proving him guilty beyond a reasonable doubt.' The jury was then provided a definition of reasonable doubt. Contrary to defendant's argument, there is no reasonable likelihood that the jury understood the disputed language to mean it should view defendant's guilt as a foregone conclusion.

(*People v. Lewis* (2001) 25 Cal.4th 610, 652 Citations Omitted)

The instruction given in appellant's trial adequately explained to the jurors that they must be convinced of appellant's guilt beyond a reasonable

doubt in order to convict him of the charges. Appellant's hypothesis of how the jurors might have interpreted this instruction to assume he was guilty without such proof is beyond convoluted. Furthermore, his contention that the instruction's language supposed guilt as a foregone conclusion is undermined by the prosecutor's use of the phrase "if you believe he's guilty" in the section of her closing argument that he also argues exploited the instruction's inadequacy. Nobody presupposed appellant's guilt; it was proven beyond a reasonable doubt. Appellant's claims should be rejected.

V. THE COURT PROPERLY INSTRUCTED THE JURY WITH REGARD TO THE ELEMENTS OF ROBBERY AND DID NOT UNDERMINE THE REASONABLE DOUBT STANDARD

Appellant claims that the court erred by instructing the jury with CALJIC No. 2.15, claiming that this instruction further eroded the reasonable doubt standard. (AOB 119-136.) Specifically, appellant challenges the language of the instruction, and claims that the instruction's reference to "slight corroboration" undermines the people's burden of proving each element of robbery beyond a reasonable doubt. (AOB 122-136.) Appellant's claim lacks merit.

A. Background

The jury was instructed with CALJIC No. 2.15 as follows:

> If you find that a defendant was in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant is guilt of the crimes of robbery and grand theft. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt.

The instruction continued to give examples of corroboration. (11 RT 2338; 9 CT 2663.)

The jury was also instructed with the definitions of the crimes of robbery and grand theft as well as the lesser included theft offenses. (9 CT 2673-2676.) The jury was reminded that if they had "reasonable doubt about whether the robbery is of the first or second degree, you must find it to be second degree" and that "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict him of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime." (11 RT 2357-2363; 9 CT 2676.) The jury was also instructed with CALJIC No. 2.90, as discussed above, explaining the people's burden of proof beyond a reasonable doubt (11 RT 2345) as well as told in CALJIC No. 2.61 that the defendant may rely on the state of the evidence "and the failure, if any, to prove beyond a reasonable doubt every essential element of the charge" must result in an acquittal. (11 RT 2341-2342; 9 CT 2665.) The jury was also told to "consider the instructions as a whole and each in light of all the others." (11 RT 2333.)

B. Analysis

Courts have consistently concluded that CALJIC No. 2.15, when given, as here, with other instructions on the elements of offenses and the burden of proof, does not alter the prosecution's burden to prove a defendant's guilt beyond a reasonable doubt or otherwise violate a defendant's constitutional rights. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 248; *People v. Smithey*, *supra*, 20 Cal.4th at pp. 976-979; *People v. Holt*, *supra*, 15 Cal.4th at p. 677, 63 Cal.Rptr.2d 782, 937 P.2d 213; *People v. Barker* (2001) 91 Cal.App.4th 1166, 1174, [CALJIC No. 2.15's "inference of guilt has been held not to relieve the prosecution of its burden of establishing guilt beyond a reasonable doubt"]; *People v. Gamble* (1994) 22 Cal.App.4th 446, 454-455 [CALJIC No. 2.15's "permissive inference does not shift the prosecution's burden of proof"]; *People v. Anderson* (1989).

210 Cal.App.3d 414, 427[CALJIC No. 2.15's "permissive inference empowers the jury to credit or reject the inference based on its evaluation of the evidence, and therefore does not relieve the People of any burden of establishing guilt beyond a reasonable doubt"]; *People v. Harden* (2003) 110 Cal.App.4th 848, 857-858.)

As this Court stated in *Prieto*: "CALJIC No. 2.15 [does] not directly or indirectly address the burden of proof, and nothing in the instruction absolved the prosecution of its burden of establishing guilt beyond a reasonable doubt." (*People v. Prieto, supra*, 30 Cal.4th at p. 248.) Contrary to appellant's assertion, the instruction merely provides that evidence of possession of stolen property can be considered along with other factors in finding appellant's guilt. Given that later instructions define each element of robbery and grand theft, respectively, the reasonable interpretation of CALJIC No. 2.15 is that the jury still must find, beyond a reasonable doubt, that each element of robbery and grand theft has been proven before it can convict.

Despite the law being squarely adverse to his position, appellant urges this Court to reverse his conviction because of the "[trial] court's other errors" and because the instruction "collapse[d]" the distinction between theft and robbery. (AOB 134-135.) Appellant is wrong. The court instructed the jury with separate CALJICs defining grand theft, as charged in count IV, and robbery, as charged in count III, as well as all applicable lesser included offenses. The jury was reminded repeatedly in these instructions that it could not convict on either the charged offenses or the lesser crimes if it did not find the defendant guilty beyond a reasonable doubt. (11 RT 2357-2363; 9 CT 2676.) CALJIC No. 2.15 did not change this burden; appellant was properly convicted.

C. All the Instructions Interpreted Together Adequately Protected Appellant's Constitutional Rights; Any Error Is Harmless

Appellant fails to interpret CALJIC No. 2.15 in the context of all of the instructions given the jury. Here, as in *Holt,*

> [t]he jury was advised that the instructions were to be considered as a whole and each in the light of all of the others. It was also instructed on all of the required elements of burglary and robbery and was expressly told that in order to prove those crimes, each of the elements must be proved.

(*People v. Holt*, *supra*, 15 Cal.4th at p. 677, *See also People v. Harden, supra,* 110 Cal.App.4th at pp. 857-858.)

Considering all of the instructions the jury received, both orally and in the instruction packet, there is no reason to suspect that the jury misunderstood the law with respect to robbery or grand theft. (*People v. Holt*, *supra*, 15 Cal.4th at p. 677, [concluding that there was "no possibility" that the jury would disregard the statutory elements of robbery because of the additional language provided in CALJIC No. 2.15]; *People v. Smithey*, *supra*, 20 Cal.4th at pp. 978-979; cf. *People v. Anderson, supra*, 210 Cal.App.3d at pp. 429-430 [CALJIC No. 2.15, "both on its face and when read in conjunction with the remaining instructions, sufficiently informed the jury of the permissive nature of the inference, and did not impose any constitutionally suspect presumption"].)

Appellant's claim that "this was a case in which the evidence of robbery, as opposed to theft, was entirely equivocal" (AOB 120) is patently absurd. The evidence proved that he bludgeoned two elderly people to death with a hatchet and then stabbed them with a long bladed boning knife which he sharpened himself, all to pawn their belongings less than 24 hours later. The element of "force" was not a close call in this case. Because the instructions adequately define the elements of robbery and grand theft,

separately, "there is 'no possibility' CALJIC No. 2.15 reduced the prosecution's burden of proof in this case. [Citation.]" (*People v. Prieto, supra*, 30 Cal.4th at p. 248.)

VI. THE COURT PROPERLY INSTRUCTED THE JURY ON THE INTENT REQUIRED TO CONVICT APPELLANT OF ROBBERY

Appellant claims that the court erred in instructing the jury with CALJIC No. 9.40.2, an instruction explaining that the intent to steal required for a conviction of robbery must be formed before the property is taken. (AOB 137- 144.) Specifically, he argues that the instruction invited the jury to find appellant guilty of robbery without finding that the intent to rob was formed before the act of force was committed. (AOB 138-143.) Appellant's claim lacks merit.

A. Background

Appellant's jury was instructed with CALJIC No. 9.40.2 as follows:

> To constitute the crime of robbery, the perpetrator must have formed the specific intent to permanently deprive an owner of his or her property before or at the time that the act of taking the property occurred. If this intent was not formed until after the property was taken from the person or immediate presence of the victim, the crime of robbery has not been committed.

(11 RT 2358; 9 CT 2674.)

This instruction followed CALJIC No. 9.40 defining the elements of robbery including that "The taking or carrying away was accomplished either by force or fear. . ." and CALJIC No. 9.41 which states that,

> The element of fear in the crime of robbery may be either:
>
> 1. The fear of an unlawful injury to the person or the property of the person robbed, or to any of his or her relatives or family members; or
>
> 2. The fear of immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery."

(11 RT 2357-2359; 9 CT 2674.)

With respect to the special circumstance of murder in the commission of a robbery, the jury was instructed pursuant to CALJIC No. 8.21 that they must find:

> 1. The murder was committed while the defendant was engaged in the commission or attempted commission of a robbery, and
>
> 2. The murder was committed in order to carry out or advance the robbery or to facilitate the escape there from or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the robbery was merely incidental to the commission of the murder.

(11 RT 2354-2356; 9 CT 16.)

B. Forfeiture

Appellant did not object or request any clarifying language with respect to this instruction. Thus, this claim should be deemed forfeited. (See *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156 [A defendant "may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language"].)

C. CALJIC No. 9.40.2, in Conjunction with the Other Instructions, Adequately Defined the Intent Element of Robbery

To support a robbery conviction, the evidence must show that the requisite intent to steal arose either before or during the commission of the act of force. "[I]f the intent arose only after the use of force against the victim, the taking will at most constitute a theft.' [Citation.] The wrongful intent and the act of force or fear 'must concur in the sense that the act must be motivated by the intent. [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Zamudio* (2008) 43 Cal.4th 327, 361.) This Court has held that CALJIC Nos. 8.21 and 9.40, both given at appellant's trial as

cited above, "adequately cover the issue of the time of the formation of the intent to steal." (*People v. Hendricks* (1988) 44 Cal.3d 635, 643; see also *People v. Hayes* (1990) 52 Cal.3d 577; *People v. Zamudio* (2008) 43 Cal.4th 327, 361; *People v. Hughes* (2002) 27 Cal.4th 287, 360.)

The court did not err by giving CALJIC No. 9.40.2 in addition to CALJIC Nos. 8.21 and 9.40, as it explained to the jury that the intent to steal needed to occur before the taking of the property, a true statement of law. This element of robbery was not really in contention since the evidence was clear that appellant intended to permanently deprive the owners when he took the property, since he had already killed them and was taking their property to sell it for cash. Nonetheless, the instruction did not misstate the law or change the prosecution's burden of proving the other elements of robbery beyond a reasonable doubt. Appellant should have requested a clarifying instruction if he felt that the intent required for robbery was not adequately explained. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192 ["if defendant believed the instruction was unclear, he had the obligation to request clarifying language"].) Regardless of this instruction, the jury could not convict appellant unless they found that the intentional taking of the property "was accomplished either by force or fear . . ." (CALJIC Nos. 9.40, 9.41; 11 RT 2357-2359; 9 CT 2674.) These instructions together "adequately informed" the jury "concerning the point in time the intent to steal must have been formed." (*People v. Hughes, supra,* 27 Cal.4th at 360; see also *People v. Zamudio, supra,* 43 Cal.4th at 361; *People v. Hayes* (1990) 52 Cal.3d 577, 626.) Furthermore, the jury was instructed to read the instructions as a whole and not to "single out any particular . . . instruction and ignore the others" (11 RT 2333) as appellant urges this Court to do now. Since appellant's jury was properly instructed with the correct definition and elements of robbery, appellant's claim should be rejected.

D. Any Error Harmless

Even if this Court somehow found that giving CALJIC No. 9.40.2 constituted error, the other instructions properly explained to the jury that it must find, beyond a reasonable doubt, that appellant intentionally acted with force or fear for the purpose of stealing. (See CALJIC No 9.40.) The evidence showed that appellant bludgeoned and stabbed the Jenks to death and then tracked their blood throughout the house while ransacking their belongings, some of which were pawned by appellant the very next day. The evidence showed appellant was familiar with their house and their valuables and had already blown his monthly income at the casino. Given the strength of the evidence that appellant intended to rob and murder the Jenks, there is little if any likelihood the jury could have found robbery based on an invalid theory because of CALJIC No. 9.40.2. Moreover, the prosecutor's argument clearly theorized that appellant murdered the Jenks in order to fulfill his objective of stealing their valuables. (11 RT 2412.) The prosecution never insinuated appellant's current hypothesis that based on CALJIC No. 9.40.2 the jury could convict appellant of robbery if he decided to steal after the Jenks were dead. From start to finish, the people's case proved that appellant murdered the Jenks in order to rob them, without leaving witnesses. (See arg. IC.) Any error in giving CALJIC No. 9.40.2 should be deemed harmless under any standard. (See *People v. Lee* (1987) 43 Cal.3d 666, 678.)

VII. THE COURT PROPERLY INSTRUCTED THE JURY WITH RESPECT TO FIRST AND SECOND DEGREE MURDER, UNANIMITY AND THE PROSECUTION'S BURDEN OF PROOF

Appellant complains, for almost 30 pages, that the trial court erred in instructing the jury with CALJIC No. 8.71, arguing that it unconstitutionally shifted the burden of proof and coerced the jury into finding him guilty of first degree murder. (AOB 145-173.) He adds to his

argument that CALJIC No. 17.10 exacerbated the coercive effect of CALJIC No. 8.71 and that his convicitons therefore must be reversed. (AOB 171-173.) Appellant's claim lacks merit.

A. Background

The trial court read CALJIC No. 8.71 as follows:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of the doubt and return a verdict fixing the murder as of the second degree as well as a verdict of not guilty of murder in the first degree.

(11 RT 2352; 9 CT 2671.)

The trial court also gave CALJIC No. 17.10 as follows:

> If you are not satisfied beyond a reasonable doubt that the defendnat is guilty of the crime charged, you may nevertheless convict him of any lesser crime, if you are convinced beyond areasonable doubt that the defendnat is guilty of the lesser crime. The crime of second degree murder is lesser to that of first degree murder charged in counts 1 and 2.
>
> The crime of grand theft is lesser to that of robbery charged in count 3.
>
> The crime of petty theft is lesser to that of robbery charged in count 3. Thus, you are to determine whether the defendnat is guilty of not guiltyof the crimes charged in counts 1,2,3, and 4or of any lesser crimes. In doing so, you have discretion to choose the roder in which you evaluate each crime and consider evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdicts. However, the court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the charged crime.

(11 RT 2362-2363; 9 CT 2676.)

Appellant did not object to either of these instructions or ask for any clarifying or supplemental instruction on this point.

B. Forfeiture

Appellant had a duty to ask for supplemental clarifying language if he felt that this instruction was unclear. Because he did not, he forfeited this issue on appeal. (See *People v. Palmer, supra,* 133 Cal.App.4th at 1156 [A defendant "may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language"].) Although he will argue that this "error" cannot be forfeited, he cannot credibly maintain that CALJIC No. 8.71 is a misstatement of law. At best, he claims that it is misleading and incomplete, and thus, to preserve this claim on appeal, he needed to object below and request clarifying or amplifying language. In any event, the instruction adequately stated the law.

C. CALJIC No. 8.71 Has Been Repeatedly Upheld by This Court and Does Not Shift the Burden of Proof

Courts have consistently upheld the validity of CALJIC No. 8.71 against the same constitutional attacks appellant now raises. (*People v. Dennis* (1998) 17 Cal.4th 468, 536-537; *People v. Morse* (1964) 60 Cal.2d 631, 656-657; *People v. Pescador* (2004)119 Cal.App.4th 252, 255-256.) CALJIC No. 8.71 merely explains the process jurors must go through to determine the degree of murder. Under CALJIC No. 8.71, if the jury unanimously has a reasonable doubt as to whether the murder is of the first or second degree, they must return a verdict of guilty of second degree murder and a verdict of not guilty of first degree murder. (See *People v. Pescador, supra,* 119 Cal.App.4th at 255-256.)

Appellant's interpretation of this instruction as "grossly misleading" and coercive (AOB 150) completely overlooks the other instructions. The

correctness of jury instructions must be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. (*People v. Holt* (1997) 15 Cal.4th 619, 677.) For example, CALJIC No. 17.40, also given to appellant's jury, provides:

> The People and the defendant are entitled to the individual opinion of each juror. Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors. Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision. Do not decide any issue in this case by the flip of a coin, or by any other chance determination.

(11 RT 2468; 9 CT 2678.)

In addition, the court instructed the jury to "[c]onsider the instructions as a whole and each in light of all the others." (11 RT 2333) Appellant attempts to undermine the jury's ability to understand the instructions, however when considered as a whole, there is nothing unclear about the prosecution's burden of proving guilt beyond a reasonable doubt and the defendant's right to an acquittal absent that standard being met. Here, when considering the entire packet of instructions, the jury was adequately informed of the law. Appellant's interpretation of CALJIC No. 8.71 is ridiculous when viewed contextually. If anything, the instruction benefits the defense, as a jury ready to convict appellant of murder but unsure of what degree must choose second degree murder.

D. The Instructions Were Not Biased or Coercive

Appellant also complains in a related point that the combination of CALJIC No. 8.71 and CALJIC No. 17.10 exacerbated the coercive effect on the jury. Appellant urges this Court to abandon the "acquittal first rule"

claiming that it violates his rights to due process and a fair trial. (AOB 154-173.)

CALJIC No. 17.10 is based on *People v. Kurtzman* (1988) 46 Cal.3d 322, which "established that the jury may deliberate on the greater and lesser included offenses in whatever order it chooses, but that it must acquit the defendant of the greater offense before returning a verdict on the lesser offense. [Citation.] In this manner, when the jury renders its verdict on the lesser included offense, it will also have expressly determined that the accused is not guilty of the greater offense." (*People v. Fields* (1996) 13 Cal.4th 289, 309, *citing Kurtzman, supra*, 46 Cal.3d at p. 334 .)

