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In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent,

v.

CHRISTOPHER ERIC POORE,

Appellant.

CAPITAL CASE

Case No. S104665

Riverside County Superior Court Case No. INF-033308
The Honorable Ronald M. George, Judge

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INTRODUCTION

In 1999, Christopher Eric Poore lured Mark Kulikov into the bedroom of Kulikov's Palm Springs home and Poore shot Kulikov five times while Kulikov was sitting in a chair in his bedroom. In 2002, Poore was convicted of first degree murder with true findings as to the financial gain and lying in wait special circumstances, robbery, burglary and being a felon in possession of a firearm, and sentenced to death.

Poore's judgment and death sentence should be affirmed because: (1) the trial court properly exercised its discretion in determining there was a manifest need to use physical restraints in the courtroom; (2) the trial court properly excused two prospective jurors for cause who expressed they were unable to apply the law as instructed by the court; (3) California's death qualification voir dire is constitutional; (4) the trial court's acquiescence in Poore's refusal to allow his counsel to present a penalty phase defense did not violate Poore's constitutional rights; (5) the death penalty as administered in California is not unconstitutional; (6) not yet providing Poore with habeas counsel does not render his judgment and sentence unconstitutional; (7) California's death penalty statute as interpreted by this Court and applied at Poore's trial is constitutional; and (8) there was no cumulative error.

STATEMENT OF THE CASE

The Riverside County District Attorney charged Poore by information with the murder of Mark Kulikov (Pen. Code,[1] § 187; count 1) with special circumstances of financial gain (§ 190.2, subd. (a)(1)) and lying in wait (§ 190.2, subd. (a)(15)); robbery (§ 211; count 2); burglary (§ 459; count 3); and being a felon in possession of a firearm (§ 12021, subd. (a)(1); count

[1] All statutory references are to the Penal Code unless otherwise stated.

4). It was further and specially alleged: as to counts 1 and 2 that Poore personally used a firearm (§§ 212022.5, subd. (a) & 1192.7, subd. (c)(2)) and personally and intentionally discharged a firearm causing great bodily injury or death (§§ 12022.53, subd. (d) & 1192.7, subd. (c)(8)); as to counts 1, 2 and 3 that Poore committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)); and that Poore has previously convicted of first degree burglary, a serious and violent felony (§§ 667, subd. (b) & (c) & 1170.12, subd. (c)). (1CT 196-199.)

On January 2, 2002, a Riverside County jury convicted Poore of first degree murder, and found true the financial gain and lying in wait special circumstances, robbery, burglary, and being a felon in possession of a firearm. The jury found true that Poore personally used a firearm and personally and intentionally discharged a firearm causing great bodily injury or death as to counts 1 and 2. The jury found not true the gang enhancement on counts 1, 2 and 3. (31CT 9014-9026, 9031-9032; 27RT 5813-5820.)

Following a penalty phase trial, on January 16, 2002, the jury returned a verdict of death. (31CT 9087, 9092; 29RT 6350-6351.)

On February 19, 2002, the trial court denied the automatic motion to modify the verdict under section 1181.7. On February 19 and 20, 2002, the trial court sentenced Poore to 41 years to life and death, with the 41 years to life sentence stayed pursuant to section 654 pending the outcome of the imposition of death and imposed a $10,000 restitution fine pursuant to section 1202.4, subdivision (b). (32CT 9257-9260, 9283-9284, 9291-9292; 29RT 6374-6380, 6383-6384.)

On February 20, 2002, the trial court filed the judgment of death and prison commitment. (32CT 9263-9266.)

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

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution

a. Poore's Association with the Aryan Brotherhood

In 1998, Poore was housed at Pelican Bay State Prison ("PBSP") and was validated as an associate of the Aryan Brotherhood prison gang ("AB"). (18RT 3784, 3876-3877; 20RT 4222, 4240-4241, 4248, 4263; 25RT 5318.) In prison, Poore wanted to be "running a yard" for the AB and "calling the shots" on violent acts or acquiring drugs. (18RT 3855-3856, 3859.) Upon being paroled, Poore wanted to take care of the AB "fellas" and do anything required including committing murder, to "make his bones" to become a member. (18RT 3858; 19RT 4101-4103, 4138-4139.) Before Poore was paroled, AB associate Mike Hammett put Poore in contact with Hammett's wife, Kathleen O'Donnell. (18RT 3681-3682, 3933-3934.)

In April of 1999, after Poore was paroled, he went to Crescent City to meet with O'Donnell to help her move. (18RT 3888-3889, 4023.) O'Donnell was a third-party communicator for the AB who facilitated communications with persons in or out of prison. (19RT 4099-4100; 20RT 4250-4251.) Poore and O'Donnell started a "really close" and romantic relationship. (18RT 3889-3980, 4022-4023.) Poore violated his parole by visiting O'Donnell and he was sent to the California Institution for Men at Chino ("CIM"). (18RT 3892, 3923, 4024.)

In September of 1999, Poore was living in Palm Springs and his girlfriend was Melinda "Mindy" McGuire. (16RT 3390, 3395.) McGuire used methamphetamine. (16RT 3518-3519.) McGuire was aware that

Poore was affiliated with the AB. (16RT 3592-3593.) McGuire introduced Poore to Mark Kulikov. (16RT 3594.)

b. November 7, 1999: Poore Gets a Gun

On November 7, 1999, Poore and McGuire went to the home of McGuire's sister, Cherice Wiggins. (15RT 3153, 3156; 16RT 3520-3531.) Poore asked Wiggins if she had a gun because he wanted to confront a man named Morris. (15RT 3158, 3161, 3170; 16RT 3528-3531; 17RT 3629-3630.) Wiggins was aware that Poore was a convicted felon. (15RT 3143.) They agreed on a purchase price of $200. (15RT 3158.) Although Poore did not pay at that time, Wiggins gave him a Colt .32-caliber pistol and a box of ammunition which were contained in a plastic gun box. (15RT 3160-3164.)

c. November 8, 1999: Poore Shoots Mark Kulikov

On November 8, 1999, after 7:00 a.m., Brian White drove Kulikov's truck from a casino to Kulikov's home where he had been living. (16RT 3399, 3405-3406.) When White arrived, Steve Carel was awake and Kulikov was sleeping in his bedroom. (16RT 3405-3406.) White woke Kulikov, who was supposed to drive Carel and Morris McCormies to Yucca Valley. (16RT 3406.) Kulikov said he was too tired and asked White to take them. (*Id.*) Debra "Debi" Feller, who was cleaning the residence, told White she received a call requesting someone drive to Poore's condominium to pick up Gary Richards and give him a ride to Morongo Valley. (16RT 3407.) White left the residence with Carel and McCormies, picked up Richards, drove to Indio to get methamphetamine, and then drove to Yucca Valley. (16RT 3407-3409, 3448.)

In the morning, Jamie Wolden arrived unannounced at Poore's condominium. (16RT 3183-3184.) Wolden had served time in prison, had

known Poore for about two weeks, and knew that Poore was a validated AB associate. (15RT 3179-3180, 3194, 3236, 3242, 3262, 3264-3265, 3268.) Wolden said he was looking for McCormies who owed him $130 in cash or marijuana. (15RT 3184, 3243-3244, 3256, 3259.) Poore said that he had seen McCormies at Kulikov's house and he was headed there. (*Id.*) Wolden accepted a ride in Poore's Jeep. (15RT 3185.)

After arriving at Kulikov's house, Poore knocked on the front door which was opened by Feller. (15RT 3187-3188, 3245.) Feller was cleaning the residence because Kulikov's parents might come by because they were attending a funeral. (15RT 3279-3281.) Poore and Wolden joined Kulikov in the kitchen and drank beer. (15RT 3188-3199, 3288.) Richards sat on a couch in the living room while Feller was tidying up and vacuuming. (15RT 3190-3191.)

Poore and Kulikov left the kitchen and walked down the hallway to Kulikov's bedroom. (15RT 3192-3193.) After entering the bedroom, Poore motioned from the open bedroom door and told Wolden to "come here." (15RT 3193-3195, 3246, 3288-3289.) Wolden walked into the bedroom and put his beer down on a refrigerator. (15RT 3196, 3198, 3231-3232.) Poore sat down on a bed and faced Kulikov, who was seated in a chair at the corner of the bedroom. (15RT 3196-3197, 3291-3292.) Poore told Kulikov he was going to lose his Jeep and asked him to "kick down" drugs or money. (15RT 3197, 3199-3200.) Kulikov said that he had spent his money on "speed" the previous night but Poore could take his stereo, television or any item that Poore could pawn for money. (15RT 3198-3199.) Poore got up from the bed, pulled a gun from his waistband, stretched out his arm and fired three or four shots in rapid succession at Kulikov. (15RT 3201, 3204, 3246.)

Feller was walking down the hallway and heard three noises – "bang," "bang," "bang." (15RT 3294-3295.) Wolden opened the bedroom door

and saw Feller. (15RT 3204.) Poore told White and Feller that he was told to do this by the "fellas" and that his "bros" get out of parole every day. (15RT 3205-3206.) White and Feller thought this was a reference to the AB and what could happen to them if they snitched on Poore. (*Id.*) Feller asked Poore if he could cover up the shot Kulikov who was still seated in the chair and appeared to be dead. (15RT 3299, 3336.) Poore covered Kulikov with a white down blanket. (15RT 3299-3300; 16RT 3440.)

Wolden saw Poore in a different bedroom that contained computers, stereo equipment and electronic parts. (15RT 3206.) Poore was loading the gun, which had one bullet in the chamber. (15RT 3206-3207, 3247-3248.) Poore put the empty casings in his jacket pocket and inserted the other bullets. (15RT 3207-3208.) Poore directed Wolden to assist Richards to load the stereo speakers onto the back of his Jeep and drive them to his condominium. (15RT 3208-3210, 3300-3301, 3261.)

When White arrived at Kulikov's house, Feller told him to do whatever Poore said. (15RT 3304-3305; 16RT 3410-3411, 3448.) Poore was seated at the desk of the home office with a gun in his hand. (15RT 3305-3306; 16RT 3381-3382.) Poore said that Kulikov had gotten into trouble with the "fellas" in prison who asked Kulikov for money or drugs. (15RT 3307-3308; 16RT 3415-3417, 3421.) White looked at Poore and said, "Oh, my God, you killed Mark." (16RT 3410.) Poore told White that he "had to" because "the order came from upstate," meaning the AB at PBSP. (16RT 3421.)

Poore asked White and Feller to look for drugs or a safe containing money, but there were none at Kulikov's house. (15RT 3301-3302, 3334-3336; 16RT 3423, 3451-3452.) Poore told White and Feller to gather their personal items, pack items in boxes including a video cassette recorder, a stereo system and box, and a television that was in Kulikov's bedroom, load them into Kulikov's truck and take the items to the garage at his

condominium. (15RT 3303, 3309, 3341-3342, 3344; 16RT 3378, 3424-3425, 3437-3439, 3453.)

d. Kulikov's Property Is Taken to Poore's Condominium

Wolden drove and took Richards in Poore's Jeep; and White drove and took Feller in Kulikov's truck to deliver the items from Kulikov's home to Poore's condominium. (15RT 3310, 3344; 16RT 3425, 3457-3458, 3551-3553.) Wolden gave Poore the keys to the Jeep and he walked home. (15RT 3310-3311.) Feller was handed a 12-pack of beer and told to enter the condominium. (15RT 3312-3313.) Feller put the beer in the refrigerator and was met by McGuire who had been outside walking a dog. (15RT 3313-3314.) Poore, Richards and White took the items from the Jeep and Kulikov's truck and placed them in the garage. (15RT 3313; 3425.) Poore invited them to his condominium to drink beer. (15RT 3314; 16RT 3426.) Poore, McGuire, Richards, White and Feller sat in the living room, drank beer, and looked at photographs Poore had taken of them when they were previously at Kulikov's house. (15RT 3314-3315; 16RT 3426, 3555-3556.)

