In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** v. **LOUIS RANGEL ZARAGOZA,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S097886

San Joaquin County Superior Court Case No. SP076824A
The Honorable Thomas Teaford, Judge

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STATEMENT OF THE CASE

In a second amended information filed on January 9, 2001, the district attorney charged appellant, Louis Rangel Zaragoza, and his brother, David Rangel Zaragoza (David Zaragoza), in the San Joaquin County Superior Court with the murder of David Jeffery Gaines (Pen. Code,[1] § 187) and robbery (§ 211).[2] (5 CT 1171-1172.) It was also alleged that appellant and David Zaragoza committed the murder of David Gaines while lying in wait within the meaning of section 190.2, subdivision (a)(15), and while they were engaged in the commission of a robbery within the meaning of section 190.2 subdivision (a)(17). (5 CT 1171-1172.) The amended information also charged that in the commission of both offenses, appellant personally used a firearm within the meaning of sections 1203.06, subdivision (a)(1), and 12022.5, subdivision (a), and that appellant personally discharged a handgun causing the death of David Gaines within the meaning of section 12022.53, subdivision (d). (5 CT 1173.) It was also alleged as to David Zaragoza that during the commission of both offenses, a principal was armed with a handgun within the meaning of section 12022, subdivision (a). (5 CT 1176.)

The district attorney further alleged that appellant was convicted of receiving stolen property on March 16, 1981, upon which he served a separate prison term as set forth in section 667.5, subdivision (b). (2 CT 393, 4 CT 1049, 5 CT 1174.) It was also alleged that appellant was convicted of murder on November 25, 1975, and attempted armed bank robbery on November 21, 1982, both of which constituted prior strike

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[1] Unless otherwise stated, all further statutory references are to the Penal Code.

[2] The original information was filed on August 31, 1999, while a first amended information was filed on November 20, 2000. (2 CT 390-391, 4 CT 1044-1045.)

convictions within the meaning of sections 1170.12, subdivision (b), and 667, subdivision (d). (5 CT 1174-1175.) It was also alleged that appellant served a separate prison term for the attempted armed bank robbery conviction within the meaning of section 667.5, subdivision (b). (5 CT 1175.)

The district attorney also alleged that David Zaragoza was convicted of robbery on January 28, 1983, and January 23, 1989, as well as battery with serious bodily injury on June 17, 1993, all of which constituted serious felony offenses within the meaning of section 667, subdivision (a), and strike convictions within the meaning of sections 1170.12, subdivision (b), and 667, subdivision (d). (5 CT 1176-1178.) It was also alleged on or about July 15, 1993 that David Zaragoza was convicted of assault, where he served a separate prison term as set forth under section 667.5, subdivision (b). (5 CT 1176-1177.)

On December 6, 1999, David Zaragoza's attorney, Andrew Quinn, questioned his client's competence to stand trial. (1 RT 53, 58.) The trial court suspended criminal proceedings as to David Zaragoza only and ordered that he be evaluated pursuant to section 1369.[3] (1 RT 54, 60; 2 CT 445.) On June 7, 2000, the district attorney filed notice of intent to seek the death penalty for both appellant and David Zaragoza. (3 CT 633-634.) On June 16, 2000, David Zaragoza's jury trial regarding his competence to stand trial began. (3 CT 639-640.) On July 28, 2000, the jury found David Zaragoza incompetent to stand trial. (3 CT 835-840.) Thereafter, the court ordered that David Zaragoza be placed at Atascadero State Hospital for care, treatment and training. (4 CT 1000-1002.)

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[3] On May 25, 2000, David Zaragoza's motion to disqualify the trial judge, the Honorable Terrence Van Oss, was granted. (2 CT 519, 3 CT 626.)

On October 16, 2000, appellant filed a motion to suppress evidence seized by law enforcement from his residence. (4 CT 1028-1036.) After hearing testimony and argument, the trial court denied appellant's motion on November 22, 2000. (4 CT 1091-1092.)

On December 5, 2000, appellant's trial commenced with jury selection. (5 CT 1125.) On February 23, 2001, the jury found appellant guilty of the murder of David Gaines in the first degree. (6 CT 1534-1535; 31 RT 8095.) The jury further concluded that appellant committed the murder while lying in wait and during the commission of a robbery, both special circumstances making appellant eligible for the death penalty. (6 CT 1540; 31 RT 8096.) The jury found true that in the commission of both offenses, appellant personally used a handgun within the meaning of section 12022.5, subdivision (a), which in turn caused the death of another person within the meaning of section 12022.53, subdivision (d). (6 CT 1536-1537, 1541-1542; 31 RT 8095-8097.)

On March 13, 2001, the penalty phase of appellant's trial commenced. (7 CT 1798.) On April 6, 2001, the jury returned a verdict of death. (7 CT 1914.)

On May 24, 2001, the trial court denied appellant's motion for new trial as well as the automatic motion to modify the death verdict and sentenced appellant to death. (10 CT 2653-2656.) The court granted the People's motion to dismiss the prior strike allegation relating to the attempted armed robbery conviction and the prior prison term enhancements relating to appellant's convictions for receiving stolen property and attempted armed bank robbery in the interest of justice. (10 CT 2666-2667.) The court sentenced appellant to an indeterminate term of 25 years to life for the weapon enhancement as set forth under section 12022.53, subdivision (d). (10 CT 2667.) As for the robbery conviction, the court sentenced appellant to the aggravated term of five

years as a result of the manner in which the crime was carried out, as well as an indeterminate term of 25 years to life for the section 12022.53, subdivision (d), weapon enhancement. (10 CT 2668.) The court stayed the sentenced imposed for the weapon enhancement relating to the murder conviction, and the sentence for the weapon enhancement relating to the robbery conviction until the execution of the death sentence or until such sentence is modified by further order of a court. (10 CT 2668.)

As a result of the sentence of death, appellant's case is automatically appealed to this Court pursuant to section 1239, subdivision (b).

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution

William Gaines lived with his wife, Mary Gaines, and their 36-year-old son, David Gaines, at 1122 Cameron Way, a residential street in an unincorporated area of Stockton, California.[4] (23 RT 6059, 24 RT 6090, 6239-6240, 6296.) William Gaines owned and operated Gaines Liquors at 2211 West Alpine Road in Stockton, where David Gaines worked as a paid employee. (23 RT 6059-6060, 24 RT 6240-6241.) The liquor store's hours were 7:00 a.m. to 11:00 p.m. (24 RT 6242.) David Gaines generally had a regular work schedule, which included working on Friday and Saturday nights from 3:00 or 4:00 p.m. to closing time at 11:00 p.m. (23 RT 6068, 24 RT 6297-6298.) On other days, he worked from 3:00 p.m. to 8:00 p.m., but would routinely return to the store around 11:00 p.m. to help his father close the business. (24 RT 6087.)

[4] William and Mary Gaines had four other adult sons, Jeff, William, Larry and Steven. (23 RT 6060, 24 RT 6086.)

Friday evenings at Gaines Liquors were busy so often Mary Gaines prepared something for David Gaines to eat for dinner at the store. William Gaines delivered the meals to David Gaines in the evening and stayed until closing time. (23 RT 6060, 24 RT 6243.) On the nights they closed the store together, William and David Gaines drove home along the same route in separate vehicles. (24 RT 6243.) William Gaines regularly parked his gold station wagon in front of their residence while David Gaines parked his vehicle in the garage after opening the garage door with an electric car door opener. (24 RT 6244-6245.) There were some bushes and a tree directly across the street from where William Gaines parked his vehicle. (23 RT 5981; People's Ex. 43.) Upon closing the garage door, David Gaines entered the residence through an interior door in the garage. (24 RT 6085, 6285-6286.) William Gaines entered the residence through the front door. (24 RT 6286.) Mary Gaines normally waited up for her husband to return home from work, which was routinely around 11:15 p.m. (23 RT 6064.) Very seldom would William Gaines bring the store's receipts home. (24 RT 6242, 6307.)

Initially, June 11, 1999, was a normal Friday night. (23 RT 6060, 24 RT 6243.) David Gaines worked the evening shift so Mary Gaines prepared a salad for his dinner and placed it in a Pyrex bowl with a blue lid. The bowl was part of a set of bowls Mary Gaines received as a Christmas gift. (23 RT 6061-6063.) William Gaines brought David Gaines his dinner in the Pyrex bowl at seven o'clock that evening and worked with his son until 11:00 p.m., at which time they closed the store together. (24 RT 6243.) They then drove home in separate cars along the same route with David Gaines following behind his father. During the drive, William Gaines did not notice anyone following them, nor did he see any cars in front of him. (24 RT 6244-6245.) Sitting next to William Gaines in the front seat was a brown paper bag containing the Pyrex bowl with the

remnants of David Gaines's dinner salad, along with a paring knife that had been left at the store on a prior occasion. (24 RT 6078, 6245, 6283.)

William Gaines parked his station wagon in front of the residence, while David Gaines parked his vehicle inside the garage. (24 RT 6245.) William Gaines exited his vehicle but forgot the brown paper bag containing the Pyrex bowl on the front seat so he turned, bent inside the vehicle and retrieved it. (24 RT 6245-6246.) When William Gaines came back out and shut the car door, a man struck him on the chin and then in the upper left shoulder area with his fist without saying a word. (24 RT 6246-6248, 6280, 6282, 6291, 6309.) Although stunned for a moment, William Gaines got a good glimpse of the man that hit him whom he later identified as being David Zaragoza. (24 RT 6248, 6249, 6270, 6279, 6321-6322, 6308; 26 RT 6723, People's Ex. 51.)

When he was struck, William Gaines held his car keys in his left hand and the paper bag containing the Pyrex bowl in his right hand. (24 RT 6246, 6248.) The force of the blows brought William Gaines down to one knee momentarily. (24 RT 6247.) As he went down, David Zaragoza pulled the paper bag away from William Gaines and then dropped it on the street. (24 RT 6248-6249, 6280, 6282-6283, 6284, 6299.) David Zaragoza then picked up the bag with both hands and ran east down Cameron Way. (24 RT 6249-6250, 6251, 6269, 6271, 6282.) William Gaines did not see David Zaragoza with a gun in his hands. (24 RT 6249.) As he rose from his knee, William Gaines hollered "David" for his son to help him as he watched David Zaragoza run down the street. (24 RT 6247, 6252, 6285, 6287.) David Gaines was coming out of the garage. (24 RT 6285, 6287, 6289-6290.) Although he did not recall at trial that his son responded, William Gaines testified David Gaines or someone else may have yelled something. "There was a voice in there. But whether it was David or not, I'm not sure." (24 RT 6288-6289.)

William Gaines then heard gun shots. (24 RT 6247.) William Gaines testified that David Zaragoza had run approximately 10 to 20 feet down the street and was not yet halfway past the Gaines's driveway when the gunshots were fired, after which he ducked down behind the station wagon for a few seconds, losing sight of David Zaragoza. (24 RT 6252, 6271-6272, 6290, 6293-6294, 6303.) William Gaines testified that David Zaragoza did not fire the shots because he was running down the street with his back to William Gaines at that time. In addition, William Gaines, an experienced gunman, did not see any muzzle flashes come from David Zaragoza. Nor did David Zaragoza run onto the sidewalk or up onto the Gaines's driveway. (24 RT 6252-6253, 6271, 6301.)

When he stood up, William Gaines testified that he looked down the street and saw two men about 50 to 100 feet away running east down Cameron Way. One man was about 10 feet ahead of the other man. (24 RT 6272, 6278, 6294-6295.) He then found David Gaines lying about halfway down his driveway with blood all over him. (23 RT 5961, 5964, 24 RT 6272-6273.) William Gaines entered his residence, told his wife that their son had been shot in the driveway and called 911. (7 CT 1981-1985; 23 RT 5990-5993, 6064-6066, 24 RT 6273.) Mary Gaines ran outside and found David Gaines lying on the driveway, doubled over. (23 RT 6066.) She knew her son was dead given the amount of bleeding from his head and chest. (23 RT 6066.)

David Gaines was five feet, nine inches tall. (25 RT 6569.) He had sustained an injury to his interior, right forearm and two metal fragments were embedded in his right palm. (25 RT 6570-6571.) He also had a circular hematoma on the right side of his head possibly caused by a bullet fragment. (25 RT 6598-6599.) He had sustained four gunshot wounds, including a perforated wound to his left wrist, which traveled underneath the untanned portion of his skin where he wore a watch. (24 RT 6156,

25 RT 6573-6576, 6583-6584.) He also sustained a perforated gunshot wound to the left side of his chest. The bullet traveled downward, front to back, before exiting out the left side of his lower back. (25 RT 6589-6592.) He also sustained a penetrating gunshot wound to the right side of his chest. The bullet entered just below his right nipple, traveled downward, and entered his spinal column at vertebrae number L4 and was recovered in vertebrae number L5. (25 RT 6592-6593.) The fourth gunshot wound was to the left side of David Gaines's head and was caused by a bullet that struck his skull and fractured. A portion of the bullet entered the brain, while the other part traveled on top of the head before exiting. (25 RT 6595, 6598, 6601-6603, 6599.) All four bullet wounds were contact wounds caused by a gunshot fired less than 18 to 24 inches from the body. (25 RT 6579-6580, 6588, 6589, 6592, 6596, 6604.) The order of the shots was unknown, but they all were sustained prior to David Gaines's death. (25 RT 6611.) The gunshot wounds were all fatal independent of each other, but for the wound to the left wrist. (25 RT 6605-6606.) The gunshot to the brain disabled David Gaines preventing him from moving upon sustaining that injury. (25 RT 6609-6610.) Bullet fragments from David Gaines's wrist, a partial bullet from his head and a bullet from his spine were recovered by law enforcement. (24 RT 6129-6134.)

David French lived next door to the east of the Gaines residence. Heavy bushes and trees separated their homes. (23 RT 6002-6003, 6007.) At approximately 11:15 p.m. on the night in question, French heard three or four gunshots and went outside onto his front porch where he saw people yelling. After going back inside momentarily, French came back out and called 911, relating to the operator that a neighbor had seen two younger people running east on Cameron Way. (7 CT 1985; 23 RT 6004.) French also saw David Gaines lying on the driveway surrounded by blood. (23 RT 6001-6003.)

Six days later, French found a spent bullet on the west edge of his front lawn near the Gaines's driveway, 16 feet from the corner of the Gaines's garage. (23 RT 6005, 6119-6126.) The bullets retrieved from David Gaines's head and spine, as well as the bullet found on French's lawn, appeared to have been from a .38 or .357 caliber gun and could have been fired from the same weapon. (26 RT 6749-6750, 6764, 6766-6769, 6772.)

Carol Maurer lived at 1105 Cameron Way, directly across the street from French and just east of the Gaines residence. (23 RT 6008-6011.) At around 11:00 p.m. on the night of the shooting, Maurer was in her bedroom, which was on the west end, facing the street and was the closest part of her home to the Gaines residence. Upon turning off her lights to go to sleep, she heard William Gaines call "David," which was followed by the sound of gunshots. (23 RT 6011-6013.) Maurer immediately got up, looked out her bedroom window, which was less than two feet from her bed, and saw one man running ahead of a second man east down Cameron Way for quite some time before her garage blocked her view. (23 RT 6013-6014, 6021-6023, 6026-6027, 6032.) The second man was wearing something white and had a hat on. Maurer did not see what the other man was wearing. (23 RT 6014-6015, 6031.) The two men appeared to be young adults in their twenties, not too large or tall. (23 RT 6015, 6026.)

Cynthia Grafius lived at 1034 Cameron Way, four houses east of the Gaines residence on the same side of the street. (23 RT 6034.) Shortly after 11:00 p.m., she heard four loud pops like fireworks while watching television. She got up and walked to her kitchen, looked out the window and saw one man running east on the sidewalk of the street for about three seconds. (23 RT 6034-6038-6039, 6049.) She did not notice the man carrying a bag or a weapon in his hands. (23 RT 6038-6039, 6044.) Fifteen to twenty seconds later, Grafius walked out of her house and was

standing a foot or two in the street, where she first looked west, then east, but did not see anything else. (23 RT 6039-6042, 6050, 6056.)

At approximately 11:16 p.m., San Joaquin County Sheriff Department Deputies Jeff McLean and Gary Sanchez received a dispatch call while parked at Lincoln Center regarding a man being shot on Cameron Way. (23 RT 5993-5994, 24 RT 6090-6092, 6100.) They responded in separate patrol vehicles and arrived at the scene about a minute later. (24 RT 6095-6096, 6110.) Upon their arrival, they found David Gaines lying in the driveway with his legs folded underneath him, as if he had collapsed. Deputy Sanchez administered CPR. Moments later, Stockton City Fire Department paramedic Chris Barkman arrived and checked David Gaines, but found no signs of life. (23 RT 5998, 6000; 24 RT 6104-6105.)

Deputy McLean established a crime scene to collect evidence. (24 RT 6096.) Deputy Sanchez obtained a description from William Gaines of the person who hit him to broadcast to other officers. At that time, William Gaines was calm but had a distance stare. He did not indicate that there was more than one suspect at that time. (24 RT 6106-6107, 6112-6113.)

David Gaines's body and mace canister were found lying halfway up the Gaines's driveway, approximately 24 feet, one inch from the southeast corner of the garage. (23 RT 5961, 5966, 24 RT 6152-6154, 6180.) The driveway sloped downward from the garage, or in a northerly direction, toward the street. (24 RT 6178-6179.) Blood spatter that appeared to be moving in a northwesterly direction was also found near David Gaines's body. (24 RT 6156-6157, 6177, 6203.) David Gaines also had bloodstains on the inside of the tennis shoes he was wearing. (25 RT 6568.) Two torn pieces of a brown paper bag and a paring knife were found by the driver's front fender and door of William Gaines's station wagon, some 48 feet, five inches from the southeast corner of the garage. (23 RT 5964, 5966, 5979,

24 RT 6078, 6152, 6185, 6189.) A book and release form dated May 22, 1999, with "Mr. Zar" written on the back, was discovered just east of the driver's door of the station wagon. (24 RT 6187-6188, 6199-6200, People's Ex. 60.) Pieces of David Gaines's watch were found scattered primarily in a northwesterly direction from his body, including the band near the Gaines's lawn, the watch crystal on the street in front of the station wagon, the dial pin in the middle of the street, and the watch backing a few feet north of the front left tire of the station wagon. (23 RT 5977-5978, 5982-5983, 5985, 24 RT 6080, 6141-6142, 6181-6182, 6189-6191, 6195; People's Exs. 1 & 3.) Genine Montelongo lived at 1133 Cameron Way, which was northwest and on the opposite side of the street from the Gaines residence. On June 13, 1999, she found the face of David Gaines's watch in her front yard north of a cherry tree, some 72 feet from where the station wagon was parked on the night of the shooting. (23 RT 5982-5985, 24 RT 6142, 6190-6191, 6195; People's Exs. 1 & 3.)

Detective Jerry Alejandre interviewed William Gaines at the crime scene. (24 RT 6313, 6326.) Upon exiting his vehicle, William Gaines indicated he was struck by a stocky Hispanic male about five feet, four inches tall, on the left side of the face, knocking him to the ground. (24 RT 6327.) The suspect ripped the paper bag from William Gaines's hands without saying anything and then ran eastbound down Cameron Way. (24 RT 6313-6315, 6330-6331.) As he fell to the ground, William Gaines yelled for his son to help him. (24 RT 6328.) In response, he heard his son say either "Stop" or "Hey." (24 RT 6328, 24 RT 6330-6331.) William Gaines then heard gunshots, at which time he lost sight of David Zaragoza running eastbound down Cameron Way. (24 RT 6313-6415, 6331.) After the shots were fired, William Gaines said he looked down the street and saw only David Zaragoza running away. He did not see anyone else. (24 RT 6328, 6331.)

David Zaragoza was identified as a possible suspect by the book and release form discovered on the street near the station wagon. (26 RT 6819-6820, 27 RT 6965-6966.) David Zaragoza lived in a group home run by James and Stella Allen at 357 West Fifth Street in South Stockton. (26 RT 6820-6821, 27 RT 3966-3976.) At around 11:00 a.m. on June 12, 1999, Detectives Alejandre and Bruce Wuest went to David Zaragoza's residence but he was not home. (26 RT 6822, 27 RT 6966.) Detective Alejandre left his number and asked that the Allens call him when David Zaragoza returned. (26 RT 6822.) Before leaving, Detective Alejandre saw some pictures of David Zaragoza's family on the living room table, including an individual photograph of appellant. (26 RT 6821-6822.) The detectives also conducted a cursory search of the group home, including David Zaragoza's room, for firearms but found none. (26 RT 6823-6824.)

Detectives Alejandre and Wuest returned after David Zaragoza came home in the afternoon. (26 RT 6717.) While waiting for David Zaragoza to finish eating, Detective Alejandre looked at the David Zaragoza's family photographs again and noticed the picture of appellant was gone. (26 RT 6824-6825, 27 RT 6971.) Detectives Alejandre and Wuest then drove David Zaragoza to the sheriff's department for an interview that lasted approximately an hour and a half and was videotaped. (26 RT 6833, 27 RT 6972.) During the interview, David Zaragoza denied being with appellant the night before. (27 RT 6972.)

Shortly after the shooting, William Gaines returned to his station wagon parked on the street and discovered a number of papers lying on the ground which he assumed belonged to him. (24 RT 6275-6276.) The following day, William Gaines looked at the paperwork he had collected and realized that the documents were not his and reported the matter to the sheriff's department. (24 RT 6277.)

The paperwork belonged to David Zaragoza, and included a San Joaquin County Medical Facility interoffice memo, a San Joaquin County Public Defender Office appointment card with the names Janis Everett and Danielle Ramirez on it, a State of California benefit card and two transit cards. (24 RT 6320-6321.) David Zaragoza's fingerprints were on four of the items recovered by William Gaines. (24 RT 6342-6345.) Both Janis Everett and Danielle Ramirez were attorneys with the public defender's office and were representing David Zaragoza in an unrelated criminal matter at the time of the shooting. (24 RT 6351-6356, 26 RT 6646-6647.)

Upon retrieving the paperwork, Detectives Alejandre and Wuest again picked up David Zaragoza at his residence in the evening on June 12, 1999, and drove him to the sheriff's department where they interviewed him for a second time about the murder of David Gaines. (27 RT 6972-6974.)

In June 1999, appellant lived with his sister Ophelia "Nina" Koker and her husband, John Koker, at 429 South Airport Way in Stockton. (25 RT 6381, 26 RT 6667, 27 RT 6991-6992.) Nina Koker worked at Park Woods Cleaners while her husband John Koker was disabled and could not speak. (26 RT 6829, 27 RT 6991-6992, 7032, 7036-7037.) Nina Koker testified that David Zaragoza did not come around to her house too often nor was it common for him to spend the night. (27 RT 7005.) In fact, when appellant asked if David Zaragoza could spend the night on June 11, 1999, Nina Koker said no because she wanted the house kept quiet for her disabled husband. (27 RT 7005, 7009.)

Appellant worked as a welder in Tracy, California, Monday through Friday, and often on Saturday. His work hours were 6:00 a.m. to 2:30 p.m., unless he worked overtime, at which time he would get off between 3:30 to 4:30 in the afternoon. (26 RT 6656, 6660-6661.) He earned $10.25 an hour, drove his mother's beige Honda to work and sported a large mustache, which he shaved prior to trial. (26 RT 6653, 6654, 6665.)

Appellant's mother, Yolanda Tahod, allowed appellant to use her beige Honda daily to drive back and forth from work because appellant did not have a vehicle. (25 RT 6381-6382.) Typically, Tahod would take appellant her car the night before a work day. Appellant would drive his mother home and then use the car to go to work early the following morning. After work in the afternoon, appellant would pick up his mother, who would then drive appellant back to his residence at 429 South Airport Way, drop him off and then run her errands. When she was done, she would again drive to appellant's home to start the routine over again of lending him the car for the following day's drive to work. (25 RT 6382-6384.)

According to Yolanda Tahod, David Zaragoza did not drive, did not have a driver's license nor did she ever lend him her vehicle to drive. (25 RT 6390-6391, 26 RT 6735-6736, 6826-6827.) Rather, David Zaragoza received rides from his mother or his siblings, including appellant. (25 RT 6392, 27 RT 7006.)

On Friday, June 11, 1999, appellant dropped Yolanda Tahod's car off in the afternoon. (25 RT 6384.) Typically on Friday nights, Yolanda Tahod returned the car to appellant after church around 9:00 p.m. so he could go to work on Saturday morning. (25 RT 6387-6388, 6396.) When he arrived at work on Saturday, June 12, 1999, appellant was told he was not needed and was sent home. (26 RT 6660-6662.) Nina Koker got off work at Park Woods Cleaners around 9:00 a.m. on Saturday, June 12, 1999. (27 RT 7035, 7038.) Before she did, appellant dropped by and picked up some drapes to deliver to their brother, Reynaldo Zaragoza, who lived close to the cleaners. (27 RT 7036, 7038.) Yolanda Tahod testified that appellant returned her car between 2:00 and 3:00 p.m. that Saturday afternoon. (25 RT 6387-6388.)

Detectives Alejandre and Wuest first made contact with appellant at his residence on 429 South Airport Way on June 13, 1999. (25 RT 6527, 26 RT 6830, 27 RT 6981-6983.) Appellant agreed to give an interview.[5] He was not under arrest. (6 CT 1554, 26 RT 6830, 6839.) During the interview, appellant said that he got home from work after he had dropped the car off at his mother's house around 5:30 p.m. on June 11, 1999. (6 CT 1560.) While at home, David Zaragoza called asking if he could spend the night. Appellant said he would pick him up later when their mother dropped off the car for work the next day. (6 CT 1556-1557.) Sometime between 8:00 and 9:00 p.m., Yolanda Tahod returned her car to appellant. (6 CT 1568, 1570.) Appellant then drove over to David Zaragoza's group home between 9:00 and 9:30 p.m., picked up David Zaragoza and brought him back to appellant's residence. (6 CT 1557.) David Zaragoza was wearing a white shirt and light blue pull-up pants similar to pajamas appellant had purchased for him. According to appellant, David Zaragoza wore those pants everywhere. (6 CT 1562-1564.) Nina Koker was not home and did not return until 5:00 or 5:30 the next morning. (6 CT 1559, 1582.) Appellant had David Zaragoza rub his hands and feet before falling asleep on the couch around 10:30 p.m. When appellant woke around 11:00 or 11:30 p.m., David Zaragoza was gone. (6 CT 1558-1559, 1581.) Appellant went to work on Saturday, June 12, 1999, but when he arrived, he found out he was not scheduled to work that day. (6 CT 1568-1569, 1571.) Later that morning, David Zaragoza called and told appellant he had to leave the night before because he began hearing voices. (6 CT 1558.)

Appellant admitted that he had picked up David Zaragoza from their brother, Eddie Tahod's residence on the Monday evening before the

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[5] The interview was tape recorded and was shown to the jury. (26 RT 6839, People's Exs. 143 & 143a.)

shooting. As they drove home, appellant stopped at Gaines Liquors to purchase David Zaragoza some cigarettes. (6 CT 1576-1578.) They also stopped at the Back Door, a bar near Lincoln Center. (6 CT 1585, 1587, 1589.)

After appellant's interview, Detectives Alejandre and Wuest went to Yolanda Tahod's house with appellant to search the beige Honda and then to appellant's residence to conduct a cursory search. (26 RT 6830-6831.) While at appellant's residence, Detective Wuest searched the garbage can located adjacent to the driveway and found a Pyrex bowl wrapped in a white grocery plastic bag inside a larger white kitchen garbage bag that was tied at the top. (25 RT 6511-6514, 6527-6529, 26 RT 6714, 6727, 6831.) Inside the bowl there appeared to be small particles of a green leafy substance. (26 RT 6731.) Mary Gaines identified the bowl as the one that contained David Gaines's dinner on the night of the shooting. (23 RT 6063, 24 RT 6081, 25 RT 6536.) Detective Wuest also found a Jack-In-The-Box bag in the garbage can containing an empty box of Marlboro 100 lights, a small French fry container and a Jack-In-The-Box receipt, as well as five or six unopened containers of ketchup with the Jack-In-The-Box label. (25 RT 6530-6531, 26 6715-6717, 6730.) The Jack-In-The-Box receipt was from store 460 located at 6200 Pacific Avenue in Stockton and indicated that a Jumbo Jack and water had been purchased on June 12, 1999, at 12:03 a.m. (25 RT 6531-6532, 26 RT 6683, 6685-6686, 6729, 6782.) Law enforcement also seized a pair of IOU jeans, a pair of black boots and a watch for forensic testing. (24 RT 6226, 27 RT 6983-6984.) Law enforcement took photographs of appellant's tattoos on his arms as well. (25 RT 6507, 6510, 27 RT 7153, 33 RT 8611.)

On June 14, 1999, both appellant and David Zaragoza were arrested. (26 RT 6724.) After his arrest, appellant was again interviewed by Detectives Alejandre and Wuest.[6] (26 RT 6844.) During this interview, appellant stated that Nina Koker agreed that David Zaragoza could spend the night on Friday. (6 CT 1597-1598.) Appellant picked up David Zaragoza in their mother's car between 9:00 and 9:45 p.m. because David did not drive. (6 CT 1603-1605.) Once home, appellant fell asleep on a living room couch around 10:30 p.m. as David Zaragoza rubbed his feet. (6 CT 1607.) When appellant woke, he looked at his watch and it was between 11:30 and 11:45 p.m., and David Zaragoza was gone. (6 CT 1608-1609.) Nina Koker returned home shortly thereafter. (6 CT 1610.) Appellant denied any knowledge of the Pyrex bowl found in the garbage can, but admitted he emptied the trash from the kitchen in the house. (6 CT 1614-1615, 1618, 1620, 1622-1623.) Appellant never saw David Zaragoza drive a car and appellant normally drank water. (6 CT 1604-1605, 1612.)

On Saturday or Sunday following the shooting, Yolanda Tahod testified that she went over to appellant's residence. (25 RT 6392.) At one point, she began to take the kitchen garbage bag out to the garbage can when appellant took the bag from her and did it himself. (25 RT 6392-6393.) Yolanda Tahod did not own any Pyrex bowls similar to the one that was taken from William Gaines. Nor did her daughter, Nina Koker, possess such bowls. (25 RT 6394-6395.) Detective Wuest did not find any Pyrex products in the search of appellant's residence, but seized a pair of blue jeans from the back yard. (25 RT 6538, 26 RT 6733, 6985, 6988.)

On June 15, 1999, appellant's residence was searched pursuant to a search warrant. (26 RT 6537, 27 RT 6985, 6989.) During the search,

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[6] The interview was tape recorded and parts of it were played for the jury. (26 RT 6843, 6847-6850.)

Detective Wuest found the blue lid to Mary Gaines's Pyrex bowl within a tin can in the garbage can. (23 RT 6063, 25 RT 6520, 26 RT 6832.) The tin can had the words "cigarette butts" written on the outside, and Detective Alejandre remembered seeing the tin can on the living room table when conducting the cursory search of the residence on June 13, 1999. (6 RT 6832.) Nina Koker admitted that the tin can had been in her living room and was used as an ashtray. (27 RT 7026.) She did not remember when, but she threw the can away because it looked "nasty" sitting on her table, but she did not know how the blue lid got into the tin can. (27 RT 7028.) Nina Koker smoked the red pack of Marlboros. Appellant and David Zaragoza also smoked. (27 RT 7022.) It was common for her to throw away containers with old dog food in them to avoid cleaning them but could not recall whether she had any Pyrex bowls or had thrown any bowls out between Friday, June 11, 1999, and Sunday, June 13, 1999.[7] (27 RT 7024-7025.)

Nina Koker also testified that she had driven her white Plymouth Sundance to the Amtrak station around 6:00 or 7:00 p.m. on June 11, 1999, to pick up her boyfriend, Raymond Padilla. (27 RT 7009-7010.) They then drove to Padilla's cousin's home, where they watched television with Marcus Ellsworth but did not eat anything. (27 RT 7012-7013.) Nina Koker tried to leave around 11:45 or 11:50 p.m., because she had to work early the next morning but discovered she had locked her keys in the car. (27 RT 7014.) A locksmith came out and retrieved the keys. (27 RT 7021.) Thereafter, she testified that she drove down Pacific Avenue and stopped at a Jack-In-The-Box a little after midnight and purchased a "combo," which came with a drink and fries. (27 RT 7014, 7016-7017,

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[7] In June 1999, the garbage was picked up in the early morning on Fridays. (6 CT 1620, 25 RT 6524-6525.)

7032.) She did not recall whether she got water or a Diet Coke. (27 RT 7019.) She then drove home arriving around 12:25 a.m. (27 RT 7014.) At the time, she smoked Marlboro's, the red pack, and noted that David Zaragoza would smoke any kind of cigarette. Appellant also smoked. (27 RT 7022-7023.)

Marcus Ellsworth testified that Padilla and Nina Koker came over to his residence at 6360 Porterfield Court in Stockton around 9:00 or 10:00 p.m. on June 11, 1999. (26 RT 6773-6775.) They hung out and ate a home-cooked meal together. Nobody went out for fast food. (26 RT 6776.) Nina Koker had to leave late in the evening because she had to work early Saturday morning, but found she had locked her keys in her car. Padilla called a tow service, which arrived approximately 45 minutes later and retrieved Koker's car key. (26 RT 6776-6777.) As a result, Nina did not leave until around 1:00 or 2:00 a.m. (26 RT 6778.)

On June 11, 1999, Cecil's Security Systems received a call at 11:51 p.m. from 6360 Porterfield Court about car keys being locked inside a car. (26 RT 6669-6671, 6681.) Cecil's Security Systems dispatched a locksmith to the address around 11:55 p.m. to access the car. (26 RT 6672, 6677-6678.) The locksmith arrived at 11:59 p.m. and the call was completed at 12:08 a.m. (26 RT 6673.)