> The acquittal-first rule, requiring the jury to expressly acquit the defendant before rendering a verdict on the lesser offense, serves the interests of both defendants and prosecutors [citations], and we encourage trial courts to continue the practice of giving the so-called *Kurtzman* instruction set forth in CALJIC No. 17.10 (1989 re-rev.) at the outset of jury deliberations.

(*Fields, supra,* 13 Cal.4th at p. 309.)

This Court has repeatedly rejected challenges to the acquittal-first jury instruction and, on more than one occasion, has refused to reconsider it. (*People v. Jurado* (2006)38 Cal.4th 72, 126-127; *People v. Cox* (2003) 30 Cal.4th 916, 967, 70 P.3d 277 disapproved of on other grounds *in People v. Doolin*, (2009) 45 Cal.4th 390; *People v. Nakahara* (2003) 30 Cal.4th 705, 715; *People v. Dennis* (1998) 17 Cal.4th 468, 535-537; *Fields, supra*, 13 Cal.4th at pp. 310-311.) The instruction makes sense as it prevents double jeopardy issues, gives the defense the benefit of the doubt, and ensures both sides a unanimous verdict.

E. The Acquittal First Rule Does Not Create an "Unacceptable Risk" of Coercion

Appellant argues that the "acquittal first" rule creates an unacceptable risk of coercion, by pointing to different approaches used by other

jurisdictions. (AOB 152-166.) However, decisions of sister state courts are not binding on California courts, and have persuasive value only where the issues raised involve conflicting policies and the case is one of first impression in California. (*Savett v. Davis* (1994)29 Cal.App.4th Supp. 13, 16, fn. 2.) As discussed above, the "acquittal first" rule is not an issue of first impression; it is well-settled, well-reasoned law.

Appellant relies on the Arizona Supreme Court's decision in *State v. LeBlanc* (1996) 186 Ariz. 437 (*LeBlanc*), and urges this Court to follow the reasoning of other states (AOB 158-164.) However, the cases he cites, most notably *LeBlanc,* do not squarely address the issue he raises, nor do they evaluate an instruction identical to CALJIC No. 17.10. *LeBlanc* addressed an instruction which had previously been approved (*State v. Wussler* (1984) 139 Ariz. 428 [679 P.2d 74] (*Wussler*)), and stated that all jurors must agree to a finding of not guilty on the greater offense before they can begin to discuss anything less. (*LeBlanc, supra*, 924 P.2d at p. 442; *Wussler, supra*, 679 P.2d at p. 76.) The *LeBlanc* Court held the "better practice" was to require a jury to do no more than use reasonable efforts to reach a verdict on the charged offense, as such a procedure "more fully serves the interest of justice and the parties." (*LeBlanc, supra,* 924 P.2d at p. 442.) However, the *LeBlanc* court expressly declined to find the "acquittal-first" instruction unconstitutional:

> Although today's decision directs trial courts to abandon the Wussler rule in favor of a 'reasonable efforts' instruction, we remain persuaded that the acquittal-first requirement does not violate the United States or Arizona Constitutions. [Citation.] Moreover, the giving of a Wussler-type instruction does not rise to the level of fundamental error. [Citation.]

(*LeBlanc, supra*, 924 P.2d at pp. 443-444; see also *State v. Lee* (1997) 189 Ariz. 590 [944 P.2d 1204, 1216].)

Thus, while *LeBlanc* disapproved of Arizona's version of the "acquittal-first" instruction, it expressly declined to find the instruction was unconstitutional. Moreover, in contrast to the *Wussler* instruction, CALJIC No. 17.10 expressly permits the jurors to choose the order in which they evaluate the evidence as to each crime, and reach tentative conclusions on all charges and lesser offenses before reaching any final verdict.

Appellant attempts to analogize rulings by the Louisiana and New Jersey Supreme Courts to garner support for his theory that the acquittal first rule forces jurors to convict rather than cause a mistrial. (AOB 159-161.) However, his analogies do not withstand scrutiny. In *State v. Williams* (La. 1980) 392 So.2d 619 the Louisiana state supreme court reversed a death sentence where the instructions implied that failure to agree on penalty could result in a mistrial, rather than a life prison term. The Louisiana state court found that this unduly pressured jurors, at risk of causing a mistrial, and reversed the death sentence. (*Ibid.*)

The acquittal first rule obviously differs significantly from the situation addressed by the Louisiana Supreme Court in that the acquittal first rule in no way insinuates to jurors that a murderer will go free absent unanimity with respect degree. There is ample reason on the basis of this difference alone for this Court to decline to consider the *Williams* case when analyzing appellant's claim.

Interestingly, though, the Louisiana state supreme court's decision was disagreed with by other courts that found an instruction on the consequences of a non-unanimous jury was not required. For example, the Fourth Circuit held that even though the Virginia capital statute requires that the defendant receive a life sentence if the jury is unable to reach unanimity, the defendant is not entitled to a hung jury instruction. (See *Evans v. Thompson*, 881 F.2d 117, 123-124 (4th Cir.1989), cert. denied, 497 U.S. 1010, 110 S.Ct. 3255; See also *Gaskins v. McKellar*, 916 F.2d

941, 955 (4th Cir.1990), cert. denied, 500 U.S. 961 (1991) [holding that although the South Carolina capital statute requires an instruction on the consequences of a hung jury, the lack of such an instruction has no affect on the sentencing decision.].) The Eleventh Circuit reached the same conclusion, noting that North Carolina, Florida and Alabama "do not require the jury to be informed of the effect of a failure to reach a unanimous verdict." (See *U.S. v. Chandler* (1993) 996 F.2d 1073, 1089, *citing Barfield v. Harris*, 540 F.Supp. 451, 472 (E.D.N.C.1982); *Aldridge v. State*, 351 So.2d 942, 944 (Fla.1977) (per curiam); *Coulter v. State*, 438 So.2d 336, 346 (Ala.App.1982).) Thus, even appellant's tangential surveying of other jurisdictions failed to yield any results which actually lend support to his claim.

Appellant's argument, essentially, that unanimity is coercive, is further refuted by the general concept of the criminal justice system, that "unanimous verdict forces jurors to examine their views on the case and engage in discussions and deliberations as they attempt to resolve their differences." (*U.S. v. Chandler* (1993) 996 F.2d 1073, 1089 .) Indeed, jurors are instructed that:

> The People and the Defendant are entitled to the individual opinion of each juror. Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with other jurors.
>
> Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision.

(CALJIC No. 17.40; 11 RT 2469; 9 CT 2677.)

Thus, appellant's jurors were well aware of their obligation to individually consider and determine the facts and not be coerced by other

jurors. Notably, appellant argues later in his brief that absence of a unanimity requirement on aggravating factors (AOB 338), theory of first degree murder (AOB 328), and prior unadjudicated crimes evidence introduced at his penalty trial (AOB 291-314), violated his constitutional rights. These arguments sharply undercut his point herein. Absent each juror's agreement, appellant would not have been convicted of two counts of first degree murder.

In summary, California's instructions do not coerce jurors into convicting a defendant of first degree murder without being convinced beyond a reasonable doubt of the truth of that charge. Appellant's jurors were properly informed that they would have the opportunity to consider lesser charges if they did not find him guilty of the greater charge. Appellant's speculation that his jury convicted him of first degree murder because they were misled by the instructions is irrational given the reasonable interpretation of the instructions as a whole and the mountain of incriminating evidence against him.

F. No "Exacerbation" of Errors Occurred

Appellant also argues that the unfairness intrinsic in CALJIC Nos. 8.71 and 17.10 exacerbated one another and the result was prejudicial, reversible error. (AOB 168- 173.) Respondent submits that both of these instructions were proper as discussed above. In any event, appellant's prejudicial error claim fails in light of all of the instructions. As discussed above, this Court has held that "the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.]" (*People v. Burgener* (1986) 41 Cal.3d 505, 538, disapproved on another point in *People v. Reyes* (1998) 19 Cal.4th 743, 750-754; *People v. Holt, supra* ,15 Cal.4th at p. 677 [instructions are not considered in isolation].) Appellant's jury was informed per CALJIC No. 17.40 that each juror needed to come to

his or her own conclusion about the case and that he or she should not change an opinion based on other jurors unless he or she was convinced that the previous opinion was wrong. Thus, any confusion or possible coercion caused by CALJIC Nos. 8.71 and 17.10 was resolved by this final instruction, reminding jurors that the parties are entitled to each individual juror's opinion. The jury was also instructed that murder was committed by every person who unlawfully killed a human being with malice aforethought or killed during the commission of a robbery. (CALJIC No. 8.10.) Murder of the first degree was defined as "any kind of willful, deliberate and premeditated killing with express malice aforethought." (CALJIC No. 8.20.) The mental states of deliberation and premeditation were explained in the same instruction. CALJIC Nos. 8.30 and 8.31 explained the mental states required for second degree murder with express malice and implied malice. Finally, the jury was instructed that the prosecutor had the burden of proving appellant guilty beyond a reasonable doubt. (CALJIC No. 2.90.) Therefore, if the jury found the prosecution did not establish every element of first degree murder beyond a reasonable doubt as required by CALJIC Nos. 8.20 and 2.90, it could not convict appellant of that crime. Thus, any error in giving CALJIC Nos. 8.71 and 17.10 should be considered harmless beyond a reasonable doubt. (*People v. Lee* (1987) 43 Cal.3d 666, 678.) Moreover, appellant points to no decision, in any jurisdiction, where the giving of these instructions or instructions with identical or even similar language constituted reversible error. Thus, appellant's claim of error should be denied.

VIII. THE COURT PROPERLY INSTRUCTED THE JURY ON CONSIDERING CONSCIOUSNESS-OF-GUILT EVIDENCE PRESENTED BY THE PROSECUTION

Appellant complains that the court erred in instructing the jury with CALJIC No. 2.03, the consciousness-of-guilt instruction. (AOB 174-195.)

He argues that the case law approving of this instruction should not be applied here, because there was an "exceedingly flimsy" factual basis for giving the instruction. (AOB 184-195.) Appellant's claim lacks merit.

CALJIC No. 2.03 instructed the jury that:

> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(11 RT 2337.) Both parties agreed to this instruction being read. (11 RT 2262-2263.)

In *People v. Jurado* (2006) 38 Cal.4th 72, 126 this Court stated, "[w]e have repeatedly rejected contentions that these standard jury instructions on consciousness of guilt were impermissibly argumentative or permitted the jury to draw irrational inferences about a defendant's mental state during the commission of the charged offenses." (Citing E.g., *People v. Benavides* (2005) 35 Cal.4th 69, 100; *People v. Nakahara, supra*, 30 Cal.4th at p. 713, 134; *People v. Kipp* (1998) 18 Cal.4th 349, 375.)

The Court reiterated its previous holdings regarding consciousness of guilt instruction in *People v. Page* (2008) 44 Cal.4th 1, 50, explaining that: "The cautionary nature of [CALJIC No. 2.03] benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory. [Citations.]" (Citing *People v. Jackson* (1996) 13 Cal.4th 1164, 1224.) The Court went on to explain that "CALJIC No. 2.03 specifically addresses this risk by acknowledging the inference that may be drawn from a defendant's willfully false or misleading statement, but precluding a finding of guilt based solely upon a willfully false or misleading statement." (*Ibid.*)

Appellant urges this Court to revisit the issue but respondent submits that the reasoning behind this instruction is sound. It allows the jury to consider a defendant's statements or actions after an alleged crime to determine whether they are consistent with consciousness of guilt. The instruction does not state a factual conclusion; it merely allows the jury to draw an inference if it finds certain facts to be true. This Court should decline appellant's invitation to overrule convincing and reasonable precedent. (See *People v. Jurado, supra,* 38 Cal.4th at 126.)

Appellant attempts to undermine the consciousness of guilt evidence, arguing that it is so weak that it did not merit an instruction. (AOB 177-194.) Respondent disagrees. Police officers went to appellant's house on August 6, 1997, the day after the Jenks' bodies were found. (10 RT 208.) When asked whether he had a hatchet, appellant stated that he recently lost it when moving from one apartment to another. (10 RT 2101-2102.) This statement was proven dishonest, by Williams' testimony that she had last seen appellant with the hatchet after he had moved into his new apartment and was using it to hang speaker wire. (7 RT 1549.) Appellant's lie was a critical and very telling one, since if he had not murdered the Jenks with his hatchet, he would have no reason to be hiding it, or falsely claiming it had been lost months before the murders. Thus, lying about the hatchet's whereabouts or the circumstances under which it went missing tends to show appellant's consciousness of guilt.

Appellant argues that his language was somewhat equivocal and equates appellant to a normal "innocent" person who made an every day life mistake of misplacing something and not being too sure where it was lost. (AOB 178.) What appellant ignores with this argument, though, is the hatchet was not just an insignificant item that he misplaced. It was something that he constantly carried everywhere he went. He had been stopped twice by police within six months of the murder and had the

hatchet on him both times. Williams' son Quentin so closely associated appellant with the hatchet that he asked appellant where it was after hearing about the murders. Appellant losing his hatchet would be like if a normal person lost their car keys or wallet, something the person always carried. And one would expect that, an innocent person, if questioned about such a loss, would know exactly when the crucial item went missing. Appellant's vague response and attempt to come up with an excuse of why he did not have the hatchet certainly could be viewed as his consciousness of guilt and thus justified the instruction.

Appellant's claim that the instruction is duplicative of other instructions has also already been rejected by this Court. (See *People v. Page, supra,* 44 Cal.4th at 50 ["Thus, CALJIC No. 2.03 is not merely duplicative of CALJIC No. 2.00 and CALJIC No. 2.01, which address more general principles of evidence"].)

Next, appellant attempts to garner support for his argument that the instruction is argumentative and favors the prosecution's point of view in this Court's opinion in *People v. Mincey* (1992) 2 Cal.4th 408 (*Mincey*). (AOB 184-186.) In *Mincey*, the trial court declined to instruct the jury that particular inferences favorable to the defendant could be drawn from specified items of evidence. This Court ruled that the "proffered instructions would have invited the jury 'to infer the existence of [the defendant's] version of the facts, rather than his theory of defense.'" (*People v. Page, supra*, 44 Cal.4th at 50, quoting *Mincey*, at p. 437.) Appellant claims that CALJIC No. 2.03 is similar to the instruction in *Mincey*, because CALJIC No. 2.03 instructs jurors that they may infer a fact favorable to the prosecution, the defendant's consciousness of guilt, if they find that other facts to be proven. (AOB 184-190.) As appellant acknowledges, this analogy has recently been rejected by this Court in *People v. Page, supra,* 44 Cal.4th at 50 and *People v. Nakahara, supra,* 30

Cal.4th at 713. "As is implicit in defendant's contention that CALJIC No. 2.03 simply reiterates more general instructions concerning evidence, CALJIC No. 2.03 provides guidance concerning the uses and limitations of circumstantial evidence. That the instruction specifically addresses evidence indicating that a defendant made false or misleading statements concerning the crimes does not alter the circumstance that the instruction addresses the law applicable to the evidence rather than any party's version of the facts." (*People v. Page, supra,* 44 Cal.4th at 50.)

Additionally, courts have found this instruction to be favorable to the defense, because it "precludes a jury from convicting a defendant based solely upon his or her dishonest statements relating to the crimes." (*Ibid.* citing *People v. Boyette* (2002) 29 Cal.4th 381, 438; *People v. Medina* (1995) 11 Cal.4th 694, 762); *People v. Kelly* (1992) 1 Cal.4th 495, 531-532.)

Appellant also claims that it was "fundamentally unfair" for the trial court to give this instruction as it "singled him out" and ignored all of the evidence of his cooperation with police. (AOB 186-190.) The instruction did not unfairly single appellant out or force the jury to assume any facts; instead it started with the word "if", and gave the jury parameters to consider a willfully false statement only if they found that appellant had made one. Appellant was free to argue, as he did, that he cooperated with police, had nothing to hide, and did not make a willfully false statement. Likewise, the jury was free to decide whether his statement about the hatchet was true or not. Thus appellant fails to show any unfairness in this instruction particular to his case.

Similarly, appellant's reliance on *People v. Harris* (1989) 47 Cal.3d 1047, 1099 does not assist him. There, this Court upheld the trial court's rejection of a special instruction allowing the jury to disregard testimony from a witness who was intoxicated during the events which he perceived.

(*Id.* at 1098.) The trial court rightly found the instruction superfluous since the jury was already told how to evaluate the reliability of witness statements in other instructions and that this instruction would unfairly single out the only intoxicated witness in the case. (*Id.* at 1099.)

Appellant's situation here is quite different. Appellant was not a "witness" since he was not testifying. Thus, contrary to his contention that the pattern instructions on witness credibility adequately addressed the issue (AOB 187-188), those instructions do not directly apply to his out of court statement. Moreover, the instruction contained language designed to protect him, so that the jury would not convict him on his lie alone.

