IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff & Respondent,* *v.* **GARY GALEN BRENTS,** *Defendant & Appellant.*	**CAPITAL CASE** S093754

Orange County Superior Court No. 96NF2113
The Honorable JOHN J. RYAN, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On May 8, 2000, the District Attorney of Orange County filed a first amended information charging appellant Gary Galen Brents (hereinafter, "Brents") with: the October 4, 1995 murder of Kelly Ann Gordon in violation of Penal Code section 187, subdivision (a) (count one); kidnapping in violation of Penal Code section 207, subdivision (a) (count two), and assault by means of force likely to produce great bodily injury in violation of Penal Code section 245, subdivision (a)(1) (count three). The first amended information alleged that the murder was committed while Brents was engaged in the commission of a kidnapping, within the meaning of Penal Code section 190.2, subdivision (a)(17), and that the murder involved the infliction of torture within the meaning of Penal Code section 190.2, subdivision (a)(18). Finally, the amended information alleged that Brents had suffered three prior serious felony convictions within the meaning of Penal Code sections 667, subdivisions (a), (b) through (e), and 1170.12, and that Brents had served five prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). (2 CT 574-579.) Brents was arraigned on the first amended information on May 8, 2000, and pleaded not guilty and denied the special allegations. Brents' motion to bifurcate the priors was granted that same day. (2 CT 581-582.)

Jury selection commenced on May 8, 2000. (2 CT 581-583.) The jury was sworn on May 24, 2000. (2 CT 732.)

The guilt phase of Brents' trial commenced on May 30, 2000. (2 CT 740.) On June 20, 2000, the jury found Brents guilty as charged in counts one through three. The jury further determined that Brents had murdered the victim during the commission of a kidnapping. The jury was unable to reach a verdict on the torture special circumstance allegation. The court declared a mistrial, and the prosecution later dismissed the torture special circumstance allegation. (3 CT 848-850, 908.)

On June 20, 2000, Brents waived his right to a jury trial on the prior conviction allegations. (3 CT 849-850.) On June 29, 2000, the trial court determined all of the serious felony and prison prior allegations to be true. (3 CT 923-924.)

The penalty phase of Brents' trial began on June 26, 2000. (3 CT 907-912.) On June 30, 2000, the jury returned a verdict of death. (3 CT 1145-1146.)

On December 15, 2000, the trial court heard and denied Brents' motion for new trial and the requisite motion for modification of sentence. Brents was sentenced to death for his murder of Kelly Ann Gordon (count one). The trial court additionally imposed a consecutive 25-year-to-life sentence on the assault by means of force likely to produce great bodily injury conviction in count three under the Three Strikes law, as well as three consecutive five-year terms on the Penal Code section 667, subdivision (a) enhancements. The sentence on Brents' kidnapping conviction in count two was ordered stayed, and the trial court struck the prior-prison-term enhancements, for an aggregate sentence of death plus 40 years to life. (4 CT 1230-1239.)

A notice of the automatic appeal was filed on December 15, 2000. (4 CT 1264.)

STATEMENT OF FACTS

On October 4, 1995, Brents became angry with Kelly Gordon (hereinafter, "Gordon" or "the victim") because Gordon owed Brents approximately $100 for methamphetamine. Brents and several of his acquaintances physically assaulted Gordon. Brents subsequently forced Gordon into the trunk of a car and drove her sixteen miles to an isolated section of an industrial area in Carson. After he parked the vehicle, Brents opened the trunk, poured gasoline on Gordon, and set her on fire. Brents fled the scene, leaving Gordon to burn to death.

Brents Becomes Angry With Kelly Gordon

During the month of October 1995, Brents, who was known by the street name "Dragon," rented a room at the Travel Lodge motel at 328 North Stanton in Anaheim. Brents sold drugs and was a pimp. (6 RT 1388, 1391, 1493; 7 RT 1633; 9 RT 1966-1968, 10 RT 2358, 2372.) Kelly Gordon had a personal relationship with Brents, and also worked for him as a prostitute. Gordon told an acquaintance that she was in love with Brents and she wanted to be his "number one 'ho.'" (6 RT 1399, 1454.)

Both Brents and Gordon were acquainted with Michelle Savidan (hereinafter, "Savidan") and Abigail Diaz (hereinafter, "Diaz"), and they all spent time at the Travel Lodge in Brents' room. (6 RT 1394-1399, 1493-1498.) Victoria Myers (hereinafter, "Myers") and Anna Sara Uele (hereinafter, "Uele") were friends with Savidan and Diaz, and were also acquainted with Brents. (7 RT 1630–1639, 9 RT 1963-1970.)

On October 3, 1995, Brents made an arrangement with Savidan, whereby Brents would front her money to purchase methamphetamine, which Savidan would then sell at a profit, giving the proceeds to Brents in exchange for his allowing her to stay in the motel room. After Brents gave her the

money, Savidan purchased a quarter of an ounce of methamphetamine. When she returned to the Travel Lodge, Brents, Gordon, and Diaz were in Brents' room. Although Savidan had planned to sell all of the methamphetamine by herself, Brents gave Gordon two grams of methamphetamine (worth approximately $100) for Gordon to sell. (6 RT 1394-1398, 1400-1404.) Later on that evening, Brents and Gordon were stopped by a police officer for a prostitution investigation on a street in Anaheim where prostitutes were known to be working. Gordon's thumbprint was placed on a field identification card during this stop.[1/] (9 RT 2159-2168, 2173-2178.)

The following evening, October 4, 1995, Brents, Gordon, and Savidan returned to Brents' motel room. By this time, Savidan had sold her portion of the methamphetamine and had given the money she received for the sale to Brents. However, Gordon had not given any money to Brents, and she no longer had any methamphetamine. Brents was angry. He told Savidan, "The bitch fucked off the money or the dope," meaning that he believed Gordon had used the methamphetamine instead of selling it. (6 RT 1404-1405, 1408-1409, 1453-1455.) Savidan was also angry because Gordon's consumption of methamphetamine was slowing down the profitability of the drug sales. She told Brents he should get rid of Gordon, meaning send her away. Savidan offered to go next door to the Kings Motel where she would wait for Gordon in the parking lot, beat her up, and tell Gordon not to return to the Travel Lodge. Brents initially agreed with this plan, and Savidan went to the motel next door and waited for Gordon in the parking lot. (6 RT 1405-1410.)

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1. Gordon's thumbprint was subsequently instrumental in identifying her body. (8 RT 1790-1791; 10 RT 2370-2371.)

In the meantime, Vicki Myers was with her girlfriend, Jasmine,[2/] and Sara Uele. The three women were driving around in a blue Cadillac which Uele had borrowed from Willie Keller in exchange for "dope" or cocaine. (7 RT 1636-1637; 9 RT 1968, 1972 , 2013-2014; 10 RT 2531-2532.) Someone from the Travel Lodge paged Uele. When Uele returned the page, she spoke with Brents and Savidan.[3/] They asked her to come to the Travel Lodge, and Uele agreed to do so. (7 RT 1636-1640, 9 RT 1969-1971, 2016-2017, 2057.)

When Uele and Myers arrived at Brents' motel room, Brents was talking to Gordon about money. Gordon sat crying at a table with her head down while Brents demanded, "Where is the money?" (9 RT 1975-1976.) Gordon told Brents she did not have the money, but she could get it. Hearing this, Uele told Gordon, "Well, I have a car. Just tell us where we got to go and I will take you there to get the money." (6 RT 1500.)

Brents and His Companions Assault Kelly Gordon

Uele, Myers, Jasmine, and the victim left Brents' motel room and got into the Cadillac. (9 RT 1978-1979.) Brents went to the parking lot next door to retrieve Savidan, and then they both got into the Cadillac, along with the four other women. Uele was driving, Gordon sat in the middle front seat, and Savidan sat next to her in the front passenger seat. Brents, Myers, and Jasmine sat in the back seat. (6 RT 1410-1412; 7 RT 1643-1646; 9 RT 1979-1982.) Brents directed Uele to a business parking lot next door to the Travel Lodge.

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2. Jasmine was not a witness in these proceedings because she died prior to the commencement of trial. (8 RT 1764.)

3. Savidan testified that she waited in the Kings Motel parking lot until Brents came to tell her there was now a different plan, and "they" had Gordon "over there in the car." (6 RT 1409-1410, 1459.)

Uele parked the Cadillac behind a brick wall. (6 RT 1413-1414; 7 RT 1645; 9 RT 1982.)

Once the car was parked, Savidan angrily asked Gordon, "Where's the money and what happened to the dope?" (6 RT 1413.) Savidan was trying to scare Gordon. At first, Gordon said she could get it, but she was unable to reveal the whereabouts of the money or the drugs. When Gordon continued to refuse to answer, Savidan hit her in the face. (6 RT 1416-1418.)

Uele got out of the car and opened the passenger-side door. Uele dragged Gordon out of the car, while at the same time Savidan was kicking Gordon out of the vehicle. (6 RT 1418; 9 RT 1983.) For several minutes, Uele, Savidan, Myers, and Jasmine proceeded to hit and kick Gordon numerous times. Gordon was on the ground and bleeding from her nose and mouth during this beating. (6 RT 1417-1420; 7 RT 1647-1648; 9 RT 1983-1985.)

At some point as he stood watching the beating, Brents pulled Savidan aside and said, "Check this out. You know, I think she [Gordon] is a snitch. I want to put her out." (6 RT 1419- 1420.) Savidan thought this meant Brents wanted to kill Gordon. Savidan told Brents that such a plan was not a good idea. Brents kept insisting that Gordon was a "snitch." Brents then gave Savidan the key to his motel room and told her to go back to the room, which Savidan did. (6 RT 1421-1423; 7 RT 1653.) When Savidan got back to the motel room, Diaz was there. Savidan told Diaz, "We need to get away from Dragon [Brents]. We are either going to end up dead or in jail." (6 RT 1424.)

Meanwhile, Brents, Eule, Myers, Jasmine, and Gordon got back into the Cadillac. Brents sat in the middle back seat, directly behind Gordon. (7 RT 1648; 9 RT 1986-1987.) Brents placed a plastic bag over Gordon's head and tightened it around her neck. Gordon struggled, and managed to remove the bag. (7 RT 1651; 9 RT 1987-1990.) Brents then put his arm around Gordon's neck and choked her from behind. (7 RT 1648-1649; 9 RT 1997, 2036-2037.)

Brents directed Uele to "[g]et the trunk open." (9 RT 1990-1991.) Eule, who was frightened of Brents due to his size and reputation on the street, complied with his directive to open the Cadillac's trunk. (9 RT 1993-1994.)

Brents Kidnaps and Murders Kelly Gordon

Brents pulled Gordon out of the Cadillac's front seat. Gordon, who was still bleeding from having been beaten, struggled with Brents. (7 RT 1649-1650.) Brents picked up Gordon and forced her inside the Cadillac's trunk. (7 RT 1650-1654; 9 RT 1992.) Uele and Myers were scared for Gordon, and asked Brents what he was doing. They told Brents his actions were not right. Neither Uele, Myers, nor Jasmine provided any assistance to Brents as he put his hands around the victim's neck and stuffed her inside the Cadillac's trunk. (7 RT 1653-1657, 1675; 9 RT 1992-1993.) Once Gordon was inside the trunk, Brents removed his rings and hit the victim twice in the face. (9 RT 1994.)

Gordon continued to struggle against Brents until he closed the lid of the trunk. (7 RT 1657.) In response to continued protests from Myers, Brents stated, "We got to take her out." (7 RT 1657, 1724.) Brents explained that Gordon was "going to tell" on them. (7 RT 1657, 1724; 9 RT 2000, 2034-2035.) Eule, Myers, and Jasmine decided to leave and return to the Travel Lodge. (7 RT 1657-1658; 9 RT 1997-1999.) Before they left, Eule gave Brents the keys to the Cadillac. (9 RT 2000, 2034-2035.) As they walked away, Eule heard the sounds of the victim "pounding" from inside the closed trunk. (9 RT 1999.)

Shortly after Eule and Myers went back to the Travel Lodge, Brents briefly returned to the room, apparently to use the restroom. Brents quickly left the motel while Eule, Myers, Diaz, Savidan, and Jasmine were still in the room. (6 RT 1503-1505; 7 RT 1657-1662.) No one ever saw Kelly Gordon again after Brents left the Travel Lodge. (6 RT 1505; 7 RT 1669.)

