COPY

SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ANTHONY GILBERT DELGADO,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S089609

Kings County Superior Court Case No. 99CM7335
The Honorable Peter M. Schultz, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
WARD A. CAMPBELL
Supervising Deputy Attorney General
STEPHANIE A. MITCHELL
Deputy Attorney General
TIA M. CORONADO
Deputy Attorney General
State Bar No. 252064
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5232
Fax: (916) 324-2960
Email: Tia.Coronado@doj.ca.gov
Attorneys for Plaintiff and Respondent

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE

In an information filed October 19, 1999, the Kings County District Attorney charged appellant, Anthony Gilbert Delgado, in count I with aggravated assault by a life prisoner on Frank Mendoza (Pen. Code,[1] § 4500; otherwise known as assault by means likely to inflict great bodily injury by a prisoner serving a life sentence); in count II with aggravated assault by a life prisoner on Kevin Mahoney, Jr. (§ 4500); in count III with the murder of Frank Mendoza (§ 187, subd. (a)); in count IV with the murder of Kevin Mahoney, Jr. (§ 187, subd. (a)); in count V with battery on a correctional officer (§ 4501.5); and in count VI with possession of a sharp instrument by a prisoner (§ 4502, subd. (a)). (1 CT 13-16.) It was further alleged as to counts I and II that the assault victims died within a year and a day (a circumstance rendering appellant eligible for the death penalty); as to counts III and IV that appellant committed the murders while lying in wait (§ 190.2, subd. (a)(15)) and committed multiple murders (§ 190.2, subd. (a)(3)) (special circumstances rendering appellant eligible for the death penalty); and as to all counts that appellant suffered two prior felony convictions within the meaning of the Three Strikes law (§§ 667, subds. (d), (e); 1170.12). (*Ibid.*) The following day, appellant pled not guilty and denied all allegations. (1 CT 17.)

On May 8, 2000, a jury was impaneled to try the case. (8 CT 2313-2315.) The guilt phase of the trial commenced May 10, 2008. (8 CT 2318.) On May 15, 2000, the jury found appellant guilty on all counts and found true all allegations. (9 CT 2474-2485.)

On May 17, 2000, the penalty phase of trial commenced. (9 CT 2673-2675.) On March 23, 2000, the jury returned a verdict of death on counts I

---

[1] All further undesignated statutory references are to the Penal Code.

and II (§ 4500) and counts III and IV (§§ 187, subd. (a); 190.2, subd. (a)(3) and (15)). (9 CT 2684-2689.)

On June 21, 2000, the court denied the automatic motion to modify the death verdict and sentenced appellant to death on counts I through IV and then stayed the imposition of death on counts I and II pursuant to section 654. (10 CT 2809-2813, 2824-2825.) The court further imposed a consecutive indeterminate term of 25 years to life for each of counts V (§ 4501.5) and VI (§ 4502, subd. (a)), to be served consecutive to appellant's prior prison sentence. (10 CT 2809-2813, 2824-2827.)

Because of the sentences of death, appellant's case is automatically appealed to this Court pursuant to section 1239, subdivision (b).

STATEMENT OF FACTS

A. Guilt Phase

On December 17, 1997, prior to the assault and murders alleged in this case, a Lassen County Superior Court jury found appellant guilty of battery on a nonprisoner by a prisoner (§ 4501.5) and resisting an executive officer my means of force (§ 69). (4 RT 875; 8 CT 2384; People's Exhibit 88.) On March 4, 1998, the Lassen County Superior Court sentenced appellant to state prison for an indeterminate term of 25 years to life under the Three Strikes law for the battery conviction; stayed sentence on the resisting conviction pursuant to section 654; and imposed an additional consecutive year for each of three prior prison terms pursuant to section 667.5, subdivision (b), for a total sentence of 28 years to life. (*Ibid.*) Appellant was eligible for sentencing under the Three Strikes law because he had two prior felony convictions for assault with a gun (§ 245, subd. (a)(2)). (4 RT 875; 8 CT 2383; People's Exhibit 88.)

Appellant was serving his Three Strikes sentence when he committed the aggravated assaults, murders, and battery in this case. (4 RT 875-876.)

1. The October 1, 1998, Murder of Inmate Frank Mendoza at Corcoran State Prison

On September 30, 1998, Correctional Officer Faustino Carmona[2] conducted a security check and count of all inmates in his section at Corcoran State Prison, including appellant and appellant's cellmate, Frank Mendoza. (3 RT 537-538.) Around 11:15 p.m., both appellant and Mendoza were lying on their bunks watching television. (3 RT 539.) Mendoza was alive. (*Ibid.*)

Around 12:10 a.m. on October 1, 1998, Officer Craig Williams, who was stationed in the control booth overlooking the prison cells, heard someone yell, "Control A Section." (3 RT 511-512.) Officer Williams looked through the control booth windows and saw appellant in his cell waving his hands. (3 RT 512.) Officer Williams contacted Officer Carmona and advised him to respond to appellant's cell. (3 RT 514-515, 540.) Officer Williams then asked appellant what was wrong, and appellant pointed behind him into the cell. (3 RT 514.) Officer Williams could not see inside the cell. (*Ibid.*)

Shortly thereafter, Officer Carmona approached appellant's cell. (3 RT 515, 540.) Appellant was standing at the cell door, and Mendoza was facing the back of the cell on his knees between the beds. (3 RT 540-541.) Officer Carmona asked appellant if Mendoza had had a seizure. (3 RT 542.) Appellant did not verbally respond. Appellant walked to Mendoza, lifted Mendoza up by a cloth material wrapped around Mendoza's neck, and dropped Mendoza back to the ground. (3 RT 542-543.) A hissing sound came from Mendoza when he fell back to the ground. (3 RT 543.) Appellant was calm and quiet. (*Ibid.*)

---

[2] Unless otherwise noted, all of the witnesses hereafter referred to as "Officer" were correctional officers at either High Desert or Corcoran State Prisons.

Mendoza was unresponsive when officers entered the cell. (3 RT 554-555.) Various items were tied around Mendoza's head, neck, and face. (3 RT 583.) A blue pillowcase was over Mendoza's head, a torn bed sheet was tied around Mendoza's face and head, a white sock was tied around Mendoza's mouth, and a torn bed sheet was tied around Mendoza's mouth and neck. (3 RT 604-609.) The ligatures were tied tight enough to cause bruising and had to be cut away. (3 RT 604, 609, 656.) In addition to the ligatures, there was writing on the back of Mendoza's t-shirt. The writing read, "There's consequences to everything. He paid his and I'm to pay mine, too. Toro." (3 RT 580-581, 610-611.) Human excrement was on the floor below Mendoza's body and numerous items including string, torn bed sheets, and crumpled papers were on the floor near the cell door. (3 RT 630, 649.)

Appellant voluntarily detailed and reenacted how and why he killed Mendoza. (4 RT 705, 723, 727, 733; 8 CT 2370; People's Exhibits 21-A, 21-B, 38, 38-A, 39, 39-B.) Appellant and Mendoza had been cellmates for approximately a month and had agreed to be cellmates to avoid having others placed in their cells. (8 CT 2335.) However, appellant had problems with Mendoza from the beginning because Mendoza continually bragged about how he was an officer for the Nuestra Familia. (8 CT 2334-2335.) On the morning before appellant killed Mendoza, Mendoza had continued his bragging. (8 CT 2336.) Even before that day, appellant had planned to kill Mendoza and had rehearsed how he would do so numerous times. (8 CT 2337, 2346.) Appellant had nothing to lose. (8 CT 2342, 2346.)

On the night of the murder, appellant waited until the night watch passed their cell. (8 CT 2337.) Appellant then placed paper under the cell door to prevent the door from opening and officers from intervening. (8 CT 2337, 2349.) He also prepared a wet paper towel in case officers pepper sprayed him. (8 CT 2337.) Mendoza, who was sitting on his bed with his

back against the wall watching television, asked appellant what he was doing. (8 CT 2350-2351.) Appellant assured Mendoza that he was just "messing around." (8 CT 2350.)

For appellant's plan to succeed, Mendoza's back could not be against the wall. Appellant knew that Mendoza wanted to watch a specific news story that evening. (8 CT 2352.) To get Mendoza away from the wall, appellant asked Mendoza to change the television channel to the news. (8 CT 2352; People's Exhibit 21-A.) Noticing that Mendoza had to get up from his bed to change the channel, appellant waited until the news story was over and then told Mendoza to change the channel to whatever he wanted to watch. (People's Exhibit 21-A.) This time when Mendoza leaned forward, appellant took a step toward Mendoza, got onto Mendoza's bed and behind Mendoza, wrapped his right arm around Mendoza's neck, used his left hand to tighten his right arm around Mendoza's neck, and wrapped his legs over Mendoza's feet. (8 CT 2339, 2352; People's Exhibit 21-A.) Mendoza struggled to get away. (8 CT 2352.) Appellant held Mendoza in a chokehold and watched the clock displayed on the news station. (8 CT 2353.) After about two minutes, Mendoza defecated and urinated. (*Ibid.*) Still feeling air in Mendoza's throat, appellant continued to choke Mendoza. (*Ibid.*) He also continued to watch the clock. (8 CT 2353-2354.) After exactly four minutes and 16 seconds, appellant let go of Mendoza. (*Ibid.*) Mendoza's body collapsed onto the floor. (8 CT 2339, 2354.)

Appellant was not finished. Appellant grabbed a piece of torn bed sheet and tied it around Mendoza's neck. (8 CT 2339, 2354.) He waited to see if Mendoza was still alive. (8 CT 2339.) He then got a sock, wrapped it around Mendoza's neck, and pulled it as tight as he could. (8 CT 2339, 2355.) Appellant again watched and waited. (8 CT 2355.) Next, in case Mendoza vomited, appellant placed a pillowcase over Mendoza's head and

tied a piece of torn bed sheet around Mendoza's neck to hold the pillowcase closed. (8 CT 2340, 2355.) Finally, appellant wrote on the back of Mendoza's shirt: "There's consequences to everything, he paid his and I'll pay mine. Toro." (8 CT 2343-2344, 2357, 2365.) Appellant believed that "if [Mendoza] didn't hear it when he was with us, maybe he'll hear it now." (8 CT 2343-2344.)

Satisfied that Mendoza was dead, appellant removed the materials from under the cell door, watched television, and then got the control tower officer's attention. (8 CT 2356-2358.) Appellant made a slicing motion across his neck to indicate to the officer that Mendoza was dead. (*Ibid.*) Shortly thereafter, another officer arrived and asked if Mendoza had had a seizure. (8 CT 2359.) Appellant grabbed the bed sheet and pillowcase tied around Mendoza's head, lifted Mendoza's head, and then let it fall back down. (*Ibid.*) Appellant "felt comfortable" with what he had done and believed Mendoza "had it coming." (8 CT 2356.)

2. The October 20, 1998, Battery of a Correctional Officer and Weapons Possession at Corcoran State Prison

On October 20, 1998, around 3:25 p.m., Officer Prentis Uyeg approached appellant's cell and ask him if he wanted to shower. (4 RT 736-738.) Appellant stated he did and placed his hands through the food port so Officer Uyeg could handcuff his wrists. (4 RT 741.) After Officer Uyeg placed a handcuff on appellant's left wrist, appellant ran toward the middle of his cell. (4 RT 741.) Officer Uyeg immediately closed and locked the food port. (4 RT 742.) Appellant then proceeded to cover his cell door windows with wet paper and bed sheets. (*Ibid.*) When Officer Uyeg asked appellant what was bothering him, appellant replied in a serious tone, "This conversation's over and I'm taking this to the next level." (4 RT 743.)

Additional officers responded to extract appellant from his cell. (4 RT 746-747, 759-761, 770-771, 782.) Prior to officers entering appellant's cell, Officer John Vasquez sprayed pepper spray inside the cell. (4 RT 750.) Appellant rushed toward the cell door with a mattress folded in front of him, forcing the pepper spray out of the cell through the holes in the cell door. (4 RT 748, 750-752.)

Subsequently, when four officers entered appellant's cell, appellant rushed toward the officers. (4 RT 753, 763, 783.) The first officer to enter the cell slipped on a liquid substance on the floor and fell to his knees but he was able to pin appellant against the wall with his shield. (4 RT 753, 764, 773.) The second officer to enter the cell also slipped and fell against the wall. (4 RT 754.) Officer Eric Mares, the fourth officer to enter appellant's cell, bent over appellant and tried to place leg restraints on him. (4 RT 754, 784.) Appellant, who had a sharpened weapon in his hand, reached over the top of the shield that held him to the ground and quickly struck Officer Mares in the left shoulder three times. (4 RT 754-755, 765, 773, 775; People's Exhibit 100.)

Following the extraction, Officer Mares felt a burning pain in his left shoulder. (4 RT 789.) He removed his protective vest and noticed puncture holes on the left side of his vest and left backside of his jumpsuit. (4 RT 791-792, 794-796.) Officer Mares sustained a shallow laceration to his left shoulder. (4 RT 797.)

Also following the extraction, officers located two weapons inside appellant's cell. The first weapon was located on the ground near the toilet, was made of sharpened plastic, and was approximately five to five-and-a-half inches long. (4 RT 755-756, 775.) The second weapon was located on appellant's bed, was also made of sharpened plastic, and was approximately five and five-eighths inches long. (4 RT 810-811.)

Appellant admitted to stabbing an officer during the cell extraction. A couple days earlier, appellant had made two weapons from a plastic cup. (8 CT 2374-2375.) He had a weapon in each hand when the officers entered his cell and had placed shampoo on the ground in front of the cell door so officers would slip and fall. (8 CT 2375-2376, 2379.) When officers grabbed his arms, appellant was able to lift his right arm and stab the officer who was directly in front of him. (*Ibid.*) Appellant believed he hit the officer twice. (8 CT 2376.) Also during the scuffle, appellant saw an officer's protective mask fall off. (*Ibid.*) Appellant tried to stab that officer in the neck but did not have the weapon positioned correctly in his hand. (*Ibid.*) Appellant did not believe the weapon could have killed an officer, but thought it could cause serious injury to an officer's neck or eyes if the officer's mask had been removed. (8 CT 2377.) Appellant attacked the officers because he was bored and had nothing to lose. (8 CT 2374, 2376, 2378.)

3. The July 2, 1999, Murder of Inmate Kevin Mahoney, Jr., at Corcoran State Prison

On July 2, 1999, around 9:30 a.m., Officer Robert Todd first escorted Inmate Kevin Mahoney, Jr., to an individual holding cell before allowing Mahoney to go onto the exercise yard. (4 RT 878-880, 882.) Officer Todd then escorted appellant to an individual holding cell. (4 RT 881-882.) After both appellant and Mahoney had been searched, they were allowed onto the exercise yard. (4 RT 882, 885, 890.) Appellant and Mahoney were the only inmates on the exercise yard. (4 RT 890.)

Around 11:40 a.m., a security alarm sounded for the exercise yard where appellant and Mahoney had been placed. (4 RT 892.) Officer Todd removed appellant from the exercise yard and placed him in an individual holding cell. (4 RT 895-896.) Appellant's feet and legs were covered with blood. (4 RT 897.) When Officer Todd went back onto the exercise yard,

he saw Mahoney lying face down in a large pool of blood near the far corner of the yard. (4 RT 898-899, 922.) Mahoney was not breathing and had no pulse. (4 RT 927-928.) Pieces of cloth were tied around his neck and he had numerous lacerations and bruises to his face, head, and body. (3 RT 669-684, 687; 4 RT 899-900, 923, 925-926.) Splattered blood was on the cement wall near Mahoney's body. (3 RT 687.) A happy face drawn with blood was also on the cement wall. (5 RT 991-992.)

Officer John Montgomery also responded to the security alarm. (5 RT 1019.) On his way to the exercise yard, Officer Montgomery passed appellant and asked appellant how he was doing. (*Ibid.*) Appellant stated, "You guys gave me three strikes on some chicken shit fight, so now I'm going to earn mine. I got two now, and I got one more to go." (*Ibid.*) Officer Montgomery continued to the exercise yard. (5 RT 1020.)

A surveillance camera recorded the murder. (5 RT 1020; People's Exhibit 148.) Appellant voluntarily detailed and reenacted Mahoney's murder. (5 RT 996-999, 1010, 1012, 1014-1015; People's Exhibits 144, 144-A, 145-A, 145-B.)

The day of the murder was the first time appellant had been on the exercise yard with another inmate since he had assaulted a correctional officer on October 20, 1998. (9 CT 2406, 2408.) Even though appellant did not know Mahoney, his intent was to kill him. (9 CT 2412-2413.) For approximately 55 minutes after being put on the exercise yard, appellant and Mahoney walked the yard peacefully, at times walking next to each other and talking. (5 RT 1024; People's Exhibit 148.) Appellant even told Mahoney that he did not want any problems. (9 CT 2413.) He wanted Mahoney to believe he was not a threat. (*Ibid.*)

Appellant launched three separate attacks on Mahoney. (9 CT 2412; People's Exhibit 148.) Appellant's first attack occurred while appellant and Mahoney were walking side by side. (People's Exhibit 148.)

Appellant lunged toward Mahoney and attempted to get his arm around Mahoney's neck. (9 CT 2429; People's Exhibit 148.) Unsuccessful, appellant hit and kicked Mahoney repeatedly when Mahoney fell to the ground. (9 CT 2405, 2429; People's Exhibit 148.) After the first attack, appellant continued to walk back and forth on the yard for approximately 12 minutes. (5 RT 1029-1030; People's Exhibit 148.) Periodically, appellant would stand near Mahoney who was sitting cross-legged on the ground. (5 RT 1029-1030; People's Exhibit 148.)

Mahoney was still sitting on the ground when appellant launched his second attack. (5 RT 1031; People's Exhibit 148.) This time, appellant used his hard sandal-type shoe to hit Mahoney repeatedly. (9 CT 2439; People's Exhibit 148.) After the second attack, appellant walked back and forth on the yard for approximately 27 minutes and periodically stopped near Mahoney. (5 RT 1030; People's Exhibit 148.) Mahoney continued to sit cross-legged on the ground. (*Ibid.*)

Appellant's third attack was fatal. This time, while Mahoney was still sitting on the ground, appellant wrapped his arm around Mahoney's neck, drug Mahoney into the corner of the yard near the toilet, wrapped one leg around Mahoney's legs, and placed his other foot inside the toilet and under the rim to secure his position. (9 CT 2412, 2414, 2416, 2441-2442; People's Exhibit 148.) Mahoney tried to scratch appellant's eyes and grab appellant's crotch. (9 CT 2415.) Appellant continued to choke Mahoney until Mahoney passed out. (9 CT 2412, 2414, 2441-2442; People's Exhibit 148.) When appellant believed Mahoney awoke, appellant choked Mahoney again for three to four minutes. (9 CT 2442.) Appellant finally released Mahoney's body when Mahoney urinated on himself. (*Ibid.*) Appellant then ran across the yard, retrieved a t-shirt, tore the shirt into two pieces, and tied the pieces around Mahoney's neck. (9 CT 2412, 2443;

People's Exhibit 148.) Appellant kicked Mahoney in the head and walked away. (9 CT 2443-2444; People's Exhibit 148.)

Appellant was not finished. He repeatedly returned to Mahoney's body to cause more damage. Appellant kicked Mahoney's head into the concrete ground numerous times and kicked Mahoney in the crotch. (9 CT 2419-2420, 2444; People's Exhibit 148.) Appellant retrieved another t-shirt and tied it around Mahoney's neck. (9 CT 2412, 2416-2417; People's Exhibit 148.) Appellant's goal was to cause as much injury to Mahoney's body as possible. (9 CT 2420.) Finally, appellant dipped his foot in Mahoney's blood and drew a happy face on the concrete wall above Mahoney's body. (9 CT 2454-2455.)

Appellant told a chilling account of why he committed the murder and his actions while in prison. According to appellant, he vowed to commit a murder for each strike of his three-strike sentence. (9 CT 2422.) He bluntly told investigators, "I already got two that's my two strikes. I'm gonna earn each and every one of my strikes." (*Ibid.*) Admittedly, committing three murders, one for each of his strikes, would not satisfy appellant. (9 CT 2423.) He told investigators, "My whole objective from here to now, now until I die, is to kill and to hurt, to cause as much destruction however, wherever, whenever." (9 CT 2427.) Appellant desired to commit between 10 and 15 murders. (*Ibid.*) He declared that he would do whatever he could to harm others when he encountered them. (9 CT 2411.)

Appellant also explained why he forced correctional officers to extract him from his cell. Cell extractions gave him the opportunity to have physical contact with officers. (9 CT 2422.) Appellant believed a cell extraction was successful if he was able to remove an officer's mask and stab or cut the officer. (*Ibid.*) Appellant's goal during the extractions was to cause harm to the officers. (*Ibid.*)

4. Defense

Appellant did not testify and presented no witnesses or evidence on his behalf.

B. Case in Aggravation

The prosecution presented evidence of unadjudicated criminal activity by appellant involving the use or attempted use of force or violence or the express or implied use of force or violence pursuant to section 190.3, factor (b).

1. March 8, 1997, Assault of an Officer at High Desert State Prison

On March 8, 1997, while housed in the Administrative Segregation Unit at High Desert State Prison, appellant and his cellmate, Inmate Frutos, covered their cell door windows with paper and other materials. (6 RT 1217, 1219-1223.) Officers were unable to see inside the cell, and appellant and Frutos repeatedly refused to remove the materials. (6 RT 1222-1223.) Officers planned a cell extraction to remove appellant and Frutos from their cell. (6 RT 1222.)

Prior to entering the cell, officers deployed pepper spray into the cell multiple times. (6 RT 1224.) Officers followed each deployment of pepper spray with a request for appellant and Frutos to voluntarily submit to being handcuffed and removed from the cell. (*Ibid.*) Appellant and Frutos refused to comply. (*Ibid.*) Officers then opened the cell door approximately four to six inches and discharged two rounds of less-lethal rubber ammunition. (6 RT 1225-1226; People's Exhibit A-1.) Officers followed the discharge of less-lethal ammunition with a request for appellant and Frutos to voluntarily submit to being handcuffed and removed from the cell. (6 RT 1225-1226.) Appellant and Frutos refused to comply. (6 RT 1226.) Officers again opened the cell door and discharged

two more rounds of less-lethal rubber ammunition. (*Ibid.*) Appellant and Frutos again refused to comply. (*Ibid.*)

Following appellant and Frutos' continued refusals, eight officers prepared to enter the cell. (6 RT 1227.) However, when officers opened the cell door to discharge two more rounds of less-lethal ammunition before entering the cell, appellant charged toward officers. (6 RT 1237; People's Exhibit A-1). Appellant had a mattress held in front of him and physically contacted the officers. (*Ibid.*)

2. March 12, 1997, Battery of an Officer at High Desert State Prison

On March 12, 1997, appellant and his cellmate, Inmate Romo, covered their cell door windows. (6 RT 1238.) Officers repeatedly requested that appellant and Romo remove the materials from the windows. (*Ibid.*) Appellant and Romo refused to comply with the officers' requests. (*Ibid.*)

In an attempt to see where appellant and Romo were positioned inside the cell, Officer Ken Dewall placed a Plexiglas shield in front of the cell door, opened the food port, and shined a flashlight into the cell through the food port. (6 RT 1239.) As Officer Dewall was attempting to look inside the cell, two small milk cartons were thrown through the food port. (*Ibid.*) Both cartons struck the Plexiglas shield and a yellowish-brown substance smelling of feces and urine splashed from the cartons onto the Plexiglas shield and Officer Dewall's right arm, face, and head. (*Ibid.*) The substance also splashed on Officer Hahn who was standing nearby. (6 RT 1240.) Officer Dewall did not see who threw the cartons through the food port. (6 RT 1257.) After the incident, referred to as a "gassing," appellant and Romo continued to refuse to comply, and officers prepared to remove appellant and Romo from their cell. (6 RT 1240, 1257.)

3. March 13, 1997, Battery of an Officer at High Desert State Prison

On March 13, 1997, following the "gassing" and officers' requests for appellant and Romo to voluntarily submit to being handcuffed and removed from their cell, officers prepared to extract appellant and Romo from the cell. (6 RT 1240.) Prior to entering, officers deployed pepper spray several times through a small opening on the side of the cell door. (6 RT 1242-1243.) Each deployment of pepper spray was followed by a request for appellant and Romo to cuff-up and exit the cell. (6 RT 1242-1243.) Appellant and Romo refused to comply. (6 RT 1243.) Officers then discharged two rounds of less-lethal rubber ammunition from a 37-millimeter launcher into the cell, followed by a request to cuff-up and exit the cell. (6 RT 1244.) Appellant and Romo again refused to comply, and officers repeated the previous sequence with the 37-millimeter launcher two more times. (*Ibid.*) Before each discharge of less-lethal ammunition, officers requested that appellant and Romo submit to being handcuffed and removed from their cell. (6 RT 1244.) Appellant and Romo refused. (*Ibid.*)

Following appellant and Romos' continued refusals, six officers entered the cell. (6 RT 1245.) Appellant and Romo physically and violently fought with the officers. (*Ibid.*) During the incident, appellant was able to get on top of Officer Hornbeck, who was lying on his back near the cell door. (6 RT 1246.) Appellant repeatedly hit Officer Hornbeck in the chest. (6 RT 1246.) Officer Dewall then entered the cell with a baton and struck appellant six times in the upper torso. (6 RT 1246-1247.) Appellant continued to hit Officer Hornbeck. (6 RT 1247) Appellant eventually rolled off Officer Hornbeck, and officers subdued appellant. (*Ibid.*)

4. December 18, 1997, Assault of an Officer at High Desert State Prison

On December 18, 1997, appellant and his cellmate, Inmate Garcia, covered their cell door windows and overhead light with various materials. (6 RT 1268-1269, 1271.) Officers were unable to see inside the cell, and, after repeated requests, appellant and Garcia refused to remove the material from the windows and refused to be voluntarily removed from their cell. (6 RT 1271; People's Exhibit B-1.) Officers planned a cell extraction. (6 RT 1270.) Prior to entering the cell, officers deployed pepper spray numerous times, followed by requests to remove the material from the windows and to submit to being handcuffed. (6 RT 1280, 1282; People's Exhibit B-1.) Appellant and Garcia refused to comply. (People's Exhibit B-1.)

Following appellant and Garcia's continued refusals, officers prepared to enter the cell. (People's Exhibit B-1.) It was dark inside the cell when officers opened the door. (6 RT 1271; People's Exhibit B-1.) Officer Steven Schmidt, the first officer to enter the cell, contacted either appellant or Garcia. (6 RT 1271-1273.) When the light was uncovered, Officer Schmidt saw appellant slide out from under the Plexiglas shield Officer Schmidt was holding and slide underneath a bed bunk. (6 RT 1274.) Appellant kicked Officer Schmidt. (6 RT 1274-1276.) Officer Schmidt kicked back. (6 RT 1275.) Appellant eventually came out from underneath the bunk. (6 RT 1276.) Before complying, appellant hit Officer Schmidt, and then Officer Schmidt hit appellant. (6 RT 1276-1277.) Appellant was handcuffed and removed from the cell. (6 RT 1277; People's Exhibit B-1.)

5. November 13, 1999, Assault of Inmate Lopez and Weapons Possession at Corcoran State Prison

On November 13, 1999, Officer Jaime Tovar escorted Inmate Lopez to the shower next to appellant's cell. (6 RT 1292, 1294, 1298.) As Lopez entered the shower, he turned to his right and kicked toward appellant's cell door. (6 RT 1297-1298, 1300.) Officer Tovar looked toward appellant's cell, saw an object protruding from the side of the food port, pushed Lopez into the shower, and then kicked the object that was protruding from appellant's cell door. (6 RT 1301.) Officer Tovar's kick caused the object to break apart. A portion of the object fell to the floor. (6 RT 1302.) The remainder of the object was lodged in the gap on the side of the food port. (6 RT 1302.) Officer Tovar grabbed the piece protruding from appellant's cell door and retrieved the part of the object that had broken off and fallen to the floor. (*Ibid.*) The part of the object that fell to the ground was a piece of plastic fashioned into a sharpened blade. (6 RT 1303-1304.) The part protruding from appellant's cell door was rolled-up paper that was approximately 12 inches long. (6 RT 1303, 1314-1315.) The sharpened blade had been attached to the rolled-up paper. (6 RT 1308.)