Considering the entire charge to the jury and all of the evidence against appellant, there is no reasonable likelihood that the jury convicted appellant because they were misled by CALJIC No. 2.03. (See *People v. Holt, supra,* 15 Cal.4th at p. 677; See also *People v. Cain* (1995) 10 Cal.4th 1, 34.) The Court should reject appellant's contention as it already has in the past.[5]

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[5] Respondent finds appellant's use of a television commercial gimmick (AOB 195) to summarize the trial inappropriate and disturbing given the gravity of this case. The evidence against him was extremely strong– his watch was found underneath Mr. Jenks's body, his eye glasses contained the victim's blood, and the murder weapon was a hatchet, an item several witnesses testified to seeing appellant in possession of. Only one set of shoe prints were found in the house and those shoe prints matched the bottom of a pair of shoes that were given to appellant before the murders and went inexplicably missing after the murders. Appellant pawned the Jenks' jewelry less than 24 hours after bludgeoning them to death. One could say this evidence was "priceless" in T.V. gimmick terms, but since this happened in real life, to a real family, appellant's apparent attempt at humor is repulsive.

IX. THE COURT PROPERLY ADMITTED GALLOWAY'S OUT-OF COURT STATEMENT; ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

Appellant claims that the court erred in admitting statements Oscar Galloway made to Detective Walker concerning appellant's whereabouts the week of the murders. (AOB 196-204.) He argues first that the admission of these statements violated his Confrontation Clause rights under *Crawford v. Washington* (2004) 541 U.S. 36 (AOB 196-198), second, that the statements were hearsay and did not meet the requirements of Evidence Code section 1237 (AOB 198-202), and finally that this constituted prejudicial error. (AOB 202-214.) Appellant's claim lacks merit.

A. Background

At trial, Oscar Galloway testified that he gave appellant rides to the Palace Casino in Lemoore on two occasions. (10 RT 2208.) However, he admitted that his memory was failing him, because he was suffering from cancer and undergoing radiation therapy, and could not remember many of the details from the week he gave appellant a lift. (10 RT 2209-2210, 2211.) Galloway testified that while in court he was wearing a "pain patch" and taking Tylenol codeine pills. (10 RT 2210.) Galloway was directly asked whether he remembered speaking with Investigator Walker the year before the trial and he answered, "Yes I do." (10 RT 2211.) He was next asked whether he remembered being asked questions about appellant, to which he stated, "Yes, I do." (*Ibid.*) He was then asked whether "when asked those questions, did you tell the truth?" to which he replied "Yes." (*Ibid.*) At a later point during questioning, Galloway again repeated that he had told Walker the truth. (10 RT 2212.)

Appellant's counsel cross-examined Galloway. He questioned him concerning his lack of memory. (10 RT 2213.) Galloway maintained that

he remembered giving appellant a ride to the Palace on two occasions but could not give specific dates or any other information. (10 RT 2214.)

Detective Walker testified that he interviewed Galloway on August 9, 1997. (10 RT 2218.) Detective Walker was shown a copy of his report and testified that it was true and accurate. (*Ibid.*) He stated that he wrote the report to summarize the interview with Galloway and that he typed it at his office within a day of taking the information. (10 RT 2219.) He explained that the report was dated August 15 because he corrected it on that date. (10 RT 2220.) Detective Walker reviewed the report and testified that it was an accurate record of Galloway's statement taken on August 9. (10 RT 2220.)

Before reading the statement into the record, both sides argued outside the presence of the jury regarding whether the statement met the requirements of Evidence Code section 1237, past recollection recorded. (10 RT 2221-2227.) Appellant objected that the statement contained speculation that would not be allowed if Galloway were testifying and that the statement did not meet the requirements of the recollection recorded exception to the hearsay rule. The statement contained speculation from Galloway, that he "guessed" appellant was going to the pawnshop when they stopped downtown, and the court ruled that speculative portions of the statement had to be excised. (10 RT 2227.) Before allowing the statement to be admitted, the court and the prosecutor asked Detective Walker about the process for recording the information and whether notes were taken during the interview. (10 RT 2228-2229.) Detective Walker explained that since it was a short interview, he did not take notes but wrote the report, accurately summarizing the information he had received, the same day. (10 RT 2229.) He also explained that by opening the report to spell check it or print it, the word processing system would automatically update the date on the report which is why the report stated August 15 rather than August 9.

(10 RT 2229-2230.) The court further inquired about how Detective Walker was able to confirm that Galloway actually gave appellant a ride as opposed to some other person named Thomas Potts. (10 RT 2230-2231.) Detective Walker testified that Galloway referred to appellant as "Thomas" and stated that he lived in the apartment complex behind Galloway's apartment complex, a fact which was accurate. (10 RT 2231.) Detective Walker also explained that the reason he interviewed Galloway in the first place was because appellant told Detective Walker that Galloway had given him a ride to the Palace. (10 RT 2231.)

After listening to argument and carefully considering this evidence, the trial court ruled as follows:

> The Court will find that the statement which Investigator Walker has made a written record of was made at a time when the facts recorded in that statement were fresh in Mr. Galloway's memory. The Court will find that the witness– that the statement was made for the purpose of recording the witness' statement, that was Mr. Walker's purpose, certainly, in making the record. The Court's going to find that the statement is being offered after the witness testified that the statement he made was a true statement of such fact and is offered after the writing has been authenticated by this witness, Mr. Walker. And the– as such, the statement may be read into evidence.

(10 RT 2231-2332.)

The court further stated, in response to appellant's Confrontation Clause claim, that the witness would be present and available to "recall" or "disavow" any portions of the statement, or answer "any further questions on the subject." (10 RT 2235.) At appellant's request, Galloway remained in the courtroom while the statement was read and appellant had an opportunity to recall Galloway as a witness after Walker read the statement. (10 RT 2235.)

The statement contained the following, in summary: Galloway told Walker that he had given appellant a ride to the casino on August 5, 1997

and that appellant had a blue duffle bag with him. (10 RT 2237.) On the way to the casino, appellant asked Galloway to stop downtown, which he did. (10 RT 2237.) Galloway talked to a friend at the Cottage Inn until appellant returned. (10 RT 2237.) They then went to the casino for a short while. (10 RT 2237.) The next day, August 6, 1997, appellant went to Galloway's house and asked if he had left his bag in Galloway's car. The blue duffle bag was on the seat of the car, but appeared to Galloway to be a lot emptier than it was when he first saw it, when he had picked appellant up the day before. (10 RT 2237.)

B. Analysis

1. Confrontation Clause

Appellant's first contention is that this statement violates appellant's right to confront witnesses against him under the Constitution. He cites *Crawford v. Washington, supra,* 541 U.S. 36 and its progeny arguing that the statement is "testimonial" because it was made in the context of police "interrogation". (AOB 198.) Respondent agrees that the statement is testimonial. However, appellant's argument is flawed because he overlooks the fact that the witness was available and subject to cross-examination.

In *Crawford*, Justice Scalia clarified the scope of the Confrontation Clause, holding that it bars the introduction of testimonial statements obtained from witnesses *unavailable* to testify at trial. (*Id.* at p. 59 ["Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.".]) Only testimonial statements cause "the declarant to be a 'witness' within the meaning of the Confrontation Clause. [Citation.]" (*Davis v. Washington* (2006) 547 U.S. 813, 821.)

While *Crawford* and *Davis* dealt with witness statements being admitted at trial, neither involved a situation where the declarant was actually available and testified. The Supreme Court in *Crawford* explained that the Confrontation Clause bars introduction of testimonial statements introduced against a defendant when the person who made the testimonial statement is *unavailable* for cross-examination. (See *Crawford* at pp. 68-69.) Likewise in *Davis*, the witness was unavailable to testify, and thus, in lieu of victim testimony, the prosecution introduced a 911 tape. (*Davis* at pp. 818-819.) The Court in *Crawford* expressly reaffirmed its former decision in *California v. Green* (1970) 399 U.S. 149, 158 [*Green II*], stating that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it...." (*Crawford, supra*, 541 U.S. at p. 59, fn. 9.)

In *United States v. Owens* (1988) 484 U.S. 554, the United States Supreme Court reached an issue similar to this. The case involved the prosecution of an inmate for assaulting and seriously injuring a correctional counselor at a federal prison. While hospitalized, the counselor described the attacker to an FBI agent, named the attacker, and identified him from a photographic array. (*Id.* at 558.) At trial the counselor, whose skull had been fractured in the beating, causing severe memory loss, testified he remembered identifying the defendant as his assailant when speaking to the FBI agent, but admitted on cross-examination he could not remember actually seeing his assailant during the attack, did not recall that he had had numerous visitors other than the agent while he was in the hospital and did not know whether any of his visitors had suggested the defendant had committed the assault. (*Ibid.*) The Supreme Court held that the witness' near complete memory loss, and the consequent inability of defense

counsel to conduct any meaningful cross-examination concerning the basis for his out-of-court identification of the defendant, did not mean admission of that statement of identification violated the Confrontation Clause: "[T]he Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (*Id.* at p. 559 [Citations Omitted].) "The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee." (*Id.* at p. 560.) When the declarant "is present at trial and subject to unrestricted cross-examination, the traditional protections of the oath, cross-examination, and the opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements." (*Ibid* .; see also *Delaware v. Fensterer* (1985) 474 U.S. 15, 21-22 ["the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities [forgetfulness or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony"]; *People v. Perez* (2000) 82 Cal.App.4th 760, 762 ["a criminal defendant is not denied the constitutional right to confront a witness when the witness is present at trial and subjected to unrestricted cross-examination but answers 'I don't remember' to virtually all questions"]; *People v. O'Quinn* (1980) 109 Cal.App.3d 219, 228 [no Confrontation Clause violation when witness "was ostensibly unable to remember the circumstances of the crime or her statements to the police, [but] she was nevertheless on the stand and available for cross-examination"]; See *People v. Cummings* (1993) 4 Cal.4th 1233, 1292 & fn. 32 [admission of police officer's record of interview with witness implicating defendant, pursuant to Evid. Code, § 1237, did not violate defendant's Confrontation Clause rights

notwithstanding witness' testimony at trial he had no recollection of his conversation with either the police officer or defendant].)

Appellant overlooks this rudimentary component of Confrontation Clause jurisprudence. Here, Galloway testified to giving appellant a ride, meeting with a detective about the details of this ride, and giving the detective truthful information. Appellant had an opportunity to confront him about the statement he gave, impeach his lack of memory, and test his credibility. Moreover, the trial court's ruling requiring Galloway to remain in the courtroom while the statement was read gave appellant the added opportunity to examine him about any information contained in the statement and exploit any weaknesses therein. Thus, appellant's Confrontation Clause rights were fully vitiated under the law.

2. Evidence Code section 1237

Appellant argues that the trial court erred in finding the elements of Evidence Code section 1237 met. Initially, respondent submits that the proper standard of review for analyzing this claim is the abuse of discretion standard. The abuse of discretion standard applies to questions about the existence of the foundational facts necessary to satisfy a hearsay exception. (*People v. Poggi* (1988) 45 Cal.3d 306, 318; *People v. Alvarez* (1996) 14 Cal.4th 155, 201.) On appeal, the trial court's ruling will not be disturbed unless the foundational facts on which it relied are not supported by a preponderance of the evidence. (*People v. Trimble* (1992) 5 Cal.App.4th 1225, 1234.)

Section 1237 provides, in pertinent part:

> (a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which: [¶] (1) Was made at a time when the fact recorded in the writing

> actually occurred or was fresh in the witness' memory; [¶] (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made; [¶] (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and [¶] (4) Is offered after the writing is authenticated as an accurate record of the statement.

Relying on *People v. Simmons* (1981) 123 Cal.App.3d 677, appellant argues that the witness' lack of memory obliterated any opportunity for meaningful cross-examination, a point already addressed above. Nonetheless, *Simmons* is distinguishable. In *Simmons*, a witness provided a signed statement to the police describing how the defendant discussed his plans to burn a home and boasted of the arson afterwards. (*Id.* at p. 679.) The witness subsequently suffered a severe head injury, developed amnesia and, on the stand, could not recall giving his statement to the police, nor could he independently recall discussing the arson with the defendant. (*Id.* at p. 680.) The court held the witness's written statement was inadmissible, concluding the past recollection recorded doctrine applied only "where the trustworthiness of the contents of those statements is attested to by the maker. . . ." (*Id.* at p. 682.)

Unlike the witness in *Simmons*, Galloway recalled providing a statement to police and testified he was truthful when relaying information. Accordingly, the prosecution satisfied its statutory burden to lay a foundation for the statement's trustworthiness. (§ 1237, subd. (a)(3) [requiring that witness "testif[y] that the statement he made was a true statement"]; see also Cal. Assembly Jud. Com. com., 29B Pt. 4 West's Ann. Evid.Code (1995 ed.) foll. § 1237, p. 243 ["Sufficient assurance of the trustworthiness of the statement is provided if the declarant is available to testify that he made a true statement and if the person who recorded the statement is available to testify that he accurately recorded the statement"].)

The present situation is more akin to *People v. Gentry* (1969) 270 Cal.App.2d 462, 468-470, where a declarant could not remember at trial what had happened, but testified that she did remember speaking with the officer at the time of the incident and had told the truth. (See also *People v. Cummings* (1993) 4 Cal.4th 1233, 1292-1293 [declarant had no recollection of conversation with detective because he was undergoing detoxification, but he testified he told detective truth and spoke with him while incident fresh in his mind].) Galloway's testimony provided the pertinent information to satisfy section 1237 in that he remembered speaking with Detective Walker and he remembered giving Detective Walker a truthful statement.

C. Any Error Was Harmless

The erroneous admission of hearsay evidence as past recollections recorded is harmless error if it is not reasonably probable that admission of the evidence affected the verdict. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1220; *People v. Parks* (1971) 4 Cal. 3d 955, 961; *People v. Price* (1991) 1 Cal.4th 324, 412.) Evidence erroneously admitted in violation of a defendant's Confrontation Clause right is reviewed under the harmless beyond a reasonable doubt standard. (*People v. Cage* (2007) 40 Cal.4th 965, 921-922.)

Here, the statement was admitted during the prosecution's rebuttal case, presumably to rebut appellant's attempt at undermining Williams' testimony about appellant's whereabouts the week of the murders and to refute appellant's alleged opportunity to commit the crimes. The evidence Galloway provided assisted the prosecution with establishing a time line and corroborated evidence about appellant's whereabouts, as well as his ability to discard incriminating items and pawn stolen jewelry. Considering all of the evidence the prosecution had on these facts, it is not difficult to say that the jury would have reached the same result without this evidence.

Appellant's guilt was conclusively established through the following, in summary: blood on appellant's own prescription eye glasses, Fred Jenks's DNA found within that blood, appellant's watch being found underneath Fred Jenks's body, appellant's watch going missing the day after the murders, appellant's familiarity with the Jenks' house, appellant being identified through finger prints as having pawned the Jenks' jewelry within a day of the murders, appellant losing all of his money the week before at the casino, appellant "losing" his trusty hatchet that he always carried with him and the murder weapon being a hatchet, a fairly new set of appellant's clothing being missing after the murders, appellant frequently wearing a pair of Nike shoes that matched the only bloody shoe prints left at the Jenks' house, those shoes also being missing from appellant's closet after the murders. The identity of the killer was not a close call, given the mountain of evidence linking appellant to these crimes, nor was it disputable that appellant pawned jewelry stolen from the Jenks. Thus, any error in admitting Galloway's statement was harmless under any standard. (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1220; *People v. Parks*, *supra*, 4 Cal.3d at p. 961; *People v. Price*, *supra*, 1 Cal.4th at p. 412.)

Appellant's argument that Galloway's testimony prejudiced him during the penalty phase because it showed that he was callous enough to go gambling right after killing the Jenks (AOB 203-214) is also unavailing. The fact that appellant went gambling after murdering two people paled in comparison to evidence properly before the jury that he raped two different woman on previous occasions, raped 72 year-old Mrs. Jenks during the robbery and murders, and had five prior felonies already on his record. Adding to the enormity of the offense was the gut-wrenching testimony of Mrs. and Mr. Jenks' close relatives who were devastated by appellant's heinous acts. Appellant's post-murders trip to the casino was the least of it in this case, and thus any error in admitting Galloway's statement was

harmless. (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1220; *People v. Parks*, *supra*, 4 Cal.3d at p. 961; *People v. Price*, *supra*, 1 Cal.4th at p. 412.)

X. SUFFICIENT EVIDENCE SUPPORTS THAT MR. AND MRS. JENKS WERE ELDERLY PERSONS; HOWEVER, THE ENHANCEMENT DOES NOT APPLY TO MURDER

Appellant appears to be correct in his argument that section 667.9, subdivision (a), does not apply to the crime of murder. (AOB 215.) While the 1997 version of the Penal Code lists robbery among the crimes that this enhancement applies to, it does not list murder. (West § 667.9 subd. (c).) The information charging appellant alleged the enhancement with respect to the murder counts, (1 CT 196-198.) but since the same information also charged appellant with robbery, respondent submits that the enhancement should still be applied to the robbery count.

Evidence that the Jenks' were elderly persons within the meaning of the statute was sufficiently shown at trial. In determining the sufficiency of evidence to support a conviction, enhancement, or special circumstance finding, the court "reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kipp, supra,* 26 Cal.4th 1100, 1128; see also *People v. Mayfield, supra,* 14 Cal.4th 668, 790-791.)

Here, sufficient evidence was introduced to show that Mr. and Mrs. Jenks were elderly persons within the meaning of section 667.9, subdivision (a). Dr. Dollinger who conducted the autopsies testified that Mr. and Mrs. Jenks appeared to be in their early seventies when they were murdered. (6 RT 1397; 7 RT 1440.) This information was also introduced through certified copies of their death certificates, which were introduced without objection, as People's Exhibits 60 and 61. People's Exhibit 60

stated that Fred Jenks was born on October 19, 1923, and People's Exhibit 61 stated that Shirley Jenks was born on November 8, 1924. (7 RT 1453, exh. 60-61.)

