In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Respondent,** **v.** **KEVIN BOYCE,** **Appellant.**	**CAPITAL CASE** Case No. S092240

County Superior Court Case No. 97NF2316
Honorable Frank F. Fasel, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

On a summer night in 1997, Appellant Kevin Boyce and his cohort Willis burst into the De Cut Salon in Buena Park, planning to rob the place. Amy Parish was inside the salon styling the hair of her sister, Jennifer Parish, and Jennifer's fiancé, Shayne York. Jennifer Parish and Shayne York were both off-duty Los Angeles County Sheriff's Deputies. At gunpoint, Boyce and Willis ordered the three victims to the ground and began searching for money. When the robbers determined the salon's cash drawer had little money, they began robbing Ms. Parish, Deputy Parish, and Deputy York. As Boyce was going through Deputy York's pockets, Boyce found his badge. Boyce questioned where Deputy York worked and discovered Deputy York worked at a jail where Boyce had previously been incarcerated. Boyce accused Deputy York of treating "us Nigger Crips like shit in jail." After obtaining the PIN number for Deputy York's ATM card, Boyce shot Deputy York execution-style in the back of the head. Deputy York died from the single gunshot wound. Boyce and Willis finished robbing Deputy Parish and then fled. Before being caught by police, Boyce and Willis stopped later that same evening at a Lamppost Pizza in Yorba Linda where they robbed the customers and emptied the cash registers and safe.

The jury convicted Boyce of capital murder with special circumstances, to wit, murder committed during the commission of a burglary and robbery, and killing of a peace officer in retaliation for the performance of his official duties. The jury also found Boyce guilty of several counts of robbery and burglary, and found the firearm use enhancements true. After the penalty phase, the jury returned a verdict of death. The trial court sentenced Boyce to death for the murder, and to a determinate term of 34 years and six months for the other offenses.

In this appeal, Boyce challenges the admissibility of the audio tapes of the calls to 911 by Ms. Parish and Deputy Parish. He also contends the court erred by instructing the jury on flight. Additionally, Boyce separately claims the evidence is insufficient to support the jury's true findings on the three special circumstances. Boyce contends the trial court improperly denied him his right of self- representation in the penalty phase of his trial. Boyce further claims his death sentence is cruel and unusual punishment because he is significantly impaired intellectually, brained damaged, and severely mentally ill. Boyce challenges the determinate sentence imposed for his non-capital crimes. He also raises a series of challenges to the penalty-phase instructions and to California's death penalty law; all of which have been repeatedly rejected by this Court.

The judgment should be affirmed in its entirety. The trial court properly exercised its discretion in admitting the audio of the 911 calls from the survivors of the robbery at the hair salon in the guilt phase, and allowing consideration of those calls as circumstances of the crime in the penalty phase. The trial court also properly instructed the jury on flight. Substantial evidence supports the jury's true findings on all three of the special circumstance allegations. The trial court properly denied Boyce's untimely, equivocal motion to represent himself. The Eighth Amendment does not prohibit imposing the death penalty on Boyce. The trial court did not err in sentencing Boyce for his non-capital crimes. Finally, Boyce provides no persuasive reason for this Court to reconsider its prior precedent rejecting the standard attacks on the penalty phase instructions and death penalty law that he raises here.

STATEMENT OF THE CASE

On July 30, 1999, the Orange County District Attorney filed an amended information charging appellant Kevin Boyce and Andre Willis with the murder of Los Angeles County Sheriff's Deputy ShayneYork

(Pen. Code, § 187, subd. (a) [Count 1].) It was alleged the murder was a serious felony (Pen. Code, § 1192.7, subd. (c)(1)) committed under the following special circumstances: while engaged in the commission of second degree burglary (Pen. Code, § 190.2, subd. (a)(17)(7)); while engaged in the commission of robbery (Pen. Code, § 190.2, subd. (a)(17)(1)); and as to Boyce only, that Boyce intentionally killed Deputy York, a peace officer, in retaliation for the performance of his duties (Pen. Code, § 190.2, subd. (a)(7)). The amended information also alleged the following crimes: second degree robbery of Jennifer Parish (Pen. Code, §§ 211/212.5, subd. (c)/213, subd. (a)(2) [Count 2]); second degree robbery of Amy Parish (Pen. Code, §§ 211/212.5, subd. (c)/213, subd. (a)(2) [Count 3]); second degree commercial burglary of De Cut Salon (Pen. Code, §§ 459-460, subd. (b) [Count 4]); second degree robbery of Rodney Tamparong (Pen. Code, §§ 211/212.5, subd. (c)/213, subd. (a)(2) [Count 5]); second degree robbery of Edward Tharp (Pen. Code, §§ 211/212.5, subd. (c)/213, subd. (a)(2) [Count 6]); second degree robbery of Mark Cook (Pen. Code, §§ 211/212.5, subd. (c)/213, subd. (a)(2) [Count 7])[1]; second degree robbery of Christopher Pierce (Pen. Code, §§ 211/212.5, subd. (c)/213, subd. (a)(2) [Count 8]); attempted second degree robbery of Ernest Zuniga (Pen. Code, §§ 664-211/212.5, subd. (c)/213, subd. (a)(2) [Count 9]); attempted second degree robbery of Sean Gillette (Pen. Code, §§ 664-211/212.5, subd. (c)/213, subd. (a)(2) [Count 10]); and second degree commercial burglary of Lamppost Pizza (Pen. Code, §§ 459- 460, subd. (b) [Count 11]).

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[1] On August 15, 2000, Count 7 was amended to allege attempted robbery (Pen. Code, §§ 664-211/212.5, subd. (c)/213, subd. (a)(2)). (9 CT 3070.)

The amended information alleged the robberies and attempted robberies (counts 2-3, & 5-10) were serious felonies within the meaning of Penal Code section 1192.7, subdivision (c)(1), and that Boyce and Willis personally used a firearm during the commission and attempted commission of the crimes (Pen. Code, §§ 12022.5, subd. (a), & 1192.7, subd. (c)(8)). Additionally, the information alleged Boyce sustained a prior serious or violent criminal conviction (Pen. Code, §§ 667, subds. (d) & (e)(1), & 1170.12, subds. (b) & (c)(1)), a prior serious criminal conviction (Pen. Code, §§ 667, subd. (a)(1), & 1192.7, subd. (c)), and failed to remain free from prison custody during the five years subsequent to serving a prison term (Pen. Code, § 667.5, subd. (b)). (7 CT 2098-2102.)

On July 24, 2000, the trial court severed Willis's case from Boyce's. (4 PRT 999-115 – 999-118.) Boyce's trial by jury began on July 25, 2000. (9 CT 2899.) On August 22, 2000, the jury found Boyce guilty of all counts, found true each special circumstance allegations, and found Boyce personally used a firearm, specifically, a handgun, during commission of the crimes.[2] (10 CT 3251-3275, 3354-3357.)

The penalty phase commenced on August 28, 2000. (10 CT 3363.) On September 7, 2000, the jury found the appropriate penalty to be death. (10 CT 3508, 3572.)

On September 29, 2000, the trial court heard and denied the automatic motion to modify the jury's penalty verdict. (11 CT 3648-3652.) The court sentenced Boyce to death for the murder of Deputy York committed with special circumstances. The court stayed the determinate sentence of 34 years and four months, which was imposed for the remaining counts and

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[2] Trial on the prior conviction allegations was bifurcated from the substantive charges and allegations. (4 PRT 115.) The prosecution moved to dismiss the prior conviction allegations after the jury returned a verdict of death. (12 RT 4059-4060; 10 CT 3573.)

ordered to be served consecutively to the death sentence because the court relied on the facts underlying these offenses to deny the Motion to Modify the Death Penalty. (11 CT 3653-3656.)

This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF FACTS

Guilt Phase

A. Prosecution's Case in Chief

1. Robbery/Murder at De Cut Salon

In August, 1997, Deputies Shayne York and Jennifer Parish were Los Angeles County Sheriff's Deputies working at the Peter Pitchess Honor Farm, East Facility, also known as "Wayside," in Castaic. (4 RT 1804-1806.) The deputies were engaged to be married the following spring. (4 RT 1804.) On August 14, 1997, they planned to go to Las Vegas to celebrate Deputy Parish's birthday. (4 RT 1804-1805.) Before leaving, Deputy York went to an ATM machine and withdrew $200. (4 RT 1806.) The deputies ordered and ate pizza, and then went to Long Beach to drop off their dogs at Deputy Parish's mother's house. (4 RT 1807-1808.) The two then stopped in Buena Park at De Cut Hair Salon to have their hair done by Amy Parish, Deputy Parish's sister. They arrived around 7:30 p.m. (4 RT 1808; 6 RT 2149.)

Ms. Parish put highlighting foils in Deputy Parish's hair and began cutting Deputy York's hair. No other clients or employees remained in the salon. (4 RT 1808-1811.) Suddenly, Ms. Parish looked towards the front door of the salon with a frightened expression on her face. (4 RT 1811, 1841.) At approximately 8:00 p.m., Appellant Boyce and Andre Willis, armed with guns, burst through the front doors. (4 RT 1812; 6 RT 2150.) Willis, wearing green pants and a black sweatshirt pulled up over his head, pointed a gun at Ms. Parish's stomach. (4 RT 1812-1813; 6 RT 2150-2151.) The gun was a semi-automatic and appeared to be either a Glock or

nine-millimeter. The gun he was holding resembled the gun depicted in the photograph in prosecution's exhibit number 2. (4 RT 1814-1815, 1843-1848, 1891-1893; 6 RT 2151, 2216.) Willis yelled, "Get the fuck on the ground, whiteys." (4 RT 1815, 1854; 6 RT 2151, 2204.)

The three got on the ground, face down with their arms spread out in prone position. Because of the close quarters, Deputy York's head crossed the lower part of Deputy Parish's body, and Ms. Parish's feet were by Deputy Parish's head. (4 RT 1816-1818, 1891; 6 RT 2152-2153, 2174.) Boyce and Willis asked for the location of the money and the cash register. (4 RT 1818-1819, 1855-1856; 6 RT 2155.) As Willis remained near the victims, Boyce looked for the cash register. (4 RT 1819-1821, 1853.) Boyce yelled, "Where's the fucking money? Where's the fucking money?" (4 RT 1821.) Ms. Parish explained there was no cash register, as the money was kept in a drawer up front. (4 RT 1856; 6 RT 2155.) When Boyce found the cash drawer, he became agitated because there was only about $11 in it. (4 RT 1823, 1857-1858, 1861; 6 RT 2157-2158.) Ms. Parish gave Boyce approximately $30 or $40 that she had in her pocket. (4 RT 1824; 6 RT 2156.)

Boyce approached Deputy York and said, "Where is the money? Give me your wallet." Deputy York politely complied. (4 RT 1824-1825, 1863; 6 RT 2158.) After taking the wallet, Boyce demanded more money. Deputy York said he had a hundred dollars in his front pocket, and offered Boyce his watch. Boyce took the money, but not the watch. (4 RT 1826-1827; 6 RT 2158.) Boyce asked Deputy York for his ATM card and his PIN number. Deputy York apparently did not understand what Boyce was asking, because he hesitated. (4 RT 1827-1828, 1867-1869; 6 RT 2158.) Boyce kicked Deputy York several times during this encounter. (4 RT 1837-1838, 1860, 1869.)

Boyce then found Deputy York's badge, which was in his left back pocket. (4 RT 1824, 1828-1830.) Boyce said, "Well, well, well. Look what we have here, a mother fucking pig. Whitey is a mother fucking pig." (4 RT 1828-1829; 6 RT 2158.) Boyce asked, "Where the fuck you work at, whitey?" Deputy York responded, "Wayside." Boyce then asked where at Wayside and York replied, "East Facility." (4 RT 1830; 6 RT 2159.) Boyce asked Deputy York if he "liked to treat Nigger Crips like shit in jail?" (4 RT 1830, 1875; 6 RT 2159.) Deputy York said "No, sir." Boyce said, "No, I know you like to treat us Nigger Crips like shit in jail." (4 RT 1830, 1866-1867, 1875, 1878-1879; 6 RT 2159.) Deputy York said, "No, sir." (4 RT 1831; 6 RT 2159.) Boyce again asked Deputy York for his PIN number. Deputy York still hesitated. Deputy Parish said, "the PIN number, the access code to your ATM card." Deputy York then said "5455." (4 RT 1831, 1870, 1892-1893.)

After Deputy York gave Boyce his PIN number, Boyce said "Fuck the whitey," and shot York in the back of his head. (4 RT 1831, 1870; 5 RT 2021-2024, 2037-2045; 6 RT 2238-2241, 2243, 2285-2286; 13 JQCT 3808-3809, 3819-3820, 3825, 3857.) Deputy York collapsed on Deputy Parish; she could feel the blood pouring on her legs. (4 RT 1831.) At trial, Ms. Parish said she could smell the blood and hear it pumping out of Deputy York's body. (6 RT 2160.) Boyce said something to the effect that he had always wanted to kill a "cop." (4 RT 1832, 1877-1878; 6 RT 2160.)

Willis approached Deputy Parish and lifted her by the back of her pants while searching her pockets. Her pockets were empty. Willis then tugged at Deputy Parish's engagement ring but it would not come off. Willis told her to take off the ring and he walked over to her purse. (4 RT 1832, 1862-1864.) Deputy Parish took off her engagement ring and gave it to Willis. (4 RT 1833, 1866.) Willis also took her watch. (4 RT 1833.) While going through Deputy Parish's purse, Willis found her badge and

said, "We've got another mother fucking pig in here." Willis asked "who is the other fucking white pig?" (4 RT 1834, 1883; 6 RT 2162.) Deputy Parish raised her hand and said she was. Willis said, "Don't worry, bitch. We're not going to shoot you. You're a fucking woman." (4 RT 1835, 1884; 6 RT 2162.) Willis found Deputy Parish's ATM card and asked for the PIN number. Deputy Parish could not remember her PIN number but told Willis it was written on the sleeve envelope containing the card. (4 RT 1835-1836, 1879-1882.)

Willis told Deputy Parish and Ms. Parish not to get up, and he and Boyce left the salon. (4 RT 1837, 1884; 6 RT 2163.) Deputy Parish carefully slid out from under Deputy York and went to the front door to see if she could see anything, but she could not. (4 RT 1838, 1884-1885, 1890.) Deputy Parish returned to Deputy York, who was bleeding from his nose, ears, mouth, and neck. She held him like a baby in her arms and talked to him. (4 RT 1839.) Ms. Parish called 911, and then hung up so she could lock the door. (6 RT 2165-2166.) Deputy Parish then grabbed the phone and called 911. (4 RT 1839; 6 RT 2165-2166.) Deputy Parish told the 911 operator that her husband had been shot in the head and was on the floor of the hair salon. (JQCT[3] 3769-3771.) Tape-recordings of Ms. Parish's and Deputy Parish's 911 calls were played for the jury at trial. (4 RT 1839-1840; 6 RT 2166-2167; Exh. Nos. 11 & 71.)

Deputy York was taken to the hospital where doctors performed a craniotomy to try to reduce the pressure on his brain and prolong his life. (5 RT 2049.) The bullet impacted the left side, internal portion of his skull. (5 RT 2050.) When the bullet struck the back of Deputy York's skull, it caused a number of fragments to break into several pieces inside the skull.

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[3] JQCT refers to the Clerk's Transcript containing the juror questionnaires.

(5 RT 2050-2051.) Deputy York died due to swelling of the brain and a fractured skull as a result of the gunshot wound to his head. (5 RT 2054.) The pathologist who performed the autopsy on Deputy York opined that the pathway of the bullet was consistent with the shooter standing over Deputy York, who was lying on the ground, and firing straight down into the skull. (5 RT 2053-2054.)

2. Robberies at Lamppost Pizza

Within two hours of Deputy York being fatally shot, at approximately 10:00 p.m. that same evening, fellow rugby players Edward Tharp, Sean Gillette, Mark Cook, and Christopher Pierce were at a Lamppost Pizza in Yorba Linda. (5 RT 2055-2056, 2089, 2122-2123.) Rodney Tamparong, one of the pizza parlor's managers, went out the back door to empty the trash. (5 RT 2056-2057, 2137-2138.) Tamparong saw a white convertible Ford Mustang backed into a parking stall. Willis and Boyce were standing next to it. (5 RT 2138-2139.) Willis called Tamparong over to the car, but, feeling that something was not right, Tamparong back-pedaled into the restaurant saying, "Whoa, whoa." (5 RT 2139-2140, 2123, 2144.) Willis grabbed the door and forced his way inside. (5 RT 2058-2059, 2139-2140.) Willis, who had his hands up underneath his shirt, ordered everyone to the ground. Willis said something like, "Get on the floor, mother fuckers." (5 RT 2059-2060, 2070-2073, 2097-2098, 2118, 2123, 2140.) Willis was wearing dark clothing, dark shoes or boots, and gloves. (5 RT 2061, 2073-2075, 2088.)

Willis went to the door and let in Boyce, who was wearing a dark sweatshirt with a tee-shirt underneath, light blue pants, and dirty white sneakers. (5 RT 2060-2061, 2063, 2072, 2118-2119, 2123-2124.) Boyce pulled a semi-automatic gun out and told everyone to empty their pockets. (5 RT 2063, 2065-2066, 2090-2091, 2113-2114.) Willis asked who the manager was. Ernest Zuniga stood up and said that he was. (5 RT 2077,

2116-2117, 2125, 2141.) Zuniga took Willis to the back where the cash registers and safe were located, and gave Willis the money, which was approximately $60.00 from the cash register and $483 from the safe. (5 RT 2066, 2078, 2125-2127, 2132-2133, 2142.)

Boyce ordered the men on the ground to take out their wallets and cash, and turn their pockets inside out. (5 RT 2092, 2107.) Cook took his money out of his pants pockets and put it down the front of his pants. Cook then turned his pockets inside out to make it look like he did not have any money. (5 RT 2092.) Boyce kicked Cook while Cook was laying on the ground. (5 RT 2091.)

Boyce kicked Tharp near his crotch and took his wallet. (5 RT 2067-2068, 2080.) Tharp had about $80 in his wallet. (5 RT 2069.) Boyce approached Gillette and put the gun in his face. Gillette did not have a wallet but he had a nylon briefcase containing paperwork. (5 RT 2109.) Boyce told Gillette to open the briefcase and Boyce shoved the gun into Gillette's face. (5 RT 2109-2110, 2121.) Boyce kicked Pierce as he was surrendering his wallet. (5 RT 2092-2093.)

Boyce asked the men on the ground of any of them were "cops." Cook said, "no, we are teachers." (5 RT 2069, 2082-2083, 2093, 2102, 2107, 2125, 2142.) Tamparong, who was a park ranger at the time, hid his wallet underneath a table so Boyce would not think he was a police officer. (5 RT 2142.) Boyce asked Cook what he taught and Cook said, "special ed." (5 RT 2093, 2107.) Boyce said that he was in "special ed" class. (5 RT 2093, 2095, 2102-2103, 2107.) When Willis returned, he asked Tamparong for his wallet, and Tamparong said he did not have a wallet. Willis searched Tamparong and then moved on. (5 RT 2084, 2143.)

Boyce told the men not to look at them and not to move. Boyce and Willis then escaped through the back door. (5 RT 2096.)

Shortly after the robberies at the pizza restaurant, police drove Tharp and Tamparong to a location on the 91 Freeway. Tharp identified Willis as the first robber and Boyce as the second robber. Tamparong identified Willis as the first robber. (5 RT 2061-2062; 2143-2144.) Tharp correctly identified Willis in both a photographic line-up and in a live line-up at the Orange County Jail on December 1997. (5 RT 2062.) Tharp also correctly identified Boyce as the gunman in a live line-up in December 1997 and again at trial in a photograph. (5 RT 2064-2065.) In December 1997, Zuniga attended a live line-up at the Orange County jail. At first, Zuniga thought he could not identify anyone even though he had a feeling one of the men in the line-up was Willis. Zuniga later called the investigator and said he believed Willis was the person in the number five position.[4] (5 RT 2130-2131.)

3. The Arrest and Investigation

Less than three hours after Deputy York was fatally shot, at approximately 10:40 p.m. that same evening, Fullerton Police Officer Nathan Marple heard a broadcast to look for a white convertible Ford Mustang. (4 RT 1894.) Officer Marple saw a white convertible Mustang driving northbound on Harbor Boulevard, over the 91 freeway, and then entering the westbound 91 freeway. (4 RT 1895.) Officer Marple followed the Mustang and after back-up units arrived, made a felony car stop between the Valley View and Knott Avenue exits. (4 RT 1895-1896; 5 RT 1965.) Willis was driving the Mustang and Boyce was the sole passenger. (4 RT 1897.) The officers detained and eventually arrested Willis and Boyce. (4 RT 1902-1903.) No weapons were found during a cursory search of the car. (4 RT 1903-1907, 1918-1919.)

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[4] Willis was in position number five in the live line-up. (6 RT 2164; Exh. No. 61.)

Officers drove Ms. Parish to a field line-up on the 91 freeway, and told her she could not identify the person based on clothing. (6 RT 2163.) She thought she recognized one of the two men she was shown because of his clothing and shoes, but she did not see much of his face in the salon because he was wearing a knit cap and sweatshirt pulled tightly around his face, so she was unable to positively identify him.[5] (6 RT 2163.) In December 1997, Ms. Parish correctly identified Willis as being in position number five in a live line-up. (6 RT 2164.) At trial, Ms. Parish correctly identified Willis in a photographic line-up, and also correctly identified Boyce in a photographic line-up. (6 RT 2164-2165.)[6]

Buena Park Police Officer Michael Quam searched Boyce and Willis at the Buena Park jail. (5 RT 1995.) Officer Quam found the following during his search of Willis: $557 in currency in his left sock; a Guess watch in his left back pants pocket; $48.40 in currency and coin, and a pager in his right front pants pocket; $51, all singles, in his right sock; and $100.26 in currency and coin, and some keys in his left front pants pocket. (5 RT 1996-1997.) During the search of Boyce, Officer Quam found: $200 in his left sock; a blue bandana and a right-handed green glove in his right back

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[5] At trial, Ms. Parish said Exhibit No. 35 appeared to be the same type of knit cap, and Exhibit No. 32 appeared to be the same type of sweatshirt. (6 RT 2163-2164.)

[6] Orange County District Attorney Investigator Douglas Kennedy interviewed Ms. Parish two days after the shooting. Ms. Parish initially said she could not identify the shooter. (6 RT 2177-2179.) She then told Investigator Kennedy that she thought the shooter was the first person through the door, or Willis. (6 RT 2180-2183, 2191.) On May 5, 1998, Ms. Parish told Investigator Kennedy that based on the positions of the robbers, she believed the second person, or Boyce, had to have been the one who pulled the trigger. (6 RT 2177, 2218-2220.) At trial, Ms. Parish explained her thoughts were all over the place in the days after the shooting, she was exhausted, distraught, and more concerned with Deputy York's condition than her interview with Kennedy. (6 RT 2185, 2218.)

pants pocket; a green left-handed glove and a brown right-handed glove in his left back pants pocket; $53.25 in coin and currency, lipstick and cigarettes in a plastic bag in his right front pants pocket; and keys in his right shoe. (5 RT 1998-1999.) The total amount of money found on Willis was $756.66, and $253.25 was the total amount of money found on Boyce's person. (5 RT 2000-2001.)

During a search of the Mustang, officers found a black hooded sweatshirt, a baseball cap with the words "Del Amo," gray knit gloves, a black knit watch cap, and a small Phillips screwdriver. (5 RT 1972-1975, 1986.) Deputy York's Ford Citibank card, and Deputy Parish's Kaiser Permanente Federal Credit Union card and Wells Fargo ATM card were found underneath the center console in the Mustang. (4 RT 1835, 1837; 5 RT 1975-1977, 1986-1988.) Two handguns were found underneath the speakers on the passenger side. (5 RT 1977-1978, 1988-1990.) One of the handguns was loaded and had the hammer cocked back, ready to fire (Exh. No. 2), and the other gun had rounds in the cylinder with one expended round lined up with the barrel (Exh. No. 37). (5 RT 1978-1981, 1992-1993.)

Deputy York's ATM card, a business card from De Cut Hair Salon with "5545" written on it, and an address book were found inside the lining of the Mustang's trunk. (4 RT 1924-1925, 1928-1929.) Deputy Parish's engagement ring was never found. (4 RT 1833, 1926, 1931; 5 RT 1969, 2002.)

The parties stipulated that Deputy York's ATM card was used to withdraw $200 from a California Federal bank in Yorba Linda at 9:41 p.m. on August 14, 1997. (6 RT 2285.) The parties also stipulated that Boyce was incarcerated at Pitchess Detention Facility, also known as Wayside, from October 1, 1994 through December 7, 1994. (6 RT 2285-2286.)

Further, there is no record that Willis was ever incarcerated at Wayside. (6 RT 2286.)

Boyce's fingerprint was found on the left side, above the grip and below the hammer area, of the same Colt revolver that had one expended round lined up with the barrel (Exh. No. 37). (5 RT 2021–2024.) Projectile fragments found in Deputy York's brain matched that same Colt revolver (Exhibit Number 37) recovered from the Mustang that Boyce and Willis were in when stopped by police within hours of the shooting of Deputy York. (5 RT 2037-2045.)

A latent fingerprint found on Deputy York's Ford Citibank Visa matched Willis. (5 RT 2025-2027, 2029-2030.) Latent fingerprints recovered from the cash drawer did not match either Boyce or Willis. (5 RT 2019-2020, 2029.)

On August 15, 1997, Willis and Boyce were placed together in an interview room at Buena Park Police Department. Investigator Cecil Reece listened and watched a covert conversation between the two. (6 RT 2291-2293.) The conversation was recorded. Because the recording was difficult to understand at times, Investigator Reece took the tapes to a lab to try to remove some of the background noise. The modified or enhanced tape was played for the jury. (6 RT 2294-2297, 2301-2302 [Exhibits 79 (transcript) & 80 (audiotape)].) Investigator Reece observed that during the conversation, Willis and Boyce whispered to each other at times, and looked around the room and under the table as if they were looking for something. (6 RT 2293.)

Willis told Boyce they had pictures of "take out." (13 JQCT 3882.) Boyce asked Willis what they were saying they did, and Willis said they robbed a salon and pizza place, and one person was a "peep out," and they had a gun for the robbery. (13 JQCT 3883.) Willis said they will fight the

robbery and attempted murder. Boyce replies, "We should have blown up (inaudible)." (13 JQCT 3884.) Willis said,

> when the mother fuckers come and talk, I'll put it on a third person. Some body they don't need to (inaudible) I ain't going down for no mother fucking watch coward. I'll put it on a third person.

(13 JQCT 3884.) Boyce asked who the third person was. Willis replied, "He (inaudible). I already know, I already know, I already know you're shit is clean and who was the driver." (13 JQCT 3884.) Boyce asked Willis if he was going to make up a story and Willis said,

> I already know who was the driver. I already know there was two people that went in. (Inaudible) whoop de whoop whoop (inaudible) the gun, gonna show who had, when they come back with the gun, who did the shooting, whoop, whoop, whoop. Uh . . . damn.

(13 JQCT 3884.)

The conversation continued:

Boyce: What this crime is? (Inaudible) (Inaudible) I ain't doing (inaudible) I sure ain't doing it for no mother fuckin' watch coward.

Willis: Both of us.

Willis: (Inaudible) watch coward. Attempted murder. (Inaudible) mother fuckin' (inaudible). Think again. How do I know what crime it is; you're a real nigger. What I'm askin' you, I'm gonna ride it out, man.

Boyce: (Inaudible).

Willis: I'm telling you this, I'm gonna ride it out, ok. But, in the end result in trial time (inaudible) both of us don't need to go to hell for this shit.

Boyce: Keep it down. Popo is sittin' right there. Man, two strikes, that's 25 anyway. We're totally fucked.

Willis: Huh?

Boyce: Man, we're totally fucked. What do they care. The mother fucker's lying and shit always seeing something. Probably arrested for a parole violation.

. . .

Willis: Have to do, though. (Inaudible) trial . . . go to trial over this, you know what I'm saying? (Inaudible.) So, I mean how you feel? Just leave it just how it is, you know what I'm saying, go one with the trial and all that shit, you know what I'm saying?

Boyce: I ain't done shit. (Inaudible.) So far as we know (inaudible) goddamn witnesses (inaudible) what with that shit.

. . .

Willis: (Inaudible) and they got the damn card, too.

Boyce: Huh?

Willis: The card, the card.

Boyce: Oh, yeah.

Willis: (Inaudible) ATM card (inaudible) ashtray on side (inaudible).

(13 JQCT 3885-3886.)

After a detective told Willis and Boyce they had five more minutes to talk, the conversation continued:

Willis: You get what I'm saying? Now I'm just saying, Cuzz (inaudible) I don't see no mother fuckin' way to get the hell out of this shit. You know what I'm saying? ¶ (Inaudible) I mean, you know (inaudible) both of us . . . you know what I'm saying (inaudible).

Boyce: (Inaudible.) Oh man, they can't prove it (inaudible). ¶ They can't prove nothing.

Willis: No. No. (Inaudible.)

Boyce: They can't prove a mother fuckin' thing. It's my word against they mother fuckin' word. I still don't see what's going on.

. . .

Boyce: They didn't even tell me what I was coming in this mother fucker for. Shit . . . Damn.

Willis: I don't know, Cuzz. (Inaudible) what I see in the end we might as well, fuckin' I don't care. You know both of us ain't closer to hell (inaudible) one mother fuckin' thing. . .

Boyce: I'm gonna try to fight this shit. ¶ I don't understand this shit? You know?