The distance between David Zaragoza's residence and appellant's home was 2.3 miles. (26 RT 6782.) The distance from David Zaragoza's home to the Gaines residence was 7.5 miles. (26 6782-6783.) The distance from the Gaines residence to appellant's residence after passing the Jack-In-The-Box on Pacific Avenue was 6.1 miles. (26 RT 6783-6784.) The distance from the Gaines residence to the Jack-In-The-Box was six-tenths of a mile. (26 RT 6784.)

No identifiable fingerprints were found on the Pyrex bowl, its lid, or the Jack-In-the-Box evidence. (24 RT 6345-6350.) Gunshot residue tests

conducted on appellant and his watch were negative, but gunshot residue was found on David Gaines's watch band. (24 RT 6216, 6225-6226, 26 RT 6717-6718.) No gunshot residue test was performed on David Zaragoza. (26 RT 6717.)

In June 1999, appellant's brother, Ed Tahod, and his wife lived about two blocks from Gaines Liquors with their daughters. (25 RT 6362-6363, 6367-6368.) Appellant used to come over to Tahod's house and take his nieces to buy candy at Gaines Liquors. (6 CT 1578, 25 RT 6375.)

Also in June 1999, Paul Banning worked the evening shift from 5:00 to 9:00 p.m. at Gaines Liquors. (26 RT 6697.) When asked by detectives if anyone looked suspicious, Banning indicated one guy looked familiar because of his mustache, but he was not 100% certain. (26 RT 6698.) Banning described the mustache as stretching down to the man's lips and being real awkward. (26 RT 6699.) Thereafter, Banning identified a photograph of appellant, particularly his mustache, and noted he was a regular customer who bought 24-ounce beers in the store. (26 RT 6699.) Banning did not recall seeing David Zaragoza in the store. (26 RT 6702.)

Billy Gaines was William Gaines's grandson and worked at Gaines Liquors. (25 RT 6492-6493.) On Monday, June 14, 1999, he told the press he was working the day before the shooting when a man came into the liquor store around 1:30 or 2:00 p.m., bought a bottle of beer, and asked if the store security camera worked. (25 RT 6494-6497, 6500-6501.) Billy Gaines had seen this person in the store before and described him as being a short, stocky guy, with a real thick mustache and possibly wearing a hat. (25 RT 6499-6501.) Two hours later, when interviewed by news media again, Billy Gaines identified a photograph of appellant shown to him by the press as the man who came into the store asking about the

security camera the day before the shooting.[8] (25 RT 6501-6502; People's Ex. 50.) Later that same day, Billy Gaines told the sheriff's department that the suspect had tattoos on his neck and arms. (25 RT 6501.) Billy Gaines was shown a picture of David Zaragoza but did not recognize him and had never seen him in the store. (25 RT 6502; People's Ex. 51.) Appellant's time card for work demonstrated that he worked from 5:23 a.m. to 4:32 p.m. on June 10, 1999. (26 RT 6663-6666, 30 RT 7911.) At trial, Billy Gaines did not recognize appellant because appellant had gained weight and shaved his mustache. (25 RT 6504.)

Howard Stokes lived just west of the Gaines residence at 1155 Cameron Way. (25 RT 6429, 6431.) He generally walked his dog every evening east past the Gaines residence toward Gettysburg Place around 11:00 p.m. (25 RT 6430-6431, 6463.) During the evening on Monday, June 7, 1999, Stokes took his dog for a walk and encountered a man who had gotten out of green minivan at the intersection of Gettysburg and Cameron Way. (25 RT 6430-6431.) Stokes was on the south side of the street while the other man was on the north side. As both men walked back west toward the Gaines residence, William Gaines drove by and illuminated the man with his car's head lights. (25 RT 6430-6432, 6465-6466.) In response, the man ducked behind the tree to go to the bathroom or hide from the lights. (25 RT 6431.) The man had a stocky build, was 5 feet, six or eight inches tall and probably Hispanic. (25 RT 6433-6434, 6469.) Although Stokes did not make eye contact with the man, he was intimidating. His face was dark, almost like it had shoe polish all over it. Stokes did not recall if the man had a mustache, nor was Stokes sure he could identify the man. (25 RT 6435-6436, 6471-6472.)

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[8] The videotaped recording of Billy Gaines's television interview was played for the jury. (26 RT 6817.)

Stanley Monckton lived on 1041 Cameron Way a few houses east from the Gaines residence on the opposite side of the street. (25 RT 6476-6477, 6481.) Sometime between 11:00 a.m. and 12:00 p.m. on Saturday, June 12, 1999, Monckton was watering his front lawn when a small, yellow or creamed colored car similar to the car owned by Yolanda Tahod, drove by eastbound on Cameron Way. (25 RT 6478-6479, 6481-6482, 6484.) The car was moving slowly and the driver had a big Fu Manchu mustache with tattoos on his arms. (25 RT 6479-6481.) On June 16, 1999, Monckton saw appellant's arraignment on the news and realized appellant was the man he had observed driving the car slowly down Cameron Way so he contacted the sheriff's department. (25 RT 6482, 6485.) Law enforcement showed him a series of photographs and Monckton identified appellant's picture as the driver of the car. (25 RT 6483; People's Ex. 50.) At trial, he identified appellant as well, and noted appellant no longer had his Fu Manchu mustache. (25 RT 6483.)

Nina Koker indicated that David Zaragoza acted funny and strange at times; he spoke of space ships and felt that a particular judge in San Joaquin County was trying to poison him. (27 RT 7006-7007.) He always carried a radio around and liked playing loud music. (27 RT 7008.) He was not allowed to have cash, but used vouchers to purchase items. (27 RT 7006.)

Dr. Anthony Chellsen, a licensed clinical psychologist, evaluated David Zaragoza in late 1999 to determine if he was competent to stand trial. (25 RT 6399-6400.) In doing so, Dr. Chellsen concluded that David Zaragoza suffered from drug abuse and chronic paranoid schizophrenia. Dr. Chellsen also concluded David Zaragoza had a mixed personality disorder with schizotypal paranoid and antisocial features. (25 RT 6403-6404, 6420.) In addition, David Zaragoza also suffered from a developmental reading disorder and read at a second grade level. His

ability to function intellectually was borderline and he had a verbal IQ of 61. (25 RT 6404, 6408.) His capacity to care for his own needs was severely impaired and he had difficulty weighing and comparing the advantages of two different options or scenarios and was incapable of thinking in the abstract, conceptually and hypothetically. (25 RT 6405, 6409.)

2. Defense

In early 1999, appellant began dating Antoinette "Toni" Duque, but they became only friends after a few months. (27 RT 7074-7075.) Nonetheless, appellant called Duque daily. (27 RT 7077.) The day before the shooting, appellant accompanied Duque to a high school graduation in Modesto. Afterwards, Duque and appellant ate dinner and appellant then drove home. (27 RT 7078-7081.) The day of the shooting, appellant called Duque at 3:29 p.m. (27 RT 7084.) On Saturday, June 12, 1999, appellant spoke to Duque on the telephone at 6:42 a.m., 7:40 a.m., and 10:42 p.m. (27 RT 7082, 7085.) In the late evening hours on Sunday, June 13, 1999, Duque began working the graveyard shift which ended in the early morning hours on Monday, June 14, 1999. (27 RT 7086.) Prior to work, Duque spoke to appellant on the telephone and received another call from him in the early morning hours on Monday while she was working. Appellant wanted to meet her before he was arrested. Appellant told her that he did not know why he was going to be arrested. She agreed to meet him at work because her employer had security. (27 RT 7087-7088.)

Appellant's brother, Reynaldo Zaragoza lived in northwest Stockton close to Park Woods Cleaners where Nina Koker worked. On June 12, 1999, appellant picked up and delivered some drapes that had been cleaned at the cleaners to Reynaldo Zaragoza and stayed about an hour and a half. (28 RT 7169, 7170-7171.) Reynaldo Zaragoza testified that David Zaragoza did not drive at the time of the shooting. (28 RT 7172.)

James Allen testified that David Zaragoza had been living at his board and care home since April or May 1999. (27 RT 7098-7099.) On the night in question, David Zaragoza had left between 8:00 and 9:00 p.m. and had come home between 10:00 and 11:00 p.m. while Allen was watching the 10 o'clock news. (27 RT 7099-7100, 7108-7109.) Since it was past the 10:00 p.m. curfew when appellant returned, Allen had to unlock the front door to let him in. (27 RT 7111.) Allen did not see David Zaragoza again until the next morning. (27 RT 7103.) Residents were permitted to spend the night elsewhere but had to sign out if they did but it was easy for residents to sneak out of the home at anytime. (27 RT 27 RT 7110-7111, 7119.) Allen did not recall David Zaragoza asking for permission to spend the night away from the home on June 11, 1999. (27 RT 7120-7121.) While David Zaragoza lived at the boarding home, he did not have a car nor did he drive. Someone would come by, honk the car horn, and David Zaragoza would leave. (27 RT 7108, 7114.) David Zaragoza really liked appellant and had a photograph of him in the living room of the group home. (27 RT 7107.) David Zaragoza was on medication and went to the mental health clinic almost daily. (27 RT 7118.)

Ernie Williams was David Zaragoza's roommate at the board and care home. (27 RT 7147-7149.) Williams told law enforcement that David Zaragoza came home the night of the shooting and woke Williams up by turning on the television to watch the Letterman Show, which ran until midnight. (28 RT 7316-7318, 7369.) The Letterman Show was on for only a few minutes before it ended and another show came on after David Zaragoza's return. (28 RT 7370.)

Kimberly Kjonaas, a psychiatric technician with the San Joaquin County Mental Health Department, saw David Zaragoza on a regular basis. (27 RT 7139-7140.) On June 11, 1999, David Zaragoza came in around 7:45 in the morning for a cup of coffee. (27 RT 7140-7141.) She did not

recall telling law enforcement that David Zaragoza was stable and living in a group home at that time. (27 RT 7142.) On Sunday, June 13, 1999, David Zaragoza came into the mental health department stating he was sick and needed medication. He wanted to be admitted for a 72 hour psychiatric evaluation, and was defecating in his pants and wiping his feces on his shirt at that time. (27 RT 7142-7143, 7146.) He was not admitted. (27 RT 7146.)

In March 1999, Stockton City Police made contact with David Zaragoza outside the Mayfair Apartments, a group home for people struggling to live a normal life. (28 RT 7202-7204.) Upon request, David Zaragoza gave the police the keys to his room. When they entered, the police found a naked man and half undressed woman with an odor of rock cocaine in the room. Two crack pipes were found inside the room, one of which was being used by the couple. David Zaragoza was arrested for possession of paraphernalia used to smoke narcotics for the second crack pipe but nothing was found on his possession. (28 RT 7205-7206.)

Yolanda Tahod stated that her son, David Zaragoza, spent a lot of time at the library and mental health department. (28 RT 7307.) She also indicated her son had a temper that would flare up every three to four days. (28 RT 7308.) David Zaragoza was also unable to have a long conversation and his mental problems put a large strain on the family. (28 RT 7308-7310.) David Zaragoza was very difficult to be around and sometimes he did not make a lot of sense. (28 RT 7310.)

The 1999 Stockton telephone book had two listings for the name William Gaines. One listing was for 1122 Cameron Way, while the other listing was for 4952 East Elvin Avenue. There were also three listings for the name Billy Gaines. The phone book was available at the San Joaquin County Library. (28 RT 7303-7305.)

Ed Tahod lived a few blocks from Gaines Liquors. (28 RT 7310, 7314.) On the Monday before his arrest, David Zaragoza came over to Ed Tahod's home for dinner around 8:00 p.m. About 30 minutes later, appellant arrived to visit and then took David Zaragoza home around 8:45 p.m. (28 RT 7313.)

San Joaquin County Sheriff Deputy Daniel Anema responded to the crime scene about 25 minutes after the shooting occurred. (27 RT 7188-7199.) Shortly after his arrival, Deputy Anema spoke to Howard Stokes, who, after being reminded by his wife, described the incident he witnessed during the evening hours on Monday, June 7, 1999, where a stranger with what looked like a painted face had been lurking around in the bushes on Cameron Way. Stokes indicated that the subject walked quickly with a gait of a young person and was associated with a green minivan. (27 RT 7189-7191, 7192-7193, 7199-7200.)

Carol Maurer told Deputy Anema she heard five shots and then heard a person by the name of David yell. Maurer looked out her window and saw two white males, possibly kids in their late twenties, running east bound on Cameron Way. One of the two men appeared to have been wearing a baseball hat, dark in color. At the time, Maurer was shaken and it was hard to get information from her. (27 RT 7192, 7194-7195.)

On May 8, 2000, defense investigator William Stewart interviewed Carol Maurer at her residence. (28 RT 7374-7375.) During this interview, Maurer said she heard the struggle the two kids had with William Gaines and looked out her window. She then saw David Gaines run out of the garage and yell at the two kids. Maurer heard the shots and then saw the two kids running side by side all the way to the corner of Cameron Way. (28 RT 7376-7377.) When Mary Gaines came out of her home, the two boys were about midway in front of the first house across the street and to the east of the Gaines residence. (28 RT 7378, 7392.) Later Maurer

clarified her statement, indicating that she was not sure when she heard the gunshots. (28 RT 7392.) Maurer never saw the subjects' faces and could not tell what they were wearing but believed they were possibly in their twenties. (28 RT 7392.) Maurer also explained that she was not prejudice against Mexicans but after speaking to the neighbors, she believed the two Mexican boys were responsible for the murder. (28 RT 7378-7379.)

Stewart also contacted Howard Stokes on two occasions. In August 2000, Stewart played a portion of a videotaped interview of David Zaragoza for Stokes to determine if he could recognize David Zaragoza. Upon review, Stokes said David Zaragoza was consistent with the person he saw on June 7, 1999. (28 RT 7379-7380.) On January 14, 2001, Stokes told Steward that he saw a picture of appellant in the morning paper and the person he saw on June 7, 1999, did not have a mustache like the one appellant had. (28 RT 7380-7381.)

Detective Alejandre interviewed William Gaines within hours of the incident. During this interview, William Gaines indicated the suspect yanked or ripped the bag from his grasp, but did not state there was a struggle over it. (28 RT 7396, 7401.) William Gaines also stated the suspect was wearing lighter color clothing, possibly brown, but not dark in color. (28 RT 7397.) Detective Alejandre also spoke to Cindy Grafius within two hours of the shooting. She too noted that the clothing of the person she saw was light in color, not dark. (28 RT 7398.) When interviewed by law enforcement about the crime, David Zaragoza was wearing light blue pants without pockets, and a reddish colored, medium dark plaid shirt. (28 RT 7399, 7401.)

Nina Koker told Detective Wuest that she smoked Marlboro Lights in the regular pack. A box of Marlboro Lights 100 was inside the Jack-In-The-Box bag found in appellant's garbage can on June 13, 1999. (28 RT

7319-7320.) The Jack-In-The-Box bag was found separate from the white kitchen garbage bag in the garbage can. (28 RT 7323-7325.)

At the time of trial, Raymond Padilla was Nina Koker's fiancé. (29 RT 7504.) Padilla testified that on the night in question, Nina Koker picked him up at the Stockton train station around 5:30 or 6:00 p.m. (29 RT 7506.) After running an errand, they spent the evening at Padilla's cousin's house in north Stockton. (29 RT 7507.) Nina Koker did not intend to stay the night because she had to work early Saturday morning. (29 RT 7508.) However, when she attempted to leave, she discovered she had locked the car key inside her vehicle. (29 RT 7508.) A locksmith was summoned and arrived around 11:30 p.m. to recover the key. (29 RT 7508, 7511.) Padilla initially testified that Nina Koker did not stay long and left around 11:45 p.m. (29 RT 7511.) He ultimately admitted he did not remember the exact time she left that evening or how long she stayed after the locksmith had unlocked her vehicle. (29 RT 7513.) Koker could have stayed anywhere between five and 20 minutes longer. (29 RT 7508, 7513.) Padilla testified that Nina Koker smoked both Marlboro Lights and Marlboro Reds. (29 RT 7510-7511.)

The California Department of Justice tested the pair of black boots, the IOU pair of jeans, the pair of blue jeans, appellant's watch and four swab samples taken from the beige Honda for blood with negative results. (27 RT 7092-7095.) Law enforcement did not lift any fingerprints from Yolanda Tahod's beige Honda because they believed there was no question who controlled the vehicle. (28 RT 7326.)

The defense presented an animated reconstruction of the incident promoting the defense theory of the case that the crime was committed solely by David Zaragoza. (28 RT 7177-7186, 7209-7300; Exhibit 300a.) Its creator, Jorge Mendoza, an animation engineer, admitted the recreation was based on information he received from defense counsel and on guess

work, assumptions, as well as the arbitrary and random selection of facts. (28 RT 7216-7218, 7220-7221, 7225, 7227, 7230, 7231, 7234, 7271, 7285-7286.) Mendoza did not consider all of the facts when developing the recreation such as David Zaragoza dropping the bag after taking it from William Gaines. (28 RT 7235, 7238, 7241, 7271.) Mendoza also got lost when driving what he guessed to be the route taken by David Zaragoza to the Gaines residence on the night of the shooting. (28 RT 7224-7225.) Mendoza was not a reconstruction expert, a crime scene expert nor a ballistic expert. He was hired to support the defense theory of the case, not as an independent entity trying to discover what happened. (28 RT 7293-7296.) In addition, defense counsel asked him to exclude certain facts from the recreation because they did not support the defense theory of the case. (28 RT 7297.)

A more extensive version of law enforcement's videotaped interview of appellant on June 14, 1999, was shown to the jury. (27 RT 6956, 28 RT 7404, 7432-7433, 29 RT 7520, 7562; Defense Exs. 333 & 338.) During the interview, appellant indicated that when he arrived home from work on the day in question, appellant relaxed, exercised then ate some chicken his girlfriend had bought him the night before after they had attended a graduation ceremony in Modesto. (6 CT 1631, 1652-1654, 1668.) Sometime between 6:30 and 7:00 p.m., David Zaragoza called asking if he could spend the night. According to appellant, Nina Koker was home and agreed that David Zaragoza could do so. (6 CT 1631-1632.) Eventually appellant picked his brother up between 9:00 and 9:45 p.m. (6 CT 1634, 1636, 1638.) It took them about 10 minutes to drive to appellant's residence, arriving around 9:45 or 10:00 p.m. (6 CT 1640.) Once there, appellant lied down on a couch in the living room while David Zaragoza spoke on the telephone for about 10 minutes. David Zaragoza then massaged appellant's feet for about 10 to 15 minutes. (6 CT 1641-1642.)

At the time, appellant was wearing blue jeans, a gray sweater and black corduroy slippers. Appellant fell asleep once David Zaragoza was finished with his massage around 10:30 p.m. (6 CT 1643-1644, 1680.) When appellant woke up, he looked at his watch and it was between 11:30 and 11:45 p.m. and his brother was gone. (6 CT 1645-1646.) Shortly thereafter, Nina Koker returned home. (6 CT 1648.) Appellant left for work the following morning around 4:45 a.m. (6 CT 1651-1652.) Upon his arrival, appellant was told he was not needed so he drove to his mother's house and she drove him home. (6 CT 1657.) Sometime after noon, David Zaragoza called appellant from his residence and stated that he left the night before because he was hearing voices. (6 CT 1658-1659.) Later, appellant was told by his mother that David Zaragoza had been picked up by the police. When appellant asked him why, David Zaragoza said he did not know. (6 CT 1659-1660, 1663.) During the interview, appellant asked to smoke a cigarette at which time, Detective Alejandre reached into appellant's personal belongings and handed him Camels. (6 CT 1660; 29 RT 7520-7521.) Appellant admitted that he emptied the white trash bag from the kitchen basket in his house on Fridays. (6 CT 1666-1667, 1711, 1713.) However, he denied that the receipt from Jack-In-The-Box found in the garbage can was his. (6 CT 1672-1674, 1676-1677, 1691.) He also denied any knowledge of the Pyrex bowl found in his garbage can. (6 CT 1684-1685, 1688-1689, 1714.)

The defense also played short excerpts of law enforcement's June 12, 1999, videotaped interview of David Zaragoza. (28 RT 7162-7164, 7358, 29 RT 7521-7525, 7541, 7546, 7563; Exhibits 300A & 340.) During the portion of the interview that was shown, David Zaragoza stated he used his pants pocket to carry his belongings but for his chewing tobacco and lighter. (6 CT 1722-1726.) However, at the time of the interview, David Zaragoza was wearing pants with no pockets, which were the same

pants he was wearing the night before. (6 CT 1726.) As a result, he carried his possessions in his shirt pocket. (6 CT 1726, 7 CT 1728.)

3. Rebuttal

Dr. Kent Rogerson, a psychiatrist, concluded that David Zaragoza was incompetent to stand trial in 2000. (28 RT 7434-7435; 29 RT 7467, 7487.) In doing so, Dr. Rogerson determined that David Zaragoza was not a concrete thinker. (28 RT 7470-7471, 29 RT 7477-7478.) David Zaragoza also suffered from schizoaffective schizophrenia, bipolar type, since at least 1979. (28 RT 7443.) He was a polysubstance abuser, meaning he indiscriminately abused all drugs. (28 RT 7443.) Dr. Rogerson also noted that David Zaragoza was functioning intellectually on the borderline, which was tantamount to being mildly retarded with an IQ of roughly 55 to 70. He was further diagnosed with a personality disorder not otherwise specified because his schizophrenia and mental retardation made it difficult to identify the exact disorder. (28 RT 7443-7446, 29 RT 7480.) Over the last 20 years, David Zaragoza was commonly diagnosed with having an antisocial personality disorder, which included a feeling of being more important than he really was, as well as being deceitful, irresponsible and manipulative in a simplistic manner. (28 RT 7447, 29 RT 7479-7480.) He was also manipulated by others. (28 RT 7449.) Dr. Rogerson noted that David Zaragoza had been on occasion very paranoid. When confronted with someone he felt was after him, David Zaragoza was capable of either reacting violently or running away. (29 RT 7482-7484.) Haldol was one of the main psychotropic drugs used to treat David Zaragoza and he had been prescribed Haldol for the six months prior to June 11, 1999. (28 RT 7438, 7450, 29 RT 7494.)

B. Penalty Phase

1. Prosecutor's aggravating evidence

On September 21, 1975, appellant and Daryl Thomas planned to rob a liquor store in Stockton. (32 RT 8483, 33 RT 8524, 8526.) Appellant, however, required that they be armed. As a result, Thomas obtained a .22-caliber revolver that was partially loaded. Appellant took additional rounds from his father so that the weapon was fully loaded. (32 RT 8484.) When they arrived at the liquor store, appellant recognized the clerk so they decided not to commit the robbery. (32 RT 8484, 8495.) While getting something to eat, appellant and Thomas agreed to rob a cab driver, so Thomas had an employee of the restaurant call for a cab. (32 RT 8495.) Benny Wooliver responded to the call and picked both appellant and Thomas up. Appellant sat in the front passenger seat while Thomas sat in the back of the cab. Thomas had told appellant he would kill the cab driver so as not to be identified. Thomas gave Wooliver a false address and as they drove, Thomas told the cab driver that he was being robbed. Thomas then shot Wooliver behind the right ear. The cab jumped the curb and ran into a house. (32 8485-8486, 8496, 33 RT 8524.) Appellant and Thomas took $50 from the cab and ran from the scene, where they were picked up by a car being driven by Gilbert Renteria with three other male occupants inside the vehicle. After telling the men in the vehicle what had just occurred, they drove toward the crime scene but turned away when they saw law enforcement had arrived. (32 RT 8487, 8488.) Appellant and the other people in the car then agreed to rob a 7-11 convenience store. (32 RT 8487-8488.)

The group randomly selected a 7-11 in north Stockton to rob. (32 RT 8488.) They parked the car behind the store, turned off its lights out but kept the engine running. (32 RT 8471.) Appellant, Renteria and Marcus

Duron got out and entered the store. Initially, Duron possessed the .22 caliber revolver. (32 RT 8469-8470, 8489.) Once in the store, Renteria and appellant surrounded the front counter facing the cash register, while Duron was on his knees on top of the counter trying to open the cash register. (32 RT 8472, 8489, 8505-8506.) According to the store clerk, Dale Sym, all three suspects handled the gun during the robbery. (32 RT 8506.) Eventually, appellant took the gun from Duron who took $167 from the cash register. (32 RT 8489, 8492.) They also took Sym's watch and class ring. (32 RT 8489, 8507.) The three suspects left the store when a car pulled up in the parking lot. (32 RT 8507.) As they ran out of the store, appellant turned and fired the gun twice, hitting Sym once in the small of his back. (32 RT 8473, 8489, 8508.) Renteria and Duron got back into the vehicle, which then drove off at a high rate of speed. (32 RT 8474, 8489, 8491.) Appellant left on foot and eventually stole a bicycle from a backyard and rode home. (32 RT 8474, 8491.) The vehicle was stopped shortly thereafter by law enforcement and the occupants were arrested, including Daryl Thomas. (32 RT 8475, 8477.) The assailants in the vehicle told law enforcement that appellant was also involved in the robbery. (32 RT 8481.)

Appellant turned himself in on September 24, 1975. He was 15 years old at the time. (323 RT 8482.) Upon his arrest, Thomas admitted he had shot the cab driver after initially blaming the shooting on appellant. (32 RT 8500, 33 RT 8557.) During the autopsy, it was determined that the bullet had entered behind Wooliver's right ear and traveled right to left, back to front, and slightly upward. Thus, depending upon the position of the victim's head, the assailant could have been to the right of Wooliver or in the back seat to his right. (33 RT 8569, 8571.) During the trial of Daryl Thomas for Wooliver's murder, appellant testified that he shot the victim. (33 RT 8575-8577, 8581, 8583.) According to appellant's testimony,

Thomas was not in the cab at the time. (33 RT 8578-8579.) Nonetheless, Thomas was convicted of first degree murder. (33 RT 8591.) Prior to Thomas's trial, appellant admitted to first degree murder as an aider and abettor, whereupon he was committed to the California Youth Authority. (33 RT 8588.)

On December 24, 1980, Stockton Police made a felony stop of a car driven by appellant. (32 RT 8441-8442, 8462, 8466.) Four other people were in the vehicle. (32 RT 8461.) A loaded .22-caliber revolver was found underneath the right rear seat while a .30-caliber 17-inch baffled semi-automatic weapon with a banana clip was found in the trunk. (32 RT 8462-8463.) The car was registered to Ruben Arellano, Sr. Ruben Arellano, Jr., was in the car at the time of the stop. (32 RT 8464-8465.) Appellant was convicted of felony receiving stolen property for items other than the weapons found in the car and sent to state prison for one year. (32 RT 8447.)

The Federal Bureau of Investigation (FBI) and the Stockton Police Department got a tip that the Bank of America in Stockton was going to be robbed on Tuesday, July 6, 1982. (32 RT 8371, 8381, 8389.) They were told to be on alert for a blue and white Mustang with four suspects. (32 RT 8399, 8411-8412.) As a result, the FBI and the Stockton Police Department positioned agents and officers on top of a neighboring building as well as in and around the bank. (32 RT 8369, 8371-8373, 8381, 8389, 8399.) Around 10:30 a.m., the Mustang entered the area and three men got out. (32 RT 8399.) One man wearing a baseball cap entered the bank from the east side, pulled out a handgun from his pants and fired one shot into the air. As he did, he yelled "This is it." (32 RT 8373-8374, 8383.) The assailant was immediately shot by a FBI agent but was able to continue to fire his gun, hitting one agent in the shoulder before dying. (32 RT 8383-8384.) At the same time, two other assailants approached the bank's north

entrance, including appellant, who was described as being about five feet, five inches tall, medium build with a mustache, carrying a sawed-off shotgun and wearing a brown pin stripe suit and dark ski mask. (32 RT 8383, 8385, 8387-8388, 8400, 8402, 8405, 8418, 8420.) The other man was carrying a handgun. (32 RT 8419.) However, appellant and his cohort turned and fled after realizing that shots had been fired inside the bank. (32 RT 8385-8386, 8400-8401.) As they did, a FBI agent approached and yelled at appellant to drop his weapon and freeze. (32 RT 8421.) Appellant raised his shotgun and pointed it at the agent as if he was going to shoot. At the same time, another agent on the roof top fired a shotgun at appellant. (32 RT 8401, 8422-8423.) In response, appellant lay down on the cement, spread his arms and placed the shotgun he was carrying to the side. (32 RT 8402.) Appellant's cohort was shot and wounded trying to run from the scene. (32 RT 8423.) Upon inspection, it appeared that appellant's shotgun had malfunctioned. (32 RT 8407-8408, 8422.) Appellant was sentenced to federal prison for his part in the attempted bank robbery and was released from prison in October 1998. (33 RT 8708, 8711.)

David Gaines was 36 years old when he was murdered. (33 RT 8618.) According to his family, David Gaines was an innocent and gentle person, as well as a beloved son, brother and uncle. (33 RT 8645-8646, 8647, 8661.) He loved gadgetry, history, flying airplanes and his family. (33 RT 8618.) He was the son that helped out the most at the liquor store and watched over his father. (33 RT 8623, 8637.) David Gaines was concerned that someone would hurt his father, so he made sure everyone knew he carried a can of pepper spray with him. (33 RT 8637.) David Gaines closed the liquor store on Friday and Saturday nights, but would also show up on the other evenings of the week to help his father close. (33 RT 8638.) Since their mother and father were both over 80 years old, it

was a great comfort to the family members that David lived at home. (33 RT 8650.) According to Mary Gaines, David Gaines loved being home and he did many of the little day to day chores around the house such as put gas into Mary Gaines's car, empty the trash and take care of the dog. (33 RT 8656-8657.) Even though she still had a wonderful family, Mary Gaines had no expectation that her life would ever be the same because of the murder. (33 RT 8660.) William Gaines lost interest in everything but the store. (33 RT 8660.) Because of his murder, David Gaines's parents believed that they would live out the rest of their lives without really having another good day. (33 RT 8654.)

2. Defense mitigating evidence

Yolanda Tahod was raised in Los Angeles by her aunt. (33 RT 8738.) She met Louis Zaragoza, Sr., when she was 14 years old and soon after became pregnant with the first of six children they had together. (33 RT 8682, 8739-8740, 34 RT 8841.) Thereafter, Louis Zaragoza, Sr., was sent to the Youth Authority. Upon his release, Yolanda and Louis Zaragoza, Sr., were married in Stockton in 1956 or 1957. (33 RT 8740.) They returned to Los Angeles and had their other five children, including David Zaragoza and appellant. David Zaragoza was born one year before appellant. (33 RT 8742.)

Yolanda Tahod was afraid of Louis Zaragoza, Sr. (33 RT 8686.) He would often beat her. One time, he hit her with a wooden board causing her arm to swell. (33 RT 8744.) He did not allow her to handle any money. She was there to clean and cook. (33 RT 8743.) The family was on welfare much of the time because he could not keep a job. (33 RT 8743.) At one point, the entire family lived in a trailer. (33 RT 8687, 8713, 8741.)

Yolanda Tahod was unable to protect her children from Louis Zaragoza, Sr. (33 RT 8686, 34 RT 8842.) Since he did not work, he was

home much of the time and drank a lot. (33 RT 8684.) When he drank, he became angry and would frequently hit his children with his fists and other things, particularly appellant and David Zaragoza. On one occasion, he shoved a big cooking spoon into David Zaragoza's mouth because he was upset at how much his son ate. Louis Zaragoza, Sr., picked on appellant because he was really cute and would call him sissy because of his curly hair. (33 RT 8685-8686, 8744-8745.) Appellant's sister, Valencia Pinto, remembered being scared and nervous all of the time while growing up. (33 RT 8741.)

In 1967, Yolanda Tahod separated from her husband after he was hospitalized for digging a big grave for the family in their back yard. She moved her children to Stockton where she married Albert Tahod about a year later. (33 RT 8683, 8690, 8706, 8746-8748, 8767, 34 RT 8841.) Appellant was seven years old when they left his father. (33 RT 8706, 8751.) Shortly thereafter, Louis Zaragoza, Sr., came to Stockton and kidnapped the children, but he was arrested by the police on the freeway trying to return to Los Angeles. (33 RT 8691.) Both Reynaldo Zaragoza and appellant's sister, Valencia Pinto, voluntarily returned to live with their father for a short time after the family had moved to Stockton. (33 RT 8691, 8707, 8715.) Louis Zaragoza, Sr., passed away during appellant's trial in February 2001. (33 RT 8702.) Once married, Yolanda Tahod and Albert Tahod drank heavily and argued a lot while Yolanda Tahod failed to pay attention to her children. (33 RT 8751, 8752, 34 RT 8907.)

Appellant began getting into trouble after the family moved to Stockton. (33 RT 8754-8755.) At seven years old, he was arrested for shoplifting. At eleven, appellant was arrested for shoplifting and malicious mischief. At twelve, he was made a ward of the juvenile court after committing an automobile burglary and sniffing glue. (34 RT 8847-8848.)

After that, appellant did not spend too much time at home because he was often institutionalized. (33 RT 8754-8755.)

At the age of 15, appellant met Daryl Thomas and they began committing strong armed robberies together. (34 RT 8854-8856.) Prior to Benny Wooliver's murder, appellant and Thomas committed a number of such robberies. (34 RT 8922) At Thomas's trial, appellant testified that he shot Wooliver because Thomas was the father of a new born baby and he was going to be tried as an adult for murder. (34 RT 8863, 8932.) In 1975, as a juvenile offender, appellant could be held in the Youth Authority until the age of 25. (34 RT 9062.) On the other hand, the punishment for Thomas if convicted of first degree murder was life in prison. (34 RT 9062.)

On March 17, 1980, appellant was released from the Youth Authority for his role in the shooting death of Benny Wooliver. He was 19 years old. When he came home, appellant found his mother was still drinking. (33 RT 8752, 8769.) While at the Youth Authority, appellant was befriended by counselor Ruben Arrellano, Sr., a man old enough to be appellant's father. Upon his release, Arrellano promised appellant things, took him places and treated appellant like a son. On occasion, he let appellant drive his Cadillac. Appellant looked up to Arrellano. (33 RT 8753-8754, 8769, 8717-8718, 8805, 34 RT 8863-8865.) However, instead of helping appellant, Arrellano encouraged him to continue to live a life of crime. (34 RT 8864.)