While appellant suggests that the prosecution should have introduced the victims' birth certificates or other documentation, this was not necessary. The age of the victims was not in dispute and the testimony of Dr. Dollinger combined with the information on the death certificates was sufficient for the jury to determine, beyond a reasonable doubt, they were over 65 years old.

XI. THE COURT PROPERLY DETERMINED APPELLANT'S RESTITUTION FINE

Appellant argues that the $10,000 fine imposed against him is excessive and that the trial court failed to consider his ability to pay when imposing this fine. (AOB 219-235.) Appellant's claim lacks merit.

A. The Court Properly Set the Restitution Amount

Appellant relies on the record of a hearing that occurred on February 27, 2007, where the trial court, without having jurisdiction, nonetheless ruled on the merits of appellant's claim, finding it unavailing. After reviewing points and authorities and numerous exhibits submitted by appellant[6] attempting to show his inability to pay, the trial court found that only 44 percent of his income was actually being seized, "and that seems a minimal burden considering the incredible loss that was inflicted . . ." (augmented RT 6.) The trial court expressly took appellant's ability to pay into account, but nonetheless ruled against him. (*Ibid.*) This Court already declined to consider this issue in its summary rejection of his petition for review on September 19, 2007. (See S155393.)

[6]Appellant augmented the record to include these exhibits.

Appellant's claim should again be rejected by this Court. Section 1202.4, subdivision (b), states:

> In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.

This fine shall be set at the discretion of the trial court commensurate with the seriousness of the offense, and shall not be less than $200, or not more than $10,000, if the person is convicted of a felony. (§ 1202.4, subd. (b)(1).) In setting the amount of the fine in amount more than $200, the court shall consider a number of factors including,

> the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime.

(§ 1202.4, subd. (d).) A restitution award is reviewed for abuse of discretion or error of law. (*People v. Draut*t (1999) 73 Cal.App.4th 577, 581; *People v. DeFrance* (2008)167 Cal.App.4th 486, 505.) Moreover, "Absent a showing to the contrary, we presume the trial court fulfilled its duty to make the requisite determination." (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1836; *People v. Romero* (1996) 43 Cal.App.4th 440, 448-449,["A defendant shall bear the burden of demonstrating his or her inability to pay].)

Appellant argues, as he did in the trial court, that garnishing 55 percent[7] of what little money he has will leave him with insufficient funds to supplement cafeteria food and standard prison hygiene products like

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[7] The trial court found that only 44 percent of appellant's money was being taken.

shaving cream, which he claims are insufficiently supported by the prison. (AOB 222-226.) To a person like appellant, who spent his life before being incarcerated stealing and robbing innocent victims to get what he wanted whenever he wanted it, it is understandable why being given a more limited allotment of food and toiletries is an adjustment. Nonetheless, the imposition of a fine which requires 44 or even 55 percent of his money to be redirected, pales in comparison to the extreme suffering he caused to the Jenks family. Debra Washington would give all the shaving cream in the world to see her mother again, but she never will because of what appellant did. Appellant's outrageously cruel and heinous criminal acts merit the maximum punishment and fine available under the law. The trial court did not err in imposing, and then refusing to reduce this fine. All of the arguments appellant now raises on appeal were raised before the trial court, and squarely rejected. Specifically, the court found that appellant did have the ability to pay since he had money in his account and only 44 percent of it was being taken for restitution. (augmented RT 6) The trial court made a correct determination on this issue and by no means abused its discretion.

B. Appellant's Statutory Argument Fails

Appellant's statutory argument (AOB 227-228) also fails since "inability to pay the fine is not a compelling and extraordinary reason not to impose the fine, but it shall be considered in setting the fine above the minimum of $200." (*People v. DeFrance, supra,* 167 Cal.App.4th 486, 505; § 1202.4, subds.(c) & (d).) Here, the trial court did consider appellant's ability to pay; after all, the trial court had in front of it all of appellant's exhibits attesting to his meager income and the financial demands of prison life. Nonetheless, the court determined, for a second time, that the maximum fine was appropriate given the fact that he was still allowed to keep some of his income. (See augmented RT 6.)

Appellant's reliance on *People v. Vieira* (2005) 35 Cal. 4th 264, 306 (AOB 227-229) is also taken out of context since there, the amendment to section 1204.2 had not yet taken effect when the trial court imposed the defendant's fine, and thus the Court remanded to the trial court for redetermination based on the new component of the law requiring a trial court to consider a defendant's ability to pay. (*Id.* 305-306.) Here, appellant's ability to pay was taken into account, both the first time the fine was set when the probation officer communicated to the court through his report that appellant would be "capable of earnings" and more expressly on the record during the February 27, 2007 hearing when the trial court specifically considered and rejected this claim. The court complied with the statute when imposing this fine.

C. Appellant's Constitutional Claims Fail

Appellant's claim that his fine violates the constitution's due process (AOB 230-231), equal protection, (AOB 232-243) and excessive fines clauses (AOB 229-230) should also be rejected by this Court. Appellant relies on *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 731-732 (AOB 229), a case in which a civil penalty of $14,826,200 was assessed against a defendant without any assessment of the defendant's culpability. (*Ibid.*) Appellant's situation is obviously distinguishable since the court determined the amount of the fine with sufficient information before it. Appellant was convicted of double murder and robbery and evidence showed him to be a serial rapist and career criminal who utterly destroyed the lives of his murder victims and their family. A "culpability" question was not still lingering before the court when appellant's fine was imposed. His cite to *U.S. v. Bajakajian* (1998) 524 U.S. 321 where the Supreme Court held that the Eighth Amendment is violated when a punitive fine is "grossly disproportional to the gravity of a defendant's offense" (*Id.* at p. 334.) is similarly misplaced. There, the fine

held to violate the Eighth Amendment was $337,144 for failing to declare the amount of currency being taken out of the country. (*Id.* at p. 324.) Appellant was convicted of two counts of first degree murder, not failing to declare the amount of currency taken out of the country. The fine is $10,000, not over $300,000. *Bajakajian* is irrelevant. The gravity of the offense amply supports the fine and thus the fine does not violate either the state or federal constitution's excessive fines clause.

Appellant's due process and equal protection arguments are based on the false premise that the trial court failed to take into account his ability to pay. (AOB 330-334.) Because this claim is directly refuted by the record, it must be rejected. (See aug. RT 6.)

XII. THE COURT PROPERLY EXCUSED SEVERAL JURORS FOR LEGITIMATE REASONS AND APPELLANT FORFEITED THIS ISSUE BY STIPULATING BELOW

Appellant contends that the trial court erred in excusing death-scrupled jurors. (AOB 236-273.) He claims that the trial court improperly questioned these jurors and did not truly or fairly ascertain whether they were capable of following the law. (AOB 241-272.) Specifically, appellant complains that seven jurors discussed below, were unfairly rejected for cause. (AOB 241-272.) Appellant is incorrect.

A. Background

Any juror seeking to be excused for a hardship filled out a written declaration which was reviewed by the parties and the court. (2 RT 376.) That juror was either excused, or brought in for further questioning. Each prospective juror not claiming hardship filled out a questionnaire containing pertinent questions about views on the death penalty as well as other relevant legal issues. After questionnaires were reviewed, some jurors were brought in chambers for individual questioning by the court and parties.

1. Helen Donnell

Helen Donnell filled out a hardship declaration, on which she wrote, under penalty of perjury, "I was told, that if you have a felony on your record, that by law, a person cannot serve on any jury trial, I am also against the death penalty." (6 CT 1736.) After reviewing the Declaration, appellant's counsel, the prosecutor, and the court all agreed that she be excused without further questioning. (2 RT 501.)

2. Paul Silveira

Paul Silveiri stated in his questionnaire that "Because of my religen I have no right choosing the life of a nother person meaning death or life in peresen. I would like to please Be relest from juror duty I deeply belive in my religen I am also illiterete."

The court asked the parties whether they wanted to stipulate to excusing Silveiri even though his declaration did not technically state a hardship. (2 RT 452-453.) After reviewing the declaration, both parties so stipulated. (2 RT 453.)

3. Jennifer Montoya

Based on some of Montoya's answers in her questionnaire concerning religion, the death penalty, and pre-trial publicity, the court brought her in to ask some follow-up questions. (4 RT 881-882.) The court told Montoya that, "We need to be assured, however, that your vote in this case, your actual deliberations and decisions are going to be the product of your own evaluation of the evidence and are going to be based on the law and not based upon your perception of what you think your church would require you to do. Can you promise me that you'll be able to do that?" (4 RT 883.) Montoya responded, "I can try. I don't know if I can definitely do it, but I can try, but, you know, I can't–I'll– I can't really promise you that I will because my beliefs might get in the way." (4 RT 883-884.) A somewhat

confusing conversation followed, at the end of which, the court asked the following summary questions:

> Q. "Now, as we sit here right now, do you think that there are some doubts as to whether you'd be able to participate in a death verdict?
>
> A. Yeah, I think there are some doubts.
>
> Q. Okay. Do you think those doubts rise to the level that you cannot assure me that you'd be able to strictly follow the law? And – and vote for death?
>
> A. Strictly, no, yeah.
>
> ....
>
> Q. That was a yes, you don't think so?
>
> A. Oh, yes, yes, I don't think so.
>
> Q. So you have some doubts that you'd be able to follow the law, it sounds like?
>
> A. Yeah."

(4 RT 888-890.)

Both parties declined the court's invitation to ask further questions and the court excused Montoya following a stipulation. (4 RT 890.)

4. Mike Sisco

Mike Sisco was brought in for additional questioning after some inconsistencies were discovered in his questionnaire answers. (3 RT 700.) Sisco told the court that a member of his family had been convicted of some form of homicide offense and was serving 25 years. (3 RT 702.) Sisco admitted that he had a bias against law enforcement, at least in Tulare county where his nephew was convicted. (3 RT 705.) Sisco was next questioned about a statement he made in his questionnaire, that "we give every brother and sister another chance in life. There's always a second chance in a person." (3 RT 705.) When asked whether he could suspend

his personal philosophy to impose the death penalty or life in prison, he said, "I don't think so." (3 RT 706.) Sisco had also wrote on his questionnaire that he could not impose the death penalty. The court asked him whether this was the answer he intended to give and he responded "no", meaning that he could not impose the death penalty.[8] (3 RT 706.) The court then asked the parties whether they wanted to stipulate to excusing Sisco, to which appellant's counsel and the prosecutor replied affirmatively. (3 RT 706.)

5. Vicki Brannon

Vicki Brannon was excused without questioning. (4 RT 812-813.) Her questionnaire reflected openness to the death penalty but expressed some misconceptions about the law, namely that the crime had to be proven "beyond a doubt" and if there were no special circumstances, the defendant would receive life without the possibility of parole. (7 CT 1807.) She stated that if it was a gruesome murder than she could impose the death penalty. (*Ibid.*) She also had heard pretrial publicity about the case– essentially that the Jenks were an elderly couple killed by the "groundskeeper." (*Ibid.*) Both parties stipulated to Brannon being excused. (4 RT 812.)

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[8]Appellant seems to think that this answer negated his previous response that he could not impose the death penalty, but respondent submits, that reading this in context, especially considering the request for a stipulation by the court immediately following this answer, shows that his answer of "no" was consistent with his questionnaire, indicating that he could not vote in favor of imposing the death penalty. This Court should defer to the findings of the trial court regarding Sisco's responses. (*Patton v. Yount* (1984) 467 U.S. 1025, 1038; See *Wainwright v. Witt,* 469 U.S. 412, 423 (1985).) The fact that neither party objected further supports respondent's interpretation of the record.

6. Richard Hathaway

Richard Hathaway's questionnaire expressed willingness to impose the death penalty because life in prison is "a waste of tax payer's money." (7 CT 2071.) He also wrote that he did not know whether he could view graphic evidence without being unduly influenced by it, and left the question asking him if he could be fair, blank. (7 CT 2076.) When questioned by the court, Hathaway stated that upon further reflection he was not sure whether he could vote to put someone to death. (4 RT 940.) He said that he had rethought his views since filling out the questionnaire and he just did not know whether or not he could. (4 RT 940-941.) The court explained that there would be objective criteria and asked whether, if all of the elements were met and death was the only rational choice under the law, whether he could impose it. (4 RT 942.) He responded, "I don't think I could. . . . Honestly." (4 RT 942.) Both parties stipulated to Hathaway being excused. (4 RT 943.)

7. Ruth Sanchez

Ruth Sanchez's questionnaire reflected multiple issues which required follow-up. With respect to religion she stated, "I don't frequent church as often as I should but I believe in God and try to follow the churches [sic] ways. I don't believe any person should take anothers [sic] life without ramifications but to decide on a persons [sic] fate would be very draining." (8 CT 2327.) Later in the questionnaire when responding to a question asking her feelings about imposing the death penalty she stated, "I am really not sure/I would feel that they would have to prove the unconditional guilt for me to impose death but would drain me emotionally to think I could take someone's life." (8 CT 2335.) Towards the end of her questionnaire Sanchez stated that she had back problems and may not be able to sit for long periods of time, and also that she was using Vicodin for

shoulder spasms and that this caused her to be sleepy at times. (8 CT 2339-2340.)

When questioned by the court concerning her religious beliefs, Sanchez added that she was studying with a Jehovah's Witness and considering joining that church. (4 RT 947-948.) When asked whether she could impose penalty in accordance with the law she expressed ambivalence, stating "Honestly—I don't know. I can't honestly say I can. . . ." (4 RT 947.) The trial court followed-up asking whether "if all of the circumstances and factors pointed toward death being the appropriate disposition rather than life without parole, would you be able to follow the law and impose that death penalty without violating your own conscience?" (4 RT 949.) Sanchez responded: "I can't honestly answer that with a yes or no because I'm not–right now at this point I don't think I could–I could set anyone to death, but I don't know. I'd have– I really don't know." Both attorneys then stipulated to excusing Sanchez for cause. (4 RT 949.)

B. Appellant's Claims are Forfeited

Appellant stipulated to the excusal of each of the juror's he now challenges on appeal. Appellant repeatedly refers to his stipulation to excuse jurors as "acquiescence." (See AOB 241, 244, 262, 264, 268.) Respondent notes that acquiescing means accepting, complying or passively submitting. This term misstates the record since appellant actually stipulated—meaning he affirmatively agreed— to have these prospective jurors excused. Appellant's use of the term "acquiesce" is misleading. Appellant stipulated, and thus forfeited this claim.

In *People v. Rogers* (2006) 39 Cal.4th 826, 858-859, this Court refused to review challenges to prospective juror excusals where the parties had stipulated to the challenges. "This record is adequate to establish that defense counsel stipulated or agreed to all but one of these 133 excusals. The record thus is adequate to show that defendant has waived any claim of

error-including his federal constitutional claims-predicated on these 132 excusals." (*Ibid. citing People v. Ervin*, *supra*, 22 Cal.4th at p. 73; *People v. Champion* (1995) 9 Cal.4th 879, 906-907; *People v. Mickey* (1991) 54 Cal.3d 612, 663-665.) Similarly, in *People v. Mitcham* (1992) 1 Cal.4th 1027, 1061 the Court recognized that "because of the stipulation, the trial court was not called upon to decide whether these prospective jurors could properly be excused for cause. The stipulation thus bars defendant from challenging the excusals on appeal." (*Ibid.* See *People v. Coogler* (1969) 71 Cal.2d 153.)

Particularly with respect to the jurors excused for hardship, this Court has noted:

> 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. The requirement of a contemporaneous and specific objection promotes the fair and correct resolution of a claim of error both at trial and on appeal, and thereby furthers the interests of reliability and finality. When a contemporaneous and specific objection is made, the parties are put on notice to characterize the claim as they think proper and to set out the law and facts as they deem necessary. With their response, the trial court is provided with a basis on which to define the claim and then determine whether it is meritorious and, if so, how any harm may be avoided or cured as promptly and completely as possible. On such a record, the appellate court may then decide whether a challenge to the trial court's ruling is sound.

(*People v. Mickey* (1991) 54 Cal.3d 612, 664.)

Appellant not only failed to object, he stipulated to all of the excusals he now challenges on appeal. He argues that the forfeiture rule does not apply to claims of error under the United States or California Constitution, however, "the reasons for the [contemporaneous objection] requirement extend to all claims of whatever dimension. Its operation should therefore

extend to all as well." (*Ibid;* See *United States v. Olano* (1993) 507 U.S. 725, 731.) Appellant's claim should be deemed forfeited.

C. Appellant Fails to Show that Jurors Donnell, Silvieri and Brannon Were Excused for Being Death Scrupled

As discussed more fully below, opposition to the death penalty alone is not a basis for excusal based on cause. (See *Wainwright v. Witt, supra,* 469 U.S. at p. 423; *People v. Stewart* (2004) 33 Cal.4th 425.) However, appellant fails to show that Donnell, Silvieri, or Brannon were excused based on attitudes towards the death penalty. The abuse of discretion standard applies to claims challenging the propriety of a trial court's dismissal of a prospective juror. (*People v. Waidla* (2000) 22 Cal.4th 690, 715.) Here, appellant fails to show that the court abused its discretion.

1. Helen Donnell

Appellant challenges the dismissal of Helen Donnell claiming that her declaration provided inadequate grounds for excluding her for "hardship, cause, or ineligibility." (AOB 241-242.)