About two hours after they had last seen Brents, Savidan and Diaz were standing with some other people in front of the Stage Stop, a motel located about half a mile from the Travel Lodge. Brents approached Savidan and Diaz, leaned over and said to Savidan, "I took her to the hospital." Savidan replied, "Good." (6 RT 1428-1431.) Brents explained to Diaz that he found out Gordon was a "snitch," and that he had to "take care of her." Brents told Diaz that Gordon was in the hospital, but that she was "okay." (7 RT 1531.)

In front of the group, Brents exclaimed to Savidan, "Well, that was sure some good sex you and me had back at the motel room." (6 RT 1431-1432.) Savidan and Diaz looked at each other, puzzled because they knew Brents was lying. Brents then took Savidan away from the group and asked her, "Now, if I took gasoline and I poured it all on the inside of the car and on the outside of the trunk, do you think the fire would reach the inside of the trunk?" (6 RT 1432, 1478.) Savidan was sure Brents had "done something" to Gordon, but she did not go to the police because she was scared of Brents.[4/] (6 RT 1432.)

Law Enforcement Officers Discover Kelly Gordon's Remains & Investigate Her Murder

On the evening of October 4, 1995, at approximately 10:48 p.m., Los Angeles County firefighter Ken Salmans responded to a report of a burning vehicle on Santa Fe Avenue in an isolated industrial area of Carson,[5/]

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4. Following Brents' arrest, he was interviewed by Investigator Stephen Davis on November 23, 1995. Brents waived his constitutional rights and spoke to Investigator Davis, but denied involvement in Gordon's murder. (4 CT 1270-1301;10 RT 2366, 2378-2379.) However, Brents could not account for his whereabouts on the evening of Gordon's murder. (10 RT 2390.)

5. The address listed on Brents' driver's license is located approximately (continued...)

located approximately 16 miles away from the Travel Lodge where Brents was renting a room. (6 RT 1342-1344; 10 RT 2390-2392.) Upon arrival, Salman discovered a blue Cadillac. The Cadillac's trunk was engulfed in flames, although the rest of the car was not burning. The fire appeared to have recently been lit. (6 RT 1345, 1356, 1364.) The keys were still in the Cadillac's ignition. (6 RT 1348.)

As soon as the fire was extinguished, Salmans opened the vehicle's trunk, and immediately smelled gasoline, as well as the uniquely identifiable odor of burnt flesh. (6 RT 1349-1350.) Inside the trunk, Salmans saw a deceased young woman, later identified as Kelly Gordon. The victim's body was entirely burned, with the burn marks on her lower torso and legs appearing to be especially severe. (6 RT 1351-1352, 1366; 8 RT 1811; 10 RT 2370-2371.) It looked as if gasoline had been poured directly on the victim's body before she was set aflame. (6 RT 1357.)

Investigators discovered a blue plastic antifreeze container laying on the street behind the car on the driver's side. The container smelled like gasoline. (6 RT 1364; 9 RT 2099.) A piece of carpet removed from the Cadillac's trunk was collected, and later found to have gasoline residue on it. (9 RT 2094-2098; 2184-2185.) Terry Danielson, an arson and explosives expert, subsequently examined the Cadillac, and determined that the fire that killed Gordon was caused by gasoline being poured inside and on top of the vehicle's trunk before being lit. Danielson opined that gasoline had been poured inside the trunk directly between the victim's legs, as well as on the driver's side exterior of

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5. (...continued)
three miles from the crime scene. None of the women involved in the earlier beating of Gordon lived near the area where the Cadillac was found burning. (10 RT 2366-2369.)

the trunk lid, before an open flame was applied to the gasoline to ignite the flames. (6 RT 1372-1375, 1380.)

Several potential blood stains were retrieved from the Cadillac, three of which ultimately proved to be consistent with the victim's DNA. (8 RT 1829-1832, 1859, 1864-1865.) A cigarette butt was also retrieved from the Cadillac, and DNA was collected from the filter. Sara Uele could not be excluded as the donor of the DNA found in the saliva on the cigarette filter. (8 RT 1848-1856.)

On October 8, 1995, Dr. Thomas Gill, a forensic pathologist, performed an autopsy on the victim's body. (8 RT 1771-1776.) There were second- and third-degree burns covering 70 to 80 percent of Gordon's body. (8 RT 1777.) Gordon's entire head and much of her neck were covered in third-degree burns, which is the most severe type of burn. (8 RT 1778-1780, 1784.) Dr. Gill also observed that Gordon had suffered a bloody nose and an injury to her temple before death, which appeared to have been caused by blunt force trauma. (8 RT 1781-1783, 1801-1802.) There were no internal injuries to Gordon's neck; however, Dr. Gill stated that it was possible Gordon had been choked before her death. (8 RT 1803-1807.) Gordon's legs and lower body were very charred, and it appeared that gasoline had been applied directly to this area of Gordon's body before she was set aflame. (8 RT 1788-1789.)

Gordon had a very elevated carbon-monoxide level in her blood at the time of death. (8 RT 1810.) Dr. Gill opined that Gordon died as a result of her severe burns and smoke inhalation. (8 RT 1810-1812.) There was a large amount of soot in Gordon's larynx, trachea, and the bottom of her lungs. Dr. Gill stated that this finding was an extremely clear indication that Gordon was alive when she was set aflame, and that she had lived for a substantial period of time until she burned to death. (8 RT 1807-1811.)

Brents Attempts to Influence and Threaten Witnesses

While Brents was in custody awaiting trial for the murder of Gordon, Investigator Julian Harvey was involved in a narcotics search at the National Inn in Anaheim. In the bathroom of one of the rooms, Investigator Harvey found a large manila envelope addressed to Iris Hernandez. (10 RT 2399-2402.) Iris Hernandez, who knows Brents as "Dragon," is Abigail Diaz's mother. (10 RT 2363-2364.) Investigator Harvey found several letters written by Brents inside the manila envelope. The letters were addressed to Diaz, Savidan, Eule, and Myers, and they were all signed with Brents' street name, "Dragon." (2 CT 633-637; 10 RT 2403-2404.) The letters were admitted into evidence, and the jury was given copies of all of them. (2 CT 632-637; 10 RT 2433-2435; Peo. Exhs. 43A-E.)

In a note to Iris Hernandez, Brents directed her to personally deliver the letters to Diaz, Savidan, Eule, and Myers. Brents told Hernandez that "the girls" should "burn" the letters after they read them because "we don't need or want no letters around . . . ." (2 CT 633.) Over thirty identifiable fingerprints, all matching Brents', were subsequently discovered on these letters. (10 RT 2407-2418.)

In all four of the letters to Diaz, Savidan, Eule, and Myers, Brents stated that he was in jail on a "parole violation," but should be out soon. Brents implored all four women to refuse to be witnesses against him, because he did not want to go to court for a murder he did not do. (2 CT 634-637.) Brents instructed the women that the best and easiest way to handle the situation would be for the women to tell the police they "don't remember" because no one could be arrested for simply failing to remember what happened. (2 CT 634-637.) Brents told Eule and Savidan that, if questioned by the police, they should offer an alibi that "we all kicked in the room getting high all night or most of the night." (2 CT 634, 637.) In his letters to all four women, Brents told them "if

all goes well" and they "help him" get out of jail soon, he will give them some money. In two of the letters, Brents specified a sum of $10,000. Brents signed all of the letters "Most greatfully [sic] yours, Dragon," and concluded each note with an instruction: "Now burn this letter." (2 CT 634-637.)

In early 1999, Brents met fellow inmate Sandra Floyd in a jail bus while they were on their way to court. Brents showed Floyd pictures of four women, including a picture of Sara Eule, whom Floyd recognized. Brents asked Floyd if she knew any of the four women in the pictures. (9 RT 2203-2209, 2214.) Floyd later told an investigator that Brents had informed her that the women depicted in the photos he showed her were all "snitches," and Brents instructed her to hurt them if possible. (9 RT 2223-2226.) During a search of Brents' jail cell on June 30, 1999, a deputy found the pictures of the four women. (9 RT 2219-2220.)

On May 22, 2000, Brents met Heather Castaneda, another inmate, on the jail bus. (10 RT 2242–2244.) Brents confided in Castaneda that he had been "snitched off" by Sara Eule, who was also in the jail. Brents explained that he was trying to get the word out so that Uele would be killed. (10 RT 2245-2248, 2275, 2300, 2315-2320.) Frightened for Eule, Castaneda notified deputies about Brents' threats. (10 RT 2249-2250, 2300, 2317, 2320.) Later, Brents asked Castaneda if she planned to testify against him. Brents threatened to kill Castaneda's young son, and made a slashing gesture across his throat. Castaneda interpreted Brents' action to mean that she was a "rat snitch" who was probably going to die. (10 RT 2251-2256, 2318, 2325-2327, 2331-2332, 2346-2349.)

Defense

Two private defense investigators testified that Sara Eule had, at one time, lived within several miles of the vicinity where Gordon's body was found burned to death inside the Cadillac's trunk. (11 RT 2577-2582.)

Penalty Phase — Prosecution

In the summer of 1979, Pamela Lippincott Hack encountered Brents outside a convenience store. As Hack left the store, Brents tried to snatch her purse, but Hack refused to let go. Brents slapped Hack a couple of times, and dragged her over the asphalt of the parking lot. Hack finally let go her purse, and Brents and a cohort ran away with it. Hack suffered injuries to her face, arm, shoulder, and knee as a result of Brents' assault. (12 ER 3014-3018.)

Bradford Miles met Brents in 1984 when they were both inmates in the Los Angeles County Jail. (12 RT 2856.) Brents and another inmate attacked Miles, and they stole his property. Brents forcibly sodomized Miles, and then tried to force Miles to masturbate and orally copulate him. (12 RT 2864-2869.)

In 1991, Brents asked Lisa Walker to be one of his prostitutes. When she declined, Brents later responded by hitting Walker and breaking her jaw. (12 RT 2945-2949.) Vanessa Taylor witnessed Brents' assault on Walker. When Brents later threatened Taylor that he would break her jaw like he had broken Walker's, Taylor was afraid. A few days later, she stabbed Brents at a pool hall because she was scared of him and worried that he would carry out his threat against her. (12 RT 2940-2943.)

On October 16, 1996, Orange County Sheriff's Deputy Gene Hyatt was assigned to the men's jail, where both Brents and Gary Alquin were inmates. Deputy Hyatt observed Brents assault Alquin with closed fists, even though Alquin had done nothing to instigate the attack. Alquin suffered a bloody nose. He later requested to file charges against Brents, so the deputy prepared a crime

report. Alquin told Deputy Hyatt that Brents thought he was a "snitch" who was planning to testify against him in a murder trial. (12 RT 2908-2910, 2918-2926, 2933.)

In June of 1999, Brents was an inmate in the Orange County Jail, awaiting trial on the charges in this case. Andrew Lesky was also incarcerated in the Orange County Jail at that time. On a day when Deputy David Barr was responsible for putting Brents in restraints, Brents lied to the deputy and said his left wrist was fractured, so Deputy Barr left that wrist uncuffed. The deputy told Brents to stand behind his fellow inmate, Lesky. Deputy Barr saw Brents punch Lesky in the back of the head, causing Lesky to fall and hit his head on the ground. (12 RT 2840-2844.) Lesky required seven stitches to his forehead as a result of this incident. When Deputy Barr later testified about this episode in Brents' presence, Brents threatened the deputy by simulating pulling the trigger of a gun in Deputy Barr's direction. The deputy interpreted this action to indicate that Brents was threatening his life. (12 RT 2845-2850.)

The parties stipulated that Brents had suffered nine prior felony convictions. On November 19, 1979, Brents was convicted of attempted grand-theft auto. That same day, Brents was also convicted of the robbery of Pamela Lippincott Hack. On February 23, 1984, Brents was convicted of assault with a deadly weapon. On October 10, 1984, Brents was convicted of the robbery of Bradford Miles. On May 16, 1986, Brents was convicted of the possession of heroin. On August 19, 1988, Brents was convicted of possession of cocaine for sale. On June 16, 1989, Brents was convicted of possession of a firearm by a person previously convicted of a felony. On August 30, 1991, Brents was convicted of possession of marijuana in jail. On October 19, 1992, Brents was convicted of possession of a firearm by a person previously convicted of a felony. (12 RT 3019-3021.)

Gordon's mother, stepfather, and brother all testified. (12 RT 3021-3037.) Gordon's brother, Jeff Gordon, stated that he had been devastated by his sister's murder, and said that he would have gladly given Brents the money his sister owed him if Brents would have spared his sister's life. (12 RT 3024-3025.) Gordon's mother and stepfather are now raising Gordon's son, Joey. Before her death, Gordon was a very loving mother. (12 RT 3026-3027.) Gordon's mother and stepfather testified that their daughter's murder had taken all of the family's hopes away. (12 RT 3032, 3037.)