Willis: Yo, yo, yo mama, yo what are your feelings cuzz? I mean, being real. When we ride this shit out as long as we can. When we see this shit ain't going away, you know. Don't take it wrong, man. But what I'm speaking is what's on my mind. I'm not saying these people's are (inaudible). I'm gonna ride this all the way out, Cuzz. I'm gonna see if there's any changes . . . they got evidence. Know what I'm saying? (Inaudible.) Cuzz, you know what I'm saying? Gonna let both of us take this attempt murder charge?

Boyce: (Inaudible.)

Willis: After we ride this shit out, you still ain't gonna say anything. We both real niggers. I want to know yo . . . yo opinion, Cuzz.

Boyce: (Inaudible) how can they put this shit on somebody, though? Who the nigga supposed to attempted murder anyway?

Willis: Some mother fucka . . .

Boyce: Female, male, what?

Willis: Some mother fuckin' male, police.

Boyce: Male police? What mother fucker that bold? I didn't kill no police. ¶ Damn.

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Willis: That's what I'm saying (inaudible), you know what I'm saying? You know what I'm saying? (Inaudible), Cuzz. If, if a . . . ¶ You know what I'm saying? (Inaudible.)

Boyce: What does that shit carry anyway?

Willis: Attempted? Shit, I don't know. (Inaudible.) I don't know, I don't know.

Boyce: (Inaudible.)

Willis: Nah, you know what I'm saying, I'm trying to talk to you man. We might not get a chance to talk in a while. You know what I'm saying? I also know that, you know what I'm saying? How, nigger, if, how I would do it, how niggers, all niggers don't do it like that. We're true niggers, Cuzz. I'll come at you real. In your . . in your head full of lead, two mother fuckers. (Inaudible) you know that, you know that cold.

Boyce: This shit's all fucked up. They're probably gonna separate us, huh?

Willis: They might, I don't know. I don't even know.

(13 JQCT 3888-3889.)

At trial, Investigator Reece explained that when Willis was talking about pictures of "take out," Willis made a gesture with his hands, like pointing a gun. (6 RT 2298.) Willis made this same gesture when he said "they have got pictures." (6 RT 2299.) When Willis told Boyce "they got the damn card, too," Willis made a gesture as if he was picking something up with his right index finger and thumb. (6 RT 2299.)

Buena Park Police Officer Daniel Binyon, an African-American officer working gang detail, listened to the recording of the covert conversation between Willis and Boyce, and testified regarding street slang used by African-American males. (6 RT 2263-2264.) Officer Binyon explained that "watch coward" is slang for correctional officer or custodial workers, "take out" refers to either a handgun or to literally take someone out, i.e. hurt somebody, "peep out" means to either see something or telling

someone to look at something, "popo" is slang for police officer, "whoop, dewhoop, whoop" is similar to et cetera, et cetera, and Crip gang members often call each other "cuz." (6 RT 2264-2270.)

On August 17, 1997, after being advised of and waiving his *Miranda*[7] rights, Boyce spoke with Investigator Kennedy and Buena Park Police Homicide Investigator Ruben Gomez. (6 RT 2224; 13 JQCT 3781-3782.) An audiotape of the interview was played for the jury. (6 RT 2226-2227 [Exhibits 72 (transcript) & 74 (audiotape)].) At the beginning of the interview, Boyce claimed he was innocent and denied any knowledge of the pizza parlor robbery or any guns. (6 RT 2231, 2235; 13 JQCT 3782-3794.) Boyce said the money found on him when he was arrested was from gambling and selling marijuana. (13 JQCT 3797.)

Boyce then said if he could smoke one cigarette, he would tell them what happened. (13 JQCT 3802.) Boyce said he had split personalities, he did not like the name Kevin Boyce, and that his name was Osiris. (13 JQCT 3804.) "I'm Osiris. Yup. I ain't Kevin Boyce. That's a white man's name. My name is Osiris X." Boyce said that Osiris does not rob – "guess Osiris musta had too much, um, the devil juice or as alcohol, his drugs." (13 JQCT 3805.) Boyce then said, "Yeah. I can't tell ya exactly what happened. All I remember is pow ya and I was like, damn." (13 JQCT 3805.) Boyce then gave his versions of the events.

Boyce said someone had told him the hair salon near Knott's Berry Farm was an easy hit and had a safe with $7,000. (13 JQCT 3807, 3829, 3851.) Boyce asked Willis for a ride to the salon – Willis did not know about the robbery and did not go in the salon. (13 JQCT 3807-3808.) Boyce said he walked into the hair salon and told everyone to be quiet and

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

get on the floor. Boyce said he asked where the safe was, and was told there was not a safe. (6 RT 2240-2241; 13 JQCT 3808-3809, 3819.) Boyce said there were only two people in the hair salon: a male and a female. The male was sitting in a chair and quickly got to the ground. (6 RT 2242; 13 JQCT 3809-3810, 3834-3835, 3854.) Boyce drew a diagram indicating the placement of the victims. (6 RT 2242-2243; 13 JQCT 3832-3836.) Boyce said they gave him the money from their pockets. (13 JQCT 3809.)

Boyce said he went to the cash register and took about $13 from it. (13 JQCT 3819-3820, 3856-3857.) Boyce said he had a semi-automatic gun, nine-millimeter, that he was holding in his left hand. (6 RT 2243; 13 JQCT 3810, 3825, 3828, 3859.) Boyce said he walked by a chair and must have bumped into it with the gun because all he remembered was "pow ya" and the gun went off. (6 RT 2238-2241; 13 JQCT 3809, 3820, 3825, 3857.) Boyce said he picked up the shell casing and later threw it away. (13 JQCT 3826, 3828, 3859-3860.) The female then started crying. Boyce said he took money from the female but no jewelry. (13 JQCT 3820.) Boyce described the female as having red or reddish brown hair and being heavy set.[8] She gave him about $5 or $7 from her little black purse. (13 JQCT 3841, 3855.)

Boyce said he never saw a badge, and if he knew the male was a deputy sheriff, he "woulda been got up outta there," and thought it was a set up. (13 JQCT 3809, 3838.) Boyce said he did not take the male's wallet. (13 JQCT 3829.) Boyce also said he did not take any ATM cards or credit

[8] During closing argument, defense counsel noted that Boyce "actually even describes [Amy Parish] as kind of a big boned woman, kind of reddish black hair." (8 RT 2792.)

cards, and that he did not know how to work an ATM machine. (13 JQCT 3839-3840, 3869.)

Boyce admitted committing the robberies at Lamppost Pizza. Boyce saw the pizza place when they were driving and told Willis to take him over there. (13 JQCT 3814.) Boyce said there were four people inside the Lamppost Pizza: two men and two women. Boyce walked in with a gun and told everyone to get down. (6 RT 2245; 13 JQCT 3815-3816, 3862.) Boyce said he did not take any wallets during the robbery of the pizza parlor, only money. (6 RT 2245; 13 JQCT 3816, 3866.) When Detective Kennedy told Boyce that some of the wallets were taken, Boyce replied, "Really, y'all did not find it in the car?" (13 JQCT 3816.) Boyce said he did not know anything about wallets being dumped somewhere. (13 JQCT 3816.) Boyce said that no shots were fired at the pizza parlor – "Learned from the last mistake. So I kept my finger off the trigger." (13 JQCT 3817-3818.)

Boyce said he did everything himself and Willis waited outside. Boyce said Willis was lying if he said he was involved, and they should let Willis go. (13 JQCT 3811-3812, 3818-3819.) Boyce also said Willis also did not have anything to do with the robbery of the pizza parlor. (6 RT 2239-2240, 2245-2246; 13 JQCT 3869.)

Boyce said he was in Wayside in 1994 but did not have any trouble with the deputies there. (13 JQCT 3839.)

On August 19, 1997, a trucker found a wallet near the truck stop by the Weir Canyon exit on the 91 freeway. The wallet contained cards belonging to Edward Tharp. (4 RT 1920-1921.) Other items belonging to Tharp were also found along the freeway. (4 RT 1921-1922; 5 RT 2015.)

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B. Guilt Phase Defense

Buena Park Police Lieutenant Kenneth Coovert and Sergeant Robin Sells testified regarding the search efforts to locate evidence that might have been discarded from the robberies. (7 RT 2409-2410, 2415-2416.) Volunteers and police Explorers searched the areas near the Lamppost Pizza in Yorba Linda, the truck scales off the 91 freeway, the area of the 91 freeway near the Valley View exit, and the area around the ATM that was used to withdraw money from Deputy York's account. (7 RT 2411-2414, 2416-2419.) No diamond engagement ring or any other evidence was found. (7 RT 2414, 2419-2420.)

The defense called Christopher Pierce, the fourth rugby player at Lamppost Pizza, to testify regarding the robbery. Pierce confirmed he was at Lamppost Pizza the night of August 14, 1997, with Cook, Tharp, and Gillette. (7 RT 2421-2422.) Pierce saw Rodney Tamparong go out the back door to take out the trash, and return with his hands up saying "whoa, whoa." (7 RT 2423.) Pierce said the first robber came through the door with his hand under his jacket, like he was holding a gun. The robber told the men to get on the ground. (7 RT 2425-2428.) The first robber went out the back door and talked to someone. He then came back inside and a second robber entered with a shiny metal semi-automatic pistol in his hand. (7 RT 2430-2432.)

As the first robber took the two employees into the back room, the second robber told the rugby players to empty their pockets. (7 RT 2430, 2432.) The second robber kicked him and kicked Cook. (7 RT 2432, 2436.) Pierce took his wallet out of his pocket and gave it to the second robber. His wallet contained his driver's license, military dependent identification, ATM card and about $8 cash. (7 RT 2432-2433.) The second robber took his wallet and put it in a clear plastic bag. No one ever

asked him for his PIN. (7 RT 2433, 2436-2437.) Pierce's wallet was never recovered. (7 RT 2436-2437.)

The second robber asked the rugby players why they were at the pizza parlor so late. They explained they had been at rugby practice. The robber asked what rugby was, and after Cook said it was like football, the robber asked if it was an English or European sport. (7 RT 2433-2434.) The second robber then asked if any of them were "cops." Cook said no, they were teachers. After hearing that they taught "special ed," the robber said that he was in "special ed." (7 RT 2434.) The first robber came back and told the group to stay on the ground while the robbers left. (7 RT 2435.)

Dr. Richard Leo, Ph.D., testified as an expert regarding police interrogation practices. (7 RT 2444-2453.) Dr. Leo explained the different type of interrogation techniques that police are trained to use, and how certain techniques can foster or induce false statements or admissions. (7 RT 2457-2462.) Dr. Leo said the type of techniques that are likely to lead to unreliable statements include (1) ones that communicate differential or lenient treatment in exchange for an admission or confession, (2) confronting a suspect with what a co-defendant said, and (2) building rapport, and being friendly and sympathetic. (7 RT 2471-2474.)

Dr. Leo reviewed the 103-page transcript of Investigator Kennedy's interrogation of Boyce in order to look for certain techniques. (7 RT 2465.) Dr. Leo said that at first, the officers essentially told Boyce that he was caught. (7 RT 2466-2467.) Then the officers told Boyce that it might have been an accidental shooting, which is a technique used to make the suspect feel less morally or legally culpable. Dr. Leo said this theme was used a few times during the interview. (7 RT 2467-2468.) Dr. Leo pointed out the discussion regarding giving Boyce a cigarette, and said that promises or offers such as a cigarette, can transform an interrogation into an inducement of some type. (7 RT 2476-2477.) Dr. Leo explained the post-admission

phase or narrative is important to look at when determining the reliability of the admission. This part of the interrogation demonstrates whether the narrative fits the crime scene facts and is corroborated by the evidence. (7 RT 2477-2480.)

On cross-examination, Dr. Leo said he would expect a lower percentage of false confessions from suspects with a prior criminal record. (7 RT 2483-2484.) Dr. Leo acknowledged that a simplification of what he was saying is that police have developed techniques to interrogate defendants and in response to those techniques, some defendants tell the truth and others lie. (7 RT 2484-2485.)

Dr. Kara Cross, Ph.D., a clinical psychologist specializing in neuropsychology, reviewed Boyce's school records, met with Boyce for 10 hours, and administered six different neuropsychological tests on Boyce. (7 RT 2486-2495, 2504-2505.) Dr. Cross noted that when Boyce was seven years old, he was given the Slosson Intelligence Test and the result was an intelligence quotient or I.Q. of 114, placing Boyce in the above-average range. (7 RT 2506-2509.) Around the same time, Boyce was also given the Peabody Picture Vocabulary Test and his I.Q. was 83, in the below average range. (7 RT 2509-2510.) Dr. Cross believed the difference in the results of these two tests showed that something was wrong with either the administration, scoring, or taking of the tests. (7 RT 2510-2511.) Dr. Cross said in the late 1970's/early 1980's, the Slosson Test was revised, and was administered to Boyce again. Boyce scored an I.Q. of 80, in the below average range. (7 RT 2512.) Boyce also re-took the Peabody test and scored around a 70, in the borderline intellectual functioning range. (7 RT 2512-2513.)

Dr. Cross gave Boyce six neuropsychological tests that tested for varying functions such as motor skills, sensory skills, and verbal skills. (7 RT 2518-2520.) Dr. Cross said the testing was delayed because Boyce

would get frustrated very easily and would either divert attention off the testing or began telling personalized anecdotal stories, i.e. go off on a tangent. (7 RT 2520-2522.) The first test given to Boyce was the Stroop Test, which measures a person's ability to focus on a given task at hand while tuning out interferences. (7 RT 2523-2525.) Boyce's score placed him in the bottom two percent of the population, indicating some type of organic brain impairment. She explained the test was indicating there was probably something wrong with Boyce's frontal lobe of his brain. (7 RT 2527-2529.)

The next test was the Wisconsin Card Sorting Test, which measures for skills that fall within the frontal lobe area such as judgment, problem-solving ability, logic, reasoning, and some verbal skills. (7 RT 2530-2533.) Boyce scored in the bottom one percent, indicating an inability to filter out interference in frontal lobe activity. This result was consistent with the result on the Stroop Test. (7 RT 2533-2534.) On the Memory for Designs Test, which evaluates an individual's visual spatial memory and fine motor coordination, Boyce scored a seven out of fifteen. This score indicated some type of impairment perhaps to motor skills, vision, or memory. (7 RT 2535-2537.)

Dr. Cross administered the Wechsler Adult Intelligence Scale, or WAIS, which was one of the mostly widely used I.Q. tests. This test consists of 14 different subtests. (7 RT 2538-2539.) Boyce's verbal I.Q. was 80, and his Performance I.Q., which measures visual spatial ability, was 68. (7 RT 2540-2543.) Boyce's Full Scale I.Q. which combines all the scores together to show an overall global functioning was 69, in the extremely low or mentally retarded range. (7 RT 2544.)

The next part of the WAIS was the Verbal Comprehension Index, which tests a person's ability to take in auditory and visual information, process it, and communicate with words, i.e. understand what people have

to say and interpret it using verbal skills. (7 RT 2544-2546.) Boyce's score was 86, in the below average range or bottom 16 percent. Dr. Cross found this to be a strength for Boyce. (7 RT 2546.) On the Performance Organization test, which measures a person's ability to visually see and organize the world according to patterns and images, Boyce scored 65, in the bottom one percent. (7 RT 2546-2547.) Boyce's lowest score on the various tests administered by Dr. Cross was the score of 57 on the Working Memory Test, which tests immediate recall. (7 RT 2548-2549.) Lastly, on the Processing Speed Test, which tests how quickly a person can process information, Boyce was in the bottom two percent, indicating Boyce's working memory was impaired and he could not hold on to what was in his memory. (7 RT 2549-2550.)

Dr. Cross found that based on the WAIS results, Boyce could take in information just as well as almost anyone, but the problem was with his processing of the information and his understanding of what the information meant. (7 RT 2550-2551.) Boyce's ability to use logic, to abstract, to have good problem-solving skills, i.e. to take in information and hold it in his memory, work with it, come out with a logical conclusion and take appropriate action was impaired. (7 RT 2551-2552.) Dr. Cross found Boyce's relative strengths were his verbal skills and ability to be a pool of general information. (7 RT 2552.)

Dr. Cross also gave Boyce the Luria Nebraska Neuropsych Test, which localized the dysfunction in the brain. (7 RT 2563-2572.) The test revealed that one of Boyce's strengths was immediate memory. His expressive or receptive speech was a relative strength. (7 RT 2574-2575.) Boyce's areas of impairment were his intellectual processing, i.e. the logic, problem-solving, abstract, and reasoning abilities. Boyce's reading, writing and arithmetic were significantly elevated, and his rhythm and tactical functions were elevated. (7 RT 2575-2576.) Boyce's memory, his

expressive and receptive speech and motor skills were not impaired. (7 RT 2576-2577.)

Dr. Cross opined that Boyce's current scores were completely consistent with his scores from age seven through twelve years old. Dr. Cross testified that consistency with prior test scores was one of the strongest measurements for malingering and here there was a 99.9 percent probability that Boyce is not malingering. (7 RT 2560-2561.) Dr. Cross gave Boyce the Reys Test for malingering, and the results did not indicate Boyce was malingering. (7 RT 2561-2563.)

On cross-examination, Dr. Cross said Boyce was able to know the difference between right and wrong, able to understand cause and effect, and able to make decisions and choices. (7 RT 2578-2579.) Further, Boyce had the ability to decide whether or not to tell the truth, could decide whether or not to kick somebody or rob somebody, and had the coordination to pull the trigger of a gun. (7 RT 2579.) Boyce also was able to communicate, and to read and write. (7 RT 2580.)

Terrence Pascoe, a forensic document examiner, compared two samples of Boyce's writing to the numbers "5455" that were written on the back of the De Cut Hair Salon business card. (7 RT 2608, 2615-2616.) Pascoe concluded the writer of the samples was probably not the writer of the numbers "5455" on the back of the business card. (7 RT 2619-2620, 2622-2626.) On cross-examination, Pascoe acknowledged he was not given writing samples from Willis. (7 RT 2633.)

C. Prosecution Rebuttal

The prosecution did not offer any rebuttal evidence during the guilt phase.

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Penalty Phase

A. Prosecution's Case-in-Aggravation

In addition to relying on the facts and circumstances surrounding the murder of Deputy York and the robberies at both the hair salon and the pizza parlor, the prosecution presented the following evidence in aggravation:

Damani Gray testified that it 1987, when he was twelve-years old, he was walking to a bus stop in Los Angeles when Boyce approached him and asked what set or gang he was from. (9 RT 3064.) After Gray said he was not from any set or gang, Boyce asked Gray if he wanted to be from Rollin' 60's Crip gang. Gray said no, and Boyce grabbed him and punched him unconscious. (9 RT 3064-3065.) When Gray awoke, school police officers were arresting Boyce. (9 RT 3065-3066, 3086, 3089-3090, 3096.) A couple of months before the penalty phase trial, Gray identified Boyce in a photographic line-up as the person who attacked him. (9 RT 3065-3066.)

On cross-examination, Gray acknowledged that in April 1995, he had an argument with his wife. Gray denied punching his wife in the face, grabbing her by the throat, or dragging her into the hall. Gray also said he did not threaten to kill her. (9 RT 3075-3077.) Gray said he called the police two days later to escort him to his home to obtain some belongings. (9 RT 3077.) On a different occasion, when his wife was throwing his belongings into a dumpster, he said "if you don't stop throwing my stuff into the dumpster, I will kill you." Gray testified that he meant it figuratively, not literally, and he did not mean it as a physical threat. (9 RT 3080-3081.) Gray also admitted that in 1994 he was arrested for calling a man and telling him he had his dog and would return the dog for $500. (9 RT 3085-3086.)

On redirect, Gray said that none of this information changed the fact that Boyce beat him up when he was 12-years old. (9 RT 3086.) Gray also

said he was still married to the same woman, and that they had some troubles five years prior and went to counseling. At the time of trial, Gray was a full-time student, worked full-time and was a father. (9 RT 3086-3088.)

Robert L. Jones testified that in 1987, he was a Los Angeles Unified School District police officer, and he wrote a report regarding an incident between Boyce and Gray. Boyce was arrested as the suspect and Gray was the victim. (9 RT 3089-3090.) Although the report wrongly attributed the statement to Gray, Jones recalled that Boyce said "he is going to fuck up the punk who had him arrested when he gets out of jail." (9 RT 3092-3094.)

The prosecution presented documentary evidence of two prior convictions for Boyce: a conviction for robbery on January 31, 1989, and a conviction for possession of a firearm by a felon on November 18, 1994. (9 RT 3097-3098 [Exhibits 81 & 82].)

Brandon York, Deputy York's younger brother, testified Deputy York was 17 months older than him, and growing up they were just a grade apart in school. They did everything together from playing sports to being roommates in college. (9 RT 3099.) Brandon said he felt like one of the biggest parts of his life was gone. He and Deputy York had always talked about watching their children grow up together and taking family vacations together. (9 RT 3101.) Brandon did not have a wedding party at his wedding because his best man was not there. (9 RT 3101.) Brandon said he missed just being able to talk to Deputy York and watching sports together. Deputy York was his best friend. (9 RT 3102.)

Deputy Parrish testified that she and Deputy York were to be married in June 1998. (9 RT 3103.) She described their relationship as extraordinary – they were best friends and did everything together from working together to being at home together. (9 RT 3104.) Not a day goes

by without her thinking of Deputy York and what he looked like that night and what was done to him. She is reminded of him every day at work. She began wearing Deputy York's badge number, as a reminder that he is not there to wear it. Deputy Parrish said how hard it was to go back home and see Deputy York's clothes and everything that said he should be there, but in reality he never would be coming back home. (9 RT 3105.)

Daniel York, Deputy York's father, a retired Los Angeles County Sheriff's Deputy, testified that half of his life is gone. He explained he had a great relationship with both of his sons from managing their baseball teams growing up, to fishing and golfing together. Daniel had worked at the same facility as Deputy York and they knew a lot of the same people. Deputy York often would call his father to talk about work and ask for his advice. (9 RT 3107-3108.) Daniel said he was on his way to Salt Lake City for a family reunion when he received the call about his son being shot and killed. (9 RT 3108.) Daniel said what he misses most is Deputy York's smile and his love for others. (9 RT 3109.)

Patricia Steele, Deputy York's mother, testified regarding the void her son's murder has left in her life. She was very close to Deputy York and his brother, and the boys were her whole life. (9 RT 3110.) She explained her son's death was like a stone that drops and just spreads, and affects every aspect of your life and most of the time, she just feels like she is going through the motions day to day. (9 RT 3111-3112.) She will never be the same. Although her mind knows what happened, her heart does not want to believe Deputy York is gone. (9 RT 3112-3113.)

B. Defense Case-in- Mitigation

Boyce presented the testimony of Los Angeles Police Officer Maria Gholizadeh and of Los Angeles Police Lieutenant Andrew Monsue to impeach Gray's testimony. Officer Gholizadeh testified regarding a 1995 spousal abuse complaint involving Gray where it was alleged that Gray

punched his wife in the face, choked her, dragged her outside, and threatened to kill her if she called the police. (9 RT 3124-3127.) Lieutenant Monsue testified regarding a follow-up interview to the spousal abuse complaint. (9 RT 3198-3202.)

In mitigation, Boyce presented numerous family members and friends who testified regarding Boyce's childhood and the impact his death would have on them.

In 1969, in Grand Rapids, Michigan, Boyce's mother, Vertis Boyce became pregnant with Boyce. Cleveland Moore, Sr. was the father. (9 RT 3330-3334, 3347-3351.) Shortly after Boyce was born, Vertis moved to Louisiana to marry Terry Boyce, who was in the military. (9 RT 3142-3143, 3334, 3350-3351.)

Around age two, Boyce's family moved to North Carolina. (9 RT 3144-3146, 3284-3285, 3288-3289.) There, Evelyn Collier Dixon, Boyce's aunt, helped take care of Boyce when he was young. (11 RT 3591, 3606.) Boyce was an average baby, nothing unusual. He had some upper respiratory problems when he was three months old and a fever from a cold. Boyce also had some seizures during that time. (11 RT 3606.) Dixon remembered only one incident where Boyce had a seizure and an incident when he had a high fever, and her mother, Boyce's grandmother, took him to the doctor[9] (11 RT 3610.)

Dixon never saw Boyce's skin blister from a fever. (11 RT 3614.) However, at trial, Vertis said Boyce had a fever that was so bad that Boyce's skin peeled off. (9 RT 3144-3146.) Vertis then said she did not remember this and did not tell the defense investigator that Boyce had a

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[9] Dixon said that when she and Vertis were young, their grandmother Hattie told them they did not go see a medical doctor for a medical problem because they had "Dr. Jesus." Before Boyce was born, Vertis put down "Dr. Jesus" on a medical form. (11 RT 3607-3609.)

terrible fever where his skin blistered. Vertis then said she did remember Boyce's skin peeling.[10] (9 RT 3148-3149.) Orange County Public Defender Investigator John Depko testified that Vertis told him the fever was so severe that it caused Boyce's skin to peel off. Vertis said she did not seek medical attention because at the time, she did not believe in medical doctors. (9 RT 3362-3363.) Vertis told Depko the fever occurred around the same time Boyce was beginning to talk, and after the fever, Boyce did not talk for approximately two years. (9 RT 3363-3364.) Vertis said that when Boyce started talking again around age five, he spoke with a stutter.[11] (9 RT 3364.)

Cleveland Moore testified that he had kept in contact with Vertis and she never said anything about Boyce having seizures or a fever. (9 RT 3354.)

Dixon noticed Boyce had a speech impediment but was told he might be mimicking his uncle who stuttered. (11 RT 3615-3616.) Vertis told her Boyce was seeing a speech therapist in North Carolina. (11 RT 3616.) Dixon said when Boyce stopped stuttering, the tone of his voice was louder. (11 RT 3646.)

Boyce got along well with Dixon's son, Sean. Boyce was an average, sweet, quiet child and played with Sean. (11 RT 3613-3614.) Boyce also got along well with Dixon's daughter, La Rhonda. La Rhonda had some

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[10] At trial, Vertis contradicted herself several times. According to several family members and friends, Vertis had a drinking problem which began around 1985. When Boyce was born, Vertis did not drink or smoke and was described as a "real churchy girl." After Vertis began drinking, she became more aggressive and assertive. (9 RT 3271, 3296, 3327-3330, 3345-3346; 11 RT 3600-3602, 3647-3648.)

[11] Vertis testified that Boyce did not stop talking at age two and did not have trouble talking from age two to four. Vertis said that Boyce's uncle stuttered and Boyce would mimic him. Vertis said everyone stuttered where they grew up. (9 RT 3152-3153.)

mental infirmities and was slow in learning. (9 RT 3189; 11 RT 3593-3595.) La Rhonda had some problems developing speech when she was growing up and at the time of trial, she lived in a group home for developmentally retarded persons. (11 RT 3595-3596.) Boyce and La Rhonda were very close, favorite cousins. Boyce was a quiet child but he would open up around La Rhonda. (11 RT 3596-3597.) Boyce would protect La Rhonda when other kids would ostracize her. Boyce made La Rhonda laugh. (9 RT 3189; 11 RT 3597-3598.)

Brenda Boyce, Boyce's aunt and a teacher, spent time with Boyce in North Carolina. Brenda said Boyce was quiet and played by himself a lot, but was a delightful, rambunctious young boy who did things other normal kids did at his age. (9 RT 3289.) Brenda said Boyce was always playful, running around and getting into things like a two- or three-year old. (9 RT 3311-3312.)

Boyce's cousin, Tony Boyce, also spent a lot of time with Boyce in North Carolina. Tony said Boyce was quiet and shy, kept to himself but was jovial. Boyce did not play with a lot of other children but instead stayed in the house with his family. (9 RT 3249-3257.) Tony did not notice that Boyce was slow or would stutter. (9 RT 3256-3257.)

Trudith Bell, Boyce's first grade teacher in North Carolina, testified that "educable-wise," Boyce was one of her worst students. (9 RT 3204-3209.) Bell said Boyce had special needs – he had repeated kindergarten once and was still not prepared for first grade.[12] (9 RT 3210.) Bell felt that

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[12] At trial, Vertis testified that the school in North Carolina told her that Boyce would have to repeat kindergarten. According to Vertis, Boyce did not repeat kindergarten and was singled out because he was "black." (9 RT 3166-3168.) Vertis denied that Boyce had any learning problems in school, and said he was always polite. (9 RT 3169.) However, according

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Boyce was immature and very shy. She said Boyce would get frustrated and would not do his school work. (9 RT 3210-3211.) At that time, the school did not have the resources to deal with someone like Boyce. (9 RT 3211-3212, 3214.) They had a special class for the educable mentally retarded, but Boyce did not qualify because his I.Q. was not below 70. (9 RT 3212-3213.) Boyce was placed in a speech program because of his stuttering. (9 RT 3213-3214, 3235.)

Bell said she referred Boyce to the mental health clinic, and had a conference with Vertis and asked Vertis to take Boyce to the mental heath clinic. (9 RT 3223-3224.) Vertis was also having problems with Boyce at home. (9 RT 3225.) According to Bell, Evelyn Edmisten, an education specialist and "employee of mental health," met with Boyce and his mother. (9 RT 3228-3229.) Bell had told Edmisten that Boyce had been having problems in the classroom, that he did not get along well with his peers, did not do his work, gave up too easily and got frustrated, and was a loner and an introvert. (9 RT 3229-3230.) Bell talked to Edmisten about Boyce's need to repeat first grade, and Vertis being uncooperative. (9 RT

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to defense Investigator Depko, Vertis said that she insisted Boyce repeat first grade. (9 RT 3365.)

Brenda Boyce said that Vertis told her she was concerned about Boyce repeating kindergarten because Vertis did not want him labeled as a slow learner or an exceptional child. (9 RT 3290-3291.) Brenda said it was better to keep him back when he was younger and that Boyce should be tested. (9 RT 3291-3292.) Brenda thought that Vertis never really accepted the fact that Boyce had any learning problems. Brenda said Boyce had obvious problems – he stuttered and mumbled his words and sometimes did not use full sentences. (9 RT 3293-3295.) Brenda said Vertis moved the family to California after the school recommended Boyce repeat first grade. (9 RT 3294.)