Code of Civil Procedure, section 203, subdivision (a)(5) provides that "[p]ersons who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored" are ineligible to be prospective trial jurors. It appears from Donnell's own plain statement that she had a felony conviction. While this does not fall within the hardship excusal requirements, the court, in its discretion, decided to save her the time and trouble of filling out an entire questionnaire since it appeared that she ultimately would not be able to serve. The trial court did not make this decision alone; both the prosecution and appellant stipulated to Donnell's excusal. (2 RT 501.) The record does not affirmatively establish that Donnell was excused because of her anti-death penalty views and thus appellant's claim that the court was required to question her as a "death scrupled juror" fails. In any event, the fact that on a hardship declaration

she put two potentially disqualifying pieces of information about herself which were outside the confines of the contemplated topics of the declaration, showed at the very least, she was unwilling or unable to follow instructions. It also previewed for the parties and the court her anti-death penalty views and prior criminality. Without more, the parties could already tell that she was not someone they wanted on the jury and stipulated to her excusal for various reasons, as appellant would not have been concerned about her anti-death penalty attitude. On this record, where the trial court and the parties were in the best position to evaluate her, appellant fails to show that the trial court abused its discretion.

2. Paul Silvieri

Appellant complains that Paul Silvieri was excused for insufficient bases, and the trial court's failure "to ascertain the entire picture with Silvieri resulted in serious constitutional error." (AOB 243-245.)

Silvieri was purportedly excused for his religious beliefs. The court and the parties opted not to require him to fill out a questionnaire, since he was illiterate, and instead agreed to excuse him based on his hardship declaration alone, which stated that he could not sit in judgment of another human being. In *People v. Avila* (2006) 38 Cal.4th 491, this Court found it proper, under certain circumstances, to excuse a juror based on written statements alone, holding that "a prospective juror in a capital case may be discharged for cause based solely on his or her answers to the written questionnaire if it is clear from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law." (*Id.* at p. 531.)

Silvieri's statement that he "deeply" believed in his religion that prevents him from judging another, certainly implies that he would not be able to temporarily set aside his religious beliefs to be a juror. While the statement was brief, it was a direct expression of inability to sit in judgment

of another, the most essential job function of a juror. The trial court did not abuse its discretion in excusing Silvieri. Moreover, the court's suggestion that he be excused was embraced by the prosecutor and appellant's trial attorney, who both stipulated to Silvieri's excusal. Under these circumstances, appellant's claim of error fails.

3. Vicki Brannon

Appellant complains that Brannon was excused despite "near ideal attitudes (*sic*) towards the death penalty." (AOB 264-265.) However, this complaint assumes without reference to the record that she was excused because of her death penalty views. There is no support in the record for appellant's speculation that it had anything to do with her death penalty views. What is clear from the record is that the court suggested excusing her, and both parties agreed to her excusal. Her answer relating to pretrial publicity, that the groundskeeper was accused of killing the elderly victims, certainly exposed a potential bias against appellant which may have been a concern to both parties and the court. For whatever reason, appellant stipulated to her excusal and thus cannot show on appeal that the trial court abused its discretion in excusing her.

Appellant relies on *People v. Stewart* (2004) 33 Cal.4th 425 (*Stewart)* in his claim of error of the three unquestioned jurors, highlighting the fact that "mere written responses" were insufficient to base these excusals on and that the trial court should have brought these jurors in for questioning. (See AOB 236-245.) However, *Stewart* is distinguishable.

In *Stewart*, the trial court excused five prospective jurors, based on their written questionairres alone, finding their views clearly and unambiguously against the death penalty. (*Id.* at pp. 444-445.) However, the phrasing of the questionnaire asked jurors whether they held views that would "prevent or make it very difficult" for the prospective juror "[t]o ever vote to impose the death penalty." (*Id.* at pp. 442- 443.) The Court

reversed, finding that the language "very difficult" was not sufficient cause to automatically excuse a juror, since finding it "very difficult" to impose the death penalty was not a clear statement that one would never impose the death penalty. (*Ibid.*) The Court explained that "[b]efore granting a challenge for cause concerning a prospective juror, over the objection of another party, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would 'prevent or substantially impair' the performance of his or her duties. . ." (*Id.* at p. 445, citing *Wainwright v. Witt, supra*, 469 U.S. at p. 423.)

Stewart is inapplicable for two reasons. First, the entire discussion in *Stewart* is premised on a situation in which the defendant objects to the juror being excused. (*Id.* at 445.) Here, not only did appellant fail to object to any of the three unquestioned jurors being excused, he specifically stipulated after looking at the hardship declaration or written questionnaire answers. As discussed above, appellant's stipulation forfeits this issue, and also renders *Stewart* inapplicable. Second, *Stewart* is a case specifically analyzing the unique circumstances surrounding the dismissal of death scrupled jurors. Here, appellant's argument that these three jurors were excused because of their death penalty views is mere speculation. *Stewart* is taken out of context if applied to appellant's case since there is nothing in the record to suggest that Donnell, Silvieri, or Brannon were excused because of their death penalty views. Appellant did not make a record otherwise.

Inasmuch as appellant argues that it is improper to excuse jurors based on brief written answers alone (AOB 244-245), this Court has held otherwise. (*People v. Avila supra* 38 Cal.4th at p. 531.) In *Avila*, the trial court excused four jurors without orally questioning them, based solely on their written answers to the jury questionnaire. The Court found no error

and distinguished *Stewart* on the ground that the jury questionnaire in *Stewart* included a "material flaw" not present in the questionnaire used in *Avila*. (*Avila*, at p. 530; *People v. Wilson* (2008) 44 Cal.4th 758, 786-787.) The Court explained that "nothing in Stewart indicates that an excusal without oral voir dire is improper where the prospective juror's answers to a jury questionnaire leave no doubt that his or her views on capital punishment would prevent or substantially impair the performance of his or her duties. . ." (*Avila*, at p. 531; *People v. Wilson supra* 44 Cal.4th at p. 786-787.)

At least in Silvieri's case, his unprompted written statement that his deeply held religious beliefs would prevent him from judging another appear sufficient. Because all parties stipulated to each excusal and appellant cannot show that the court erroneously excused them for being death scrupled, this claim should be rejected.

D. The Jurors Were Appropriately Excused Based on Equivocal Answers and Inability to Follow the Law

Prospective jurors Montoya, Sisco, Hathaway and Sanchez were excused following a review of their questionnaires and individual questioning by the trial court. Arguably, these jurors were excused for ambivalence to commit to following the law and/or inability to impose a death verdict. These excusals, none of which appellant took issue with below, were proper.

1. Governing Legal Principles for Excusing Jurors Based on Death Penalty Views

The state and federal constitutional guarantees of a trial by an impartial jury include the right in a capital case to a jury whose members will not automatically impose the death penalty for all murders, but will instead consider and weigh the mitigating evidence in determining the appropriate sentence. (*People v. Weaver* (2001) 26 Cal.4th 876, 910;

accord, People v. Crittenden (1994) 9 Cal.4th 83, 120-121.) A juror may be challenged for cause based upon his or her views concerning capital punishment only if those views would "prevent or substantially impair" the performance of the juror's duties as defined by the court's instructions and the juror's oath. (*People v. Hamilton* (2009) 45 Cal.4th 863, 890-891, *citing People v. Bonilla* (2007) 41 Cal.4th 313, 338-339.) In *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522, the United States Supreme Court held that a defendant cannot be sentenced to death if the jury that imposed the penalty was chosen by excluding prospective jurors for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." In *Wainwright v. Witt* (1985) 469 U.S. 412, 424, the high court clarified its decision in *Witherspoon* and held that a prospective juror may be excluded for cause because of his or her views on capital punishment if those views would "prevent or substantially impair" the performance of his or her duties as a juror in accordance with the trial court's instructions and his or her oath. (*Ibid*; See also *People v. Cunningham* (2001) 25 Cal.4th 926.) "A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate." (*Cunningham, supra*, 25 Cal.4th 926, 975.)

Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. (*Id.* at p. 975; *People v. Heard* (2003) 31 Cal.4th 946, 958; *People v. Hamilton, supra* 45 Cal.4th at 890-891.) Jurors frequently "give conflicting or confusing answers regarding . . . impartiality or capacity to serve, and the trial court must weigh the juror's responses in deciding whether to remove the juror for cause. The trial court's resolution of these factual matters is binding on the appellate court if supported by substantial evidence." (*Ibid.*) Where

equivocal or conflicting responses are elicited regarding a prospective juror's ability to impose the death penalty, the trial court's determination as to his true state of mind is binding on an appellate court. (*Ibid.* citing *People v. Boyette* (2002) 29 Cal.4th 381, 416; *accord, People v. Moon* (2005) 37 Cal.4th 1, 14; *People v. Bonilla, supra*, 41 Cal.4th at p. 339.) "In other words, the reviewing court generally must defer to the judge who sees and hears the prospective juror, and who has the 'definite impression' that he is biased, despite a failure to express clear views." (*People v. Lewis* (2006) 39 Cal.4th 970, 1007.) The United States Supreme Court recently explained: "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." (*Uttecht v. Brown* (2007) 551 U.S. 1, ----, 127 S.Ct. 2218, 2224.)

Here, each of the excused jurors whom appellant challenges the excusal of for the first time on appeal, showed substantial impairment to following the law and imposing the death penalty.

2. Jennifer Montoya

Jennifer Montoya was equivocal and gave answers that conflicted, but towards the end of her questioning, when asked directly whether she could strictly follow the law, she stated that she "didn't think so." (6 RT 888-890.) The parties were given an opportunity to ask follow up questions, but both appellant's attorney and the prosecutor declined. On these facts, the trial court's determination should be given deference. Her statement that she did not think she could follow the law, gave the court legitimate reason to excuse her for cause, a decision which with neither party disagreed. (6 RT 690.)

Appellant relies on the trial court's explanation to Montoya of why she was being excused, capitalizing the court's verbage, "I don't want to

violate your religious convictions or cause you to be in a position where you might have to do something you're not comfortable with." (AOB 252, quoting 4 RT 890.) But this brief comment by the trial court to the prospective juror excusing her is utterly irrelevant since the court had already decided to excuse her, after inviting the parties to ask further questions and then accepting a stipulation. (4 RT 890.)

Appellant's claim initially focuses on the trial court's use of the term "not comfortable" when excusing the juror (AOB 252-255) rather than Montoya's actual answers which show a stated inability to put religious beliefs aside. The "equivocal and conflicting" answers supplied by Montoya "give rise to a definite impression that [her] views on the death penalty would substantially impair the performance of [her] duties." (*People v. Lewis, supra,* 39 Cal.4th at p. 1007.) The court and the parties were in the best position to judge 18-year-old Montoya's answers and demeanor when she made statements to the effect that she did not think she could vote for death and that she would try and follow the law but that she could not "really promise" to because her religious convictions "may get in the way." (4 RT 883-884.) The parties were entitled to 12 jurors who could follow the law, a commitment Montoya could not make. Thus, the court did not abuse its discretion when dismissing her.

Appellant also claims that the court led her astray by implying that her religious philosophy needed to be set aside. (AOB 256-259.) Appellant points to the court's questioning where the court asked her whether she could exercise her own judgment based on the law regardless of what her church would teach her to do. (AOB 257, citing 4 RT 883, 886.) Appellant contends that these statements by the court, combined with questioning whether Montoya could be guided by the facts of the case and the law rather than religious views (4 RT 885) misstated California law, which gives "a decisive role to a juror's personal evaluation." (AOB 258.)

Appellant apparently misses the court's obvious emphasis on following the law, which includes the juror's duty to personally evaluate the evidence. In addition to general instructions explaining the process of evaluating evidence and aggravating and mitigating factors given to Montoya and the other prospective jurors before individual questioning (4 RT 799-813), the court specifically told Montoya that "a juror . . . is responsible for making independent decisions, their own decisions have to be made based on their evaluation of the evidence, and in doing so they have to follow the legal principles that they're instructed upon by the court." (4 RT 882-883; See also 4 RT 883 "your actual deliberations and decisions are going to be the product of your own evaluation of the evidence".) In asking whether Montoya, or any other juror could strictly follow the law, which could at times cause him or her to make a decision contrary to religion or other philosophy, the court was insuring appellant and the people's right to a jury who followed the law. This questioning did not misinform Montoya regarding a juror's duty; it properly informed her. Montoya expressed "substantial impairment" to following the law and thus excusing her was valid. (See *People v. Cunningham supra* 25 Cal. 4th at p. 975.) The trial court did not abuse its discretion in accepting the parties' stipulation and excusing Montoya.

3. Mike Sisco

Appellant complains that Sisco was improperly excused by the trial court, and that the court failed to adequately inform him about California's "guided discretion system." This failure, appellant argues, misled Sisco into saying that he could not follow the law. (AOB 262-264.) Although the court was initially inclined to excuse Sisco based on his questionnaire alone which stated that he believed in giving every person a second chance, stated "never condemn anyone," and checked boxes indicating that his religion prevented him from judging another and that he could not be a fair juror in

this case (6 CT 1558, 1562.) Appellant's counsel did not agree to his excusal and instead requested that the court bring him in for questioning. (3 RT 683.) Following questioning however, appellant's attorney stipulated to Sisco being excused. (3 RT 706.)

Sisco's answers confirmed what was foreshadowed, if not expressly stated in his questionnaire– that he could not commit to following the law and the court's instructions. Notably, Sisco answered that he could not set aside his personal beliefs to impose a sentence of life imprisonment or the death penalty because of his religious philosophy that everyone should get a second chance. (3 RT 706.) His answers both during vior dire and on the questionnaire certainly reflect a deep seeded religious philosophy which would "prevent or substantially impair" the performance of his duties as defined by the court's instructions and the juror's oath. (*Wainwright v. Witt, supra,* 469 U.S. at p. 424.) Appellant's counsel had an opportunity to attempt to rehabilitate these answers, but instead stipulated to Sisco being excused. (3 RT 706.)

Appellant's contention that the trial court failed to explain the nuances of California law which might not have been inconsistent with Sisco's religious beliefs also fails. The court told prospective jurors including Sisco what the jury's role was and with respect to penalty, that the jurors would be expected to weigh aggravating and mitigating factors to assign the appropriate penalty. (3 RT 553-554.) Thus appellant's claim that "Sisco was left to believe that the law could require him a choice that would give the defendant no second chance" (AOB 263) is belied by the record. The court and the parties were correct in their unanimous assessment that Sisco should be excused for cause. His answers expressed irreparable conflict with the law which could not be set aside, and thus the trial court did not abuse its discretion in excusing him.

4. Richard Hathaway

Appellant's complaints with respect to the excusal of Hathaway are similar to those discussed above: that the court misstated the law and thus Hathaway's answers indicating reluctance or inability to follow the law are meaningless. (AOB 268-269.) The claim again fails since the court explained in clear terms to Hathaway and all other jurors:

> The jury determines the penalty phase by weighing and considering certain enumerated aggravating factors and mitigating factors, bad and good things that relate to the facts of the crime and the background and character of the defendant...including consideration of sympathy.

(4 RT 907-908.)

The trial court went on to properly define aggravating and mitigating factors and explained that the weighing of these factors is qualitative and not quantitative, and that "in order to pick the penalty of death, you must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors that death is warranted instead of life without the possibility of parole . . ." (4 RT 908.) The court even used the term "guided discretion" to explain to the jury that it would receive further instruction on what kind of objective criteria to consider if the trial ever gets to that point. (4 RT 908-909.) These general instructions were a correct statement of law. Moreover, when Hathaway was questioned individually, these concepts were repeated. (4 RT 942) Hathaway could not commit to following the law and his answers reflected substantial impairment to imposing the death penalty, stating "I don't think I could" in response to direct questioning on whether he could impose the death penalty. (4 RT 943.)

Appellant plucks the word "objective" out of its context in his rant about the trial court not explaining to the jurors the "subjective nature of the weighing process." (AOB 268.) The trial court's use of the term

"objective" relates to the criteria that the jurors must consider in making their own (subjective) determinations about whether the death penalty is warranted. (4 RT 907-909; 944.) Indeed, appellant himself makes the point in argument XIII that the jury by law, can only consider statutorily enumerated aggravating factors. (AOB 274.) Thus, while the weight given to various factors is up to each individual juror to determine, the jury is to be guided by objective criteria in terms of what it can consider as aggravating or mitigating. Hathaway's answers do not show a possible misunderstanding of what the law is, or reflect the misconception that he could be required to vote for death absent evidentiary support. Instead, Hathaway's answers communicated, first that he completely changed his mind between the time he filled out the questionnaire and the time he was questioned (which may have contributed to appellant and the prosecutor wanting him excused), and that he did not think he was capable of returning a death verdict under any circumstances. (4 RT 943.) The latter communication constituted sufficient cause. (*Wainwright v. Witt supra* 469 U.S. at 424; *People v. Crittenden, supra,* 9 Cal.4th at 121; *People v. Mincey, supra,* 2 Cal.4th at 456; *People v. Cunningham, supra*, 25 Cal.4th 926, 975 ["A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate."]) Thus, the trial court properly exercised its discretion in accepting the parties' stipulation to excuse Hathaway.

5. Ruth Sanchez

In his final rebuke of the trial court's for cause excusals, appellant asserts that Ruth Sanchez was excused "without the required information, and for the wrong reason." (AOB 271-272.) He repeats his claim that use of the term "objective criteria" left no room for the juror's own beliefs or values. (AOB 271-272.) As explained above, appellant's claim fails. Sanchez was excused by stipulation, after being asked by the court whether

she could impose penalty in accordance with the law and responding "I can't honestly say that I can." The court and the parties were in the best position to determine whether she was fit to serve on the jury. Some of the information they learned about her included that she was on pain medication that caused sleepiness, was contemplating joining the Jehovah's Witness church, did not know whether she could follow the law, and did not think she could sentence someone to death. (4 RT 947-949; 8 CT 2327-2340.) With this information in mind, and the fact that appellant stipulated to Sanchez being excused, the trial court did not abuse its discretion in excusing her.