On Christmas Eve 1980, appellant was arrested for receiving stolen property and sent to state prison. At the time, appellant was driving Arrellano's Cadillac with loaded weapons. (33 RT 8770, 8728, 34 RT 8864, 8935.) Upon being paroled on May 25, 1982, appellant reconnected with Arrellano. (34 RT 8865.) At the time, Arrellano associated with a woman who engineered bank robberies and he recruited appellant to put

together a crew to carry out these crimes. (34 RT 8866.) During the short time between his release from prison and his arrest for the attempted back robbery of Bank of America, appellant and his crew committed five armed bank robberies. (33 RT 8770, 8728, 34 RT 8866, 8937.)

In 1997, appellant was released from federal prison for the attempted bank robbery, but his parole was violated and he was sent back to federal prison for a year for associating with the driver of the car used in the foiled attempt to rob the Bank of America. (34 RT 8872-8873.) Upon his rerelease from federal prison in 1998, appellant decided to change his life. (33 RT 8719.) He reestablished a relationship with his mother with the help of religion. (33 RT 8755-8756, 34 RT 8875.) He attended Delta College in Stockton and learned how to weld, eventually getting a job as a welder and enjoyed his work. (33 RT 8694, 8711, 8719-8720, 8759-8760, 8806.) Appellant also had a girlfriend, wanted to get married and start a family. He became more involved with his own family, including his nieces and nephews. (33 RT 8697-8698, 8721-8722, 8757-8758, 8806-8808, 34 RT 8880.) He made arrangements to borrow money from his brother to purchase a car. (33 RT 8807.) There was no indication he was not adjusting to life after prison. (33 RT 8699, 8760.)

On the other hand, David Zaragoza was known for his bursts of anger. He would start hollering and saying things about people. (33 RT 8703-8704.) He talked about his royal inheritance from the country of San Salvador, and would accuse local judges, attorneys and county mental health officials of being racially prejudiced against him. David Zaragoza also drew spaceships and sent them to his sister, Valencia Pinto. (33 RT 8704.)

Yolanda Tahod testified that David Zaragoza called her on the night of the murder and told her that appellant had fallen asleep while David Zaragoza massaged his feet. (33 RT 8766, 8799-8800.) Yolanda

Tahod also spoke to David Zaragoza a week after his arrest. (33 RT 8762.) At that time, he admitted to his mother that he committed the shooting by himself because he needed money for rock cocaine. He also admitted that he took her car to commit the crime. (33 RT 8763-8764, 8780, 8786.)

On June 21, 1999, David Zaragoza told Reynaldo Zaragoza that appellant had fallen asleep on the night in question so he left and walked to Charter Way where he met up with an unknown white man who offered David Zaragoza a ride. (33 RT 8729, 8736.) While in the vehicle, David Zaragoza saw a revolver. The white man drove to somewhere in north Stockton where he shot someone at a residence before taking David Zaragoza home. (33 RT 8730.) According to David Zaragoza, the white man had long blond hair to his shoulders, had a thin build, and raggedy clothing. (33 RT 8732.)

During appellant's trial, Yolanda Tahod, Reynaldo Zaragoza, and Nina Koker visited David Zaragoza at Napa State Hospital at which time he admitted he committed the shooting and the robbery by himself after he took his mother's car. (33 RT 8765, 8722-8724, 8731.) He needed drugs that night and a white guy gave him the gun. (33 RT 8788-8789.) After the shooting, he drove to Nina Koker's house and later sold the gun for drugs. (33 RT 8734.)

Tami Brown, the court reporter at appellant and David Zaragoza's arraignment on June 23, 1999, testified that shortly after the brothers were brought into the courtroom, David Zaragoza stated he wanted to talk to the judge. (34 RT 8962-8963.) Despite the judge's warning about speaking in court, David Zaragoza stated four times that he shot and killed the person and also said he wanted to be sentenced that day. (34 RT 8964, 8970-8972.) Later, David Zaragoza pulled down his pants and defecated in the courtroom after which he was removed from the proceedings. (34 RT 8965-8966.)

Ilene Yasemsky, a licensed clinical social worker, conducted a psychosocial assessment on appellant and concluded that, contrary to the prosecutor's view of the case, appellant was only an armed robber. (34 RT 8820-8821, 8823-8824, 8832, 8839, 8946.) At the time of the Wooliver murder and the 7-11 robbery, Yasemsky opined appellant was at his worse. He was truly out of control, acting out as a defense to all the abuse he had suffered while growing up. (34 RT 8862, 8929.) However, she also noted that appellant was scared when he fired two shots in the 7-11, hitting Sym once. (34 RT 8859.) She claimed that appellant used guns in committing his crimes to control the amount of violence through intimidation. (34 RT 8867, 8871, 8942.) Nonetheless, she acknowledged that all of appellant's brothers and sisters were victims of childhood abuse as well, but they did not take the same path appellant took. (34 RT 8910.)

Prison ministry held bible studies and religious services at the San Joaquin County Jail. From August 9, 2000, to January 26, 2001, appellant attended these religious activities while awaiting trial. (34 RT 8992, 8984, 9002.) Prior to joining, appellant had already accepted the Lord, was interested in following the Christian life and was sincere about his religious beliefs. (34 RT 8984-8986, 8996.) Appellant also recruited other men in the jail to participate and held bible studies on days when the ministry was not present. (34 RT 8984-8985, 8995, 9002.) Appellant was remorseful and, after one meeting, indicated he "would never do this again." (34 RT 8996, 8998-8999.) A number of fellow in-custody defendants testified that through appellant's ministry and bible studies, they gained the peace and salvation they needed to lead a better life inside and outside of jail. (34 RT 9008-9009, 9010, 9015-9016, 9019, 9025-9026, 9033, 9054, 9078.)

Toni Duque had known appellant since their early teenage years. (34 RT 9038-9039.) Upon appellant's release from prison in 1999, they

started dating. (34 RT 9043, 9051.) However, in May 1999, their relationship as boyfriend and girlfriend ended because he wanted a family and Duque was not interested in having more children. (34 RT 9045-9046, 9051.) On the day appellant was arrested, she met him at her work because she knew the police had contacted him and she wanted to be in the open and in control of the situation, not because she was afraid of appellant. (34 RT 9047, 9050.)

Appellant testified that he did not kill David Gaines. (35 RT 9079.) He admitted he started getting into trouble when his family moved to Stockton when he was seven or eight years old. He was not interested in school and was kicked out of junior high. (35 RT 9080.)

When he was twelve or thirteen years old, he was placed in the California Youth Authority for approximately nine months after escaping from Juvenile Hall. (35 RT 9082, 9215.) During this time, he had roses with his nickname "Chuco" tattooed on his left arm and the United Farm Workers' bird on his right forearm. He also had "SSS" which stood for South Side Stockton tattooed on his stomach. (35 RT 9082-9083.)

Appellant had a positive experience the first time he was sent to the California Youth Authority because he was accepted and was allowed to join in the activities. (35 RT 9084.) Upon his release in 1975, he came home but spent most of his time living on the streets where he met Daryl Thomas. Together, they began committing crimes, including four or five strong-armed robberies of people on the street. (35 RT 9085-9088.) Appellant testified that Thomas wanted to rob a liquor store but appellant required that they have a weapon. Thomas obtained a .22 revolver that had three or four bullets. Appellant admitted he took ammunition from his father so that the weapon would be fully loaded. (35 RT 9099, 9092, 9185-9186.) Appellant knew the clerk of the liquor store they planned to rob so they left and walked downtown and ate at a restaurant. While eating, they

decided to rob a cab driver so Thomas called a cab. (35 RT 9091-9092.) Once in the cab, Thomas gave the cab driver a false address. As the cab driver drove, Thomas pulled out the gun and put it to the head of the cab driver and told him to stop the car. The cab driver refused so Thomas shot him once in the head. The car ran into the side of a house. Appellant jumped out of the car and ran and Thomas followed. They were picked up by some guys in a station wagon. (35 RT 9092-9095, 9186, 9191.) Appellant told the car's occupants what had happened with the cab driver so they drove back to check it out but turned around when they saw that house lights were on at the scene. (35 RT 9095, 9192.) The group then decided to rob a 7-11 on the north side of town. Appellant agreed because of his loyalty to his friends. (35 RT 9095, 9194.)

Once at the 7-11, Thomas gave appellant the gun and told him to rob the store with two other occupants in the car. Once inside, appellant pulled the gun out and told the clerk, "This is a robbery." (35 RT 9095-9096.) Appellant gave the gun to a cohort and opened the cash register while another assailant struggled to pull the rings off the clerk's fingers before they left the store. Appellant was the last to leave and as he was going out the door, he fired his weapon twice as Sym bent down to retrieve something behind the counter, hitting Sym once in the back. (35 RT 9098-9097, 9195-9198.) The station wagon drove off without appellant, so he stole a bicycle and rode home. (35 RT 9097.) Appellant turned himself in a couple of days later and told the police what had happened. (35 RT 9098-9099.) A few months later, he admitted to being an aider and abettor to murder and was placed in the Youth Authority. (35 RT 9100.) Appellant agreed to testify at Thomas's trial that Thomas was not in the cab because Thomas was facing a sentence of life in prison and appellant felt for him. (35 RT 9100-9103.)

While in the Youth Authority, appellant was befriended by Ruben Arellano, Sr., who worked as a supervisor. (35 RT 9104-9106, 9200.) Upon appellant's release in 1980, Arellano, Sr., picked appellant up in his Cadillac and gave him $500. Appellant was driving Arellano's Cadillac when he was pulled over and arrested for receiving stolen property on Christmas Eve, 1980. Appellant and a group of friends, including Arellano's son, had burglarized some homes just before the stop. Appellant received a year in state prison for this offense. (35 RT 9110, 9201.) Appellant claimed he was not aware of the weapons found in the car and that they belonged to Arellano. (35 RT 9107-9109, 9200, 9202.)

When he got out of state prison, Arellano, Sr., contacted appellant and introduced him to a woman who planned bank robberies. (35 RT 9111-9112, 9115.) With the help of Arellano and the woman, appellant gathered a crew of friends and committed about five bank robberies in a little over a 30-day period. (35 RT 9112, 9117, 9121, 9203-9205.) They used guns in every bank robbery but for the first one, when the bank teller laughed at them because they were unarmed. (35 RT 9122.) After each bank robbery, they met at Arellano's house to split the money and then traveled to Lake Tahoe for the weekend where appellant spent his share of the money. (35 RT 9118, 9205-9206.)

During the attempt to rob Bank of America, appellant admitted he was armed with a sawed-off shotgun. However, before the crime occurred, appellant broke the firing pin to make it inoperable. During the bank robbery, appellant admitted he may have pointed the weapon at a FBI agent when the shotgun came out of his coat. (35 RT 9122, 9208, 9211, 9218.) Appellant pled to the attempted bank robbery charge because he was guilty of the crime and wanted to take responsibility for the offense. (35 RT 9123.) He spent 16 years in federal prison and was released in 1997, but returned on a parole violation. (35 RT 9125.) While in federal prison,

appellant's brothers and sisters visited him and he saw how they were prospering, including having families of their own. He realized he wanted the same thing.[9] (35 RT 9125-9126.)

Upon his release in October 1998, appellant obtained his driver's license. (35 RT 9127, 9222.) He attended Delta College where he took courses in machinery and welding. (35 RT 9128-9129.) In April 1999, he got a job as a welder in Tracy after passing a welding test, a physical and drug test. He also advised his employer that he had been to prison and why. It was the first regular job he had ever had and it made appellant feel great. (35 RT 9131-9135, 9222.) He usually worked six days a week and spent his Sundays with Duque in Modesto even after the relationship became one of friends. He also went to church on a regular basis. (35 RT 9148-9149.) Appellant was regularly involved with David Zaragoza after he was released from federal prison and living with Nina Koker, but he also spent a lot of time with other family members, including Eddie Tahod's daughters, who he took to Gaines Liquors to buy them candy and soda. (35 RT 9145-9148.)

Appellant admitted that he drove David Zaragoza home after he ate dinner at Eddie Tahod's house the Monday evening before the murder. (35 RT 9149.) On the way home, appellant stopped at Gaines Liquors, which was only a few blocks from Eddie Tahod's home and bought David Zaragoza cigarettes and soda. (35 RT 9151.) Appellant then drove David Zaragoza straight home without stopping at the Back Door. (35 RT 9151.) Rather, appellant testified that he had been to the Back Door with David Zaragoza the week before to check on their sister, Nina Koker. (35 RT 9154-9155.)

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[9] Appellant had been a free man for 20 months since September 23, 1975. (35 RT 9218.)

Appellant was arrested at the county mental health department with his brother after he drove him down to get a check cashed. (35 RT 9161-9162.) After his arrest, appellant called his parole agent to report he had been contacted by the police. (35 RT 9156.) He also voluntarily agreed to accompany Detectives Alejandre and Wuest to the sheriff's department for an interview on June 13, 1999. (35 RT 9157-9158.) On Saturday June 12, 1999, he went to Modesto to speak to Duque about what was happening. (35 RT 9160.) The night before the murder, appellant attended a graduation ceremony with Duque in Modesto. At that time, he showed Duque the bruise he had on his right shoulder and the one he had on his calf he received at work. (35 RT 9175-9177.)

On June 11, 1999, appellant testified he worked a regular day and then went home because his mother needed the car. (35 RT 9165, 9172.) Once home, David Zaragoza called and asked if he could spend the night. Nina Koker agreed he could. When his mother returned the car, appellant picked David Zaragoza up and they returned to his house. (35 RT 9172-9173.) David Zaragoza then spent a few minutes on the phone before he massaged appellant's feet. Appellant fell asleep during the massage. When he woke later, David Zaragoza was gone. He did not see David Zaragoza again until the following day, at which time he told appellant he did not spend the night because he was hearing voices and had to leave. (35 RT 9178-1979.)

3. Prosecution rebuttal

Laura Perez, an investigator for the San Joaquin County Public Defender's Office, testified that she interviewed Stella Tahod at her residence on August 12, 1999. (36 RT 9399-9400.) During the interview, Stella Tahod indicated that David Zaragoza called her home from the county jail and said, "I'm getting 250 milligrams of Handol. Then they

wonder why we shot that man." (36 RT 9402, 9408.) Perez was working for David Zaragoza's attorney. (36 RT 9391, 9404.)

Stella Tahod denied she told Perez that David Zaragoza said, "we" shot that man." (36 RT 9388.) Rather, she told Perez that her brother said, "Then they wonder why I shot that guy." (36 RT 9389.)

On August 12, 1999, Ed Tahod visited David Zaragoza in jail. During this visit, David Zaragoza said that while he was at Nina Koker's house, appellant had fallen asleep so David Zaragoza took off walking and was picked up by a white man in a car. As they drove, the white man flashed a gun in the car. David Zaragoza then dozed off. He did not mention anything about shooting anyone at that time. (36 RT 9393-9396.)

San Joaquin County District Attorney Investigator Mitchell Thirty interviewed Yolanda Tahod on August 3, 1999. (36 RT 9413-9414.) At that time, she indicated that she spoke to David Zaragoza while he was in jail. David Zaragoza told her that he had walked to a donut store on Charter Way to buy a soda when he approached a white man in a car. The white man said he would give David Zaragoza some change if David Zaragoza went with him. They then drove to a residence David Zaragoza did not recognize in north Stockton where David Zaragoza said that the white man shot somebody. (36 RT 9416.) Later, David Zaragoza told his mother that he had killed a man. (36 RT 9417.) He stated he was on medication and did not remember everything but he did know he didn't mean to do it. (36 RT 9417, 9421.)

When Detective Alejandre interviewed David Zaragoza on June 12, 1999, about what he had been doing the night before, there were some inconsistencies. (36 RT 9424.) David Zaragoza initially said he had not been with appellant at all Friday evening but had left the group home and walked to Taco Bell, not the donut shop. Nor did he say anything about the unknown white man or driving that evening. He denied any association

with the murder of David Gaines. (36 RT 9425-9427, 9438-9439.) When Detective Alejandre asked Yolanda Tahod if David Zaragoza had contacted her the night of the shooting, she said no. (36 RT 9427-9428, 9440.)

On June 21, 1999, Yolanda Tahod told Detective Wuest that she received a call from David Zaragoza on June 17 and 21, 1999, wherein he told her that on the night of the murder, he left appellant's residence after appellant had fallen asleep, and he walked around in the area of Charter Way. David Zaragoza also said he came into contact with a white man who gave David Zaragoza a ride to north Stockton. David Zaragoza did not remember anything else or how he got home. (36 RT 9443-9445.) Yolanda Tahod stated that David Zaragoza called her in the evening of June 11, 1999, but she could not remember what he had said. (36 RT 9443, 9445.)

4. Defense surrebuttal

Keith Yeyuker, a crisis clinician at the San Joaquin County Mental Health Services, testified that he had contact with David Zaragoza since the early months of 1999. (36 RT 9450-9451.) In April 1999, David Zaragoza reported that he was abusing drugs and not taking his medication. He also indicated that he might kill himself or others. (36 RT 9453.) Yeyuker did an assessment on David Zaragoza dated February 10, 1999, wherein he considered David Zaragoza a danger to others. (36 RT 9457.)

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO SUPPORT APPELLANT'S CONVICTIONS

Appellant contends that there was insufficient evidence to support his convictions. (AOB 44-67.) Respondent disagrees.

A. Relevant Legal Principles

When there is a challenge to the sufficiency of the evidence to support a judgment upon appeal, this Court examines the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) "'[I]f the verdict is supported by substantial evidence, [the Court] must accord due deference to the trier of fact and not substitute [its own] evaluation of a witness's credibility for that of the fact finder.' [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

The same standard of review applies to cases in which the prosecution relies mainly on circumstantial evidence (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), and to special circumstance allegations (*People v. Ochoa,* (1998) 19 Cal.4th 353, 413-414). "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Snow* (2003) 30 Cal.4th 43, 66, internal quotation marks omitted.)

"An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.) "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." (*People v. Rodriguez, supra,* 20 Cal.4th at p. 11.) "Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable

doubt." (*People v. Bean* (1988) 46 Cal.3d 919, 933, internal quotation marks omitted.)

Here, there was no claim that the offenses and special allegations charged in this matter had not been committed. Instead, the only issue in dispute was the identity of the shooter. In that regard, there was substantial evidence introduced at trial from which a reasonable jury could conclude that appellant was the gunman beyond a reasonable doubt.

B. Analysis

Based on the evidence presented at trial, it was reasonable for the jury to have concluded that two people committed the crimes in this instance. David Zaragoza was one of them. However, given the circumstances surrounding the murder, he was not the person who shot David Gaines. Rather, the evidence demonstrated that appellant was the gunman.

1. David Zaragoza did not act alone, nor was he the gunman

Contrary to appellant's principal contention (AOB 53), David Zaragoza did not act alone and shoot David Gaines. After being struck by David Zaragoza and having the brown paper bag ripped from his hands, William Gaines testified he watched David Zaragoza run east down Cameron Way. (24 RT 6187-6188, 6248, 6249-6250, 6251, 6269, 6271, 6282, 6291.) Upon calling for his son, William Gaines heard gunshots. (24 RT 6247.) According to William Gaines, David Zaragoza had run approximately 10 to 20 feet down the street and was not yet halfway past the Gaines's driveway when the gunshots were fired. Upon hearing the shots, William Gaines ducked behind his station wagon, losing sight of David Zaragoza momentarily as a result. (24 RT 6252, 6271-6272, 6290, 6293-6294, 6303, 6313-6315, 6331.) William Gaines testified that he did not see David Zaragoza fire a weapon as he ran down the street. Nor did he see David Zaragoza run up onto the sidewalk or up the Gaines's driveway

before the shots were fired. (24 RT 6252-6253, 6271, 6301.) Based upon this testimony alone, the jury could have reasonably concluded that someone other than David Zaragoza shot David Gaines on the driveway.

Even so, additional evidence supports the conclusion that David Zaragoza was not the person who shot David Gaines. Upon standing up from behind the station wagon, William Gaines testified at trial that he looked down the street and saw two men about 50 to 100 feet away running east down Cameron Way. One man was 10 feet ahead of the other man. (24 RT 6272, 6272, 6278, 6294-6295.) When interviewed by law enforcement at the crime scene, William Gaines said he looked down the street after the shots were fired and saw only David Zaragoza running down the street. (24 RT 6328, 6331.) Despite this contradiction, other evidence corroborates William Gaines's trial testimony he saw two men. Carol Maurer consistently stated she saw two people running down Cameron Way after shots had been fired. (23 RT 6013-6014, 6021-6023, 6027, 6032, 28 RT 7376-7377.) Like William Gaines, Maurer stated that one man was ahead of the other by a few feet. (23 RT 6024-6026.) The short distance that separated the two assailants while they ran down the street after the shooting could have explained why Cynthia Grafius saw only one person running eastbound on Cameron Way when she momentarily looked out her kitchen window. (23 RT 6034, 6038-6039, 6049.) In fact, it was entirely possible the one suspect ran by Grafius's house before she even had a chance to look out her window.

Furthermore, David Gaines's body and his mace canister were found halfway up the driveway, or approximately 24 feet from the garage. (23 RT 5961, 5966.) He had been shot four times. (25 RT 6573, 6589, 6592, 6595.) All four wounds were contact wounds caused by gunshots fired less than 10 to 24 inches from his body. (25 RT 6579-6580, 6588-6589, 6592, 6596, 6604.) In order for David Zaragoza to have shot David Gaines at

such a close range, he had to have changed direction away from his escape route eastbound on Cameron Way by turning south and running across the sidewalk and up the driveway to within a little over a foot of David Gaines, all while he armed himself as he carried a paper bag containing what he believed to be the liquor store receipts.

However, there are serious flaws in this theory. As previously discussed, William Gaines watched David Zaragoza run down Cameron Way after David Zaragoza ripped the bag from his grasp. As he did, William Gaines did not see David Zaragoza change course and run up the driveway. Nor did William Gaines see muzzle flashes come from David Zaragoza. Rather, David Zaragoza was running down the street with his back to William Gaines when the shots were fired. (24 RT 6252-6254, 6271, 6301, 6331.) Appellant contends that since the shooting took place halfway up the driveway, William Gaines could not see who fired the shots, particularly in light of the fact he was knocked down. (AOB 51.) Granted, William Gaines may not have had a clear view of the driveway given his location on the street when his son was shot. In fact, he did not see who shot his son. Nonetheless, this fact does not support the argument that David Zaragoza was the shooter because as he testified to at trial, William Gaines was watching David Zaragoza run down the street when the shots were fired. (24 RT 6252, 6271-6272, 6290, 6293-6294, 6303, 6313-6315, 6331.)

Appellant also argues that in response to hearing David Gaines yell "Hey" and seeing David Gaines move down the driveway with a mace canister in his hand, David Zaragoza pulled out a gun, spilling his paper work in the process. (AOB 53-54.) However, appellant fails to explain how David Zaragoza armed himself after taking the bag from William Gaines. (AOB 54.) When David Zaragoza took the paper bag from William Gaines, he did not have a weapon in his hands. (24 RT 6249.) In

addition, on the night in question, David Zaragoza was wearing blue pull-up pants, similar to pajamas, appellant had bought him. In fact, appellant told law enforcement, David Zaragoza wore those pants everywhere. (6 CT 1562-1564.) These pants had no pockets. (6 CT 1726.) Thus, David Zaragoza had no pants pockets in which to carry the .38 or .357-caliber revolver that was more than likely used in this instance to shoot David Gaines. (26 RT 6769.) On the other hand, David Zaragoza admitted to law enforcement he carried his personal belongings in his front shirt pocket when he had no pants pockets. (6 CT 1726, 7 CT 1728, 28 RT 7399, 7401.) As the prosecutor argued, it is more reasonable to believe that David Zaragoza's paperwork found near the station wagon fell out of his shirt pocket when he ripped the brown paper bag from William Gaines, dropped it on the ground and then bent down to pick it up with both hands before running eastbound down Cameron Way. (24 RT 6248, 6249-6250, 6251, 6269, 6271, 6282.) Furthermore, it is unreasonable to believe that David Zaragoza, who appellant argues was spiraling downward and considered himself a danger to others (AOB 58) would use the weapon to make certain his getaway by shooting David Gaines, but not wield the gun to commit the robbery of the liquor store receipts.

In addition, the physical evidence does not support the theory that David Zaragoza acted alone and shot David Gaines. The Gaines's driveway sloped downward, away from the garage, toward the street, or in a northerly direction. (24 RT 6178-6179.) If David Zaragoza was the shooter as appellant contends, he had to have run from the station wagon with the brown bag in his hands, up the driveway toward the garage, or in a southerly direction, to meet and then shoot David Gaines. David Gaines would have been coming down the driveway toward the street, or in a northerly direction, if such was the case. However, one of the bullets struck David Gaines in the left wrist, and then traveled underneath the untanned

portion of his skin where he wore his watch. (24 RT 6156, 25 RT 6573-6576, 6583-6584.) Although it was impossible to determine the order of the four shots (25 RT 6611), the shot to his left wrist was likely the first one sustained by David Gaines because it was not fatal and he was probably shot when he raised his left arm in self defense while holding the mace canister in his right hand. (25 RT 6605-6606.) The force of the gunshot to David Gaines's left wrist not only blew his watch off, it blew the watch apart, scattering pieces primarily in a northwesterly direction from where his body was found on the driveway. For instance, the watch band was located west of the body near the grass line, the watch crystal was found on the street in front of the station wagon, the dial pin was found in the middle of the street, and the backing was discovered a few feet north of the front tire of the station wagon. (23 RT 5977-5978, 5982-5983, 5985, 24 RT 6080, 6141-6142, 6181-6182, 6189-6191, 6195; People's Exs. 1 & 3.) Genine Montelongo lived at 1133 Cameron Way, or northwest and on the opposite side of the street from the Gaines residence. A couple of days after the shooting, she found the face of David Gaines's watch in her front yard, north of a tree, some 72 feet from where the station wagon had been parked. (23 RT 5982-5985, 24 RT 6142, 6190-6191, 6195.) If the gunman was facing David Gaines as appellant contends, consistent with the direction of the gunshot, the force of the bullet that hit David Gaines's wrist would have blown the pieces of his watch backward or behind him. Given the fact that the pieces of his watch were found primarily to the northwest of his body, David Gaines must have been facing southeast toward the edge of the garage and the French residence, not toward the street as appellant contends, when he was shot. If David Gaines had been facing the street, the force of the gunshot would have scattered the pieces of his watch behind him about the house and garage area, not into the street. Therefore, in light of this physical evidence, David Zaragoza could not have been the

shooter as appellant argues. Rather, the shooter was someone else, moving out from the cover of darkness southeast of the Gaines's driveway. The blood spatter found near David Gaines's body that ran in a northwesterly direction is additional evidence that supported this conclusion for the same reasons. (24 RT 6156-6157, 6177, 6203.)

Another bullet that struck David Gaines entered the left side of his chest and eventually exited out from his lower left back. (25 RT 6589-6592.) Six days after the shooting, David French found a spent bullet on his lawn east of where David Gaines's body was found, some 16 feet from the corner of the garage. (23 RT 6005, 6119-61126.) The bullets retrieved from David Gaines's head and spine, as well as the bullet French found on his lawn, appeared to have been shot from the same gun. (26 RT 6749-6750, 6764, 6766-6768, 6772.)

Appellant contends that the bullet found by French suggests that the shooter was standing to the west of David Gaines, where William Gaines had parked, and where David Zaragoza would have been when he moved toward David Gaines. (AOB 51.) Again, appellant is mistaken. As noted above, the bullet exited from the left side of David Gaines's lower back. Under appellant's theory, if David Zaragoza was the shooter, he would have come up the driveway, or south, toward the garage to meet David Gaines, not from the west. David Gaines would have been facing north or down the driveway toward the street in order to confront David Zaragoza coming up the driveway. If such was the case, David Gaines's left side would have been facing west, or toward the Gaines's lawn, not east toward David French's lawn. Thus, under appellant's theory, the bullet would not have been found on French's lawn, but rather on the Gaines's lawn. However, such was not the case for the bullet was found on French's lawn, which meant David Gaines was facing

south toward the garage when he was shot by someone other than David Zaragoza.

The trajectory of the two bullets that entered David Gaines's chest also confirmed the prosecutor's argument that the shooter came from the southeast, not the north, or from the street. David Gaines was five feet, nine inches tall. (25 RT 6569.) Both appellant and David Zaragoza were about five feet, six inches tall. If the shooter approached from the street as appellant contends, David Gaines would not only have had a height advantage but also would have been on higher ground given the slope of the driveway. Thus, it stands to reason, if the shooter was shorter and standing on lower ground, the trajectory of the two bullets that entered David Gaines's chest would not have been downward or straight, but rather upward. However, in this instance, the two bullets that entered David Gaines's chest had a downward trajectory. (25 RT 6589-6593.) Given the trajectory of these two bullets, the more reasonable interpretation was that the shooter was on higher ground on the driveway, or facing the street, while David Gaines was on lower ground, facing the garage when he was shot by someone besides David Zaragoza.

2. Appellant was the gunman

Contrary to appellant's argument (AOB 46), a reasonable trier of fact could have rationally concluded from the evidence presented at trial that appellant was the person who emerged from the darkness southeast of the Gaines's driveway and shot and killed David Gaines.

The Pyrex bowl and blue lid were found in appellant's garbage can, not in David Zaragoza's possession or at his residence. (25 RT 6511-6514, 6527-6529, 26 RT 6714, 6727, 6831.) After the crime was committed, it is evident that the bowl was brought into appellant's house, removed from the brown paper bag and placed in a white grocery bag, which was tied and then placed in the kitchen garbage bag. Such deliberate conduct was

inconsistent with David Zaragoza's persona. In addition, nor more than a couple days after the murder, appellant took the kitchen garbage bag from his mother and threw it into the garbage can. (25 RT 6392-6393.) Superficially, appellant's conduct could be dismissed as merely a son helping his mother. However, under the circumstances, a more reasonable explanation was that appellant was making sure the bowl was disposed of without it being discovered. Four days after the murder, police found the blue lid inside a tin can in appellant's garbage can. (26 RT 6832, 27 RT 7026.) Before it had been thrown away, the tin can had been used as an ash tray in the living room, where appellant claimed he was asleep when the murder occurred. (26 RT 6832, 27 7026.) Thus, if David Zaragoza had acted alone, he had to have disposed of the bowl in the kitchen garbage and the lid in the tin can in the very room appellant was allegedly asleep in without waking appellant, all of which was highly unlikely in light of David Zaragoza's nature. Therefore, given this evidence, a trier of fact could reasonable conclude that appellant was involved in the murder.

In addition, it was clearly established at trial that appellant was with his brother at appellant's residence before the murder on the night in question. (6 CT 1557-1559.) Appellant also had his mother's car that evening and David Zaragoza did not drive a car. (6 CT , 1568-1570, 1603-1605; 25 RT 6390-6391; 26 RT 6735-6736.) From these facts, the jury could have reasonably concluded that appellant drove his brother to the crime scene and since David Zaragoza was running down the street when the shots were fired, appellant was the one who murdered David Gaines.

At trial, appellant presented the alibi defense that he fell asleep on the couch around 10:30 p.m. on the night in question while his brother rubbed his feet. When appellant woke up later that evening, his brother was gone. (6 CT 1558-1559.) However, appellant's account lacked credibility. In his first interview with law enforcement, appellant claimed he fell asleep on his

living room couch around 10:30 p.m. while his brother was massaging his feet. He woke up between 11:00 and 11:30 p.m. (6 CT 1558-1559.) But if such was the case, there was not enough time for his brother to have committed the murder alone, travel back to appellant's residence and dispose of the Pyrex bowl and lid by 11:30 p.m. given that David Gaines was shot at about 11:15 p.m. Appellant changed his story and told law enforcement during his second interview that when he woke up on the night in question, he looked at his watch and it was between 11:30 and 11:45 p.m. (6 CT 1608-1609.) A trier of fact could reasonable infer that appellant's change in times was a blatant attempt to get the timing of his alleged alibi in sync with the murder.

In addition, it was unreasonable for the jury to believe David Zaragoza could have met the time line of the shooting if he acted alone. David Zaragoza left appellant's residence no earlier than 10:30 p.m. when appellant claimed he fell asleep. (6 CT 1558-1559, 1607.) If this was true, David Zaragoza had less than 30 minutes to get home since Allen testified that he was watching the news which ended at 11:00 p.m. when David Zaragoza returned home that evening. (27 RT 7099-7100, 7109.) The distance between David Zaragoza's residence at 357 West Fifth Street and appellant's home at 429 South Airport Way was 2.3 miles. (26 RT 6782.) In his second interview with law enforcement, appellant indicated it took him about 10 minutes to drive home from David Zaragoza's residence. (6 CT 1640.) However, as appellant admitted, David Zaragoza did not drive. (6 CT 1604-1605.) Thus, if on foot, it would have been extremely difficult for David Zaragoza to have covered the 2.3 miles to his home from appellant's residence before 11:00 p.m. Assuming he did make it home before 11:00 p.m. on foot, David Zaragoza certainly would not have been able to then walk the 7.5 miles to the Gaines residence before William Gaines arrived home around 11:15 p.m. (26 RT 8782-8783.)