Penalty Phase — Defense

A defense investigator testified that he had interviewed prosecution witness Bradford Miles on August 16, 1999. During this interview, Miles denied that Brents sodomized him. The interview, which was conducted in the presence of Miles' friends, was not recorded. (13 RT 3104-3109.)

Several of Brents' family members testified that he had been a loving and respectful young boy. One of Brents' nephews and a sister testified that Brents was a good uncle. Most of these relatives had not been in contact with Brents for many years. (13 RT 3098-3103, 3113-3121, 3125-3128, 3131-3133, 3138, 3156, 3172-3179, 3180-3182, 3185-3186.)

Brents was one of five children born to Anna Brents in Illinois. Although there was some uncertainty concerning Brents' parentage, the man believed to be his father died in a car accident when Brents was six years old. (13 RT 3115-3119.) Brents' mother later remarried Frank Cole, who beat Brents and his siblings. (13 RT 3120, 3160.) Brents' mother eventually left Cole, and in 1970 she and her five children moved to Compton. (13 RT 3118-3119.)

Brents' siblings testified that their mother worked very hard to become a registered nurse and support the family. She was a good role model for her

children. Brents' mother treated Brents and his siblings all very well, and she tried to help Brents stay out of trouble. Mrs. Brents died in 1981. (13 RT 3156-3162, 3167-3169, 3185-3186, 3189-3193.) Brents' brother testified that he does not approve of the way Brents has chosen to live his life; nevertheless, Brents' brother still loves him. (13 RT 3196-3197.)

ARGUMENT

I.

SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S TRUE FINDING ON THE KIDNAPPING SPECIAL CIRCUMSTANCE ALLEGATION

Brents contends that insufficient evidence supports the jury's true finding on the kidnapping special circumstance allegation because Brents' kidnapping of Gordon was merely incidental to the victim's subsequent murder. Brents maintains that the prosecution presented inadequate evidence from which the jury could rationally conclude that Brents' murder of Gordon was committed in order to carry out or advance the independent felonious purpose of the kidnapping. (AOB 22-31.) Substantial evidence supports the jury's verdict because reasonable jurors could conclude that Brents had not finally decided Gordon's fate at the time he imprisoned her in the Cadillac's trunk before driving her 16 miles to the location of the victim's ultimate murder by immolation. Alternatively, substantial evidence reasonably supported a conclusion that Brents possessed the concurrent intents of kidnapping and murdering the victim, a finding which Brents concedes is adequate to support the verdict.

An appeal challenging the sufficiency of the evidence presented at trial requires the appellate court to review the record in the light most favorable to the judgment to determine whether it contains substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139.) Substantial evidence is evidence that is "reasonable, credible, and of solid value." (*People v. Ceja, supra*, at pp. 1138-1139; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) The testimony of a single witness is sufficient to support a

conviction, unless the testimony of that witness is "physically impossible or inherently improbable." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) It is not for the reviewing court to reweigh the evidence or reevaluate witness credibility; such determinations are the factfinder's exclusive province. (*Ibid.*) A judgment will not be reversed for insufficient evidence unless "'upon no hypothesis whatever is there sufficient evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

In this case, Brents was charged with counts of first degree murder and kidnapping, and the amended information alleged that the murder had been committed while Brents was engaged in the commission of a kidnapping offense, a felony murder special circumstance within the meaning of Penal Code section 190.2, subdivision (a)(17)(B). (2 CT 574-579.) This Court has concluded that the felony murder special circumstance is "inapplicable to cases in which the defendant intended to commit murder and only incidentally committed one of the specified felonies while doing so." (*People v. Clark* (1990) 50 Cal.3d 583, 608, citing *People v. Green* (1980) 27 Cal.3d 1, 61-62.)

In assessing Brents' claim of insufficient evidence to support the special circumstance allegation, this Court must examine the evidence in the light most favorable to the prosecution and decide whether a rational trier of fact could find beyond a reasonable doubt that Brents had a purpose for his kidnapping of the victim apart from her eventual murder. (*People v. Raley* (1992) 2 Cal.4th 870, 902; *People v. Bonin* (1989) 47 Cal.3d 808, 850.) As conceded by Brents, a conclusion by a jury that the defendant possessed a concurrent intent to kill and to commit an independent felony will support a felony murder special circumstance. (AOB 27.) Thus, even if the jury in this case concluded that Brents had any intent to kill Gordon at the time he kidnapped her, the kidnapping could not be deemed merely incidental to the murder. (*People v.*

Raley, 2 Cal.4th at p. 903, citing *People v. Clark*, *supra*, 50 Cal.3d at pp. 608-609.)

A. The Trial Court Correctly Determined That Substantial Evidence Supports the Jury's True Finding on the Kidnapping Allegation

The facts presented in this case compel the conclusion that Brents' kidnapping of Gordon was not merely incidental to her murder. Nothing prevented Brents from killing Gordon long before he forced her into the Cadillac's trunk and drove her 16 miles away from the Travel Lodge to the site where he ultimately murdered Gordon by setting her on fire. The trial court concluded that a juror could reasonably find that Brents had not yet made up his mind about Gordon's ultimate fate when he initially kidnapped the victim. Moreover, as conceded in the Opening Brief, even if Brents harbored a concurrent intent to kill Gordon at the time that he intended to kidnap her, the jury's verdict must be affirmed. (AOB 27-28, citing *People v. Mendoza* (2000) 24 Cal.4th 130, 182-184; *People v. Barnett* (1998) 17 Cal.4th 1044, 1157-1159; *People v. Raley*, *supra*, 2 Cal.4th at pp. 902-903.) Ample evidence was presented in support of either conclusion.

The evidence established that Brents and Savidan were angry with Gordon because they had given her $100 worth of methamphetamine to sell for them, but Gordon failed to return either the money or the drugs. (6 RT 1404-1413.) Savidan's initial scheme was to scare Gordon into revealing the whereabouts of the missing money or the methamphetamine. (6 RT 1413-1418.) Savidan and Brents enlisted the assistance of Eule, Myers, and Jasmine to assault Gordon. At some point during the group-beating of the victim, Brents told Savidan that he thought Gordon was a "snitch" and added that "I want to put her out." (6 RT 1419-1423.)

After Savidan left the scene, Brents continued to assault Gordon before he pulled her from the Cadillac and forced her into the vehicle's trunk. Brents hit Gordon twice in the face before slamming the trunk's lid shut. Brents stated, "We got to take her out." (7 RT 1657.) Brents told Eule and Myers that he put Gordon in the trunk because "she was going to tell" on them concerning the beating or about the drugs. (7 RT 1657; 9 RT 1999-2000.) Brents plainly could have killed Gordon at any point during this time.

Instead, Brents drove the Cadillac and Gordon to an isolated venue located approximately 16 miles away from the site where he had forced the victim into the trunk. (10 RT 2391-2392.) Brents thereafter poured gasoline on the victim and set her aflame. Gordon's charred body was discovered inside the Cadillac's still burning trunk at 10:48 that same evening. (6 RT 1342-1352, 1373-1377.)

Following the jury's verdicts and the true finding on the kidnapping special circumstance, Brents moved to dismiss the true finding on the ground that it was supported by insufficient evidence because the kidnapping was merely incidental to the murder. (12 RT 2824.) The trial court denied the motion, noting that the question of Brents' objectives had been a factual one for the appropriately instructed jury. (12 RT 2824-2825.) The court concluded:

> I am satisfied the jury did follow the law and especially with some of the evidence as to "She is going to tell," for example, this is after the beating. So for sure there is at least two or maybe more objectives that the jury could have found. So your motion is denied.

(12 RT 2825.)

Following the conclusion of the penalty phase, Brents filed a motion for new trial, again raising the claim that insufficient evidence had been presented in support of the jury's true finding on the kidnapping special circumstance. (3 CT 1170-1187.) At the hearing on the motion, defense counsel maintained

that it seemed clear that Brents' sole intent was to murder the victim. (13 RT 3399.) The court responded:

> We don't know when he formed that intent. It is a question of fact. The jury could reasonably infer he was going to scare the living daylights out of her, teach her a big lesson and then decided he got carried away with the flammable material and killed her, you know, and juries can do that.
>
> And I don't think it is within my province based upon this evidence to reverse it. So your motion is denied as to the special circumstances.

(13 RT 3399-3400.)

B. Precedent From This Court Supports the Trial Court's Determination That Brents' Kidnapping of the Victim Was Not Merely Incidental to Her Murder

The trial court's findings were entirely correct. This Court's prior decisions serve to support this conclusion. (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1026; *People v. Raley*, *supra*, 2 Cal.4th at p. 902; *People v. Barnett*, *supra*, 17 Cal.4th at p. 1158.)

In *Ainsworth*, the defendant shot a woman in her car in a parking lot, then drove the victim's car away from the scene of the shooting with the bleeding victim inside the car. The defendant drove the injured victim around for hours, denying her medical care, until she finally bled to death. This Court concluded that substantial evidence existed from which the jury could have determined that the defendant's kidnapping of the victim was not merely incidental to her murder. (*People v. Ainsworth*, *supra*, 45 Cal.3d at p. 1026.) Similarly, in the instant case, Brents did not kill Gordon once he had her imprisoned in the trunk of his car. Although, as noted by the trial court, it is uncertain exactly when Brents determined to kill Gordon, it is evident that he did not need to drive her 16 miles away before he finally murdered her. (13 RT 3399-3400.)

In *Raley*, the defendant was a security guard who gave his teenaged victims an unauthorized tour of the mansion where he worked. After assaulting the girls, he put his victims into the trunk of his car, and eventually drove them to his home. One of the victims later died from the injuries she sustained. (*People v. Raley*, *supra*, 2 Cal.4th at pp. 882-884.) On appeal, the defendant maintained that insufficient evidence supported the jury's true finding on the kidnap-murder special circumstance because the defendant's kidnapping of the victims was incidental to the deceased victim's eventual murder. (*Id.*, at p. 902.) Rejecting the contention, this Court noted:

> In the instant case, defendant did not immediately dispose of his victims once he had them in the trunk of his car, but brought them to his home. He may have been undecided as to their fate at that point. It could reasonably be inferred that defendant formed the intent to kill after the asportation, so that the kidnaping could not be said to be merely incidental to the murder.

(*Id.*, at p. 903.)

In *People v. Barnett*, two groups of people unexpectedly encountered one another at a remote campsite. The defendant killed one man after first binding the murder victim and several others and driving away from the rest of the group. (*People v. Barnett*, *supra*, 17 Cal.4th at pp. 1069-1075.) On appeal, this Court rejected the defendant's contention that the kidnapping was committed to facilitate the murder, and therefore was merely incidental to the killing. This Court explained its reasoning in rejecting this argument as follows:

> Although the jurors heard evidence that defendant had threatened to kill [the victim] even before the two confronted each other on the day of the murder, they were not bound to find that defendant's sole intent from the beginning of the confrontation was to kill him. There was evidence that defendant had considered letting [the victim] and his group leave the camp at various points before the time they were tied up and driven away from campsite. There was also evidence that defendant

> may not have killed [the victim] when he was first separated from the others in the Jeep but that defendant may have wanted [the victim] to be left wounded and exposed to the elements for a couple of days before being rescued . . . . From such evidence a reasonable juror could infer that defendant had not finally decided [the victim's] fate at the time of the asportation, so that the kidnapping could not be said to be "merely incidental" to the murder.

(*People v. Barnett*, *supra*, 17 Cal.4th at p. 1158, citing *People v. Raley*, *supra*, 2 Cal.4th at p. 902.)

Similarly, in the instant case, the jury could reasonably conclude that Brents formed the intent to kill Gordon after the asportation. Although, as in *Barnett,* there was some evidence Brents had threatened to kill his victim before the kidnapping commenced, the jury was not bound to find Brents' sole intent from the beginning of the confrontation was to kill Gordon. (*People v. Barnett*, *supra*, 17 Cal.4th at p. 1158.) As noted by the trial court, the jury could have rationally concluded that Brents' original intent was to "scare the daylights" out of Gordon and "teach her a big lesson," but instead Brents later "got carried away." (13 RT 3399.)