XIII. THE COURT PROPERLY INSTRUCTED THE JURY ON AGGRAVATING FACTORS FOLLOWING THE PENALTY PHASE EVIDENCE

Appellant argues that the trial court committed reversible error in instructing the jurors, per CALJIC No. 8.88, on the definition of aggravating factors. (AOB 274-275.) He contends that use of the term "any fact" in that instruction, gave the jury latitude to find aggravating facts beyond the exclusive statutory list. (AOB 274-276.) Appellant's claim lacks merit.

A. Appellant's Claim Has Soundly Been Rejected by This Court

This Court has repeatedly upheld CALJIC No. 8.88. (*See People v. Butler* (2009) filed June 18, WL 1688251 [stating "It is settled that CALJIC No. 8.88 properly instructs the jury on the balancing of aggravating and mitigating circumstances."] See also *People v. Lindberg*, 2008 45 Cal.4th 1, 52; *People v. Moon, supra*, 37 Cal.4th at pp. 42-43.)

Appellant points to the phrase "any fact" to complain that the instruction allows the jury to go outside of the proper scope of aggravating factors. (AOB 274-275.) However, appellant ignores the full instruction

and fails to analyze it in the context of the other instructions. The first portion of CALJIC 8.88, in relevant part, reads as follows:

> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the *applicable* factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

(13 RT 2830; italics added, 10 CT 2890.)

Appellant's jury was not told that it could consider anything under the sun when it weighed factors for the purpose of determining appellant's penalty. They were instructed to consider "applicable factors", a list of which was previously provided to them in CALJIC 8.85. (13 RT 2825-2826; 10 CT 2287-2288.) Moreover, the phrase "any fact" which described both aggravating and mitigating factors, was directed at the circumstances of the crime itself. Given the instruction as a whole and the other instructions specifically delineating what factors the jury could consider as aggravating, it is highly improbable that appellant's convoluted interpretation of CALJIC 8.88 was shared by any of the jurors or had any impact on their verdict. Thus, his argument should be rejected.

B. Any Error Harmless

Appellant's claim that this instruction constituted reversible error should also be rejected. Respondent submits that no legal authority supports his claim of error. In any event, appellant's claim that the jury inappropriately relied on other facts is speculative and irrational. The other

facts that he lists as inappropriate aggravating factors, i.e. evidence that he was an alcoholic, an irresponsible gambler, lived off the government (AOB 275-276) pale in comparison to proper aggravating evidence that he was a convicted criminal with five felonies on his record, had committed at least two forcible rapes, and that he brutally murdered two elderly people that invited him into their home, and pawned their jewelry within a day of slaying them. Not to mention the horrifying fact that he raped 72 year-old Shirley Jenks before or during the heinous murder he committed, causing life-long suffering to her family. Appellant's claim that the jury misinterpreted the instruction and relied on facts they should not have to set the penalty at death is without merit.

XIV. THE COURT DID NOT COMMIT ERROR BY FAILING TO GIVE A LIMITING INSTRUCTION WITH RESPECT TO THE VICTIM IMPACT EVIDENCE

Appellant complains that the trial court erred by failing, sua sponte, to give a limiting instruction with respect to victim impact evidence. (AOB 278-290.) He argues that the jury needed guidance on considering the evidence for proper purposes and that without such guidance, they were likely to misuse such evidence. (AOB 284-288.) Appellant concludes that the trial court's failure to give an appropriate limiting instruction on the consideration of victim impact evidence constituted reversible error. (AOB 288-290.) Appellant's claim lacks merit.

A. Forfeiture

Preliminarily, appellant failed to request a limiting instruction or object to any of the prosecution's victim impact evidence being admitted. Respondent submits that failure to do so forfeits this claim on appeal. (*People v. Boyer* (2006) 38 Cal.4th 412, 465 [stating that "[w]hile the trial court should give [a limiting] instruction upon request [citations], it need not do so sua sponte. Hence, failure to request such an instruction in the

trial court forfeits a direct appellate claim that it should have been given."]) Respondent notes that appellant is not directly arguing that any of this evidence was irrelevant or improper, but merely that the instructions failed to adequately define the jury's use of the evidence. This underscores appellant's duty to request a clarifying or limiting instruction in the trial court. Because he failed to do so, this claim should be deemed forfeited. In any event, appellant's claim is utterly unavailing.

B. The Instructions Given By the Court Were Adequate

In *People v. Morgan* (2007) 42 Cal.4th 593, 624, the defendant challenged the trial court's decision not to give a limiting instruction, proposed by the defense, explaining how victim imact evidence should be considered by the jury. In that case, the victim's mother, father, and brother testified to being adversely affected by losing the victim from their family, similar to how Hazelum and Washington had described the loss of the Jenks. This Court rejected the defendant's claim that an instruction was required "to ensure that 'emotion would [not] overcome the jurors' reason, preventing them from making a rational penalty decision. . . .'" (*Ibid* [citations omitted].) This Court noted that other instructions, including "CALJIC No. 8.84.1, were sufficient to inform the jury of its responsibilities, and the proposed instruction by the defense 'would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1.'" (*Ibid. quoting People v. Ochoa* (2001) 26 Cal.4th 398.) Thus, the Court concluded that even where requested by the defense, the trial court has no duty to give a limiting instruction with respect to victim impact evidence. (*Ibid;* See also *People v. Zamudio* (2008) 43 Cal.4th 327, 368.) Here, the court gave CALJIC No. 8.84.1. Appellant advances no compelling reason why a trial court should be required, sua sponte, to give a limiting instruction, when this Court has squarely held that denying a defense request for such instruction is not

error. Appellant's reference to a short list of other jurisdictions that encourage a special instruction (AOB 284) should not be considered here, where this Court has soundly held that California's instrucitons adequately explain how evidence is to be evaluated.

C. Any Error Harmless

Appellant cannot show that the trial court's failure to give a limiting instruction prejudiced him. Like in *Morgan*, the trial court here gave CALJIC 8.84.1 and told the jury what it could consider as aggravating and mitigating per CALJIC 8.85. (13 RT 2824-2827; 10 CT 2887.) Thus, appellant's jury was properly advised with respect to victim impact evidence.[9]

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[9]Contrary to appellant's implicit assertion that the victim-impact testimony injected unfair, inflammatory evidence into appellant's trial, (AOB 280-288) respondent submits that the evidence was properly admitted. In *Payne v. Tennessee* (1991) 501 U.S. 808, the United States Supreme Court explained that a relevant consideration for sentencing authorities traditionally has been the "specific harm caused by the crime." (*Id.* at p. 825.) In order to understand the harm caused by the crime, a state may choose to permit the introduction of victim-impact evidence because such evidence is "designed to show . . . each victim's 'uniqueness as an individual human being. . . .' " (*Id.* at p. 823.) The high court determined that the state should not be prevented from "offering 'a quick glimpse of the life' which a defendant 'chose to extinguish' [citation], or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." (*Id.* at p. 822.) Thus, "[a] State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Id.* at p. 827; *see People v. Dykes* [June 15, 2009] WL 1651345; *People v. Pollock* (2004) 32 Cal.4th 1153, 1180.)

XV. UNANIMITY IS NOT REQUIRED WITH RESPECT TO EVIDENCE OF PRIOR CRIMES; THE JURY WAS UNANIMOUS IN ITS DECISION THAT APPELLANT DESERVES TO DIE FOR THE BRUTAL SLAYING AND ROBBERY OF AN INNOCENT ELDERLY COUPLE

Appellant next complains that the trial court violated his constitutional rights by failing to require juror unanimity with respect to unadjudicated criminality. (AOB 291-316.) He argues that this Court intended jurors to be unanimous with respect to such factors when it required the reasonable doubt standard. (AOB 292-299.) Further he claims that the instructions given triggered unreliability and that single juror determination is constitutionally unacceptable. (AOB 301-312.) These claims should be rejected.

This Court has repeatedly held that the "jury need not unanimously agree on the truth of aggravating factors." (*People v. Hines* (1997) 15 Cal.4th 997, 1066.) More specifically the Court has ruled that "[j]ury unanimity is not required with respect to unadjudicated criminal conduct." (*People v. Harris* (2008) 43 Cal.4th 1269, 1316.) This Court has also specifically rejected appellant's "analogy" claim that *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, or *Cunningham v. California* (2007) 549 U.S. 270, require juries to enter unanimous findings concerning aggravating factors. (*People v. Salcido, supra*, 44 Cal.4th at p. 167; see also *People v. Williams* (2008) 43 Cal.4th 584, 649.) This Court should again decline appellant's invitation "to reconsider our prior decisions." (See *People v. Dykes* [June 15, 2009] WL 1651345.) Appellant offers no compelling reason to reexamine sound and recent precedent. His claim should therefore be rejected.

XVI. APPELLANT WAS CONVICTED AND SENTENCED TO DEATH FOLLOWING A FAIR TRIAL AND ALL OF THE CONSTITUTIONAL RIGHTS TO WHICH HE WAS ENTITLED

Appellant's sixteenth argument on appeal is that the cumulation of error infected both phases of his trial and therefore reversal is required on a cumulative error basis. (AOB 317-326.) He urges that even claims found by this Court to not be error should be considered as contributory to a fundamentally unfair trial. (AOB 317-326.) In support of his argument, appellant points specifically to the alleged errors that underlie Arguments II, III, IV, VII, XIII, and IX. (AOB 323-324.) Appellant summarized the arguments he made in sections IX, XV, XIV and XVIII of his AOB to also claims that cumulative error invalidated the penalty phase of his trial as he was denied due process. (AOB 326-327.) As argued in corresponding sections ante, respondent submits that there were no errors and that he was convicted and sentenced to death following a fair trial where all of his rights were strictly adhered to. Appellant is a callous, cold-hearted five-time felon who brutally slayed two elderly folks that trusted him along with committing rape and robbery. He had a fair trial and the jury's verdicts convicting him of double murder and sentencing him to die should be affirmed.

To the extent any errors occurred, the errors were harmless. Respondent urges that even if any errors are viewed cumulatively, they "do not compel the conclusion that [appellant] was denied a fair trial." (*People v. Rundle*, *supra*, 43 Cal.4th at p. 199; see also *People v. Watson, supra*, 43 Cal.4th at p. 704 ["Whether considered independently or together, any errors or assumed errors are nonprejudicial and do not undermine defendant's conviction or sentence."]; *People v. Carter*(2005) 36 Cal.4th 1215, 1212-1213 ["Having determined that defendant's trial was nearly devoid of any error, and that to the extent any error was committed it was

clearly harmless, we conclude that defendant's contention as to cumulative error lacks merit."].) Appellant was afforded all of the protections required by the constitution and his convictions and death verdict should be affirmed.

XVII. THE JURY WAS NOT REQUIRED TO AGREE OR COMMUNICATE WHICH PROSECUTION THEORY IT RELIED ON WHEN CONVICTING APPELLANT OF FIRST DEGREE MURDER

Appellant complains that his constitutional rights were violated by the jury's ability to find him guilty of first degree murder without agreeing unanimously on the theory of first degree murder. He admits that this argument has already been rejected by this Court. (AOB 328.) Appellant's claim lacks merit.

The trial court instructed the jury on both premeditated first degree murder and first degree felony murder. Appellant's argument that the court should have required the jury to agree on one particular theory has been repeatedly rejected by this Court. (*People v. Valencia* (2008) 43 Cal.4th 268, 289; *People v. Morgan, supra,* 42 Cal.4th at p. 617; *People v. Nakahara* (2003) 30 Cal.4th 705, 712-713.) Respondent submits that this Court's sound precedent should not be disturbed, since appellant's jury was unanimous in its agreement that appellant committed first degree murder.

Appellant's argument fails for another reason: the jury convicted him of robbery, as charged in count three and special circumstance of robbery, and thus all jurors agreed that appellant robbed the Jenks. Therefore, it is difficult to contemplate a scenario where they would not have unanimously found him guilty of murder under the felony murder theory. (See e.g. *People v. Valencia supra* 43 Cal.4th at p. 289; *People v. Seaton, supra*, 26 Cal.4th at p. 671.) Thus, his postulation that he could have been convicted without juror unanimity with respect to a particular theory of first degree

murder is directly contradicted by the jury's verdicts. (See *Schad v. Arizona* (1991) 501 U.S. 624, 633-634.) His argument should be rejected.

XVIII. CALIFORNIA'S DEATH PENALTY STATUTE AS APPLIED IN APPELLANT'S TRIAL IS CONSTITUTIONAL

Appellant argues that California's death penalty law, as interpreted by this Court and applied at his trial, violates the United States Constitution. (AOB 329-351.) In so arguing, appellant reiterates numerous constitutional challenges to the law – all of which this Court has repeatedly rejected and should reject again.

A. Section 190.2 is Not Overly Broad

Appellant argues first that California's death penalty law fails to narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (AOB 331.) He urges that this is so because the special circumstances set forth in section 190.2 are so numerous and so broad in definition makes "almost all first-degree murders eligible for the death penalty." (AOB 331.) Appellant's claim lacks merit.

This Court has consistently and repeatedly rejected this same challenge to the death penalty statute. (See, e.g., *People v. Watson* (2008) 43 Cal.4th 652, 703; *People v. Zamudio* (2008) 43 Cal.4th 327, 373; *People v. Prince* (2007) 40 Cal.4th 1179, 1298; *People v. Jablonski, supra*, 37 Cal.4th at p. 837; *People v. Stitely* (2005) 35 Cal.4th 514, 573.) In this case, charged conservatively by the prosecution as the rape was not alleged as a special circumstance, appellant was found guilty of special circumstance murder on two different bases: multiple murder and robbery. Thus, even limiting the statute would be unlikely to assist him since there are two different theories under which he is death eligible and multiple murder is unlikely to be a special circumstance that anyone would support eliminating. In any event, appellant provides no persuasive reason why this

Court should deviate from prior decisions which soundly reject appellant's argument.

B. Section 190.3, Factor (a), Which Directs the Jury to Consider in Determining Penalty "Circumstances of the Crime," Does Not Result in an Arbitrary or Capricious Penalty Determination

Appellant argues next that his death penalty is invalid because section 190.3, factor (a), as applied allows arbitrary and capricious imposition of death and thus violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as it fails to adequately narrow the scope of aggravating factors. (AOB 332-333.) This claim too should be rejected.

This Court has repeatedly upheld factor (a) against challenges like appellant's. It has squarely held: "Section 190.3, factor (a), is not overbroad, nor does it allow for the arbitrary and capricious imposition of the death penalty. [Citations.]" (*People v. Manriquez* (2005) 37 Cal.4th 547, 589; see also, e.g., *People v. Watson*, *supra*, 43 Cal.4th at p. 703; *People v. Zamudio, supra*, 43 Cal.4th at p. 373; *People v. Rundle, supra*, 43 Cal.4th at p. 198.) This Court has further observed: " '[A] statutory scheme would violate constitutional limits if it did not allow such individualized assessment of the crimes but instead mandated death in specified circumstances. [Citation.]' [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 365, italics added.) Again appellant provides no persuasive reason why this Court should reexamine its decision.

C. California's Death Penalty Law is Not Unconstitutional For Failing to Require Proof Beyond a Reasonable Doubt For Choosing the Death Sentence

Appellant contends that his constitutional right to a jury determination beyond a reasonable doubt of all facts essential to the imposition of a penalty of death was violated in that his death verdict was not premised on

findings beyond a reasonable doubt by a unanimous jury that one or more aggravating circumstances existed and that those circumstances outweighed mitigating circumstances. (AOB 333-344.) However, in *People v. Fairbank* (1997) 16 Cal.4th 1223 this Court held that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors." (*People v. Fairbank, supra*, at p. 1255; see also *People v. Zamudio*, *supra*, 43 Cal.4th at p. 373; *People v. Prince, supra*, 40 Cal.4th at p. 1297; *People v. Prieto* (2003) 30 Cal.4th 226, 263.)

Appellant suggests that this Court's opinion in *Prieto* should be reevaluated in light of the United States Supreme Court decisions in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466 (*Apprendi*); *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*); *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*); and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856] (*Cunningham*). (AOB 334) This Court has repeatedly ruled, however, that the *Apprendi-Ring-Blakely* line of cases – generally requiring "beyond a reasonable doubt" proof for findings of fact that increase the maximum sentence beyond that allowed solely on the basis of the underlying conviction – do not require imposition of a reasonable-doubt burden of proof on the prosecution under the California death penalty scheme. (See, e.g., *People v. Rundle, supra*, 43 Cal.4th at pp. 198-199; *People v. Morrison* (2005) 34 Cal.4th 698, 731; *People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn. 14.) This is so, because in California, capital defendants become eligible for the statutory maximum punishment of death only upon proof beyond a reasonable doubt of the charged murder and only upon proof beyond a reasonable doubt of the special-circumstance allegation at the death-sentence "eligibility" phase of the trial. (§ 190.2.) That special-circumstance finding itself qualifies as an aggravating factor

that may suffice to support a discretionary decision to sentence the defendant to death at the later sentence-selection phase. (See § 190.3, subd. (a) [in determining penalty, trier of fact shall take into account "the existence of any special circumstances found to be true"].) Under the governing state statutes, then, no further proof of any fact beyond the murder and the special circumstance is required as support for a death sentence. Because appellant's jury under state law was at least authorized to sentence him to death upon proof that he was a special-circumstance murderer – without needing to find any further historical facts beyond those found beyond a reasonable doubt in the guilt and special-circumstance determinations – the jury's sentence fully comported with any *Apprendi-Blakely-Ring* command. (*People v. Prieto,* supra, 30 Cal.4th at p. 263.)