3231-3232.) Boyce moved after the end of the school year. (9 RT 3226-3228.)

Bell said besides the stuttering, Boyce had delayed language. (9 RT 3241.) Bell also said that Boyce had failed a vision test, but was not referred to an optometrist. Bell explained that a person needs to have all of his senses in order to be able to learn. (9 RT 3242.)

Boyce, his mother, and his sister moved to Los Angeles in 1978. Terry Boyce stayed behind but joined the family a year later. (9 RT 3166, 3173.) During the year Terry Boyce stayed in North Carolina, he had a relationship with Hazeline Smith. (9 RT 3313-3314.) Ms. Smith met Boyce when Boyce and his sister Michelle stayed with Terry during the summer of 1979. (9 RT 3315.) Boyce was not as outgoing as Michelle and he kept to himself. (9 RT 3319.) Boyce would stutter when he got excited, and the other children would make fun of him. (9 RT 3321.) After Boyce warmed up to Smith, he was clingy and needy, and spent most of the time with her. (9 RT 3323-3324.) Smith thought Boyce was scared and did not have the confidence to speak out or play with the other children. (9 RT 3325.) At some point, Terry suddenly left with his children and moved back to California. (9 RT 3324.)

In Los Angeles, Boyce, his mother and sister initially lived with Hattie Wilson, Vertis's sister. Boyce was five or six years old. (11 RT 3820-3822.) Boyce was quiet, very respectful, and an obedient child. Boyce appeared to be shy and he stuttered a lot. (11 RT 3823.) Boyce was very close to his grandmother Nellie. (9 RT 3307; 11 RT 3824, 3837-3839.)

After Terry Boyce moved to California in 1979, the family moved to Huntington Beach. (9 RT 3166, 3173.) Brenda visited the family in Huntington Beach and said that Boyce was still quiet but he played with other children. (9 RT 3303.)

The Boyce family then relocated to South Central Los Angeles. (9 RT 3165, 3175, 3177-3178.) The school referred Boyce to mental health services and special education. (9 RT 3175.) At some point, Boyce went to speech therapy for his stuttering. (9 RT 3176.) Boyce stopped going to special education classes around junior high school because he no longer wanted to do so. (9 RT 3183-3184.)

When Boyce was seven or eight years old, he attended the First Baptist Church in Los Angeles with his stepdad and grandmother. (10 RT 3566-3569.) Reverend Jeff Barber testified that Boyce was very quiet at church – he was well-behaved and did not say too much or play with the other children. Boyce attended church until he was a teenager. Reverend Barber thought Boyce was an unusual child and perceived him as being sad. (10 RT 3570-3574.)

When Boyce was 10 or 12 years old, Boyce's aunt, Hattie Wilson, remembered him having a fever and going to the hospital. (11 RT 3826-3827.) Wilson thought Boyce had some allergic reaction to Penicillin and was in a coma. (11 RT 3827.) Dixon also recalled that when Boyce lived in California, he had another high fever. She thought Boyce was about nine years old. Vertis would not take him to the doctor because she did not have insurance. (11 RT 3619.) Dixon told Vertis to pretend Boyce was Sean, who did have medical coverage, so Vertis did so. (11 RT 3620.)

Dixon said that Vertis did not like being told how to raise her children. One time their mother, Nellie, told Vertis that Boyce might need some psychiatric care like La Rhonda and Vertis said, "No, because nothing is wrong with my child." Vertis had a pattern of this kind of denial. (11 RT 3633-3634.) One Easter, the children were given Easter poems to read. La Rhonda, who had been diagnosed educable retarded, could not learn hers. Boyce had trouble with his poem and Vertis got upset

with him because he could not concentrate on the speech. (11 RT 3635-3636.)

In 1983, when Boyce was 13-years old, he went to Michigan to meet his father, Cleveland Moore. Boyce first spent about a week with Ann Moore and her family, and then spent about three weeks in Lansing, Michigan with his father, stepmother and family. (9 RT 3335-3336, 3354-3356.) Boyce was quiet and "stand-offish," but he talked to the other children. (9 RT 3340, 3357-3358.) It appeared Boyce fit in at his father's house and he played with the other boys. (9 RT 3341, 3360.) Boyce did not want to leave when it was time for him to go home. (9 RT 3357-3358.) Boyce did not see his father after this. (9 RT 3358.)

That same year, Boyce's cousin Tony visited him in Los Angeles. Boyce had started wearing "saggy" pants but everything else seemed fine with Boyce and his family. (9 RT 3257-3259.) A few years later, Tony lived with Boyce's family for about one year and shared a room with Boyce. (9 RT 3261.) Boyce was still laid back and quiet, but was also polite and respectful towards others. Boyce still wore the "saggy" pants and told Tony they were living in a "Crip" neighborhood. (9 RT 3263.) Boyce said he was a member of the Rolling 60's Crip gang, but that he was more involved in the neighborhood than the gang because it was something to do, like family. (9 RT 3263-3264, 3282.) Boyce's Uncle Rusty was just a few years older than Boyce and in a gang. (9 RT 3266-3268.) Tony thought Boyce was more talkative and open around Rusty. (9 RT 3271.)

At that point, Boyce had been kicked out of a few high schools and did not go out very much. Tony said Boyce had a few male friends but he spent a lot of time talking to females on the phone. (9 RT 3265.) At some point, Boyce quit going to high school. (9 RT 3191.) Boyce's parents supported him and did not make him get a job. (9 RT 3191.)

Around 1986, Vertis talked to Ann Moore about her concern with Boyce and gangs.[13] Vertis said Boyce was misbehaving and admiring the wrong people. (9 RT 3345-3346.) Around this same time, Vertis also called Cleveland Moore and said she was concerned because Boyce had gotten involved in a gang in Los Angeles. Vertis asked if Boyce could move to Michigan. Mr. Moore said he could if that was what he wanted to do. Moore never heard back from Vertis until some time later to inform him he had a grandchild in California. (9 RT 3359.)

While the Boyce family was living in California, Boyce's great-grandmother Hattie lived with them. Boyce helped take care of Hattie because she was older and sick. (9 RT 3179-3180; 11 RT 3638-3639.) In 1985 through 1987, Boyce helped wash Hattie's clothes, helped her to the bathroom, and made sure she had food. (11 RT 3639, 3837-3839.) When Hattie died in 1994, Boyce was devastated. (11 RT 3641.) Boyce was a pallbearer at Hattie's funeral. (11 RT 3839.) Seven months later, Boyce's grandmother Nellie died. Dixon thought that Boyce was incarcerated when Nellie died. (11 RT 3642.)

In 1985, Brenda Boyce saw Boyce in Texas at wedding. Boyce was wearing baggy pants down to his hips. Boyce was cooperative and polite, and kept to himself. (9 RT 3304.)

According to Boyce's aunt, Hattie Wilson, it was around 1988 when Boyce was spending time with his Uncle Rusty, who was involved in a gang. (11 RT 3825, 3828-3829.) Dixon also testified that later in life was when Boyce spent more time with and looked up to his uncles, Rusty, Greg, and Terry, and that was when Boyce started wearing baggy pants. (11 RT 3624-3625.)

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[13] But, according to Vertis, Boyce spent a lot of time at home and did not go out "gang-banging." (9 RT 3188.)

Hattie Wilson knew Boyce was drinking, and around that time, Boyce was smoking PCP or "sherms." (11 RT 3830-3832.) Wilson said sometimes Boyce would be "all spaced out" and she would see him just staring or talking to trees or walls. (11 RT 3832.) Wilson said when Boyce was under the influence, he would refer to himself as "Osiris." (11 RT 3833.)

Around this same time, Wilson was addicted to cocaine and Boyce discouraged her from using it. Boyce was 17 and 18 years old and he would say to her "Auntie Hattie Mae, get yourself together, I love you." Boyce always loved her and respected her. (11 RT 3827-3828, 3834-3835.)

Boyce has a daughter, Kevonna, who was seven years old at the time of trial. Vertis said that Kevonna visited Boyce in jail, and the two loved each other and had a good relationship. (9 RT 3193-3194.) Chavon White is Kevonna's mother. (11 RT 3718.) Chavon's father, Walter White, testified that he met Boyce in 1992, when his daughter began dating Boyce. (11 RT 3708-3709.) When Chavon met Boyce, she had a five-year old daughter. (11 RT 3711.) White said that Boyce was different from the other guys that Chavon dated. Boyce was polite and showed respect for him, such as calling him "Mr. White." (11 RT 3711-3712.) White said Boyce also treated Chavon very well. (11 RT 3715.) His only complaint about Boyce was that he would not get a job. (11 RT 3716.)

White said that Boyce was sort of quiet but he had a sense of humor. The two would talk about sports. (11 RT 3716-3718.) When Boyce and Chavon were together, Chavon would go to work and Boyce stayed home and took care of the children during the day – he fed them, got them dressed, kept them clean, and changed diapers. (11 RT 3719-3721.) White said Boyce was a good father and was kind and gentle to both girls. (11 RT 3722-3723.)

Vertis testified that she learned about "Osiris" after Boyce spent time in prison. Boyce said this was his name, and Vertis thought it was normal. (9 RT 3192-3193, 3368.) Vertis said Boyce slept for two days after she first heard him call himself Osiris. She did not know if he had been doing drugs at the time. After that time, Boyce often referred to himself as Osiris. (9 RT 3368-3369.)

On August 4, 1997, about ten days before the murder, Dixon was visiting California and she saw Boyce. She said Boyce was very polite to her. (11 RT 3621.) Dixon did not notice anything unusual about Boyce, and said he was quiet and reserved, and was home a lot during the evenings. (11 RT 3622.) Dixon said Boyce watched a lot of television and was a loner. (11 RT 3623.)

Boyce's family members testified regarding the impact a death sentence would have upon them. Boyce' s mother said her family would be hurt and empty, and she loved Boyce more than anybody in the world. (9 RT 3195-3196.) Boyce's cousin Tony said he was shocked by the convictions because he never saw a "bad bone" in Boyce. Tony said Boyce's death would hurt him. (9 RT 3280-3281.) Brenda Boyce said Boyce's death would be like a light went out, one that was flickering for a long time but no one bothered to see why. (9 RT 3311-3312.)

Boyce also presented several experts in mitigation. Alex Alonso testified regarding gangs in Los Angeles. Alonso had completed his Master's thesis on Territoriality Among African-American Street Gangs in Los Angeles, and was currently a doctoral student in human geography at the University of Southern California. (10 RT 3376-3380.) Alonso explained that from 1972 to 1996, there was a rise in the number of gang members and gang activity, and an expansion of gang territory in Los Angeles. (10 RT 3394-3395.) Alonso was familiar with the Rollin' 60's, a

Crip gang associated with the Hyde Park area in South Central Los Angeles. (10 RT 3399-3400.)

Alonso said youth in a certain neighborhood will be aware of the gangs and learn the boundaries of the gang and where not to go. Some people are perceived to be in a gang because of where they live, even if they are not actually part of the gang. (10 RT 3409.) Defense counsel showed Alonso maps of where Boyce lived and went to school in South Central Los Angeles. Alonso described what gangs controlled those areas. (10 RT 3416-3428.) For example, where Boyce lived on 4th Avenue was controlled by the Rollin's 60's Crip gang. (10 RT 3421-3422.) The address that Damani Gray testified that he lived at was claimed by the Inglewood Blood Gang, a rival to the Rollin' 60's gang. (10 RT 3423.)

On cross-examination, Alonso said he was associated with the Rollin' 20 Bloods and still lived in a neighborhood controlled by the Rollin' 20 Bloods. (10 RT 3431-3433.) Alonso said if a gang member is told to commit a robbery or murder, doing so would elevate his status within the gang. (10 RT 3435.) Alonso agreed that gang members generally do not get along with the police but said only a small minority of gang members would pull the trigger and kill a police officer. (10 RT 3437-3438.) Killing a police officer may impose a greater status for a gang member with other gang members, even in prison. (10 RT 3438.)

Dr. James H. Johnson, Jr., a sociologist and professor of management, sociology and public policy, testified regarding urban social geography and inner city youth. Dr. Johnson was an expert on the economic background of South Central Los Angeles from the 1950's forward, and the phases of its development and effect on the sociology of an individual. (11 RT 3650-3658.) Dr. Johnson had documented the experiences of young African-American males in South Central Los Angeles. (11 RT 3659.) Dr. Johnson

explained to the jury the history of the formation of gangs in the South Central area. (11 RT 3361-3664.)

Dr. Johnson said he reviewed and evaluated materials provided to him regarding Boyce. (11 RT 3667-3668.) Dr. Johnson explained the factors that determine whether a male African-American inner city youth in South Central will succeed or start committing crimes. First, children are less likely to succeed if their parents do not have the proper parenting skills and family management skills that are critical to successful child development. (11 RT 3669-3670.) Second, even when parents have good parenting skills, if the family lives in a community without what is called "mediating institutions," or ways to encourage children to pursue mainstream avenues of social and economic mobility, and discourage dysfunctional and antisocial behaviors, this can lead to criminal behavior. This is common with children who often moved residences because they are not able to place down roots and build a network of institutional resources and key individuals that can make a different in their lives. (11 RT 3670.)

Dr. Johnson said there is a high correlation between residential moves and school moves – both are very disruptive. (11 RT 3670.) Dr. Johnson explained moving is disruptive for everyone, but in a family context, such as developing ties to places and people, those ties are broken when you move and it is a disruptive process in and of itself. (11 RT 3671.) Dr. Johnson saw this disruptive process with the residential and school moves that Boyce encountered. (11 RT 3671.) Between birth and age 17, Boyce moved residences 17 times and went to 23 different schools through tenth grade. (11 RT 3671, 3699-3701.)

Based on his studies, Dr. Johnson said that among students who entered high school in 1984 in predominantly African-American high schools, between 60 and 79 percent of those students did not graduate in

1988. (11 RT 3692.) Dr. Johns acknowledged that one reason for this was stricter standardized testing. (11 RT 3693.)

Dr. Joseph Cervantes, a clinical psychologist and college professor, testified regarding child development issues and how they impact pathology or aberrant behavior. (11 RT 3724-3725.) Dr. Cervantes said developmental milestones, such as speech and language, fine and gross motor skills, intellectual functioning, the ability to attach to others or interpersonal functioning are primary things to look at when evaluating a child. For example, if a child does not learn to speak until age four, five, or even six years old, that will set a certain stage for some difficulties with developmental deviation and potentially mental retardation and learning disabilities. It is a signal that something could be amiss. (11 RT 3730.) Dr. Cervantes said if milestones are not met when they are supposed to be, it becomes difficult to catch up and can hinder growth in the future. (11 RT 3734-3735.) If a child is shy, quiet, withdrawn and a loner, this may be a sign of a milestone issue. (11 RT 3736.)

Dr. Cervantes said that most children begin talking around 10 to 12 months of age, and by two years are talking. (11 RT 3737.) If a child is slow to begin talking, for example, not until four or five years old, and if there is a speech or language problem, it may be a sign of possible retardation, a learning disability, or an aphasia, i.e. being able to see and understand but not being able to speak. (11 RT 3737-3738.) Dr. Cervantes explained that self-esteem is embedded in the physical, emotional, mental, and overall psychological framework of a developing child. (11 RT 3738.)

Dr. Cervantes said linking learning stability with brain damage is a controversial area. Some think that some neurological mis-wiring impacts a child's ability to be able to learn. (11 RT 3740.) Seizures and febrile activity oftentimes can compromise the brain and be a precursor to later problems. There is a "strong relationship" between febrile seizures in

young infants and children, and later problems with academic functioning, learning disabilities, and attention deficit disorder. (11 RT 3741.) When a child's developmental life cycle is impacted with speech and language difficulty or impaired intellectual functioning, it may lead to negative experiences in school such as having little or no friends, and an instable social life. (11 RT 3742-3743.) The child's level of self-esteem will probably be low, his social relationships will be minimal or nonexistent, and if there is intellectual impairment, it will set the stage for how the child views himself in terms of future relationships, employment and ability to earn a living. (11 RT 3743.)

A child with compromised speech and language intellectual functioning and interpersonal functioning will have a skewed perception of the world and will tend not to understand the rules of how to socialize. (11 RT 3745-3746.) This person will not be able to cognitively think through situations or react to situations with reason, so he might strike out or be aggressive. (11 RT 3746-3747.)

Dr. Samuel Benson, M.D., testified regarding his evaluation of Boyce. Dr. Benson's specialty is psycho pharmacology, a sub-branch of psychiatry that uses medications to treat the very seriously ill. (10 RT 3439-3440.) The defense hired Dr. Benson to evaluate Boyce, and as part of the evaluation, Dr. Benson reviewed a neurological report from Dr. Kenneth Nudleman, a report from Dr. Kara Cross, Boyce's school records from birth through junior high school, and some mental health records and psychiatrists' reports. (10 RT 3447-3449, 3450, 3453, 3549-3550.) Dr. Benson also reviewed defense investigative reports prepared regarding interviews of several people who testified for the defense in the penalty phase, including Brenda Boyce, Tony Boyce, Evelyn Collier, Trudith Bell, and Vertis and Terry Boyce. (10 RT 3450-3451, 3549-3550.) Dr. Benson unsuccessfully tried to meet with Vertis Boyce. (10 RT 3451-3452.) Dr.

Benson met with Boyce at the jail approximately six times, for an hour and a half each time. Boyce would not discuss the facts underlying the current crimes with Dr. Benson. (10 RT 3449, 3454, 3549-3550; 11 RT 3803-3804.)

Dr. Benson opined that Boyce had organic brain damage. He formed his opinion after reviewing Dr. Nudleman's report based on a December 22, 1997, test performed on Boyce. Dr. Benson said a diagnosis of organicity damage was consistent with Dr. Nudleman's report that the Q.E.E.G. (a type of electroencephalogram or E.E.G.) was abnormal. Dr. Benson's opinion was also consistent with Dr. Cross's report and diagnosis that Boyce has a moderate to high probability of organicity. (10 RT 3460-3464.)

Dr. Benson diagnosed Boyce based on the multiaxial system in the D.S.M. IV book. Axis I deals with the mental disorder of the patient, i.e. what is the psychiatric diagnosis particularly as related to the mental disease. It represents major psychiatric disorders, i.e. the inability to test and understand reality as it presents itself. Schizophrenia, organic brain disease, and depression would fall into this category. (10 RT 3469, 3479.) Dr. Benson diagnosed Boyce with organic brain disease and ruled out delusional disorder. The specific diagnosis was psychosis N.O.S., ruling out delusional disorder and substance abuse disorder including alcohol, marijuana, and Phencyclidine (10 RT 3468-3470.)

Under Axis II, Dr. Benson diagnosed Boyce with schizotypal disorder with borderline features and specific learning disabilities, secondary to organic brain disease since childhood. (10 RT 3468.) This axis looks at how well a person handles situations under stress, i.e. the defense mechanism or the style a person has when maximally stimulated. (10 RT 3470-3471.) Dr. Benson diagnosed Boyce as schizotypal and opined that Boyce exhibits all of the factors that make a person schizotypal: ideas of

reference, odd beliefs, magical thinking, unusual perceptions, perceptual experiences, odd thinking and speech, suspiciousness or paranoid ideation, inappropriate or restricted affect, behavior or appearance that is odd, eccentric or peculiar, lack of close friends and confidantes other than relatives, and excessive social anxiety. Only five out of these nine factors is needed to be diagnosed schizotypal. (10 RT 3471-3472, 3535-3539.)

Dr. Benson's finding under the second part of Axis II was specific learning disability secondary to organic brain damage since childhood. The learning disability finding was based on Boyce's school records. (10 RT 3472.) Dr. Benson looked at Boyce's history and risk factors to explain the organic brain damage, and the most reasonable explanation was that Boyce suffered periods of high fevers, starting at age two or three, and according to Vertis and Brenda Boyce, seizures, for which Boyce did not receive adequate medical care. (10 RT 3472-3475, 3562.) A severe fever can cause brain damage because a brain cannot take high temperatures. (10 RT 3516, 3518.) Dr. Benson saw that Boyce had a 105 degree fever from measles. (10 RT 3518.)

Dr. Benson found no problems under Axis III, which deals with medical issues. (10 RT 3468, 3475, 3479.) Under Axis IV, psychological stressors, i.e. what kind of stress the person has been under, Dr. Benson noted that Boyce had been incarcerated, which is very stressful. (10 RT 3468, 3475, 3479-3480.) Lastly, Axis V deals with the global assessment of functioning, or G.A.F., which is basically one's ability to function generally. (10 RT 3468, 3475, 3480.) Boyce's highest assessment of functioning in the past year was 40; the range for G.A.F. is from 10 to 100. (10 RT 3476.) A person with a G.A.F. of less than 40 is not functioning very well, i.e. his level of understanding of his environment or how he is getting along in the word is low. Dr. Benson opined that Boyce's G.A.F. had not been higher than 40 in the past year. (10 RT 3477.)

The factors that influenced Dr. Benson's diagnosis of organic psychosis were Boyce's symptoms of auditory and visual hallucinations, his delusions of grandeur and persecution, illogical and magical thinking, poor vision and limited reality testing, combined with the neurological results from the E.E.G. (10 RT 3480.) Dr. Benson opined that when Boyce was a small child, he had difficulties doing well in school and getting along with his peers, so he had certain coping mechanisms, including hallucinations and delusions. (10 RT 3501-3503, 3507.)

Boyce told Dr. Benson that he first heard voices that no one else could hear around age three or four. (11 RT 3806.) Boyce said he called it the power of "special forces." Dr. Benson explained that when a troubled brain became delusional, Boyce would hear an authoritarian voice that would explain things to him that were troubling. (11 RT 3792.) An example of this was that Boyce told Dr. Benson he believed his grandmother was somehow responsible for him going to prison. This appeared to be a way for Boyce to deal with his grandmother's death. (11 RT 3792-3793.) There was also evidence that Boyce heard voices in kindergarten, a type of hallucination. (10 RT 3518.) Boyce said that when he was in kindergarten, a voice told him to pick up a wooden cube and throw it at a girl. (11 RT 3793.)

Boyce described a psychotic episode he had when he was ten years old. Boyce slept with the lights on because he was afraid of demons in the darkness. Boyce described a particular trance-like state in which he headed or commanded God's army against evil. (11 RT 3793-3794.) Dr. Benson said that although Boyce was almost borderline mentally retarded, he found it unsurprising that he was able to recall an event from when he was 10 years old and another incident from kindergarten. (11 RT 3805-3806.)

Dr. Benson said it appeared Boyce was struggling with his identity and the reality he was facing, i.e. not being able to compete with others

academically and having difficulties at home. In this kind of situation, the brain, in order to function, will create a more desired mental state. The person may develop delusions or false beliefs in order to function. (11 RT 3790.) Dr. Benson opined that the hallucinations and delusions originated from organic brain damage. Boyce's delusions and hallucinations progressively intensified since when he first heard voices. (11 RT 3795-3796.)

Dr. Benson could not find any school records that mentioned Boyce hearing voices. Dr. Benson thinks he received this information from Boyce himself. (11 RT 3817-3818.) Dr. Benson attributes the voices to Boyce's organic brain damage, and believes Boyce is legitimately hearing voices and that Boyce is being truthful. (11 RT 3818.)

Dr. Benson reviewed a report dated March 1998 regarding an interview with Michelle Boyce. Michelle said the Osiris phenomenon started in 1986, when Boyce returned from a stay at juvenile hall, and Boyce claimed to be a reincarnation of the Egyptian God Osiris, Lord of the Dead. (11 RT 3788-3789.) Michelle said Boyce had an obsession with Osiris since that time and had not wavered from his belief since then. (11 RT 3789.) Dr. Benson also reviewed a report from an interview with Chavon White dated June 2000. Chavon said Boyce referred to Osiris as his king and told Chavon she was his queen. She said the subject about Osiris just came out of the blue one day. (11 RT 3790-3791.) Dr. Benson opined that "Osiris" was also a coping mechanism. (10 RT 3501-3503, 3507.)

Dr. Benson noted that there was a connection between Boyce's history of learning disability, stuttering and speech formation issues, and his organic brain damage or dysfunction. Specifically, there was a lack of speech between ages two and four, and after that Boyce had developmental issues. (10 RT 3484-3485.) School records from 1980, when Boyce was

nine-years old, said he was having difficulty with vocabulary and forming sentences. The records showed Boyce was withdrawn and immature, and had difficulty adjusting with his peers. (10 RT 3520-3523.) School records through 1983 consistently showed Boyce had low academic functioning, delayed speech development, vocabulary below normal, and reading and learning dysfunction. (10 RT 3524-3531.)

Dr. Benson did not diagnose Boyce with antisocial personality. (10 RT 3480-3482, 3554-3558; 11 RT 3799.) Dr. Benson found that Boyce's history and analysis are consistent with schizotypal personality and Boyce therefore does not fit the criteria for antisocial personality. (10 RT 3482-3483.) A diagnosis of antisocial personality is based on a lifelong pattern of behavior, and most people have incidents that can fit into an antisocial episode, but that does not mean the person has an antisocial personality. (10 RT 3563.) Schizotypal is defined as something affecting a person's reality testing, i.e. he or she does not perceive the world in the same way as the majority of people do. (10 RT 3563-3564.) Episodes of psychosis is a characteristic of schizotypal personality. (10 RT 3565.) Dr. Benson determined Boyce was not an antisocial personality but was schizotypal because of Boyce's style, i.e. generally trying to get along and be helpful, quiet and straight-forward, and not a trickster. People who are antisocial are deceitful, cheating, and have a lot of history of getting things by deceit. Boyce's pattern showed he was not like that, and there was nothing in the records showing that. (10 RT 3565.)

Dr. Benson acknowledged that he was not saying that Boyce could not write, make a choice, or pull a trigger of a gun. (10 RT 3519-3520.) On cross-examination, Dr. Benson acknowledged that some of Boyce's records included positive comments, such as stating that Boyce was a fine boy and was progressing with his reading. One record said that Boyce needed to work on self-control. Teachers stated that "I have enjoyed

having [Boyce] in my class this year," and that Boyce was "trying very hard in all areas. Great family. Parents very cooperative. Well liked. Too shy to appreciate it." (10 RT 3540-3541.) The records also said that Boyce disliked academics but liked the nonacademic activities such as taking trumpet lessons and playing sports. A record from 1983 noted that Boyce was "still showing a quick temper," but he excelled when he was in his element, such as playing basketball. (10 RT 3541-3542, 3554.)

Regarding Boyce's medical history, a school record from 1980 said "besides 105-degree fever with measles, the medical history appears unremarkable." This was the only mention in the records about a high fever and it did not say when the fever occurred. (10 RT 3542-3543.) People that were around Boyce as a baby said he had fevers from infant to around three-years old, and Dr. Benson got the impression Boyce had suffered more than a single episode of a high fever. (10 RT 3543-3544.) Dr. Benson discussed Roseola, which is a childhood viral infection. Symptoms include a rash and high fever. (10 RT 3544-3547.)

Boyce told Dr. Benson he began "gang-banging" when he was 14 or 15 years old. (11 RT 3801.) Boyce described the time he spent in prison, including going to Pelican Bay for assaulting a police officer. The assault occurred when Boyce was in a different prison and assaulted a correctional officer. (11 RT 3801-3802.) Boyce did not say a voice told him to commit the assault or any other crimes. (11 RT 3802-3803.)

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ARGUMENT

I. BOYCE'S DEATH SENTENCE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

Boyce contends his death sentence must be vacated because the Eighth Amendment prohibits imposition of the death penalty on people who are mentally ill. (AOB 62-81.) Boyce's contention is legally unsupportable.

In *Atkins v. Virginia* (2002) 536 U.S. 304, 321 [122 S.Ct. 2242, 153 L.Ed.2d 335], the United States Supreme Court held that execution of a mentally retarded criminal is "cruel and unusual punishment" under the Eighth Amendment. Boyce first claims the record contains "clear and convincing evidence" that he is mentally retarded as defined by *Atkins*. As Boyce acknowledges, however, post-conviction *Atkins* claims must be raised by a petition for writ of habeas corpus. (AOB 62, citing *In re Hawthorne* (2005) 35 Cal.4th 40, 47; *People v. Jackson* (2009) 45 Cal.4th 662, 679-680.) Accordingly, Boyce expressly states that he is not raising his *Atkins'* claim on direct appeal. (AOB 62.)

