IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **ROBERT CARRASCO,** Defendant and Appellant.	S077009 **CAPITAL CASE**

Los Angeles County Superior Court No. BA109453
The Honorable Michael B. Harwin, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an indictment filed by a Los Angeles County grand jury on March 12, 1997, appellant was charged with two counts of first degree murder in violation of Penal Code[1/] section 187 (counts 1 and 2); and one count of second degree robbery in violation of section 211 (count 3). The indictment alleged that in the commission of all three offenses, appellant personally used a firearm within the meaning of section 12022.5, subdivision (a)(1). The indictment further alleged the following special circumstances: the murder charged in count 1 was intentional and carried out for financial gain (§ 190.2, subd. (a)(1)); the murder charged in count 2 was committed in the commission of a robbery (§ 190.2, subd. (a)(17)); both murders were especially heinous, atrocious, and cruel, manifesting exceptional depravity (§ 190.2, subd. (a)(14)); and the murders charged in counts 1 and 2 constituted multiple murder (§ 190.2, subd. (a)(3)). (1CT 255-257, 259.) In an information filed by the Los Angeles District Attorney on July 11, 1997, appellant was charged with escape from custody in violation of section 4532, subdivision (b)(1). (4Supp. CT 130-131.) Before

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

trial, the parties agreed that the escape would be tried with the indictment's charges and referred to as count 4, although the cases would not be consolidated. (2CT 308.)

Appellant pled not guilty and denied the special allegations. (1CT 260; 4Supp. CT 142.) Trial was by jury. (2CT 312, 319.) On March 24, 1998, appellant was found guilty on all four counts. The jury also found all the special allegations to be true. (2CT 461-473.)

On March 27, 1998, following the penalty phase of trial, the jury returned a verdict of death on counts 1 and 2. (2CT 488-493.) Appellant's trial counsel filed motions to strike the special circumstances, for a new trial, and to reduce the offense for lack of proportionality. (2CT 523-543.) Appellant retained new counsel, who also filed motions for a new trial (3CT 546-592, 624-666, 743-757), and a motion to reduce appellant's sentence to life without parole (3CT 612-623). An evidentiary hearing on appellant's new trial motion was conducted over the course of five months. (3CT 732-734, 739-742, 766.)

On February 5, 1999, the trial court denied all of appellant's post-verdict motions. Appellant was sentenced to death on counts 1 and 2. Appellant was further sentenced to consecutive 10-year upper terms for the firearm use enhancements on counts 1 and 2. Appellant was also sentenced to the upper term of five years on count 3, plus 10 years for the firearm use enhancement, and the upper term of three years on count 4. The sentences on counts 3 and 4 were stayed. (3CT 765-781, 782A-782B; 4Supp. CT 222-225.)

This appeal from the judgment of death is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution Evidence

a. Murder Of George Camacho

In 1994, appellant and George Camacho worked for Ross-Swiss Dairy on Albion Street in Los Angeles. (11RT 1150-1151; 12RT 1234.) In October 1994, Harry Holton, who was the distribution warehouse manager at the dairy, fired Camacho for not showing up to work. (11RT 1152; 12RT 1194-1195, 1210, 1214.) Camacho had been working the graveyard shift from midnight or 1:00 a.m. to 8:00 or 9:00 a.m. In compliance with union rules, Holton solicited bids for Camacho's shift from current employees. Appellant bid on the shift, and it was given to him due to his seniority. (11RT 1159, 1165; 12RT 1195-1196; 13RT 1413-1414.)

Robert Martin Rios, the union representative for the plant employees of Ross-Swiss Dairy, believed that Camacho had been wrongfully discharged. Rios was able to get Camacho's job back for him. (13RT 1273-1274.) Appellant was a union shop steward, which meant he had been elected by his coworkers to represent them in on-site issues before the issues were brought to the attention of union representatives such as Rios. (12RT 1241; 13RT 1275, 1316.) Appellant did not assist in getting Camacho's job back for him. (13RT 1275.)

The date scheduled for Camacho's return to work was December 16, 1994. (12RT 1196, 1210; 13RT 1300.) A few days before that date, Holton informed appellant, who said he wanted to keep the shift. Appellant explained that if he was forced to work days at the dairy, he would be unable to continue his second job working on cars, and he would lose about $60,000 per year. (12RT 1197-1198.) Holton told appellant that if he had a problem with

Camacho's return, he should speak with the union representative. (12RT 1198.) Appellant spoke to Rios on behalf of union members regarding Camacho's return. (13RT 1301-1302.)

Appellant also told his coworker, Andrew Nunez, that he hated to give up the shift because it would cause him to lose about $9,000 per month from his second job painting cars. (11RT 1153-1154, 1159-1160, 1167-1168, 1173.) Appellant also told another coworker, Anthony Morales, that he was upset about Camacho returning to his shift because appellant wanted to continue to work on cars during the day. (13RT 1304, 1313.) About a week before Camacho was scheduled to return to work, appellant told his supervisor, Greg Janson, that he would make sure Camacho did not make it back to work. (15RT 1411-1412, 1414, 1447-1448, 1575-1576, 1579.) Janson knew that appellant occasionally carried a .380-caliber gun. (15RT 1439, 1449-1450; 16RT 1676.)

Camacho returned to work on December 16, 1994. At 1:25 a.m., Efrain Bermudez ended his shift at the dairy. (12RT 1226.) Appellant was not scheduled to work the night shift that date. (12RT 1222; 15RT 1546-1547, 1576.) As Bermudez punched out, he saw Camacho punching in to begin his shift. (12RT 1227.) Bermudez walked out to the dock and exited the dairy property. (12RT 1227.) As he put on a bandana, he saw Camacho moving a truck on the dairy property. When Bermudez was about one house away from the gate to the dairy, he heard six to eight gunshots. (12RT 1227-1230.) Bermudez dropped to the ground and turned to look back toward the dairy. He saw a man running from the dairy and another man running from the side of the parking lot right outside the dairy. (12RT 1231, 1259.) Both men were wearing black. (12RT 1231.) They were approximately six feet tall and

weighed about 220 pounds. (12RT 1233.)[2/] The two men ran to a car, and both entered the passenger side. The car quickly drove away without its headlights on. (12RT 1232-1234, 1236.) Another car that was parked down the street also quickly drove away. (12RT 1236-1237.)

Between 1:15 and 1:30 a.m., Michael Fernandez was dropping off his employer, Estella Duran, at her home on Albion Street. (11RT 1117-1118.) As Fernandez double parked in front of Duran's home, he noticed some commotion in front of the dairy. (11RT 1118-1120.) Fernandez saw three people wearing dark clothing run from the dairy and get into a "Camaro-type car." (11RT 1121, 1123-1124.) A fourth man wearing dark clothing walked down the street, coming within a few feet of Fernandez. The fourth man was five feet, eight or nine inches. He was wearing a hood over his head, so Fernandez could only see part of his face. Fernandez could discern that the man was Hispanic and had a thick mustache. He appeared to be between thirty and forty years old. (11RT 1125, 1142-1143.)[3/] This man got into the passenger side of a Toyota that had louvers in the back. (11RT 1126.) The Toyota and Camaro drove off together down Albion Street, in the opposite direction of the dairy. Both cars had their headlights off. (11RT 1127-1128, 1144-1146.)

Between 1:30 and 1:45 a.m., Dennis Martinez, who lived adjacent to Albion Street, heard two to four gunshots. (11RT 1097-1099.) When he heard the shots, Martinez was looking out his window at Albion Street. (11RT 1099.) Martinez ducked when he heard the gunshots, then stood back up and looked out the window again. He saw a man wearing a ski mask and dressed in dark

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2. Appellant was described as 5 feet, 11 inches tall, weighing 215-220 pounds. (15RT 1564-1565.)

3. At the time of Camacho's murder, appellant was in his late 30's. (See 22RT 2533.) He was Hispanic and had a thick mustache. (See 15RT 1564.)

clothing walking from the direction of the dairy. (11RT 1099-1103.) The man was carrying a gun. (11RT 1102.) He was about six feet tall and weighed 170 to 180 pounds. (11RT 1102.) He got into the passenger side of a dark colored car that had louvers in the back. (11RT 1100-1101.) After he entered the car, it quickly drove away in the direction away from the dairy. (11RT 1102, 1104.)

Meanwhile, after hearing the gunshots, Bermudez ran back to the dairy, where he saw Camacho lying behind a truck. Camacho was bleeding from gunshot wounds to his chest and face. (12RT 1234-1235.) Bermudez ran to the dock and notified other dairy employees, who called 911. (12RT 1235.) Los Angeles police officers arrived at the dairy around 1:40 a.m. (13RT 1404; 15RT 1531.) They saw Camacho lying next to a truck. He had a gunshot wound to his head. It appeared that he had several other gunshot wounds. There were several spent shell casings on the ground around Camacho. Camacho was not breathing or moving. (13RT 1405-1406; 15RT 1531-1532.) An ambulance was called, and the officers secured the scene. (13RT 1406; 15RT 1533.) Camacho died at the hospital at 3:27 a.m. (15RT 1524.)

At about 5:30 a.m., Los Angeles Police Detective John Spreitzer arrived at the dairy. (16RT 1707.) He found seven spent .380-caliber shell casings near the area where Camacho's body had been found. (16RT 1709.) He also found four fired .380-caliber bullets in Camacho's clothing, which had been left at the scene by the paramedics. (16RT 1710.) It was determined that the seven casings and four bullets were fired from the same gun. (19RT 2167-2170, 2176-2177.) It was also determined that the casings and bullets were not fired from the .380-caliber gun found in appellant's El Camino when he was ultimately arrested on February 12, 1996. (18RT 2143-2144; 19RT 2170-2171, 2176, 2189.)

Los Angeles County Deputy Medical Examiner Irwin Golden performed an autopsy on Camacho and determined that Camacho died from multiple

gunshot wounds. Specifically, Camacho suffered nine gunshot wounds: one to his right temple; two to his left shoulder; three to the right side of his back; one to the back of his right knee; and two to the back of his right elbow. Four of the gunshot wounds were fatal. Two bullets were recovered from Camacho's body. At the time of his death, Camacho had .38 micrograms of methamphetamine in his system. He did not have cocaine or alcohol in his system. (15RT 1512-1525, 1528; 20RT 2255.)

After Camacho's murder, appellant took over the night shift again. (15RT 1548-1549.) The night after the shooting, appellant told Bermudez not to speak to anyone. (12RT 1237.) He then asked Bermudez, "Didn't you see me?" (12RT 1238.) Bermudez told appellant that he had not. Appellant said, "I saw you. Uh-huh, you were putting on your bandana." (12RT 1238.) Bermudez did not respond, and appellant repeated that Bermudez should not talk to investigators. (12RT 1238.) Appellant also asked Bermudez if he had seen Camacho. Bermudez replied that he had seen Camacho bleeding to death. Appellant said, "Good." (12RT 1263.) Bermudez was afraid of appellant. (12RT 1238.) He had seen appellant carrying a .380-caliber gun at work every day prior to the shooting. (12RT 1239, 1244-1245.) After the shooting, Bermudez saw appellant carrying a different gun, possibly a .45-caliber. (12RT 1239.)

Also the night after the shooting, appellant confessed to Janson that he had killed Camacho. Appellant said he had some friends with him when he committed the murder. (15RT 1576-1577.)[4/] Janson was afraid of appellant.

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4. At trial, Janson claimed he did not remember what he had said in his statement to police about appellant's confession. (15RT 1415-1418, 1441-1444.) Janson admitted that he did not want to testify because he was afraid of appellant. (15RT 1444-1446, 1465-1467, 1572, 1574.) Janson further admitted that the reason he claimed at the preliminary hearing and grand jury hearing that he did not remember his statements to the police was because he feared for his life. (15RT 1560; 16RT 1636, 1639; 19RT 2191.) The tape of Janson's

(15RT 1438-1439, 1569, 1571-1572; 16RT 1677-1678.) Janson also noticed that after Camacho's murder, appellant stopped carrying the .380-caliber gun and began carrying a different gun. (15RT 1460, 1569, 1577, 1602, 1605.)

That same night, the night after Camacho's murder, appellant went to a McDonald's restaurant with Mario Baltazar and Morales, one of the workers to whom appellant had expressed his dismay about Camacho's return to work. (13RT 1306.) Baltazar asked appellant, "What happened?" (13RT 1307.) Appellant said that he, three other men, and a woman killed Camacho. Appellant said that he and his cohorts were waiting in two cars about a half block away from the front gate to the dairy. Appellant said that Janson paged appellant to let him know Camacho was in the area of the dairy just inside the gate. Appellant and his cohorts ran toward Camacho and shot him. (13RT 1308-1310.) Appellant said he and his cohorts had all been wearing black, and he had been wearing a hooded shirt. (13RT 1309.) Appellant also said that after the shooting, his male cohorts drove away in one car, and he and his female cohort drove away in another car. He said he drove to the beach and threw the guns into the ocean. (13RT 1312, 1325.) On the way back from McDonald's, appellant told Baltazar and Morales that if they told anyone what he had said, he had a "plan B." (13RT 1344.)

After hearing appellant speak about the murder, Morales became afraid of him. (13RT 1310-1311.) Morales had seen appellant carrying a gun at work on a couple of occasions before the murder. (13RT 1311.) After the murder, Morales noticed that appellant always carried a gun at work. (13RT 1311.) When Morales was first approached by the police, he did not tell them about appellant's statements regarding the murder, because he was afraid. (13RT 1315, 1323; see 16RT 1711.) However, sometime after the trip to McDonald's,

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statement to the police was ultimately played for the jury. (15RT 1561-1619; 16RT 1622.)

appellant looked at Bermudez and said to Morales, "Somebody's talking to the cops." Appellant told Morales that he was going to do something to Bermudez. Bermudez and Morales then spoke with detectives about appellant's statements. (13RT 1343-1344, 1354; 16RT 1712-1714.)

Sometime after the murder, appellant approached Nunez, another coworker to whom appellant had expressed his dismay regarding Camacho's return to work. Appellant walked up to Nunez on the dock of the dairy and pulled a nine-millimeter gun out of his waistband. He pointed the gun at Nunez and said, "You think I did it." (11RT 1155, 1169, 1171.) Nunez told his supervisor, Holton, that appellant had a gun on dairy property. (11RT 1155; 12RT 1200.) Holton spoke with appellant, who denied he carried a gun. (12RT 1200.) However, Nunez saw appellant with the gun at the dairy numerous times after Nunez reported the incident to Holton. (11RT 1175.) Nunez was afraid of appellant. (11RT 1156.)

Sometime after Camacho's death, Camacho's mother placed flowers on the front gate of the dairy. The flowers seemed to anger appellant, and he told Nunez that he was going to kick the flowers over. (11RT 1157.) Nunez told appellant he should not kick the flowers over because it would be disrespectful. (11RT 1158.) Appellant said he did not care. (11RT 1158.)

About six months after Camacho's murder, Ross-Swiss Dairy employee Steve Apodaca saw appellant "horseplaying" with another employee on the loading dock. Apodaca said something to appellant, and appellant responded, "You could be fired for horseplaying, but not for shooting somebody." (18RT 1953-1954, 1958.)

b. Murder Of Allan Friedman

At 8:30 a.m. on October 24, 1995, 17-year-old Shane Woodland arrived at work at Perry's Auto Body Detail in Van Nuys, where appellant also worked. (18RT 1963-1964, 2000.) Woodland lived with Delia and Javier "Gabby"

Chacon, who owned the auto body shop. (18RT 1963, 1965, 1977, 2035.)[5/] Chacon was involved in the sale of cocaine, and that day he asked Woodland to drive appellant somewhere in Chacon's blue Honda Accord to obtain drugs. (18RT 1965-1966, 1987.) Around 1:00 p.m., Chacon gave appellant an envelope full of money, which appellant placed in his back pocket. Woodland and appellant got into the Honda, and appellant took out a nine-millimeter gun and placed it on the floor. (18RT 1967, 2005.) Woodland drove, and appellant directed him to a gas station. (18RT 1967-1969.) On the way, appellant used a cell phone two or three times. (18RT 1979.) When they arrived at the gas station, they saw a black Jeep, and appellant directed Woodland to follow it. (18RT 1969.) Allan Friedman, who Woodland knew from the auto body shop as "Angel," was driving the Jeep. (18RT 1969-1971.)

Woodland and appellant followed Friedman down several side streets, eventually parking behind the Jeep on Chicopee Street. (18RT 1970, 1972.) Appellant exited the Honda and walked up to the driver's side of the Jeep. (18RT 1972-1973.) About 10 minutes passed, and Woodland began playing with the radio. Suddenly, he heard gunshots and looked up to see appellant shooting at Friedman. Appellant then ran back to the Honda with a bag. (18RT 1973, 1975, 1988, 2022, 2064.) Appellant got into the Honda, pointed the gun toward Woodland, and said, "Get the fuck out of here. Let's go." (18RT 1973, 2022.) Woodland drove away. As they passed the Jeep, appellant stuck his hand out the window and shot at Friedman several more times. (18RT 1973-1974, 1988.)

Woodland asked appellant what had happened. Appellant told him to be quiet and not worry about it. (18RT 1974.) Woodland asked appellant again what had happened. Appellant again told Woodland to be quiet and added that

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5. For ease of reference, respondent will hereinafter refer to Delia Chacon as "Delia," and Javier Chacon as "Chacon."

so long he did not say anything, nobody would kill him and his family. (18RT 1974.) Appellant looked through the bag he had brought back to the Honda, repeatedly cursed, and said, "It's not in here." (18RT 1975.) As they drove down Oxnard Street, appellant threw the bag out the window. (18RT 1975.) As they drove back to the auto body shop, appellant told Woodland that he should not say anything to the police. He said nothing was going to happen to Woodland because Woodland did not do anything. (18RT 1975.) Appellant also told Woodland this was not the first time he had killed someone. He said it was "just like popping a balloon." (18RT 1975.) Specifically, appellant said he had killed someone at the dairy and that even though the police had investigated him, nothing had happened to him. (18RT 1975-1976.) Woodland was afraid of appellant, so he drove back to the auto body shop and did not say anything. (18RT 1976.)

At the time of the shooting, around 1:30 p.m., Shawna Ryder was at her home on Chicopee Street. (16RT 1681.) Ryder heard the first round of shots, but she thought they were fireworks. (16RT 1682.) Ryder heard the muffled sound of men arguing after the first round of shots. When she heard the second round, Ryder recognized it as gunfire. She walked to her front door as she called 911 on a portable phone. (16RT 1682-1683, 1689.) When Ryder reached her front porch, she saw the blue Honda with its two occupants leaving the area in front of her house. (16RT 1683, 1687.) She also saw the black Jeep parked in front of her house. (16RT 1684-1686.) Friedman was hanging part way out of the open front door of the Jeep. Blood was dripping down his arm. (16RT 1684-1685.) Ryder approached the Jeep and told Friedman that help was on the way. (16RT 1685.)

Meanwhile, Hugo Saavedra, who lived around the corner from Ryder, was leaving his home when the blue Honda came speeding down the street. The Honda came very close to hitting Saavedra's car. The two occupants of the

Honda glared at Saavedra. Saavedra let the Honda pass, pulled his car behind it, and wrote down the license plate number. Saavedra drove around the corner, saw the Jeep, and heard Ryder screaming for help. (17RT 1839-1843, 1846.) Saavedra later identified Woodland from a photographic lineup as the driver. (17RT 1844, 1888; 19RT 2194-2198.) Saavedra got a better look at the driver than the passenger, but he described the passenger as either Hispanic or Caucasian with short hair. (17RT 1844.) At trial, Saavedra identified appellant as the passenger, testifying that he was about 70 percent sure it was appellant. (17RT 1845-1846.)

Following the 911 operator's directions, Ryder and her neighbors pulled Friedman out of the Jeep and laid him flat on the ground. (16RT 1685; 17RT 1843.) Saavedra gave Ryder the license plate number, and Ryder gave the number to the 911 operator. (16RT 1688-1689, 1691; 17RT 1843.) When paramedics arrived, Friedman was pronounced dead at the scene. (18RT 2132.)

Los Angeles County Deputy Medical Examiner Christopher Rodgers performed an autopsy on Friedman and determined that Friedman died from multiple gunshot wounds. Specifically, Friedman suffered eight gunshot wounds: one to his right arm, four to the left side of his chest, one to his left shoulder, one to the left side of his back, and one to the right side of his back. Gun powder on the wound to Friedman's left chest indicated that the wound was inflicted from about 18 inches away. There were no drugs in Friedman's system. He had a blood alcohol level of .02 percent. (13RT 1385-1397.)

Five nine-millimeter bullet casings were recovered from the area near the Jeep. (18RT 2134.) Two nine-millimeter bullets were found in the Jeep. (18RT 2136.) Two kilos of cocaine were found wrapped in a red sweatshirt on the floor of the backseat of the Jeep. (18RT 2135.)

Later, a resident of the neighborhood where the shooting occurred found a yellow knapsack on a dirt lot on Oxnard Street. The knapsack contained

documents and a driver's license bearing Friedman's name. (18RT 2136-2139; 19RT 2155-2158.)

When Woodland and appellant returned to the auto body shop after the shooting, appellant immediately left. (18RT 1977.) Chacon asked Woodland to have the Honda's windows tinted. Woodland used the Honda to take his girlfriend to school, then had the windows tinted. (18RT 1978-1980.) While the windows were being tinted, appellant paged Woodland. Woodland called appellant, and appellant again told him to relax and not worry about anything. (18RT 2038-2039.) Later, Woodland drove the Honda to Chacon's house on Winnetka Avenue in Canoga Park. (16RT 1733; 18RT 1981.)

By the time Woodland left Chacon's house at 7:00 p.m., Los Angeles Police Detectives Harry Hollywood and Steve Krauss had begun a surveillance of Chacon's residence, on the lookout for the Honda. (16RT 1731-1734; 18RT 1983.) The detectives followed Woodland on Winnetka Avenue in their unmarked police car while they radioed for a marked police car and a police helicopter to assist in stopping the Honda. (16RT 1734; 18RT 1983.)

After both cars passed Victory Boulevard, Woodland noticed the police badge on Detective Hollywood's jacket. Woodland made a sudden U-turn. As the detectives followed, the Honda continued into its turn, turning completely around and again speeding northbound on Winnetka Avenue. The detectives followed. During the turn, the cars came close to each other and Detective Hollywood looked directly at Woodland. (16RT 1734-1735; 18RT 1983-1984.) The detectives continued to follow Woodland as he made abrupt turns, exceeded the speed limit, and cut through a car wash. (16RT 1735-1738; 18RT 1984.) At some point, a police helicopter and a marked police car joined in the chase. (16RT 1737-1740.) About four and a half miles from where the chase began, Woodland stopped on Mecca Avenue in Tarzana, at a residence Woodland recognized as the home of his brother's friend. Woodland exited the

car and ran into the house with the cell phone appellant had used on the way to the murder, leaving the Honda running with the door open and the lights on. (13RT 1375; 16RT 1740-1741, 1744, 1751; 18RT 1985.)

Julie Streb lived in the house Woodland entered. (13RT 1375-1376.) Streb did not know Woodland, and when he burst through her front door, she told him to get out of her house. (13RT 1376; 16RT 1742.) Woodland said, "I'm Ryan's little brother. Hide me." (13RT 1376.) Streb knew her cousin had a friend named Ryan, but she did not know Ryan's last name. (13RT 1377.) Streb told Woodland, "It doesn't matter. You still have to leave." (13RT 1377.) Woodland threw a cell phone at Streb and said, "Hide this." Streb threw the phone back at Woodland and said, "No. Get out." (13RT 1377.) Woodland threw the cell phone into some bushes, then returned to the house. (18RT 1985, 2048-2049.) Woodland tried to hide the cell phone because he knew it was an illegally cloned phone. (18RT 1985.)

The police ordered everyone out of the house. When Woodland exited the house, he asked the officers what was wrong and what was going on. (16RT 1742.) Detective Hollywood recognized Woodland as the driver of the Honda. (16RT 1742.) Detective Hollywood arrested Woodland. (16RT 1742; 18RT 1985.) A search dog was brought to the scene to search the location. The dog located the cell phone in the bushes. (16RT 1743-1744.)

The Honda was taken into police custody and dusted for fingerprints. Seven latent prints were lifted from the car. Appellant's print was found on a can of hairspray in the glove compartment of the Honda. (18RT 2105-2111.) Chacon's prints were found on the roof above the front door, outside the Honda. None of the prints found on the Honda belonged to Woodland. (18RT 2112-2113.) A nine-millimeter bullet casing was found in the Honda's backseat. (18RT 2140-2141.)

That same night, the night of the shooting and Woodland's arrest, appellant gave Janson details about the murder. (15RT 1449, 1583-1584, 1610-1611; 16RT 1717-1718.) Without specifically naming his cohort or the victim, but describing Woodland as a young man who worked at the auto body shop, and the victim as an Armenian, appellant told Janson the following details about the murder: appellant and his cohort had planned to exchange cocaine for money, then take both the money and the drugs from the victim (15RT 1451, 1457, 1584);[6/] appellant's cohort drove appellant to the scene of the offense in the middle of the day in a blue Honda that was registered to a man for whom appellant worked and with whom he lived (15RT 1452, 1458, 1581, 1589-1590, 1603, 1612); appellant was sleeping with the wife of the man to whom the car was registered (15RT 1452, 1580, 1592, 1600); appellant gave the cocaine to the victim, approached the victim's black Jeep, repeatedly shot the victim from close range with a nine-millimeter gun, shot the victim a few more times when the victim made a moaning noise, and grabbed a bag from the Jeep that looked like the bag in which the cocaine had been, although the bag actually only contained a book (15RT 1455-1457, 1584-1586, 1603, 1607, 1619); after the murder, appellant's cohort had the windows of the Honda tinted (15RT 1458, 1591); and appellant's cohort attempted to flee police during a routine traffic stop of the Honda and was eventually apprehended (15RT 1464-1465, 1612). (15RT 1457, 1587-1588.)

After explaining these details of the murder to Janson, appellant indicated that he was afraid his cohort was going to implicate him. (15RT 1465, 1582.) Appellant asked Janson if he would provide appellant with an alibi for the murder. (15RT 1453-1454, 1582.) Appellant also asked to stay

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6. Appellant told Janson that he brought cocaine to the meeting to sell to Friedman; Woodland testified that appellant brought money to the meeting to buy cocaine from Friedman.

with Janson, stating that he needed to "lay low." (15RT 1455, 1582-1583.) When appellant told Janson about the murder, appellant was carrying a nine-millimeter gun. (15RT 1454.)

Although Woodland was originally charged as appellant's codefendant, he ultimately pled guilty to manslaughter and received a six-year prison term in exchange for his truthful testimony at appellant's trial. (18RT 1986-1987.) After one session of the preliminary hearing, at which Woodland was still a codefendant, Woodland and appellant were in an interview room together outside the courtroom. Appellant told Woodland not to worry about anything because he was going to kill the witnesses before the trial started. (18RT 1989; 19RT 2191.) Specifically, appellant said he was going to call someone to make sure Janson did not take the stand. (18RT 1989-1990.) Janson thereafter testified at the preliminary hearing, largely claiming that he did not remember his statement to the police regarding appellant's incriminating admissions. After the session during which Janson testified, Woodland and appellant were in a holding cell together. Appellant said, "See, I told you he wouldn't say nothing." (18RT 1990.)

On February 12, 1996, appellant was stopped while driving his El Camino. Appellant was arrested, and the car was searched. A loaded .380-caliber gun was found on the floor in front of the front passenger seat. (18RT 2143-2144.) That day, a search of appellant's residence was conducted pursuant to a warrant. (18RT 2141.) Numerous nine-millimeter bullets, a magazine to a nine-millimeter gun, and a gun cleaning kit were found in a dresser drawer next to appellant's bed. (18RT 2142.) Officers also found paperwork bearing the Chacons' names, computer disks, papers bearing numerous telephone numbers, and some cell phones. (18RT 2142.)

Appellant waived his *Miranda*[7] rights and agreed to speak with Los Angeles Police Detective Michael Coblentz. (19RT 2185-2186.) Appellant denied ever having been in a blue Honda. (19RT 2186; 23RT 2690.) Appellant claimed that he had not been with Woodland at the time of the Friedman murder and that he had been at work at the auto body shop. (19RT 2186-2187.)

The day after appellant's police interview, Delia visited appellant in jail. Appellant thereafter called Detective Coblentz and asked to meet with the detective again to revise his statement. Detective Coblentz agreed. At the second interview, appellant claimed that at the time of the Friedman murder, he had been with Delia, with whom he was having an affair. (19RT 2187-2189.)

c. Escape

In May 1997, appellant was in custody on the two murder charges. The night of May 31, 1997, it was determined that appellant was missing from custody in the North County Correctional Facility in Saugus. The facility was placed on lockdown and sheriff's deputies searched the area around building 700, where appellant was housed. A small screen in the wall surrounding the yard immediately outside building 700 had been cut away, and a steel grate had been bent. Barrels full of sheets were stored in this yard. In one of the barrels, deputies found boxer shorts, some socks, and a dark blue county-issued inmate uniform. There was a large amount of blood on the clothing. On the other side of the wall on which the screen had been cut, was another yard. The second yard was surrounded by a 25-foot wall that separated the facility from the outside. There were toilets in this yard, and deputies found a hacksaw blade in the toilet right next to the screen that had been cut. There were sheets, blankets,

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7. *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] (*Miranda*).

and a makeshift rope ladder over the wall leading outside the facility. There were also mattresses on top of the razor wire that covered the top of the wall. There was a trail of blood from the bent grate to the makeshift ladder. (16RT 1759-1768, 1770-1772, 1775-1776, 1782-1783, 1785, 1788-1793; 17RT 1890-1897, 1902, 1919; 18RT 2069-2071, 2077-2079.)

At some point, it was also determined that three other inmates had attempted to escape with appellant, but they had not succeeded. (17RT 1917.) The three inmates were interviewed, and an investigation into appellant's contacts outside jail began. (17RT 1918-1919.) Around 1:30 or 2:00 a.m., sheriff's deputies went to Delia's residence in West Los Angeles. (17RT 1920-1922; 18RT 2085.) Deputies obtained a description of the vehicle Delia drove. When they did not see the vehicle at the residence, they established a surveillance of the residence. (17RT 1922-1923.) At about 3:00 a.m., the vehicle drove down the street. Yvonne Aragon was driving, and she had a Hispanic male passenger. The deputies approached the car and determined that appellant was not inside. Aragon let a deputy into Delia's residence. It appeared Delia was in the process of moving out of the residence. Deputies continued their surveillance of the residence and began a surveillance of Aragon. (17RT 1923-1925, 1940; 18RT 2085-2086, 2091-2092.)

The next evening, deputies reinterviewed Aragon outside her parents' residence in West Los Angeles. During the interview, a gray sports utility vehicle drove down the street. A Hispanic woman was driving, and a Hispanic man was the passenger. The car passed the deputies interviewing Aragon, pulled over, then abruptly drove away. (17RT 1926-1927, 1929-1930.) Deputies followed the car, pulled up next to it at an intersection, and saw that appellant was inside. (17RT 1930.) Deputies stopped the car and arrested appellant. (17RT 1931-1932.) Appellant had scratches and dried blood on his body. (17RT 1932.) The woman driving the car was Francis Carrasco,

appellant's sister. (17RT 1932-1933.)

2. Defense Evidence

a. Murder Of George Camacho

One Friday before Camacho was killed, Bermudez, Janson, appellant, and some others had a barbecue. A Ross-Swiss Dairy employee, Albert Ramirez, decided to have a fist fight with Bermudez. Appellant, who was the shop steward at the time, tried to break up the fight. One of Bermudez's friends approached, and appellant pushed him, stating, "It's none of your business." Bermudez's friend hit appellant on the side of the head with a gun. Janson approached Bermudez's friend, who pointed the gun at Janson's face. Ramirez tried to hit Bermudez's friend, and the friend pointed the gun at Ramirez. Bermudez's friend eventually ran away. (20RT 2273-2277, 2283.)

Ramirez testified that he had never seen appellant and Camacho have an altercation. (20RT 2271-2273.) Ramirez had never seen appellant with a gun at work. (20RT 2273, 2280-2281.) Sometime after Camacho's murder, Ramirez asked appellant if he had committed the shooting. Appellant said he had not. (20RT 2282.)

Mario Baltazar testified that after Camacho's murder, he went to McDonald's with appellant and Morales, as Morales had testified. (21RT 2301-2302.) However, according to Baltazar, while they discussed the Camacho murder, appellant never admitted having committed the murder. (21RT 2303, 2305.) Baltazar testified that he had jokingly said that he had committed the murder. (21RT 2303, 2308, 2316.)

Appellant testified that his father died when he was 10 years old, leaving him responsible for his brother and sisters. He lived in a dangerous neighborhood, and some teenagers gave him a gun. Since then, he always kept a gun for protection. (22RT 2491-2493.) In 1975 or 1976, appellant registered

a .38 special in his name. (22RT 2493.) He began carrying a gun at the dairy after the Los Angeles riots. (22RT 2493-2495, 2497.) However, he never carried his gun on his person; he left it in his car. (23RT 2677.) Appellant's wife, Eva Carrasco, testified that by the time of trial, she and appellant had been married for 17 years. However, they separated in 1994. (21RT 2398-2399.) When Eva and appellant lived together, appellant had kept a gun in a closet. Eva never saw the gun outside the closet. (21RT 2399-2400.)

Appellant testified that sometime in 1992, Janson asked him to deal with some gang members who had broken into the dairy. Appellant had his gun with him, but he did not point it at the gang members. (22RT 2498-2499.) Appellant claimed he had never pointed a gun at a person. (22RT 2499.)

Appellant testified that he owned an auto body shop, which he began operating before he began working at the dairy. (22RT 2528-2530.) When he started his first dairy job, he turned his auto body shop into a hobby. He used the shop to train younger men in the community to work on cars in an attempt to keep them from doing and selling drugs. For one year beginning sometime in 1995, appellant worked at an auto body shop owned by the Chacons. He usually broke even or lost money each year on the side business. (22RT 2531-2546, 2550-2551; 23RT 2631.) Appellant denied that he told anyone at the dairy that he made $7,000 or $9,000 per month by working on cars. He also denied telling anyone at the dairy that he was upset about Camacho's return because he would lose money on his side business. (22RT 2539-2540; 23RT 2624.)

Appellant testified that he met Camacho when appellant first started working at the dairy in 1988 or 1989. (22RT 2494, 2508.) Appellant and Camacho had a good working relationship, and appellant thought Camacho was "the nicest guy." (22RT 2510.) After three years, appellant's job changed, resulting in his having more contact with Camacho. (22RT 2511.) Appellant

and Camacho began to have arguments. (22RT 2512.) Sometime in 1993 or 1994, appellant and Camacho almost had a fistfight. (22RT 2513.) At the time, appellant was the shop steward. (22RT 2513.) He and Holton would work together to deal with problematic employees without having to involve the union. (22RT 2514-2515.) At some point before Camacho was fired, Holton approached appellant about a problem with Camacho. (22RT 2515.) As soon as Camacho was fired, appellant spoke with Rios, the union representative. (22RT 2521-2523.)

Appellant claimed that when he took Camacho's shift after Camacho was fired in October 1994, he was paid $.05 less per hour. He claimed he agreed to take the shift because he was the only person qualified to do it. (22RT 2506-2508, 2519-2520; 23RT 2555-2556.) After working Camacho's shift for about a month, appellant decided it was too difficult to work all night and run his auto body shop during the day. However, he knew that he would not be allowed to change his shift. (23RT 2556-2558.)

Less than three months after appellant took over Camacho's shift, appellant learned that Camacho would be returning to work and taking back the shift. It was a few days before Camacho's scheduled return. Appellant was scheduled to move to an evening shift that began at 4:00 or 6:00 p.m. and ended at 12:30 or 2:30 a.m. Appellant was admittedly upset about Camacho's return and told Rios. However, he claimed he was not upset about losing the shift but only about the conditions of Camacho's return. As shop steward, appellant felt that Camacho's return to work should have been contingent upon his receiving counseling for his drug problem. (22RT 2524-2528; 23RT 2556, 2558-2561.)[8/] Appellant denied shooting Camacho in order to keep his shift at the dairy. He

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8. Rios testified that appellant never approached him regarding any alleged drug use or sales by Camacho. Rios was not aware of any drug use or sales by Camacho. (13RT 1276.) Morales also testified that he never saw Camacho selling drugs at the dairy. (13RT 1316.)

claimed he actually preferred the shift he would have received upon Camacho's return. (23RT 2558.)

Appellant testified that the night of Camacho's murder, he called Janson around 1:00 a.m. and arranged to come to work and cover the shift if Camacho did not show up. Appellant arrived at the dairy around 1:30 a.m. (23RT 2562.) Appellant noticed that the front gate of the dairy was wide open, which was unusual. Also, there was no one inside the guard shack. (23RT 2563-2564.) Appellant walked toward Janson's office. On the way, he saw a truck driving toward him. As he approached the stairs leading to Janson's office, he heard a door slam and then gunshots. (23RT 2564-2566.) Appellant ducked, then looked toward the truck. He saw Culver City gang member Brian Skolfield, known as "Little Ghost," standing over Camacho and continuing to shoot him. Appellant knew Skolfield because he was one of the young men appellant had trained at the auto body shop. Appellant had seen Skolfield talking to Camacho at the dairy sometime before Camacho was fired. (23RT 2566-2567, 2617-2619, 2664-2665.) Skolfield looked at appellant, then ran away. (23RT 2567.) Appellant approached Camacho and saw that he was bleeding. Appellant left the scene. (23RT 2567-2568.) Appellant never saw Bermudez that night. (23RT 2568.) Appellant claimed that Bermudez lied about the shooting because Bermudez had been fired from the dairy and he blamed appellant. (23RT 2652-2653.)

Appellant admitted that he did not tell the police that Skolfield shot Camacho. However, appellant claimed to believe that if he told the police about Skolfield's involvement, his life and the lives of his family members would be in danger. (23RT 2619-2622.) Appellant claimed that he had asked Skolfield's friend, Michael Carranza, why Skolfield had committed the murder. (23RT 2620.) Appellant also asked Skolfield the same question when he saw him in custody. Skolfield told appellant it was none of his business. (23RT

2596, 2621.)

Appellant denied telling Baltazar and Morales that he shot Camacho. (23RT 2570, 2655.) He claimed Morales lied because he also had been fired from the dairy and blamed appellant. (23RT 2652.) Appellant also denied ever threatening Nunez or Morales. (23RT 2571-2572.) Appellant claimed Nunez lied to impress his family. (23RT 2652-2653.)

Appellant claimed the .380-caliber gun found in the car in which he was arrested belonged to his friend's father. However, appellant did not remember his friend's last name or his address. (23RT 2605-2606.)

b. Murder Of Allan Friedman

On October 24, 1995, Ronald Allen, who lived on Chicopee Street, heard both rounds of gunshots. He looked out his front window and saw a blue Honda with tinted windows parked next to a black Jeep. There were two clean-cut Caucasian men with short hair or shaved heads in the Honda. Allen did not see the faces of the men in the Honda. At trial, Allen was asked to look around the courtroom and identify anyone he had seen in the Honda. Allen did not identify appellant as one of the occupants of the Honda. (21RT 2319-2324, 2326-2327, 2330.)

Thomas Cuosineau also lived on Chicopee Street and heard both rounds of gunshots. Cuosineau ran outside onto Chicopee Street. He saw a blue Honda in the middle of the street and a Jeep parked at the curb. Two men were standing next to the Honda. They entered the Honda and drove down the street toward Cuosineau. No more shots were fired as the Honda drove down the street. Cuosineau did not get a good look at the driver, but he saw the passenger. He described the passenger as a Caucasian male in his 20's with black hair and a mustache. (20RT 2257-2262, 2266.) Sometime after the shooting, Cuosineau looked through about 50 mug shots, but he was unable to identify anyone. (20RT 2264-2265.)

Despite Saavedra's in-court identification of appellant as the Honda's passenger, before trial, Saavedra identified a photograph of Woodland's brother, Ryan, from a six-pack photographic lineup, indicating, "I think this guy in number two is the guy who was the passenger. I don't remember the mustache. These two guys looked like brothers." (19RT 2208-2210.)

The defense introduced a bill of sale written by Woodland, indicating that Woodland's brother, Brandon, sold a Nissan Maxima to Allan Friedman. Woodland claimed that the person to whom he sold the car was not actually Friedman. He explained that he wrote Friedman's name on the receipt because the person who bought the car said that was his name. Woodland described the person as someone who did not look like Friedman. Woodland testified that although he sold the car, he wrote his brother's name on the receipt because the car was registered in his brother's name. (18RT 2009-2014, 2058-2060.)

Woodland's prints were found on the passenger side door of Friedman's Jeep. (18RT 2128-2129.)

Delia testified that Woodland was her son's friend. Woodland lived with her and her family for five years starting when he was 11 years old. (21RT 2334-2335, 2345-2346.) Delia considered herself Woodland's mother. (21RT 2347; 22RT 2423.) Appellant had also lived with the Chacons. (21RT 2334, 2340-2341, 2343-2344.) On the date of Friedman's murder, appellant and Woodland were living in the same residence with the Chacons. (21RT 2344, 2349-2350; 22RT 2445.) Delia always purchased the brand and type of hairspray that was found in the glove compartment of the Honda. Everyone in her household used the same can of hairspray. (21RT 2348; 22RT 2460-2461.)

Delia had seen Woodland with a gun before. She had never seen appellant with a gun. (21RT 2366-2367.)

Delia further testified that Woodland and his two brothers, Ryan and Brandon, worked at one of the Chacons' two auto body shops. (21RT 2336-

2337; 23RT 2583-2584.) On the morning of Friedman's murder, Delia saw Woodland at the auto body shop. (21RT 2350.) Woodland told Chacon, "I have two kilos sold again." Around 10:30 a.m., a man arrived at the auto body shop and handed Woodland a wrapped package. Woodland placed the package in the Honda, which Woodland owned. At some point that morning, Friedman called the auto body shop. (21RT 2351-2356.)

Delia claimed that she left the shop and met appellant around noon on a side street where they regularly met. From there, they drove for about half an hour to a location near Pepperdine University, where they spent about an hour and a half talking. Delia and appellant were best friends. Although they lived together, they secretly went to this location many times to spend time together because Delia's husband was very jealous. (21RT 2352, 2363-2365, 2368.) Delia claimed that she and appellant were just friends and did not have a sexual relationship, but she also claimed that they were in love. (21RT 2365-2366, 2387.) Delia admitted that she originally told detectives that she did not see appellant on the day of the shooting. (21RT 2380-2381.) Delia visited appellant in custody immediately after speaking with the detectives. (21RT 2381.) Delia admitted at trial that she was still in love with appellant. (21RT 2387.)

Delia had a copy of the Friedman murder book, which was a compilation of all the information collected by detectives in the murder investigation. Delia kept the murder book at one of her auto body shops. (21RT 2363; 22RT 2475.) Delia claimed the murder book did not contain a statement from Janson. (21RT 2382.) After Woodland was arrested, Delia saw Janson on about three occasions at that auto body shop. (21RT 2362; 22RT 2477.)[9/]

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9. Ross-Swiss Dairy employee Ramirez, appellant's wife Eva, and appellant each testified that Janson had worked on cars with appellant at the auto body shop. (20RT 2277-2278; 21RT 2399; 22RT 2546-2548.)

Appellant testified that he discovered Chacon was a drug dealer when he witnessed Chacon deal drugs at the auto body shop one day. After that, appellant moved out of the Chacons' residence. (23RT 2587-2588.)

Appellant admitted that he had been in the blue Honda, but he claimed he had never been in the car with Woodland. (23RT 2577-2578.) Appellant knew Woodland, but he rarely saw Woodland at the Chacons' residence when they were both living there. (23RT 2578, 2582.) Appellant had moved in with the Chacons pursuant to Chacon's request after four men broke into the residence and tied Delia up. (23RT 2578-2579.) Although appellant worked long hours and hardly spent any time at the Chacons' residence, he slept and showered there. He used Delia's hairspray. (23RT 2579.)

Appellant testified that the afternoon Friedman was murdered, appellant was in the mountains near Pepperdine University with Delia. They met on a side street, then drove to the mountains together. Delia drove appellant back to his car at about 2:30 p.m. (23RT 2484-2486.) Appellant did not tell the police during his first interview that he had been with Delia when the Friedman murder occurred because he did not want his wife or Delia's husband to find out. (23RT 2590.) He only told the police that he had been with Delia after he obtained her consent. (23RT 2625.)

Appellant claimed Woodland lied about appellant committing the murder. Appellant claimed that the week before Woodland testified, Chacon accused appellant of having an affair with Delia. Chacon told appellant that he had instructed Woodland to frame appellant. Appellant believed that Woodland thought of Chacon as his father. (23RT 2651.)

Appellant denied asking Janson to provide him with an alibi. He also denied telling Janson the details of the Friedman murder. (23RT 2631, 2634.) Appellant also denied telling Woodland that witnesses would not testify against him. (23RT 2632-2633.)

Appellant claimed that he had the nine-millimeter bullets at his residence because he and his brother-in-law used to go to the shooting range. He claimed the gun cleaning kit was given to him by one of Chacon's friends. (23RT 2606-2607.) He also claimed that he did not know to whom the cell phones belonged, but he knew they came from the Chacons' residence and that Delia had brought them to appellant's residence. (23RT 2609-2610.)

c. Escape

Delia testified that she visited appellant the day he escaped from custody. However, she did not remember what she did that day after the visit. (21RT 2388; 22RT 2413, 2419.) She did recall that she spent that night in a motel. She was in the process of moving out of her apartment because her husband, from whom she had separated, knew where she was living and had been harassing her. She sold her car to Aragon that night because she needed the money. A few days after appellant's escape, Delia rented a car and drove to a timeshare she owned in Sequoia, where she lived for approximately one month to avoid her husband. (22RT 2412-2413, 2431-2433, 2437, 2458; 2463-2465, 2484-2488.) Despite Delia's testimony that she sold her car the day appellant escaped because she needed money, she admitted that in the months leading up to appellant's escape, she consistently deposited $35 to $300 into appellant's jail account on a weekly basis. (21RT 2414-2418.)

Appellant testified that when he was arrested for the murder of Friedman, he was placed into custody. He had never been in prison before. He was charged with Camacho's murder about one year later. (23RT 2591.) At some point during his incarceration at the North County Correctional Facility, appellant applied to become a trustee. A trustee was permitted to work within the facility and was compensated with extra food. Appellant was interviewed and given the position. (23RT 2594-2595.)

Appellant planned his escape for about four months. He planned the

escape alone, but at some point, three other inmates decided to join in the attempt. Appellant determined when the guard tower was unoccupied. He determined a spot on the wall that the security cameras did not see. He spent six days sawing through the metal grate with a hacksaw blade someone smuggled to him in a magazine. Then appellant offered to clean graffiti off some plastic chairs used in the room where church services were held. Appellant was permitted to clean the chairs in the first yard. He had been timing the laundry services, so he knew when the containers in that yard would be full of sheets and when they would be retrieved. The day before the escape, he and his cohorts tied the sheets together to make a 48-foot rope. They placed the rope in the bottom of one of the containers appellant knew would not be touched before the next day, and they placed dirty laundry on top of the rope so no one would see it. They escaped the next night. (23RT 2596-2603, 2612.)

Appellant planned the escape because he believed he had been wrongfully accused and he had to take care of his family. Appellant also believed his family was in danger because Chacon had visited appellant's wife in what appellant took as an implied threat to harm his family. Appellant also escaped because he felt his life was in danger in custody. In the time he was in custody before his escape, he had been involved in two race riots. (23RT 2659-2660.)

After appellant escaped from custody, he did not come into contact with a firearm. (23RT 2603-2604.)

3. Rebuttal Evidence

Brian Skolfield was in custody at the time of trial, serving a sentence on his conviction for possession for sale of cocaine. He had been incarcerated at the North County Correctional Facility when appellant was there in 1997. Skolfield did not know appellant's name, but he had "seen him around." (25RT 2754-2756.) Skolfield was not at Ross-Swiss Dairy on December 16, 1994.

He did not even know where the dairy was. (25RT 2756, 2765.) He denied shooting Camacho. He did not even know who Camacho was. (25RT 2756, 2766.) He denied being a Culver City gang member. (25RT 2757-2758.) However, he admitted that he grew up in Culver City, had numerous Culver City tattoos, and was friends with Michael Carranza, who was a Culver City gang member. (25RT 2756-2760.)[10/]

According to Detective Coblentz, appellant never told investigating detectives that Skolfield was responsible for Camacho's murder. (23RT 2690.)

4. Surrebutal Evidence

Los Angeles County Sheriff's Deputy James Ponsford testified that he worked at the North County Correctional Facility when Skolfield and appellant were incarcerated there. He had seen Skolfield and appellant in the same building there. (25RT 2774-2775.)

B. Penalty Phase

1. Aggravating Evidence: Victim Impact

a. Testimony From Members Of George Camacho's Family

Camacho's mother, Francisca DeLeon, testified that Camacho was 29 years old when he was killed. (28RT 3015, 3020.) In his youth, Camacho had earned numerous trophies for his involvement in sports. (28RT 3016-3017.) He also graduated from high school. (28RT 3017.) Camacho eventually married, and he and his wife had two children, Georgie and Vanessa, who were

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10. Carranza was called as a surrebuttal witness for the defense. When asked if he knew Skolfield, Carranza invoked his Fifth Amendment privilege against self-incrimination. (25RT 2777.) Outside the presence of the jury, Carranza thereafter invoked the privilege on every question, including where he was born and where he lived. (25RT 2789, 2794-2796.) The jury was instructed to disregard his testimony. (25RT 2781.)

five and six years old when Camacho was killed. (28RT 3018-3019, 3025.) By December 1994, Camacho had separated from his wife and had been living with DeLeon for three months. (28RT 3016.) Camacho loved his children, and they stayed with him at DeLeon's residence every weekend. (28RT 3019.)

Camacho was happy when he got his job back at the dairy. (28RT 3023.) DeLeon last saw her son alive when he left for work the night of his murder. The next time DeLeon saw Camacho, he was lying in a coffin. Because he had been shot in the head, his head had been wrapped up. (28RT 3021-3022.)

Camacho's grandmother was especially fond of Camacho because she had never had a son herself. (28RT 3019.) DeLeon also loved Camacho very much. (28RT 3017.) His death made her want to die. (28RT 3020.) After Camacho was killed, DeLeon did not see her grandchildren nearly as often. (28RT 3019.) DeLeon testified that Camacho's children needed him "desperately." (28RT 3020.)

Camacho's sister, Christine, testified that she was very close with her brother. (28RT 3024-3025.) Camacho was her only full sibling. (28RT 3026.) The last time Christine saw Camacho was at Thanksgiving in 1994. At that time, Camacho was separated from his wife. He was sad that his children were not at that family gathering. However, he played with his aunt's children and had an enjoyable Thanksgiving. (28RT 3027-3028.) Camacho hugged Christine when he said goodbye. (28RT 3028.)