6. November 13, 1999, Weapons Possession at Corcoran State Prison

On November 13, 1999, following appellant's assault on Inmate Lopez, officers searched appellant's cell. (6 RT 1317-1320.) Officers located a weapon in appellant's locker. (6 RT 1321.) The weapon consisted of a toothbrush that had been sharpened into a spear and attached to a handle made of tightly bound newspaper. (6 RT 1321-1322, 1326, 1328.)

7. November 14, 1999, Assault of an Officer at Corcoran State Prison

On November 14, 1999, correctional officers saw appellant throwing his television against his cell wall and floor, breaking it into small pieces. (6 RT 1336-1338.) Officers were concerned that appellant could use the broken glass, metal, and plastic to make weapons. (6 RT 1338, 1342.)

Shortly thereafter, officers requested that appellant put his hands through the food port so he could be handcuffed and removed from his cell. (6 RT 1346.) When officers opened the food port, appellant threw multiple pieces of his television at officers through the food port. (6 RT 1346-1347.) At that point, officers were interrupted by another incident. (6 RT 1348.) When they returned to appellant's cell, appellant had covered his cell door with a sheet, and officers could not see inside the cell. (6 RT 1348-1349.) Appellant did not respond to officers' attempts to communicate. (6 RT 1348.) Officers prepared to extract appellant from his cell. (6 RT 1350.)

Officers first put a ramming device through the food port to remove the materials covering the cell door. (6 RT 1352; People's Exhibit L-2.) Officers also administered pepper spray and two pepper spray grenades through the food port. (6 RT 1352-1353.) Appellant was still unresponsive. (6 RT 1354-1355.) Officers then attempted to slide the cell door open, but the door jammed and only opened approximately a foot. (6 RT 1356.) The first extraction team member placed his shield in front of the opening. (6 RT 1357.) Appellant threw items at, kicked, and hit the shield. (*Ibid.*) When officers sprayed pepper spray through the small opening, appellant attempted to grab the pepper spray canister. (*Ibid.*) Finally, when appellant forcibly tried to get out of the cell, officers were able to grab appellant's arms and legs and subdue him to the floor. (6 RT 1358.)

A subsequent search of appellant's cell revealed a cord tied to the doorframe to prevent the cell door from opening. (6 RT 1373-1374.) There was also a bundle of items at the base of the cell door. (6 RT 1375.)

8. March 29, 2000, Weapons Possession at Corcoran State Prison

On March 29, 2000, appellant covered his cell door windows and requested to talk to Officer Kenneth Pearson. (7 RT 1415.) Officer Pearson told appellant that he would come back and talk to appellant later. (7 RT 1419.) Appellant became upset and stated, "I guess when you try to program [i.e. follow regulations] you don't get anywhere. I got more attention when I was causing all the trouble." (*Ibid.*) Appellant then requested to be transferred to an outside holding cell to talk to Officer Pearson. (*Ibid.*) Officers escorted appellant to a rotunda-holding cell. (*Ibid.*)

Once in the holding cell, and with his handcuffs removed, appellant placed what appeared to be a piece of paper on the food port. (7 RT 1420.) Appellant told Officer Pearson, who was leaning against a nearby pillar, the item was "nothing" and swept it onto the floor.[3] (7 RT 1420, 1422-1423.) Appellant and Officer Pearson continued to talk. (*Ibid.*) Appellant wanted a radio for his cell and became agitated when Officer Pearson told appellant he could not have a radio because appellant had broken his previous television. (7 RT 1421.)

While Officer Pearson continued to talk to appellant, Officer Francisco Mascarenas saw appellant place a weapon on the food port. (7

---

[3] A video taken of the interaction between appellant and Officer Pearson does not show appellant sweeping an object from the food port onto the floor. (People's Exhibit F-2.) On this record, it is not clear if Officer Pearson was mistaken about appellant's actions or Officer Mascarenas began recording sometime after appellant swept the object onto the floor.

RT 1437-1438.) Officer Mascarenas retrieved a video camera and recorded the interaction between appellant and Officer Pearson. (7 RT 1438.) Once Officer Pearson was finished speaking to appellant and walked away, appellant took the weapon from the food port and put it in his boxer shorts. (7 RT 1441; People's Exhibit F-2.) Officer Mascarenas turned off the camera and told appellant to give him the weapon. (7 RT 1442.) Appellant threw the weapon into a nearby trashcan, and Officer Mascarenas retrieved the trashcan and placed it in a nearby office. (*Ibid.*) A short time later, Officer Mascarenas showed Officer Pearson the weapon. (7 RT 1443.) The weapon was approximately six inches long, had a sharpened metal point, and a handle made from tightly rolled paper, string, and an elastic glove. (7 RT 1426, 1431.) Officer Pearson had been unaware that the weapon was on the food port while he was talking to appellant. (7 RT 1424; People's Exhibit F-2.)

9. April 15, 2000, Weapons Possession at Corcoran State Prison

On April 15, 2000, Officer William Henderson saw appellant, the sole occupant of Cell 25, make unusual movements inside his cell in the Security Housing Unit. (6 RT 1383-1384.) When Officer Henderson first looked through appellant's cell door, appellant was standing on a bunk and partially covering the overhead light fixture with a blanket. (6 RT 1385.) Appellant then went to the sink and then back onto the bunk. (*Ibid.*) Appellant repeated this sequence two or three times. Each time appellant was on the bunk he reached toward the overhead light fixture. (*Ibid.*) Officer Henderson notified Officer William Butts. (6 RT 1386.)

Officer Butts approached appellant's cell and asked appellant to remove the blanket from the overhead light. (7 RT 1393.) Appellant removed the blanket from the light, and officers removed appellant from his cell. (*Ibid.*)

A search of appellant's cell revealed several six-inch long grooves cut into the overhead light fixture and plastic shavings on the ground directly below the light. (7 RT 1394-1395.) Officer Butts also located scratch marks, likely made from sharpening objects, on the left-hand side bunk in the cell. (7 RT 1394.) Officer Butts further searched appellant's cell. Underneath the blanket on appellant's mattress were three weapons. (7 RT 1401-1402, 1409.) The weapons were of varying lengths, each made of metal and sharpened either to a point or on one side. (7 RT 1402-1404.)

10. April 18, 2000, Battery of an Officer at Corcoran State Prison

On April 18, 2000, Officer James Gatto notified appellant that appellant was being moved to a different cell. (7 RT 1459-1461.) Appellant was cooperative and asked for time to get his belongings together. (7 RT 1461.) When Officer Gatto returned twenty minutes later, appellant said he had changed his mind, refused to change cells voluntarily, and told Officer Gatto that he would move cells the way he wanted to move. (7 RT 1461-1462.) Officer Gatto obtained a pepper spray canister and deployed a three to five second spray through the food port. (7 RT 1465-1466.) Officer Gatto had his right hand on the nozzle and his left hand on the body of the canister. (People's Exhibit H-2.) While Officer Gatto was spraying the pepper spray, appellant reached through the food port and attempted to grab the pepper spray canister. (7 RT 1465-1466, 1470; People's Exhibit H-2.) Appellant's entire arm, up to his shoulder, was outside the cell. (People's Exhibit H-2.) Officer Gatto quickly stepped out of appellant's reach. (7 RT 1465-1466, 1470; People's Exhibit H-2.) Officer Gatto immediately attempted to deploy more pepper spray through the food port. (People's Exhibit H-2.) When he positioned the pepper spray in front of the food port, appellant again reached through the food port. (7 RT 1469; People's Exhibit H-2.) This time appellant was able to

grab the pepper spray canister near the nozzle. (*Ibid.*) Officer Gatto tried to maintain a hold on the canister but after a brief struggle, appellant pulled the canister out of Officer Gatto's hands and into the cell. (*Ibid.*) Appellant contacted Officer Gatto's hand when he grabbed the canister. (7 RT 1479-1481; People's Exhibit H-2.) Approximately 40 ounces of pepper spray remained in the canister appellant pulled into his cell. (7 RT 1483.) Officers closed the food port, and Officer Gatto retrieved a second pepper spray canister. (7 RT 1471.)

While Officer Gatto was retrieving the additional pepper spray, appellant struck the cell window repeatedly with the pepper spray canister he had inside his cell. (7 RT 1471.) Appellant shattered the window and glass was projected outward onto the floor. (*Ibid.*) Officers placed a shield in front of appellant's cell door. (7 RT 1471; People's Exhibit H-2.) Officers again opened the food port and deployed pepper spray into appellant's cell. (7 RT 1472.) Appellant placed his mattress in front of the food port to block the pepper spray. (7 RT 1472; People's Exhibit H-2.) When officers pulled part of the mattress through the food port and deployed more pepper spray, appellant again reached through the food port and attempted to grab the second pepper spray canister. (7 RT 1472; People's Exhibit H-2.) Officer Gatto pulled the canister away from appellant's reach, and appellant continued to grab for the canister. (People's Exhibit H-2.) Officer Gatto then deployed the pepper spray through a small opening on the side of the cell door. (7 RT 1473.) At that point, appellant requested to be removed from his cell and gave the pepper spray canister to officers through the food port. (7 RT 1474.)

C. Prior Felony Convictions

Appellant was previously convicted of possession of stolen property (§ 496, subd. (a)), possession of a deadly weapon by a prison inmate (§ 4502, subd. (a)), and second degree burglary (§ 459). (7 RT 1504-1505.)

D. Case in Mitigation

Appellant grew up in a family with eight other siblings. (7 RT 1508.) Appellant's mother, who died in 1991 from kidney problems, drank while she was pregnant with appellant and rarely cared for him when he was an infant. (7 RT 1509, 1512, 1514.) Appellant's sister, Maggie Velez, helped care for appellant and would often find him crying, soiled, and hungry when she came home from school. (7 RT 1515.) In addition to neglecting appellant, appellant's mother hit him with belts, used a broom stick to hit him in the head and make him fall down,[4] made him kneel on rice, and tied him up and locked him in closets. (7 RT 1519-1520, 1533.)

Appellant's mother treated appellant differently than the other children. (7 RT 1522-1523.) On one occasion, appellant brought food home, and appellant's mother became upset because she did not want her children begging for food. (7 RT 1524.) As his punishment, appellant's mother made him eat everything in the refrigerator. (7 RT 1524.) On another occasion, appellant's mother believed appellant stole $300 from her purse. (7 RT 1525.) She beat and locked appellant in a closet. (*Ibid.*) She later found the money in the kitchen. (*Ibid.*) All of the incidents of abuse occurred before appellant was seven years old. (7 RT 1526.)

As a teenager and young adult, appellant lived with Velez and her family. (7 RT 1531-1532.) Appellant was never violent. (7 RT 1531-1533.)

Inocencio Diburcio Ortega, appellant's cousin, last saw appellant when they were both either 13 or 14 years old. (7 RT 1538-1539.) Ortega

---

[4] In rebuttal, James Davis, a private investigator for the defense, testified that he interviewed Valez on January 10, 2000, for approximately an hour. (7 RT 1586-1587.) During the interview, Valez did not state that their mother had hit appellant on the head with a broomstick, causing him to fall down onto the ground. (*Ibid.*)

lived a few houses away from appellant. (7 RT 1540.) Ortega knew that appellant's mother had locked appellant in closets when he was younger and that she had hit him with electrical cords and sticks. (7 RT 1540, 1543.) Ortega would often hide appellant in a closet so appellant's mother could not find him. (7 RT 1542.) Ortega was also aware that appellant's brothers did drugs and gave appellant glue to sniff. (7 RT 1544-1545.) According to Ortega, appellant would cry for no apparent reason. (7 RT 1546-1547.) Appellant was never violent with Ortega.[5] (*Ibid.*)

When appellant was around 11 years old he lived in Yolanda Perez-Logan's group home. (7 RT 1556, 1558-1561.) Appellant was unkept, very shy, and had marks on his skin. (*Ibid.*) During the year and a half appellant lived in the group home, appellant learned to play with other boys his age and was not violent with others. (7 RT 1562-1563.) However, appellant often tore apart his personal belongings when he was frustrated. (*Ibid.*) Appellant again lived with Perez-Logan when he was an adult. (7 RT 1568.) Appellant stayed in the same room as Perez-Logan's six or seven year old son. (*Ibid.*) At that time, Perez-Logan noticed ligature marks on appellant's wrists. (7 RT 1569.) Perez-Logan never saw appellant act violently. (*Ibid.*)

Mary Ann Clare, appellant's fifth grade teacher, noticed that when appellant was in her class he had inadequate social skills and would react in an angry manner if challenged. (7 RT 1570-1573.) However, appellant would never become violent and his behavior improved over time. (*Ibid.*)

---

[5] In rebuttal, District Attorney Investigator Randy Ebner testified that he attempted to interview Ortega. (7 RT 1588-1591.) On the day of the scheduled meeting, Ebner was unable to contact Ortega. (7 RT 1589.) Subsequently, when Ebner finally contacted Ortega, Ortega stated that he wanted to speak to an attorney before talking to Ebner. (7 RT 1591.)

ARGUMENT

I. THE PRESENCE OF CORRECTIONAL OFFICERS DURING ATTORNEY-CLIENT CONFERENCES DOES NOT RISE TO THE LEVEL OF A CONSTITUTIONAL OR STATE VIOLATION; APPELLANT HAS FAILED TO DEMONSTRATE THAT HE WAS PREJUDICED AS A RESULT OF THE OFFICERS' PRESENCE

Appellant contends it was error for correctional officers to be present during his conferences with his defense counsel. (AOB 41-80.) Specifically, appellant argues: (1) the court erroneously extended the attorney-client privilege to the correctional officers (AOB 48-52); (2) the presence of officers was a structural error and miscarriage of justice that violated his right to counsel under the Sixth Amendment and the state Constitution (AOB 52-66); (3) his absence from the in camera hearing during which the prosecutor, defense counsel, and court agreed to have officers present during appellant's conferences with counsel violated his due process and state statutory rights to be present (AOB 66-74); (4) the court acted in excess of jurisdiction when it extended the attorney-client privilege to include correctional officers (AOB 74-75); (5) the appointment of counsel who requested the presence of officers during conferences with appellant constituted a complete deprivation of counsel (AOB 76-78); and (6) the presence of officers violated the right to be present at trial (AOB 78-79). Respondent disagrees.

A. Procedural and Factual Background

On August 6, 1999, prior to appellant's arraignment, the court held an in camera hearing. (RTIC[6]; CTPP 21[7].) The Honorable John G. O'Rourke,

---

[6] "Reporter's Transcript of In Camera Proc. (Capital Case)" occurring on August 6, 1999, and consisting of seven pages (pages 15-21) will be referred to as "RTIC."

prosecutors Chris Gularte and Shane Burns, District Attorney Investigator Rick Bellar, prospective defense counsel Donna Tarter, and Corcoran State Prison Correctional Officers Martinez and Kaszap were present at the hearing. (RTIC 17.) Appellant was not.

During the brief hearing, Gularte indicated that appellant was very dangerous; he had killed two people and desired to commit more killings. (RTIC 17.) Gularte further stated that the prosecution was "willing to stipulate that the attorney/client privilege will extend to the transport officers who are present with Donna Tarter." (RTIC 18.) Gularte informed the court that he and Tarter had discussed the issue with Officers Martinez and Kaszap prior to the hearing and "told them not to disclose any of the communications they hear while they're in the room with [ ] Tarter and [appellant]" and that any disclosure of the communications would be a violation of a court order. (*Ibid.*) Tarter stated that she was "in agreement with that order." (*Ibid.*) Subsequently, the court informed Officers Martinez and Kaszap that any communication between Tarter and appellant was confidential and ordered them not to disclose appellant and Tarter's conversations. (RTIC 18-19.) Following the court's order, Tarter requested that the in camera transcript be sealed and indicated that she was going to speak to appellant. (RTIC 19-20.)

Following the in camera hearing, the court held an arraignment hearing. (CTPP 24-38.) With appellant present, the court read the charges filed by the prosecution, and appellant stated he understood the charges. (CTPP 24-29.) The court further advised appellant of his right to counsel. (*Ibid.*) Appellant indicated that he could not afford an attorney, and the

---

(...continued)

[7] "Clerk's Transcript on Record of Preliminary Proceedings" consisting of one volume with 235 pages will be referred to as "CTPP."

court appointed Tarter to represent appellant. (CTPP 29-30.) The court then advised appellant of his trial rights. (CTPP 30-31.) During a discussion of when the preliminary hearing would be held, appellant indicated that he did not want to waive time and wanted the matter "done and over with." (CTPP 31-34.) When the court questioned whether Tarter would have sufficient time to prepare for the preliminary hearing, appellant stated he had "nothing to discuss with [Tarter] before or after" she read the thousands of pages of reports and had "no intentions to discuss anything with her." (CTPP 34.) On behalf of appellant, Tarter entered pleas of not guilty to the charges and denied all allegations. (CTPP 37.)

Tarter represented appellant during the preliminary hearing (CTPP 46-47, 62-192), arraignment (1 RT 2-7), and motion for continuance (1 RT 8-12). Appellant appeared in court but did not object to the officers' presence during his conferences with Tarter.

During a pretrial conference, Gularte notified the Honorable Peter M. Schultz that the prison had requested that two officers, Officers Masters and Close, be admonished not to disclose any of the conversations they heard while accompanying Tarter during her conferences with appellant. (1 RT 14-15.) In appellant's presence, the prosecutor and Tarter requested that the court admonish Officers Masters and Close not to disclose any conversations they heard between appellant and Tarter, and the trial court obliged. (1 RT 15-18.) Appellant did not object.

Appellant did not object to the presence of officers at his conferences with Tarter when he appeared in court at other pretrial conferences. (See 1 RT 55-56, 97.)

Prior to the commencement of trial, the court inquired about security during the trial. (1 RT 113.) Officer Eric Griem stated, "There's going to be three of us at all times; one to the left and one to the right and one directly behind [appellant]. There will be two armed officers in the back

that are going to be in plain clothes; one outside and one outside the courthouse." (1 RT 114.) Appellant did not object.

B. Appellant Waived His Claim that the Officers' Presence During Attorney-Client Conferences Violated His Right to Counsel; No Error Occurred

Appellant waived any claim that his right to counsel was violated by the officers' presence during attorney-client conferences. At the in camera hearing, prior to her appointment as counsel, Tarter indicated her desire to have officers present when she met with appellant. (RTIC 18.) The court accepted her request and admonished Officers Martinez and Kaszap not to disclose Tarter and appellant's conversations. (RTIC 18-19.) Immediately thereafter, presumably in the accompaniment of Officers Martinez and Kazsap, Tarter met with appellant for the first time. (RTIC 19-20.) Given that the officers were openly present with Tarter, and the fact that the in camera hearing had just commenced, it is a reasonable inference that Tarter explained to appellant why the officers were accompanying her. Shortly thereafter, at arraignment, knowing that officers would accompany Tarter to all conferences, appellant accepted Tarter's appointment as counsel. (CTPP 29-30.)

Subsequently, at the preliminary hearing on October 5, 1999, appellant did not express any displeasure with Tarter's desire to have officers present during the attorney-client conferences. (CTPP 46-47, 62-192.) On October 20, 1999, appellant accepted Tarter's reappointed as counsel. (1 RT 5.) On December 16, 1999, after speaking to Tarter "for about a half an hour or so," appellant did not object to the officers' presence. (1 RT 8-12.) Then, on December 22, 1999, in appellant's presence, the court admonished Officers Masters and Close not to disclose appellant and Tarter's conversations. (1 RT 15-18.) Appellant did not object. In fact, at no time did appellant object to Tarter's desire to have

officers accompany her when she met with appellant. (1 RT 8-12, 15-18, 55-56, 95-114.) Appellant waived any claim that the officers' presence violated his right to counsel when he failed to object to their presence and accepted Tarter's appointment as counsel under those circumstances. (See *People v. Towler* (1982) 31 Cal.3d 105, 122 (*Towler*).)

Even if appellant did not waive his claim of error on appeal, unlike the cases of interference with a defendant's right to communicate confidentially with counsel that have previously been before this Court (e.g., *People v. Alexander* (2010) 49 Cal.4th 846, 891 (*Alexander*) [dismissal not warranted where there was no showing of "realistic possibility that defendant was injured by, or the prosecution benefited from, the monitoring and recording of the three-way call" between defendant, his mother, and defense investigator]; *People v. Ervine* (2009) 47 Cal.4th 745 (*Ervine*) [dismissal not warranted in case where jail personnel seized defense documents from defendant's jail cell but did not communicate information to prosecution]; *Barber v. Municipal Court* (1979) 24 Cal.3d 742 (*Barber*) [dismissal warranted in case where undercover officers posing as codefendant in meetings with defense counsel revealed information about defense strategy to prosecution witness, and caused defendants to stop cooperating with defense counsel because of fear of infiltration]), this is not a case of government interference of appellant's right to counsel.

At the in camera hearing on August 6, 1999, the prosecutor explained to the court that officers would accompany Tarter to her conferences with appellant, but Tarter wanted the officers present for her protection. (RTIC 18.) The prosecution did not unilaterally request, and the court did not unilaterally order, the officers to accompany Tarter. Any alleged interference to appellant's right to consult privately with his counsel was not at the government's hands.

In any event, there simply is no error. In *People v. Rich* (1988) 45 Cal.3d 1036, 1100, fn. 16, this Court rejected the defendant's claim that the presence of an officer violated his right to counsel. *Rich* held "that the presence of an officer during [defendant's] interview with Dr. French" did not violate his right to counsel because "[t]he officer was instructed not to repeat anything he heard during the interview" and "[d]efense counsel informed the court that they did not object to the procedure because '[t]he officer assures us that he has not and will not discuss the occurrence with anyone.'" (*Ibid.*)

Like *Rich*, the officers' presence during appellant's attorney-client conferences did not violate appellant's right to counsel. Tarter requested the officers' presence. (RTIC 18.) Tarter met with appellant immediately following the in camera hearing. (RTIC 19-20.) Presumably, Officers Martinez and Kaszap accompanied Tarter to this first meeting with appellant. Also presumably, given the officers' presence, Tarter explained why the officers were accompanying her. The court admonished the officers not to disclose anything they heard during Tarter and appellant's conferences, and the officers abided by the court's admonishment. (RTIC 18-19.) There is nothing in the record to suggest otherwise. On these facts, there is no evidence that appellant's right to counsel was violated.

C. The State Statutes That Protect the Right to Confidential Communications with Counsel Were Not Implicated; Appellant is Unable to Show that any Error Resulted in a Miscarriage of Justice

Appellant contends that the agreement to have officers present during Tarter and appellant's conferences erroneously extended the attorney-client privilege. (AOB 48-52.) He argues that the officers were not third party persons necessary to accomplish the purpose of the legal consultation as

contemplated by Evidence Code section 952[8] (defining "confidential communication"), and therefore the officers' presence destroyed the confidential nature of his conversations with Tarter. (*Ibid.*) As a result, he claims that because his conversations with Tarter were not "confidential" under Evidence Code section 952, he was without recourse to prevent the officers from disclosing those conversations (Evid. Code, § 954). (*Ibid.*) Respondent disagrees.

The officers' presence did not implicate Evidence Code section 952. Evidence Code section 952 defines "confidential" communications between a client and attorney. Evidence Code section 952 further explains that an attorney-client communication is "in confidence" if the "means" by which the "information" was "transmitted" does not "so far as the client is aware" disclose the information to unnecessary third parties.

The officers were not unnecessary third parties. Under Evidence Code section 952, communications remain confidential between a client and an attorney if they are disclosed "to no third persons other than ... those to whom disclosure is reasonably necessary for the transmission of the information." Tarter desired the officers' presence for her protection. (RTIC 18.) Presumably, she was aware of the facts underlying appellant's charges. Even though the officers were employed by the prison where

---

[8] Evidence Code section 952 states: "As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."

appellant's crimes occurred, Tarter's desire to have the officers accompany her to all conferences with appellant made the officers, in essence, part of the defense team. In this respect, the officers were reasonably necessary for the transmission of the information from appellant to Tarter.

Moreover, there is nothing in the record to suggest that appellant did not understand why the officers were present during conferences with his attorney and that those communications would remain confidential. Indeed, the court admonished Officers Masters and Close not to disclose appellant and Tarter's conversations in appellant's presence. (1 RT 15-18.) Under the circumstances, appellant was aware the officers accompanied Tarter for her protection and could not disclose anything they heard. With respect to Evidence Code section 952, "so far as [appellant was] aware," he did not knowingly disclose any information to unnecessary third parties. As a result, appellant's conversations with Tarter retained their "confidential" nature.

In any event, Evidence Code section 952 is not implicated because this Court is not presented with the question of whether the conversations between appellant and Tarter made in the presence of the officers were or were not "confidential." The prosecution never asserted at trial that the officers were third parties who destroyed the "confidential" nature of appellant and Tarter's communications. There was no question appellant and Tarter's communications remained confidential.

The officers' presence also did not implicate Evidence Code section 954. Evidence Code section 954 grants a client the privilege "to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer...." Again, this Court is not presented with the question of whether appellant could or could not prevent another from disclosing the communications between him and Tarter. The prosecution did not seek to admit any evidence that may have been learned

by the officers. (See *People v. Navarro* (2006) 138 Cal.App.4th 146, 157 [noting that "attorney-client privilege is a testimonial *privilege*" that "is merely a rule of evidence"].)

Even assuming, arguendo, the agreement to have officers in attendance at all conferences violated state statues that protect the right to communicate confidentially with counsel (Evid. Code, §§ 952, 954), reversal is unwarranted. The California Constitution provides that no criminal judgment may be set aside "for any error as to any matter of procedure" unless the error resulted "in a miscarriage of justice." (Cal. Const., art. VI, § 13; *Ervine, supra,* 47 Cal.4th a p. 771.) As shown more thoroughly below, appellant has failed to demonstrate even a prima facie case of prejudice resulting from the officers' presence during conferences between appellant and Tarter.

D. The Officers' Presence During Attorney-Client Conferences Did Not Violate Appellant's Federal Constitutional Right to Counsel

Appellant contends that the officers' presence during his out-of-court and in-court conferences[9] with counsel violated his Sixth Amendment right

---

[9] Appellant contends that officers positioned in the courtroom during trial were "'circling around'" him and were "between appellant and attorney Tarter" at counsel table. (AOB 48, 60.) The record does not support a finding officers were sitting "between appellant and attorney Tarter" at counsel table. On May 2, 2000, during a discussion regarding courtroom security, Officer Griem stated, "There's going to be three of us at all times. One to the left and one to the right and one directly behind." (1 RT 114.) During trial, after a witness identified appellant and his location in the courtroom, the prosecutor clarified for the record that the witness identified appellant as the person officers were "circling around." (5 RT 996-997.) Based on these statements, appellant argues that an officer was between him and Tarter at counsel table. However, appellant ignores that immediately prior to the prosecutor's short-hand way of describing appellant's location in the courtroom, the witness, Investigator Ebner, stated that appellant was "to the left of defense attorney Tarter, and three

(continued...)

to counsel. (AOB 52-63.) Relying on *United States v. Cronic* (1984) 466 U.S. 648 (*Cronic*) and *Bell v. Cone* (2002) 535 U.S. 685 (*Bell*), appellant argues that the circumstances amount to a structural error for which prejudice is presumed and reversal is automatic. (*Ibid.*) Respondent disagrees.

1. Overview of Structural Error

Arizona v. Fulminante (1991) 499 U.S. 279 (*Fulminante*) divided constitutional error into two classes: "'trial error'" which "occurred during the presentation of the case to the jury," the effect of which may "be quantitatively assessed in the context of other evidence presented in order to determine whether [the error] was harmless beyond a reasonable doubt" (*id.* at pp. 307-308), and "structural defects," which "defy analysis by 'harmless-error' standards" because they "affec[t] the framework within which the trial proceeds" and are not "simply an error in the trial process itself" (*id.* at pp. 309-310). Structural errors "'infect the entire trial process,' [citation], and 'necessarily render a trial fundamentally unfair,' [citation]. Put another way, these errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.' [Citation.]" (*Neder v. United States* (1999) 527 U.S. 1, 8-9 (*Neder*).)

Included in the list of "structural defects" are the total deprivation of the right to counsel at trial (*Gideon v. Wainwright* (1963) 372 U.S. 335), the denial of the right of self-representation (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8), the denial of the right to counsel of choice

---

(...continued)
correctional officers *to his rear*." (5 RT 996, italics added.) On this record, there is no support for appellant's claim that an officer was sitting at counsel table between he and Tarter.