Thereafter, Poore showed his AB association paperwork to White. (16RT 3432-3433.) Feller and McGuire walked upstairs to the bedroom to discuss why Feller and the others were at the condominium. (16RT 3558.) Feller cried and told McGuire that Kulikov had been shot five times and was dead. (15RT 3559, 3563, 3566, 3568.) White walked upstairs and Feller terminated her conversation with McGuire. (*Id.*) Poore received a telephone from his mother saying she was coming to the condominium to pick up her dog. (15RT 3317.) White feigned a telephone conversation where he arranged to pick up drugs in Dessert Hot Springs. (16RT 3427.) Poore told White and Feller to get the personal items they had packed from Kulikov's house and he was going to follow them. (15RT 3318-3319.)

After White and Feller left in Kulikov's truck, McGuire was in the garage getting her clothes out of the dryer when she noticed many items on top of the washing machine and boxes in the garage. (16RT 3559-3561, 3603, 3605-3606.) McGuire asked Poore how it was Kulikov wound up dead. (16RT 3560, 3562-3565.) Poore initially said it was "none of [her] fucking business," ignored her further repeated requests, and finally said that McGuire would be "mad about what happened" and that Kulikov was "asleep for good." (16RT 3562-3563, 3567-3568, 3571.) Poore told McGuire that he shot Kulikov five times and that he had opened up Kulikov's jugular vein. (16RT 5377; 17RT 3627, 3635, 3655, 3663.)

e. Police Search Kulikov's House and Find His Body

At 1:55 p.m., Palm Springs Police Officer Thomas Beckert was dispatched to Kulikov's residence after a caller reported that a person named Mark was dead inside the house. (16RT 3481-3482.) Officer Beckert was met by Officer Kelly Fieux. (16RT 3484-3485.) Officers Beckert and Fieux went to the backyard, opened the door and yelled out "Mark." (16RT 3485.) They did not receive a response and conducted a protective sweep for the presence of any persons inside the residence. (16RT 3485-3486.) As the officers walked through the house they noticed fast food boxes and containers in the kitchen and how messy the house was as they walked to the master bedroom at the end of the hallway. (16RT 3487-3490.) The officers opened the closed master bedroom door, entered and saw clothing and other items on the floor. (16RT 3491.) A pair of legs were sticking out of a chair that was covered with a white comforter. (16RT 3492.) Officer Beckert pulled the comforter and saw a deceased Kulikov with bullet holes on his body. (16RT 3493-3494.) The officers exited the bedroom and called their supervisor to report Kulikov's residence as a crime scene. (16RT 3494-3495.)

Around 2:20 p.m., Officer Troy Castillo received information about persons and vehicles that were frequently seen at Kulikov's house. (21RT 4509.) Officer Castillo spoke with a neighbor who said he had seen Poore's Jeep parked across the street from a residence which belonged to Poore's friend Cameron Blodgett. (21RT 4510.) Officer Castillo drove 20 minutes to Blodgett's house, he saw an older broken-down pickup truck parked at the residence but he did not see Poore's Jeep. (21RT 4511.)

About 2:30 p.m., Detectives Bryan Reyes and Mark Harvey walked through Kulikov's residence. (20RT 4320-4323, 4405, 4409.) Detective Harvey also confirmed that Kulikov's truck was missing, and Detective Harvey reported it as being stolen possibly by an armed and dangerous person. (20RT 4409.) The detectives walked to the master bedroom and saw Kulikov's body sitting in a chair with visible gunshot wounds to his head and hand. (20RT 4325, 4368-4369, 4375, 4405.) Kulikov's shirt was covered with blood, had bullet holes, and there was a hypodermic syringe needle in the shirt pocket. (21RT 4515-4517.) After the detectives removed Kulikov's shirt they saw that Kulikov had two bullet holes above his right eye, one bullet hole to his right cheek, two bullet holes in the center of his chest, a bullet hole to the front and to the back of his hand, and a bullet hole in his left rear shoulder area. (21RT 4516-4517.) The officers recovered a bullet that was embedded in the upper portion of the chair near the backrest. (21RT 4517-4518.)

f. White and Feller Meet with Police

Detective Harvey confirmed that Kulikov's truck was missing, and he reported it as being stolen possibly by an armed and dangerous person. (20RT 4409.) White and Feller drove in Kulikov's truck for a while before deciding to go to Yucca Valley to meet with Carel and McCormies. (15RT 3220, 3345-3346; 16RT 3428-3429.).

After their conversation, White and Feller decided to report Kulikov's murder to the police and drove to Feller's home in Joshua Tree. (15RT 3272, 3321, 3346-3347; 16RT 3429-3430.) Feller called the Sheriff's Department in Joshua Tree, and they arranged for Feller and White to meet with detectives from the Palm Springs Police Department. (15RT 3323, 3348; 16RT 3430-3431.)

Sheriff's Deputies drove White and Feller to a convenience store in Morongo Valley where they met with Detectives Harvey and Reyes. (15RT 3323-3324, 3348; 16RT 3431; 20RT 4326-4327, 4410-4411.) White had used drugs a couple of hours before he spoke with the officers. (16RT 3642.) Detective Harvey spoke with White in the patrol car; and Detective Reyes spoke with Feller outside the car. (20RT 4329-4330, 4382-4383, 4411.) The detectives confirmed that White and Feller provided consistent information, and they drove them to the Palm Springs Police Department for further interviews. (20RT 3325, 3349; 20RT 4330.) White and Feller were more forthcoming and provided more information in their subsequent interviews. (20RT 4336-4337, 4412.) After White was interviewed, he was booked into jail for a parole violation. (20RT 4337, 4397, 4412.)

Kulikov's truck was recovered by police officers in Morongo Valley. (20RT 4379-4380; 21RT 4560-4562.) The officers collected items that were in the bed of the truck. (21RT 4560, 4562.) Kulikov's wife's driver's license was laying on the ground by the truck. (21RT 4603-4604.)

g. Poore Buries the Gun in the Backyard of Blodgett's House

About 8:00 p.m. or 9:00 p.m., Poore drove McGuire in his Jeep to the home of his friends Cameron Blodgett and Jo-Lin Ferdinand in Palm Springs to housesit while Blodgett and Ferdinand were away on vacation. (16RT 3580-3581, 3601.) At Blodgett's house, Poore told McGuire that he

shot Kulikov. (16RT 3580.) McGuire saw the gun that Wiggins provided to Poore tucked in the waistband of Poore's pants. (16RT 3587.)

Feller drove with police officers to identify Poore's condominium where the lights were not turned on. (15RT 3326-3327; 20RT 4340, 4343.) Around 10:00 p.m. to 11:00 p.m., the officers drove to Blodgett's residence and Feller saw Poore's Jeep. (15RT 3328; 20RT 4343.) The officers checked the license plate and confirmed that Poore was the registered owner of the Jeep. (21RT 4522.) Detectives went to Blodgett's home and set up a perimeter around the home. (21RT 4564.) The detectives hid in a dirt lot which had a six-feet-tall wood plank fence abutted by bushes which prevented the detectives from looking over the fence to Blodgett's backyard. (21RT 4564-4566, 4604.)

McGuire went to the backyard to smoke and Poore went with her. (16RT 3582.) McGuire sat on a lounge chair to smoke and Poore walked around the backyard. (*Id.*) When Poore was out of her sight, McGuire heard Poore moving around bricks, rocks or a flower bed. (16RT 3583, 3633.) The detectives at the dirt lot heard the sound of glass breaking coming from the backyard of Blodgett's residence. (21RT 4565-4567.)

h. Police Arrest Poore and McGuire

On November 9, 1999, around 2:30 a.m., Detective Reyes dialed the telephone number for Blodgett's house and Poore answered. (15RT 3329; 4345.) Detective Reyes handed the telephone to Feller, who told Poore she needed a ride. Poore asked Feller if something was "wrong." (15RT 3330; 16RT 3584, 4344-4345.) Feller said "never mind" and told Poore she was going to call him back. (15RT 3330.)

After the call, Poore woke up McGuire and said he was going to drive her home. (15RT 3584-3585.) The detectives conducting surveillance called Detective Reyes to inform him that Poore and McGuire exited the

house, entered the Jeep and were driving away. (20RT 4348-4349; 21RT 4569-4570.) Detective Reyes called police officers and told them to stop the Jeep. (20RT 4349, 4570.) Around 2:35 a.m., police officers stopped the Jeep. (15RT 3585; 20RT 4349.) McGuire noticed that the gun was not on the top of console of the Jeep where Poore kept it. (16RT 3587-3588; 17RT 3652.) Poore told McGuire that he had buried the gun and to "sit still and don't say nothing." (16RT 3589; 17RT 3633, 3661.) Police officers removed Poore and McGuire from the Jeep, arrested both for murder and McGuire also for being an accessory to murder. (16RT 3586, 3589; 20RT 4454-4455, 4524; 21RT 4455, 4523-4524, 4532-4533, 4571.)

i. Police Find the Gun Buried in Blodgett's Backyard Patio

On November 10, 1999, in the early morning, detectives searched Blodgett's house pursuant to a search warrant. (21RT 4418, 4572-4573.) Detective Michael Donovan went to the backyard. (21RT 4573-4574.) Detective Donovan saw bricks missing from a post that surrounded latticework, dirt that had been turned over and not packed down, and a broken coffee mug that could have caused the broken glass noise that he and other detectives heard the previous night. (21RT 4590-4591, 4607-4608.) Detective Donovan put on a pair of gloves and used his finger like a hook to dig through the dirt. (21RT 4574.) His finger hit a hard object, he pulled up the object and found a handgun that was buried. (*Id.*) Detective Donovan recognized the gun as an older model .32-caliber Colt handgun. (21RT 4575, 4587-4588, 4592, 4606-4607.) The cylinder contained six live rounds of .32-caliber ammunition which Detective Donovan removed and placed into evidence. (21RT 4577.)

j. Police Find Kulikov's Property and Empty Cartridges

Detective Harvey and other officers searched Poore's condominium pursuant to a search warrant. (20RT 4418-4420, 4431-4432.) A plastic gun box containing a cardboard box with .32-caliber ammunition was on the top shelf of a closet in the master bedroom. (20RT 4433-4434, 4436-4437; 21RT 4433-4434, 4436, 4441, 4581-4582.) The living room had stereo equipment and the photographs that Poore had taken at Kulikov's residence were on tables near a fireplace. (21RT 4447-4448.)