After Camacho's death, there was "an overwhelming sadness" whenever the Camacho family gathered. (28RT 3026.) Camacho was buried two days before Christmas, so gatherings at Christmastime were especially difficult. (28RT 3026.) Christine testified that Camacho's first priority was always his children. (28RT 3026.) At the time of trial, Christine had not seen her niece and nephew for over a year. (28RT 3027.) Christine testified that her brother's

murder would always impact her. (28RT 3028.)

Camacho's father, George, testified that he had thought about Camacho every day since learning of Camacho's murder. (28RT 3030-3031.) The last time George saw Camacho was about a year before he was killed. (28RT 3031.) George had been close with Camacho when Camacho was growing up. After George and Camacho's mother divorced, Camacho lived with George from the ages of 12 to 18. George never missed one of Camacho's sports practices. (28RT 3031-3032.) George testified that his son's murder would always impact him. (28RT 3032.)

b. Testimony From Members Of Allan Friedman's Family

Friedman's father, Shlomo, testified that Friedman was 28 years old when he was murdered. (28RT 3035, 3040.) Friedman was born in Israel and moved to America when he was 15 years old. (28RT 3036, 3039.) When Friedman was 25 years old, his parents divorced. (28RT 3037.) Friedman had lived with Shlomo for six months in Florida before moving to California three months before he was murdered. (28RT 3036.) In Florida, Friedman had been trying to get into the fashion business by selling clothes his sister designed. (28RT 3039, 3048.) Shlomo was not aware when Friedman became involved in drugs. (28RT 3039.)

Friedman had been likeable and had a lot of friends. (28RT 3040.) Shlomo loved his son and had been very close with him. (28RT 3037, 3040.) Shlomo testified that his son's death made him want to take his own life, but his other children had convinced him that they needed him. (28RT 3040.) Shlomo had not told his own parents in Israel that Friedman was dead because he was afraid the news would kill them. (28RT 3041.) Other than two instances when Shlomo was visiting his parents in Israel, Shlomo had attended every court proceeding in appellant's case over the two and a half years leading up to the

penalty phase. (28RT 3041.) When asked how his life would be in the future without his son, Shlomo responded, "What life? What life?" (28RT 3041.)

Friedman's sister, Galit, testified that Friedman had been a friendly, likeable, and nonviolent man. (28RT 3044, 2046.) Galit and Friedman had grown up together and were very close. (28RT 3046.) He was five years older than her. (28RT 3046.) Galit thought Friedman had a more difficult life than she did because he did not have a particular talent. (28RT 3046.) Galit testified that her brother's murder left her with a void in her life. She regretted that when she had children, they would never know their uncle. (28RT 3047.)

Friedman's mother, Soli, testified that she saw her son for the last time about 20 minutes before his murder. Friedman had stopped by Soli's restaurant for a meal. (28RT 3055-3056.) Soli was very close with her son; they were "like friends." (28RT 3056.) Soli testified that her son's death made her feel lonely. She worked three jobs to try to keep herself from thinking about her son's murder. She testified, "I cry, and I come to work, I cry at night when nobody sees." (28RT 3057.) She no longer enjoyed holidays "because it's too painful without him." (28RT 3058.)

2. Rebuttal Aggravating Evidence: Unadjudicated Criminal Activity[11/]

In 1980, Richard Leroy Morrison worked at Edgemar Dairy with appellant. One day at work, appellant pulled out a gun and told Morrison, "Get out of here." Morrison was scared. He called his employer the next day and quit. He did not tell anyone about the incident except for his wife. (29RT

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11. After members of appellant's family testified about appellant's nonviolent character, the prosecutor sought to admit evidence of prior unadjudicated criminal activity in rebuttal. The trial court ruled the evidence was admissible. (28RT 3097.) The rebuttal evidence was presented out of order, before appellant testified, and appellant's testimony addressed this evidence.

3123-2125.)

3. Mitigating Evidence

a. Testimony From Members Of Appellant's Family

Appellant's mother, Martha Heredia; younger sister, Leandra Kamba; older sister, Barbara Carrasco-Gamboa; and wife, Eva Carrasco, testified. At the time of the penalty phase, appellant was 41 years old. When appellant was four years old, his family moved to the Mar Vista projects in a bad neighborhood in Culver City. Appellant had a good relationship with his mother and siblings. (28RT 3062-3064, 3080-3081, 3084.) Appellant attended St. Gerard's Catholic School in Culver City, where he was a straight-A student. (28RT 3063, 3089-3090.) When appellant was 10 years old, his father died. (28RT 3063.) Appellant assumed extra responsibilities after his father died, taking care of his mother, older brother, and three sisters. (28RT 3068-3069, 3082, 3084, 3090.)

Appellant began working at McDonald's when he was 13 years old. During appellant's youth, he sometimes had two or three jobs at a time. He used the money he earned to buy his own clothes. (28RT 3064-3065.) Appellant attended Venice High School, where he played football. (28RT 3064-3065, 3072, 3088-3089.) He also continued to work various jobs throughout high school, including starting his auto body shop. (28RT 3065-3066, 3083, 3107.)

Appellant did not become involved with gangs in high school, and he never got into serious trouble. Once when he was 10 or 11 years old, he was caught breaking into a school. Once when he was about 17 years old, he was arrested for being involved in a fistfight with his friends. (28RT 3066-3067, 3071, 3083, 3092.) However, appellant was never suspended or expelled from school. (28RT 3083.) Appellant never missed a day of school, and he

graduated from high school. (28RT 3066, 3073.) Appellant's brother and two of his sisters attended UCLA. (28RT 3091.)

Appellant tried to keep gang members from fighting in the neighborhood. (28RT 3072.) He assisted his mother in organizing activities for the children in the projects. (28RT 3073.) Appellant was also involved in an organization called Westside Barrios Unidos, which worked to keep children out of gangs. Appellant was always concerned with dispelling negative stereotypes about people who lived in the projects. (28RT 3091-3092.)

After appellant graduated from high school, he decided he wanted to be a firefighter. Appellant passed the written firefighter exam, but he did not pass the physical exam because he had broken a vertebra in his neck when he was younger. (28RT 3068, 3073.) Appellant continued to work at his auto body shop. (28RT 3067, 3107.) He trained young men in the community to work on cars in an effort to keep the young men out of trouble. (28RT 3074-3075, 3089-3090.) Even after appellant closed his shop and began working at the dairy, he continued to work on cars. (28RT 3076-3077, 3107-3108.)

Appellant and Eva met in high school in 1975. They were married in 1980. (28RT 3068, 3106.) Appellant continued to look after his mother and sisters. (28RT 3070, 3085.) Appellant and Eva eventually had three daughters. (28RT 3074.) A few years after Eva and appellant had their first child, appellant encouraged Eva to go back to college, which she did. Appellant supported the family through difficult financial times until Eva graduated from college. (28RT 3109-3110, 3114.) Eva explained that her and appellant's marital problems developed when she graduated from college. Eva wanted to buy a home, but appellant wanted to continue training young men to work on cars despite the fact that he did not gain financially from it, nor, Eva believed, was he appreciated for it. (28RT 3114.) She and appellant separated, but they attended counseling and tried to work on their marriage. (28RT 3113, 3116.)

At the time of the penalty phase, appellant and Eva's oldest daughter was a 20-year-old student at UCLA majoring in political science. (28RT 3085, 3109, 3116.) According to Eva, appellant had been a good father to his oldest daughter. He had attended her sporting events and helped coach her softball team. (28RT 3085, 3111-3112.) At the time of the penalty phase, appellant and Eva's second child, Amanda Christina, was eight years old, and their third child, Olivia, was four years old. (28RT 3085, 3112-3113.) Eva testified that appellant's children loved him very much. Although she and appellant had marital problems, they were careful not to fight in front of the children. They had also shielded the children from the details about appellant's trial. Eva testified, "They know he's away now, they don't know very much, really." (28RT 3112-3113.) Even when appellant and Eva were separated, appellant spent a lot of time with his children. (28RT 3115.) Even when he was incarcerated, appellant spoke with his younger children at least three times per week. His oldest daughter communicated with him through letters. All the children had visited appellant in custody at least once. (28RT 3112-3113, 3115, 3117-3118.) Kamba testified that appellant's children were going to be devastated by appellant's conviction. (28RT 3082.)

Appellant was not violent or threatening. While appellant had a "quick temper," "[h]e never did anything about it." (28RT 3069-3070, 3078-3079, 3082-3083, 3085-3086, 3094, 3115-3116.) However, appellant was a big man with an intimidating presence, which he would use to protect his sisters from unwanted advances, even when they were adults. (28RT 3096.) Appellant had never been convicted of a felony as an adult, nor had he spent any time in juvenile hall. (28RT 3071-3072, 3095.) Heredia and Barbara testified that they had never seen appellant with a gun. (28RT 3071, 3092, 3094.) Kamba knew that appellant carried a gun for protection. He never hid the gun, and Kamba had seen it. (28RT 3084.)

Barbara described appellant as an intelligent, compassionate man with a good sense of humor. (28RT 3091.) Eva described appellant as caring, encouraging, and hard working. (28RT 3114, 3116.) In 1995, Barbara was diagnosed with cancer and had to undergo chemotherapy. Appellant helped her through the ordeal by convincing her to pray. (28RT 3093-3094.)

On cross-examination, Kamba acknowledged that contrary to her testimony that appellant was always protecting his sisters, appellant involved their sister, Francis, in his escape, resulting in Francis's conviction of a criminal offense. (28RT 3086-3087.)

On cross-examination, Barbara testified that she did not know appellant had been arrested for grand theft of an automobile in 1974, petty theft in 1975, possession of a controlled substance in 1977, carrying a concealed weapon in a vehicle in 1984, possession for sale of PCP in 1986, and assault with a deadly weapon in 1990. (28RT 3103-3104.) Eva was aware of appellant's arrest for a drug offense. He was in his 20's when the arrest occurred. He attended a rehabilitation program, and he was not convicted of any charges. (28RT 3115-3116.)

b. Appellant's Testimony

Appellant started using drugs when he was eight years old. When he was 27 years old, he tried to quit using drugs. He struggled to quit until he finally succeeded when he was 30 years old. At the time of the penalty phase, appellant had not used drugs for 11 years. (29RT 3138-3139.)

Appellant had never been convicted of a felony. He was arrested for possession for sale of PCP because he had $800 in cash in his pocket when he was arrested with the drugs. However, appellant only had the cash because he had just cashed his paycheck. The charge of possession for sale was dropped. Appellant admitted he had possessed the drugs for personal use. He completed a drug diversion program and was on probation for one year. Appellant had

been convicted of misdemeanor driving under the influence. Appellant admitted that he had been arrested on other occasions, but none of those arrests resulted in a conviction. (29RT 3135-3138.)

Appellant denied threatening Morrison with a gun. At the time of the alleged incident, appellant was 22 or 23 years old. There were other Hispanic workers at that dairy. At the time, Morrison said he quit because he had obtained another job. (29RT 3133-3135.)

Appellant remained in contact with some of the young men he had trained to work on cars. Some of them used to be drug dealers. One of them had gone to college and started running a business. Appellant trained the young men even though he did not earn any money doing it, because he wanted to help the community. (29RT 3139-3141.)

Appellant kept in contact with his children as much as possible. (29RT 3141-3142.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY EXCUSED PROSPECTIVE JURORS DUE TO FINANCIAL HARDSHIP

Appellant claims he was denied his right to a fair and impartial jury drawn from a representative cross-section of the community because 40 percent of the prospective jurors were excused due to financial hardship. (AOB 22-36.) Appellant forfeited his claim by failing to challenge the jury-selection procedure in the trial court. Moreover, appellant's claim fails because he has not shown that the jury-selection procedure in this case involved a systematic exclusion of a distinctive group in the community.

A defendant is entitled to an impartial jury drawn from a representative cross-section of the community. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16; *Duren v. Missouri* (1979) 439 U.S. 357, 358-359 [99 S.Ct. 664, 58 L.Ed.2d 579]; *People v. Burgener* (2003) 29 Cal.4th 833, 855-856.) "That guarantee mandates that the pools from which juries are drawn must not systematically exclude distinctive groups in the community." (*People v. Burgener*, *supra*, 29 Cal.4th at p. 856.) "The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community." (*Taylor v. Louisiana* (1975) 419 U.S. 522, 538 [95 S.Ct. 692, 42 L.Ed.2d 690].) The defendant has the burden of establishing that the representative cross-section guarantee has been violated by showing there has been a systematic exclusion of a distinctive group. To do so, "the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such

persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." (*Duren v. Missouri*, *supra*, 439 U.S. at p. 364; *People v. Howard* (1992) 1 Cal.4th 1132, 1159.) If the defendant establishes a prima facie case of systematic exclusion of a distinctive group, the burden shifts to the prosecution to "provide either a more precise statistical showing that no constitutionally significant disparity exists or a compelling justification for the procedure that has resulted in the disparity in the jury venire." (*People v. Burgener*, *supra*, 29 Cal.4th at p. 856.)

Here, the parties agreed to excuse prospective jurors whose employers would not pay for at least 25 days of jury service. (2RT 24B-26; see also 2RT 45-46, 79; 3RT 89, 104, 109; 4RT 183.) In accordance with the agreement, numerous prospective jurors were excused due to hardship. (See generally 2RT 27-57; 3RT 105-162; 4RT 196-245.) Because appellant stipulated to the jury-selection procedure, and did not object to the panel or move to quash the venire, he forfeited his claim. (*People v. Ervin* (2000) 22 Cal.4th 48, 73; *People v. Fauber* (1992) 2 Cal.4th 792, 816; *People v. Howard*, *supra*, 1 Cal.4th at p. 1159; *People v. Mickey* (1991) 54 Cal.3d 612, 664.) By failing to object or make a motion in the trial court, a factual record regarding the jury-selection process was not created. (See *People v. Mickey*, *supra*, 54 Cal.3d at p. 664.) For example, there are no facts in the record to support appellant's assumption that every prospective juror excused because his or her employer would not pay for at least 25 days of jury service was a person of low income. (See AOB 32-34.) Because of the agreement, all prospective jurors whose employers would not pay for at least 25 days of service were excused regardless of their financial status. Simply because the excused jurors' employers did not pay for at least 25 days of jury service does not mean that those employees were poor. (See *People v. DeSantis* (1992) 2 Cal.4th 1198, 1216 ["the record does not reveal that the excused jurors were uniformly or even largely poor"].) In fact, many

of the jurors excused due to financial hardship had stable, gainful employment. (See, e.g., 2RT 27 [engineer], 30 [middle school math teacher with Los Angeles Unified School District], 44 [Master Control Technical Director for the television station KCAL], 45 [Categorical Program Advisor for Los Angeles Unified School District], 46 [artist employed by Disney], 48 [registered nurse at UCLA and Cedars-Sinai], 128-129 [physician employed by Kaiser], 137-138 & 162 [loss prevention officer employed by Borders Books and Music]; 4RT 198-199 [salaried employee of consulting firm, who also received commissions], 232 [employee of San Fernando Valley Association of Realtors], 237 [legal secretary for employment defense law firm].) Likewise, there is nothing in the record to support appellant's assertion that the excusal of prospective jurors whose employers would not pay for at least 25 days of jury service necessarily resulted in the disproportionate excusal of women, African-Americans, and Hispanics. (See AOB 35.) Accordingly, appellant forfeited his claim by failing to challenge the jury-selection procedure in the trial court.

Further, appellant has failed to make a prima facie case under *Duren*. First, people excluded due to financial hardship are not a "distinctive" group under the first prong of the *Duren* test. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 856; *People v. Carpenter* (1997) 15 Cal.4th 312, 352; *People v. DeSantis*, *supra*, 2 Cal.4th at p. 1216; *People v. Johnson* (1989) 47 Cal.3d 1194, 1214.)

Further, appellant has failed to make any showing regarding a disparity between the number of low income persons on the jury panel and the number of such persons in the community, thus utterly ignoring the second prong of the *Duren* test. Moreover, appellant's assessment that 40 percent of the jury pool was excluded based on financial hardship does not satisfy the third prong of the test. "A defendant does not discharge the burden of demonstrating that the underrepresentation was due to systematic exclusion merely by offering statistical evidence of a disparity. A defendant must show, in addition, that the

disparity is the result of an improper feature of the jury selection process." (*People v. Burgener, supra*, 29 Cal.4th at p. 857.) Appellant has not made such a showing.

Additionally, it appears appellant's statistical assessment of the jurors excluded due to financial hardship is inaccurate. For example, appellant lists numerous employees of Boeing as having been excused because the company only pays for 25 days of jury service. (See, e.g., AOB 25 [listing Stacey Celestre, prospective juror number 971417603, and David Becht, prospective juror number 970995130], 27 [listing Greta Hernandez, prospective juror number 971718028], 30 [listing prospective juror number 971885306].) However, the record is clear that these prospective jurors were *not* excused due to financial hardship, but were asked to complete the full juror questionnaire and participate in voir dire. (2RT 63 [Celestre], 64-65 [Becht]; 3RT 142-143 [Hernandez]; 4RT 201 [prospective juror number 971885306]; see 6RT 373-374 [Hernandez asks a question during voir dire]; 7RT 509-514 [Becht discusses his answers to the questionnaire], 518-522 [Hernandez discusses her answers to the questionnaire], 546 [Becht is excused through a peremptory challenge]; 8RT 579 [Hernandez is excused through a peremptory challenge]; 9RT 829-832 [Celestre discusses her answers to the questionnaire]; 10RT 896-898 [Celestre is questioned by counsel regarding the questionnaire], 910-911 [Celestre is excused for cause due to her statement that she might faint at the sight of gruesome photographs]; see also 6RT 316 [prosecutor and court comment that a number of prospective jurors employed with Boeing had not been excused due to hardship].) In fact, prospective juror number 5306, who appellant lists as a juror who was "excused for cause due to financial hardship because of lack of adequate jury service compensation" (AOB 23, 30), *actually served on the jury*. (9RT 812-814, 839; 10RT 866, 954-955.)

In other words, appellant's statistical analysis is based on the incorrect factual premise that the court excused all prospective jurors whose employers would not pay for *more than* 25 days of jury service. In fact, the court only excused those prospective jurors whose employers would not pay for *at least* 25 days of jury service. Further, appellant lists numerous prospective jurors who were excused due to hardship, without giving the record citation where such excusals might be found. (AOB 24-27; see Cal. Rules of Court, rules 8.204(a)(1)(C), 8.360(a).) Thus, appellant's statistical assessment is not accurate or persuasive.

With regard to appellant's assertion that the alleged underrepresentation was caused by the failure to pay jurors more money (AOB 31-32, 34-35), "[n]either the state nor federal Constitutions oblige local government to increase jury fees or otherwise ameliorate the economic hardship caused by jury duty" (*People v. Burgener*, *supra*, 29 Cal.4th at p. 857; *People v. Kraft* (2000) 23 Cal.4th 978, 1067; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 352). Thus, appellant has failed to make a prima facie showing of systematic exclusion under *Duren*. Accordingly, appellant's claim fails.

II.

FELONS WERE PROPERLY EXCLUDED FROM SERVING ON APPELLANT'S JURY

Appellant claims the statutory exclusion of felons from jury service denied him his rights to a jury selected from a representative cross-section of the community, equal protection, due process, and a fair trial. (AOB 36-44.) Appellant's claim is forfeited by his failure to raise it in the trial court. Further, appellant fails to support his equal protection and due process claims with any argument or supporting authority. In any event, the claim fails because the cited constitutional provisions do not require that felons be permitted to serve on juries.

Outside the presence of the other prospective jurors, a prospective juror informed the court that he had previously been convicted of burglary and robbery. He had served a prison term and a term of parole, which ended in 1991. (8RT 668-671.) Outside the prospective juror's presence, the prosecutor and court indicated that they did not think felons were permitted to serve on a jury. (8RT 671-672.) Defense counsel stated that he would like to confirm the prosecutor and court's conclusion. (8RT 672.) The court, prosecutor, and defense counsel consulted the rules on juror qualifications. Referring to Code of Civil Procedure section 203, subdivision (a)(5), the court stated that felons were not permitted to serve on juries. (8RT 672.) The prosecutor and defense counsel agreed with the court's reading of the statute, and both parties stipulated to excusing the felon. (8RT 672-673.)

Appellant forfeited his claim of error by stipulating to the felon's exclusion, and not objecting to the panel or moving to quash the venire. (*People v. DeSantis*, *supra*, 2 Cal.4th at pp. 1216-1217 [defendant's contention that exclusion of felons from venire violated his right to a representative jury was rejected "on procedural grounds" because defendant did not raise the point in the trial court]; see *People v. Fauber*, *supra*, 2 Cal.4th at p. 816 [by failing to object to the panel or move to quash the venire, defendant waived the claim that he was denied the right to a representative jury due to the exclusion of hearing-impaired persons]; *People v. Howard*, *supra*, 1 Cal.4th at p. 1159 [defendant's failure to object in the trial court waived his claim that due to hardship excusals, the venire did not fairly represent Hispanics].)

In any event, appellant's claim that the exclusion of felons denied him a representative jury fails because felons are not a distinctive group within the meaning of the three-prong *Duren* test. As explained, to establish that a defendant's right to an impartial jury drawn from a representative cross-section of the community has been violated, "the defendant must show (1) that the

group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." (*Duren v. Missouri*, *supra*, 439 U.S. at p. 364; *People v. Howard*, *supra*, 1 Cal.4th at p. 1159.) To establish the first prong of the *Duren* test, the defendant must show: (1) that members of the allegedly cognizable group "share a common perspective arising from their life experience in the group, i.e., a perspective gained precisely because they are members of that group"; and (2) "that no other members of the community are capable of adequately representing the perspective of the group assertedly excluded." (*Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98; see *People v. Fields* (1983) 35 Cal.3d 329, 348-349.)

Even if appellant could show that felons share a common perspective gained from their status as felons, which respondent does not concede, he cannot show that no other members of the community are capable of adequately representing the same perspective. (See *Rubio*, *supra*, 24 Cal.3d at pp. 98-100.) Community members who have been convicted of misdemeanors and served time in county jail, those who have suffered juvenile convictions and served time in the California Youth Authority, and those who have been involuntarily committed to state mental institutions, "have had similar experiences of loss of personal liberty followed by social stigmatization." (*Id.* at pp. 99-100.) Thus, felons do not constitute a cognizable group within the meaning of *Duren*. (*Rubio*, *supra*, 24 Cal.3d at p. 100.) Accordingly, appellant's right to a venire comprised of a representative cross-section of the community was not violated by the exclusion of felons. (*People v. DeSantis*, *supra*, 2 Cal.4th at p. 1217, fn. 17 [citing *Rubio* in rejecting on the merits defendant's claim that the exclusion of felons from the venire violated his Sixth Amendment right to a representative

jury].)

Indeed, felons were never contemplated to be part of a representative jury. When the California Constitutional provision upon which appellant relies was enacted (AOB 40, 44), statutes provided for the exclusion of felons from juries (*People v. Karis* (1988) 46 Cal.3d 612, 633). Because felons were excluded from juries when the California constitutional provisions were enacted, it cannot be said "that the right to jury trial, and to a fair and impartial jury drawn from a representative cross-section of the community contemplated inclusion of [felons] in that 'representative cross-section' of the populace." (*Ibid.*, internal citation omitted; accord, *People v. Pride* (1992) 3 Cal.4th 195, 227.) The United States Supreme Court also has not interpreted the federal Constitution to include felons in the right to a representative cross-section of the community. (See *People v. Karis*, *supra*, 46 Cal.3d at p. 633.) Thus, appellant's right to a venire comprised of a representative cross-section of the community was not violated by the exclusion of felons.

Regarding appellant's claim that the exclusion of felons violated the guarantees of equal protection and due process, respondent notes that appellant has failed to provide argument or authority with regard to the claim. Indeed, appellant merely lists the constitutional provisions in the heading, introduction, and conclusion of the argument, without any discussion of their application to appellant's claim. (AOB 36-44.) Accordingly the claims should not be considered. (*People v. Smith* (2003) 30 Cal.4th 581, 616, fn. 8 ["We need not consider such a perfunctory assertion unaccompanied by supporting argument."]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1340 [Court would not entertain claims for which defendant had failed to provide discussion or citation to authority]; accord, *People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Regardless, the exclusion of felons from appellant's jury did not violate the guarantees of equal protection and due process. Jury service is not a

fundamental right:

> The guarantee of the Sixth Amendment is primarily for the benefit of the litigant - not persons seeking service on the jury; and even though lawfully qualified, a citizen may not demand to serve on a jury. At most, the citizen is entitled to be considered for jury service. His interest in becoming a juror is clearly secondary to the interests of the litigants in securing an impartial jury, as shown by the traditional exclusion of prospective jurors for cause or upon peremptory challenge. Jury service is commonly viewed more as a combination of duty and privilege than as a right, sanctions being imposed for failure to appear.

(*Adams v. Superior Court* (1974) 12 Cal.3d 55, 61; accord, *Rubio*, *supra*, 24 Cal.3d at p. 101.) Thus, excluding felons from jury service cannot be a violation of due process. (*Rubio*, *supra*, 24 Cal.3d at p. 101, fn. 11.) Moreover, "[i]t follows that the exclusion does not violate equal protection if it has any rational relationship to some legitimate state objective." (*Id.* at p. 101, citing *Adams v. Superior Court*, *supra*, 12 Cal.3d at p. 62; *People v. Fields*, *supra*, 35 Cal.3d at p. 352.) The state has a legitimate objective in protecting the right to an impartial jury. (*Rubio*, *supra*, 24 Cal.3d at p. 101.) Excluding felons from jury service rationally promotes that objective because it is reasonable to assume a felon will "harbor a continuing resentment against 'the system' that punished him and an equally unthinking bias in favor of the defendant on trial, who is seen as a fellow underdog caught in its toils." (*Ibid.*, cited with approval in *People v. Ansell* (2001) 25 Cal.4th 868, 889.) Accordingly, the exclusion of felons from appellant's venire did not violate the guarantees of equal protection and due process.[12/]

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12. Respondent notes that in support of appellant's arguments regarding the systematic exclusion of felons from jury service, appellant cites numerous statistics allegedly supported by reports and websites outside the record on appeal. (AOB 42-43.) Because the cited statistics are not properly

III.

APPELLANT WAS NOT DENIED HIS RIGHT TO BE PRESENT DURING CRITICAL STAGES OF THE TRIAL

Appellant alleges he was denied the right to be present at critical stages of the trial because he was absent during various hallway conversations between defense counsel, the prosecutor, and the trial court. (AOB 45.) This Court should not consider appellant's claim, because appellant fails to provide supporting argument or authority. However, even if the merits of the claim are considered, the claim should be rejected because appellant's presence was not required at the hallway conversations in question and appellant has failed to show his absence prejudiced him in any way.

This Court should not consider appellant's claim because appellant fails to provide sufficient argument or authority in support of the claim. Appellant cites numerous conversations which occurred in the hallway between the judge and both counsel and which were transcribed by the court reporter. (AOB 45.) However, appellant fails to describe what occurred during each of these conversations, fails to explain how such conversations constituted critical stages of the trial, and fails to demonstrate how his presence at such conversations would have benefitted the defense. Whether appellant was deprived of his right to be personally present during critical stages of the proceedings is not a "routine or generic claim" that this Court has routinely rejected, so appellant

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before this Court, they should be disregarded. (See *People v. Waidla* (2000) 22 Cal.4th 690, 743 [appellate jurisdiction is limited to the appellate record]; accord, *People v. Gardner* (1969) 71 Cal.2d 843, 854-855; see also *People v. Sakarias* (2000) 22 Cal.4th 596, 636 [denying defendant's request to take judicial notice based on "general rule that an appellate court should not take notice of matters not first presented to and considered by the trial court, where to do so would unfairly permit 'one side to press an issue or theory on appeal that was not raised below'"], quoting *People v. Hardy* (1992) 2 Cal.4th 86, 134.)

may not assert the claim without providing sufficient argument and authority. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304 & 303, fn. 22.) Accordingly this Court should not consider appellant's perfunctory and speculative assertion that his rights were violated. (See *People v. Smith, supra*, 30 Cal.4th at p. 616, fn. 8 ["We need not consider such a perfunctory assertion unaccompanied by supporting argument."]; accord, *People v. Griffin* (2004) 33 Cal.4th 536, 589, fn. 25; *People v. Catlin* (2001) 26 Cal.4th 81, 123, fn. 8; *People v. Bradford, supra*, 15 Cal.4th at p. 1340; *People v. Stanley, supra*, 10 Cal.4th at p. 793; *People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2; *People v. Mayfield* (1993) 5 Cal.4th 142, 196.)

Even if this Court considers appellant's claim on the merits, the claim should be rejected. A defendant has a federal and state constitutional right to be present at a proceeding only when the proceeding is critical to the outcome of the trial and the defendant's presence would contribute to the fairness of the proceeding. (*People v. Perry* (2006) 38 Cal.4th 302, 312; *People v. Cole* (2004) 33 Cal.4th 1158, 1231.)[13/] A defendant does not have the right to be present at chambers or sidebar conversations unless his presence bears a reasonably substantial relation to the fullness of his opportunity to defend against the charge. (*People v. Cole, supra*, 33 Cal.4th at p. 1231; accord, *People v. Ochoa* (2001) 26 Cal.4th 398, 433, disapproved on another ground in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14; *People v. Bradford, supra*, 15 Cal.4th at p. 1357.) "Thus a defendant may ordinarily be excluded from conferences on questions of law, even if those questions are critical to the outcome of the case, because the defendant's presence would not contribute to the fairness of the proceeding." (*People v. Perry, supra*, 38 Cal.4th at p. 312

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13. Appellant does not claim any violation of his statutory right to be present. (See §§ 977, 1043; *People v. Young* (2005) 34 Cal.4th 1149, 1214; *People v. Weaver* (2001) 26 Cal.4th 876, 967-968.)

[examples of proceedings at which defendant's presence is not ordinarily required include conferences on the competency of a witness, on whether to remove a juror, and on jury instructions].) Moreover, there is no error in excluding a defendant from "routine procedural discussions on matters that do not affect the outcome of the trial," such as scheduling or whether certain spectators should be excluded from the courtroom. (*Id.* at pp. 312-314.) Appellant bears the burden of establishing that his absence prejudiced his case or denied him a fair trial. (*People v. Bradford, supra*, 15 Cal.4th at p. 1357.)

Here, appellant has utterly failed to meet his burden of establishing that his absence at any of the hallway conversations in question denied him a fair trial.[14/] First, many of the conversations in question occurred during jury selection and involved prospective jurors' sensitive answers to the questionnaire. (See, e.g., 6RT 322-325 [prospective juror had been arrested], 337-344 [prospective juror's daughter witnessed a murder]; 7RT 462-465 [prospective juror's son was a drug addict], 511-514 [prospective juror had been arrested]; 8RT 590-592 [prospective juror's vacation plans], 708-712 [prospective juror's brother had been murdered, another prospective juror was sick, and another prospective juror wanted to be excused to have a telephone installed]; 9RT 801-807 [prospective juror had been accused of child molestation]; 10RT 862-865 [prospective juror's scheduled business trip], 872-877 [prospective juror's stepfather had been convicted of child molestation],

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14. The record does not clearly indicate that appellant was absent at the hallway conversations. Instead, the record states that the conversations took place in the hallway, outside the jury's presence. However, the record elsewhere indicates that appellant was in restraints (see, e.g., 1RT 182-183; 6RT 295), and that when appellant had to move, the jury was excused so it would not see the restraints (see, e.g., 29RT 3130-3131). Because it appears the jury remained in the courtroom when both counsel and the judge moved into the hallway, respondent will assume for the sake of this argument that appellant did not move into the hallway for the conversations. (See *People v. Kelly* (2007) 42 Cal.4th 763, 781.)

938-944 [prospective juror was uncomfortable with the proceedings and had overheard another prospective juror make derogatory comments about jury selection], 999-1005 [prospective juror had been falsely accused of murder].) Appellant has failed to show how his presence at these conversations bore a reasonably substantial relation to his opportunity to defend against the charges. Indeed, such conversations generally do not require the defendant's presence. (See *People v. Kelly*, *supra*, 42 Cal.4th at pp. 781-782 [no violation of right to be present in defendant's absence at questioning of prospective juror and excusals of prospective jurors for cause]; *People v. Ochoa*, *supra*, 26 Cal.4th at pp. 433-434 & fn. 6 [rejecting claim that defendant's constitutional rights were violated by his absence at confidential sidebar conversations regarding, among other things, "past criminal behavior on the part of prospective jurors, their friends or relatives, the criminal victimization of a relative, the possible professional hardship imposed by jury service"]; *People v. Holt* (1997) 15 Cal.4th 619, 707 [no indication that defendant's presence would have had an impact on conference on jury selection procedures, discussions of juror hardship forms, or examination of juror]; see also *United States v. Gagnon* (1985) 470 U.S. 522, 526-527 [105 S.Ct. 1482, 84 L.Ed.2d 486] [no constitutional violation when defendant was not present during the judge's conversation with a juror].)

Additionally, several of the conversations in question were requested by defense counsel in order to challenge prospective jurors for cause or hardship reasons. (See, e.g., 6RT 395-399; 8RT 622-624; 9RT 781-786, 816-822, 832; 10RT 909-911.) Appellant has failed to show how his presence at these conversations would have affected the outcome of his trial. (*People v. Rogers* (2006) 39 Cal.4th 826, 855-856 [defendant's presence at discussions of juror hardship excusals "'would have served little purpose'"], quoting *People v. Ervin*, *supra*, 22 Cal.4th at p. 74; *People v. Panah* (2005) 35 Cal.4th 395, 443

[no prejudice shown from defendant's absence at in camera proceeding during voir dire at which prosecutor and defense counsel passed for cause and each exercised three peremptory challenges; because defendant failed to cite anything in the record to show defense counsel excused a juror defendant would have kept, defendant's claim that he was prejudiced was "speculative"]; *People v. Holt*, *supra*, 15 Cal.4th at p. 707 [no indication that defendant's presence would have had an impact on discussions of challenges for cause]; *People v. Hardy*, *supra*, 2 Cal.4th at p. 178 [defendant failed to show any prejudice resulted from his absence at the presentation of prospective jurors' hardship excuses].) Indeed, almost all of the prospective jurors challenged by defense counsel at these conversations were excused. (6RT 395-399; 8RT 622-624; 9RT 781-786, 816-822, 832; 10RT 909-911.)

Further, several of the hallway conversations dealt with administrative matters. (See, e.g., 3RT 163-171 [whether Delia Chacon should be excluded as a spectator]; 7RT 532-533 [clarification of which prospective juror was being questioned because defense counsel was reading the wrong questionnaire]; 8RT 709-712 [calculation of how many peremptory challenges had been used]; 9RT 753-756, 765-772 [scheduling and discussion of whether an employee of Javier Chacon should be excluded as a spectator], 807-808 [procedure for selecting alternate jurors], 832-835 [how to proceed after excusing sworn juror]; 10RT 860-861 [calculation of peremptory challenges and discussion of how to proceed with voir dire], 944-948 [ordering witnesses back and deciding how to proceed questioning prospective jurors about whether they heard inappropriate comments from another prospective juror], 1027 [calculation of peremptory challenges]; 13RT 1421-1422 [scheduling]; 18RT 2101-2103 [defense counsel made a record of his objection to the fingerprint evidence, an issue that had been fully litigated in appellant's presence]; 25RT 2768-2772 [discussion about moving People's exhibits into evidence;

scheduling]; 26RT 2968-2969 [the prosecutor made a record regarding guilt phase instructions which were not read because the defense had not requested them]; 29RT 3130-3131 [defense counsel's request that the jury be excused while appellant moved into the witness chair so the jury would not see appellant's restraints].) Appellant could not have been prejudiced by his absence at such "routine procedural discussions on matters that do not affect the outcome of the trial." (*People v. Perry*, *supra*, 38 Cal.4th at pp. 312-314; see *People v. Rundle* (2008) 43 Cal.4th 76, 178 [ex parte meetings between judge and defense counsel "concerning the potential problem of juror misconduct and possible courses of action that might be taken to resolve that issue" did not require defendant's presence]; *People v. Holt*, *supra*, 15 Cal.4th at p. 707 [no indication that defendant's presence would have had an impact on discussions of guilt phase instructions and scheduling of witnesses].)

Other conversations dealt with purely legal issues in which appellant could not have assisted. (See, e.g., 13RT 1419-1421 [whether the tape of Janson's interview with the police could be played for the jury if the transcript of that interview did not refresh Janson's memory as to statements he made during the interview]; 18RT 2010-2011 [whether defense counsel's questions called for hearsay]; 22RT 2516-2518 [same]; 25RT 2777-2781 [how the trial should proceed after Carranza invoked his Fifth Amendment right against self-incrimination]; 28RT 3096-3098 [whether the defense opened the door during its penalty phase evidence to the admission of evidence of the prior assault at Edgemar Dairy]; see *People v. Kelly*, *supra*, 42 Cal.4th at pp. 781-782 [no error in defendant's absence at argument on his *Batson/Wheeler*[15] motion, at a discussion about admissibility of evidence, and when the prosecutor informed the court and defense counsel that a victim witness had only recently reported

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15. *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*), and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

that defendant had raped her]; *People v. Holt*, *supra*, 15 Cal.4th at p. 707 [defendant's absence from conversations about evidentiary motions, the admissibility of defendant's statement, and a possible objection to an anticipated question by the prosecutor, did not interfere with his opportunity for effective cross-examination because defendant prevailed on some of the matters discussed and he did not suggest on appeal how his presence would have made an impact on the discussions]; *People v. Hardy*, *supra*, 2 Cal.4th at p. 178 [defendant's absence at discussion of guilt phase instructions had no impact on defendant's ability to defend against the charges].) Appellant has not suggested how his presence at such conversations would have benefitted the defense.[16/]

In sum, appellant has completely failed to show that his presence was necessary for an opportunity for effective cross-examination, would have contributed to the fairness of the proceeding in any way, or bore a reasonably substantial relation to the fullness of his opportunity to defend against the charges. (See *People v. Cole*, *supra*, 33 Cal.4th at pp. 1231-1232; accord, *People v. Waidla*, *supra*, 22 Cal.4th at p. 742; see also *People v. Bradford*, *supra*, 15 Cal.4th at p.1358 ["Defendant has not shown how his attendance at such hearings would have assisted the defense or otherwise altered the outcome of his trial, and therefore has not demonstrated prejudice."]; *People v. Horton* (1995) 11 Cal.4th 1068, 1122 ["Defendant fails to explain how his attendance at the conferences in question would have benefitted the defense or otherwise altered the outcome of his trial. Defendant's claim that his exclusion bore a substantial relation to his opportunity to defend therefore must fail."].) Accordingly, appellant's claim should be rejected.

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16. Respondent also notes that some of appellant's citations to the record are in error. For example, the following transcript pages, which appellant cites as describing discussions held outside his presence (AOB 45), actually show proceedings held in court in appellant's presence: 9RT 772-775; 10RT 972; 28RT 3099.

IV.

ANY ERROR IN ALLEGING THAT THE MURDERS WERE HEINOUS, ATROCIOUS, AND CRUEL, MANIFESTING EXCEPTIONAL DEPRAVITY, WAS HARMLESS

Appellant correctly claims the special circumstance allegations that the murders were heinous, atrocious, and cruel, manifesting exceptional depravity, must be stricken. (AOB 46.) However, as appellant recognizes (AOB 46), any error was harmless.

The indictment alleged that both murders were especially heinous, atrocious, and cruel, manifesting exceptional depravity, within the meaning of section 190.2, subdivision (a)(14). (1CT 256.) The jury was instructed regarding the special circumstance as follows:

> To find the special circumstance referred to in this instruction as murder that was especially heinous, atrocious, or cruel, manifesting an exceptional depravity, the killing must be conscienceless or pitiless that was unnecessarily torturous to the victim. [¶] As used in this instruction, the phrase, "especially [heinous], atrocious, or cruel manifesting exceptional depravity" means a conscienceless or pitiless crime that is unnecessarily torturous to the victim.

(26RT 2957; 2CT 435 [CALJIC No. 8.81.18 ["Special Circumstance--Murder Especially Heinous, Atrocious or Cruel"]].) The jury found the allegation true as to both murders. (2CT 461-462.) The jury also found true the following special circumstance allegations: the murder of Camacho was carried out for financial gain (§ 190.2, subd. (a)(1)); the murder of Friedman was committed in the commission of the crime of robbery (§ 190.2, subd. (a)(17)); and appellant committed multiple murders (§ 190.2, subd. (a)(3)). (2CT 461-462.)

The "especially heinous" special circumstance allegation has been found to be unconstitutionally vague. (*People v. Superior Court (Engert)* (1982) 31

Cal.3d 797, 801-803; accord, *People v. Sanders* (1990) 51 Cal.3d 471, 520.) Accordingly, the jury's true findings on the allegations should be stricken.

However, as appellant recognizes (AOB 46), reversal of the judgment of death is not required. The jury properly considered multiple other special circumstances, listed above, which rendered appellant eligible for the death penalty. (*Brown v. Sanders* (2006) 546 U.S. 212, 223-224 [126 S.Ct. 884, 163 L.Ed.2d 723].) Moreover, the jury's consideration of the "especially heinous" eligibility factor in the weighing process did not result in constitutional error because all of the facts admissible to establish that factor were also properly presented as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. The facts were thus properly considered. (*Id.* at p. 224; see § 190.3; 29RT 3171; 2CT 481 [CALJIC No. 8.85 ["Penalty Trial--Factors for Consideration"]].) Accordingly, appellant was not prejudiced by the jury's consideration of the "especially heinous" eligibility factor.

V.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO EXCLUDE REFERENCE TO THE HAIRSPRAY CAN FOUND IN THE CAR USED IN THE FRIEDMAN MURDER

Appellant claims that the prosecution committed misconduct by not preserving the hairspray can found in the Honda used in the Friedman murder. Appellant further claims that the trial court erred by permitting the prosecution to present evidence that appellant's fingerprint was found on the hairspray can. (AOB 47-56.) Appellant's claims fail because he has failed to show any bad faith on the part of law enforcement in failing to preserve the can. In any event, any error was harmless.

A. Procedural Background

Before trial, appellant filed a general motion for discovery. (2Supp. 2CT 283-288)[17], and a subsequent specific motion for discovery of the hairspray can found in the glove compartment of the Honda (2Supp. 2CT 293). On February 3, 1997, the parties discussed whether discovery issues would require moving the trial date. The prosecutor stated, "The only discovery item that counsel indicates he wanted was the can and the latent print. I really don't see how that would impact the trial [date]. It is available, to my knowledge." (1RT A35.) The prosecutor further specified, "I mean we have pictures of it. But I can give him the latent." (1RT A35.)

On February 10, 1997, defense counsel filed a motion to exclude any mention of the hairspray can because it had not been preserved. The motion indicated that the previous week defense counsel had learned that the can would not be available. (2Supp. 2CT 327-333; 1RT A39.) At the hearing, the prosecutor stated:

> [Defense counsel] wanted to see the latent prints, and they are present in court. And I believe Detective Lopez showed him the latent print. There is one item that we indicated to the court we would certainly turn over to counsel. That was the item, the can, the aerosol can from the glove compartment section of the car with the defendant's print on it. [¶] And I indicated to counsel I would give that to him; however, Detective Lopez indicated to me when we were here last time, the 3rd of February, that that can was never retrieved. They photographed it, and I believe counsel has a copy of that photograph. They just left the can in the car. They never retrieved it. We don't have that. We just

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17. As there are two volumes of the second supplemental clerk's transcript, respondent will cite to volume one as, "2Supp. CT," and volume two as, "2Supp. 2CT."

have a photograph of it and the latents that were lifted from the can. That's where we stand right now.

(1RT A37.)[18] The trial court did not rule on appellant's motion.

On February 23, 1998, after the jury was selected but before counsel had made their opening statements, defense counsel reminded the court of the motion to exclude evidence relating to the fingerprint found on the can. Defense counsel argued:

> I was led to believe that was well over a year ago that the - - I would be getting the can to - - at least observe the can and perhaps get my own expert to take a look at the print since the can was not preserved I never had an opportunity to examine the can or to look at it. [¶] I now see pictures of it in the vehicle, so I'm going to renew my motion to preclude mention of that can because the fact we were deprived the opportunity to discover its authenticity and to take a look at the print.

(11RT 1052.) The prosecutor informed the court that appellant had been given the latent print that had been lifted from the can. The prosecutor argued that the can itself was not exculpatory, so law enforcement was not required to preserve it. (11RT 1052-1053.) Defense counsel conceded that the print itself was admissible, but he argued the photographs of where the can was found should be excluded because he had been deprived the opportunity to view the can and thus did not "know if this is the same can." (11RT 1053.) The prosecutor argued that the witness who lifted the print would testify as to where he found the can. She further argued that even if she still had the can, she would not admit it into evidence, because she had a photograph of the can where it was found in the Honda. (11RT 1053-1054.) The court deferred ruling on

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18. The prosecutor later explained that after the can was examined, it was placed back in the Honda, which was ultimately returned to its owner. (11RT 1054.)

appellant's motion until after it had an opportunity to view the photographs of the can. In the meantime, the court ordered the prosecutor not to mention the evidence in her opening statement. (11RT 1055.)

Later that day, after a few witnesses had testified, the prosecutor asked the court for a ruling on appellant's motion. (11RT 1187.) The prosecutor showed the court a photograph of the hairspray can where it was found in the glove compartment of the Honda. (11RT 1187.) The court asked defense counsel what was prejudicial about the can, considering defense counsel was not objecting to the print. (11RT 1188.) Defense counsel responded:

> I am objecting to the lift. I mean certainly the lift - - I didn't have a chance to send anybody to do an analysis on the print. [¶] All I have is the can was supposedly going to be available to me. I waited months and then eventually it was told to me it was not preserved and that it was not preserved long before I was waiting for it. So I was deprived an opportunity to do an analysis on the print.

(11RT 1188.) The prosecutor informed the court that defense counsel had in fact been given the print. (11RT 1188-1189.) The prosecutor argued, "If I had the can here, what is it that he would want off the can because what was lifted on the can is in evidence, and he has had an opportunity to look at that." (11RT 1189.) Defense counsel explained that he wanted to look at the can to see if there were other prints on it. (11RT 1189.)

The court asked defense counsel to explain why the photograph of the can was prejudicial. (11RT 1189.) Defense counsel argued that without the can, he had no way of knowing if the can in the photograph was the actual can found in the Honda. (11RT 1189-1190.) The court stated that that issue was a proper topic for cross-examination of the person who had custody of the can. The court ruled that the evidence was admissible. (11RT 1190.)

Later, outside the presence of the jury, the prosecutor marked the photograph of the can for identification. Defense counsel stated, "I want to make sure my objection is on the record. I am objecting to evidence regarding the finger print because the can has not been preserved like they said it would. It was going to be. [¶] I didn't have an opportunity to inspect it, and we have gone through this before. I want to make sure it is on the record that I am objecting to even mentioning the can of hairspray." (18RT 2101-2102.) The prosecutor stated that when defense counsel made his specific discovery request for the can, the prosecutor began to look for it. She promptly informed defense counsel when she learned that the can had not been preserved. (18RT 2103.) The court stated that defense counsel could argue and cross-examine on the issue of the can's absence in evidence. (18RT 2103.)

Los Angeles Police Forensic Print Specialist Charles Caudell testified to the jury that he lifted a latent print from the hairspray can he found in the glove compartment of the Honda. He determined that the print belonged to appellant. After dusting the can for prints, Caudell left the can in the glove compartment where he had found it. (18RT 2104-2111.) On cross-examination, Caudell stated that he did not know where the can was anymore. (18RT 2117-2119.) After both parties stated they had no further questions for Caudell, the court did not excuse Caudell, but asked him to wait outside. (19RT 2129.)

After another witness testified, the court asked the prosecutor to call Caudell back into the courtroom outside the jury's presence. (18RT 2149.) In response to questions from the court, Caudell stated that it might have been possible for another expert to lift the same print from the can after Caudell had lifted it; however, the second lift would result in a lighter impression. (18RT 2149-2150.) Caudell explained, "[W]hat I am developing is a residue of the perspiration or the oil or whatever was on there. I am laying a layer of powder

on top of that, and sometimes the adhesive may remove that lower layer that the dust adhered to. [¶] In that case that does remove the actual latent that I developed and sometimes it doesn't. It just takes the top layer and the residue may still be underneath." (18RT 2151.) Caudell informed the court that there was no way for him to determine whether a second lift of the print on the can could have been taken in this case. (18RT 2152.) The court ordered Caudell to return the next court date. (18RT 2152.)

The next day, Caudell was recalled to the stand for further cross-examination by defense counsel. (19RT 2180.) In front of the jury, Caudell testified that it is sometimes possible to lift a latent print after one lift of the print has already been performed. (19RT 2180-2182.) However, on redirect, Caudell testified that even if a second lift of the print on the hairspray can had been possible, the lifted impression would have been of the same print as the lifted impression Caudell took. (19RT 2183.) Caudell testified that an expert could compare the latent he lifted from the can with other print exemplars. (19RT 2182.) Caudell further testified that it was not his practice to retain an item from which he has lifted a print because the lifted impression of the latent print is the relevant evidence. (19RT 2182-2183.)

Defense counsel again objected to the photograph of the can when the prosecutor moved to admit it into evidence. (19RT 2246.) The court admitted the exhibit, indicating that the fact that the can was not preserved went to the weight of the evidence, not its admissibility. (19RT 2246.)

B. The Trial Court Properly Admitted The Fingerprint Evidence And Photograph Of The Can

Due process requires that law enforcement preserve material exculpatory evidence. (*California v. Trombetta* (1984) 467 U.S. 479, 488-489 [104 S.Ct. 2528, 81 L.Ed.2d 413]; *People v. DePriest* (2007) 42 Cal.4th 1, 41-42; *People v. Beeler* (1995) 9 Cal.4th 953, 976.) "To fall within the scope of this duty, the

evidence 'must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.'" (*People v. Roybal* (1998) 19 Cal.4th 481, 510, quoting *Trombetta*, *supra*, 467 U.S. at p. 489.) When a defendant's challenge is to law enforcement's failure to preserve evidence "of which no more can be said than it could have been subjected to tests, the results of which might have exonerated the defendant," a due process violation will not be found unless the defendant shows bad faith on the part of law enforcement. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57-58 [109 S.Ct. 333, 102 L.Ed.2d 281]; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 283; *People v. Roybal*, *supra*, 19 Cal.4th at p. 510; *People v. Memro* (1995) 11 Cal.4th 786, 831.) A trial court's ruling on the failure to preserve evidence is reviewed for whether, viewing the evidence in the light most favorable to the trial court's ruling, there was substantial evidence to support the ruling. (*People v. Carter* (2005) 36 Cal.4th 1215, 1246, quoting *People v. Roybal*, *supra*, 19 Cal.4th at p. 510.)

Here, there was substantial evidence to support the trial court's ruling. The hairspray can itself was not obviously exculpatory. As appellant recognizes, in order to have any value at all to the defense, particular tests needed to be performed on the can, and particular results needed to have been achieved. (AOB 53.) In other words, the evidence was only "potentially useful," not "material exculpatory" evidence. (*Youngblood*, *supra*, 488 U.S. at pp. 57-58; see *Illinois v. Fisher* (2004) 540 U.S. 544, 549 [124 S.Ct. 1200, 157 L.Ed.2d 1060].) Thus, there was substantial evidence to support the trial court's finding that the can did not have an apparent exculpatory value before it was given back to the Honda's owner.