Based on the foregoing, a rational trier of fact could, and did, reasonably conclude that Brents had a purpose for kidnapping Gordon apart from her eventual murder, so that Brents' kidnapping of Gordon was not merely incidental to the killing. Even if the jury concluded that Brents possessed concurrent intents to kidnap and murder Gordon, sufficient evidence still supports the jury's true finding on the kidnapping special circumstance in this case.

II.

BRENTS' JURY WAS PROPERLY INSTRUCTED PURSUANT TO CALJIC NO. 8.81.17 CONCERNING THE KIDNAPPING SPECIAL CIRCUMSTANCE ALLEGATION

Brents contends the trial court prejudicially erred when it improperly instructed the jury concerning the kidnapping special circumstance allegation. (AOB 32-42.) As defense counsel conceded in the trial court, the jury received appropriate instruction concerning the elements of the kidnapping special circumstance allegation. Any alleged error did not prejudice the defense because, as previously discussed in Argument I, *supra*, ample evidence supported the jury's conclusion that Brents' kidnapping of Gordon was not merely incidental to her eventual murder.

Without objection,[6/] the trial court instructed the jury in the language of CALJIC No. 8.81.17 on the kidnapping special circumstance allegation:

> To find that the special circumstance referred to in these instructions as murder in the commission of kidnapping is true, it must be proved:
>
> 1. The murder was committed while the defendant was engaged in the commission of a kidnapping, and[,]
>
> 2. The murder was committed in order to carry out or advance the commission of the crime of assault by force likely to produce great bodily injury 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

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6. Defense counsel fully concurred in the instructions given in this case, and indicated he did not have "any problem" with the jury receiving the instructions given; therefore, Brents' current complaint has been waived. (10 RT 2527; 13 RT 3399.) However, as noted by Brents, the claim of instructional error is reviewable on appeal to the extent it is alleged to have affected Brents' "substantial rights." (AOB 35; *People v. Prieto* (2003) 30 Cal.4th 226, 247.)

the kidnapping was merely incidental to the commission of the murder.

(11 RT 2737; see also 3 CT 894.)

Brents now contends that CALJIC No. 8.81.17 inadequately defined the kidnapping-murder special circumstance allegation because the jury was not instructed that the murder had to be committed in order to carry out or advance the commission of a kidnapping offense. (AOB 35.) According to Brents, the court's use of the words "assault by force likely to produce great bodily injury" in the second paragraph of the instruction, as opposed to "kidnapping," failed to require the jury to find that the murder was committed in order to advance the commission of the kidnapping offense. (AOB 39.) However, the trial judge indicated, without objection from the parties, that he carefully considered the wording of this instruction in order that the jury would clearly understand the kidnapping must have been committed for a purpose other than to murder the victim. (11 RT 2583-2586.)

The propriety of CALJIC No. 8.81.17 has been consistently upheld by this Court. (*People v. Stanley* (2006) 39 Cal.4th 913, 956-957; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1143; *People v. Kimble* (1988) 44 Cal.3d 480, 501, fn. 16.) The second paragraph of CALJIC No. 8.81.17, at issue in Brents' contention of error, is merely a clarifying clause, and does not purport to state or add an additional element to the felony murder (kidnapping) special circumstance. (*People v. Stanley*, *supra*, 39 Cal.4th at p. 956.)

The instructions given by the trial court properly guided the jury's consideration of the evidence relating to the special circumstance allegation. If Brents believed that a modification to CALJIC No. 8.81.17 as given was required, he, not the trial court, was obligated to request it. (*People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1142-1143.) As previously noted, both parties concurred in the wording of this instruction before it was given. (10 RT 2526-2527.) Brents' argument essentially appears to be another attack on the

sufficiency of the evidence presented in support of the kidnapping special circumstance allegation. (See Argument I, *supra*.) Brents' reweighing of the evidence in a self-serving manner under the guise of attacking the instructions on the special circumstance allegation should be rejected.

Brents' complaint is essentially that the disputed instruction should have been more carefully drafted. Contrary to Brents' assertion, any error of this type would not violate the federal Constitution. (AOB 41.) Only an erroneous instruction that omitted an element of a special circumstance would present a scenario constituting possible error of a constitutional magnitude. (*People v. Prieto* (2003) 30 Cal.4th 226, 256-257, citing *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) No such error occurred in this case. The only alleged error identified by Brents is contained in the wording of the second paragraph of the disputed instruction, CALJIC No. 8.81.17. (AOB 32-42.) As previously noted, this paragraph is merely a clarifying clause which does not purport to state or add an additional element to the felony murder special circumstance. (*People v. Stanley*, *supra*, 39 Cal.4th at p. 956.) Accordingly, the alleged error was not of a federal constitutional dimension. It is not reasonably probable that a result more favorable to Brents would have been achieved in the absence of the alleged instructional error, if any. (*People v. Breverman* (1998) 19 Cal.4th 142, 178; *People v. Watson* (1956) 46 Cal.2d 818, 836.) In any event, the alleged error was harmless under either standard.

According to Brents, the disputed instruction, as given, did not require the jury to find that Brents committed the murder in order to carry out or advance the commission of a kidnapping offense. (AOB 38-41.) However, the jury was plainly instructed that the murder must have been committed while the defendant was engaged in the commission of a kidnapping. (11 RT 2737; see also 3 CT 894.) The second paragraph of the instruction merely served to

clarify that Brents' kidnapping of the victim must have had an independent purpose apart from the victim's eventual murder, as noted by the trial court and approved by the parties. (11 RT 2583-2586.) In reality, given the facts present in this case, Brents' claim of instructional error would have been much more viable, had the instruction not been modified to refer to the crime of assault by force, instead of kidnapping.

During their deliberations, the jury sent out a note inquiring about the meaning of the second paragraph of CALJIC No. 8.81.17, asking:

> 1. Does the phrase "facilitate escape therefrom" refer to the crime of assault by force, or the crime of kidnapping, or something other than that?
>
> 2. Does the phrase "avoid detection" refer to the crime of assault by force, or the crime of kidnapping, or something other than that?

(3 CT 797.)

The trial court provided the jury with the following written response, "1 and 2 both refer to the crime of assault by force." (3 CT 793.) According to Brents, this was an erroneous response which would have compelled the jurors to accept that the requirements of the second instructional paragraph had been met. (AOB 41.) Without any support whatsoever, Brents maintains that the jury did not consider the second paragraph's final sentence, which states, "In other words, the special circumstance referred to in these instructions is not established if the kidnpping was merely incidental to the commission of the murder." (11 RT 2737; see also 3 CT 894.) In reality, the jury's question and the court's response point out the lack of merit in Brents' claim that insufficient evidence supports the jury's true finding on the kidnapping special circumstance allegation. (Argument I, *supra*.) By its question, the jury appears to have wanted to ensure that the second paragraph of the instruction did not refer to the crime of kidnapping so that the jury's verdict would not violate

the proscription against the kidnapping being "merely incidental" to the victim's eventual murder.

Based on the foregoing, the jury was properly instructed concerning the felony murder kidnapping special circumstance pursuant to CALJIC No. 8.81.17, and any alleged error did not prejudice the defense.

III.

THE TRIAL COURT PROPERLY PERMITTED PROSECUTION WITNESS MISTY SINKS TO TESTIFY CONCERNING PRIOR INCONSISTENT STATEMENTS MADE TO HER BY SARA EULE AFTER EULE'S TESTIMONY HAD BEEN IMPEACHED ON CROSS-EXAMINATION

Brents maintains that the trial court violated his constitutional rights when the court permitted Misty Sinks to testify and rehabilitate Sara Eule under the prior consistent statement exception to the hearsay rule. (AOB 43-50.) Sinks' testimony was properly admitted as evidence of prior consistent statements pursuant to Evidence Code section 791.[7/] Any error in the admission of Sinks' testimony was harmless because the testimony of Vicki Myers was entirely consistent with that of both Eule and Sinks.

Prosecution witness Sara Eule was impeached by defense counsel during her cross-examination. (9 RT 2206-2058.) Defense counsel elicited an admission from Eule that she had testified inconsistently at the preliminary hearing and during trial concerning whether or not she had opened the Cadillac's trunk before Brents forced the victim inside of it. (9 RT 2006-2012.)

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7. Evidence Code section 791 provides as follows:

> "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:
>
> "(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or
>
> "(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

During cross-examination, Eule admitted that there were inconsistencies between her testimony and that given by Savidan, Diaz, and Myers. (9 RT 2020-2026.) Defense counsel's cross-examination of Eule finally resulted in her admission that she had lied to the jury during her testimony. (9 RT 2056-2057.)

At the conclusion of Eule's testimony, the prosecutor sought permission to have witness Misty Sinks testify concerning statements Eule made to her on the night of the victim's murder. Both Eule and Myers testified that they had gone to Sharon Reed's home after they left the Travel Lodge that evening. Misty Sinks was also present in Reed's home at that time, and she spoke with Eule. (7 RT 1669-1671, 1763-1764; 9 RT 2000, 2053.)

Brents objected to the admission of Sinks' testimony on hearsay grounds. (9 RT 2059-2061.) The prosecutor responded that Sinks was being called as a witness to establish Eule's prior consistent statements before Eule had any reason to fabricate. (9 RT 2062.) The prosecutor added, "[I]t is our position that the defense, the entire defense is to cast a doubt on the credibility of these witnesses obviously. And these are prior consistent statements made when they felt as if they were in a safe place talking to safe friends in an attempt to rehabilitate the credibility under 791 of the Evidence Code." (9 RT 2063-2064.)

The defense continued to object to the admission of Sinks' testimony, and argued that the fabrication which the defense believed occurred in this case took place immediately after the group assault on the victim when Eule and Myers were still in the motel room and allegedly discussed how to get their stories straight with the other witnesses. (9 RT 2065.) The trial court noted that Eule's statements to Sinks were made long before the witness was interviewed by the police or given immunity to testify in this case. The court noted its belief that, "[b]ased upon what I have seen . . . we wouldn't have any

testimony but for immunity." (9 RT 2066.) Defense counsel continued to object, and also noted that Eule had not been impeached concerning the exact subject of Eule's having witnessed Brents forcibly pushing Gordon into the Cadillac's trunk, so there was no inconsistent statement that required rehabilitation. (9 RT 2067.) The trial court overruled defense counsel's objection, commenting, "I believe the law does allow rehabilitation when a witness has been impeached the way all of these witnesses have been impeached." (9 RT 2067.)

Misty Sinks subsequently testified that she had seen Eule and another woman, presumably Myers, at Sharon Reed's house in Fullerton on the night of the victim's murder. Both Eule and the other woman had blood on their clothing. (9 RT 2070-2072, 2079.) Eule told Sinks that she and some other people had beaten up a girl near the Travel Lodge. (9 RT 2073-2074.) The beating was motivated by the victim's debt to Brents for money she owed him for drugs. (9 RT 2079.) Eule told Sinks that Brents put the victim in the trunk of a blue Cadillac and then drove off with her inside the vehicle's trunk. (9 RT 2078.)

Evidence of a previous statement made by a witness is admissible under the prior consistent statement exception to the hearsay rule if there has been an express or implied charge that the witness's testimony is recently fabricated, and the prior consistent statement was made before the motive for fabrication is alleged to have arisen. (*People v. Crew* (2003) 31 Cal.4th 822, 843, citing Evid. Code, § 791.) Evidence Code section 791 permits the admission of a prior consistent statement when there is a charge that the testimony is fabricated, not just when a particular statement at trial has been challenged. (*People v. Kennedy* (2005) 36 Cal.4th 595, 614.)

In this case, Eule's testimony had plainly been impeached on cross-examination, as the trial court accurately noted. (9 RT 2067.) In fact, defense

counsel concluded his cross-examination of Eule by eliciting the admission that she had been lying about certain aspects of her testimony. (9 RT 2056-2057.) Because Eule's statement to Sinks preceded the police investigation and ensuing grant of immunity to Eule, Sinks' testimony was admissible as evidence of prior consistent statements by Eule. (*People v. Crew*, *supra*, 31 Cal.4th at pp. 843-844.)