Appellant argues that David Zaragoza took the car key to their mother's car after appellant had fallen asleep and used the vehicle to commit the crimes. (AOB 54.) However, David Zaragoza did not drive and had not in years. Nonetheless, even if he was capable of driving, no trier of fact could have reasonably agreed with appellant's contention since David Zaragoza still would have failed to meet the time line of events on his own. According to appellant, it took about 10 minutes to drive from David Zaragoza's home to appellant's residence. (6 CT 1640.) Thus, David Zaragoza would not have arrived home any earlier than 10:40 p.m. after leaving appellant's residence when appellant fell asleep at 10:30 p.m. Upon his arrival, David Zaragoza had to wait for Allen to unlock the front door to let him in because it was past his curfew. (27 RT 7111.) Once inside, David Zaragoza had to immediately sneak out of the residence without being noticed by Allen or his roommate Williams. (27 RT 7110-7111.) He then had to retrace his steps back to where he had parked the car and then successfully navigate the 7.5 miles across town and find the Gaines's neighborhood. (26 RT 6782-6783.) Once there, he had to park the vehicle on another street, make his way down Cameron Way without being noticed, determine which house was the Gaines residence and hide all before William Gaines arrived home at 11:15 p.m. This would have been difficult for a person of normal intelligence to accomplish in such a tight timeframe. For David Zaragoza, it would have been improbable. David Gaines was mentally challenged, suffered from significant psychiatric problems and drug abuse. (25 RT 6403-6408, 6420.) He had no connection to the Gaines family and he did not drive. Thus, it is unreasonable to believe he was capable of driving the 7.5 miles across town without difficulty. It is even more questionable that he had the ability to actually find the Gaines residence in a timely fashion on his own. This is particularly true given the fact that appellant's own expert in animation

reconstruction, Jorge Mendoza, got lost trying to locate the same residence during his field investigation. (28 RT 7224-7225.)

But assuming that David Zaragoza did all of the above efficiently without assistance, the timing of his return trip after allegedly committing the robbery and murder by himself was laden with more problems. Under the duress of having just shot someone, David Zaragoza had to run back to where his mother's car was parked. He then had approximately 15 minutes, or until 11:30 p.m., to drive the 6.1 miles back to appellant's home and return the car without mishap and before his brother woke up. (26 RT 6783-6784.) If he arrived any later than 11:30 p.m., David Zaragoza would not have had enough time to then walk the 2.3 miles home and wake his roommate before the Letterman Show ended at midnight. (28 RT 7316-7318, 7369-7370.) However, once at appellant's residence, David Zaragoza had to park the car, get out and enter the residence and replace the car key. He also had to take the Pyrex bowl out of the brown bag, place the bowl in another bag, tie it, and throw it in the kitchen garbage while placing the bowl's blue lid in the cigarette tin in the living room without waking his brother who was allegedly still sleeping on the living room couch. (6 CT 1558-1559; 27 RT 7028.) Once out of the house, he had less than half an hour to dispose the weapon and walk home. Again, all of this would have been extremely difficult for an ordinary person to accomplish in such a tight timeframe, let alone someone like David Zaragoza, who was mentally disabled and, as appellant contends, was allegedly under the strain of having just committed a robbery and shot someone. In fact, as the prosecutor argued, it would have been impossible for him to do so given the circumstances surrounding the crime. (30 RT 7885-7889.)

The most reasonable interpretation of the night's events is that appellant was not asleep on the couch when the crime was committed, but rather drove himself and David Zaragoza to and from the crime scene.

Appellant had possession of the car, he was with his brother that evening and he was familiar with north Stockton given his visits to Ed Tahod's house and attending Delta College, none of which could be said for David Zaragoza. Once at the scene, as David Zaragoza ran down the street clutching the brown paper bag he took from William Gaines, appellant appeared from the darkness from behind the garage and shot David Gaines on the driveway.

Appellant argues that if he jumped out and surprised David Gaines from the southeast, "it is not easy to see how David Gaines would have been able to find and use the mace can, nor is it easy to see how they traveled halfway down the driveway." (AOB 50.) Appellant's argument improperly assumes that appellant was lying in wait on the edge of the driveway and confronted David Gaines immediately. However, in order to avoid detection, it was more likely that appellant hid farther back in the darkness or foliage between the Gaines and French residences. Thus, upon seeing David Gaines appear from the garage, it would have taken appellant a moment to emerge from his hiding place and get to the driveway allowing David Gaines the opportunity to retrieve his mace canister and walk partially down the driveway.

Furthermore, given the circumstances of this case, a jury could have reasonably concluded that appellant, not David Zaragoza, orchestrated the crime. This was not a random, spontaneous or unplanned crime. Instead, given the circumstances surrounding the incident, particularly the location, the time and individuals victimized, the crime was planned by someone who was familiar with the liquor store and its owner. For instance, instead of selecting some random person on the street, William Gaines, an elderly man and owner of a prosperous liquor store, was the chosen victim of the robbery. (23 RT 6059-6060, 24 RT 6239.) Rather than commit the robbery at Gaines Liquors, where there was a risk of being seen by a witness or

caught by the store's security camera, the crime took place in front of the Gaines residence in a quiet residential neighborhood, where appellant and his brother could lie in wait under the cover of darkness. (24 RT 6239, 6243, 6245.) The crime also happened late on a Friday night, normally a busy night for the liquor store, where the store receipts were potentially more substantial thereby making the robbery more lucrative. (23 RT 6060.) The time of night also provided the opportunity to arrive in the neighborhood and hide in the dark near the residence before William Gaines returned home without being detected. (23 RT 6002-6003, 6007.)

It was evident that the store receipts were the intended spoils of the robbery. Upon his arrival home, David Zaragoza suddenly appeared from behind the foliage across the street, and pounced on William Gaines, striking him in the face and shoulder without saying a word. (23 RT 5981, 24 RT 6246-6249, 6280.) David Gaines then grabbed the brown paper bag from William Gaines and ran east down Cameron Way. (24 RT 6246-6249.) Although William Gaines rarely took the store's receipts home, it was reasonable to infer from David Zaragoza's conduct that the plan was to take the bag, particularly given the fact that David Zaragoza struck William Gaines and then immediately grabbed the bag without saying a word or without attempting to take William Gaines's wallet or any other valuables. (24 RT 6242, 6307.)

It is also reasonable to infer from the circumstances that appellant and David Zaragoza were familiar with the type of vehicle William Gaines drove and what time he routinely arrived home given how quickly David Zaragoza sprang from the dark and attacked William Gaines after he had exited his vehicle.

At trial, appellant tried to establish that David Zaragoza planned and committed the crime alone. However, there was nothing that linked David Zaragoza to Gaines Liquors. Rather, it was appellant, not

David Zaragoza, who was familiar with the store and had ample opportunity to learn the owner and the store's routine. Paul Manning, a liquor store clerk who worked from 5:00 to 9:00 p.m., identified appellant, specifically by his mustache, as a regular customer who usually bought 24-ounce beers. (26 RT 6697-6699.) On the other hand, Banning did not recall ever seeing David Zaragoza in the store. (26 RT 6702.) Appellant's brother, Ed Tahod, lived only a few blocks from Gaines Liquors. Appellant admitted he visited his brother regularly and took his nieces to Gaines Liquors to buy candy when attending Delta College. (6 CT 1578; 25 RT 6375.) Billy Gaines identified appellant as the person who came into the store and asked about the store security camera the day before the crime occurred. (25 RT 6494-6496, 6496-6498, 6501-6502.) Although Billy Gaines may have been mistaken as to the date and/or time of when he saw appellant in the store, he accurately described appellant as being a short, stocky guy with a real thick mustache and tattoos on his arms. (25 RT 6500-6501.) Billy Gaines also noted he saw appellant in the store before. (25 RT 6494.) On the other hand, he did not recognize a photograph of David Zaragoza. (25 RT 6502.) Appellant also admitted he had stopped at Gaines Liquors during the evening on Monday, June 7, 1999, to buy David Zaragoza some cigarettes. (6 CT 1576-1578.) Howard Stokes testified that he saw a man emerge from a green minivan and walk down Cameron Way late Monday evening that possibly fit the description of David Zaragoza. (25 RT 6430-6431, 6433-6434, 6465-6466.) If it was David Zaragoza that Stokes ran into that evening, his presence was linked to appellant, for appellant admitted he had picked David Zaragoza up at the Tahod's residence and driven to Gaines Liquors that evening. (6 CT 1576-1578.) Therefore, given his connection to Gaines Liquors, it was reasonable for the jury to conclude that appellant, not David Zaragoza, planned the crime.

In addition, David Zaragoza was incapable of planning this crime himself. David Zaragoza was mentally challenged with an IQ of 55 to 70, read at a second grade level and was not a concrete thinker. (25 RT 6404, 6408, 28 RT 7443-7446, 7470-7471.) He also suffered from a number of significant psychiatric problems and was a drug abuser. (25 RT 6403-6404, 6420, 28 RT 7443, 28 RT 7447, 29 RT 7479-7480.) His ability to care for himself was limited and he was not allowed to use money. (25 RT 6405, 6409.) He did not drive, but instead relied on his siblings to give him rides, including appellant. (25 RT 6390-6392, 26 RT 6735-6736, 27 RT 7006.)

However, appellant contends that this crime was anything but sophisticated. In fact, appellant argues David Zaragoza could have easily learned where the owner of the liquor store lived and found his house. Appellant reasons, "The 'Gaines Liquor Store' was owned by the Gaines Family, whose address was found in the telephone book available in the downtown library in Stockton." (AOB 64.) In other words, David Zaragoza could have simply connected the dots between Gaines Liquors and William Gaines's residence by merely using the telephone book in the public library. (28 RT 7303-7305.)

Appellant's argument ignores the fact there was no evidence presented at trial to establish the David Zaragoza was aware of Gaines Liquors, let alone who owned the liquor store and where the owner lived. For someone who did not drive and relied on others for transportation, it is unreasonable to believe David Zaragoza would decide to rob some random victim in an unfamiliar neighborhood some seven miles away from his own residence on his own. In addition, appellant's argument disregards the fact that David Zaragoza was mentally challenged, had significant psychiatric problems and abused drugs. Thus, to believe David Zaragoza was capable of determining not only who was the owner of Gaines Liquors, but also which home address was the correct one, by simply opening the phone

book at the public library and doing a little reading is irrational. This is particularly true in light of the fact that there were two listings for the name of William Gaines and three listings for Billy Gaines in the phone book at the time of the murder. (28 RT 7303-7305.) Despite the fact he that he had access to a 1999 Stockton telephone book at the public library, David Zaragoza lacked the aptitude to plan and execute such a crime on his own using that resource alone. (25 RT 6403-6404, 6408, 6420; 28 RT 7308-7310.)

Appellant also argues there is no reasonable basis to believe David Gaines would be present at the time of the robbery. (AOB 49.) However, the evidence presented at trial indicated that David Gaines normally closed the liquor store on Friday nights. (23 RT 6068, 24 RT 6297-6298.) He also helped his father close the store on the evenings he was not scheduled to work. (24 RT 6087.) Someone familiar with the store's routine, as was appellant, would have known this fact. In addition, even if it was not known when they initially took up their hiding positions near the Gaines residence, appellant and his brother certainly knew David Gaines was present when he drove up behind William Gaines on the night in question. (24 RT 6245.)

Appellant also argues that it was extremely risky for him and David Zaragoza to hide out for an indefinite period of time near the crime scene. (AOB 50.) However, the evidence demonstrated that William Gaines arrived home from work routinely around 11:15 p.m. (23 RT 6064.) Thus, given his knowledge of William Gaines's routine, appellant knew he and his brother had to be in position only a short time before William Gaines came home and briefly wait under the cover of darkness before acting. Furthermore, the risk of being caught while hiding in the neighborhood that appellant argues would have deterred them was nonexistent given the fact

that both appellant and David Zaragoza successfully hid in the dark without being detected while they waited for William Gaines to come home.

Other evidence established appellant's guilt as well. Law enforcement found a receipt from Jack-In-The-Box in appellant's garbage can at the same time they found the Pyrex bowl. The receipt was from a Jack-In-The-Box located just six-tenths of a mile from the Gaines residence in Stockton. (25 RT 6531-6532, 26 RT 6792, 6782.) The receipt indicated that a Jumbo Jack and water had been purchased on June 12, 1999, at 12:03 a.m., or about 45 minutes after the murder occurred. (26 RT 6683, 6685-6686, 6729.) Appellant's sister, Nina Koker, claimed that she purchased the food from Jack-In-The-Box, which came with a drink and fries. (27 RT 7014, 7016-7017, 7032.) However, her testimony was completely discredited for she did not leave Ellsworth's residence until 12:08 a.m. at the earliest when a locksmith was able to open her car and retrieve her car key she had locked inside her vehicle. (26 RT 6673.) Nina Koker's fiancée admitted that she had left Ellsworth's anywhere between five to 20 minutes after the locksmith had opened her car. (29 RT 7508, 7513.) Ellsworth claimed she left between 1:00 and 2:00 a.m. (26 RT 6778.) Thus, it is evident that Nina Koker did not make the subject purchase at Jack-In-The-Box.

Nonetheless, appellant argues that the receipt was incorrect given the fact that the Jack-In-The-Box bag contained Nina Koker's brand of cigarettes. (AOB 53.) However, Nina Koker admitted that appellant smoked as well. (27 RT 7022-7023.) Granted, appellant had Camels with him during his interview with law enforcement after his arrest but there was no evidence that he smoked that brand exclusively. Although Nina Koker testified that she had ordered French fries, which was consistent with the container found in the bag, she did not recall whether she ordered a water or Diet Coke. (27 RT 7019.) On the other hand, appellant admitted he

normally drank water, which supports the argument he had made the purchase. (6 CT 1604-1605, 1612.) Therefore, as the prosecutor argued, the more reasonable explanation for the receipt included appellant making the purchase at Jack-In-The-Box upon returning to the area to check things out after dropping David Zaragoza off at his residence. (30 RT 7870.)

Appellant's return to the crime scene the day after the shooting was also further evidence he was the shooter. Stanley Monckton saw appellant driving slowly in his mother's car eastbound down Cameron Way checking out the crime scene around noon on Saturday, June 12, 1999. (25 RT 6478-6479, 6481-6482, 6484.) Monckton specifically identified appellant by his Fu Manchu mustache and tattoos on his arms. He was also able to pick appellant out of a photographic line-up and indentified him in court during trial. (25 RT 6479-6481, 6483.) During his second interview with law enforcement, appellant attempted to cover up the fact he was seen at the murder scene the day after by stating he returned the car to his mother Saturday morning. (6 CT 1657.) However, his mother contradicted appellant on this point by testifying he had returned the car Saturday afternoon between 2:00 and 3:00 p.m. (25 RT 6387-6388.)

Appellant also demonstrated a consciousness of guilt by shaving off his mustache, which was one physical characteristic he was readily identifiable by, before trial. (26 RT 6653-6654.) As noted above, his effort to avoid identification did not throw Monckton off for he was able to identify appellant at trial. However, Billy Gaines was unable to identify appellant when testifying because appellant no longer had a mustache. (25 RT 6504.)

In addition, appellant called Toni Duque three times early Saturday morning on June 12, 1999. (27 RT 7082, 7085.) If he had not been involved in the murder, appellant had no reason to apparently be so anxious at that time since he had not yet spoken to his brother or mother that day

about the crime. (6 CT 1658-1660.) Duque also received a call from appellant in the early morning hours on Monday, June 14, 1999, while she was working, at which time he made the unusual request that she meet him before he was arrested. Although she testified that appellant indicated he did not know why he was going to be arrested, his desire to meet with her at that time before his arrest reasonably inferred that he was involved in the murder of David Gaines, that he knew he was in serious trouble with the law and that it was more than likely he would not have a chance to meet with her again as a result. (27 RT 7087-7088.)

David Zaragoza's conduct also confirmed appellant shot David Gaines. When law enforcement first attempted to contact him at his board and care home, they observed a picture of appellant in the living room. Upon their return a few hours later, appellant's picture was gone. (26 RT 6825.)

Although appellant acknowledges that such evidence is not required to secure a conviction, he contends that he had absolutely no motive to commit this crime since he was living a stable life with a good job. (AOB 57-58.) However, in reality, he was being paid only $10.25 an hour, which apparently was not enough to live on his own or buy a car. (25 6381-6382, 26 RT 6665, 6667.) In addition, Duque had asked that their relationship as boyfriend/girlfriend end. (27 RT 7074-7075.) Thus, appellant's description of his life is not quite accurate nor does it support his argument there was no reason, financial or otherwise, for him to have committed the crime.

C. Conclusion

Considering the entire record in the light most favorable to the judgment, there was substantial evidence that was reasonable, credible and of solid value presented at trial from which the trier of fact could reasonably find that not only did appellant plan this crime, he drove himself

and David Zaragoza to the crime scene, and as his brother ran down the street with what they believed were the store receipts, appellant appeared from the darkness and shot and killed David Gaines on the driveway to make certain his brother's escape. Appellant's contention that David Zaragoza had planned the offense and acted alone in this instance is an unreasonable interpretation of the facts given the testimony of William Gaines, the physical evidence, his lack of connection to Gaines Liquors, his challenged intellect and psychiatric issues, as well as his inability to drive. Therefore, the judgment should be affirmed.

II. THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST TO SUBPOENA DAVID ZARAGOZA AS A WITNESS AT TRIAL

Appellant contends that the trial court's denial of his request to subpoena David Zaragoza as a witness at trial violated his state and federal constitutional rights to compulsory process, as well as his guarantee to due process and equal protection under the law and a reliable verdict which requires his conviction and sentence be reversed. (AOB 68-79.) Appellant's argument is without merit, for defense counsel had the right to assert David Zaragoza's Fifth Amendment privilege against self incrimination upon behalf of his incompetent client.[10]

A. Factual and Procedural Background

Appellant and David Zaragoza were charged together as co-defendants in this matter. (1 CT 1-7, 5 CT 1171-1172.) At their

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[10] Section 930 provides: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify." Section 940 states: "To the extent that such a privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him."

arraignment on June 23, 1999, David Zaragoza told the court that he had committed the murder, that appellant had nothing to do with it, and that he wanted to be sentenced that day. (1 RT 10-11.) He then was removed from the courtroom after he pulled down his pants and defecated. (34 RT 8965.)

David Zaragoza also made a number of other statements about the incident outside the courtroom. When interviewed by law enforcement on June 13, 1999, David Zaragoza indicated that he did not shoot David Gaines. (4 CT 976, 979.) He told his mother that a white man gave him a ride somewhere to the north side of Stockton on the night of the murder. (5 CT 1233.) On June 20, 1999, David Zaragoza told his brother, Reynaldo, that he had been given a ride by a white man who drove to a house somewhere in north Stockton where the white man shot someone with a revolver he had in the car. (5 CT 1239-1240.) On July 31, 2000, a cellmate in the county jail told law enforcement that David Zaragoza admitted that he had committed the robbery and murder of David Gaines by himself. (5 CT 1241-1242.)

On December 6, 1999, David Zaragoza's public defender, Andrew Quinn, questioned his client's competence to stand trial. (1 RT 53, 58.) As a result, the trial court suspended criminal proceedings as to David Zaragoza only and ordered that he be evaluated pursuant to section 1369.[11] (1 RT 54, 60; 2 CT 445.) On June 16, 2000, David Zaragoza's jury trial regarding his competence to stand trial began. (3 CT 639-640.) On July 28, 2000, the jury concluded he was incompetent to stand trial. (4 CT 835-840; 16 RT 4060.) The court ordered that David Zaragoza be placed at

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[11] On May 25, 2000, David Zaragoza's motion to disqualify the trial judge, the Honorable Terrence Van Oss, was granted. (2 CT 519, 3 CT 626.)

Atascadero State Hospital for care, treatment and training. (4 CT 1000-1002.)

On January 25, 2001, appellant subpoenaed David Zaragoza to testify at trial and requested the trial court order his transport to the San Joaquin County Jail. (5 CT 1260-1261.) On February 1, 2001, counsel for David Zaragoza moved to quash the subpoena, arguing that since David Zaragoza had been deemed incompetent to stand trial, counsel must make certain tactical decisions for him, including asserting his privilege against self incrimination, which would make him unavailable to testify at trial. (5 CT 1279, 1282-1286; 26 RT 6889-6891.) The trial court granted counsel's motion to quash. In doing so, it held:

> I think we are left with general principles. And we have to reason backward and reason backward from the concept that a defendant who has been found incompetent to stand trial has been found by what amounts to a general verdict to not comprehend his own status and his situation in reference to the proceedings and able to assist his attorney in conducting his own defense or to be unable to understand the nature of the charges against him. [¶] I don't think that in David Zaragoza's case that latter one is the significant issue. I think he understands what he's charged with, in some general way anyway. [¶] But he doesn't understand his own status, the relationship of the proceedings. He's not able to assist his attorney in his own defense. [¶] And if he were not incompetent and he were to stand up and wish to testify, Mr. Quinn's objections would have to be disregarded. [¶] If he chose not to testify, he chose not to take the stand, of course, I'd have to respect that. I wouldn't be able to question it. [¶] When he's incompetent to stand trial, he's incompetent to make the decisions whether that's a rational thing to do. And it is his defense. It is his defense because he's still charged with a crime. [¶] He still is required to decide whether this is a wise move, whether his calculations are correct, that if he testifies, he bears a risk of being convicted of the charge. [¶] He's not able to make those kinds of decisions at this point according to the jury and according to the presumption that I have to go on at this point.

(26 RT 6893-6894.)

Appellant argues that trial counsel had no right to frustrate David Zaragoza's desire to testify on appellant's behalf, particularly in light of the fact that there was no finding he suffered from testimonial incompetence. (AOB 70-77.) Appellant's argument is misguided.

B. Analysis

Although an attorney representing a criminal defendant has the authority to control the court proceedings, that authority may not be exercised to deprive a defendant of certain fundamental rights such as the right to testify in one's own behalf. Thus, a defendant who timely demands to take the stand, contrary to his counsel's advice, has the right to testify in his own defense. (*People v. Robles* (1970) 2 Cal.3d 205, 214 -215.) However, as this Court has pointed out, "It is a fundamental cannon of criminal law and a foundation of due process, that '[a] person cannot be tried or adjudged to punishment while such person is mentally incompetent.' [Citations.]" (*People v. Samuel* (1981) 29 Cal.3d 489, 494.) Once a prima facie showing of mental incompetence has been made, the defendant's attorney must play a greater role in making fundamental choices for him out of necessity, and cannot be expected to seek approval of strategic decisions from the client. (*Id.* at p. 495.) This Court "tacitly recognized the obvious: if counsel represents a defendant as to whose competence the judge has declared a doubt sufficient to require a section 1368 hearing, he should not be compelled to entrust key decisions about fundamental matters to his client's apparently defective judgment." (*Ibid.*)

In *People v. Masterson* (1994) 8 Cal.4th 965, the trial court was in the midst of a jury trial to determine competency when one juror became ill. Counsel stipulated that the trial could continue with the remaining eleven jurors. Despite the defendant's preference there be 12 jurors, the court proceeded with only 11 jurors. (*Id.* at p. 967.) This Court ruled that counsel was able to waive the defendant's right to a jury trial in such a

situation. In doing so, the Court reasoned: "[T]he defendant necessarily plays a lesser personal role in the [competency] proceedings than in a trial of guilt. How can a person whose competence is in doubt make basic decisions regarding the conduct of a proceeding to determine that very question?" (*Id.* at p. 971.)

In *People v. Merkouris* (1956) 46 Cal.2d 540, 555, defendant was convicted of first degree murder, and the death penalty was imposed. Contrary to the advice of counsel, defendant personally withdrew his plea of not guilty by reason of insanity. After an automatic appeal, the judgment was reversed and remanded for a new trial. (*Id.* at p. 552-554.) In doing so, this Court held that it was an abuse of discretion for the trial court to allow a defendant, whose competence was in question, to withdraw a plea of not guilty by reason of insanity, thereby in effect pleading guilty, over counsel's objections. (*Id.* at p. 555.)

In *Shephard v. Superior Court* (1986) 180 Cal.App.3d 23 (*Shephard*), the court of appeal determined that the trial court erred by relieving defense counsel and appointing private counsel to represent defendant at a competency hearing because defendant had indicated that he wanted to be found competent. (*Id.* at pp. 28-29.) The Court of Appeal held: "Allowing a defendant to compel his counsel to argue competency (and suppress contrary evidence) would ... be increasing the danger of a prima facie incompetent defendant subjecting himself to a guilty verdict at a trial where there is substantially likelihood that he would be unable to assist counsel in a rational manner." (*Id.* at p. 30.)

In *People v. Bell* (2010) 181 Cal.App.4th 1071, the court of appeal held that the purpose of section 1368 proceedings is to protect an incompetent defendant from being tried on a criminal charge. Thus, once it is established that a trial court has a doubt as to a defendant's competency,

it should be counsel's decision whether it is best that a defendant testify. (*Id.* at pp. 1085-1086.)

Based on the holdings of the before mentioned cases, it is evident that counsel has the authority to make the decision as to whether a defendant, who has been deemed incompetent to stand trial, should testify in a codefendant's trial and incriminate himself in doing so. As discussed above, a defendant has a due process right not to be tried while he is incompetent. (*People v. Samuel, supra*, 29 Cal.3d at p. 494.) Allowing an incompetent defendant to testify in any proceeding that will later incriminate him in his own trial violates this well-established principle. Since incompetency to stand trial prevents a defendant from being tried on a crime, it should in the same fashion protect an incompetent defendant from incriminating himself. Counsel is in the best position to protect this right, not an incompetent defendant with defective judgment.

In this matter, David Zaragoza was declared incompetent to stand trial. If he was incompetent to stand trial, he lacked the judgment to make key decisions about fundamental matters necessary to assist counsel in his own defense. In other words, he was incapable of acting in his own best interests. Thus, it was incumbent upon his defense counsel to play a greater role in making these fundamental judgments, including deciding whether David Zaragoza should testify at appellant's trial. Given the apparent incriminating nature of his testimony regarding the charges filed against him, it was not improper for counsel to assert David Zaragoza's Fifth Amendment privilege not to incriminate himself in order to protect his right to due process. Nor did the trial court err when it quashed David Zaragoza's subpoena to testify at appellant's trial for the same reason.

Appellant relies on *People v. Allen* (2008) 44 Cal.4th 843, to argue that David Zaragoza had a right to testify despite his counsel's objections. (AOB 74.) Appellant's reliance is misplaced. The issue addressed in *Allen*

was whether a defendant in a proceeding to be committed as a sexually violent predator has a state or federal constitutional right to testify over the objection of his attorney. (*Id.* at p. 848.) The Court held that "'[b]ecause civil commitment involves a significant deprivation of liberty, a defendant in an SVP[A] proceeding is entitled to due process protections. [Citations.]' ... [¶] '"Once it is determined that [the guarantee of] due process applies, the question remains what process is due." [Citation.]'" (*Id.* at p. 862.) The Court then determined, after reviewing the factors applicable to a due process analysis, that "the defendant in a sexually violent predator proceeding has a right under the due process clauses of the federal and state Constitutions to testify, in accordance with the rules of evidence and procedure, over the objection of counsel." (*Id.* at p. 870.) *Allen*, however, is distinguishable from the matter at hand:

> SVPA proceedings, however, are unlike competency determinations. The main concern in a competency proceeding is protection of the accused from being tried in a criminal proceeding while he or she is incompetent, while an SVPA proceeding is initiated in order to protect society from sexually violent predators. [Citations.]

(*People v. Bell*, *supra*, 181 Cal.App.4th at pp. 1084-1085.)

Appellant also cites *People v. Harris* (1993) 14 Cal.App.4th 984, and *People v. Bolden* (1979) 99 Cal.App.3d 375, to support his contention that David Zaragoza had a right to testify against his attorney's wishes. (AOB 75.) In *Harris*, the court of appeal noted "when defense counsel seeks to prove defendant's incompetence over his or her objection, and the defendant expresses the desire to testify that he or she is competent, counsel should permit defendant to so testify, unless the court separately determines that the defendant is incompetent to do so." (*People v. Harris*, *supra*, 14 Cal.App.4th at pp. 993-994.) However, as the court of appeal explained in *Bell*, the conclusion in *Harris* was dicta. "There was no indication the

defendant in that case wanted to testify or that his counsel would object to that testimony." (*People v. Bell, supra*, 181 Cal.App.4th at p. 1083.) In *Bolden*, the trial court was concerned with defendant's competency but defendant felt otherwise. Counsel believed the defendant was incompetent but was hesitant in pursuing such a finding against his client's wishes. As a solution, trial counsel allowed the defendant to testify that he was competent but counsel also presented evidence that he was incompetent. (*People v. Bolden, supra*, 99 Cal.App.3d at pp. 377-378.) On Appeal, defendant claimed his right to effective assistance of counsel was violated by counsel seeking to find him incompetent despite the defendant's desire to be found otherwise. (*Id.*, at p. 379.) The court of appeal determined, "Diligent advocacy does not require an attorney to blindly follow every desire of his client. An attorney can ordinarily make binding waivers of many of his client's rights as to matters of trial tactics [citation]. When the attorney doubts the present sanity of his client, he may assume his client cannot act in his own best interests and may act even contrary to the express desires of his client [citation]." (*Id.* at pp. 379-380.) Given these circumstances, the court of appeal in *Bell* found, "*Bolden* is limited to the holding that counsel does not provide ineffective assistance by raising his client's competency when the defendant does not want to be declared incompetent. Although in *Bolden* the defense attorney chose to have his client testify, the appellate court did not in any way rule that the defendant had a right to testify or that such procedure was necessary." (*People v. Bell, supra*, 181 Cal.App.4th at pp. 1083-1084.)

Appellant argues that counsel's authority to oversee David Zaragoza's legal interests ended when he was found incompetent to stand trial since counsel was not appointed conservator or guardian. Thus, counsel does not get to direct his treatment, determine which family members can visit him or overrule David Zaragoza's desire to testify on his brother's behalf.

(AOB 76.) However, a conservator or guardian may be appointed for a defendant who has not been restored to competency only at the end of three years from the date of commitment. (§§ 1370, subd. (c)(1) & (2).) Such a time period had not elapsed for David Zaragoza at the time of trial for appellant. More importantly, although suspended because of the finding of incompetence, David Zaragoza had extremely serious criminal charges pending against him at the time of appellant's trial. Given this situation, legal representation was just as important to him, if not more upon a finding of incompetence, so as to protect his fundamental interests such as his privilege against self-incrimination. In other words, it is unreasonable to assert that defense counsel simply closes the file and sits on his hands after a finding of incompetency, particularly when his incompetent client has been charged with capital murder.

Appellant also tries to frame this issue as one dealing with the competency of a witness. In doing so, he contends that the trial court should have allowed David Zaragoza to testify because there was no showing he was incompetent to do so. (AOB 72-73.) Given the evidence relating to his mental health, appellant's argument David Zaragoza was competent to testify is tenuous at best. Nevertheless, David Zaragoza's competency as a witness was not the issue. Granted, it is well-established that a defendant accused of a crime has a Sixth Amendment right to compel attendance of a witness in his defense. (*People v. Jacinto* (2010) 49 Cal.4th 263, 268.) In addition, Evidence Code section 700 states, "Except as otherwise provided by stature, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify in any matter." Evidence Code section 701 provides the standard grounds for disqualification, including an inability to express oneself concerning the matter so as to be understood and an inability to understand the duty to tell the truth. (Evid. Code, § 701, subd. (a)(1) & (2).) However, as appellant

notes, his right to subpoena a competent witness to testify in his own defense is not without exceptions. In *Washington v. Texas* (1967) 388 U.S. 14, the United States Supreme Court acknowledged that a defendant's right to call a witness to present a defense is a fundamental element of due process of the law. (*Id.* at p. 19.) But the Supreme Court also recognized that testimonial privileges, such as the privilege against self incrimination, still provide exceptions to this right. (*Id.* at p. 23, fn. 21.) Thus, whether David Zaragoza was competent to testify at appellant's trial was not at issue. Rather, the issue at hand was whether trial counsel could assert David Zaragoza's right against self incrimination on behalf of his incompetent client, David Zaragoza. In light of the relevant legal precedent discussed above, the trial court properly ruled that counsel had the authority to do so.

C. In Any Event, Any Error Was Harmless

As appellant notes, the prejudicial effect of a violation of a defendant's Sixth Amendment right to present a defense is subject to the harmless error analysis set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 ["[T]he constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to ... harmless-error analysis"]; see also *Crane v. Kentucky* (1986) 476 U.S. 683, 691 [exclusion of testimony about circumstances of defendant's confession deprived defendant of his fundamental constitutional right to present a defense, but the error was subject to harmless error review.] Therefore, the correct inquiry is whether, assuming that the trial court violated appellant's right to present a defense by not allowing his brother to testify, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 684.)

Appellant contends that the trial court's denial of his request to call David Zaragoza as a witness was prejudicial because "[i]t is quite likely that David Zaragoza could have testified in a way that made the jury consider that he indeed had done the crime himself, even while reinforcing the view that he is mentally impaired." (AOB 78.) Appellant is mistaken.

Assuming David Zaragoza would have testified that he was responsible alone for the murder of David Gaines at appellant's trial, such testimony would have been severely discredited by his other statements to the contrary. As previously mentioned, he told law enforcement only a couple of days after the murder that he did not shoot David Gaines. (36 RT 9438-9439.) He told both his mother and brothers, Reynaldo Zaragoza and Ed Tahod, that a white man was involved in the murder. (33 RT 8729, 8736, 36 RT 9443-9445, 9393-9396.) Given these inconsistent statements and the fact that he certainly was loyal to appellant, the jury could have easily concluded that David Zaragoza's testimony he acted alone was not credible. Furthermore, David Zaragoza's significant mental impairments would have cast serious doubt on his credibility as a witness and whether he was accurately portraying the testimonial events. Most importantly, David Zaragoza's testimony that he acted alone on the night in question would have been unreasonable given the overwhelming circumstantial evidence that appellant was not only involved, but also was the person who shot David Gaines. Therefore, contrary to appellant's argument, despite the trial court's decision to quash the subpoena, the alleged error was harmless beyond a reasonable doubt and the judgment should be affirmed.