Because the can was not obviously exculpatory, but *might* only have been exculpatory had further testing been performed, appellant was required to

show bad faith on the part of law enforcement. (*Youngblood*, *supra*, 488 U.S. at pp. 57-58; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 283; *People v. Roybal*, *supra*, 19 Cal.4th at p. 510.) However, there was substantial evidence that the prosecution did not act in bad faith in failing to maintain the hairspray can. "The presence or absence of bad faith by [law enforcement] for purposes of the Due Process Clause must necessarily turn on [law enforcement]'s knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." (*Youngblood*, *supra*, 488 U.S. at p. 56, fn. *; *People v. Beeler*, *supra*, 9 Cal.4th at p. 976; see also *People v. Webb* (1993) 6 Cal.4th 494, 519-520 [due process principles outlined in *Youngblood* "are primarily intended to deter the police from purposefully denying an accused the benefit of evidence that is in their possession *and known to be exculpatory*"], italics added.) The prosecutor stated that she never intended to admit the can itself into evidence, as the latent print was the material evidence, not the can. (11RT 1053-1054.) When appellant specifically moved for discovery of the can, the prosecutor did not know that the can had been returned with the Honda to its owner. (1RT A37.) It appears that the prosecutor immediately informed defense counsel when she learned that the can had not been preserved. (1RT A35, A39; 18RT 2103; 2Supp. 2CT 327-333.) Thus, appellant has not shown any bad faith on the part of the prosecutor. (See *Illinois v. Fisher*, *supra*, 540 U.S. at p. 548 ["We have never held or suggested that the existence of a pending discovery request eliminates the necessity of showing bad faith on the part of police."].)

Appellant claims bad faith was established because the prosecution delayed in complying with his discovery request. Specifically, appellant claims he made a discovery request on September 9, 1996, and he did not learn that the can was unavailable until February 10, 1997. (AOB 55.) First, defense counsel actually learned that the can was unavailable the week before February 10, 1997. (2Supp. 2CT 327.) Further, the record does not show that the

prosecution deliberately delayed in informing defense counsel of the can's unavailability. While appellant requested general discovery in September 1996 (2Supp. 2CT 283-288), the prosecution clearly did not believe that the can was part of the motion because the lifted print was the material evidence, not the can itself (see 11RT 1052-1054). Indeed, from the transcripts of the hearings regarding discovery, it appears that the prosecution was making its best efforts to comply with appellant's discovery request, and appellant did not have any complaints about the speed with which the prosecution was complying. (See, e.g., 1RT A17-18, A20-21, A23, A29.) When defense counsel ultimately requested the can specifically, on February 3, 1996, the prosecutor immediately made efforts to locate the can (1RT A33-34 [the prosecutor informs the court that after the hearing she will go to the Los Angeles Police Department with defense counsel to show him the lifted latent print and the can], and she promptly informed defense counsel when she learned that the can had not been preserved (1RT A39; 18RT 2103; 2Supp. 2CT 327-333).[19] Accordingly, appellant has failed to show that the prosecution acted in bad faith. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 284-285 [rejecting defendant's claim that bad faith in failing to refrigerate bloodstained jacket was shown by

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19. Sometime after appellant filed his general discovery request in September 1996, and before February 1997, when it was discovered that the can had not been preserved, prosecution of the case was transferred from Deputy District Attorney James Bozajian to Deputy District Attorney Danette Meyers. In support of his motion to exclude reference to the can, defense counsel claimed that Deputy District Attorney Bozajian had stated that the can was in his possession and would be available to the defense. (2Supp. 2CT 327, 329; 18RT 2101-2103.) Respondent is unable to find anywhere in the record where Deputy District Attorney Bozajian makes specific reference to discovery of the can. Indeed, appellant reiterates defense counsel's argument, but fails to cite to anywhere in the record where such promises can be found. (AOB 55.) Thus, there is nothing in the record to suggest that Deputy District Attorney Bozajian purposefully failed to disclose to the defense that the can had not been preserved.

prosecution's failure to hand over the jacket pursuant to various discovery requests, including one for "all physical evidence," because results of tests performed on the jacket were given to the defense and the jacket was eventually turned over, presumably pursuant to a specific request for it].)

Additionally, appellant has not shown any bad faith on the part of the police. The record shows that photographs were taken of the can where it was found in the glove compartment of the Honda. (18RT 2107.) Moreover, Caudell preserved the lifted latent print itself, which was provided to the defense for its own evaluation and comparison to appellant's prints. (18RT 2108.) While Caudell testified that the latent print possibly could have been lifted from the can again by another expert, it would have been the same latent print. (19RT 2183.) Thus, such further testing of the can would have been fruitless. Indeed, Caudell testified that it was not his practice to maintain an item from which he has lifted a latent print, as the print itself is the evidence, not the item from which it was removed, and his testimony under oath is sufficient to establish from where the print was lifted. (19RT 2182-2183.) Appellant has therefore failed to show bad faith on the part of law enforcement. (See *Illinois v. Fisher*, *supra*, 540 U.S. at p. 548 [no bad faith shown in destruction of substance seized from defendant because "police testing indicated that the chemical makeup of the substance inculpated, not exculpated, [defendant]"]; *People v. DePriest*, *supra*, 42 Cal.4th at p. 42 [no bad faith in failure to preserve the car in which the victim was killed and in which three unidentified prints were found, because "[t]he record discloses that the prosecution scoured Nguyen's car for trace evidence, and provided the results of that examination to the defense. Defendant has not argued at trial or on appeal that the prosecution failed to conduct necessary tests or performed any testing in a deficient manner."]; *People v. Farnam* (2002) 28 Cal.4th 107, 166-167 [no bad faith shown in law enforcement's failure to refrigerate or freeze

biological evidence recovered from the crime scene when, at the time, the police crime laboratory did not routinely retain evidence in that fashion and "[d]efendant does not contend that the prosecution withheld any evidence or reports pertaining to the sexual assault kit or any other evidence gathered from the crime scene"]; *People v. Stansbury* (1993) 4 Cal.4th 1017, 1056 ["The police criminalist did not consider retaining the contents of the freezer because he was satisfied that the photographs adequately recorded the condition of the evidence. The record is devoid of evidence that the police acted in bad faith."], revd. on other grounds in *Stansbury v. California* (1994) 511 U.S. 318 [114 S.Ct. 1526, 128 L.Ed.2d 293].)

Appellant nevertheless claims there was "a reckless disregard" for preservation of the can. (AOB 53-54.) However, as explained, the failure to preserve the can was not negligent or done in bad faith, as the actual material evidence--the lifted latent print--was preserved. Moreover, negligence does not establish bad faith. (*Youngblood*, *supra*, 488 U.S. at p. 58; *People v. DePriest*, *supra*, 42 Cal.4th at p. 42; *People v. Webb*, *supra*, 6 Cal.4th at p. 520.) In sum, appellant "has not shown that the police believed the evidence they failed to preserve . . . would have exculpated defendant, or that their purpose was to deny him the opportunity to use the evidence to exculpate himself." (*People v. Seaton* (2001) 26 Cal.4th 598, 657.) Hence, there was substantial evidence that the prosecution and police did not act in bad faith.

Because the can was not obviously exculpatory and appellant has not shown that the prosecution or police acted in bad faith in failing to preserve the can, appellant has not shown that his due process rights were violated. The trial court thus properly denied appellant's motion to exclude reference to the can. (See *Illinois v. Fisher*, *supra*, 540 U.S. at pp. 547-548; *People v. Tafoya* (2007) 42 Cal.4th 147, 187 [failure to preserve police files did not violate due process because the files were only potentially relevant and defendant did not establish

bad faith because the files were destroyed in the normal course of business]; *People v. Farnam*, *supra*, 28 Cal.4th at pp. 166-167; *People v. Roybal*, *supra*, 19 Cal.4th at p. 510 [no due process violation in failing to preserve fingerprint evidence because the fingerprint "may or may not have been the perpetrator's" and there was no evidence of bad faith by law enforcement].)

C. Any Error Was Harmless

In any event, any error in denying appellant's motion was harmless beyond a reasonable doubt because the failure to preserve the can surely did not contribute to the verdict. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Yeoman* (2003) 31 Cal.4th 93, 126 [finding no prejudice resulted from prosecution's loss of original photographs, "even if, as defendant argues, we must evaluate prejudice under the standard of *Chapman*"].) The jury was informed that the hairspray can found in the Honda had not been preserved. (18RT 2117-2119.) The jury was also informed that although further testing on the can was possible, such testing would have been pointless because the latent print lifted from the can would have been the same. (19RT 2183.) Appellant did not contest Caudell's testimony that the fingerprint found on the can was his, or that the can was found in the Honda; instead appellant argued that the can must have come from the Chacon house, where he, Woodland, and others shared cans of that brand of hairspray. (See, e.g., 21RT 2344, 2348-2350; 22RT 2445, 2460-2461; 23RT 2579.) Accordingly, it is clear the failure to preserve the can did not contribute to the jury's verdict.

VI.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO SUA SPONTE DECLARE A MISTRIAL DUE TO AUDIENCE SNICKERING

Appellant contends the trial court committed constitutional error by not sua sponte declaring a mistrial due to audience "snickering" in the presence of

the jury during the guilt phase. Appellant claims the snickering prejudiced him and was not curable by an admonition. (AOB 56-61.) Appellant forfeited his claim by failing to request a jury admonition or move for a mistrial in the trial court. In any event, appellant's contention fails because the alleged spectator misconduct was brief and unemotional, and did not prejudice appellant.

A. Factual Background

During a hallway sidebar after Morales's testimony, defense counsel stated, "I would like either the prosecutor or the court to admonish the victim's mother, who has been snickering, that it has got to stop. She is right within an earshot of the jurors." (13RT 1335-1336.) The court indicated that it had not heard any snickering. (13RT 1336.) Defense counsel stated, "Yes. She snickers and has been snickering." (13RT 1336.) The prosecutor identified the victim's mother for the court and stated that she had not heard any snickering either. (13RT 1336.) The court indicated that it would admonish the victim's mother not to snicker. (13RT 1336.) The prosecutor pointed out that she was physically closest to the woman, and she had not heard the woman snicker or laugh. (13RT 1336-1337.) The court stated that it would accept defense counsel's representation that he had heard the woman snicker. (13RT 1336-1337.)

Back in the courtroom but outside the presence of the jury, the court stated, "[T]hose of you in the audience, you are not to react in any way to any testimony, any questions, either orally, physically, or any other way." (13RT 1337.) The court then recessed for lunch. (13RT 1337.)

Upon return from the lunch break, the court informed the audience outside the presence of the jury that a medical examiner would be testifying that session. (13RT 1338.) The court stated, "You understand, I have to ensure that the jury does not see any emotional displays from either side. I'm not making any finding or anything like that, I just want you to know in advance that I can't

allow the jury to see anything like that. [¶] So knowing in advance that that testimony's going to be coming, if it should be difficult for you, you might want to do whatever you think is appropriate . . . ." (13RT 1338.)

Later in the trial, the court heard a noise from the audience during appellant's testimony. At a break, outside the presence of the jury, the court stated, "The people in the audience have been warned that if I hear or see any physical response from any testimony, that you will be asked to leave." Addressing Camacho's father, the court said, "Now, sir, two jurors looked right at you." Camacho's father stated that he had not made a sound. A female relative of Friedman admitted that she had made the sound. The court asked her to wait outside the courtroom for the rest of the afternoon and not make any comments near the jurors. The court further warned, "Should you come back in the future, if I hear any sounds from you or anyone else, I will have the bailiff take them into custody. If anyone has any questions about that, just try it." (23RT 2644-2645.)

The following discussion immediately occurred in the hallway outside the audience and jurors' presence:

> THE COURT: The record should reflect that during the course of the testimony of the defendant that there was a, I would call it, snort or - -
>
> [THE PROSECUTOR]: Snicker.
>
> THE COURT: Some sort of sound. I immediately stopped the proceedings when I saw two jurors look in that direction. [¶] I, frankly, thought it was coming from Mr. Camacho. Apparently, it came from Mrs. Friedman. [¶] Do either of you wish any further comment?
>
> [THE PROSECUTOR]: No, Your Honor. I was standing right by them. I heard the comment. I thought it was appropriate what the court did.
>
> [DEFENSE COUNSEL]: I appreciate what the court did because I

heard it. I was going to come and ask for a break at an appropriate time. I appreciate your doing that.

THE COURT: All right. Do either of you wish me to do anything further?

[DEFENSE COUNSEL]: No, Your Honor.

[THE PROSECUTOR]: No. I warned them. I warned the parents and the relatives about the testimony of defendant, and the fact that they probably should not sit here through the testimony.

(23RT 2646.) The court then asked both counsel to speak to the audience members and make sure no further sounds were made. (23RT 2647-2648.)

The prosecutor and defense counsel informed the court that the day before there had been an altercation outside the courthouse between appellant's mother and Camacho's mother, but the jury had not witnessed it. (23RT 2648-2649.) The court stated:

It may well be I need to admonish everybody again. I think I did it rather forcefully. But I want you both to speak to the families on either side. Now, you have to explain to them I personally have nothing against any of them; on the other hand, I am going to take very swift action if anything goes on that will jeopardize the several months we have invested in this trial.

(23RT 2649.) Both the prosecutor and defense counsel insisted that they had repeatedly warned the family members of appellant and the victims to behave appropriately in the courtroom. (23RT 2649.) The court asked if either counsel had anything to add. (23RT 2649.) Defense counsel asked the court to admonish the whole audience again. (23RT 2650.) The court stated that it had just done so. (23RT 2650.) Defense counsel stated, "Maybe, you can say you heard other reports if the jury ever got it and explain it to them what it is all about." The court responded, "I would like you to speak to the respective

families first; and then if you feel something else is necessary, let me know. I don't think I could make it any more clear. [¶] Just so the record is clear, it didn't reflect it, but I looked at both sides of the courtroom as I was saying what I said. . . . To make it clear to both sides I have no intention of letting anyone say anything during the time the jury is in the courtroom." (23RT 2650.)

Later in the trial, after the prosecutor had presented her first rebuttal witness, the court stated outside the jury's presence:

> Ladies and gentlemen, for those of you that are in the audience, I just want to make a few brief remarks: [¶] I am aware that this proceeding is very emotional for all parties concerned, whether you are here for either of the victims alleged or for the defendant. [¶] On Friday the attorneys will be arguing. Whether you agree or disagree with anything stated by either of the attorneys, you must understand that the jury cannot be allowed to observe any expressions, either verbal or by body language, that may in any way affect their deliberations whether in this courtroom or anywhere in or near this courthouse. [¶] This is a public proceeding and you may all be present if you conduct yourselves appropriately only as observers. [¶] The bailiffs are instructed that anyone in the audience displaying any inappropriate comments, body language, sounds, noises, statements, will be cited for contempt and taken into custody. [¶] Folks, please, help me maintain the dignity of these proceedings.

(23RT 2715-2716.)

At the start of the next court session, outside the presence of the jury, the court stated:

> Ladies and gentlemen, it is my expectation that we will be getting to argument this morning. Whether you agree or disagree with any of the statements that are made by either of the attorneys, I will expect that

there will be no outward shows of emotion, approval or disapproval. No sounds, noise, gestures. No facial gestures. No body language at all. [¶] The bailiffs have been instructed to watch the audience as well. Please, do not cause any incidents that will endanger this trial. [¶] If any of you feel that you are going to have a problem with maintaining the appropriate demeanor during the arguments of the attorneys, please, wait outside and do not cause us a problem later on. [¶] It may well be, and you should know in advance, you probably are not going to agree with everything that is said by both of the attorneys. Knowing that be forewarned.

(25RT 2752-2753.)

B. Appellant's Claim Is Forfeited

"A defendant's failure to object to and request a curative admonition for alleged spectator misconduct waives the issue for appeal if the objection and admonition would have cured the misconduct." (*People v. Hill* (1992) 3 Cal.4th 959, 1000, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1369, fn. 13.) Likewise, a defendant forfeits the claim if he fails to seek further curative action than that which the court took. (*People v. Chatman* (2006) 38 Cal.4th 344, 368 [because "the court did everything defendant asked of it regarding [the spectator]'s behavior," "[d]efendant may not argue that the court should have granted a mistrial he did not request"]; *People v. Hinton* (2006) 37 Cal.4th 839, 898 [defendant forfeited claim of spectator misconduct because he "failed below to object to the alleged comment, failed to request a hearing to determine whether the jury heard any such comment, and failed to request a curative admonition"].)

Here, appellant brought the first incident to the court's attention and asked the court to admonish the spectator. The court granted appellant's request and admonished the audience. (13RT 1335-1337.) With regard to the

second incident, the court observed the incident itself, immediately called a recess, and sua sponte admonished the spectators. (23RT 2644-2646.) On both occasions, appellant failed to move for a hearing to determine whether any of the jurors had heard the sounds. Appellant also failed to request that the court admonish the jury regarding spectator misconduct.[20] Moreover, appellant failed to move for a mistrial on the basis of spectator misconduct. Indeed, defense counsel specifically declined to make any such requests when the court asked if the parties would like it to take further action. (23RT 2646.) In light of appellant's acquiescence in the court's treatment of the situation, appellant should not be heard to complain that the court failed to sua sponte take further action. (*People v. Chatman*, *supra*, 38 Cal.4th at p. 368.) Accordingly, appellant's claim is forfeited.

C. The Trial Court Did Not Abuse Its Discretion In Failing To Sua Sponte Declare A Mistrial

Even if appellant's claim is cognizable, it fails on the merits. "Although spectator misconduct constitutes a ground for new trial 'if the misconduct is of such a character as to prejudice the defendant or influence the verdict,' the trial court must be accorded broad discretion in evaluating the effect of claimed spectator misconduct." (*People v. Cornwell* (2005) 37 Cal.4th 50, 87, quoting *People v. Lucero* (1988) 44 Cal.3d 1006, 1022; accord, *People v. Chatman*,

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20. Appellant claims defense counsel did ask the court to instruct the jury to disregard the spectator's noise after the first incident. (AOB 57, citing 13RT 1336.) However, such a request does not appear on that page of the transcript. In fact, no such request was ever made. Defense counsel requested that the court admonish the spectator to remain quiet; he never requested that the jury be admonished regarding the spectator's conduct. (13RT 1335-1337.) It appears defense counsel reasonably decided "to avoid calling attention to a comment the jurors may not have even heard." (*People v. Hinton*, *supra*, 37 Cal.4th at p. 899.) Indeed, after the second incident, the trial court made special efforts to ensure the jury did not discover that the court had taken the recess during appellant's testimony in order to admonish the audience. (23RT 2645.)

supra, 38 Cal.4th at pp. 368-369; *People v. Panah*, *supra*, 35 Cal.4th at p. 451.) "[P]rejudice is not presumed when spectators misbehave during trial; rather, the defendant must establish prejudice." (*People v. Cornwell*, *supra*, 37 Cal.4th at p. 88; accord, *People v. Chatman*, *supra*, 38 Cal.4th at p. 369.) The issue is "whether what the jury might have heard 'was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged [conduct] is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over.'" (*People v. Hinton*, *supra*, 37 Cal.4th at p. 898, quoting *Holbrook v. Flynn* (1986) 475 U.S. 560, 572 [106 S.Ct. 1340, 89 L.Ed.2d 525]; accord, *People v. Chatman*, *supra*, 38 Cal.4th at p. 369.)[21]

Here, the trial court did not abuse its discretion in failing to sua sponte declare a mistrial. First, although appellant characterizes the snickering as "continual" (AOB 58), it only occurred twice. Thus, appellant's characterization of the snickering as "continual" is misleading. Moreover, it is not likely the jury even heard the first instance of snickering, as the prosecutor stated that she was closest to the spectator who allegedly made the noise, yet she did not hear it. (13RT 1336-1337.) The court also did not hear it. (13RT 1336.) Appellant cannot establish that he was prejudiced by a sound the jury may not have heard. (*People v. Panah*, *supra*, 35 Cal.4th at p. 451 [trial court did not abuse its discretion in denying mistrial motion and failing to admonish jury to disregard incident in which victim's mother kissed court bailiff, when

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21. Although California cases have applied *Flynn*'s "inherently prejudicial" standard, the United States Supreme Court recently held, "This Court has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial. And although the Court articulated the test for inherent prejudice that applies to state conduct in [*Estelle v.*] *Williams* [(1976) 425 U.S. 501 [96 S.Ct. 1691, 48 L.Ed.2d 126],] and *Flynn*, we have never applied that test to spectators' conduct." (*Carey v. Musladin* (2006) 549 U.S. 70 [127 S.Ct. 649, 653-654, 166 L.Ed.2d 482], footnote omitted.)

the incident "appears to have been brief and it was not clear that any juror even witnessed it"].)

Regardless, even if both instances of snickering were heard by the jury, the trial court acted within its discretion in not declaring a mistrial. The alleged misconduct consisted of, at most, snickering by family members of the victims. Neither spectator actually spoke words; neither informed the jury of facts not presented at trial; and neither made an emotional outburst, such as sobbing, which might garner sympathy for the victims' families. At most, the snickering would have informed the jury that the victims' family members did not believe the defense case. However, such information would not have surprised the jury. (See *People v. Chatman*, *supra*, 38 Cal.4th at p. 369 [outbursts by the victim's mother, including asking "Are you satisfied now?" during defendant's testimony, "provided the jury with no significant information it did not already know or might not readily surmise"]; *People v. Hinton*, *supra*, 37 Cal.4th at p. 898 ["we are skeptical the jury would have paid any mind to [the victim's mother's] brief and unsurprising comment"].) Moreover, it is possible that the spectators' conduct would have been viewed as rude and inappropriate, and actually led the jury to disfavor the victims' families.

Further, it is clear the trial court was aware of and took seriously its duty to "ensure that the proper legal resolution [was] untainted by extraneous influence" by giving appropriate anticipatory directions. (*People v. Chatman*, *supra*, 38 Cal.4th at p. 369; see, e.g., 23RT 2647 ["my responsibility is to see the jury is not distracted in any way"], 2649 ["I am going to take very swift action if anything goes on that will jeopardize the several months we have invested in this trial"].) Throughout the trial, the court repeatedly admonished the spectators, demanding decorum in the courtroom, indicating that it and the bailiffs were monitoring the audience for any misconduct, and threatening to take spectators into custody for contempt if they disobeyed. (See, e.g., 13RT

1338; 23RT 2645, 2715-2716; 25RT 2752-2753.) The trial court was "in the best position to evaluate the impact of [the spectators'] conduct on the fairness of the trial." (*People v. Cornwell*, *supra*, 37 Cal.4th at p. 87.) Its implied finding that the two alleged instances of snickering did not prejudice appellant was reasonable.

Indeed, the trial court's actions are in accordance with controlling precedent. For example, in *People v. Lucero*, *supra*, 44 Cal.3d at page 1006, defense counsel argued during the guilt phase closing argument that because neither victim's screams were heard coming from the house where the killings occurred, the killings were not premeditated, but occurred suddenly in an "explosion of violence." As the jury prepared to leave the courtroom and begin deliberations, the mother of one of the victims cried out:

> There was screaming from the ball park. They couldn't hear the girls because there was screaming from the ball park. That's why they couldn't hear it. The girls were screaming - screaming from the ball park, screaming, screaming, screaming. That wasn't in the case. Screaming, screaming from the ball park. Why wasn't that brought up? Why, why, why?

(*Id.* at pp. 1021-1022.) The spectator was escorted from the courtroom, but her continued outburst could be heard from the hallway. (*Id.* at p. 1022.) The court instructed the jurors "to disregard the outburst," then excused them to begin deliberations. (*Ibid.*) The trial court denied the defendant's motion for a mistrial. (*Ibid.*) It was held that the trial court did not abuse its discretion in denying the motion, in light of the admonition given. (*Id.* at p. 1024.)

If the outburst in *Lucero*--which was much more dramatic and involved facts not presented to the jury during the trial--was not prejudicial, the minor snickering that occurred in this case could not have prejudiced appellant. This is true even though the jury was not admonished to ignore the snickering. As

in *People v. Cornwell*, "In the present case, although more than one incident was alleged and, unlike the situation in *Lucero*, there was no pointed admonition from the court, defendant does not claim that the spectators actually attempted to convey information to the jury; there was no dramatic, anguished outburst, and the spectator conduct, even taking defendant's claims at face value, was not particularly disruptive or likely to influence the jury." (*People v. Cornwell*, *supra*, 37 Cal.4th at p. 87.)

In *Cornwell*, the defendant moved for a mistrial based on allegations of numerous spectator outbursts during the guilt phase. (*Id.* at p. 84.) Specifically, the defendant alleged that: spectators had burst into the courtroom during defense counsel's closing argument; spectators rolled their eyes and sighed audibly; spectators whispered, snickered, laughed, and gasped in disbelief; a spectator made dismissive gestures and shook her head during testimony; and a spectator said, "That's right," during the prosecutor's closing argument. (*Id.* at pp. 84-85.) This Court held that the trial court did not abuse its discretion in denying the defendant's mistrial motion because it appeared the jury did not notice each of the instances of alleged misconduct and, even if it had, "the effect of the incidents was innocuous or, at most, trivial." (*Id.* at p. 87.) As the conduct here was less frequent and dramatic as that in *Cornwell*, it cannot be said that the conduct prejudiced appellant. Accordingly, the trial court did not err in failing to sua sponte declare a mistrial.

VII.

EVIDENCE OF APPELLANT'S ESCAPE FROM CUSTODY WAS PROPERLY ADMITTED DURING THE GUILT PHASE

Appellant claims his right to equal protection and his due process right to a fair trial were violated during the guilt phase of his trial by the admission of evidence regarding his escape from custody. (AOB 61-64.) Appellant

forfeited his equal protection claim by failing to object on that ground below and by failing to offer supporting argument in his appellate brief. Appellant's due process claim fails because the trial court properly ruled that the evidence was more probative than prejudicial. In any event, any error was harmless.

A. Procedural Background

On February 12, 1996, appellant was arrested and charged with the Friedman murder. (2Supp. CT 1-4.) On March 12, 1997, while appellant was still in custody, a grand jury indicted appellant on the Camacho murder. (1CT 255.) On May 31, 1997, appellant escaped from custody. (16RT 1759-1793; 17RT 1890-1902; 18RT 2069-2079.)

On January 30, 1998, appellant filed a motion to sever the escape charge from the murder trial, arguing that trying all charges together was improper under section 954 and violated due process. (2Supp. 2CT 398-406.) The same day, the prosecutor filed a motion to present evidence of appellant's escape from custody at the murder trial, arguing that appellant's escape was admissible as evidence of his consciousness of guilt. (4Supp. CT 155-157.)

At argument on the motions, defense counsel argued that any mention of the escape in the murder trial would be more prejudicial than probative. (2RT 8-9.) The prosecutor indicated that she did not intend to try the escape charge along with the murder and robbery charges. She argued, however, that she should be permitted to admit evidence of appellant's escape, as evidence of his consciousness of guilt on the murder and robbery charges. (2RT 9.) The prosecutor emphasized that appellant had been in custody for over a year on the Friedman murder charge without making an attempt to escape. He only escaped after the indictment charging appellant with the Camacho murder had been filed. (2RT 9-10.) Defense counsel emphasized the magnitude of the case and argued that the evidence was prejudicial. (2RT 10-11.) The trial court ruled, "The court finds that the evidence would be material and relevant, having

balanced the potential [prejudice] pursuant to [Evidence Code section] 352. [¶] Your request to deny the People permission to bring it up is denied." (2RT 11.)

In light of the trial court's ruling that the escape evidence would be admitted, the following question was posed on the prospective juror questionnaire:

> There will be testimony in this trial that the Defendant escaped from jail. Do you believe that if a Defendant escapes from custody while awaiting trial that this fact would automatically, in your mind, mean that the Defendant is guilty of the charged crimes?

(See, e.g., 4CT 801.) During jury selection, defense counsel indicated that since the jury would hear about the escape anyway, he would not oppose the escape charge being tried along with the murder and robbery charges. (5RT 267.) The following discussion then occurred:

> THE COURT: Is that something you want to do as a tactical matter?
>
> [DEFENSE COUNSEL]: I think since we already have it out there, I got the responses [to the questionnaire] back, rather than wasting the court's time, certainly wouldn't hurt Mr. Carrasco's case, I don't believe.
>
> THE COURT: I don't want you to feel - - have you make any decision based on wasting the court's time. I want you to consult with your client and make what you feel is the best professional and tactical decision for your case. [¶] If that's accurate, however, and you do want me to try them all together, I'm going to have to read some new charges to the jury. [¶] Miss Meyers, do you have a preference here?
>
> [PROSECUTOR]: No, Your Honor, because as the court - - given the court's decision with respect to allowing me to put on that evidence, I'm prepared to put that evidence on. [¶] I was intending to put it on in my case in chief, not as extensively, but now that [defense counsel] has agreed that they be tried together, that's just fine.

(5RT 267.)

The prosecutor then informed appellant that he had a right to have a separate jury decide the escape charge. (5RT 268.) Appellant waived that right. (5RT 268.) Appellant also specifically agreed to have the same jury hear the escape case and the murder and robbery case. (5RT 268.) Defense counsel joined in appellant's waiver and agreement. (5RT 268.) The trial court confirmed with appellant that he had had an opportunity to discuss with counsel his right to have separate juries hear the two cases. (5RT 268-269.) The court further confirmed, "And knowing that and understanding that and having discussed it with your lawyer, it's your preference, after getting your advice from counsel, to have them all tried together?" (5RT 269.) Appellant replied, "Yes." (5RT 269.)

During a procedural discussion on whether the escape charge would simply be an added count or if the two cases would be consolidated, the trial court stated, "I'm still going to give you an opportunity, [defense counsel], if you've reflected to not have this tried together, if you want to do that, that's okay with me." (6RT 276.) Defense counsel replied, "Not separate." (6RT 276.) All four charges were thus tried in front of the same jury.[22/]

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22. At one point in his argument that the escape evidence should have been excluded, appellant states, "Appellant was prejudiced by the trial court's denial of his motion to sever trial of the escape charge from that on the murder charges." (AOB 64.) As explained, though, the court never denied appellant's motion to sever the charges. Instead, the court granted the prosecutor's motion to present evidence of the escape. That ruling did not deny appellant's motion to have the escape charge tried separately. Indeed, the prosecutor specifically stated that she was not trying the two cases together. Moreover, from the court's cautious remarks to appellant and defense counsel, it appears the court was going to require that the cases be tried separately until appellant explicitly waived his right to separate jury trials and agreed to try all the charges together.

B. Appellant Forfeited His Equal Protection Claim

Appellant claims that admission of evidence of his escape violated his right to equal protection. (AOB 61, 64.) However, appellant forfeited this claim by failing to specifically object to the escape evidence on that ground at trial. (See *People v. Rogers*, *supra*, 39 Cal.4th at p. 854; see also *People v. Koontz* (2002) 27 Cal.4th 1041, 1076.) Moreover, respondent notes that appellant has failed to provide argument or authority with regard to the claim. Indeed, appellant merely lists the constitutional provision in the heading and conclusion of the argument, without any discussion of its application to appellant's claim that the escape evidence was improperly admitted. (AOB 36-44.) Accordingly appellant's equal protection claim should not be considered. (*People v. Smith*, *supra*, 30 Cal.4th at p. 616, fn. 8; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1340; *People v. Stanley*, *supra*, 10 Cal.4th at p. 793.)

C. The Trial Court Properly Admitted The Escape Evidence

The trial court properly ruled that the escape evidence was admissible under Evidence Code section 352. Evidence Code section 352 gives the trial court discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice. A trial court has "broad discretion" in weighing evidence under Evidence Code section 352. (*People v. Ayala* (2000) 24 Cal.4th 243, 282.) "[A] court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing function under Evidence Code section 352." (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169.) A trial court's decision to admit evidence under Evidence Code section 352 will not be disturbed on appeal absent a showing that the court "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest

miscarriage of justice." (*People v. Geier* (2007) 41 Cal.4th 555, 585, quoting *People v. Brown* (2003) 31 Cal.4th 518, 534, internal quotation marks omitted.)

Here, the trial court specifically indicated that it had performed its balancing function under Evidence Code section 352. (2RT 11.) The trial court properly found the evidence's probative value outweighed any potential prejudice. First, the escape evidence was highly probative of appellant's consciousness of guilt. Indeed, this Court has repeatedly held that evidence of a defendant's attempt to escape custody is admissible as being indicative of the defendant's consciousness of guilt. (*People v. Valdez* (2004) 32 Cal.4th 73, 120; *People v. Kipp* (2001) 26 Cal.4th 1100, 1126; *People v. Box* (2000) 23 Cal.4th 1153, 1205; *People v. Holt* (1984) 37 Cal.3d 436, 455, fn. 11.) Here, there was not just an attempt, but appellant actually escaped custody. Additionally, the timing of appellant's escape was especially indicative of his consciousness of guilt. Appellant spent over a year in custody after being charged with the Friedman murder. It was only after appellant was indicted with the Camacho murder, and numerous special circumstances rendering appellant eligible for the death penalty were alleged, that appellant escaped from custody. (See *People v. Kipp*, *supra*, 26 Cal.4th at p. 1126 [evidence that defendant attempted escape after death penalty was imposed on one murder was admissible at trial on second murder as being probative of consciousness of guilt of second murder].) Further, the escape evidence was highly probative in corroborating the testimony provided by Woodland, who may have been an accomplice. (See *People v. Perry* (1972) 7 Cal.3d 756, 780 [evidence defendant planned escape from custody was admissible to corroborate accomplice's testimony], overruled in part on another ground in *People v. Green* (1980) 27 Cal.3d 1, 28-34.) Thus, the escape evidence was highly probative.

On the other hand, any prejudicial effect of the escape evidence was minimal.

> The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. [A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is prejudicial. The prejudice referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, prejudicial is not synonymous with damaging. [Citation.]

(*People v. Karis*, *supra*, 46 Cal.3d at p. 638, internal quotation marks omitted.) Here, no evidence was presented that appellant engaged in any violence in his escape. (See *People v. Kipp*, *supra*, 26 Cal.4th at p. 1126 [because attempted escape "involved no overt violence," evidence of the attempt "would not so inflame the jurors' emotions as to interfere with their fair and dispassionate assessment of the evidence of defendant's guilt"]; see also *People v. Holt*, *supra*, 37 Cal.3d at p. 455, fn. 11 [evidence that escape attempt involved violence might cause the evidence's prejudicial effect to outweigh its probative value].) In fact, the only person physically injured by appellant's escape was appellant himself. Thus, the evidence did not tend to evoke an emotional bias against appellant.

Appellant offers numerous alternate explanations besides consciousness of guilt for why he may have escaped from custody. (AOB 64.) However, "[t]he existence of alternate explanations for the defendant's conduct goes to the weight, not the admissibility of the evidence." (*People v. Perry*, *supra*, 7 Cal.3d at p. 779.) Indeed, as appellant recognizes (AOB 62), he presented such

alternate explanations to the jury (see, e.g., 23RT 2659-2660).

Because the escape evidence was highly probative and not prejudicial, the trial court properly admitted the evidence under Evidence Code section 352. Appellant nevertheless claims admission of the escape evidence violated his right to due process. However, generally, ordinary application of the rules of evidence do not implicate a defendant's federal constitutional rights. (*People v. Kraft, supra*, 23 Cal.4th at pp. 1035-1036.) In any event, since the evidence here was relevant, there was no due process violation. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70 [112 S.Ct. 475, 116 L.Ed.2d 385] [where a permissible inference can be drawn from evidence, so that the evidence is relevant, there is no due process violation in its admission]; accord, *People v. Steele* (2003) 27 Cal.4th 1230, 1246.) Accordingly, the escape evidence was properly admitted.

D. Any Error Was Harmless

In any event, any error was harmless because it is not reasonably probable appellant would have achieved a more favorable result had the escape evidence been excluded. (See Evid. Code, § 353, subd. (b); *People v. Scheid* (1997) 16 Cal.4th 1, 21 [erroneous admission of evidence is reviewed under *People v. Watson* (1956) 46 Cal.2d 818, 836]; accord, *People v. Earp* (1999) 20 Cal.4th 826, 878.) Other than the escape evidence, there was ample evidence of appellant's guilt on both murders and the robbery. As to the Camacho murder, the evidence established that: appellant had said he did not want Camacho returning to work and taking back his shift; appellant regularly carried to work the type of gun used in the murder; witnesses saw a person matching appellant's description flee the dairy immediately after the shooting; sometime after the murder, appellant told Bermudez, who was leaving the dairy at the time of the shooting, that he saw him at the time of the shooting, asked if Bermudez had seen him, and instructed Bermudez not to speak to anyone about the shooting; and appellant confessed to the murder to different people

on separate occasions. As to the Friedman murder and robbery: Woodland testified that he saw appellant commit the offenses, including taking a bag from Friedman's Jeep and expressing disappointment with the bag's contents; two kilos of cocaine were found in the Jeep in which Friedman was killed; Friedman's bag was found where Woodland said appellant had thrown it out; neighbors testified that they saw the Honda drive away with two occupants; one neighbor testified he was 70 percent sure appellant was the passenger of the Honda; appellant's fingerprint was found in the Honda; bullets and a magazine matching the size of the bullets used in the murder were found in appellant's residence; Janson saw appellant carrying a gun that was the same caliber as that used in the murder; and Janson testified that appellant confessed to these crimes as well.

Further, the trial court instructed the jury that evidence of appellant's escape was insufficient alone to establish appellant's guilt and that the jury could give the escape evidence whatever weight it deserved in determining appellant's guilt on the murders and robbery. (26RT 2940; 2CT 400 [CALJIC No. 2.52 ["Flight After Crime"]].) In light of the substantial evidence of appellant's guilt and the instructions regarding the escape evidence, it is not reasonably probable appellant would have achieved a more favorable result had the escape evidence been excluded. (See *People v. Box*, *supra*, 23 Cal.4th at p. 1205; *People v. Williams* (1988) 44 Cal.3d 1127, 1144.)[23] For the same reasons, any federal constitutional error was harmless beyond a reasonable

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23. In support of appellant's argument that he was prejudiced by the admission of the escape evidence, appellant emphasizes the prosecutor's references to the escape evidence during argument and the amount of evidence on the escape that was presented in the prosecution's case-in-chief. (AOB 62-64.) However, once appellant agreed to try the escape charge with the other charges, he placed on the prosecutor the burden of proving the escape charge to the jury beyond a reasonable doubt. The prosecutor cannot be faulted for sufficiently proving and arguing her case.

doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

VIII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING RETAINED COUNSEL'S MOTION TO BE APPOINTED, AND RETAINED COUNSEL ABANDONED HIS ALTERNATIVE MOTION TO WITHDRAW ABSENT APPOINTMENT

Appellant claims his constitutional rights were violated by the trial court's failure to appoint appellant's retained counsel, Robert Beswick, or allow Beswick to withdraw and appoint other counsel. Appellant contends the court's refusal to appoint Beswick "warrants a presumption of prejudice due to state interference with the right to counsel." (AOB 65-88.) First, Beswick abandoned his motion to withdraw by failing to renew it in the trial court as instructed by another judge who heard Beswick's confidential pretrial motions. Further, the trial court did not abuse its discretion in denying Beswick's motion to be appointed because Beswick was paid substantial money to represent appellant and there was no showing that Beswick's appointment was necessary to ensure appellant received effective representation. In any event, appellant has failed to show he was prejudiced by the court's denial of Beswick's motion.

A. Procedural Background

After appellant was arrested on the Friedman murder in February 1996, he retained private counsel Tom Kontos. (See 2Supp. CT 19-20.) Sometime prior to June 21, 1996, appellant retained Robert Beswick. (1RT A7.) On July 17, 1996, upon appellant's request, Kontos was relieved and Beswick was substituted as retained counsel for appellant. (1RT A11-A12.) Thereafter, appellant was indicted on both the Friedman and Camacho murders and charged with the escape from custody. (1CT 255-257; 4Supp. CT 1-4; 1RT A56.)

On August 13, 1997, Beswick executed a motion for appointment of additional counsel pursuant to section 987.[24] (2Supp. 2CT 343-347.) In a declaration attached to the motion, Beswick asserted:

> Counsel was privately retained, however, the fee was substantially less than would be necessary to defend against a capital charge involving two separate murders. Counsel is a sole practitioner and as such cannot devote the necessary time needed to question and investigate the facts and circumstances surrounding this case without compromising and prejudicing the remaining practice. Moreover, because of the seriousness of the charge and the penalty it is imperative that every aspect of the case be analyzed legally to insure that the defendant is given the full protection of the California and United States Constitutions.

(2Supp. 2CT 345.)

The motion for appointment of additional counsel was filed on October 20, 1997. (2Supp. 2CT 361-366.) On October 21, 1997, Superior Court Judge J. Stephen Czuleger filed an order denying Beswick's request. The order stated, "The Court has read and considered defense counsel's Ex-Parte Application for Appointment of Second [C]ounsel and it is denied. The application fails to provide any specific or compelling reasons requiring the assistance of additional counsel. [Citations.]" (2Supp. 2CT 367, 370.)

On November 20, 1997, Beswick filed a motion for reconsideration of the court's denial of his motion for appointment of additional counsel. (2Supp. 2CT 376-382A.) The motion emphasized that the case involved two murder charges, each of which "is an independent and distinct fact pattern with its own

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24. Section 987, subdivision (d) states in pertinent part, "In a capital case, the court may appoint an additional attorney as a cocounsel upon a written request of the first attorney appointed."

set of players, facts and circumstances." (2Supp. 2CT 378.) The motion further asserted that although Beswick was retained to represent appellant against the first murder charge, Beswick was not aware more charges would be brought. The motion also alleged that Beswick had not been paid for his representation. (2Supp. 2CT 378.) The motion concluded, "Funds should be made available in order to retain additional counsel in addition to appointing present counsel as he is not receiving compensation from either the defendant or his family. In the alternative counsel should be allowed to withdraw from the case and the appropriate public defender be charged with the duty of representing the defendant." (2Supp. 2CT 378-379.)

In the declaration attached to the motion, Beswick asserted:

> Despite being retained as private counsel defendant does not have the funds to pay my fees. I received a small retainer fee at the outset of this case. At the time I was retained, however, I was neither aware of the second murder nor was I aware that the District Attorney's office would be filing a second murder charge and allege special circumstances. The defendant is indigent and he has no resources with which to pay me. His family does not have any money to pay me. Consequently, I have not been paid and will not be paid. To continue representing the defendant on my own will be ruinous to my practice in that I will not be able to devote my time to my other clients and I will not be able to produce income for my firm. Additional counsel will allow me to continue my practice as well as insure that the defendant is well represented.

(2Supp. 2CT 381.) Beswick also stated, "Given the complexity of the case and the indigence of the defendant I feel that it is appropriate that not only should additional counsel be appointed but also that I should be appointed by the court. The burden of representing the defendant who is indigent in this matter without additional counsel and without appointment will be overwhelming. There is a

genuine need for additional counsel as well as a genuine need for the court to appoint me." (2Supp. 2CT 381-382.) The declaration concluded, "Should the court not feel that there is a need for additional counsel and for appointment of myself, then I respectfully request that the court allow me to withdraw and that a public defender take over representation." (2Supp. 2CT 382.)

On November 20, 1997, Judge Czuleger filed a Second Order Denying Application for Second Counsel. The order stated:

> The Court has read and considered defendant's Motion for Reconsideration of Court's Denial of Motion for Appointment of [Second] Counsel. It is denied.
>
> For the reasons stated in the Court's order of October 21, 1997, counsel for defendant has failed to demonstrate good cause for appointment of a second counsel. The case is not a complex one. Counsel's contentions that there are two murders, counsel is a sole practitioner, he has not been fully paid, he has not represented a defendant in a death penalty case and that "a second attorney may lend important assistance with preparing for trial or presenting the case" are not sufficient grounds for appointment of second counsel.
>
> Counsel's alternative request to be relieved from the case and the Public Defender's Office appointed, must be brought before the bench officer who is currently hearing this matter and is therefore denied without prejudice.

(2Supp. 2CT 375.)

On December 11, 1997, Beswick told the trial court, Superior Court Judge Michael Harwin, that Judge Czuleger had denied his motion for additional counsel and that the order had instructed Beswick to make his alternative request for appointment to Judge Harwin. Beswick did not inform the trial court of his alternative request to Judge Czuleger that he be permitted

to withdraw from the case absent appointment. (1RT A132-A133.) Judge Harwin indicated that he would consider the motion whenever Beswick made it. (1RT A133.) Judge Harwin ordered Beswick to continue preparing for trial on his own while the motion was pending. (1RT A133.) Beswick responded, "Definitely and I am; absolutely." (1RT A133.)

On January 8, 1998, Beswick filed with Judge Harwin an application to be appointed as counsel. (2Supp. 2CT 385-390.) The motion alleged:

> Counsel was originally retained to represent Mr. Carrasco in the initial murder charge which at the time was not combined with a special circumstance allegation. At that point counsel was paid an initial retainer fee. It was agreed to by and between the parties that defendant would arrange for further payment of fees during the course of the representation. Notwithstanding the fee agreement counsel was never paid any additional fees despite the continued representation. Counsel has not been paid in almost two years. Counsel has attempted to get defendant's family to contribute towards fees, however, the family does not have the financial resources to contribute anything towards attorneys fees.
>
> The defendant himself has a wife and two children; consequently, any resources available goes towards the children.

(2Supp. 2CT 386-387; see also 2Supp. 2CT 388.) In the declaration attached to the motion, Beswick stated, "Essentially I [am] to remove myself from my practice of which I am the sole practitioner. To work for the period of time required without compensation would prove disastrous to my practice and my employee. I have already expended considerable time in the preparation of the defense without compensation. I cannot continue to represent Mr. Carrasco for the duration of the trial without compensation. I feel that to do so would not only cause me great financial hardship but that it would also impact the

defendant in that I would be very hard pressed to provide the representation needed while at the same time trying to save my practice." (2Supp. 2CT 388.) Beswick did not ask the trial court to allow him to withdraw from the case if he was not appointed.

On January 13, 1998, Judge Harwin suggested that Beswick file an amendment to his motion, explaining his "own personal financial arrangement." (1RT A179.) On January 16, 1998, Beswick filed a supplemental declaration in support of the motion. (2Supp. 2CT 392-395.) In the declaration, Beswick explained that sometime in 1996, he was approached by appellant's sister, who was a secretary in Beswick's suite and who Beswick had known for many years. Appellant's sister indicated that appellant was represented by counsel but that she and her family were interested in retaining Beswick. (2Supp. 2CT 392.) Beswick explained:

> I met with Mr. Carrasco's family and discussed the case. Initially the case was rather straight forward with witness statements which at best were inconclusive. The family was at this point desperate and persuaded me to represent Mr. Carrasco. Given my familiarity with the family and the nature of the case I agreed to represent Mr. Carrasco for a reduced fee. Neither Mr. Carrasco nor his family had the financial resources to pay the type of fees attendant to representation in a murder case. The family signed a retainer indicating they would pay my fees and any costs as they were incurred. I entered into the agreement based on that representation.

(2Supp. 2CT 392-393.) Beswick specified that he was paid a $15,000 retainer fee. (2Supp. 2CT 393.)

Beswick further alleged:

> After this agreement was signed several things subsequently happened which prevented that family from fulfilling their obligation to pay my

fees. The family suffered from financial hardship and were thus unable to make any further payments towards my fee. Mr. Carrasco then informed me that other friends of his were going to contribute towards the fee. After many months and telephone calls it soon became apparent that no one was going to help in paying the attorneys fees.

(2Supp. 2CT 393.) Beswick emphasized the complexity of the case, including the fact that contrary to the state of evidence when he was retained, now the codefendant in the first murder case had agreed to testify against appellant and a second murder charge and escape charge had been filed. (2Supp. 2CT 393.) Beswick claimed, "These turn of events were not foreseeable at the time I entered into the fee agreement." (2Supp. 2CT 393.) Beswick also stated that the trial was estimated to take two months and that his practice could not survive two months without income. (2Supp. 2CT 394.) Beswick concluded, "I am extremely concerned that my involvement in this case will have a devastating impact on my practice. Getting appointed will allow me to continue my practice and continue representing Mr. Carrasco without the unnecessary pressure of worrying how my practice is going to survive." (2Supp. 2CT 394.)

On January 28, 1998, Judge Harwin ruled on Beswick's motion outside the prosecutor's presence:

THE COURT: I'm afraid I'm not going to be able to grant your request. I want you to know I did consider it, having been in private practice myself, I know what the drain is. [¶] However, the bottom line is, you did get retained and you had been paid substantial monies, even - - if not all you would have wanted, I did run your request by Judge Reid as well. [¶] So anything further?

[DEFENSE COUNSEL]: I appreciate the court's consideration. Obviously, my stance was it was a single murder case, now it's turned into a second murder case death penalty and escape. [¶] As I tried to

bring to the court's attention, I've got much more than I bargained for and much longer trial [than] I anticipated.

THE COURT: I understand. I don't, in good conscience, see how I can bill the county for that.

(Formerly sealed portion of 2RT 3.) In the motion and declarations submitted to Judge Harwin, Beswick did not request to withdraw from the case and have alternate counsel appointed. (2Supp. 2CT 385-390, 392-395.) Beswick continued to represent appellant throughout the trial.

After trial, at the evidentiary hearing on appellant's new trial motion, Beswick testified that he did not move Judge Harwin to allow him to withdraw from the case absent appointment, although Judge Czuleger had directed him to bring the alternative motion before Judge Harwin. (30CRT 3296.)

B. Beswick Abandoned His Motion To Withdraw And Have Other Counsel Appointed

Appellant's claim regarding the trial court's failure to relieve Beswick and appoint other counsel fails because Beswick abandoned his motion to withdraw by failing to renew it in the trial court. As explained, Beswick filed motions for the appointment of second counsel with Judge Czuleger. (2Supp. 2CT 343-347, 361-366, 376-382A.) In one of those motions, Beswick also asked that he be appointed or, in the alternative, that he be permitted to withdraw and other counsel appointed. (2Supp. 2CT 378-379, 381-382.) Judge Czuleger denied the motion to withdraw without prejudice, instructing Beswick to bring the motion before Judge Harwin, who would preside over the trial. (2Supp. 2CT 375.) Judge Czuleger properly ordered Beswick to bring his motion to withdraw before the trial court. While confidential motions must be heard by a judge other than the one who will preside over the trial (§ 987.9, subd. (a) [requests for investigative and expert funds in capital cases are confidential and must be heard by a judge other than the judge who will preside

over the trial]; *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430 [motions for second counsel and hearings on such motions are confidential]), other motions such as motions by counsel to withdraw, should be raised in the trial court, which has the discretion to grant or deny such motions (see *People v. Sanchez* (1995) 12 Cal.4th 1, 37 ["whether to grant or deny a motion by an attorney to withdraw is within the sound discretion of the *trial court*"], italics added).