Even assuming for the sake of argument that the trial court somehow improperly admitted the testimony of Misty Sinks, any error was harmless because there is no reasonable probability that Sinks' testimony affected the outcome of the trial. Brents contends that this was a "close case," and notes that the jury asked to have Sinks' testimony reread to them during their deliberations. (AOB 50; 11 RT 2754.) However, Brents fails to note that Eule's testimony was also corroborated by prosecution witness Vicki Myers, the only other witness present when Brents forced the victim into the trunk and drove off with her in the Cadillac. (7 RT 1652-1657.) Myers accompanied Eule to Sharon Reed's house on the night of the murder because they were scared. Both Eule and Myers talked to other people present at Reed's home about what had just happened that evening, although Sinks was ultimately the only witness called concerning these conversations. (7 RT 1669-1671.) Because Sinks merely repeated statements made by Eule which were nearly identical to the evidence presented by Myers, it is not reasonably probable that any alleged error in the admission of Sinks' testimony affected the outcome of Brents' trial. (*People v. Harris* (2005) 37 Cal.4th 310, 336, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

Based on the foregoing, because Sinks' testimony served to rehabilitate Eule, an impeached prosecution witness, the trial court properly admitted this evidence pursuant to Evidence Code section 791, and any alleged error did not prejudice the defense.

IV.

A PHOTOGRAPH OF THE CRIME SCENE AND THE VICTIM'S BODY WAS RELEVANT, AND THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO FIND IT ADMISSIBLE

Brents claims the trial court's ruling that the crime scene photograph designated as People's Exhibit Two could be admitted into evidence prejudiced the defense and violated state law and the federal Constitution. (AOB 52-57.) The trial court properly concluded that the disputed photograph was admissible to establish that Brents premeditated his deliberate murder of the victim. Ultimately, the disputed photograph was not formally admitted into evidence. Instead, the prosecutor used the picture of the victim's body during her argument to the jury in order to urge the jurors to conclude that Brents had tortured the victim prior to her death. Any error in the determination that the disputed lone photograph was admissible did not prejudice the defense because the jury was unable to reach a verdict on the torture special circumstance allegation.

Brents filed an *in limine* motion seeking to limit the prosecution's admission of photographic evidence. (2 CT 604-611; 3 RT 538.) The parties agreed that none of the victim's autopsy photographs would be admitted unless the defense created an issue during the coroner's testimony that potentially might serve to necessitate the admission of the autopsy photos. (3 RT 538-540.) However, the prosecution sought to admit evidence of one or more of the crime scene photographs depicting the victim's burned body inside the Cadillac's trunk. (3 RT 540.) Defense counsel conceded that at least one of the three photos the prosecutor desired to have admitted into evidence was probably going to be permitted, and counsel acknowledged that he did not see how the defense could "reasonably object" to this limited admission of

evidence; however, the defense objected to the admission of more than one such photograph. (3 RT 540.)

The prosecutor submitted three photographs of the victim's body at the crime scene for the court to consider, and sought to have at least two of the three photos admitted into evidence. (3 RT 541-555.) Ultimately, the trial court decided to admit only one of the photos into evidence, People's Exhibit Two. This exhibit showed the victim's burned body lying in the trunk of the Cadillac. Unlike another one of the prosecutor's proposed exhibits, the photograph the trial court admitted was not a close-up shot, and instead had been taken from a distance. (3 RT 545, 553.) The trial court found that the photo was admissible on the issues of "premeditation, deliberation, malice aforethought and specific intent." The court noted that it would be difficult for the prosecutor to make these requisite statutory showings without at least one of the crime-scene photos being deemed admissible. (3 RT 555.) Subsequently, both the firefighters who had responded to the crime scene and the forensic pathologist who had conducted the autopsy described the condition of the victim's body. (6 RT 1350-1357; 6 RT 1363-1366; 8 RT 1777-1802.)

Despite the trial court's ruling, the prosecutor apparently did not introduce the disputed exhibit into evidence during the presentation of her case. (1 RT Exhibit Index, Guilt Phase, notes People's Exhibit Two as being a "photo of burned female body in the vehicle trunk," but does not indicate that the photo was ever formally admitted into evidence.) Instead, it appears that the prosecution only used the photo of the victim's burned body during her closing argument to emphasize that Brents inflicted torture on the victim prior to her death. (11 RT 2631, 2638.) The jury was subsequently unable to reach a verdict on the torture special circumstance. The trial court declared a mistrial as to the torture special circumstance allegation, and it was later dismissed by the prosecution. (3 CT 848-850; 12 RT 2823-2824.)

The admission of victim photographs lies within the broad discretion of the trial court when they are claimed to be unduly gruesome and inflammatory. (*People v. Heard* (2003) 31 Cal.4th 946, 972; *People v. Kipp* (2001) 26 Cal.4th 1100, 1136; *People v. Hines* (1997) 15 Cal.4th 997, 1046.) Evidence is substantially more prejudicial than probative only if it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome. (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) This Court must apply the deferential abuse of discretion standard when reviewing the trial court's ruling. (*People v. Kipp, supra*, 26 Cal.4th at p. 1136.) An exercise of discretion is not an abuse unless the court exercised its discretion in an "arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438.)

The disputed photograph designated as People's Exhibit Two was relevant and probative to establish that the murder of Kelly Gordon was premeditated and deliberate. Brents contends that the admission of the disputed photograph was not necessary to the prosecutor's case because Brents did not challenge the fact that the victim had been burned to death in the Cadillac's trunk. (AOB 55.) This argument overlooks the prosecution's burden to show that, in fact, a first degree murder had occurred. (Pen. Code, § 190.2; *People v. Steele* (2002) 27 Cal.4th 1230, 1243-1244 [prosecutor entitled to prove all facts central to guilt]; *People v. Millwee* (1998) 18 Cal.4th 96, 160-161.) The jury was instructed that a willful, deliberate, and premeditated killing was murder of the first degree. (3 CT 890.) The fact that the victim was doused in gasoline and set aflame was relevant to establish that the killing was not accidental or unconsidered. (*People v. Wilson* (1992) 3 Cal.4th 926, 937-938; *People v. Pierce* (1979) 24 Cal.3d 199, 211.)

That a victim's photograph may be probative of an uncontested issue does not impact its relevance. (*People v. Scheid* (1997) 16 Cal.4th 1, 14-17.)

As this Court stated in *People v. Lewis* (2001) 25 Cal.4th 610, 641, "we have made clear that the absence of a defense challenge to particular aspects of the prosecution's case or its witnesses does not render victim photographs irrelevant." (*Ibid.*) Moreover, the lone photograph of the victim's body which the trial court had determined was admissible was particularly relevant to the prosecutor's argument that she had been tortured prior to her death. (11 RT 2631, 2638.)

Assuming, arguendo, that the trial court should have excluded the disputed photograph, any error in the trial court's ruling on its admissibility was harmless. (*People v. Heard*, *supra*, 31 Cal.4th at p. 978.) Although the crime-scene photograph may have been unpleasant, it was not unusually disturbing, nor more inflammatory than the graphic testimony of the forensic pathologist and other witnesses. Thus, examining the evidence as a whole, it is not reasonably probable a more favorable trial result would have occurred, had the disputed photograph been excluded, and there was no miscarriage of justice. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 247; *People v. Weaver* (2001) 26 Cal.4th 876, 934; *People v. Raley*, *supra*, 2 Cal.4th at pp. 895-896.) This is especially true in the instant case because the prosecutor only used the photograph during her argument to the jury in order to urge the jurors to conclude that Brents had tortured the victim prior to her death. The jury was unable to reach a verdict on the torture special circumstance allegation, and the prosecution subsequently dismissed the charge.

Based on the foregoing, the trial court properly exercised its discretion in determining that the photograph contained in People's Exhibit Two was admissible, and any error did not prejudice the defense.

V.

THE TRIAL COURT PROPERLY GRANTED CHALLENGES FOR CAUSE AS TO FOUR PROSPECTIVE JURORS BECAUSE THEY ALL STATED THAT THEY COULD NOT VOTE TO IMPOSE THE DEATH PENALTY

Brents claims that the trial court denied his constitutional rights by improperly granting the prosecutor's challenges for cause to prospective jurors Brian Z., Kathy S., Paul J., and David B. Brents further claims that exclusion of these prospective jurors mandates reversal *per se* of the death sentence. (AOB 58-65.) Contrary to Brents' claim, there was no error in excluding the challenged prospective jurors. The trial court properly dismissed all four prospective jurors for cause because they all unequivocally stated that they could not vote to impose the death penalty as punishment in this case.

A. The Juror Questionnaire & Voir Dire of Prospective Juror Brian Z.

Brian Z. (Prospective Juror No. 315) stated in his jury questionnaire that he was against the death penalty because "innocent people may be executed." He noted recent news reports he had read concerning police "corruption" and "mistakes" made in the state of Illinois. (3[8/] CTJQ 982-1001.) Brian Z. indicated that he would "refuse to vote for the death penalty" because he did not want to be responsible for the execution of a possibly innocent person. (3 CTJQ 990-991.)

During voir dire, Brian Z. told the court that he would be unable to vote for the death penalty "no matter what." (4 RT 914.) He indicated that

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8. As noted by Brents, there is a separate Clerk's Transcript that contains the jury questionnaires in this case. In conformity with Brents' designation, references to these volumes will be referred to by the citation "CTJQ." (AOB 59, fn. 14.)

he would never vote for a penalty of death. (4 RT 916-917.) Although the parties had apparently originally stipulated that this juror should be excused for cause, defense counsel noted that Brian Z.'s views were influenced by recent events in the state of Illinois and requested that this juror not be excused. (4 RT 917.) The trial court responded that this prospective juror could still properly be removed for cause, regardless of what had influenced his anti-death-penalty views. Defense counsel did not disagree with the court's assessment, and Brian Z. was excused for cause. (4 RT 917-918.)

B. The Juror Questionnaire & Voir Dire of Prospective Juror Kathy S.

In her juror questionnaire, Kathy S. (Prospective Juror No. 275), indicated that she did not believe in the death penalty because "in a number of cases, there has been evidence of innocence uncovered after the defendant has been put to death." (6 CTJQ 2029.) Kathy S. indicated that she would automatically vote for a verdict of life imprisonment without parole. (6 CTJQ 2030.)

During voir dire, Kathy S. told the court that there is no way she would ever vote for the death penalty. (4 RT 960.) Upon questioning from defense counsel, Kathy S. stated that, no matter what the evidence might demonstrate, nothing is infallible and a mistake could always be made. (4 RT 962.) Kathy S. indicated that under no circumstances would she ever vote for the death penalty. (4 RT 962.)

The prosecutor moved to excuse Kathy S. for cause. Defense counsel objected, noting that the basis of the juror's opposition to the death penalty was not grounded in religious or moral beliefs, but was instead premised upon her lack of faith in the reliability of the system. The trial court excused Kathy S. for cause over defense counsel's objection. (4 RT 963-967.)

C. The Juror Questionnaire & Voir Dire of Prospective Juror Paul J.

In his juror questionnaire, Paul J. (Prospective Juror No. 190) indicated that he opposed the use of the death penalty "under any circumstances." He added that he believed the death penalty should be abolished because "inevitably some innocent people will be executed." (9 CTJQ 3289.)

During voir dire, Paul J. reiterated that he opposed the use of the death penalty under any circumstances, even in cases where such a punishment might be appropriate to the offense. (3 RT 621.) Upon questioning by defense counsel, Paul J. indicated that one of the problems he had with capital punishment is that the system was not infallible, and he noted some problems he had read about in the state of Illinois. (3 RT 623.) This prospective juror indicated he could be fair during a guilt phase; however, he did not believe he could give equal consideration to the possibilities of life imprisonment versus death during a penalty phase. (3 RT 629.) Paul J. added that he could not foresee himself ever voting for the death penalty. (3 RT 630.)

The prosecutor moved to dismiss Paul J. for cause, and defense counsel objected. (3 RT 630-631.) The court granted the prosecution's motion and dismissed Paul J. for cause, noting:

> It is pretty clear to the court that there is no way that this particular juror because of his moral convictions could ever vote for a penalty of death. He made that crystal clear. That man was struggling up there. And even though you [defense counsel] spent 10 or 11 minutes talking to him and convincing him, you still didn't get him over the edge. So he is excused for cause.

(3 RT 631-632.)

D. The Juror Questionnaire & Voir Dire of Prospective Juror David B.

Prospective Juror No. 114, David B., stated in his juror questionnaire that he was against the death penalty and thought it should be abolished. This prospective juror noted that he had read news accounts about defendants who had been wrongly convicted. David B. unequivocally stated that he would not vote for the death penalty. (9 CTJQ 3489-3490.)