Detectives found speakers, stereo equipment and two cameras in the condominium. (21RT 4375, 4436-4437; 21RT 4581-4583.) The garage contained a DeLorean under a cover, stereo equipment, speakers, a television, a large case, a box addressed to Kulikov and a box containing drug paraphernalia. (21RT 4437-4438, 4497-4498, 4500, 4583-4584.) A dumpster near the garage had a trash can with a box addressed to Kulikov's house. (21RT 4497-4498, 4500, 4584.) Inside the trash can was a trash bag with a note written by Poore to Ferdinand, five expended .32-caliber bullet cartridges and one live .32-caliber cartridge that would fit the Colt handgun. (21RT 4499, 4501-4505; 21RT 4583, 4594-4596, 4626-4627, 4631.) A ballistics expert test fired the Colt handgun and determined that the five expended cartridges were fired from that gun. (21RT 4650-4652, 4654, 4664-4665.)

k. Kulikov's Autopsy

On November 12, 1999, an autopsy was performed on Kulikov. (21RT 4462, 4482.) Kulikov had three gunshot entry wounds to his head – two to the right side of the forehead and one to the right side of the chin, two gunshot entry wounds to the chest, and a through-and-through gunshot wound to the right hand. (21RT 4464-4471, 4477-4479, 4486-4487.)

Kulikov's death was caused by intrathoracic bleeding from a gunshot wound to the chest which pierced the heart and both lungs. (21RT 4471-4472.) A contributing death factor was a contusion and laceration to the brain from a gunshot wound to his head. (21RT 4472.)

l. Poore's Post-Arrest Efforts to Eliminate Witnesses

Poore's sister Amber informed O'Donnell, a third-party communicator for the AB who had been romantically involved with Poore, that Poore had been arrested for murder. (18RT 3897-3898.) Poore asked O'Donnell, who had a criminal justice degree, to assist him with his case. (18RT 3900.) In January of 2000, O'Donnell received a packed of police reports that were mailed by Amber. (18RT 3900-3901, 3955-3956, 3959; 23RT 5390-5391.) O'Donnell highlighted portions of witness statements to show that White was a "snitch" and dismissed cases that included allegations of child molestation which she sent in a 25-page packet to inmate Kenneth Cook who had been incarcerated with Poore at the jail in Indio. (18RT 3904-3905, 3912, 3962, 3965-3976, 3991; 17RT 3675, 3684.) The information regarding White was essentially a "death warrant" for White who was in prison which Cook would be expected to execute. (19RT 4093, 4113-4115.)

Cook and Poore were at the county jail in Indio together for four days before Cook was transferred to state prison. (17RT 3675, 3684.) Poore showed Cook his paperwork validating him as an AB associate. (17RT 3727, 3746-3747.) Poore told Cook that he had been charged with murder, and he had a "serious problem" with five witnesses that "need to be dealt with." (17RT 3688-3689, 3739-3740.) Cook believed Poore wanted him to murder the witnesses. (17RT 3689-3690.) Poore told Cook that he would receive a custom CJ7 Jeep and access to stored items including electronics if Cook "took care of it." (17RT 3693.)

Cook was transferred from the Indio jail to the CIM reception center. (17RT 3695.) Cook did not receive the "death warrant" packet because it was intercepted by investigators at CIM. (15RT 3134-3135.) After Cook arrived, an inmate told him that the "Big Homey sends his love and respect," which is an AB greeting. (17RT 3703, 3712; 20RT 4255-4256.) About an hour later, White came to Cook's cell. (17RT 3696-3697, 3741-3742.) Cook and White subsequently had a conversation on the yard; and Cook was convinced White was a witness in Poore's murder case that he had to "deal with." (17RT 3698, 3742-3744.) An hour later, White was transferred to a different housing facility and Cook was transferred to a different yard. (17RT 3698-3699.) Thereafter, Cook was quickly classified at CIM and sent to New Folsom State Prison. (17RT 3699.)

In February of 2000, AB dropout Steven Pearson was at the county jail in Riverside pending a trial on narcotics-related charges. (17RT 3762-3763, 3774-3775, 3782, 3791; 19RT 4146-4147.) Poore saw Pearson's AB shamrock tattoo and introduced himself to Pearson as being associated with the AB. (17RT 3770-3771, 3785, 3790-3791, 3804-3805.) Poore said he was trying to tax a drug dealer, became frustrated and shot the man in the chest and head. (17RT 3800-3801.) Poore said the man was sitting in a recliner chair in his bedroom when Poore shot him. (17RT 3799-3800.) A woman entered the room and asked if he could cover the dead man in the chair with a blanket. (17RT 3794.) Poore told Pearson he hid the gun under some bricks at a home where he had spent the night. (17RT 3795.) Poore asked Pearson if he had any AB "brothers" at CIM who could take care of White. (17RT 3795.) Poore said he would have his sister put money in the prison "books" and he had a DeLorean car to pay for having an inmate take care of White. (*Id.*)

On February 16, 2000, Poore arrived at the county jail in Riverside. (22RT 4808.) Poore told his cellmate Neal O'Neill that he was charged with murder. (19RT 4165-4166.) Poore told O'Neill that he shot a man in the rear bedroom of the man's home. (19RT 4167-4169.) Poore said he hid the .32-caliber gun he used by digging a hole in a patio and placing it underneath a brick. (19RT 4171.) Poore said there were two male and two female witnesses. (*Id.*) Poore offered O' Neill a DeLorean and a Jeep CJ7 if he would kill the witnesses. (19RT 4171-4175.)

O'Neill had nitroglycerin pills on his dresser which were prescribed as medication for his heart. (19RT 4176.) Poore asked O'Neill if he could have the nitroglycerin pills because he wanted to kill a man at the county jail in Indio. (19RT 4177.) O'Neill said "no" because he did not want to implicated in the murder. (*Id.*) On March 21, 2000, Poore was transferred out of the Indio jail to go to court. (19RT 4177; 20RT 4297.) The following morning, O'Neill discovered his nitroglycerin pills were missing and he contacted his court-appointed investigator and jail staff. (19RT 4177-4178; 20RT 4297.) O'Neill said that Poore told him that he had a syringe and wanted the nitroglycerin pills to make a "hot shot" injection to kill someone; and that Poore had talked to O'Neill about murdering witnesses. (19RT 4179-4180, 4210; 20RT 4279-4280, 4284; 22RT 4726, 4729-4734, 4742-4743.)

On March 25, 2000, at 9:05 p.m., a search was conducted of Poore's cell at the Indio jail. (22RT 4680-4681.) The correctional officer searched Poore's property box and found a brown bottle containing nitroglycerin pills which a nurse confirmed were not prescribed for Poore. (22RT 4682-4683, 4685, 4692-4693, 4695.) Poore told the officer he found the pills at the county jail in Riverside and he kept them. (22RT 4683, 4687-4688.) The following day, jail officials in Riverside confirmed that the nitroglycerin pills had been recovered from Poore. (20RT 4286-4287.)

On March 27, 2000, when Poore arrived at the county jail in Riverside he was searched and then x-rayed. (22RT 4697-4698, 4735-4736.) The x-ray revealed that Poore had secreted contraband items in his rectum. (22RT 4700.) Poore removed loose-leaf tobacco, a lighter, three hand-rolled cigarettes and an inmate-manufactured syringe covered with a protective cap from his rectum. (20RT 4291; 22RT 4701-4703.)

2. Defense

a. Poore Is Paroled from Prison

As an adult, Poore had convictions for grand theft, being a felon in possession of a firearm, possessing methamphetamine and being under the influence. (25RT 5301-5303.) His latest conviction was for being a felon in possession of a firearm where he was assigned to Calipatria State Prison ("CSP") and later PBSP. (25RT 5303-5304.) Poore broke many prison rules and was involved in "a lot of fights" with other inmates during his incarnation. (25RT 5304-5305, 5314, 5377.) Poore admitted he was validated as an associate of the AB and a was a "separatist" regarding races. (25RT 5306-5307, 5313.) The letters "IE," for Inland Empire are tattooed on his chest to identify him as an inmate from that area; and "Dirty Deeds" is tattooed on his neck because likes the rock band AC/DC. (25RT 3503, 5312, 5377.)

In March of 1999, Poore was paroled from PBSP and went to stay with his mother in Rancho Mirage. (25RT 5307, 5318.) Poore violated his parole when he went to Crescent City to visit O'Donnell. (25RT 5309.) After returning from Crescent City, Poore was arrested and served 60 days at CIM for the parole violation. (25RT 5311, 5314-5315.) In addition to staying with his mother, Poore also stayed for as long as he wanted at a condominium in Palm Springs that belonged to his mother's fiancée, Richard Grommon. (23RT 5054-5055, 5057, 5059; 25RT 5318-5319.)

Poore's mother and Grommon paid for Poore's rent, utility bills, and insurance. (24RT 5057, 5059; 25RT 5310-5320, 5365-5366.) Poore's mother paid cash to purchase a 1985 Jeep CJ7 when Poore got out of prison. (24RT 5056; 25RT 5320.) In July and August of 1999, Poore worked for eight to ten weeks for a construction company that did wood framing and earned between $400 and $500 a week. (23RT 5315-5318.) Poore received his last pay stub on August 28, 1999. (23RT 4934.)

Around September of 1999, Poore became friends with Cameron Blodgett and his girlfriend Jo-Lin Ferdinand at a pub where Ferdinand worked in Palm Springs. (23RT 4968-4971; 25RT 5321.) Blodgett knew that Poore had been in prison and had a reputation for violence. (23RT 4945, 4996.) Poore frequently went to Blodgett's home to visit with Blodgett and Ferdinand. (23RT 4945-4946.) Poore helped Blodgett with yard work because he walked with a cane and had a back injury. (23RT 4946-4947; 25RT 5322.)

Poore began a sexual relationship with McGuire. (25RT 5324-5325.) McGuire used methamphetamine but Poore had not used drugs for eight years. (25RT 5325.) McGuire introduced Poore to Kulikov when he took McGuire to pick up her clothes at Kulikov's house. (25RT 5323.) McGuire regularly stayed at Kulikov's house. (*Id.*)

b. Poore Claims Purchasing Kulikov's Stereo Equipment

On November 6, 1999, Poore purchased the stereo equipment from Kulikov for $1,000 and he intended to resell it. (25RT 5341-5342, 5385.) Poore got the money from his mother and he paid Kulikov in cash with $100, $50 and $20 bills. (25RT 5342.) The expensive equipment that could be used by a disk jockey, which Poore thought might have been stolen, included a carpeted case with two turntables and a sound equalizer, a stereo rack and two very large speakers. (25RT 5340-5341, 5385.)

Poore's friend, Robert Hamilton, testified that Poore offered to pay $150 for the stereo equipment which included speakers in Kulikov's bedroom, an expensive main tuner, a stack of speakers and a turntable. (24RT 5144-5148.) Kulikov did not want to sell the equipment. (24RT 5154.) Although Kulikov told Poore the equipment was not for sale, Poore gave Kulikov $150 for the stereo equipment. (24RT 5154.)

c. November 7, 1999: Poore Gets a Gun

Poore said he borrowed Blodgett's truck to drive McGuire to Sky Valley to visit McGuire's mother to take her flowers for her birthday and visit Wiggins. (25RT 5327.) According to Poore, he learned that Wiggins had a gun that was a collector's item that he wanted to purchase as a gift for Grommon. (25RT 5327-5328, 5358.) Wiggins wanted $200 for the gun which he promised to pay her when he would get money from his mother when she returned from vacation. (25RT 5328.) The gun and a box of ammunition were inside a case. (25RT 5329, 5358-5359.) Poore was aware he was breaking the law as a convicted felon when he took possession of the gun from Wiggins. (25RT 5333, 5358.) Poore and McGuire then returned to Blodgett's house to drop off the truck. (25RT 5350.) Poore took the gun out of the bed of the truck, wrapped it in a rag, and placed it at the bottom of a toolbox of his Jeep which he locked and then he drove McGuire in the Jeep back to his condominium. (25RT 5330, 5333-5334.) However, neither Blodgett nor Ferdinand recalled loaning Blodgett's Toyota pickup truck to Poore that day. (23RT 5011; 24RT 5047-5048.)