Subsequent to Judge Czuleger's order, Beswick did file a motion for Judge Harwin to appoint him. (2Supp. 2CT 385-390, 392-395.) However, Beswick never requested that Judge Harwin relieve him and appoint other counsel. (2Supp. 2CT 385-390, 392-395; see 30CRT 3296.) Thus, there is no final ruling before this Court regarding Beswick's motion to withdraw. Because Beswick never renewed his withdrawal motion in the trial court, appellant may not complain on appeal that the trial court erred in failing to relieve Beswick and appoint other counsel. (See *People v. Lancaster* (2007) 41 Cal.4th 50, 70-71 [defendant was not permitted to argue on appeal that the trial court erred in not appointing particular private counsel when neither defendant nor counsel ever properly requested such appointment].)

C. The Trial Court Did Not Abuse Its Discretion In Denying Beswick's Motion For Appointment

> A criminal defendant's right to counsel is guaranteed by both the federal Constitution's Sixth Amendment (applicable to the states through the Fourteenth Amendment), and by the California Constitution article I, section 15. The essential aim is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers. [Citation.]

(*People v. Cole, supra*, 33 Cal.4th at p. 1184, internal quotation marks omitted.)

"On appeal, a trial court's orders concerning the appointment of counsel for an indigent defendant are reviewed for an abuse of discretion. [Citations.] A court abuses its discretion when it acts unreasonably under the circumstances of the particular case." (*Id.* at pp. 1184-1185.)

Here, the trial court did not abuse its discretion in declining to appoint Beswick. As the trial court stated, Beswick was paid "substantial monies" when retained by appellant. (Formerly sealed portion of 2RT 3.) Although Beswick informed the trial court that he had not been paid since receiving the retainer fee, Beswick never told the trial court that he wished to withdraw from the case if he was not appointed. In fact, Beswick acknowledged in his testimony at the motion for new trial that he never made a motion in the trial court to be relieved, after being invited to do so by Judge Czuleger. It thus appears that Beswick was simply dissatisfied with appellant's payment. However, any such dissatisfaction or dispute was not a basis for the trial court to appoint Beswick. (See *People v. Jones* (1991) 53 Cal.3d 1115, 1137.) This is especially true here, where counsel was aware of appellant's financial status and accepted the case for a reduced fee. (2Supp. 2CT 393.) Accordingly, the trial court did not abuse its discretion in denying Beswick's motion for appointment.

The Court of Appeal case of *People v. Castillo* (1991) 233 Cal.App.3d 36, is instructive. *Castillo* held, "[A] defendant in a criminal proceeding, who becomes indigent after retaining defense counsel, is not necessarily denied effective representation by reason of a trial court decision not to accord appointed status to his counsel in order to assure that the attorney is paid . . . in the context of attorneys who are willing to serve, and clients who do not seek their discharge or replacement." (*Id.* at p. 42.) In *Castillo*, the defendants' retained counsel requested appointment because defendants had become indigent. Defendants wished to retain their respective counsel. The trial court

denied counsel's requests. (*Id.* at pp. 52-54.) The Court of Appeal found that the failure to appoint counsel did not necessarily create a conflict of interest that violated defendants' rights to the effective assistance of counsel. (*Id.* at p. 52.) In making this finding, the Court of Appeal emphasized that "[n]either attorney sought to walk away from the case, as he might have done by asking that he be relieved *unless* he received a section 987, subdivision (a) appointment." (*Id.* at p. 56.)

Likewise, here, appellant never personally requested to discharge Beswick, and he thereby evidenced his desire to retain Beswick's representation. Beswick never asked the trial court to withdraw unless he was appointed. Further, Beswick continued to prepare for trial while his motion was pending, and he continued to represent appellant throughout trial even without appointment. Under these circumstances, as in *Castillo*, the trial court did not abuse its discretion or violate appellant's constitutional rights by declining to appoint retained counsel.

D. Appellant Has Failed To Show He Was Prejudiced By The Denial Of Beswick's Motion For Appointment

In any event, even if the trial court abused its discretion by declining to appoint Beswick, the error was harmless. Appellant claims the trial court's denial of Beswick's request amounted to state interference with appellant's right to the effective assistance of counsel, warranting a presumption of prejudice and per se reversal. (AOB 65, 76-84.) However, the cases appellant relies upon are inapposite. (AOB 83.) Those cases ordered reversal without a showing of prejudice because the defendants' federal constitutional rights were necessarily violated in a manner by which prejudice could not be ascertained or proven. (See, e.g., *Waller v. Georgia* (1984) 467 U.S. 39 [104 S.Ct. 2210, 81 L.Ed.2d 31] [violation of right to public trial]; *Holloway v. Arkansas* (1978) 435 U.S. 475 [98 S.Ct. 1173, 55 L.Ed.2d 426] [right to assistance of counsel

violated by denial of defendants' motions for separate counsel in light of appointed attorney's indication that representing all codefendants would create a conflict of interest]; *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562] [right to conduct own defense violated by denial of motion for self-representation]; *Gideon v. Wainwright* (1963) 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed.2d 799] [indigent defendant's right to appointed counsel in all criminal proceedings violated by denial of request for appointed counsel]; *Payne v. Arkansas* (1958) 356 U.S. 560 [78 S.Ct. 844, 2 L.Ed.2d 975] [right to due process violated by admission of confession obtained by coercion]; *Tumey v. Ohio* (1927) 273 U.S. 510 [47 S.Ct. 437, 71 L.Ed. 749] [right to due process violated when defendant's trial was presided over by a judge who would be paid for his service only if defendant was convicted].)

Here, appellant was represented at every critical stage of the proceedings. Moreover, the trial court never denied appellant his counsel of choice, as appellant himself never requested that Beswick be discharged, permitted to withdraw, or appointed, and Beswick continued to represent appellant at trial even without appointment. Thus, appellant's constitutional rights were not violated. (See *People v. Jones* (2004) 33 Cal.4th 234, 244 [abuse of discretion in failing to appoint requested counsel does not violate defendant's right to counsel]; *People v. Castillo*, *supra*, 233 Cal.App.3d at pp. 57-58 [because defendants continued to trial with counsel of their choice, any error in trial court's denial of retained counsel's motions to be appointed was "moot unless it can be shown to have resulted in prejudice" to defendants "in the representation they actually received at trial"]; *Id.* at p. 63 [per se reversal standard did not apply where defendants wanted to keep retained attorneys, retained attorneys did not request to be removed but only to be appointed, and defendants did not express dissatisfaction with counsel at trial].) Additionally, prejudice in this context can be ascertained by determining whether appellant

received ineffective assistance of counsel due to the trial court's failure to appoint Beswick. In this context, prejudice must be shown, not presumed.

Appellant has not shown he was prejudiced by the failure to appoint Beswick. While Beswick was not appointed, he was granted investigative funds, and an investigator was appointed to assist him. (See, e.g., 1RT A112, A130.) Beswick assured the trial court that he was preparing to go to trial even if his motion was denied. (1RT A133, A179.) Further, although Beswick claimed financial hardship in his request for appointment, once that request was denied, he never renewed his request to withdraw, and never indicated that he was overwhelmed or unable to competently represent appellant due to a lack of funds. Beswick also did not request a continuance when the trial court denied his motion for appointment. (Formerly sealed portion of 2RT 3.) In fact, at the lengthy evidentiary hearing on appellant's new trial motion, Beswick never testified that his actions during his representation of appellant were dictated by any lack of money or resources. Beswick consistently testified that the decisions he made in representing appellant were tactical. (See, e.g., 30CRT 3327-3328, 3330; 30GRT 3526-3534, 3535-3536.) There is no reason to believe Beswick's conduct would have been any different had he been appointed.

Moreover, it is clear from the record that Beswick competently represented appellant. Each of appellant's claims of ineffective assistance of counsel (see AOB 85-87), are fully addressed in Arguments X and XI. In sum, Beswick competently represented appellant during the guilt phase by: conducting an investigation into the facts underlying the charges, including locating witnesses who did not identify appellant as the shooter in the Friedman murder; conducting an investigation into the prosecution witnesses and obtaining impeachment evidence; making an opening statement; thoroughly cross-examining the prosecution witnesses, including impeaching some

witnesses; presenting numerous defense witnesses; giving a lengthy closing argument; and overall presenting a comprehensive theory of defense to both murders and the robbery. Beswick also artfully used appellant's admission of the escape charge to gain sympathy due to appellant's plight in custody, and to support the defense theory that appellant was a thoughtful, deliberate person who would not have committed the careless, rash robbery and murders. At the penalty phase, Beswick competently represented appellant by: conducting an investigation into appellant's family, relationships, upbringing, and character; making an opening statement; cross-examining each of the prosecution's witnesses; presenting defense witnesses who described appellant's family, relationships, upbringing, and good character; and delivering a closing argument. Appellant has failed to show that Beswick's representation was deficient or that appellant was prejudiced by any of Beswick's conduct. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674].) Accordingly, appellant has failed to show he was prejudiced by the trial court's denial of Beswick's request to be appointed.

IX.

JUDGE CZULEGER DID NOT ABUSE HIS DISCRETION IN DENYING RETAINED COUNSEL'S MOTIONS FOR THE APPOINTMENT OF ADDITIONAL COUNSEL

Appellant asserts Judge Czuleger denied him the effective assistance of counsel by denying defense counsel's motions for the appointment of additional counsel. (AOB 88-154.) Respondent disagrees. Judge Czuleger acted well within his discretion in denying the motions. In any event, any error was harmless because Beswick did not render ineffective assistance.

A. The Denial Of A Request To Appoint Additional Counsel Is Reviewed For An Abuse Of Discretion

Section 987, subdivision (d), states:

> In a capital case, the court may appoint an additional attorney as a cocounsel upon a written request of the first attorney appointed. The request shall be supported by an affidavit of the first attorney setting forth in detail the reasons why a second attorney should be appointed. Any affidavit filed with the court shall be confidential and privileged. The court shall appoint a second attorney when it is convinced by the reasons stated in the affidavit that the appointment is necessary to provide the defendant with effective representation. If the request is denied, the court shall state on the record its reasons for the denial of the request.

(See *Keenan v. Superior Court*, *supra*, 31 Cal.3d at p. 430.) A denial of a motion for cocounsel pursuant to section 987, subdivision (d), is reviewed for an abuse of discretion, and a court will not be found to have abused its discretion unless "it exercised its discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice." (*People v. Lancaster*, *supra*, 41 Cal.4th at p. 71, quoting *People v. Roldan* (2005) 35 Cal.4th 646, 688, internal quote marks omitted; accord, *People v. Alfaro* (2007) 41 Cal.4th 1277, 1303.)

> The right of a capital defendant to the resources necessary for a full defense must be carefully considered, and the demands of pretrial preparation in a complex case weigh in favor of appointing an additional attorney. Nevertheless, it is the defendant's burden to make a specific showing of necessity. The appointment of a second counsel in a capital case is not an absolute right protected by either the state or the federal Constitution.

(*People v. Lancaster*, *supra*, 41 Cal.4th at p. 71, internal citations and quote marks omitted.)

B. Beswick's Motions For Additional Counsel Were Properly Denied

As explained in the previous argument (Arg. VIII. A.), appellant's retained counsel, Robert Beswick, filed two motions pursuant to section 987, subdivision (d), requesting that additional counsel be appointed to assist him in the trial (2Supp. 2CT 343-347, 376-382A). Both motions were properly denied. (2Supp. 2CT 367, 370, 375.)[25/]

As Judge Czuleger found, this case was not especially complex. (2Supp. 2CT 375.) The prosecution's case was largely based on eyewitness testimony, including that of a former codefendant, and on appellant's admissions. (See *People v. Roldan*, *supra*, 35 Cal.4th at p. 688 [holding that the case was "quite straightforward" because eyewitnesses had identified the defendant and two witnesses were to testify to the defendant's "damaging and incriminating admissions"].) The only anticipated medical testimony--that each of the victims

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25. Respondent notes that section 987, subdivision (d), specifically provides for the appointment of cocounsel upon a written request of *appointed counsel*. It does not provide for the appointment of cocounsel upon a request of *retained counsel*. Because Beswick was retained, he did not come within the express language of section 987, subdivision (d), providing for the appointment of cocounsel. (See *People v. Lancaster*, *supra*, 41 Cal.4th at p. 72, fn. 8 [rejecting claim that equal protection required appointment of at least one counsel at public expense for indigent defendant]; *People v. Padilla* (1995) 11 Cal.4th 891, 928 [explaining that section 1095 confers upon a defendant the right to have two retained attorneys argue the case, whereas section 987, subdivision (d), gives the trial court discretion to appoint cocounsel upon a written request by the first appointed counsel], overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; see also *People v. Johnson* (2006) 38 Cal.4th 717, 723-724 [if statutory language is clear and unambiguous, the plain language of the statute establishes the Legislature's intent].)

suffered fatal gunshot wounds--was not elaborate or contested. The only inculpatory forensic evidence dealt with a fingerprint and was not unduly complicated. The escape charge did not require extensive investigation or preparation. In fact, Beswick's strategy was not to contest the escape evidence, but use it to garner sympathy regarding appellant's plight in custody and to show that appellant was calculating and would not have committed the seemingly rashly committed murders. No prior convictions were alleged, and the special circumstance allegations dealt solely with the facts of the charged crimes. The case did not involve an inordinate number of witnesses, any codefendants, or any complex scientific evidence such as DNA. Thus, Judge Czuleger properly found that the case was not unduly complex.

Additionally, as Judge Czuleger found, the fact that Beswick had not tried a death penalty case was an insufficient basis to grant the requests for cocounsel. (See *People v. Wright* (1990) 52 Cal.3d 367, 412 ["the circumstance that counsel had not yet tried a death penalty case does not inescapably lead to a conclusion that appointment of second counsel was warranted here, absent some evidence that he was so inexperienced he could not provide effective assistance"]; see also *People v. Lancaster*, *supra*, 41 Cal.4th at p. 72 [noting that inexperience on the part of retained counsel does not necessarily justify appointment of cocounsel].) In fact, Beswick appeared to have a good deal of experience trying serious criminal cases. (See 2Supp. 2CT 346 ["Although counsel has represented defendants in numerous capital cases [presumably meaning special circumstance cases] he has never represented a capital case involving the death penalty."], 380 ["The majority of my practice is devoted to the practice of criminal law"].) Moreover, when Beswick made his first motion for second counsel, he had been representing appellant for over one year in the Friedman murder case and over five months in the Camacho murder case. Beswick was also granted investigative funds,

and an investigator was appointed to assist him. (See, e.g., 1RT A112, A130.) Thus, Judge Czuleger properly found Beswick's alleged inexperience was an improper basis for appointing second counsel.

Further, as Judge Czuleger found, the fact that Beswick was a solo practitioner and had not been paid were not sufficient grounds to grant the requests for cocounsel. (2Supp. 2CT 375.) Such assertions did not show that cocounsel was necessary to appellant's defense, only that cocounsel would be convenient and beneficial to Beswick's practice. Indeed, Beswick significantly focused his requests in terms of convenience with respect to his practice, not in terms of necessity with respect to appellant's rights. (See, e.g., 2Supp. 2CT 345 ["Counsel is a sole practitioner and as such cannot devote the necessary time needed to question and investigate the facts and circumstances surrounding this case without compromising and prejudicing the remaining practice."], 378 [emphasizing that Beswick is "the sole financial resource for the firm" and was not being compensated], 380-381 [twice stating that "additional counsel would be useful"], 381 ["To continue representing the defendant on my own will be ruinous to my practice in that I will not be able to devote my time to my other clients and I will not be able to produce income for my firm. Additional counsel will allow me to continue my practice as well as insure that the defendant is well represented."].)

In other words, regarding the actual defense of appellant, Beswick's requests "did not articulate any specific need for the services of second counsel . . . over and above the abstract desire for assistance." (*People v. Roldan*, *supra*, 35 Cal.4th at p. 688.) Accordingly, Judge Czuleger did not abuse his discretion in denying Beswick's motions for cocounsel. (See *Id.* at pp. 687-688 [no abuse of discretion in denying motions for cocounsel, which were based on appointed counsel's representations that: the case was complicated due to the number of witnesses who would testify; he needed to interview witnesses

personally instead of through an investigator; there was a high probability that the case would go to penalty phase; and he had been acting as second counsel in another capital case]; see also *People v. Lucky* (1988) 45 Cal.3d 259, 280 ["abstract assertion that consolidation in capital cases inherently imposes an undue burden on defense counsel cannot be used as a substitute for a showing of genuine need"].)

Appellant's comparison of this case to *Keenan v. Superior Court*, *supra*, 31 Cal.3d at page 424 (AOB 100-101), is unsound. The defendant in *Keenan* showed a genuine need for the appointment of second counsel as follows: the seven-count case was legally and factually complex; first appointed counsel anticipated having to interview 120 witnesses; counsel also anticipated extensive and complicated scientific and psychiatric testimony, which would have required an "extraordinary" amount of preparation; the defendant was charged in five other pending, unrelated criminal cases, and the prosecution planned to introduce evidence relating to all of the charges; the trial date was set seven weeks after first counsel's appointment in the case, despite his protests that he could not be prepared within that time; and first counsel was planning on filing extensive pretrial motions. (*Keenan*, *supra*, 31 Cal.3d at pp. 432-434.)

Here, on the other hand: Beswick was retained, not appointed; as explained, the case was not especially complex; Beswick anticipated having to interview at most 60 witnesses (2Supp. 2CT 380); while Beswick stated in his first request that the case would "involve extensive investigation, forensic work, and the use of experts" (2Supp. 2CT 345), he only specified that an inspection of the Honda would be required (2Supp. 2CT 345), and investigatory and expert funds were granted to assist Beswick (1RT A112, A130); in Beswick's second request, he merely stated that additional counsel "would be useful" in organizing information gathered from witnesses, his investigator, and a forensic expert (2Supp. 2CT 380); the escape evidence, which was the only evidence

relating to charges other than those involved in the capital case, was not complicated; and at the time Beswick filed his first motion for second counsel, a trial date had not yet been set (see 1RT A104), and Beswick had been representing appellant for over one year. Thus, this case is not comparable to *Keenan*.

In light of the lack of complexity of this case, the time Beswick had to prepare for the case, and Beswick's failure to state an actual need for cocounsel to protect appellant's rights, as opposed to a mere desire for assistance to avoid financial difficulty in Beswick's practice, Judge Czuleger here did not abuse his discretion in denying Beswick's motions.

C. Any Error Was Harmless

Regardless, any error was harmless because it is not reasonably probable appellant would have achieved a more favorable result had second counsel been appointed. (See *People v. Williams* (2006) 40 Cal.4th 287, 300-301 [appointment of second counsel in a capital case is not an absolute right, so error in failing to appoint second counsel is reviewed under *People v. Watson*, *supra*, 46 Cal.2d at p. 836, for whether it is reasonably probable the defendant would have achieved a more favorable result had second counsel been appointed]; accord, *People v. Clark* (1993) 5 Cal.4th 950, 997, fn. 22.) While Beswick's motions were pending, he indicated that he was preparing for trial on his own. (1RT A133, A179.) By the time of jury selection, which commenced February 2, 1998 (2RT 11-12; 2CT 301), Beswick had represented appellant for over 18 months on the Friedman murder, and approximately 11 months on the Camacho murder, which was ample time to thoroughly investigate the charges and prepare for trial. Indeed, Beswick did not request a continuance or indicate that he was unprepared in any way. Additionally, appellant never complained about Beswick's representation until after the jury returned verdicts of death. Indeed, as will be fully explained in Arguments X.

and XI., the record shows that Beswick competently represented appellant. (See *People v. Williams*, *supra*, 40 Cal.4th at pp. 301-302 [no prejudice in denying motion to appoint second counsel because first counsel was not ineffective]; see also *People v. Alfaro*, *supra*, 41 Cal.4th at p. 1304 [rejecting claim of ineffective assistance of counsel in failing to request second counsel because the record did not show that counsel was overwhelmed or rendered ineffective assistance]; *People v. Anderson* (2001) 25 Cal.4th 543, 598 [no prejudice in denying motion to appoint second counsel because, although absence of mitigating character and background evidence at penalty phase was "troubling," record offered no basis to conclude that such absence was a result of the failure to obtain second counsel].) Moreover, at the lengthy evidentiary hearing held on appellant's new trial motion, Beswick never testified that the lack of second counsel prevented him from performing any task or inhibited his representation of appellant in any way.

Despite Beswick's efforts, the evidence against appellant was strong. With regard to the Camacho murder, various witnesses testified that: appellant did not want Camacho to return to work and take back his shift; appellant regularly carried a gun the same caliber as that used to kill Camacho; witnesses saw a person matching appellant's description flee the dairy immediately after the shootings; and appellant admitted murdering Camacho. With regard to the Friedman murder and robbery: Woodland testified that he drove appellant to the murder scene and witnessed appellant shoot Friedman and take his bag; the cocaine found in Friedman's Jeep and Friedman's bag, found where Woodland said appellant had thrown it out, corroborated Woodland's testimony; appellant's fingerprint was found in the Honda used in the murder; a neighbor identified appellant as an occupant of the Honda, with 70 percent certainty; appellant had been seen carrying a gun the same caliber as that used in the murder; and appellant again admitted to at least one witness that he committed

the killing. Appellant admitted the escape.

Furthermore, the substantial aggravating evidence presented during the penalty phase solidified the death verdict. The prosecution showed that the victims' families had been greatly affected by the murders and that appellant had threatened a coworker with a gun before committing the charged murders. Appellant then testified without admitting his guilt, which he had denied when he testified during the guilt phase. Under these circumstances, it is not reasonably probable appellant would have achieved a more favorable result had second counsel been appointed. Accordingly, any error in failing to appoint second counsel was harmless.

X.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S NEW TRIAL MOTION BECAUSE APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE

Appellant alleges defense counsel rendered ineffective assistance during the guilt phase, and the trial court therefore erred in denying appellant's new trial motion on the ground of ineffective assistance of counsel. (AOB 154-218.) Respondent submits that defense counsel competently represented appellant and that appellant was not prejudiced by any of counsel's acts or omissions. Thus, the trial court properly denied appellant's new trial motion.

A. Procedural Backgound And Evidence Presented At The Hearing On Appellant's New Trial Motion

After the jury reached its verdicts of death on March 27, 1998, Beswick filed a motion for new trial on the ground that he provided appellant with ineffective assistance. Specifically, Beswick alleged that because his request for cocounsel was denied, he "only met with the defendant a few times prior to

trial." (2CT 529-535.)[26] Appellant thereafter retained William Pitman, who filed a "partial" new trial motion on June 19, 1998, on the ground that Beswick provided ineffective assistance during the penalty phase of the trial. (2CT 544; 3CT 546-592.)[27] On August 3, 1998, Pitman filed another motion for new trial, based partially on the ground that Beswick provided ineffective assistance during the guilt phase. (3CT 624-659.) The prosecutor filed oppositions to Pitman's motions. (3CT 601-610, 667-676.)

On September 17, 1998, appellant filed a declaration in support of the new trial motion. In the declaration, appellant claimed that he first met Beswick the day Beswick substituted in as attorney of record on the case. Appellant claimed that Beswick only visited him twice in custody, for a total of 10 minutes. Appellant stated that he also had brief meetings with Beswick in the lockup facilities of the courthouse on days they had court appearances. At these meetings, they did not discuss the facts of the case or appellant's background. Appellant complained that Beswick never discussed trial strategy with him and did not prepare him for testifying. Appellant asserted that he never met with a defense investigator, psychologist, psychiatrist, or other expert. Appellant also complained that Beswick never reviewed the police reports with appellant or showed him photographs or other evidence. (3CT 721-723.)

An evidentiary hearing on the new trial motion began September 17,

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26. The motion was also based on arguments that the guilt verdicts were not supported by sufficient evidence and the death penalty is unconstitutional. (2CT 529-535.) Beswick also filed a motion to strike the special circumstance findings and reduce the penalty (2CT 523-528), and a motion to reduce the offense for lack of proportionality because appellant's original codefendant, Woodland, was given a lighter sentence (2CT 536-543).

27. Unsigned declarations attached to Pitman's motion for new trial purported to be from appellant's mother, sister, and wife. The declarations were generally consistent with the testimony given by those individuals at the evidentiary hearing on the motion, which is detailed below. (3CT 573-578.)

1998. (3CT 731.) The hearing was conducted on at least six court dates, spanning almost five months. The hearing concluded on February 5, 1999. (3CT 732-734, 739-742, 766; 30FRT 3474-3479.)[28] The following is the evidence adduced at the hearing.

1. Defense Evidence

a. Robert Beswick

By the time of the evidentiary hearing, Beswick had been an attorney for almost 20 years. (30CRT 3308.) When Beswick first began representing appellant, the case involved only the Friedman charge. Woodland was charged as appellant's codefendant. Beswick spoke with Woodland's counsel on multiple occasions, discussing their respective defense strategies. Beswick also repeatedly met with the deputy district attorney prosecuting the case in an attempt to negotiate a disposition. (30CRT 3310-3311.)

Appellant's trial was Beswick's first death penalty trial. However, Beswick had assisted lead counsel in a death penalty case in the past. (30CRT 3257-3259.) Also, Beswick had tried numerous criminal cases, including murder cases, most involving complex hardcore gang issues. (30CRT 3308.) In preparation for appellant's case, Beswick reviewed recent case law and other literature on trying capital cases, including a Continuing Legal Education syllabus. (30CRT 3277.)

Beswick filed requests to be appointed in the case and to have second counsel appointed, but his requests were denied. (30CRT 3293-3295.) Beswick also filed a motion to sever the escape charge from the murder charges. (30CRT 3315.) Beswick further filed motions for discovery, for

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28. The reporter's transcript consists of volumes one through 30, then 30B through 30J. Thus, "30FRT" refers to volume 30F of the transcript. Respondent will cite to the transcripts in this manner throughout.

sanctions as a result of not receiving discovery in a timely manner, to suppress the fingerprint evidence, and to dismiss the special circumstances. (30CRT 3315, 3317.)

In Beswick's first declaration in support of a motion for investigatory funds, filed in November 1997, Beswick stated that an investigator was needed to interview approximately 60 witnesses; and in a later declaration filed in January 1998, he stated that an investigator was needed to interview 30 to 40 witnesses. (30CRT 3252.) Beswick ultimately did not have an investigator interview 30 to 40 witnesses. (30CRT 3254-3255.)

Beswick did retain Mark Garrelts of Nationwide Fugitive Recovery as a defense investigator in appellant's case around the time the trial started. (30CRT 3246-3248.) Beswick paid for Garrelts's services with funds granted by the trial court. (30CRT 3248, 3278, 3291.) Beswick did not personally pay for any investigative services, and Garrelts did not send Beswick an invoice. (30CRT 3249, 3278-3279, 3291.) Beswick did not employ an investigator during the penalty phase of the trial. (30CRT 3257, 3259.)

Beswick did not receive any reports from the investigator. (30CRT 3248.) Beswick provided Garrelts with copies of the discovery in the case, and they met about five times. (30CRT 3249.) Garrelts located witnesses Carranza and Skolfield for Beswick. (30CRT 3247, 3249.) Beswick did not call Skolfield to testify because it was in appellant's best interest for Skolfield not to testify so the jury would wonder where he was. (30CRT 3312.)

Before Beswick was substituted in as appellant's attorney, he spoke with appellant on the phone. (30CRT 3265.) Throughout the course of his representation, Beswick met with appellant "many times" at "numerous places," although he did not keep a log of such meetings, so he did not remember exactly how many times he met with appellant. (30CRT 3266, 3273; 30GRT 3516.) However, Beswick recalled that he met with appellant in the lockup

facility of the courthouse before and after court appearances. (30CRT 3272-3273.) Beswick also met with appellant in person two to five other times. (30CRT 3274.) Beswick specifically remembered meeting with appellant in person at least twice in county jail and numerous times in lockup in the courthouse. (30CRT 3274; 30GRT 3550.) When Beswick met with appellant, they discussed the facts of the case. Appellant was provided with copies of the police reports relating to the case. (30CRT 3276, 3312.) In addition to the in-person meetings Beswick had with appellant, Beswick also spoke on the phone with appellant on numerous occasions. (30CRT 3274; 30GRT 3550.)[29/]

Beswick did not have an investigator interview members of appellant's family. (30CRT 3279.) However, before and during trial, Beswick interviewed members of appellant's family himself, including two of appellant's sisters, his mother, his stepfather, his wife, and Delia Chacon. (30CRT 3280-3281, 3306-3307; 30GRT 3486, 3518-3519, 3525, 3551.) In fact, appellant's sisters and mother attended most days of the trial. Beswick routinely walked out of the courtroom with members of appellant's family, spoke with them, and had lunch with them. (30CRT 3316.) Beswick also spoke with members of appellant's family in between the guilt and penalty phases. (30CRT 3306-3307.) Beswick thus spoke with members of appellant's family on numerous occasions during the trial, and they discussed appellant and the case. (30CRT 3316.) Appellant's family assisted Beswick in preparing information to present at the penalty phase. (30CRT 3304-3305.) Beswick did not contact any of the prosecution witnesses for the penalty phase. (30CRT 3286.)

Beswick was aware that appellant had children, but he did not interview appellant's children in preparation for the penalty phase. (30CRT 3297-3298.)

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29. Before the evidentiary hearing, Beswick filed a declaration indicating, "I had numerous telephone interviews with the defendant and various meetings with the defendant at Wayside Correctional, Los Angeles County Jail, and in lock-up at the Van Nuys Courthouse." (3CT 720.)

Beswick did not interview appellant's only adult daughter because appellant asked him not to do so. Appellant "sheltered" his daughter, and she was not aware of the seriousness of the charges against him. At the time of the penalty phase, appellant's daughter was taking final exams at college, and appellant did not want Beswick to contact her. (30CRT 3326, 3534-3535.)

Before trial, Beswick interviewed Janson, Saavedra, and Allan. He also interviewed numerous other potential witnesses and subpoenaed some witnesses. (30CRT 3267, 3286; 30GRT 3505-3506, 3523.) Beswick interviewed Janson for approximately one hour. Beswick and Janson were alone, and Beswick did not take notes. (30CRT 3268, 3286-3287.) Beswick had spoken with Janson on the phone before that in-person interview. (30CRT 3286.) Beswick knew that Janson was on Prozac and had reason to believe Janson had a history of psychiatric problems. (30CRT 3287-3288.) At trial, Beswick attempted to undermine Janson's statement to the police by eliciting Janson's testimony at trial that he had lied on a number of occasions. (30CRT 3326.) Beswick did not subpoena employment records for Janson, Bermudez, or Morales. (30CRT 3288-3289.) Beswick did not have an investigator interview Bermudez or Morales. (30CRT 3289.)

Beswick purposefully did not take notes of his interviews with witnesses in order to avoid having to provide such notes to the prosecution as reciprocal discovery required by section 1054. Beswick testified that this was a tactic employed by many defense attorneys. (30CRT 3313, 3316-3317, 3325-3326, 3335.) Beswick also did not take copious notes of his interviews with Delia Chacon and appellant because they made statements that incriminated appellant. (30GRT 3538.)

Beswick did not have an investigator look into Woodland's background. (30CRT 3300.) Beswick was aware that Woodland had a juvenile record, but he did not petition the juvenile court for Woodland's file. (30CRT 3300-3301.)

Beswick also did not obtain Woodland's school records. (30CRT 3301.) However, Beswick attempted to interview people who knew Woodland. (30CRT 3301.) For example, Beswick interviewed Delia Chacon numerous times before trial, and he ultimately subpoenaed her as a witness regarding Woodland's credibility. (30CRT 3301, 3324, 3327.) Further, Beswick used Woodland's arrest record, the police and probation reports in this case, and Woodland's beneficial disposition in exchange for his testimony, to undermine Woodland's credibility and bring out the fact that he had lied before. (30CRT 3326-3327.)

Before trial, Beswick learned that appellant had a history of substance abuse. (30CRT 3280.) Beswick did not consult with an expert regarding the effects of substance abuse. (30CRT 3281, 3339; 30GRT 3548-3549.) Beswick also knew that appellant had been placed in a drug treatment program by Ross-Swiss Dairy. Beswick did not obtain appellant's personnel file from the dairy or any records from the drug treatment program. (30CRT 3269-3271, 3298-3299, 3304, 3338-3339.) However, during trial, Beswick received appellant's employment records from the dairy, including a 1990 memorandum detailing appellant's forced participation in the substance abuse program. (30CRT 3319-3320, 3336-3338.)[30/] Beswick did not present the memorandum to the jury because he thought the memorandum was damaging in that it stated that appellant had denied his substance abuse problem. (30CRT 3320, 3323.)

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30. Two days into trial, Beswick received a letter addressed to him, care of the court, from Ross-Swiss Dairy. The letter indicated that appellant had called the dairy from jail and asked for copies of his personnel records. The letter stated that dairy personnel had asked appellant to have Beswick call them, but appellant had said that Beswick was too busy. (30CRT 3341-3342.) Beswick did not contact the dairy for appellant's personnel records either before or after receiving the letter. (30CRT 3342.) However, the dairy worker's union representative, witness Rios, and appellant's supervisor at the dairy, witness Holton, brought appellant's personnel records to court during trial and provided the records to Beswick and the prosecutor. (30CRT 3319-3320, 3336-3338.)

Beswick did not determine whether there were follow-up reports in appellant's personnel file regarding the substance abuse treatment he received; nor did he attempt to obtain the records relating to the urine test mentioned in the memorandum, which was the basis for the imposed treatment. (30CRT 3339-3341.)

Beswick did not think it was valid within the defense presented to offer the testimony of an expert regarding appellant's substance abuse problem. (30CRT 3323, 3344.) Indeed, the decision not to obtain or present records and experts regarding appellant's substance abuse problem was a tactical decision made by Beswick upon appellant's request not to delve into the topic. Appellant and Beswick agreed that presenting evidence of appellant's past drug use at the penalty phase would undermine the credibility of the testimony appellant gave at the guilt phase that he was innocent, that the crimes had nothing to do with his using drugs, and that he was no longer a drug user. Beswick's decision was informed by the fact that there were records indicating that appellant had been drug-free for at least 10 years. (30GRT 3526-3534, 3535-3536.) Regardless, at both phases of the trial, Beswick presented some evidence of appellant's former substance abuse problem. (30CRT 3318; 30GRT 3541.)

Beswick did not obtain appellant's school records, but his family provided him with appellant's diploma. (30CRT 3271, 3303.) Beswick did not remember if he obtained appellant's birth records. He knew the hospital where appellant was born, but he did not go there. He did not obtain appellant's mother's medical records from that hospital. (30CRT 3302-3303.) Beswick did not obtain any social service records for appellant. (30CRT 3303.) Beswick did not retain any forensic experts, criminalists, medical doctors, psychologists, social workers, or penalty phase mitigation experts in the case. (30CRT 3256-3257, 3278, 3293.) Beswick did not think it was beneficial to

the defense to employ a social worker. (30CRT 3328.)

Beswick did not obtain a release form from appellant for his medical records, and he did not obtain appellant's medical records. (30CRT 3269, 3279, 3304.) Appellant was in an accident in 1987, but the only injuries he sustained were a "strain and sprains," for which he was treated with outpatient physical therapy and an over-the-counter pain reliever. (30GRT 3541-3542, 3553-3554.) Beswick did not have appellant examined by a psychiatrist or psychologist. Appellant informed Beswick that he had never received any psychiatric or psychological treatment in the past. (30CRT 3279.) The defense presented at the penalty phase through appellant's family was that appellant was a good person who was an asset to his family and the community. (30CRT 3324.) None of appellant's family members testified that appellant had a psychological problem. (30CRT 3324.)

Before trial, Beswick made a tactical decision not to employ a medical doctor, neurologist, or forensic expert. (30CRT 3327-3328.) Although Beswick's November 1997 declaration stated that a forensic expert would be necessary to the defense, he ultimately determined that such an expert was not needed. (30CRT 3332-3333.) Beswick's decision was at least partially informed by the fact that the only forensic evidence in this case was appellant's fingerprint, which was found on a can inside the car used in one of the murders. Had there been blood or DNA evidence, Beswick would have employed a serologist or DNA expert. (30CRT 3328.)

Before trial, Beswick, the prosecutor, and the trial court spent several weeks preparing a lengthy juror questionnaire. Several questions drafted by Beswick were included in the questionnaire. Beswick reviewed the completed questionnaires in preparation for jury selection. During jury selection, Beswick's challenges to numerous prospective jurors were granted. (30CRT 3328-3329.)

The defense Beswick presented regarding the Camacho murder was that the murder was actually committed by Skolfield. (30CRT 3317.) Another defense was that appellant had such a good character, he could not have killed Camacho. (30CRT 3317-3318.) In support of the defense regarding the Friedman murder, Beswick presented eyewitnesses who were unable to identify appellant as one of the people involved in the murder. (30CRT 3325-3326.) Beswick presented a "full blown" defense in the guilt phase. He presented eyewitnesses to the crimes who had given statements to the police describing the culprit as someone who did not match appellant's physique. He also presented witnesses from the Ross-Swiss Dairy who testified favorably to appellant. (30GRT 3538-3539.) At the penalty phase, Beswick argued lingering doubt. (30GRT 3543.)

When the death verdict was reached, Beswick filed a new trial motion and another motion to strike the special circumstances findings. Beswick also filed a motion to reduce the offense for lack of proportionality. The motions were supported by declarations from members of appellant's family. (30CRT 3315-3316; 30GRT 3543-3544.) Beswick denied that members of appellant's family filed the declarations without Beswick's assistance. (30GRT 3545.)[31] In the new trial motion, Beswick alleged that he had performed inadequately. Beswick based this allegation on the fact that appellant had been found guilty. (30CRT 3297.)

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31. The declarations stated that they were "in support of motion to revoke death penalty." (2CT 504-522.) The declarations variously stated that the evidence was insufficient to support appellant's convictions, executing a judgment of death would "be devastating" to appellant's daughters, appellant was innocent, appellant received ineffective assistance of counsel, the jury was insensitive in reaching its verdicts, death was not an appropriate penalty for appellant, and appellant should be granted a new trial because some facts were not presented at trial. (2CT 504-505, 507-508, 510-511, 513-515, 517-518, 520-521.)

All of Beswick's decisions regarding motions, witnesses, and arguments were based on his or appellant's opinion. (30CRT 3330.)

b. Carl Jones

At the time of the evidentiary hearing, Carl Jones had been an attorney for approximately 31 years. He practiced criminal defense. Jones had received training in trying death penalty cases, and he estimated that he had handled 19 or 20 such cases. (30CRT 3348-3351.) The defense paid Jones $3,000 for his testimony at the hearing. (30DRT 3423-3424.)

To familiarize himself with appellant's case, Jones reviewed: the transcripts of appellant's trial, excluding jury selection; appellant's post-verdict motions and the prosecution's responses; appellant's employment records, which covered his substance abuse treatment and a head injury for which he filed workers' compensation paperwork; appellant's declaration; and Beswick's declarations in support of his pretrial requests for funds, second counsel, and his own appointment. (30CRT 3352.) Jones was also present during Beswick's testimony at the evidentiary hearing. (30CRT 3352.)

Jones was retained to form an opinion of Beswick's performance during the penalty phase only. He did not have an opinion regarding Beswick's performance during the guilt phase. He did feel that Beswick adequately cross-examined the prosecution's witnesses during the guilt phase. (30DRT 3392-3394, 3432.) He also agreed that Beswick made a reasonable tactical decision not to present evidence of appellant's substance abuse in the guilt phase. (30DRT 3420.)

According to Jones, the first step in defending a capital case is to recognize that "death is different." Defense counsel must simultaneously investigate the guilt and penalty phases. The guilt phase investigation involves investigating the crimes. The penalty phase investigation involves investigating the defendant "'from the cradle to the arrest,'" including prenatal and birth

complications, childhood illnesses and accidents, experience with drugs, personality, behavior disorders, interpersonal relationships, family, physical problems, sociocultural problems, and institutionalization. (30CRT 3358-3360.) Jones believed it was necessary to have an investigator to assist in preparation for the penalty phase. (30CRT 3360; 30DRT 3390-3391.) He had never heard of a capital case in Los Angeles in which the defense attorney did not have an investigator for the penalty phase. (30DRT 3390.) However, Jones admitted that it is not improper for an attorney to investigate his or her own case. (30DRT 3398.)

According to Jones, defense counsel in a capital case has a duty to investigate regardless of what the defendant does or does not tell him. (30DRT 3389.) For example, if a capital defendant asks his counsel not to speak with his family, counsel should disregard the defendant and interview the family. (30DRT 3389-3390.)

Jones testified that an attorney should not interview a witness without an investigator present, and an attorney should always take notes during an interview, because otherwise the witness cannot be impeached with his or her statements to the attorney. (30DRT 3391, 3435.)

Jones opined that if an attorney defending a death penalty case learned that the defendant had had a substance abuse problem or used PCP, the attorney should investigate the drug use further. (30CRT 3361; 30DRT 3381.) According to Jones, an expert could testify PCP use might result in brain damage. This information might be beneficial to the defense during the penalty phase. (30CRT 3365; 30DRT 3382.)

In July 1998, Pitman obtained a release from appellant for his medical records. (30DRT 3384.) The records indicated that appellant sustained injuries to his jaw and skull in a traffic collision in 1987. (30DRT 3383.) Jones opined that such information should have caused a competent defense attorney to

follow up through more investigation and expert assistance. (30DRT 3384.) Jones opined that evidence that the defendant had suffered a head injury could be used in mitigation at the penalty phase. (30DRT 3385.)

Jones was familiar with the legal standard for determining whether a defendant received effective assistance of counsel. (30CRT 3353.) Based on his experience, Jones opined that Beswick's representation during the penalty phase fell below an objective standard of reasonableness. Jones further opined that Beswick's conduct undermined confidence in the jury's verdict of death. (30CRT 3355-3358; 30DRT 3413-3414, 3433-3435, 3437-3438; 30DRT 3386-3388.)

c. Martha Heredia

Heredia, appellant's mother, developed toxemia, or very high blood pressure, during appellant's birth. (30GRT 3567.) Beswick never asked Heredia for information about appellant's birth, and she never told him about her toxemia. (30GRT 3567, 3574.) Heredia's toxemia did not appear to have had an effect on appellant, as he was born healthy and sent home from the hospital with his mother the next day. (30GRT 3586.)

Appellant lived with Heredia until he was 18 years old. (30GRT 3565.) Appellant had an older brother, Ricardo, and three sisters. (30GRT 3565.) To Heredia's knowledge, Beswick never contacted Ricardo regarding appellant's trial. (30GRT 3565.) Appellant and his siblings grew up in the Mar Vista housing projects in Culver City. (30GRT 3567.)

When appellant was four or five years old, he fell off the back of a chair and broke a vertebrae. He was hospitalized for two weeks. (30GRT 3572-3573.) Appellant was eventually able to play sports, but Heredia made him quit football because she was concerned about his neck. (30GRT 3573.) Heredia did not tell Beswick about appellant's neck injury. (30GRT 3574.)

When appellant was 10 years old, his 36-year old father died. (30GRT 3565.) Appellant was at home when his father had a heart attack and was taken to the hospital by ambulance. (30GRT 3565-3566.) Appellant had been very close with his father. After his father's death, appellant became "moody and depressed." However, he "kept the other kids[']' spirits up." (30GRT 3566.) When Heredia spoke with Beswick, Beswick already knew about the effect appellant's father's death had on appellant. (30GRT 3574.)

When appellant was 13 years old, Heredia remarried. (30GRT 3568.) Heredia's new husband was an alcoholic. He did not hit Heredia, but he would shove her. He also verbally abused Heredia in appellant's presence. (30GRT 3568-3569.) Heredia did not tell Beswick about her husband's behavior. (30GRT 3574, 3587.) Heredia admitted that appellant got along with her husband. In fact, when appellant was an adult, he and his stepfather worked together at the dairy. (30GRT 3587-3588.)

When appellant was 17 years old, he started an auto body business. (30GRT 3570.) He moved out of Heredia's home when he was almost 19, but he still saw Heredia every day. (30GRT 3570.) Right after appellant and Eva were married, they and their child moved in with Heredia. (30GRT 3570-3571.) Appellant and Eva eventually obtained their own apartment. (30GRT 3571.) However, several years later, when appellant was using drugs, he moved back in with Heredia. (30GRT 3571.) During that time, appellant hallucinated and suffered from headaches. (30RT 3571-3572.) However, Heredia admitted that she had only seen appellant act as if he was on drugs two or three times in his entire life. (30GRT 3590-3591.) She knew appellant had participated in various substance abuse treatment programs. (30GRT 3592-3594.) Heredia discussed appellant's drug use with Beswick, but she did not tell him the full extent of appellant's problem. (30GRT 3574.)

At some point in appellant's adulthood, he injured his jaw while he was working for a towing company. (30GRT 3573-3574.) Heredia did not know if appellant had been hospitalized as a result of this accident. (30GRT 3588-3589.) Heredia did not tell Beswick about this injury. (30GRT 3574.)

Heredia regularly attended appellant's trial. (30GRT 3558.) The first time Heredia spoke with Beswick was after the trial had started, when he called her to ask for the phone number of appellant's sister. They did not speak about appellant's case at that time. (30GRT 3559.) A defense investigator never contacted Heredia regarding appellant's case. (30GRT 3559.) The only place Beswick and Heredia ever met was in the courthouse during the trial. (30GRT 3559-3560.) The only time Beswick spoke with Heredia about the specifics of appellant's case or about obtaining information about appellant was after the guilt phase. (30GRT 3560.) Heredia admitted that throughout the trial, she waited for Beswick at every recess and walked with him to the elevators. Heredia also admitted that throughout the trial she had conversations with Beswick outside the courtroom near the phones. However, she claimed these conversations did not have to do with appellant's case. (30GRT 3581-3582.)

The penalty phase began the same day the guilt verdicts were returned. During the noon recess, which occurred after the prosecution had begun to present evidence, Heredia approached Beswick and asked him whether he wanted to know anything about appellant's background and personality. Beswick told Heredia that he was going to have her testify. It was 15 minutes before they were scheduled to return to the courtroom. Appellant's sister Barbara, and his wife Eva were present for the conversation. (30GRT 3561-3563, 3574-3575.) Heredia told Beswick about appellant's childhood, his schooling, and his drug abuse. Beswick asked about appellant's education, work history, and the ages of his children. (30GRT 3563, 3568.) Beswick told Heredia that when she testified she should not get emotional or seek sympathy

from the jury, express condolences to the victims' families, or profess appellant's innocence. (30GRT 3564.) Heredia testified at the penalty phase that afternoon. (30GRT 3563.)

Heredia claimed she did not remember her testimony at the penalty phase that: appellant was depressed after his father's death (30GRT 3578-3579); appellant took charge of the family after his father's death (30GRT 3579); appellant worked and supported himself from a young age (30GRT 3579-3580); and, after appellant graduated from high school, he tried to become a firefighter (30GRT 3585).

d. Leandra Kamba

Appellant's sister, Leandra Kamba, had known Beswick for about 10 years. Kamba was a legal secretary for an attorney who shared a suite with Beswick in a building in Century City. (30GRT 3595-3597.) After appellant was arrested for murder, he asked Kamba if she knew a criminal attorney because he wanted new representation. (30GRT 3596.) Kamba spoke with Beswick about appellant, and Beswick agreed to take appellant's case. (30GRT 3596.) Throughout the course of Beswick's representation of appellant, Kamba had contact with Beswick a few times a week. (30GRT 3597-3598.) Kamba claimed that Beswick only told her "basic things about the case," such as recounting Janson's testimony. (30GRT 3598.)

During the course of the trial, appellant called Kamba and asked her to prepare subpoenas. Appellant gave Kamba a list of names, and Kamba prepared the subpoenas. Kamba had Heredia, a friend, and an attorney service serve the subpoenas. Kamba gave the proofs of service to Beswick. (30GRT 3603-3604.)

After at least half of the trial dates Kamba attended, she, her sisters, Heredia, and Beswick met outside the courtroom. They discussed the trial, including which witnesses Beswick was planning on presenting next. Kamba

regularly questioned Beswick about why he did or did not take certain actions during the trial. (30GRT 3613-3615.) During these conversations, Beswick did not ask Kamba about appellant's background. (30GRT 3598-3599, 3616.) A defense investigator never interviewed Kamba. (30GRT 3600.)

The first time Beswick told Kamba that he wanted her to testify at the penalty phase was after the guilt verdicts had been read. (30GRT 3601.) During a break, Heredia, Kamba, Eva, and appellant's sister Barbara, met with Beswick outside. (30GRT 3601.) Beswick asked the women about appellant's childhood and drug problem. The conversation lasted about 15 minutes. Beswick told the women not to show emotion or talk about the guilt verdicts. (30GRT 3602.) Kamba admitted that she nevertheless cried during the trial, testified that appellant was a loving person, and testified that she loved appellant. Kamba's testimony was aimed at informing the jury that appellant was a good person. (30GRT 3611-3612.)

Kamba asked Beswick if she should call appellant's daughter, who was 20 years old at the time. Beswick told her not to call appellant's daughter because it would be "too much" for her. (30GRT 3602, 3606, 3617.) At the time of this conversation, appellant's daughter did not know about the guilt verdicts. In fact, appellant and his family did not tell appellant's daughter about the verdicts until a month later. (30GRT 3607-3608.)

After the death verdicts, Beswick's coworker informed Kamba that Beswick would be filing a motion with attached declarations. Kamba drafted declarations from members of her family on her home computer. Kamba had appellant's three other siblings, Heredia, and appellant's wife sign the declarations. Kamba brought the declarations to the courthouse, blue-backed them, prepared proofs of service, and mailed copies of them. Heredia filed the declarations with the court. (30GRT 3604-3605.) Beswick was not involved in preparing the declarations. (30GRT 3606.)

Kamba admitted that she had not been aware of appellant's prior drug problem until about five years before trial. She recognized that she testified to the jury at the penalty phase that: appellant was not violent; appellant was protective of his sister; appellant was kind to other children in the neighborhood; appellant was never involved in gangs; Kamba was not aware that appellant had ever been suspended from school; and appellant had worked from a young age. (30GRT 3608-3610.)

e. Eva Carrasco

Eva began dating appellant in 1975. They married in 1980, and had three daughters. Appellant and Eva divorced December 2, 1998, approximately one week before the evidentiary hearing. (30HRT 3620-3621.)

When Eva and appellant were young, appellant used PCP. When they were older, appellant used cocaine or crack. Eva thought that appellant's drug problem spanned about 20 years. Appellant's behavior changed from "joyful" to "grumpy" and "nervous." Sometimes Eva thought that appellant was hallucinating. Appellant's drug use was the reason he and Eva divorced. (30HRT 3632-3634.) Sometime in the late 1980's, appellant came home under the influence of drugs. Eva contacted a rehabilitation program. Andy Padilla, a representative from the program, picked up appellant at his home and took him to the rehabilitation facility. Appellant remained in the program for three or four months. (30HRT 3635-3637, 3642.) It was the third substance abuse treatment program appellant had attempted. (30HRT 3637.) Appellant attended the first two programs in the late 1970's and early 1980's. (30HRT 3642.) Eva never told Beswick about the details of appellant's drug problem because Beswick never asked her. (30HRT 3634, 3637.) However, before she testified at the penalty phase, Eva told Beswick that she was divorcing appellant because of his drug problem. Beswick told Eva that he did not want her delving into that topic in court. (30HRT 3635.)