III. THE TRIAL COURT PROPERLY EXCLUDED THE PORTION OF DAVID ZARAGOZA'S VIDEOTAPED INTERVIEW WHERE HE WAS DEPICTED PICKING UP AN ITEM FROM THE FLOOR

Appellant contends that the trial court violated state law and his constitutional rights to present a defense and a reliable guilt determination

when it refused to allow appellant to play a portion of David Zaragoza's videotaped interview depicting him picking up an item from the floor to the jury. (AOB 80-86.) Respondent disagrees since the subject evidence was irrelevant.

A. Procedural and Factual Background

At trial, William Gaines testified that after he had retrieved the brown paper bag containing the Pyrex bowl from the front seat of his station wagon, he was struck on the chin and left shoulder by David Zaragoza. (24 RT 6246-6247, 6270.) David Zaragoza then grabbed the bag away from William Gaines, dropped it and immediately picked it up with both hands as he turned and began running east down Cameron Way. (24 RT 6248-6250.) After the shooting had occurred, a number of small personal papers belonging to David Zaragoza were found scattered on the street near the driver's front door of the station wagon. (24 RT 6187-6188, 6199, 6275-6276, 6320-6321; People's Ex. 88.)

During his initial interview with law enforcement on June 13, 1999, appellant indicated that on the night of the murder, David Zaragoza was wearing light blue pull-up pants similar to pajamas appellant had bought for him. According to appellant, David Zaragoza wore those pants everywhere. (6 CT 1562-1564.) During the defense case, appellant played a portion of the videotaped interview of David Zaragoza of June 12, 1999. (28 RT 7162-7164, 7358, 29 RT 7541, 7521-7525, 7546, 7563.) During the interview, David Zaragoza was wearing pants with no pockets that he admitted were the pants he was wearing the night before, which was the night of the murder. (6 CT 1726.) He also admitted he carried his possessions in his front shirt pocket when wearing pants with no pockets. (6 CT 1726, 7 CT 1728.)

During the interview, Detective Wuest put a pouch of Bugler tobacco and a cigarette lighter in David Zaragoza's shirt pocket. He then placed an

item on the floor and asked David Zaragoza to stand up, walk over and pick the item up. (8 CT 2243-2244.) When David Zaragoza complied, nothing fell out of his shirt pocket. (28 RT 7353-7354.)

Appellant requested that he be permitted to show this portion of the videotaped interview to the jury to support his theory of the case, which was that David Zaragoza carried the bag he took from William Gaines in his left hand and removed the gun from his pants pocket with the right hand, spilling his personal papers in the process as depicted by the defense animated reconstruction of the crime. (28 RT 7236-7237.)

The prosecutor objected, arguing that the subject portion of the videotaped interview was irrelevant and would not meet *Kelly/Frye* reliability standards for admitting scientific evidence.[12] (28 RT 7353-7355.) After further argument, the prosecutor withdrew his objection. (28 RT 7358.) But when the issue was raised again a short time later, the prosecutor renewed his objection, claiming that the excerpt was "an improper experiment that's got no relevance, no value. It's non-testimonial. Its prejudice outweighs its probative value. Implies that Detective Wuest conducted a known valid experiment." (28 RT 7422.) In response, appellant's counsel thought the evidence had some value. (28 RT 7424.) The trial court excluded the evidence, holding, "There's a lot of things that aren't the same." (28 RT 7424.)

During closing argument, the prosecutor argued in relevant part:

> And so the bag – after the bag is ripped, the bag – the bowl falls down to the ground. And David Zaragoza goes to pick up the bowl. And as he goes to pick up the bowl, he drops this book and release form. The book and release form that has "Mr. Zar" on it. [¶] And not only does the book and release form come out, all the other papers come out, too. [¶] ... [¶] All the

[12] *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.

papers spill in this general area here, right by the front tire, right by the door.

(30 RT 7835-7836.) Appellant's counsel argued, in relevant part, that there was no evidence that David Zaragoza's papers fell out of his front pocket when he was bending over. (30 RT 7961-7962.)

Appellant now claims that exclusion of the subject excerpt of the videotaped interview of David Zaragoza was prejudicial error for it supported appellant's version of the events at the crime scene as well as his contention that the investigators decided prematurely that he was the perpetrator, and therefore ignored evidence to the contrary. (AOB 82.)

B. Analysis

"Only relevant evidence is admissible [citations], and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. [Citations.] Relevant evidence is defined in Evidence Code section 210 as evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts.... [Citations.] [Citation.] The trial court has broad discretion in determining the relevance of evidence. [Citation.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1000-1001, internal quotation marks omitted.)

Appellant argues the subject excerpt of the videotaped interview was relevant because it represented the same act law enforcement accused him of committing at the crime scene, but without the desired effect. (AOB 84.) Respondent disagrees.

Detective Wuest's experiment occurred inside an interview room, not outside on a neighborhood street late at night. Instead of small pieces of paperwork, David Zaragoza had a lighter and a pouch of chewing tobacco in the pocket of his shirt, which may not have been the same shirt he was

wearing the night of the murder. In addition, rather than occurring during a violent and hectic physical assault and struggle that consisted of many different twists and turns, David Zaragoza merely walked over to the object, bent over and picked it up off the floor. On the other hand, during his physical assault upon William Gaines, David Zaragoza threw two punches and then ripped the brown paper bag away from William Gaines. When the bag fell to the ground, David Zaragoza bent over and scooped it up with both hands as he turned to make his escape, causing the paperwork to fall from his front shirt pocket. Thus, contrary to appellant's argument, Detective Wuest's experiment was completely dissimilar to the circumstance at which time David Zaragoza's personal paperwork fell from his shirt pocket. Consequently, it did not have the tendency to prove or disprove whether David Zaragoza's personal papers fell from his shirt pocket or not.

Appellant also argues that Detective Wuest's experiment supports his contention that law enforcement's investigation was skewed from its earliest days toward finding him guilty of the shooting. (AOB 85.) However, if such was the case, law enforcement would not have continued the interview, wherein David Zaragoza was pressed about why his paperwork was found at the scene and whether he shot David Gaines. (8 CT 2253-2284.) Furthermore, given the obvious mental impairments of David Zaragoza and the circumstances of the murder, it quickly became apparent that appellant was the one who actually shot David Gaines.

C. Any Error Was Harmless

Even assuming error, it was harmless under any standard. Appellant asserts the improper exclusion of this evidence is subject to harmless error analysis under *Chapman v. California, supra*, 386 U.S. at page 24. However, California authority would indicate otherwise. (*People v. Hall* (1986) 41 Cal.3d 826, 836 [improper exclusion of possible third-party

culpability evidence evaluated under harmless error analysis articulated in *People v. Watson* (1956) 46 Cal.2d 818, 837]; *People v. Boyette* (2002) 29 Cal.4th 381, 427–428 [*Watson* harmless error standard applies to exclusion of evidence on relevance grounds]; *People v. Cunningham* (2001) 25 Cal.4th 926, 999.) Nonetheless, the subject evidence was not persuasive since both appellant and David Zaragoza indicated that David Zaragoza was wearing pajama-type pants without pockets on the night of the murder. (6 CT 1562-1564, 1726.) In light of this evidence, even if admitted, Detective Wuest's experiment would not have convinced the jury that David Zaragoza pulled the gun out from his pants pocket in order to shoot David Gaines to make his escape since he had no pockets in which to pull the gun from. Thus, the judgment should be affirmed.

IV. THE PROSECUTION PROPERLY DISCOVERED THE JACK-IN-THE-BOX DRIVE THRU VIDEOTAPE

Appellant contends that the prosecution's failure to provide him with a usable copy of the Jack-In-The-Box videotape on the night of the murder violated his right to discovery under section 1054.1 and his rights to a fair trial and due process under the Sixth and Fourteenth Amendments of the United States Constitution as guaranteed by *Brady v. Maryland* (1963) 373 U.S. 83. (AOB 87-93.) Respondent disagrees.

A. Procedural and Factual Background

On July 9, 1999, defense counsel for David Zaragoza indicated that he was aware of the Jack-In-The-Box videotape in open court with all parties present, including appellant's attorney, noting that apparently the tape was not very clear with regard to what it depicted. (1 RT 46-47.) After trial and in response to the People's opposition to his motion for new trial filed with the court on May 24, 2001, appellant claimed that the Jack-In-The-Box videotape was not provided to the defense by Detective Wuest. (10 CT 2658.) In doing so, appellant stated in relevant part:

> This ... is definitely potentially *Brady* material. The prosecutor argued that [appellant] was present at the Jack in the Box in the early morning hours of June 12, 1999, and since the tape apparently does not confirm this theory, it could be viewed as exonerating. There were numerous requests for this and since it would appear to be exonerating, the duty would be on the People to turn this over independent of our state discovery laws.

(10 CT 2658-2659.)

At the hearing on the motion for new trial, the prosecutor advised the court that the subject videotape had always been made available to the defense. However, a copy of the videotape could not be made because the videotape system Jack-In-The-Box employed could not convert the videotape to a normal VHS tape. In addition, the detectives viewed the tape at the Jack-In-The-Box and noted that it depicted a corner of a compact car, but the make, model or color as well as whether anyone was in the vehicle could not be determined. Given the inadequacy of the videotape, the prosecutor told appellant's counsel he did not intend to use the videotape during trial. (37 RT 9779-9782.) When asked to respond by the court, appellant's counsel admitted that the videotape had not been withheld from the defense. Rather, counsel was not aware of any place in which to view the videotape but for Jack-In-The-Box. (37 RT 9783-9784.) Counsel added, "We were told in the beginning, a copy would be made available, that there was a process by which it could be. That turned out not to be available, as I understand it, through whatever technical reasons." (37 RT 9784.) The trial court found that no discovery violation had occurred as follows:

> As to the Jack-In-The-Box tape, in my opinion, so long as [appellant's counsel] had access to the actual physical evidence, it was not necessary for the prosecutor to search the world to see whether there's proper technology to do the transfer. [¶] If it had done the transfer, then I think, depending upon what's on the videotape, certainly - - well, depending what's on the videotape, whether they intended to use it, the prosecutor may

> have had the duty to turn it over. But there's no evidence that the prosecutor ever was able to convert it to something that you could actually see.

(37 RT 9791.)

B. Relevant Legal Principles

"Pursuant to *Brady*, *supra*, 373 U.S. 83, the prosecution must disclose material exculpatory evidence whether the defendant makes a specific request (*id.* at p. 87), a general request, or none at all." (*In re Brown* (1998) 17 Cal.4th 873, 879.) Evidence is favorable if it helps the defense or hurts the prosecution, as by impeaching a prosecution witness. (*United States v. Bagley* (1985) 473 U.S. 667, 674, 676; see *In re Sassounian* (1995) 9 Cal.4th 535, 544.) Evidence is material if there is a reasonable probability its disclosure would have altered the trial result. (E.g., *Banks v. Dretke* (2004) 540 U.S. 668, 699.) "Because a constitutional violation occurs only if the suppressed evidence was material by these standards, a finding that *Brady* was not satisfied is reversible without need for further harmless-error review." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132–1133 (*Zambrano*), disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also *Cone v. Bell* (2009) 556 U.S. 449.)

Section 1054.1 (the reciprocal-discovery statute) "independently requires the prosecution to disclose to the defense, ... certain categories of evidence 'in the possession of the prosecuting attorney or [known by] the prosecuting attorney ... to be in the possession of the investigating agencies.'" (*Zambrano*, *supra*, 41 Cal.4th at p. 1133.) Evidence subject to disclosure under section 1054.1 includes:

> (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial. [¶] (b) Statements of all defendants. [¶] (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged. [¶] (d) The existence of a felony conviction of any material witness whose

> credibility is likely to be critical to the outcome of the trial. [¶] (e) Any exculpatory evidence. [¶] (f) Relevant written or recorded statements of witnesses or reports of statements of witnesses whom the prosecutor intends to call at the trial.

(§ 1054.1, subds. (a)-(f).)

C. Analysis

Contrary to appellant's argument, the prosecution was not required to provide him with a "usable copy" of the videotape. *Schaffer v. Superior Court* (2010) 185 Cal.App.4th 1235 (*Schaffer*), sets forth the meaning of "to disclose" as it relates to discovery as follows:

> Section 1054.1 provides that the prosecuting attorney "shall disclose" to the defendant certain materials and information listed in subdivision (a) through (f) of the section. Section 1054.3 provides reciprocal discovery obligations for the defense. These statutes do not specify the means by which the parties must "disclose" discoverable information to each other, or specify that the party making disclosure must produce a copy of the discoverable item for the benefit of the opposing party. No court has interpreted the prosecution's duty to disclose under section 1054.1 to include the responsibility of furnishing photocopies or other materials to a defendant at taxpayer expense. The ordinary meaning of the word "disclose" is to "divulge," "open up," "expose to view," or to "make known." (Webster's 3d New World Internet. Dict. (1981).)

(*Id.* at p. 1242.)

In *Zambrano, supra*, the defendant, in a death penalty case, argued that the prosecution's delay in disclosing a letter from his sister to a deputy sheriff about his mental conditions and other matters was prejudicial since it might have spurred an investigation into possible mental defenses. The letter was discovered by the defense before the end of the guilt phase, but was not introduced at trial. (*Zambrano, supra*, 41 Cal.4th at p. 1131.) On appeal, the defendant argued that the prosecutor's failure to disclose the letter violated both the state reciprocal discovery statute (§ 1054 et seq.),

and the federal constitutional obligation, under *Brady*, not to suppress evidence materially favorable to the defense. (*Id.* at p. 1132.) This Court disagreed, noting that the letter had been placed in the prosecutor's file and the prosecutor had invited defense counsel on a couple of occasions to go through the entire file to make sure everything in the file had been turned over to the defense. The Court found that the prosecutor's open file policy satisfied the prosecutor's duty to disclose exculpatory evidence under *Brady* since the letter was in the file. (*Id.* at p. 1134.) In doing so, the Court stated: "[T]he prosecutor's *Brady* obligation may, under proper circumstances, be satisfied by an 'open file' policy, under which defense counsel are free to examine all materials regarding the case that are in the prosecutor's possession." (*Ibid.*)

In this instance, the prosecution disclosed the existence of the Jack-In-The-Box videotape by revealing to appellant's counsel its existence very early on in the process. (1 RT 46-47.) In addition, even though the prosecution did not intend to use it at trial, the videotape was always made available to appellant's counsel. In fact, appellant's counsel admitted that the videotape had never been withheld from the defense. (37 RT 9783-9784.) As the court of appeal held in *Schaffer*, there was no requirement that the prosecution produce a copy of the videotape for the benefit of the opposing party. (*Schaffer*, *supra*, 185 Cal.App.4th at p. 1242.) Thus, under both the state reciprocal discovery statute and federal constitutional obligation set forth under *Brady*, the prosecution fulfilled its responsibility to disclose the videotape to appellant.

Appellant also complains that the prosecution did not provide him a means in which to watch the videotape. (AOB 88.) Appellant provides no legal authority to support his contention that the prosecution was required to do so. In addition, according to the prosecution, appellant's counsel represented that he did not need a copy if the prosecution was not going to

use the videotape at trial. (37 RT 9781.) Appellant's counsel was also aware that the videotape could be viewed at Jack-In-The-Box. (37 RT 9783.) Thus, appellant's complaint has no merit.

Finally, appellant has failed to demonstrate that the videotape was remotely favorable or material to his defense. He contends that the videotape would not have shown either of the cars at issue as having gone through the Jack-In-The-Box at the relevant time in question. Thus, it would have supported appellant's version of the events, including the argument that he was not the one who purchased food at the restaurant after the murder. (AOB 92.) However, according to the detectives who watched it, the videotape had a grainy, monochrome view from a window of the restaurant which only depicted a corner of a compact car. Consequently, the make, model, color or whether anyone was in the vehicle could not be determined. In other words, the videotape did not reveal what type of car it was or the identity of the driver. (37 RT 9779-9782.) Thus, it had no probative value whatsoever. In *Kyles v. Whitley* (1995) 514 U.S. 419, the United States Supreme Court explained that a *Brady* violation is shown when "the favorable evidence could reasonably be taken to put the whole cause in such a different light as to undermine confidence in the verdict." (*Id.* at p. 435, fn. omitted.) "[T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same." (*Id.* at p. 453.) Given the content of the videotape, the jury's verdict would have been the same even if it had viewed the subject evidence.

V. THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST TO GIVE A PINPOINT JURY INSTRUCTION RELATING TO CIRCUMSTANTIAL EVIDENCE

Appellant contends that the trial court prejudicially erred in refusing to give a pinpoint jury instruction regarding circumstantial evidence during the guilt phase of his trial. (AOB 94-101.) Respondent disagrees.

A. Procedural and Factual Background

At the conclusion of the guilt phase of the trial, appellant's counsel submitted two proposed special jury instructions relating to circumstantial evidence. (See appendix of appellant's opening brief for copy of both proposed instruction.) At the time, CALJIC No. 2.01 [Sufficiency of Circumstantial Evidence – Generally] stated in relevant part: "Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to a defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence and reject that interpretation which points to his guilt."[13]

Appellant's first proposed instruction modified CALJIC No. 2.01 as follows: "Also, if the circumstantial evidence [as to any particular count] is susceptible of two reasonable interpretations, one of which points to *a finding of guilt and the other to a finding that guilt had not been proven*, you must adopt that interpretation which points to *a finding that guilt has not been proven*, and reject that interpretation which points to *a finding of guilt*." (Emphasis added.) The trial court agreed with this proposed modification and instructed the jury with the requested language. (30 RT 7753-7754.)

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[13] CALJIC No. 2.01 has been replaced by CALCRIM No. 224.

Appellant's second proposed instruction read: "If the evidence permits two reasonable interpretations, one of which points to the guilt of the defendant and the other to the guilt of David Zaragoza, you must reject the interpretation that points to the defendant's guilt and return a verdict of not guilty." The trial court declined to give this pinpoint instruction. In doing so, it found:

> Yeah, I don't think I'm going to give this, because I think they could easily misunderstand this, that they – as being evidence can only point to the guilt of one or other, but they could easily in this case conclude that the guilt points – that the evidence points to the guilt of both. Besides, they are not going to determine the guilt of David. But certainly his responsibility. [¶] So I'm not going to give that modification. So that one will be refused. I think we have sufficient other instructions to ... get the point I think you're trying to make, which is if they think it was David alone, they have to acquit the defendant if it is shown by circumstantial evidence.

(30 RT 7690-7691.) Appellant now asserts that the trial court erred in refusing to give his requested pinpoint instruction because although he had an alternate theory of how the crime was committed, he was only required to create a reasonable doubt in order to prevail. The proposed pinpoint instruction would have made this distinction clear in the precise context of the case. (AOB 98.) Appellant's argument is misguided.

B. Discussion

"A court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial. [Citations.]" (*People v. Ervin* (2000) 22 Cal.4th 48, 90.) A trial court must instruct the jury regarding how to evaluate circumstantial evidence "'sua sponte when the prosecution substantially relies on circumstantial evidence to prove guilt.' [Citations.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 885.) In appropriate circumstances, a trial court may be required to give a requested jury instruction that pinpoints a defendant's theory of the case. (*People v.*

Gutierrez (2002) 28 Cal.4th 1083, 1142; *People v. Wright* (1988) 45 Cal.3d 1126, 1137-1138.) However, "a trial court may properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence [citation]." (*People v. Moon* (2005) 37 Cal.4th 1, 30.) This Court applies a de novo standard of review to a defendant's claim the trial court erred by refusing to give a requested instruction. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.) "Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without deference." (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

Here, the court's rejection of the subject pinpoint instruction as being misleading was proper since the jury could have misunderstood the instruction to mean that either appellant or David Zaragoza was responsible for the crimes but not both. However, given the evidence presented at trial, it was possible that both appellant and David Zaragoza were responsible for the crimes committed, one as the shooter and one as an accomplice. Thus, the jury was not necessarily required to find that one or the other was guilty, but not both, as the subject instruction directed.

In addition, the instruction was duplicative of the modified version of CALJIC No. 2.01 the court gave. The given instruction, in essence, directed the jury that if the evidence was susceptible of two reasonable interpretations, one of which points to a finding of guilt, i.e., appellant was involved in the commission of the crime, and the other to a finding that guilt has not been proven, i.e., David Zaragoza acted alone as appellant argued, they must reject the former and accept the latter.

Finally, the pinpoint instruction was not supported by substantial evidence. Although William Gaines identified David Zaragoza as being the

person who assaulted him and took the brown paper bag, the overwhelming body of evidence established that David Zaragoza was not the shooter. William Gaines did not see David Zaragoza with a weapon during the assault and David Zaragoza could not carry a weapon on the night in question because he was wearing pants without pockets. Nor did William Gaines see David Zaragoza cross the sidewalk and run up his driveway toward David Gaines before the shooting occurred. Rather, when the shots were fired, David Zaragoza was running east down Cameron Way. Furthermore, as previously discussed in Argument I, *ante*, the physical evidence established that the shooter came from the southeast, not up the driveway from the north.

Appellant's reliance on *People v. Rogers*, *supra*, 39 Cal.4th 826, is misplaced. In *Rogers*, the Court found the trial court erred by not giving CALJIC No. 2.01 when the prosecution's case relied substantially upon circumstantial evidence. (*Id.* at pp. 885-886.) In this instance, the trial court gave CALJIC No. 2.01 as modified pursuant to appellant's request.

But even if the trial court erred in refusing to give the pinpoint instruction, any error was harmless. "This error requires reversal only if 'the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error.' (*People v. Watson* (1956) 46 Cal.2d 818, 836.)" (*People v. Wright*, *supra*, 45 Cal.3d at p. 1144.) As previously discussed, there was substantial evidence to support the finding that, beyond a reasonable doubt, appellant shot and killed David Gaines. (*People v. Johnson*, *supra*, 26 Cal.3d at pp. 576-578.)

In addition, the jury was instructed on the sufficiency of circumstantial evidence with a modified version of CALJIC No. 2.01, the prosecution's burden of proving guilt beyond a reasonable doubt (CALJIC

No. 2.90) and specifically that if the jury entertained a doubt concerning whether defendant was present at the time the crime was committed, it would have to find him not guilty (CALJIC No. 2.91). (30 RT 7753-7754, 7762.) The jury was also instructed that to prove the lying in wait and commission of robbery special circumstances, the prosecution had to prove that defendant physically aided or committed the act causing death. (30 RT 7775-7781.) These instructions adequately addressed the prosecution's burden of proving beyond a reasonable doubt that appellant committed the crimes charged. (See *People v. Adrian* (1982) 135 Cal.App.3d 335, 342 [refusal of pinpoint instruction on defense claim of self defense was harmless where other instructions adequately conveyed that the prosecution had the burden of disproving the defense beyond a reasonable doubt]; *People v. Gomez* (1972) 24 Cal.App.3d 486 [refusal of instruction on reasonable doubt regarding accuracy of identification was harmless where instruction on alibi called to the jury's attention the necessity of finding beyond a reasonable doubt that the defendant was present when the offense was committed].)

Finally, appellant's attorney thoroughly detailed the defense theory of the case in closing argument. (30 RT 7900-7954.) Thus, the jury was well aware of appellant's contention that David Zaragoza committed the charged offenses alone. The jury, however, disagreed with this contention.

Appellant cites *People v. Fuentes* (1986) 183 Cal.App.3d 444, in support of his argument that the alleged instructional error was prejudicial. (AOB 99-100.) In *Fuentes*, none of the required language in CALJIC No. 2.01 was given by the trial court in a prosecution that substantially relied upon circumstantial evidence. Thus, the court of appeal found the error prejudicial. (*People v. Fuentes*, *supra*, 183 Cal.App.3d at p. 456.) However, in this matter, the trial court did instruct the jury with CALJIC

No. 2.01 as modified per appellant's request. Thus, *Fuentes* is inapplicable to the case at hand.

Given the before mentioned factors, it is not reasonably probable that a verdict more favorable to appellant would have resulted had the court given the pinpoint instruction. The judgment should be affirmed.

VI. THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST TO MODIFY THE JURY INSTRUCTION RELATING TO MOTIVE

Appellant argues that the trial court prejudicially erred when it denied his request to modify CALJIC No. 2.51 so that the question of motive was not only raised with respect to appellant, but David Zaragoza as well. Respondent disagrees.

A. Procedural and Factual Background

The trial court instructed the jury with the standard CALJIC No. 2.51, which provides: "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty." At the end of the guilt phase of the trial, appellant's counsel requested that the court modify CALJIC No. 2.51 as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive *in the defendant or [David Zaragoza]* may tend to establish *that person's* guilt. Absence of motive *in the defendant or [David Zaragoza]* may tend to establish *that person's innocence. You will therefore, give its presence or absence, as the case may be, the weight to which you find it to be entitled.*

(See proposed instruction No. 3 in appendix of appellant's opening brief, emphasis added.) The trial court declined to give this modified instruction holding: "I don't think the jury is deciding whether David Zaragoza is

guilty or - - guilty in this case. That's a modification to 2.51. [¶] I'm going to refuse number three, though you can argue that David [Zaragoza] had motives." (29 RT 7631.)

B. Discussion

As discussed before, a trial court may be required to give a requested jury instruction that pinpoints a defense theory of the case in appropriate circumstances. But a trial court may properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing, or if it is not supported by substantial evidence. (*People v. Moon*, *supra*, 37 Cal.4th at p. 30.)

Here, appellant challenges the court's failure to give the requested modification to the instruction on motive, arguing that he had "the right to an instruction to direct the jury's attention to evidence from which a reasonable doubt of his guilt could be inferred." (AOB 103.) However, the trial court was not required to modify the standard motive instruction, which accurately conveyed the law to the jury. (See *People v. Daya* (1994) 29 Cal.App.4th 697, 714.) In addition, as the trial court properly held, appellant's proposed instruction was confusing because it instructed the jury to consider David Zaragoza guilt or innocence, something they were not charged to determine. Finally, an instruction that directs a jury to consider evidence that David Zaragoza had a motive to commit the crime, as appellant's proposed instruction did in this instance, is properly rejected as argumentative. (*People v. Ledesma* (2006) 39 Cal.4th 641, 720.)

Nonetheless, in arguing the court erred, appellant relies on *People v. Sears* (1970) 2 Cal.3d 180, 190, where this Court stated that "[a] defendant is entitled to an instruction relating particular facts to any legal issue. [Citations.]" However, as this Court itself noted subsequently, that particular passage from *Sears* did not "abrogat[e] sub silentio the well settled rule against argumentative instructions on a disputed question of

fact. '"None of the cases cited in *Sears* says, and *Sears* itself does not say, that upon request the judge must direct the attention of the jury to specific testimony and tell the jury it may look to that testimony for the purpose of forming a reasonable doubt on an issue."'" (*People v. Wright*, *supra*, 45 Cal.3d at p. 1137.) Because appellant's pinpoint instruction focused on specific evidence relating to motive rather than defendant's legal theory, the court could properly reject it as argumentative.

Assuming, arguendo, that the court should have instructed as appellant requested, this Court need not reverse. A conviction may be reversed for this type of instructional error only if it is reasonably probable the defendant would have achieved a more favorable result absent the error alleged. (*People v. Earp* (1999) 20 Cal.4th 826, 887.) In this instance, even though the court did not instruct with appellant's modified version of CALJIC No. 2.51, it did give an unmodified version of that same instruction. Thus, the jurors were instructed on many of those same legal principles. In addition, the jurors heard evidence on appellant's third party culpability theory and the jury was free to consider evidence of David Zaragoza's motive, a subject appellant's counsel argued extensively in his closing remarks. (30 RT 7941-7944, 7952.) Furthermore, in accordance with CALJIC No. 2.90, the jury was instructed that appellant was presumed innocent until proven guilty, and that the burden of proving guilt fell to the prosecution. Finally, the evidence against appellant was substantial. Given these circumstances, it is not reasonably probable appellant would have achieved a more favorable result absent the error alleged.

VII. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT UPON HIS ARREST

Appellant contends that the trial court prejudicially erred in denying his motion to suppress evidence because he did not freely and voluntarily

consent to make a statement and he was arrested without probable cause. (AOB 107-111.) Respondent disagrees.

A. Procedural and Factual Background

Prior to trial, appellant filed a motion to suppress the Pyrex bowl found in the garbage can at appellant's residence and his statements made on June 13 and June 14, 1999. (4 CT 1030-1036.) In doing so, appellant argued that there was insufficient probable cause to seize such evidence or justify his arrest without a warrant. (4 CT 1028-1029.) In response, the prosecutor filed an opposition to the motion to suppress evidence as well as a motion to introduce appellant's pre-trial statements. (4 CT 1055-1058, 1065-1072.)

On November 22, 2000, the trial court held a hearing on appellant's motion to suppress evidence. (17 RT 4335.) At that time, the parties stipulated that there was no arrest warrant when appellant was interviewed on either June 13 or June 14, 1999, and appellant had no expectation of privacy with respect to the contents of the garbage can. (17 RT 4346-4347.) Thus, as appellant acknowledges, the only evidence at issue was appellant's statements to law enforcement. (AOB 107.) Detectives Wuest and Alejandre testified at the hearing. (17 RT 4347-4407.) Upon hearing the evidence, the court denied appellant's motion to suppress, finding:

> But I think there is a strong suspicion of probable cause for the officers to have arrested the defendant Louis Zaragoza on the 14th and, therefore, they could take his statement. [¶] And I – and I think on June 13th, I think it was a clearly voluntary effort on the part of the defendant – or clearly voluntary on the defendant's part to go to the station to be – to be interviewed. Not custodial in any way.

(17 RT 4413.)

B. Standard of Review

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. [The reviewing court] defer[s] to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, [the court] exercise[s] [its] independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

C. Appellant's Consent Was Freely and Voluntarily Given

Appellant contends that his statement made on June 13, 1999, should have been suppressed because his decision to accompany law enforcement to the station was the "product of an implied assertion of authority," and, thus, his consent was not freely and voluntarily given. (AOB 108-109.) Respondent disagrees.

"[T]he Fourth Amendment's exclusionary rules are designed to deter police misconduct. In contrast, evidence obtained in violation of the Fifth Amendment rights protected by *Miranda* is excluded to ensure protection of the suspect's right against compulsory self-incrimination." (*People v. Smith* (1995) 31 Cal.App.4th 1185, 1192, citing *New York v. Quarles* (1984) 467 U.S. 649, 654.) Accordingly, "[b]ecause the particular interests protected by the Fourth Amendment, a statement must be suppressed, even when knowing, voluntary, and intelligent, if it is the direct product of an illegal arrest or detention. [Citations.] By prescribing searches and seizures without adequate cause or judicial authorization, the Fourth Amendment guards, amongst other things, against the police tactic of 'investigative detention.'" (*People v. Boyer* (1989) 48 Cal.3d 247, 267, disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

There are three categories of police-citizen encounters. The first is referred to as a "consensual encounter" that involves no restraint on the person's liberty. The second type, called "detention," involves a seizure of the individual for a limited duration and for limited purposes. The third type involves seizures in the nature of an arrest, which are justified only if the police have probable cause to arrest the person for a crime. (*People v. Bailey* (1985) 176 Cal.App.3d 402, 405, citing *Florida v. Royer* (1983) 460 U.S. 491.)

> [C]onsensual encounters do not trigger Fourth Amendment scrutiny. [Citation.] Unlike detentions, they require no articulable suspicion that the person has committed or is about to commit a crime. [Citation.] [¶] The United States Supreme Court has made it clear that a detention does not occur when a police officer merely approaches an individual on the street [or in a public place] and asks a few questions. [Citation.] As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner restrains the individual's liberty, does a seizure occur. [Citations.] "[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." [Citation.] This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation. [Citation.] Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled. [Citations.]

(*In re Manuel G.* (1997) 16 Cal.4th 805, 821; see also *People v. Hughes* (2002) 27 Cal.4th 287, 327-328.) "The Fourth Amendment does not prevent a person from agreeing to accompany officers to the police station

and remain there for interrogation. [Citations.]" (*Ford v. Superior Court* (2001) 91 Cal.App.4th 112, 125.)

Without referencing any specific action or conduct by law enforcement, appellant contends that his consent to accompany law enforcement to their quarters was no more than acquiescence to local authorities, and was not freely and voluntarily given. (AOB 108-109.) His argument is without merit.

In this case, there was no question that appellant agreed to give a statement and voluntarily went to the sheriff's department on June 13, 1999, to do so. Detective Wuest testified at the hearing that he and his partner, Detective Alejandre, first made contact with appellant at his residence. When they arrived, appellant was sitting on his porch. The detectives introduced themselves and advised appellant of the investigation they were conducting. (17 RT 4350-4351.) The detectives were in street clothes and drove an unmarked police car. No other police units were present. When asked by the detectives if he would be willing to come down to the Sheriff's Department for an interview, appellant agreed to do so. The detectives then left appellant alone on the porch for about 15 minutes while they spoke to appellant's sister, Nina Koker, inside the house. (17 RT 4351.) After speaking to Koker, the detectives came back outside and asked appellant if he was ready to accompany them to the Sheriff's Department. Appellant again agreed to do so and sat in the front seat of the unmarked unit after he was quickly pat searched for weapons for officer safety. (17 RT 4353.) Detective Alejandre drove while Detective Wuest sat in the back of the vehicle. Appellant was not restrained in any fashion by handcuffs or shackles. (17 RT 4354.) The drive to the Sheriff's Department took approximately 15 minutes. Upon their arrival, they went to an interview room to begin appellant's interview. At no time during the transport did the detectives tell appellant he was under arrest. (17 RT

4355.) At the start of the interview, the detectives advised appellant that he was not under arrest, the interview was voluntary, and he could stop the interview at anytime and they would take him home. The door to the interview room was not locked. Appellant acknowledged and appeared to have understood what he was told. (17 RT 4355-4356.) The interview lasted about two hours. During that time, appellant voluntarily agreed to take a computer voice stress analysis test. (17 RT 4357-4358.) During their contact with appellant, there was no indication that the detectives displayed or used weapons or made any show of force. Nor was there any evidence that either detective touched or restrained appellant at any time, but to quickly pat him down for weapons. The detectives did not block appellant's path, chase after him, run at or yell at him, or command him to do anything. And it appears from the record that the detectives spoke to appellant in a conversational tone, rather than forceful or hostile manner. All of these factors show the encounter was not a detention, but a standard consensual encounter. (See *In re Manuel G.*, *supra*, 16 Cal.4th at p. 821.) Thus, the trial court appropriately determined that appellant accompanied the detectives and spoke, not because of coercion applied by the police, but freely and voluntarily.