Hamilton testified that night, Kulikov came over to Hamilton's house and Kulikov counted between $700 and $900 in cash because Kulikov wanted to buy some drugs. (24RT 5152-5155.) However, Hamilton did not have any drugs to supply to Kulikov. (24RT 5155.)

d. November 8, 1999: Poore's Alibi

On November 8, 1999, Poore planned to go to Blodgett's house around 11:30 a.m. to make coffee and chat with Blodgett and Ferdinand. (25RT 5331.) Around 10:30 a.m. to 10:45 a.m., Poore received a telephone call from Wolden asking for a ride to Kulikov's house to look for McCormies who owed $130 to Wolden. (25RT 5331.) The gun was still in the toolbox of the Jeep when Poore drove his Jeep to pick up Wolden. (25RT 5334, 5360-5361.) Poore drove the Jeep to Blodgett's residence where he arrived around 11:30 a.m. to 11:45 a.m. (25RT 5334.) Poore threw the keys to Wolden so he could drive to Kulikov's house. (25RT 5334.) Poore told Wolden there was a gun in the Jeep and not to get pulled over by police because Wolden was a parolee. (*Id.*)

Poore had a key to Blodgett's residence, he opened the door and went to the kitchen to make coffee. (25RT 533405335.) Afterwards he had coffee and chatted for up to two hours with Blodgett and Ferdinand. (25RT 3553.) Poore then went to work on the 1936 Ford pickup truck that he had purchased for Blodgett. (*Id.*) After working on the truck, Poore went to the backyard to clean it up because Blodgett had asked him to housesit the next day. (25RT 5335.) Poore testified that he was at Blodgett's house until "well after 4:00 p.m." (25RT 5336.) Poore left Blodgett's house and returned to his condominium to take a shower. (25RT 5336-5337.)

Blodgett and Ferdinand had a different version of what occurred that day at Blodgett's house. Poore arrived at Blodgett's house between 11:30 a.m. and noon. (23RT 4949; 24RT 5027, 5034.) Poore made coffee and poured himself a cup before Blodgett woke up. (23RT 4949.) Poore and Blodgett were supposed to work on the 1936 pickup truck, but they did not do so. (23RT 5008; 24RT 5016.) After noon, Blodgett and Ferdinand went to their bedroom to pack and do laundry. (23RT 5008-5009; 5036-5038.) Neither Blodgett nor Ferdinand could say where Poore was between noon

and 4:00 p.m. (23RT 5009-5010; 24RT 5021-5022, 5042.) According to Blodgett, Poore left his house around 4:30 p.m. or 5:00 p.m. because he had to drive Ferdinand to work and attend an anger management class. (23RT 4950.) Ferdinand did not recall seeing Poore before Poore drove her to work. (24RT 5029-5030, 5042-5043.)

Poore testified that, after he arrived at his condominium in his Jeep, White and Feller arrived in Kulikov's truck to drop off the stereo equipment Poore had purchased from Kulikov. (25RT 5342-5343.) White and Feller also had boxes with items that belonged to Kulikov who was moving out of his home and wanted Poore to store. (25RT 5343.) White, Feller and Richards took the stereo equipment and boxes to the garage. (25RT 5344.) After unloading the items, White, Feller and Richards entered the condominium and had a beer with Poore and McGuire. (*Id.*) Richards left to visit his girlfriend who lived a couple of blocks away from Poore's condominium. (*Id.*) Around 6:00 p.m. to 7:00 p.m., Poore received a telephone call from his mother saying she was coming over to pick up her dog. (*Id.*) After the call, White and Feller drove away in Kulikov's truck. (*Id.*)

About 9:00 p.m., Blodgett finished his anger management class and he met up with Poore at the pub in time to see the last quarter of the Monday night football game. (23RT 4951, 4983-4984; 24RT 5020-5021.) McGuire was with Poore. (23RT 4983-4984, 4985-4986.) A raffle was held after the football game and Blodgett won a bicycle. (23RT 4951, 4985; 24RT 5032; 25RT 5337.) Poore testified that between 10:00 p.m. and 11:00 p.m., he drove McGuire from the pub to his condominium and dropped her off. (25RT 5337-5338.) Poore then drove to Blodgett's house where he and Blodgett played video games. (25RT 5338.) Blodgett testified that he, Poore and McGuire left the pub, drank beer and hung out until midnight. (23RT 4951.) After midnight, Blodgett did not recall

seeing McGuire when he and Poore returned to the pub and stayed until Ferdinand finished working at 2:30 a.m. (23RT 4951; 25RT 5338.) Poore then drove back to his condominium. (25RT 5338.)

e. Poore Buries the Gun in Blodgett's Backyard

On November 9, 1999, Blodgett and Ferdinand were traveling to San Diego to babysit Blodgett's granddaughter. (23RT 4952; 25RT 3558.) Blodgett had asked Poore to housesit and feed his puppies and cat while Blodgett and Ferdinand were away, but Poore lost the key to Blodgett's home. (23RT 4953, 4980-4981; 25RT 5339.) Between 10:00 a.m. and 3:00 p.m., Blodgett and Ferdinand drove to Poore's condominium to drop off the key. (23RT 4953, 4972-4973, 4979; 24RT 5031-5032, 5046; 25RT 5340, 5383, 5426, 5435.) Blodgett saw boxes, papers, electronic devices and other items throughout the living room. (23RT 4875.) Blodgett also saw two stereo speakers next to the DeLorean in the garage and items that were covered with blankets. (23RT 4975-4978.)

After Blodgett and Ferdinand left, Poore and McGuire drove in Poore's Jeep to take the dog to his mother's house in Rancho Mirage. (25RT 5345.) After dropping off the dog, Poore and McGuire had dinner and then went to the pub to drink beer. (*Id.*) They left the pub and drove to Blodgett's residence to feed the pets and housesit. (*Id.*) Poore and McGuire watched a television newscast which notified Poore of Kulikov's death. (*Id.*)

Around midnight, Blodgett's dogs were barking in the backyard. (25RT 5346.) Poore turned off the lights, looked out the window and saw a man wearing a suit running across the patio and Poore assumed it was a police officer. (25RT 5346, 5355-5356, 5362.) Poore went outside to his Jeep, unlocked the toolbox, took the gun and buried it in the backyard just outside the sliding glass door of the living room. (25RT 5347, 5356-5357,

5363.) After hiding the gun, Poore returned to the bedroom to have sex with McGuire when he received a telephone call from Feller. (25-RT 5346-5347.) After the call, Poore told McGuire to "grab her shit and get in my Jeep." (25RT 5347.) Shortly after driving away from Blodgett's residence, police pulled over the Jeep and arrested Poore and McGuire. (25RT 5348, 5352, 5386-5387.)

Some time after Poore was arrested, he wrote a letter to McGuire claiming that Feller, White and the police were responsible for his arrest. (25RT 5369.) Poore wrote to McGuire, "When the trial comes [] I sure hope you tell the truth" and "that I never had no knowledge of any gun, and that I never got one from your sister." (25RT 5370-5371.)

3. Rebuttal

On November 27 or 28, 2001, defense investigator Michael Lewis interviewed Hamilton who was incarcerated at the jail. (25RT 5414-5415.) Hamilton said that Wolden told Hamilton that he did not shook Kulikov or know who did it. (25RT 5416, 5418.) About two weeks later, Lewis again interviewed Hamilton. (25RT 5417.) On that occasion, Hamilton told Lewis that Wolden said that Poore shot Kulikov. (*Id.*)

The driving time between Kulikov's house and Blodgett's house was about two and a half minutes. (25RT 5344.) The driving time between Kulikov's house and Poore's condominium was at most eight and half minutes. (*Id.*)

B. Penalty Phase

1. Poore's Violence and Weapon Possession in Prison

On May 29, 1999, Poore was assigned to the California Medical Facility which housed inmates with medical needs, mental problems and some general population inmates. (28RT 6128-6129.) Inmate Pyatt was

known by correctional staff and other inmates to have mental problems, being immature and displaying bizarre behavior. (28RT 6129, 6135-6136, 61138-6139, 6150-6151.) Inmate Pyatt had blood coming out his mouth and yelled that he had been hit and his dentures had been knocked out. (28RT 6130-6131.) Poore told correctional staff that he struck Pyatt because Pyatt had disrespected him in front of the other inmates. (28RT 6148.)

On August 22, 1999, Poore was assigned to California State Prison ("CSP"). (28RT 6109-6112.) A fight was reported and a correctional officer saw Poore's cellmate, inmate Foster, standing at the cell door with a swollen eye. (28RT 6111-6114.) Poore later said that he had requested a cell change because he was not getting along with Foster. (28RT 6125.) Poore said that he had returned from the yard, got in an argument with Foster, they began fighting and Poore "just got a lucky punch in." (*Id.*)

On April 16, 1995, Poore was in the administrative segregation yard at CSP with other Caucasian inmates. (27RT 6072-6073.) Inmates who are disciplined or have problems with other inmates are housed in administrative segregation. (27RT 5935.) A fight ensued where Poore was fighting with inmate Bennett; Poore's cellmate, also named Bennett was fighting with inmate Dunham; two inmates named White were fighting each other; and inmates Tripp and Thomas were fighting. (27RT 6073-6074.) The inmates disregarded orders to stop fighting, several rubber or wood block rounds were fired from a gas launcher before most of the inmates got down on the ground. (27RT 6079.) Poore's cellmate Bennett and Dunham continued to fight until a correctional officer loaded a rifle. (27RT 6078.) Both Bennett and Dunham had weapons in their hands. (27RT 6079.)

On May 21, 1999, Poore and inmate Burke walked into the administrative segregation yard at CSP where other inmates were present.

(27RT 6056-6057.) Inmate Collins rushed at Burke and struck Burke's head and neck. (27RT 6056-6057.) A correctional officer ordered the inmates to get down on the ground. (27RT 6060.) Poore and other inmates complied with the order, but Burke and Collins continued fighting. (*Id.*) Collins made slashing motions and blood was flowing from Burke's neck. (27RT 6060.) An officer fired one round from a gas gun, and Burke and Collins got down on the ground. (27RT 6061.) Burke was in a prone position with blood flowing from his neck when Poore stood up and kicked Burke's head. (27RT 6061-6062.) The correctional officer loaded a round in a rifle which stopped Poore's aggression. (27RT 6063-6064.) Burke had an inch-long cut on his neck, and cuts on his back and left side of his head. (27RT 6067, 6070.) Neither Poore nor Collins were injured. (27RT 6066, 6071.)