Instead, Boyce contends that the evidence established he is "significantly brain damaged and severely mentally ill," and, thus, the rationales underlying *Atkins* apply equally to the execution of a criminal who is severely mentally ill. (AOB 62-78.) As Boyce acknowledges (AOB 70, fn. 37), state and federal courts have declined to extend the holding in *Atkins* to mental illness. (*ShisInday v. Quartermain* (5th Cir. 2007) 511 F.3d 514, 521; *Mays v. State* (Tex. 2010) 318 S.W.3d 368, 379-380; *Diaz v. State* (Fla. 2006) 945 So.2d 1136, 1150-1151; *Commonwealth v. Baumhammers* (Pa. 2008) 960 A.2d 59, 96-97; *State v. Johnson* (Mo. 2006) 207 S.W.3d 24, 51; *Lewis v. State* (Ga. 2005) 620 S.E.2d 778, 764; *State v. Hancock* (Ohio 2006) 840 N.E.2d 1032, 1059-1060.) There is no reason for this Court to conclude otherwise. Boyce fails to show a national

legislative consensus has developed against the execution of mentally ill individuals, as was the case in *Atkins* with mentally retarded individuals. (*Atkins v. Virginia, supra,* 536 U.S. at pp. 314-317.) The United States Supreme Court did not rely in *Atkins*, as does Boyce here, on the opinion of mental health organizations, law reviews, and a Gallup poll survey of Americans. (See AOB 72-78.) Given the absence of legislative consensus, there is no need to turn to the question of whether any such national consensus is supported by United States Supreme Court's recognition of retribution and deterrence as justifications for the death penalty. (See *Atkins v. Virginia, supra,* 536 U.S. at p. 318 ["[O]ur death penalty jurisprudence provides two reasons consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution"].)[14]

For these same reasons, Boyce's death sentence does not violate his rights under the Due Process and Equal Protection Clauses of the state and federal Constitutions (see AOB 78-81). (See *Carroll v. Secretary, Dept. of Corrections* (11th Cir. 2009) 574 F.3d 1354, 1370; *State v. Hancock, supra,* 840 N.E.2d at pp. 1059-1060; see also *Tigner v. Texas* (1940) 310 U.S. 141, 147 [60 S.Ct. 879, 84 L.Ed. 1124] [holding equal protection "does not

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[14] In addition to being legally unsupportable, Boyce's claim of cruel and unusual punishment predicated on mental illness is factually unsupported. The evidence established that Boyce knew the difference between right and wrong, he was able to make choices and knew the consequences of his actions. When he was younger, Boyce cared for his ailing great-grandmother (9 RT 3179-3180; 11 RT 3638-3639, 3837-3839), and later in life took care of his daughter (11 RT 3719-3721.) Boyce was characterized as a "good father." (11 RT 3722-3723.) Just days before the murder, Boyce's aunt was in town and she said Boyce was very polite to her, offering to pick up items from the store for her. She did not notice anything unusual about him. (11 RT 3621-3623.) Viewed as a whole, the evidence does not factually support Boyce's theory of mental illness.

require things which are different in fact or opinion to be treated in law as though they were the same"].)

II. THE TRIAL COURT PROPERLY ADMITTED THE 911 TAPES

Boyce contends the trial court denied him his state and federal constitutional rights by erroneously admitting into evidence during the guilt phase of his trial audio recordings of the 911 calls made after Boyce and Willis fled the salon, arguing the tapes of the calls were irrelevant and unduly prejudicial. (AOB 82-90.) Boyce further claims the trial court erred in permitting the jury to consider the 911 tapes as circumstances of the crimes during the penalty phase. (AOB 90-96.) The trial court acted within its discretion in admitting the evidence. In any event, Boyce was not prejudiced by admission of the 911 calls during the guilt phase of his trial, nor consideration of as evidence of the circumstances of the murder of Deputy York during the penalty phase.

Two 911 calls were made from the salon after Boyce shot Deputy York, the first by Ms. Parish, the second by Deputy Parish. During their respective testimony, the prosecutor played Deputy Parish's and Ms. Parish's 911 calls. (4 RT 1839-1840 [Exhibit Nos. 10 (transcript) & 11 (tape)]; 6 RT 2166-2167 [Exhibit Nos. 71 (tape) & 70 (transcript)].)

When Ms. Parish called 911, she stated there was a gunshot victim who was shot in the back of the head but was still breathing. Ms. Parish said, "He's shot in the back of the head and there's stuff coming out of his nose." The dispatcher told Ms. Parish to "lay him down." Ms. Parish said, "It's two black men. They each have a gun . . . Please help him . . . They took the guns with them." The dispatcher told Ms. Parish what to do for the bleeding. Ms. Parish told the dispatcher a police officer was there and asked where the ambulance was. The dispatcher told Ms. Parish the ambulance was on the way. Ms. Parish said, "Oh, God. (Background voices) Yes. Right here. All you need. Right here. All you need. I'm

trying sir." The police officer told Ms. Parish to hang up and she did so. (See Exh. No. 70; 13 JQCT 3773-3776.)

In her call to 911, Deputy Parish indicated they needed an ambulance and said, "My husband's been shot in the head. I'm over here * * * so hurry yeah." Deputy Parish told the dispatcher he was on the floor, at a hair salon, and she gave the dispatcher the address. The transcript of the 911 call then noted that "due to an unknown technical difficulty with the tape this was the only information received by the recording device for this incident. It's unknown what the trouble was and why there was no more recorded." (See Exh. No. 10; 13 JQCT 3769-3771.)

Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts such as identity, intent, or motive. (*People v. Heard* (2003) 31 Cal.4th 946, 973.) Any evidence is admissible to support the credibility of a witness if it will establish a fact that has a tendency in reason to prove the truthfulness of the witness's testimony. (*People v. Jones* (1984) 155 Cal.App.3d 153, 182; Evid. Code, § 780.)

Once it is determined that evidence is relevant, the provisions of Evidence Code section 352 become important. Evidence Code section 352 provides:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create the substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

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A trial court's determination of whether evidence is admissible is subject to the abuse of discretion standard on review. (*People v. Cox* (2003) 30 Cal.4th 916, 955.)

> Where, . . .a discretionary power is inherently or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.

(*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Before trial, Boyce filed a motion in limine to exclude admission of the 911 tapes. (7 CT 2374-2378.) Boyce claimed the tapes were not relevant in either the guilt or penalty phases, and were more prejudicial than probative. Boyce also summarily objected on constitutional grounds. (7 CT 2377-2378.) The prosecution opposed the motion in limine, asserting the tape[15] was relevant to provide a description of the crime scene, prove elements of murder including malice, bolster the credibility of Deputy Parish and Ms. Parish, and rebut Boyce's defense of accident. The prosecution further explained the tape was not more prejudicial than probative, and should be admitted in both the guilt and penalty phases. (8 CT 2565-2568.)

At a hearing on the motion, defense counsel added that there was nothing relevant in the 911 tapes, and even if there was some relevancy, "it would be beyond prejudicial to play in front of any jury other than appealing to the emotions or affect of the tape. It adds nothing to any disputed issue in this case." (3 PRT 810.) Defense counsel also said it was

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[15] Boyce asserts his motion addressed both 911 tapes: from Deputy Parish and Ms. Parish. (AOB 82, fn. 42.) The prosecutor's written opposition appears to address only Deputy Parrish's tape. (8 CT 2565-2568.) The hearings on the motion addressed both tapes. (4 PRT 999-22.)

the defense's intent to concede any discrepancies or inconsistencies which may arise as a result of the trauma involved in the incident – "it was massive and intense and that's probably understating it." (3 PRT 810.)

Defense counsel further argued the prosecution "missed the mark" in the opposition papers because the tape did not actually show what the prosecution claimed it showed. (3 PRT 810-811.) The tapes did not "rebut malice," nor show premeditation and deliberation. Further, the defense was not going to allege the shooting was an accident. (3 PRT 811.) Defense counsel said the tapes were "the most emotional thing I have ever heard in my life," and the prosecutor even admitted the tapes show "so much human suffering." (3 PRT 812.) Defense counsel also said that even if the tapes had some relevance, the tapes did not need to be played. Rather, the transcript could be used as rebuttal. (3 PRT 812.)

With respect to the penalty phase, defense counsel acknowledged it was a different standard than Evidence Code section 352, but admissibility still had to be reviewed for relevance, and for due process and fairness. (3 PRT 812-813.)

The prosecutor explained the probative value of the tapes included that they described the crime scene and were valuable to show the truth and fresh recollection of the witnesses. (3 PRT 813-814.) The prosecutor rebutted defense counsel's claim that the defense was not going say it was an accident, because Boyce's own statement to the police was that the gun went off accidentally. (3 PRT 814-815.)

The trial court said it had not received a copy of the tapes. The prosecutor indicated he would provide the tapes to the court and the matter was submitted. (3 PRT 815.)

At a subsequent hearing, the trial court said it had listened to the tapes and read the transcript. The court heard further argument. (4 PRT 999-22.)

Defense counsel again argued there was no relevance or probative value to the tapes:

> There is nothing here that advances, that I can see, or supports the theory of the prosecution in any way. Nothing that's in dispute, nothing that we are saying did not happen. Of course, you always have the prejudicial effect regarding tone of voice, things like that, and circumstances right after the incident.

(4 PRT 999-25.)

Defense counsel then noted that the prosecution's brief appeared to discuss things that were not on the tape, such as descriptions of the individuals involved and the location of the wound. (4 PRT 999-25 – 999-26.) The prosecutor responded that there had been some confusion over what was originally thought to be the transcript and tape, and what was a compilation of memory. The prosecutor said the tape was admissible as a spontaneous statement. (4 PRT 999-26.) The tape showed the complaining witnesses talking about two Black men and guns. The prosecution had to prove certain issues such as identity, and the tapes showed the witnesses' credibility, i.e. the impression as it was fresh in their minds, contemporaneous with the murder and robbery. (4 PRT 999-26 – 999-27.)

Defense counsel said they were not disputing identity, and even if they were, the prosecution could prove it on the witness stand.

> It is the tape that's the issue. They are not going to be able to prove that, and he will admit that right now. That's not a problem.
>
> So when we get to the tape, we are further removed and we have more prejudice and no value at all. Now, if something happens on the witness stand where he can't prove it or we place it in issue to some such a degree that he needs, that I can't do anything about that - - and that's acceptable, but that's not where we are at at all.

(4 PRT 999-27.)

The prosecutor responded that he does have to prove identity, and unless the prejudicial value substantially outweighs the probative value, he should be able to prove it the way he wants to prove it. The 911 tapes, spontaneous statements, traditionally have been admissible on an issue in question that he has the burden of proving. (4 PRT 999-27 – 999-28.)

The court asked defense counsel if there was an identification issue, and noted there appeared to be an issue as to whether there were one or two suspects in the salon when the shooting occurred. (4 PRT 999-28.) Defense counsel said he did not see an issue as to whether there were one or two people in the salon, and agreed they were both African-Americans. And that was what the tape addressed – two Blacks with guns. That was not in dispute. (4 PRT 999-28 – 999-29.) Defense counsel said there was not an identification issue "with respect to that at all." (4 PRT 999-29.)

The trial court overruled Boyce's objections:

> Okay. I don't know, I - - the court is going to overrule the objection. I do see some credibility/believability issues. I see some classic 2.20 CALJIC issues that go to these people's, what I am going to assume is going to be proffered testimony. And I think the People have a right to put that on, put that evidence on out front, so to speak, as opposed to reserving and waiting and seeing whether you can rehabilitate somebody.
>
> The court has done the weighing process, and the probative value outweighs any prejudicial effect and they both shall be admissible pending further objection on other grounds, if there are any.

(8 PRT 999-29.)

A. The Trial Court Properly Admitted the 911 Audio Tapes in the Guilt Phase of Trial As the Two 911 Calls Were Relevant and Not Unduly Prejudicial

Here, the trial court properly exercised its discretion by admitting the 911 tapes because the tapes of the calls by Ms. Parish and Deputy Parish were relevant and there was no substantial danger of undue prejudice. Even

though Deputy Parish and Ms. Parish were upset during their respective calls, the tape recordings served to bolster their credibility as the two eyewitnesses to Deputy York's shooting.

The tapes were also relevant to refute Boyce's statement to Investigators Kennedy and Gomez, claiming that the gun went off accidentally. (6 RT 2238-2239, 2240-2241; 13 JQCT 3809, 3820, 3825, 3857.) Both Deputy Parish and Ms. Parish told the 911 operator that Deputy York was shot in the back of the head. (13 JQCT 3769, 3773-3774.) This was consistent with Ms. Parish's testimony that Boyce was standing over Deputy York when he discovered the deputy's badge and subsequently shot him. (6 RT 2158-2160, 2175-2176, 2218-2219.) It also corroborated the forensic pathologist's testimony that the pathway of the bullet was consistent with the shooter standing over Deputy York and firing straight down. (5 RT 2053-2054.) Further, evidence that Deputy York was shot "execution style" in the back of the head contradicted Boyce's statement that he must have bumped a chair and the gun went off. (6 RT 2238-2239, 2240-2241; 13 JQCT 3809, 3820, 3825, 3857.)

The tapes also refuted the defense theory that a third person was involved and Boyce was merely a lookout. (See Defense Opening Statement, 4 RT 1782, 1786, 1794-1795, 1798.) Ms. Parish told the 911 operator that there were "two Black men. They each have a gun." Ms. Parish said, "They took the guns with them." Ms. Parish also said something about a hood. There was no mention of a third person standing outside. (13 JQCT 3774.)

In *People v. Roybal* (1998) 19 Cal.4th 481, this Court upheld the admission in the guilt phase of a 911 call made by a victim's husband where he described the scene of his wife's murder. In *Roybal*, the defense objected to the admission of the recording on hearsay and relevance grounds. (*Id.* at p. 515.) This Court found that the recording had probative

value in dispelling alternative theories made by the defense and in describing the scene of the crime. (*Roybal, supra,* at pp. 516-517.) The same general analysis applies here.

Additionally, the probative value of the tapes was not substantially outweighed by the danger of undue prejudice. The prejudice referred to in Evidence Code section 352 applies to evidence that uniquely tends to evoke an emotional bias against one party as an individual and has very little effect on the issues. (*People v. Wright* (1985) 39 Cal.3d 576, 585.) Section 352 is designed to avoid "undue" prejudice, which differs from the prejudice or damage created by relevant, probative evidence. Here, the crux of the defense was to discredit Deputy Parish's and Ms. Parish's testimony placing Boyce inside the salon as the shooter. As stated above, the 911 recordings were relevant to support Deputy Parish's and Ms. Parish's credibility. Thus, the tapes addressed an issue in the case, i.e. whether the jury should credit the sisters' testimony regarding their recollection of what occurred at the salon. The statements in the calls were descriptive and not highly inflammatory such as to evoke an emotional bias. (See *People v. Roybal, supra,* 19 Cal.4th at p. 517.) Accordingly, the trial court reasonably determined the probative value of the calls outweighed the potential for prejudice.

B. The Trial Court Properly Permitted the Jury to Consider the 911 Tapes During the Penalty Phase as Circumstances of the Crime under Factor (a)

Boyce also contends the trial court erred in permitting the jury to consider the 911 calls during the penalty phase of the trial. (AOB 90-91.) Having properly admitted the tapes of the 911 calls in the guilt phase, the trial court did not err in allowing the jury to consider that evidence as part of its penalty determination.

During the penalty phase, the trial court properly told the jury it could consider evidence from the guilt phase, including the 911 tapes, in making the penalty determination. As part of the penalty phase instructions, the trial court told the jury, "[i]n determining which penalty is to be imposed on the defendant, you shall consider all the evidence which has been received during any part of the trial of this case." (CALJIC No. 8.85; 12 RT 4039; 10 CT 3442.) This was proper because factor (a) of Penal Code section 190.3 allows the jury to consider the circumstances of the crime during the penalty phase.

A trial court's discretion to exclude circumstances-of-the-crime evidence as unduly prejudicial is more circumscribed in the penalty phase than at the guilt phase. (*People v. Box* (2000) 23 Cal.4th 1153, 1201.) Accordingly, even assuming error in admitting the tapes in the guilt phase, it does not follow that the jury would have been precluded from considering the tapes in the penalty phase. To the extent the 911 calls evidenced the pain and suffering of Boyce's victims, it would be relevant to the penalty determination. (*People v. Smith* (2005) 35 Cal.4th 334, 364, citing *People v. Wrest* (1992) 3 Cal.4th 1088, 1107-1108.)

> Evidence may be excluded under the due process clause or Evidence Code section 352 if it is 'unduly inflammatory' [citation], but that language refers to an extreme situation. Evidence relating to the suffering of the victim and prosecutorial comment on that suffering are appropriate in death penalty cases.

(*People v. Smith, supra,* 35 Cal.4th at p. 364, citing *Wrest, supra,* 3 Cal.4th at pp. 1107-1108.)

In *People v. Hawthorne* (2009) 46 Cal.4th 67, this Court upheld admission of a 911 tape as relevant victim impact evidence during the penalty phase. There, one of the victims, a 16-year-old girl, called 911 and said two men had just entered her house and shot both her and her mother

in the back of the head. (*Hawthorne, supra,* at p. 101.) The girl described the assailants to the 911 operator. (*Ibid.*) After a friend arrived and took over the call, the girl could be heard screaming in the background when she discovered her injured mother. (*Ibid.*) The prosecution played the tape during the victim's testimony and again during rebuttal argument. (*Ibid.*)

The *Hawthorne* Court found,

> [T]he 911 tape clearly showed the immediate impact and harm caused by defendant's criminal conduct on the surviving victim and was relevant because it 'could provide legitimate reasons to sway the jury to . . . impose the ultimate sanction.' [Citations.] The 911 tape here was relevant under factor (a) of section 190.3. [Citations.]

(*Id.* at p. 102.)

The trial court did not err in allowing the jury to consider the 911 tapes that were played during the guilt phase as circumstances of the crime during the penalty phase in order to show the impact on Deputy Parish and Ms. Parish of having been robbed and witnessing Deputy York being shot to death. The tapes were undeniably relevant to the jury's penalty phase determination. There was no undue emphasis on the tapes. The prosecutor did not refer to the tapes in closing argument and the court simply told the jury it could consider all guilt phase evidence when making the penalty determination, which necessarily included the 911 tapes. Accordingly, the trial court did not abuse its discretion by allowing the jury to consider the 911 tapes during the penalty phase.

C. Admission of the 911 Tapes Did Not Deny Boyce Due Process

Boyce contends that admission of the 911 tapes was a denial of due process that rendered his trial fundamentally unfair. (AOB 93-94.) Since, as explained above, the trial court properly admitted the recording of the

911 calls under state law in the guilt phase, the jury's consideration of the tapes in the guilt and penalty phases of trial did not render his trial fundamentally unfair so as to offend due process. "[T]he admission of evidence . . . results in a due process violation only if it makes the trial fundamentally unfair." (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Here, there were clearly "permissible inferences the jury [could have] draw[n] from the evidence." (See *People v. Albarran* (2007) 149 Cal.App.4th 214, 229-230.) As noted above, Deputy Parish's and Ms. Parish's testimony was consistent with their statements during the 911 calls. (4 RT 1812-1813, 1818, 1831, 1843, 1890; 6 RT 2150-2151, 2158-2160, 2175-2176, 2195, 2199-2200, 2218-2219.) Accordingly, any claim that introduction of the tapes rendered Boyce's trial fundamentally unfair should be rejected. (See *People v. Roybal, supra,* 19 Cal.4th at p. 517, fn. 10.)

D. Even Assuming Error, Boyce was Not Prejudiced by the Admission of the 911 Tapes

Even if the trial court erred in admitting the 911 tapes, Boyce was not prejudiced. A trial court's erroneous admission of evidence pursuant to Evidence Code section 352 constitutes trial error, and as such is subject to the harmless error standard enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836, which requires the People to demonstrate it is not reasonably probable that the defendant would have enjoyed a more favorable outcome absent the trial court's error in admitting the evidence in question. Considering the evidence against Boyce, it is not reasonably probable he would have enjoyed a different outcome if only the court had excluded the audio tapes of the two 911 calls made after he shot Deputy York.

The evidence at trial established Boyce targeted the De Cut Salon because he believed it contained a safe with several thousand dollars. (13

JQCT 3807, 3829, 3851.) At approximately 8:00 pm that night, Boyce and Willis, wearing sweatshirts with hoods and caps, burst through the doors of the salon, armed with guns. (4 RT 1812-1813; 6 RT 2150-2151.) Boyce and Willis ordered Deputy York, Deputy Parish, and Ms. Parish to the ground and began searching for money. (4 RT 1814-1815, 1818-1821, 1843-1848, 1853-1856, 1891-1893; 6 RT 2151, 2155, 2216.) Deputy Parish could tell that Willis was walking back and forth in a space near her and the other victims, while Boyce was looking for a cash register or cash drawer. (4 RT 1820-1823, 1853, 1856-1858, 1860-1861.) Boyce became upset after finding only about $11 in the cash drawer, so he asked each individual for money. (4 RT 1824-1828, 1863, 1867-1869; 6 RT 2156, 2158.)

The evidence further established Boyce was the robber standing over Deputy York, demanding his money, ATM card, and PIN number. When Boyce shot Deputy York, Deputy Parish knew Willis was next to her and was not the shooter. (4 RT 1820-1829, 1831, 1853, 1870, 1875, 1892-1893.) Ms. Parish told Investigator Kennedy that based on the positioning of the robbers, she also believed Boyce was the shooter. (6 RT 2177, 2218-2220.)

When Boyce found out Deputy York worked at Wayside, Boyce asked if he "liked to treat Nigger Crips like shit in jail." (4 RT 1830, 1866-1867, 1875-1876, 1878-1879; 6 RT 2159.) The parties stipulated that Boyce spent time in Wayside and Willis did not. (6 RT 2285-2286.) There was also evidence that Boyce was a Crip. (6 RT 2264-2270.) After Boyce shot Deputy York, he said he had always wanted to kill a "cop." (4 RT 1832, 1877-1878; 6 RT 2160.)

The murder weapon was found in Willis's car after Willis and Boyce were arrested. (5 RT 2037-2045.) Deputy Parish and Ms. Parish identified the other gun found in Willis's car as the weapon used by Willis. (4 RT

1814-1815, 1845-1848; 5 RT 1977-1981, 1988-1993; 6 RT 2151, 2195-2199, 2216; Exhibit No. 2.) Boyce's fingerprint was found on the murder weapon. (5 RT 2021-2024.) Deputy York's credit card and Deputy Parish's ATM card were found underneath the center console in Willis's car. (4 RT 1835, 1837; 5 RT 1975-1977, 1986-1988.) A business card from the salon with the PIN for York's ATM card was found in the trunk of Willis's car. (4 RT 1924-1925, 1928-1929.) Two hundred dollars was found in Boyce's sock. (5 RT 1998-1999.) Deputy York had approximately $200 when he went to the salon. (4 RT 1807; 6 RT 2285.) At trial, Ms. Parish identified Boyce and Willis in photographic lineups. (6 RT 2164-2165.)

During his interview with Investigator Kennedy, Boyce admitted being in the salon and shooting Deputy York. (13 JQCT 3805, 3807-3810, 3819-3820, 3825, 3834-3835, 3854, 3857; 6 RT 2238-2243.) The covert tape between Willis and Boyce corroborated certain things such as the police finding the guns and the ATM card, and the fact Boyce shot a police officer. (13 JQCT 3882, 3885-3886; 6 RT 2264-2270, 2298-2299.)

Lastly, evidence of the robberies at Lamppost Pizza further established Boyce killed Deputy York. Boyce did not dispute he was involved in the Lamppost Pizza robberies. (13 JQCT 3814.) Tharp identified Boyce as one of the robbers. (5 RT 2064-2065.) As with the salon, Boyce and Willis were the only two involved in the crimes. Similar language was used at both crime scenes. (4 RT 1815, 1854; 5 RT 2059-2060, 2070-2073, 2092, 2097-2098, 2107, 2118, 2123, 2140; 6 RT 2151, 2204.) Boyce asked the victims if any of them were "cops." (5 RT 2069, 2082-2083, 2093, 2102, 2107, 2125, 2142; 7 RT 2434.) Boyce kicked some of the victims during the Lamppost Pizza robberies, as he did Deputy York. (4 RT 1837-1838, 1860, 1869; 5 RT 2067-2068, 2080, 2091-2093; 7 RT 2432, 2436.) Boyce made derogatory comments towards "whites" at

both the salon and the pizza parlor. (4 RT 1815, 1828-1831, 1854, 1870; 5 RT 2091; 6 RT 2151, 2158-2160, 2204.)

Accordingly, there was overwhelming evidence that Boyce was the shooter. Moreover, the prosecutor did not refer to the tapes in closing argument. Thus, absent admission of the 911 tapes, it is not reasonably probable the jury would have reached a result more favorable to Boyce.

III. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 2.52, REGARDING FLIGHT INDICATING CONSCIOUSNESS OF GUILT

Boyce contends that the trial court erred when it instructed the jury regarding flight indicating consciousness of guilt (CALJIC No. 2.52), because the instruction was not supported by substantial evidence, and because it unduly favored the prosecution, was "argumentative and unnecessary," should not be given when identity was conceded, and allowed an impermissible inference concerning Boyce's guilt. (AOB 97-104.) Boyce's claims are without merit. The trial court properly instructed the jury with CALJIC No. 2.52 as substantial evidence supported the instruction. Moreover, this Court has repeatedly rejected Boyce's general challenges to CALJIC No. 2.52 (and other similar instructions regarding consciousness of guilt), and Boyce has offered no reason for this Court to reconsider its prior decisions in the instant case. Finally, assuming the trial court erred, Boyce has failed to establish that he was prejudiced as a result of the trial court instructing the jury with CALJIC No. 2.52.

During a discussion of the applicable instructions in the guilt phase, the trial court was reading through the CALJIC numbers of the instructions that it intended to give when Boyce objected to CALJIC No. 2.52, regarding flight after crime demonstrating consciousness of guilt. (7 RT 2640.) Defense counsel argued,

> They went and did another crime. I'm not sure that's flight. They obviously fled from the crime, but I don't think that's what

> is intended. Wait a minute. One second. ¶ I don't think it's applicable. We don't think it's applicable. I don't know what theory.

(7 RT 2640.)

The prosecutor said the fact Boyce and Willis committed another crime did not negate flight. The point was that they left the scene and did not really go anywhere at first; they ended up at the pizza parlor with some stops in between. They then fled from the scene of the robberies at Lamppost Pizza and were caught driving down the 91 freeway. Flight simply means they do not stick around and own up to the crime. (7 RT 2640-2641.) Defense counsel disagreed and said every crime then has flight unless the perpetrators are caught at the location. Defense counsel did not believe that was the type of flight contemplated by the Legislature. "Flight would be a chase on the 91 freeway, something to that effect. That's not what's occurring. Nothing is occurring except doing a crime and then doing another crime." (7 RT 2641.) Defense counsel said that the Use Note to CALJIC No. 2.52 said an arrest at a later date and location different from the location of the crime was not sufficient to warrant giving the flight instruction. (7 RT 2641.)

The trial court said evidence of flight was admissible and relevant as relating to consciousness of guilt. (7 RT 2641.) The prosecutor agreed and said that was why flight was admissible – leaving the scene of the crime shows some guilty mind, i.e. knowing they did something wrong, and that is why they leave and act like they did nothing wrong. Flight was only relevant if it showed that. (7 RT 2641-2642.)

Defense counsel disagreed and said there would be flight in every case where the defendant was not arrested at the scene of the crime. He said flight only occurred when a defendant led police on a chase or got out of a car when being pulled over and ran away – that was reflective of

consciousness of guilt. He argued the instruction only covered acts over and above the commission of the crime and leaving the scene. (7 RT 2642.) The prosecutor responded that the instruction contemplates someone who commits a crime and then instead of calling the police or rendering aid, i.e. an act showing a non-guilty state of mind, the person leaves the scene, showing a guilty state of mind. (7 RT 2642-2643.) The trial court took the issue under submission. (7 RT 2643.) Later, the trial court overruled defense counsel's objection and said it would give the flight instruction. (8 RT 2657.)

The trial court subsequently instructed the jury with CALJIC No. 2.52, as follows:

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

(8 RT 2875; 9 CT 3105.)

There was no instructional error. An instruction on flight is properly given if the jury could reasonably infer that a defendant's flight reflects consciousness of guilt and that flight was to avoid being arrested. (*People v. Smithey* (1999) 20 Cal.4th 936, 982; *People v. Roybal, supra,* 19 Cal.4th at p. 517; *People v. Visciotti* (1992) 2 Cal.4th 1, 60; *People v. Crandell* (1988) 46 Cal.3d 833, 869.) Where evidence of a defendant's flight is relied upon as tending to show guilt, the instruction must be given. (Pen Code, § 1127c; *People v. Mason* (1991) 52 Cal. 3d 909, 943.)

Boyce's act of getting into Willis's vehicle and driving away from the crime scene immediately after shooting Deputy York, without summoning help or rendering aid for Deputy York, demonstrates that he fled the scene in order to avoid arrest, and justifies the trial court's act of instruction the

jury with CALJIC No. 2.52. (*People v. Jurado* (2006) 38 Cal.4th 72, 126; *People v. Turner* (1990) 50 Cal.3d 668, 694-695; *People v. Visciotti, supra, 2 Cal.4th at pp. 60-61*; *People v. Hoang* (2006) 145 Cal.App.4th 264, 276-277 [defendant's act of leaving the scene of the crime quickly and in silence is sufficient to warrant giving of CALJIC No. 2.52]; *People v. Marchialette* (1975) 45 Cal.App.3d 974, 981 [defendant's act of leaving scene of the shooting hastily and without explanation or rendering aid warrants CALJIC No. 2.52].)

Boyce devotes the majority of his argument to asserting that CALJIC No. 2.52 unduly favored the prosecution, is argumentative and unnecessary, and allows an irrational permissive inference about a defendant's guilt. (AOB 98-102.) As Boyce acknowledges, this Court has repeatedly rejected these precise challenges to CALJIC No. 2.52, and to other similar instructions providing for permissive inferences. (*People v. Brady* (2010) 50 Cal.4th 547, 567; *People v. Howard* (2008) 42 Cal.4th 1000, 1021; *People v. Jurado, supra,* 38 Cal.4th at p. 125; *People v. Guerra* (2006) 37 Cal.4th 1067, 1137; *People v. Benavides* (2005) 35 Cal.4th 69, 100; *People v. Hughes* (2002) 27 Cal.4th 287, 348; *People v. Nakahara* (2003) 30 Cal.4th 705, 713; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439; *People v. Mendoza* (2000) 24 Cal.4th 130, 179.) This court has also repeatedly rejected Boyce's specific claim that consciousness of guilt instructions permit irrational permissive inferences concerning a defendant's mental state. (*People v. Guerra, supra,* 37 Cal.4th at p. 1137; *People v. Nakahara, supra,* 30 Cal.4th at p. 713; *People v. Jackson* (1996) 13 Cal.4th 1164, 1222-1224; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579; *People v. Crandell, supra,* 46 Cal.3d at p. 871.) While acknowledging that this Court has repeatedly rejected these claims, and Boyce asks this Court to reconsider its prior decisions. (AOB 98-99, 102.) However, Boyce has not

provided this Court with any reason to do so. (See *People v. Jurado, supra,* 38 Cal.4th at p. 125.)