When appellant was arrested in this case, he and Eva were separated and no longer living together. (30HRT 3621.) Eva was not contacted by Beswick or a defense investigator before appellant's trial began. (30HRT 3622-3623.) Eva attended appellant's trial two to three days per week. (30HRT 3623, 3625.) During jury selection, she approached Beswick and introduced herself. She asked Beswick if he would like to meet with her. Beswick said he could not meet then, but he would call Eva. Eva gave Beswick her business card and went back to work. Beswick did not call her. (30HRT 3623-3624.)

Eva called Beswick's office about three times and left messages. Beswick's assistant called Eva back and said Beswick had been busy. Beswick's assistant told Eva that Beswick would call her when she was needed. Beswick did not call her. (30HRT 3624-3625.)

Eva initially admitted that she spoke with Beswick outside the courtroom during the guilt phase, then later tried to deny that the conversations took place. Eva ultimately admitted that she spoke with Beswick on occasion outside the courtroom during the guilt phase. However, she maintained that the conversations were brief and, despite her concern for appellant's trial, they did not talk about the case. (30HRT 3625-3626, 3657-3658.)

One day during the guilt phase, Kamba asked Eva to appear in court because Beswick would probably need her. Eva did not know why Beswick wanted Eva there. When Eva arrived at the courthouse, she spoke with Beswick in the hallway for about 10 minutes. Beswick told Eva that he was going to ask her questions about whether she knew Janson because Janson had testified that he did not know Eva. Eva testified that she did know Janson. (30HRT 3626-3628.)

Beswick never contacted appellant's oldest daughter, who was attending UCLA. Beswick never asked Eva whether he could interview her daughter or whether her daughter would be willing to testify. Eva did not ask her daughter

to go to court with her. (30HRT 3639.)

Eva was in court the day the guilt verdicts were read. No one had told her to come to court that day. She knew the jury had been deliberating. (30HRT 3628.) Prior to the guilt verdicts being read, Beswick had not told Eva that he wanted her to testify at the penalty phase. He also had not interviewed her about appellant's background and their relationship. (30HRT 3628.)

After the guilt verdicts were read, Beswick spoke with Eva and other members of appellant's family. He told Eva that the penalty phase would follow and that he was going to call her to testify about appellant's character as a husband and father. Beswick's conversation with Eva and other members of appellant's family lasted 45 minutes to an hour. (30HRT 3631-3632, 3638.)

Eva claimed that she did not testify about appellant's drug problem at the penalty phase because Beswick did not ask her about it. (30HRT 3645.) However, when read a portion of her penalty phase testimony, Eva admitted that in response to a question regarding appellant's arrests or convictions, she had testified that appellant had a substance abuse problem in his 20's, for which he had attended a rehabilitation program. (30HRT 3646-3647.) When read another portion of her penalty phase testimony, Eva admitted that Beswick asked her the following general question: "Is there anything - - you've heard the family, mother and sisters talk about [appellant]. Is there anything else you can add to help the jury understand [him]?" Eva admitted that in response to that question, she had testified that appellant was "a compassionate guy," "a good dad," and "a good husband," and she had not imparted any of the information about appellant's alleged hallucinations or drug-induced behavior to which she testified at the evidentiary hearing. (30HRT 3648-3649.) Moreover, Eva admitted that contrary to her evidentiary hearing testimony that she and appellant divorced because of his drug problem, she had testified at the penalty phase that they ended their relationship because she graduated from

college and wanted to buy a house, and she resented the time and money he spent helping young men in the community. (30HRT 3650-3652.)

f. Barbara Carrasco-Gamboa

Appellant's sister Barbara was less than two years older than appellant, and they grew up together. (30HRT 3662, 3666.) Appellant was really close with their father. Barbara thought that appellant was their father's favorite child. (30HRT 3678-3679.) Their father died just before Barbara's twelfth birthday. (30HRT 3676.) He had suffered two previous heart attacks. When he had the fatal heart attack, Barbara was home alone with him. She called an ambulance, then went to get appellant, who was playing football. When appellant and Barbara returned home, their father was already being wheeled by stretcher into the ambulance. (30HRT 3676-3677.) Appellant became withdrawn after his father's death. He spent more time with his friends, away from home. (30HRT 3678.) However, Barbara admitted that at the penalty phase she had testified that after their father's death, appellant "assume[d] the father figure role." Barbara attempted to explain the contradictory descriptions of appellant's behavior after their father's death by saying that he was very involved in the family and protective of his siblings, but he would skip school and sneak out of the house late at night to spend time with his friends. (30HRT 3682-3685.)

About three years after appellant's father died, Heredia remarried. (30HRT 3678.) Her new husband was an alcoholic. He was verbally abusive. For example, he would yell at the children to do the dishes. (30HRT 3679.) Barbara's stepfather had also hit her. On at least one occasion in 1977, police were called to the house and Barbara's stepfather was arrested. Appellant was not present when the abuse occurred or when their stepfather was arrested. Barbara did not know if her stepfather had ever hit appellant. (30HRT 3688-3691.) Barbara claimed that appellant was not on friendly terms with their

stepfather. However, she admitted that they worked together as adults at the dairy. (30HRT 3688-3689.)

When appellant was somewhere between 17 and 21 years old, Barbara went to visit him at his auto body shop and noticed that he was under the influence of a drug. Barbara contacted her friend, Andy Padilla, who was a drug counselor. Padilla went to Heredia's home and spoke with appellant. (30HRT 3667, 3691.) He recommended a substance abuse treatment program, which appellant attended. (30HRT 3674-3675.) Appellant attended at least two such programs in his lifetime. (30HRT 3675.) Barbara did not talk to Beswick about appellant's drug problem because when Eva brought up the subject, Beswick told them that it would not help appellant's case. (30HRT 3670-3671.) To Barbara's knowledge, appellant overcame his drug problem in the late 1980's. (30HRT 3687-3688.)

Beswick did not interview Barbara before appellant's trial started. (30HRT 3662-3663.) Midway through appellant's trial, Barbara began attending regularly. That was when she first met Beswick, although Beswick did not interview her. Barbara spoke with Beswick during breaks in court sessions, but he did not discuss the details of appellant's case with her. (30HRT 3664-3666.) Beswick never asked Barbara for photographs or mementos from appellant's childhood. (30HRT 3698.)

Barbara, Heredia, Kamba, and Eva just happened to be in court the day the guilt verdicts were read. Barbara decided to go to court every day during deliberations because she did not want to rely on Beswick to tell her when the verdicts came in. (30HRT 3672, 3692-3694.) Before the day the verdicts were read, Beswick had never spoken to Barbara about testifying at the penalty phase. (30HRT 3672.) During the lunch break that day, Beswick told Barbara, Eva, Heredia, and Kamba that he was going to have them testify. He told Barbara that he would ask her questions about how close she was to appellant

and what appellant was like as a brother. (30HRT 3673, 3680.) During Barbara's testimony at the penalty phase, Beswick asked her about growing up with appellant, including how old appellant was when his father died. (30HRT 3670-3671.)

During the lunch break conversation, Barbara asked Beswick what he would have done if she and her family had not appeared in court that day. Beswick said that he would have called them right away. (30HRT 3674.) Beswick told Barbara and her family not to elicit sympathy from the jury. He told them to only answer his questions and not to give additional information. (30HRT 3680.) He told them they could testify that they loved appellant. (30HRT 3696.) Beswick asked appellant's family if they had any photographs of appellant's children. Eva happened to have photographs of the children in her wallet. (30HRT 3698.) Beswick did not tell Barbara that he was going to ask her about appellant's arrest history. (30HRT 3681.) However, Barbara had heard Heredia and Kamba's testimony, during which Beswick asked about appellant's prior arrests. (30HRT 3681-3682.)

2. Prosecution Evidence: Bruce Hill

At the time of the evidentiary hearing, Bruce Hill had been an attorney for approximately 31 years. He had spent about 25 years as a criminal defense attorney. (30HRT 3704.) He had been involved in approximately 20 death penalty cases, having personally tried 12 of them. (30HRT 3705-3706.) Hill had cocounsel in the first death penalty case he tried. He did not believe that his cocounsel had had prior experience trying a death penalty case. (30HRT 3742.) Of all the death penalty cases Hill had tried, he only had cocounsel in two. (30HRT 3712-3713.) When Hill tried his first death penalty case, he had not attended any seminars on trying death penalty cases, but he had studied a syllabus on the subject. (30HRT 3742-3744.)

Generally, when Hill began representing a defendant in a capital case, he first familiarized himself with the prosecution's investigation. He also investigated the background of the defendant by speaking with people who were acquainted with the defendant. He had several meetings with the defendant to convey to the defendant that he cared about him or her. He also attempted to learn as much as possible about the defendant's background from the defendant or the defendant's family members. While Hill generally attempted to learn as much background information about the defendant as early in the process as possible, he recognized that "[t]here are circumstances in which it is difficult to do that and there are certain circumstances in which information comes to you late." Additionally, while in some cases Hill had procured psychologists, photographs of defendants, and records from defendants' lives, he did not think that a competent defense attorney needed to "recreat[e] the life of a defendant from birth to trial." Instead, he believed an attorney needed to focus his or her inquiry on areas that would specifically assist the defense at the penalty phase. (30HRT 3744-3759.)

Hill was present in court during the defense testimony presented at the evidentiary hearing on appellant's new trial motion. Hill testified that, had he represented appellant, he would not have presented to the jury the evidence of appellant's substance abuse problem. Hill also would not have presented to the jury the evidence regarding the jaw injury appellant suffered as a result of an accident. Hill explained, "[A]n attorney loses credibility when he attempts to convince a jury to show mercy predicated on factors which are not meaningful to the jury." In fact, in many of the death penalty cases Hill had tried, he had decided not to present to the jury information obtained from experts. (30HRT 3760-3762.)

Hill represented Woodland, who was originally charged with first degree murder as appellant's codefendant in the Friedman murder case. Woodland

was not charged with robbery or conspiracy, and no special circumstances were alleged against him, although Hill thought that the prosecution could have brought such charges and allegations. (30HRT 3707-3709, 3716.) Before Woodland pled guilty, Hill spoke with Beswick about the case on numerous occasions. For example, they spoke on the telephone approximately 10 times. They also discussed the case when they appeared together in court. On one occasion, Beswick went to Hill's office. They went to lunch and discussed the case for approximately three hours. (30HRT 3709, 3711.)

When Hill began representing Woodland, he made an index of names mentioned in the police's murder book. A page was created for each name, and notations were made on the pages regarding where in the prosecution's discovery that person was mentioned. Hill shared the index--minus the page devoted to Woodland--with Beswick, and they discussed it. (30HRT 3727-3730.)

As discovery from the prosecution, Hill received about 12 audio tapes. He personally listened to the tapes and transcribed them. He provided copies of the transcriptions to Beswick and the prosecution. (30HRT 3717-3718, 3730-3731.)

Hill did not employ a defense investigator during his representation of Woodland. However, he did receive some information from an investigator who had done "some modest to minor work" on the case before Hill began representing Woodland. (30HRT 3712.) Hill did not employ a defense investigator in every death penalty case he handled. (30HRT 3712.) Hill believed that as long as a defense attorney became aware of material information, it was irrelevant whether the information was discovered through investigation by the defendant, the defendant's family members, a defense investigator, or the attorney him or herself. (30HRT 3758-3759.)

Pursuant to his investigation, Hill discovered that Woodland knew Friedman from the Chacons' auto body shop. He also spoke with Martin Sasson, who "indirectly" claimed that Friedman had arranged to meet Woodland the day of the shooting. Hill believed he had discussed this information with Beswick. (30HRT 3724.)

The prosecution's discovery included the fact that the Los Angeles Police Department had found Woodland's fingerprint on the passenger side door of Friedman's Jeep. Hill did not have the fingerprint retested. (30HRT 3725-3726.)

On October 30, 1996, Hill submitted a written proffer to the prosecution, explaining the testimony Hill believed Woodland would give in exchange for a plea bargain. Beswick was not aware of the proffer. In mid to late January 1997, Hill and the prosecutor began discussing the possibility that Woodland would testify against appellant in exchange for a reduced charge of manslaughter. The prosecutor and detectives interviewed Woodland at a custodial facility. A few days later, the prosecutor and detectives interviewed Woodland again in the jury room of the courtroom. (30HRT 3731-3739.)[32/] Ultimately, the prosecutor and Woodland reached an oral agreement that in exchange for Woodland's truthful testimony at appellant's trial and a guilty plea to voluntary manslaughter, the prosecutor would recommend to the court a

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32. The prosecution's interviews with Woodland during these negotiations were videotaped. The videotape of both interviews was played for the parties during the evidentiary hearing on appellant's new trial motion. (30JRT 3889.) Beswick testified at the evidentiary hearing that he had received a copy of the videotape from the prosecution before appellant's trial. (30JRT 3896.) Beswick reviewed the tape, but he did not have it transcribed. (30JRT 3896.) Beswick did not show the tape to appellant, but he told him what was on the tape. (30JRT 3896.) The tape was not part of Beswick's case file, which was admitted into evidence at the evidentiary hearing. It was unclear whether Beswick lost the tape or the tape was lost after Beswick gave his file to Pitman. (30JRT 3898.)

sentence of six years. The prosecutor also agreed to make good faith efforts to protect Woodland in custody. (30HRT 3739-3740.)

Hill never told Beswick about the negotiations with the prosecution. He did not provide Beswick with the notes he took during the prosecution's first interview of Woodland. (30HRT 3731-3733, 3735-3737, 3739.)

3. The Trial Court's Denial Of The New Trial Motion

At the conclusion of the evidentiary hearing, the trial court denied appellant's new trial motion. The court ruled, "Having heard the entire trial, I'm satisfied that presentation of Mr. Beswick was competent, that he was prepared for each witness. He thoroughly cross-examined each witness, he called the witnesses that he felt were appropriate. I did not find that his performance was below the standard that is required." (30JRT 3913-3914.)

B. The Trial Court Properly Denied Appellant's New Trial Motion

A trial court's denial of a motion for a new trial is reviewed for an abuse of discretion. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1188; *People v. Seaton*, *supra*, 26 Cal.4th at p. 693.) The trial court here did not abuse its discretion in denying the new trial motion.

Respondent notes that many of the specific claims appellant raises on appeal regarding Beswick's representation during the guilt phase were not raised in the new trial motion, which mostly focused on Beswick's representation during the penalty phase. (Compare AOB 154-218 with 3CT 546-568, 624-656, 743-754.) Moreover, as explained below, Beswick's conduct fell within the wide range of competent representation, and appellant was not prejudiced by Beswick's representation. That Beswick conducted an adequate investigation and represented appellant effectively is easily seen in the transcripts. Beswick actively defended appellant, calling witnesses who identified suspects other than appellant and who gave descriptions of suspects

that did not match appellant's description. Beswick presented evidence that Skolfield committed the Camacho murder, and Woodland and his brother committed the Friedman murder. Beswick also thoroughly cross-examined the prosecution's witnesses, including impeaching Janson with prior inconsistent testimony, emphasizing Woodland's beneficial deal with the prosecution, and eliciting exculpatory fingerprint evidence from the prosecution's own expert. Beswick gave a lengthy closing argument, which emphasized alleged weaknesses in the prosecution's theory and evidence, and presented plausible alternative theories and suspects for the murders. (26RT 2880-2914.) Thus, the trial court properly found that Beswick competently represented appellant. The trial court therefore did not abuse its discretion in denying appellant's new trial motion.

C. Defense Counsel Represented Appellant Competently, And Appellant Was Not Prejudiced By Defense Counsel's Performance

To prevail on a claim of ineffective assistance, appellant must show that counsel's performance was objectively deficient and that such deficiency prejudiced appellant. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 687.) Appellant failed to meet this burden in the trial court, so the court did not abuse its discretion in denying appellant's new trial motion. Appellant also fails to meet the burden on appeal, so his appellate claim of ineffective assistance fails. (See *People v. Lucas* (1995) 12 Cal.4th 415, 437 [claim of ineffective assistance of counsel on direct appeal places a heavy burden on appellant].)

As to the first prong of *Strickland*, counsel's performance is objectively deficient if it falls below an objective standard of reasonableness under prevailing professional norms. (*People v. Ledesma* (2006) 39 Cal.4th 641, 745-746.) "Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a

strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. [Citations.] We accord great deference to counsel's tactical decisions [citation], and we have explained that courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight [citation]." (*People v. Weaver*, *supra*, 26 Cal.4th at pp. 925-926, internal quotation marks omitted; accord, *People v. Jones* (2003) 29 Cal.4th 1229, 1254.) "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." (*Strickland*, *supra*, 466 U.S. at pp. 690-691.) "If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.]" (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 746; accord, *People v. Weaver*, *supra*, 26 Cal.4th at p. 926; *People v. Fosselman* (1983) 33 Cal.3d 572, 581.)

With regard to *Strickland*'s second prong, prejudice is established by showing there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. (*Strickland*, *supra*, 466 U.S. at p. 746.) Where an ineffective assistance of counsel claim can be rejected based on the failure to establish prejudice, that course should be followed. (*Id.* at p. 697; *People v. Boyette* (2002) 29 Cal.4th 381, 430-431.)

Appellant alleges numerous instances of ineffective assistance by Beswick. Respondent will address each allegation separately. Initially,

however, it must be emphasized that a lengthy evidentiary hearing was conducted pursuant to appellant's new trial motion on the ground of ineffective assistance of counsel. Although appellant was given every opportunity to thoroughly investigate and present evidence regarding his allegations against Beswick, he utterly failed to present any evidence at the hearing that Beswick's representation prejudiced him in any way. Especially with regard to appellant's claims regarding Beswick's investigation and preparation for the case, appellant appears to believe that simply alleging Beswick failed to investigate certain evidence establishes ineffective assistance regardless of whether evidence discovered from such investigation would have been admissible or whether Beswick would have reasonably chosen to present such evidence. Appellant fails to address the prejudice prong of *Strickland*, which requires a showing that further investigation would have resulted in usable evidence, so that it is reasonably probable appellant would have achieved a more favorable result had further investigation been conducted. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1082, overruled on another ground in *People v. Hill*, *supra*, 17 Cal.4th at p. 823, fn. 1.)

Respondent also notes that appellant makes some general assertions that Beswick failed to conduct *any* investigation in this case. (AOB 154-158.) The record demonstrates that appellant's assertions are clearly not true. Beswick presented witnesses in support of the defense. It would have been impossible to present defense witnesses without conducting any investigation. Additionally, Beswick testified at the evidentiary hearing that before trial he interviewed numerous witnesses, including each of the witnesses he presented in defense. (30CRT 3267, 3286, 3313, 3316-3317, 3325-3326; 30GRT 3505-3506, 3523.) Further, the record shows that Beswick visited the facility from which appellant escaped in order to investigate the escape charge. (5RT 270.) Thus, the record does not support appellant's allegations that Beswick failed to

conduct any investigation at all.

Lastly, although respondent will individually address appellant's failure to establish prejudice as to each of his allegations of ineffective assistance of counsel, respondent submits that appellant has also failed to establish prejudice because there was substantial evidence of appellant's guilt and thus any deficiency in Beswick's performance was not reasonably probable to have changed the outcome of appellant's trial. (See *People v. Sapp* (2003) 31 Cal.4th 240, 280; *People v. Maury* (2003) 30 Cal.4th 342, 416; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1127; *People v. Bradford*, *supra*, 14 Cal.4th at p. 1052.) As to the Camacho murder, the evidence established that: appellant had said he did not want Camacho returning to work and taking back his shift; appellant regularly carried to work the type of gun used in the murder; witnesses saw a person matching appellant's description flee the dairy immediately after the shooting; sometime after the murder, appellant told Bermudez, who was leaving the dairy at the time of the shooting, that he saw him at the time of the shooting, asked if Bermudez had seen him, and instructed Bermudez not to speak to anyone about the shooting; and appellant confessed to the murder to different people on separate occasions. As to the Friedman murder and robbery: Woodland testified that appellant committed the offenses; two kilos of cocaine were found in the Jeep in which Friedman was killed; Friedman's bag was found where Woodland said appellant had thrown it out; neighbors testified that they saw the Honda drive away with two occupants; one neighbor testified he was 70 percent certain appellant was the passenger of the Honda; appellant's fingerprint was found in the Honda; bullets and a magazine matching the size of the bullets used in the murder were found in appellant's residence; Janson saw appellant carrying a gun that was the same caliber as that used in the murder; and appellant confessed these crimes to Janson as well. Appellant also admitted the escape to the jury. In light of this evidence, it is not reasonably

probable that appellant would have achieved a more favorable result had Beswick represented him differently.

1. Beswick Adequately Interviewed Appellant And His Family, And Appellant Was Not Prejudiced By Beswick's Conduct

Appellant claims Beswick failed to adequately consult with appellant and members of appellant's family. (AOB 158-168.) Respondent disagrees. "[T]he number of times one sees his attorney, and the way in which one relates with his attorney, does not sufficiently establish incompetence." (*People v. Silva* (1988) 45 Cal.3d 604, 622; accord, *People v. Hart* (1999) 20 Cal.4th 546, 604; see also *People v. Walker* (1976) 18 Cal.3d 232, 237-238 [motion for new counsel on the ground of ineffectiveness was properly denied where counsel had not visited defendant in jail but had interviewed defendant and consulted with defendant at least nine times in court].) Likewise, there is no requirement that defense counsel frequently confer with the defendant's family members in order to adequately represent the defendant. Thus, Beswick was not ineffective with regard to his contact with appellant and members of appellant's family.

Regardless, the record shows Beswick adequately met with appellant and his family. At the evidentiary hearing, Beswick testified that he spoke with appellant on the phone even before he officially began representing appellant. (30CRT 3265.) Beswick also met with appellant in person "many times" at "numerous places" throughout the course of his representation, including visiting him in jail at least twice before trial and meeting with him numerous times in the lockup facility of the courthouse before and after court appearances. (30CRT 3266, 3272-3274; 30GRT 3516, 3550.) In addition to these in-person meetings, Beswick also spoke on the phone with appellant on numerous occasions. (30CRT 3274; 30GRT 3550.) Thus, it appears Beswick consulted with appellant frequently throughout the course of his representation.

Appellant's self-serving declaration indicating that Beswick never discussed the case with him (3CT 721-723), does not undermine Beswick's testimony to the contrary. First, the trial court implicitly rejected appellant's version of events by denying the new trial motion. The court's rejection of appellant's version is entitled to deference because substantial evidence supports the implied finding that appellant's declaration was not credible. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 796; *In re Marquez* (1992) 1 Cal.4th 584, 603.) The declaration was self-serving and inherently untrustworthy. (*People v. Duarte* (2000) 24 Cal.4th 603, 611 [self-serving declarations generally lack trustworthiness].) Moreover, appellant's allegation is not credible because it was made by appellant for the first time six months after the jury returned the death verdicts. (2CT 492-493 [death verdicts were reached on March 27, 1998]; 3CT 721 [appellant's declaration was filed on September 17, 1998].) During the nearly two years that Beswick represented appellant at both phases of the trial, appellant never asked to discharge Beswick, never made a *Marsden*[33] motion on the ground that Beswick's performance was deficient, and never complained to the trial court that Beswick had failed to adequately discuss the case with him. (See 1RT A11-A12 [Beswick was officially substituted in as appellant's counsel on July 17, 1996]; 2CT 544 [Pitman was officially substituted in as appellant's counsel on April 27, 1998].) Thus, appellant's belated complaints are not credible. (See *In re Avena* (1996) 12 Cal.4th 694, 711-712 [defendant's testimony at habeas corpus evidentiary hearing that he told trial counsel about his PCP use was not credible in light of counsel's testimony to the contrary and defendant's incentive to lie in order to lay the groundwork for an ineffective assistance of counsel claim]; *People v. Whitt* (1990) 51 Cal.3d 620, 659 [three- to four-month delay before defendant expressed dissatisfaction with counsel gave the court "reasonable grounds to

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33. *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

question the sincerity of his current criticisms"].)

The record shows that Beswick adequately met with appellant during the course of his representation. In fact, the record shows that Beswick's meetings with appellant were frequent and substantial enough for Beswick to formulate a strong defense to both murders (i.e., Skolfield committed the Camacho murder, and Woodland and his brother committed the Friedman murder), which included the presentation of eyewitness testimony that appellant was not the culprit, and which was consistent with appellant's testimony at trial.

Likewise, the evidence shows Beswick adequately met with members of appellant's family. Beswick specifically testified that before and during trial, he spoke with members of appellant's family, including two of appellant's sisters, his mother, his stepfather, and his wife. (30CRT 3280-3281, 3306-3307, 3313, 3316-3317, 3325-3326, 3335; 30GRT 3518.) Indeed, during the trial, Beswick routinely walked out of the courtroom with members of appellant's family, spoke with them about appellant and the case, and had lunch with them. (30CRT 3316.) Beswick thus spoke with members of appellant's family on numerous occasions during the course of his representation.

The contrary testimony of members of appellant's family was not credible. First, the witnesses were biased in appellant's favor and had incentive to lie. (See *In re Avena, supra*, 12 Cal.4th at p. 716 [in weighing the credibility of testimony given by defendant's friends and family at a habeas corpus evidentiary hearing, the Court noted that "friends and family would have an incentive to testify favorably to petitioner"].) Second, the testimony of appellant's family members was undermined by numerous inaccuracies and inconsistencies within that testimony. For example, in complaining that Beswick did not prepare her for cross-examination by the prosecutor during the penalty phase, Heredia testified that the prosecutor cross-examined her. (30GRT 3575.) In fact, the prosecutor did not cross-examine Heredia. (28RT

3079; see 30IRT 3826.) Additionally, Heredia's testimony that Beswick never discussed appellant's case with her was not credible in light of her admission that she regularly attended appellant's trial, waited for Beswick at every recess and walked with him to the elevators, and had multiple conversations with Beswick outside the courtroom near the phones. (30GRT 3558, 3581-3582.) Moreover, Kamba testified that after at least half of the trial dates she attended, she, her sisters, Heredia, and Beswick met outside the courtroom and discussed the trial, including which witnesses Beswick was planning on presenting next. (30GRT 3613-3615.) Heredia and Barbara's testimony that they just happened to be at the courthouse the day the guilt verdicts were read (30GRT 3582-3583; 30HRT 3672, 3692-3694), was contradicted by Kamba's testimony that Beswick had contacted Heredia and told her to be in court for the verdicts that day (30GRT 3600, 3606-3607). Barbara's evidentiary hearing testimony that appellant spent more time away from home and became distant after their father's death was impeached by her penalty phase testimony that after their father's death, appellant became more involved in his sisters' lives and assumed a father figure role. (30HRT 3678, 3682-3685.)

Likewise, Eva's testimony lacked credibility. Eva first admitted she had spoken with Beswick throughout the course of the guilt phase, then denied the conversations took place, then ultimately admitted conversations took place but claimed appellant's case was not discussed. (30HRT 3625-3626, 3657-3658.) Further, Eva's testimony that she did not testify to the jury at the penalty phase regarding appellant's alleged drug-induced behavior because Beswick did not ask her about it, was impeached by portions of the trial transcript in which Eva testified that appellant had a substance abuse problem, for which he attended a rehabilitation program. (30HRT 3646-3647; see also 30HRT 3645-3649.) Eva's testimony at the evidentiary hearing that she and appellant divorced because of his drug problem was also impeached by her penalty phase

testimony that other reasons ended their relationship. (30HRT 3650-3652.) Thus, the testimony of appellant's family members was not credible and does not undermine Beswick's testimony that he adequately met with them. Because Beswick consulted with appellant and members of appellant's family on numerous occasions, appellant has failed to show Beswick's performance was deficient.

Further, even if Beswick failed to adequately meet with appellant or members of his family, appellant has failed to show he was prejudiced by such conduct at the guilt phase. Appellant has utterly failed to explain how he was prejudiced during the guilt phase by any failure by Beswick to adequately consult with appellant's family. Thus, appellant's claim of ineffective assistance of counsel on this ground fails. (*People v. Bolin* (1998) 18 Cal.4th 297, 333 ["defendant fails to establish additional investigation would have produced exculpatory or impeachment evidence"]; *People v. Berryman*, *supra*, 6 Cal.4th at p. 1082 [defendant failed to establish ineffective assistance in defense counsel's alleged failure to further prepare an expert for his testimony, because defendant "does not demonstrate that fuller preparation would have yielded favorable results"].) Additionally, each of appellant's claims of prejudice resulting from Beswick's alleged failure to adequately interview appellant lack merit.

Appellant first claims he was prejudiced because, had Beswick adequately interviewed him, Beswick could have obtained releases for appellant's personnel records at the dairy, which revealed appellant's participation in a drug rehabilitation program. (AOB 159-161, 167.) However, it is undisputed that Beswick knew about appellant's participation in the program. (30CRT 3269-3271, 3280, 3298-3299, 3304, 3319-3320, 3336-3339; AOB 160.) Thus, it is not the case that Beswick failed to obtain the records because, due to inadequate interviews of appellant, he did not know about them.

Instead, as Beswick testified, he made an informed, tactical decision not to obtain the records because evidence of appellant's past drug problem would undermine the defense. (30GRT 3526-3534, 3535-3536.) "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. . . . And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." (*Strickland*, *supra*, 466 U.S. at pp. 691, 695-696.) Further, appellant has not explained how records of his participation in a drug rehabilitation program would have been relevant or admissible in the guilt phase of his trial. (See *People v. Bolin*, *supra*, 18 Cal.4th at p. 333.)

Appellant next claims that he was prejudiced because, if Beswick had interviewed him further, he would have provided information about witnesses who could have testified to Janson's mental problems and involvement in the Camacho murder. (AOB 167.) However, it was established that Beswick did know of Janson's mental problems. (30CRT 3287-3288.) In fact, on cross-examination at the guilt phase, Beswick elicited Janson's testimony that at the time he gave his statement to police he was taking prescription drugs for depression, stress, and anxiety, and the medication clouded his mind. (15RT 1471-1472; 16RT 1636-1637, 1655.)

Additionally, there was absolutely no evidence presented at the evidentiary hearing that appellant had information that Janson was involved in the Camacho murder. (See *In re Avena*, *supra*, 12 Cal.4th at p. 717 [because petitioner failed to present evidence at a habeas corpus evidentiary hearing that

he was on PCP the night of the shooting, the Court "may assume that had [defense counsel] investigated the point prior to trial, he would not have uncovered any additional information in that regard"].) Appellant did not testify at the hearing, and his declaration, which was not admitted into evidence, did not discuss Janson. (3CT 721-723.) Likewise, no testimony, declarations, or other evidence was presented at the hearing to establish that there were potential witnesses who could testify to Janson's alleged involvement in the murder, and no evidence was presented as to what the content of such testimony would have been. (See *In re Avena*, *supra*, 12 Cal.4th at p. 738 ["petitioner does not even attempt to explain, let alone demonstrate with further declarations or other available documentary evidence, how these alleged acts and omissions by [defense counsel] were prejudicial . . . . [W]e cannot, and will not, predicate reversal of a judgment on mere speculation that some undisclosed testimony may have altered the result"], internal quotation marks omitted; *People v. Wash* (1993) 6 Cal.4th 215, 269 [rejecting ineffective assistance claim on the ground of failure to call expert witnesses because defendant failed to provide any evidence of what the experts' testimony would have been].) In fact, the only evidence in the record indicating that anyone had information about Janson's alleged involvement in the Camacho murder was Morales's testimony during the guilt phase that appellant told him Janson had assisted in the Camacho murder by letting appellant know when and where Camacho was just before the shooting. (13RT 1308-1310.) Thus, it appears any evidence regarding Janson's alleged involvement may have implicated appellant in the murder. Accordingly, appellant has not shown that further consultation with him would have given Beswick additional information which would have undermined Janson's testimony.

Appellant additionally claims he was prejudiced because, had Beswick interviewed him further, he could have identified witnesses who would testify

as to Morales's hostility toward appellant, which could have been used to show Morales's testimony was biased. (AOB 167.) However, appellant testified to the jury during the guilt phase that Morales had lied about appellant's confession because Morales blamed appellant for his being fired. (23RT 2652.) Thus, the evidence was presented to the jury. Moreover, appellant presented no evidence at the extensive evidentiary hearing that he could identify other witnesses who could and would testify to Morales's alleged hostility. Accordingly, appellant has failed to show that such witnesses existed, and his claim must be rejected. (See *People v. Bolin*, *supra*, 18 Cal.4th at p. 333; *In re Avena*, *supra*, 12 Cal.4th at pp. 717, 738.)

Appellant also claims he was prejudiced because, had Beswick interviewed him further, he could have identified witnesses who would testify that Camacho was a drug dealer and that his murder was related to that business. (AOB 167.) Again, appellant presented no such evidence at the evidentiary hearing. Appellant did not testify at the hearing, and he did not present testimony or declarations from witnesses averring that they knew Camacho to be a drug dealer, and would have been willing and available to so testify at appellant's trial. (See *People v. Bolin*, *supra*, 18 Cal.4th at p. 333.)

Moreover, the record shows that Beswick did investigate and discuss with appellant the theory that Camacho was involved in the drug business. As appellant recognizes (AOB 167), Beswick presented the theory to the jury during opening statement (11RT 1079 [stating that Camacho was "in the drug business"], 1085 [stating that Camacho was "involved with drugs as well. He uses them. He sells them."]). When the prosecutor objected, Beswick specifically informed the court that he anticipated appellant, Holton, and Janson would testify that Camacho dealt drugs. (11RT 1080.) Beswick explicitly based this offer of proof on information he had received from appellant (11RT 1081 ["I know from Carrasco that he and Harry Holton were in the process of

trying to get Mr. Camacho into drug rehab."]), information in the police reports that Camacho had cocaine on his person at the time of his death (11RT 1081-1082; Camacho Murder Book, section 3, page 5 of Preliminary Investigation Report),[34/] and information in the prosecution's discovery that Holton and Janson knew about Camacho's involvement with drugs (11RT 1083; Camacho Murder Book, section 14, page 1 of Statement Form of Greg Janson ["Camacho would sell 'coke' on the job"]).

The only reasonable conclusion from this record is that Beswick raised the theory based on information he received from appellant and others during his investigation, but he was ultimately unable to locate any witnesses to confirm the theory other than appellant, who testified that Camacho had a drug problem (23RT 2559-2561), and the medical examiner's testimony that Camacho had methamphetamine in his system at the time of his death (15RT 1525-1527). Indeed, in response to the prosecutor's questions, Holton, Rios, and Morales testified to the jury that they had no personal knowledge of Camacho using or selling drugs at the dairy. (12RT 1222; 13RT 1276, 1316.) Had witnesses existed who could and would have testified that Camacho was involved with drug sales, appellant would have presented them at the evidentiary hearing. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1211; accord, *People v. Burgener*, *supra*, 29 Cal.4th at p. 880; see also *In re Avena*, *supra*, 12 Cal.4th at pp. 717, 738.)

Lastly, appellant makes the baseless claim that he was prejudiced because, had Beswick interviewed him further, he could have provided "information about the true conspirators who killed Allan Friedman and then successfully framed him." (AOB 167.) Appellant then describes the evidence presented at trial and the preliminary hearing supporting the theory that

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34. The murder books were collectively made court's exhibits and were marked as "Court's Exhibit 2005" at a record correction hearing.

Woodland and his brother committed the murder, and Javier Chacon arranged to frame appellant for the murder. (AOB 167-168.) First, as appellant recognizes, this theory, and evidence supporting the theory, were presented by Beswick at trial. Thus, it is clear that Beswick had investigated the theory. On appeal, appellant fails to point to any evidence of *additional* information on this theory that he may have had and that Beswick failed to discover. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 333.) Indeed, no such evidence was presented at the extensive evidentiary hearing. (See *In re Avena*, *supra*, 12 Cal.4th at pp. 717, 738.)

In sum, appellant has not shown that, due to inadequate interviews of appellant and his family members, Beswick failed to learn information that would have been beneficial to the defense and admissible in the guilt phase of appellant's trial. The record of the trial and the protracted evidentiary hearing does not support appellant's bald assertions that he had information Beswick failed to discover that would have led to advantageous and admissible evidence at the guilt phase. Pitman filed new trial motions based on Beswick's alleged ineffective assistance of counsel on June 19 and August 3, 1998. Pitman was granted multiple continuances, and the evidentiary hearing was held on at least six court dates from September 17, 1998, through February 5, 1999. (3CT 731-734, 739-742, 766; 30FRT 3474-3479.) Thus, appellant was given every opportunity to present evidence regarding Beswick's alleged deficiencies and any prejudice that resulted. This Court is bound by the record before it (*People v. Burgener*, *supra*, 29 Cal.4th at p. 880; *People v. Cunningham* (2001) 25 Cal.4th 926, 1003; *People v. Szeto* (1981) 29 Cal.3d 20, 35), which contains no support for appellant's claims that he was prejudiced by any failure of his trial counsel to meet with him or members of his family more frequently.

Appellant compares this case to *In re Jones* (1996) 13 Cal.4th 552, and *In re Cordero* (1988) 46 Cal.3d 161. (AOB 166.) Both cases are inapposite.

In *Jones*, defense counsel was found to be ineffective not based on the lack of meetings he had with the defendant, but based on the fact that defense counsel failed to adequately investigate information the defendant gave defense counsel. Although the defendant had specifically informed defense counsel that neither of the two guns the prosecution had connected to him were in his possession at the time of the murder, defense counsel failed to locate the guns and have them tested to rule them out as the murder weapon. This failure was found to constitute ineffective assistance. (*Jones*, *supra*, 13 Cal.4th at pp. 562-566.) Here, on the other hand, there is nothing in the record to suggest that appellant gave Beswick pertinent, exculpatory information, which Beswick failed to investigate.

In *Cordero*, defense counsel failed to adequately question the defendant and investigate information regarding the defendant's mental state at the time of the charged murder. Defense counsel was aware that the defendant had consumed a large amount of alcohol prior to the shooting, the defendant told police during a post-arrest interview that he was "high" at the time of the shooting, and a police report stated that a PCP-laced cigarette was found at the scene of the shooting. (*Cordero*, *supra*, 46 Cal.3d at pp. 166, 173, 182-183.) Nevertheless, defense counsel failed to investigate a possible diminished capacity defense, including failing to contact witnesses defense counsel knew had been with the defendant the day of the shooting. Defense counsel made no opening statement and introduced no evidence in support of a defense theory or to impeach the prosecution's witnesses. (*Id.* at pp. 166, 174-176.) On habeas corpus, the defendant presented evidence that he had been high on PCP and alcohol the day of the shooting and that witnesses who had been with him that day would have testified to his intoxication, had defense counsel sought them out. (*Id.* at pp. 168, 176-178.) The defendant also presented a declaration from an expert regarding the effects PCP use might have had on the defendant's

mental state. (*Id.* at pp. 168-169.) Trial counsel's failure to adequately investigate known facts suggesting a potential diminished capacity defense was found to be incompetent and prejudicial. (*Id.* at pp. 182-183.)

Here, unlike in *Cordero*: defense counsel gave an opening statement; counsel presented a comprehensive defense theory of third-party culpability and misidentification, including eyewitness testimony, which obviously resulted from competent investigation; and counsel thoroughly cross-examined and impeached the prosecution's witnesses. Moreover, unlike in *Cordero*, appellant here failed to present any evidence at the evidentiary hearing that further conversations with appellant would have revealed relevant, admissible evidence that would have benefitted the defense during the guilt phase. Thus, appellant's reliance on *Jones* and *Cordero* is misplaced. Accordingly, appellant's claim fails.

2. Beswick Interviewed Witnesses And Conducted An Adequate Investigation In Preparation For The Guilt Phase, Beswick Reasonably Elected Not To Hire An Expert, And Appellant Was Not Prejudiced By Beswick's Conduct

Appellant next claims Beswick was ineffective in failing to interview witnesses, hire experts, or conduct "any investigation whatsoever" in preparation for the guilt phase. (AOB 168-176.) Respondent disagrees. Beswick adequately prepared for the guilt phase of appellant's trial, as seen in his thorough cross-examination of the prosecution's witnesses and the strong defense he presented. Beswick's decision not to employ experts was a rational tactical decision. In any event, appellant was not prejudiced by Beswick's conduct.

First, appellant contends Beswick failed to subpoena or interview prosecution witnesses. (AOB 168-169.) However, Beswick specifically testified that prior to trial he interviewed prosecution witnesses Janson and Saavedra. (30CRT 3267-3268, 3286-3287.) In any event, it is unclear how

Beswick was incompetent or how appellant was prejudiced by any failure to subpeona or interview prosecution witnesses when Beswick effectively cross-examined each prosecution witness, including: impeaching Janson with his prior inconsistent statements; undermining Woodland's credibility by eliciting details about the beneficial plea bargain he received in exchange for his testimony against appellant; eliciting the prosecution's fingerprint expert's testimony that appellant's fingerprints were not found on Friedman's Jeep, but Woodland's print was; and eliciting Detective Coblentz's testimony that approximately one week after the Friedman murder, Saavedra identified Woodland's brother Ryan from a photographic lineup as Woodland's accomplice in the murder. Thus, Beswick was sufficiently prepared to, and did, meaningfully cross-examine the prosecution's witnesses. Appellant has failed to show Beswick would have gleaned any more impeachment evidence by further investigation or interviews. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 333.)

Next, appellant complains that Beswick interviewed appellant and other defense witnesses only minutes before they testified at the guilt phase. (AOB 169, 176.) However, Beswick specifically denied this claim. (30CRT 3335.) The only evidence supporting appellant's claim is his own self-serving declaration and Eva's evidentiary hearing testimony that Beswick met with her regarding her guilt phase testimony only minutes before she testified. However, as explained, Eva's evidentiary hearing testimony was unreliable and inconsistent. (Arg. X. C. 1.; see *In re Avena*, *supra*, 12 Cal.4th at p. 716.) Likewise, appellant's declaration was unreliable (*People v. Duarte*, *supra*, 24 Cal.4th at p. 611), and was never admitted into evidence (*In re Burton* (2006) 40 Cal.4th 205, 228 [declaration not admitted into evidence may not be relied upon]). Moreover, it appears that Beswick did not anticipate calling Eva during the guilt phase, but felt it was necessary after Janson's guilt phase testimony.

(See 30HRT 3626-3628.) Thus, even if Beswick discussed Eva's testimony with her for the first time only minutes before she testified, he did not necessarily do so with other defense witnesses, whom he had planned to call to the stand. Regardless, the failure to interview witnesses until the day of their testimony does not establish deficient performance. (*People v. McDermott* (2002) 28 Cal.4th 946, 991-992.)

Moreover, appellant has failed to show how he was prejudiced by Beswick's alleged failure to prepare the defense witnesses prior to trial. Appellant failed to present any evidence at the extensive evidentiary hearing that the defense witnesses would have provided materially different testimony or had further exculpatory testimony that Beswick failed to elicit. Thus, appellant's claim fails. (See *People v. Bolin*, *supra*, 18 Cal.4th at p. 333; *In re Avena*, *supra*, 12 Cal.4th at pp. 717, 738.)

Appellant also complains that Beswick failed to interview Skolfield or Carranza. (AOB 170.) However, it was never established that Beswick failed to interview Skolfield or Carranza. In fact, the record shows that Beswick listened to a taped interview between Carranza and a police detective, and that Beswick personally interviewed Carranza before calling Carranza to testify. (25RT 2778, 2793.) Appellant has failed to show that further interviews would have yielded beneficial information. (See *People v. Berryman*, *supra*, 6 Cal.4th at p. 1082.)

Additionally, the record shows that Beswick was prepared for Skolfield and Carranza's testimony. After Beswick presented appellant's testimony that Skolfield committed the Camacho murder (23RT 2566-2567, 2664-2665), the prosecution called Skolfield as a rebuttal witness. Skolfield denied killing Camacho (25RT 2756), but Beswick effectively cross-examined him. For example, Skolfield denied being a Culver City gang member (25RT 2757-2758), but Beswick forced Skolfield to admit that he had Culver City tattoos

(25RT 2759). Beswick also elicited Skolfield's testimony that he was friends with Carranza, who was a Culver City gang member. (25RT 2760.) Beswick's effective cross-examination of Skolfield shows he was prepared for the witness and appellant was not prejudiced by any failure to investigate or interview Skolfield.

Beswick called Carranza as a surrebuttal witness. When asked whether he knew Skolfield, Carranza invoked his Fifth Amendment right against self-incrimination in front of the jury. (25RT 2777.) Outside the jury's presence, Carranza thereafter invoked the privilege on every question, including where he was born and where he lived. (25RT 2789, 2794-2796.) The court instructed the jury to disregard Carranza's testimony. (25RT 2781; 26RT 2939; 2CT 396 [CALJIC No. 2.25 ["Refusal of Witness to Testify--Exercise of Privilege Against Self-incrimination"]].) Because the court instructed the jury to disregard Carranza's testimony, the testimony, and any deficiency in Beswick's preparation for it, cannot have prejudiced appellant. (See *People v. Gray* (2005) 37 Cal.4th 168, 231 [it is presumed that jurors understand and follow instructions].)

In any event, even if the jury considered Carranza's testimony, it could only have been to appellant's benefit. Beswick specifically told the court that he wanted the jury to see Carranza's demeanor when he was asked questions about Skolfield. (25RT 2791-2792.) Skolfield's testimony that he was friends with Carranza, and his denial of his obvious gang membership, coupled with Carranza's refusal to answer any questions about Skolfield, could only have supported appellant's testimony that Skolfield was involved in the Camacho murder. Indeed, the prosecutor expressed her concern that the jury was so influenced (25RT 2785, 2793, 2796), and Beswick emphasized Skolfield's demeanor in closing argument (26RT 2912 ["And you watched his demeanor on the stand, he doesn't want to admit to knowing anybody that could be

possibly connected with the case until the machismo came out about being a Culver City gang member. Then you saw a whole different demeanor on that guy."]). Thus, appellant has not shown ineffective assistance of counsel with regard to Beswick's investigation of Skolfield and Carranza.[35/]

Appellant further complains that Beswick provided the names of only two witnesses in discovery to the prosecution and that Beswick's anticipated witness list did not change over a period of 18 months prior to trial. (AOB 170-171.) Yet, Beswick's failure to provide discovery to the prosecution could only have hurt *the prosecution's* preparation for trial. The jury was never informed that Beswick had erred in any way with regard to discovery. Moreover, Beswick presented more than two defense witnesses, and appellant has not shown that there were more witnesses who should have been called at the guilt phase. Thus, appellant has failed to establish ineffective assistance.

Appellant also complains that Beswick indicated before trial that he needed to interview 60 witnesses, then two months later reduced the number of witnesses to 30 to 40. (AOB 169.) First, because there is no evidence to the contrary, it must be assumed that Beswick reasonably changed the number of witnesses who needed to be interviewed. (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 746.) The change may have occurred because Beswick had interviewed some witnesses in the time since the first estimation, or because, through further investigation, he had reached a more accurate estimate. (See 30GRT 3505-3506.) Moreover, appellant failed to show at the evidentiary hearing that there were witnesses Beswick failed to interview who could have

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35. Appellant also complains that Beswick falsely claimed Carranza would implicate Skolfield in the Camacho murder. (AOB 170, citing 5RT 258-259.) However, because Beswick made the claim outside the presence of the jury, appellant cannot have been prejudiced. As explained, Carranza's invocation of his right against self-incrimination in the jury's presence can only have worked to appellant's benefit.

provided beneficial information or admissible, exculpatory testimony. Thus, appellant has failed to show incompetence or prejudice.

Next, appellant complains that in Beswick's request for investigative funds, he stated that he needed to hire forensic experts to inspect the Honda, but he ultimately failed to hire forensic or medical experts. (AOB 169.) However, Beswick testified that it was a tactical decision not to employ a medical doctor, neurologist, or forensic expert, because he had determined that such experts were not needed. (30CRT 3327-3328, 3332-3333.) Beswick's decision was informed by the fact that the only damaging forensic evidence in this case was appellant's fingerprint, which was found on a can inside the Honda and for which the defense presented a plausible, exculpatory explanation without the assistance of an expert. Had there been damaging blood or DNA evidence, Beswick would have employed a serologist or DNA expert. (30CRT 3328.) It should also be noted that Beswick made every effort to have the forensic evidence recovered from the Honda excluded, and the trial court did not rule on Beswick's exclusion motions until trial. Further, the decision not to employ an expert was reasonable in light of the fact that exculpatory evidence was elicited from *the prosecution's forensic experts*. For example, Los Angeles Police Department Criminalist Denis Fung testified that the .380-caliber bullets used to shoot Camacho were not fired from the .380-caliber gun found in appellant's possession when he was arrested. (19RT 2170-2171; see 19RT 2176, 2189.) Additionally, Los Angeles Police Forensic Print Specialist Charles Caudell testified that Woodland's prints were found on Friedman's Jeep, and no other prints, including appellant's, were found on the Jeep. (18RT 2128-2129.) Thus, Beswick made an informed, reasonable decision not to hire experts.

Moreover, appellant has again failed to show he was prejudiced by Beswick's decision not to hire experts. Appellant did not present evidence at the evidentiary hearing that there was exculpatory evidence that forensic or

medical experts would have discovered that was not presented at trial. (See *People v. Bolin*, *supra*, 18 Cal.4th at p. 334 ["'Such claims must be supported by declarations or other proffered testimony establishing both the substance of the omitted evidence and its likelihood for exonerating the accused. . . .' The record does not establish defense experts would have provided exculpatory evidence if called, and we decline to speculate in that regard as well."]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1277 [no prejudice was shown in counsel's failure to consult an independent pathologist because "[d]efendant presented no evidence at the reference hearing that an independent pathologist would or even might have" testified in defendant's favor].)

Appellant also complains that Beswick failed to employ an investigator other than to locate two witnesses. (AOB 171-173.) However, Beswick testified that he personally interviewed witnesses and conducted an adequate investigation. Moreover, appellant presented no evidence at the evidentiary hearing that an investigator would have discovered or provided additional admissible, exculpatory evidence during the guilt phase. (See *People v. Berryman*, *supra*, 6 Cal.4th at p. 1082.) Thus, appellant has failed to show ineffective assistance of counsel.

Appellant also contends that Beswick did not attempt to corroborate his assertion in opening statement that Camacho was a drug dealer. (AOB 173.) Appellant's contention is belied by the record. Beswick elicited the medical examiner's testimony that Camacho had methamphetamine in his system at the time of his death. (15RT 1525-1527.) Beswick also elicited appellant's testimony that Camacho had a drug problem. (23RT 2559-2561.) Appellant nevertheless claims Beswick should have obtained Camacho's "employee records, union representative's records, medical or drug treatment records" to support the theory that Camacho was a drug dealer. (AOB 173.) However, appellant failed to present any evidence at the evidentiary hearing that such

records existed, would support the theory, were admissible, and were undiscovered by Beswick. (See *People v. Bolin*, *supra*, 18 Cal.4th at p. 333; *People v. Berryman*, *supra*, 6 Cal.4th at p. 1082.) Thus, appellant has failed to meet his burden of establishing ineffective assistance of counsel.