On June 7, 1995, Poore and his cellmate inmate Bennett were released onto the yard at CSP. (27RT 6022-6023, 6014-6015, 6031-6032.) Two African-American inmates, Carroll and Mays, entered the yard. (*Id.*) Poore fought with Carroll and Bennett fought with Mays. (27RT 6024, 6033.) After punching Carroll, correctional officers saw in item in his hand that he used to slash or stab Carroll who started retreating to defend against Poore's attack. (27RT 5986-5987, 6025, 6017-6018, 6033-6034.) A correctional officer fired one rubber round from a gas launcher, but Poore continued his aggression. (27RT 6019, 6035.) A second correctional officer fired a rubber round directly at Poore and he stopped fighting. (27RT 6026, 6019-6020, 6036.) Poore went down to the ground and threw the weapon next to the yard fence. (27RT 6026-6027.) Carroll's chest was bleeding and correctional officers recovered the weapon. (27RT 6027, 6039-6041, 6052-6053.) Carroll had slash wounds on his chest and stomach, scratches on his left forearm, and puncture wounds to his chest, ribcage and inner right elbow. (27RT 6021, 6036, 6048-6051.)

On July 4, 1995, Poore and Bennett were on the yard at CSP when African-American inmates Thomas and Taylor entered the yard. (27RT 5989, 6000-6001.) Poore fought Thomas and Bennett fought Taylor. (27RT 5990, 6001-6002, 6009.) They disregarded orders to "get down" and two correctional officers each fired rubber founds from a gas launcher. (27RT 5991-5992, 6003.) Bennett and Taylor got down on the ground but Poore and Thomas continued punching each other in the head and neck area. (27RT 5993, 6011.) A correctional officer threw a central nervous gas grenade onto the yard but it did not have any effect; and the two correctional each fired second rubber rounds which stopped the fight between Poore and Thomas. (27RT 5993-5995, 6004-6005, 6012.)

On November 15, 1999, Poore was housed in the administrative segregation unit at CSP in the same cell with inmate Taylor. (27RT 5955-5956.) A random cell search for contraband was conducted and a correctional officer searched an envelope addressed to Poore located on the shelf assigned to Poore in the cell. (27RT 5957, 5959-5960.) The envelope contained an inmate-manufactured slashing weapon fashioned by placing two razor blades side-by-side wrapped with masking tape and bound with thread to form a handle. (27RT 5959-5961, 5968-5969.) The razor blades were covered with a sheath made from a milk carton wrapped with masking tape. (27RT 5960.) Poore admitted to the correctional officer the slashing weapon was "mine" and "was in my letter." (27RT 5965.)

On November 24, 1995, two African-American inmates, Tolliver and Hyder, were released onto the administrative segregation yard at CSP. (27RT 5947-5948.) Poore and inmate Tyler were then released onto the yard and began fighting with Tolliver and Hyder. (27RT 5948-5949.) They disregarded orders to stop fighting and get down on the ground. (27RT 5949.) A correctional officer fired one rubber round but the fighting

continued. (*Id.*) After a tear gas grenade was thrown onto the yard, Poore and the other inmates stopped fighting. (*Id.*)

On December 10, 1995, a correctional officer was randomly searching cells for contraband in the administrative segregation unit at CSP. (27RT 5971-5974.) The correctional officer searched a cell where Poore was assigned the lower bunk bed and Tyler was in the upper bunk bed. (27RT 5977.) The correctional officer found a disposable razor inside a folded towel on the shelf unit of the lower bunk. (27RT 5975-5976.) Razors inside cells are considered to be contraband because they can be used to make slashing weapons. (27RT 5978.)

On December 19, 1995, Poore and inmate McCarter were released onto the administrative segregation yard at CSP and they started fighting. (27RT 5941.) Poore and McCarter disregarded several orders to "get down" and struck each other with clenched fists. (27RT 5942.) It took five rounds of rubber blocks fired by three different correctional officers and a tear gas grenade to get Poore and McCarter to stop fighting and get down on the ground. (27RT 4943-5945.)

On October 19, 1999, Poore and inmates Burns and Hernandez were released onto the security housing unit yard at the California State Prison at Corcoran. (27RT 5925, 5928-5929.) Poore walked towards Hernandez who said, "Let's make this look good" before he and Poore started fighting. (27RT 5929-5930.) A correctional officer activated an alarm and he ordered Poore and Hernandez to "get down." (27RT 5929.) Poore and Hernandez continued fighting and the correctional officer fired wood block rounds from a gas launcher. (27RT 5929-5951.) Burns then got up from his prone position and attacked Poore. (27RT 5931.) Poore struck Burns, who was knocked down to the ground and Poore resumed fighting with Hernandez. (*Id.*) The correctional officer fired a second round of wood blocks. (27RT 5932.) Poore, Hernandez and Burns then assumed a prone

position on the ground and they were secured by correctional officers and returned to their cells. (27RT 5932.)

On November 4, 1996, Poore and inmate Munoz were released onto the security housing unit yard at the state prison in Corcoran. (27RT 5918-5920.) Poore and inmate Munoz started fighting, striking each other in the head and upper torso. (27RT 5920.) A correctional officer ordered them to stop fighting and get down on the ground. (27RT 5920-5921.) Poore and inmate Munoz complied with the order and were handcuffed by correctional officers. (27RT 5921-5923.)

On February 16, 2000, several inmates from the jail in Indio arrived at the jail in Riverside. (5900-5902, 5905.) Jail officers went to a holding cell where Poore was straddling over and punching African-American inmate Keyes. (27RT 5906-5907.) Inmate Keyes was balled up in a fetal position and trying to defend himself as Poore punched Keys 10 to 12 times in the upper torso, face and head. (27RT 5908-5909.) After five or six orders from jail officers, Poore stopped fighting. (27RT 5909.) Inmates Keyes had redness and bruising on his face as a result of the fight. (27RT 5911-5912.)

2. Victim Impact Evidence

Mark Kulikov was the only son of Alex and Frances Kulikov[2]; and he had three sisters, Janina Burton, Deborah Carruth and Elizabeth Myers. (28RT 6157, 6191.) They lived and went to school in a farming town in Arizona where Alex had a cotton farm. (28RT 6159-6160.) When Kulikov was four years old, he was afflicted with rheumatic fever which caused his nose to bleed and prevented him from walking. (28RT 6157, 6192.) Kulikov had to be carried as a child and took antibiotics for 10 years. (*Id.*)

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[2] Alex and Frances Kulikov will be referred to by their first names for convenience and to avoid confusion.

He was a kind, gentle and mischievous boy. (28RT 6159-6160, 6172, 6208.) Between the ages of 6 and 15, Kulikov worked with Alex on the cotton farm and at a produce house in Phoenix. (28RT 6160, 6180.) Kulikov was an honor's student in high school, but he decided to take the General Education Development (GED) test rather than finish high school. (28RT 6160.)

On November 8, 1999, about 9:40 a.m., Frances called Kulikov's house and a woman answered the call and said Kulikov was sleeping. (28RT 6163.) Frances asked the woman to wake up Kulikov because Frances needed to speak with him. (*Id.*) Frances told Kulikov that his uncle's wife had passed away and the family was preparing to attend the funeral in Pismo Beach. (28RT 6163-6165.) Carruth subsequently informed Frances that Kulikov was going to pick up his daughter Alexa and drive to the funeral. (*Id.*)

Alex and Frances flew from Arizona to Sacramento where Carruth picked them up at the airport and drove them to Pismo Beach. (28RT 6167-6168.) When they reached Pismo Beach, Carruth received a call from Burton telling her to drive Alex and Frances straight to the motel because "something happened." (28RT 6167-6168, 6201-6202, 6213.) At the motel in San Luis Obispo, Burton called Carruth and told her that Kulikov had been killed but they did not want Frances to know. (28RT 6184, 6214-6215.) Alex was only told that Kulikov was killed and he thought it was as a result of car accident when Kulikov was driving to the funeral. (28RT 6184-6185.)

The following morning, Carruth drove Alex and Frances to a motel in Palm Springs. (28RT 6167.) At the motel, Alex and Frances saw television news coverage where Kulikov's body was being brought out of his house. (28RT 6168, 6184.) Carruth told Alex and Frances how Kulikov had been killed and they all wept. (28RT 6215.)

At Kulikov's funeral, it was arranged to have an open casket viewing so that Alex, who came from a Russian family, could say good-bye to his son. (28RT 6204.) Russians have to see a body to determine that the person is gone. (28RT 6226-6227.) When Alex saw Kulikov's body in the casket, his knees buckled, his legs went out from under him, and he said, "Oh, my son, my boy." (28RT 6227.)

Since Kulikov's death, Frances has not liked the person she had become because she lacks patience, especially with her husband Alex. (28RT 6170-6171.) Frances has been depressed and her doctor prescribed her medication for the depression. (28RT 6071.) Frances feels that Kulikov's death robbed her of two years of her life, which is a lot of time because Frances is in her seventies. (28RT 6171.) Frances saw Kulikov in the casket but she did not have a chance to say good-bye to him. (28RT 6175-6176.) Frances lost her only son, who was special and a good person that was easily taken advantage of. (28RT 6176.)

Alex and Kulikov had a good rapport and spoke often. (28RT 6186.) Alex saw Kulikov about three months before his death. (*Id.*) Alex gave Kulikov $20,000 for the down payment on Kulikov's house; and he sent Kulikov another $5,000 for the house in Palm Springs. (28RT 6187.) Kulikov is always in Alex's prayers. (28RT 6188.) Kulikov was Alex's only son and he carried the Kulikov name from Russia as his heritage. (*Id.*) Alex lost his heritage when Kulikov died. (*Id.*)

Several days before Kulikov was killed, Kulikov called Frances and said he wanted to leave Palm Springs. (28RT 6162.) Alex and Frances were looking forward to Kulikov returning to their farming community in Arizona because Alex was going to be 79 years old and Frances 75 years old and they needed Kulikov's assistance. (*Id.*) Kulikov had made their fiftieth wedding anniversary very memorable; and Alex and Frances were

looking forward to seeing Kulikov at their upcoming sixtieth wedding anniversary. (28RT 6170, 6187-6188.)

Burton was the oldest sibling and eight years older than Kulikov. (28RT 6191.) When Kulikov was 10 years-old, Burton got married and left their home. (28RT 6192.) Burton and her husband took 10-year-old Kulikov with them on a trip to the Canadian Rockies and various state parks when they drove back to Arizona. (28RT 6193-6194.) Burton considered Kulikov to be her "champion" because Kulikov always defended Burton when her sisters picked on her. (28RT 6196.) Burton and Kulikov shared a common bond because they both suffered from a form of depression. (28RT 6198.) Kulikov was very proud and tried to hide it, but Burton told him that she would always be there for him. (*Id.*)

Burton looked at Kulikov in the casket but wanted to remember him as the "big teddy bear" that she hugged and had dinner with in Palm Springs in May of 1999. (28RT 6228-6229.) Burton misses having her "champion" and has gained 40 pounds since his death because she sought comfort in sweets. (28RT 6202, 6205.) Burton also developed a sleep disorder and is awake most of the night since Kulikov's death. (28RT 6202-6203.)