As this Court has observed, "[t]he Cunningham decision involves merely an extension of the *Apprendi* and *Blakely* analyses to California's determinate sentencing law [DSL] and has no apparent application to the state's capital sentencing scheme." (*People v. Prince, supra*, 40 Cal.4th at p. 1297; *see also People v. Salcido* (2008) 44 Cal.4th 93, 167.) This observation is borne out when it is considered that key to the decision in *Cunningham* was the fact that, at the time of the decision, an upper-term sentence could only be imposed under California's DSL when the trial court found an aggravating circumstance beyond the elements of the charged offense. If the trial court did not find an aggravating circumstance, it was required to impose the middle term. (See *Cunningham v. California*, 549 U.S. at pp. [127 S.Ct. at pp. 861-862, 868-871].) As demonstrated ante in the preceding paragraph, California's death penalty law does not feature the characteristics that drove the opinion in *Cunningham*. Namely, no further proof of any fact beyond the murder and the special circumstance – facts that have been found true beyond a reasonable doubt by the

fact-finder at the guilt-phase trial – is required as support for a death sentence. Thus, appellant's reliance on *Cunningham* is unavailing.

This Court has repeatedly and consistently held that the *Apprendi-Blakely-Ring* line of cases does not affect California's death penalty law, including the decision whether aggravating factors outweigh mitigating factors. (See, e.g., *People v. Rundle, supra*, 43 Cal.4th at pp. 198-199; *People v. Morrison*, *supra*, 34 Cal.4th at p. 731.) This Court has further stated that, because the determination of penalty is essentially moral and normative (and thus different in type than the determination of guilt), the United States Constitution does not require the prosecution to bear either the burden of proof or the burden of persuasion at the penalty phase. (See *People v. Rundle, supra*, at p. 199; *People v. Sapp* (2003) 31 Cal.4th 240, 317.) Once again appellant provides no persuasive reason why this Court should reexamine its decision. Recently, the Supreme Court held that the *Apprendi-Ring-Cunningham* cases did not apply to the trial court's historically discretionary power to impose consecutive sentences. (*Oregon v. Ice* (2009) 555 U.S. ----, ---- [129 S.Ct. 711, 714-715].) Similarly, the ultimate decision between life and death has historically been exercised by the sentencer.

Appellant attempts to add a new twist to his burden of proof arguments– that under basic evidentiary principles, the jury should have been instructed that the prosecution had the burden of proof or alternatively, that there was no burden of proof. (AOB 335-338.) However, the instructions given adequately address appellant's argument. The jury was told that they must not impose death unless aggravating factors substantially outweigh mitigating ones and that factors should be weighed qualitatively. (See CALJIC 8.88.) Thus, under the current system one could not be sentenced to death with no evidence presented as appellant hypothesizes, nor would it make any sense to instruct the jury that there is

no burden of proof. (AOB 337-338.) Instead, it is a system where the jury evaluates the evidence and must be convinced, unanimously, of the appropriate penalty given all of the information before it. (*People v. Dykes, supra,* 46 Cal.4th 731.) As discussed above, the jury had already determined during the guilt phase that appellant was death eligible because of the proof, beyond a reasonable doubt, that appellant committed two special circumstance murders.

D. Jurors Are Not Required to Make Written Findings

Appellant claims that by failing to require the jury to make written findings, his right to meaningful appellate review has been violated. (AOB 344.) This claim has been repeatedly rejected and should be rejected again. "The California death penalty statute is not unconstitutional in failing to require the jury to make written findings concerning the aggravating circumstances relied upon, nor does the failure to require written findings preclude meaningful appellate review." (*People v. Prince, supra*, 40 Cal.4th at p. 1297; *People v. Robinson, supra*, 37 Cal.4th at 655; *People v. Morrison, supra*, 34 Cal.4th at pp. 730-731.)

E. The Instructions Adequately Defined Aggravating and Mitigating Factors

Appellant argues next that the instructions on aggravating and mitigating factors were unconstitutional in numerous ways. (AOB 345-350.) He claims that the instructions contained unfair restrictive language which prevented the jury from considering other mitigating facts, (AOB 344) that the court erred in reading all of the factors that did not apply in appellant's case, (AOB 345), and that the instructions failed to explain to the jurors which factors could be used as aggravating, mitigating, or both. (AOB 346-347.) Finally, he adds that the instructions were insufficient for not including lingering doubt as a mitigating factor, and for not advising the jury that it could not consider the cost or deterrent effect when imposing the

sentence. (AOB 348-349.) Each of these arguments have been rejected by this Court and should be rejected again.

Appellant's argument that the trial court violated his state and federal constitutional rights by giving CALJIC No. 8.85 in its entirety and thereby instructing the jury on aggravating and mitigating factors that were inapplicable on the evidence in the case has been repeatedly rejected. (*People v. Wilson* (2005) 36 Cal.4th 309, 360.) Appellant offers no compelling reason to reconsider this issue. Likewise, his claim that the language of the instruction is restrictive has also been rejected by this Court. (*People v. Avila, supra,* 38 Cal. 4th at p. 614.) Appellant's claim that the instructions failed to explain to the jurors which factors could be used as agrravating, mitigating, or both has also been rejected. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1069; see *People v. Farnam* (2002) 28 Cal.4th 107, 191-192.)

Appellant's argument that the court should have instructed the jury to consider lingering doubt as an aggravating factor and also not to consider cost or deterrent effect, if any, when setting the penalty (AOB 348-349) is also unavailing. In *People v. Zamudio* (2008) 43 Cal.4th 327, 370-371 this Court reviewed a similar claim raised by a defendant who, unlike appellant, requested such instruction below. The Court nonetheless found the claim without merit. (*Ibid.*) The Court ruled that "a lingering doubt instruction 'is required neither by state nor federal law [citation], and . . . that this concept is sufficiently covered in CALJIC No. 8.85. [Citations.]'" (*Ibid.* citing *People v. Geier, supra*, 41 Cal.4th at p. 615.) The Court also held that no instruction telling jurors not to consider cost or deterrence was necessary, noting that this was not something the parties had produced any evidence of during the trial. (*People v. Zamudio, supra,* 43 Cal.4th at p. 371.) Similarly here, neither party argued or presented evidence regarding

the cost or deterrent effect of either sentence. Thus, instruction on this non-issue was not warranted and appellant's claim should be rejected.

F. Inter State Proportionality Review Is Not Required

Appellant next claims that the absence of inter-case proportionality review "guarantees arbitrary and disproportionate imposition of the death sentence." (AOB 349-350.) Appellant's claim lacks merit.

Inter-case proportionality review is not constitutionally required. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 511; *People v. Anderson*, *supra*, 25 Cal.4th at p. 602.) In any event, appellant would not be aided by such review. Given the nature of these murders, and appellant's previous criminal activity, his sentence is not grossly disproportionate to his personal culpability and proportionality review would buttress the jury's conclusion. (*People v. Hillhouse, supra*, 27 Cal.4th at p. 511.)

G. California's Death Penalty Law Does Not Violate Principles Of Equal Protection

Appellant argues that California's death penalty scheme violates the equal protection clause of the United States Constitution in that it provides greater protection to non-capital defendants than to capital defendants. (AOB 350.) This claim lacks merit.

This Court has repeatedly considered and decided this issue against appellant, holding that "California's death penalty statute does not violate equal protection by denying capital defendants certain procedural safeguards . . . while affording such safeguards to noncapital defendants." (*People v. Watson*, *supra*, 43 Cal.4th at pp. 703-704; see also, e.g., *People v. Zamudio, supra*, 43 Cal.4th at p. 373; *People v. Rundle, supra*, 43 Cal.4th at p. 198.) This Court should so hold again as "capital defendants are not situated similarly to noncapital defendants." (*People v. Rundle, supra*, at p. 198.) Appellant makes no new arguments nor gives any compelling reason

to revisit sound, recent, precedent rejecting this claim. It should therefore be rejected again.

H. Capital Punishment In California Does Not Violate International Law Or International Norms

Appellant's final attack on California's death penalty scheme is that it falls short of international norms and violates international law. (AOB 350-351.) Appellant raises an argument that this Court has repeatedly and consistently rejected. (See, e.g., *People v. Harris, supra*, 43 Cal.4th at p. 1323; *People v. Zamudio, supra*, 43 Cal.4th at p. 373; *People v. Bonilla, supra*, 41 Cal.4th at p. 360.) Once again appellant provides no persuasive reason why this Court should reexamine its decision. Appellant's claim should be rejected.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: August 6, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
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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 36,682 words.

Dated: August 6, 2009

EDMUND G. BROWN JR.
Attorney General of California

Maggy Krell

MAGGY KRELL
Deputy Attorney General
Attorneys for Plaintiff and Respondent

APPENDIX A

Appellant urges this Court to abandon the current structure of harmless error analysis in the penalty phase context. (AOB 353-376.) Respondent submits that there is no reason to retreat from the Court's present harmless error approach. This Court's current approach has been upheld by the Supreme Court. (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259; *Clemons v. Mississippi* (1990) 494 U.S. 738, 741.) Appellant's argument should be rejected.

APPENDIX B

2655

FILED

JUN 18 1998

TODD H. BARTON
KINGS COUNTY COURT EXECUTIVE OFFICER
AND CLERK OF COURTS
_____ DEPUTY

JURY INSTRUCTIONS GIVEN

PEOPLE OF THE STATE OF CALIFORNIA

Case No. 97CM2167

Michael Reinhart/Gayle Helart

Dept. No. 1

Plaintiff(s)

THOMAS POTTS

Jerry Hultgren

Defendant(s)

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INTRODUCTORY INSTRUCTIONS

0.50 Members and alternate members of the Jury:

You have been selected and sworn as jurors and alternate jurors. I shall now instruct you as to your basic functions, duties and conduct. At the conclusion of the case, I will give you further instructions on the law. All of the court's instructions, whether given before, during, or after the taking of testimony are of equal importance.

You must base the decisions you make on the facts and the law.

First, you must determine the facts from the evidence received in the trial and not from any other source. A "fact" is something proved by the evidence or by stipulation. A stipulation is an agreement between attorneys regarding the facts. Second, you must apply the law that I state to you, to the facts, as you determine them, and in this way arrive at your verdict and any finding you are instructed to include in your verdict.

You must accept and follow the law as I state it to you, whether or not you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.

You must not be influenced by pity for a defendant or by prejudice against him. You must not be biased against the defendant because he has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that he is more likely to be guilty than not guilty. During the guilt phase of the trial, you must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences.

Statements made by the attorneys during the trial are not evidence. However, if the attorneys stipulate or agree to a fact, you must regard that fact as proven as to the party or parties making the stipulation.

If an objection is sustained to a question, do not guess what the answer might have been. Do not speculate as to the reason for the objection.

Do not assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it helps you to

understand the answer. Do not consider for any purpose any offer of evidence that is rejected, or any evidence that is stricken by the court; treat it as though you had never heard of it.

You must not independently investigate the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not on your own visit the scene, conduct experiments, or consult reference works or persons for additional information.

You must not converse among yourselves, or with anyone else, on any subject connected with the trial, except when all the following conditions exist:

(a) The case has been submitted to you for your decision by the court, following arguments by counsel and jury instructions;

(b) You are discussing the case with a fellow juror; and

(c) All twelve jurors, and no other persons, are present in the jury deliberating room.

You must not read or listen to any accounts or discussions of the case reported by the newspapers or other news media, including radio and television.

You will be given notebooks and pencils. Leave them on your seat when you leave each day and at each recess. You will be able to take them into the jury room when you deliberate.

A word of caution: You may take notes; however, you should not permit note-taking to distract you from the ongoing proceedings. Remember you are the judges of the believability of witnesses.

Notes are only an aid to memory and should not take precedence over recollection. A juror who does not take notes should rely on his or her recollection of the evidence and not be influenced by the fact that other jurors do take notes. Notes are for the note-taker's own personal use in refreshing his or her recollection of the evidence.

Finally, should a discrepancy exist between a juror's recollection of the evidence and a juror's notes, or between a juror's recollection and that of another, you may request that the reporter read back the relevant testimony which must prevail.

You will be permitted to separate at recesses. You must return following the recesses at such times as I instruct you. During recesses, you must not discuss with anyone any subject connected with this trial.

As for the Alternate Jurors, you are bound by all of these admonitions. You must not converse among yourselves or with anyone else on any subject connected

with this trial, or form or express any opinion on it until the case is submitted to you, which means until such time as you are substituted in for one of the 12 jurors and begin deliberating on the case.

This means that you must not decide how you would vote if you were deliberating with the other jurors and that you must not form or express an opinion about the case, unless and until you have been substituted in as a juror in the case.

You must not visit or view the premises or place where the crime or crimes charged were allegedly committed, or any other premises or place mentioned or involved in the case.

During the course of this trial and before you begin your deliberations, you must keep an open mind on this case and upon all of the issues that you will be asked to decide. In other words, you must not form or express any opinions on this case until the matter is finally submitted to you.

Before, and within 90 days of your discharge as a juror in this matter, you must not request, accept, agree to accept, or discuss with any person, receiving or accepting, any payment or benefit in consideration for supplying any information concerning the trial.

You must promptly report to the Court any incident within your knowledge involving an attempt by any person to improperly influence any member of this jury.

At this time, the lawyers will be permitted to make an opening statement if they choose to do so. An opening statement is not evidence. Neither is it an argument. Counsel are not permitted to argue the case at this point in the proceedings. An opening statement is simply an outline by counsel of what he or she believes or expects the evidence will show in this trial. Its sole purpose is to assist you in understanding the case as it is presented to you.

1.00 Members of the Jury:

You have heard all the evidence, and now it is my duty to instruct you on the law that applies to this case. The law requires that I read the instructions to you. You will have these instructions in written form in the jury room to refer to during your deliberations.

You must base your decision on the facts and the law.

You have two duties to perform. First, you must determine what facts have been

proved from the evidence received in the trial and not from any other source. A "fact" is something proved by the evidence or by stipulation. A stipulation is an agreement between attorneys regarding the facts. Second, you must apply the law that I state to you, to the facts, as you determine them, and in this way arrive at your verdict and any finding you are instructed to include in your verdict.

You must accept and follow the law as I state it to you, regardless of whether you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.

You must not be influenced by pity for or prejudice against a defendant. You must not be biased against a defendant because he has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that a defendant is more likely to be guilty than not guilty. You must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and a defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences.

1.01 If any rule, direction or idea is repeated or stated in different ways in these instructions, no emphasis is intended and you must not draw any inference because of its repetition. Do not single out any particular sentence or any individual point or instruction and ignore the others. Consider the instructions as a whole and each in light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

17.45 The instructions which I am now giving to you will be made available in written form for your deliberations. These are your own copies and you may make such notations upon them as you see fit. They will be disposed of in the same manner as your notes at the conclusion of the trial.

You will find that the instructions may be typed, printed or handwritten. Portions may have been added or deleted. You must disregard any deleted part of an instruction and not speculate as to what it was or as to the reason for its deletion. You are not to be concerned with the reasons for any modification.

Every part of the text of an instruction, whether, typed, printed or handwritten, is of equal importance. You are to be governed only by the instruction in its final wording.

1.02 Statements made by the attorneys during the trial are not evidence. However, if the attorneys have stipulated or agreed to a fact, you must regard that fact as proven.

If an objection was sustained to a question, do not guess what the answer might have been. Do not speculate as to the reason for the objection.

Do not assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it helps you to understand the answer. Do not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken by the court; treat it as though you had never heard of it.

1.03 You must decide all questions of fact in this case from the evidence received in this trial and not from any other source.

You must not independently investigate the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not on your own visit the scene, conduct experiments, or consult reference works or persons for additional information.

You must not discuss this case with any other person except a fellow juror, and then only after the case is submitted to you for your decision and only when all twelve jurors are present in the jury room.

GENERAL INSTRUCTIONS ON EVIDENCE

2.00 Evidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact.

Evidence is either direct or circumstantial.

Direct evidence is evidence that directly proves a fact. It is evidence which by itself, if found to be true, establishes that fact.

Circumstantial evidence is evidence that, if found to be true, proves a fact from

which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

2.01 However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to his guilt.

If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

2.03 If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

2.11 Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events. Neither side is required to produce all objects or documents mentioned or suggested by the evidence.

2.13 Evidence that at some other time a witness made a statement or statements that is or are inconsistent or consistent with his or her testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on that former occasion.

If you disbelieve a witness' testimony that he or she no longer remembers a certain event, that testimony is inconsistent with a prior statement or statements by him or her describing that event.

2.15 If you find that a defendant was in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant is guilty of the crimes of robbery and grand theft. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt.

As corroboration, you may consider the attributes of possession--time, place and manner, that the defendant had an opportunity to commit the crime charged, the defendant's conduct, a false account of how he acquired possession of the stolen property any other evidence which tends to connect the defendant with the crime charged.

EVALUATION OF EVIDENCE

2.20 Every person who testifies under oath is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

In determining the believability of a witness you may consider anything that has a tendency to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following:

The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness testified;

The ability of the witness to remember or to communicate any matter about which the witness testified;

The character and quality of that testimony;

The demeanor and manner of the witness while testifying;
The existence or nonexistence of a bias, interest, or other motive;
The existence or nonexistence of any fact testified to by the witness;
The attitude of the witness toward this action or toward the giving of testimony; and,
A statement previously made by the witness that is consistent or inconsistent with his or her testimony.