(*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 152), the denial of the right to a public trial (*Waller v. Georgia* (1984) 467 U.S. 39, 49, fn. 9), the denial of the right to an impartial judge (*Tumey v. Ohio* (1927) 273 U.S. 510), the existence of racial discrimination in the selection of the grand jury (*Vasquez v. Hillery* (1986) 474 U.S. 254) or the petit jury (see *Batson v. Kentucky* (1986) 476 U.S. 79, 100), and the denial of the right to trial by jury by giving a defective reasonable doubt instruction (*Sullivan v. Louisiana* (1993) 508 U.S. 275). (*Neder, supra*, 527 U.S. at p. 8 [listing structural error cases].)

2. Presumption of Prejudice

"As the United States Supreme Court has explained, the right to the assistance of counsel is violated either by (1) the complete deprivation of counsel or its equivalent, or (2) the denial of the effective assistance of counsel. [Citations.]" (*Alexander, supra,* 49 Cal.4th at p. 888.)

> [T]ypically, a defendant claiming a violation of the federal constitutional right to effective assistance of counsel must satisfy a two-pronged showing: that counsel's performance was deficient, and that the defendant was prejudiced, that is, there is a reasonable probability the outcome would have been different were it not for the deficient performance. [Citation.] In contrast, a defendant is spared "the need of showing probable effect upon the outcome ... where assistance of counsel has been denied entirely of during a critical state of the proceedings[ ] ... the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary. [Citations.]

(*Ibid.*)

It is well settled that "'most constitutional errors can be harmless.' [Citation.] '[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.' [Citation.] Indeed, we have found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases.'

[Citations.]" (*Neder, supra,* 527 U.S. at p. 8, criticized on other grounds in *People v. McCall* (2004) 32 Cal.4th 175, 187, fn. 14.)

In *Cronic, supra,* 466 U.S. at pages 656 to 657, the United States Supreme Court stated:

> [T]he adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." [Citation.] The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.... [I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

(Fns. omitted.) *Cronic* recognized several categories of "presumed" prejudice. First, prejudice is presumed where counsel is either totally absent or is prevented by government action from assisting the accused at a "critical stage" of the proceeding. (*Cronic, supra,* at pp. 659 & fn. 25.) As an example, the court cited *Geders v. United States* (1976) 425 U.S. 80 (*Geders*). In *Geders*, the United States Supreme Court held "that an order preventing petitioner from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment." (*Geders, supra*, at p. 91.)

Later Supreme Court cases have affirmed that *Geders* established a rule of per se reversal. In doing so, however, those cases describe the deprivation of counsel as complete. (See, e.g., *Bell, supra,* 535 U.S. at p. 696, fn. 3 [noting that cases where prejudice was presumed "involved criminal defendants who had actually or constructively been denied counsel by government action," including the order in *Geders* "preventing defendant from consulting his counsel "about anything" during a 17-hour overnight recess..."]; *Mickens v. Taylor* (2002) 535 U.S. 162, 166 [prejudice presumed where "assistance of counsel has been denied entirely

or during a critical state of the proceeding," citing *Cronic* and *Geders*]; *Lockhart v. Fretwell* (1993) 506 U.S. 364, 378 & fn. 2 [same].)

Second, a presumption of prejudice is warranted when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." (*Cronic, supra*, 466 U.S. at p. 659). In commenting on this category of "presumed" prejudice, the Supreme Court has clarified that "the attorney's failure must be complete." (*Bell, supra,* 535 U.S. at p. 697.) This category is reserved for "situations in which counsel has entirely failed to function as the client's advocate." (*Florida v. Nixon* (2004) 543 U.S. 175, 189.)

Third, the court will presume prejudice "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not." (*Bell, supra,* 535 U.S. at p. 696, citing *Cronic, supra*, 466 U.S. at pp. 659-662.) As an example, *Cronic* cited *Powell v. Alabama* (1932) 287 U.S. 45 (*Powell*), where six days before a capital murder trial, the trial judge appointed "all the members of the bar" for purposes of arraignment. On the day of trial, a lawyer from Tennessee appeared on behalf of persons "interested" in the defendants, but announced that he was unprepared and therefore unwilling to represent the defendants on such short notice. (*Cronic, supra,* at p. 660.) The Supreme Court reversed the convictions without an evaluation of counsel's performance at trial. (*Id.* at pp. 660-661.) It held that under the circumstances presented, the likelihood that counsel could have performed as an effective adversary was as remote as to have made the trial inherently unfair.

In setting forth these categories of presumed prejudice, *Cronic* cautioned that "[a]part from circumstances of [the magnitude listed], there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. [Citations.]" (*Cronic, supra*, 466 U.S. at p. 659, fn.

26.) *Cronic* declined to apply the presumption of prejudice to the facts before it: the defendant's counsel was young; his principal practice was real estate; it was his first jury trial; and he had only 25 days to prepare for trial on complex fraud charges. (*Id.* at pp. 663-666.) The Court rejected an "inference that counsel was unable to discharge his duties" (*id.* at p. 658) and instead demanded that the defendant make out a claim of ineffective assistance of counsel by pointing to specific errors and demonstrating prejudice (*id.* at pp. 666-667 & fn. 41.)

The Supreme Court in *Bell* also refused to apply a presumption of prejudice where the defendant claimed his counsel failed to "'mount some case for life'" after the prosecution introduced evidence in the sentencing hearing and gave a closing statement. (*Bell, supra,* 535 U.S. at pp. 696-697.) There, the Court observed that "[w]hen we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete." (*Ibid.*)

In *Mickens v. Taylor, supra,* 535 U.S. 162, the Court refused to apply a presumption of prejudice "'unblinkingly'" to all kinds of attorney interference. (*Id.* at p. 174.) A defendant is "spared ... the need of showing probable effect upon the outcome" only where "assistance of counsel has been denied entirely or during a critical stage of the proceeding." (*Id.* at p. 166.) "[O]nly in 'circumstances of that magnitude' do we forgo individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict." (*Ibid.*, quoting *Cronic, supra,* 466 U.S. at p. 659, fn. 26.)

3. Appellant is Not Entitled to a Presumption of Prejudice

Appellant speculates that the officers' presence "prevented open communications between counsel and [appellant], and thus affected

strategic decisions at every stage of the trial." (AOB 63.) To the extent appellant contends the officers' presence during his conversations with Tarter constitutes a "circumstance of [the] magnitude" of the complete denial of counsel, he is mistaken. (*Cronic, supra,* 466 U.S. at pp. 659-662 & fn. 26; *Bell, supra,* 535 U.S. at p. 696.)

As set forth above, under *Cronic* and *Bell* prejudice is presumed only under the most egregious conditions. Prejudice is presumed when the government interferes to the extent there is a complete deprivation of counsel during a critical stage of the proceeding. The situation before this Court does not approximate the rare situation where a court has held that there is prejudice per se based on governmental interference that amounts to an actual or constructive complete deprivation of counsel. Assuming interference, it was not a result of any government action. As *Bell* explained, no prejudice needs to be shown when the criminal defendant "had actually or constructively been denied counsel *by government action.*" (*Bell, supra*, 535 U.S. at p. 696, fn. 3, italics added.) The presence of the officers during appellant and Tarter's conferences was not a "government action." Tarter requested the officers' presence for her protection. (RTIC 18.) Neither the prosecution nor the court ordered the officers' to accompany Tarter. At the in camera hearing, the prosecutor merely explained to the court that the officers would accompany Tarter and that he and Tarter had already discussed the matter with the officers. (RTIC 17-18.) The court, accepting Tarter's desire to have officers accompany her, admonished the officers not to disclose anything they heard between appellant and Tarter. (RTIC 18-19.) Under the circumstances, government action did not cause any interference with appellant's right to counsel.

In addition, assuming interference, the officers' presence did not result in the actual or constructive "'complete denial of counsel.'" (*Bell, supra*, 535 U.S. at p. 695.) Tarter was not precluded from communicating

with appellant (e.g., *Geders, supra*, 425 U.S. 80), from discussing defense strategy, from investigating the case, or from consulting with appellant during any portion of the trial. "Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise prepare for trial violates a defendant's Sixth Amendment right to counsel." (*Morris v. Slappy* (1983) 461 U.S. 1, 11.) There is nothing in the record that the officers' presence prevented appellant from effectively communicating with his attorney. In fact, appellant never objected to their presence and neither appellant nor Tarter ever advised the court that the officers' presence was affecting her ability to effectively represent appellant. Under the circumstances of this case, the officers' presence during appellant and Tarter's conferences under the assurance that the officers would not repeat the confidential conversations was not so egregious that it amounted to the actual or constructive "'complete denial of counsel.'" (*Bell, supra*, at p. 695.)

There was also not a "breakdown in the adversarial process." (*Cronic, supra,* 466 U.S. at pp. 659-662; *Bell, supra,* 535 U.S. at pp. 696-697.) The presence of officers during appellant's conferences with Tarter under the assurance that the officers would not repeat anything they heard did not "demonstrate that counsel failed to function in any meaningful sense as the Government's adversary." (*Cronic, supra*, at p. 666.) There is no evidence that Tarter "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." (*Id.* at p. 659.)

Finally, counsel was not "called upon to render assistance under circumstances where competent counsel very likely could not." (*Bell, supra,* 535 U.S. at p. 696; *Cronic, supra,* 466 U.S. at pp. 659-662.) Tarter requested the officers' presence. (RTIC 18.) The officers were admonished not to disclose anything they heard during appellant and Tarter's conferences. (RTIC 18-19.) Under these circumstances, it cannot

be found that Tarter was "called upon to render assistance ... where competent counsel very likely could not." (*Cronic, supra,* at pp. 659-662; cf. *Powell, supra,* 287 U.S. at pp. 57-58 [out-of-state attorney not prepared to go to trial was appointed by the trial court to represent defendants on the day of trial].) No structural error occurred in this case.

4. There Was No Realistic Possibility of Injury to Appellant or Benefit to the Prosecution

The Sixth amendment guarantees a criminal defendant the right "to have the Assistance of Counsel for his defense." This right does not "subsume" an attorney-client privilege. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 553 (*Weatherford*).) Nevertheless, the government's intrusion into confidential communications between a defendant and his counsel may rise to the level of a constitutional violation if that intrusion "created at least a realistic possibility of injury to [the defendant] or benefit to the State...." (*Id.* at p. 558; *Alexander, supra,* 49 Cal.4th at pp. 888-889.) Critical factors relevant to this determination include: whether the contents of those communications were presented to the jury; whether any of the prosecution's evidence was derived from those communications; whether the "prosecuting staff" even learned of the contents of those communications; if so, whether the communications concerned defense trial strategy; and whether the intrusion was deliberate or the result of a legitimate law enforcement purpose. (*Weatherford, supra,* at pp. 554, 556, 558.)

Once a Sixth Amendment violation has been demonstrated, then the remedy "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." (*United States v. Morrison* (1981) 449 U.S. 361, 364.) However, no remedy may be imposed in the absence of any actual or threatened "adverse effect upon the effectiveness of counsel's representation or some other

prejudice to the defense." (*Id.* at p. 365.) Thus, "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate...." (*Ibid.; Alexander, supra,* 49 Cal.4th at pp. 888-889.)

On this record, there is no realistic possibility of benefit to the prosecution. The government did not intrude into appellant's confidential communications with Tarter. Tarter requested the officers' presence. (RTIC 18.) The court admonished the officers not to disclose any of Tarter and appellant's privileged conversations. (RTIC 18-10; 1 RT 15-18.) There is no evidence that the officers violated the court's admonitions. Under the circumstances of this specific case, the officers were not acting on behalf of the state, but for the benefit of Tarter. The officers were in effect part of the defense team, not the prosecution. (See *Weatherford, supra,* 429 U.S. at p. 557 ["This is not a situation where the State's purpose was to learn what it could about the defendant's defense plans"].)

Appellant nevertheless assets that any knowledge gained by the officers must automatically be "imputed" to the prosecution because they were officers at Corcoran State Prison where the alleged crimes occurred. (AOB 58-59.) However, such an assertion was dismissed in *Weatherford*, wherein the Court rejected an assumption that law enforcement agents always communicate the content of intercepted communications to the prosecutors. (*Weatherford, supra,* 429 U.S. at pp. 556-557 [rejecting the contention that "federal and state prosecutors will be so prone to lie or the difficulties of proof will be so great that we must always assume ... that an informant communicates what he learns from an encounter with the defendant and his counsel...."].) As stated above, the officers were present for Tarter's benefit, not the benefit of the prosecution. More, the officers were admonished, prior to hearing any conversation between appellant and Tarter, that they were not to disclose any of appellant and Tarter's

conversations. (RTIC 18-19; 1 RT 15-18.) This record offers no support for a finding that the state benefitted from the officers' presence.

There is also no realistic possibility of injury to appellant. Appellant makes no attempt to demonstrate how he suffered any actual prejudice from the officers' presence. Instead, he offers a conclusory statement that the officers' presence had a "chilling effect" on his "ability to assist counsel" (AOB 60) and "prevented open communications between counsel and her client" that "affected strategic decisions at every stage of the trial (AOB 63). However, in making these specious arguments, appellant fails to identify any portion of the record to support his claim and he has failed to demonstrate any prejudice. This Court has declined to presume a "chilling effect" even in cases of egregious and pervasive government interference in the attorney-client relationship. In *Ervine, supra,* 47 Cal.4th 745, this Court rejected the defendant's argument that "'[a]n inevitable consequence' of the intrusion ... was an 'enduring fear' concerning the privacy of his communications with counsel" and stated, "a defendant's inability to consult with counsel or to assist in his defense must appear in the record. [Citation.]" (*Ervine, supra,* at p. 769.)

Ervine distinguished *Barber, supra,* 24 Cal.3d 742, where an undercover government agent posing as a codefendant infiltrated confidential meetings between the defendants and their attorneys, and then communicated privileged information to his supervisors. In *Barber*, the court did not presume prejudice, but instead noted that "the record demonstrated that the petitioners had been prejudiced in their ability to prepare their defense in that they had become '[d]istrustful of each other and fear[ful] that any one of them might also be an undercover police officer' and thus refused to participate or cooperate in their defense, which 'resulted in counsel's inability to prepare adequately for trial.'" (*Ervine, supra,* 47 Cal.4th at p. 770, citing *Barber, supra,* at p. 756.)

Here, appellant presents absolutely no evidence of such chilling effect, and the record before this Court does not justify a finding that the officers' presence had a chilling effect on appellant's ability to assist Tarter or Tarter's ability to assist appellant. The officers were openly present during appellant and Tarter's conferences. Appellant was therefore aware of their presence. Presumably, appellant was aware of why the officers were accompanying Tarter. Tarter, accompanied by Officers Martinez and Kaszap, met with appellant immediately following the in camera hearing. (RTIC 19-20.) It is a logical inference that Tarter explained the officers' presence to appellant. Appellant knew that the court had admonished the officers not to disclose any of appellant and Tarter's conversations, and that the officers had assured the court that they understood and would abide by that order. (RTIC 18-19; 1 RT 15-18.) Although appellant had numerous opportunities to express his concern or dissatisfaction with the officers' presence, he failed to do so at any time. Accordingly, appellant's unfounded assertions of a chilling effect must be entirely disregarded because they lack any evidentiary support. (*Ervine, supra*, 47 Cal.4th at pp. 769-770.)

Because the record demonstrates no realistic possibility of injury to appellant or benefit to the prosecution, appellant's claim that his Sixth Amendment right to counsel was violated must be rejected.

E. No Violation of Appellant's State Constitutional Right to Counsel

Like the Sixth Amendment, the California Constitution similarly guarantees the right "to have the assistance of counsel for the defendant's defense." (Cal. Const., art. I, § 15.) Unlike the Sixth Amendment, this guarantee under the state Constitution "embodies the right to communicate in absolute privacy with one's attorney." (*Barber, supra,* 24 Cal.3d at p. 751.) Nevertheless, the California Constitution further provides that no

criminal judgment may be set aside "for any error as to any matter of procedure" unless the error resulted "in a miscarriage of justice." (Cal. Const., art. VI, § 13.)

In *Barber, supra,* 24 Cal.3d 742, this Court granted the extraordinary remedy of a dismissal solely based on the California constitutional right to counsel. There, 50 protestors, including two undercover officers, were arrested for trespassing during a demonstration. (*Id.* at p. 747.) Over the next two months, the entire group was jointly represented by the same counsel. (*Id.* at p. 748.) During these months, the undercover officers attended and actively participated in numerous attorney-client conferences, and then relayed the contents of those conferences, including defense strategy, to their supervisors. (*Id.* at pp. 748-749.) When the undercover officers were finally revealed, the remaining defendants became so distrustful and paranoid of each other that they refused to speak in conferences with their counsel, and even became suspicious of their counsel's new student intern. (*Id.* at pp. 749-750.)

Barber concluded that the "intrusion, through trickery," of the attorney-client relationship amounted to a violation, solely under California law, of the defendants' right to communicate privately with counsel. (*Barber, supra*, 24 Cal.3d at pp. 755-756, 759-760.) *Barber* further concluded that dismissal without prejudice was the only fair remedy because the defendants' understandable "lack of cooperation" effectively rendered their counsel unable "to prepare adequately for trial." (*Id.* at p. 756.)

To the extent appellant relies on *Barber* to argue that the officers' presence during his attorney-client conferences amounts to a miscarriage of justice, *Barber* is distinguishable. As this Court recognized in *Alexander, supra,* 49 Cal.4th 846,

> *Barber* involved an application for a pretrial writ of prohibition, while the present case is an appeal from a judgment of conviction and sentence. As such, this case is subject to article IV, section 13 of the California Constitution.... This provision mandates that, typically, a defendant having proved error must further establish there exists a reasonable probability he or she would have obtained a more favorable outcome in the trial of guilt or innocence were it not for the error. [Citation.] In *Barber*, because we were not considering the reversal of judgment, we had no occasion to consider whether a violation of the state right to counsel resulting from an invasion of the attorney-client relationship can be considered a "miscarriage of justice" without a showing of prejudice to the outcome of the trial.

(*Id.* at p. 896.) This case is an appeal from a judgment of conviction and sentence. As such, this case is subject to article VI, section 13 of the California Constitution. A showing of prejudice must be made for any error to be considered a "miscarriage of justice."

Barber is factually distinguishable. Unlike in *Barber* where there was "intrusion, through trickery" (*Barber, supra,* 24 Cal.3d at p. 759), in this case there is no "intrusion" of the attorney-client relationship, much less one resulting from "trickery." Tarter requested that the officers accompany her to meetings with appellant. (RTIC 18.) The court admonished, and the officers understood, that they were not to disclose any of appellant and Tarter's conversations. (RTIC 18-19; 1 RT 15-18.) The undisputed evidence is that the officers abided by the court's order and did not disclose any of appellant and Tarter's conversations. More, the officers openly accompanied Tarter, and appellant was aware of their presence. It cannot be concluded that appellant's right to counsel was intruded upon or that the intrusion was through trickery.

Barber is also factually dissimilar because the record does not demonstrate that appellant was prejudiced in his ability to prepare his defense. (*Barber, supra,* 24 Cal.3d at p. 756.) After appellant was aware

that officers would be present, appellant never objected to the officers' presence. Appellant never indicated that he was, or had become, distrustful of the officers or that he was deterred from participating in his own defense as the result of the officers' presence. Any argument by appellant to the contrary is pure speculation. Appellant failed to make the record in the court below and only now suggests that the officers' presence had a "chilling effect" on his "ability to assist counsel." (AOB 60.) Appellant's contention must be rejected. (*Ervine, supra*, 47 Cal.4th at p. 769 ["a defendant's inability to consult with counsel or to assist in his defense must appear in the record"].)

Citing *Alexander, supra,* 49 Cal.4th at p. 896, and this Court's "acknowledg[ment] that some errors may rise to the level of a miscarriage of justice without regard to the strength of the evidence presented at trial," appellant argues that the government's interference in this case is "precisely the type of interference that should be deemed a miscarriage of justice because it served to deprive appellant of ... the right to counsel." (AOB 65-66.) Contrary to appellant's conclusory assertion, "the facts in this case do not involve such an error." (*Alexander, supra,* at p. 896.) Unlike the cases that have previously been before this Court regarding the intrusion into privileged and confidential communications (e.g., *Alexander, supra,* 49 Cal.4th 846; *Ervine, supra*, 47 Cal.4th 745; *Towler, supra,* 31 Cal.3d 105), this case does not deal with governmental intrusion. As explained repeatedly, Tarter requested that the officers accompany her to her conferences with appellant. (RTIC 18.) Prior to the officers attending any confidential conference between appellant and Tarter, the court admonished the officers, and the officers agreed, not to repeat anything they heard between appellant and Tarter. (RTIC 18-19; 1 RT 15-18.) The officers did not intrude into appellant's confidential conversations.

Like the findings in *Alexander, Ervine,* and *Towler*, the record contains no evidence that appellant was prejudiced in the preparation of his defense. (*Alexander, supra,* 49 Cal.4th at p. 897; *Ervine, supra,* 47 Cal.4th at p. 770; *Towler, supra,* 31 Cal.3d at p. 771.) Not only is there no evidence that any of appellant and Tarter's conversations were disclosed to the prosecutors, but appellant offers only conclusory statements on appeal that the officers' presence interfered with his attorney-client relationship and served to deprive appellant of the right to counsel. Appellant's unsupported, conclusory statements should be accorded "'zero weight.'" (*Alexander, supra,* at p. 897.) Consequently, because there is nothing to support a finding of a realistic possibility of injury to appellant or benefit to the prosecution, appellant's claim that the officers' presence violates his state constitutional right to counsel must be rejected.

F. Appellant's Constitutional and Statutory Rights to be Personally Present Were Not Violated by His Absence from the In Camera Hearing; Appellant is Unable to Demonstrate That his Absence Prejudiced His Case or Denied Him a Fair Trial

Appellant contends his federal and state constitutional rights and his state statutory right to be present were violated when he was not included in the in camera hearing where Tarter indicated her desire to have officers accompany her to conferences with appellant. (AOB 66-74.) He argues that the in camera hearing was a critical stage of the proceedings and that his absence from that hearing was a structural error requiring reversal. (*Ibid.*) Respondent disagrees.

A criminal defendant's right to be personally present at trial is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution; by article I, section 15 of the California Constitution; and by sections 977, subdivision (b)(1) and 1043, subdivision (a). (*People v. Wallace* (2008) 44 Cal.4th 1032, 1052.)

> "'Under the Sixth Amendment, a defendant has the right to be personally present at any proceeding in which his appearance is necessary to prevent "interference with [his] opportunity for effective cross-examination."' [Citation.] 'Due process guarantees the right to be present at any "stage that is critical to [the] outcome" and where the defendant's "presence would contribute to the fairness of the procedure."' [Citation.] '"The state constitutional right to be present at trial is generally coextensive with the federal due process right. [Citations.]" [Citation.] Neither the state nor the federal Constitution, nor the statutory requirements of sections 977 and 1043, require the defendant's personal appearance at proceedings where his presence bears no reasonable, substantial relation to his opportunity to defend the charges against him. [Citations.]' [Citation.] 'Defendant has the burden of demonstrating that his absence prejudiced his case or denied him a fair trial.' [Citation.]" [Citation.]

(*People v. Gonzales* (2012) 54 Cal.4th 1234, 1253-1254.)

"Erroneous exclusion of the defendant is not structural error that is reversible per se, but trial error that is reversible only if the defendant proves prejudice. [Citations.]" (*People v. Perry* (2006) 38 Cal.4th 302, 312, citing *Rushen v. Spain* (1983) 464 U.S. 114, 118-119.)

1. No Structural Error

Appellant contends that his absence from the in camera hearing where Tarter stated her desire to have officers accompany her to conferences with appellant was a structural error because his "relationship with attorney Tarter was fundamentally altered and unconstitutionally restricted." (AOB 74.) Appellant appears to argue that his absence from the in camera hearing resulted in a complete deprivation of counsel. This case, however, does not approximate the situation where a court has held that there is prejudice per se based on an actual or constructive complete deprivation of counsel. As explained above in Argument I, subsection D and adopted fully herein, Tarter's desire to have the officers' present did not amount to a complete deprivation of the right to counsel.

More, appellant's absence from the in camera hearing was not a "'defect[ ] in the constitution of the trial mechanism, which def[ies] analysis by "harmless-error standards'" because the error has "'consequences that are necessarily unquantifiable and indeterminate.'" (*United States v. Gonzalez-Lopez, supra,* 548 U.S. at p. 150.) Here, appellant complains that his exclusion from the in camera hearing, which resulted in the presence of officers during his conferences with Tarter, caused his "relationship with attorney Tarter [to be] fundamentally altered and unconstitutionally restricted" and "affected his very first meeting with counsel, and every subsequent conversation or consultation...." (AOB 74.) On the contrary, there is no indication in the record here that the officers' presence affected appellant and Tarter's relationship. On this record, where appellant had numerous opportunities to voice any concern he had regarding the officers' presence, his claim that his relationship with Tarter was affected is without substance, is quantifiable, and is determinate. As a result, no structural error occurred.

2. Constitutional and Statutory Rights Not Violated

Appellant further argues that his presence at the in camera hearing bore a reasonable and substantial relation to his full opportunity to defend against the charges and would have contributed to the fairness of the proceedings. He claims that if he had been present, the court could have fully explained that the "attorney-client privilege had been extended to" the officers, thereby ameliorating the chilling effect of the officers' presence. (AOB 69.) He further argues that if he had been present he could have opposed the agreement, voiced his concerns to the court, and explained to the court that the officers were coworkers of one of the victims and that they were officers at the prison where the charged crimes occurred. (AOB 70-71.) Finally, appellant argues that because the in camera hearing took place immediately prior to arraignment, he had no opportunity to decide

whether to accept Tarter's appointment as counsel or to represent himself. (AOB 71.)

Appellant's assertions are speculative. They are inadequate to demonstrate that his presence at the in camera hearing was a critical stage, would have contributed to the fairness of the procedure, or bore a reasonably substantial relation to his ability to defend against the charges. (See *People v. Castaneda* (2011) 51 Cal.4th 1292, 1318; see also *People v. Harris* (2008) 43 Cal.4th 1269, 1307; *People v. Waidla* (2000) 22 Cal.4th 690, 742.)

In any event, it is reasonable to infer that following the in camera hearing, Tarter explained to appellant the officers' presence and that the officers were not to disclose any of appellant and Tarter's conversations. (RTIC 19-20.) In addition, in appellant's presence, the court admonished Officers Masters and Close not to disclose any conversations between appellant and Tarter. (1 RT 15-18.) Appellant also had multiple opportunities to voice his concerns about the officers' presence. He was before the court numerous time before trial commenced. Finally, appellant accepted Tarter's reappointment as counsel knowing that Tarter desired officers to accompany her while in appellant's presence. (1 RT 5.) Under the circumstances, appellant's assertions of what he would or could have done if he had been present at the in camera hearing are not only speculative, but contrary to the record.

3. No Prejudice

Even assuming appellant's right to be present at the in camera hearing was violated, appellant is unable to show that the violation resulted in prejudice or denied him a fair trial. (*People v. Gonzales, supra,* 54 Cal.4th at pp. 1253-1254.) At the conclusion of the in camera hearing, Tarter indicated that she was going to talk to appellant. (RTIC 19-20.) It is a fair assumption that Officers Martinez and Kaszap accompanied Tarter to her

first meeting with appellant. It is also a fair assumption that, because the issue of the officers' presence had just been discussed and Officers Martinez and Kaszap openly accompanied Tarter to her conference with appellant prior to arraignment, Tarter explained to appellant why the officers were present. Shortly after speaking to appellant, in the presence of the officers, appellant and Tarter appeared for arraignment. (CTPP 24-38.) With the knowledge that officers would accompanying Tarter to all conferences with appellant, appellant accepted the court's appointment of Tarter as counsel. (CTPP 29-30.) At no time did appellant indicate his displeasure or objection to Tarter's desire to have officers accompany her when she met with appellant.

Appellant also did not indicate any displeasure with the arrangement at the preliminary hearing, after the court reappointed Tarter as counsel, or at a continuance hearing. (CTPP 46-47, 62-192; 1 RT 2-12.) More importantly, during a pretrial hearing and in appellant's presence, the prosecutor asked the court to admonish Officers Masters and Close to not disclose Tarter and appellant's conversations. (1 RT 17.) Tarter joined in the request, and the court admonished Officers Master and Close not to disclose anything they heard during Tarter and appellant's conversations. (1 RT 17-18.) Appellant did not indicate his displeasure or objection to the arrangement. (1 RT 18, 55-56, 97-98.)