Similarly, Boyce acknowledges this Court has repeatedly rejected his claim that the flight instruction should not be given when identity is conceded but asks the Court to reconsider the issue. (AOB 100-101.) Again, Boyce has not provided this Court with any reason to do so. (See *People v. Thornton* (2007) 41 Cal.4th 391, 438-439 [CALJIC Nos. 2.06 and 2.52 are proper when defendant "admits some or all of the charged conduct, merely disputing its criminal implications"]; *People v. Moon* (2005) 37 Cal.4th 1, 28 [instruction proper where defendant admitted shooting, and his theory was that he was guilty only of second degree murder]; *People v. Smithey, supra,* 20 Cal.4th at p. 983 ["According to defendant, CALJIC No. 2.52 should be given only when the identity of the perpetrator is disputed, and not when the principal disputed issue is the defendant's mental state at the time of the crime."]; *People v. Turner, supra,* 50 Cal.3d at p. 694 & fn. 10 [consciousness of guilt instruction proper where prosecution contended that defendant intended to murder and rob victim and defendant claimed unintentional killing in self-defense and denied intent to steal].)

Boyce complains that instructing the jury with CALJIC No. 2.52 lessened the burden of proof. (AOB 104.) Boyce has forfeited his claim because he failed to preserve the issue by objecting on those grounds below. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.) Even if his claim had been properly preserved for appeal, he would not be entitled to relief as his contention is without merit. The jury was instructed with CALJIC No. 2.90 (9 CT 3115) on the burden of proof, and it is presumed that the jury followed this instruction and therefore the People carried the burden of proving Boyce's guilt beyond a reasonable doubt. (See *Shannon v. United States* (1994) 512 U.S. 573, 585 [114 S.Ct. 2419, 129 L.Ed.2d 459].)

Furthermore, given that the trial court properly instructed the jury with CALJIC No. 2.52, Boyce's federal constitutional claims under the Sixth, Eighth, and Fourteenth Amendments also fail. (See *People v. Benavides, supra,* 35 Cal.4th at p. 100.)

Finally, even assuming the trial court erred when it instructed the jury with CALJIC No. 2.52, any error was harmless as it is not reasonably probable that Boyce would have received a more favorable outcome at trial had the trial court refrained from giving the challenged instruction. (*People v. Watson, supra,* 46 Cal.2d at p. 836; *People v. Crandell, supra,* 46 Cal.3d at p. 870 [error in instructing jury with CALJIC No. 2.52 evaluated under *Watson*].) Under the challenged instruction, the existence and significance of flight were left to the jury to determine, and the instruction expressly informed jurors that flight was not sufficient to establish guilt. (8 RT 2875; 9 CT 3105; see *People v. Carter* (2005) 36 Cal.4th 1114, 1182-1183 *People v. Crandell, supra,* 46 Cal.3d at p. 870.) Moreover, had the trial court refrained from giving the instruction, the jury would have still been aware of Boyce's flight following the offense and been able to give this evidence the same weight during deliberations. (*People v. Moon, supra,* 37 Cal.4th at p. 28.)

The flight instruction "did not figure in the prosecutor's closing argument" in any manner. (*People v. Crandell, supra,* 46 Cal.3d at p. 870; see 8 RT 2660-2741, 2840-2864.) As previously explained, the People introduced overwhelming evidence demonstrating Boyce's mental state in killing Deputy York. (See Argument II, *supra*.) Had the trial court refrained from instructing the jury with CALJIC No. 2.52, the outcome of Boyce's trial would have been no different. (*People v. Crandell, supra,* 46 Cal.3d at p. 869.)

Even assessing prejudice under the more stringent standard articulated in *Chapman* for errors of constitutional magnitude, Boyce was not

prejudiced. It is clear beyond a reasonable doubt that the outcome would not have been different if the trial court had not given CALJIC No. 2.52 in light of the overwhelming nature of the evidence of Boyce's guilt, and the prosecutor's utter lack of reliance on Boyce's flight during closing argument. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

IV. SUFFICIENT EVIDENCE SUPPORTS THE SPECIAL FINDING THAT BOYCE KILLED A PEACE OFFICER IN RETALIATION FOR THE PERFORMANCE OF HIS DUTIES; THIS SPECIAL CIRCUMSTANCE IS NOT UNCONSTITUTIONALLY VAGUE

Boyce contends the evidence was insufficient to establish he killed Deputy York in retaliation for the performance of his official duties. Boyce also asserts the special circumstance of killing a peace officer in retaliation for the performance of his duties is unconstitutionally vague. (AOB 105-116.) Substantial evidence supports the special circumstance finding. Moreover, the special circumstance of killing a peace officer in retaliation for the performance of his duties is not unconstitutionally vague.

The law governing "sufficiency of the evidence" claims is well established, and applies to special circumstance findings as well as guilty verdicts. (*People v. Mayfield* (1997) 14 Cal.4th 668, 790-791.) When a court reviews a claim of insufficient evidence, it must view the evidence in the light most favorable to the judgment of conviction and presume in support of that judgment the existence of every fact the jury could have reasonably deduced from the evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) The oft-repeated rule is that, when a verdict is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support it. (*People v. Johnson, supra,* 26 Cal.3d at p. 577.) When two or

more inferences are reasonably deducible from the facts, a reviewing court is without power to substitute its deductions for those of the trier of fact. (*Johnson, supra,* at p. 577.) It is of no consequence that the reviewing court, believing other evidence, or drawing different inferences, might have reached a conclusion contrary to the one reached by the trier of fact. (*Ibid.*)

To the extent the prosecution relied upon circumstantial evidence, the standard of review is the same. (*People v. Bean* (1988) 46 Cal.3d 919, 932; *People v. Towler* (1982) 31 Cal.3d 105, 118.) Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, "it is the jury, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Bean, supra,* 46 Cal.3d at pp. 932-933.) Indeed, if the circumstances reasonably justify the trier of fact's findings, "'the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'" (*Id.,* at p. 933, quoting *People v. Hillery* (1965) 62 Cal.2d 692, 702.)

The standard of review mandated by the federal Constitution is the same as the state standard articulated above. That is, the critical inquiry is to determine whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt. The reviewing court does not determine whether it believes that the evidence at trial established guilt beyond a reasonable doubt, but whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

Penal Code section 190.2 lists multiple "special circumstances" under which a defendant, convicted of first-degree murder, may be sentenced to

either death or life imprisonment without the possibility of parole. This section expressly provides that "one or more" circumstances may be found true. (Pen. Code, § 190.2, subd. (a).) As relevant here, the seventh circumstance provides,

> The victim was a peace officer . . . who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer . . . or a former peace officer . . . and was intentionally killed in retaliation for the performance of his or her official duties.

(*People v. Jenkins* (2000) 22 Cal.4th 900, 1019; Pen. Code, § 190.2, subd. (a)(7).)

Accordingly, the jury here was instructed that in order to find the special circumstance of murder of a peace officer true, each of the following facts must be proved:

> (1) The person murdered was a peace officer; and
>
> (2) The person murdered was intentionally killed in retaliation for the performance of his duties.
>
> If you find that the defendant was not the actual killer of a human being, or if you are unable to decide whether the defendant was the actual killer, you cannot find this special circumstance to be true as to the defendant.

(8 RT 2889; 9 CT 3136 [CALJIC No. 8.81.7].)

The jury was further instructed on the definition of "in the performance of his duties:"

> Any lawful act or conduct while engaged in the maintenance of the peace and security of the community or in the investigation or prevention of crime.
>
> Guarding or transporting any person lawfully under arrest or undergoing imprisonment in any city or county jail or in any

prison or institution under the jurisdiction of the California Department of Corrections or California Youth Authority.

(8 RT 2889-2890; 9 CT 3137 [CALJIC No. 8.81.8].)

Boyce does not dispute that Deputy York was a peace officer who worked at the Wayside correctional facility. He also acknowledges that he was incarcerated at Wayside for several months in 1994. (AOB 110-111.) Boyce, however, argues that insufficient evidence supports the jury's true finding on the peace officer special circumstance allegation because Deputy York's performance of his duties at Wayside occurred a few years after Boyce was incarcerated there. (AOB 110-113.)

The evidence overwhelmingly established that Boyce killed Deputy York in retaliation for the official performance of his duties, i.e. guarding the inmates at Wayside. After Boyce found Deputy York's badge, Boyce asked York where he worked. After hearing that Deputy York worked at the East Facility at Wayside, Boyce asked if he "liked to treat Nigger Crips like shit in jail?" (4 RT 1828-1830, 1875; 6 RT 2158-2159.) When Deputy York politely said, "No, sir," Boyce said, "No, I know you like to treat ----- Nigger Crips like shit in jail." (4 RT 1830-1831, 1866-1867, 1875, 1878-1879; 6 RT 2159, emphasis added.) After obtaining Deputy York's ATM PIN number, Boyce said, "Fuck the whitey" and shot York in the back of the head. (4 RT 1831, 1870; 6 RT 2160.) Boyce then said something like he had always wanted to kill a "cop." (4 RT 1832, 1877-1878; 6 RT 2160.) The parties stipulated that Boyce was incarcerated in Pitchess Detention Facility, also known as Wayside, from October 1, 1994 through December 7, 1994. (6 RT 2285-2286.) Additionally, the evidence showed that Boyce was a Crip gang member. (13 JQCT 3888-3889; 6 RT 2264-2270.) Deputy Parish testified that it was not uncommon for African-American Crip members to be housed at Wayside. (4 RT 1841.)

The evidence clearly established that Boyce was upset by the way he was treated at Wayside so he shot and killed Deputy York in retaliation for the way Boyce believed York, as a guard in the jail, treated people like Boyce. As the prosecutor correctly argued,

> . . . the bottom line is that although [Deputy York] was not on duty as a peace officer at the time that the murder took place, it was because Mr. Boyce was angry at the fact that he found out that [Deputy York] had – was a guard at Wayside, a place where Mr. Boyce had been incarcerated. And I am going to talk about that a little bit later. So it is in retaliation for that, and that's the lawful performance.

(8 RT 2684.)

Accordingly, substantial evidence supports the jury's true finding on the peace officer special circumstance allegation.

Boyce further contends that the peace officer special circumstance as applied in this case is unconstitutionally vague and fails to provide adequate notice because it is unclear whether the officer's performance of his official duties must relate to the defendant. (AOB 113-114.) Boyce is attempting to place an additional element into the statute. There is no need to look beyond its language to understand its meaning. The plain language of the statute clearly states that the killing of the peace officer must be in retaliation for the performance of the officer's official duties. There is no requirement of a direct relationship between the officer and the defendant. The killing simply has to be done in return for or as pay back for past performance of the victim officer's duties.

"The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law." (*People v. Pieters* (1991) 52 Cal.3d 894, 898.) Society has an especially strong interest in protecting police officers because they, in turn, protect the public's safety. (See *People v. Celis* (2004) 33 Cal.4th 667, 680 [recognizing that "the work of a police officer in the field is often fraught

with danger"]; see also *Grandstaff v. City of Borger* (5th Cir. 1985) 767 F.2d 161, 166 [noting that police "officers stand at the front of law and the order processes of society" because they "restrain the violator, protect the compliant, and represent constituted authority in the scenes of both peace and turbulence of community life"].) "[W]e all depend on not only the presence but the commitment of law enforcement officers to help ensure safe and peaceable communities . . " (*People v. Brown* (2004) 33 Cal.4th 382, 400.) As this Court acknowledged in *People v. Rodriguez* (1986) 42 Cal.3d 730, society considers the killing of a peace officer "especially serious for several reasons."

> The community abhors the human cost to these especially endangered officers and their families, 'who regularly must risk their lives in order to guard the safety of other persons and property.' [Citation.] Murders of this kind threaten the community at large by hindering the completion of vital public safety tasks; they evince a particular contempt for law and government, and they strike at the heart of a system of ordered liberty. Applying longstanding values, the electorate may reasonably conclude that an intentional murderer increases his culpability, already great, when he kills one whom he knew or should have known was a police officer performing his duties.

(*Id.* at p. 781 [rejecting constitutional challenges to peace officer special circumstance statute].)

Here, by its plain language, the peace officer special circumstance unambiguously states that one who kills a police officer to retaliate, i.e., get back at, the officer for performing his official duties, i.e. guarding inmates at a county jail, will suffer a higher penalty. No person of ordinary intelligence would be left guessing as to the meaning of this language. There is nothing about the statute that suggests it should be limited to motivation based on a distinct act performed by a peace officer or one directed specifically at the defendant.

Moreover, contrary to Boyce's claim, the jury's note did not indicate it was confused by the language of the statute. Rather, the jury asked if the peace officer had to be performing a duty at the time of the crime, and the trial court responded "no." (See 8 RT 2915-2916.) The court told the jury if it did not answer the jury's question appropriately, then to write another note with more specificity. The fact that the jury did not do so indicated that the trial court properly interpreted and responded to the jury's question. (8 RT 2916.)

The statute is "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." (*People v. Saad* (1951) 105 Cal.App.2d Supp. 851, 854 quoting *Connally v. General Constr. Co.* (1926) 269 U.S. 385, 391 [46 S.Ct. 126, 70 L.Ed. 322].)

Lastly, Boyce contends that even if the robbery-murder and burglary-murder special circumstances are upheld, if the peace officer special circumstance finding is vacated, his death judgment must be reversed because the prosecution's reliance on an invalid circumstance caused distortion in the jury's weighing process. (AOB at 114-116.) The United States Supreme Court, however, rejected a similar argument in *Brown v. Sanders* (2006) 546 U.S. 212, 220-225 [126 S.Ct. 884, 163 L.Ed.2d 723]. In *Sanders,* the court held that the invalidation of two special circumstances on appeal did not render a death sentence unconstitutional where two other special circumstances were proper and where, as here, all the facts and circumstances admissible to prove the invalid special circumstances were properly introduced under another factor regarding the circumstances of the crime. (See also *Clemons v. Mississippi* (1990) 494 U.S. 738, 745-50 [110 S.Ct. 1441, 108 L.Ed.2d 725] [regarding appellate reconsideration of death judgment]; *Zant v. Stephens* (1983) 462 U.S. 862, 890 [103 S.Ct. 2733, 77 L.Ed.2d 235] [invalidity of one aggravating factor does not require vacation

of death sentence]; *People v. Lewis* (2008) 43 Cal.4th 415, 520; *People v. Ledesma* (2006) 39 Cal.4th 641, 716.) A single valid special circumstance is sufficient to determine the defendant is eligible for the death penalty. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1102.) Accordingly, Boyce's claim must be rejected.

V. SUFFICIENT EVIDENCE SUPPORTS THE JURY'S SPECIAL CIRCUMSTANCE FINDINGS THAT THE MURDER WAS COMMITTED WHILE BOYCE WAS ENGAGED IN COMMISSION OF A ROBBERY AND IN COMMISSION OF SECOND DEGREE BURGLARY; THE TRIAL COURT PROPERLY RESPONDED TO THE JURY'S NOTE; THE FELONY-MURDER SPECIAL CIRCUMSTANCE IS NOT UNCONSTITUTIONAL

Boyce contends insufficient evidence supports the true findings on the robbery-murder and burglary-murder special circumstance findings because the evidence did not establish that the killing was committed in order to advance an independent felonious purpose. (AOB 121-124.) Boyce further claims the trial court incorrectly responded to the jury's note regarding the robbery-murder /burglary-murder special circumstance instruction. (AOB 124-127.) Finally, Boyce asserts the robbery-murder /burglary-murder special circumstances are unconstitutional, and reversal is required. (AOB 127-130.) Substantial evidence supports the robbery-murder and burglary-murder special circumstance findings. Moreover, with defense counsel's acquiescence, the trial court properly responded to the jury's note regarding the robbery-murder /burglary-murder special circumstance instruction. Lastly, the special circumstances are constitutional.

A. Substantial Evidence Supports the Robbery-Murder and Burglary-Murder Special Circumstance Findings

Boyce contends the robbery-murder special circumstance was not supported by sufficient evidence because the killing was not committed in order to advance the independent felonious purpose of robbery. (AOB 121-124.) Substantial evidence, however, supports the jury's true finding.

As stated above, in determining whether the evidence is sufficient to support a criminal conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Johnson, supra,* 26 Cal.3d at p. 576; *Jackson v. Virginia, supra,* 443 U.S. at pp. 318-319.) The same test is used to determine the sufficiency of the evidence for a special circumstance allegation. (*People v. Mayfield, supra,* 14 Cal.4th at pp. 790-791.)

To prove a felony-murder special circumstance, the defendant must have "intended to commit the felony at the time he killed the victim and . . . the killing and the felony were part of one continuous transaction. [Citations.]" (*People v. Coffman* (2004) 34 Cal.4th 1, 88.) In other words, the underlying felony may not be "merely incidental to murder[.]" (*People v. Green* (1980) 27 Cal.3d 1, 61, overruled on other grounds as stated in *People v. Dominguez* (2006) 39 Cal.4th 1141, 1155; see *People v. Turner, supra,* 50 Cal.3d at p. 688 ["the elements of a robbery-murder special circumstance are not present if theft of the victim's property was merely 'incidental' to a murder"].) Concurrent intents to kill and to commit an independent felony will support a felony-murder special circumstance. (*People v. Clark* (1990) 50 Cal.3d 583, 608-609; see *People v. Zapien* (1993) 4 Cal.4th 929, 984-985 [where the evidence suggested a pre-existing intent to kill and then rob the victim, the robbery-murder special circumstance finding was proper because the robbery was not merely incidental to the murder]; *People v. Bolden* (2002) 29 Cal.4th 515, 554 [special circumstance may be imposed if the defendant acted with the independent but concurrent intents to kill and rob].)

For purposes of a robbery-murder special circumstance allegation, the jury is required to find that the murder was committed while the defendant was engaged in the commission of, attempted commission of, or immediate

flight after committing or attempting to commit a robbery. (Pen. Code, § 190.2, subd. (a)(17).) Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211; *People v. Hill* (1998) 17 Cal.4th 800, 849.)

Here, there was substantial evidence from which a rational trier of fact could have found the robbery-murder special circumstance true beyond a reasonable doubt. Boyce believed the hair salon had a safe containing $7,000 and was an "easy hit." (13 JQCT 3807, 3829, 3851.) Boyce and Willis entered the salon armed with guns and ordered the occupants to the ground. (4 RT 1812-1815, 1843-1848, 1854, 1891-1893; 6 RT 2150-2151, 2204, 2216.) The robbers asked for the location of the safe or cash register and became angry and agitated when they found out there was no safe, just a cash drawer with approximately $11 in it. (4 RT 1818-1823, 1853-1858, 1861; 6 RT 2155, 2157-2158.) In order to get more money, Boyce and Willis began robbing the victims. It was during this pursuit for money and ATM PIN codes that a frustrated Boyce shot and killed Deputy York. (4 RT 1824-1831, 1837-1838, 1860, 1863, 1866-1869, 1870, 1875, 1878-1879, 1892-1893; 6 RT 2156, 2158-2160.) After shooting Deputy York, Willis continued to rob Deputy Parish before the two fled the salon. (4 RT 1832-1837, 1862-1864, 1866, 1879-1884; 6 RT 2162-2163.)

Contrary to Boyce's claim, the prosecutor did not concede that the killing was not committed to advance the robbery or burglary. (See AOB 123.) Rather, during closing argument, the prosecutor told the jury it had to determine if the murder was committed during a robbery or burglary. (8 RT 2673.) The prosecutor pointed out that $200 cash was found in Boyce's sock when he was arrested; the same amount of money Deputy York had withdrawn from an ATM machine earlier that night. (8 RT 2717.) The prosecutor concluded his closing argument by telling the jury that Boyce

killed Deputy York for two reasons: one, in retaliation for being a peace officer, and two, in the commission of a robbery and burglary. (8 RT 2739-2740.) The prosecutor said Boyce and Willis chose that salon for a reason, i.e. the money that was supposed to be in a safe; killing Deputy York helped Boyce and Willis facilitate their robbery and escape. (8 RT 2740.) The prosecutor argued that it must have been a surprise to find a police officer at the salon, but it did not prevent the robbery from happening. (8 RT 2740-2741.)

During rebuttal argument, the prosecutor told the jury that Boyce could have had more than one reason for killing Deputy York:

> What I mean is that the perpetrator can have two different reasons. He . . . could have more than two. But in this case could have two different things going on. There is nothing that excludes one from the other.
>
> If you consider what happened in that salon, if you consider the fact that when [Deputy York] is killed, number one, it eliminates the only male that's there in the salon. I suggested yesterday, and I repeat this, that there is no expectation there was going to be any males there. There was probably no expectation there was going to be anybody there because the salon was closed beyond maybe just a worker. But we don't know that for sure, so I'm not going to ask you to speculate about that.

(8 RT 2845-2846.)

The prosecutor then pointed out that the robbery did not end after Boyce shot Deputy York. Rather, the robbery continued, with property being taken from Deputy Parish; having Deputy York out of the picture made the job easier. (8 RT 2846.) These facts and circumstances are consistent with the perpetrators intending to rob their victims, and kill Deputy York to eliminate a witness and affect their escape. In light of the above, substantial evidence supported the robbery-murder special circumstance finding.

Further, contrary to Boyce's claim (AOB 121-124), substantial evidence supports the jury's finding on the burglary-murder special circumstance finding. A burglary is committed if the defendant enters a residence or other enumerated structure "with intent to commit grand or petit larceny or any felony." (Pen. Code, § 459.) But "the felony-murder rule and the burglary-murder special circumstance do not apply to a burglary committed for the sole purpose of assaulting or killing the homicide victim. [Citations.]" (*People v. Seaton* (2001) 26 Cal.4th 598, 646.) On the other hand, a killing is committed in the perpetration of a burglary if the killing and burglary "are parts of one continuous transaction." (*People v. Hayes* (1990) 52 Cal.3d 577, 631; *People v. Thompson* (1990) 50 Cal.3d 134, 176.)

Here, substantial evidence supports the burglary-murder special circumstance finding. As stated above, the evidence clearly established Boyce and Willis entered the salon with the intent to steal money. Moreover, some of the items stolen from the salon were found in Willis's car after the officers arrested Boyce and Willis. (4 RT 1835, 1837; 5 RT 1975-1977, 1986-1988, 1996-1997.) "There is no better proof that a burglar entered with the intent to commit theft than a showing that he did commit it." (*People v. Shepardson* (1967) 251 Cal.App.2d 33, 36, quoting *People v. Jones* (1962) 211 Cal.App.2d 63, 71-72.) Thus, the evidence established that Boyce had a felonious purpose independent of murder upon entering the salon. (See *People v. Clark, supra,* 50 Cal.3d at pp. 608-609.) Accordingly, the jury's true finding as to the burglary-murder special circumstance allegation was supported by substantial evidence.

In sum, the evidence amply supports the jury's true findings on the robbery-murder and burglary-murder special circumstance findings. That the evidence also supports the jury's true finding on the peace officer retaliation special circumstance finding "does not render the evidence

insufficient to support the [jury's] verdict." (See *People v. Zamudio* (2008) 43 Cal.4th 327, 359 quoting *People v. Bolden, supra,* 29 Cal.4th at p. 554; *People v. Horning* (2004) 34 Cal.4th 871, 904.) Accordingly, the facts at trial fully support the jury's true findings.

B. Boyce Forfeited the Right to Challenge the Trial Court's Response to the Jury's Question Regarding the Robbery-Murder/Burglary-Murder Special Circumstances; in Any Event, the Trial Court Properly Responded to the Jury's Question

Boyce contends the trial court violated his state and federal constitutional rights by responding incorrectly to a question the jury asked during deliberations about the robbery-murder/burglary-murder special circumstance instruction. (AOB 124-127.) Boyce forfeited his right to challenge the trial court's response to the jury's inquiry on appeal because defense counsel acquiesced to the trial court's proposed response. In any event, the trial court properly responded to the jury's question.

The trial court instructed the jury regarding the robbery-murder /burglary-murder special circumstance as follows:

> To find that the special circumstance, referred to in these instructions as murder in the commission of robbery or burglary, is true, it must be proved:
>
> 1. The murder was committed while a defendant was engaged in or was an accomplice in the commission or attempted commission of a robbery or burglary; and
>
> 2. The murder was committed in order to carry out or advance the commission of the crime of robbery or burglary or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the robbery or burglary was merely incidental to the commission of the murder.

(8 RT 2890; 9 CT 3138 [CALJIC No. 8.81.17].)

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During deliberations, the jury sent the court a note asking,

> Re: page 53, part 2 of the jury instructions. Question: If first degree murder is committed as a consequence of or results from the intent or commission of armed robbery and/or burglary, is this sufficient to establish the special circumstance cited?

(9 CT 3175.)

The prosecutor said the answer to the question was "maybe yes, maybe no," because "it just depends on the facts that they find, really." (8 RT 2918.) Defense counsel said they sort of agreed but felt the answer was no, because part two is necessary. (8 RT 2918-2919.) Defense counsel added that the court should answer no and then read 8.80.1, which deals with *Tyson* aider and abettor type of language and the special circumstances, and to re-read page 53 (CALJIC No. 8.81.17). "We definitely feel whatever answer, those two instructions, page 47 and 53, need to be read." (8 RT 2919.)

The prosecutor did not agree that the instruction regarding aiding and abetting should be read because "that's presupposing that there are facts that have been found . . . that's supposing the defendant is not the actual killer." (8 RT 2919.) The trial court said there were cases that said the court should respond specifically to the question as opposed to repeating a jury instruction. (8 RT 2919.) The court said,

> Answering this question is problematic, it seems to the court. And I don't want to make it sound overly simplistic, but I tend to agree that it depends upon what they are finding to be the facts. And I don't want to suggest anything one way or another.
>
> I am wondering whether it would be overly simplistic merely to reread 8.80.1, and then page 53 again.

(8 RT 2919-2920.)

The prosecutor did not think any instructions should be reread because the jury had a written copy of the instructions. The prosecutor said

the court could simply tell the jury it depended on what they found the facts to be. (8 RT 2920.) Defense counsel agreed it was problematic and suggested the answer was in the instruction:

> And it really depends on what they determine the facts to be and there are, I don't know, any number of different ways they can interpret the facts and then have to interpret the law and how they apply to the facts.

(8 RT 2920-2921.)

The court replied, "Maybe the answer is that 'it depends upon what you find to be the facts,' and 8.80.17 speaks for itself, that's the law." (8 RT 2921.) The prosecutor said the court could tell that to the jury and then carefully reread the instruction. Defense counsel said it seemed like the jury was asking for an interpretation of what the facts meant. (8 RT 2921.) The court agreed. (8 RT 2921.) The court discussed whether it should reread the instruction or tell the jury "page 53 speaks for itself." (8 RT 2912-2922.) Defense counsel wanted the court to reread page 53 and the prosecutor did not object. (8 RT 2922.)

The trial court asked whether 8.80.1, page 49, should be reread. (8 RT 2922.) Defense counsel said he thought the problem the prosecutor had with that instruction was that it addressed the liability of an aider and abettor, and rereading that instruction presupposed the jury's direction.

> Maybe the best way to do it is page 53, and then see if they have - - if there is any other instruction and they need clarification on it, or to wait to see if they need more clarification.

(8 RT 2923.)

The prosecutor suggested the court answer, "[it] depends what the facts are, and I am going to reread this instruction," and read page 53. (8 RT 2923.) Defense counsel agreed. (8 RT 2923-2924.) The trial court brought in the jury and answered as follows:

> The court's answer, ladies and gentlemen, is it depends upon what the jury finds to be the facts, okay? That's the answer. I propose to reread the jury instruction that you have just alluded to because, obviously, that states the law, all right?

(8 RT 2924.) The trial court then reread CALJIC No. 8.81.17, and repeated, "So, again, the answer to your question is it just depends upon what the jury finds to be the facts." (8 RT 2924-2925.)

Preliminarily, Boyce has forfeited his right to object to the court's response to the jury's inquiry as a result of defense counsels' acquiescence with the court's proposed response. (*People v. Rodrigues, supra,* 8 Cal.4th 1060). In *Rodrigues,* this Court reviewed a defendant's claim that the court had not sufficiently responded to a jury inquiry, although the trial court's response had been suggested and consented to by the defendant's trial counsel. This Court said, "Inasmuch as defendant both suggested and consented to the responses given by the court, the claim of error has been waived." (*Id.* at p. 1193.) Further, *Rodrigues's* forfeiture holding applies to circumstances when counsel merely agrees with the court's response to a jury inquiry or fails to seek further clarification. (*People v. Dykes* (2009) 46 Cal.4th 731, 802-804; *People v. Marks* (2003) 31 Cal.4th 197, 237; *People v. Hughes, supra,* 27 Cal.4th at p. 402.) Here, defense counsel not only agreed with the trial court's proposed response, but also suggested it. (See 8 RT 2920-2921, 2923-2924.) Thus, Boyce has forfeited this claim on appeal.

In any event, the trial court's response to the jury's inquiry was well within its discretion. Penal Code section 1138 governs a trial court's obligation to respond to jury questions during deliberations. Section 1138 provides that if a jury "desire[s] to be informed on any point of law arising in the case," it must be brought into court and "the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

This section does not require elaboration of the standard instructions when the jury expresses confusion, "but rather directs the court to consider how it can best aid the jury and decide whether further explanation is desirable, or whether the reiteration of previously given instructions will suffice." (*People v. Yarbrough* (2008) 169 Cal.App.4th 303, 317 [internal quotation marks omitted].) "Where . . . the original instructions are themselves full and complete, the court has discretion . . . to determine what additional explanations are sufficient to satisfy the jury's request for information." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1213; see also *People v. Smithey, supra,* 20 Cal.4th at p. 985; *People v. McCleod* (1997) 55 Cal.App.4th 1205, 1219-1220.)