During voir dire, David B. reiterated that he would not vote for the death penalty. (3 RT 768-769.) Upon defense counsel's questioning, this prospective juror indicated he had lost faith "in the process" because of incidents he was familiar with where he believed "false evidence" had been presented. (3 RT 769-770.) The prosecutor moved to excuse David B. for cause, and defense counsel objected, noting that the prospective juror's view were not based on religious or philosophical grounds. (3 RT 773-775.) The court overruled the objection and dismissed David B. for cause, noting:

> I am not aware of any restriction. If a juror can't follow the law, that juror is excusable for cause. And this juror made it unmistakably clear that this juror could not follow the law in regard to penalty and just could not vote for death. I am not saying that any juror must vote for death, but this juror can't no matter what, and it is based upon a unique reason, but the People's motion is granted.

(3 RT 774-775.)

E. The Trial Court Properly Sustained the Challenges for Cause and Excused All Four of the Prospective Jurors at Issue in This Case

A state "has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." (*Uttecht v. Brown* (2007) ___ U.S. ___ [127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014].) In *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841],

the United States Supreme Court held that a "prospective juror may be excluded for cause because of his or her views on capital punishment" if that "juror's views would 'prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his instructions and his oath.'" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; accord, *Morgan v. Illinois* (1992) 504 U.S. 719, 728 [112 S.Ct. 2222, 119 L.Ed.2d 492]; *People v. Smith* [9] (2003) 30 Cal.4th 581, 601 [applicable law in this area is settled]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 488 ["A party may challenge a prospective juror for actual bias, defined as a state of mind that would prevent that person from acting impartially and without prejudice to the substantial rights of any party"].)

The *Witt* standard does not require "ritualistic adherence to a requirement that a prospective juror make it 'unmistakably clear . . . that [she] would *automatically* vote against the imposition of capital punishment . . . .'" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 419.) The United States Supreme Court clarified:

> [T]his standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to

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9. This Court first adopted the *Witt* standard in *People v. Ghent*. (*People v. Moon* (2005) 37 Cal.4th 1, 13, citing *People v. Ghent* (1987) 43 Cal.3d 739, 767.) The *Witt* test repeatedly has been described as a "clarification" of the test earlier articulated in *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776]. In *Witherspoon*, the United States Supreme Court implied that a prospective juror could not be excused for cause without violating a defendant's federal constitutional right to an impartial jury unless he made it "unmistakably clear" that he would "*automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before [the juror]. . . ." (*Witherspoon*, *supra*, at p. 522, fn. 21, italics in original.)

> reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

(*Wainwright v. Witt*, *supra*, 469 U.S. at pp. 424-426, fn. omitted.)

On appeal, the general rule is that the trial court's decision excusing the prospective juror must be upheld if supported by substantial evidence. (*People v. Holt* (1997) 15 Cal.4th 619, 651; *People v. Mickey* (1991) 54 Cal.3d 612, 680.) "'On appeal, [the California Supreme Court] will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous.'" (*People v. Smith*, *supra*, 30 Cal.4th at p. 601, quoting *People v. Mayfield* (1997) 14 Cal.4th 668, 727.) Further, if the prospective juror's answers are equivocal, conflicting, or confusing, the trial court's overall determination about the state of mind which produced them is binding. (*People v. Farnam* (2002) 28 Cal.4th 107, 133-134; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 488; *People v. Millwee*, *supra*, 18 Cal.4th at p. 146; *People v. Bradford* (1997) 14 Cal.4th 1005, 1047.) A prospective juror who has expressed an unwillingness to impose the death penalty may properly be excused for cause. (*People v. Jenkins* (2000) 22 Cal.4th 900, 986-987; see *People v. Lewis*, *supra*, 25 Cal.4th at p. 631.)

The foregoing excerpts from the record in this case plainly establish that prospective jurors Brian Z., Kathy S., Paul J., and David B. were properly excused for cause because they all unequivocally stated that they could not vote for the death penalty. All four of the prospective jurors' responses indicate

clearly that they were unwilling and/or unable to impose the death penalty under the criteria established by the law. (4 RT 914-917 [Brian Z.]; 4 RT 960-962 [Kathy S.]; 3 RT 621, 629-630 [Paul J.]; 3 RT 768-770 [David B.].)

The unwillingness of these four prospective jurors to even consider imposing the death penalty was an appropriate reason for excusing them. (*People v. Schmeck* (2005) 37 Cal.4th 240, 262 [prospective jurors must be able to consider imposing death penalty as a reasonable possibility].) A prospective juror who has expressed an unwillingness to impose the death penalty may properly be excused for cause. (*People v. Lewis*, *supra*, 25 Cal.4th at p. 631; *People v. Jenkins*, *supra*, 22 Cal.4th at pp. 986-987; *People v. Avena* (1996) 13 Cal.4th 394, 412.)

Based on the foregoing, the trial court correctly granted the prosecutor's challenges for cause as to all four of the disputed prospective jurors because they all unequivocally indicated they could not or would not be able to vote to impose the death penalty in this case.

VI.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO IMPANEL A NEW JURY FOR THE PENALTY PHASE OF BRENTS' TRIAL

Brents claims that the trial court violated his rights under the state and federal Constitutions when the court denied Brents' request to impanel a new jury for the penalty phase of Brents' trial after the jury expressed concern that Brents might possess personal information about the jurors. (AOB 66-71.) The trial court did not abuse its discretion in denying Brents' motion to impanel a new jury for the penalty phase because no good cause was shown in support of the motion.

A. Procedural & Factual Background

Following the guilt phase of Brents' trial, the jury sent a note to the court indicating that the jurors were concerned about their personal security in light of Brents' threats to witnesses. The jury inquired what personal information Brents possessed about the individual jurors. (3 CT 802.) The trial court informed the jurors that Brents possessed no personal information about them, during the following colloquy:

> [THE COURT:] As far as the note is concerned, you are numbers. All of that other information is with my clerk, and nobody has that. That is the information you wrote out for us and the . . . computerized information. That is all with the clerk, and it is not available.
>
> And I am assuming that took care of whatever your concern was.
>
> [JUROR EIGHT:] There were copies.
>
> [THE COURT:] They were all destroyed.
>
> [JUROR EIGHT:] Okay.
>
> [THE COURT:] This is a pretty efficient courtroom. You may have noticed that. And my staff is absolutely tremendous.

> Without a great staff, this thing doesn't work; believe me. And that information – the law requires that to be kept private, and we do our best to comply with the law obviously. So the attorneys, of course, know your names when they are talking to you. If they remember them now, I will be surprised. But nobody has access to that information at this time.
>
> See my name down there? Very public. I have been here a long time. You know, that is the nature of the job. You may get concerned, and it would be easy for me to tell you not to. I am not. But I can't – you are an individual just like I am. But the question concerned what information was out there. None. There is no information. There are just numbers, okay? That is to comply with the law that requires that your personal identifying data be sealed. That is what the law says, okay?
>
> So you haven't completed this trial, which means you have to keep your mind clear. Be cautious of any news articles. Don't talk about anything with anybody else concerning the case and no further opinions, okay? No discussions, no opinions.

(11 RT 2805-2806.)

Subsequently, prior to the commencement of the penalty phase, defense counsel made a motion to discharge the jury and have a new jury impaneled to hear the penalty phase trial, based on the jurors' previously expressed concern for their security. (12 RT 2828.) The following colloquy ensued:

> [THE PROSECUTOR:] Their feelings are based upon the facts, and I don't think that is grounds for a new jury. They haven't heard anything improper. They haven't indicated they couldn't be fair.
>
> [THE COURT:] No, they have not. And I am sure their reaction or the reaction of some of them was based upon the alleged threats made actually just immediately before the trial and during trial to various witnesses. And that could happen with any 12 jurors now, next year, the year after. So your motion for a separate jury is denied.
>
> Would you like them to be admonished or talk to the jurors about this topic . . .?
>
> [DEFENSE COUNSEL:] No, your Honor.

[THE COURT:] I would be willing to do anything.

I know what the problem is. You bring it up again and then there is a concern that jurors will say, well, maybe this is a real concern.

[DEFENSE COUNSEL:] That is our difficulty.

[THE COURT:] That is a problem. But I am willing to do anything that is reasonable and helpful.

(12 RT 2828-2829.)

Defense counsel then explained that he was concerned because the guilt-phase jury had heard "quasi penalty phase" evidence concerning the threats Brents made to several witnesses. Counsel indicated that he believed the court had "done the best it could," but noted that he felt there was no way "we cure this thing." (12 RT 2829-2830.) The court responded that evidence of Brents' threats would be admissible even if a new penalty phase jury was impaneled, as evidence of circumstances relating to Brents' crimes, pursuant to Penal Code section 190.3, subdivision (a). (12 RT 2830-2831.)

B. The Trial Court Properly Exercised Its Discretion in Denying Brents' Motion Because No Good Cause for Impaneling a New Penalty Phase Jury Was Demonstrated

Penal Code section 190.4, subdivision (c), requires that, absent good cause, the same jury must decide both guilt and penalty during a capital trial. (*People v. Ledesma* (2006) 39 Cal.4th 641, 732; *People v. Earp* (1999) 20 Cal.4th 826, 890, citing *People v. Lucas* (1995) 12 Cal.4th 415, 483.) Good cause to discharge the guilt-phase jury and to impanel a new one must be based on facts that appear in the record as a demonstrable reality showing the jury's inability to perform its function. (*People v. Prince* (2007) 40 Cal.4th 1179, 1281; see also *People v. Earp*, *supra*, 20 Cal.4th at p. 891, citing *People v. Bradford* (1997) 15 Cal.4th 1229, 1354.) A trial court's decision to deny a

defense request to impanel a separate jury for the penalty phase is reviewed for an abuse of discretion. (*People v. Kraft* (2000) 23 Cal.4th 978, 1069.)

The trial court did not abuse its discretion in denying Brents' request to impanel a new jury[10/] because no good cause supported this request. At no point did the jurors give any indication that they would be unable to fairly evaluate the evidence presented to them during the penalty phase. The primary concern expressed by the jurors was for the confidentiality of their personal information. (11 RT 2805-2806.) As conceded by defense counsel, the trial court adequately addressed the jurors' concerns and "had done the best it could" to reassure the jury without unnecessarily implicating Brents. (12 RT 2829-2830.)

Based on the foregoing, the trial court properly exercised its discretion in denying Brents' motion to impanel a new jury for the penalty phase because no good cause was shown in support of the motion.

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10. Brents' reliance on *People v. Navarette* (2003) 30 Cal.4th 458, 499-500, is misplaced. (AOB 70-71.) In *Navarette,* a lone juror expressed concerns about his family's safety and sought to be removed from the jury for cause. The defense in *Navarette* did not seek to impanel a new jury for the penalty phase. Instead, the issue presented had solely to do with whether the sole complaining juror should have been removed from the panel. This Court found that the trial court exercised its discretion appropriately in handling the situation. The trial court asked the jurors to report if they could no longer be fair and unbiased, and the juror who had submitted the note did not pursue the matter further. (*Id.* at pp. 499-500.)

VII.

THE TRIAL COURT PROPERLY IMPOSED CONSECUTIVE TERMS FOR BRENTS' FORCIBLE ASSAULT OF THE VICTIM AND HER MURDER BECAUSE THE ASSAULT OCCURRED WELL BEFORE, AND WAS NOT MERELY INCIDENTAL TO, BRENTS' KILLING OF THE VICTIM

Brents contends the trial court improperly sentenced him to consecutive terms for his murder and assault by force likely to produce great bodily injury convictions in violation of Penal Code section 654. (AOB 72-77.) Brents' sentence does not violate Penal Code section 654 because each of his crimes constituted a separate incident with different objectives.

At Brents' sentencing hearing, defense counsel raised no objection to, and actually concurred with, the court's imposition of the now disputed consecutive terms. (13 RT 3420.) Accordingly, this Court should find that Brents' current complaint has been waived.[11] (*People v. Scott* (1994) 9 Cal.4th 331, 353.)

Assuming that this Court declines to find a waiver, Brents was still appropriately sentenced. Penal Code section 654[12] prohibits multiple

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11. Respondent acknowledges that this Court has previously found that the failure to object to the imposition of an "unauthorized" term does not waive the defect. (See *People v. Scott*, *supra*, 9 Cal.4th at p. 354, at fn. 17.) However, such a conclusion seems to fly in the face of the logic set forth in the *Scott* opinion itself, *i.e.*, that the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its *discretionary* sentencing choices. (*Id.*, at p. 353.) For this reason, respondent raises this issue and hereby seeks to preserve it.