There is nothing on this record to show appellant would not have agreed to Tarter's desire to have officers accompany her to all conferences with appellant if he had attended the in camera hearing. Appellant had multiple opportunities to state his displeasure with the arrangement or indicate how the arrangement affected his ability to communicate with Tarter. Appellant never did so and even accepted Tarter's reappointment following the preliminary hearing. As a result, appellant is unable to show

that his absence from the in camera hearing resulted in prejudice or denied him a fair trial.

G. Appellant is Estopped from Arguing that the Court Acted in Excess of Jurisdiction

Appellant contends the court acted in excess of jurisdiction when it agreed to the "stipulation" to have officers accompany Tarter to all conferences with appellant and admonished the officers not to disclose any of appellant and Tarter's conversations. (AOB 74-75.) Respondent disagrees.

> "[A]n excess of jurisdiction is typically described as the case '"where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites."' [Citations.]" [Citation.] "Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari." [Citation.] In contrast with judgments lacking fundamental jurisdiction, judgments or orders in excess of jurisdiction are valid unless attacked. [Citation.]

(*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1225-1226.)

Parties may be precluded from setting acts in excess of jurisdiction "'aside by such things as waiver, estoppel, or the passage of time. [Citations.]' [Citation.]" (*People v. Lara* (2010) 48 Cal.4th 216, 225.) "Whether a party who has sought or agreed to an action in excess of a court's jurisdiction is estopped to complain depends on the importance of the irregularity and considerations of public policy. [Citations.]" (*In re Andres G.* (1998) 64 Cal.App.4th 476, 482.) "Reviewing courts have repeatedly allowed acts in excess of jurisdiction to stand when the acts were

beneficial to all parties and did not violate public policy [citation], or when allowing objection would countenance a trifling with the courts. [Citation.]" (*Id.* at pp. 482-483.)

In this case, assuming the court acted in excess of jurisdiction, no policy, substantive or procedural, precludes estoppel of appellant to attack the excess of jurisdiction that resulted from the court's acceptance of Tarter's request to have officers accompany her to all conferences with appellant. Tarter desired to have officers accompany her. (RTIC 18.) It is a reasonable inference that appellant had knowledge of Tarter's request given that Tarter met with appellant immediately following the in camera hearing and Officers Martinez and Kaszap openly accompanied her. (RTIC 19-20.) Appellant never expressed any displeasure to the arrangement even though he had multiple opportunities to do so. (CTPP 24-38, 46-192; 1 RT 2-12, 15-18, 55-56, 97-114.) Appellant's failure to indicate his displeasure with the arrangement, thereby amounting to a waiver, precludes him from setting aside the court's acceptance of Tarter's request. (*People v. Lara, supra,* 48 Cal.4th at p. 225.)

In addition, as appellant acknowledges, none of the officers who were present during appellant's conferences with Tarter or who were positioned near appellant in the courtroom disclosed any of the conversations they may have heard.[10] (AOB 75.) In addition, as explained more thoroughly

---

[10] Appellant argues that Officer Griem, the officer in charge of courtroom security, was never admonished and that "it was unlikely that [Officers] Masters and Close alone transported appellant every day of the 14 day trial." (AOB 75.) As explained in Argument I, subsection D, fn. 9, Officer Griem and two other officers sat at some distance behind appellant during the trial. There is nothing to support a claim that Officer Griem should have been admonished because there is nothing on this record to support a finding there was a risk Officer Griem would overhear appellant and Tarter's conversations at counsel table. In addition, appellant's claim

(continued...)

above in Argument I, subsection D, there is nothing to support appellant's speculative claim on appeal that the officers' presence had a chilling effect on his ability to discuss his case freely with Tarter. Under the circumstances, appellant should be estopped from contesting the court's jurisdiction to accept Tarter's request because, to hold otherwise, would permit appellant to trifle with the court. (See *In re Andres G., supra,* 64 Cal.App.4th at p. 482.)

H. Appointment of Counsel Who Desired the Presence of Officers During Meetings with Appellant Did Not Result in a Complete Denial of Counsel

Appellant contends the court's appointment of Tarter amounted to a complete denial of counsel in violation of his Sixth Amendment and state constitutional rights to counsel. (AOB 76-78.) He argues that appointment of an attorney who desires officers to accompany her at all times interferes with a defendant's right to private consultation and is therefore "tantamount to a failure to appoint counsel at all." (AOB 78.) Respondent disagrees.

As discussed more thoroughly above in Argument I, subsection D and adopted herein, the appointment of counsel who desires the presence of officers does not amount to a total deprivation of counsel.

I. Appellant Was Able to Confer Privately with Counsel in the Courtroom Before and During Trial

Appellant contends that his Sixth Amendment and state constitutional rights to be present during trial was violated. (AOB 78-79.) He argues that although he was physically present at trial, he was *in absentia* because the

---

(...continued)
that Officers Masters and Close were not the only officers present during appellant and Tarter's conferences is based on pure speculation. Appellant presents nothing in support of his claim.

location of the three security officers in the courtroom prevented him from assisting counsel during trial. (*Ibid.*) Respondent disagrees.

"Under the Sixth Amendment, a defendant has the right to be personally present at any proceeding in which his appearance is necessary to prevent 'interference with [his] opportunity for effective cross-examination.'" (*People v. Butler* (2009) 46 Cal.4th 847, 861, quoting *Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745, fn. 17 (*Stincer*).) In addition, a defendant has a due process right "to be present at any 'stage ... that is critical to [the] outcome' and where the defendant's 'presence would contribute to the fairness of the procedure.'" (*People v. Butler, supra,* at p. 861, quoting *Stincer, supra,* at p. 745.) "The state constitutional right to be present at trial is generally coextensive with the federal due process right. [Citations.]" (*People v. Harris, supra,* 43 Cal.4th at p. 1307.)

Appellant bases his argument that he was unable to confer with counsel before or during trial on the faulty belief that security officers were seated "at counsel table." (AOB 79.) Appellant is mistaken. None of the three security officers positioned near appellant were sitting at counsel table. Prior to trial, Officer Griem explained that an officer would be positioned to the right of appellant, to the left of appellant, and directly behind appellant. (1 RT 114.) During trial, the three officers' positions in the courtroom were clarified. District Attorney Investigator Ebner, a witness at trial, identified appellant and described appellant's position in the courtroom as being "to the left of Defense Attorney Tarter, and three correctional officers to his *rear.*" (5 RT 996, italics added.) As the record shows, the officers were sitting at some distance behind appellant, not at counsel table.[11]

---

[11] Appellant does not argue that the court abused its discretion regarding the security measures inside the courtroom or that the presence of (continued...)

There is no evidence to support a finding that the three officers sitting at some distance behind appellant prevented or impeded appellant's ability to converse privately with his trial counsel. On the contrary, appellant's counsel indicated that she did not object to the security measures and never indicated her displeasure with the officers positioned behind appellant. (1 RT 115.) In addition, the evidence suggests that appellant was not prevented from conversing with his counsel during trial. During a discussion regarding security measures, the court indicated that appellant would be "unrestrained at counsel table so that he can communicate in writing with his lawyer." (1 RT 116.) Officer Griem assured the court that appellant would be "provided with a pen filler," otherwise known as the "middle of the pen," for the purposes of communicating with counsel during trial. (*Ibid.*)

On this record, there is no evidence to support a finding that the three security officers impeded or interfered with appellant's ability to assist his counsel before or during trial. As a result, this is not a case where appellant, though physically present at trial, was in essence *in absentia* because he was unable to assist his counsel at trial. Appellant's claim that his right to be present under the Sixth Amendment and state Constitution was violated should be rejected.

In sum, appellant waived any claim that the officers' presence during attorney-client conferences violated his right to counsel. In any event, there simply was no error, and even assuming there was an intrusion into appellant's confidential communications, there was no realistic possibility of injury to appellant or benefit to the prosecution. Finally, appellant is

---

(...continued)
the three officers was inherently prejudicial. (See *Holbrook v. Flynn* (1986) 475 U.S. 560, 568-569; *People v. Jenkins* (2000) 22 Cal.4th 900, 997-999.)

unable to show that his absence from the in camera hearing prejudiced his case or denied him a fair trial, he is estopped from arguing that the court acted in excess of jurisdiction by agreeing to the arrangement, and appellant's right to confer privately with counsel during trial was not violated. Under the circumstances of this case, specifically appellant's violent nature and his desire to kill others, the officers' presence and assurance that they would not repeat anything they heard strikes a fair balance between attorney safety, confidentiality of communications, and assistance of counsel.

II. MURDER IS NOT A LESSER INCLUDED OFFENSE OF AGGRAVATED ASSAULT BY A LIFE PRISONER

Appellant contends his murder convictions (§ 187, subd. (a); counts III and IV) are lesser included offenses of his convictions for aggravated assault by a life prisoner (§ 4500; counts I and II). (AOB 81-87.) Appellant characterizes section 4500 as "murder by a life prisoner" and argues that when the victim dies, and the offense is charged as a capital crime, the determination of whether the victim died within a year and a day is an element of the offense. (*Ibid.*) As a result, he argues that murder is a lesser included offense of "murder by a life prisoner" because "the capital crime set forth in section 4500 cannot be committed without also necessarily committing murder." (AOB 86.) Respondent disagrees.

The prosecution charged appellant with aggravated assault by a life prisoner (§4500; count I) and murder (§ 187, subd. (a); count III) of Mendoza. (1 CT 13-14.) The prosecution charged appellant with the same crimes against Mahoney (counts II and IV). (1 CT 14-15.) The prosecution further alleged as to counts I and II (§ 4500) that Mendoza and Mahoney died within a year and a day as a proximate result of the aggravated assaults. (1 CT 13-14.)

The jury found appellant guilty of the murder and aggravated assault of both Mendoza and Mahoney. (9 CT 2474-2485.) The jury further found that appellant committed the murders while lying in wait, committed multiple murders, and that Mendoza and Mahoney died within a year and a day of the aggravated assaults. (*Ibid.*) The jury found death to be the appropriate punishment for both murders and both aggravated assaults (9 CT 2684-2689), and the court sentenced appellant to death for each murder and aggravated assault, then stayed the imposition of death for the aggravated assaults pursuant to section 654 (10 CT 2809-2813, 2824-2825). The aggravated assault and murder of each victim, separately, arose out of the same act or course of conduct.

Although a defendant may be convicted of multiple crimes arising out of the same conduct, "[a] judicially created exception . . . 'prohibits multiple convictions based on necessarily included offenses.' [Citation.]" (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.)

> In deciding whether multiple conviction is proper, a court should consider only the statutory elements. Or, as formulated in [*People v.*] *Scheidt* [(1991) 231 Cal.App.3d 162], "only a statutorily lesser included offense is subject to the bar against multiple convictions in the same proceeding. An offense that may be a lesser included offense because of the specific nature of the accusatory pleading is not subject to the same bar." [Citation.]

(*Id.* at p. 1229.) The test, referred to as the statutory elements test, is satisfied when """all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense,""" i.e., the defendant could not have committed the greater offense without also necessarily committing the lesser offense. (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) In addition to the specific nature of the accusatory pleading, the underlying facts of the case are not considered. (*People v. Ramirez* (2009) 45 Cal.4th 980, 985.)

Section 4500, titled, "Person undergoing life sentence; commission of assault with means of force likely to produce great bodily injury; punishment," states:

> Every person while undergoing a life sentence, who is sentenced to state prison within this state, and who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

(§ 4500). Section 187, subdivision (a), titled "Murder," states: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

Murder is not a lesser included offense of aggravated assault by a life prisoner. Under the statutory elements test, aggravated assault by a life prisoner can be committed without necessarily committing murder. Section 4500 is an assault statute, not a murder statute. (See *People v. Smith* (1950) 36 Cal.2d 444, 448 ["Defendants properly concede that the offenses of assault by a life term convict and murder are not 'necessarily included offenses'"]; see also *People v. McNabb* (1935) 3 Cal.2d 441, 458 [explaining that the predecessor statute, former section 246,[12] "was enacted as a disciplinary regulation and as a means of protection to prisoners themselves against the assaults of the vicious, and also to protect the

---

[12] Former section 246 defined the offense of assault with a deadly weapon by a person undergoing a life sentence. It was repealed and reenacted as section 4500 in 1941. (See Historical and Statutory Notes, 47C West's Ann. Pen. Code (2008 ed.) foll. § 246, p. 371.)

officers who are required to mingle with the inmates, unarmed"].) The statute proscribes "*assault* upon the person of another with a deadly weapon or instrument, or by means of force likely to produce great bodily injury," when committed by a life-term inmate with malice aforethought. (§ 4500, italics added.)

Unlike murder, where the victim's death is a necessary element of the offense, the death or survival of the victim is not determinative of the defendant's guilt of aggravated assault. The death or survival of the victim is relevant only to the punishment that is imposed upon a finding of guilt. Section 4500 separates the actions that amount to aggravated assault by a life prisoner from the punishment available for the defendant's commission of the offense. The statute first lays out the elements that amount to aggravated assault by a life prisoner: "Every person while undergoing a life sentence ... and who, with malice aforethought, commits an *assault* upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury...." (§ 4500, italics added.) The statute then details the penalties that may be imposed for commission of the offense: "*is punishable* with death or life imprisonment without possibility of parole.... however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years." (§ 4500, italics added.) In other words, there is a difference between the acts that constitute aggravated assault and the punishment that may be imposed. Whether the victim survived or died only becomes relevant *if* the defendant is found to have committed aggravated assault. The defendant's guilt of aggravated assault, therefore, is not dependent on the victim's death or survival.

As a result, looking solely to the statutory elements that establish a defendant's commission of aggravated assault, murder is not a lesser included offense of aggravated assault because a person can commit aggravated assault without also committing murder.

Appellant's attempt to analogize section 4500 with section 219, train derailing or wrecking, is not persuasive. (AOB 85-86.) Appellant argues that sections 4500 and 219, both death penalty eligible crimes, are similarly worded statutes.[13] (*Ibid.*) Appellant therefore claims that because section 219's corresponding jury instruction (CALJIC No. 9.97) requires the jury to find whether a death occurred, death is an element of section 219 and likewise is an element of section 4500. (*Ibid.*) Appellant cites no authority that jury instructions are relevant under the statutory elements test. In any event, just as accusatory pleadings and facts of the case are not relevant under the statutory elements test to determine if an offense is a lesser included offense, the wording of specific jury instructions are just as irrelevant.

More, that the court and the parties agreed to put the issue of whether Mendoza and Mahoney died within a year and a day of the aggravated assaults before the jury does not demonstrate that the victim's death is an

---

[13] Section 219, titled "Train derailing or wrecking; punishment," states in relevant part:

> Every person who unlawfully throws out a switch, removes a rail, or places any obstruction on any railroad with the intention of derailing any passenger, freight or other train, car or engine and thus derails the same ...is guilty of a felony and punishable with death or imprisonment in the state prison for life without possibility of parole in cases where any person suffers death as a proximate result thereof, or imprisonment in the state prison for life with the possibility of parole, in cases where no person suffers death as a proximate result thereof. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

essential element of aggravated assault. As shown above, the victim's survival or death following the assault is relevant only to the punishment that may be imposed. In this sense, whether the victim dies within a year and a day is a fact that increases the penalty for aggravated assault beyond the statutory maximum and is therefore an enhancement allegation that must be found true by a jury. (See *People v. Sloan* (2007) 42 Cal.4th 110, 122-123; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*).) As an enhancement allegation, however, the fact may not be considered for purposes of the rule prohibiting multiple convictions based on necessarily included offenses. (*People v. Sloan, supra,* at pp. 113-114.) As a result, whether the victim dies within a year and a day is irrelevant under the statutory elements test.

Under section 4500, the death of the victim is relevant only to the punishment received for commission of aggravated assault by a life prisoner. Under the statutory elements test, aggravated assault by a life prisoner can be committed without committing murder. Thus, murder is not a lesser included offense of aggravated assault by a life prisoner.

III. THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS CONSTITUTIONAL

Appellant contends the lying-in-wait special circumstance is unconstitutional because it fails to narrow the class of death eligible defendants. (AOB 88-97.) Appellant argues this Court's expansive interpretation of the elements of the lying-in-wait special circumstance has eliminated any distinction between the special circumstance and premeditated first degree murder. (AOB 89-92) He further argues there is no significant distinction between the lying-in-wait special circumstance and lying-in-wait murder. (AOB 92-95.) Finally, appellant argues the lying-in-wait special circumstance fails to provide a meaningful basis for

distinguishing death eligible defendants from those not death eligible. (AOB 95-97.) This Court has consistently rejected these claims.[14]

At the time of appellant's murder of Mendoza and Mahoney, section 190.2, former subdivision (a)(15), made it a special circumstance if the defendant killed the victim "while lying in wait."[15] The elements of the lying-in-wait special circumstance required that an intentional killing be "committed under circumstances that included a physical concealment or concealment of purpose; a substantial period of watching and waiting for an opportune time to act; and, immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." (*People v. Stevens* (2007) 41 Cal.4th 182, 201.)

In *People v. Stevens, supra,* 41 Cal.4th 182, this Court rejected the claim that there is no distinction between the lying-in-wait special circumstance and premeditated first degree murder. (*People v. Stevens, supra,* at pp. 203-204.) This Court stated:

> In distinction with premeditated first degree murder, the lying-in-wait special circumstance requires a physical concealment or concealment of purpose and a surprise attack on an unsuspecting victim from a position of advantage. [Citations.] Thus, any overlap between the premeditation element of first degree murder and the durational element of the lying in wait special circumstance does not undermine the narrowing function of the special circumstance. [Citation.] Moreover, contrary to Justice Moreno's concurring and dissenting opinion, concealment of purpose inhibits detection, defeats self-defense, and may betray at least some level of trust, making it more blameworthy than premeditated murder that does not involve surprise. [Citations.]

---

[14] The following arguments by no means contain an exhaustive list of decisions addressing and rejecting these claims.

[15] "In March 2000, the language of the lying-in-wait special circumstance was changed to delete the word 'while' and substituted with the phrase 'by means of.' [Citations.]" (*People v. Streeter* (2012) 54 Cal.4th 205, 246, fn. 7.)

(*Ibid*; *People v. Streeter, supra,* 54 Cal.4th at pp. 252-253; *People v. Sims* (1993) 5 Cal.4th 405, 434.)

In *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148-1149, this Court rejected the claim that there is no distinction between the lying-in-wait special circumstance and lying-in-wait murder. This Court stated:

> "[M]urder by means of lying in wait requires only a wanton and reckless intent to inflict injury likely to cause death. [Citations.]" [Citation.] In contrast, the lying-in-wait special circumstance requires "an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage ...." [Citations.] Furthermore, the lying-in-wait special circumstance requires "that the killing take place *during the period of concealment and watchful waiting*, an aspect of the special circumstance distinguishable from a murder perpetrated by means of lying in wait, or following premeditation and deliberation. [Citation.]" [Citation.]
>
> The distinguishing factors identified in *Morales* and *Sims* that characterize the lying-in-wait special circumstance constitute "clear and specific requirements that sufficiently distinguish from other murders a murder committed while the perpetrator is lying in wait, so as to justify the classification of that type of case as one warranting imposition of the death penalty." [Citation.]

(*Ibid.*, italics in original, fn. omitted; *People v. Streeter*, *supra*, 54 Cal.4th at pp. 252-253; *People v. Stevens, supra,* 41 Cal.4th at p. 204.)

In *People v. Nakahara* (2003) 30 Cal.4th 705, 721 (*Nakahara*), this Court rejected the claim that the lying-in-wait special circumstance fails to distinguish between death eligible defendants and non-death eligible defendants. This Court stated:

> Defendant next argues that the lying-in-wait special circumstance (§ 190.2, subd. (a)(15)) is invalid for failure to sufficiently narrow the class of persons eligible for death and to provide a meaningful basis for distinguishing the few cases in

> which death is imposed from the many cases in which it is not. [Citation.] We have repeatedly rejected this contention, and defendant fails to convince us the matter warrants our reconsideration. [Citations.]

(*Ibid.*; *People v. Streeter*, *supra*, 54 Cal.4th at pp. 252-253.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting these claims.

IV. THE STANDARD GUILT AND PENALTY PHASE INSTRUCTIONS DO NOT UNDERMINE THE REASONABLE DOUBT STANDARD

Appellant contends that various standard jury instructions violate the requirement of proof beyond a reasonable doubt. (AOB 98-108.) Appellant argues that CALJIC No. 2.01 (sufficiency of circumstantial evidence) reduced the prosecution's burden of proof from beyond a reasonable doubt to mere reasonableness and created a mandatory presumption that required the jury to draw an incriminating inference if it was merely reasonable. (AOB 99-101.) He further argues that CALJIC No. 2.21.2 (willfully false testimony), CALJIC No. 2.22 (weighing conflicting testimony), CALJIC No. 2.27 (sufficiency of testimony of one witness), and CALJIC No. 8.20 (deliberate and premeditated murder) individually and collectively lessened the reasonable doubt standard to a preponderance of the evidence. (AOB 102-104.) Finally, appellant argues that CALJIC No. 2.51 (motive) reduced the prosecution's burden of proof because it suggested he could be found guilty based on the presence of an alleged motive and shifted the burden to appellant to prove his innocence and the absence of motive. (AOB 104-106.) This Court has consistently rejected these claims. (See fn. 14.)

This Court has repeatedly rejected the claim that CALJIC No. 2.01 (sufficiency of circumstantial evidence) alters the burden of proof and creates a mandatory presumption of guilt. (*People v. Bonilla* (2007) 41 Cal.4th 313, 338; *People v. Kipp* (1998) 18 Cal.4th 349, 374-375.)

This Court has also repeatedly rejected the claim that CALJIC No. 2.21.2 (willfully false testimony), CALJIC No. 2.22 (weighing conflicting testimony), CALJIC No. 2.27 (sufficiency of testimony of one witness), and CALJIC No. 8.20 (deliberate and premeditated murder) individually and collectively lessen the prosecution's burden of proof. (*People v. Streeter, supra,* 54 Cal.4th at p. 253, and cases cited therein.) "Each of these instructions ' "is unobjectionable when, as here, it is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof."' [Citation.]" (*Ibid.*) Here, these instructions were unobjectionable because the jury was instructed with CALJIC No. 2.90, which explained the presumption of innocence, reasonable doubt, and the prosecution's burden of proof. (10 CT 2731.)

Finally, this Court has repeatedly rejected the claim that CALJIC No. 2.51 (motive) allows the jury to determine guilt based solely on motive and shifts the burden to defendant to prove his innocence and the absence of motive. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1357; *People v. Cleveland* (2004) 32 Cal.4th 704, 750.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting these claims.

V. APPELLANT FORFEITED HIS CLAIMS THAT THE COURT ERRED IN ADMITTING EVIDENCE OF TWO UNADJUDICATED OFFENSES AND THAT THERE WAS INSUFFICIENT EVIDENCE OF SEVEN UNADJUDICATED OFFENSES TO SUPPORT THE JURY'S USE OF THOSE OFFENSES AS AGGRAVATING EVIDENCE; ON THE MERITS, THE COURT DID NOT ERR IN ADMITTING TWO UNADJUDICATED OFFENSES AND SUFFICIENT EVIDENCE SUPPORTS A FINDING THAT APPELLANT COMMITTED THE SEVEN UNADJUDICATED OFFENSES BEYOND A REASONABLE DOUBT

Appellant makes numerous claims regarding the court's admission and the jury's use of unadjudicated offenses presented by the prosecution during the penalty phase as aggravating evidence pursuant to section 190.3,

factor (b). (AOB 109-195.) First, appellant contends the court abused its discretion when it admitted evidence of the March 8, 1997, assault and April 18, 2000, battery because the incidents lacked the force or violence required by section 190.3, factor (b). (AOB 111-134.) He further argues that admission of the two incidents violated the federal Constitution because they skewed the sentence-selection process toward death and were irrelevant to the jury's penalty determination because they were "*de minimus*" violent conduct. (AOB 134-138.) As a result, he claims his death sentence should be reversed. (AOB 139.) Second, appellant contends there was insufficient evidence to establish that he committed seven of the unadjudicated offenses presented during the penalty phase. (AOB 140-174.) Third, appellant contends the unadjudicated offense instructions were erroneous. (AOB 174-185.) He argues that the instructions created a mandatory presumption (AOB 179-180) and failed to define "force or violence" (AOB 180-185). Fourth, appellant raises numerous constitutional challenges to the use of unadjudicated offenses during the penalty phase. (AOB 185-190.) He argues it was error for the same jury to decide guilt and penalty (AOB 186-188) and for there to be a lack of jury unanimity as to the unadjudicated offenses (AOB 189-190). Finally, appellant asserts that reversal of his death judgment is required because the invalid and factually insufficient aggravating factors unconstitutionally skewed the jury's penalty determination toward death and the erroneous admission of the unadjudicated offenses was not harmless beyond a reasonable doubt. (AOB 190-195.)

Appellant is not entitled to relief. His arguments are forfeited and meritless. In any event, any error was harmless.

A. Legal Principles Regarding Section 190.3, factor (b) Evidence

"The purpose of [section] 190.3, factor (b) 'is to enable the jury to make an individualized assessment of the character and history of a defendant to determine the nature of the punishment to be imposed.' [Citation.]" (*People v. Tully* (2012) 54 Cal.4th 952, 1029.) Section 190.3, factor (b) allows the jury, in determining the penalty to impose, to consider "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (§ 190.3, factor (b).) Whether the unadjudicated offense involves the use or attempted use of force or violence or the express or implied threat to use force or violence "'is not one that is made on the basis of the abstract, *definitional* nature of the offense[ ]' [citation]," but is "based on the *conduct* of the defendant which gave rise to the offense. [Citations.]" (*People v. Thomas* (2011) 52 Cal.4th 336, 363.) "'[E]vidence admitted under this provision must establish that the conduct was prohibited by a criminal statute and satisfied the essential elements of the crime. [Citations.]" (*People v. Tully, supra,* at p. 1027.) The unadjudicated crimes evidence may amount to either a felony or a misdemeanor. (*People v. Phillips* (1985) 41 Cal.3d 29, 71.) "The prosecution bears the burden of proving the factor (b) other crimes beyond a reasonable doubt.' [Citation.]" (*People v. Tully, supra,* at p. 1027.) "A trial court's decision to admit, at the penalty phase, evidence of a defendant's prior criminal activity is reviewed under the abuse of discretion standard. [Citation.]" (*People v. Bacon* (2010) 50 Cal.4th 1082, 1127; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 225.)

B. Appellant Forfeited his Claims That the Court Abused Its Discretion When it Admitted Evidence of the March 8, 1997, and April 18, 2000, Unadjudicated Offenses in the Penalty Phase; On the Merits, the Court Did Not Abuse Its Discretion

Appellant contends the court abused its discretion in admitting evidence of two unadjudicated offenses during the penalty phase. (AOB 109-134.) He argues that the March 8, 1997, and April 18, 2000, unadjudicated offenses lacked the force or violence required by section 190.3, factor (b). (*Ibid.*) He further contends admission of the two unadjudicated offenses violates the federal Constitution because they impermissibly skewed the sentence-selection process toward death and were irrelevant to the jury's penalty determination because they were "minor incidents of only *de minimus* violent or forceful criminal conduct." (AOB 134-139.) As a result, he requests that his death sentence be reversed. (AOB 139.) Appellant forfeited his claims because he failed to object to the admission of this evidence at trial. On the merits, the court did not abuse its discretion when it admitted evidence of the March 8, 1997, and April 18, 2000, unadjudicated offenses, and the admission of the incidents violated no constitutional guarantee.

1. Procedural Background Regarding the March 8, 1997, and April 18, 2000, Unadjudicated Offenses

Prior to the conclusion of the guilt phase, and in preparation of a possible penalty phase, the court inquired of the evidence the prosecution would offer as circumstances in aggravation. (5 RT 1049.) The prosecutor indicated that he would introduce evidence of several cell extractions, an assault on another inmate, and numerous weapons possessions. (5 RT 1050-1051.) During the discussion, the court noted that custodial possession of a sharpened instrument amounted to an implied threat of force and was admissible under section 190.3, factor (b). (5 RT 1053.)