Here, everyone agreed that the jury was asking the court for an interpretation of the facts. (8 RT 2918-2924.) Thus, it was proper for the court to tell the jury that it depended upon what the jury found the facts to be.

Further, because CALJIC No. 8.81.17 is a "full and complete" explanation of the law, the trial court correctly exercised its discretion by rereading the instruction. The second paragraph of CALJIC No. 8.81.17, addressed by the jury question, provided: "The murder was committed in order to carry out or advance the commission of the crime of robbery or burglary or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the robbery or burglary was merely incidental to the commission of the murder." This paragraph is not a separate element of the felony-murder special circumstance. (*People v. Kimble* (1988) 44 Cal.3d 480, 501.) It merely clarifies what it means to commit a murder while engaged in the commission or attempted commission of a felony. (*Ibid.*)

> The second paragraph of CALJIC No. 8.81.17 is appropriate where the evidence suggests the defendant may have intended to

> murder his victim without having an independent intent to commit the felony that forms the basis of the special circumstance allegation. In other words, if the felony is merely incidental to achieving the murder - the murder being the defendant's primary purpose - then the special circumstance is not present, but if the defendant has an 'independent felonious purpose' (such as burglary or robbery) and commits the murder to advance that independent purpose, the special circumstance is present.

(*People v. Navarette* (2003) 30 Cal.4th 458, 505.)

Reinstructing the jury with CALJIC No. 8.81.17 told the jury it had to find that the murder occurred while Boyce was engaged in a robbery/burglary. It also told the jury it had to find that, as opposed to the robbery being incidental to the murder, the murder must have occurred in order to carry out or advance the robbery. Thus, it correctly advised the jury that separate but concurrent intents to rob and kill would support the finding.

Accordingly, the trial court properly exercised its discretion in this case by informing the jury that the answer depended on what the jury found the facts to be, and rereading the robbery-murder/burglary-murder special circumstance instruction, CALJIC No. 8.81.17. Absent a further request for clarification from the jurors, it must be presumed that they listened to the reread instruction, understood it, and then properly applied it. (*Waddington v. Sarausad* (2009) 555 U.S. 179 [129 S.Ct. 823, 834, 172 L.Ed.2d 532]; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1212-1213.) Accordingly, no error occurred.

But even if the court's answer was somehow lacking, Boyce was not prejudiced. As CALJIC No. 8.81.17 is correct statement of the law (see Pen. Code, § 190.2, subd. (a)(17); *People v. Green, supra,* 27 Cal.3d at pp. 59-62), the jury was properly instructed regarding what it needed to find to support the robbery-murder/burglary-murder special circumstance finding,

regardless of any deficiency in the court's response to its question. Thus, if error occurred, it was harmless under any standard. (Compare *People v. Zavala* (2005) 130 Cal.App.4th 758, 771 [evaluating instructional error pursuant to *People v. Watson, supra,* 46 Cal.2d at p. 836] with *People v. Cordero* (1989) 216 Cal.App.3d 275, 283 [evaluating instructional error pursuant to *Chapman v. California, supra,* 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]].)

Accordingly, Boyce's contention must be rejected as forfeited. Alternatively, Boyce's contention must be denied on the merits.

C. California's Felony-Murder Special Circumstance Adequately Narrows the Class of First Degree Murderers Eligible for the Death Penalty

Boyce further claims that if this Court concludes the felony-murder special circumstance does not require that the killing was committed in order to advance the independent felonious purpose of the underlying felony, then the special circumstance, both facially and as applied, violated the federal Constitution because "it fails to narrow the class of death eligible defendants to a smaller subclass more deserving of the death penalty." (AOB 127-128.) This Court has rejected this same argument on numerous occasions (see e.g. *People v. Stanley* (2006) 39 Cal.4th 913, 968; *People v. Gurule* (2002) 28 Cal.4th 557, 663; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1265-1266) and Boyce offers no new or compelling reasons for overturning those decisions. Accordingly, Boyce's claim must be rejected.

D. Multiple Felony-Murder Special Circumstances May Properly Be Considered By the Penalty Jury

Lastly, Boyce contends that even if the peace-officer special circumstance is upheld, if the finding of any other special circumstance is vacated, his death judgment must be reversed because the prosecution's

reliance on an invalid circumstance caused distortion in the jury's weighing process. (AOB at 128-130.) As set forth above, the United States Supreme Court, however, rejected a similar argument in *Brown v. Sanders, supra,* 546 U.S. at pp. 220-225. A single valid special circumstance is sufficient to determine the defendant is eligible for the death penalty. (*People v. Bittaker, supra,* 48 Cal.3d at p. 1102.) Accordingly, Boyce's claim must be rejected.

VI. THE TRIAL COURT PROPERLY DENIED BOYCE'S UNTIMELY AND EQUIVOCAL REQUEST FOR SELF-REPRESENTATION

Boyce claims the trial court violated his Sixth Amendment right to self-representation when it denied his *Faretta*[16] motion. (AOB 131-142.) The trial court properly denied the equivocal and untimely motion.

A defendant in a criminal proceeding has two constitutional rights with respect to representation that are mutually exclusive. (*People v. Marshall* (1997) 15 Cal.4th 1, 20.) A defendant has a right to be represented by counsel at all critical stages of the criminal prosecution. (*United States v. Wade* (1967) 388 U.S. 218, 223-227 [87 S.Ct. 1926, 18 L.Ed.2d 1149].) On the other hand, a defendant possesses the right to represent himself. (*Faretta v. California, supra,* 422 U.S. at p. 835; see *Meeks v. Craven* (9th Cir. 1973) 482 F.2d 465, 467; *People v. Marshall, supra,* 15 Cal.4th at p. 20.) The right to counsel is self-executing. (*Carnley v. Cochran* (1962) 369 U.S. 506, 513 [82 S.Ct.884, 8 L.Ed.2d 70].) Moreover, the right to counsel persists unless the defendant affirmatively waives that right. (*Brewer v. Williams* (1977) 430 U.S. 387, 404 [97 S.Ct. 1232, 51 L.Ed.2d 424].)

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[16] *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562].

However, "unlike the right to be represented by counsel, the right of self-representation is not self-executing." (*Faretta v. California, supra,* 422 U.S. at p. 834.) Rather, in order to invoke the right of self-representation, a defendant must knowingly and voluntarily make a timely and unequivocal request for self-representation after having been apprised of its dangers. (*Faretta. supra,* at pp. 835-836; *People v. Valdez* (2004) 32 Cal.4th 73, 98-99.) Indeed, the "'*Faretta* right is forfeited unless the defendant "articulately and unmistakably" demands to proceed in propria persona.'" (*People v. Valdez, supra,* 32 Cal.4th at p. 99, quoting *People v. Marshall, supra,* 15 Cal.4th at p. 21, quoting *United States v. Weisz* (D.C.Cir. 1983) 718 F.2d 413, 426; *Adams v. Carroll* (9th Cir. 1989) 875 F.2d 1441, 1443-44 ["If [a defendant] equivocates, he is presumed to have requested assistance of counsel."]; *Lacy v. Lewis* (C.D.Cal. 2000) 123 F.Supp.2d 533, 547 [a request for self-representation must be unequivocal, timely, and not a tactic to secure delay]; see *Jackson v. Ylst* (9th Cir. 1990) 921 F.2d 882, 888, citing *United States v. Weisz, supra,* 718 F.3d at p. 426 ["the right of self-representation is waived unless defendants articulately and unmistakably demand to proceed pro se"].)

"[A] motion made out of temporary whim, or out of annoyance or frustration, is not unequivocal -- even if the defendant has said he seeks self-representation." (*People v. Marshall, supra,* 15 Cal.4th at p. 21; see *Reese v. Nix* (8th Cir. 1991) 942 F.2d 1276, 1281 [defendant's statement that he did not want counsel deemed an impulsive response to the trial court's denial of a request for new counsel]; *Jackson v. Ylst, supra,* 921 F.2d at pp. 888-889.) Moreover, as noted by this Court,

> [s]ome courts have held that vacillation between requests for counsel and for self-representation amounts to equivocation or waiver or forfeiture of the right of self-representation.

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(*People v. Marshall, supra,* 15 Cal.4th at p. 22, citing *Williams v. Bartlett* (2nd Cir. 1994) 44 F.3d 95, 100-101; *Brown v. Wainwright* (5th Cir. 1982) 665 F.2d 607, 611; *United States v. Bennett* (10th Cir. 1976) 539 F.2d 45, 49-51.)

Further, since courts must indulge every reasonable presumption against the waiver of the countervailing right to counsel (*Brewer v. Williams, supra,* 430 U.S. at p. 404),

> [i]t follows, as several courts have concluded, that in order to protect the fundamental constitutional right to counsel, one of the trial court's tasks when confronted with a motion for self-representation is to determine whether the defendant truly desires to represent himself or herself.

(*People v. Marshall, supra,* 15 Cal.4th at p. 23, citing *Jackson v. Ylst, supra,* 921 F.2d at p. 889 [the court must be reasonably certain that the defendant in fact wishes to represent himself] [parenthetical added]; *Adams v. Carroll, supra,* 875 F.2d at p. 1444 [same]; *Hodge v. Henderson* (S.D.N.Y. 1990) 761 F.Supp. 993, 1001 [the court must "'determine whether a defendant genuinely means what he says'"]).

The motion also must be timely made. (*People v. Burton* (1989) 48 Cal.3d 843, 852; *People v. Frierson* (1991) 53 Cal.3d 730, 742.) "Because the phases of a capital trial are stages of a unitary trial, not distinct trials, we have held a motion made after the guilt phase verdicts have been returned is untimely." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 434; *People v. Hardy* (1992) 2 Cal.4th 86, 194-195.) Thus, a motion made after the guilt phase is subject to the trial court's sound discretion. (*People v. Doolin* (2009) 45 Cal.4th 390, 453, citing *People v. Mayfield, supra,* 14 Cal.4th at p. 810.)

"On appeal, a reviewing court independently examines the entire record to determine whether the defendant knowingly and intelligently invoked his right to self-representation." (*People v. Doolin, supra,* 45

Cal.4th at p. 453, citing *People v. Stanley, supra,* 39 Cal.4th at p. 932.) When reviewing the trial court's denial of a *Faretta* motion, reviewing courts give considerable weight to the court's exercise of discretion and must examine the total circumstances confronting the court when the decision was made. (*People v. Jenkins, supra,* 22 Cal.4th 900, 962-963; *People v. Windham* (1977) 19 Cal.3d 121, 128.)

Here, the trial court did not abuse its discretion. Before commencement of the penalty phase, defense counsel told the trial court that Boyce wanted a *Marsden*[17] hearing. (8 RT 2952.) The trial court held an in camera hearing with defense counsel and Boyce to discuss the matter. The court confirmed with Boyce that he was requesting his attorneys be relieved and another attorney appointed to represent him. Boyce said "yes." Boyce said, "I feel that they did their job already, you know, and ain't no need to put no defense for me for the penalty phase." (8 RT 2953.) Boyce said his defense attorneys "did a good job" and he appreciated their help, but he did not want them to present a defense for him during the penalty phase. (8 RT 2953-2954.) The following colloquy occurred:

THE COURT: . . . Do you want another attorney?

BOYCE: No, I don't want no other attorney.

THE COURT: You don't want another attorney?

BOYCE: No.

THE COURT: Okay. You want to represent yourself?

BOYCE: No, I just want the prosecutor to put his little - - what he want to put up.

THE COURT: Well, Mr. Boyce, it is either a lawyer representing you, or a lawyers more than one, or you are in pro

[17] *People v. Marsden* (1970) 2 Cal.3d 118.

per; that is, you are representing yourself. It sounds like you are telling me you want to represent yourself. Is that correct?

BOYCE: If I represent myself, I could just be quiet then, right?

THE COURT: Well, yeah, you could do pretty much what you feel is appropriate to do with respect to the penalty phase of the trial.

I can't give you any legal advice because it would be improper for me to do so, but I am just trying to find out whether you want the court – whether you are asking the court to appoint another lawyer or more than one lawyer to represent you, or whether you are asking to go without an attorney representing you.

BOYCE: I just want Mr. Davis and Ron Klar moved off my case. I don't want no new lawyers, I don't want to represent myself.

THE COURT: You want new lawyers?

BOYCE: No, I don't want no new lawyers. I don't want to represent myself. I just want the prosecutor to do the rest of his little job and I will go on my way.

THE COURT: Okay. Is there anything else that you would like to tell the court?

BOYCE: No, sir.

THE COURT: Okay, I would like to ask [defense counsel], is this a *Faretta* hearing or *Marsden*?

(8 RT 2954-2955.)

Defense counsel then explained that the real issue was that Boyce did not want his attorneys presenting any evidence in mitigation. "So I suppose the real crux of the situation is that [Boyce and defense counsel] are at loggerheads over whether or not any evidence should be produced." (8 RT 2955-2956.) Defense counsel said they planned to present witnesses that Boyce did not want presented, but it was essentially the attorneys' call and

in Boyce's best interest. (8 RT 2956.) The trial court then asked both defense counsel to state for the record their experience in criminal matters, and what they had done as far as representing Boyce. (8 RT 2957-2958.) The court asked Boyce if he had anything else to add, and he said "no." (8 RT 2958.) The court continued,

> THE COURT: I recognize the fact that this is a *Marsden* hearing, but I can't help but address some of the court's inquiry as related to *Faretta*. What that means, Mr. Boyce, is that - - we have talked about this a few minutes ago, and that is that it is a little bit difficult for the court to figure out whether you want to represent yourself. I think that's what you are saying because you are telling me you don't want another lawyer appointed and you want the court to relieve [defense counsel]. So, let me just ask you a couple of questions.
>
> You basically just want to sit there during the penalty phase and let the D.A. put on his evidence without anybody asking those people any questions?
>
> BOYCE: You know, Your Honor, if I could have it my way, I don't want to be here at all. I want to stay in the jail. You could notify me of the outcome.
>
> THE COURT: Well, let me ask you a few questions, Mr. Boyce.
>
> BOYCE: Yes, sir.

(8 RT 2958-2959.)

The court then asked Boyce his level of education, his employment history, and whether he had ever represented himself in a criminal proceeding or knew anything about the law or rules of evidence. (8 RT 2959-2960.) The court then said,

> Okay. All right. With respect to any *Faretta* issues, the court finds that Mr. Boyce is not qualified to represent himself for the reasons of the answers that he just gave to the court regarding his educational background and lack thereof.

> And also, with respect to some of the evidence that the court heard during the guilt phase of the trial, specifically Dr. . . . Cross. The court considers that as well.
>
> Plus, from a procedural standpoint, the request to go pro per, which in effect the court deems this to be part and parcel of a *Marsden* request, I don't think that portion of it is technically timely made. But, just rather than a procedural denial, the court wanted to make inquiry of Mr. Boyce's ability to represent himself.
>
> So his request to go pro per is denied.
>
> . . .
>
> For the purposes of the *Marsden* hearing, this court is going to find that both [defense counsel] have properly represented you and they will continue to do so. So the request to have them relieved as well is denied.

(8 RT 2960-2961.)

The trial court was incorrect in referring to Boyce's limited educational background and testimony of Dr. Cross when rejecting Boyce's request for self-representation. (See *People v. Doolin, supra,* 45 Cal.4th at p. 454 ["the trial court incorrectly referred to defendant's educational background and evidence that he was a 'slow learner' in denying defendant's request for self-representation."]) The trial court's remarks and the totality of the circumstances, however, reveal the request was untimely and equivocal, and properly denied.

First, based on the timing of the request and the fact Boyce never requested self-representation during the guilt phase, the request was manifestly untimely. Boyce waited until the day the penalty phase was scheduled to start to make his request. (8 RT 2952.) As stated above, a motion for self-representation made after the guilt phase is untimely. (*People v. Doolin, supra,* 45 Cal.4th at p. 454; *People v. Hardy, supra,* 2

Cal.4th at pp. 194-195.) Thus, when denying the motion, the trial court properly found it was not "technically timely made." (8 RT 2961.)

More importantly, Boyce did not unequivocally assert his right to self-representation. The motion started out as a *Marsden* motion with Boyce seeking to have his attorneys relieved and another attorney appointed to represent him. Boyce revealed the reason for his request was that he did not want a defense presented during the penalty phase. (8 RT 2953-2954.) After questioning from the trial court, Boyce said he did not want another attorney. When the court asked Boyce if he wanted to represent himself, Boyce said no. (8 RT 2954.) It was not until the trial court told Boyce he either had to be represented by counsel or represent himself that Boyce asked if he could represent himself and remain quiet. (8 RT 2954.) Even after the court told Boyce he could pretty much do what he wanted if he represented himself, Boyce still did not ask to represent himself. Rather, Boyce clearly said that he did not want to represent himself. (8 RT 2955.)

Defense counsel pointed out the real issue was not whether Boyce wanted new representation or to represent himself; it was a disagreement over presenting penalty phase evidence. (8 RT 2955-2956.) Out of an abundance of caution, the trial court treated the request as both a *Marsden* and *Faretta* motion. (8 RT 2957-2960.)

Viewing the discussion as a whole, it is obvious that Boyce never unequivocally said he wanted to represent himself. At one point he said he did not even want to be present at the hearing. (8 RT 2959.) Thus, even if Boyce's discussion constituted a request for self-representation, it was equivocal, and therefore, the trial court was not required to grant it.

Further, contrary to Boyce's claim, the trial court considered the proper factors when denying Boyce's request. Factors to be considered by a trial court when considering an untimely *Faretta* motion are:

> the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay that might reasonably be expected to follow the granting of such a motion.

(*People v. Barnett* (1998) 17 Cal.4th 1044, 1104-1105, citing *People v. Windham, supra,* 19 Cal.3d at p. 128.)

The trial court may implicitly or explicitly consider the *Windham* factors. (*People v. Marshall* (1996) 13 Cal.4th 799, 828.) Where the reasons for the denial of a Faretta motion are clear on the record, the trial court's failure to verbalize its reasons does not detrimentally affect the justice system and its ruling will be upheld. (*People v. Marshall, supra,* 13 Cal.4th at p. 828.) Moreover, a trial court has acted within its discretion in denying a *Faretta* motion where two of the *Windham* factors weighed strongly against a grant of pro per status. (*People v. Mayfield, supra,* 14 Cal.4th 668, at p. 809.)

Here, as set forth above, the trial court considered the quality of counsel's representation, the reason for the request, and the length and stage of the proceedings. (8 RT 2953-2961.) This was sufficient for the court to exercise its discretion and deny the motion.

Lastly, the trial court's denial of Boyce's untimely and equivocal *Faretta* motion did not deny Boyce his right to control his defense at the penalty phase. (See AOB 141.) First, Boyce's comments at the hearing on the *Marsden/Faretta* motion were not a sufficient reason to grant the request. A disagreement over trial tactics is "an insufficient reason to grant an untimely *Faretta* request." (*People v. Wilkins* (1990) 225 Cal.App.3d 299, 309, fn. 4.) Also, there is nothing in the record to indicate Boyce had any further disagreement with counsel presenting mitigating evidence during the penalty phase or any other issues with his defense.

The cases relied upon by Boyce are inapposite. In *People v. Lang* (1989) 49 Cal.3d 991, the defendant claimed his trial counsel was ineffective when he abided by the defendant's request that his grandmother not be called as a witness during the penalty phase. (*Lang, supra,*. at pp. 1029-1030.) After noting that defense counsel should not be required to present mitigating evidence over a defendant's request, this Court rejected the claim of ineffective assistance. (*Id.* at pp. 1030-1033.)

In *People v. Blair* (2005) 36 Cal.4th 686, the defendant claimed the trial court erred in letting him represent himself during the penalty phase because the Sixth Amendment right to self-representation did not extend to the penalty phase of a capital trial. (*Id.* at p. 736.) The defendant further asserted that allowing him to prevent any mitigating evidence at the penalty phase violated his Eighth Amendment right to a reliable penalty determination. (*Id.* at p. 737.) This Court rejected both contentions, finding the right to self-representation extends to the penalty phase, and "a rule requiring a pro se defendant to present mitigating evidence would be unenforceable and self-defeating. [Citations.]" (*Id.* at pp. 736-737.)

Although *Blair* held that a self-represented defendant has the right to refrain from presenting mitigating evidence during the penalty phase of a capital case, the reverse, as Boyce claims, is not true. A defendant who does not want to present mitigating evidence at the penalty phase, does not have the right to represent himself based solely on that fact. Because Boyce did not clearly request to represent himself, the trial court properly denied his request.

Thus, based on the totality of the circumstances, the trial court did not abuse its discretion by denying Boyce's untimely and equivocal *Faretta* motion.

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VII. THE TRIAL COURT CORRECTLY REFUSED BOYCE'S PROPOSED INSTRUCTIONS

Boyce claims the trial court erred in refusing his proposed penalty phase instructions regarding the jurors' consideration of compassion, sympathy, and mercy (proposed instruction numbers 2, 3, and 4); regarding the concept of lingering doubt (proposed instruction numbers 12, 13, 14, and 15); regarding the jurors' consideration of mental and emotional disturbance (proposed instruction number 18); and regarding mitigating evidence and factors and the weighing process (proposed instruction numbers 1, 2, and 16). Boyce contends CALJIC Nos. 8.85, and 8.88 were insufficient to convey the law as to how to access mitigating evidence and the decision of which punishment to impose. While Boyce acknowledges this Court has previously decided these matters adverse to his position, he claims this Court should revisit its prior holdings. (AOB 143-171.) The trial court properly refused to instruct the jury with Boyce's proposed instructions because they were argumentative, duplicative, incomplete, or erroneous. Moreover, Boyce provides no persuasive reason for this Court to revisit settled issues of law.

A. Trial Court Properly Refused Boyce's Proposed Instructions Regarding the Jurors' Consideration of Compassion, Sympathy and Mercy

Boyce contends the trial court erred by refusing several instructions Boyce requested regarding the jury's consideration of mercy, compassion, and sympathy. (AOB 147-152.) The trial court did not err.

Boyce requested three penalty phase instructions addressing consideration of mercy, compassion, and sympathy. First, the last paragraph of defense proposed instruction no. 2, a proposed addition to the end of CALJIC No. 8.85, stated,

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> A juror is further permitted to use mercy, sympathy and/or sentiment in deciding what weight to give each mitigating factor.

(10 CT 3465 [Def. proposed instruction no. 2, ¶ 3].)

The prosecutor objected noting that case law indicates that trial courts are not required to instruct the jury on sympathy and mercy, and in any event, this concept is covered by the standard CALJIC instructions. (11 RT 3860.) The trial court agreed and denied the request. (11 RT 3861.)

Boyce also requested the following proposed instruction:

> A mitigating circumstance does not constitute a justification or excuse for the offense in question. A mitigating circumstance is a fact about the offense, or about the defendant which in fairness, sympathy, compassion or mercy may be considered in extenuating or reducing the degree of moral culpability or which justifies a sentence less than death, although it does not justify or excuse the offense.

(10 CT 3466 [proposed instruction no. 3].)

The prosecutor also objected to this proposed instruction because the concept was covered by Factor (k) and CALJIC No. 8.88. The prosecutor noted that a similar instruction was rejected in *People v. Edwards* (1991) 54 Cal.3d 787, 841-842. (11 RT 3861.) The trial court said it concurred with "most of those" reasons, and declined to give the proposed instruction. (11 RT 3861.)

Lastly, Boyce requested the court instruct the jury:

> If a mitigating circumstance or aspect of the defendant's background or his character arouses mercy, sympathy, empathy or compassion such as to persuade you that death is not the appropriate penalty, you must act in response thereto and impose a sentence of life without the possibility of parole.

(10 CT 3467 [Def. proposed instruction no. 4].)

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The prosecutor objected to this instruction on the grounds it was argumentative and already covered by CALJIC No. 8.85. (11 RT 3861-3862.) The trial court agreed and denied the request. (11 RT 3862.)

The trial court properly refused these proposed instructions. This Court has repeatedly rejected this exact same claim in other capital cases. (See, e.g., *People v. Avila* (2009) 46 Cal.4th 680, 722 & fn. 17; *People v. Boyer* (2006) 38 Cal.4th 412, 487 [court properly declined mercy instruction]; *People v. Griffin* (2004) 33 Cal.4th 536, 591 [same]; *People v. Lewis* (2001) 26 Cal.4th 334, 393 [same]; *People v. Benson* (1990) 52 Cal.3d 754, 808 [same].)

As this Court has explained, a capital defendant is not entitled to an instruction on mercy because it "implies an unguided or arbitrary discretion in the jury to render a greater or lesser penalty at its whim ...." (*People v. McPeters* (1992) 2 Cal.4th 1148, 1195, superseded by Prop. 115 on other grounds.) The standard instructions given to the jury "focusing on sympathy and compassion in relation to the circumstances more precisely and adequately cover the area." (*People v. McPeters, supra,* 2 Cal.4th at p. 1195.)

Boyce's jury was instructed with CALJIC No. 8.85 regarding factor (k) that they shall consider: "[a]ny other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (12 RT 4039-4042; 10 CT 3443-3444; see also CALJIC No. 8.88, 12 RT 4049; 10 CT 3453-3454 ["You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider."].) CALJIC No. 8.85 "adequately instructs the jury concerning

the circumstances that may be considered in mitigation, including sympathy and mercy." (*People v. Burney* (2009) 47 Cal.4th 203, 261.)

Boyce acknowledges this Court has concluded that CALJIC Nos. 8.85 and 8.88 adequately instruct a penalty phase jury regarding mitigation, including mercy, sympathy and compassion, but asks this Court to reconsider its decisions. (AOB 149.) Boyce complains that none of the penalty phase instructions used the terms "mercy" or "compassion," which are separate moral responses to mitigating evidence. (AOB 149-150.) However, as this Court had found, "the standard instructions did not mislead the jury as to its responsibility to consider sympathy, mercy, and any other aspect of defendant's character and record in mitigation." (*People v. DePriest* (2007) 42 Cal.4th 1, 59, citations omitted; see also *People v. Ervine* (2009) 47 Cal.4th 745, 801 ["CALJIC No. 8.85 adequately instructs the jury concerning the circumstances that may be considered in mitigation, including sympathy and mercy."].) Moreover, defense counsel appropriately argued for the jury to show Boyce mercy. (12 RT 4030-4031.)

Boyce does not provide a basis for this Court to revisit its repeated holdings that CALJIC No. 8.85 adequately instructs a penalty phase jury regarding mercy, compassion and sympathy. Accordingly, it was not error for the trial court to refuse to instruct as requested by the defense.

B. Trial Court Properly Refused Boyce's Proposed Instructions Regarding the Jurors' Consideration of Lingering Doubt

Boyce next argues the trial court violated his constitutional rights by refusing his requested four special instructions regarding lingering doubt. (AOB 153-159.) The trial court, however, properly declined to instruct the jury on lingering doubt.

During discussion on the penalty phase instructions, Boyce requested four instructions regarding lingering doubt:

> While you may not now acquit Kevin Boyce of either murder or the special, you may evaluate the evidence presented in light of determining which punishment shall be imposed. This includes any doubts you may entertain on the question of guilt or the circumstances of the defendant's involvement and participation in the crimes, including but, not limited to, the issue of the identification of the actual person who shot Mr. York. This is called lingering or residual doubt. The concept of lingering or residual doubt exists somewhere between absolute truth and reasonable doubt.
>
> You were previously required to find each element of the charges and the special circumstances beyond a reasonable doubt. However, as you were instructed previously, reasonable doubt is not a mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. Thus you may have had a doubt as to his guilt or the appropriate participation or involvement and therefore culpability level in the crimes, but concluded it was not a reasonable doubt.
>
> Before determining the appropriate penalty to be imposed upon Kevin Boyce you may determine if the People have proven the case based upon a higher standard than reasonable doubt. Only you are the judges of what standard of proof must be met before imposing a sentence of death in light of all the instructions the court has given you. However, you may determine, aside from any other mitigation evidence presented, that there is some doubt, and based upon that finding impose a sentence of life without possibility of parole.

(10 CT 3477 [Def. proposed instruction no. 12].)

> The adjudication of guilt is not infallible and any lingering doubts you entertain on the question of guilt or culpability level may be considered by you in determining the appropriate penalty, including the possibility that at some time in the future, facts may come to light which have not yet been discovered. [¶]

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> It may be considered as a factor in mitigation if you have a lingering doubt as to the guilt or culpability level of the defendant.

(10 CT 3478 [Def. proposed instruction no. 13].)

> The adjudication of guilt is not infallible, and any lingering doubts you entertain on the question of guilt, or level of participation and involvement in the crimes, or the circumstances of defendant's participation and involvement in the crimes may be considered by you in determining the appropriate penalty. The weight such lingering doubts should carry, if any, is for you to determine.

(10 CT 3479 [Def. proposed instruction no. 14].)

> Each individual juror may consider as a mitigating factor residual or lingering doubt as to whether defendant intentionally and/or personally killed the victim. Lingering or residual doubt is defined as the state of mind between beyond a reasonable doubt and beyond all possible doubts. [¶] Thus, if any individual juror has a lingering or residual doubt about whether the defendant intentionally and/or personally killed the victim, he or she must consider this as a mitigating factor and assign to it the weight you deem appropriate.

(10 CT 3480 [Def. proposed instruction no. 15].)

The prosecutor objected to all four instructions and argued the court was not required to instruct on lingering doubt. The prosecutor noted that defense counsel was free to argue lingering doubt, but case law has uniformly held that the language of Factor (k) was sufficient to cover the issue. (11 RT 3867.) The trial court refused the instruction, noting that while some cases have held such instruction was appropriate, the court felt the broad definition of Factor (k) evidence was sufficient, and defense counsel could argue it in more specifics. (11 RT 3868.)