D. Appellant's Arrest Was Lawful

Section 836 authorizes a peace officer to make an arrest without a warrant whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence or whenever he has reasonable cause to believe that the person to be arrested has committed a felony. (§ 836, subd. (a) (1)-(3).) "'Cause to arrest exists when the facts known to the arresting officer would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime.' [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 410; see also *People v. Ingle* (1960) 53 Cal.2d 407,

412.) Under the Fourth Amendment, a lawful arrest based on probable cause is a lawful arrest. (*Virginia v. Moore* (2008) 553 U.S. 164, 176.) There is probable cause for a warrantless arrest, if, under the totality of the facts and circumstances known to the arresting officer, a prudent person would have concluded that the suspect had committed or was committing a crime. (*Gerstein v. Pugh* (1975) 420 U.S. 103, 111-112.) Probable cause is a "fluid concept—turning on the assessment of probabilities in particular factual contexts...." (*Illinois v. Gates* (1983) 462 U.S. 213, 232.) "Each case must be decided on its own facts and circumstances and on the total atmosphere of the case." (*People v. Ingle*, *supra*, 53 Cal.2d at p. 412.)

In this matter, appellant and David Zaragoza were arrested at San Joaquin Mental Health Department on June 14, 1999. (17 RT 4369-4370.) Immediately after his arrest, Detectives Wuest and Alejandre interviewed appellant at the police station. (6 CT 1625.) Appellant claims that the trial court erroneously denied his motion to suppress his statement made to the detectives because it was a product of an illegal arrest.

Prior to their arrest, law enforcement quickly identified David Zaragoza as a suspect after the shooting by a number of his personal papers found scattered about the street near the station wagon. (17 RT 4347-4350, 4372, 4382.) Thereafter, law enforcement developed other information that led them to reasonably conclude appellant was also involved in the murder. For instance, Detective Wuest testified at the hearing on appellant's motion to suppress that William Gaines told law enforcement that the person who assaulted him and took the salad bowl was running down the street when he heard two gunshots. (17 RT 4402.) David Gaines's body was found halfway up the driveway and an autopsy of David Gaines revealed he had sustained four contact wounds, which indicated that a second person who was standing very close to him on the driveway committed the shooting. (17 RT 4402, 4397.) An elderly neighbor also saw two men running down

the street after the shooting. (17 RT 4405, 4407.) The day after the shooting, David Zaragoza told law enforcement he was not with appellant on the night in question. (17 RT 4375, 4381, 4388.) However, when David Zaragoza left his residence between 8:00 and 9:00 p.m. on the night of the murder, he told his roommate that he was leaving with appellant. (17 RT 4379.) Appellant also told law enforcement he had been with his brother on the night in question and appellant had his mother's car. (17 RT 4361, 4388.) A couple of days after the shooting, Detective Wuest found the Pyrex bowl that had been taken from William Gaines and a Jack-In-The-Box receipt for a purchase of food close in time and location to the crime in appellant's garbage can. (17 RT 4363-4367, 4374.) Given these circumstances, a person of "ordinary care and prudence" would to "conscientiously entertain an honest and strong suspicion" (*People v. Ingle*, *supra*, 53 Cal.2d at p. 412) that appellant was involved in the murder of David Gaines. Accordingly, the trial court properly denied appellant's motion to suppress his statement made on June 14, 1991.

E. Any Error Was Harmless

Assuming the trial court erred in denying appellant's motion to suppress, it was not prejudicial as appellant contends. As discussed in Argument I, *ante*, the evidence of appellant's guilt was substantial even without appellant's statement to law enforcement after his arrest on June 14, 1999. This included a similar statement made by appellant to detectives on June 13, 1999. Furthermore, as appellant acknowledges in his opening brief (AOB 110-111), he denied committing the crime or knowing anything about it in the subject statement. Appellant's statement in this regard became the centerpiece of his defense that he was asleep on the couch when the murder occurred. Thus, if the trial court erred in allowing appellant's June 14, 1999, statement into evidence, it was harmless beyond a

reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 23; see also *People v. Cahill* (1993) 5 Cal.4th 478, 510.)

VIII. A JUROR WHO HAD A WORK RELATIONSHIP WITH THE VICTIM'S BROTHER WAS PROPERLY ALLOWED TO REMAIN ON THE JURY

Appellant argues that the trial court prejudicially erred by not properly inquiring into Juror No. 8's working relationship with the victim's brother during the guilt phase and by not disqualifying the same juror upon being challenged by appellant's counsel during the penalty phase of the trial. (AOB 112-121.) Respondent disagrees.

A. Guilt Phase Procedural and Factual Background

On February 8, 2001, Juror No. 8 wrote the following message to the trial court:

> Steve Gaines and myself have talked on the plane before.[14] We both work for Save-Mart. I think this should be no problem, but you should know.

(28 RT 7415.) As a result, the court had the following discussion with Juror No. 8 outside the presence of the other jurors:

> THE COURT: Thank you for bringing that to our attention.
>
> JUROR NO. 8: I didn't realize it before now.
>
> THE COURT: Okay. That's - - that was the first question, is because of the questions were asked this morning - -
>
> JUROR NO. 8: Uh--huh.
>
> THE COURT: - - that came to your mind. Do you recall what that conversation was about?
>
> JUROR NO. 8: Just work-related, just work-related type things.

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[14] It was later determined that Juror No. 8 had spoken to Steve Gaines on the phone, not the plane. (28 RT 7418.)

THE COURT: How long ago was that?

JUROR NO. 8: It was on more than one occasion. I mean, it was just different things that - - installation of a time card in the store.

THE COURT: Yeah. Sounds interesting.

JUROR NO. 8: Yeah.

THE COURT: And in terms of the events related - -

JUROR NO. 8: Nothing.

THE COURT: - - about this case?

JUROR NO. 8: Nothing.

THE COURT: Nothing at all?

JUROR NO. 8: No.

THE COURT: Did you even - - were you even aware from those conversations?

JUROR NO. 8: It was even before the case, I was even put on the jury.

THE COURT: Yeah. Was it before these - - before the homicide allegedly occurred?

JUROR NO. 8: Yes.

THE COURT: Okay.

JUROR NO. 8: I just wanted to make you aware of that.

THE COURT: So it's been a couple of years?

JUROR NO. 8: No, it's been probably, I'd say, at least three conversations this - - within the last three or four months.

THE COURT: Oh.

JUROR NO. 8: But it was, you know, there's no - - no idea that I would ever be involved in this. I just wanted to make you aware of it.

THE COURT: It the person that you had a conversation with here?

JUROR NO. 8: I - - I have never even met the person's face. I don't know who it was.

THE COURT: I thought it says - -

JUROR NO. 8: It's the name, that's the right name.

THE COURT: "Steve Gaines and I have talked on the plane."

JUROR NO. 8: Phone.

THE COURT: Oh. Your writing is better than mine, but I can see the problem. Oh. A plane conversation can last a little while. Well, so can a telephone conversation, but a plane, know a person a little better sometimes.

JUROR NO. 8: Okay.

THE COURT: I thought maybe you were going to a convention for Save-Mart or something. That's a little different matter. Okay. All right. Can you avoid contact during the trial?

JUROR NO. 8: I will have no choice.

THE COURT: Right.

JUROR NO. 8: Yeah.

THE COURT: You will avoid it?

JUROR NO. 8: Yes.

THE COURT: Oh, okay. Thank you. Any other questions?

(28 RT 7416-7419.) In response, the following colloquy was had with appellant's counsel, the court and Juror No. 8:

[APPELLANT'S COUNSEL]: Let's say that - - that you returned a verdict that's not proper with Mr. Gaines. Would that cause you any problems?

JUROR No. 8: I have no idea. That's something you would have to, you know, it's something that could be a possibility.

THE COURT: Okay. Remember. I don't know. I asked some jurors, maybe not in your presence, I asked some jurors regardless of what your verdict was, would you feel that you had some sort of obligation to explain to anybody?

JUROR NO. 8: No.

THE COURT: Including Mr. Gaines?

JUROR NO. 8: No.

THE COURT: [Appellant counsel] anything else?

[APPELLANT'S COUNSEL]: You feel comfortable with where you're at right now then?

JUROR NO. 8: I'm fine. I just wanted to make you aware of this.

[APPELLANT'S COUNSEL]: I appreciate it. I have no more questions.

(28 RT 7419-7420.) At no time during the guilt phase did appellant's counsel object on the record to the scope of the court's inquiry into the alleged juror misconduct or the court's decision to allow Juror No. 8 to continue to sit as a juror during the remainder of the guilt phase.

B. Discussion

Appellant now argues for the first time on appeal that the trial court failed to properly inquire into "what sort of problem was posed by Juror No. 8's ongoing relationship with the victim's brother." (AOB 117.) Respondent disagrees.

The trial court has a duty to "conduct a sufficient inquiry to determine facts alleged as juror misconduct 'whenever the court is put on notice that good cause to discharge a juror may exist.'" (*People v. Davis* (1995) 10 Cal.4th 463, 547, quoting *People v. Burgener* (1986) 41 Cal.3d 505, 519.) "Failure to conduct a hearing sufficient to determine whether good cause to discharge the juror exists is an abuse of discretion subject to appellate

review." (*People v. Burgener*, *supra*, 41 Cal.3d at p. 520.) Nevertheless, "[t]he court's discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry." (*People v. Beeler* (1995) 9 Cal.4th 953, 989.) By failing to object to the scope of the court's inquiry in the trial court, the defendant forfeits his claim that the court's inquiry was inadequate. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1045-1047; *People v. Rhoades* (2001) 93 Cal.App.4th 1122, 1126; *People v. McIntyre* (1981) 115 Cal.App.3d 899, 905-906.)

Here, appellant's counsel did not object to any of the questions posed to Juror No. 8 by the trial court and asked questions of Juror No. 8 himself when permitted to do so by the court. If appellant had objected to the trial court's method of inquiry into Juror No. 8's alleged bias, the court could have exercised its discretion to determine whether further questioning was necessary. By failing to object, appellant deprived the court of the opportunity to correct any deficiency in the inquiry it had already conducted. Having failed to raise the issue in the trial court, appellant cannot now contend for the first time on appeal that the trial court's inquiry was inadequate and grounds for reversal. (*People v. Holloway* (2004) 33 Cal.4th 96, 126 [defendant forfeited claim of an inadequate examination of a juror because defendant did not "seek a more extensive or broader inquiry of the juror at the time, or in any other way object to the trial court's course of action"].) Thus, appellant's claim of error related to the alleged bias of Juror No. 8 is forfeited.

Nonetheless, appellant's argument is without merit. The trial court may discharge a juror for good cause at any time, including during deliberations, if the court finds that the juror is unable to perform his or her duty. (*People v. Lomax* (2010) 49 Cal.4th 530, 588-589; § 1089.) "Grounds for investigation or discharge of a juror may be established by his

statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists. [Citations.]" (*People v. Keenan* (1988) 46 Cal.3d 478, 532.) A juror who is actually biased is unable to perform the duty to fairly deliberate and thus is subject to discharge. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1051.)

In this matter, appellant contends that Juror No. 8 "obliquely" acknowledged that voting in favor of appellant might cause problems for him with the victim's brother. (AOB 114.) Thus, appellant argues "the court was duty bound to inquire as to what sort of problem was posed by Juror No. 8's ongoing relationship with the victim's brother." (AOB 117.) Appellant's argument is misguided. As the record indicates, the court's inquiry determined that Juror No. 8 did not have an "ongoing relationship" with the victim's brother. Rather, he had three business telephone conversations over a three to four month period with Steve Gaines before trial began. In fact, Juror No. 8 had never met Steve Gaines in person. (28 RT 7417-7418.) In addition, as Juror No. 8 noted, he had no idea whether his business contact with Steve Gaines would cause a problem. (28 RT 7419.) In other words, he was, in essence, merely speculating as to whether such a problem would arise. More importantly, immediately after making the statement that problems could possibly arise, Juror No. 8 unequivocally told the court that he would feel no obligation to explain his verdict to anybody, including the victim's brother. (28 RT 7419.) Thus, given these circumstances, the court's inquiry demonstrated no actual bias existed on the part of Juror No. 8. Once that was established the court was not required to probe deeper into the issue. Appellant's counsel apparently agreed for he stopped the inquiry when Juror No. 8 acknowledged he felt comfortable as a juror and noted he only wanted to make the court aware of the issue. (28 RT 7419.)

Assuming, without conceding, the court's inquiry was inadequate, any error was harmless. The verdict will be set aside only if there appears a substantial likelihood that the conduct resulted in juror bias. "Such bias may appear in either of two ways: (1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not 'inherently' prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was 'actually biased' against the defendant. If [the court] find[s] a substantial likelihood that a juror was actually biased, [the court] must set aside the verdict, no matter how convinced [the court] might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard." (*People v. Nesler* (1997) 16 Cal.4th 561, 578-579.)

In this case, there was not a substantial likelihood that Juror No. 8 was biased by his contact with Steve Gaines. The contact involved three phone calls relating to business during a three to four month span before the trial started and had nothing to do with the case. (28 RT 7417.) And there was nothing about the communication that could be construed as tending to create juror sympathy for the prosecution's case. In fact, Juror No. 8 had never met Steve Gaines in person. (28 RT 7418.) Furthermore, Juror No. 8's explanation to the court that he did not realize he had these conversations with Steve Gaines until the day he raised them with the court, demonstrated that he respected and intended to follow the court's instructions. Indeed, when Juror No. 8 realized he had these prior contacts with Steve Gaines, he immediately reported it to the court, again demonstrating a respect and intent to follow the court's instructions. In effect, Juror No. 8's prior contact with Steve Gaines was de minimis and

does not support a conclusion that there is a substantial likelihood Juror No. 8 was prejudiced by it. Therefore, the judgment should be affirmed.

C. Penalty Phase Procedural and Factual Background

During the penalty phase of the trial, the court decided to again question Juror No. 8 about his ability to be fair in light of the fact that Sally Gaines, the wife of Steve Gaines, would testify relating to victim impact for the prosecution. (32 RT 8336-8337.) When Juror No. 8 appeared outside the presence of the other jurors, the following discussion occurred:

> THE COURT: [T]he reason I called you in here this morning is because at the penalty phase, family members of David Gaines are going - - are allowed to testify. [¶] One of the family members is Sally Gaines, who is likely to testify, and she's the wife of - - of Steve Gaines. [¶] And they are permitted to testify regarding how David Gaines was a unique human being, and what they knew of David Gaines, and - - they are also entitled to talk to you about the emotional impact that David Gaines' death had on them and their family members and on the community. [¶] So it's a slightly different situation that we have now than we had during the [] guilt phase of the trial. [¶] My question to you is would the fact that you had this contact - - I suppose it's possible that you may have contact with Steve Gaines in the future.
>
> JUROR NO. 8: More than likely, yes.
>
> THE COURT: Would those facts affect your ability to fairly and impartially evaluate this evidence?
>
> JUROR NO. 8: I have never met her, I wouldn't even probably recognize her if I saw her. And no.
>
> THE COURT: And you understand that we are talking about she may talk about the impact on Steve Gaines himself, is that going to have an effect?
>
> JUROR NO. 8: No.
>
> THE COURT: Okay.

JUROR NO. 8: He's not anywhere within my path to have any effect on my career.

THE COURT: Okay. All right. Unless there is other questions. [Appellant's counsel].

[APPELLANT'S COUNSEL]: I guess the only question we ask, [Juror No. 8], is if you put yourself in my client's position, would you feel uncomfortable to have somebody of your state of mind - - especially when we are at the point where you are going to make probably the most significant decision, whether they live or die - - would you want somebody in your state of mind making that decision?

JUROR NO. 8: That's a good question. I don't know how to answer it.

THE COURT: Let me put it this way, and this may be a way to focus on it: If there were twelve people with your state of mind on the jury would you feel that – that you had a fair and impartial jury? For this phase?

JUROR NO. 8: I - - I - - I have done everything that I've done by the instructions that you've given us and the law, and that's how I think I would continue to do things.

THE COURT: [Appellant's counsel]. Anything further?

[APPELLANT'S COUNSEL]: Would you feel - - would you feel uncomfortable if you were in his position knowing how you would feel?

JUROR NO. 8: Possibly.

[APPELLANT'S COUNSEL]: Possibly. Does that have a relationship to the fact that you might have to deal with Steve Gaines?

JUROR NO. 8: It would be very seldom if any contact that I would ever have with the gentleman. And I think I can be fair and impartial. [¶] But that's your decision to make beyond that. I mean . . .

THE COURT: Anything further?

[APPELLANT'S COUNSEL]: No.

(32 RT 8341-8343.) Thereafter, appellant's counsel challenged Juror No. 8 based upon the "equivocal nature" of his answers. In doing so, counsel argued, "[I]t's not so open and shut case. We have had a situation before. And at this particular point in time, given the magnitude of the decision, I think we have to have somebody with an absolutely clear mind. [¶] And his equivocation in that last answer to the question I gave causes us great concern." (32 RT 8343.)

The prosecutor disagreed, arguing that the question asking whether Juror No. 8 would be uncomfortable being in appellant's position and himself on the jury was broader. (32 RT 8344.) The prosecutor argued that there were no parameters defining what would make Juror No. 8 uncomfortable, but he did indicate that it had nothing to do with his relationship with Steve Gaines. "And as he indicated, he's done everything by the book. And ... this relationship is so far removed that ... I can't see it having any impact. There is not even a professional relationship. I mean, it's so attenuated." (32 RT 8344.) Appellant's counsel responded by arguing that there was something on Juror No. 8's mind when he made the statement.

After argument by counsel, the court denied appellant's challenge. In doing so, the court stated:

> I think I understand. And I think I've made my own determination. I think [Juror No. 8] can be fair in the matter. And I think he is. [¶] I think what he's - - he's being I think especially fair in saying that there's a possibility that if he were in [appellant]'s situation, he would not feel comfortable with himself on the jury. It's an equivocal answer, and I - - I - - I think he's firmly committed to the concepts we talked to him about, about not allowing those kinds of things to affect him. [¶] And he seems to be an intelligent man who understands the importance of being fair and impartial, but he's allowing for the possibility that someone else may not think he is. [¶] I think

> under the circumstances he can sit in this case fairly and impartially, and I think contact with Steve Gaines is very minimal and - - and - - and it's in the past, though it may occur in the future. It's not as if he has a - - even a moderately close working relationship with him.

(32 RT 8345.)

Appellant argues that the trial court's ruling was wrong for it did not address the acknowledged appearance of bias. "The juror himself recognized that there was an appearance of bias in his continuing to serve." (AOB 120.) Respondent disagrees.

D. Discussion

As discussed above, a trial court may discharge a juror at any time during the proceeding upon the showing of good cause that the juror is unable to perform his duty. (*People v. Lomax*, *supra*, 49 Cal.4th at pp. 588-589; § 1089.) A juror who is actually biased is unable to perform the duty to fairly deliberate and thus is subject to discharge. (*People v. Barnwell*, *supra*, 41 Cal.4th at p. 1051 [the court properly discharged a juror for cause because the record demonstrated that the juror exhibited a general bias against police officers that prevented him from fairly weighing police testimony in this case.].) This Court reviews a trial court's decision whether to discharge a juror for abuse of discretion and will uphold the court's ruling if supported by substantial evidence. (*People v. Marshall* (1996) 13 Cal.4th 799, 843.) "[A] juror's inability to perform as a juror must '"appear in the record as a demonstrable reality."'" (*Ibid.*)

As appellant implicitly concedes by his argument, the record in this instance fails to demonstrate that Juror No. 8 was actually biased because of his limited business contact with Steve Gaines prior to trial. In fact, when examined by the court as to whether he had the proper state of mind to continue to sit as a juror during the penalty phase, Juror No. 8 indicated that he followed the law as he had been instructed and would continue to do

so. (32 RT 8343.) In addition, Juror No. 8 stated he could be fair and impartial. (32 RT 8343.) Thus, as the trial court properly found, the record established not an actual bias, but rather that Juror No. 8 could be fair and impartial. Accordingly, the trial court did not abuse its discretion in denying appellant's request to discharge Juror No. 8.

Respondent disagrees with appellant's characterization of Juror No. 8's answer to the question as to whether appellant had reason to be uncomfortable as being equivocal. (AOB 120.) Granted, Juror No. 8 said it was possible that appellant would feel uncomfortable with having him on the jury. (32 RT 8342.) Under the circumstances, it was "possible" that appellant may have felt uncomfortable with anyone on the jury in light of their verdict regarding the guilt phase of the trial. However, that had nothing to do with Juror No. 8's business contacts over the telephone with Steve Gaines. As Juror No. 8 unequivocally noted immediately following his possible comment, "It would be very seldom if any contact that I would ever have with the gentleman. And I think I could be fair and impartial." (32 RT 8343.)

Nevertheless, appellant contends that even if there is no showing of actual bias in the tribunal, due process may be denied if there is a probability of bias. (AOB 120.) In support of his argument, appellant relies on *Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 U.S. 868, 129 S.Ct. 2252. However, *Caperton* is factually distinguishable from the case at hand. In *Caperton*, the United States Supreme Court held that a state supreme court justice was required to recuse himself from the prevailing party's case where that party had made significant campaign contributions to the justice's campaign for office. (*Id.* at pp. 2256-2257.) However, the Court's holding was narrow. (*Id.* at p. 2265.) The Court noted the "extreme facts" of that case and limited its holding to the "extraordinary situation" where the "probability of the actual bias rises to an

unconstitutional level." (*Ibid.*) Unlike circumstances in *Caperton*, there is no probability of actual bias in this case.

Assuming the court erred in not discharging Juror No. 8 because of the appearance of bias, it was harmless. Juror No. 8's prior business contact with Steve Gaines before trial was minimal and does not support a conclusion that there is a substantial likelihood Juror No. 8 was prejudiced by it. Therefore, the judgment should be affirmed.

IX. PROOF BEYOND A REASONABLE DOUBT IS THE PROPER STANDARD OF PROOF

Appellant contends that the Eighth Amendment of the United States Constitution and due process of the law forbids the penalty of death to be imposed unless guilt is found beyond all reasonable doubt. (AOB 122-142.) Respondent disagrees.

As appellant acknowledges, this Court has rejected claims that death penalty cases require a standard of proof higher than beyond a reasonable doubt. (*People v. Riel* (2000) 22 Cal.4th 1153, 1182 (*Riel*).) In *Riel*, the jury was instructed on the reasonable doubt standard. This Court held that no higher standard applies in a death penalty case. (*Id.* at p. 1182.) "'There is no requirement, under the Eighth Amendment to the federal Constitution, to instruct on a higher standard of proof of guilt at the penalty phase of a capital trial. (See *Franklin v. Lynaugh* (1988) 487 U.S. 164, 172-175.)'" (*Riel, supra*, 22 Cal.4th at p. 1182, quoting *People v. Kaurish* (1990) 52 Cal.3d 648, 706.)

Nonetheless, appellant argues that given the increasing number of wrongful convictions, the beyond a reasonable doubt standard is unconstitutional because it leads to a substantial number of executions of innocent people. (AOB 133.) In support of this argument, appellant relies on a district court decision from the Southern District of New York, which held the Federal Death Penalty Act unconstitutional. (See *U.S. v. Quinones*

(2002) 205 F.Supp.2d 256, 257.) However, the Second Circuit reversed this decision finding:

> The argument that innocent people may be executed-in small or large numbers-is not new; it has been central to the centuries-old debate over both the wisdom and the constitutionality of capital punishment, and binding precedents of the Supreme Court prevent us from finding capital punishment unconstitutional based solely on a statistical or theoretical possibility that a defendant might be innocent.

(*U.S. v. Quinones* (2002) 313 F.3d 49, 63.) "Since 1878, the Supreme Court has upheld challenges to death penalty statutes based upon the Due Process Clause as well as the Eighth Amendment." (*U.S. v. Quinones*, *supra*, 313 F.3d at p. 65.) Particularly, in *Furman v. Georgia* (1972) 408 U.S. 238, all nine Justices found that application of a particular state death penalty statute was so arbitrary that it violated the Eighth Amendment. Nevertheless, only two Justices were willing to declare the death penalty a per se violation of the Constitution. Only Justice Thurgood Marshall believed that the possibility of executing an innocent person was sufficient on its own to render the death penalty unconstitutional. (*Id.* at pp. 305, 358-59, 364). In *Gregg v. Georgia* (1976) 428 U.S. 153, the Supreme Court held that capital punishment does not constitute a per se violation of the Eighth Amendment. (*Id.* at p. 207.) Thereafter, in *Herrera v. Collins* (1993) 506 U.S. 390, the United States Supreme Court held that the death penalty is not per se unconstitutional at the same time it acknowledged that innocent individuals may be executed under the inherent fallibility of any system of justice. (*Id.* at pp. 416-420.)

"Under the United States Constitution, the government explicitly may, with due process of law, deprive a person of life." (*U.S. v. Honken* (2008) 541 F.3d 1146, 1174, citing U.S. Const. amend. V.) "[T]he Supreme Court has upheld state and federal statutes providing for capital punishment for over two hundred years, and it has done so despite a clear recognition of the

possibility that, because our judicial system ... is fallible, innocent people might be executed." (*U.S. v. Quinones*, *supra*, 313 F.3d at p. 65.) "[T]he mere possibility that an actually innocent person may be convicted cannot be the constitutional touchstone for a due process violation. If it were, no judicial system could withstand the scrutiny." (*U.S. v. Montgomery* 2007 WL 1031282 *7 (W.D.Mo. Apr. 12, 2007.) Given this legal authority, appellant's argument must fail.

X. THE TRIAL COURT PROPERLY EXCUSED TWO PROSPECTIVE JURORS FOR CAUSE

Appellant argues that the judgment must be reversed because the trial court wrongfully excused two prospective jurors for cause. (AOB 143-151.) Respondent disagrees.

Under the due process clause of both the state and federal Constitution, a capital defendant is entitled to an impartial jury at the guilt and penalty phases of trial. (*People v. Martinez* (2009) 47 Cal.4th 399, 425; *People v. Blair* (2005) 36 Cal.4th 686, 741.) A "criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9, citing *Witherspoon v. Illinois* (1968) 391 U.S. 510, 521.) On the other hand, the People have an important interest in having jurors who are able to apply capital punishment as state law prescribes. (*Wainwright v. Witt* (1985) 469 U.S. 412, 416 (*Witt*).) To balance these two competing interests, the law permits a prospective juror to be challenged for cause only if the juror's views in favor of or against capital punishment "would 'prevent or substantially impair the performance of his [or her] duties as a juror'" in accordance with the court's instructions and the juror's oath. (*Id.* at p. 424, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146.) "Death qualification" in a capital case is thus an

inquiry into whether the prospective juror's views and attitudes would interfere with his or her ability to faithfully and impartially apply the law in the case." (*People v. Taylor* (2010) 48 Cal.4th 574, 602, internal quotation marks omitted.) However, "'[t]here is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. [Citations.] Rather, it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror.' [Citation.]" (*People v. Gray* (2005) 37 Cal.4th 168, 192-193.) A prospective juror can properly be excused for cause if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. (*People v. McWhorter* (2009) 47 Cal.4th 318, 340.)

"'Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court.' [Citations.]" (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 668.) Generally, a trial court's rulings on motions to exclude for cause are afforded deference on appeal because, in addition to the answers given, the trial court considers the tone and demeanor of the prospective jurors. (*People v. Avila* (2006) 38 Cal.4th 491, 529.)

In addition, "a prospective juror in a capital case may be discharged for cause based solely on his or her answers to the written questionnaire if it is clear from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law." (*People v. Avila*, *supra*, 38 Cal.4th at p. 531; accord, *People v. Wilson* (2008) 44 Cal.4th 758, 787.) However, deference is not given when the trial court's ruling is based solely on the record of the prospective juror's answers on a written questionnaire since the same information is available on appeal. (*People v. Avila. supra*, 38 Cal.4th at p. 529.) Accordingly, this Court independently reviews a trial court's decision to excuse for cause a prospective juror based

solely upon that juror's written responses to a questionnaire. (*People v. McKinnon* (2011) 52 Cal.4th 610, 643.)

A. Prospective Juror No. 129

Appellant argues that the trial court's dismissal of prospective Juror No. 129 based solely on her questionnaire answers was improper and, as a result, the matter should be reversed. (AOB 146-149.) Appellant's argument is without merit.

The jury questionnaire used in this instance asked prospective jurors about their religious convictions. In response to the question whether she had any such convictions which would in any way interfere with her ability to sit as a juror in a case that involves the death penalty, Juror No. 129 indicated she did and explained that she did not feel she had the right to decide if a person is to die. (17 CT 4806.) As to her attitudes regarding the death penalty, when asked in question 2 if her religious, moral or personal beliefs made it difficult for her to impose the death penalty, Juror No. 129 said yes and commented she did not believe she had the right to make the judgment for another human to die. She made the same remark when asked about her general feelings regarding the death penalty in question 3, and commented that her belief about the death penalty was a moral one in question 5. (17 CT 4817, 4819.) Juror No. 129 further wrote she would not refuse to find the defendant guilty of first degree murder or refuse to find true the special circumstances just to prevent the penalty phase from taking place. Furthermore, she claimed she would not automatically impose a sentence of life without the possibility of parole because of her views of the death penalty. (17 CT 4818.) She believed the death penalty was imposed about the right amount and she would not raise the burden of proof to some other standard because the defendant may face the death penalty. (17 CT 4818.) She also believed she would be able to set aside her own personal feelings what the law in this case should be and follow

the law as the court explained it to her. (17 CT 4817-4818.) At the end of the questions relating to her attitude toward the death penalty, Juror No. 129 noted when answering question 18 that none of her answers given were based on a religious consideration. However, in response to question 19, which asked whether any religious beliefs she may have would have a substantial impact on her decision in the case, she remarked "somewhat." (17 CT 4819.)

The prosecutor moved to dismiss Juror No. 129 based upon her belief she did not have the right to decide if a person should die because of her religious beliefs. (19 RT 4877.) Appellant's counsel opined that he Juror No. 129 did not present an unwillingness to follow the law. (19 RT 4877.) Based upon her answers, the trial court granted the prosecutor's request to excuse Juror No. 129 for cause, finding Juror No. 129's ability to be neutral substantially impaired based on her religious beliefs. (19 RT 4878-4879.) Appellant's counsel did not object.[15] (19 RT 4879.)

Appellant now argues that the trial court's decision to excuse Juror No. 129 was per se error because she "did not say anywhere in her questionnaire that she would be so bound by a religious conviction that she could not follow the law as it was given to her by the trial court." (AOB 148.) Appellant's argument is mistaken.

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[15] In *People v. McKinnon*, *supra*, 52 Cal.4th at p. 643, this Court held, "[C]ounsel must make either a timely objection, or the functional equivalent of an objection, such as a statement of opposition or disagreement, to the excusal stating specific grounds under *Witherspoon/ Witt* in order to preserve the issue for appeal." However, the Court did not apply this rule to cases tried before the *McKinnon* decision was rendered in 2011 (*Ibid.*) Thus, despite appellant's failure to properly object to the court's decision to exclude Juror No. 129, the issue has not been forfeited on appeal given the fact that his case was tried in 2001.

As discussed above, a prospective juror may be disqualified on his or her questionnaire responses alone if those answers, "taken together," clearly demonstrate the juror's unwillingness or inability, because of attitudes about the death penalty, to perform his or her duties in a capital trial. (*People v. Avila*, *supra*, 38 Cal.4th at p. 533.) If the written questionnaire responses leave no doubt that the prospective juror cannot or will not act fairly in a capital case, excusal of the juror is justified. (*People v. Wilson*, *supra*, 44 Cal.4th at p. 787.)

Appellant contends that it cannot be said that Juror No. 129's questionnaire answers leave no doubt that she was unable or unwilling to follow the law as instructed. (AOB 148.) As appellant points out, Juror No. 129's questionnaire includes pro forma statements of a willingness to apply the law as the court instructed. However, appellant fails to acknowledge that her answers are replete with statements that she was opposed to capital punishment. Juror No, 129 noted that it would be difficult for her to impose the death penalty because of her religious convictions. (17 CT 4806.) In three of her answers relating to her opinion about the death penalty, she remarked that she did not believe she had the right to make the judgment for another human to die. (17 CT 4817.) In answering question 18 at the end of the questionnaire, Juror No. 129 indicated that none of her answers given were based on religious considerations. However, in her response to the very next question, question 19, Juror No. 129 completely contradicted herself when stating that her religious beliefs would have "somewhat" of a substantial impact on her decision in the case. (17 CT 4819.) Her response to question 19 alone left considerable doubt as to whether she was willing and able to apply the law and evaluate the death penalty choice fairly. When viewed together, Juror No. 129's answers relating to her feelings about imposing the death

penalty clearly demonstrated an unwillingness or inability to temporarily set aside her own beliefs and follow the law as instructed.