Following the guilt phase, the court further inquired of the evidence the prosecution would present during the penalty phase. (5 RT 1192.) The prosecutor stated that he would present evidence of unadjudicated offenses pursuant to section 190.3, factor (b), listed the dates and general description of the unadjudicated offenses, and stated that the unadjudicated offenses violated sections 4501.5 (battery by prisoner on a non-confined person) and 4502 (possession of a manufactured weapon). (5 RT 1192-1193.) Subsequently, when the court inquired whether either party "anticipate[d] any evidentiary problems as far as the penalty phase, motions in limine, anything of that nature," appellant's only concern was the scheduling of witnesses. (5 RT 1195-1197.)

a. The March 8, 1997, Assault

During the penalty phase, Officer Dewall testified regarding appellant's March 8, 1997, assault of an officer at High Desert State Prison. (6 RT 1216-1217.) During Officer Dewall's testimony, the court indicated that it was going to take a short recess. (6 RT 1233.) Outside the presence of the jury, the court stated that it intended to strike Officer Dewall's testimony. (6 RT 1234.) The court noted that the prosecution had offered Officer Dewall's testimony to show that appellant assaulted an officer, but that Officer Dewall's current testimony offered only a nondescript statement that a confrontation occurred. (*Ibid.*) The court inquired whether the prosecution could show appellant assaulted an officer. (*Ibid.*) The prosecutor indicated he could. (*Ibid.*)

Still outside the presence of the jury, Officer Dewall testified that when officers opened appellant's cell door, appellant had a mattress in front of him and he charged toward officers. (6 RT 1236.) Based on the inclusion of this evidence to Officer Dewall's testimony, the court found the March 8, 1997, unadjudicated offense evidence admissible. (6 RT

1236-1237.) Officer Dewall continued his testimony in the presence of the jury. (6 RT 1237.)

b. The April 18, 2000, Battery

Also during the penalty phase, Officer Gatto testified regarding appellant's April 18, 2000, battery on an officer at Corcoran State Prison. (7 RT 1458-1459.) During Officer Gatto's testimony, the court indicated that it was going to take a short recess. (7 RT 1476.) Outside the presence of the jury, the court inquired as to the admissibility of Officer Gatto's testimony. (*Ibid.*) The prosecutor indicated that it believed appellant's actions violated section 4502 (possession of a manufactured weapon) because he took possession of a pepper spray canister during the incident, appellant's actions were an express use of force or violence when he shattered the glass on his cell door with the pepper spray canister, and appellant's actions constituted vandalism. (7 RT 1476-1477.) The court noted that pepper spray was not tear gas and therefore not a weapon listed in 4502, subdivision (a). (7 RT 1477.) The prosecutor clarified that the pepper spray fell under section 4502, subdivision (b), weapon stock, because appellant could have used the canister and the broken glass as weapons. (*Ibid.*) The court determined that "weapon stock" was not indicated in section 4502, subdivision (b), and the prosecutor further questioned Officer Gatto outside the presence of the jury. Officer Gatto testified that appellant contacted his hand when appellant grabbed the pepper spray canister and pulled it away from Officer Gatto. (7 RT 1478-1480.) Based on the inclusion of this evidence, the court found that the April 18, 2000, unadjudicated offense amounted to a battery under sections 4501.5 and 242 and that it was admissible. (7 RT 1480.) Before continuing Officer Gatto's testimony in the presence of the jury, the court asked appellant's counsel if she had any comment on the matter. (7 RT

1480-1481.) She did not. (*Ibid.*) Officer Gatto continued his testimony in the presence of the jury. (7 RT 1481.)

2. Appellant Forfeited His Claims That the Court Abused Its Discretion When It Admitted Evidence of the March 8, 1997, and April 18, 2000, Unadjudicated Offenses

Appellant failed to object to the admission of the unadjudicated offenses on any ground at trial and therefore has forfeited his claims of error on appeal. The court, on its own accord, questioned whether the officers' testimony satisfied the requirements for admission of unadjudicated offenses under section 190.3, factor (b). (6 RT 1233-1237; 7 RT 1476-1480.) At no time during the discussions regarding the admission of aggravating evidence did appellant object to the evidence as inadmissible on any ground. (See 5 RT 1049-1053, 1192-1197.) In addition, appellant did not join in the court's concerns and did not object to the court's ultimate determination that the evidence was admissible. In fact, when the court asked appellant's trial counsel if she had any comment before allowing Officer Gatto to continue his testimony in front of the jury, appellant's trial counsel indicated she did not. (7 RT 1480-1481.)

Appellant did not object to the admission of the March 8, 1997, and April 18, 2000, unadjudicated offenses on the ground that they lacked "the use or attempted use of force or violence or the express or implied threat to use force or violence." Therefore, he has forfeited his claims that the court abused its discretion when it found the two unadjudicated offenses admissible. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1175; *People v. Lewis* (2008) 43 Cal.4th 415, 529-530; *People v. Montiel* (1993) 5 Cal.4th 877, 928; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 588.)

3. On the Merits, the Court Did Not Abuse Its Discretion in Admitting Evidence of the March 8, 1997, and April 18, 2000, Unadjudicated Offenses

Assuming appellant preserved the issue for appeal, the court reasonably determined that substantial evidence existed to prove that the March 8, 1997, and April 18, 2000, unadjudicated offenses established conduct that "involved the use or attempted use of force or violence or the express or implied threat to use force or violence" as required by section 190.3, factor (b).

a. The March 8, 1997, Assault Involved the Use or Attempted Use of Force or Violence or the Threat Thereof

During the penalty phase, Officer Dewall testified regarding appellant's March 8, 1997, assault on an officer at High Desert State Prison. (6 RT 1216-1217.) According to Officer Dewall, on March 8, 1997, while housed in the Administrative Segregation Unit, appellant and his cellmate, Inmate Frutos, covered their cell door windows with paper and other materials. (6 RT 1217, 1219-1223.) Officers were unable to see inside the cell, and appellant and Frutos repeatedly refused to remove the materials and refused to voluntarily be handcuffed and removed from the cell. (6 RT 1222-1223.) Officers planned a cell extraction. (6 RT 1222.)

Prior to entering the cell, officers deployed multiple bursts of pepper spray into the cell. (6 RT 1224.) Officers followed each round of pepper spray with a request for appellant and Frutos to voluntarily submit to being handcuffed and removed from the cell. (*Ibid.*) Appellant and Frutos repeatedly refused to comply. (*Ibid.*) Officers then opened the cell door approximately four to six inches and discharged two rounds of less-lethal rubber ammunition, one round each from two separate 37-millimeter launchers. (6 RT 1225-1226; People's Exhibit A-1.) Officers followed the discharge of less-lethal ammunition with a request for appellant and Frutos

to voluntarily "cuff-up and exit the cell." (6 RT 1225-1226.) Appellant and Frutos refused to comply. (6 RT 1226.) Officers again opened the cell door and discharged two more rounds of less-lethal ammunition. (*Ibid.*) Appellant and Frutos again refused to comply. (*Ibid.*)

Following appellant and Frutos' continued refusals, eight officers prepared to enter the cell. (6 RT 1227.) When officers opened the cell door to discharge two more rounds of less-lethal ammunition before entering the cell, appellant immediately charged toward officers. (6 RT 1236; People's Exhibit A-1.) Appellant had a mattress held in front of him and physically contacted the officers. (6 RT 1237.) Inmates housed in the Administrative Segregation Unit are not allowed to leave their cells without first being handcuffed. (6 RT 1237.)

The court reasonably determined that substantial evidence existed to prove that the assault involved the use or attempted use of force or violence or the threat thereof to satisfy the requirements of section 190.3, factor (b).[16] Officer Dewall testified that inmates in the Administrative Segregation Unit are not allowed to leave their cell without first being handcuffed. (6 RT 1219-1220, 1237.) Appellant repeatedly refused to be voluntarily cuffed and removed from the cell. (6 RT 1223-1226.) Significantly, appellant refused to voluntarily cuff-up and exit his cell following the second deployment of less-lethal ammunition. (6 RT 1226.) Immediately following this refusal, when officers opened the cell door for the third time to discharge less-lethal ammunition into appellant's cell,

---

[16] Appellant does not argue here that the court abused its discretion in finding substantial evidence existed to prove that appellant committed an assault. In a separate argument, infra, appellant argues there was insufficient evidence for the jury to determine he committed an assault. For consistency, respondent limits the argument here to whether the court abused its discretion in finding the assault involved force or violence under section 190.3, factor (b).

appellant held a mattress in front of him and charged toward officers. (6 RT 1236; People's Exhibit A-1.) Appellant's act of charging toward officers, taken together with his repeated refusals to voluntarily comply with the officers' requests to be handcuffed and removed from the cell and his forcing officers to extract him from his cell, gave rise to the reasonable inference that appellant's intentional act of charging toward officers when they opened the cell door involved the attempted use of force or violence, or at the least, a threat to use force or violence.

Appellant's claim that his actions on March 8, 1997, did not involve the use or attempted use of force or violence or the threat thereof is based entirely on his one-sided view of his actions as "minimal" and his belief that there are innocent explanations for his actions. (AOB 122.) Appellant characterizes his act of attempting to exit his cell as an act of compliance with the officers' demands to exit the cell. (*Ibid.*) He further characterizes his act of holding a mattress in front of him as an attempt to protect the officers so they would not be injured when he came out of his cell. (*Ibid.*)

Appellant's explanations are absurd given the surrounding circumstances of the incident. Appellant was not complying with the officers' requests to exit the cell. Appellant repeatedly refused to comply with the officers' requests to be handcuffed and removed from his cell. (6 RT 1223-1226.) Appellant's last refusal occurred immediately before officers opened the cell door for the third time, and appellant charged toward the officers. (6 RT 1226, 1236; People's Exhibit A-1.) Appellant was not holding the mattress in front of him to protect the officers, as appellant suggests. (AOB 141-142.) Appellant forced officers to initiate a cell extraction and refused to comply with their repeated requests. The evidence shows that he shielded himself with a mattress, stood by the entrance to his cell door, and waited for officers to open the cell door. (6 RT 1236; People's Exhibit A-1.) The record does not support appellant's

innocent explanations. In addition, appellant did not present his innocent explanations to the court before it ruled on the admissibility of the March 8, 1997, unadjudicated offense. Under the circumstances, the court did not abuse its discretion when it concluded that appellant's conduct during the March 8, 1997, assault involved the use or attempted use of force or violence or threat thereof sufficient for admission under section 190.3, factor (b).

b. The April 18, 2000, Battery Involved the Use or Attempted Use of Force or Violence or the Threat Thereof

During the penalty phase, Officer Gatto testified regarding appellant's April 18, 2000, battery on an officer at Corcoran State Prison. (7 RT 1458-1459.) According to Officer Gatto, on April 18, 2000, he notified appellant that appellant was being moved to a different cell. (7 RT 1459-1461.) Appellant was cooperative and asked for time to get his belongings together. (7 RT 1461.) When Officer Gatto returned 20 minutes later, appellant said he had changed his mind, refused to change cells voluntarily, and told Officer Gatto that he would move cells the way he wanted to move. (7 RT 1461-1462.) Officer Gatto obtained a pepper spray canister and deployed a three to five second burst of pepper spray through the food port. (7 RT 1465-1466.) Officer Gatto had his right hand on the canister nozzle and his left hand on the body of the canister. (People's Exhibit H-2.) While Officer Gatto was spraying the pepper spray, appellant reached through the food port and attempted to grab the pepper spray canister. (7 RT 1465-1466, 1470; People's Exhibit H-2.) Appellant's entire arm, up to his shoulder, was outside of the cell. (People's Exhibit H-2.) Officer Gatto quickly stepped out of appellant's reach. (7 RT 1465-1466, 1470; People's Exhibit H-2.) Officer Gatto immediately attempted to deploy more pepper spray through the food port. (People's Exhibit H-2.) When he positioned

the pepper spray in front of the food port, appellant again reached through the food port. (7 RT 1469; People's Exhibit H-2.) This time appellant was able to grab the canister near the nozzle. (*Ibid.*) Officer Gatto tried to maintain a hold of the canister but after a brief struggle, appellant pulled it out of Officer Gatto's hands and into the cell. (*Ibid.*) Appellant contacted Officer Gatto's hand when he grabbed the canister. (7 RT 1479-1481; People's Exhibit H-2.) Officers closed the food port, and Officer Gatto retrieved a second pepper spray canister. (7 RT 1471.) Approximately 40 ounces of pepper spray remained in the canister appellant pulled into his cell. (7 RT 1483.)

While Officer Gatto was retrieving the additional pepper spray, appellant struck the cell window repeatedly with the pepper spray canister he had inside his cell. (7 RT 1471.) Appellant shattered the window, and glass was projected outward onto the floor. (*Ibid.*) Officers placed a shield in front of appellant's cell door. (7 RT 1471; People's Exhibit H-2.) Officers again opened the food port and deployed pepper spray into appellant's cell. (7 RT 1472.) Appellant placed his mattress in front of the food port to block the pepper spray. (7 RT 1472; People's Exhibit H-2.) When officers pulled part of the mattress through the food port and deployed more pepper spray, appellant again reached through the food port and attempted to grab the second pepper spray canister. (7 RT 1472; People's Exhibit H-2.) Officer Gatto pulled the canister out of appellant's reach, and appellant continued to grab for the canister. (People's Exhibit H-2.) Officer Gatto then deployed the pepper spray through a small opening on the side of the cell door. (7 RT 1473.) At that point, appellant requested to be removed from his cell and gave the pepper spray canister to officers through the food port. (7 RT 1474.)

The court reasonably determined that substantial evidence existed to prove that the battery on Officer Gatto involved the use or attempted use of

force or violence or the threat thereof to satisfy the requirements of section 190.3, factor (b).[17] Appellant refused to be voluntarily handcuffed and removed from his cell. He wanted to move the way he wanted to move. (7 RT 1462.) During the very first deployment of pepper spray, appellant reached his entire arm out of his cell through the food port and repeatedly attempted to grab the pepper spray canister from Officer Gatto's hands. (7 RT 1465-1466, 1470; People's Exhibit H-2.) Officer Gatto was able to avoid appellant's reach. (People's Exhibit H-2.) When Officer Gatto attempted to deploy additional pepper spray, appellant again reached through the food port, contacted Officer Gatto's hand, and, after a short struggle, pulled the canister from Officer Gatto's hands. (7 RT 1469; People's Exhibit H-2.) Appellant contacted Officer Gatto's hand when he grabbed the canister. (7 RT 1479-1481; People's Exhibit H-2.)

Appellant's conduct of touching Officer Gatto's hand and pulling the canister away from Officer Gatto's grip, taken together with the surrounding circumstances, gave rise to the reasonable inference that appellant's conduct of touching Officer Gatto's hand, a battery, involved the attempted use of force or violence, or at the least, a threat to use force or violence. (*People v. Thomas* (2011) 51 Cal.4th 449, 504-505 [evidence that defendant sucked on victim's neck, leaving a bruise, "admissible under section 190.3, factor (b) as 'criminal activity by the defendant which involved the use or attempted use of force or violence' "]; *People v. Hamilton* (2009) 45 Cal.4th 863, 933-934 [evidence that defendant spit on

---

[17] Appellant does not argue here that the court abused its discretion in finding substantial evidence existed to prove that appellant committed a battery. In a separate argument, infra, appellant argues there was insufficient evidence for the jury to determine he committed a battery. For consistency, respondent limits the argument here to whether the court abused its discretion in finding the battery involved force or violence under section 190.3, factor (b).

an officer admissible under section 190.3, factor (b) as a battery that involved the use or attempted use of force or violence]; *People v. Burgener* (2003) 29 Cal.4th 833, 868 [evidence that defendant threw water at a correctional officer admissible under section 190.3, factor (b) as a battery that involved the use or attempted use of force or violence].) Under the circumstances, the trial did not abuse its discretion when it concluded that appellant's conduct during the April 18, 2000, battery involved the use or attempted use of force or violence or the threat thereof sufficient for admission under section 190.3, factor (b).

4. Admission of the March 8, 1997, and April 18, 2000, Unadjudicated Offenses Did Not Violate the Federal Constitution

Appellant contends that the erroneous admission of the March 8, 1997, and April 18, 2000, unadjudicated offense violated the federal Constitution because they skewed the sentence-selection process toward death and were irrelevant to the jury's penalty determination because they were "*de minimus*" violent conduct. (AOB 134-139.) As already shown, appellant forfeited any claim that the court abused its discretion in admitting evidence of the March 8, 1997, and April 18, 2000, unadjudicated offenses under section 190.3, factor (b). In addition, on the merits, the court did not abuse its discretion in finding that the two unadjudicated offenses involved the use or attempted use of force or violence or the express or implied threat of force or violence sufficient for admission under section 190.3, factor (b). Therefore, because the court properly admitted the unadjudicated offenses as aggravating evidence pursuant to section 190.3, factor (b), the evidence did not impermissibly skew the jury's penalty determination toward death and the evidence was not constitutionally irrelevant to the jury's penalty determination.

C. Appellant Forfeited his Claims That there Was Insufficient Evidence to Support Seven of the Unadjudicated Offenses; On the Merits, There is Sufficient Evidence Appellant Committed the Seven Unadjudicated Offenses Beyond a Reasonable Doubt

Appellant contends there was insufficient evidence for the jury to find beyond a reasonable doubt that he committed seven of the 11 unadjudicated offenses presented in the penalty phase. (AOB 140-174.) Specifically, appellant contends there was insufficient that he: (1) committed an assault on March 8, 1997; (2) committed a battery on March 12, 1997; (3) committed an assault or battery on March 13, 1997; (4) committed an assault or possessed a weapon on November 13, 1999; (5) possessed a weapon on March 29, 2000; (6) possessed a weapon on April 15, 2000; and (7) committed a battery on April 18, 2000. (*Ibid.*) Appellant forfeited his claims because he failed to object to the sufficiency of this evidence at trial.

1. Appellant Forfeited His Claims That There Was Insufficient Evidence to Support a Finding He Committed the Seven Unadjudicated Offenses Beyond a Reasonable Doubt

Following the guilt phase, the court inquired of the evidence the prosecution would present during the penalty phase. (5 RT 1192.) The prosecutor stated that he would present evidence of unadjudicated offenses pursuant to section 190.3, factor (b), listed the dates and general descriptions of the unadjudicated offenses, and stated that the unadjudicated offenses violated section 4501.5 (battery by prisoner on a non-confined person) and 4502 (possession of a manufactured weapon). (5 RT 1192-1193.) Subsequently, when the court inquired whether either party "anticipate[d] any evidentiary problems as far as the penalty phase, motions in limine, anything of that nature," appellant's only concern was the scheduling of witnesses. (5 RT 1195-1197.)

At the penalty phase, Officer Dewall testified regarding the March 8, 1997, cell extraction of appellant at High Desert State Prison. (6 RT 1216-1217.) During Officer Dewall's testimony, the court, on its own accord, questioned whether appellant's conduct evidenced a criminal offense. (6 RT 1233-1234.) After the prosecutor further questioned Officer Dewall outside the presence of the jury, the court was satisfied that appellant committed an assault and allowed Officer Dewall to continue his testimony. (6 RT 1236-1237.) Appellant did not indicate that he joined in the court's concerns or disagreed with the court's ultimate decision.

Also during the penalty phase, Officer Gatto testified regarding the April 18, 2000, cell extraction of appellant at Corcoran State Prison. (7 RT 1458-1459.) During Officer Gatto's testimony, the court, on its own accord, questioned whether appellant's conduct evidenced a criminal offense. (7 RT 1476-1480.) After the prosecutor further questioned Officer Gatto outside the presence of the jury, the court was satisfied that appellant had committed a battery and allowed Officer Gatto to continue his testimony. (7 RT 1478-1480.) Appellant did not indicate that he joined in the court's concerns or disagreed with the court's ultimate decision. In fact, when the court asked appellant's trial counsel if she had any comment, appellant's trial counsel stated she did not. (7 RT 1480-1481.)

Finally, during the penalty phase, numerous witnesses testified about other incidents of appellant's violent conduct in prison. Appellant did not object to, or move to exclude or strike, the evidence on the ground that the evidence was insufficient to support a finding that appellant committed the unadjudicated offenses. Appellant also did not contest the sufficiency of evidence when the prosecution rested its penalty phase case or anytime thereafter.

Appellant forfeited his claims that there was insufficient evidence of the seven unadjudicated offenses. On appeal, a criminal defendant may

challenge the sufficiency of the evidence to support a conviction without an objection. (*People v. Livingston, supra,* 53 Cal.4th at p. 1175.) However, as this Court explained in *People v. Montiel, supra,* 5 Cal.4th 877,

> Even if defendant need do nothing at trial to preserve an appellate claim that evidence supporting his *conviction* is legally insufficient, a different rule is appropriate for evidence presented at the penalty phase of a capital trial. There the ultimate issue is the appropriate punishment for the capital crime, and evidence on that issue may *include* one or more other discrete criminal incidents. (§ 190.3, factor (b), (c).) If the accused thinks evidence on any such discrete crime is too insubstantial for jury consideration, he should be obliged in general terms to object, or to move to exclude or strike the evidence, on that ground. [Citations.]

(*Id.* at p. 928, fn. 23; see also *People v. Livingston, supra*, at p. 1175.) Because appellant did not object to, or move to exclude or strike, any of the evidence on the grounds that it was insufficient, he has forfeited his claims of error on appeal.

2. On the Merits, Sufficient Evidence Supports a Finding Appellant Committed the Seven Unadjudicated Offenses beyond a Reasonable Doubt

a. Sufficient Evidence Supports a Finding That Appellant Committed an Assault on March 8, 1997, and That His Actions Were Not Done in Lawful Self-Defense

Appellant contends there was insufficient evidence he committed an assault on March 8, 1997, during a cell extraction at High Desert State Prison. (AOB 140-149.) In support of his claim, appellant offers innocent explanations for his actions. (AOB 140-143.) Appellant further argues that the prosecution failed to prove beyond a reasonable doubt that he was not acting in lawful self-defense in response to officers' unreasonable and excessive force. (AOB 143-149.) Respondent disagrees.

(1) The Evidence and the Court's Instructions

As described more thoroughly above in Argument V, subsection B(3)(a), and adopted fully herein, appellant and Frutos covered their cell door windows on March 8, 1997. (6 RT 1217, 1219-1223.) Appellant and Frutos refused to remove the materials and repeatedly refused to be voluntarily handcuffed and removed from the cell before, during, and after the officers deployed pepper spray and discharged less-lethal ammunition into the cell in an attempt to obtain appellant and Frutos' compliance. (6 RT 1222-1227; People's Exhibit A-1.) When officers opened the cell door to discharge the last two rounds of less-lethal ammunition before entering the cell, appellant immediately charged toward the officers. (6 RT 1237; People's Exhibit A-1.)

To determine if appellant committed an assault, the court instructed the jury with CALJIC Nos. 9.00 (Assault-Defined) and 9.01 (Assault-Present Ability to Commit Injury Necessary). (10 CT 2732-2734.) Out of an abundance of caution, the court also instructed the jury regarding unreasonable and excessive force and lawful self-defense. (7 RT 1610-1612; 8 RT 1627-1631.) As relevant to the issue of lawful self-defense, the court included the following paragraph in CALJIC No. 9.00:

> A willful application of physical force upon the person of another is not unlawful when done in lawful self-defense against the use of excessive force by a correctional officer. The People have the burden to prove that the application of physical force was not in lawful self-defense. If you have a reasonable doubt that the application of physical force was unlawful, you may not consider that activity as a circumstance in aggravation.

(10 CT 2732-2733, brackets omitted.) Also relevant to the issue of lawful self-defense, the court instructed the jury with CALJIC Nos. 9.26 (Arrest or Detention-Use of Reasonable Force-Duty to Submit) and 5.51 (Self-Defense-Actual Danger Not Necessary):

A correctional officer may lawfully require a prisoner to move from one cell to another for purposes of prison administration, and if a prisoner refuses to comply with lawful directions the correctional officer may use reasonable force to compel compliance.

The officer need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the prisoner.

Where a correctional officer is in the lawful performance of his duties, and the prisoner has knowledge, or by the exercise of reasonable care should have knowledge, that he is being given lawful directions by a correctional officers, it is the duty of the prisoner to refrain from using force or any weapon to resist the directions of the correctional officer unless unreasonable or excessive force is being used against the prisoner.

However, if you find that the correctional officer used unreasonable or excessive force in controlling the prisoner, the prisoner may lawfully use reasonable force to defend himself against the use of the excessive force.

(10 CT 2737; CALJIC No. 9.26, brackets omitted.)

Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in [his] [her] mind, as a reasonable person, an actual belief and fear that [he] [she] is about to suffer excessive force, and if a reasonable person in a like situation, seeing and knowing the same facts, would be justified in believing [himself] [herself] in like danger of suffering excessive force and if that individual so confronted acts in self-defense upon these appearances and from that fear and actual beliefs, the person's right of self-defense is the same whether the danger is real or merely apparent.

(10 CT 2738; CALJIC No. 5.51, brackets in original.)

(2) Sufficient Evidence of Assault

An assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) "'The "violent injury" here mentioned is not synonymous with "bodily harm," but includes any wrongful act committed by means of physical force against the person

of another....' [Citation.]" (*People v. Rocha* (1971) 3 Cal.3d 893, 899, fn. 12.) "'In other words, *force* against the person is enough, it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave any mark.' [Citation.]" (*Ibid.*) Assault requires "an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*People v. Williams* (2001) 26 Cal.4th 779, 790.) In addition, the present ability element "is satisfied when 'a defendant has attained the means and location to strike immediately.' [Citations.] In this context, however, 'immediately' does not mean 'instantaneously.' It simply means that the defendant must have the ability to inflict injury on the present occasion." (*People v. Chance* (2008) 44 Cal.4th 1164, 1168.)

Appellant's claim of insufficient evidence is based entirely on his one-sided view that his actions have innocent explanations. (AOB 141-143.) For example, appellant asserts that he did not charge toward officers, but "simply attempt[ed] to come to the front of the cell, as he had been ordered to do...." (AOB 141.) He further suggests that he went to the front of the cell because the less-lethal ammunition caused him to be disorientated. (AOB 141-142.) Finally, appellant asserts that he carried the mattress in front of him not only for his own protection, but for the officers' protection. (AOB 142.)

The record does not support appellant's innocent explanations. This Court's task is to look at all of the evidence, along with the inferences that reasonably could be deduced therefrom, not isolated bits of evidence. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1203; *People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Officer Dewall testified that inmates were not allowed to leave their cells without first being handcuffed. (6 RT 1219-1220, 1237.) During the course of the incident, appellant repeatedly refused to voluntarily cuff-up and exit the cell. (6 RT 1223-1226.) Telling

of his true intentions was appellant's refusal between the second and third set of less-lethal ammunition. (6 RT 1226; People's Exhibit A-1.) Immediately following this refusal, officers opened the cell door to discharge a third set of less-lethal ammunition. (6 RT 1237; People's Exhibit A-1.) Before officers could fire the ammunition into the cell, appellant met officers at the entrance of the cell with a mattress in front of him and charged toward officers. (*Ibid.*) This evidence and the reasonable inferences establish that appellant was not complying with the officers' demands to exit the cell, was not disorientated, and was not carrying the mattress to protect the officers. Instead, the evidence shows that appellant refused to exit his cell voluntarily, waited by his cell door for officers to open the cell door again, and then intentionally charged toward officers at the most unsuspecting and opportune time.

Moreover, the jury, who had the benefit of watching the video recording of the incident, was entitled to credit Officer Dewall's characterization of appellant's actions as "charging" and, given appellant's repeated refusals to voluntarily cuff-up, could determine appellant's actions were intentional and willful.

A reasonable jury could also find that a reasonable person in appellant's position would have realized that charging toward officers standing directly outside his cell would result in physical force being applied to those officers. Appellant was aware that officers were outside his cell preparing to enter and remove him from the cell; the cell door had to be opened a number of times to discharge less-lethal ammunition into the cell. (6 RT 1225-1226; People's Exhibit A-1.) Knowing that officers were standing outside his cell door, appellant would have known that if he charged out of his cell directly toward those officers he would apply physical force to those officers when he made contact with them.