2.21.1 Discrepancies in a witness's testimony or between a witness's testimony and that of other witnesses, if there were any, do not necessarily mean that any witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to an important matter or only to something trivial should be considered by you.

2.22 You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

2.27 You should give the testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends.

2.51 Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

2.60 A defendant in a criminal trial has a constitutional right not to be compelled to

testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way.

2.61 In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. No lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding against him on any such essential element.

ADMISSION [redacted]

2.71 An admission is a statement made by the defendant which does not by itself acknowledge his guilt of the crimes for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence.

You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part.

Evidence of an oral admission of the defendant not made in court should be viewed with caution.

2.71.5 If you should find from the evidence that there was an occasion when the defendant (1) under conditions which reasonably afforded him an opportunity to reply; (2) failed to make a denial or made false, evasive or contradictory statements, in the face of an accusation, expressed directly to him or in his presence, charging him with the crime for which this defendant now is on trial or tending to connect him with its commission; and (3) that he heard the accusation and understood its nature, then the circumstance of his silence and conduct on that occasion may be considered against him as indicating an admission that the accusation thus made was true. Evidence of an accusatory statement is not received for the purpose of proving its truth, but only as it supplies meaning to the silence and conduct of the accused in the face of it. Unless you find that the defendant's silence and conduct at the time indicated an admission that the accusatory statement was true, you must entirely disregard the statement.

2.72 No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any admission made by him outside of this trial.

The identity of the person who is alleged to have committed a crime is not an element of the crime nor is the degree of the crime. The identity or degree of the crime may be established by an admission.

EXPERTS

2.80 Witnesses who have special knowledge, skill, experience, training or education in a particular subject have testified to certain opinions. Any such witness is referred to as an expert witness. In determining what weight to give to any opinion expressed by an expert witness, you should consider the qualifications and believability of the witness, the facts or materials upon which each opinion is based, and the reasons for each opinion.

An opinion is only as good as the facts and reasons on which it is based. If you find that any fact has not been proved, or has been disproved, you must consider that in determining the value of the opinion. Likewise, you must consider the strengths and weaknesses of the reasons on which it is based.

You are not bound by an opinion. Give each opinion the weight you find it deserves. You may disregard any opinion if you find it to be unreasonable.

2.81 In determining the weight to be given to an opinion expressed by any witness who did not testify as an expert witness, you should consider his or her believability, the extent of his or her opportunity to perceive the matters upon which his or her opinion is based and the reasons, if any, given for it. You are not required to accept an opinion but should give it the weight, if any, to which you find it entitled.

2.82 In examining an expert witness, counsel may ask a hypothetical question. This is a question in which the witness is asked to assume the truth of a set of facts, and to give an opinion based on that assumption.

In permitting such a question, the court does not rule, and does not necessarily find that all the assumed facts have been proved. It only determines that those

assumed facts are within the possible range of the evidence. It is for you to decide from all the evidence whether or not the facts assumed in a hypothetical question have been proved. If you should decide that any assumption in a question has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumed facts.

BURDEN OF PROOF

2.90 A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

INTENT

3.31 In the crimes and allegations charged in Counts 1, and 2 of felony murder in the commission of a robbery, and in the alleged special circumstance of murder in the commission of a robbery, and in the crime charged in count 3, namely robbery, and the crime charged in count 4, namely grand theft, and in the lesser included offenses to count 3 of grand theft and petty theft, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists the crime or allegation to which it relates is not committed or is not true.

The specific intent required is included in the definitions of the crimes or allegations set forth elsewhere in these instructions.

2.02 The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not

find the defendant guilty of the crimes charged in Counts 1, 2, 3, and 4 or the crime of second degree murder which is a lesser included offense to that charged in counts 1 and 2, or the crimes of grand theft or petty theft which are lesser included offenses to that charged in count 3, unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent or and mental state but (2) cannot be reconciled with any other rational conclusion.

Also, if the evidence as to any specific intent or mental state permits two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other its absence, you must adopt that interpretation which points its absence. If, on the other hand, one interpretation of the evidence as to the specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

3.31.5 In the allegations charged in Counts 1 and 2 of willful, deliberate and premeditated murder with malice aforethought there must exist a union or joint operation of act or conduct and a certain mental state in the mind of the perpetrator. Unless this mental state exists the crime to which it relates is not committed.

The mental states required are included in the definitions of the crimes set forth elsewhere in these instructions.

DEFENSES

4.71 When, as in this case, it is alleged that the crime charged was committed "on or about" a certain date, if you find that the crime was committed, it is not necessary that the proof show that it was committed on that precise date; it is sufficient if the proof shows that the crime was committed on or about that date.

CRIMES

8.00 Homicide is the killing of one human being by another, either lawfully or

unlawfully. Homicide includes murder and manslaughter, which are unlawful, and the acts of excusable and justifiable homicides, which are lawful.

8.10 Defendant is accused in Counts 1 and 2 of having committed the crime of murder, a violation of Penal Code Section 187.

Every person who unlawfully kills a human being with malice aforethought or during the commission or attempted commission of the crime of robbery, is guilty of the crime of murder in violation of Section 187 of the Penal Code.

In order to prove this crime, each of the following elements must be proved:

1. A human being was killed;

2. The killing was unlawful; and

3. The killing was done with malice aforethought or occurred during the commission or attempted commission of the crime of robbery.

8.11 "Malice" may be either express or implied.

Malice is express when there is manifested an intention unlawfully to kill a human being.

Malice is implied when:

1. The killing resulted from an intentional act;

2. The natural consequences of the act are dangerous to human life; and

3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought.

The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

The word "aforethought" does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act.

8.20 All murder which is perpetrated by any kind of willfull, deliberate and premeditated killing with express malice aforethought is murder of the first degree.

The word "willfull," as used in this instruction, means intentional.

The word "deliberate" means formed or arrived at or determined upon as a

result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.

If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill.

8.21 The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of robbery is murder of the first degree when the perpetrator had the specific intent to commit that crime.

The specific intent to commit robbery and the commission or attempted commission of such crime must be proved beyond a reasonable doubt.

8.30 Murder of the second degree is the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation.

8.70 Murder is classified into two degrees. If you should find the defendant guilty of murder, you must determine and state in your verdict whether you find the murder to be of the first or second degree.

8.71 If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree as well as a verdict of not guilty of murder in the first degree.

8.74 Before you may return a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or not guilty, but also, if you should find him guilty of an unlawful killing, you must agree unanimously as to whether he is guilty of murder of the first degree or murder of the second degree.

In arriving at a verdict for first degree murder, it is not necessary that all jurors agree on one or more of several theories proposed by the prosecution. Is is sufficient that each juror is convinced beyond a reasonable doubt that the defendant is guilty of murder in the first degree as that offense is defined by law.

8.80.1 If you find the defendant in this case guilty of murder of the first degree, you must then determine if one or more of the following special circumstances are true or not true:

Commission of multiple murders, or

Commission of murder in the course of committing a robbery.

The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.

Unless an intent to kill is an element of a special circumstance, if you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true.

You must decide separately each special circumstance alleged in this case. If you cannot agree as to all of the special circumstances, but can agree as to one or more of them, you must make your finding as to the one or more upon which you do agree.

In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously.

You will state your special finding as to whether this special circumstance is or is not true on the form that will be supplied.

8.81.3 To find the special circumstance, referred to in these instructions as multiple murder convictions, is true, it must be proved:

The defendant has in this case been convicted of at least one crime of murder of the first degree and one or more crimes of murder of the first or second degree.

8.81.17 To find that the special circumstance, referred to in these instructions as murder in the commission of robbery, is true, it must be proved:

1. The murder was committed while the defendant was engaged in in the commission or attempted commission of a robbery; and

2. The murder was committed in order to carry out or advance the commission of the crime of robbery or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the robbery was merely incidental to the commission of the murder.

8.83 You are not permitted to find a special circumstance alleged in this case to be true based on circumstantial evidence unless the proved circumstance is not only (1) consistent with the theory that a special circumstance is true, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the truth of a special circumstance must be proved beyond a reasonable doubt.

In other words, before an inference essential to establish a special circumstance may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which that inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence is susceptible of two reasonable interpretations, one of which points to the truth of a special circumstance and the other to its untruth, you must adopt the interpretation which points to its untruth, and reject the interpretation which points to its truth.

If, on the other hand, one interpretation of that evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

8.83.1 The specific intent with which an act is done may be shown by the circumstances surrounding its commission. But you may not find a special circumstance alleged in this case to be true unless the proved surrounding circumstances are not only, (1) consistent with the theory that the defendant had the required specific intent, but (2) cannot be reconciled with any other rational conclusion.

Also, if the evidence as to any specific intent is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent and the other to the absence of the specific intent, you must adopt that interpretation which points to the absence of the specific intent.

If, on the other hand, one interpretation of the evidence as to the specific intent appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

8.83.2 In your deliberations the subject of penalty or punishment is not to be discussed or considered by you. That is a matter which must not in any way affect your verdict or affect your finding as to the special circumstances alleged in this case.

9.40 Defendant is accused in Count 3 of having committed the crime of robbery, a violation of Section 211 of the Penal Code. It is also alleged in Counts 1 and 2 that the murders of Fred Jenks and Shirley Jenks were committed during the commission of a robbery.

Every person who takes personal property in the possession of another, against the will and from the person or immediate presence of that person, accomplished by means of force or fear and with the specific intent permanently to deprive that person of the property, is guilty of the crime of robbery in violation of Penal Code Section 211.

"Immediate presence" means an area within the alleged victim's reach, observation or control, so that he or she could, if not overcome by violence or prevented by fear, retain possession of the subject property.

"Against the will" means without consent.

In order to prove this crime, each of the following elements must be proved:

1. A person had possession of property of some value however slight;

2. The property was taken from that person or from his or her immediate presence;

3. The property was taken against the will of that person;

4. The taking was accomplished either by force or fear; and

5. The property was taken with the specific intent permanently to deprive that person of the property.

9.40.2 To constitute the crime of robbery, the perpetrator must have formed the specific intent to permanently deprive an owner of his or her property before or at the time that the act of taking the property occurred. If this intent was not formed until after the property was taken from the person or immediate presence of the victim, the crime of robbery has not been committed.

9.41 The element of fear in the crime of robbery may be either:

1. The fear of an unlawful injury to the person or property of the person robbed, or to any of his or her relatives or family members; or

2. The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery.

9.42 There are two degrees of robbery.

Every robbery of any person which is perpetrated in an inhabited dwelling house is robbery of the first degree.

All other robberies are of the second degree.

If you find the defendant guilty of robbery, you must determine the degree thereof, and state that degree in your verdict. If you have a reasonable doubt whether the robbery is of the first or second degree, you must find it to be of the second degree.

14.00 The crime of theft may consist of (1) theft by larceny, (2) theft by trick and device, (3) theft by embezzlement, or (4) theft by false pretense.

14.02 Defendant is accused in Count 4 of having committed the crime of grand theft, a violation of Section 487 of the Penal Code. The crime of grand theft is also a lesser offense to the crime of robbery which is alleged in count three.

Every person who steals, takes, carries, leads, or drives away the personal property of another with the specific intent to deprive the owner permanently of his or her property is guilty of the crime of theft by larceny.

To constitute a "carrying away," the property need not be actually removed from

the place or premises where it was kept, nor need it be retained by the perpetrator.

In order to prove this crime, each of the following elements must be proved:

1. A person took personal property of some value belonging to another;

2. When the person took the property he had the specific intent to deprive the alleged victim permanently of his or her property; and

3. The person carried the property away by obtaining physical possession and control for some period of time and by some movement of the property.

14.20 Theft is either grand theft or petty theft. If you find the defendant guilty of theft, you must determine whether the crime was grand theft or petty theft and state which it is in your verdict.

If you find the defendant guilty of theft, but unanimously have a reasonable doubt as to whether it is grand theft, you must find it to be petty theft.

14.21 When property is taken by theft, and the value of the property taken exceeds four hundred dollars, the crime is grand theft; if the value is four hundred dollars or less, the crime is petty theft.

14.26 When the value of property alleged to have been taken by theft must be determined, the reasonable and fair market value at the time and in the locality of the theft shall be the test. Fair market value is the highest price, in cash, for which the property would have sold in the open market at that time and in that locality, (1) if the owner was desirous of selling, but under no urgent necessity to do so; (2) if the buyer was desirous of buying but under no urgent necessity to do so; (3) if the seller had a reasonable time within which to find a purchaser; and (4) if the buyer had knowledge of the character of the property and of the uses to which it might be put.

14.27 An expression of opinion on value by the owner may be considered by you in determining value together with any other evidence bearing on that issue. In determining what weight to give an owner's opinion, you should consider the believability of the owner, the facts or materials upon which the opinion is based and the reasons for the opinions.

An opinion is only as good as the facts and reasons on which it is based. If you find that any fact has not been proved or has been disproved, consider that in

determining the value of the opinion. Likewise, you must consider the strengths and weaknesses of the reasons on which it is based.

You are not bound to accept an opinion as conclusive, but you should give to it the weight which you shall find it to be entitled. You may disregard any opinion if you find it to be unreasonable.

[redacted] MULTIPLE COUNTS

17.02 Each Count charges a distinct crime. You must decide each Count separately. The defendant may be found guilty or not guilty of any or all of the crimes charged. Your finding as to each Count must be stated in a separate verdict.

LESSER OFFENSES

17.10 If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict him of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime.

The crime of second degree murder is lesser to that of first degree murder charged in Counts 1 and 2.

The crime of grand theft is lesser to that of robbery charged in Count 3.

The crime of petty theft is lesser to that of robbery charged in count 3.

Thus, you are to determine whether the defendant is guilty or not guilty of the crimes charged in Counts 1, 2, 3 and 4 or of any lesser crimes. In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdicts. However, the court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the charged crime.

17.49 In this case there are 3 possible verdicts as to count 1, there are 3 possible verdicts as to count 2, there are 4 possible verdicts as to count 3, and there are 2 possible verdicts as to count 4. These various possible verdicts are set forth in the

forms of verdict which you will receive. Only one of the possible verdicts may be returned by you as to any particular count. If you all have agreed upon one verdict as to a particular count, the corresponding form is the only verdict form to be signed as to that count. The other forms are to be left unsigned.

CONCLUDING INSTRUCTIONS

17.24 It is alleged that at the time of the commission of the crime charged in Counts 1 and 2, the defendant, (1) committed the crime against a person 65 years of age or older and that condition was known or reasonably should have been known to the defendant.

If you find the defendant guilty of the crimes charged in Counts 1 and/or 2, you must determine whether or not the truth of this allegation has been proved.

The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true.

Include a special finding on that question, using a form that will be supplied to you.

17.30

I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness.

If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion.

17.31 The purpose of the court's instructions is to provide you with the applicable law so that you may arrive at a just and lawful verdict. Whether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist. Do not conclude that because an instruction has been given I am expressing an opinion as to the facts.

17.40 The People and the defendant are entitled to the individual opinion of each juror.

Each of you must consider the evidence for the purpose of reaching a verdict if

you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors.

Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision.

Do not decide any issue in this case by the flip of a coin, or by any other chance determination.

17.41 The attitude and conduct of jurors at all times are very important. It is rarely helpful for a juror at the beginning of deliberations to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, a sense of pride may be aroused, and one may hesitate to change a position even if shown it is wrong. Remember that you are not partisans or advocates in this matter. You are impartial judges of the facts.

17.42 In your deliberations do not discuss or consider the subject of penalty or punishment. That subject must not in any way affect your verdict.

17.43 During deliberations, any question or request the jury may have should be addressed to the Court on a form that will be provided. Please understand that counsel must first be contacted before a response can be formulated. If a readback of testimony is requested, the reporter will delete objections, rulings, and sidebar conferences so that you will hear only the evidence that was actually presented. Please understand that it may take time to provide a response. Continue deliberating until you are called back into the courtroom.

17.47 Do not disclose to anyone outside the jury, not even to me or any member of my staff, either orally or in writing, how you may be divided numerically in your balloting as to any issue, unless I specifically direct otherwise.

17.50 You shall now retire and select one of your number to act as foreperson. He or she will preside over your deliberations. In order to reach verdicts, all twelve jurors must agree to the decision and to any finding you have been instructed to include in your verdict. As soon as you have agreed upon a verdict, so that when polled each may state truthfully that the verdicts express his or her vote, have them dated

and signed by your foreperson and then return with them to this courtroom. Return any unsigned verdict forms.

17.52 You will be permitted to separate at the noon and evening recesses. During your absences the jury room will be locked. You are to return following the recess as you will be directed. During periods of recess, you must not discuss with anyone any subject connected with this trial, and you must not deliberate further upon the case until all 12 of you are together and reassembled in the jury room. At that time you shall notify the clerk or the bailiff that the jury is reassembled, and then continue your deliberations.

17.53 As for the Alternate Jurors, you are still bound by the admonition that you are not to converse among yourselves or with anyone else on any subject connected with this trial, or to form or express any opinion on it until the case is submitted to you, which means until such time as you are substituted in for one of the 12 jurors now deliberating on the case. This also means that you are not to decide how you would vote if you were deliberating with the other jurors.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Potts**
No.: **S072161**

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 August 7, 2009, 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 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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Clerk of the Court
Kings County Government Center
1426 South Drive
Hanford, CA 93230

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 August 7, 2009, at Sacramento, California.

_____
Declarant

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