The trial court instructed the jury with CALJIC No. 8.85 which told the jury one of the factors it could consider was,

> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any

> sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle. Sympathy for the family of the defendant is not a matter that you may consider in mitigation. Evidence, if any, of the impact of an execution on family members should be disregarded unless it illuminates some positive quality of the defendant's background or character.

(12 RT 4042; 10 CT 3443-3444.)

During closing argument, defense counsel argued lingering doubt regarding who was the actual shooter. (12 RT 3966-3967.)

A defendant "clearly has no federal or state constitutional right to have the penalty phase jury instructed to consider any residual doubt about defendant's guilt." (*People v. Rodrigues, supra,* 8 Cal.4th 1060 at p. 1187, citing *People v. Johnson* (1992) 3 Cal.4th 1183, 1253 and *People v. Fauber* (1992) 2 Cal.4th 792, 864; *Franklin v. Lynaugh* (1988) 487 U.S. 164, 173-174 [108 S.Ct. 2320, 101 L.Ed.2d 155]; *People v. Cox* (1991) 53 Cal.3d 618 at pp. 677-678.) A "defendant may urge his possible innocence to the jury as a factor in mitigation." (*People v. Johnson, supra,* 3 Cal.4th at p. 1252; Pen. Code, § 190.3, factors (a), (k).) "[A]lthough it is proper for the jury to consider lingering doubt, there is no requirement that the court specifically instruct the jury that it may do so." (*People v. Brown* (2003) 31 Cal.4th 518, 567, citing *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)

Here, Boyce's proposed instructions at issue on appeal went further than merely addressing lingering doubt. They urged the jury to speculate about what, if anything, might be found in the future concerning the case. They were also argumentative and implied that the jurors' weighing of aggravating and mitigating circumstances required a particular degree of proof. No such burden of proof exists in the penalty phase. (*Tuilaepa v.*

California (1994) 512 U.S. 967, 978-980 [114 S.Ct. 2630, 129 L.Ed.2d 750]; *People v. Sanders* (1995) 11 Cal.4th 475, 564; *People v. Medina* (1995) 11 Cal.4th 694, 752.) The trial court is not obligated to give argumentative or legally incorrect instructions. (*People v. Ashmus* (1991) 54 Cal.3d 932, 1004.) There was no evidence or legal basis for the proposed instructions and the trial court properly refused them.

Moreover, the jury was instructed it "shall consider, take into account and be guided by the following factors, if applicable: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true." (12 RT 4040; 10 CT 3442; CALJIC No. 8.85; Penal Code, § 190.3, factor (a).) The jury was further instructed to consider "Any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. . . ." (12 RT 4042; 10 CT 3442-3443; CALJIC No. 8.85(k); Penal Code, § 190.3, factor (k).) These instructions sufficiently encompassed the concept of lingering doubt and the trial court was under no duty to give a more specific instruction. (*People v. Gray* (2005) 37 Cal.4th 168, 232; *People v. Hines* (1997) 15 Cal.4th 997, 1068; *People v. Osband* (1996) 13 Cal.4th 622, 716.) No error occurred concerning the trial court's refusal to instruct the jury with the proposed lingering doubt instructions.

An instruction on lingering doubt in the penalty phase is not required under the United States or California Constitutions. While lingering doubt may be argued, there is no requirement that the trial court instruct the jury regarding it. The concept of lingering doubt was adequately conveyed by the other penalty phase instructions given to the jury. Accordingly, the trial

court was not required to give the defense proposed instructions on lingering doubt.

C. Trial Court Properly Refused Boyce's Proposed Instruction Regarding the Jurors' Consideration of Mental and Emotional Disturbance

Boyce contends the trial court erred by refusing his requested instructions regarding the jury's consideration of Boyce's mental and emotional disturbance. (AOB 159-162.) The trial court properly refused the proposed instruction.

Boyce requested the following special instruction concerning the jury's consideration of Boyce's mental and emotional disturbance:

> A person may be under the influence of mental or emotional disturbance even though his mental and emotional disturbance was not so strong as to preclude deliberation or premeditation.
>
> Mental and emotional disturbance may result from any cause or may exist without apparent cause.
>
> For this mitigating circumstance to exist, it is sufficient that the defendant's mind or emotions were disturbed, from any cause, whether from consumption of drugs, mental illness, or other cause, and that he was under the influence of that disturbance when he killed. A person would be under the influence of mental or emotional disturbance if a mental or emotional condition existed which influenced his conduct so as to make it different than it otherwise would have been.
>
> So, if you are satisfied from the evidence that defendant was under the influence of mental or emotional disturbance, from any cause, then it would be your duty to find this a mitigating circumstance.

(10 CT 3483 [Def. proposed instruction no. 18].)

The prosecutor objected to the proposed instruction as redundant because the notion was covered by Factor (h). The proposed instruction was also argumentative and misleading because the evidence did not

support it. (11 RT 3870-3871.) The trial court agreed and refused to give the instruction. (11 RT 3871.) This was proper.

Here, the jury was instructed with CALJIC No. 8.85 on mental or emotional disturbance and impaired capacity as a mitigating circumstance as follows:

> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> . . .
>
> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> . . .
>
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.
>
> . . .
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(12 RT 4039-4042; 10 CT 3442-3444 [CALJIC No. 8.85].)

A court is not required to give duplicative instructions, even if they are legally correct. (*People v. Brown, supra,* 31 Cal.4th at p. 559.) Accordingly, the court may refuse a proffered instruction that is duplicative or might confuse the jury. (*People v. Gurule, supra,* 28 Cal.4th at p. 659.) As noted above, the jury was instructed that it could consider "Whether or not at the time of the offense the capacity of the defendant to appreciate the

criminality of his conduct or to conform his conduct to the requirements of law was impaired as the result of mental disease or defect of the effects of intoxication." (12 RT 4041; 10 CT 3443.) Thus, the proposed instruction was surplusage and properly rejected by the trial court.

In addition, the instruction suggested the jury consider if Boyce's mind or emotions were disturbed from "the consumption of drugs, mental illness, or other cause, . . ." (10 CT 3483.) As there was no evidence presented that Boyce was under the influence of drugs or mental illness at the time of the killing, the trial court properly refused this instruction.

Boyce acknowledges that in *People v. Williams* (2006) 40 Cal.4th 287, 325-326, this Court found that the trial court properly refused a similarly worded proposed instruction. In *Williams,* defense counsel requested an instruction elaborating on section 190.3, factor (h). (*Williams, supra,* at p. 325.) With the exception of a few words, the proposed instruction was almost identical to the one requested in this case. (See *Id.* at pp. 325-326.) This Court held the trial court did not err in refusing the proposed instruction because "nothing in the above rather confusing instruction that would have clarified the instruction already given pursuant to section 190.3, factor (h)." (*Id.* at p. 326.) Likewise here, the trial court properly refused the proposed duplicative instruction.

D. Trial Court Properly Refused Boyce's Proposed Instructions Regarding Mitigating Evidence

Lastly, Boyce claims the trial court erred by refusing his requested instructions regarding the jury's consideration of mitigating evidence. (AOB 162-165.) The trial court properly refused the requested instructions.

Boyce requested the following instructions regarding consideration of mitigating evidence. First, as an addition to CALJIC No. 8.88, Boyce requested the following:

"Substantially" as discussed in this instruction means considerably, essentially or materially.

(10 CT 3463 [Def. proposed instruction no. 1].)

After pointing out the word in 8.88 was "substantial," not "substantially," the prosecutor objected to the instruction because "substantial" was a word of common knowledge that did not need amplification or to be defined for the jury. (11 RT 3858-3859.) Defense counsel then agreed that the instruction should read "substantial" not "substantially." (11 RT 3859.) The trial court refused the instruction, noting it was a commonly understood term that did not need some alternate definitions for the jury. (11 RT 3859-3860.)

As Boyce acknowledges, this Court has repeatedly rejected this claim. (*People v. Salcido* (2008) 44 Cal.4th 93, 163; *People v. Moon, supra,* 37 Cal.4th at p. 43; *People v. Breaux* (1991) 1 Cal.4th 281, 316 & fn. 14.) Boyce provides no compelling reason for this Court to reconsider these decisions. Accordingly, it was not error for the trial court to refuse to elaborate on the definition of "substantial."

Boyce also requested, as an addition to CALJIC No. 8.85:

The mitigating circumstances that I have read for your consideration are given merely as examples of some of the factors that a juror may take into account as reasons for deciding not to impose a death sentence in this case. A juror should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But a juror should not limit his or her consideration of mitigating circumstances to these specific factors. A juror may also consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty.

A mitigating circumstance does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any evidence to support it no

matter how weak the evidence may be. Any mitigating circumstances may outweigh all the aggravating factors.

A juror is further permitted to use mercy, sympathy and/or sentiment in deciding what weight to give each mitigating factor.

(10 CT 3465 [Def. proposed instruction no. 2].)

The prosecutor objected because CALJIC No. 8.88 sufficiently covered the subject, and the proposed instruction was argumentative and overbroad. The prosecutor noted *Wharton*[18] did not support or recommend giving the proposed instruction. Rather, in *Wharton,* this Court found it was not error to give this instruction in that case. (11 RT 3860-3861.) The trial court concurred and denied the request. (11 RT 3861.)

Boyce also requested the following instruction regarding mitigating evidence:

The mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence on Mr. Boyce. You should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances presented as reasons for not imposing the death sentence.

This includes, but is not limited to, any other circumstance which extenuates the gravity of the crime even though it is not a excuse for the crime, and any other factor proffered by the defendant as a factor in mitigation of the penalty.

(10 CT 3481 [Def. proposed instruction no. 16].)

The prosecutor objected to this request because it was overbroad and covered by the standard CALJIC instructions. The trial court denied the request. (11 RT 3868.)

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[18] *People v. Wharton* (1991) 53 Cal.3d 522, 601-602.

The trial court properly declined to give the instructions, because they were duplicative and argumentative under this Court's precedent. A trial court is under no obligation to give an instruction which tells the jury that the mitigating factors listed in CALJIC No. 8.85 are only "examples" and that the jury can consider other circumstances as reasons for not imposing the death penalty, as the instruction would be duplicative of CALJIC No. 8.85. (*People v. Lucero* (2000) 23 Cal.4th 692, 729.) A trial court may properly refuse to give an instruction which states that any mitigating factor may, standing alone, support a decision that death is not the appropriate penalty, as the instruction is duplicative of CALJIC Nos. 8.85 and 8.88. (*People v. Bolin* (1998) 18 Cal.4th 297, 343.)

Further, a trial court may properly refuse to give an instruction that tells the jury not to limit its consideration of mitigating factors to those specifically listed by the trial court, as the instruction is duplicative of CALJIC No. 8.85. (*People v. Hines, supra,* 15 Cal.4th at pp. 1068-1069.) A trial court is not required to instruct the jury that mitigating evidence need not be proved beyond a reasonable doubt. (*People v. Samayoa* (1997) 15 Cal.4th 795, 862; see also *People v. Hines, supra,* at pp. 1068-1069 [trial court properly refused to give instruction stating same].) An instruction that tells the jury that any mitigating circumstance may outweigh all the aggravating factors "is argumentative, because its states that a single mitigating circumstance may be dispositive without saying the same about a single aggravating circumstance." (*People v. Hines, supra,* at p. 1069.)

Finally, where, as here, a trial court instructs the jury under CALJIC No. 8.85 that it may sympathetically consider all mitigating evidence,[19] the

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[19] CALJIC No. 8.85, as read to the jury, provided, in part, that the jury could take into account, any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime, and (continued...)

trial court need not inform jurors that they may consider mercy, sympathy or sentiment in deciding the appropriate sentence. (*People v. Bolin, supra,* 18 Cal.4th at pp. 343-344.) Therefore, the trial court here properly refused to give defense proposed instruction nos. 2 and 16.

VIII. BOYCE WAS NOT PREJUDICED BY THE COURT'S FAILURE TO INSTRUCT THE JURY NOT TO DOUBLE COUNT THE SPECIAL CIRCUMSTANCES AS FACTORS IN AGGRAVATION; THE TRIAL COURT PROPERLY REFUSED BOYCE'S REQUESTED INSTRUCTION THAT THE JURY COULD NOT RELY SOLELY ON THE FACTS OF THE OFFENSE IN DETERMINING THE APPROPRIATE PENALTY

Boyce next contends the trial court erroneously refused his request to instruct the sentencing jurors not to double count the facts underlying the special circumstances. (AOB 172-175.) Boyce also claims the trial court erroneously refused his requested instruction seeking to limit the sentencing jurors' consideration of the facts used to find first degree murder. (AOB 175-176.) Any error in refusing Boyce's special instruction request regarding double counting the special circumstances was harmless. Further, the trial court properly refused Boyce's proposed instruction regarding not relying solely on the facts of the offense.

Boyce requested the trial court instruct the jury with the following special instruction:

> You must not consider as an aggravating factor the existence of any special circumstance if you have already considered the facts of the special circumstance as a circumstance of the crime for which the defendant has been convicted. In other words, do

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(...continued)
any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.
(12 RT 4042; 10 CT 3443-3444.)

not consider the same factors more than once in determining the presence of aggravating factors.

(10 CT 3482; 11 RT 3868; AOB 172-173.)

The prosecutor objected to the request, stating it appeared the goal was to talk about not double counting special circumstances, but the way the proposed instruction was written assumed the jurors were going to double count the special circumstances. The prosecutor said there was nothing about the standard CALJIC instructions that would lead the jury to double count, and he would not argue in a manner that would lend itself to the jury being misled as to how to consider the special circumstance findings. (11 RT 3869.) The trial court agreed the proposed instruction was somewhat misleading and refused the request, but told defense counsel they could resubmit something "a little bit more specific as it relates to not double counting or overlapping." (11 RT 3869-3870.) Boyce did not elect to modify his proposed instruction.

The trial court instructed the jury with CALJIC No. 8.85, which provided in part,

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

(12 RT 4039-4042; 10 CT 3442-3443.)

Boyce relies on *People v. Melton* (1988) 44 Cal.3d 713, to argue he is entitled to relief on appeal based on the trial court failing to instruct the jury on double counting. While a trial court should instruct against "double counting" when requested to do so (*People v. Monterroso* (2004) 34

Cal.4th 743, 789), as this Court concluded in *People v. Ayala* (2000) 24 Cal.4th 243, the failure to give an identically worded requested instruction was harmless error in light of the absence of any misleading argument by the prosecutor. As this Court explained:

> In *People v. Melton* (1988) 44 Cal.3d 713 [244 Cal.Rptr. 867, 750 P.2d 741], we stated, "The literal language of [factor] (a) [of Pen. Code, § 190.3 & CALJIC No. 8.85] presents a theoretical problem . . . since it tells the penalty jury to consider the 'circumstances' of the capital crime *and* any attendant statutory 'special circumstances.' Since the latter are a subset of the former, a jury given no clarifying instructions might conceivably double-count any 'circumstances' which were also 'special circumstances.' On defendant's request, the trial court should admonish the jury not to do so. [¶] *However, the possibility of actual prejudice seems remote . . . .*" (*Id.* at p. 768, second italics added.)
>
> When reviewing a supposedly ambiguous [i.e., potentially misleading] jury instruction, "we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution.'" [Citation.]
>
> We discern no such reasonable likelihood here. "[W]e have already concluded that the standard instructions do not inherently encourage the double counting of aggravating factors. [Citations.] We have also recognized repeatedly that the absence of an instruction cautioning against double counting does not warrant reversal in the absence of any misleading argument by the prosecutor." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1180 [74 Cal.Rptr.2d 121, 954 P.2d 384].)

(*People v. Ayala, supra,* 24 Cal.4th at p. 289.)

Here, it is not reasonably likely that the jury viewed the court's instruction as allowing the double counting of the special circumstances as a factor in aggravation, and there is nothing in the record to indicate such. As this Court has found, because in argument the prosecutor did not encourage the jurors to double count, it is "unlikely" the jurors would actually double count. (*People v. Monterroso, supra,* 34 Cal.4th at p. 790.)

Thus, any error in not giving a limiting instruction was clearly harmless. (See *People v. Ayala, supra,* 24 Cal.4th at p. 290.)

Furthermore, the trial court properly refused Boyce's special instruction request number 6, which stated,

> In deciding whether you should sentence the defendant to life imprisonment without the possibility of parole, or to death, you cannot consider as an aggravating factor any fact which was used by you in finding him guilty of murder in the first degree unless that fact establishes something in addition to an element of the crime of murder in the first degree. The fact that you have found Kevin Boyce guilty beyond a reasonable doubt of the crime of murder in the first degree and attendant special circumstances is not itself an aggravating circumstance.

(10 CT 3469; 11 RT 3863.)

The prosecutor objected to this proposed instruction because it was confusing, it conflicted with what the jurors could do with Factor (a) evidence, and it was already covered by CALJIC No. 8.88. (11 RT 3862-3863.) The trial court agreed and said it was also vague and conflicted with some of the basic instructions. (11 RT 3863.) Boyce claims the trial court's refusal to give this proposed instruction violated his constitutional rights to a reliable sentencing determination, due process, and a fair trial in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. (AOB 175-176.) However, as Boyce acknowledges, this Court has rejected the same argument in *People v. Moon, supra,* 37 Cal.4th at pp. 39-40. (AOB 176; see also *People v. Whisenhunt* (2008) 44 Cal.4th 174, 226-227.) Boyce offers no persuasive reason to reconsider these decisions. Accordingly, his claim should be rejected.

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IX. THE COURT'S FAILURE TO REINSTRUCT THE PENALTY JURY WITH APPLICABLE GUILT PHASE INSTRUCTIONS WAS HARMLESS ERROR

Boyce contends the trial court erred in failing to instruct the jury during the penalty phase with the following instructions: CALJIC No. 1.01 [Instructions considered as a whole]; CALJIC No. 1.03 [Jurors forbidden independent investigation]; CALJIC No. 1.05 [Juror's use of notes]; CALJIC No. 2.00 [Direct and circumstantial evidence]; CALJIC No. 2.01 [Sufficiency of circumstantial evidence]; CALJIC No. 2.02 [Sufficiency of circumstantial evidence to prove specific intent or mental state]; CALJIC No. 2.03 [Consciousness of guilt – falsehood]; CALJIC No. 2.11 [Production of all available evidence not required]; CALJIC No. 2.13 [Prior consistent or inconsistent statements as evidence]; CALJIC No. 2.21.2 [Witness willfully false]; CALJIC No. 2.22 [Weighing conflicting testimony]; CALJIC No. 2.27 [Sufficiency of testimony of one witness]; CALJIC No. 2.81 [Opinion testimony of lay witness]; CALJIC No. 2.82 [concerning hypothetical questions]; and CALJIC No. 2.90 [regarding the definition of reasonable doubt]. Boyce claims the court's failure to give these instructions resulted in prejudicial error that warrants reversal of the penalty phase verdict. (AOB 177-185.) While the trial court's failure to reinstruct with the applicable guilt phase instructions was error, Boyce was not prejudiced.

During the penalty phase, the prosecution presented evidence of a 1987 attack on Damani Gray as well as documentary evidence regarding two prior convictions for Boyce: a 1989 conviction for robbery and a 1994 conviction for possession of a firearm by a felon. (9 RT 3064-3098.) The prosecution also presented four victim-impact witnesses: Brandon York, Jennifer Parrish, Daniel York, and Patricia Steele. (9 RT 3099-3113.) In mitigation, the defense presented numerous witnesses who testified

regarding Boyce's history, including family members and friends, a prior teacher, and a minister. The defense also presented several experts including a gang expert, a sociologist, a psychiatrist, and a psychologist. (9 RT 3124- 11 RT 3818.)

After the presentation of evidence in aggravation and mitigation, the parties discussed the proposed jury instructions. Without objection, the prosecutor requested CALJIC Nos. 1.02, 2.20, 2.21.1, 2.80, 8.84, 8.84.1, 8.85, 8.86, 8.87, and 8.88. (11 RT 3849; 10 CT 3457.) Defense counsel requested CALJIC No. 2.61 regarding the defense relying on the state of the evidence. (11 RT 3849-3850.) After some discussion, the trial court agreed to give 2.61 as modified by the defense. (11 RT 3850-3852.)

Thereafter, the jury was instructed with CALJIC Nos. 8.84 and 8.84.1, which advised, "You will now be instructed as to all of the law that applies to the penalty phase of this trial" and told them, "Disregard all other instructions given to you in other phases of this trial." (12 RT 4039; 10 CT 3438, 3441.) The jury was instructed with CALJIC No. 8.85, which listed the factors to be considered during the penalty phase based on section 190.3. (12 RT 4039-4043; 10 CT 3442-3444.) This instruction included factor (b) which informed the jurors to consider, "[T]he presence or absence of criminal activity by the defendant, other than the crime for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the expressed or implied threat to use force or violence."

The jury was instructed with CALJIC No. 8.86 regarding conviction of other crimes, proof beyond a reasonable doubt, which instructed the jurors that,

> Evidence has been introduced for the purpose of showing that the defendant Kevin Boyce has been convicted of the crimes of robbery and felon in possession of a handgun prior to the offense

> of murder in the first degree of which he has been found guilty in this case.
>
> Before you may consider any of the alleged crimes as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant was in fact convicted of the prior crimes. You may not consider any evidence of any other crime as an aggravating circumstance.

(12 RT 4043-4044; 10 CT 3446 [CALJIC No. 8.86].)

The jury was also instructed with CALJIC No. 8.87 on the proof beyond a reasonable doubt standard as to the assaults, batteries and robberies at Lamppost Pizza, and the assault and battery on Damani Gray allegation. The jury was told:

> Before a juror may consider any such criminal act as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did, in fact, commit such criminal act. . . .
>
> . . . If any juror is convinced beyond reasonable doubt that such 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.

(12 RT 4044-4045; 10 CT 3447.)

The jury was then given the definition of assault, including the elements the prosecution was required to prove in order for Boyce have violated section 240 (CALJIC No. 9.00); and the definition of battery, including the elements the prosecution was required to prove in order to prove the crime of battery (CALJIC No. 16.140). (12 RT 4045-4047; 10 CT 3449-3450.) Additionally, the trial court gave the following instructions: CALJIC No. 1.02 [Statements of counsel – evidence stricken out – insinuations of questions – stipulated facts]; CALJIC No. 2.20 [Believability of witness]; CALJIC No. 2.21.1 [Discrepancies in testimony]; CALJIC No. 2.80 [Expert testimony – qualification of expert]; CALJIC No. 2.60 [Defendant not testifying – no inference of guilt may be

drawn]; and a modified CALJIC No. 2.61 [Re defendant relying on the state of the evidence]. (12 RT 4033-4037, 4047-4048; 10 CT 3433-3437, 3451-3452.) The trial court also gave select special instructions requested by defense counsel. (12 RT 4038, 4043, 4045; 10 CT 3439-3440, 3445, 3448.)

Preliminarily, with respect to the failure to reinstruct on the duties of the jury (CALJIC Nos. 1.01, 1.03, and 1.05), Boyce forfeited his claim "by failing to request such instructions at trial." (*People v. Ervine, supra,* 47 Cal.4th 745 at p. 804, quoting *People v. Wilson* (2008) 43 Cal.4th 1, 30.)

Moreover, Boyce was not prejudiced by any omitted guilt phase instructions. As stated above, at the conclusion of the penalty phase, the trial court instructed the jury with CALJIC No. 8.84.1, which provides, in relevant part:

> You will now be instructed as to all of the law that applies to the penalty phase of this trial. [¶] You must determine what the facts are from the evidence received during the entire trial, unless you are instructed otherwise. [¶] You must accept and follow the law that I shall state to you. [¶] Disregard all other instructions given to you in other phases of this trial.

(12 RT 4039.)

The court proceeded to instruct the jury with CALJIC No. 8.85, enumerating the factors for the jury's consideration in determining Boyce's penalty, a modified No. 8.87, requiring proof beyond a reasonable doubt for every example of other criminal activity offered in aggravation and defining the burden of proof beyond a reasonable doubt, and a modified No. 8.88, setting forth the concluding instructions for the penalty phase. (12 RT 4039-4045, 4048-4050; 10 CT 3442-3448, 3453-3454.)

The court instructed the jury with some but not all of the applicable evidentiary instructions from CALJIC Nos. 1.00 through 2.81, and the trial court did not instruct on the definition of reasonable doubt, CALJIC No.

2.90. The omitted instructions included some of the instructions this Court has held are required in all criminal cases, such as CALJIC No. 2.22 on weighing conflicting testimony. (*People v. Carter* (2003) 30 Cal.4th 1166, 1219; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884.) Boyce contends the court's failure to give these standard evidentiary instructions violated his right to due process, equal protection, and a fair and reliable capital-sentencing determination under the Eighth and Fourteenth Amendments to the federal Constitution and article I, sections 7, 15, and 17 of the California Constitution, and requires reversal of the death judgment. (AOB 177-185.) Respondent submits that reversal of the death verdict is not required because the error committed by the court was clearly harmless.

Trial courts are "strongly urge[d] to ensure penalty phase juries are properly instructed on evidentiary matters. 'The cost in time of providing such instructions is minimal, and the potential for prejudice in their absence surely justified doing so.'" (*People v. Moon, supra,* 37 Cal.4th at p. 37, fn. 7, quoting *People v. Carter, supra,* 30 Cal.4th at p. 1222.) Normally, a court must instruct the jury on general principles of law that are closely and openly connected with the facts and necessary for the jury's understanding of the case, even absent a request from the defendant. (*Carter, supra,* 30 Cal.4th at p. 1219.) Thus, if a court instructs the jury at the penalty phase not to refer to instructions given at the guilt phase, it later must provide the jury with those instructions applicable to the evaluation of evidence at the penalty phase. (*Moon, supra,* 37 Cal.4th at p. 37.) Accordingly, it was error for the court here not to reinstruct the jury on the general principles regarding evaluating evidence, witness credibility and weighing conflicting testimony. (*Ibid.*; See also *People v. Lewis, supra,* 43 Cal.4th at p. 535; *People v. Carter, supra,* 30 Cal.4th at p. 1219.)

Nevertheless, this Court has repeatedly found that it is harmless error not to instruct a penalty-phase jury on evidentiary matters, after instructing

the jury to disregard guilt-phase instructions, where the defendant fails to demonstrate a reasonable likelihood that the instructions given in the case precluded the sentencing jury from considering any constitutionally relevant mitigating evidence. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1073-1074; *People v. Lewis, supra,* 43 Cal.4th at p. 535; *People v. Wilson, supra,* 43 Cal.4th at pp. 28-30; *People v. Loker* (2008) 44 Cal.4th 691, 745-746; *People v. Moon, supra,* 37 Cal.4th at p. 39; *People v. Carter, supra,* 30 Cal.4th at p. 1221.)

The instant case is similar to *People v. Carter, supra,* 30 Cal.4th 1166, where the trial court, as it did in here, instructed the penalty jury to disregard the earlier instructions, but failed to instruct with the standard evidentiary instructions. (*Id.* at pp. 1218-1219.) While this Court found the trial court's omission to be error, it found such error to be harmless under both federal and state law. Specifically, it found that the defendant failed to definitively demonstrate how the omission of the applicable evidentiary instructions prejudiced him; the Court found Boyce's assertions of error to be nothing more than speculation. (*Id.* at pp. 1220-1222.)

The same is true here. While Boyce generalizes that the absence of the evidentiary instructions "inserted an element of capriciousness into the jurors' deliberations and sentencing decision, failed to provide adequate procedural safeguards protecting against the arbitrary and capricious imposition of the death sentence, and failed to meet the constitutionally-required heightened standard for reliability in the procedures that led to the death determination," he cites not one concrete example of how he has been prejudiced. (See AOB 178-183.) Nor can he because the trial court's failure to reinstruct was harmless under either the state "reasonable possibility" standard for penalty phase error (*People v. Brown* (1988) 46 Cal.3d 432, 446-448), or the "harmless beyond a reasonable doubt"

standard for federal constitutional error (*Chapman v. California, supra,* 386 U.S. at p. 24). (*People v. Carter, supra,* 30 Cal.4th at pp. 1221-1222.)

Here, while the prosecution introduced evidence of Boyce's prior criminal activity, the jury was given the elements of the alleged criminal assault and battery, and expressly told that they could not consider the incident as an aggravating circumstance unless they found beyond a reasonable doubt that the criminal activity had occurred. (12 RT 4043-4047; 10 CT 3447-3450.) The only other aggravating evidence presented by the prosecution was the brief victim impact testimony given by Deputy Parrish and by Deputy York's mother, father, and brother. Boyce, in mitigation, presented several witnesses who talked about Boyce's life from childhood to when he committed the current crimes. He also presented witnesses who discussed the sociology of gangs in Los Angeles, child development issues, and organic brain disease. There is nothing in the record to indicate that the jury misunderstood or misused this evidence because of the omitted instructions. Thus, as in *Carter,* any alleged instructional error was harmless. (See *People v. Carter, supra,* 30 Cal.4th at p. 1221 ["the jury expressed no confusion or uncertainty . . . and never requested clarification" as to how to evaluate the witnesses' testimony].)

The jury is presumed to possess the common sense to accomplish its task. (See *United States v. Scheffer* (1998) 523 U.S. 303, 313 [118 S.Ct. 1261, 140 L.Ed.2d 413] ["Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men'"]; *Conservatorship of Early* (1983) 35 Cal.3d 244, 253 [jurors are "presumed to be intelligent" and "capable of properly assessing the evidence" since "[a] juror is not some kind of dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life

for the first time in the jury box"].) "There is no realistic possibility that jurors were misled about how to evaluate the testimony of penalty phase witnesses, or that the absence of general instructions at the penalty phase induced arbitrary and capricious deliberations." (*People v. Melton, supra,* 44 Cal.3d at p. 758.)