Finally, a reasonable jury could find that appellant had the present ability to apply force to the officers. Appellant positioned himself at the cell door's entrance. (People's Exhibit A-1.) When the cell door opened, appellant was able to charge toward officers through the opened cell door. (6 RT 1237; People's Exhibit A-1.) Therefore, on the entire record, substantial evidence supports a finding that appellant committed an assault on March 8, 1997.

(3) Acts Not Done in Lawful Self-Defense

Despite the court's instructions, appellant did not argue at trial that the officers' actions were unlawful or excessive, or that he acted in self-defense. On the contrary, appellant and his trial counsel admitted that appellant intentionally forced the cell extractions. (8 RT 1692-1693; 9 CT 2422.) Nevertheless, the evidence presented to the jury did not support a finding that appellant acted in lawful self-defense.

Appellant's actions were not done in lawful self-defense in response to unreasonable or excessive force. The prosecution proved beyond a reasonable doubt that officers did not use unreasonable or excessive force. The uncontroverted evidence showed that it was a violation of institutional rules for inmates to cover their cell door windows, even if officers could still see inside the cell through the food port.[18] (6 RT 1222-1223, 1250-

---

[18] On appeal, appellant attacks the rule prohibiting inmates from covering their cell door windows. (AOB 146-147.) He argues that it was unreasonable for officers to use any force in this situation because officers could have looked through the unblocked food port to account for inmates. (*Ibid.*) Appellant ignores that it was a violation of institutional rules for inmates to cover their cell door windows. (6 RT 1222-1223, 1250-1251.) He also ignores that it would be unreasonable for officers to look through an unblocked food port to see inside the cell. As the evidence at the penalty phase showed, looking through the food port to see inside a cell was not a reasonable alternative. On one occasion, appellant reached through the food port and grabbed an officer and the pepper spray canister the officer

(continued...)

1251.) Appellant violated this rule when he repeatedly refused to remove the materials covering his cell door windows. (6 RT 1222-1223.) Appellant also repeatedly refused to submit to being handcuffed and removed from his cell so officers could remove the materials from the cell door windows. (6 RT 1224.) Appellant's actions forced officers to initiate procedures to remove appellant from his cell. (6 RT 1222.)

The evidence was uncontroverted that the use of pepper spray to gain an inmate's compliance to be handcuffed and removed from his cell was not unreasonable or excessive force. Officer Dewall testified that when a cell extraction is deemed necessary, officers first deploy pepper spray into the cell to attempt to gain an inmate's compliance. (6 RT 1218.) Officers deploy the pepper spray into the cell three times in two-second bursts. (6 RT 1223-1224.) Officers wait a few minutes between each deployment. (*Ibid.*) Here, the officers' actions were consistent with that procedure.

Officer Dewall notified appellant that if he continued to refuse to remove the window coverings and refused to voluntarily be placed in handcuffs and removed from his cell, officers would use pepper spray and physical force, if necessary, to remove him from his cell. (People's Exhibit A-2.) Despite the notification, appellant refused, and continued to refuse, after each deployment of pepper spray. (6 RT 1224.) No evidence was

---

(...continued)
was holding. (7 RT 1469-1470, People's Exhibit H-2.) On another occasion, appellant threw a substance containing urine and feces at officers through the food port. (6 RT 1239-1240.) On yet another occasion, appellant threw sharp pieces of his broken television set at officers through the food port. (6 RT 1346.) Clearly, it was not a reasonable alternative for officers to rely on an unblocked food port to see inside the cell. Therefore, the use of pepper spray and less-lethal ammunition to remove an inmate who refused to remove materials from their cell door windows and repeatedly refused to voluntarily be handcuffed and removed from the cell was not unreasonable force.

presented at trial that the prison's policy of using pepper spray, or its specific deployment of pepper spray on March 8, 1997, was unreasonable or excessive force in response to appellant's repeated refusals to remove the materials from his cell door windows and his repeated refusals to submit to being handcuffed and removed from his cell. In other words, "[t]he evidence ... did not raise any legal justification for [appellant's] actions, and, therefore the prosecution was not required to introduce evidence negating any possible justification for the activities. [Citation.]" (*People v. Moore* (2011) 51 Cal.4th 1104, 1136.) From the evidence on this record, a reasonable trier of fact could reasonably conclude that officers used necessary, not excessive, force to discharge their duty to secure appellant and remove him from the cell.

The evidence was also uncontroverted that the use of less-lethal ammunition to gain an inmate's compliance and to make it safer for officers to enter the cell was not unreasonable or excessive force.[19] Officer Dewall testified that the 37-millimeter launcher is a "departmentally approved" weapon for use in cell extractions in order to distract, intimidate, and force

---

[19] On appeal, citing *Madrid v. Gomez* (1995) 889 F.Supp.1146, 1175 (*Madrid*), appellant argues that the use of less-lethal ammunition during cell extractions has been criticized. (AOB 147-148.) First, this evidence appellant now cites on appeal, or any evidence criticizing the use of less-lethal ammunition, was not presented at trial. In fact, no evidence was presented at trial to cast doubt on High Desert State Prison's "departmentally approved" use of the 37-millimeter launcher. (6 RT 1225.) Second, even if *Madrid* is considered persuasive on appeal (*People v. Gonzales* (2011) 52 Cal.4th 254, 296 [lower federal court persuasive but not controlling), *Madrid* did not believe that the use of less-lethal ammunition should be prohibited. (*Madrid, supra,* at 1178.) *Madrid's* criticism of less-lethal ammunition occurred in the context of the court's concern that cell extractions at Pelican Bay State Prison were being used as opportunities to punish and inflict pain on inmates. (*Ibid.*) No such concern was presented or occurred in this case.

inmates away from the cell doors for staff to enter the cells without resistance. (6 RT 1225-1226, 1253, 1255.) He further testified that officers discharge six rounds, two at a time, into the cell. (6 RT 1226.) Officers wait between each set of rounds and request that inmates voluntarily cuff-up and exit the cell. (*Ibid.*) On March 8, 1997, officers followed these procedures, and appellant refused to comply during each request. (6 RT 1226.) No evidence was presented at trial that the prison's policy of using less-lethal ammunition, or the prison's specific use of less-lethal ammunition on March 8, 1997, was unreasonable or excessive force in response to appellant's repeated refusals to submit to being handcuffed and removed from his cell. As a result, the prosecution proved beyond a reasonable doubt that the officers did not use unreasonable or excessive force to remove appellant from his cell on March 8, 1997. In other words, "[t]he evidence ... did not raise any legal justification for [appellant's] actions, and, therefore the prosecution was not required to introduce evidence negating any possible justification for the activities. [Citation.]" (*People v. Moore, supra,* 51 Cal.4th at p. 1136.) From the evidence on this record, a reasonable trier of fact could reasonably conclude that officers used necessary, not excessive, force to discharge their duty to secure appellant and remove him from the cell.

The prosecution also proved beyond a reasonable doubt that officers did not engage in behavior appellant believed put him in danger of suffering excessive force. Appellant repeatedly refused to be handcuffed and removed from his cell. (6 RT 1222-1224, 1226.) He refused to comply after Officer Dewall told him that pepper spray would be deployed into the cell and he would be physically removed from the cell, if necessary. (People's Exhibit A-2.) Appellant refused to comply after each deployment of pepper spray. (6 RT 1223-1224.) Appellant refused to comply after the first set of less-lethal ammunition rounds. (6 RT 1226.) Appellant refused

to comply after the second set of less-lethal ammunition. (*Ibid.*) Immediately after appellant's refusal, appellant charged toward the officers when they opened the cell door to administer the third set of less-lethal ammunition and to remove him from the cell. (6 RT 1228, 1237; People's Exhibit A-2.) Appellant's continued refusals, knowing that officers would deploy pepper spray and less-lethal ammunition, prove beyond a reasonable doubt that he did not believe the officers' actions put him in danger of suffering excessive force.

Under all the circumstances, the prosecution proved beyond a reasonable doubt that appellant committed an assault and that appellant's action of charging toward officers was not done in lawful self-defense. As a result, appellant's claim there was insufficient evidence to prove he committed an assault on March 8, 1997, is without merit.

b. Sufficient Evidence Supports a Finding that Appellant Committed a Battery on a Non-Confined Person on March 12, 1997

Appellant contends there is insufficient evidence to support a finding he committed a battery on a non-confined person on March 12, 1997. (AOB 149-150.) Appellant does not contest that a battery occurred, only that the evidence does not show beyond a reasonable doubt he was the person, or one of the people, who threw a milk carton filled with a substance containing urine and feces through the food port. (*Ibid.*) Respondent disagrees.

On March 12, 1997, appellant and his cellmate, Romo, covered their cell windows. (6 RT 1238.) Officers repeatedly requested that appellant and Romo remove the materials from the windows. (*Ibid.*) Appellant and Romo refused to comply with the officers' requests. (*Ibid.*)

In an attempt to see where appellant and Romo were positioned inside the cell, Officer Dewall placed a Plexiglas shield in front of the cell door,

opened the food port, and shined a flashlight into the cell through the food port. (6 RT 1239.) As Officer Dewall was attempting to look inside the cell, two small milk cartons were thrown through the food port. (*Ibid.*) Both cartons struck the Plexiglas shield, and a yellowish-brown substance smelling of feces and urine splashed from the cartons onto the Plexiglas shield and Officer Dewall's right arm, face, and head. (*Ibid.*) The substance also splashed on Officer Hahn who was standing nearby. (6 RT 1240.) Officer Dewall did not see who threw the cartons through the food port. (6 RT 1257.) Subsequently, appellant and Romo continued to refuse to comply, and officers prepared to remove appellant and Romo from their cell. (*Ibid.*)

The evidence supports a finding that appellant and Romo each threw one of the milk cartons through the food port. Officer Dewall testified that two small milk cartons were thrown through the food port. (6 RT 1239.) Both milk cartons hit the Plexiglas shield that was positioned in front of the food port and splashed a substance onto Officer Dewall. (*Ibid.*) Officer Dewall immediately closed the food port. (6 RT 1240.) From this evidence, a reasonable inference could be made that the two milk cartons were simultaneously, or in rapid succession, thrown through the food port because the food port was closed immediately thereafter.

The jury had the benefit of being able to determine the approximate size of the food port on appellant and Romo's cell door. Officer Dewall testified that on March 12, 1997, appellant was in section A-5, cell 217. (6 RT 1238.) He also testified that a few days earlier, on March 8, 1997, appellant was in section A-5, cell 116. (6 RT 1221.) A video recording was taken of the March 8, 1997, incident. (People's Exhibit A-1.) The video of the March 8, 1997, incident provided an example of the size and location of the food port on appellant and Romo's cell door in section A-5.

From an entirety of the evidence, a reasonable inference was that both Romo and appellant each threw a milk carton through the food port. As the evidence shows, the milk cartons were thrown either simultaneously or in rapid succession through a relatively small opening in the cell door with enough force to cause the substance inside the cartons to splatter out of the cartons after striking the Plexiglas shield. For such accuracy to occur, appellant and Romo each would have had to have thrown a carton. Accuracy would not have been present if one person threw two milk cartons, either one in each hand or two in one hand. On the entire record, a rational trier of fact could find that appellant personally threw one of the milk cartons containing urine and feces and therefore committed the March 12, 1997, battery beyond a reasonable doubt.

Even if the evidence does not support a finding appellant personally threw one of the milk cartons, the record supports a finding appellant aided and abetted Romo in committing a battery on Officer Dewall. "[A]n aider and abettor is a person who, 'acting with ... knowledge of the unlawful purpose of the perpetrator; and ... the intent or purpose of committing, encouraging, or facilitating the commission of the offense, ... by act or advice aids, promotes, encourages or instigates, the commission of the crime.' " (*People v. Prettyman* (1996) 14 Cal.4th 248, 259, quoting *People v. Beeman* (1984) 35 Cal.3d 547, 561.)

Here, both Romo and appellant repeatedly refused to abide by Officer Dewall's demands to remove the coverings from the cell windows, cuff-up, and exit the cell. (6 RT 1238.) Appellant knew that if he refused to comply, officers would forcibly remove him from the cell. Four days earlier, appellant and his former cellmate, Frutos, covered their cell windows, refused to remove the coverings, and forced officers to enter the cell. (6 RT 1221-1223, 1227-1228.) Given appellant and Romo's refusals to comply, it was a reasonable conclusion that appellant and Romo were in

agreement that they would force officers to extract them from their cell. It was also reasonable to conclude that because of appellant and Romo's collusion, appellant knew that two milk cartons containing urine and feces were inside his cell and that Romo was going to throw them at officers. On the evidence presented, the jury could reasonably conclude that appellant, acting with the intent for Romo to commit a battery, and with knowledge that Romo would throw the milk cartons containing urine and feces at an officer, encouraged or instigated the battery by colluding with Romo to force officers to initiate a cell extraction. Under all the circumstances, the prosecution proved beyond a reasonable doubt appellant committed a battery. As a result, appellant's claim there was insufficient evidence to prove he committed a battery on March 12, 1997, is without merit.

c. Sufficient Evidence Supports a Finding That Appellant Committed a Battery on a Non-Confined Person on March 13, 1997, and That His Actions Were Not Done in Lawful Self-Defense

Appellant contends there was insufficient evidence he assaulted an officer on March 13, 1997. (AOB 151-155.) He argues that the prosecution failed to establish the elements of assault or battery and failed to establish that his actions were not done in lawful self-defense. (AOB 153-155.) Respondent disagrees.

(1) The Evidence and the Court's Instructions

On March 13, 1997, following the "gassing" and officers' requests for appellant and Romo to voluntarily submit to being handcuffed and removed from their cell, officer prepared to extract appellant and Romo from the cell. (6 RT 1240.) Prior to entering, officers deployed pepper spray through a small opening on the side of the cell door. (6 RT 1242-1243.) Each deployment of pepper spray was followed by a request for appellant

and Romo to cuff-up and exit the cell. (6 RT 1242-1243.) Appellant and Romo refused to comply. (6 RT 1243.) Officers then discharged two rounds of less-lethal rubber ammunition from a 37-millimeter launcher into the cell, followed by a request for appellant and Romo to voluntarily cuff-up and exit the cell. (6 RT 1244.) Appellant and Romo again refused to comply, and officers discharged two more rounds of less-lethal ammunition into the cell. (*Ibid.*) Officers repeated the above sequence once more, and appellant and Romo again refused to comply.

Following appellant and Romo's continued refusals, six officers entered the cell. (6 RT 1245.) Appellant and Romo physically and violently fought with the officers. (*Ibid.*) Officer Dewall rated appellant and Romo's level of violence as a nine on a scale of 10. (*Ibid.*) Shortly after entering the cell, two officer exited the cell before appellant and Romo could be restrained. (*Ibid.*) Officer Dewall entered the cell and saw appellant on top of Officer Hornbeck who was lying on his back near the cell door. (6 RT 1246.) Appellant was hitting Officer Hornbeck in the chest. (6 RT 1246.) Officer Dewall obtained a baton and struck appellant six times in the upper torso. (6 RT 1246-1247.) Appellant continued to hit Officer Hornbeck while Officer Dewall hit appellant with the baton. (6 RT 1247) Appellant eventually rolled off Officer Hornbeck, and officers subdued appellant. (*Ibid.*)

To determine if appellant committed a battery on a non-confined person (§ 4501.5), the court instructed the jury with CALJIC No. 7.37 as follows:

> Every person confined in a state prison of this state who willfully [and unlawfully] uses any force or violence upon the person of any individual not a confined person therein is guilty of the crime of battery by prisoner on non-confined person in violation of Penal Code Section 4501.5.

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

1. A person used force or violence upon another;

2. The use of force or violence was willful [and unlawful];

3. The person who used force or violence was at the time confined in a state prison of this state; and

4. The person upon whom the force or violence was inflicted was not at the time confined within that prison.

[The use of force or violence is not unlawful when done in lawful[self-defense]. The burden is on the People to prove that the use of force or violence was not in lawful [self-defense]. If you have a reasonable doubt that the use of force or violence was unlawful, you must find the defendant not guilty.]

(10 CT 2735, brackets in original.) The court further defined for the jury "force and violence" as relevant to battery:

As used in the foregoing instruction, the words "force" and "violence" are synonymous and mean any [unlawful] application of physical force against the person of another, even though it causes no pain or bodily harm or leaves no mark and even though only the feelings of such person are injured by the act. The slightest [unlawful] touching, if done in an insolent, rude, or an angry manner, is sufficient.

It is not necessary that the touching be done in actual anger or with actual malice; it is sufficient if it was unwarranted and unjustified.

The touching essential to a battery may be a touching of the person, of the person's clothing, or of something attached to or closely connected with the person.

(10 CT 2736, brackets in original.) Finally, out an abundance of caution (7 RT 1610-1612; 8 RT 1627-1631), the court instructed the jury with CALJIC Nos. 9.26 (Arrest or Detention-Use of Reasonable Force-Duty to Submit) and 5.51 (Self-Defense-Actual Danger Not Necessary). (10 CT 2737-2738.)

(2) Sufficient Evidence of Battery

Ample evidence supports a finding that appellant committed a battery on March 13, 1997. A reasonable jury could find beyond a reasonable doubt appellant used force or violence upon Officer Hornbeck and that his use of force was willful. Appellant physically and violently fought with officers when the officers entered the cell. (6 RT 1245.) Upon this evidence alone, the jury could find that appellant used willful force or violence upon another. But there is more. Appellant got on top of Officer Hornbeck as Officer Hornbeck lay on his back on the ground and repeatedly hit Officer Hornbeck in the chest.[20] (6 RT 1246-1247.)

(3) Act Not Done in Lawful Self-Defense

Despite the court's instructions, appellant did not argue at trial that the officers' actions were unlawful or excessive, or that he acted in self-defense. On the contrary, appellant and his trial counsel admitted that appellant intentionally forced the cell extractions. (8 RT 1692-1693; 9 CT 2422.) Nevertheless, the evidence presented to the jury did not support a finding that appellant acted in lawful self-defense.

Appellant's actions were not done in lawful self-defense in response to unreasonable or excessive force. The prosecution proved beyond a reasonable doubt that officers did not use unreasonable or excessive force. The uncontroverted evidence showed that it was a violation of institutional rules for inmates to cover their cell door windows, even if officers could look inside the cell through the food port.[21] (6 RT 1222-1223, 1250-1251.)

---

[20] Appellant does not challenge the sufficiency of evidence on elements three and four of CALJIC No. 7.37, that appellant was confined and Officer Hornbeck was not confined in a state prison when appellant used force or violence on Officer Hornbeck. (10 CT 2735.)

[21] On appeal, appellant attacks the rule prohibiting inmates from covering their cell door windows. (AOB 154.) He argues that it was

(continued...)

Appellant violated this rule when he repeatedly refused to remove the materials covering his cell door windows. (6 RT 1238, 1241.) Appellant also repeatedly refused to submit to being handcuffed and removed from his cell so officers could remove the materials from the cell door windows. (6 RT 1240.) Appellant's actions forced officers to initiate procedures to remove appellant from his cell. (6 RT 1240-1241.)

The evidence was uncontroverted that the use of pepper spray to gain an inmate's compliance to be handcuffed and removed from his cell was not unreasonable or excessive force. As discussed above, Officer Dewall testified that when a cell extraction is deemed necessary, officers first deploy pepper spray into the cell to attempt to gain an inmate's compliance. (6 RT 1218; see also 6 RT 1223-1224.) Here, on March 13, 1997, Officer Dewall followed the prison's policy. (6 RT 1242-1243.) After each deployment of pepper spray, appellant refused to cuff-up and exit the cell. (6 RT 1243.) No evidence was presented at trial that the prison's policy of using pepper spray, or its specific deployment of pepper spray on March 13, 1997, was unreasonable or excessive force in response to appellant's repeated refusals to remove the materials from his cell door windows and his repeated refusals to submit to being handcuffed and removed from his cell. In other words, "[t]he evidence ... did not raise any legal justification for [appellant's] actions, and, therefore the prosecution was not required to introduce evidence negating any possible justification for the activities. [Citation.]" (*People v. Moore, supra,* 51 Cal.4th at p. 1136.) From the evidence on this record, a reasonable trier of fact could reasonably conclude

---

(...continued)
unreasonable for officers to use any force in this situation because officers could have looked through the unblocked food port to account for inmates. (*Ibid.*) It was not a reasonable alternative for officers to rely on an unblocked food port to see inside the cell. (See fn. 18.)

that officers used necessary, not excessive, force to discharge their duty to secure appellant and remove him from the cell.

The evidence was also uncontroverted that the use of less-lethal ammunition to gain an inmate's compliance and to make it safer for officers to enter the cell was not unreasonable or excessive force. (See fn. 19.) As discussed above, Officer Dewall testified that the 37-millimeter launcher is a "departmentally approved" weapon for use in cell extractions in order to distract, intimidate, and force inmates away from the cell doors for staff to enter the cells without resistance. (6 RT 1225-1226, 1253, 1255.) On March 13, 1997, officers followed these procedures, and appellant refused to comply during each request. (6 RT 1244.) No evidence was presented at trial that the prison's policy of using less-lethal ammunition, or the prison's specific use of less-lethal ammunition on March 13, 1997, was unreasonable or excessive force in response to appellant's repeated refusals to submit to being handcuffed and removed from his cell. In other words, "[t]he evidence ... did not raise any legal justification for [appellant's] actions, and, therefore the prosecution was not required to introduce evidence negating any possible justification for the activities. [Citation.]" (*People v. Moore, supra,* 51 Cal.4th at p. 1136.) From the evidence on this record, a reasonable trier of fact could reasonably conclude that officers used necessary, not excessive, force to discharge their duty to secure appellant and remove him from the cell.

The prosecution also proved beyond a reasonable doubt that officers, including Officer Hornbeck, did not engage in behavior that appellant believed put him in danger of suffering excessive force. Officer Dewall testified that the six-member extraction team entered appellant's cell, and appellant and Romo immediately physically fought with the officers. (6 RT 1245.) During the violent confrontation, two team members exited the cell. (*Ibid.*) Officer Dewall then entered the cell and saw appellant on top of

Officer Hornbeck who was lying on his back on the ground. (6 RT 1246.) Appellant was hitting Officer Hornbeck in the chest. (*Ibid.*) Officer Dewall exited the cell to obtain a baton. (*Ibid.*) When Officer Dewall returned to the cell, appellant was still on top of Officer Hornbeck and hitting him in the chest. (6 RT 1246-1247.)

Based on this evidence, appellant urges this Court to conclude that the prosecution failed to prove beyond a reasonable doubt that appellant did not act in lawful self-defense on the basis of a series of unknowns: it was unknown how the altercation between appellant and Officer Hornbeck began (AOB 154); it was unknown how appellant came to be on top of Officer Hornbeck (AOB 155); and it was unknown whether Officer Hornbeck used unreasonable force prior to appellant getting on top of Officer Hornbeck (AOB 155). However, a lack of evidence that appellant was *not* acting in self-defense is not evidence that he *was* lawfully defending himself.

More, appellant repeatedly refused to be handcuffed and removed from his cell after each deployment of pepper spray and less-lethal ammunition. (6 RT 1240, 1243, 1244.) Appellant had previously forced officers to extract him from his cell just five days earlier and he knew that officers would deploy pepper spray and less-lethal ammunition and enter the cell to attempt to restrain him. (6 RT 1221.) Appellant's repeated refusals, made with knowledge of the methods used to obtain his compliance, prove beyond a reasonable doubt that appellant did not believe the officers' actions put him in danger of suffering excessive force.

Under all the circumstances, where it is clear that appellant intentionally forced officers to enter his cell, that appellant fought with officers, that appellant got on top of Officer Hornbeck and repeatedly hit Officer Hornbeck in the chest, and there is no evidence that Officer Hornbeck or the other officers were the aggressors, the prosecution proved

beyond a reasonable doubt that appellant committed a battery and that appellant's actions of physically fighting with officers and repeatedly hitting Officer Hornbeck in the chest was not done in lawful self-defense. As a result, appellant's claim there was insufficient evidence to prove he committed a battery on March 13, 1997, is without merit.

d. Sufficient Evidence Supports a Finding That Appellant Possessed a Weapon and Assaulted another Inmate on November 13, 1999

Appellant contends there was insufficient evidence for the jury to determine that he knowingly possessed a weapon protruding from his cell door on November 13, 1999. (AOB 155-158.) He argues the evidence did not show that the weapon was ever within his control or that he was the person that caused the weapon to protrude from his cell door. (AOB 157-158.) Appellant further contends there was insufficient evidence for the jury to determine he assaulted another inmate on November 13, 1999. (AOB 158-160.) Respondent disagrees.

(1) The Evidence and the Court's Instructions

Officer Tovar testified regarding appellant's November 13, 1999, weapons possession and assault on an inmate. Officer Tovar first testified regarding the Security Housing Unit at Corcoran State Prison. He explained that inmates housed in the Security Housing Unit are not allowed to leave their cell unhandcuffed and unaccompanied by an officer. (6 RT 1293-1294.) He then testified that on November 13, 1999, he escorted Lopez to the shower that was next to appellant's cell. (6 RT 1292, 1294, 1298.) As Lopez entered the shower, Lopez turned to his right and kicked toward appellant's cell door, cell number 6. (6 RT 1297-1298, 1300, 1310.) Officer Tovar looked toward appellant's cell, saw an object protruding from the side of the food port, pushed Lopez into the shower,

and then kicked the object that was protruding from appellant's cell door. (6 RT 1301-1302.) Officer Tovar's kick caused the object to break apart. A portion of the object fell to the floor. (6 RT 1302.) The remainder of the object was lodged in the gap on the side of the food port. (6 RT 1302.) Officer Tovar grabbed the piece protruding from appellant's cell door and retrieved the part of the object that had broken off and fallen to the floor. (*Ibid.*) The part of the object that fell to the ground was a piece of plastic fashioned into a sharpened blade. (6 RT 1303-1304.) The part protruding from appellant's cell door was rolled-up paper that was approximately 12 inches long. (6 RT 1303, 1314-1315.) The sharpened blade had been attached to the rolled-up paper. (6 RT 1308.)

To determine whether appellant, a prisoner, possessed a weapon on November 13, 1999, the court instructed the jury with CALJIC No. 7.38 as follows:

> Every person who, while confined in any penal institution, [possesses or carries upon [his] person or has under [his] custody or control] any instrument or weapon commonly known as a sharp instrument, is guilty of a violation of Penal Code Section 4502(a), a crime.
>
> ["Penal institution" means [the state prison].]
>
> In order to prove this crime, each of the following elements must be proved:
>
> 1. A person was confined in any penal institution; and
>
> 2. While so confined, [possessed or carried upon [his]] person or had under [[his] custody or control] an instrument or weapon commonly known as a sharp instrument.

(10 CT 2739, brackets in original.) The court further instructed the jury with the definition of "possession" as follows in CALJIC No. 1.24:

> There are two kinds of possession: actual possession and constructive possession.

Actual possession requires that a person knowingly exercise direct physical control over a thing.

Constructive possession does not require actual possession but does require that a person knowingly exercise control over or the right to control a thing, either directly or through another person or persons. One person may have possession alone, or two or more persons together may share actual or constructive possession.

(10 CT 2740.)

(2) Sufficient Evidence of Weapon Possession

Sufficient evidence supports a finding appellant knowingly possessed a weapon while confined in a penal institution (§ 4502, subd. (a)) on November 13, 1999.[22] Officer Tovar testified that he saw the entire, intact object, which included the sharpened point attached to the rolled-up-paper handle, protruding from the gap on the side of the food port on appellant's cell door. (6 RT 1301-1302.) The sharpened point was attached to the paper handle until Officer Tovar kicked the weapon, causing the sharpened point to break away from the paper handle and fall to the floor. (6 RT 1302-1304.) Officer Tovar also testified that in the Security Housing Unit at Corcoran State Prison, officers handcuff and escort inmates when inmates are outside of their cells. (6 RT 1293-1294.) He further testified that appellant was the inmate in cell number 6. (6 RT 1310.) Given these facts, it was not a reasonable inference that someone other than appellant placed the weapon in the gap on the side of the food port on appellant's cell door. The only reasonable inference the jury could deduce from this evidence was that appellant caused the weapon to protrude from inside his

[22] Appellant does not challenge the sufficiency of evidence on element one of CALJIC No. 7.38, that appellant was a person confined in a penal institution. (10 CT 2739.)

cell through the gap on the side of the food port. Therefore, on the entire record, substantial evidence supports a finding that appellant knowingly possessed and had control of the weapon protruding from his cell, and that appellant committed the November 13, 1999, weapons possession beyond a reasonable doubt.