Juror No. 129's answers most closely resemble the responses Prospective Juror O.D. gave in his jury questionnaire in *People v. Avila*, *supra*, 38 Cal.4th 491. In finding that the trial court did not err in excusing him for cause based solely on his responses to the jury questionnaire, this Court explained:

> Although Prospective Juror O.D. indicated he strongly opposed the death penalty, he also acknowledged that one of the duties of a juror was to follow the law and indicated he could set aside his personal feelings and follow it. Given only these two answers, we might not be able to say that O.D.'s opposition to the death penalty was clear and unequivocal. But he also indicated that he entertained such conscientious opinions regarding the death penalty that he would, in every case and regardless of the evidence presented, automatically vote for something other than first degree murder so as not to reach the penalty phase, automatically vote for a verdict of not true as to the special circumstances alleged so as not to reach the penalty phase, and, automatically vote for life imprisonment without the possibility of parole if there were a penalty phase. O.D. also strongly disagreed with the following three statements, based on his religious beliefs: (1) "Any person who intentionally kills another person, unless the killing was in self-defense or the defense of another, deserves the death penalty"; (2) "Convicted murderers should be swiftly executed once they are convicted"; and (3) belief in the adage "An eye for an eye." When asked to explain his answers, O.D. answered, "I was taught that there should be no reason to kill and I will continue to think this way." We find that, taken together, O.D.'s answers to the jury questionnaire professed an opposition to the death penalty that would prevent him from performing his duties as a juror.

(*Id.* at p. 532.) Although Juror No. 129 was not as recalcitrant as Juror O.D., she had the same sort of contradictory statements in her responses in her jury questionnaire. Thus, as was the case with Juror O.D. in *Avila*, Juror No. 129's constant and contradictory references to religious scruples support the court's finding that she would be unable to perform her duties

as a juror. Accordingly, the trial court did not err in dismissing Juror No. 129 for cause based upon her answers to the jury questionnaire.

In *People v. Stewart* (2004) 33 Cal.4th 425, the trial court the court excused five prospective jurors solely on the basis of their answers on a written questionnaire. Specifically, the trial court relied on the jurors' responses to the question whether their views would "'prevent or *make it very difficult* [¶] ... [¶] [t]o ever vote to impose the death penalty.'" (*Id.* at pp. 442–443, italics added.) This Court found that the trial court erred in excusing the prospective jurors on this basis because the questionnaire answers provided insufficient information about the jurors' states of mind. (*Id.* at pp. 446–452.) As *Stewart* explained, "the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror' under *Witt, supra,* 469 U.S. 412." (*People v. Stewart, supra*, 38 Cal.4th at p. 447; see also *People v. Avila, supra*, 38 Cal.4th at p. 530 ["mere difficulty in imposing the death penalty does not, per se, prevent or substantially impair the performance of a juror's duties"].) This is so because individuals who firmly oppose the death penalty "'may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law.'" (*People v. Stewart, supra,* 38 Cal.4th at p. 446, quoting *Lockhart v. McCree* (1986) 476 U.S. 162, 176.)

The questionnaire in this instance did not suffer from the same defect. Question 2 in the questionnaire's section about "Attitudes Regarding the Death Penalty" asked whether the prospective juror had any religious, moral or personal beliefs that would make it "difficult" for the juror to impose the death penalty. (17 CT 4817.) Although this question asked for a "yes" or "no" answer, it was followed by a request for an explanation if

the response was yes. (*Ibid.*) Question 3 asked the prospective juror what were his or her general feelings about the death penalty. (*Ibid.*) Question 4 then asked "What purpose do you feel the death penalty serves?" (*Ibid.*) Question 5 then asked, "Are there particular reasons for your feelings about the death penalty?" (*Ibid.*) The questionnaire also asked in question 9a, "Would you, because of any views you may have concerning the death penalty, automatically refuse to vote for the death penalty and automatically vote for life imprisonment without the possibility of parole, without considering any evidence of any of the aggravating or mitigating factors (to which you will be instructed) regarding the facts of the crime and the background and character of the defendant?" (17 CT 4818.) Finally, critical to the court's evaluation of Juror No. 129, the questionnaire asked in question 19, "Do you believe that any religious beliefs you may have would have a substantial impact on your decision in this case?" (17 CT 4819.)

Therefore, the questionnaire utilize in this matter "included more expansive and detailed questions on capital punishment and gave jurors the clear opportunity to disclose views against it so strong as to disqualify them for duty on a death penalty case." (*People v. Avila*, *supra*, 38 Cal.4th at p. 531.) Furthermore, Juror No. 129's answers to the before mentioned questions were sufficiently unambiguous to allow the court to spot a disqualifying bias on the basis of her written responses alone. Thus, the trial court's decision to excuse Juror No. 129 for cause based solely on her answers to the jury questionnaire was proper.

B. Prospective Juror No. 16

Appellant also contends that the trial court's dismissal of prospective Juror No. 16 for cause constituted prejudicial error and deprived him of a qualified prospective juror. (AOB 149-151.) Respondent disagrees.

In response to question 3 in the jury questionnaire's section relating to general feelings about the death penalty, Juror No. 16 stated that she did not feel that she would be able to take a life. In response to question 6 in the same section, she thought life imprisonment without the possibility of parole for murder was an appropriate sentence. (11 CT 3200.) She also stated in response to question 9a that she would automatically refuse to vote for the death penalty and automatically vote for life imprisonment without the possibility of parole, without considering any evidence of aggravating and mitigating factors, because of her views concerning the death penalty. But she also indicated that her answer would change if instructed by the court that she must consider and weigh such evidence before voting on the issue of penalty. (11 CT 3201.) Finally, when asked in question 16 whether she would be able to follow the court's instruction that the monetary costs of either keeping the defendant in prison for life or executing him was not to be considered in deciding the penalty, she wrote no. (11 CT 3202.)

During voir dire, Juror No. 16 informed the court that she would be able to follow the instruction that she was not to consider the monetary costs of either keeping the defendant in prison for life or executing him in deciding what penalty to impose. (20 RT 5228.) When the court then asked why she said no on the questionnaire to the same question, Juror No. 16 stated: "Well, I really don't feel that I should be - - should take - - or be a part of taking another person's life. But if the law says you – I have never broken the law in my life, and I don't intend to do one now." When asked by the court whether she had any religious, moral or personal beliefs that would make it difficult for her impose the death penalty, she said no. (20 RT 5230.)

Thereafter, the prosecutor challenged Juror No. 16 for cause, arguing that many of her answers were "contradictory," "conflicted" and

"disingenuous." The prosecutor had a strong suspicion that Juror No. 16 had an agenda, was not being forthcoming and was entrenched in her ways. "She does not want to be here but she's also pretty entrenched in her views. I believe her - - that her jury questionnaire indicates she would not vote for the death penalty. There's nothing here that she said I believe honestly that would indicate otherwise." (21 RT 5383.)

In response, appellant's counsel argued the Juror No. 16 came around. "In fact, she was fairly vehement claiming to [the prosecutor] that she would have no trouble in voting for the death penalty if he proved the case so I agree there's some ambivalence. I didn't see the inability to follow the law that I think is required." (21 RT 5384.)

The trial court noted that a number of Juror No. 6's answers during voir dire indicated that she could be fair. However, when those answers were compared to those given on her questionnaire, the court found her equivocal which led the court to believe that the juror's ability to be neutral and follow the court's instruction was substantially impaired. Thus, the trial court granted the prosecutor's challenge for cause. (21 RT 5385.)

Appellant now argues the court erred because Juror No. 16 was emphatic that she could vote for the death penalty if the circumstances warranted. (AOB 149.) Respondent disagrees. Juror No. 16 was anything but certain about capital punishment.

It is well settled that the trial court may excuse for cause a prospective juror whose views on the death penalty would prevent or substantially impair the performance of that juror's duties" in accordance with the court's instructions and the juror's oath. (*People v. Hamilton* (2009) 45 Cal.4th 863, 889; *People v. Bonilla* (2007) 41 Cal.4th 313, 338-339; *Witt, supra*, 469 U.S. at p. 424.)

> Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court.

> [Citation.] The trial court must determine whether the prospective juror will be 'unable to faithfully and impartially apply the law in the case.' [Citation.] A juror will often give conflicting or confusing answers regarding his or her impartiality or capacity to serve, and the trial court must weigh the juror's responses in deciding whether to remove the juror for cause. The trial court's resolution of these factual matters is binding on the appellate court if supported by substantial evidence. [Citation.] '[W]here equivocal or conflicting responses are elicited regarding a prospective juror's ability to impose the death penalty, the trial court's determination as to his true state of mind is binding on an appellate court. [Citations.]

(*People v. Bonilla*, *supra*, 41 Cal.4th at p. 339, internal quotation marks omitted.) "In other words, the reviewing court generally must defer to the judge who sees and hears the prospective juror, and who has the 'definite impression' that he is biased, despite a failure to express clear views." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1007.) The United States Supreme Court explained: "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." (*Uttecht v. Brown*, *supra*, 551 U.S. 1, 9.)

Under this standard, the trial court did not abuse its discretion by excusing Juror No. 16 for cause. As appellant's own trial counsel admitted, Juror No. 16 was uncertain about her position on the death penalty. In her questionnaire, she stated that she did not feel she could take a life when asked about her general feeling regarding the death penalty. (11 CT 3200.) She also noted she would automatically vote for life in prison without the possibility of parole without considering any evidence regarding aggravating or mitigating factors. (11 CT 3201.) Although she indicated she could change this position if instructed to do so by the court and could set aside her own personal feelings about what the law should be and

follow the law as the court explains it, she was not sure whether she would not consider the monetary cost of either keeping the defendant in prison for life or executing him in deciding the penalty. (11 CT 3201, 3202.) During voir dire, Juror No. 16 told the court she would be able to follow the law and not consider the monetary costs when deciding penalty. However, when asked why she said she could not in her questionnaire, Juror No. 16 wavered by reiterating her feeling that she did not believe she should be part of taking a person's life before backtracking, stating that she had never broken the law in her life and she did not intend to so now. (21 RT 5229.) Based upon this record, it is evident that Juror No. 16's statements were contradictory and equivocal. Thus, the trial court was well within its broad discretion in granting the challenge to Juror No. 16 and this Court must defer to the trial court's ruling in this regard.

XI. THE TRIAL COURT PROPERLY DENIED APPELLANT'S *BATSON/WHEELER* MOTION

Appellant contends that the trial court erred by denying the defense motion under *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) that the prosecutor impermissibly used peremptory challenges to remove two Hispanic prospective jurors based on their race. (AOB 152-157.) Respondent disagrees.

A. Procedural and Factual Background

The prosecutor used his first peremptory challenge to excuse Juror No. 2, Lorraine Marie Romero. The prosecutor then excused Juror No. 7, Rose Elizabeth Coronado, with his second peremptory challenge. After appellant's counsel excused another juror with his second peremptory challenge, the court recessed. (21 RT 5445.) During the recess, appellant's counsel made a *Wheeler* motion, objecting to the prosecutor's first two peremptory challenges. In doing so, appellant's counsel voiced a concern

that the first two jurors excused by the prosecution clearly were Hispanic like appellant. As a result, appellant's counsel argued a pattern had developed and asked that the prosecutor provide a justification for his first two peremptory challenges. (21 RT 5448.) In turn, the prosecutor argued that excusal of the first two jurors with Spanish surnames did not establish a pattern. Rather, the prosecutor argued that appellant's counsel failed to make the required prima facie showing that the peremptory challenges were based on invidious reasoning or were race based. (21 RT 5449.) Considering all the information it had, including the jury questionnaires and the answers the subject jurors gave during voir dire, the court denied the motion, finding that appellant's counsel had not made a prima facie showing that the prosecutor had systematically excluded jurors of Hispanic origin based on their race. (21 RT 5450-5451.)

In his opposition to appellant's motion for new trial,[16] the prosecutor independently raised and argued that appellant's counsel failed to make the requisite prima facie showing. Citing *People v. Howard* (1992) 1 Cal.4th 1132, 1156, the prosecutor argued that appellant failed to show a "strong likelihood" that the two prospective jurors had been challenged for their group association rather than for any specific race-neutral reason. (9 CT 2571-2572.) In doing so, the prosecutor noted that five Spanish-surnamed jurors had been selected to serve on the jury, including Palacios (foreman), Vigil, Matta, Yetner and Gonzales.[17] (9 CT 2571.) In addition, assuming without conceding that a prima facie showing had been made by appellant's counsel, the prosecutor set forth his race-neutral justifications for

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[16] Appellant's motion for new trial was filed on May 3, 2001. (9 CT 2508-2539.)

[17] Appellant contends that only two jurors, Matta and Palacious, were actually Hispanic. (AOB 153.)

challenging the jurors based primarily on answers provided on their questionnaires and during voir dire. (9 CT 2573-2575, 2580-2583.)

On May 24, 2001, the court heard appellant's motion for new trial. During the hearing, the prosecutor explained why he set forth the race-neutral reasons for challenging the subject jurors in his opposition to appellant's motion for new trial, including the fact that he wanted to preserve the record for subsequent review. (37 RT 9774-9775, 9776-9777.) The court reiterated its original holding, finding that there was no prima facie showing of discrimination of Hispanic jurors. (37 RT 9788-9790.) In doing so, the court stated that it used the "strong likelihood" test in determining whether the prosecutor improperly exercised the peremptory challenges. (37 RT 9790.)

Appellant now argues that the court applied the wrong test and reached the wrong result. Although at the time it was the correct standard, respondent acknowledges that the "strong likelihood" test has been subsequently invalidated. However, even though the trial court applied the incorrect standard, reversal is not required in this instance.

B. Analysis

"There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination." (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 341.) "[A] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias-that is, bias against 'members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds'-violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the [California] Constitution." (*People v. Hawthorne* (2009) 46 Cal.4th 67, 77-78.) Discriminatory peremptory challenges also violate a

defendant's right to Equal Protection under the Fourteenth Amendment to the federal Constitution. (*Batson*, *supra*, 476 U.S. at p. 88.)

Batson established a three-step procedure to determine whether discriminatory peremptory challenges have occurred. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' Second, once the defendant has made out a prima facie case, the 'burden shifts back to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. Third, '[i]f a race neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination.'" (*Johnson v. California* (2005) 545 U.S. 162, 168; see also *People v. Hawthorne*, *supra*, 46 Cal.4th at p. 78.) The same three-step procedure is used for both federal and state constitutional claims. (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 341.)

This Court determined that *Batson's* threshold step of showing a prima facie case required the defendant to "show a strong likelihood" of discriminatory group bias. (*Wheeler*, *supra*, 22 Cal.3d at p. 280.) However, the United States Supreme Court later held that the "strong likelihood" standard was "an inappropriate yardstick by which to measure the sufficiency of a prima facie case" under *Batson*. (*Johnson v. California*, *supra*, 545 U.S. at p. 168.) The high court explained that *Batson's* first step was not intended "to be so onerous that a defendant would have to persuade the judge-on the basis of all the facts, some of which are impossible for the defendant to know with certainty-that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Id.* at p. 180.) The United

States Supreme Court noted that "[a]n 'inference' is generally understood to be a 'conclusion reached by considering other facts and deducing a logical consequence from them.'" (*Id.* at p. 168, fn. 4.)

Here, the trial court expressly denied appellant's *Wheeler* motion for failure to show a prima facie case of purposeful discrimination using the incorrect "strong likelihood" standard. However, even though the trial court applied the wrong standard in this matter, reversal is not necessarily required. (*People v. Bell* (2007) 40 Cal.4th 582, 597.) Instead, this Court reviews the record independently to apply the high court's standard articulated in *Johnson v. California*, *supra*, 545 U.S. 162, to "resolve the legal question whether the record supports an inference that the prosecutor excused a juror on a prohibited discriminatory basis." (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 342; accord, *People v. Taylor*, *supra*, 48 Cal.4th at p. 614.) As will be discussed, the record does not support such an inference.

At trial, appellant argued that there was a pattern of peremptory challenges indicative of a group bias because the prosecutor's first two peremptory challenges excused Hispanic jurors. Based on the subject jurors' questionnaires and voir dire, the trial court disagreed. (21 RT 5450-5451.)

In her written questionnaire, Romero indicated she was a 29 year old nurse. (10 CT 2805.) She could not determine if someone was telling the truth without evidence stating otherwise. (10 RT 2807.) She had been arrested for theft, a crime of moral turpitude, while her sister had been arrested on a drug charge for which she went to jail. (10 RT 2811.) Romero also noted she strongly disagreed with the position that harsh punishment is the best solution to the crime problem. (10 CT 2813.) She had a sister who sought mental health help to overcome her drug problem and believed that a medical diagnosis can explain the conduct of another. (10 CT 2818-2819.) With respect to the death penalty, Romero stated she

preferred life without the possibility of parole as a punishment and would raise the burden of proof from beyond a reasonable doubt to without doubt. (10 CT 2820-2822.) In other words, she could justify the death penalty if she knew the defendant was 100% guilty. (10 CT 2822.)

Romero's written answers to the questionnaire revealed a number of reasons other than racial bias for any prosecutor to excuse her. For instance, Romero and her sister were involved in the criminal justice system. (*People v. Cowan* (2010) 50 Cal.4th 401, 450 ["A prospective juror's negative experience with the criminal justice system, including arrest, is a legitimate, race-neutral reason for excusing the juror."]; *People v. Farnam* (2002) 28 Cal.4th 107, 138 ["close relative's adversary contact with the criminal justice system" is one ground upon which the prosecutor might challenge a perspective juror]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1282 [fact that prospective juror's relative had been convicted of a crime was a proper consideration justifying peremptory challenge].) Romero's reluctance to impose the death penalty was a race-neutral reason to excuse her as well. (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 678 ["A juror's reluctance to impose the death penalty, even if insufficient to justify a challenge for cause, is a valid reason for a prosecutor to exercise a peremptory challenge."].) Her feelings about mental health problems relating to how someone acted was also a valid race-neutral reason for the prosecutor to excuse Romero as a juror. (*People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1124 [Potential response to mental health evidence was an important concern for prosecutor.].) In addition, Romero worked as a nurse, which is a profession the prosecutor reasonably could have believed would tend to make Romero overly sympathetic to the defense. (*People v. Reynoso* (2003) 31 Cal.4th 903, 924–925 [prosecutor may properly challenge potential jurors on the belief that their occupations do not render them the best type of juror to sit on the case]; *United States v. Thompson*

(9th Cir. 1987) 827 F.2d 1254, 1260 [excusing jurors based on their profession is wholly within the prosecutor's prerogative].) Finally, Romero was 29 years old. "A potential juror's youth and apparent immaturity are race-neutral reasons that can support a peremptory challenge." (*People v. Lomax*, *supra*, 49 Cal.4th at p. 575.)

In her written questionnaire, prospective juror Coronado indicated that she did not believe in the death penalty because of her religious convictions. (11 CT 3151, 3162.) She did not believe that another life should be taken. She also felt that the death penalty did not serve any purpose. (11 CT 3162.) During voir dire by the court, Coronado confirmed that she did not believe in taking a life and did not believe in the death penalty because of her firmly held religious convictions. (20 RT 5225-5227, 21 RT 5360.) "A juror's reservations about the death penalty constitute a valid race-neutral reason for a peremptory challenge." (*People v. Salcido* (2008) 44 Cal.4th 93, 140-141.) Coronado's religious views about the death penalty also provided a sufficient race-neutral reason to excuse her as a juror. (*People v. Watson* (2008) 43 Cal.4th 652, 681; *People v. Ledesma*, *supra*, 39 Cal.4th at p. 678.) Based on the record, there was substantial evidence that the prosecutor's challenges to both Romero and Coronado were not impermissibly race motivated.

Notwithstanding the abundant race-neutral reasons for challenging both Romero and Coronado, it was appellant's burden to make a prima facie case, and the Court's independent review is not a substitute for appellant's affirmative showing of facts sufficient to infer group bias. (See *Batson*, *supra*, 476 U.S. at p. 98 [reiterating that a defendant still "must show that the [ ] facts and any other relevant circumstances raise an inference" of discrimination].) "Certain types of evidence may be especially relevant" in establishing a prima facie case of discrimination, such as showing that a prosecutor "has struck most or all of the members of

the identified group" or "used a disproportionate number of [its] peremptories against [a] group" or that the prosecutor engaged in only a desultory examination of the excused juror during voir dire. (*Wheeler*, *supra*, 22 Cal.3d at pp. 280-281, see also *People v. Davis* (2009) 46 Cal.4th 539, 582.) To that end, the defendant should make as complete a record of the facts and circumstances as possible. (*Wheeler*, *supra*, 22 Cal.3d at p. 280; *People v. Taylor*, *supra*, 48 Cal.4th at p. 614.)

Here, appellant merely argues that because the first two jurors excused by the prosecutor were Hispanic, there was a pattern of peremptory challenges indicative of a discriminatory purpose. Appellant offers no other evidence that would support this contention. However, nothing in *Wheeler* suggests that the removal of members of a cognizable group, standing alone, is dispositive on the question of whether defendant has established a prima facie case of discrimination. (See, e.g., *People v. Crittenden* (1994) 9 Cal.4th 83, 119 [the excusal of all members of a cognizable group may give rise to an inference of impropriety but is not dispositive of whether defendant has shown purposeful discrimination]; *People v. Howard*, *supra*, 1 Cal.4th at pp. 1154–1155 [the defendant relied solely on the fact that the prosecutor challenged the only two African–American prospective jurors and made no effort to set out other relevant circumstances; such a showing was "completely inadequate"]; *People v. Sanders* (1990) 51 Cal.3d 471, 500 [the removal of all members of a cognizable group is not dispositive on the question of whether a prima facie case has been shown]; *People v. Rousseau* (1982) 129 Cal.App.3d 526, 536 [the defendant's prima facie showing was limited to his statement that "'there were only two blacks on the whole panel, and they were both challenged by the district attorney'"; this "statement was not a prima facie showing of systematic exclusion"].) Had appellant's counsel supported his *Wheeler* motion with references to the questionnaire and voir dire responses

of the subject jurors excused by the prosecutor, the court could have evaluated them with the benefit of its own observations, and the prosecutor could have explained his reasoning. (See *People v. Hartsch* (2010) 49 Cal.4th 472, 489-490.) Given the record in this instance, it was evident no such discriminatory evidence was available with respect to either Romero or Coronado.

Moreover, when Romero and Coronado were excused by the prosecutor, it was evident that they were not the only two prospective Hispanic jurors on the panel. In fact, as the prosecutor pointed out, five jurors with Hispanic surnames were selected to serve on the jury. (9 CT 2571.) Although the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is "an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider." (*People v. Hartsch*, *supra*, 49 Cal.4th at p. 487; accord, *People v. Lenix* (2008) 44 Cal.4th 602, 629 [holding that the "prosecutor's acceptance of the panel containing a black juror strongly suggests that race was not a motive in his challenge."].) The record thus does not support an inference that the prosecutor in this matter excused Romero and Coronado on the basis of race or group bias.

Therefore, based on the entire record, appellant failed to "produce evidence sufficient to permit the trial judge to draw an inference that discrimination ha[d] occurred." (*Johnson v. California*, *supra*, 545 U.S. at p. 170.) In addition, the record discloses race-neutral reasons for the prosecutor's use of peremptory challenges to Romero and Coronado, validating the trial court's ruling that appellant failed to establish a prima facie case of discrimination. Thus, the trial court did not err in denying appellant's motion under *Johnson*. (See *People v. Hawthorne*, *supra*, 46 Cal.4th at p. 80.)

XII. THE VICTIM IMPACT EVIDENCE PRESENTED WAS NEITHER UNDULY PREJUDICIAL NOR INFLAMMATORY

Appellant argues that the trial court violated his state and federal constitutional rights to due process of the law and a reliable penalty determination, as well as state evidentiary rules, in allowing extensive victim impact evidence to be presented during the penalty phase of trial. (AOB 158-161.) Respondent disagrees.

On November 21, 2000, the prosecutor filed a notice of penalty phase evidence listing seven Gaines family members as victim impact witnesses, including David Gaines's four brothers, his mother and father, and his sister-in-law, Sally Gaines. (7 CT 1761.) Appellant filed a motion to limit penalty phase evidence, requesting that the court prohibit such testimony or severely limit the number of persons who could testify. (7 CT 1755-1760.) Thereafter, the prosecutor filed a response to appellant's motion, arguing that victim impact testimony is proper under section 190.3. (7 CT 1767-1775.)

The court heard the motion on March 6, 2001. (31 RT 8187, 8221.) After extensive argument by counsel, the court denied appellant's motion to limit the number of victim impact witnesses, noting that the number of listed witnesses was not so large as to unduly influence the jury in an inflammatory fashion. The court allowed the prosecutor to call the seven family members listed. (31 RT 8258-8260.)

During the presentation of evidence during the penalty phase, the prosecutor called only five family members to testify regarding victim impact. While on the stand, David Gaines's oldest brother, Jeff, identified family members in a photograph and testified that the victim lived at home, loved gadgetry, history and flying airplanes, as well as his nieces and nephews. (33 RT 8618-8619.) Jeff Gaines described how he found out about his brother's murder and the fact that he missed him being around.

(33 RT 8620-8621, 8624.) He also noted that David Gaines was their father's watchdog at the liquor store. (33 RT 8623.) Sally Gaines testified that she was married to David Gaines's brother, Steve. (33 RT 8625.) She noted that David Gaines did quite a few things for her kids. He was more a friend to them than an uncle. (33 RT 8627.) She also described how David Gaines's murder affected her husband Steve and their children. (33 RT 8629-8631.) Finally, she testified that she had a sense of relief once the verdict was returned and broke down. She also identified a photograph of her children with their Uncle, David Gaines, at the liquor store. (33 RT 8631-8632.) David Gaines's brother, Larry, testified that he was very close to the victim and described the victim's interest in flying and music. (33 RT 8635-8636, 8638-8640, 8642.) Larry Gaines noted that the victim was an important employee at the liquor store under their father, for he took on more and more responsibility at the store, including returning to the store every night to help close despite the fact that he was not paid to do so. (33 RT 8637-8638.) Larry Gaines described how he found out about his brother's murder and how he handled his brother's personal affairs after his death. (33 RT 8643.) He also noted how he and his brothers cleaned the bloodstains off their parents' driveway after the murder. (33 RT 8644.) Finally, he described David Gaines's role at family gatherings and how he was missed since his murder. (33 RT 8646-8647.) David Gaines's brother, William, described the relationship he and his children had with the victim. (33 RT 8648-8647.) He indicated that David Gaines was very close to their father and that he was a big comfort to his elderly parents living at home. (33 RT 8649-8650.) He felt that David Gaines's death had a devastating impact on his parents. (33 RT 8650, 8654.) Mary Gaines testified that David Gaines loved being at home and liked being around family. She noted her son did a lot of the little things around the house and described how they would interact with each other upon his return from work. She

remarked that although she still had a wonderful family and life, she would never be really happy again because so many things reminded her of David Gaines. (33 RT 8657-8658.) She noted that since their son's death, her husband was not interested in anything but work and was unable to show his emotions. (33 RT 8660-8661.) David Gaines's mother described him as a very gentle person and she missed having him around. (33 RT 8661.)

Appellant contends that the trial court erred in allowing this testimony because it far surpassed the boundaries of properly admitted victim impact evidence under state evidentiary rules as well as violated appellant's state and federal constitutional guarantees of due process of the law and reliable penalty determination. (AOB 160-161.)

However, the United States Supreme Court has determined that the Eighth Amendment does not prohibit the admission of evidence showing how a defendant's crimes directly impacted the victim's family, friends, and community as a whole, unless such evidence is "so unduly prejudicial" that it results in a trial that is "fundamentally unfair." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.) In doing so, the high court held that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Id.* at p. 827.) It also held "that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." (*Id.* at p. 825.) Likewise, under California law, this Court has held that victim impact evidence is admissible as a circumstance of the crime under section 190.3,

factor (a), so long as it "is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*People v. Taylor*, *supra*, 48 Cal.4th at p. 646; *People v. Huggins* (2006) 38 Cal.4th 175, 238.)

Here, the victim impact evidence was neither unduly prejudicial nor so inflammatory that it invited the jury to make its penalty determination on a purely irrational basis. Rather, the subject evidence adduced in this case was illustrative of the harm caused by appellant's murder of David Gaines. Of the original seven witnesses permitted to testify by the trial court, only five family members took the stand. These family members briefly described what kind of person David Gaines was and what his interests were. Each witness spoke of how they missed having David Gaines in their lives and what he personally meant to them and his close-knit family. No neighbors, customers or community leaders testified. Instead, the victim impact evidence consisted of only 44 reporter's transcript pages of testimony from immediate family members of which no witness was cumulative of another. As the record discloses, the evidence "concerned the kinds of loss that loved ones commonly express in capital cases." (*People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1057.) Thus, the testimony constituted traditional impact victim evidence, "permissible under California law as relevant to the circumstances of the crime, a statutory capital sentencing factor." (*People v. Cole* (2004) 33 Cal.4th 1158, 1233.)

Appellant argues that the Eighth Amendment requirement that penalty determination be a "reasoned moral response" should have led the trial court to limit the victim impact testimony to at most David Gaines's parents because they were close by when the crime was committed. (AOB 160.) However, this Court has determined that there is no requirement that victim impact evidence be limited to the testimony of witnesses who were present

at the scene either during or immediately after the crime. (*People v. Taylor*, *supra*, 48 Cal.4th at p. 647.)

Thus, for the reasons set forth above, appellant's death sentence should be affirmed.

XIII. THE TRIAL COURT PROPERLY EXCLUDED EXECUTION-IMPACT EVIDENCE AT THE PENALTY PHASE

Appellant contends that the trial court violated his federal constitutional rights under the Eighth and Fourteenth Amendments, and rendered his trial unfair, by precluding the jury from considering evidence relating to the impact appellant's execution would have on his extended family. (AOB 162-174.) Respondent disagrees.

Appellant's trial counsel submitted Proposed Instruction 8, which stated as follows:

> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational and purely subjective response to emotional evidence or argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy.

(7 CT 1843.) Appellant's trial counsel argued that this proposed instruction was necessary because it provided some guidance for the jury that was lacking on how to use victim impact evidence. (35 RT 9281-9282.) The trial court refused to give the instruction, noting that it was duplicative of other instructions. Shortly thereafter, the court advised counsel that it would instruct the jury with the standard CALJIC No. 8.85, factor (k), bracketed language relating to sympathy for the family of the defendant. (35 RT 9298-9301.) Appellant's trial counsel objected as follows:

> So the record is clear, I'm objecting to giving the portion because it - - it's directly contrary to the - - to the request that I made in defendant's proposed number 8 which would have illuminated the use of the victim impact evidence. [¶] I think the - - it should be consistency all along. [¶] If you're not going to say anything about that and how they are to use that, then there should be nothing said about something which there was never any evidence.

(35 RT 9301.) Thereafter, the court instructed the jury with the bracketed portion of factor (k) as follows: "Sympathy for the family of the defendant is not a matter that you may - - that you can consider in mitigation. Evidence, if any, of the impact of an execution on family members should be disregarded unless it illuminates some positive quality of the defendant's background or character." (35 RT 9546-9547.)

Appellant now argues that the court's failure to allow the jury to consider the impact of his execution on his extended family violated well-settled principles of the Eighth and Fourteenth Amendments to the United States Constitution, and rendered his trial fundamentally unfair. (AOB 163, 173.) Again, appellant's argument is without merit.

In determining the appropriate sentence in a capital case, section 190.3 permits a defendant to introduce mitigating evidence of his character and background. However, "[t]he impact of a defendant's execution of his or her family may not be considered by the jury in mitigation." (*People v. Bennett* (2009) 45 Cal.4th 577, 601, citing *People v. Smith* (2005) 35 Cal.4th 334, 366–367; *People v. Smithey* (1999) 20 Cal.4th 936, 1000; *People v. Ochoa*, *supra*, 19 Cal.4th at pp. 454-456. In *Ochoa*, this Court explained "what is ultimately relevant is a defendant's background and character—not the distress of his or her family. A defendant may offer evidence that he or she is loved by family members or others, and that these individuals want him or her to live. But this evidence is relevant because it constitutes indirect evidence of the defendant's character. The jury must

decide whether the defendant deserves to die, not whether the defendant's family deserves to suffer the pain of having a family member executed." (*Ochoa*, *supra*, 19 Cal.4th at p. 456.)

Appellant contends that the prohibition of execution-impact evidence is inconsistent with the holding in *Payne v. Tennessee*, *supra*, 501 U.S. at page 826, and other authorities around the country. (AOB 163-167.) Respondent disagrees. In *Payne*, the United States Supreme Court held that victim impact evidence is admissible during the penalty phase of a capital case. (*Id.* at p. 827.) In doing so, the Supreme Court observed that "a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." (*Id.* at 825.) Victim impact evidence is relevant in that it shows the victim's "uniqueness as an individual human being." (*Id.* at p. 823.) Appellant contends that if the impact of a victim's death on the victim's family is admissible to demonstrate the victim as a unique human being, it follows execution-impact evidence should also be allowed to show a defendant's uniqueness as a human being. (AOB 164-165.) Granted, the United States Supreme Court has held there are virtually no limits placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances. (*Payne*, *supra*, 501 U.S. at p. 822.) "[A] State [may] not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 318; accord, *id.* at p. 328.) However, as this Court has explained, "execution-impact evidence is irrelevant under section 190.3 because it does not concern a defendant's own circumstances but rather asks the jury to spare defendant's life based

on the effect his or her execution would have on his or her family." (*People v. Bennett*, *supra*, 45 Cal.4th at p. 602, citing *Ochoa*, *supra*, 19 Cal.4th at p. 456.) Thus, sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation and the trial court's instruction excluding such evidence was proper.

Appellant's argument regarding the appearance of racial bias is also without merit. (AOB 171-172.) He contends that "[t]he valuation of a White life over a Brown life is implicit when several family members of the former are allowed to testify in poignant detail about the impact on them of the loss of their loved one, but not family members of the latter." (AOB 172.) However, as previously discussed, a jury may not spare a defendant's life because they feel sympathy for a family member. They must determine if the defendant deserves to die "which requires an individualized assessment of the defendant's background, record, and character, and the nature of the crimes committed, both as a matter of state law [citations] and as a federal constitutional requirement. [Citation.]" (*Ochoa*, *supra*, 19 Cal.4th at p. 456.) Therefore, as previously discussed, "family members may offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character." (*Ibid.*)

During the penalty phase in this matter, appellant's mother, sister and two brothers testified on his behalf about his changed life after his release from federal prison in 1998. Collectively, they testified that appellant had reestablished a relationship with his mother with the help of religion. (33 RT 8755-8756, 34 RT 8875.) He attended community college and learned how to weld, eventually getting a job as a welder and enjoying his work. (33 RT 8694, 8711, 8719-8720, 8759-8760, 8806.) Appellant had a girlfriend and wanted to get married and start a family and had become more involved with his own family, including his nieces and nephews.