12. Penal Code section 654 provides in relevant part:

> "An act or omission that is punishable in different ways by different provisions of the law shall be punished under the provision that provides for the longest potential term of

(continued...)

punishment where the two crimes were part of an indivisible course of conduct. (*People v. Norrell* (1996) 13 Cal.4th 1, 6; *People v. Latimer* (1993) 5 Cal.4th 1203, 1208; *People v. Harrison* (1989) 48 Cal.3d 321, 335.) If the offenses were not merely incidental to each other, the defendant may be punished for each offense even though the violations shared common acts or were part of an otherwise indivisible course of conduct. (*People v. Hicks* (1993) 6 Cal.4th 784, 789; *People v. Green* (1996) 50 Cal.App.4th 1076, 1084-1085.) To determine whether several criminal acts constitute a single course of conduct, the court must look to the intent and objective of the defendant in committing the acts. (*People v. Harrison*, *supra*, 48 Cal.3d at p. 335; *Neal v. State of California* (1960) 55 Cal.2d 11, 19.)

Ascertaining a defendant's intent and objective is primarily a question of fact for the trial judge, whose express or implicit finding that the crimes were divisible will be upheld on appeal unless unsupported by the evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Green*, *supra*, 50 Cal.App.4th at p. 1085.) "[M]ultiple punishment may be imposed where the defendant commits one offense with one intent, then as an afterthought, forms the independent intent to commit a second offense." (*People v. Latimer*, *supra*, 5 Cal.4th at pp. 1212, 1216.) As the trial court properly noted, that is exactly what happened in this case. (13 RT 3420.)

Brents, along with Savidan, originally planned to assault the victim. That was initially Brents' sole objective. (6 RT 1405-1413.) After Savidan and her cohorts assaulted the victim in the parking lot, Savidan returned to the Travel Lodge. (6 RT 1421-1423.) Brents, Eule, Myers, Jasmine, and

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12. (...continued)
imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ."

Gordon got back into the Cadillac. Brents sat in the middle back seat, directly behind Gordon. (7 RT 1648; 9 RT 1986-1987.)

Brents placed a plastic bag over Gordon's head and tightened it around her neck. Gordon struggled, and managed to remove the bag. (7 RT 1651; 9 RT 1987-1990.) Brents then put his arm around Gordon's neck and choked her from behind. (7 RT 1648-1649; 9 RT 1997, 2036-2037.) Brents directed Uele to "[g]et the trunk open." (9 RT 1990-1991.) Brents pulled Gordon out of the Cadillac's front seat. Gordon, who was still bleeding from having been beaten, struggled with Brents. (7 RT 1649-1650.) Brents picked up Gordon and shoved her inside the Cadillac's trunk. (7 RT 1650-1654; 9 RT 1992.) Brents put his hands around the victim's neck and stuffed her inside the Cadillac's trunk. (7 RT 1653-1657, 1675; 9 RT 1992-1993.) Once Gordon was inside the trunk, Brents removed his rings and hit the victim twice in the face. (9 RT 1994.) This evidence constituted the factual support for Brents' forcible assault conviction.

Following the assault, Brents drove off in the Cadillac with the victim imprisoned in the vehicle's trunk. No one ever saw Gordon alive again. (6 RT 1505; 7 RT 1669; 9 RT 2074-2079.) The victim's burned body, still aflame inside the Cadillac's trunk, was discovered at a remote location 16 miles away from the Travel Lodge later that evening. (6 RT 1342-1352; 10 RT 2390-2392.) Although it is not clear at what point in time Brents formed the intent to murder Gordon, the evidence presented supported the conclusion that Brents had not firmly decided the victim's fate at the time he choked and hit her in the parking lot. Plainly, Brents' vicious assault was not necessary or merely incidental to Brents' murder of Gordon, because Brents had no need to choke and hit the victim prior to dousing her with gasoline and setting her aflame.

At Brents' ensuing sentencing hearing, the trial court stayed imposition of sentence on Brents' kidnapping conviction. (13 RT 3420.) In imposing the

consecutive terms on Brents' murder and forcible assault convictions, the trial court noted, without objection:

> Count III, which is assault by force likely to produce great bodily injury, that actually is a separate incident. It was before the kidnapping and before the homicide. And for that conviction and the finding to be true of three serious or violent priors, it is a Three Strike case, the penalty provided by law is 25 years to life. Are we all in agreement?

(13 RT 3420.)

Based on the foregoing, Brents was appropriately sentenced to consecutive terms for his murder and assault convictions because Brents' forcible assault of the victim took place at an earlier time and in a different location than the victim's eventual murder; therefore, the two crimes constituted separate incidents.

VIII.

BRENTS' CHALLENGES TO CALIFORNIA'S DEATH PENALTY STATUTE HAVE ALL BEEN REPEATEDLY REJECTED BY THIS COURT AND ARE OTHERWISE LACKING IN MERIT

Brents alleges that numerous aspects of California's capital sentencing scheme violate the United States Constitution. (AOB 78-114.) As Brents himself concedes (AOB 78), all of these claims have been presented to, and rejected by, this Court in prior capital appeals. Because Brents fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims must all be rejected. Moreover, as this Court has observed in the past, it is entirely proper to reject Brents' complaints by case citation, without additional lengthy legal analysis. (*People v. Welch* (1999) 20 Cal.4th 701, 771-772; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256.)

A. The Special Circumstances Set Forth in Penal Code Section 190.2 Are Not Constitutionally Overbroad, Because They Sufficiently Narrow the Class of Murder Cases Eligible for the Death Penalty

Brents contends the failure of California's death penalty law to meaningfully distinguish those murders in which the death penalty is imposed from those in which it is not requires reversal of the death judgment in this case. Specifically, Brents argues his death sentence is invalid because Penal Code section 190.2 is impermissibly broad and fails adequately to narrow the class of persons eligible for the death penalty. (AOB 80-82.) The United States Supreme Court has found that California's requirement of a special circumstance finding adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 871, 79 L.Ed.2d 29].)

Likewise, this Court has repeatedly rejected, and continues to reject, the claim raised by Brents that California's death penalty law contains so many special circumstances that it fails to perform the narrowing function required under the Eighth Amendment, or that the statutory categories have been construed in an unduly expansive manner. (*People v. Burgener* (2003) 29 Cal.4th 833, 884 ["Section 190.2, despite the number of special circumstances it includes, adequately performs its constitutionally required narrowing function."]; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1078 ["The scope of prosecutorial discretion whether to seek the death penalty in a given case does not render the law constitutionally invalid."]; *People v. Barnett*, *supra*, 17 Cal.4th at p. 1179; *People v. Arias* (1996) 13 Cal.4th 92, 186-187.) Brents' claim must similarly be rejected.

B. Penal Code Section 190.3, Factor (a), Is Not Impermissibly Overbroad and Does Not Allow for an Arbitrary Imposition of the Death Penalty

Brents contends the death penalty is invalid because Penal Code section 190.3, factor (a), as applied allows arbitrary and capricious imposition of death in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.[13] (AOB 82-84.) Specifically, Brents contends factor (a) has been applied in a "wanton and freakish" manner so that almost all features of every murder have been found to be "aggravating" within the meaning of the statute. (AOB 82.) This contention is also without merit.

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13. Penal Code section 190.3, factor (a), states:

> "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1."

The United States Supreme Court has specifically addressed the issue of whether California's Penal Code section 190.3, factor (a), is constitutionally vague or improper. In *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750], the Supreme Court commented on factor (a), stating:

> We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

(*Id.*, 512 U.S. at p. 976.)

This Court has been presented with ample opportunity to revisit the issue raised by Brents since the holding in *Tuilaepa*. However, this Court has consistently rejected the claim and followed the United States Supreme Court's ruling. (See, *e.g.*, *People v. Mendoza* (2007) 42 Cal.4th 686, 708; *People v. Guerra* (2006) 37 Cal.4th 1067, 1165; *People v. Smith* (2005) 35 Cal.4th 334, 373; *People v. Turner* (2004) 34 Cal.4th 406, 438.) There is no need for this Court to revisit the issue.

C. Application of California's Death Penalty Statute Does Not Result in Arbitrary and Capricious Sentencing

Brents also contends California's death penalty statute contains no safeguards to avoid arbitrary and capricious sentencing, and therefore violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 84-85.) He raises multiple sub-claims in support of this claim, including challenges involving the burden of proof required at the penalty phase, the failure to require juries to make written findings or reach unanimity as to the aggravating factors, and the inability to conduct an intercase

proportionality review. All of these claims have been previously and repeatedly rejected by this Court and are without merit.

1. The United States Constitution Does Not Compel the Imposition of a Beyond a Reasonable Doubt Standard of Proof, or Any Standard of Proof, in Connection With the Penalty Phase; the Penalty Jury Does Not Need to Agree Unanimously as to Any Particular Aggravating Factor

Brents asserts his death sentence violates the Eighth and Fourteenth Amendments for the following reasons: (1) because the death sentence was not premised on findings beyond a reasonable doubt by a unanimous jury that one or more aggravating factors existed and that these factors outweighed mitigating factors, Brents' constitutional right to a jury determination beyond a reasonable doubt of all facts essential to the imposition of the death penalty was violated; (2) the penalty jury was not instructed that they could impose a death sentence only if they were persuaded beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors and that death was the appropriate penalty; (3) even if proof beyond a reasonable doubt was not constitutionally required for finding (a) that an aggravating factor exists, (b) that the aggravating factors outweigh the mitigating factors, and (c) that death is the appropriate sentence, then proof by a preponderance of the evidence is constitutionally compelled as to each such finding; (4) some burden of proof is required at the penalty phase in order to establish a tie-breaking rule and ensure even-handedness; and (5) even if a burden of proof is not constitutionally required, the trial court erred in failing to instruct the jury to that effect. (AOB 86-100.) This Court has previously and repeatedly rejected all of Brents' contentions.

Unlike the determination of guilt, the sentencing function is inherently moral and normative, not functional, and thus not susceptible to *any* burden-of-

proof qualification. (*People v. Brown* (2004) 33 Cal.4th 382, 401; *People v. Burgener*, *supra*, 29 Cal.4th at pp. 884-885; *People v. Anderson* (2001) 25 Cal.4th 543, 601; *People v. Welch*, *supra*, 20 Cal.4th at p. 767; *People v. Sanchez* (1995) 12 Cal.4th 1, 81; see *People v. Daniels* (1991) 52 Cal.3d 815, 890.) This Court has repeatedly rejected claims identical to Brents' regarding a burden of proof at the penalty phase (*People v. Stitely* (2005) 35 Cal.4th 514, 573; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Welch*, *supra*, 20 Cal.4th at pp. 767-768; *People v. Ochoa* (1998) 19 Cal.4th 353, 479; *People v. Dennis* (1998) 17 Cal.4th 468, 552; *People v. Holt*, *supra*, 15 Cal.4th at pp. 683-684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"]), and, because he does not offer any valid reason to vary from those past decisions, should do so again here. Moreover, California death penalty law does not violate the Sixth, Eighth, and Fourteenth Amendments by failing to require unanimous jury agreement on any particular aggravating factor. Neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors. (*People v. Fairbank*, *supra*, 16 Cal.4th at p. 1255; *People v. Osband*, *supra*, 13 Cal.4th at p. 710.)

Brents argues, however, that this Court's decisions are invalid in light of *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]; *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]; and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]. (AOB 86-100.) This Court has considered and rejected Brents' argument by finding that neither *Blakely*, *Ring*, nor *Apprendi* have altered or undermined this Court's conclusions regarding the burden of proof in the penalty phase, and do not otherwise effect California's death penalty law. (*People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Stitely*, *supra*, 35 Cal.4th at p. 573 [*Blakely*, *Ring*, and *Apprendi* "do not require

reconsideration or modification of our long-standing conclusions in this regard"]; *People v. Morrison* (2004) 34 Cal.4th 698, 730-731; *People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263, 271-272; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; see *People v. Smith*, *supra*, 30 Cal.4th at p. 642.) Moreover, this Court has specifically concluded that "[t]he trial court need not instruct that the beyond-a-reasonable-doubt standard and the requirement of juror unanimity do not apply to mitigating factors." (*People v. Rogers* (2006) 39 Cal.4th 826, 897; see also *People v. Cook* (2007) 40 Cal.4th 1334, 1365.)