(3) Sufficient Evidence of Assault

Sufficient evidence also supports a finding appellant assaulted Lopez on November 13, 1999. An assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) "'The "violent injury" here mentioned is not synonymous with "bodily harm," but includes any wrongful act committed by means of physical force against the person of another....' [Citation.]" (*People v. Rocha, supra,* 3 Cal.3d at p. 899, fn. 12.) "'In other words, force against the person is enough, it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave any mark.' [Citation.]" (*Ibid.*) Assault requires "an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*People v. Williams, supra,* 26 Cal.4th at p. 790.) In addition, the present ability element "is satisfied when 'a defendant has attained the means and location to strike immediately.' [Citations.] In this context, however, 'immediately' does not mean 'instantaneously.' It simply means that the defendant must have the ability to inflict injury on the present occasion." (*People v. Chance, supra,* 44 Cal.4th at p. 1168.) To determine whether appellant assaulted Lopez, the court instructed the jury with CALJIC Nos. 9.00 and 9.01. (10 CT 2732-2734.)

A reasonable jury could find beyond a reasonable doubt appellant intentionally caused the 12-inch weapon to protrude through the gap on the side of his food port and toward Lopez. As shown above, appellant first

possessed the weapon inside his cell and caused the weapon to protrude through the gap on the side of the food port.

A reasonable jury could also find beyond a reasonable doubt appellant had actual knowledge of those facts sufficient to establish that causing a 12-inch weapon to protrude through a gap on the side of the food port toward Lopez would probably and directly result in the application of physical force to Lopez. The jury could find that appellant saw Lopez approaching and then standing outside appellant's cell. The jury saw a picture of appellant's cell door, and testimony established that the cell doors in the Security Housing Unit were covered with dime-sized holes. (6 RT 1292-1296.) The jury could also find that appellant was aware of the weapon's qualities because he had possessed the weapon in his cell before causing it to protrude through the gap on the side of his food port. Given the above circumstances, any reasonable person would realize that causing a 12-inch weapon to protrude through a cell door toward a person standing outside that door and near where the spear was protruding would probably result in physical force to that person.

Finally, ample evidence also supports a finding that appellant had the present ability to apply physical force to Lopez. "California cases establish that when a defendant equips and positions himself to carry out a battery, he has the 'present ability ' required by section 240 if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken, and even if the victim or the surrounding circumstances thwart the infliction of injury." (*People v. Chance, supra,* 44 Cal.4th at p. 1172.) As shown above, appellant equipped himself with a 12-inch spear and caused that spear to protrude from his cell. Appellant was able to cause the weapon to protrude far enough outside of his cell that Lopez felt the need to turn and kick at the weapon. (6 RT 1300-1301, 1315.) A reasonable inference was that Lopez reacted to avoid being struck with the weapon,

and thus thwarted the infliction of injury. Therefore, on the entire record, substantial evidence supports a finding appellant committed an assault on November 13, 1999.

e. Sufficient Evidence Supports a Finding That Appellant Possessed a Weapon While in Custody on March 29, 2000

Appellant contends there was insufficient evidence for the jury to determine that on March 29, 2000, when he possessed a weapon while confined in a penal institution, he committed an act of violence or threat of violence. (AOB 160-165.) Appellant argues, "the mere possession of a weapon does not establish proof beyond a reasonable doubt of an implied threat of use of force or violence, a necessary element of factor (b) evidence." (AOB 163-164.) Respondent disagrees.

(1) The Evidence

On March 29, 2000, appellant covered his cell door windows and requested to talk to Officer Pearson. (7 RT 1415.) Officer Pearson told appellant he would come back and talk to him later. (7 RT 1419.) Appellant became upset and stated, "I guess when you try to program [i.e. follow regulations] you don't get anywhere. I got more attention when I was causing all the trouble." (*Ibid.*) Appellant then requested to be transferred to an outside holding cell to talk to Officer Pearson. (*Ibid.*) Officers escorted appellant to a rotunda holding cell. (*Ibid.*)

Once in the holding cell, with his handcuffs removed, appellant placed what appeared to be a piece of paper on the food port. (7 RT 1420.) Appellant told Officer Pearson, who was leaning against a nearby pillar, the item was "nothing" and swept it onto the floor (see fn. 3). (7 RT 1420, 1422-1423.) Appellant and Officer Pearson continued to talk. (*Ibid.*) Appellant wanted a radio for his cell and became agitated when Officer

Pearson told appellant he could not have a radio because appellant had broken his previous television. (7 RT 1421.)

While Officer Pearson continued to talk to appellant, Officer Mascarenas saw appellant place a weapon on the food port. (7 RT 1437-1438.) Officer Mascarenas retrieved a video camera and recorded the interaction between appellant and Officer Pearson. (7 RT 1438.) Once Officer Pearson was finished speaking to appellant and walked away, appellant took the weapon from the food port and put it in his boxer shorts. (7 RT 1441; People's Exhibit F-2.) Officer Mascarenas turned off the camera and told appellant to give him the weapon. (7 RT 1442.) Appellant threw the weapon into a nearby trashcan, and Officer Mascarenas retrieved the trashcan and placed it in a nearby office. (*Ibid.*) A short time later, Officer Mascarenas showed Officer Pearson the weapon. (7 RT 1443.) The weapon was approximately six inches long, had a sharpened metal point, and a handle made from tightly rolled paper, string, and an elastic glove. (7 RT 1426, 1431.) Officer Pearson was unaware that the weapon was on the food port while he was talking to appellant. (7 RT 1424; People's Exhibit F-2.)

(2) Forfeiture

In addition to having forfeited his sufficiency of evidence argument for failing to object, moving to strike, or moving to exclude the evidence at trial, appellant forfeited his claim regarding his March 29, 2000, weapons possession for an additional, but similar, reason. Appellant does not contend there was insufficient evidence he possessed a weapon pursuant to section 4502, subdivision (a) on March 29, 2000. Instead, appellant argues that the evidence was insufficient because "no reasonable trier of fact could have concluded that appellant made an *express or implied threat of violence* on March 29, 2000." (AOB 164, italics added.) However, whether unadjudicated acts involve force or violence or the express or implied threat

to use force or violence is a legal question for the court, not a factual issue for the jury. (*People v. Thomas* (2012) 53 Cal.4th 771, 833-834 ["[T]he question of whether [unadjudicated] acts occurred is a factual issue for the jury, but 'the *characterization* of those acts as involving an express or implied use of force or violence, or the threat thereof, would be a legal matter properly decided by the court' "]; *People v. Butler, supra,* 46 Cal.4th at p. 872; *Nakahara, supra,* 30 Cal.4th at p. 720.) Therefore, whether appellant's March 29, 2000, weapons possession involved an express of implied threat of violence was a matter for the court in relation to the admission of the evidence. It was not for the jury to consider in determining whether the evidence supported a finding that appellant knowingly possessed a weapon beyond a reasonable doubt.

Here, the court noted that possession of a sharpened instrument while in custody amounted to an implied threat of force and was admissible under section 190.3, factor (b). (5 RT 1053.) Appellant did not object when the court admitted evidence of appellant's March 29, 2000, weapons possession. As a result, in addition to forfeiting the claim that the evidence was insufficient, he has forfeited any claim regarding the admissibility of his March 29, 2000, weapons possession.

(3) No Abuse of Discretion

On the merits, the court did not abuse its discretion when it determined that appellant's March 29, 2000, weapons possession involved an implied threat of force or violence sufficient for admission pursuant to section 190.3, factor (b). Contrary to appellant's contention, this Court has held that "*mere possession* of a potentially dangerous weapon in custody ' "involves an implied threat of violence even where there is no evidence defendant used or displayed it in a provocative or threatening manner." [Citation.]' [Citation.]" (*People v. Martinez* (2003) 31 Cal.4th 673, 694, italics added; *People v. Moore, supra,* 51 Cal.4th at p. 1137; *People v.*

Smithey (1999) 20 Cal.4th 936, 1002-1003; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1186-1187.) In this case, appellant had actual possession of the weapon when he placed it on the food port and when he retrieved the weapon from the food port and concealed it in his boxer shorts. (7 RT 1437-1438, 1441; People's Exhibit F-2.) Because appellant's "mere possession" of the weapon was sufficient to find that his actions involved an implied threat of violence, the court did not abuse its discretion in admitting evidence of appellant's March 29, 2000, weapons possession.

(4) Sufficient Evidence of Weapons Possession

Also on the merits, sufficient evidence supports a finding that appellant knowingly possessed a weapon while in custody on March 29, 2000. To determine whether appellant, a prisoner, knowingly possessed a weapon on March 29, 2000, the court instructed the jury with CALJIC Nos. 7.38 and 1.24. (10 CT 1739-1740.) The jury could find that appellant committed a violation of section 4502, subdivision (a), if it determined appellant (1) was a person confined in a penal institution,[23] (2) possessed a weapon known as a sharp instrument, and (3) knowingly exercised control over the weapon by actual or constructive possession. (*Ibid.*)

Ample evidence supports a finding that appellant possessed a weapon known as a sharp instrument, and that he knowingly exercised control over the weapon by actual possession. As described above, the item Officer Mascarenas saw appellant place on the food port and conceal in his boxer shorts was approximately six inches long, had a sharpened metal point, and a handle made from tightly rolled paper, string, and an elastic glove. (7 RT 1426, 1431.) Officer Mascarenas video recorded appellant after appellant

[23] Appellant does not challenge the sufficiency of evidence on element one of CALJIC No. 7.38, that appellant was a person confined in a penal institution. (10 CT 2739.)

placed an object on the food port. (7 RT 1437-1438.) The video provided a close-up view of the weapon and showed appellant retrieving the weapon from the food port and concealing it in his boxer shorts. (People's Exhibit F-2.) The weapon, which was retrieved by Officer Pearson from a trashcan, was admitted as evidence at trial (People's Exhibit E-1). (7 RT 1425-1428, 1430-1431, 1443.) Officer Mascarenas identified the weapon as the same weapon appellant placed on the food port, concealed in his boxer shorts, and threw in the trashcan. (7 RT 1443-1444.) A reasonable jury, with the benefit of the testimony, the video recording, and the actual weapon, could reasonably conclude that appellant knowingly possessed a weapon.

On the entire record, sufficient evidence supports a finding that appellant committed the March 29, 2000, weapons possession beyond a reasonable doubt.

f. Sufficient Evidence Supports a Finding that Appellant Possessed a Weapon While in Custody on April 15, 2000

Appellant contends there was insufficient evidence for the jury to determine that on April 15, 2000, he knowingly possessed weapons that officers found in his cell. (AOB 165-168.) Appellant argues that no witness saw him make the weapons and no evidence established that he had sole access to the cell. (AOB 166-168.) Respondent disagrees.

(1) The Evidence and the Court's Instructions

On April 15, 2000, Officer Henderson saw appellant, the sole occupant of Cell 25, make unusual movements inside his cell in the Security Housing Unit. (6 RT 1383-1384.) When Officer Henderson first looked through appellant's cell door, appellant was standing on a bunk and partially covering the overhead light fixture with a blanket. (6 RT 1385.) Appellant then went to the sink area and then back onto the bunk. (*Ibid.*)

Appellant repeated this sequence two or three times. Each time appellant was on the bunk he reached toward the overhead light fixture. (*Ibid.*) Officer Henderson notified Officer Butts. (6 RT 1386.)

Officer Butts approached appellant's cell and asked appellant to remove the blanket from the overhead light. (7 RT 1393.) Appellant removed the blanket from the light, and officers removed appellant from his cell. (*Ibid.*)

A search of appellant's cell revealed several six-inch long grooves cut into the overhead light fixture and plastic shavings on the ground directly below the light. (7 RT 1394-1395.) Officer Butts also located scratch marks, likely made from sharpening objects, on the left-hand side bunk in the cell. (7 RT 1394.) Officer Butts further searched appellant's cell. As Officer Butts prepared to search under appellant's mattress, which was on the right-hand side of the cell, Officer Butts pulled back the blanket on top of appellant's mattress. (7 RT 1401.) Underneath the blanket, and thrown across the mattress, were three weapons. (7 RT 1401-1402, 1409.) The weapons were of varying lengths, each made of metal and sharpened either to a point or on one side. (7 RT 1402-1404.)

To determine whether appellant, a prisoner, knowingly possessed a weapon on April 15, 2000, the court instructed the jury with CALJIC Nos. 7.38 and 1.24. (10 CT 1739-1740.) The jury could find that appellant committed a violation of section 4502, subdivision (a), if it determined appellant (1) was a person confined in a penal institution, (2) possessed a weapon known as a sharp instrument, and (3) knowingly exercised control over the weapon by actual or constructive possession. (*Ibid.*)

(2) Sufficient Evidence of Weapons Possession

Ample evidence supports a finding appellant knowingly possessed a weapon, that he was the sole occupant of cell 25 and, other than officers,

had sole access to cell 25.[24] Officers Henderson and Butts testified that appellant was the sole occupant of cell 25. (6 RT 1384; 7 RT 1392.) Appellant's cell, cell 25, was in the Security Housing Unit. (6 RT 1383-1384.) Officer Tovar testified that inmates housed in the Security Housing Unit are not allowed to leave their cells unhandcuffed and unaccompanied by an officer. (6 RT 1293-1294.) Therefore, even though appellant had been temporarily removed from his cell at some time prior to April 15, 2000 (7 RT 1411-1412), appellant was the only inmate that had access to cell 25. From this evidence, a reasonable inference could be made that appellant had sole access to cell 25, and therefore, the weapons found in his cell could not have been placed in the cell, as appellant suggests, at some point while appellant was outside of his cell.

Ample evidence also supports a finding that appellant knowingly exercised control over the three weapons found in his cell. Officer Butts testified that he discovered the three weapons under appellant's blanket on top of appellant's mattress. (7 RT 1401.) Specifically, Officer Butts testified that as he "was getting ready to search under [appellant's] mattress" he first "pulled the blanket back" and discovered the three weapons. (7 RT 1401.) The weapons were thrown across the mattress under the blanket. (7 RT 1409.) Contrary to appellant's characterization of Officer Butts' testimony, the weapons were not under appellant's mattress. (AOB 166.) Also contrary to appellant's characterization of Officer Butts' testimony, the weapons were not "'underneath' or 'in' a blanket *on the right side of the bunk.*" (AOB 166, italics added.) Rather, because there are generally two bunks in each cell, and Officer Butts had previously

---

[24] Appellant does not challenge the sufficiency of evidence on element one of CALJIC No. 7.38, that appellant was a person confined in a penal institution. (10 CT 2739.)

testified that he had noticed scratch marks on the bunk located on the left-hand side of the cell (7 RT 1394), the prosecutor asked Officer Butts if he searched "the right side bunk or the left side bunk." (7 RT 1402.) Officer Butts indicated that he searched the bunk on the "right-hand side" of the cell. (7 RT 1401-1402.) Appellant's bunk was on the right-hand side of the cell. (*Ibid.*) A clear reading of the testimony reveals that the three weapons were located on appellant's bunk, were on top of appellant's mattress, and were covered by appellant's blanket.

Finally, the jury could reasonably infer from appellant's actions by the light fixture, the grooves cut into the light fixture, the plastic shavings on the ground below the light fixture, and the scratch marks on the bunk, that appellant was making the weapons when he was interrupted by Officer Butts. (6 RT 1385; 7 RT 1394-1395.)

From the evidence as a whole, the jurors could reasonably infer that appellant exercised control over the three weapons inside his cell and knew the weapons were under his blanket on his mattress. Appellant, the sole occupant of the cell, and the only person who slept on the mattress where the weapons were found, would have no doubt noticed the three weapons underneath his blanket. It is not an unreasonable inference that appellant would have either slept on them or felt them when he either lay on his mattress or slept under the blanket on his mattress. On the entire record, sufficient evidence supports a finding that appellant committed the April 15, 2000, weapons possession beyond a reasonable doubt.

g. Sufficient Evidence Supports a Finding That Appellant Committed a Battery on April 18, 2000, and That His Actions Were Not Done in Lawful Self-Defense

Appellant contends there was insufficient evidence he committed a battery on April 18, 2000, because the prosecution failed to prove beyond a

reasonable doubt that his actions were not done in lawful self-defense.[25] (AOB 168-174.) Respondent disagrees.

(1) The Evidence and the Court's Instructions

As described more thoroughly above in Argument V, subsection B(3)(b), and adopted fully herein, on April 18, 2000, appellant refused to voluntarily move to a different cell. (7 RT 1459-1462.) Officer Gatto obtained a pepper spray canister and deployed a three to five second burst through the food port. (7 RT 1465-1466; People's Exhibit H-2.) While Officer Gatto was spraying the pepper spray, appellant reached through the food port and attempted to grab the canister. (7 RT 1465-1466, 1470; People's Exhibit H-2.) Officer Gatto was able to avoid appellant's reach. (*Ibid.*) Immediately thereafter, when Officer Gatto positioned the pepper spray canister in front of the food port again, appellant reached through the food port and grabbed the canister. (7 RT 1469; People's Exhibit H-2.) After a brief struggle, appellant pulled the canister out of Officer Gatto's hands and into the cell. (*Ibid.*) Appellant contacted Officer Gatto's hand when he grabbed the canister. (7 RT 1479-1481; People's Exhibit H-2.)

---

[25] Appellant also argues that there was insufficient evidence he possessed a sharpened instrument on April 18, 2000. (AOB 168-170.) The prosecutor did not ask the jury to find, and the evidence does not support, that appellant possessed a weapon on April 18, 2000. Even though Officer Gatto testified that the broken glass from the cell door window carried a sharp edge and could be used to construct a weapon (7 RT 1482), he also testified that the glass projected outward onto the floor when appellant struck the glass with the pepper spray canister (7 RT 1471). During his penalty argument to the jury, the prosecutor recalled that the glass window shattered (8 RT 1680), but did not argue that appellant took possession of the broken pieces of glass. Based on the prosecutor's argument to the jury and the evidence, respondent does not argue that the evidence showed appellant possessed a sharpened instrument pursuant to section 4502, subdivision (a) on April 18, 2000.

While Officer Gatto was retrieving an additional pepper spray canister, appellant struck the cell window repeatedly with the pepper spray canister he had inside his cell, and shattered glass projected outward onto the floor. (7 RT 1471.) Officers placed a shield in front of appellant's cell door, opened the food port, and deployed pepper spray into appellant's cell. (7 RT 1471-1472; People's Exhibit H-2.) Appellant blocked the food port with a mattress. (7 RT 1472; People's Exhibit H-2.) When officers pulled part of the mattress through the food port and deployed more pepper spray, appellant again reached through the food port and attempted to grab the second pepper spray canister. (7 RT 1472; People's Exhibit H-2.) Officer Gatto then deployed the pepper spray through a small opening on the side of the cell door, and appellant requested to be removed from his cell. (7 RT 1473-1474.)

To determine if appellant committed a battery on a non-confined person (§ 4501.5), the court instructed the jury with CALJIC No. 7.37, which included a paragraph regarding lawful self-defense. (10 CT 2735.) Accordingly, the prosecution was required to prove: (1) appellant used force or violence upon another; (2) appellant's use of force or violence was willful; (3) appellant was confined in a state prison when he used force or violence upon another; and (4) appellant used force or violence upon a person not confined within the prison. (*Ibid.*) The court also defined for the jury what amounted to "force or violence." (10 CT 2736.) Finally, out of an abundance of caution (7 RT 1610-1612; 8 RT 1627-1631), the court instructed the jury with CALJIC No. 9.26 (Arrest or Detention-Use of Reasonable Force-Duty to Submit) that explained an officer's lawful performance of their duties and an inmate's duty to refrain from using force, and CALJIC No. 5.51 (Self-Defense-Actual Danger Not Necessary) that explained a defendant's right to use self-defense. (10 CT 2737-2738.)

(2) Sufficient Evidence of a Battery

Ample evidence supports a finding that appellant committed a battery on April 18, 2000. A reasonable jury could find beyond a reasonable doubt appellant used force or violence upon Officer Gatto and that his force was willful. Appellant reached through the food port, grabbed the pepper spray canister, and pulled it out of Officer Gatto's hands and into the cell. (7 RT 1469, 1479-1481; People's Exhibit H-2.) Appellant also contacted Officer Gatto's hand when he grabbed the pepper spray canister. (*Ibid.*)[26]

(3) Act Not Done in Lawful Self-Defense

Despite the court's instructions, appellant did not argue at trial that the officers' actions were unlawful or excessive, or that he acted in self-defense. On the contrary, appellant and his trial counsel admitted that appellant intentionally forced the cell extractions. (8 RT 1692-1693; 9 CT 2422.) Nevertheless, the evidence presented to the jury did not support a finding that appellant acted in lawful self-defense.

Appellant's actions of grabbing the canister, contacting Officer Gatto's hand, and pulling the canister out of Officer Gatto's hands were not done in lawful self-defense in response to unreasonable or excessive force. The prosecution proved beyond a reasonable doubt that Officer Gatto did not use unreasonable or excessive force. The uncontroverted evidence showed that it was a violation of institutional rules for inmates to refuse to comply with an officer's order for an inmate to move from one cell to another. (7 RT 1460-1461; 10 CT 2737 [CALJIC No. 9.26 explained: "A correctional officer may lawfully require a person to move from one cell to

---

[26] Appellant does not challenge the sufficiency of evidence on elements three and four of CALJIC No. 7.37, that appellant was confined and Officer Gatto was not confined in a state prison when appellant used force or violence on Officer Gatto. (10 CT 2735.)

another for purposes of prison administration"].) Appellant violated this rule when he refused to move cells and told officers he would move the way he wanted to move. (7 RT 1462, 1465.)

The evidence was also uncontroverted that the use of pepper spray to gain an inmate's compliance was not unreasonable or excessive force. Officer Gatto testified that he was given authority to use the pepper spray. (7 RT 1465.) He further testified that he administered the pepper spray through an open food port on appellant's cell door in approximately three to five second bursts. (*Ibid.*) No evidence was presented at trial that the prison's general use of pepper spray, or its specific deployment of pepper spray on April 18, 2000, was unreasonable or excessive force in response to appellant's repeated refusal to comply with Officer Gatto's request for appellant to move from one cell to another. In other words, "[t]he evidence ... did not raise any legal justification for [appellant's] actions, and, therefore the prosecution was not required to introduce evidence negating any possible justification for the activities. [Citation.]" (*People v. Moore, supra,* 51 Cal.4th at p. 1136.) From the evidence on this record, a reasonable trier of fact could reasonably conclude that appellant committed a battery, and the officers used necessary, not excessive, force to discharge their duty to secure appellant and remove him from the cell.

On appeal, appellant now cites a plethora of case authority he contends shows that "bursts of pepper spray are limited to no more than three seconds duration and generally only last *a half-second*." (AOB 172-173, italics in original.) He argues that Officer Gatto's use of pepper spray on April 18, 2000, was excessive because Officer Gatto "provided no explanation for his use of the spray in a manner that contradicted all policies and guides for its safe use...." (AOB 173.) As a result, appellant contends the prosecution failed to prove that Officer Gatto's use of the pepper spray was not excessive force. (*Ibid.*) No evidence was presented

at trial that Officer Gatto's use of pepper spray allegedly contradicted the policies and practices of other law enforcement personnel through the country. In fact, no evidence was presented that Officer Gatto's use of pepper spray violated or exceeded any policy. The evidence remained that Officer Gatto's use of pepper spray was not excessive.

Also on appeal, appellant claims that "[a]ppellant grabbed for the canister after Gatto had been spraying him with pepper spray for at least *13 seconds*," that he "used no force beyond that necessary to stop the chemical attack," and only "disarmed [Officer Gatto] so [Officer] Gatto could not continue to spray him." (AOB 174, italics in original.) Appellant's claim that he was justified in grabbing the canister from Officer Gatto is based on appellant's erroneous view of the evidence. Appellant attempted to grab the canister during the first deployment of pepper spray. (7 RT 1465, 1470; People's Exhibit H-2.) When appellant reached through the food port and attempted to grab the canister, Officer Gatto pulled the canister away from the food port. (People's Exhibit H-2.) Officer Gatto's first deployment of pepper spray lasted four to five seconds before appellant reached through the food port toward the canister, and Officer Gatto stopped spraying the pepper spray through the food port. (*Ibid.*) Officer Gatto immediately attempted to deploy a second burst of pepper spray through the food port. However, *before* Officer Gatto could begin, appellant reached through the food port, grabbed the canister, and pulled the canister into his cell. (7 RT 1469; People's Exhibit H-2.) When appellant grabbed the canister, he contacted Officer Gatto's hand and pulled the canister out of Officer Gatto's hands. (7 RT 1481.) It was then that appellant committed a battery. Contrary to appellant's view of the evidence, appellant did not

commit the battery in lawful self-defense in order to stop a "13-second" "chemical attack."[27]

The prosecution also proved beyond a reasonable doubt that officers did not engage in behavior appellant believed put him in danger of suffering excessive force. Appellant forced the cell extraction. He refused to move cells and told officers he would move the way he wanted to move cells. (7 RT 1462.) Appellant was aware of the procedures officers used to gain an inmate's compliance. Appellant had forced a previous cell extraction at Corcoran State Prison on November 14, 1999. (6 RT 1336, 1350.) An officer deployed pepper spray during that cell extraction. (6 RT 1352-1353.) Appellant's refusal to move cells voluntarily and his knowledge that officers would deploy pepper spray during a cell extraction prove beyond a reasonable doubt that he did not believe the officers' actions put him in danger of suffering excessive force.

Under all the circumstances, where it is clear that there is no evidence that Officer Gatto used excessive force prior to appellant committing a battery, the prosecution proved beyond a reasonable doubt that appellant's act of grabbing the pepper spray canister from Officer Gatto and contacting Officer Gatto's hand was not done in lawful self-defense. As a result,

---

[27] Notably, People's Exhibit H-2 does show Officer Gatto deploying approximately a 13-second burst of pepper spray into appellant's cell. (People's Exhibit H-2.) However, this 13-second deployment of pepper spray occurred *after* appellant had already committed the battery and pulled the first canister into his cell. (*Ibid.*) The 13-second deployment of pepper spray also occurred after appellant shattered his cell door window with the pepper spray canister and during the time appellant was attempting to cover the food port with his mattress. (People's Exhibit H-2.) Accordingly, because the 13-second deployment of pepper spray occurred after appellant had already committed the battery, appellant cannot base his claim of lawful self-defense on the 13-second deployment of pepper spray.

appellant's claim there was insufficient evidence to prove he committed a battery on April 18, 2000, is without merit.

D. CALJIC No. 8.87 Correctly Instructed the Jury Regarding the Use of Unadjudicated Offenses as Factors in Aggravation

Appellant contends CALJIC No. 8.87 (other criminal activity) erroneously removed from the jury's determination whether the unadjudicated offenses involved force or violence or the express or implied threat to use force or violence. (AOB 174-178.) Appellant argues that the instruction created an impermissible mandatory presumption (AOB 179-180), and the court failed to define the "force or violence" elements of section 190.3, factor (b) (AOB 180-185).

CALJIC No. 8.87, the standard instruction for considering other criminal activity as aggravating evidence under section 190.3, factor (b), states:

> Evidence has been introduced for the purpose of showing that the defendant has committed criminal [act[s]] for which he has not been previously convicted which involved [the express or implied use of force or violence] [or] [the threat of force or violence]. Before a juror may consider any criminal [activity] as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal [activity]. A juror may not consider any evidence of any other criminal [activity] as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.
>
> The alleged criminal activity involving force or violence or the threat of force or violence for which the defendant has not been convicted but which the People offer as a circumstance in aggravation involves alleged violations of Penal Code sections

240, 4501.5, and 4502. In a moment I will define for you the elements of these uncharged crimes.

(10 CT 2730, brackets in original.)

This Court has "consistently ruled that whether criminal acts pose a threat of violence is a legal question for the court, and that CALJIC No. 8.87 does not create an unconstitutional mandatory presumption. [Citations.]" (*People v. Butler, supra,* 46 Cal.4th at p. 872; *People v. Thomas, supra,* 53 Cal.4th at pp. 833-834 ["We have previously held that the question of whether the acts occurred is a factual issue for the jury, but 'the *characterization* of those acts as involving an express or implied use of force or violence, or the threat thereof, would be a legal matter properly decided by the court' "] italics in original; *People v. Streeter, supra,* 54 Cal.4th at p. 266; *People v. D'Arcy* (2010) 48 Cal.4th 257, 302-303; *People v. Lewis, supra,* 43 Cal.4th at p. 530; *People v. Gray* (2005) 37 Cal.4th 168, 235; *People v. Monterroso* (2004) 34 Cal.4th 743, 793 (*Monterroso*); *Nakahara, supra,* 30 Cal.4th at p. 720 ["CALJIC No. 8.87 is not invalid for failing to submit to the jury the issue whether the defendant's acts involved the use, attempted use, or threat of force or violence"].)