Carruth last saw Kulikov about six months before Kulikov was killed. (28RT 6211, 6222.) Carruth and Kulikov were at their parent's home in Arizona because their uncle had passed away. (*Id.*) Carruth knew that because Kulikov was the only man in their family that would take responsibility for taking care of their elderly parents. (28RT 6212.) At the funeral, Carruth saw Kulikov in the casket. (28RT 6216.) Kulikov had more gray hair and was thinner than when Carruth last saw Kulikov, and the bullet holes on his body were visible. (*Id.*) Carruth said good-bye and kissed Kulikov. (*Id.*) Carruth feels that the loss of Kulikov was equivalent

to losing her soul mate because Carruth and Kulikov had similar personalities. (*Id*.)

At the funeral, Myers saw an open gap on Kulikov's neck that the mortician attempted to conceal. (28RT 6227.) Myers could not understand how someone like Kulikov, who would give the shirt off his back to help someone, could somehow have an enemy. (28RT 6223-6224.) Attending portions of the trial caused Myers to take sleeping pills because she could not sleep and had nightmares. (28RT 6224.) After Kulikov's death, Myers now calls her elderly parents every three or four days to check up on them. (28RT 6225-6226.) Kulikov's death is like a branch that is missing from their family tree because Myers and her family did not have an opportunity to say good-bye to him. (28RT 6230.) Myers has a new baby that Kulikov did not get to see; and she would have loved to have seen Kulikov as a grandfather. (28RT 6231.)

Kulikov's wife of almost 20 years, Joie, described Kulikov as her best friend and confidante. (28RT 6234.) They were married after a "storybook" three week romance where they became deeply in love. (28RT 6161, 6210-6211, 6334-6235.) Kulikov was very supportive of Joie, including taking Lamaze classes to assist Joie with the birth of their daughter Alexa. (28RT 6237-6238.) Joie was a stay-at-home mother but also a graphic design artist. (28RT 6239.) Kulikov was very supportive of Joie's art, and she stopped paining after Kulikov's death. (*Id*.)

After getting married, they lived in Pacific Grove and then moved to Salinas where Kulikov worked for a transportation company. (28RT 6238-6239.) Kulikov and Joy moved to their home in Palm Springs when Alexa started kindergarten. (6240-6241.) When Alexa was about to graduate from high school, Joie and Kulikov were preparing to remodel and paint the house to move to a new home because Alexa was leaving for college in Redlands. (28RT 6241.) In April of 1999, the home remodeling began and

it was to conclude by June when Alexa graduated. (28RT 6243.) Joie began working extra hours at a hotel in Palm Desert, but Kulikov was unemployed and they shared one vehicle. (28RT 6244.) At that time, Kulikov seem preoccupied, lacked concentration and had new friends that Joie did not know. (28RT 6245.) When Joie arrived home from work around 10:00 p.m., she noticed strangers leaving their home. (*Id.*)

On September 3, 1999, Joie demonstrated "tough love" towards Kulikov and moved to Palm Desert to be closer to her work and not worry about getting a ride. (28RT 6246-6247.) Alexa had moved to Redlands. (*Id.*) On September 30, 1999, Joie went to the house in Palm Springs to pick up her valuables and noticed that some of her jewelry was missing. (28RT 6247.) Thereafter, Joie went to work for the same hotel in New Jersey because her father was in New York and ill. (28RT 6248.)

On November 8, 1999, Alexa called Joie at her work and Alexa said the street was closed and there was tape around their home in Palm Springs. (28RT 6249.) Later, a friend called Joie to tell her that she had seen news coverage on the television and saw that Kulikov was dead. (28RT 6250.) Joie called Kulikov's mother Frances to confirm the news. (*Id.*)

Joie was in charge of making arrangements for Kulikov's funeral. (28RT 6250.) Kulikov was cremated and Joie kept his ashes because she does not want to let go of Kulikov. (28RT 6251.) Joie sleeps with Kulikov's t-shirt and keeps his ashes next to her bed. (*Id.*) Joie has nightmares because she did not want Kulikov to die alone. (28RT 6251-6252.) Joie had been looking forward to reuniting with Kulikov to live the American dream and growing old with Kulikov. (28RT 6252.) As a result of Kulikov's death, Joie sees a psychiatrist, she has lost her sense of trust, but is grateful for having had a relationship with Kulikov. (28RT 6253.)

Alex described Kulikov as a kind, generous and supportive father who was her hero when she was growing up. (28RT 6256-6257.) Kulikov was

very involved in Alexa's senior year activities and Kulikov was able to see Alexa graduate from high school. (28RT 6256-6257.)

Kulikov met and approved of the man that Alexa was dating and was happy for her relationship. (28RT 6257-6258.) Alexa is 20 years old and is getting married. (28RT 6257.) Alexa feels that it is horrible that Kulikov will not be able to walk her down the aisle at her wedding. (28RT 6258.) After Kulikov's death, Alexa has recurring nightmares and loss of sleep about what happened to Kulikov. (*Id.*) Alexa was with her roommates in Redlands when a police officer knocked on the door and asked Alexa if she could locate his truck. (28RT 6259-6260.) A friend who lived near Kulikov's home called Alexa and told her that Kulikov had been shot. (28RT 6260.)

Alexa thinks about Kulikov daily. (28RT 6260.) Alexa misses Kulikov's kindness and his ability to listen to any problems that Alexa was having with her life. (28RT 6261.) Alexa will miss having Kulikov present for her life's events and Alexa will have to explain to her children why they do not have a grandfather. (*Id.*) Alexa wishes she had the opportunity to say good-bye to Kulikov and tell Kulikov how much Alexa loved him. (*Id.*)

The defense did not present any penalty phase evidence.

ARGUMENT

I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DETERMINING THERE WAS A MANIFEST NEED FOR PHYSICAL RESTRAINTS; AND POORE CANNOT DEMONSTRATE ANY PREJUDICE

Poore contends his rights to due process, to a fair trial, to present a defense, to the effective assistance of counsel, to trial by jury, and to a fair and reliable verdict determination were prejudiced by the trial court's unjustified decision to restrain Poore during his trial. (AOB 75-145, Arg.

I.) Poore's contention lacks merit as the trial court properly exercised its discretion when it determined that Poore's violent custodial behavior and threats to harm witnesses supported the trial court's discretion to order that Poore be physically restrained. Moreover, Poore cannot establish prejudice as the record does not reveal that the restraints hampered Poore's ability to assist with his defense or that any juror viewed the restraints.

A. Background

Prior to qualification of jurors, the People filed a motion to restrain Poore during trial. (2CT 328.) The motion was based on Poore's validation as an associate of the AB prison gang who said that upon being paroled from PBSP he was going to "make his bones" which meant kill someone, Poore's custodial request of inmates to have trial witnesses killed, the "death warrant" for White, the confiscation of nitroglycerin pills and a syringe secreted in Poore's anal cavity that could be used for a lethal "hot shot," and Poore's numerous fights and stabbings while in prison. (2CT 238-331.) The prosecutor suggested use of a REACT stun belt, and that Poore be shackled or chained to a chair bolted to the floor. (2CT 330.) The defense filed a motion to preclude restraints alleging that restraining Poore would prejudice the jury, could impair Poore's faculties, could impede the communication between Poore and his counsel, could detract from the dignity and decorum of the court proceedings, and could be painful to Poore. (2CT 367-376.)

A hearing was held where the prosecutor expressed his belief that no further evidence or testimony was required beyond what was expressed in the motion for the court to determine whether restraints were necessary. (1RT 109, 180.) The trial court disagreed and noted that evidence had to be presented to establish a manifest need for restraining Poore. (1RT 180-181, 183-186.) The trial court stated that upon a showing of manifest need, the

court had discretion to determine what restraints were appropriate under the circumstances. (1RT 186-188.) The trial court read defense counsel's opposition and points and authorities before taking a recess. (1RT 189.)

The trial resumed the hearing and, citing *People v. Cox* (1991) 53 Cal.3d 618, noted that the court had to make its determination of manifest need based on facts and not rumor or innuendo. (1RT 192.) The trial court indicated that the prosecutor had proffered that: Poore was a validated AB member who said that when he was paroled he would "make his bones," which generally means to kill someone; that while in custody Poore told several inmates to have certain trial witnesses killed, and sent a "death warrant" to CIM to have a witness killed; that nitroglycerin pills were confiscated and a syringe and other contraband were secreted in Poore's anal cavity such that a "hot shot" could be created and used to kill a person; and that Poore threatened witnesses immediately after the murder of Kulikov by saying that he knew who they were, where they lived, and that he had "brothers" who got out of prison all the time; that Poore was paroled from secured housing PBSP and was being handled "specially" by the Riverside County Sheriff's Office in his jail housing and transportation to court; and that Poore was involved in numerous fights and stabbings while incarcerated, and had concealed contraband while in jail. (1RT 192-194.)

The prosecutor stated that in the notice to introduce aggravating evidence during the penalty phase, it contained a chronology of Poore's violent and assaultive behavior while incarcerated which can support a trial court's exercise of discretion to order extra courtroom security pursuant to *People v. Hawkins* (1995) 10 Cal.4th 920. (1RT 195; see 1CT 283-285.) The trial court looked at the motion and noted Poore's incidents of violence which included Poore: severely beating up inmate Keys in an unprovoked fight at the jail in Riverside; separate fights with inmate Munoz and Hernandez at Corcoran State Prison; numerous incidents while Poore was

incarcerated at CSP including a fight with inmate McCarter, possessing a deadly weapon made from two razor blades in his cell, fighting inmate Tolliver, possessing a deadly slashing weapon made with two razor blades connected with tape, fighting inmate Thomas, stabbing inmate Carroll numerous times during a fight, kicking inmate Burke, and fights with inmates Bennett, Trippe, Thomas and Foster; and a fight with inmate Pyatt at the California Medical Facility. (1RT 195-196; see 1CT 284-285.[3]) The prosecutor added that Poore also fought with inmate Steiner at the jail in Riverside. (1RT 196.)

Defense counsel argued that Poore was not a member of the AB but had friends or associates in the AB. (1RT 197-198.) Defense counsel stated that during the 23 months that Poore had been in court he had been

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[3] The listed incidents of violence in the Notice to Include Evidence in Aggravation During the Penal Phase of the Trial included: (1) Poore's requests/solicitations to have witnesses killed in the instant case; (2) Poore's actions in having a package delivered to CIM containing witness statements, rap sheets, and other identifying information on witness Brian White; (3) On March 25, 2000, Poore smuggled nitroglycerin into the Indio jail; and on March 27, 2000, Poore smuggled a syringe ostensibly to combine the two for a "hot shot," which is lethal injection, on another inmate; (4) On February 2, 2000, Poore severely beat up inmate Jermaine Keyes in an unprovoked fight; (5) a fight with inmate Munoz at Corcoran State Prison; (6) a fight with inmate Hernandez at Corcoran State Prison; (7) a fight with inmate McCarter at Calipatria State Prison (CSP); (8) Poore possessed a deadly weapon (two razor blades) in his cell at CSP; (9) a fight with inmate Tolliver at CSP; (10) Poore possessed a deadly/slashing weapon (two razor blades connected by tape) in his cell at CSP; (11) fight with inmate Thomas at CSP; (12) Poore stabbed inmate Carroll numerous times in a fight at CSP; (13) Poore kicked inmate Burke in the head for no apparent reason at CSP; (14) fight with multiple inmates Bennett, Trippe and Thomas at CSP; (15) fight with inmate Foster at CSP; (16) fight with inmate Pyatt at the California [Medical] Facility (CMF); (17) Poore's involvement with the AB "which subscribes to violence to accomplish its objectives both in and out of prison"; and (18) "[f]urther evidence as discovered through the continuous investigation of [Poore]'s background and past history." (1CT 284-285.)

respectful and not caused any problems. (1RT 198.) Defense counsel argued that the appropriate security measure would be to have additional courtroom security staff but objected to shackling, use of a stun belt, or restraining Poore to a chair. (1RT 198-199.)