Accordingly, while it was error for the trial court to fail to reinstruct the jury with the standard applicable guilt phase evidentiary instructions, it was harmless because there was no possibility that the instructions given in this case precluded the jury from considering any constitutionally relevant mitigating evidence. Thus, under either federal or state standards of review, no prejudicial error occurred. (*People v. Carter, supra,* 30 Cal.4th at pp. 1221-1222; see also *People v. Moon, supra,* 37 Cal.4th at pp. 35-39.)

Further, any error in failing to reinstruct the jury on the definition of reasonable doubt (CALJIC No. 2.90) was also harmless. (See AOB 180-181.) In *People v. Lewis, supra,* 43 Cal.4th at p. 536, this Court found harmless error when the trial court failed to reinstruct the jury with the definition of reasonable doubt (CALJIC No. 2.90.). There, as here, the jury was instructed that "before it could consider defendant's alleged prior criminal activity as aggravating, it had to find beyond a reasonable doubt that defendant had in fact engaged in that activity." (*Id.* at p. 536.) In *Lewis,* this Court found there was "no reasonable possibility the jury would have believed that the reasonable doubt standard it was required to apply at the penalty phase was any different than the standard it had just applied at the guilt phase." (*Ibid.,* citing *People v. Chatman* (2006) 38 Cal.4th 344, 408.) Similarly here, it is not reasonably probable the jury applied a different reasonable doubt standard than it had applied during the guilt phase, less than three weeks before.

Additionally, during the guilt phase, the jury already had found beyond a reasonable doubt that Boyce had committed the Lamppost Pizza

robberies. (8 RT 2933-2935.) And during closing argument, the prosecutor told the jury the "Factor B" evidence had to be proven beyond a reasonable doubt. (12 RT 3899-3900.) Accordingly, it is not reasonably possible that re-instruction on the definition of reasonable doubt would have affected the penalty verdict.

X. BOYCE'S UPPER TERM SENTENCES ON HIS NONCAPITAL CRIMES SHOULD BE UPHELD; THE TRIAL COURT DID NOT ERR BY IMPOSING CONSECUTIVE TERMS; THE ABSTRACT OF JUDGMENT CORRECTLY REFLECTS THE STAYED TERMS

Boyce contends his sentence for the crimes other than the murder should be reversed and remanded for resentencing because the trial court erred in relying on aggravating factors to impose the upper term and consecutive sentences, and because the determination was made on factors that were not found true beyond a reasonable doubt by a jury, thereby violating his rights under the Sixth and Fourteenth Amendments to the Constitution and Article I, section 16 of the California Constitution. (AOB 186-190, 192-195.) Boyce also claims the trial court improperly relied on the vulnerability of the victim to impose the upper term on count two and the associated gun-use enhancement. (AOB 190-191.)

The trial court properly imposed the upper term based on Boyce's recidivism and on facts the jury necessarily found true. Even assuming Boyce's sentence rested with aggravating circumstances that were not the subject of a jury trial, any error was harmless beyond a reasonable doubt. Furthermore, the trial court properly imposed a consecutive term and properly relied on the vulnerability of the victim to impose the upper terms. Lastly, contrary to Boyce's claim (AOB 193), the abstract of judgment correctly shows that the sentences on counts 2 through 11 were ordered stayed. (See 11 CT 3660.)

In addition to being sentenced to death, Boyce was sentenced to a determinate term of 34 years and 4 months in state prison. (12 RT 4123.)

The determinate sentence was imposed as follows: the upper term of five years for the second degree robbery of Deputy Parish (count 2), with 10 consecutive years for the firearm enhancement, and on counts 3 through 11, one-third the mid-term on the substantive counts and one-third the mid-term for each related firearm use enhancement, all to be served consecutively.[20] (12 RT 4121-4123; 11 CT 3653-3656.) The trial court explained it was imposing the upper terms on count 1 and the related firearm enhancement because of the vulnerability of the victims. (12 RT 4121.) The trial court stayed the determinate sentence:

> because of the fact that the court relied on the facts underlying these offenses to deny the motion to modify the death penalty. Said stay shall be during the pendency of the appeal on count 1 and shall become permanent when the sentence on count 1 is completed.

(12 RT 4123; 11 CT 3656, 3660.)

In *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], the United States Supreme Court held that California's procedure for selecting upper terms under former section 1170, subdivision (b), violated the defendant's Sixth and Fourteenth Amendment right to jury trial because it gave "to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." (*Cunningham, supra,* 549 U.S. at p. 274.) The Court explained that "the Federal Constitution's jury trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum

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[20] Although Boyce did not object to imposition of the determinate sentence, failure to do so does not forfeit his claims on appeal. (*People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4 [failure to object does not forfeit Sixth Amendment claim raised prior to the United States Supreme Court's 2004 decision in *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403].])

based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Id.* at pp. 274-275.)

A. The Trial Court Properly Imposed the Upper Term

The trial court properly imposed the upper terms based on Boyce's recidivism. An upper term sentence based on at least one aggravating circumstance complying with *Cunningham* "renders a defendant eligible for the upper term sentence," so that "any additional fact finding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*People v. Black* (2007) 41 Cal.4th 799, 812 (*Black II*).) An aggravating circumstance accords with *Cunningham* if it was based on the defendant's criminal history. (*Black II, supra,* 41 Cal.4th at pp. 816, 818.) This "exception" for a defendant's "[r]ecidivism" must not be read "too narrowly" and encompasses "not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions." (*Black II, supra,* 41 Cal.4th at pp. 818-820 [trial court's finding that a defendant's prior convictions were numerous or of increasing seriousness falls within the exception]; accord, *People v. Towne* (2008) 44 Cal.4th 63, 79-84 [trial court's findings that a defendant served prior prison terms, was on probation or parole at the time of the offense, and had unsatisfactory prior performance on probation or parole due to a prior conviction, fall within the exception].)

Here, before sentencing Boyce, the trial court said it had read and considered the probation report. (12 RT 4079.) The probation report listed the following circumstances regarding Boyce's criminal history in aggravation: Boyce's prior convictions as an adult, and sustained petitions in juvenile delinquency proceedings are numerous and of increasing seriousness (Cal. Rules of Court, rule 421, subd. (b)(2)); Boyce has served three prior prison terms (Cal. Rules of Court, rule 421, subd. (b)(3)); Boyce

was on parole when he committed the crimes (Cal. Rules of Court, rule 421, subd. (b)(4)); and Boyce's prior performance on probation and parole was unsatisfactory (Cal. Rules of Court, rule 421, subd. (b)(5)). (11 CT 3630-3631.)

During the motion for modification, the trial court noted Boyce's two prior felony convictions, for robbery and being an ex-felon possessing a firearm, were proven beyond a reasonable doubt. (12 RT 4077.) Thus, in imposing the upper terms, the trial court permissibly relied on Boyce's criminal history. Under these circumstances, the trial court's reliance on other aggravating circumstance findings did not violate Boyce's right to jury trial under *Cunningham.* (*People v. Black, supra,* 41 Cal.4th at p. 812.)

B. The Error Was Harmless

In any event, the failure to give Boyce a jury trial on the aggravating circumstances was harmless. The denial of the right to a jury trial on aggravating circumstances is reviewed under the harmless error standard set forth in *Chapman v. California, supra,* 368 U.S. at pp. 23-24, requiring reversal unless the reviewing court determines beyond a reasonable doubt that the error did not affect the jury's verdict. (*People v. Sandoval, supra,* 41 Cal.4th at p. 838.) Since the verdict on the charged offense is not at issue, "we must determine whether, if the question of the existence of an aggravating circumstance or circumstances had been submitted to the jury, the jury's verdict would have authorized the upper sentence." (*Ibid.*)

Here, the jury had determined death was the appropriate sentence for Boyce, so clearly they found his crimes aggravated, and would have found the aggravating circumstances to authorize the upper term. In addition to the circumstances surrounding Boyce's criminal history, the probation report listed as circumstances in aggravation that (1) the crime involved great violence, great bodily harm, threat of great bodily harm and other acts

disclosing a high degree of cruelty, viciousness or callousness. Despite victim Deputy York's compliance to all of the defendant's demands, he was shot in the back of his head as he lay face down on the floor while Boyce's two other robbery victims awaited their fates. Despite the victims at Lamppost Pizza's total compliance with the defendant's demands, a number of them were bullied and kicked by the defendant in addition to being robbed (Cal. Rules of Court, rule 421, subd. (a)(1)); and Boyce has engaged in violent conduct which indicates a serious danger to society (Cal. Rules of Court, rule 421, subd. (b)(1)). The report listed no circumstances in mitigation. (11 CT 3630-3631.)

The jury heard and rejected Boyce's mental health evidence, and found it did not mitigate his sentence for murder in that, in spite of the mitigation evidence he presented, they sentenced him to death. It is clear beyond a reasonable doubt that the jury would have found Boyce's crimes justified imposing the upper term sentence. Boyce's crimes were committed with a high degree of cruelty, viciousness and callousness. Boyce and Willis burst into the salon and forced the victims face down to the ground at gunpoint. Boyce and Willis began to rob the victims. (4 RT 1812-1815, 1818-1821, 1843-1848, 1853-1856, 1891-1893; 6 RT 2150-2151, 2155-2156, 2216.) After finding Deputy York's badge, Boyce kicked him several times before brutally shooting him execution style in the back of the head. Boyce used racial slurs and proclaimed his dislike for the police. The victims heard Boyce say he always wanted to kill a "cop" and hoped this one died. (4 RT 1830-1832, 1866-1867, 1870, 1875-1879; 6 RT 2159-2160.)

Later the same evening, Boyce and Willis went to Lamppost Pizza to commit another series of armed robberies. They ordered the victims to lay face down on the ground. Boyce kicked several of the victims and held a gun to one of the victim's face. (5 RT 2059-2060, 2067-2068, 2070-2073,

2080, 2091-2093, 2097-2098, 2109-2110, 2118, 2121, 2123, 2140.) These facts show that, as to the underlying crimes, Boyce exhibited a great deal of cruelty, viciousness and callousness. The facts also show the particular vulnerability of the victims. The four unsuspecting rugby players were finishing up their night at the pizza parlor when they were ordered to the ground at gunpoint. None of the victims had weapons and none tried to fight back. (5 RT 2055-2056, 2059-2060, 2070-2073, 2089, 2092, 2097-2098, 2107, 2118, 2122-2123, 2140.) After Boyce asked if any of the men were "cops," Tamparong, scared of being mistaken for a police officer, hid his park ranger badge underneath a table. (5 RT 2069, 2082-2083, 2093, 2102, 2107, 2125, 2142.)

The jury rejected the defense version of the evidence in the guilt phase and the penalty phase. The aggravating factors were very substantial and compelling, and the mitigating factors were weak. Had the issue been presented to the jury, it can be said beyond a reasonable doubt it would have authorized the upper term sentence for the noncapital crimes. This is made even clearer by the jury's rejection of Boyce's defense of not being the shooter, his claim of organic brain damage/dysfunction, and request for a life sentence.

If this Court disagrees and finds prejudicial *Cunningham* error, however, it should remand for resentencing under the reformed system prescribed by the California Supreme Court. (See *People v. Sandoval, supra,* 41 Cal.4th at pp. 843-852.) Under this reformed system, the resentencing court would exercise its "discretion to select among the three available terms," giving a statement of reasons for its selection, but with no requirement of an additional factual finding or of a statement of "ultimate facts." (*Id.* at pp. 846-847, 852.) The court would also use the amended rules of court as guidance. (*Id.* at p. 846; see Cal. Rules of Court, rules 4.405-4.452, as amended May 23, 2007.)

C. The Trial Court Properly Imposed Consecutive Sentences

Boyce also claims that under *Oregon v. Ice* (2009) 555 U.S. 160 [129 S.Ct. 711, 714-715, 172 L.Ed.2d 517], the imposition of a consecutive sentence based on facts that were neither found by the jury nor admitted by him violated his Sixth Amendment right to a jury trial. Boyce further faults the trial court for failing to state its reasons for imposing the consecutive terms, and claims the trial court could not properly rely on the vulnerability of the victims to support the consecutive terms. (AOB 192-193.) The claim is without merit.

First, *Oregon v. Ice* does not compel a jury trial to impose consecutive sentences. Rather, the United States Supreme Court held the Sixth Amendment does not "mandate jury determination of any fact declared necessary to the imposition of consecutive, in lieu of concurrent, sentences." (*Oregon v. Ice, supra,* 129 S.Ct. at p. 714.) The Supreme Court observed that, while "determining whether the prosecution has proved each element of an offense beyond a reasonable doubt" has historically been a function of the jury (*Id.* at p. 714), traditionally "the jury played no role in the decision to impose sentences consecutively or concurrently" (*Id.* at p. 717). "Instead, specification of the regime for administering multiple sentences has long been considered the prerogative of state legislatures." (*Ibid.*) Accordingly, "in light of historical practice and the authority of States over administration of their criminal justice systems" (*Id.* at pp. 714-715), the Supreme Court held that Oregon's choice to "constrain judges' discretion by requiring them to find certain facts before imposing consecutive, rather than concurrent, sentences" does not violate the Sixth Amendment (*Id.* at pp. 714-715).

Further, *Cunningham* is inapplicable to the decision whether to run individual sentences consecutively or concurrently. (*People v. Black,*

supra, 41 Cal.4th at pp. 822-823.) Accordingly, the trial court's imposition of consecutive terms did not violate defendant's constitutional right to a jury trial.

Concerning Boyce's claim that the trial court erred by failing to state reasons for the consecutive terms, Boyce's failure to object to a more detailed statement of reasons from the trial court precludes him from doing so now. It is well established that even where a statement of reasons to support a sentencing choice is mandatory, a failure to object to a trial court's failure to state such reasons precludes raising the issue on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 351-353; *People v. Welch* (1993) 5 Cal.4th 228, 236.)

In any event, any failure by the trial court to state its sentencing reasons was harmless. California Rules of Court, rule 406, subdivision (b)(4) (renumbered as 4.406) requires sentencing courts to orally state their reasons for imposing consecutive sentences. However, reviewing courts frequently find any error to be harmless. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 679, citing *People v. Green* (1988) 200 Cal.App.3d 538, 542-543; *People v. Porter* (1987) 194 Cal.App.3d 34, 39; *People v. Swanson* (1981) 123 Cal.App.3d 1024, 1033.) Sentencing error is harmless where there is no reasonable probability of a more favorable result were the matter to be remanded for a more explicit explanation of the statement of reasons for imposing the aggravated term. (*People v. Osband, supra,* 13 Cal.4th at p. 728 [reversal is not required if "it is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error"].)

Here, as set forth above, the probation report identified numerous aggravating circumstances, none of which Boyce challenges and any of which alone would have been sufficient to support the imposition of a consecutive term. (See *People v. Osband, supra,* 13 Cal.4th at p. 728.)

Thus, it is not reasonably probable that the superior court would have imposed a sentence more favorable to Boyce if it had stated the reasons for its decision to impose a consecutive terms. To remand merely to force the trial court to recite these reasons "would be an idle act that exalts form over substance because it is not reasonably probable the court would impose a different sentence." (*People v. Coelho* (2001) 89 Cal.App.4th 861, 889; *People v. Green, supra,* 200 Cal.App.3d. at pp. 542-543.) Accordingly, any error by the court in failing to state reasons for imposing a consecutive sentence was harmless.

XI. CALIFORNIA'S DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL

Acknowledging this Court has previously rejected his contentions, Boyce argues, to preserve federal review, that California's capital sentencing scheme is unconstitutional. (AOB 196.) Boyce has not presented any compelling reason for this Court to revisit any of its previous rulings.

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Boyce claims Penal Code section 190.2, which enumerates what are special circumstances, is impermissibly broad, thereby making "almost all first degree murders" eligible for the death penalty, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution. (AOB 196-197.) This Court has consistently rejected this claim. (*People v. Zamudio, supra,* 43 Cal.4th at p. 373; *People v. Elliot* (2005) 37 Cal.4th 453, 487; *People v. Harris* (2005) 37 Cal.4th 310, 365.) Boyce has not presented any reason to reconsider this issue.

B. Penal Code Section 190.3, Subdivision (a) Is Not Impermissibly Broad

Boyce argues that Penal Code section 190.3, subdivision (a), allowing the jury to consider the "circumstances of the crime" as an aggravating

factor is not sufficiently limited, thereby allowing prosecutors to argue every conceivable circumstance is an aggravating factor, even those that contradict each other from case to case, thereby violating the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution. (AOB 197-198.) This Court has rejected this argument.

> It is not inappropriate . . . that a particular circumstance of a capital crime may be considered aggravating in one case, while a contrasting circumstance may be considered aggravating in another case. The sentencer is to consider the defendant's individual culpability; there is no constitutional requirement that the sentencer compare the defendant's culpability with the culpability of other defendants. [Citation.] The focus is upon the individual case, and the jury's discretion is broad.

(*People v. Jenkins, supra,* 22 Cal.4th at p. 1051; accord *People v. Ramos* (2004) 34 Cal.4th 494, 533; *People v. Maury* (2003) 30 Cal.4th 342, 439.) Boyce has not presented any reason to reconsider this issue, therefore, his claim should be rejected.

C. The Standard Penalty Phase Instructions Do Not Impermissibly Fail to Set Forth the Appropriate Burden of Proof

Boyce makes a number of claims that the death penalty statute and accompanying jury instructions fail to set forth the appropriate burden of proof. None of his contentions have merit.

1. There Is No Requirement the Jury Find Aggravating Factors Outweigh the Mitigating Factors Beyond a Reasonable Doubt

Citing *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556](*Ring*); *Blakely v. Washington, supra,* 542 U.S. at pp. 303-305 (*Blakely*) and *Cunningham v. California, supra,* 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*), Boyce argues the jury needed to make factual findings beyond a reasonable doubt that (1)

aggravating factors were present and (2) the aggravating factors were so substantial as to make death the appropriate punishment, and the failure to do so violated the Due Process Clause and the Eighth Amendment to the Constitution. (AOB 198-200.)

California's death penalty statute is constitutional, and this Court has determined that the United States Supreme Court decisions in *Apprendi* and *Ring* do not alter that conclusion.

As this Court's precedent makes clear:

> The 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.] Unlike the statutory schemes in other states cited by defendant, in California 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification. [Citations.] ¶ The jury is not constitutionally required to achieve unanimity as to aggravating circumstances. [Citation.] ¶ Recent United States Supreme Court decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584 have not altered our conclusions regarding burden of proof or jury unanimity.

(*People v. Brown, supra,* 33 Cal.4th at pp. 401-402.)

In California "once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole." (*People v. Ward* (2005) 36 Cal.4th 186, 221 quoting *People v. Prieto* (2003) 30 Cal.4th 226, 263.) The United States Supreme Court's decisions, including *Cunningham,* "interpreting the Sixth Amendment's jury trial guarantee [citations] have not altered [this Court's] conclusions in this regard." (*People v. Whisenhunt, supra,* 44 Cal.4th at pp.

227-228.) As this Court has concluded, *Cunningham* "involves merely an extension of the *Apprendi* and *Blakely* analyses to California's determinate sentencing law" (*People v. Prince* (2007) 40 Cal.4th 1179, 1297), and thus has no bearing on this Court's earlier decisions upholding the constitutionality of the state's capital sentencing scheme (*People v. Stevens* (2007) 41 Cal.4th 182, 212). Thus, California's death penalty withstands constitutional scrutiny, even after reexamination in light of *Apprendi* and *Cunningham.* Boyce has not presented any reason to reconsider this issue.

2. There Is No Requirement to Instruct on the Burden of Proof or Its Absence

Boyce next contends that the jury should have been instructed that the state had the burden of persuasion on the existence of any factor in aggravation, and the appropriateness of the death penalty, and that there was a presumption that life without possibility of parole was an appropriate sentence, and the failure to do so violated his rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution. (AOB 200-201.) This Court, in previously rejecting Boyce's position, has explained: "Because the determination of penalty is essentially moral and normative [citation], and therefore is different in kind from the determination of guilt, there is no burden of proof or burden of persuasion. [Citation.]." (*People v. Lenart* (2004) 32 Cal.4th 1107, 1135-1136, quoting *People v. Hayes, supra,* 52 Cal.3d at p. 643.) The penalty phase determination is "not akin to 'the usual fact-finding process,' and therefore 'instructions associated with the usual fact-finding process—such as burden of proof—are not necessary.'" (*People v. Lenart, supra,* 32 Cal.4th at p. 1136, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 417-418.) Nor is there a requirement that the jury be instructed that there is no burden of proof. (*People v. Elliot, supra,* 37 Cal.4th at p. 488; *People v. Cornwell* (2005) 37 Cal.4th 50, 104.) This Court has also repeatedly rejected Boyce's argument that there is a

presumption of life in the penalty phase of a capital trial that is analogous to the presumption of innocence at the guilt trial. (*People v. Abilez* (2007) 41 Cal.4th 472, 532; *People v. Perry* (2006) 38 Cal.4th 302, 321; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137.)

3. There Is No Requirement the Jury Unanimously Determine Which Aggravating Factors They Relied Upon or That Boyce Engaged in Prior Unadjudicated Criminal Activity

Boyce contends his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution were violated because there is no assurance that the jury found either unanimously or by a majority which aggravating circumstances warranted the death penalty, and that he engaged in prior criminality. (AOB 201-204.) There is no constitutional requirement that a capital jury reach unanimity on the presence of aggravating factors. (*People v. Martinez* (2009) 47 Cal.4th 399, 455; *People v. Burney, supra,* 47 Cal.4th at p. 268.) Nor is there a constitutional requirement that a capital jury unanimously agree that prior criminal activity has been proven. (*People v. Martinez, supra,* 47 Cal.4th at p. 455; *People v. Dykes, supra,* 46 Cal.4th at p. 799.) Nor was Boyce's right to Equal Protection violated by not requiring unanimity on the presence of aggravating factors. (*People v. Cook* (2007) 40 Cal.4th 1334, 1367; *People v. Griffin, supra,* 33 Cal.4th at p. 598.)

4. CALJIC No. 8.88 Is Not Impermissibly Vague and Ambiguous for Using the Word "Substantial"

Boyce contends the phrase "so substantial" in the instruction to the jury that their determination of penalty depended on whether the jurors were "persuaded that the aggravating circumstances are *so substantial* in comparison with the mitigating circumstances that it warrants death instead of life without parole" (CALJIC No. 8.88) was impermissibly broad in violation of his rights under the Eighth and Fourteenth Amendments to the

Constitution. (AOB 204.) Boyce's contention is without merit. (*People v. Carrington* (2009) 47 Cal.4th 145, 199; *People v. Bramit* (2009) 46 Cal.4th 1221, 1249.)

5. CALJIC No. 8.88 Is Not Unconstitutional for Failing to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

Boyce contends CALJIC No. 8.88, informing the jurors that they can return a death verdict if the aggravating evidence "warrants" death violates the Eighth and Fourteenth Amendments to the Constitution because the correct inquiry is whether the death penalty is "appropriate," not whether it is "warranted." (AOB 204-205.) This contention lacks merit. (*People v. Rogers* (2006) 46 Cal.4th 1136, 1179; *People v. Jackson, supra,* 45 Cal.4th at p. 701.)

6. The Instructions Were Not Constitutionally Deficient Because They Failed to Inform the Jurors That If Mitigation Outweighed Aggravation, They Must Return a Sentence of Life without the Possibility of Parole

Although the instructions informed the jury the circumstances under which it could return a death verdict, Boyce contends the instructions were deficient because they did not inform the jury of the converse–that if the mitigating circumstances outweigh the aggravating circumstances they must return a verdict of life without the possibility of parole. He claims the instructions therefore violated his right to due process. (AOB 205-206.) His claim is without merit. (*People v. Carrington, supra,* 47 Cal.4th at p. 199; *People v. Medina, supra,* 11 Cal.4th 694, 781-782.)

7. There Is No Requirement to Inform the Jury That There Is a Presumption of Life

Boyce reiterates his contention regarding a presumption of life without possibility of parole and contends the jury was constitutionally

required to be instructed that there was a presumption of life imprisonment, and the failure to do so violated his rights under the Eighth and Fourteenth Amendments to the Constitution. (AOB 206-207.) As noted above, this Court has repeatedly rejected Boyce's argument that there is a presumption of life in the penalty phase of a capital trial that is analogous to the presumption of innocence at the guilt trial. (*People v. Abilez, supra,* 41 Cal.4th at p. 532; *People v. Perry, supra,* 38 Cal.4th at p. 321; *People v. Kipp, supra,* 26 Cal.4th at p. 1137.)

D. Written Findings Are Not Constitutionally Required

Boyce claims the failure of the jury to make any written findings during the penalty phase violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution. (AOB 207.) This Court has consistently rejected any claim that written findings are required by the jury as to aggravating factors. (*People v. Riggs* (2008) 44 Cal.4th 248, 329; *People v. Elliot, supra,* 37 Cal.4th at p. 488; *People v. Cornwell, supra,* 37 Cal.4th at p. 105.)

E. The Instructions on Mitigating and Aggravating Factors Were Constitutional

Next, Boyce raises a number of claims regarding the instructions on mitigating and aggravating factors. Each contention has been previously rejected by this Court, and Boyce has not presented any compelling reason for this Court to revisit its holdings.

1. The Use of Words Such as "Extreme" Is Constitutionally Permissible

Boyce contends the use of the words such as "extreme" in the list of mitigating factors (defining when mental or emotional disturbance, or the dominating influence of another, are mitigating factors) acted as barriers to the consideration of mitigation in violation of his Sixth, Eighth and Fourteenth Amendment rights to the Constitution. (AOB 207-208.) This

Court has repeatedly rejected this contention and should do so again here. (*People v. Parson* (2008) 44 Cal.4th 332, 369-370; *People v. Salcido, supra,* 44 Cal.4th at p. 168; *People v. Prince, supra,* 40 Cal.4th at p. 1298; *People v. Beames* (2007) 40 Cal.4th 907, 934.)

2. There Is No Constitutional Requirement to Delete Inapplicable Sentencing Factors

Boyce next contends his constitutional rights were violated because the trial court failed to delete inapplicable sentencing factors in CALJIC No. 8.85, which describes what factors may be considered in mitigation or aggravation. (AOB 208.) The trial court is not required to delete inapplicable sentencing factors. (*People v. Burney, supra,* 47 Cal.4th at p. 261; *People v. Bramit, supra,* 46 Cal.4th at p. 1248.)

3. There Is No Constitutional Requirement to Designate Which Factors Was Mitigating

Boyce contends the jury should have been advised which factors in CALJIC No. 8.85 were solely to be used as mitigators, and the trial court's failure to do so resulted in a violation of his Eighth and Fourteenth Amendment rights. (AOB 208-209.) CALJIC No. 8.85 is not unconstitutional for failing to inform the jury which factors can only be used as mitigating factors. (*People v. Perry, supra,* 38 Cal.4th at p. 319; *People v. Moon, supra,* 37 Cal.4th at p. 42.)

F. Intercase Proportionality Review Is Not Constitutionally Required

Boyce contends the failure to conduct intercase proportionality review violates the Sixth, Eighth and Fourteenth Amendments to the Constitution because the proceedings are conducted in a constitutionally arbitrary, unreviewable manner. (AOB 209.) This Court has repeatedly rejected this contention and should do so again here. (*People v. Cornwell, supra,* 37 Cal.4th at p. 105; *People v. Elliot, supra,* 37 Cal.4th at p. 488; *People v.*

Smith, supra, 35 Cal.4th at p. 374; *People v. Jones* (2003) 29 Cal.4th 1229, 1267.)

G. California's Capital Sentencing Sentencing Scheme Does Not Violate Equal Protection

Boyce argues California's capital sentencing scheme violates the Equal Protection Clause because it gives more procedural protections to non-capital defendants. As examples, Boyce complains that in capital cases there is no burden of proof, the jurors need not agree on what aggravating circumstances apply, and there are no written findings. (AOB 209-210.) As this Court has repeatedly and consistently held, equal protection does not "deny capital defendants equal protection because it provides a different method of determining the sentence than is used in noncapital cases. [Citation.]" (*People v. Elliot, supra,* 37 Cal.4th at p. 488; accord *People v. Dunkle* (2005) 36 Cal.4th 861, 940; *People v. Panah* (2005) 35 Cal.4th 395, 500. This is because "capital and noncapital defendants are not similarly situated and therefore may be treated differently without violating constitutional guarantees of equal protection of the laws or due process of law. [Citation.]" (*People v. Manriquez* (2005) 37 Cal.4th 547, 590.) Thus, Boyce's argument is without merit.

H. California's Death Penalty Law Does Not Violate International Law

Lastly, Boyce contends the death penalty violates international law, the Eighth and Fourteenth Amendments and "evolving standards of decency." (AOB 210.) This Court has repeatedly rejected similar arguments and should do so again here. "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citation.]" (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1322; accord *People v. Mungia* (2008) 44 Cal.4th

1101, 1143; *People v. Panah, supra,* 35 Cal.4th at p. 500; *People v. Elliot, supra,* 37 Cal.4th at p. 488.)

CONCLUSION

Respondent respectfully requests the judgment of conviction and sentence of death be affirmed in its entirety.

Dated: January 24, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 43,815 words.

Dated: January 24, 2011

KAMALA D. HARRIS
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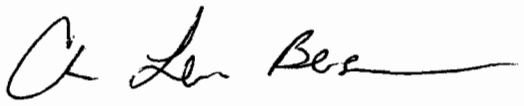

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Kevin Dewayn Boyce** No.: **S092240 - Capital Case**

I declare:

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

On **January 24, 2011,** I served the attached ***RESPONDENT'S BRIEF*** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **January 24, 2011**, at San Diego, California.

Loreen Blume
Declarant

Loreen Blume
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