Appellant recognizes this Court's recent rulings, but argues that in *People v. Dunkle* (2005) 36 Cal.4th 861 (*Dunkle*),[28] "this Court clearly indicated that the question of whether a particular criminal act involved sufficient force or violence to be weighed as an aggravating circumstance under factor (b) was for the *jury* to decide." (AOB 176, italics in original.) Appellant is mistaken. In *Dunkle*, the defendant questioned whether a residential burglary could be used as aggravating evidence. (*Dunkle, supra,* at p. 922.) It was the defendant's contention that "burglary for theft

---

[28] *Dunkle* was overruled in part on other grounds as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 421.

categorically is an offense not involving force or violence, and therefore [could] never be the subject of a section 190.3, factor (b) instruction...." (*Ibid.*)

Unlike here, the *Dunkle* court was not directly concerned with the previous, but recent, holdings in *Nakahara* and *Monterroso* that held that it was for the court, not the jury, to determine if an unadjudicated offense involved the use of force or violence or the threat thereof. "It is axiomatic, of course, that a decision does not stand for a proposition not considered by the court. [Citations.]" (*People v. Harris* (1989) 47 Cal.3d 1047, 1071.) In addition, as a further indication that *Dunkle* does not stand for the proposition that the jury rather than the court must decide if an unadjudicated offense involves force or violence, *Dunkle* did not question or even mention the relevant holdings in *Nakahara* and *Monterroso*. Both *Nakahara* and *Monterroso* were decided prior to *Dunkle* and each clearly held that the question of whether an unadjudicated offense involves force or violence or the threat thereof is a legal matter properly decided by the court, not the jury. (*Monterroso, supra,* 34 Cal.4th at p. 793; *Nakahara, supra,* 30 Cal.4th at p. 720.) Recognizing *Dunkle* for the issue actually decided, appellant offers no persuasive reason for this Court to reconsider its consistent holdings.

Because the court, not the jury, decides whether unadjudicated offenses involve the use of force or violence or the threat thereof, the court and CALJIC No. 8.87 did not fail to define force or violence for the jury. In any event, "force or violence" in the context of section 190.3, factor (b) is self-explanatory and possesses a """common-sense core of meaning ... that criminal juries should be capable of understanding."""" (*Dunkle, supra,* 36 Cal.4th at p. 923, citing *Tuilaepa v. California* (1994) 512 U.S. 967, 975.) Therefore, CALJIC No. 8.87 was not erroneous and correctly

instructed the jury regarding the use of unadjudicated offenses as factors in aggravation.

E. Appellant's Constitutional Challenges to the Use of Unadjudicated Offenses as Aggravating Evidence Are Meritless

Appellant raises a number of federal constitutional objections to the use of unadjudicated offenses at the penalty phase of his trial. (AOB 185-190.) He argues that (1) the admission of unadjudicated offenses, in general, is unconstitutional (AOB 185-186); (2) the use of the guilt-phase jury to consider the unadjudicated offenses as aggravating factors in the penalty phase is unconstitutional (AOB 186-188); (3) the failure to require the jury to make unanimous findings on each of the unadjudicated offenses is unconstitutional (AOB 189); and (4) consideration of unadjudicated offenses in capital cases causes disparate treatment between capital and noncapital defendants (AOB 189-190). Appellant recognizes this Court has rejected these arguments, but asks this Court to reconsider its previous holdings. (AOB 185-190).

This Court has repeatedly held that "[t]he use of unadjudicated criminal activity at the penalty phase and the absence of a requirement that the jury agree unanimously that it has been proved do not render a death sentence unreliable." (*People v. Thomas, supra,* 53 Cal.4th at p. 836, citing *People v. Anderson* (2001) 25 Cal.4th 543, 584; *People v. Valdez* (2012) 55 Cal.4th 82, 179; *People v. Foster* (2010) 50 Cal.4th 1301, 1364-1365; *People v. D'Arcy, supra,* 48 Cal.4th at p. 308; *People v. Ward* (2005) 36 Cal.4th 186, 221-222.) *Apprendi* and its progeny (*Cunningham v. California* (2007) 549 U.S. 270; *Blakely v. Washington* (2004) 542 U.S. 296; *Ring v. Arizona* (2002) 536 U.S. 584), do not compel a different result. (*People v. D'Arcy, supra,* at p. 308; *People v. Ward, supra,* at pp. 221-222.)

This Court has also repeatedly held that the use of the same jury for the guilt and penalty phases does not violate the impartial-jury requirement of the Sixth Amendment. (*People v. Thomas, supra,* 53 Cal.4th at p. 836; *People v. Dement* (2011) 53 Cal.4th 1, 56; *People v. Rogers* (2006) 39 Cal.4th 826, 894.) The circumstances of this case do not compel a different result. As shown above in Argument V, subsections B and C, and adopted herein, the court did not abuse its discretion in admitting the unadjudicated offenses, and there was sufficient evidence to support the jury's finding of each unadjudicated offense beyond a reasonable doubt. In addition, as shown above in Argument V, subsection D, and adopted herein, the jury was not required to find that the unadjudicated crimes involved force or violence. Also, the number of unadjudicated offenses the prosecution presented during the penalty phase did not "inflate[ ] the strength of the aggravating factors" or "unfairly skew[ ] the penalty phase in favor of death." (AOB 188.) There was sufficient evidence to support each unadjudicated offense beyond a reasonable doubt, and the jurors were instructed that they could not consider the unadjudicated offense unless the juror first found beyond a reasonable doubt that appellant committed the act. (10 CT 2730; CALJIC No. 8.87.)

Finally, this Court has repeatedly held that use of unadjudicated offenses in capital proceedings, while forbidden in noncapital cases, does not violate equal protection or due process principles. (*People v. Foster, supra,* 50 Cal.4th at p. 1365; *People v. D'Arcy, supra*, 48 Cal.4th at p. 301; *People v. Watson* (2008) 43 Cal.4th 652, 701.)

Appellant offers no persuasive reason for this Court to reconsider these holdings.

F. Reversal of Appellant's Death Sentence Is Not Warranted

Appellant contends this Court should reverse his death sentence. (AOB 190-195.) Appellant argues that because evidence of two unadjudicated offenses was erroneously admitted under factor (b), seven unadjudicated offenses were not supported by substantial evidence, the instructions regarding the use of unadjudicated offenses were incomplete, and these incidents were not admissible under any other aggravating factor (see AOB 190-192), "the presentation of the factor (b) incidents skewed the jurors' balancing of aggravating and mitigating factors in favor of death...." (AOB 192.) He further argues that any error in the admission of the unadjudicated offenses was not harmless. (AOB 193-195.) Respondent disagrees.

As already shown, appellant forfeited any claim the court abused its discretion in admitting evidence of the March 8, 1997, and April 18, 2000, unadjudicated offenses under section 190.3, factor (b). On the merits, the court did not abuse its discretion in finding the two unadjudicated offenses involved the use or attempted use of force or violence or the express or implied threat of force or violence sufficient for admission under section 190.3, factor (b). Appellant also forfeited any claim there was insufficient evidence he committed seven of the unadjudicated offenses beyond a reasonable doubt. On the merits, sufficient evidence supports a finding appellant committed the seven unadjudicated offenses beyond a reasonable doubt. Therefore, because the court properly admitted the unadjudicated offenses and there is sufficient evidence appellant committed the unadjudicated offenses, the unadjudicated-offense evidence did not impermissibly skew the jury's penalty determination toward death and the evidence was not constitutionally irrelevant to the jury's penalty determination.

Assuming for argument purposes that appellant did not forfeit his claims of error regarding the admission and sufficiency of evidence of the unadjudicated offenses presented pursuant to section 190.3, factor (b), and assuming some of the unadjudicated offenses were either inadmissible or not supported by sufficient evidence, any error was harmless beyond a reasonable doubt. "'State law error occurring during the penalty phase will be considered prejudicial when there is a *reasonable possibility* such an error affected a verdict. [Citations.] Our state *reasonable possibility* standard is the same, in substance and effect, as the *harmless beyond a reasonable doubt* standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [ ]. [Citations.]' [Citations.]" (*People v. Nelson* (2011) 51 Cal.4th 198, 218-219, fn. 15, italics in original.)

The prosecution presented three other unadjudicated offenses pursuant to section 190.3, factor (b) during the penalty phase. These three unadjudicated offenses are similar to the unadjudicated offenses appellant challenges on appeal. Appellant, however, does not contend on appeal that these three unadjudicated offenses were inadmissible or that the evidence was insufficient to prove he committed the offenses.

On December 18, 1997, officers entered appellant's cell to remove appellant after appellant repeatedly refused to remove materials from his cell door windows and refused to voluntarily submit to being handcuffed. (6 RT 1268-1271, 1280, 1281; People's Exhibit B-1.) When officers entered the cell, appellant slid under his bunk and kicked Officer Schmidt. (6 RT 1271-1276.) Appellant then hit Officer Schmidt. (6 RT 1276-1277.)

On November 13, 1999, following appellant's assault on Inmate Lopez, officers searched appellant's cell and located a weapon (a toothbrush sharpened into a spear and attached to a tightly bound newspaper handle) inside appellant's cell locker. (6 RT 1317-1322, 1326, 1328.)

The next day, on November 14, 1999, appellant broke his television. (6 RT 1336-1138.) Concerned that appellant could make weapons with the plastic and glass, officers requested that appellant voluntarily submit to being handcuffed and removed from his cell. (6 RT 1346.) When officers opened the food port for appellant to place his hands outside of the cell, appellant threw multiple pieces of his television through the food port at officers. (6 RT 1346-1347.) Officers were interrupted by another incident, but when they returned appellant had covered his cell door windows and would not communicate with them. (6 RT 1348-1349.) After deploying pepper spray into appellant's cell, officers attempted to open the cell door but the door was jammed and only opened approximately a foot. (6 RT 1352-1356.) Appellant had tied a cord to the doorframe and lodged items under the door to prevent it from opening. (6 RT 1373-1375.) Officers placed a Plexiglas shield in front of the partially opened cell door. (6 RT 1357.) Appellant threw items at the shield, repeatedly kicked and hit the shield, attempted to grab a pepper spray canister from an officer, and forcibly tried to get out of the cell. (6 RT 1357-1358.)

The prosecutor mentioned the unadjudicated offenses only fleetingly in his argument to the jury. The prosecutor told the jury it could consider the incidents and briefly reminded the jury of the facts of each incident. (8 RT 1670-1672, 1677-1680.) The principal focus of the prosecutor's argument, however, was the heinous nature of the murders—the deliberate, unprovoked, gruesome killing of two unsuspecting victims. (8 RT 1673-1677, 1681-1686.) As the prosecutor stressed, "[T]he murder of James Mahoney is particularly disturbing. It's particularly distressing and it's particularly deserving of the death penalty." (8 RT 1682.) In addition, the prosecutor reminded the jury of appellant's unsympathetic response to the murders and his vow to commit many more murders. (8 RT 1685-1685.)

The evidence of the unadjudicated offenses paled in comparison to the "'[m]uch more direct and graphic evidence of [appellant's] violent conduct [that] was before the jury.' [Citation.]" (*People v. Lewis, supra,* 43 Cal.4th at p. 528.) The jury was permitted to consider the circumstances of the crimes (§ 190.3, factor (a)) in determining penalty. Appellant admittedly strangled his two victims for no other reason than to earn his Three Strikes sentence. (9 CT 2422-2423.) Proud of his accomplishments, appellant reenacted the murders and vowed to commit many more. (4 RT 705, 723, 727, 733; 5 RT 996-999, 1010, 1012, 1014-1015; 8 CT 2370; 9 CT 2423; People's Exhibits 21-A, 21-B, 38, 38-A, 39, 39-B, 144, 144-A, 145-A, 145-B.) According to appellant, he planned to kill Mendoza because he often bragged about being a gang leader. (8 CT 2334-2337.) As for Mahoney, appellant did not know him, but decided to kill him because it was the first time appellant had been on the exercise yard with another person in months. (9 CT 2406, 2408.) Killing Mendoza and Mahoney was not sufficient for appellant. After both victims were dead, appellant tied numerous ligatures around their faces and necks. (8 CT 2339-2340, 2354, 2355; 9 CT 2412, 2416-2417, 2443.) Appellant wrote on the back of Mendoza's T-shirt. (8 CT 2343-2344.) Appellant repeatedly kicked Mahoney's head into the concrete, kicked him in the crotch, and used Mahoney's blood to draw a happy face on the concrete wall above Mahoney's body. (9 CT 2419-2420, 2443-2444, 2454-2455.) "The cold-blooded, cruel, and senseless murders" of Mendoza and Mahoney "sealed [appellant's] fate." (*People v. McKinnon* (2011) 52 Cal.4th 610, 684.)

To rebut the overwhelming aggravating evidence, appellant offered little mitigating evidence. Appellant's witnesses included his sister, cousin, former group home director, and former teacher. Each explained that although appellant had a difficult and abusive upbringing, he had been a

nonviolent child and young adult. (7 RT 1531-1533, 1547, 1563, 1569, 1572.)

Under these circumstances, there is no reasonable possibility that appellant would have received a more favorable penalty verdict had the jury not heard or considered the allegedly inadmissible and unsupported by sufficient evidence unadjudicated offenses. The jury found beyond a reasonable doubt appellant committed two murders while lying in wait. The jury also heard appellant's admissions, his callous attitude toward the murders, and his desire to murder many more people and harm officers. The jury heard evidence of three other unadjudicated offenses where appellant assaulted officers and possessed a weapon. It is extremely unlikely that the jurors had been ambivalent about the death penalty but were won over to that decision by relying on the unadjudicated assaults, batteries, and weapons possession in which no one was seriously injured. "'It would require capricious speculation for [this Court] to conclude' that any error in admitting ... testimony under factor (b) 'affected the penalty verdict.' (*Belmontes, supra*, 45 Cal.3d at p. 809, [ ] [erroneous admission of factor (b) evidence was harmless given that '[t]he properly admitted aggravating evidence,' i.e., 'the circumstances of the crime,' was 'overwhelming']; see also *People v. Silva* (1988) 45 Cal.3d 604, 636 [ ] [finding harmless error because erroneously admitted factor (b) evidence was ' "trivial when compared to [defendant's] crimes and the other proper evidence adduced at the penalty phase"']." (*People v. Valdez, supra,* 55 Cal.4th at p. 172.) As a result, any error in regards to the challenged unadjudicated offenses was harmless beyond a reasonable doubt and this Court should uphold the judgment of death.

VI. CALIFORNIA'S DEATH PENALTY SCHEME IS CONSTITUTIONAL

Appellant repeats rejected challenges to California's death penalty scheme in order to preserve them for review by the United States Supreme Court and/or federal habeas review. (AOB 196-211.) Appellant presents no compelling reason for this Court to reconsider any of its previous holdings. (See fn. 14.)

A. California's Death Penalty Scheme is Not Impermissibly Broad

Appellant contends that his death sentence is invalid because it was improperly imposed pursuant to a statutory scheme (§ 190.2) that fails to narrow the class of offenders eligible for the death penalty in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 196-197.)

This Court has "considered and consistently rejected" this claim. (*People v. Jablonski* (2006) 37 Cal.4th 774, 837, and cases cited therein.) "The special circumstances set forth at section 190.2 are not impermissibly broad and adequately narrow the class of murders for which the death penalty may be imposed. [Citations.]" (*People v. Elliot* (2005) 37 Cal.4th 453, 487.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

B. Section 190.3, Factor (a) appropriately Allows the Jury to Consider Circumstances of the Crime

Appellant contends that factor (a) of section 190.3, which allows jurors to consider the circumstances of the crime in determining penalty, "has been applied in such a wanton and freakish manner" that it allows "arbitrary and capricious imposition of the death penalty" in violation of

the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 197-198.)

This Court has repeatedly rejected this claim finding that "section 190.3, factor (a) is not impermissibly overbroad facially or as applied." (*People v. Robinson* (2005) 37 Cal.4th 592, 655, and cases cited therein.) Section 190.3, factor (a) correctly allows the jury to consider the "circumstances of the crime." (*People v. Thomas, supra,* 51 Cal.4th at p. 506; *People v. Nelson, supra,* 51 Cal.4th at p. 225; *People v. D'Arcy, supra,* 48 Cal.4th at p. 308.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

C. California's Death Penalty Scheme and Corresponding Instructions Set Forth the Appropriate Burden of Proof

Appellant contends California's death penalty scheme and accompanying penalty-phase instructions fail to set forth the appropriate burden of proof. (AOB 198-207.) Appellant argues that: (1) the jury was not instructed that it had to find that the aggravating factors outweighed any mitigating factors beyond a reasonable doubt (AOB 198-200); (2) the jury was not instructed that the prosecution had the burden of persuasion regarding any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, or, in the alternative, that neither party had the burden of proof (AOB 200-201); (3) the jury was not instructed that it had to unanimously find aggravating factors true beyond a reasonable doubt (AOB 201-203); (4) the instructions were impermissibly broad or vague in directing jurors to determine whether the aggravating factors were "so substantial" in comparison to the mitigating factors (AOB 203); (5) the jury was not instructed that the central determination is whether death is the appropriate punishment (AOB 204); (6) the jury was not instructed that it was required

to return a sentence of life without the possibility of parole if the mitigating circumstances outweighed the aggravating circumstance (AOB 204-205); (7) the jury was not instructed that it did not have to unanimously find mitigating factors true beyond a reasonable doubt (AOB 205-206); and (8) the jury was not instructed regarding the presumption of life (AOB 206-207).

1. Aggravating Factors Outweigh Mitigating Factors

This Court has found that "the greater weight of aggravating circumstances relative to mitigating circumstances ... are not subject to a burden-of-proof qualification. [Citations.]" (*People v. Elliot, supra,* 37 Cal.4th at pp. 487-488, and cases cited therein.) This Court has further found that "'[n]othing in the United States Supreme Court's recent decisions interpreting the Sixth Amendment's jury trial guarantee (e.g., *Cunningham v. California* (2007) 549 U.S. 270 []; *Ring v. Arizona* (2002) 536 U.S. 584 []; *Apprendi v. New Jersey* (2000) 530 U.S. 466[]) compels a different answer to th[is] question[ ].' [Citation.]" (*People v. Thomas, supra,* 51 Cal.4th at p. 506; *People v. Lee* (2011) 51 Cal.4th 620, 651-652.)

2. Burden of Proof or No Burden of Proof

This Court has found that "[t]he death penalty law is not unconstitutional for failing to impose a burden of proof—whether beyond a reasonable doubt or by a preponderance of the evidence—as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence. [Citation.]" (*People v. Thornton* (2007) 41 Cal.4th 391, 469; *People v. Gonzales, supra,* 54 Cal.4th at p. 1298; *People v. Howard* (2010) 51 Cal.4th 15, 39; *People v. Elliot, supra,* 37 Cal.4th at p. 488; *People v. Lomax* (2010) 49 Cal.4th at 530, 594-595.) The death penalty law and instructions are also not defective "for failing to inform the jury

that there was no burden of proof." (*People v. Gonzales, supra,* at p. 1298; *People v. Lomax, supra*, at p. 595.)

3. Unanimity of Aggravating Factors

This Court has found that section 190.3 is not unconstitutional "for failing to require unanimity as to the applicable aggravating factors. [Citation.]" (*People v. Elliot, supra,* 37 Cal.4th at pp. 487-488.) This Court has further held that "'[n]othing in the United States Supreme Court's recent decisions interpreting the Sixth Amendment's jury trial guarantee (e.g., *Cunningham v. California* (2007) 549 U.S. 270 []; *Ring v. Arizona* (2002) 536 U.S. 584 []; *Apprendi v. New Jersey* (2000) 530 U.S. 466[]) compels a different answer to th[is] question[ ].' [Citation.]" (*People v. Thomas, supra,* 51 Cal.4th at p. 506; *People v. Lee, supra,* 51 Cal.4th at pp. 651-652.)

4. "So Substantial" Standard

This Court has found that "[t]he instructions were not impermissibly broad or vague in directing jurors to determine whether the aggravating factors were 'so substantial in comparison with the mitigating factors that it warrants death instead of life without parole.' [Citation.]" (*People v. Valdez, supra,* 55 Cal.4th at p. 180, citing *People v. Carter* (2003) 30 Cal.4th 1166, 1226; *People v. Gonzales, supra,* 54 Cal.4th at pp. 1298-1299; *People v. Lomax, supra,* 49 Cal.4th at p. 595.)

5. Central Determination Whether Death is the Appropriate Penalty

This Court has found that "CALJIC No. 8.88 does not improperly fail to inform the jury that the central determination is whether death is the 'appropriate punishment.' The instruction properly explains to the jury that it may return a death verdict if the aggravating evidence 'warrants' death. [Citations.]" (*People v. McDowell* (2012) 54 Cal.4th 395, 444; *People v.*

Gonzales, supra, 54 Cal.4th at p. 1299; *People v. Mendoza* (2007) 42 Cal.4th 686, 707.)

6. Mitigating Circumstances Outweigh Aggravating Circumstances

This Court has found that the penalty instructions are not unconstitutional for failing to advise the jury that it is required to return a sentence of life without the possibility of parole if the mitigating circumstances outweigh those in aggravation. (*People v. Jones* (2012) 54 Cal.4th 1, 78-79; *People v. McWhorter* (2009) 47 Cal.4th 318, 379; *People v. Carrington* (2009) 47 Cal.4th 145, 199.)

7. Standard of Proof and Jury Unanimity of Mitigating Circumstances

This Court has found that "[t]he trial court was not required to instruct the jury that ... the beyond-a-reasonable-doubt standard and requirement of jury unanimity do not apply to mitigating factors. [Citation.]" (*People v. Streeter, supra,* 54 Cal.4th at p. 268; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1097.)

8. Presumption of Life

This Court has found that "[t]he court was not required to instruct on a 'presumption of life.' [Citations]" (*People v. Gonzales, supra,* 54 Cal.4th at p. 1299; *People v. Howard, supra,* 51 Cal.4th at p. 39; *People v. Lomax, supra,* 49 Cal.4th at pp. 594-595.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting these claims.

D. The Jury Was Not Required to Make Written Findings

Appellant contends the failure to require the jury to make written findings deprived him of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and his right to meaningful appellate review. (AOB 207-208.)

This Court has found that "[t]he death penalty law is not unconstitutional for failing to require that the jury base any death sentence on written findings. [Citation.]" (*People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Thomas, supra*, 51 Cal.4th at p. 506.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

E. The Mitigating and Aggravating Factors Jury Instructions Were Constitutional

Appellant contends the penalty-phase jury instructions regarding mitigating and aggravating factors violated his constitutional rights. (AOB 208-209.) Appellant argues that: (1) the use of the adjectives "extreme" and "substantial" in the list of potential mitigating factors (CALJIC No. 8.85, factors (d) and (g)) impermissibly acted as barriers to his jury's consideration of mitigating circumstances (AOB 208); (2) the court failed to delete inapplicable sentencing factors; and (3) the jury was not instructed that certain statutory factors were relevant solely as to mitigation (AOB 209).

1. Restrictive Adjectives in the Description of Mitigating Factors

This Court has found that "[t]he use of adjectives such as 'extreme' and 'substantial' does not prevent the jury from considering relevant mitigating evidence. [Citation.]" (*People v. Thomas, supra,* 51 Cal.4th at pp. 506-507; *People v. Valdez, supra,* 55 Cal.4th at p. 180.)

2. Deletion of Inapplicable Sentencing Factors

This Court has found that "[t]he trial court is not required to delete inapplicable sentencing factors from CALJIC No. 8.85. [Citation.]" (*People v. McDowell, supra,* 54 Cal.4th at p. 444; *People v. Stitely* (2005) 35 Cal.4th 514, 574.) "[T]he full list of factors may be put before the jury

as a framework for the penalty determination. [Citations.]" (*People v. Davis* (2009) 46 Cal.4th 539, 624.)

3. Factors Relevant Only to Mitigation

This Court has found that "'[t]he jury need not be instructed that section 190.3, factors (d), (e), (f), (g), (h), and (j) are relevant only as possible mitigators. [Citation.] Nor is the trial court required to instruct that the absence of a particular mitigating factor is not aggravating. [Citation.]' " (*People v. Thomas*, *supra*, 51 Cal.4th at pp. 506-507; *People v. Valdez, supra,* 55 Cal.4th at p. 180.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting these claims.

F. The United States Constitution Does Not Require Inter-case Proportionality Review of Death Sentences

Appellant contends that California's death penalty scheme violates the United States Constitution because it does not require "inter-case proportionality review" of sentences. (AOB 210.)

This Court has repeatedly rejected the claim that the United States Constitution requires inter-case proportionality review of death sentences. (*People v. Valdez, supra,* 55 Cal.4th at p. 180; *People v. Foster, supra,* 50 Cal.4th at p. 1368; *People v. Prieto* (2003) 30 Cal.4th 226, 276.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

G. California's Death Penalty Law Does Not Deny Capital Defendants Equal Protection Under the Law

Appellant contends that California's death penalty scheme violates the Equal Protection Clause because it denies procedural safeguards to capital defendants that are afforded to noncapital defendants. (AOB 210-211.) Appellant claims that unlike noncapital cases, the death penalty scheme is unconstitutional because there is no standard of proof in the penalty phase,

no requirement of juror unanimity on the aggravating factors, and no requirement that the jury justify the death sentence with written findings. (*Ibid.*)

As this Court has stated, "The death penalty law does not violate equal protection by denying capital defendants certain procedural safeguards that are afforded to noncapital defendants because the two categories of defendants are not similarly situated. [Citations.]" (*People v. Lee, supra,* 51 Cal.4th at p. 653.) In other words,

> "The availability of certain procedural protections in noncapital sentencing—such as a burden of proof, written findings, jury unanimity and disparate sentence review—when those same protections are unavailable in capital sentencing, does not signify that California's death penalty statute violates Fourteenth Amendment equal protection principles. [Citations.]" [Citation.]

(*People v. Thomas, supra,* 51 Cal.4th at p. 507.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

H. Application of the Death Penalty Does Not Violate International Norms

Appellant contends that California's use of the death penalty as a "regular" form of punishment violates international law and the Eighth and Fourteenth Amendments to the United States Constitution. (AOB 211.)

This Court had found that "California's use of capital punishment as an assertedly 'regular form of punishment' for substantial numbers of crimes, rather than as an extraordinary punishment for extraordinary crimes, does not offend the Eighth and Fourteenth Amendments by violating international norms of human decency. [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 53-54; *People v. Thomas, supra,* 51 Cal.4th at p. 507; *People v. Lee, supra,* 51 Cal.4th at p. 654;.) In fact, California does not use capital punishment "'as *regular punishment* for substantial

numbers of crimes.' " (*People v. Demetrulias* (2006) 39 Cal.4th 1, 43, italics in original.)

Appellant presents no compelling reason for this Court to reconsider its prior decisions rejecting this claim.

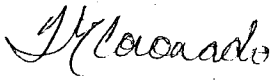
CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: March 21, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
WARD A. CAMPBELL
Supervising Deputy Attorney General
STEPHANIE A. MITCHELL
Deputy Attorney General



TIA M. CORONADO
Deputy Attorney General
Attorneys for Plaintiff and Respondent

TMC:lbj
FR2000XS0002
11025912.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 39,971 words.

Dated: March 21, 2013

KAMALA D. HARRIS
Attorney General of California

TIA M. CORONADO
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Delgado** No.: **S089609**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 22, 2013, I served the attached **Respondent's Brief** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Michael Laurence
Executive Director
Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, CA 94107

Jolie Lipsig
Senior Deputy State Public Defender
770 L Street, Suite 1000
Sacramento, CA 95814
(2 copies)
Representing appellant Anthony Delgado

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Honorable Greg Strickland
Kings County District Attorney
1400 West Lacey Boulevard
Hanford, CA 93230

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 22, 2013, at Sacramento, California.

_____
Declarant

FR2000XS0002
31647117.doc