Appellant additionally complains that Beswick failed to support the defense theory that appellant had been "set up" with any evidence other than appellant's testimony. (AOB 175.) Again the record belies appellant's complaint, as Beswick supported the theory with evidence other than appellant's testimony. For example, Beswick presented the testimony of Baltazar, who contradicted Morales's testimony and claimed that appellant never confessed to the Camacho murder. (21RT 2303, 2305.) Beswick also presented eyewitness testimony that appellant was not the shooter in the Friedman murder. (20RT 2257-2262, 2266; 21RT 2319-2324, 2326-2327, 2330; see also 19RT 2208-2210.) Beswick further presented Delia Chacon's testimony that after Woodland's murder, Janson saw the Friedman murder book at the Chacons' auto body shop, thus implying that Janson was able to learn details of the Friedman murder from a source other than appellant. (21RT 2362-2363; 22RT 2475, 2477.) Additionally, Beswick presented Woodland and Delia's testimony that Woodland was like a son to the Chacons, Delia's testimony that her husband was jealous of appellant, and Delia's testimony that she was cheating on Javier with appellant. (18RT 2002-2004, 2032; 21RT 2334-2335, 2345-2347, 2365, 2365-2366, 2368.) Thus, Beswick presented appreciable evidence besides appellant's testimony to support the theory that appellant had been set up. Moreover, appellant has not shown he was prejudiced by Beswick's conduct because he has not established that further evidence supporting his testimony existed or was available to counsel. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1032.)

Lastly, appellant complains that his trial was Beswick's first death penalty trial. (AOB 174-175.) However, Beswick had assisted lead counsel in a death penalty case, tried numerous serious criminal cases, and studied case law and literature on trying capital cases. (30CRT 3257-3259, 3277, 3308.) Thus, Beswick's alleged inexperience does not establish incompetence. (See *People v. Lancaster*, *supra*, 41 Cal.4th at p. 72; *People v. Wright*, *supra*, 52 Cal.3d at p. 412.) Moreover, appellant fails to show how was he prejudiced by Beswick's alleged inexperience. Appellant makes the outrageous claim that due to Beswick's inexperience, he did "nothing other than show[] up in court" during the guilt phase. (AOB 174.) To the contrary, the record clearly shows that Beswick assisted in developing an extensive juror questionnaire and actively participated in jury selection by questioning and challenging numerous prospective jurors. During the guilt phase, Beswick also gave an opening statement, thoroughly cross-examined the prosecution's witnesses, presented a comprehensive theory of defense to both murders and the robbery, used appellant's admission of the escape charge to bolster the defense to the other charges, presented defense witnesses, and gave a lengthy closing argument. (Compare with *In re Avena*, *supra*, 12 Cal.4th at pp. 727-728, 738 [counsel provided ineffective assistance when he failed to present an opening statement, failed to present a defense or any witnesses at the guilt phase, and failed to address the charges or special circumstance allegations in his brief closing argument; nevertheless, defendant was not prejudiced because he failed to establish with testimony or other evidence that he was prejudiced by counsel's inaction].) Accordingly, appellant's claim fails.

3. Beswick Adequately Investigated Prosecution Witnesses, And Appellant Was Not Prejudiced By Beswick's Investigation

a. Efrain Bermudez And Anthony Morales

Appellant complains that Beswick failed to investigate Bermudez and Morales's possible bias against appellant. (AOB 176.) Appellant has failed to show that Beswick acted incompetently or that appellant was prejudiced by any inadequacy in Beswick's investigation, as evidence of Bermudez and Morales's possible biases against appellant was presented. For example, appellant testified that Morales lied about appellant's confession because Morales blamed appellant for his being fired from the dairy. (23RT 2652.) Further, Beswick presented evidence that appellant once tried to break up a fistfight between Bermudez and another coworker, and Bermudez's friend ended up attacking appellant. (20RT 2273-2277, 2283.) Additionally, as explained (Arg. X. C. 1.), appellant presented no evidence at the extensive evidentiary hearing identifying witnesses other than himself who could and would have testified regarding Bermudez and Morales's alleged bias against appellant. Accordingly, appellant has failed to show that Beswick's investigation was inadequate or that he was prejudiced by any inadequacy. (See *People v. Bolin*, *supra*, 18 Cal.4th at p. 333; *In re Avena*, *supra*, 12 Cal.4th at pp. 717, 738.)

b. Greg Janson

Appellant contends Beswick failed to investigate Janson. (AOB 177-179, 185-187.) The record negates appellant's contention. Beswick specifically testified at the evidentiary hearing that he interviewed Janson prior to trial on more than one occasion. (30CRT 3267-3268, 3286.) In fact, Janson testified at the guilt phase that Beswick had interviewed him. (16RT 1671.) Beswick's investigation revealed that Janson had mental problems which required him to take medication. Beswick's investigation also revealed that

Janson had given inconsistent statements to police. Beswick used that information to thoroughly cross-examine Janson during the guilt phase, eliciting Janson's testimony that he had lied and given inconsistent testimony in this case (see generally 15RT 1486-1504, 1557-1558), and had been on medication that caused him not to think clearly when he gave his original statement to the police (15RT 1471-1472; 16RT 1636-1637, 1655). Thus, the record shows that Beswick investigated Janson.

Nevertheless, appellant complains that Beswick failed to take notes or have an investigator present when he interviewed Janson. (AOB 177-179.) Appellant fails to explain how he was prejudiced by the way Beswick conducted his interviews of Janson. Appellant presented no evidence at the evidentiary hearing that Janson made statements during the interview that Beswick could have used to impeach Janson, but was unable to do so because there was no witness to the interview and Beswick had not taken notes of the interview. Because appellant has not shown prejudice, his claim fails.

Appellant further faults Beswick for failing to investigate Janson's background or mental health and how Janson's psychiatric medication may have affected his memory and testimony. (AOB 179.) However, the record shows that Beswick meaningfully cross-examined Janson regarding his mental health, the medication he was taking at the time he gave his statement to police, and the effect that medication had on his memory, mental state, and ability to testify. (15RT 1471-1472; 16RT 1636-1637, 1655.) Moreover, appellant has failed to show, through testimony or other evidence, that further investigation of Janson's medication and mental problems would have affected the verdict by further impeaching Janson's testimony. (See *People v. Bolin*, *supra*, 18 Cal.4th at p. 333; *In re Avena*, *supra*, 12 Cal.4th at pp. 717, 738.)

Appellant again complains that Beswick failed to investigate the allegation that Janson was involved in the Camacho murder. (AOB 178-179,

185.) However, as explained, appellant has failed to show that such investigation would have resulted in admissible, exculpatory evidence. (Arg. X. C. 1.) Indeed, appellant failed to present any evidence at the evidentiary hearing that Janson was involved in the Camacho murder. As appellant recognizes, the only evidence supporting his claim that Janson was involved in the murder was Morales's testimony. (AOB 178, citing 13RT 1310, 1329.) However, Morales testified that he thought Janson was involved in the murder only because *appellant told him Janson assisted him in the murder.* In other words, Morales's testimony regarding Janson's involvement in the murder incriminated appellant. Thus, appellant's claim of ineffective assistance of counsel based on any failure to investigate Janson's involvement in the Camacho murder, fails.

Appellant also claims Beswick's investigation of Janson was insufficient because Beswick could not "exploit Mr. Janson's lack of memory nor reveal possible (possibly exculpatory) reasons for his reluctance" to testify. (AOB 177, 179.) First, Beswick *did* exploit Janson's lack of memory by thoroughly cross-examining him on his inconsistent statements. (See, e.g., 15RT 1488-1504, 1557-1558.) Moreover, Janson testified that he was afraid to testify because he had received threatening phone calls. (See, e.g., 15RT 1444-1446, 1465-1467, 1473, 1560.) Beswick attempted to impeach Janson with his grand jury testimony that appellant had not threatened him. (15RT 1557-1558.) Appellant failed to present any evidence at the lengthy evidentiary hearing that there were other "possibly exculpatory" reasons for Janson's fear of testifying. Thus, appellant failed to show there was anything more Beswick could have done to undermine Janson's testimony. Indeed, appellant himself recognizes that further investigation might only have revealed "possibly exculpatory" reasons for Janson's reluctance to testify. (AOB 177.) Ineffective assistance of counsel under *Strickland* cannot be shown by argument, unsupported by any

evidence whatsoever, that "possibly exculpatory" evidence might have resulted had counsel acted differently. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1033; *People v. Berryman*, *supra*, 6 Cal.4th at p. 1082.) Thus, appellant's baseless allegation should be rejected.

c. Shane Woodland

Appellant contends that Beswick inadequately investigated Woodland. (AOB 180-184, 187-189.) Specifically, appellant complains that Beswick failed to obtain Woodland's juvenile court records, school records, and employment records. Appellant further complains that Beswick failed to interview people who knew Woodland and might have been able to give an opinion regarding Woodland's credibility. (AOB 183.) Appellant's argument ignores Beswick's testimony at the evidentiary hearing that he interviewed people who knew Woodland in an attempt to find information undermining Woodland's credibility. (30CRT 3301.) In fact, as a result of Beswick's investigation, he presented the testimony of Delia Chacon, whose testimony contradicted Woodland's, thereby undermining Woodland's credibility.

Additionally, Beswick thoroughly cross-examined Woodland regarding: his relationship with Javier Chacon, which implied Chacon used Woodland to set up appellant for Friedman's murder (18RT 1991-1992, 2002-2004, 2032, 2035, 2037, 2040-2041, 2064-2065); Woodland's connection to Friedman, which further implicated Woodland in the murder (18RT 1997, 2007-2016); Woodland's major involvement in the murder, which undermined Woodland's credibility (18RT 1994, 1998, 2065); and the fact that Woodland was originally charged with first degree murder and faced 25 years to life in prison, but he ultimately pled guilty to a lesser charge and received only six years in exchange for his testimony against appellant, which also undermined Woodland's credibility (18RT 1992-1997, 2056-2057, 2065-2066). Indeed, in his own brief, appellant repeatedly argues that Woodland lacked credibility because he

received a beneficial plea bargain from the prosecution in exchange for his testimony against appellant. (See, e.g., AOB 185, 187.) Beswick thoroughly explored this impeachment evidence and emphasized it to the jury. His decision to rely on this evidence to undermine Woodland's testimony was reasonable. (See *People v. Bolin*, *supra*, 18 Cal.4th at p. 334 [whether witnesses should have been more rigorously cross-examined is left to counsel's discretion and rarely establishes ineffective representation].) In fact, appellant's own expert on trying death penalty cases testified at the evidentiary hearing that Beswick adequately cross-examined Woodland. (30DRT 3392-3393.)

Moreover, appellant has not established that he was prejudiced by any failure to investigate Woodland, because he offered no evidence at the evidentiary hearing that records or witnesses existed which might have further undermined Woodland's testimony. For example, in preparation for the evidentiary hearing, Pitman petitioned for Woodland's juvenile court records. (2Supp. 2CT 415-418.) Woodland's counsel opposed the petition. (2ASupp. CT 121-127.) Appellant did not present Woodland's juvenile court records at the evidentiary hearing. Thus, appellant failed to establish that Beswick could have obtained the records or that the records contained any admissible information which would have so impeached Woodland's testimony that it is reasonably probable the jury would have reached a different verdict. (See *People v. Bolin*, *supra*, 18 Cal.4th at pp. 333-334 [to establish ineffective assistance in counsel's failure to further investigate or cross-examine witnesses, defendant must submit reliable evidence establishing the substance of the omitted or undiscovered information and its likelihood for exonerating defendant].) Accordingly, appellant has failed to meets his burden of establishing ineffective assistance of counsel.

4. Appellant Has Failed To Establish Ineffective Assistance On The Ground That Beswick Failed To Present The Testimony Of Martin Sasson

Appellant claims Beswick was incompetent because he failed to present the testimony of Martin Sasson, which "would have impeached Woodland, by showing that he was lying about what he knew that day, and pointed to Woodland's culpability." (AOB 184-185.) Appellant's claim is unsupported by the record.

At the evidentiary hearing, Woodland's attorney Hill testified, "It was the account of Mr. Sasson, *albeit indirectly*, that Mr. Friedman had made arrangements to meet with Shane Woodland on the day of the fatal events and that these arrangements had been made the preceding day." (30HRT 3724, italics added.) Hill testified that he discussed Sasson's statement with Beswick. (30HRT 3724.) Additionally, on cross-examination at trial, Beswick asked Woodland if he knew Sasson. (18RT 2055.) Thus, it appears that Beswick was aware of Sasson's statement to Hill. However, appellant did not present evidence at the evidentiary hearing regarding Beswick's decision not to present Sasson as a defense witness. It must be presumed that Beswick made a reasonable tactical decision in deciding not to present Sasson as a witness. (*People v. Carter*, *supra*, 36 Cal.4th at p. 1189.) Indeed, appellant failed to present any evidence at the evidentiary hearing that Beswick did not interview Sasson or that Beswick's decision not to present Sasson was not reasonable. Moreover, appellant failed to present any evidence at the evidentiary hearing regarding who exactly Sasson was in relation to the people involved in the case, how Sasson knew about Woodland's alleged plans with Friedman, and whether Sasson's testimony would have been admissible. Actually, it appears from the italicized portion of Hill's testimony that Sasson did not have personal knowledge of the alleged arrangement and his statement would have been inadmissible hearsay. (Evid. Code, § 1200.) Accordingly, appellant has failed

to show that Beswick acted incompetently in deciding not to present Sasson as a defense witness. For the same reasons, appellant has failed to show that he was prejudiced by Beswick's decision. (See *People v. Medina* (1995) 11 Cal.4th 694, 773.)

5. Beswick Reasonably Agreed To Join The Escape Charge With The Other Charges, And Appellant Was Not Prejudiced By The Joinder

Appellant claims Beswick provided ineffective assistance by agreeing to have the escape charge joined with the murder and robbery charges. (AOB 189-192.) Respondent disagrees. Beswick rationally and tactically chose to agree to the joinder. Regardless, appellant was not prejudiced by the agreement.

First, appellant claims Beswick had no valid strategic reason to agree to have the escape charge joined with the murder charges. Appellant alleges that Beswick agreed to the joinder only to speed up the trial so his law firm would face less financial difficulty. (AOB 189-191.) Appellant's argument is not supported by the record. As explained (Arg. VII.), before trial, the court properly ruled that the escape evidence would be admissible in the murder trial (2Supp. 2CT 398-406; 2RT 8-11; see *People v. Valdez*, *supra*, 32 Cal.4th at p. 120; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1126). Thereafter, the prospective jurors were informed of appellant's escape and questioned about whether they thought such an escape automatically established appellant's guilt on the murders and robbery. (See 4CT 801.) During jury selection, Beswick indicated that since the jury would hear about the escape anyway, and the prospective jurors' responses to the questionnaire would indicate the potential effect such evidence would have on them, he did not oppose the escape charge being tried along with the murder and robbery charges. (5RT 267.) The court confirmed that Beswick and appellant did not oppose the joinder, and made sure that

appellant had consulted with Beswick regarding the joinder before agreeing to it. (5RT 267-269; 6RT 276.)

Because the jury was going to learn that appellant had escaped, Beswick reasonably decided to ensure that extensive evidence of the escape was presented. Beswick used such evidence to argue that appellant was a person who acted deliberately after considerable planning and not the type of person to commit seemingly rashly-planned and poorly-executed murders and robbery. Specifically, Beswick argued:

> Bert Carrasco took the stand, he talked about his escape. Now, I'm not condoning that he escaped, but he got on the stand, he didn't offer any excuses and didn't try to drag anybody else with him. He told you he escaped. You saw the tape, you saw basically what he had to do to escape from Wayside Correctional Facility.
>
> He planned it for months. Not only to get out of Wayside, but to do so without injuring anyone. Those are the facts, you heard it from Sergeant Waters. He used - - or has talked to Bert Carrasco to find out how to prevent it in the future. Getting a blade and sawing the grate and tying up sheets and scaling that wall. It took him months. It was well thought out.
>
> That is how his mind works whether you like it or not. That is what he did. He was candid when he hit the stand. He didn't have to say that. He could use some excuse. He didn't.
>
> On the flipside of his conduct, the prosecutor wants you to believe that Bert Carrasco shot George Camacho the very night he got back from being terminated. His first night back. Five minutes after he got there where Bert works. Bert ran up and shot him eight, nine, ten times.
>
> The same guy who planned the escape for months. He is just going to rush up and shoot him at work?

(26RT 2881-2883.) Beswick further argued:

> When Bert gets arrested in the escape, he's got no gun with him, no incidents of violence. He hesitated whether or not he should steal a car to get away, but he won't even do that. You're facing two counts of murder in the first degree, and you get out and you think that something is not right because somebody could get hurt, that's not the same sort of mentality that the prosecutor tells you or wants you to believe shot two human beings in cold blood; one for a schedule, and two for a drug rip off in Encino in broad daylight.
>
> . . .
>
> He has the ability to plan escaping from Wayside Correctional Facility, yet he's going to run up without any sort of protection. He goes to his work and in broad daylight he shoots somebody on a quiet street. That's not the same person.

(26RT 2909-2910.)

Because Beswick used the escape evidence to appellant's benefit, he had a rational tactical reason to agree to allow all the evidence of the escape in at the murder trial. By agreeing to the joinder, Beswick knew that the prosecution would present all the facts and circumstances of appellant's escape, the details of which Beswick could use in defense of the murder and robbery charges. Additionally, because Beswick's planned use of the escape evidence involved conceding the escape charge, there was no reason not to try the charge with the murder charges. (See *People v. Jennings* (1991) 53 Cal.3d 334, 376-378.) The fact that Beswick's tactic may not have proved successful does not mean the tactic was unreasonable. (*People v. Riel* (2000) 22 Cal.4th 1153, 1185; *People v. Frye* (1998) 18 Cal.4th 894, 982; *People v. Jennings*, *supra*, 53 Cal.3d at p. 378.) Had Beswick not agreed to the joinder, the jury would have learned that appellant had escaped, but the evidence might not have been as detailed or

susceptible to an interpretation that benefitted the defense. Appellant's pure speculation that Beswick only agreed to the joinder to speed up the trial should be rejected. (See *People v. Lewis* (2001) 25 Cal.4th 610, 674-675 [it is inappropriate for an appellate court to speculate about the tactical bases for counsel's conduct, and inadequate representation will not be assumed unless there was no conceivable tactical purpose for counsel's conduct].)

Even if Beswick's decision to agree to the joinder fell below an objective standard of reasonableness, appellant was not prejudiced. Appellant alleges he was prejudiced by the joinder because the escape evidence allowed the jury to draw negative inferences regarding his character and was used by the prosecution as evidence of appellant's consciousness of guilt. (AOB 191-192.) However, no evidence was presented that appellant engaged in any violence in his escape. Thus, the evidence did not tend to evoke an emotional bias against appellant. (See *People v. Kipp*, *supra*, 26 Cal.4th at p. 1126; see also *People v. Holt*, *supra*, 37 Cal.3d at p. 455, fn. 11.) Moreover, the evidence was properly used as exhibiting appellant's consciousness of guilt and would have been admissible for this purpose regardless of whether the charges were joined. (See *People v. Valdez*, *supra*, 32 Cal.4th at p. 120; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1126; *People v. Box*, *supra*, 23 Cal.4th at p. 1205; *People v. Holt*, *supra*, 37 Cal.3d at p. 455, fn. 11; see also *People v. Kelly* (1992) 1 Cal.4th 495, 541 [no prejudice resulted in counsel's failure to object to admissible evidence].) Additionally, the jury was properly instructed that the escape evidence alone could not establish appellant's guilt on the other charges. (26RT 2940; 2CT 400.) Thus, appellant has failed to show he was prejudiced by the joinder.

Appellant also claims the joinder prejudiced him at the penalty phase because the escape evidence informed the jury that appellant "was clever and devious, the type of danger that should be put to death to protect society."

(AOB 191-192.) However, the jury would have been aware of appellant's escape regardless of Beswick's agreement to join the charges. Moreover, as stated, the evidence did not tend to evoke an emotional bias against appellant. Additionally, the prosecutor did not emphasize or even mention the escape during her penalty phase argument. (See 29RT 3150-3159.) Accordingly, appellant has failed to show that the joinder prejudiced him at the penalty phase.

6. Appellant Has Failed To Establish Ineffective Assistance Of Counsel Or Trial Court Error On The Ground That The Tape Of Janson's Police Interview Should Not Have Been Played To The Jury

Appellant claims Beswick was ineffective in agreeing to have the jury listen to a tape of Janson's police interview. Appellant further claims the trial court erred in allowing the tape to be played, even if portions of the tape were admissible. (AOB 193-202.) Appellant's claims fail. Beswick originally opposed admission of the tape, then reasonably agreed to its admission when Janson's testimony opened the door to it. Additionally, the trial court properly permitted the jury to hear the tape. Moreover, appellant has failed to show he was prejudiced by the playing of the tape.

a. Procedural Background

Before Janson testified, the prosecutor sought to play a tape of Janson's police interview. (13RT 1402.) Beswick objected, arguing that Janson had to testify before it could be determined whether the tape was admissible. (13RT 1402.) The court agreed with Beswick. (13RT 1403.) Janson testified that he did not remember his statements to the police. (13RT 1415-1418.) The prosecutor then asked Janson if it would refresh his memory to listen to a tape of his police interview. (13RT 1418.) The court told the prosecutor to first allow Janson to review a transcript of the interview and see if the transcript refreshed his recollection. (13RT 1418-1419.) The prosecutor noted that she

sought to play the tape not just to refresh Janson's recollection but also to impeach his testimony. (13RT 1419.) Beswick objected, and the court stated that if the transcript and tape did not refresh Janson's recollection, the prosecutor could not use the tape to impeach Janson because there would be no testimony to impeach. (13RT 1420-1421.) The court recessed to give Janson time to read the transcript. The court indicated that the prosecutor could play the tape to Janson outside the jury's presence in order to refresh his recollection. (13RT 1422-1423.)

When Janson resumed testifying, he stated that reading the transcript had refreshed his recollection. (15RT 1438.) Janson thereafter testified, repeatedly having to refresh his memory by reading portions of the transcript. (15RT 1439-1460.)

On cross-examination, Beswick impeached Janson with his testimony at the preliminary hearing and before the grand jury. (See, e.g., 15RT 1488-1504.) During a recess, the prosecutor renewed her request to play the recording of Janson's police interview to the jury. Citing Evidence Code section 791, the prosecutor argued that because defense counsel admitted Janson's prior inconsistent statements, the prosecutor should be permitted to admit evidence of Janson's prior consistent statements. (15RT 1508.) The court stated, "I don't see any reason to disallow it at this point, Mr. Beswick." (15RT 1508.) Beswick replied, "Play the tape, your Honor." (15RT 1509.) The tape was played for the jury. (15RT 1561-1619.) Beswick thereafter recross-examined Janson. (16RT 1623-1670.)

b. The Tape Was Properly Played

First, Beswick was not ineffective in failing to renew his objection to the tape being played. Once Beswick impeached Janson with his prior inconsistent testimony at the preliminary hearing and before the grand jury, Janson's prior consistent statement to the police was admissible. (Evid. Code, §§ 791, 1236.)

Beswick was not ineffective for failing to make an unmeritorious objection. (*People v. Cudjo* (1993) 6 Cal.4th 585, 616; *People v. Price* (1991) 1 Cal.4th 324, 387.)

Nevertheless, appellant claims Beswick was ineffective in not requesting that the tape be edited to omit statements by Janson that appellant claims were inadmissible as lay witness opinion testimony, information outside the personal knowledge of the witness, and hearsay. (AOB 196-199.) It is unnecessary to evaluate the admissibility of each of the statements appellant now contests. "[E]ven when there was a basis for objection, whether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference, failure to object seldom establishes counsel's incompetence." (*People v. Majors* (1998) 18 Cal.4th 385, 403, internal quotation marks, edits, and citations omitted; see *People v. Kelly*, *supra*, 1 Cal.4th at p. 540 ["An attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel."]; accord, *People v. Boyette*, *supra*, 29 Cal.4th at p. 433.) Here, the record does not reveal why Beswick did not request redaction of the interview, as Beswick was not asked about this decision at the evidentiary hearing. Nevertheless, even if the statements appellant contests were inadmissible, there was a rational tactical basis for Beswick's decision not to request redaction of the tape. Because the redaction would have been obvious, it would have left the jury wondering, possibly to appellant's detriment, what Janson had said in the redacted portions. (See *People v. Stewart* (2004) 33 Cal.4th 425, 483 [counsel was not ineffective in failing to request redaction of letters written by defendant because the letters were partially beneficial to the defense, and redaction may have led the jury "to speculate that information especially harmful to defendant had been excised"].) Beswick may have reasonably concluded that the jury would assume the redacted portions contained highly incriminating statements about appellant.

Instead, Beswick ensured that the jury heard the whole interview, including the statements appellant now contests as inadmissible, but which were not highly inflammatory. For example, Janson's comments during the interview that he thought appellant was guilty of the murders were not prejudicial because the jury must have already inferred from Janson's testimony that he thought appellant had committed the murders. (See *People v. Riggs* (2008) 44 Cal.4th 248, 694 [any prosecutorial error in eliciting detective's testimony that he believed the defendant was guilty and untruthful was not prejudicial because the testimony "did not present any evidence to the jury that it would not have already inferred"].) Likewise, Janson's statements that other people at the dairy were afraid of appellant and that appellant carried a gun, were not prejudicial because that information was imparted to the jury through other admissible testimony. (See, e.g., 11RT 1155-1156, 1169, 1171 [appellant brandished a gun at Nunez at work, and Nunez was afraid of appellant]; 12RT 1238-1239, 1244-1245 [Bermudez had seen appellant carry a gun at work every day, and he was afraid of appellant]; 13RT 1310-1311 [Morales had seen appellant carrying a gun at work on more than one occasion, and Morales was afraid of appellant].) Further, the interviewer's questions that implied the police had received anonymous calls regarding the murders were not prejudicial because the jury was already aware of the calls. In fact, Beswick informed the jury of the calls in opening statement, using the calls to insinuate that appellant was set up and that the police accused appellant of the murders simply out of desperation. (11RT 1077-1079.)

Moreover, by allowing the entire interview to be played, Beswick allowed the jury to hear about a prior incident in which appellant was attacked while trying to stop a fight at a barbecue. After the tape was played, Beswick cross-examined Janson about the incident, clarifying for the jury that appellant was a victim in the incident and that appellant was even hurt in the incident.

(16RT 1630-1633.) Beswick later presented Albert Ramirez as a defense witness, over the prosecutor's objection. (20RT 2268-2269.) Ramirez testified as to the details of the incident, including that appellant became involved only when he tried to break up a fight and that the person who hit appellant with the gun was Bermudez's friend. (20RT 2273-2277, 2283.) Thus, Beswick used the incident as evidence of appellant's good character and as evidence of a reason Bermudez might have a bias against appellant. (See 26RT 2908-2909 [Beswick argued in closing that although appellant carried a gun for protection, the only incident involving a gun in which appellant was involved was when he was a victim].) Accordingly, Beswick reasonably allowed the entire tape to be played so the jury would not speculate as to the redacted portions.

Moreover, the trial court properly admitted the tape. The trial court did not have a sua sponte duty to analyze the admissibility of the tape under Evidence Code section 352. (*People v. Cain* (1995) 10 Cal.4th 1, 28.) Because appellant did not object to the tape pursuant to Evidence Code section 352, his conviction may not be reversed on the ground that the trial court failed to exclude the evidence pursuant to that section. (Evid. Code, § 353, subd. (a); *People v. Visciotti* (1992) 2 Cal.4th 1, 53, fn. 19.) As explained, Beswick was not ineffective in failing to object. Thus, appellant's claim is not preserved. In any event, the trial court did not abuse its discretion in admitting the tape. (See *People v. Ledesma*, *supra*, 39 Cal.4th at p. 707.) Redacting the tape of all the portions appellant now contests would have taken an undue amount of time and left the tape unintelligible, thereby confusing the jury. (Evid. Code, § 352.) On the other hand, as explained, the contested statements were not highly inflammatory. Accordingly, the trial court did not abuse its discretion in admitting the entire tape.

c. Appellant Was Not Prejudiced By The Admission Of The Tape

In any event, it is not reasonably probable appellant would have achieved a more favorable result had the contested statements been redacted from the tape of the interview. (See *Strickland*, *supra*, 466 U.S. at p. 746; *People v. Earp*, *supra*, 20 Cal.4th at p. 878 [erroneous admission of evidence under Evidence Code section 352 is harmless unless it is reasonably probable the defendant would have achieved a more favorable result had the evidence been excluded]; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) As explained, the contested statements did nothing more than repeat information the jury had already inferred from other admissible evidence. Additionally, the information about the prior incident with the gun was evidence Beswick sought to admit as ultimately benefitting the defense. Accordingly, appellant has failed to show he was prejudiced by Beswick's decision not to request redaction of the tape or by the trial court's admission of the entire tape.

7. Appellant Has Failed To Establish Ineffective Assistance Of Counsel On The Ground That Beswick Failed To Impeach Woodland With The Videotape Of His Statements During Plea Negotiations

Appellant criticizes Beswick for failing to impeach Woodland's testimony with the videotape of the statements Woodland gave to the prosecution before they reached a plea agreement. (AOB 202-206.) Respondent submits that Beswick reasonably decided not to use the videotape. In any event, appellant has failed to show he was prejudiced by the decision.

Initially, respondent notes that appellant alleges numerous facts that are not supported by the record. For example, appellant argues that Beswick lost the videotape or failed to keep a copy in his file. (AOB 202-204.) The videotape was not part of Beswick's trial file, which was admitted into evidence at the evidentiary hearing, but it was unclear whether the videotape was lost by

Beswick or Pitman. (30JRT 3898.) Indeed, Beswick testified that he gave Pitman his complete trial file but that the file admitted by Pitman at the evidentiary hearing appeared to be missing some items. (30GRT 3483-3484, 3485-3489, 3537, 3549-3550.)

Appellant also contends that Beswick either forgot about the videotape or lied to Pitman by saying he had never seen it. (AOB 203-204.) Appellant ignores the possibilities that Pitman misunderstood Beswick or that Pitman lied about Beswick's statement. Appellant's contention relies entirely on Pitman's unsworn statement to the court that Beswick told him that he had never received the videotape during discovery. However, Pitman never submitted a declaration from Beswick attesting to this. In fact, the only evidence--as opposed to argument by counsel--regarding the issue was Beswick's testimony under oath that he did receive and view the videotape before trial. (30JRT 3896.) Pitman and Beswick had a contentious relationship, which culminated in an altercation in the courthouse, allegedly instigated by Pitman. (30JRT 3890-3893.) Thus, Pitman's argument that Beswick lied about having received the videotape cannot be credited.

Additionally, appellant argues that the prosecutor and detectives used suggestive questioning and pressured Woodland to say that he saw appellant with the bag after the Friedman shooting. (AOB 202-203.) However, as the trial court found (30JRT 3904), the prosecutor and detectives' questioning was not unduly suggestive. Indeed, the prosecutor and detectives repeatedly told Woodland to be truthful, honest, and accurate.

In light of the record, Beswick was not ineffective in deciding not to use the videotape. Appellant claims Beswick unreasonably chose not to impeach Woodland with the videotape because the videotape shows that in the first interview, Woodland denied seeing appellant take a bag from Friedman, but after a plea bargain was discussed during the second interview, Woodland

stated that he had seen appellant take the bag. (AOB 203.) Appellant's characterization of the video is not entirely accurate.

During the first interview, Woodland repeatedly denied knowing that appellant was participating in a drug deal the day he shot Friedman. Woodland also denied seeing appellant take a bag from Friedman's Jeep during the shooting. It was clear from the questions and Woodland's responses that Woodland was trying to minimize his culpability by acting as if he did not know a drug deal was about transpire before the shooting. At the beginning of the second interview, Deputy District Attorney Danette Meyers indicated that her supervisor had watched Woodland's first interview, and it was "more than likely" that the District Attorney's Office would agree to Woodland's pleading guilty to manslaughter and receiving a sentence of six to seven years, in exchange for Woodland's truthful testimony against appellant. Woodland thereafter repeated the details of the day of the shooting, but he admitted that he had in fact seen appellant take the bag from Friedman's Jeep, search the bag, say "Fuck," and throw the bag out the window of the Honda as they fled the scene of the shooting.

Because the prosecutor began the second interview assuring Woodland that they had reached a deal, the video did not tend to show that Woodland changed his story about the bag simply to reach a deal. Moreover, Woodland explained in the second interview that the reason he initially denied seeing the bag was because he did not want to incriminate himself by letting the detectives and prosecutor know that he was aware of appellant and Chacon's drug business and that he drove appellant to the scene of the shooting knowing a drug deal was about to transpire. Woodland stated that he also did not want to give more information about the bag because he was afraid of Chacon and did not want to give more information about the drug business than was necessary. Thus, Woodland's statements to the detectives and prosecutor did not tend to

show that he created a false story about the bag to obtain a plea bargain. The video was therefore not as useful as impeachment evidence as appellant contends.

Further, Beswick reasonably decided not to use the video, because the harm the video would do to the defense as a prior *consistent* statement outweighed any damage it could do to Woodland's trial testimony as a prior *in*consistent statement. Had Beswick attempted to admit the portions of the videotape in which Woodland changed his story about having seen the bag, the prosecutor would have been entitled to admit the portions of the videotape in which Woodland made statements consistent with his trial testimony. (Evid. Code, §§ 356, 791, 1236.) Although in the first interview Woodland denied seeing appellant take the bag from Friedman's Jeep, all of the other details he told the detectives and prosecutor about the day of shooting were consistent with his testimony at trial. The interview lasted over 90 minutes, and the majority of Woodland's statements were consistent with his trial testimony. For example, Woodland said in the first interview that: Chacon told him to take appellant somewhere in the Honda; Woodland drove the Honda, and appellant sat in the front passenger seat; they left the auto body shop around 12:45 p.m.; appellant directed Woodland to a gas station; appellant made phone calls on a cell phone on the way; when they arrived at the gas station, Friedman was there in a Jeep; Friedman made a motion indicating that Woodland should follow him; Woodland followed Friedman to a residential street and parked the Honda behind Friedman's Jeep; appellant exited the Honda, went to the driver's side of the Jeep, and talked to Friedman; Woodland played with the radio until he heard gunshots; when he heard the gunshots, Woodland looked up and saw appellant shooting Friedman; appellant ran back to the Honda, got into the front passenger seat, pointed the gun at Woodland, and ordered Woodland to drive; as Woodland drove by the Jeep, appellant reached out the Honda's window and

shot at Friedman several more times; as they drove away and Woodland asked what happened, appellant threatened him and his family and told him not to say anything; a few minutes later appellant told Woodland not to worry, that he would not be in trouble, and that appellant had killed someone before at the dairy and he had not gotten into trouble; appellant said murder was "like popping balloons"; and when they returned to the auto body shop, Chacon asked Woodland to get the Honda's windows tinted.

Woodland's first interview with detectives and the prosecutor was also entirely consistent with his trial testimony that: appellant made statements at the preliminary hearing indicating that he had threatened Janson so Janson would not testify against appellant and Woodland; Woodland sold a Nissan Maxima to someone, but not Friedman; and Woodland was concerned about the cell phone when he entered Streb's home during the police chase because he knew the phone was cloned. In light of the fact that Woodland's statements in the first interview were entirely consistent with his trial testimony other than the one detail of the bag, showing the video would have further bolstered Woodland's incriminating testimony instead of undermining it. Thus, Beswick reasonably decided not to use the video.

Additionally, the method of cross-examination is a matter of trial tactics and rarely establishes ineffective assistance. (*People v. Frye*, *supra*, 18 Cal.4th at p. 985.) Here, without using the videotape, Beswick effectively cross-examined Woodland. In addition to questioning Woodland regarding the details of his version of the Friedman murder, Beswick thoroughly cross-examined Woodland regarding: his relationship with Chacon, which implied Chacon used Woodland to set up appellant (18RT 1991-1992, 2002-2004, 2032, 2035, 2037, 2040-2041, 2064-2065); Woodland's connection to Friedman (18RT 1997, 2007-2016); Woodland's major involvement in the murder (18RT 1994, 1998, 2065); and the fact that Woodland was originally

charged with first degree murder and faced 25 years to life in prison, but he ultimately pled guilty to a lesser charge and received only six years in exchange for his testimony against appellant (18RT 1992-1997, 2056-2057, 2065-2066). In light of the significant evidence Beswick used to impeach Woodland, it cannot be said Beswick acted unreasonably in failing to use the videotape also. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 746 ["normally the decision to what extent and how to cross-examine witnesses comes within the wide range of tactical decisions competent counsel must make"].)

Regardless, appellant has failed to establish he was prejudiced by Beswick's decision not to impeach Woodland with the videotape. On cross-examination, Beswick elicited Woodland's testimony that he refused to give statements to the police when he was arrested and that he pled not guilty to the Friedman murder. (18RT 2049-2051, 2055.) Beswick then questioned Woodland regarding his conversations with the prosecution and detectives leading up to his plea agreement. (18RT 2056-2057.) The effect of Beswick's questions was to imply that Woodland only made statements implicating appellant in order to obtain the plea deal. On the other hand, in light of the prosecutor's statement at the beginning of the second interview on the video that a plea bargain had basically already been reached on the basis of Woodland's first interview, the video did not tend to show that Woodland created a false statement about the bag in order to obtain the plea bargain. Further, as stated, the video of Woodland's statements to the detectives and prosecutor showed that Woodland initially denied seeing the bag only because he wanted to minimize evidence of his own knowledge about the drug transaction. Additionally as explained, even if Woodland's inconsistency with regard to the bag tended to impeach his trial testimony, the details he gave in the remainder of the video were entirely consistent with his trial testimony. Thus, overall, the video bolstered Woodland's testimony more than it

undermined it, whereas Beswick's questions managed to raise the implication that Woodland made up his testimony just to obtain a beneficial plea agreement. Accordingly, it is not reasonably probable appellant would have achieved a more favorable result had Beswick used the video in an attempt to impeach Woodland.

8. Beswick's Opening Statement Did Not Reflect Ineffective Assistance And Appellant Was Not Prejudiced By The Opening Statement

Appellant claims Beswick was ineffective in introducing defense theories in opening statement that he had neither investigated nor corroborated. (AOB 206-208.) Respondent disagrees. Beswick supported the theories he presented with evidence discovered through his investigation. In any event, appellant has failed to show he was prejudiced by counsel's opening statement.

First, appellant claims Beswick inadequately investigated the theory that Camacho was a drug dealer. Appellant claims Beswick was therefore ineffective in presenting the theory in his opening statement. (AOB 206-208.) However, as explained, Beswick presented the theory based on information he had received from appellant (11RT 1081), information in the police reports that Camacho had cocaine on his person at the time of his death (11RT 1081-1082; Camacho Murder Book, section 3, page 5 of Preliminary Investigation Report), and information in the prosecution's discovery that Holton and Janson knew about Camacho's involvement with drugs (11RT 1083; Camacho Murder Book, section 14, page 1 of Statement Form of Greg Janson). Thus, Beswick was not incompetent in presenting the theory in opening statement, because he had evidence to support the theory.

Even if Beswick did not ultimately present all of that supporting evidence, he did not act unreasonably. He presented evidence supporting a theory that Camacho had a drug problem, which he emphasized to the jury.

Pursuant to this theory, Beswick argued that any resistance appellant exhibited toward Camacho's return to work did not have to do with appellant's desire for Camacho's shift; it was because appellant did not want Camacho to come back to work until he received help for his drug problem. (26RT 2887-2888 ["[Appellant] is upset because he says that George Camacho is involved with drugs and he thinks he should clean up his act before he comes back. [¶] Well, he must have been pretty right because the day he came back, the night he comes back after being off work for months after being terminated, he comes back under the influence of a narcotic. I stand corrected. It wasn't coke. It was methamphetamine as if that makes a difference. He is loaded. Bert said he was - - he needed some help. He was right. He comes back. The first night he is under the influence."].) Because Beswick supported the opening statement with some evidence, he was not incompetent.

Appellant also claims Beswick was ineffective in failing to introduce evidence in support of his comment during opening statement that appellant was involved in getting Camacho's job back for him. (AOB 207.) In opening statement, Beswick said, "As the prosecutor said in her opening statement the union went to bat for [Camacho]. [¶] Mr. Carrasco's a union steward. He's involved in that battle." (11RT 1085.) This statement was not an unequivocal statement that appellant helped get Camacho's job back for him. It was simply an assertion that appellant was somehow "involved" in the process. Indeed, Beswick presented evidence that appellant became involved when, on behalf of the union's members, he approached other union officials to discuss conditioning Camacho's return to work on his receiving treatment for his drug problems. (13RT 1301; 23RT 2558-2561.) Thus, Beswick provided the jury with evidence to support his opening statement.

In any event, appellant has failed to show he was prejudiced by any failure to support Beswick's statements with evidence. "There is no reason to

assume the jury necessarily concluded counsel was unable to produce the [evidence], . . . or that the jury indeed based its guilty verdicts on the failure of the defense to produce the [evidence], contrary to the instructions they were sworn to follow." (*People v. Stanley* (2006) 39 Cal.4th 913, 955.) Any chance of prejudice was also diminished by the fact that Beswick rested the defense case three weeks after delivering his opening statement. (See *Ibid.*) Moreover, the contested statements ultimately presented the same theory: appellant did not kill Camacho. Beswick supported that theory by presenting evidence from which it could be inferred that: appellant was friendly with Camacho; appellant held a position of trust at the dairy and had never been disciplined; and Camacho had been fired from the dairy and was a drug user. Even if there was no specific evidence establishing that Camacho was a drug dealer, presenting the theory to the jury that there was an alternative explanation for the murder--one that perhaps made more sense than the prosecution's theory that appellant killed Camacho for his job shift--cannot have prejudiced appellant.

9. Beswick Reasonably Informed The Jury Of Anonymous Calls To The Police Identifying Appellant As Friedman's Murderer, And Appellant Was Not Prejudiced By Beswick's Conduct

Appellant asserts that Beswick was ineffective in informing the jury during his opening statement that the police had received anonymous phone calls in which appellant was identified as Friedman's killer. (AOB 208-209.) In fact, Beswick had a rational tactical purpose in informing the jury of the calls. Further, appellant was not prejudiced by Beswick's statement.

In his opening statement, Beswick commented that appellant did not match the descriptions witnesses gave of Friedman's assailant but that the descriptions did match that of Woodland's brother. (11RT 1075.) Beswick then emphasized the relationship between Woodland and Chacon, who was in the drug business. (11RT 1076.) Beswick next informed the jury of

Woodland's plea bargain, which he received in exchange for testifying against appellant. (11RT 1077.) After stating that Woodland would say whatever was necessary to receive the plea bargain, Beswick emphasized that Woodland was the only witness who would connect appellant to the Friedman murder. (11RT 1077.) Beswick then informed the jury that after the Friedman murder, the police received two anonymous phone calls incriminating appellant in the murder. Beswick postulated that the anonymous caller or callers made the first call to set appellant up. "That doesn't work. So a couple months later they call again because Bert Carrasco hasn't been arrested because there's no evidence to arrest him." (11RT 1077-1078.) Beswick emphasized that because the police had no "hard evidence," they arrested appellant for Friedman's murder based simply on unreliable information from unknown people. (11RT 1078-1079.)

Beswick had a rational tactical purpose in informing the jury of the anonymous calls, as they supported the defense theory that appellant was framed. In his opening statement, Beswick painted the following picture: Woodland was caught by police in the car used in the Friedman murder; witnesses described Woodland's accomplice as looking like Woodland's brother; police could not find any "hard evidence" as to Woodland's accomplice; someone trying to set appellant up called the police and implicated appellant in the murder; when the police did not arrest appellant pursuant to the first anonymous call, the person trying to set appellant up called back; the police ultimately arrested appellant out of desperation and pursuant only to anonymous phone calls; thereafter, Woodland agreed to a beneficial plea bargain in exchange for testimony incriminating appellant. Thus, the fact these anonymous calls were made supported the defense theory that appellant was set up for the Friedman murder and that Woodland and one of his brothers were the real culprits.

Beswick's objection to Detective Coblentz's testimony regarding the anonymous calls was not contrary to his tactical purpose in informing the jury of the calls. Detective Coblentz testified as to his investigation of Woodland's brothers as Woodland's accomplice. (19RT 2236-2238.) The prosecutor asked Detective Coblentz when his investigation of Woodland's brothers terminated, and the detective responded, "I believe that was in early February of 1996. It could have even been the latter part of January 1996 when my partner received, and I also received, an anonymous phone call indicating specific details of my particular crime in the San Fernando Valley. And the suspect that was involved in that particular case was a man by the name of Robert Carrasco." (19RT 2238.) Beswick's objection and motion to strike the detective's hearsay statements were granted. (19RT 2238-2239.) Beswick reasonably objected to the detective's testimony, as Beswick obviously did not want Detective Coblentz to testify to statements the callers made that might corroborate Woodland and the other evidence against appellant. Moreover, Detective Coblentz's testimony as to the content of the anonymous calls constituted inadmissible hearsay. (Evid. Code, § 1200.) On the other hand, Beswick reasonably used the fact of the calls in opening statement to emphasize the police's lack of physical evidence connecting appellant to the murder and to support the theory that appellant was set up. (See *People v. Rich* (1988) 45 Cal.3d 1036, 1092-1093 [defense counsel referred to polygraph test in opening statement as proof of defense theory that defendant wanted to be caught].) It was consistent with Beswick's tactic of minimizing the incriminating contents of the anonymous calls for him to give the jury a favorable defense explanation of the calls, and also preclude as much evidence as he could about the calls themselves.

In any event, appellant has failed to show he was prejudiced by Beswick's statement about the calls. Before opening statement, the jury was

instructed that counsel's statements were not evidence (11RT 1058), and that "[a]n opening statement is simply an outline by counsel of what he or she believes or expects the evidence will show in this trial" (11RT 1063). The statement about the calls was brief, and three weeks passed between Beswick's opening statement and the beginning of the jury's deliberations. In that time, the prosecution presented substantial evidence of appellant's guilt on the Friedman murder, including Woodland's testimony identifying appellant as the shooter, appellant's confession to Janson, and appellant's fingerprint found in the Honda used in the murder. Thus, it is not reasonably probable the jury would have reached different verdicts had Beswick not mentioned the anonymous calls in his opening statement.

10. Appellant Has Failed To Establish Ineffective Assistance Of Counsel On The Ground That Beswick Failed To Retain A Fingerprint Expert

Appellant contends Beswick was ineffective in failing to retain a fingerprint expert. (AOB 210-214.) Appellant has failed to show that Beswick's decision not to hire a fingerprint expert was unreasonable or that appellant was prejudiced by the lack of a defense fingerprint expert.

First, appellant claims Beswick improperly stipulated that the print found on the hairspray can in the Honda was appellant's, without first consulting with an expert. (AOB 210.) Appellant is mistaken. Beswick did not stipulate that the print found on the hairspray can was appellant's; he stipulated that it was appellant's rolled print on the print card with which the prosecution's expert compared the latent print recovered from the can. (18RT 2108-2109 [People's Exhibit 36 was the latent Caudell lifted from the can; People's Exhibit 35, which Beswick stipulated contained appellant's prints, was a print card Caudell used to compare with the print lifted from the can].) Beswick was clearly not ineffective in failing to contest that the print card contained appellant's rolled

prints, as the person who took the rolled impression of appellant's prints could have easily testified that the prints were appellant's.

Next, appellant complains that Beswick did not call the fingerprint expert who dusted the Jeep to specifically testify that appellant's print was not found on the driver's side door of the Jeep, where Woodland testified that appellant had stood at the time of the shooting. (AOB 211-212.) The prosecution's fingerprint expert, Charles Caudell, dusted the Honda. The Jeep was dusted by Michael Ames, another fingerprint specialist employed by the same office of the Los Angeles Police Department as Caudell. (18RT 2122-2124.) Caudell testified as to Ames's testing. Specifically, Caudell testified that the only prints found on the Jeep belonged to Woodland and that the prints came from the passenger side door. (18RT 2128-2129.) Because Caudell did not personally examine the Jeep, he could not testify as to whether the driver's side door handle of the Jeep had been dusted for prints. (18RT 2123.) However, Beswick elicited Caudell's testimony that it was routine when dusting a vehicle for prints to dust the door handles. (18RT 2123-2124.) Beswick also elicited Caudell's testimony that Ames never said that he found appellant's prints on the Jeep. (18RT 2124.) Thus, it was implied that Ames dusted the Jeep's door handle and did not find appellant's print. Appellant argues, "Ames presumably did dust the driver's side and found no print belonging to Appellant. If he had, the prosecution would have introduced it into evidence." (AOB 212.) The jury surely reached this conclusion just as appellant has. Thus, appellant has failed to show ineffective assistance in Beswick's decision not to call Ames to specifically testify that the Jeep's driver's side door handle was dusted and appellant's print was not found.

Appellant next complains that Beswick failed to ask Caudell about any prints on the Jeep during cross-examination and only asked about them on recross-examination, "[a]lmost as an after thought." (AOB 212-213.) By

appellant's own argument, he has failed to establish prejudice. Appellant frames his argument in a hypothetical (had the prosecution not subjected Caudell to redirect examination, Beswick may not have had the opportunity to elicit the testimony). However, Beswick *did* elicit the testimony. Thus, appellant was not prejudiced. Accordingly, appellant has failed to establish ineffective assistance.

Appellant further complains that Caudell's confusion about whose print was found on the Jeep diminished the power of the testimony, so Beswick should have called Ames, who would have been more sure about the print. (AOB 213.) Caudell testified that the prints found on the Jeep were matched to Javier Chacon. (18RT 2128.) Beswick pressed Caudell, making sure Caudell was referring to prints found on the Jeep and not another vehicle, asking whether another person's prints were found on the Jeep, asking whether Caudell was sure the prints were matched to Chacon, and confirming from which report Caudell was reading this information. (18RT 2128-2129.) Upon looking at the report more closely, Caudell admitted he had been confused and that the prints on the Jeep were actually Woodland's. (18RT 2129.)[36/] Beswick cannot be held responsible for the quality of the witness's answers. (*People v. Cunningham*, *supra*, 25 Cal.4th at pp. 1031-1032 ["because even the most carefully prepared witness may give a surprise answer, we may not hold defense counsel responsible for the potentially damaging responses furnished by a defendant or another witness"].) Caudell read from a report to respond to questions about testing he performed as well as testing others performed. It is likely Ames would also not have had a personal recollection of the testing he

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36. Appellant also claims that Beswick's failure to correct Caudell shows that Beswick did not know about Woodland's prints on the Jeep. (AOB 213.) The record clearly belies appellant's claim, as Beswick immediately demonstrated surprise at Caudell's incorrect response and pressed Caudell for the correct information.

performed, and would have had to read from a report. Appellant cannot show that Beswick was to blame for the witness's confusion in reading the report. Moreover, appellant cannot show that another expert would not have suffered the same confusion. Indeed, appellant failed to present Ames's testimony at the evidentiary hearing, so any argument that Ames's testimony would have been more powerful than Caudell's testimony is mere speculation.