The prosecutor argued that restraints were appropriate given Poore's history of violent and assaultive behavior while incarcerated, and his level of sophistication in getting access to contraband like nitroglycerin and ability to conceal syringes. (1RT 199-200.) The prosecutor noted that Poore was a large man who was six feet and four inches tall and weighed between 240 and 250 pounds and, if unrestrained, he could overpower even additional courtroom staff to attack a witness, security staff or trial counsel. Accordingly, Poore should be shackled to a chair that is bolted to the floor. (1RT 200-201.) Defense counsel argued that the prosecutor was overestimating Poore's aggressive tendencies. (1RT 201.)

The trial court ruled that, based on the totality of the facts, there was a good cause showing of a manifest need for restraints. However, the trial court left open the type of restraints that would be used until it obtained additional information. (1RT 202-203.)

The following day, the trial court and parties discussed evaluating evidence and determining the appropriate security measures that would be used in the courtroom. (2RT 206-212.) The trial court noted that jail or prison security personnel could testify regarding the security issues that pertained to a particular defendant and as to the defendant's background. (2RT 212.)

Correctional Corporal Jose Miramontes of the Riverside County Jail at Indio testified about classification, housing, transportation and security issues regarding Poore. (2RT 213-215.) Poore's classification notes indicated he was a validated AB member who had been assigned to a security housing unit at PBSP, which is the a "high-security" prison. (2RT

216-218.) Poore used the moniker of "Dusty," indicated he had 11 years in state prison custody, and claimed to have ranking within the AB. (2RT 225-226.) Poore was initially placed in the general population at the Indio jail. (2RT 240.) After Corporal Miramontes reviewed Poore's classification records, Poore was placed in administrative segregation. (2RT 231, 240.) That required Poore to be handcuffed before his cell door was opened to protect the safety of the jail deputies and the other inmates. (2RT 231.)

Corporal Miramontes also testified as to Poore's acts of violence and resulting discipline in jail. On November 12, 1999, Poore entered custody at the jail in Indio. (2RT 219.) On November 14, 1999, Poore received a disciplinary marker for smoking. (2RT 219.) On February 16, 2000, Poore was transferred to the jail in Riverside. When Poore arrived in the holding cell area, an officer removed the restraints and Poore then assaulted inmate Keys. (2RT 220.) On November 16, 2000, Poore was involved in a fight with his cellmate inmate Steiner at the jail in Indio. (2RT 221-222.) On March 28, 2000, a search of Poore's cell was conducted where Poore was handcuffed with his hands behind his back and Poore was able to bring his hands in front of his body. (2RT 221, 241-242.) That day, Poore was taken to the medical facility at the jail where Poore was x-rayed and a syringe, tobacco and lighter were found secreted in his body that were not detected during a body cavity search. (2RT 221, 232.) The classification notes indicated that on March 26, 2000, Poore was found to possess nitroglycerin pills without authorization which could be used to endanger the health or well-being of other inmates. (2RT 222., 226-228.)

Corporal Miramontes testified that Poore posed a threat to other inmates because during his stay in jail he had assaulted two inmates, slipped off his handcuffs, and possessed a syringe which could be used as a weapon. (2RT 228-229.) If Poore were able to secrete a weapon or syringe

before coming to court from the jail at Indio where they did not have an x-ray machine, it would have to be discovered during a body cavity search. (2RT 232-233.) Corporal Miramontes opined that because of the serious nature of the case, Poore's assaults on other inmates including his cellmate, and Poore's threat to cause bodily harm on witnesses who testified against him, it was necessary for Poore to be restrained in the courtroom. (2RT 229.) Corporal Miramontes testified that if a trial witness had been labeled to be "snitch" because they provided information against Poore, their safety in a jail facility or in the courtroom would be jeopardized. (2RT 235-236.) If there was evidence that Poore sent a packet through an intermediary into a prison facility asking an inmate to "take care" of a trial witness, there should be concern for the safety of that witness if they are no longer in custody. (2RT 237.)

Corporal Miramontes testified that the jail had an available REACT stun belt that is controlled by a remote control. (2RT 237-238.) If the remote control is pressed once, there is a warning "beep." If within two seconds the control is pressed again, the voltage is activated on the stun belt. (2RT 238.) If Poore was wearing slacks and shirt over the REACT belt, the jury might see a bulge coming from the shirt. (2RT 244.) If a person wearing a REACT belt assaulted or got ahold of another person and the voltage was activated, both persons would receive the jolt. (2RT 238, 244-245.) Corporal Miramontes testified that if would be safer if Poore was wearing a REACT belt and was restrained to a chain that was bolted to the floor. (2RT 244.)

Correctional Sergeant Susan Trevino is assigned to the jail in Indio as is familiar with courtroom security procedures. (2RT 249.) Sergeant Trevino knows Poore is assigned to administrative segregation at the jail because of his violent behavior that includes assaults on two inmates. (2RT 249-250.) Sergeant Trevino was aware of waist chains, leg chains, leg

braces, stun belts, and spit masks that are available for courtroom security. (2RT 250.) Sergeant Trevino is also aware of a restraint chair where the person's arms, chest, legs and ankles are secured onto the chair. (2RT 250-251.) That chair is not designed to be bolted onto the floor. (2RT 253.) Sergeant Trevino testified that there was a county general services office that could perform the task of modifying a chair that could be bolted onto the floor. (2RT 256-257.)

Captain Patrick Terrell of the Riverside County Sheriff's Department is assigned to court services and familiar with the types of restraints available for prisoners. (2RT 260-261.) During transportation, chains and handcuffs are the available restraints. (2RT 261.) In the courtroom, prisoners have been restrained with handcuffs, leg chains, a combination of handcuffs and leg chains, waist chains, and REACT stun belts. (*Id.*) Captain Terrell was aware of an instance when a defendant who was uncooperative in court by throwing a water bottle and attempting to overturn counsel table, was restrained in a chair that was bolted to the floor. (2RT 261-262, 269.)

Captain Terrell testified that PBSP housed the most dangerous criminals in California and would cause concern for courtroom security. (2RT 264.) If he learned that Poore had been housed at PBSP, and that two or more witnesses were considered to be "snitches," courtroom staff would have to be concerned for the safety of those witnesses. (*Id.*) Based on his experience in courtroom services, Captain Terrell opined that a delay between a courtroom deputy's perception of an attack and activation of the REACT stun belt could give a defendant enough time to initiate the attack. (2RT 266, 270.) Accordingly, it would be safer to have the defendant's seat chained to the floor to prevent him from getting access to or grabbing a witness or anyone in the courtroom. (*Id.*)

David Bowser, an investigator for the Riverside County District Attorney's Office, has gathered evidence and interviewed witnesses in Poore's murder case. (2RT 273-275.) Investigator Bowser contacted CIM regarding a mailed packet of 70 to 80 pages of police reports regarding the primary witnesses in Poore's case and a photograph of witness Brian White who was in custody at CIM. (2RT 275-277.) Investigator Bowser saw handwritten knows and highlighted names and portions of the documents highlighting dismissed cases and allegations of child abuse regarding White. (2RT 277-278.)

Investigator Bowser testified that he subsequently interviewed Kathleen O'Donnell who admitted mailing those documents from her home in Crescent City to CIM. (2RT 278-279.) O'Donnell had received the packet of documents from Poore's sister Amber Rogowicz who was directed to do so by Poore. (2RT 279-280.) Investigator Bowser took the packet to Bryan Healey, an admitted AB member who is in federal custody. (2RT 280.) Healey said that based on his experience in the AB the packet in its totality, which included the police reports, rap sheets, White's photograph, and highlighting in the color green which signals "go" to the AB, was a "death warrant." (2RT 280-281.) Investigator Bowser also received information from inmates and Greg Bonaime, an investigator in the Riverside jail, about Poore's jail conversations and relaying messages to the AB through third parties where he expressed that certain people in jail were "cancerous growths" or "rats" and the pressure was building until "the chance that I get to explode." (2RT 281-283, 285-287, 290-291.)

Leo Duarte is a special agent with the Law Enforcement Investigations Unit of the California Department of Corrections. (2RT 297-298.) Agent Duarte has experience investigating, and has testified as an expert witness, regarding prison gangs. (2RT 298.) Agent Duarte testified that he reviewed documents designating Poore as an associate of the AB.

(2RT 303.) Agent Duarte opined that Poore was "making his bones" to become a member of the AB. (2RT 303-304.) Poore could "make his bones" by assaulting a correctional officer, courtroom staff, the prosecutor or a law enforcement officer which would elevate Poore's status in the gang. (2RT 304.)

Agent Duarte testified that prison files indicated that Poore had been housed in administrative segregation at PBSP. (2RT 304-305.) Inmates who are involved in assaultive behavior or are affiliated with a known prison gang can be placed in a secured housing unit at PBSP. (2RT 305-306.) Agent Duarte reviewed Poore's prison documents from 1990 to 1997 which demonstrated over 25 incidents which resulted in a disciplinary marker or proceedings against Poore. (2RT 306.) Agent Duarte testified that they included Poore's possession of inmate-manufactured weapons, stabbing assaults, inmate-manufactured alcohol known as "pruno," and multiple fights, melees and assaults of inmates including Poore's cellmate. (2RT 307-310.) Agent Duarte acknowledged that the AB is a calculating, sophisticated and violent prison gang. (2RT 311.) Agent Duarte maintained his opinion, which he testified to at the preliminary hearing, that the murder of Kulikov was committed to further the objectives of the AB. (2RT 311-312.)

Agent Duarte testified that his review of the documentation, his preliminary hearing testimony, and the recorded jailhouse telephone calls supported his opinion that Poore would carry out an assault against someone in the courtroom or jail facility regardless of the consequences to Poore. (2RT 312.) Agent Duarte opined that, given Poore's record of assaultive behavior and background, based on his training and experience he recommended that Poore be fully restrained as he was in the courtroom with waist chains and handcuffs or utilizing a stun belt. (2RT 313, 317.)

After the testimony concluded, the trial court stated that a security chair was available where the inmate was secured with a belt that went around his waist and was fastened to a loop in the back of the chair. (2RT 318.) The prosecutor stated he had a conversation with courtroom security staff who indicated being comfortable using that chair in conjunction with the REACT stun belt. (2RT 318-319.) The prosecutor argued that the combination of the security chair and REACT stun belt should be used to restrain Poore in the courtroom. (2RT 319.) Defense counsel stated that chair would look out of place and could preclude Poore from standing up when the jurors entered or exited. (2RT 319.) Defense counsel argued that the restraint should be limited to the REACT stun belt, and a leg brace if the court believed that should be required. (2RT 319-320.) The trial court noted the chair was in the courtroom so the parties could view it, and the court wanted to conduct further research before ruling. (2RT 324.)