(33 RT 8697-8698, 8721-8722, 8757-8758, 8806-8808.) Thus, contrary to appellant's contention, family members testified to the positive characteristics and value of appellant's life during the penalty phase.

Even assuming without conceding that the court erred in excluding sympathetic execution-impact evidence, a new penalty phase is not required as appellant contends. Exclusion of mitigating evidence violates the constitutional requirement that a capital defendant must be allowed to present all relevant evidence to demonstrate he deserves a sentence of life rather than death. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 5; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) However, exclusion of such evidence does not automatically require reversal. Rather, it is subject to the harmless beyond a reasonable doubt standard of review set forth in *Chapman v. California*, *supra*, 386 U.S. 18. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1117-1118.)

Here, the circumstances of appellant's crime presented overwhelming aggravating evidence alone, including the fact that appellant shot David Gaines, an innocent 36-year-old victim, four times from a distance of no more than two feet away. Three of the gun shots were fatal independent of each other. In other words, David Gaines had no chance to survive.

On the other hand, appellant was a career criminal who had been involved in a substantial amount of criminal activity for a sustained period of time that included the use or attempted use of force or violence. In 1975, at the age of 15, appellant met up with Daryl Thomas and together they planned to rob a liquor store. (32 RT 8483, 33 RT 8524, 8526, 34 RT 8854-8856.) However, appellant conditioned his participation in the robbery on having a weapon. As a result, Thomas obtained a gun that had only four rounds in it, so appellant took a couple of rounds from his father in order for the gun to be fully loaded. (32 RT 8484.) When he realized he knew the clerk, appellant passed on robbing the liquor store. However,

shortly thereafter, appellant and Thomas randomly decided to rob a cab driver. Thomas told appellant he would kill the cab driver so that he would not be identified. This did not deter appellant. Upon getting into the cab, Thomas gave Wooliver a false address, told him he was being robbed and then killed him by shooting him in the head. (32 RT 8485-8486, 8496, 33 RT 8542.) Appellant and Thomas took $50 from the cab and fled. They were picked up by a car with four other men. After bragging about the shooting and attempting to show the others in the car the crime scene involving Wooliver, the group decided to rob a 7-11 store in north Stockton. Upon their arrival, appellant entered the store with two others with the gun used to shoot Wooliver. They took money from the cash register and stole Dale Sym's watch and class ring. (32 RT 8489, 8492, 8507.) As they left, appellant turned and fired two shots at Sym, hitting him once in his back. (32 RT 8473, 8489, 8508.) During Thomas's trial for murder, appellant took the stand and perjured himself, testifying that he shot Wooliver. (33 RT 8575-8577, 8581, 8583.) Prior to Thomas's trial, appellant had admitted to first degree murder, as an aider and abettor. (33 RT 8588.)

Upon his release from the California Youth Authority in 1980, appellant was stopped by the police driving a car with four other men in it. (32 RT 8441-8442, 8461, 8466.) A loaded .22-caliber revolver was found underneath the right rear passenger seat and a .30-caliber 17-inch baffled semi-automatic weapon with a banana clip was found in the trunk. (32 RT 8462-8463.) Appellant was convicted of felony receiving stolen property for other items found in the car and was sentenced to state prison. (32 RT 8447.)

Upon his release from state prison in 1982, appellant put together a crew to rob banks. Together, they committed five bank robberies in approximately one month. (33 RT 8770, 8728, 34 RT 8866, 8937.) On

July 6, 1982, appellant and his cohorts armed themselves and attempted to rob the Bank of America in Stockton. (35 RT 9122, 9208, 9211, 9218.) One assailant entered the bank first from the east side. Upon announcing his presence and purpose by yelling and firing his weapon into the air, the bank robber was immediately shot by an FBI agent. However, before he died, the gunman was able to shoot an agent in the shoulder. (32 RT 8383-8384.) Upon hearing the gun battle inside the bank, appellant and another assailant fled. As appellant ran through the bank's parking lot, he was confronted by a FBI agent and was told to freeze. (32 RT 8421.) Appellant lifted the sawed-off shotgun he possessed and pointed it at the agent as if he was going to fire. However, a gunshot fired at appellant from another officer made appellant drop his weapon and lay down on the ground. (32 RT 8401-8402.) The other assailant was shot and wounded as he attempted to flee from the scene. (32 RT 8423.) Appellant was sentenced to federal prison for this offense and was released initially in 1997. However, his parole was revoked because he had contacted the driver of the car used in the attempted bank robbery. (34 RT 8872-8873.) In October of 1998, just a few months before he murdered David Gaines, he was again released from federal prison. He was approximately 40 years old and had spent all but 20 months in-custody since the age of 15. (33 RT 8708, 8711, 35 RT 9218.)

Based on this record, including the circumstances of appellant's senseless murder of David Gaines, coupled with appellant's lifelong pursuit of criminal activity involving the use or attempted use of force or violence, admission of execution-impact evidence in this instance would not have affected the jury's penalty determination and thus was harmless beyond a reasonable doubt. The judgment should be affirmed.

XIV. CALIFORNIA'S DEATH PENALTY STATUTE IS LAWFUL UNDER THE UNITED STATES CONSTITUTION

Appellant contends that the state's death penalty law as interpreted by this Court and applied at trial violates the United States Constitution for various reasons. Appellant acknowledges that that these reasons have been rejected by this Court in the past, but raises them here in order to preserve the claims in federal court. He also argues that the Court has discarded these issues only in isolation without considering their cumulative impact or addressing the functioning of California's death penalty scheme as a whole. He asserts such an analytical approach is constitutionally defective. (AOB 175-177.) Respondent disagrees, and specifically addresses each of appellant's arguments as set forth below in Arguments XV through XXI.

XV. CALIFORNIA'S DEATH PENALTY SUFFICIENTLY NARROWS THE CLASS OF DEATH ELIGIBLE DEFENDANTS

Appellant contends that his death sentence is invalid because California's death penalty statute provides no meaningful basis for choosing those defendants who are eligible for death. (AOB 178-180.) Respondent disagrees.

"The Eighth Amendment to the United States Constitution, which prohibits the infliction of 'cruel and unusual punishments,' imposes various restrictions on the use of the death penalty as a punishment for crime. One such restriction is that any legislative scheme defining criminal conduct for which death is the prescribed penalty must include some narrowing principle that channels jury discretion and provides a principled way to distinguish those cases in which the death penalty is imposed from the many cases in which it is not. A death-eligibility criterion that fails to meet this standard is deemed impermissibly vague under the Eighth Amendment." (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 462 (*Bacigalupo*), citations omitted.)

The United States Supreme Court has determined that there are two distinct aspects of capital sentencing: "narrowing" and "selection." (*Zant v. Stephens* (1983) 462 U.S. 862, 878; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) "'Narrowing' pertains to a state's 'legislative definition' of the circumstances that place a defendant within the class of persons eligible for the death penalty." (*Bacigalupo*, *supra*, 6 Cal.4th at p. 465.) The narrowing function of a state's capital punishment scheme must limit the class of persons eligible for the death penalty and must provide some objective basis for distinguishing a case in which the death penalty may be imposed from the many cases it may not. A death penalty that fails to provide some narrowing function is deemed impermissibly vague under the Eighth Amendment of the United States Constitution. (*Ibid.*)

If a defendant is found to be within the narrow class of death eligible defendants, a sentence of either death or of life imprisonment must be selected. (*Bacigalupo*, *supra*, 6 Cal.4th at p. 466.) "What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime." (*Zant v. Stephens*, *supra*, 462 U.S. at p. 879.) A myriad of factors in selecting the appropriate sentence may be considered. (*California v. Ramos* (1983) 463 U.S. 992, 1008.)

Therefore, the Eighth Amendment prohibition against cruel and unusual punishment is not violated so long as a state's capital sentencing scheme narrows the class of death-eligible defendants and then during sentencing selection permits the exercise of discretion and does not limit consideration of evidence in mitigation. (*Bacigalupo*, *supra,* 6 Cal.4th at pp. 466-467, citing *Lowenfield v. Phelps* (1988) 484 U.S. 231, 246; accord, *California v. Brown* (1987) 479 U.S. 538, 541.)

As appellant admits, this Court has determined California's death penalty statute sufficiently narrows the class of death-eligible defendants.

(*People v. Virgil* (2011) 51 Cal.4th 1210, 1288; *People v. Martinez*, *supra*, 47 Cal.4th at p. 454; *People v. Mendoza* (2000) 24 Cal.4th 130, 191-192; *People v. Barnett* (1998) 17 Cal.4th 1044, 1179; *People v. Marshall* (1990) 50 Cal.3d 907, 946.) Section 190.2 "special circumstances" perform the constitutionally necessary narrowing function in that it "require[es] the jury to find at least one special circumstance beyond a reasonable doubt," therefore "limit[ing] the death sentence to a small subclass" of defendants. (*Bacigalupo*, *supra*, 6 Cal.4th at p. 468, quoting *Pulley v. Harris* (1984) 465 U.S. 37, 53.) These special circumstances guide and channel jury discretion "by strictly confining the class of offenders eligible for the death penalty." (*Bacigalupo*, *supra*, 6 Cal.4th at p. 467.)

Nonetheless, citing *People v. Edelbacher* (1989) 47 Cal.3d 983, appellant argues that California death penalty law is unconstitutional because it now contains so many special circumstances that it makes all murderers eligible for death. Specifically, he contends that almost all felony murders and lying-in-wait murders constitute special circumstances cases. (AOB 179.) Appellant's argument has been rejected by the United States Supreme Court and by the California Supreme Court. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843, citing *Pulley v. Harris*, *supra*, 465 U.S. at p. 53; *People v. Wader* (1993) 5 Cal.4th 610, 669 (*Wader*).) In *People v. Gurule* (2002) 28 Cal.4th 557, this Court rejected an over-breath claim based upon an over-inclusive felony murder rule argument. (*Id.* at p. 663.) This Court also rejected the contention that the broad application of the lying-in-wait special circumstance negates the function of the death penalty law designed to narrow the class of death-eligible defendants. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 155.) In *Wader*, the defendant made a similar argument appellant does now, which this Court rejected, finding: "[Defendant] states that all of these types of murders are likely to qualify as capital crimes under a special circumstance. But defendant has

not demonstrated on this record, or through sources of which we might take judicial notice, that his claims are empirically accurate, or that, if they were correct, this would require the invalidation of the death penalty law." (*People v. Wader*, *supra*, 5 Cal.4th at p. 669.) Appellant's contention in this matter is without merit for the same reasons. The judgment should be affirmed.

XVI. CALIFORNIA'S DEATH PENALTY CIRCUMSTANCES OF THE CRIME PROVISION DOES NOT IMPERMISSIBLY PERMIT ARBITRARY AND CAPRICIOUS SELECTION OF DEATH AS A SENTENCE

Appellant argues that the circumstances of the crime provision within factor (a) of section 190.3 violates the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution because it allows the arbitrary and capricious imposition of death. (AOB 181-183.) Respondent disagrees.

Section 190.3 provides the sentence selection factors used by the trier of fact to determine whether a death-eligible defendant shall receive a sentence of death or life imprisonment. "With the exception of section 190.3's factor (k), which invites consideration of any 'circumstances which extenuates the gravity of the crime even though it is not a legal excuse for the crime,' the statute does not explicitly designate any of the factors as exclusively aggravating or exclusively mitigating. [Citation.] It simply directs the trier of fact to aspects of the offense and the defendant's background that are relevant to the penalty determination." (*Bacigalupo*, *supra*, 6 Cal.4th at p. 469.)

The United States Supreme Court determined that factor (a) "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 ...." (*Tuilaepa v. California* (1994) 512 U.S. 967, 976.) "[C]onsideration of ... the circumstances of the particular

offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304.) This Court has determined that the circumstances of the crime of which the defendant stands convicted are the single most pertinent sentencing consideration in any criminal case. (*People v. Bacigalupo*, *supra*, 6 Cal.4th at p. 479.) Thus, factor (a), which allows the jury to consider the circumstances of the crime, does not violate the Fifth, Sixth, Eighth, or Fourteenth Amendment to the United States Constitution by allowing arbitrary imposition of the death penalty. (*People v. Redd* (2010) 48 Cal.4th 691, 757.)

Despite this legal precedent, appellant contends factor (a) permits almost every conceivable circumstance of the crime to be considered in aggravation by the jury. Thus, given the uncontrolled manner in which factor (a) has been expanded and thereafter applied by prosecutors, it has been used in ways so arbitrary and capricious as to violate both the federal guarantee of due process of the law and the Eighth Amendment. (AOB 182-183.) However, this Court has consistently rejected the claim that section 190.3, factor (a), on its face or as interpreted and applied, permits the arbitrary and capricious imposition of the sentence of death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1355; *People v. Lynch* (2010) 50 Cal.4th 693, 766; *People v. Dykes* (2009) 46 Cal.4th 731, 813.) In *People v. Page* (2008) 44 Cal.4th 1, this Court rejected the defendant's complaint that factor (a) permits almost any circumstance to be considered in aggravation, finding in relevant part "that is the nature of the fact-specific inquiry required in evaluating the appropriate penalty." (*Id.* at p. 60.) "As the United States Supreme Court noted in upholding factor (a) against an Eighth Amendment challenge, 'our capital jurisprudence has established that the sentencer should consider the circumstances of the crime in

deciding whether to impose the death penalty. [Citation.]' [Citation.]" (*Ibid.*)

Finally, appellant's reliance on *Maynard v. Cartwright* (1988) 486 U.S. 356, and *Godfrey v Georgia*, *supra*, 446 U.S. 420, is misplaced. (AOB 183.) In relevant part, *Godfrey* and *Maynard* represent those unusual instances where language is rejected by the Supreme Court on vagueness grounds because that language merely consists of "pejorative adjectives ... that describe a crime as a whole." (*Avare v. Creech* (1993) 507 U.S. 463, 472.) Such is not the case here and the judgment should be affirmed.

XVII. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE UNITED STATES CONSTITUTION BY FAILING TO PROVIDE VARIOUS PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS

Appellant contends that the California death penalty fails to use any of the commonly employed safeguards to prevent the arbitrary imposition of death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. (AOB 185-214.) As this Court has consistently held, appellant's argument is without merit.

A. Unanimous Finding of Aggravating Circumstances by Proof Beyond a Reasonable Doubt Standard is not Required

This Court has rejected appellant's argument (AOB 186-199) that the federal Constitution requires a death penalty jury to unanimously find the aggravating circumstances true beyond a reasonable doubt, to find unanimously and beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances, and to unanimously find beyond a reasonable doubt that death is the appropriate penalty. (*People v. Lee* (2011) 51 Cal.4th 620, 651 [The Sixth, Eighth and Fourteenth Amendments do not require that the prosecution prove beyond a reasonable doubt the existence of aggravating circumstances, or that the aggravating

circumstances outweigh the mitigating circumstances, or that death is the appropriate punishment.]; *People v. Martinez*, *supra*, 47 Cal.4th at p. 455 ["Nothing in the federal Constitution requires a penalty phase jury to reach unanimity on the presence of aggravating factors or to agree unanimously that aggravating factors outweigh mitigating factors."]; *People v. Marshall*, *supra*, 50 Cal.3d at pp. 935-936, 790 [the cruel and unusual punishment and due process clauses of the state and federal Constitution do not require proof beyond a reasonable doubt].) "'Unlike the guilt determination, "the sentencing function is inherently moral and normative, not factual" [citation] and, hence, not susceptible to a burden-of-proof quantification.'" (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 589.)

Appellant acknowledges this Court's interpretation of California's death penalty statute but nonetheless argues that this position has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*), *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), and *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*). (AOB 186-199.) Appellant's argument has been consistently dismissed by this Court. (*People v. Salcido*, *supra*, 44 Cal.4th at p. 120.)

In *Apprendi*, the United States Supreme Court held that under the Sixth Amendment's jury trial guarantee, "[e]xcept for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Cunningham*, *supra*, 549 U.S. at p. 283, quoting *Apprendi*, *supra*, 530 U.S. at p. 490.) The statutory maximum is "'the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.'" (*Cunningham*, *supra*, 549 U.S. at p. 283, quoting *Blakely*, *supra*, 542 U.S. at p. 303.)

In *Ring*, the United States Supreme Court addressed the constitutionality of Arizona's death penalty law. Under this scheme, the "first-degree murder statute 'authorizes a maximum penalty of death only in a formal sense,' [citation], for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty." (*Ring*, *supra*, 536 U.S. at p. 604.) Thus, "'[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.'" (*Id.* at p. 596, quoting *Apprendi*, *supra*, 530 U.S. at p. 538.) "Because Arizona's enumerated aggravating factors operate as the 'the functional equivalent of an element of a greater offense'" (*id.* at p. 2443) the Court held that "the Sixth Amendment requires that they be found by a jury." (*Ibid.*) *Blakely* involved a trial court's imposition of an "'exceptional'" sentence, one outside the "'standard range'" statutorily set for the offense of which Blakely was convicted. (*Blakely*, *supra*, 542 U.S. at p. 299.) "*Cunningham* held that any fact that increases the penalty for a crime beyond the relevant statutory maximum, which under California's determinate sentencing law is the middle term, must be submitted to the jury and found true beyond a reasonable doubt." (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1277, citing *Cunningham*, *supra*, 549 U.S. at pp. 288-289.)

However, as this Court has consistently held, none of the before mentioned holdings apply to California's death penalty scheme. (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1278; *People v. Salcido*, *supra*, 44 Cal.4th at p. 120.)

> "[U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or

> more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole." (*People v. Anderson* [,*supra*,] 25 Cal.4th [at pp.] 589-590, fn. 14.) Thus, in the penalty phase, the jury merely weighs the factors enumerated in section 190.3 and determines "whether a defendant eligible for the death penalty should in fact receive that sentence." (*Tuilaepa v. California* (1994) 512 U.S. 967, 972.) No single factor therefore determines which penalty-death or life without the possibility of parole-is appropriate.

(*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Therefore, "[i]n California, the statutory factor that renders a defendant found guilty of first degree murder eligible for the death penalty is the special circumstance. (*People v. Bacigalupo*, *supra*, 6 Cal.4th at pp. 467-468.) The special circumstance thus operates as the functional equivalent of an element of the greater offense of capital murder. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) The jury's finding beyond a reasonable doubt of the truth of a special circumstance allegation satisfies the requirements of the Sixth Amendment.... (*People v. Prieto*, *supra*, at p. 263.)" (*People v. Lewis* (2008) 43 Cal.4th 415, 521.)

B. Jury Instruction on Burden of Proof Beyond a Reasonable Doubt is not Required

Appellant contends that the due process and cruel and unusual punishment clauses of the state and federal Constitutions require that a death penalty jury be instructed that they may impose a sentence of death only if they are persuaded beyond a reasonable doubt that the aggravating factors exist and outweigh the mitigating factors and that death is the appropriate penalty. (AOB 199-203.)

Again, "California's death penalty scheme is not unconstitutional in failing to assign to the state the burden of proving beyond a reasonable doubt the existence of an aggravating factor. [Citations.] Nor does any

constitutional provision require an instruction informing jurors they may impose a sentence of death only if persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. [Citations.]" (*People v. Taylor*, *supra*, 48 Cal.4th at p. 662.) "Except for prior-violent-crimes evidence and prior felony convictions under section 190.3, factors (b) and (c), the court is not required to instruct on any burden of proof, whether for finding aggravating factors, for determining that aggravating factors outweigh mitigating factors, or for reaching the conclusion that death is the appropriate penalty." (*People v. Martinez*, *supra*, 47 Cal.4th at p. 455.) Here, the jury was instructed that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without possibility of parole." (36 RT 9550.) That is a proper instruction. (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 979 [jury "need not be instructed how to weigh any particular fact in the capital sentencing decision"].) Appellant presents no persuasive reason to overturn this finding.

C. Written Findings Are Not Required

This Court has also rejected appellant's argument (AOB 203-206) that the jury was required to make written findings for returning a verdict of death. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 228.) Written findings regarding the aggravating factors are not constitutionally required. (*People v. Martinez*, *supra*, 47 Cal.4th at p. 455; *People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 228.)

Nonetheless, appellant argues that written findings in capital cases are essential for a meaningful review of the sentence imposed. (AOB 205-206.) Granted, the California death penalty statute does not require the jurors to specify their various reasons for imposing death. However, the

death penalty scheme contains adequate alternative safeguards for assuring careful appellate review. For instance, under California law, in determining whether special circumstances exist to justify the death penalty, the trier of fact must make a special finding of the truth of each alleged special circumstance, and in case of any reasonable doubt as to a particular alleged special circumstance, the defendant is entitled to a finding that it is not true. (§ 190.4, subd. (a).) Furthermore, the trial court, in ruling upon the automatic application for modification of verdict, must review the evidence, consider the aggravating and mitigating circumstances, make its own independent determination as to the weight of the evidence supporting the jury's findings and verdict, and state on the record the reasons for its findings. (§ 190.4, subd. (e).) "[T]he statutory requirements that the jury specify the special circumstances which permit imposition of the death penalty, and that the trial judge specify his reasons for denying modification of the death penalty, serve to assure thoughtful and effective appellate review, focusing upon the circumstances present in each particular case." (*People v. Frierson* (1979) 25 Cal.3d 142, 179.)

D. Intercase Proportional Review Is Not Required

Contrary to appellant's argument (AOB 207-209), failure to require intercase proportionality review does not result in "arbitrary, discriminatory, or disproportionate impositions of the death penalty," or violate the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Pulley v. Harris*, *supra*, 465 U.S. at p. 50-51; *People v. Lee*, *supra*, 51 Cal.4th at p. 651; *People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 227.) "[U]nless a defendant demonstrates that the state's capital punishment law operates in an arbitrary and capricious manner, the circumstance that he or she has been sentenced to death, while others who may be similarly situated have received a lesser sentence, does not establish disproportionality violative of

the Eighth Amendment." (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 157.) Appellant has failed to make the required showing.

In addition, appellant is not denied equal protection and substantive due process because noncapital defendants receive some comparative review under the determinate sentencing law. (*People v. Jenkins, supra,* 22 Cal.4th at p. 1053; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.)

> [T]he "disparate sentence" law is designed to isolate sentences that are beyond the "normal range" for similar offenses. (*Martin, supra*, 42 Cal.3d at p. 445, fn. 5.) Even under the DSL, that range may be broad, because it can be affected by consecutive sentencing and by various statutory enhancements, employed in different ways by different judges. By contrast, when one stands convicted of first degree murder with one or more special circumstances, the "range" of possible punishments narrows to death or life without parole. The defendant becomes eligible for the law's two most severe penalties and for no others. By definition, therefore, either is within the "normal range" of expected sentences for offenses such as those the death-eligible defendant has committed.

(*People v. Allen*, *supra*, 42 Cal.3d at p. 1287.)

E. Use of Unadjudicated Criminal Conduct Is Permissible

Contrary to appellant's contention (AOB 209-210), "use of unadjudicated criminal activity during the penalty phase is permissible,' and does not violate the Fifth, Sixth, Eighth and Fourteenth Amendments." (*People v. Stevens* (2007) 41 Cal.4th 182, 212, quoting *People v. Box* (2000) 23 Cal.4th 1153, 1217.) "Section 190.3, factor (b), pertains to violent criminal activity other than the crimes for which a capital defendant is on trial. [Citation.] Its purpose is to show the defendant's propensity for violence [citation], which is pertinent to determining a capital defendant's individual moral culpability." (*People v. Bunyard* (2009) 45 Cal.4th 836, 857, internal quotation marks omitted.) "The jury's consideration of

unadjudicated criminal activity in aggravation (§ 190.3, factor (b)) is constitutional, and jury unanimity regarding such conduct is not required." (*People v. Valencia* (2008) 43 Cal.4th 268, 311.)

This Court has also rejected appellant's assertion that the United States Supreme Court's decisions on the Sixth Amendment's jury trial right call for a different result on that issue. (See, e.g., *People v. Hoyos* (2007) 41 Cal.4th 872, 926 [juror unanimity on the existence of aggravating factors is not required under the reasoning of *Apprendi*, *supra*, 530 U.S. 466 and its progeny]; *People v. Stevens*, *supra*, 41 Cal.4th at p. 212 [*Cunningham*, *supra*, 549 U.S. 270 does not compel a different conclusion].)

F. Use of Restrictive Adjectives

This Court has also rejected appellant's argument (AOB 210) that the use of restrictive adjectives in the list of potential mitigating factors impermissibly acted as a barrier to consideration of mitigation by appellant's jury. "The use of the words "extreme" in section 190.3, factors (d) and (g), and "substantial" in factor (g), does not render these factors unconstitutionally vague, arbitrary, or capricious, act as a barrier to the consideration of mitigating evidence, or violate the Fifth, Sixth, Eighth, and Fourteenth Amendments." (*People v. Castaneda*, *supra*, 51 Cal.4th at p. 1355; *People v. Martinez*, *supra*, 47 Cal.4th at p. 455; *People v. Stevens*, *supra*, 41 Cal.4th at p. 213.)

G. Jury Instruction on Mitigating Factors Is Not Required

Finally, contrary to appellant's contention (AOB 210-214), "[i]t is not required by the federal Constitution that the jury be instructed that certain factors may be considered solely in mitigation. (*People v. Morrison* (2004) 34 Cal.4th at p. 730 [ ].) The statute and the instruction based upon the statute directing the jury to consider 'whether or not' mitigating facts are

present, are consistent with the Eighth and Fourteenth Amendments. (*People v. Morrison*, at p. 730 [ ].)" (*People v. Martinez, supra*, 47 Cal.4th at p. 455.) During the selection phase, the jury "need not be instructed how to weigh any particular fact in the capital sentencing decision," but is allowed unbridled discretion in determining the appropriate sentence. (*Tuilaepa v. California, supra*, 512 U.S. at 979; *Buchanan v. Angelone* (1998) 522 U.S. 269, 276.) "What is important at the selection stage is an individualized determination on the basis of character of the individual and the circumstances of the crime." (*Zant v. Stephens, supra*, 462 U.S. 862, 879; *Tuilaepa v. California, supra*, 512 U.S. at 972.)

Appellant attacks *People v. Morrison* (2004) 34 Cal.4th 698, 727-729, arguing that if the trial judge in that matter could mistakenly believe that section 190.3, factors (e) and (j), constituted aggravating instead of mitigating factors, a reasonable jury could make the same mistake. (AOB 212.) However, inherent in the Court's finding in *Morrison* was the belief that the trial court's interpretation of section 190.3 was unreasonable, as compared to a *reasonable* jury, which would not commit the same error. (*Id.* at p. 730, emphasis added.)

XVIII. CALIFORNIA'S SENTENCING SCHEME DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE CAPITAL AND NONCAPITAL DEFENDANTS ARE TREATED DISSIMILARLY

Appellant contends that the California sentencing scheme violates the equal protection clause of the federal Constitution by denying procedural safeguards to capital defendants which are afforded to noncapital defendants. (AOB 215-217.) Respondent disagrees.

This Court has clearly established that California's capital sentencing scheme does not violate the equal protection clause of the United States Constitution because its determinate sentencing law takes a different statutory approach to sentencing in noncapital cases. (*People v. Carey*

(2007) 41 Cal.4th 109, 136-137; *People v. Smith*, *supra*, 35 Cal.4th at pp. 374-375.) A successful equal protection claim must demonstrate that "the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*People v. Massie* (1998) 19 Cal.4th 550, 571.) "[B]y definition, a defendant in a non-capital case is not similarly situated to his capital case counterpart for the obvious reason that the former's life is not on the line." (*People v. Superior Court (Sturm)* (1992) 9 Cal.App.4th 172, 185.) "The death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different from those applying to 'regular punishment' for felonies." (*People v. Salcido*, *supra*, 44 Cal.4th at pp. 168-169.) "[P]ersons convicted under the death penalty law 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* (1988) 45 Cal.3d 1268, 1330.) Based on this reasoning, California's death penalty law does not deny equal protection to capital defendants for failing to require either jury unanimity on aggravating circumstances or written factual findings supporting the jury's penalty determination as appellant contends (AOB 217). (*People v. Blair*, *supra*, 36 Cal.4th at p. 754.)

XIX. CALIFORNIA'S DEATH PENALTY DOES NOT VIOLATE INTERNATIONAL LAW

Appellant contends that his death sentence violates international law. (AOB 219-225.) Respondent disagrees.

As appellant admits, this Court has routinely held that California's death penalty sentencing scheme does not violate international law. (*People v. Vines* (2011) 51 Cal.4th 830, 892; *People v. Brown* (2004) 33 Cal.4th 382, 403.) Nonetheless, appellant asserts that since the United

States has ratified certain human rights treaties, "[t]his Court ... has an obligation to fully consider possible violations of international law, even where the conduct complained of is not currently a violation of domestic law." (AOB 225.) However, appellant does not demonstrate that the death penalty as applied in California violates international law. Rather, "international law does not prohibit a sentence of death where, as here, it was rendered in accordance with state and federal constitutional and statutory requirements." (*People v. Hamilton*, *supra*, 45 Cal.4th at pp. 961, 200; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1332; *People v. Brown*, *supra*, 33 Cal.4th at p. 404.) Furthermore, if a defendant demonstrates prejudicial error under domestic law, this Court can set aside the judgment on that basis without recourse to international law. (*People v. Hillhouse* (2002) 27 Cal.4th 469.)

XX. CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT EMBODY RACIAL DISCRIMINATION IN VIOLATION OF INTERNATIONAL LAW

Appellant claims that racial discrimination permeates capital punishment in violation of international law, which in turn requires that his death sentence be reversed. (AOB 226-241.) Respondent disagrees.

Appellant argues that "various studies" show the death penalty is imposed in a racially discriminatory manner. However, he fails to demonstrate that the imposition of death in his case was based on racial discrimination. As previously noted, international law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 961; *People v. Carey*, *supra*, 41 Cal.4th at p. 135.) Because appellant has failed to establish racial discrimination in violation of state or federal law, this Court need not consider the applicability of those

international treaties and laws to his appeal. (*People v. Jenkins, supra*, 22 Cal.4th at p. 1055.)

XXI. CALIFORNIA'S DEATH PENALTY LAW DOES NOT VIOLATE INTERNATIONAL NORMS OF HUMANITY AND DECENCY

Appellant argues that California's very broad death penalty scheme and use as a regular punishment violates both the international norms of humanity and decency as well as the Eighth and Fourteenth Amendments to the United States Constitution. (AOB 243-246.) Respondent disagrees.

This Court has repeatedly disagreed with appellant's position as follows:

> We again reject the argument that California's death penalty scheme is contrary to international norms of humanity and decency, and therefore violates the Eighth and Fourteenth Amendments of the United States Constitution. [Citation.] "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." [Citation.] Because we conclude that defendant's sentence was rendered in accordance with those requirements, we need not consider whether alleged violations of such requirements also would violate international law. [Citations.] We also reject the argument that the use of capital punishment "as regular punishment" violates international norms of humanity and decency and hence violates the Eighth Amendment of the United States Constitution. "California does not employ capital punishment in such a manner. The death penalty is available only for the crime of first degree murder, and only when a special circumstance allegation is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different from those applying to 'regular punishment' for felonies. [Citations.]" [Citation.] (*Jennings, supra*, 50 Cal.4th at pp. 690-691.)

(*People v. Castaneda, supra*, 51 Cal.4th at p. 1356.)

In *People v. Salcido, supra*, 44 Cal.4th 93, the Court stated:

> Defendant points out that all Western European countries, and many others around the world, have either abolished the death penalty or restrict its use to extraordinary crimes. He contends

> that this near-consensus demonstrates evolving standards of decency and humanity that should be deemed to bar use of execution "as a regular form of punishment" under the Eighth Amendment to the United States Constitution. As we recently said, however, "[d]efendant's argument that the use of capital punishment 'as regular punishment for substantial numbers of crimes' violates international norms of human decency and hence the Eighth Amendment to the United States Constitution fails, at the outset, because California does not employ capital punishment in such a manner. The death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different from those applying to 'regular punishment' for felonies. (E.g., Cal. Const., art. VI, § 11; §§ 190.1–190.9, *169 1239, subd. (b).)" (*People v. Brasure* (2008) 42 Cal.4th 1037, 1071-1072, quoting *Demetrulias*, *supra*, 39 Cal.4th at pp. 43-44; see *Moon*, *supra*, 37 Cal.4th at p. 48; accord, *People v. Bell*, *supra*, 40 Cal.4th at p. 621.)

(*Id.* at p. 168.) Appellant provides no reason for this Court to change course now.

XXII. THERE IS NO CUMULATIVE ERROR

Lastly, appellant contends that the cumulative effect of the guilt and penalty phase errors in this matter violated his right to a fair trial and requires reversal of his conviction and death sentence. (AOB 247-248.) Respondent disagrees.

As respondent has argued, none of appellant's claims has merit. If each claim independently has no merit, the result would be no different collectively. In other words, there is no basis for error cumulatively if there is no error individually. In addition, any possible error was harmless when considered separately. Considering them together, their cumulative effect likewise does not warrant reversal of the judgment. Thus, the judgment should be affirmed.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: February 14, 2012

Respectfully submitted,

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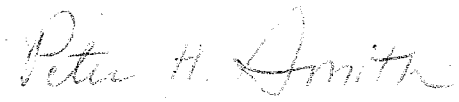

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 53,540 words.

Dated: February 14, 2012

KAMALA D. HARRIS
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Zaragoza** No.: **S097886**

I declare:

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

On February 15, 2012, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 15, 2012, at Sacramento, California.

_____
Declarant

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