Appellant claims Beswick was ineffective in failing to retain a fingerprint expert because Caudell was unable to answer questions on cross-examination about what parts of the Jeep and Honda were dusted. Appellant asks numerous questions regarding the prints found, and those not found, on the Jeep and Honda. Appellant then argues, "Such questions remained unanswered due to Mr. Beswick's inaction." (AOB 213-214.) Appellant has failed to show that Beswick acted unreasonably in not asking these questions or that appellant was prejudiced by the failure to retain an expert to answer these questions. Appellant's questions remain unanswered because he failed to present any evidence at the evidentiary hearing as to what the answers to those questions would have been and how such answers would have been beneficial to the defense. (See *People v. Medina*, *supra*, 11 Cal.4th at p. 773 ["We cannot assume from a silent record that particular witnesses were ready, willing and able to give mitigating testimony, nor can we speculate concerning the probable content or substance of such testimony."].)

In fact, it appears the answers to appellant's questions might not have been exculpatory. For example, appellant asks, "[H]ow usual is it that both the alleged driver and passenger of the Honda during the homicide left no prints inside or outside of the car itself, but only on a hairspray can in the glove compartment?" (AOB 214.) It is possible that an expert would have testified that the absence of prints was common or that the culprits could have wiped down the Honda after committing the murder. Such evidence might have

suggested that appellant destroyed evidence to cover up his involvement in the murder. Moreover, because the defense's theory was that Woodland committed the Friedman murder with his brother, it was not beneficial to the defense to emphasize that Woodland's prints were not found on the Honda. Indeed, in closing, Beswick aptly emphasized that: Woodland's print was found on the Jeep despite his testimony that he did not leave the Honda during the drug deal (26RT 2898-2899); appellant's prints were not found on the Jeep despite Woodland's testimony that appellant stood next to the driver's side door of the Jeep before the shooting (26RT 2898-2899); and none of appellant's prints were found on the dashboard, door handle, or other areas of the Honda where one might expect to find prints from someone who was in the car (26RT 2900).

In addition to the potential of unhelpful or unfavorable testimony being elicited if Ames had testified, his testimony would not have effectively rebutted Woodland's testimony that appellant leaned against the door. Woodland never testified that appellant placed his hands on the door. (18RT 1972 [testifying that appellant "went to the driver's seat of the Jeep"], 2019 [testifying that appellant stood "to the driver's side talking to [Friedman] with the door open"], 2019-2020 [testifying that Friedman "was sitting in his car just talking and [appellant] was on the door that - - on the side of it with his back towards me talking to him"].) Additionally, appellant failed to present any evidence at the evidentiary hearing that Ames would have given testimony beneficial to the defense. Thus, Beswick reasonably did not call Ames as a defense witness.

Further, respondent submits that eliciting the testimony about Woodland's prints from Caudell, who was the prosecution's own expert witness, and who had only been asked questions on direct about the print that incriminated appellant, actually made the exculpatory print evidence more powerful. In his closing argument, Beswick emphasized that the evidence was elicited from the prosecution's expert. (26RT 2898 ["Shane Woodland says I

never got out of the car. Mr. Caudell LAPD fingerprint specialist finds Shane Woodland's fingerprint on the Jeep."].) Accordingly, appellant has failed to show Beswick acted unreasonably or that he was prejudiced by Beswick's decision to elicit the evidence about Woodland's prints from Caudell.

11. Beswick's Confusion Of Names In Closing Argument Does Not Establish Incompetence Or Prejudice

Appellant claims Beswick was ineffective in confusing the names of two prosecution witnesses during his closing argument. (AOB 214-215.) Respondent disagrees.

Although appellant claims Beswick confused witnesses' names "repeatedly," he cites only one page of the transcript. (AOB 214, citing 26RT 2889.) On that page, Beswick attempted to discredit the prosecution's theory that appellant killed Camacho for his shift so that appellant could continue to work on cars during the day. Specifically, Beswick argued that according to Morales, appellant made $9,000 per month working on cars, and according to Holton, appellant made $5,000 per month. Beswick argued that if appellant could make either amount of money per month working on cars, he would not need the $13-per-hour job at the dairy at all, much less would he be willing to kill for it. (26RT 2889.) In actuality, Nunez, not Morales, testified that appellant made $9,000 per month working on cars. (11RT 1153-1154.) In closing, the prosecutor pointed out Beswick's mistake, "[H]e kept interchanging Morales and Nunez. He talked about, and I believe he meant Andrew Nunez, he kept talking about Mr. Morales. I want to make sure that you understand that it was Mr. Nunez who talked about the money the defendant would make, it was not Mr. Morales, it was Mr. Nunez." (26RT 2915.)

A single instance of the confusion of names in closing argument does not establish counsel's incompetence. (See *People v. Williams* (1997) 16

Cal.4th 153, 220 ["An occasional garbling in presentation is to be expected, and a closing argument presumably may contain such, yet fall within the range of constitutionally acceptable representation."]; *People v. Cudjo*, *supra*, 6 Cal.4th at pp. 634-635 [the effectiveness of an advocate's oral presentation is difficult to judge from a transcript, and, "[a]lthough defense counsel's argument in this case appears to have been somewhat lacking in clarity, not to mention eloquence, we are not persuaded that it fell below the standard of reasonably competent representation"].) Here, the confusion of names occurred within the context of a strong argument tending to undermine the prosecution's theory of appellant's motive for killing Camacho. Beswick's confusion of names did not diminish the force of the argument, as the point of the argument was not who testified to which amount, but the fact that if either of those amounts was true, appellant did not have a motive to kill Camacho. Additionally, the confusion occurred once in the context of Beswick's 34-page closing argument, and Beswick correctly referred to Morales in other contexts during closing argument. (See, e.g., 26RT 2884 [arguing Baltazar's testimony completely contradicted Morales's testimony that appellant confessed to the Camacho murder].) Moreover, the jury was properly instructed that counsel's argument was not evidence. (26RT 2931; 2CT 381 [CALIC No. 1.02 ["Statements of Counsel--Evidence Stricken Out--Insinuations of Questions--Stipulated Facts]].) Thus, appellant has not shown Beswick's argument was constitutionally deficient or that it is reasonable probable the jury would have reached a more favorable verdict had Beswick correctly credited Nunez instead of Morales with the testimony regarding how much money appellant made fixing cars.

12. Appellant Has Failed To Establish That Beswick Denied Appellant Access To Discovery Material Or That Appellant Was Prejudiced By Beswick's Conduct

Appellant claims Beswick was ineffective because he denied appellant the right to review the murder books provided by the prosecution in discovery. (AOB 215-217.) Respondent disagrees. The record does not show that Beswick denied appellant access to the discovery throughout the proceedings. Further, appellant has failed to show that any denial of access to the discovery was unreasonable or prejudicial.

During jury selection, the prosecutor informed the court, "You indicated Mr. Carrasco, the defendant, should not be looking at those questionnaires with regard to the jurors' addresses, and he's got them and he's looking at them. And I'm concerned because those things are supposed to be under seal." (4RT 203.) The following discussion occurred:

> THE COURT: Mr. Beswick, I'm very distressed you even left those anywhere he could see them. [¶] Does he have any notes whatsoever where he - -
>
> MR. BESWICK: No. He's seen two.
>
> THE COURT: I want you to show those, whatever he has seen, show those to the District Attorney. [¶] Will you note those two names, please.
>
> [THE PROSECUTOR]: I will, Your Honor.
>
> THE COURT: Should anything like that recur, I will take very strong action. Don't even think about those, Mr. Carrasco.
>
> THE DEFENDANT: I didn't have any idea I wasn't supposed to.
>
> THE COURT: Just don't think about it. Don't do it.

(4RT 203.)

What appears to be minutes later, the court called a conference in the hallway. The following discussion occurred:

THE COURT: Mr. Beswick, I hadn't noticed before, but in light of what [the prosecutor] b[r]ought to my attention, I have been watching your client. It appears now he's going through the murder book, is that right?

MR. BESWICK: He's reading his file.

THE COURT: I understand that. But I just want to make sure that there are no names and addresses or phone numbers of any witnesses or relatives of victims or anything like that in it. [¶] So if you're giving him access to something, I want to make sure you excise appropriate portions if you're going to let him look at it.

MR. BESWICK: I'll take everything away from him. I don't want to get into that. I'm sure I have, but just to make sure, I'll take the book away from him.

THE COURT: This will be a continuing order. He is not to be allowed anywhere near addresses or phone numbers. That's your job and the investigator[']s job. [¶] If it's reports, I will expect that if he has any access to them, that that information will be excised by you. Please understand I'm going to take that very seriously.

MR. BESWICK: There are addresses that he knows about. These are people he works with, so if you're talking about what's in the book - -

THE COURT: I don't know what it is you have, only you and [the prosecutor] know that. I've not gone through the murder book or any individual reports with both of you. [¶] But I'm going to instruct you that you are to make sure that whatever material he has access to, that you've excised that information.

MR. BESWICK: Right now he's [reading] his own statement.

THE COURT: I don't care what he's reading. I want to make sure you know, as an officer of the court, you're ordered he's not to get anywhere

near.

(4RT 207-208.) The court asked the prosecutor if she had anything to add, and she declined. The parties returned to the courtroom and jury selection resumed. (4RT 208-209.)

From this record, it cannot be said that Beswick denied appellant access to the prosecution's discovery throughout the trial. It appears that Beswick took the murder book away from appellant during that session of jury selection in order to ensure that appellant did not have access to addresses and other confidential information about witnesses. (See § 1054.2 [an attorney may not disclose to the defendant the address or telephone number of victims or witnesses].) However, it is not clear that Beswick never again granted appellant access to the murder book. Insofar as Beswick thought he had already excised any confidential information, this suggested he allowed appellant to review the records again once he made sure the confidential information had already been excised, or once he had a chance to excise the information. Beswick's responses to the court reflect an intent to give appellant unlimited access to the prosecution's discovery. Thus, it cannot be assumed that Beswick failed to grant appellant access to the materials after this court session. Additionally, appellant never complained at trial that Beswick was denying him access to the discovery. Appellant also presented no evidence at the evidentiary hearing that he was denied access to the discovery. Thus, nothing in the record shows that Beswick denied appellant access to discovery materials throughout the trial.

Regardless, Beswick was not obligated to give appellant access to the prosecution's discovery material. The statutes and cases appellant cites in support of his argument do not require an attorney representing a defendant to give the defendant access to the actual items of discovery provided by the prosecution. (AOB 216, citing §§ 1054.1 [explaining the prosecution's duty to disclose material to the defendant or his or her attorney], 1054.2 [prohibiting

attorneys from sharing the address or telephone number of a victim or witness with the defendant or his or her family], 1054.7 [setting time limitations on discovery]; *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] [holding that the prosecution has a duty to disclose material exculpatory evidence to the defense].) Indeed, even the statute requiring the prosecution to produce discovery indicates that the prosecution must disclose the material "to the defendant *or his or her attorney*." (§ 1054.1, italics added.) Accordingly, it appears there is no requirement that a represented defendant be permitted to personally view the prosecution's discovery material. (See *Spradlin v. United States* (9th Cir. 1968) 394 F.2d 816, 818 [no denial of right to counsel or abuse of discretion in court's denial of defendant's request to personally view probation report before sentencing, because the court allowed counsel to examine the report and there was no allegation that anything in the report was inaccurate].) Because the prosecution provided all discovery to Beswick, and Beswick testified that he discussed the discovery with appellant, there was no error if Beswick failed to allow appellant to personally view the discovery throughout the trial.

In any event, even if appellant was improperly denied access to the prosecution's discovery, he has failed to establish he was prejudiced by the denial. Beswick testified at the evidentiary hearing that before trial he discussed the case with appellant and provided appellant with copies of the police reports. (30CRT 3276, 3312.) Thus, at the very least, appellant had access to the police reports. Moreover, appellant offered no evidence at the evidentiary hearing that further access to the prosecution's discovery material would have allowed appellant to further assist in his defense. (See *People v. Berryman*, *supra*, 6 Cal.4th at p. 1082.) Appellant speculatively claims that he was unable to "participate in any meaningful way in his own defense" (AOB 216), but he fails to give any specific examples, supported by evidence in the

record, of anything in the prosecution's discovery that Beswick failed to utilize and that appellant would have brought to Beswick's attention had he been granted further access to the discovery. (See *People v. Karis*, *supra*, 46 Cal.3d at p. 656 [conclusory and speculative allegations of ineffective assistance are insufficient to warrant relief].) Accordingly, appellant's claim fails.

XI.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S NEW TRIAL MOTION BECAUSE APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE

Appellant alleges defense counsel rendered ineffective assistance in numerous instances during the penalty phase, and the trial court therefore erred by denying appellant's new trial motion on the ground of ineffective assistance of counsel. (AOB 219-258.) Respondent submits that defense counsel was competent and that appellant was not prejudiced by any of counsel's acts or omissions. Thus, the trial court properly denied appellant's new trial motion.

The evidence adduced at the hearing on appellant's motion for new trial is outlined in the previous argument. (Arg. X. A.)

A. The Trial Court Properly Denied Appellant's New Trial Motion

Respondent again notes that some of the claims appellant raises on appeal relating to Beswick's representation during the penalty phase were not raised in the new trial motion. (Compare AOB 219-258 with 3CT 546-568, 624-656, 743-754.) Regardless, as shown below, appellant has failed to establish he received ineffective assistance of counsel during the penalty phase. The record shows that Beswick ably portrayed appellant to the jury as a human being. (See *People v. Pensinger*, *supra*, 52 Cal.3d at p. 1279 [counsel has a duty to portray the defendant as a human being with positive qualities].) Beswick consistently referred to appellant during the penalty phase as "Bert"

or "Bertie." (See, e.g., RT 3011, 3022, 3062, 3080, 3088, 3106.) Beswick also: interviewed appellant and his family in preparation for the penalty phase; gave an opening statement at the penalty phase; cross-examined the prosecution's witnesses in an effort to emphasize lingering doubt as to appellant's guilt; presented testimony from members of appellant's family regarding appellant's good character, upbringing in the projects, strong family relationships, and religious faith; and gave a closing argument, urging the jury to find that life in prison was an appropriate penalty for appellant's crimes. At the lengthy evidentiary hearing, appellant failed to present any credible evidence that Beswick failed to present and that was reasonably probable to have had an effect on the jury's determination. Accordingly, the trial court did not abuse its discretion in denying appellant's new trial motion. (See *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1251-1252.)

B. Appellant's Claim Must Be Reviewed Under *Strickland*

With regard to his ineffective assistance claims in his new trial motion and on appeal, appellant bears the same burden of establishing ineffective assistance of counsel at the penalty phase as he did regarding the guilt phase. (*People v. Cunningham*, *supra*, 25 Cal.4th 926, 1030.) Thus, appellant must show that counsel's performance was objectively deficient and that such deficiency prejudiced appellant. (*Strickland*, *supra*, 466 U.S. at p. 687; *People v. Cunningham*, *supra*, 25 Cal.4th at pp. 1030-1031.) Citing *United States v. Cronic* (1984) 466 U.S. 648 [104 S.Ct. 2039, 80 L.Ed.2d 657], appellant claims this case falls within the limited category of cases in which prejudice is presumed. (AOB 221-224.) Appellant is mistaken.

In *Cronic*, the United States Supreme Court held that prejudice may be presumed under certain circumstances, such as when a defendant is completely denied the assistance of counsel, when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, and when, due to the

circumstances of the case, even a competent attorney could not adequately represent the defendant. (*Cronic, supra*, 466 U.S. at pp. 658-660.) The *Cronic* exception to proving prejudice is very narrow and only applies where the attorney's failure is "complete." (*Bell v. Cone* (2002) 535 U.S. 685, 696-697 [122 S.Ct. 1843, 152 L.Ed.2d 914]; *People v. Dunkle* (2005) 36 Cal.4th 861, 931.)

This case does not present the type of situation addressed by *Cronic*. Beswick was not absent from any stage of the proceedings. Moreover, the denial of Beswick's motions for second counsel or to be appointed did not prevent Beswick from actively representing appellant and subjecting the prosecution's case to meaningful adversarial testing. In fact, the record demonstrates that Beswick: filed numerous pretrial motions, including a highly-litigated motion to exclude the fingerprint evidence; participated in developing a juror questionnaire; thoroughly questioned prospective jurors; challenged prospective jurors for cause; exercised peremptory challenges; gave an opening statement; effectively cross-examined the prosecution's witnesses, including impeaching them with prior inconsistent statements; presented a theory of defense, which he supported by presenting defense witnesses; and delivered a persuasive and lengthy closing argument. During the penalty phase, Beswick: presented an opening statement; thoroughly cross-examined each of the prosecution's witnesses; presented witnesses who testified to appellant's background, family, relationships, and character; admitted photographs of appellant's children; and delivered a closing argument. Thus, *Cronic* does not apply, and appellant's specific claims regarding Beswick's conduct must be assessed for prejudice under *Strickland*. (See *People v. Snow* (2003) 30 Cal.4th 43, 110-118 [*Cronic* did not apply and, based on direct appeal record, *Strickland* did not require reversal of penalty judgment even though defense counsel did not make an opening statement, call any witnesses, introduce any

evidence, cross-examine any prosecution witnesses, or make a closing argument during the penalty phase]; *People v. McDermott*, *supra*, 28 Cal.4th at p. 991; *In re Visciotti*, *supra*, 14 Cal.4th at pp. 352-353; *In re Avena*, *supra*, 12 Cal.4th at pp. 727-728.)

C. Defense Counsel Represented Appellant Competently, And Appellant Was Not Prejudiced By Counsel's Performance

1. Beswick Reasonably Decided Not To Present Extensive Evidence Of Appellant's Past Drug Use, And Appellant Was Not Prejudiced By Beswick's Investigation Or Presentation Of Evidence Regarding Appellant's Past Drug Use

Appellant generally claims that Beswick failed to investigate in preparation for the penalty phase. Appellant bases his claim on the evidentiary hearing testimony of his family members. (AOB 224-225, 244, 253-254.) However, as explained, this testimony was unreliable. (Arg. X. C. 1.) Beswick testified that he discussed the case with members of appellant's family before and throughout the trial. (30CRT 3280-3281, 3306-3307, 3313, 3316-3317, 3325-3326, 3335.) Beswick also discussed the case with appellant, including whether to present evidence of appellant's past drug use to the jury. (30CRT 3266, 3272-3274; 30GRT 3516, 3526-3534, 3550.)

Appellant nevertheless complains that Beswick failed to investigate, hire an expert, or present evidence regarding appellant's use of PCP and other drugs. Appellant claims Beswick's decision not to present the evidence at the penalty phase was unreasonable because it was based on an inadequate investigation. (AOB 229-236, 255.) However, Beswick investigated enough to know that appellant had used drugs in the past and had been placed in drug rehabilitation programs. Beswick specifically testified at the evidentiary hearing that the decision not to present extensive evidence of appellant's past drug use was a decision he and appellant made together. (30GRT 3526-3534, 3535-3536.) Any error in Beswick's failure to further investigate or admit the

evidence was thus invited by appellant. (See *People v. Snow*, *supra*, 30 Cal.4th at pp. 116, 123; *People v. Majors*, *supra*, 18 Cal.4th at p. 409; see also *People v. Massie* (1998) 19 Cal.4th 550, 571-572 [defense counsel has an ethical obligation to defer to decisions reserved to the client].) Moreover, counsel is not incompetent for failing to investigate or present mitigating evidence over the defendant's objections. (*Strickland*, *supra*, 466 U.S. at p. 691 ["The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information."]; *People v. Snow*, *supra*, 30 Cal.4th at p. 112 ["'To require defense counsel to present mitigating evidence over the defendant's objection would be inconsistent with an attorney's paramount duty of loyalty to the client and would undermine the trust, essential for effective representation, existing between attorney and client.'"], quoting *People v. Lang* (1989) 49 Cal.3d 991, 1031; *Snow*, at p. 116 ["'an attorney's duty of loyalty to the client means the attorney "should always remember that the decision whether to forego legally available objectives or methods *because of non-legal factors* is ultimately for the client"'], quoting *Lang*, at p. 1031.)

In any event, Beswick reasonably agreed with appellant's request not to present the evidence. Beswick testified that he and appellant agreed that such evidence would impeach appellant's testimony at the guilt phase. (30GRT 3526-3534, 3535-3536.) Appellant claims this tactic makes no sense, as the penalty phase follows the completion of the guilt phase. (AOB 232.) Appellant fails to consider that lingering doubt is a factor the jury may consider in mitigation. (§ 190.3, subds. (a) & (k); *People v. Sanchez* (1995) 12 Cal.4th 1, 77.) Indeed, Beswick emphasized the lingering doubt factor during the penalty

phase. (29RT 3160-3161; see also 30GRT 3543.) Had evidence of appellant's past drug use been explored at the penalty phase, it could have undermined appellant's guilt phase testimony and thus weakened the lingering doubt argument. Thus, Beswick reasonably decided not to further investigate or present evidence of appellant's past drug use. (See *In re Andrews* (2002) 28 Cal.4th 1234, 1255 [reasonableness of counsel's decision to forego further investigation must be assessed in light of defense strategy ultimately adopted]; *People v. Sanders*, *supra*, 51 Cal.3d at p. 526 [defense counsel does not necessarily render ineffective assistance by failing to present available mitigating evidence].)

Moreover, appellant has failed to establish that he was prejudiced by Beswick's investigation into his drug use. The evidence appellant presented at the evidentiary hearing regarding his alleged drug use was the testimony of members of his family. However, as explained (Arg. X. C. 1.), this testimony was fraught with inconsistencies and added nothing to the drug use evidence presented at the penalty phase. Thus, it is not reasonably probable there would have been a different result had the jury heard the evidentiary hearing testimony. (See *People v. Pensinger*, *supra*, 52 Cal.3d at p. 1278 [rejecting ineffective assistance of counsel claim based on counsel's failure to investigate defendant's family and friends and present their testimony at penalty phase as they testified at a habeas corpus evidentiary hearing, because those witnesses would have been subject to impeachment and might have been damaging to the defense]; see also *In re Jackson* (1992) 3 Cal.4th 578, 614-615 [defense counsel may consider the detrimental effect of admitting evidence in determining whether to present it], disapproved on another ground in *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6; accord, *In re Ross* (1995) 10 Cal.4th 184, 206-209.) Also, appellant presented no evidence at the evidentiary hearing regarding any long-term effects of his past drug use. Appellant presented none

of the records or expert testimony which he complains Beswick failed to present. For example, appellant claims Beswick failed to present the records from the drug rehabilitation program in which he participated, or the testimony of Andy Padilla, a counselor who arranged for appellant's admission into the program. (AOB 256.) However, appellant has failed to show what additional information the records or Padilla's testimony would have imparted, other than the fact that appellant participated in the program, a fact which was presented to the jury. (See *People v. Medina*, *supra*, 11 Cal.4th at p. 773.) Thus, appellant has failed to establish prejudice.

Appellant also claims Beswick was incompetent for failing to present "[e]asily available mitigating evidence of mental disturbance and brain damage." (AOB 257.) No such evidence was presented at the evidentiary hearing. This Court cannot assume such evidence existed or was available to Beswick. (See *People v. Cunningham*, *supra*, 25 Cal.4th at p. 1033 ["The record does not reflect what evidence might have been presented as a result of [a psychiatric] examination, and we are therefore unable to infer anything about its existence, probative force, or the probable consequences at trial, had such evidence been presented."]; *People v. Berryman*, *supra*, 6 Cal.4th at p. 1082 [defendant failed to establish ineffective assistance in defense counsel's alleged "failure to pursue neurological testing to determine whether and to what extent he suffered from an organic mental syndrome or disorder," because defendant "does not demonstrate that such testing would have yielded favorable results" and thus could not establish that it was reasonably probable he would have achieved a more favorable result].) On this record, the most that can be said is that appellant may have had a substance abuse problem at one time, but he had not used drugs since approximately 10 years before the first murder in this case, and he suffered no obvious long-term effects from his past drug use. Thus, it is pure speculation that any evidence of appellant's drug use would have been

beneficial to the defense as opposed to damaging to the evidence presented regarding appellant's good character. (See *In re Andrews*, *supra*, 28 Cal.4th at p. 1258 [defendant's abandonment of his son to pursue his drug addiction would have undermined the suggestion that defendant deserved sympathy due to his parents' alcoholism and his grandfather's death when defendant was 10 years old]; *People v. Mayfield*, *supra*, 5 Cal.4th at p. 208, fn. 16 [in finding no prejudice resulted from defense counsel's failure to present at the penalty phase more evidence of the effect of the defendant's drug use, the Court noted the prosecution expert's testimony "that San Bernardino County venirepersons are aghast when first asked whether they can consider illicit-drug usage as a factor in mitigation"].)

Indeed, it is not reasonably probable that any evidence of long-term effects of drug use would have benefitted appellant at the penalty phase. Appellant testified during the guilt phase. His testimony was coherent and methodical. He not only denied his guilt, but he presented alternative theories for the murders and robbery. He and the other defense witnesses described appellant as a good, hardworking person. Appellant admitted that he had thoughtfully planned his escape over the course of four months, and he gave reasons for committing the escape that attempted to garner sympathy from the jury. (23RT 2596-2603, 2612, 2659-2660.) Beswick emphasized in appellant's defense that appellant was an intelligent person who acted upon careful circumspection, not whim. (See, e.g., 26RT 2908 [noting that appellant was never "flustered" during his testimony], 2910 ["He has the ability to plan escaping from Wayside Correctional Facility . . . . [¶] You saw Bert on the stand, you saw his demeanor, he answered questions."].) In light of this defense, presenting any evidence at the penalty phase regarding long-term effects of drug use, in an attempt to paint appellant as a person who suffered from brain damage, would have been seen by the jury as underhanded and

dishonest.

Appellant cites *People v. Ledesma*, *supra*, 43 Cal.3d at page 171, in support of his argument. (AOB 235-236.) Appellant's reliance on *Ledesma* is misplaced. In *Ledesma*, defense counsel was found to have been prejudicially ineffective in failing to investigate the defendant's PCP use, which provided the basis for a possible diminished capacity defense in light of the defendant's confession: (*Ledesma*, *supra*, 43 Cal.3d at pp. 197-200, 223-224.) First, appellant has offered no evidence which would have supported a defense regarding appellant's mental state at the time of the murders. Further, unlike in *Ledesma*, here, appellant presented no expert testimony at the evidentiary hearing regarding the long-term effects of drug abuse. (See *In re Andrews*, *supra*, 28 Cal.4th at p. 1246, fn. 6.) Appellant also presented no evidence that he had actually suffered any long-term effects of his alleged drug abuse. Appellant may not simply speculate that had Beswick conducted further investigation into his drug use, he would have discovered admissible evidence which would have benefitted the defense at the penalty phase. (See *People v. Medina*, *supra*, 11 Cal.4th at p. 773.) Accordingly, appellant has failed to establish ineffective assistance of counsel based on Beswick's investigation and presentation of evidence regarding appellant's past drug use.

2. Appellant Has Failed To Establish Ineffective Assistance In Beswick's Alleged Failure To Investigate And Present Evidence Of Appellant's Injuries And Heredia's Toxemia

Appellant complains that Beswick failed to investigate appellant's two "head injuries" and the toxemia appellant's mother suffered while she was pregnant with him. Appellant claims Beswick should have hired medical experts to examine appellant. (AOB 220, 237-240, 255-256.) In fact, some of the evidence on these issues was presented to the jury during the penalty phase. (See, e.g., 28RT 3068 [Heredia testified at the penalty phase that appellant did

not pass the physical examination to become a firefighter because he had once broken his neck], 3073 [Heredia testified that the neck injury prevented appellant from playing varsity football in high school].)

Appellant has failed to show he was prejudiced by any failure to present further evidence of appellant's injuries and Heredia's toxemia. While Heredia testified at the evidentiary hearing that appellant suffered a neck injury when he was a child (30GRT 3572-3573), there was no evidence presented that the neck injury had an effect on appellant's mental abilities. Thus, there is nothing in the record to suggest that appellant's childhood neck injury had any lasting effect on his mental health. Likewise, appellant failed to present any evidence that the accident in 1987 caused him any brain damage. The only evidence of this accident was a report that indicated appellant had been struck in the jaw and was prescribed outpatient rehabilitation and an over-the-counter pain reliever. (30DRT 3383; 30GRT 3541-3542, 3553-3554.) This evidence did not tend to show that appellant suffered any long-term effects from the accident. Appellant also failed to present any evidence that Heredia's toxemia affected appellant's health. Heredia testified that although she suffered toxemia during her pregnancy, appellant was born healthy and sent home the next day. (30GRT 3567, 3586.)

The record shows that appellant was an intelligent person who graduated from high school, started his own business, acted as a mentor to younger men, passed the written portion of the fireman's exam, and excelled at his job at the dairy. Appellant failed to present any evidence that any injuries he suffered in his childhood or Heredia's toxemia caused any long-term damage to appellant's brain. (See *People v. Berryman*, *supra*, 6 Cal.4th at p. 1082 [defendant failed to establish ineffective assistance in defense counsel's alleged "failure to pursue neurological testing to determine whether and to what extent he suffered from an organic mental syndrome or disorder," because defendant "does not

demonstrate that such testing would have yielded favorable results" and thus could not establish that it was reasonably probable he would have achieved a more favorable verdict].) Had evidence existed that appellant's injuries or Heredia's toxemia had caused appellant brain damage, he could have presented such evidence at the lengthy evidentiary hearing. Accordingly, appellant has failed to show he was prejudiced by Beswick's alleged failure to investigate and present evidence of the injuries and illness.

Appellant compares this case to *Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079, 1088-1089. (AOB 238-239.) First, *Douglas* is a Ninth Circuit United States Court of Appeals case and thus not binding on this Court. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.) Second, *Douglas* is highly distinguishable from this case. In *Douglas*, evidence presented at a federal evidentiary hearing that was not presented at the penalty phase included: the defendant had been exposed to toxic solvents on a daily basis; the defendant had suffered a concussion and damage to his left temporal lobe in a car accident; and the defendant had consumed a large quantity of alcohol on a daily basis for approximately 11 years. (*Douglas*, *supra*, 316 F.3d at p. 1088.) Counsel's investigation of the defendant's possible brain damage--combined with counsel's failure to present evidence of the defendant's extremely difficult childhood, including being raised by an abusive, alcoholic foster parent who would lock the defendant in a closet for long periods of time--was held to be deficient. (*Id.* at p. 1089.) The deficiency was found to be prejudicial in light of an expert's opinion, presented at the evidentiary hearing, that the defendant suffered from "significant mental illness and dysfunction," which stemmed from a "pre-existing neurological deficit" that was exacerbated by the defendant's alcoholism, exposure to toxic solvents at work, and "a serious head injury sustained in an automobile accident." (*Id.* at pp. 1086, 1091.)

On the other hand, here, there was no evidence that appellant had a pre-existing mental illness that might have been exacerbated by his drug use or any injuries. Moreover, appellant did not present any expert or other evidence at the evidentiary hearing that his injuries or his mother's illness actually caused any brain damage. A defendant who had a pre-existing mental illness, was exposed to toxic solvents on a daily basis, suffered years of alcoholism, and sustained a proven serious head injury, cannot be compared to appellant, who: had no pre-existing mental illness and actually did well in school and work; was never exposed to toxic solvents; admittedly stopped using drugs 10 years prior to committing the offenses; and, at most, had suffered a childhood neck injury that did not entirely prevent him from playing sports and an adult jaw injury for which outpatient physical therapy and an over-the-counter pain reliever were prescribed. Accordingly, *Douglas* is inapposite.

Appellant also compares this case to *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073. (AOB 239.) Again, the case is not binding on this Court. (*People v. Crittenden, supra*, 9 Cal.4th at p. 120, fn. 3.) Further, the case is also highly distinguishable. In *Bean*, the defense presented expert testimony regarding the defendant's organic brain damage. Defense counsel were found to be prejudicially deficient in failing to adequately prepare the expert witnesses, as the experts were contacted so late in the process, they could not give full assessments of the defendant's mental health. (*Bean, supra*, 163 F.3d at pp. 1078-1079.) The holding was based on "abundant new mental health evidence [presented at the federal evidentiary hearing] showing that Bean was functionally mentally retarded; that he suffered from post-traumatic stress disorder, based upon his childhood experiences; that he was brain-damaged; that his drug usage prevented him from forming the intent to kill, rob, or burglarize; and that he was incompetent to stand trial." (*Id.* at p. 1079.) Here, on the other hand, appellant has not presented any evidence that he actually

suffered any brain damage whatsoever. Thus, he has not established that he was prejudiced by any deficiency in Beswick's investigation regarding appellant's mental health. Accordingly, appellant's reliance on *Bean* is misplaced.

In sum, appellant has failed to present any evidence that he actually suffered any brain damage from old injuries, drug use, or his mother's prenatal illness. Accordingly, he has failed to establish he was prejudiced by Beswick's alleged failure to investigate and present expert testimony regarding the injuries, drug use, and illness. (See *People v. Mayfield*, *supra*, 5 Cal.4th at p. 209.)

3. Appellant Has Failed To Establish Ineffective Assistance On The Ground That Beswick Failed To Investigate The Impact Of The Death Of Appellant's Father And The Impact Of Living With An Allegedly Abusive Stepfather

Appellant claims Beswick was ineffective in failing to investigate the impact on appellant of his father's death and his mother's remarriage to an allegedly abusive alcoholic. (AOB 240-242, 256.) Respondent disagrees. Appellant has failed to show Beswick's investigation or presentation of this evidence was deficient. Appellant has also failed to establish prejudice.

First, appellant's claim that Beswick failed to investigate the impact of the death of appellant's father is not supported by the record. Beswick presented such evidence at the guilt and penalty phases. (22RT 2491-2492 [appellant testified at the guilt phase that he was very close to his father and, after his father passed away when appellant was 10 years old, appellant was forced to take care of his family]; 28RT 3063 [Heredia testified at the penalty phase that appellant's father died when appellant was 10 years old], 3068-3069 [Heredia testified at the penalty phase that appellant assumed more family responsibilities after his father died], 3082 [Kamba testified at the penalty phase that appellant assumed a father figure role after their father died], 3090 [Barbara testified at the penalty phase that appellant assumed a father figure role after

their father died].) It is not clear what further information appellant believes should have been elicited. Barbara's evidentiary hearing testimony that appellant "was always gone" after their father's death (30HRT 3678), was contradicted by her trial testimony that appellant "assume[d] the father figure role," and protected his mother and siblings after his father's death (28RT 3090). Thus, Beswick was not ineffective for failing to present such testimony to the jury.

Likewise, appellant has failed to show that there was any information about his stepfather which would have benefitted the defense at the penalty phase and which Beswick failed to discover. At the evidentiary hearing, members of appellant's family testified that Heredia's second husband was alcoholic and verbally abusive. (30GRT 3568-3569; 30HRT 3679.) However, the only example of such verbal abuse was Barbara's testimony that her stepfather would yell at her to do the dishes. (30HRT 3679 ["We would be on our way to wash dishes or something and [he would] yell at us to do it. We're going to do it, we don't need you to yell at us to do it. Always doing things like that."].) Such evidence was not compelling, and it is not reasonably probable it would have affected the jury's death verdict. (See *Wiggins v. Smith* (2003) 539 U.S. 510, 533 [123 S.Ct. 2527, 156 L.Ed.2d 471] ["*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing."].)

Additionally, while Barbara claimed her stepfather struck her at least once, she testified that appellant was not present to witness the abuse and that their stepfather never physically abused appellant. (30HRT 3688-3691.) In fact, contrary to appellant's contention (AOB 240, 242), there is absolutely no evidence that appellant himself was abused or ever witnessed members of his family being abused. (See *People v. Berryman*, *supra*, 6 Cal.4th at p. 1082

[defendant failed to establish ineffective assistance in defense counsel's alleged "failure to further investigate his background and character and then to introduce additional evidence thereon," because defendant "does not demonstrate that such further investigatory efforts would have yielded favorable results"]; see also *People v. Pensinger*, *supra*, 52 Cal.3d at p. 1278 ["While diligent counsel undoubtedly should have delved further into defendant's background rather than simply consulting briefly with parents and a few relatives and friends, further investigation has not turned up any evidence of any great weight. Appellate counsel has not produced any evidence of mental disorder, childhood abuse, or even trauma arising from defendant's parents' divorce."].) It is not reasonably probable that the jury's verdict would have been affected had the jury heard that appellant's stepfather struck appellant's sister out of appellant's presence. Moreover, had Beswick presented this evidence, the prosecutor would have presented evidence that appellant actually got along well with his stepfather and they even worked together as adults. (30GRT 3587-3588; see *In re Ross*, *supra*, 10 Cal.4th at pp. 206-209; *In re Jackson*, *supra*, 3 Cal.4th at pp. 614-615.) Accordingly, appellant has failed to show Beswick was ineffective in failing to present further evidence regarding appellant's father or stepfather.

4. Appellant Has Failed To Establish Ineffective Assistance On The Ground That Beswick Failed To Investigate The Poverty And Gang Activity In The Projects Where Appellant Grew Up

Appellant contends Beswick was ineffective in failing to investigate the poverty and gang activity in the projects where appellant was raised. (AOB 242-243, 256.) Respondent disagrees.

Again, appellant's claim is not supported by the record. At the penalty phase, Beswick presented the following evidence regarding appellant's childhood environment: appellant grew up in the projects in Culver City, which

was a "bad" neighborhood with a lot of gang activity (28RT 3063, 3081, 3092); appellant's mother had five children and could not work, so she supported her family with military insurance benefits she received after appellant's father's death (28RT 3063-3064); appellant began working at McDonald's when he was 13 years old and used the money he earned to buy his own clothes (28RT 3064); appellant was exposed to drugs and guns at a young age (22RT 2491-2493; 29RT 3138-3139); appellant was not involved with a gang and regularly tried to stop the gang fighting in his neighborhood (28RT 3072, 3083, 3092); appellant "was always concerned about trying to dispel those kinds of negative stereotypes of people who live in housing projects" (28RT 3091); appellant assisted his mother with an organization that provided non-gang activities for hundreds of children in the projects (28RT 3073, 3091); and appellant worked throughout high school, including starting his own auto repair business (28RT 3065-3066, 3083, 3107; 30GRT 3570). Thus, Beswick adequately informed the jury of appellant's childhood environment.

Moreover, appellant's depiction of his childhood environment is melodramatic and not supported by the record. For example, appellant claims that because of his stepfather's abuse, his home "ceased to provide a safe haven," so he "spent more time on the street, increasing his exposure to drugs and gang activity." (AOB 243.) However, as explained (Arg. XI. B. 3.), there was no evidence that appellant was ever abused by his stepfather or even witnessed any abuse his stepfather may have inflicted on his sister. Additionally, appellant and his family members testified that after appellant's father died, appellant assumed a father figure role, helped his mother around the house, and "was always there for [Kamba] and always there for [their] sisters and would protect [them] all the time." (22RT 2491-2492; 28RT 3063, 3068-3069, 3082, 3090.) On this record, appellant has failed to show Beswick acted incompetently in his presentation of evidence regarding appellant's childhood

environment. Moreover, by failing to present any compelling evidence at the evidentiary hearing, which Beswick failed to present at trial, appellant has failed to show that he was prejudiced by any failure to further investigate or present evidence of his childhood environment. (See *People v. Pensinger*, *supra*, 52 Cal.3d at p. 1280 ["the habeas corpus proceedings have not uncovered any character or background evidence of great significance. This is not a case in which the omitted mitigating evidence could have 'totally changed the evidentiary picture' [citation] by painting defendant's character in a new light."].)

In re Andrews, *supra*, 28 Cal.4th at page 1234, is instructive. In *Andrews*, this Court found that the defendant had failed to show he was prejudiced by counsel's alleged failure to further investigate or present evidence of the defendant's upbringing, because evidence presented at a habeas corpus hearing "was not conclusively and unambiguously mitigating." (*Id.* at p. 1257.) Specifically, this Court found: although the defendant's mother left him when he was two years old to improve her circumstances, she left him with loving and responsible family members including his grandfather, sent him money, and returned home years later; although the defendant's grandfather died when the defendant was 10 years old, "the testimony describing his upbringing and early family life generally showed it to be relatively stable and without serious privation or abuse;" all but one of the defendant's family members finished high school, and only one of the defendant's siblings had a "minor brush with the law;" and the defendant's family members counseled him against spending time with people they felt were bad influences. (*Ibid.*) This Court concluded, "Thus, petitioner did not suffer a home environment that would place his crimes in any understandable context or explain his resorting to crime . . . ." (*Ibid.*)

Here, the evidence was even less convincing that appellant's upbringing "would place his crimes in any understandable context." The evidence

established that: until appellant was an adult, he lived with his siblings and his mother, who was loving and responsible; although appellant's father died when appellant was 10 years old, appellant was raised in a relatively stable home and was never abused; appellant graduated from high school, and three of his siblings graduated from UCLA; and appellant's mother created a community organization that helped keep youths out of gangs, and appellant was an active participant in the organization. As in *Andrews*, counsel here was not deficient in failing to further investigate or present further evidence of appellant's upbringing, as such evidence was not "conclusively or unambiguously mitigating." (*Andrews*, *supra*, 28 Cal.4th at p. 1257.)

5. Appellant Has Failed To Establish Ineffective Assistance On The Ground That Beswick Failed To Investigate Or Interview Prosecution Witness Richard Morrison

Appellant claims Beswick was ineffective in failing to investigate and interview Richard Morrison. (AOB 244-247.) Again, appellant's claim is not supported by the record.

During the guilt phase, the prosecutor sought to introduce the testimony of Richard Morrison, appellant's former coworker, who claimed that sometime in the 1980's appellant threatened him with a gun at the dairy where they worked. (13RT 1423-1424.) Beswick indicated that he had just learned of the witness the day before and had not had a chance to investigate him. Beswick indicated that he had read Morrison's statement, but he had not been provided any further discovery on the witness. The prosecutor indicated that the statement was the only discovery regarding Morrison. (13RT 1424.) Beswick began to argue that the testimony should be excluded under Evidence Code section 352, but the court cut him off and asked to take up the issue at a later date after the court had had a chance to review the discovery. (13RT 1424.) Appellant claims there was no further discussion regarding Morrison, although

Morrison testified at the penalty phase. (AOB 244.) Appellant is mistaken, as further discussions were held regarding Morrison's testimony.

Specifically, the prosecutor raised the issue again during the guilt phase by renewing her request to present Morrison's testimony. (16RT 1694.) Beswick objected under Evidence Code section 352. (16RT 1694.) The court indicated that it was "concerned" about the testimony's admissibility under Evidence Code section 352, as well as the lateness of the prosecution's discovery regarding Morrison. (16RT 1694.) The prosecutor argued that she gave the discovery to the defense as soon as she learned of Morrison's existence. (16RT 1695.) The court stated, "My concern is [Beswick has] made his opening statement, a lot of his questioning was based on the discovery that you've given him, and this is a very significant change." (16RT 1695.) The court again deferred ruling on the testimony. (16RT 1695.)

Later during the guilt phase, the prosecutor indicated that she was resting her case based on the assumption that the court was not going to allow Morrison's testimony. (20RT 2252.) The court ruled that the evidence was inadmissible. (20RT 2252.) The court agreed that the prosecutor could renew her motion to admit the testimony as rebuttal evidence, depending on what evidence the defense elicited in its case. (20RT 2252.) Beswick complained that he did not have Morrison's phone number. (20RT 2252-2253.) The court indicated that it thought all the discovery had been provided. The court told the prosecutor, "What I want you to do is give Mr. Beswick everything that you possibly have or may have. And, again, you're precluded from using it at this time, and I'll make a ruling later on, if I need to. [¶] But certainly, if you haven't given discovery that's going to affect the ruling . . . ." (20RT 2253.) The court also specifically ordered the prosecutor to give Morrison's phone number to Beswick that day. (20RT 2253.)

After the defense presented Ramirez's testimony about the barbecue incident, the prosecutor renewed her motion to admit Morrison's testimony. The prosecutor argued that the defense had opened the door by eliciting evidence of appellant's good character. (20RT 2297.) The court stated, "There has been very minimal good character evidence. I just don't see any reason to change the ruling at this time." (20RT 2297.) The prosecutor argued that appellant and Delia were going to testify regarding appellant's good character. The court stated that it would wait to hear the rest of the defense testimony before deciding whether to allow Morrison's testimony in rebuttal. (20RT 2297.) The prosecutor did not renew her motion to admit Morrison's testimony during the guilt phase.

During the penalty phase, after the defense had presented some witnesses, the prosecutor argued that Beswick had presented evidence of appellant's nonviolent character and thereby opened the door to admission of Morrison's testimony. (28RT 3097.) Beswick argued that the nonviolent character evidence had only involved whether appellant had been previously convicted of felonies. Beswick argued that the evidence of prior unadjudicated criminal activity was highly prejudicial and should be excluded. (28RT 3097.) The court ruled that the defense had opened the door to evidence of prior unadjudicated violent activity, and so Morrison's testimony would be admitted. (28RT 3097.)

Appellant has failed to establish that Beswick did not adequately investigate Morrison. With respect to the guilt phase, Beswick did not need to investigate Morrison because the court ruled his testimony was inadmissible. With respect to the penalty phase, it is apparent that Beswick did investigate Morrison. At the evidentiary hearing, appellant did not ask Beswick any questions regarding his investigation of Morrison. Thus, there is nothing in the record to indicate what type of investigation Beswick conducted into

Morrison's testimony. However, the record shows that Beswick read Morrison's statement and specifically requested Morrison's phone number. Moreover, Beswick thoroughly cross-examined Morrison, eliciting Morrison's testimony that he did not report the incident to his supervisor (29RT 3127), he did not report the incident to the police (29RT 3128), no one else witnessed the incident (29RT 3127-3128), and appellant had been friendly with Morrison before this incident (29RT 3126, 3129). By showing that Morrison could not give a motive for appellant's threat and that Morrison did not report the threat, Beswick implied that Morrison was lying about the incident. Accordingly, Beswick was prepared for Morrison's testimony.

Regardless, appellant has failed to show he was prejudiced by any deficiency in Beswick's investigation of Morrison. Appellant presented no evidence at the evidentiary hearing, and there is no evidence in the record, that further investigation would have uncovered information that could have been used to further impeach Morrison's testimony. Thus, appellant has not shown it is reasonably probable the jury would have reached a more favorable verdict had Beswick further investigated Morrison. (See *People v. Berryman*, *supra*, 6 Cal.4th at p. 1082.)

6. Appellant Has Failed To Establish Ineffective Assistance On The Ground That Beswick Opened The Door To Appellant's Prior Arrests And Unadjudicated Criminal Activity

Appellant claims Beswick provided ineffective assistance by opening the door during the penalty phase to Morrison's testimony and evidence of appellant's prior arrests. (AOB 221, 247-252.) Appellant has failed to meet his burden under *Strickland*.

a. Prior Arrests

During the penalty phase, Beswick asked Heredia whether appellant had ever "been in trouble with the law" or arrested before he graduated from high

school. (28RT 3066-3067.) Beswick also asked Heredia whether appellant had been convicted of a felony as an adult. (28RT 3071-3072.) Beswick asked appellant's sister Kamba whether appellant was often in trouble during high school. (28RT 3083.) During the direct testimony of appellant's sister Barbara, the following colloquy occurred:

> [BESWICK:] Do you know . . . if [appellant] got in trouble when he was in school at all?
>
> [BARBARA:] I - - I was aware he had some, he got into some trouble, but I thought it was just with another kid in Catholic school; but I don't even remember anything major, you know, like a major fight.
>
> Q Any run-ins with the law at all?
>
> A Not that I am aware of.
>
> Q Any arrests by police that you know of?
>
> A No, not that I know of.
>
> Q Do you know if he has ever been convicted of a felony as an adult?
>
> A No, he hasn't.

(28RT 3094-3095.)

After Barbara's testimony, the prosecutor argued:

> Your Honor, Mr. Beswick has brought into issue whether or not the defendant has been arrested, and with the first witness he limited it to the defendant's juvenile problems. [¶] And then with the second witness, he sort of kind of talked about violence, but with this witness he pretty much opened the door to the defendant's arrest. [¶] The defendant has been arrested, Your Honor. As a matter of fact, he was arrested for assault, for several drug related offenses . . . .

(28RT 3096.) Beswick argued that his questions had only dealt with felony convictions. (28RT 3097.) The court asked the court reporter to read back Beswick's questions to Barbara to determine whether the evidence of

appellant's prior arrests would be admissible. (28RT 3100.) After the readback, the prosecutor argued, "I think that certainly opens the door because that is in the form of character evidence, certainly, of the defendant's character for nonviolence; and it certainly is relevant my questioning of her with respect to his arrests to show, number one, that, in fact, the defendant was arrested. [¶] I mean this witness has testified she grew up with the defendant. They were a very close family. So I think it is clearly, highly relevant." (28RT 3100-3101.) Beswick again argued that the questions had only dealt with whether appellant had prior convictions as an adult, and thus, the evidence of his adult arrests was irrelevant. (28RT 3101.) The court ruled that the prosecutor would be permitted to "go into a certain limited amount of cross-examination on the questions that she was asked on direct." (28RT 3101.) The court ordered the prosecutor not to "go too deeply into facts of the arrest." (28RT 3101.)

The prosecutor proceeded to ask Barbara whether she knew about appellant's arrests for: grand theft auto in 1974; petty theft in 1975; possession of a controlled substance in 1977; carrying a concealed weapon in a vehicle in 1984; possession for sale of PCP in 1986; and assault with a deadly weapon in 1990. Barbara testified that she knew of appellant's 1974 arrest for grand theft auto. She was unaware of the other adult arrests because her family used to keep such information from her and she frequently traveled away from home. (28RT 3103-3104.)

Reading Beswick's questions to Barbara in context, it is clear that he was asking whether appellant had been arrested as a juvenile and whether he had suffered felony convictions as an adult. Moreover, in view of Beswick's identical line of questioning to Heredia and Kamba, it is clear Beswick never specifically asked Barbara whether appellant had been arrested as an adult. Nonetheless, because Barbara testified that appellant had not been arrested or suffered felony convictions, and that she had a very close relationship with

appellant, the court properly found that the prosecutor could question Barbara about her knowledge of appellant's prior adult arrests. (See Evid. Code, §§ 780, 1101, subds. (b)-(c); *People v. Kennedy* (2005) 36 Cal.4th 595, 620; *People v. Price*, *supra*, 1 Cal.4th at p. 481; see also *People v. Farnam*, *supra*, 28 Cal.4th at p. 188 [trial court has broad discretion in permitting the parties to elicit impeachment evidence on cross-examination].) Beswick may have reasonably believed the court would not allow questions about the adult arrests because he had tailored his questions to the defense witnesses to deal only with juvenile arrests. Beswick may also have reasonably believed that opening the door to the prosecutor's questions about appellant's adult arrests was acceptable in light of the minimal prejudicial effect of the arrests and the highly beneficial impact of Barbara's testimony regarding appellant's good character, lack of felony convictions, and lack of juvenile arrests. Because there are possible reasonable and tactical explanations for Beswick's conduct, appellant has failed to show Beswick's representation was deficient in this respect. (*People v. Weaver*, *supra*, 26 Cal.4th at p. 926; *People v. Fosselman*, *supra*, 33 Cal.3d at pp. 581-582.) [37]

In any event, appellant was not prejudiced by the admission of evidence of his prior arrests. First, the prosecutor never actually admitted evidence or underlying facts of appellant's prior arrests. The prosecutor asked Barbara if she was aware of the arrests, and Barbara confirmed only appellant's 1974 arrest for grand theft auto. (28RT 3103-3104; see *People v. Gutierrez* (2002)

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37. Appellant claims it is possible Beswick did not know appellant had prior arrests. (AOB 251.) Nothing in the record supports this claim. Beswick did not seem surprised when the prosecutor mentioned the arrests. Moreover, Beswick's tailored questions regarding appellant's juvenile arrest record and adult conviction record reflect an attempt to avoid the topic of appellant's adult arrests. Additionally, the prosecution informed Beswick of appellant's prior arrests during discovery. (Camacho Murder Book, section 12.) Thus, the record shows that Beswick was aware of appellant's prior arrests.