2. The Jury Was Not Constitutionally Required to Provide Written Findings on the Aggravating Factors It Relied Upon

Brents maintains California law violates the Sixth, Eighth, and Fourteenth Amendments by failing to require that the jury base any death sentence on written findings regarding aggravating factors. (AOB 100-102.) This Court has held, and should continue to so hold, that the jury need not make written findings disclosing the reasons for its penalty determination. (*People v. Cook* (2006) 39 Cal.4th 566, 619; *People v. Young*, *supra*, 34 Cal.4th at p. 1233; *People v. Maury* (2003) 30 Cal.4th 342, 440; *People v. Hughes* (2002) 27 Cal.4th 287, 405; *People v. Welch*, *supra*, 20 Cal.4th at p. 772; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 479; *People v. Frye* (1998) 18 Cal.4th 894, 1029; *People v. Dennis*, *supra*, 17 Cal.4th at p. 552; *People v. Fairbank*, *supra*, 16 Cal.4th at p. 1256.) The above decisions are consistent with the United States Supreme Court's pronouncement that the federal Constitution "does not require that a jury specify the aggravating factors that permit the imposition of capital punishment." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746, 750 [110 S.Ct. 144, 108 L.Ed.2d 725], citing *Hildwin v. Florida* (1989) 490 U.S. 638 [109 S.Ct. 2055, 104 L.Ed.2d 728].) Brents' claim must be rejected.

3. Intercase Proportionality Review Is Not Required by the Federal or State Constitution

Brents contends the failure of California's death penalty statute to require intercase proportionality review violates his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (AOB 103-104.) Brents' argument is not well taken, as this Court has repeatedly rejected identical contentions based on United States Supreme Court precedent.

Intercase proportionality review is not constitutionally required in California (*Pulley v. Harris*, *supra*, 465 U.S. at pp. 51-54; *People v. Wright* (1990) 52 Cal.3d 367), and this Court has consistently declined to undertake it. (*People v. Jablonski* (2006) 37 Cal.4th 774, 837; *People v. Morrison*, *supra*, 34 Cal.4th at p. 730; *People v. Welch*, *supra*, 20 Cal.4th at p. 772; *People v. Majors* (1998) 18 Cal.4th 385, 442.)

4. Section 190.3, Factor (b), Properly Allows Consideration of Unadjudicated Violent Criminal Activity and Is Not Impermissibly Vague

Penal Code section 190.3, factor (b), allows the trier of fact, in determining penalty, to take into account:

> (b) The presence or absence of criminal activity by the defendant, other than the crime[s] for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(3 CT 930 [CALJIC No. 8.85].)

Brents' claim that consideration of unadjudicated criminal activity at the penalty phase violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, thereby rendering the death sentence unreliable, must be rejected because Penal Code section 190.3, factor (b), has been held by this Court to be constitutional. (AOB 104-105.) Introduction of

evidence under factor (b) does not offend the state or federal Constitution. (*People v. Kipp*, *supra*, 26 Cal.4th at p. 1138; *People v. Cunningham* (2001) 25 Cal.4th 926, 1042; *People v. Samayoa* (1997) 15 Cal.4th 795, 863.) Moreover, as previously discussed and contrary to Brents' assertion, factors in aggravation need not be unanimously determined by the jury to be true. (AOB 105; *People v. Ward* (2005) 36 Cal.4th 186, 221; *People v. Brown*, *supra*, 33 Cal.4th at p. 401.)

This Court has "long held that a jury may consider such evidence in aggravation if it finds beyond a reasonable doubt that the defendant did in fact commit such criminal acts." (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 863.) Factor (b) is also not impermissibly vague. Both the United States Supreme Court and this Court have rejected this contention. (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 976; *People v. Lewis*, *supra*, 25 Cal.4th at p. 677; *People v. Lucero* (2000) 23 Cal.4th 692, 727.) The United States Supreme Court stated:

> Factor (b) is phrased in conventional and understandable terms and rests in large part on a determination whether certain events occurred, thus asking the jury to consider matters of historical fact.

(*Tuilaepa v. California*, *supra*, 512 U.S. at p. 976.) The court concluded: "Factor (b) is not vague." (*Ibid.*)

Brents' claim must therefore be rejected.

5. Instructions on Mitigating and Aggravating Factors Did Not Violate Brents' Constitutional Rights

Brents also claims that the instructions to the jury on mitigating and aggravating factors violated his constitutional rights because the instructions used "restrictive adjectives in the list of potential mitigating factors," the instructions failed to delete inapplicable sentencing factors, and the instructions

failed to indicate that "statutory mitigating factors were relevant solely as potential mitigators." (AOB 106-108.) As previously noted by this Court, the use of restrictive adjectives, such as "extreme" and "substantial," in the list of mitigating factors "does not act unconstitutionally as a barrier to the consideration of mitigation." (*People v. Hoyos*, *supra*, 41 Cal.4th at p. 927; see also *People v. Harris* (2005) 37 Cal.4th 310, 365; *People v. Brown*, *supra*, 33 Cal.4th at p. 402.) Similarly, this Court has found that the trial court is not required to delete inapplicable sentencing factors from CALJIC No. 8.85. (*People v. Mendoza*, *supra*, 42 Cal.4th at p. 708; *People v. Stitely*, *supra*, 35 Cal.4th at p. 574; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1138; *People v. Riel* (2000) 22 Cal.4th 1153, 1225; *People v. Earp*, *supra*, 20 Cal.4th at p. 899; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064.) Likewise, Brents' claim that the failure to instruct that statutory mitigating factors are relevant solely as mitigators violated the Eighth and Fourteenth Amendments has been rejected by this Court. (*People v. Hinton* (2006) 37 Cal.4th 839, 912; *People v. Morrison*, *supra*, 34 Cal.4th at p. 730; *People v. Kraft*, *supra*, 23 Cal.4th at pp. 1078-1079.) Brents has not presented this Court with any persuasive reason to reconsider its prior holdings on these issues, and his claims of instructional error must be rejected.

D. The Death Penalty Law Does Not Violate the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-Capital Defendants

Brents claims that the absence of intercase proportionality review at trial or on appeal violates his right to equal protection of the law under the Fourteenth Amendment of the United States Constitution. (AOB 109-112.) Brents maintains it is unfair to afford non-capital inmates such review under

former Penal Code section 1170, subdivision (f), of the Determinate Sentencing Law, but not to allow such review to capital defendants.

This Court has consistently rejected the claim that Equal Protection requires that capital defendants be provided with the same sentence review afforded felons under the determinate sentencing law. (*People v. Cox* (2003) 30 Cal.4th 916, 970; *People v. Lewis* (2001) 26 Cal.4th 334, 395; *People v. Anderson*, *supra*, 25 Cal.4th at p. 602; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1053; *People v. Cox* (1991) 53 Cal.3d 618, 691; *People v. Allen* (1986) 42 Cal.3d 1222, 1287-1289.) As aptly noted by this Court in *People v. Williams* (1988) 45 Cal.3d 1268, 1330:

> [P]ersons convicted under the death penalty are manifestly not similarly situated to persons convicted under the Determinate Sentencing Act and accordingly cannot assert a meritorious claim to the "benefits" of the act under the equal protection clause.

(*People v. Williams*, *supra*, at p. 1330, citing *Tigner v. Texas* (1940) 310 U.S. 141, 147 [60 S.Ct. 879, 84 L.Ed.2d 1120].)

Accordingly, Brents' Equal Protection claim must be rejected since he is not similarly situated to a defendant sentenced under the Determinate Sentencing Law.

E. California's Death Penalty Statute Does Not Violate International Law

Brents contends his conviction and sentence resulted from due-process violations in contravention of customary international law. (AOB 112-114.) Brents is precluded from raising this issue because it has been waived and he lacks standing to assert a violation of international law. Additionally, this Court has previously and repeatedly rejected the notion that California's death penalty statutes somehow violate international law.

Initially, it is observed that Brents should be precluded from claiming violations of international customary law or treaties for the first time on appeal since he never raised any such claims in the trial court. Convicted defendants are generally precluded from raising claims on appeal if the claim was not previously raised in the trial court. (See, *e.g.*, *People v. Jones* (1997) 15 Cal.4th 119, 181; *People v. Collie* (1981) 30 Cal.3d 43, 64.) Moreover, Brents has failed to show that he has any standing to invoke the jurisdiction of international law in this proceeding, because the principles of international law apply to disputes between sovereign governments and not between individuals. (*People v. Turner*, *supra*, 34 Cal.4th at p. 439, citing *Tel-Oren v. Libyan Arab Republic* (D.D.C. 1981) 517 F.Supp. 542, 545-547.)

Brents notes that all Western European countries have abolished the death penalty, and that the Eighth Amendment should be interpreted to prohibit capital punishment based on the views of other nations. (AOB 112-113.) However, it is not the international communities' views which are relevant to Eighth Amendment analysis; "it is *American* conceptions of decency that are dispositive[.]" (*Stanford v. Kentucky* (1989) 492 U.S. 361, 370 [109 S.Ct. 2969, 106 L.Ed.2d 306].) Interpretation and application of the provisions of the United States Constitution to questions presented by state or federal statutory or constitutional law is ultimately an issue for the United States Supreme Court and the lower federal courts, not customary international law.

Finally, Brents' claim lacks merit because it has previously been specifically rejected by this Court. (*People v. Hoyos*, *supra*, 41 Cal.4th at p. 925; *People v. Beames* (2007) 40 Cal.4th 907, 935; *People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511 ["International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements"]; accord, *People v. Brown*, *supra*, 33 Cal.4th 382, 404; *People v. Jenkins*, *supra*, 22 Cal.4th at

p. 1055; *People v. Ghent*, *supra*, 43 Cal.3d at pp. 778-779.) In *Ghent*, this Court held that international authorities do not compel elimination of the death penalty, and do not have any effect upon domestic law unless either self-executing or implemented by Congress. (*Ibid.*) As in *Ghent*, Brents cites no authorities suggesting the international resolutions on which he relies have been held effective as domestic law.

In summary, Brents has waived this claim and further has no standing to invoke international law as a basis for challenging his state convictions and judgment of death. Moreover, Brents has failed to state a cause of action under international law for the simple reason that Brents' various claims of violations of due process in connection with his prosecution, conviction, and sentencing in the instant case are without merit. The United States federal courts carry the ultimate authority and responsibility for interpreting and applying the United States Constitution to constitutional issues raised by federal or state statutory or judicial law. This Court's earlier rejections of similar claims have equal applicability in this case.

Based on the foregoing, all of Brents' challenges to California's capital punishment statutes and procedures must again be rejected by this Court.

IX.

BRENTS RECEIVED A FAIR TRIAL; THERE IS NO CUMULATIVE ERROR OR PREJUDICE FOR THE COURT TO ASSESS IN THIS CASE

Brents finally contends the cumulative effect of the alleged errors which occurred in this case undermined the fundamental fairness of Brents' trial and warrants the reversal of the judgment of conviction and sentence of death. (AOB 115-116.) As previously discussed at length throughout this brief, no error occurred; therefore, there cannot be any cumulative error.

Assuming, for the sake of argument, that those claims of error Brents ascribes to the guilt and penalty phases of his trial were in fact error, each was harmless under the applicable standard of review. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 884; see also *People v. Heard*, *supra*, 31 Cal.4th at p. 982; *People v. McDermott* (2002) 28 Cal.4th 946, 1005 [no individual error, so rejecting claim of cumulative error]; accord, *People v. Slaughter* (2002) 27 Cal.4th 1187, 1223 [taken individually or cumulatively, errors harmless].) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Box* (2000) 23 Cal.4th 1153, 1214.) Because the issues claimed as error by Brents were all either not error, have been waived or were invited, or were harmless, there could be no prejudice to Brents, and therefore no cumulative effect. (*People v. Kipp*, *supra*, 26 Cal.4th at p. 1141.)

Accordingly, assuming arguendo there was any error at all, viewed cumulatively, such errors did not significantly influence the fairness of Brents' trial or detrimentally affect the jury's determination of the appropriate penalty. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1038.) Any errors were harmless, whether viewed in isolation or in cumulation. (*People v. Raley*, *supra*, 2 Cal.4th at p. 904.) Therefore, the entire judgment must be affirmed.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: November 26, 2008.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 17,874 words.

Dated: November 26, 2008.

Respectfully submitted,

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Attorney General of the State of California

Kyle Niki Shaffer

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DECLARATION OF SERVICE BY MAIL

I declare that I am employed in the County of San Diego, California; that I am over 18 years of age and am not a party to the within-entitled cause; that my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, California 92186-5266; and that on **November 26, 2008**, I served the attached

RESPONDENT'S BRIEF	***People v. Brents*** California Supreme Court S093754 **CAPITAL CASE**

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, for deposit in the United States Postal Service that same day in the ordinary course of business, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Diego, California, on **November 26, 2008**.

STEPHEN MCGEE
Typed Name


Signature