28 Cal.4th 1083, 1148.) The jury was instructed before trial and at the end of trial that counsel's questions were not evidence. (11RT 1058; 26RT 2931.) Moreover, the jury was aware that none of the arrests had resulted in convictions, and appellant minimized any prejudicial effect of the arrests by explaining that they occurred when he was young and that being unjustifiably arrested was common in the projects. (28RT 3115-3116; 29RT 3135-3138; see *People v. Price*, *supra*, 1 Cal.4th at p. 481 [defendant could not have been prejudiced by the prosecutor's question about a prior arrest "because defendant later testified fully to the events in question"].)

Further, the prosecutor's questions indicated that all of the arrests except one were for nonviolent crimes. As for that one, the jury might not even have been aware that the arrest was for a violent offense--assault with a deadly weapon--because the prosecutor simply asked whether Barbara was aware of appellant's arrest for "ADW, 245(a)(1) of the Penal Code," and the jury was not instructed as to Penal Code section 245 or the abbreviation "ADW." (28RT 3104.) Additionally, asking about the arrest for possession of a concealed weapon in a vehicle cannot have prejudiced appellant because he had already admitted to the jury that he always carried a gun. (22RT 2491-2493.) Likewise, asking about the arrests relating to drugs could not have prejudiced appellant because the jury already knew that appellant had possessed and used illegal drugs in the past. Thus, it is not reasonably probable appellant would have achieved a more favorable result had the prosecutor not asked Barbara whether she knew about appellant's prior arrests.

b. The Incident With Morrison

During the penalty phase, Beswick asked members of appellant's family questions regarding appellant's character for nonviolence. (See, e.g., 28RT 3069-3072, 3078-3079, 3082-3083, 3085-3086, 3092, 3094-3095, 3115-3116.) As explained (Arg. XI. B. 5.), over Beswick's objection, the trial court properly

ruled that the admission of this character evidence opened the door to the prosecution's presentation of Morrison's testimony. (28RT 3097; see Evid. Code, § 1102, subd. (b); *People v. Clark*, *supra*, 5 Cal.4th at p. 1028.)[38]

Beswick reasonably chose to present mitigating evidence of appellant's nonviolent character, even though it opened the door to Morrison's testimony. The defense that appellant was nonviolent was supported by the undisputed fact that appellant had no adult felony convictions. Evidence of appellant's nonviolent character also supported the defense of lingering doubt. Although Beswick knew presenting evidence of appellant's nonviolent character might open the door to Morrison's testimony, he could have reasonably believed the court might continue to exclude that evidence under Evidence Code section 352. Indeed, Beswick objected to the admission of the testimony. (28RT 3097.) Moreover, Morrison's testimony was not so damaging that opening the door to it was unreasonable. The incident took place 18 years before the penalty phase in this case, Morrison did not report the incident to his supervisor or to the police, no one else witnessed the incident, and Morrison could offer no motive for appellant's threat. Thus, Beswick reasonably chose to elicit mitigating testimony regarding appellant's nonviolent character, even though it opened the door to damaging rebuttal evidence. (See *People v. Robertson* (1982) 33 Cal.3d 21, 43, fn. 11 [appellate court should not second-guess defense counsel's tactical choices even when counsel elicits evidence adverse to his client]; accord, *People v. Williams*, *supra*, 16 Cal.4th at p. 217.)

Further, appellant was not prejudiced by the fact that Beswick opened the door to Morrison's testimony. Beswick effectively undermined the force of Morrison's testimony. As Beswick elicited during cross-examination, Morrison

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38. It appears this evidence would have qualified as aggravating evidence pursuant to section 190.3, subdivision (b). (*People v. Harris* (2008) 43 Cal.4th 1269, 1315-1316.)

apparently took almost 20 years to come forward about the threat, no one else could confirm Morrison's story, and there was no apparent motive for the threat. On the other hand, appellant and members of appellant's family testified that appellant was a nonviolent person who actually tried to help the community and stop violence around him. Their testimony was supported by the fact that appellant had no adult felony convictions. This evidence of appellant's nonviolent character was crucial to the defense.

Appellant claims he was prejudiced by Beswick's opening the door to Morrison's testimony because it allowed the prosecutor to cross-examine appellant about whether he owned a gun when Morrison claimed the threat occurred. (AOB 250.) However, appellant had already informed the jury during the guilt phase that he had owned guns from a young age and that he regularly carried a gun for protection. (22RT 2491-2495, 2497.) Because the jury already knew that appellant had owned a gun his whole life, appellant was not prejudiced by the prosecutor's elicitation of his testimony that he owned a gun when Morrison claimed the threat occurred. (See *People v. Osband* (1996) 13 Cal.4th 622, 719; *People v. Thomas* (1992) 2 Cal.4th 489, 522.)

Thus, it is not reasonably probable appellant would have achieved a more favorable result had Beswick failed to question defense witnesses regarding appellant's nonviolent character.

7. Appellant Has Failed To Establish Ineffective Assistance In Beswick's Closing Argument

Appellant complains that Beswick's penalty phase arguments were brief. (AOB 221; see also AOB 147-149.) However, Beswick's penalty phase arguments were not brief in relation to the length of the penalty phase, which lasted two days. (See *In re Andrews*, *supra*, 28 Cal.4th at p. 1262 ["relatively brief closing argument" was "consistent in both tone and length with the limited penalty phase presentation of both the prosecution and the defense"].)

Beswick's penalty phase arguments were also not brief in relation to the prosecutor's arguments. (28RT 3009-3011 [prosecutor's opening statement], 3011-3012 [Beswick's opening statement]; 29RT 3150-3159 [prosecutor's closing argument], 3159-3163 [Beswick's closing argument].) Further, "the length of an argument is not a sound measure of its quality." (*People v. Cudjo*, *supra*, 6 Cal.4th at pp. 634-635; accord, *In re Andrews*, *supra*, 28 Cal.4th at p. 1262 ["we have never equated length with effectiveness"]; *People v. Mayfield*, *supra*, 5 Cal.4th at p. 186 ["brevity and eloquence are not necessarily inconsistent"].) Additionally, by giving a brief closing argument, Beswick "may have prompted the prosecutor to forgo [her] final statement, thereby leaving the defense with the last words to the jury." (See *In re Andrews*, *supra*, 28 Cal.4th at p. 1262.) Thus, appellant has failed to establish ineffective assistance of counsel on the basis of Beswick's arguments at the penalty phase.

8. Appellant's Perfunctory Claims Regarding Beswick's Representation Should Be Rejected

Appellant insinuates that Beswick was incompetent in arguing appellant's age as a mitigating factor. (AOB 221.) Appellant's complaint should not be entertained, as he fails to mention the issue in a heading, offer argument or citation to authority in support of the complaint, or explain how Beswick's argument possibly prejudiced him. (See *People v. Smith*, *supra*, 30 Cal.4th at p. 616, fn. 8; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1340; *People v. Stanley*, *supra*, 10 Cal.4th at p. 793.) Moreover, appellant has failed to meet his burden under *Strickland*. In arguing that life without the possibility of parole would be a sufficient punishment for appellant, Beswick emphasized that conditions in prison were not pleasant. In this context, Beswick mentioned that appellant was 41 years old and would most likely spend at least 30 years in prison. (29RT 3161-3162.) Such argument was proper and reasonable and did not prejudice appellant. (See § 190.3, subdivision (i).)

Appellant complains that Kamba prepared and filed declarations from members of appellant's family in support of revoking the death penalty, without any assistance from Beswick. (AOB 219-220, 252.) However, Beswick testified at the evidentiary hearing that he had been involved in the filing of the declarations. (30GRT 3545.) Additionally, even if Kamba prepared and filed the declarations without assistance from Beswick, appellant was not prejudiced. The declarations were, one way or the other, filed. They did not offer any information that would have been admissible at the penalty phase, but was not presented to the jury. Additionally, the declarations were offered in support of post-verdict motions, so the manner of their filing cannot have prejudiced appellant with regard to how the jury reached the verdicts.

Appellant also complains that Beswick advised Heredia and Kamba not to seek sympathy from the jurors at the penalty phase. (AOB 254.) Appellant's complaint is based on the unreliable testimony of members of appellant's family at the evidentiary hearing. Beswick was not asked at the evidentiary hearing whether he had dispensed such advice. In any event, even if Beswick did so advise the witnesses, he acted reasonably. Sympathy for the defendant's family is not a proper consideration when determining whether to impose the death penalty. (*People v. Bemore* (2000) 22 Cal.4th 809, 856.) Beswick's advice to members of appellant's family not to attempt to evoke sympathy for themselves therefore would have been proper. Beswick effectively elicited testimony from members of appellant's family that was aimed at evoking sympathy *for appellant*, which is a proper consideration when determining whether to impose the death penalty. (See *People v. Edwards* (1991) 54 Cal.3d 787, 840.) Thus, Beswick acted competently.

Moreover, appellant has failed to show he was prejudiced by Beswick's advice. Kamba did in fact cry during her penalty phase testimony (30GRT 3611-3612), Kamba testified that appellant's family would be devastated by a

death sentence (28RT 3082), and Beswick admitted photographs of appellant's children (28RT 3109, 3112-3113, 3119). Thus, evidence tending to evoke sympathy for appellant's family was presented to the jury. Appellant has failed to show there is a reasonable probability that the jury would have reached a different verdict had Beswick not advised Heredia and Kamba against attempting to evoke the jury's sympathy.

Appellant next contends that Beswick was ineffective in failing to call appellant's adult daughter to testify at the penalty phase. (AOB 254-255.) Again, appellant fails to support his claim with evidence or authority. Moreover, it appears from the record that Beswick reasonably did not ask appellant's daughter to testify because appellant and his family did not want her to know about the proceedings. (30CRT 3326 [Beswick was asked not to interview appellant's children]; 30GRT 3534 [appellant instructed Beswick not to contact appellant's daughter, who was "sheltered" by her family from information about appellant's case], 3535 [Beswick did not interview appellant's adult daughter "at [appellant]'s instruction"], 3607-3608 [appellant's family did not tell appellant's adult daughter about the guilty verdicts until about a month after the verdicts were reached, because they did not want to upset her]; see *People v. Snow*, *supra*, 30 Cal.4th at p. 112 [counsel was not necessarily deficient in failing to investigate or present family background evidence in mitigation of penalty when "defendant had instructed his family members not to cooperate with the defense"]; *In re Andrews*, *supra*, 28 Cal.4th at pp. 1254, 1256-1257 [counsel were not deficient in their investigation of mitigating evidence when defendant insisted that counsel not involve his family in the investigation].) Further, appellant has not shown he was prejudiced by Beswick's failure to interview appellant's adult daughter or present her testimony. Appellant's daughter did not testify at the evidentiary hearing. Thus, there is no evidence that she was available or willing to testify,

or had any mitigating information about which to testify. (See *People v. Medina*, *supra*, 11 Cal.4th at p. 773.)

In sum, this Court should find that appellant has failed to meet his burden of establishing ineffective assistance of counsel at the penalty phase. Beswick competently presented appellant as a human being at the penalty phase, emphasizing appellant's family relationships, good character, and the jury's potential lingering doubt. (See *People v. Berryman*, *supra*, 6 Cal.4th at p. 1082 [counsel was not deficient in arguing that a sentence of life imprisonment without the possibility of parole was a severe and sufficient punishment in the case]; *People v. Pensinger*, *supra*, 52 Cal.3d at pp. 1279-1280 [defense counsel was not incompetent as a matter of law in relying on lingering doubt when counsel also presented some evidence of good character to bolster the lingering doubt argument, and habeas corpus proceedings did not reveal any significant other character evidence].)

Moreover, appellant was not prejudiced by Beswick's representation. Even considering the evidence elicited at the evidentiary hearing, the aggravating evidence outweighed the mitigating evidence. (See *Wiggins v. Smith*, *supra*, 539 U.S. at p. 534 [evaluating prejudice resulting from counsel's representation during the penalty phase by reweighing the evidence in aggravation against the totality of available mitigating evidence]; accord, *Williams v. Taylor* (2000) 529 U.S. 362, 397-398 [120 S.Ct. 1495, 146 L.Ed.2d 389]; *In re Hardy* (2007) 41 Cal.4th 977, 1032.) Appellant was raised in the projects, but he had close family relationships, an education, and the ability to work. Appellant had a drug problem at one time in his life, but he overcame it and there is no reliable evidence that the problem had any long-term effects on appellant's mental abilities. The jury apparently did not have lingering doubt. Evidence of appellant's alleged good character was far outweighed by the evidence of the brutality and callousness of his actions in committing the

robbery and two murders. Accordingly, appellant's ineffective assistance of counsel claim fails.

XII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON CONSCIOUSNESS OF GUILT DUE TO FLIGHT

Appellant claims the trial court violated his rights to due process, a fair trial, a jury trial, and equal protection by instructing the jury on consciousness of guilt due to flight pursuant to CALJIC No. 2.52 ["Flight After Crime"]. Specifically, appellant contends the instruction was unnecessary and duplicative of the general circumstantial evidence instructions. Appellant further contends that the instruction was unfairly partisan and argumentative. Lastly, appellant contends the instruction permitted the jury to draw irrational inferences about appellant's guilt. (AOB 258-271.) Appellant forfeited his claims by failing to object to the instruction. Regardless, the contentions lack merit because the instruction was correct in law, and it was properly given. Lastly, any possible error was harmless.

A. Appellant Forfeited His Claim By Failing To Object To The Instruction

The failure to object to a flight instruction forfeits any complaint that the instruction was given. (*People v. Loker* (2008) 44 Cal.4th 691, 705-706; see *People v. Farnam*, *supra*, 28 Cal.4th at p. 165; *People v. Bolin*, *supra*, 18 Cal.4th at p. 326; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223; but see *People v. Smithey* (1999) 20 Cal.4th 936, 982, fn. 12 [claim that flight instruction was not warranted by the evidence was not forfeited by failure to object].) Here, the court discussed instructing the jury pursuant to CALJIC No. 2.52 repeatedly, without objection from appellant. (24RT 2718-2719, 2722, 2744.) Recognizing his failure to object to the instruction, appellant

nevertheless argues his claim was not forfeited because giving the instruction affected his substantial rights. (AOB 259, citing § 1259.) However, as will be shown, the instruction was correctly given and appellant was not prejudiced by the instruction. Accordingly, appellant forfeited his contentions by failing to object to the instruction in the trial court.

B. The Instruction Was Properly Given

The trial court instructed the jury pursuant to CALJIC No. 2.52 as follows:

> The flight of a person immediately after the commission of a crime or after he is accused of a crime is not sufficient in itself to establish his guilt. But [*sic*] is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

(26RT 2940; 2CT 400.) The trial court also instructed the jury generally on circumstantial evidence pursuant to CALJIC Nos. 2.00 ["Direct and Circumstantial Evidence--Inferences"], 2.01 ["Sufficiency of Circumstantial Evidence--Generally"], and 2.02 ["Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State"]. (26RT 2932-2935; 2CT 384-386.)[39/]

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39. Appellant first claims that both CALJIC Nos. 2.01 and 2.02 were given. (AOB 259.) However, he later claims that the trial court chose not to deliver CALJIC No. 2.02. (AOB 268, citing RT 7322-7323.) Respondent is unable to find the pages appellant cites, as the reporter's transcript does not reach page 7322. It in fact appears that both instructions were given. (26RT 2933-2935.) CALJIC Nos. 2.01 and 2.02 are alternative instructions and generally should not both be given. (Use Notes for CALJIC Nos. 2.01 & 2.02.) However, appellant does not claim that the giving of both instructions was error or prejudiced him in any way. Indeed, this Court has held that giving both instructions is not prejudicial error. (*People v. Koontz, supra*, 27 Cal.4th at pp. 1084-1085; *People v. Bloyd* (1987) 43 Cal.3d 333, 352.)

Appellant first claims the flight instruction was improperly given because it was duplicative of the general instructions regarding circumstantial evidence. (AOB 259-260, citing CALJIC Nos. 2.00, 2.01, 2.02.) However, the instruction was not duplicative. CALJIC Nos. 2.00, 2.01, and 2.02 instructed the jurors regarding the definition of circumstantial evidence and the sufficiency of circumstantial evidence to establish facts leading to a finding of guilt. On the other hand, CALJIC No. 2.52 was a cautionary instruction which benefitted the defense by "admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*People v. Jackson*, *supra*, 13 Cal.4th at p. 1224.) Accordingly, appellant is incorrect that the flight instruction was duplicative of the general circumstantial evidence instructions.

Moreover, appellant's argument misses the point. In support of his claim, appellant cites cases which stand for the proposition that a trial court does not abuse its discretion in *declining* to read a defendant's *proposed instructions* if such instructions are duplicative of standard instructions. (AOB 259.) These cases are not relevant to whether the trial court erred in *giving* a *standard instruction*. Further, the flight instruction must be given where evidence of flight is relied upon by the prosecution. (§ 1127c; *People v. Howard* (2008) 42 Cal.4th 1000, 1020; *People v. Abilez* (2007) 41 Cal.4th 472, 521-522; *People v. Turner* (1990) 50 Cal.3d 668, 694; *People v. Cannady* (1972) 8 Cal.3d 379, 391.) Here, the instruction was properly given because evidence was presented that appellant fled the scene of each shooting by immediately getting into a car and driving away, and that appellant escaped from custody while charges were pending against him. (See *People v. Carrera* (1989) 49 Cal.3d 291, 313-314.) Indeed, appellant does not contest that the evidence was sufficient to support giving the instruction. Accordingly, the trial court was required to give the flight instruction regardless of the general instructions on circumstantial evidence.

Appellant next claims that the flight instruction was argumentative, lessened the prosecution's burden of proof, and invaded the province of the jury by focusing the jury's attention on evidence favorable to the prosecution. (AOB 260-264.) Appellant's claims have been repeatedly rejected by this Court. (*People v. Rundle*, *supra*, 43 Cal.4th at p.152; *People v. Howard*, *supra*, 42 Cal.4th at p. 1021; *People v. Mendoza* (2000) 24 Cal.4th 130, 180-181; *People v. Jackson*, *supra*, 13 Cal.4th at p. 1224 [noting that the cautionary nature of the instruction benefits the defense].) Appellant urges this Court to reconsider its holdings in light of *People v. Mincey* (1992) 2 Cal.4th 408, 437, which he contends rejected as argumentative an instruction analogous to CALJIC No. 2.52. (AOB 261-262.) However, this Court recently rejected the identical claim with regard to CALJIC No. 2.03, a similar consciousness of guilt instruction:

> [Appellant] is correct that the rejected instruction in *Mincey* was *structurally* identical to CALJIC No. 2.03: both contained the propositional structure 'If certain facts are shown, then you may draw particular conclusions.' But it was not the structure that was problematic in *Mincey*. Rather it was the way the proposed instruction articulated the predicate 'certain facts': 'If you find that the beatings were *a misguided, irrational and totally unjustified attempt at discipline rather than torture* as defined above, you may . . . .' (*Mincey*, [*supra*, 2 Cal.4th] at p. 437, fn. 5 [].) This argumentative language focused the jury on defendant's version of the facts, not his legal theory of the case; this flaw, not the generic 'if/then' structure, is what caused us to approve the trial court's rejection of the instruction. (*Id.* at p. 437 [].) Any parallels between that instruction and CALJIC No. 2.03 are thus immaterial. [Citations.] We adhere to our prior decisions rejecting the argument that CALJIC No. 2.03 is impermissibly argumentative.

(*People v. Bonilla* (2007) 41 Cal.4th 313, 330, original brackets omitted.) The same logic applies to CALJIC No. 2.52, as both are similarly structured consciousness of guilt instructions. (See *People v. Morgan* (2007) 42 Cal.4th 593, 621 [treating claims relating to CALJIC Nos. 2.03 and 2.52 uniformly]; accord, *People v. Thornton* (2007) 41 Cal.4th 391, 438; *People v. Boyette*, *supra*, 29 Cal.4th at pp. 438-439; *People v. Jackson*, *supra*, 13 Cal.4th at pp. 1223-1224.) Accordingly, this Court should follow its previous holdings and reject appellant's claim.

Lastly, appellant contends the flight instruction permitted the jury to draw irrational inferences regarding appellant's state of mind at the time the offenses were committed and regarding his guilt on all the charges. (AOB 264-270.) Respondent disagrees. As this Court has repeatedly held, CALJIC No. 2.52 does not permit the jury to draw such irrational or impermissible inferences. (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1160 ["We have explained that the flight instruction, as the jury would understand it, does not address the defendant's specific mental state at the time of the offenses, or his guilt of a particular crime, but advises of circumstances suggesting his *consciousness that he has committed some wrongdoing*."]; accord, *People v. Howard*, *supra*, 42 Cal.4th at p. 1021; *People v. Thornton*, *supra*, 41 Cal.4th at p. 438; *People v. Bolin*, *supra*, 18 Cal.4th at p. 327; see also *People v. Mendoza*, *supra*, 24 Cal.4th at pp. 179-180.) Appellant has raised no persuasive basis for reconsideration of these decisions. Accordingly, the trial court properly instructed the jury pursuant to CALJIC No. 2.52.

C. Any Error In Giving The Instruction Was Harmless

In any event, any error in giving the flight instruction was harmless. It is not reasonably probable appellant would have achieved a more favorable result had the instruction not been given. (See *People v. Turner*, *supra*, 50 Cal.3d at p. 695 [error in giving flight instruction at guilt phase is reviewed

under *People v. Watson*, *supra*, 46 Cal.2d at p. 836]; accord, *People v. Silva*, *supra*, 45 Cal.3d at p. 628.) The instructions as a whole informed the jury that the prosecution had the burden of proof beyond a reasonable doubt regarding every fact establishing appellant's guilt. (See, e.g., 26RT 2930 [CALJIC No. 1.01 ["Instructions to be Considered as a Whole"]], 2933-2934 [CALJIC No. 2.01], 2943-2944 [CALJIC No. 2.90 ["Presumption of Innocence--Reasonable Doubt--Burden of Proof"]] 2944 [CALJIC No. 2.91 ["Burden of Proving Identity Based Solely on Eyewitnesses"]], 2955 [CALJIC No. 8.71 ["Doubt Whether First or Second Degree Murder"]]; see *People v. Frye*, *supra*, 18 Cal.4th at p. 957 [appellate court looks to the entire charge to the jury to determine whether there is a reasonable probability the jury improperly applied a challenged instruction].) The instructions also informed the jury that the flight instruction might not apply. (26RT 2963-2964 [CALJIC No. 17.31 ["All Instructions Not Necessarily Applicable"]]; see *People v. Richardson* (2008) 77 Cal.Rptr.3d 163, 211.)

Moreover, there was substantial evidence of appellant's guilt aside from his flight from the scenes of the murders. With regard to the Camacho murder, appellant told coworkers at the dairy that he did not want Camacho taking back his shift; various witnesses testified that appellant regularly carried to work the type of gun used in the murder; Bermudez, who was leaving the dairy at the time of the shooting, testified that appellant later told Bermudez that he saw him at the time of the shooting, asked if Bermudez had seen him, and instructed Bermudez not to speak to anyone about the shooting; witnesses saw a person matching appellant's description flee the dairy immediately after the shooting; and Morales and Janson testified that appellant confessed to the murder on separate occasions. With regard to the Friedman murder, Woodland testified that appellant committed the murder and robbery; neighbors testified that they saw the Honda drive away with two occupants; one neighbor testified he was

70 percent certain appellant was the passenger of the Honda; appellant's fingerprint was found inside the Honda; Friedman's bag was found where Woodland said appellant had thrown it out; two kilos of cocaine were found in Friedman's Jeep; bullets and a magazine matching the size of the bullets used in the murder were found in appellant's residence; Janson saw appellant carrying a gun that was the same caliber as that used in the murder; and Janson testified that appellant confessed to this murder as well. Appellant admitted the escape. Accordingly, it is not reasonably probable appellant would have achieved a more favorable result had the flight instruction not been given. For the same reasons, any error was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

XIII.

APPELLANT WAS NOT PREJUDICED BY THE TRIAL COURT'S ACCOMPLICE INSTRUCTIONS

Appellant contends he was deprived of his rights to due process and a fair trial because the trial court gave the jury conflicting accomplice instructions. (AOB 271-272.) While the trial court did give conflicting accomplice instructions, the error was of state law only, and it was harmless.

Section 1111 states in relevant part, "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense . . . ." Thus, in California, if there is evidence that a witness against the defendant is an accomplice, the trial court must instruct the jury on the definition of an accomplice, to view an accomplice's testimony with caution, and on the state-law requirement that an accomplice's testimony be corroborated. (*People v. Brown*, *supra*, 31 Cal.4th at p. 555; *People v. Lewis*, *supra*, 26 Cal.4th at pp. 368-369; *People v. Guiuan* (1998) 18 Cal.4th 558, 569.) If the evidence establishes that a witness is an accomplice as a matter of law, the court must so

instruct the jury. On the other hand, if there is a conflict in the evidence, the court must instruct the jury to determine whether the witness is an accomplice. (*People v. Brown*, *supra*, 31 Cal.4th at pp. 556-557; *People v. Hayes* (1999) 21 Cal.4th 1211, 1270-1271; *People v. Zapien* (1993) 4 Cal.4th 929, 982.) The corroboration requirement for accomplice testimony and the duty to instruct on accomplice testimony are matters of state evidentiary law and do not implicate federal constitutional rights. (*In re Mitchell P.* (1978) 22 Cal.3d 946, 949-950; *People v. Felton* (2004) 122 Cal.App.4th 260, 273-274; see also *Lisenba v. California* (1941) 314 U.S. 219, 226-227 [62 S.Ct. 280, 86 L.Ed. 166].)

Here, the trial court instructed the jury pursuant to CALJIC No. 3.16 ["Witness Accomplice as Matter of Law"] as follows:

> If the crimes of murder as charged in count[] 2 of the indictment and robbery as charged in count 3 of the indictment and the special allegations were committed by anyone, the witness, Shane Woodland, was an accomplice as a matter of law and his testimony is subject to the rule requiring corroboration.

(26RT 2948; 2CT 416.) The court also instructed the jury pursuant to CALJIC No. 3.19 ["Burden to Prove Corroborating Witness is an Accomplice"] as follows:

> You must determine whether the witness, Shane Woodland, was an accomplice as I have defined that term. The burden of proof is proving by a preponderance of the evidence that Shane Woodland was an accomplice in the crimes charged against the defendant.

(26RT 2948; 2CT 418.) The court thus gave conflicting instructions regarding Woodland's accomplice status.

However, the error was harmless because it is not reasonably probable appellant would have achieved a more favorable result had the jury been properly instructed. (*People v. Heishman* (1988) 45 Cal.3d 147, 163-164

[prejudice from failure to give proper accomplice instructions at the guilt phase is measured by the test of *People v. Watson*, *supra*, 46 Cal.2d at p. 836].) First, the evidence did not establish that Woodland was necessarily an accomplice. An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.) To be so chargeable, the witness must be a principal in the offense, having either directly committed the offense or aided and abetted in its commission. (*People v. Avila* (2006) 38 Cal.4th 491, 564.) "An aider and abettor is one who acts with both knowledge of the perpetrator's criminal purpose and the intent of encouraging or facilitating commission of the offense. Like a conspirator, an aider and abettor is guilty not only of the offense he intended to encourage or facilitate, but also of any reasonably foreseeable offense committed by the perpetrator he aids and abets." (*Ibid.*)

Here, there was a dispute in the evidence as to whether Woodland acted with knowledge of appellant's criminal purpose and with the intent of facilitating or encouraging appellant's commission of the charged offenses. Although Woodland pled guilty to manslaughter in connection with his involvement in Friedman's murder (18RT 1986-1987), Woodland specifically testified that he did not know appellant intended to rob Friedman or murder him (18RT 1975). (See *People v. Tewksbury* (1976) 15 Cal.3d 953, 960 [the fact that a witness was prosecuted for the same offense as defendant does not alone establish that the witness was an accomplice as a matter of law]; accord, *People v. Riggs*, *supra*, 44 Cal.4th at pp. 312-313.) Woodland's mere presence at the scene of the crime and failure to prevent its commission are inadequate to establish that he was an accomplice as a matter of law. (*People v. Richardson*, *supra*, 43 Cal.4th at p. 1024; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90.) Further, Woodland's intent in assisting in the drug transaction by driving appellant to the transaction was insufficient to establish that Woodland was an

accomplice to the robbery and special circumstance murder because the robbery and murder were not reasonably foreseeable consequences of the drug deal. (See *People v. Hinton*, *supra*, 37 Cal.4th at p. 880 [rejecting claim that murder is a natural and foreseeable consequence of any drug deal involving a large sum of money]; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1202 [witness who planned drug transaction with defendant was not, as a matter of law, an accomplice to the robbery, attempted murder, and murders defendant committed during the transaction]; *People v. Garceau* (1993) 6 Cal.4th 140, 183-184 [members of drug manufacturing conspiracy were not, as a matter of law, accomplices to murder despite their knowledge of defendant's threats to kill "snitches"], overruled on another ground in *People v. Yeoman*, *supra*, 31 Cal.4th at pp. 117-118.)

People v. Garrison (1989) 47 Cal.3d 746, is instructive. There, it was held that the trial court properly instructed the jury to determine whether a witness, Roelle, was an accomplice, instead of instructing that Roelle was an accomplice as a matter of law. Although Roelle admitted activities that aided the crime, he claimed he performed those activities under duress, and he "denied harboring the intent to facilitate the crimes, which is an essential element of accomplice liability." (*Id.* at p. 772.) The *Garrison* Court noted, "The truthfulness of Roelle's account of the events . . . and the existence of facts which were material to a determination of Roelle's status as an accomplice were central factual issues at trial." (*Ibid.*) The Court concluded, "The trial court could not have instructed that Roelle was an accomplice as a matter of law without offering to the jury the court's belief that the witness had given false testimony. Accordingly the question was a factual one properly submitted to the jury." (*Ibid.*)

Likewise, Woodland testified that he aided the crimes by driving appellant to and from the scene of the robbery and murder. However,

Woodland testified that he drove appellant from the scene of the crimes because appellant ordered him to do so at gunpoint. (18RT 1973, 1976, 2022.) Further, Woodland "denied harboring the intent to facilitate the crimes, which is an essential element of accomplice liability." (*Garrison*, *supra*, 47 Cal.3d at p. 772.) Like Roelle in *Garrison*, Woodland testified that he was surprised by the killing. (*Ibid.*; 18RT 1976, 1988, 2022.) As in *Garrison*, here, an instruction that Woodland was an accomplice as a matter of law told the jury that the court did not believe Woodland's testimony. Accordingly, the proper instruction was the one that told the jury to determine whether Woodland was an accomplice. (See *People v. Williams*, *supra*, 16 Cal.4th at pp. 679-680 [jury was properly instructed to determine whether two witnesses were accomplices because evidence that one witness drove defendant to the scene of the murders and other witness helped defendant dispose of the murder weapon "was not so clear and undisputed that a single inference could be drawn that either one would be liable for the 'identical offense[s]' charged against defendant, namely, four counts of special circumstance murder"]; *People v. Stankewitz*, *supra*, 51 Cal.3d at pp. 91-92 & 91, fn. 6 [witness was not an accomplice as a matter of law despite evidence that he was present during planning and execution of offenses, because he consistently denied any intent to facilitate the offenses; the fact that the witness was originally charged with the same offenses as defendant but was granted immunity in return for his testimony did not change the result]; *People v. Chavez* (1985) 39 Cal.3d 823, 830 [witness who owned the gun used by defendant in the crime, gave the gun to defendant en route to the crime, received proceeds from the robbery, was originally charged with robbery and first degree murder, and pled guilty to being an accessory, was not an accomplice as a matter of law]; *People v. Tewksbury*, *supra*, 15 Cal.3d at pp. 960-962 [although evidence established that the witness aided defendant in the crimes, it did not establish she was an accomplice as a matter of law because it

was unclear whether she intended to facilitate the commission of the crimes].)

Because the evidence did not establish that Woodland was necessarily an accomplice, the jury was properly instructed to determine whether Woodland was an accomplice. The fact that the jury was also instructed that Woodland was an accomplice as a matter of law could only have worked to appellant's benefit by resolving that factual question for the jury, requiring the jury to view Woodland's testimony with caution, requiring that Woodland's testimony be corroborated, and implying to the jury that the court did not entirely believe Woodland's testimony. Accordingly, appellant was not prejudiced by the instructions.

Even if Woodland was an accomplice as a matter of law, and the jury was erroneously instructed to determine whether Woodland was an accomplice, the error was harmless. Appellant claims he was prejudiced because, due to the conflicting instructions, the jury might have concluded that Woodland was not an accomplice and that his testimony did not require corroboration. (AOB 271.) However, in light of counsel's arguments, it is not reasonably probable the jury followed the instruction to determine for itself whether Woodland was an accomplice. (See *People v. Garceau*, *supra*, 6 Cal.4th at p. 189 ["any theoretical possibility of confusion [caused by the accomplice instructions] was diminished by the parties' closing arguments: defense counsel argued that corroboration was required because the key prosecution witnesses were conspirators, and the prosecution emphasized that the People had shown corroboration if it was needed"]; *People v. Belmontes* (1988) 45 Cal.3d 744, 782 [finding accomplice instructional error harmless in part because both the prosecution and defense argued that corroboration of the witness's testimony was required]; *People v. Heishman*, *supra*, 45 Cal.3d at p. 164 [appellate court may consider counsel's arguments in determining how the jury understood incorrect accomplice instructions]; but see *People v. Wayne* (1953) 41 Cal.2d

814, 823-824 [in a case where witnesses were not accomplices as a matter of law, and the jury was given conflicting accomplice instructions, the Court presumed the jury followed the instruction to determine whether the witnesses were accomplices], overruled in part on another ground by *People v. Bonelli* (1958) 50 Cal.2d 190, 197.)

The prosecutor conceded that Woodland was an accomplice whose testimony required corroboration. (See, e.g., 26RT 2835 ["Again, when we are talking about Mr. Woodland, we got to talk about corroboration of an accomplice. So you need this evidence to establish corroboration of an accomplice."], 2842 [the fact that Friedman's bag was found on Oxnard Street "corroborates Shane Woodland. The accomplice must be corroborated"], 2845 [Woodland's testimony "is the only testimony in this case that must be corroborated, because he is an accomplice and he would have a reason to lie"], 2875 [Woodland was "just as responsible for Mr. Friedman's death, he was there, he saw the defendant with a gun, he's an accomplice"].) Defense counsel highlighted the prosecutor's concession and tried to use Woodland's accomplice status to appellant's advantage by claiming that Woodland actually committed the murder with his brother and only testified against appellant in order to obtain a good plea bargain. (See, e.g., 26RT 2894-2895, 2897-2899, 2901-2902, 2910.) Accordingly, it is not reasonably probable that the jury found Woodland was not an accomplice, failed to view his testimony with caution, or failed to find that his testimony was sufficiently corroborated. In fact, the jury's requests for readbacks of Woodland's testimony shows that it carefully assessed his testimony. Thus, appellant was not prejudiced by the accomplice instructions.

Additionally, error in the giving of accomplice instructions is deemed harmless if the record reveals sufficient evidence to corroborate the accomplice's testimony. (*People v. Avila*, *supra*, 38 Cal.4th at p. 562; *People*

v. Hayes, *supra*, 21 Cal.4th at p. 1271; *People v. Frye*, *supra*, 18 Cal.4th at p. 966; *People v. Arias* (1996) 13 Cal.4th 92, 143.) "Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense." (*People v. Hayes*, *supra*, 21 Cal.4th at p. 1271.) Here, Woodland's testimony was corroborated by the evidence establishing that: cocaine was found wrapped in a sweatshirt in Friedman's Jeep (18RT 2135); Friedman's bag was found where Woodland testified that appellant had thrown it out (18RT 1975, 2138-2139; 19RT 2155-2158); neighbors saw the Honda drive away with two occupants (16RT 1683, 1687; 17RT 1840-1841); one neighbor testified he was 70 percent certain appellant was the passenger of the Honda (17RT 1844-1846); the gunshot wounds sustained by Friedman were inflicted from close range (13RT 1385-1397); appellant's fingerprint was found on a can inside the Honda (18RT 2105-2111); and appellant's detailed confession of the crimes to Janson matched Woodland's testimony (15RT 1451-1458, 1581, 1584-1591, 1603, 1607, 1619). Because Woodland's testimony was sufficiently corroborated, any error in the accomplice instructions was harmless.

XIV.

CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant contends that California's death penalty statute, as interpreted by this Court and applied at appellant's trial, violates the United States Constitution. (AOB 272-298.) Respondent submits that appellant's various challenges to California's death penalty statute should be rejected because this Court has consistently rejected the same challenges and appellant raises no basis for reconsideration of those decisions.

First, appellant's claim that section 190.2 is impermissibly broad (AOB 274-276), has been repeatedly rejected by this Court. (*People v. Stevens* (2007)

41 Cal.4th 182, 211; *People v. Brown* (2004) 33 Cal.4th 382, 401; *People v. Prieto*, *supra*, 30 Cal.4th at p. 276; *People v. Burgener*, *supra*, 29 Cal.4th at p. 884 & fn. 7; *People v. Anderson*, *supra*, 25 Cal.4th at p. 601; *People v. Barnett* (1998) 17 Cal.4th 1044, 1179.) "Section 190.2, despite the number of special circumstances it includes, adequately performs its constitutionally required narrowing function. [Citation.] Prosecutorial discretion, within those limits, to determine which defendants merit the death penalty does not render the scheme invalid." (*People v. Burgener*, *supra*, 29 Cal.4th at p. 884.)

Appellant next claims that section 190.3, factor (a), which allows the jury to consider the circumstances of the crime in aggravation or mitigation when determining penalty, allows arbitrary and capricious imposition of the death penalty. (AOB 276-278.) This claim also has been repeatedly rejected by this Court. (*People v. Zamudio* (2008) 43 Cal.4th 327, 332; *People v. Valencia* (2008) 43 Cal.4th 268, 310; *People v. Hinton*, *supra*, 37 Cal.4th at p. 913; *People v. Smith* (2005) 35 Cal.4th 334, 373; *People v. Morrison* (2004) 34 Cal.4th 698, 729; *People v. Brown*, *supra*, 33 Cal.4th at p. 401; *People v. Maury*, *supra*, 30 Cal.4th at p. 439; *People v. Jenkins* (2000) 22 Cal.4th 900, 1050-1053; see *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750] [explaining that section 190.3, factor (a), was "neither vague nor otherwise improper under our Eighth Amendment jurisprudence"]). It should be rejected again in this case.

Appellant also argues that the death penalty statute fails to require that the jury make unanimous findings beyond a reasonable doubt before imposing the penalty. (AOB 278-291.) However, "no constitutional authority imposes that requirement." (*People v. Jones* (2003) 30 Cal.4th 1084, 1127; *People v. Michaels* (2002) 28 Cal.4th 486, 541.) The standard of proof beyond a reasonable doubt does not apply to finding aggravating factors (except uncharged crimes admitted pursuant to section 190.3, subdivision (b)), to

finding that aggravating factors outweigh mitigating factors, or to finding that death is the appropriate punishment. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 590; *People v. Jones*, *supra*, 30 Cal.4th at pp. 1126-1227; *People v. Snow*, *supra*, 30 Cal.4th 43, 126.) Moreover, this Court has expressly rejected the argument that *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], and/or *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], affect California's death penalty law or otherwise justify reconsideration of this Court's prior decisions. (*People v. Lewis* (2008) 43 Cal.4th 415, 521; *People v. Prince* (2007) 40 Cal.4th 1179, 1297-1298; *People v. Manriquez*, *supra*, 37 Cal.4th at p. 590; *People v. Gray* (2005) 37 Cal.4th 168, 237; *People v. Morrison*, *supra*, 34 Cal.4th at pp. 730-731; *People v. Brown*, *supra*, 33 Cal.4th at p. 402.)

> In California, the statutory factor that renders a defendant found guilty of first degree murder eligible for the death penalty is the special circumstance. [Citation.] The special circumstance thus operates as the functional equivalent of an element of the greater offense of capital murder. [Citation.] The jury's finding beyond a reasonable doubt of the truth of a special circumstance allegation satisfies the requirements of the Sixth Amendment as articulated in *Apprendi* and *Ring*. [Citation.] There is no federal constitutional requirement that a jury then conduct the weighing of aggravating and mitigating circumstances and determine the appropriate sentence. [Citation.] Indeed, the high court in *Apprendi* and *Ring* did not purport to overrule its holding in *Spanziano v. Florida* (1984) 468 U.S. 447, 465, 104 S.Ct. 3154, 82 L.Ed.2d 340, that 'there is no constitutional imperative that a jury have the responsibility of deciding whether the death penalty should be imposed' once it has found

the facts rendering the defendant eligible for that penalty. [Citation.] (*People v. Lewis*, *supra*, 43 Cal.4th at p. 521; see also *People v. Prince*, *supra*, 40 Cal.4th at p. 1298 ["'under the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death *is* no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole'"], quoting *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn. 14.) Accordingly, appellant's argument is unpersuasive.

Appellant further argues that failing to require that the jury make unanimous, written findings violated his right to meaningful appellate review. (AOB 291-293.) However, this claim has been repeatedly rejected. (See *People v. Lewis*, *supra*, 43 Cal.4th at pp. 533-534; *People v. Valencia*, *supra*, 43 Cal.4th at p. 310; *People v. Morrison*, *supra*, 34 Cal.4th at p. 730; *People v. Prieto*, *supra*, 30 Cal.4th at p. 275; *People v. Snow*, *supra*, 30 Cal.4th at p. 126.)

Next, appellant argues that the prohibition against intercase proportionality review guarantees arbitrary, discriminate, or disproportionate imposition of the death penalty. (AOB 293-295.) However, "the absence of intercase proportionality review does not make the imposition of death sentences arbitrary or discriminatory or violate the equal protection and due process clauses . . . ." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 276, citing *People v. Lewis*, *supra*, 26 Cal.4th at pp. 394-395; accord *People v. Valencia*, *supra*, 43 Cal.4th at pp. 310-311; *People v. Morrison*, *supra*, 34 Cal.4th at p. 730; *People v. Brown*, *supra*, 33 Cal.4th at p. 401.) This Court's conclusion is consistent with United States Supreme Court precedent. The High Court, after noting that the Eighth Amendment does not require comparative proportionality review by an appellate court in every case in which the death penalty is imposed

and the defendant requests proportionality review, held that California's 1977 death penalty statute[40] was not rendered unconstitutional by the absence of a provision for comparative proportionality review. (*Pulley v. Harris*, *supra*, 465 U.S. at pp. 50-54.)

Appellant additionally claims the prosecution may not constitutionally rely on unadjudicated criminal activity during the penalty phase. (AOB 295.) However, this claim has been repeatedly rejected by this Court. (*People v. Valencia*, *supra*, 43 Cal.4th at p. 310; *People v. Chatman*, *supra*, 38 Cal.4th at p. 410; *People v. Maury*, *supra*, 30 Cal.4th at p. 439; *People v. Snow*, *supra*, 30 Cal.4th at p. 126.) Although appellant claims that the jury should have been required to unanimously find the criminal activity to be true beyond a reasonable doubt (AOB 295), this claim also has been repeatedly rejected. (*People v. Valencia*, *supra*, 43 Cal.4th at p. 311; *People v. Morgan*, *supra*, 42 Cal.4th at pp. 623-624; *People v. Smith*, *supra*, 35 Cal.4th at p. 374.) Moreover, the United States Supreme Court's decisions in *Apprendi*, *Ring*, and *Blakely*, did not undermine this Court's precedent. (*People v. Valencia*, *supra*, 43 Cal.4th at p. 311; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 359; *People v. Chatman*, *supra*, 38 Cal.4th at p. 410.)

Lastly, appellant claims that the instructions to the jury on mitigating and aggravating factors violated his constitutional rights because of the use of restrictive adjectives in the list of potential mitigating factors and because of the failure to instruct that statutory mitigating factors were relevant solely as potential mitigators. (AOB 295-298.) These claims have been repeatedly rejected. (See *People v. Morrison*, *supra*, 34 Cal.4th at pp. 729-730; *People v. Brown*, *supra*, 33 Cal.4th at p. 402; *People v. Jenkins*, *supra*, 22 Cal.4th at pp.

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40. The High Court noted that the 1977 and 1978 statutes were substantially similar and that, for the most part, "what is said applies equally to the current California statute." (*Pulley v. Harris* (1984) 465 U.S. 37, 39, fn. 1 [104 S.Ct. 871, 79 L.Ed.2d 29].)

1054-1055.) There is no basis to reconsider these holdings.

Appellant recognizes that this Court has rejected each of his constitutional challenges to California's death penalty statutes, but argues that the Court has failed to "tak[e] into account their cumulative impact or address[] the functioning of California's capital sentencing scheme as a whole." (AOB 273.) To the contrary, this Court has specifically held that California's capital sentencing scheme is constitutional, even when considering the constitutional challenges collectively. (*People v. Lucero* (2000) 23 Cal.4th 692, 741.) Accordingly, appellant's constitutional claims fail.

XV.

CALIFORNIA'S SENTENCING SCHEME DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Appellant claims California's sentencing scheme violates the Equal Protection Clause by denying to capital defendants procedural safeguards that are afforded to non-capital defendants. (AOB 298-301.) However, this claim has been repeatedly rejected. (*People v. Williams* (2008) 43 Cal.4th 584, 650; *People v. Blair* (2005) 36 Cal.4th 686, 754; *People v. Roberts* (1992) 2 Cal.4th 271, 341; see *People v. Brown*, *supra*, 33 Cal.4th at p. 402.) Capital defendants are not similarly situated with noncapital defendants (*People v. Roberts*, *supra*, 2 Cal.4th at p. 341), and as this Court has held, the first prerequisite to a successful equal protection claim "is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*People v. Massie*, *supra*, 19 Cal.4th at pp. 570-571, and cases cited therein, internal quotation marks omitted.) Appellant has raised no basis for reconsideration of these holdings.

XVI.

CALIFORNIA'S USE OF THE DEATH PENALTY DOES NOT VIOLATE INTERNATIONAL NORMS OR THE EIGHTH AND 14TH AMENDMENTS

Appellant claims California's use of the death penalty falls short of international norms of humanity and decency. Appellant further claims that the state's use of the death penalty violates the Eighth and 14th Amendments to the extent those amendments are informed by international law. (AOB 301-303.) Appellant's claims have been repeatedly rejected. He offers no basis to reconsider this Court's holdings.

It is established that California's death penalty scheme does not violate international norms. (*People v. Cook* (2006) 39 Cal.4th 566, 619; *People v. Smith*, *supra*, 35 Cal.4th at p. 375; *People v. Turner* (2004) 34 Cal.4th 406, 439-440; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; see also *Medellin v. Texas* (2008) __ U.S. __ [128 S.Ct. 1346, 170 L.Ed.2d 190].) Appellant nevertheless claims California's use of the death penalty is unconstitutional because its use "as regular punishment for substantial numbers of crimes - as opposed to extraordinary punishment for extraordinary crimes" - is contrary to international norms of human decency and therefore violates the Eighth Amendment. (AOB 302-303.) Appellant's claim has been expressly rejected by this Court. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 538, citing *People v. Cook*, *supra*, 39 Cal.4th at p. 619, and *People v. Blair*, *supra*, 36 Cal.4th at pp. 754-755; *People v. Zamudio*, *supra*, 43 Cal.4th at p. 332, citing *People v. Leonard* (2007) 40 Cal.4th 1370, 1430; *People v. Brasure* (2008) 42 Cal.4th 1037, 1071-1072, and cases cited therein; *People v. Morgan*, *supra*, 42 Cal.4th at pp. 627-628, and cases cited therein; *People v. Carey* (2007) 41 Cal.4th 109, 135, and cases cited therein.) It should be rejected again.

XVII.

BECAUSE THERE WERE NO ERRORS, OR ANY ERRORS WERE HARMLESS, APPELLANT'S TRIAL DID NOT SUFFER FROM CUMULATIVE ERROR

Appellant contends that reversal is required based on the cumulative effect of errors that undermined the fundamental fairness of the trial and the reliability of the death judgment. (AOB 303-305.) Appellant's claim of cumulative error should be rejected.

As set forth above, several of appellant's claims were forfeited due to his failure to object below. However, even when the merits of the issues are considered, there are no multiple errors and, to the extent there was error, appellant has failed to demonstrate prejudice. (See *People v. Sapp*, *supra*, 31 Cal.4th at p. 316 ["We have either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial. We reach the same conclusion with respect to the cumulative effect of any assumed errors."]; *People v. Seaton*, *supra*, 26 Cal.4th at p. 692 ["The few minor errors, considered singly or cumulatively, were harmless."].) Whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Brasure*, *supra*, 42 Cal.4th at p. 1074 ["We have concluded no prejudice arose from any of these possible errors, and we can discern no cumulative or synergistic effect arising from them."]; *People v. Boyette*, *supra*, 29 Cal.4th at pp. 467-468.) Even a capital defendant is entitled to only a fair trial, not a perfect one. (*People v. Box*, *supra*, 23 Cal.4th at pp. 1214, 1219.) The record shows that appellant received a fair trial. Nothing more is required. This Court should, therefore, reject appellant's claim of cumulative error.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the findings that the murders were heinous, atrocious, and cruel, manifesting exceptional depravity, be stricken, and that appellant's judgments of conviction and death otherwise be affirmed.

Dated: December 16, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 75,828 words.

Dated: December 16, 2008

Respectfully submitted,

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DECLARATION OF SERVICE

Case Name: ***People v. Robert Carrasco***
No.: **S077009**

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; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. 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 DEC 2 2 2008, I served the attached **Respondent's Brief** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

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On DEC 2 2 2008, I caused thirteen (13) copies of the **Respondent's Brief** in this case to be delivered to the California Supreme Court at 300 South Spring Street, Los Angeles, CA 90013 by personal delivery.

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 DEC 2 2 2008, at Los Angeles, California.

Marissa O. Legaspi
Declarant

Signature

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