At a subsequent hearing, the trial court tentatively ruled that the security chair and REACT stun belt would be used in light of the evidence presented to the court. (2RT 452.) The court invited comments by the parties. (2RT 452.)

Defense counsel stated that Poore had instructed counsel to stipulate to use of the REACT stun belt and leg brace as restraints. (*Id.*) Defense counsel stated that he objected to use of the security chair that had been displayed in the courtroom and would withdraw the proposed stipulation. (*Id.*) Defense counsel argued that if the chair was going to be used that the court should instruct counsel not to stand up when the judge or jury entered or exited the courtroom to avoid the appearance of lack of respect by Poore. (2RT 453.) Defense counsel stated, "I would object to all restraints, your Honor." (*Id.*)

The prosecutor noted that the trial court had reflected that the restraint chair looked like the chair at counsel table with the exception of a hole at to

lower lumbar area inside the chair. (2RT 453.) The court noted that hole was in the seat which would be concealed when the person sits in the chair. (2RT 454.) The prosecutor demonstrated use of the restraint chair, noted he was able to stand up relatively easy, and argued it was his preference that the chair be weighted or bolted down to the floor to provide the best level of courtroom security. (2RT 454.)

The trial court ruled that good cause was shown that there was a manifest need to use the security chair and the REACT stun belt to restrain Poore during courtroom proceedings. (2RT 454.) The court noted that there would also be additional courtroom security personnel. (*Id*.) The trial court ordered that all counsel were to remain seated during the arrival and departure of jurors. (*Id*.) The trial court proposed that it was the court's practice that for the formal initial presentation of jurors for hardship qualification, that only the REACT stun belt be used to restrain Poore so that Poore and counsel would be allowed to stand. That would maintain the sense of dignity and seriousness of the proceedings in a capital case. (2RT 455.) The court stated that other than in that limited circumstance, the REACT stun belt and modified security chair would be used to restrain Poore. (2RT 455.) The court stated that, outside of the presence of the jury, the order could be modified to provide for further security or for Poore to be removed from the proceedings if it was necessary to do so. (2RT 456.)

B. Law Regarding Physical Restraints

In general, a trial court has "broad power to maintain courtroom security and orderly proceedings[] [citation], and its decisions on these matters are reviewed for abuse of discretion. [Citation.] However, the court's discretion to impose physical restraints is constrained by constitutional principles." (*People v. Lomax* (2010) 49 Cal.4th 530, 558-

559 (*Lomax*).) The federal "Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, *unless* that use is 'justified by an essential state interest' – such as the interest in courtroom security – specific to the defendant on trial.'" (*Deck v. Missouri* (2005) 544 U.S. 622, 624 [161 L.Ed.2d 953, 125 S.Ct. 2007] (*Deck*).) Similarly, "[u]nder California law, 'a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of manifest need for such restraints.'" (*Lomax*, *supra*, 49 Cal.4th at p. 559.)

In determining whether there is a manifest need to restrain the defendant, courts consider several factors, including evidence that the defendant poses a safety or flight risk or is likely to disrupt the proceedings. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 389; *Lomax*, *supra*, 49 Cal.4th at p. 559.) The mere facts that the defendant is an unsavory character and charged with a violent crime are not sufficient to support a finding of manifest need. (*People v. Duran* (1976) 16 Cal.3d 282, 293 (*Duran*). It is well-settled that a defendant's violent custodial behavior can support a trial court's exercise of discretion to order extra courtroom security. (See, e.g., *Lomax*, *supra*, 49 Cal.4th at pp. 559-562; *People v. Hawkins*, *supra*, 10 Cal.4th at p. 944.)

No formal hearing is required. But when the use of restraints is based on conduct that is outside the presence of the trial court, sufficient evidence of such conduct must be presented on the record to allow the court to make its own determination of the nature and seriousness of the conduct and whether there is a manifest need for restraints. (*People v. Simon* (2016) 1 Cal.5th 98, 115 (*Simon*); *People v. Mar* (2002) 28 Cal.4th 1201, 1221 (*Mar*).) In making that determination, the trial court cannot merely rely on the judgment of law enforcement, court security officers or the unsubstantiated comments of others. (*Mar*, *supra*, 28 Cal.4th at p. 1221.)

It cannot be based on rumor or innuendo, but the court's determination must be based on facts. (*Simon*, *supra*, 1 Cal.5th at p. 115; *People v. Cox, supra,* 53 Cal.3d at p. 652.) Even when the record establishes a manifest need for the restraints, the restraint imposed must be the least restrictive or obtrusive one under the circumstances. (*Duran*, *supra*, 16 Cal.3d at p. 291; *Mar*, *supra*, 28 Cal.4th at p. 1226.)

This Court """will not overturn a trial court's decision to restrain a defendant absent "a showing of a manifest abuse of discretion.'" [Citation.] To establish an abuse of discretion, defendants must demonstrate that the trial court's decision was so erroneous that it 'falls outside the bounds of reason.' [Citations.] A merely debatable ruling cannot be deemed an abuse of discretion. [Citations.] An abuse of discretion will be 'established by "a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice."'" (*People v. Bryant, Smith and Wheeler*, *supra*, 60 Cal.4th at p. 390.)

C. Trial Court Properly Found Manifest Need for Physical Restraints Based on Security Concerns Particular to Poore

Poore has failed to establish that the trial court abused it discretion in finding a manifest need for the use of a stun belt and restraining him to a modified chair that was bolted to the floor based on security concerns that were particular to Poore. Poore's violent and disruptive behavior while in prison and in jail, including at least eleven fights with other inmates, two separate occasions of possession of an inmate-manufactured deadly stabbing or slashing weapon in his cell at CSP, stabbing an inmate numerous times during a fight at CSP, orchestrating the sending of a "death warrant" packet in prison for trial witness Brian White, and while awaiting trial at the Indio and Riverside jails stealing nitroglycerin pills, smuggling

the pills into jail, and smuggling a syringe that he secreted in his anal cavity into jail ostensibly to combine the nitroglycerin and syringe to create a deadly "hot shot" to be used potentially on an inmate or witness justified the imposition of the restraints. This Court has recognized that a defendant's violent custodial behavior can support a trial court's exercise of discretion to order extra courtroom security. (See, e.g., *Lomax*, *supra*, 49 Cal.4th at pp. 559-562 [attack on bailiff in a courtroom holding cell]; *People v. Hawkins*, *supra*, 10 Cal.4th at p. 944 [three fistfights in prison and extensive criminal history of violence and nonconforming behavior]; *People v. Wallace* (2008) 44 Cal.4th 1032, 1050 [evidence of fighting with inmates and possession of illegal razors] (*Wallace*); *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1032 [defendant attacked another inmate and threatened to kill deputies]; *People v. Combs* (2004) 34 Cal.4th 821, 838 [defendant possessed two shanks in jail and threated jail deputies]; *People v. Alvarez* (1996) 14 Cal.4th 155, 190-192 [fights with inmates, threatening deputies, and possession of weapons and an explosive device].)

Poore contends the trial court abused its discretion because the court's decision to restrain Poore was made before there was any evidentiary showing to support a manifest need for the restraints. (AOB 107-110.) Poore's contention lacks merit. A trial court is not required to hold a formal hearing. But if the use of restraints is based on conduct that it outside the presence of the trial court, sufficient evidence of such conduct must be presented to allow the court to make its own determination about the seriousness of such conduct and whether there is a manifest need for the restraints. (*Simon*, *supra*, 1 Cal.5th at p. 115; *Mar*, *supra*, 28 Cal.4th at p. 1221.) This Court has found that a trial court can base its decision to restrain a defendant on reliable facts provided by law enforcement or counsel. (See, e.g., *Wallace*, *supra*, 44 Cal.4th at pp. 1049-1050 [upholding trial court's imposition of restraints where deputy represented that

defendant had 16 rules violations while in jail]; *People v. Medina* (1995) 11 Cal.4th 694, 731 [prosecutor's representations of facts, made without objection or rebuttal by defendant, properly supported the trial court's ruling to impose restraints].)

Poore argues that it is not clear whether the trial court used "good cause" for imposing the restraints as a synonym for "manifest need" or was applying a lesser standard. (AOB 107, fn. 25; see 2RT 202-203.) Even if the trial court's use of words "good cause" might suggest it applied a lower standard, the record as a whole establishes that the manifest need standard was met. (See *People v. Mayfield* (1993) 5 Cal.4th 142, 196 ["The record of the hearing as a whole persuades us, however, that even though the court, in insolated instances, misstated the applicable standard, it nevertheless applied the proper concept].) The trial court was clearly aware of its obligation to make its own determination on the need for restraints and not simply to defer to the wishes of the prosecutor or courtroom security personnel. (1RT 180-188, 192.) The court also clearly based its decision on the particular facts of this case, not a generalized policy that any defendant charged with a violent crime must be restrained.

Poore argues that the trial court's decision to restrain Poore was erroneous because there was no "compelling evidence of imminent threats to courtroom security" and Poore's "courtroom behavior was exemplary." (AOB 110-112.) Poore's contention lacks legal or factual merit. There is no necessity that the decision to restrain a defendant be based solely upon courtroom conduct; out-of-court conduct may properly form the basis of a decision to employ restraints. "It is not necessary that the restraint be based on the conduct of the defendant at the time of trial." (*People v. Livaditis* (1992) 2 Cal.4th 759, 774.) The record shows that the trial court based its decision on the uncontested facts of Poore's violent behavior in custody and potential danger to others in the courtroom. The trial court ruled that,

based on the totality of the facts, there was a good cause showing of a manifest need for restraints. (1RT 202-203.) The fact that these incidents occurred outside of the courtroom did not diminish their relevance or their support for the trial court's order. (*People v. Hawkins* (1995) 10 Cal.4th 920, 944 [evidence need not show disruption in courtroom proceedings or attempt to escape; when there were "multiple instances of violent and nonconforming behavior while in jail, as well as an extensive background of criminal and violent activity, we will generally not second-guess the trial court's decision"].)

Poore argues that the evidence failed to demonstrate a manifest need to restrain Poore in the courtroom. (AOB 112-122.) Here, the trial court noted that in *People v. Cox*, *supra*, 53 Cal.3d at p. 651, where the trial court's decision in that case was based on "rumors floating through the jail" about an escape attempt, the court here grounded its decision on incidents that had already occurred for which the prosecutor provided specific details and dates. (See 1RT 192.) The trial court considered the prosecutor's motion to restrain Poore during trial which included evidence of Poore's AB membership who would "make his bones" upon being paroled; Poore telling several inmates to have certain trial witnesses killed; Poore sending the "death warrant" to CIM to have witness Brian White killed; the Indio jail confiscation of the nitroglycerin pills and syringe secreted in Poore's anal cavity that in combination could be used to make a lethal "hot shot" to kill somebody; Poore's threating of witnesses immediately after the murder of Kulikov; Poore's parole from secured housing at PBSP and special housing and transportation to court by jail staff; and Poore's involvement in numerous fights and stabbings while incarcerated and his concealment of contraband while in jail. (1RT 192-194; see 2CT 238-331.) The trial court also considered the incidents included in the motion to introduce aggravating evidence which included Poore's 11 incidents of fighting and

violence in jail and state prison, Poore's possession of a deadly weapon made from two razor blades in his cell, Poore's possession of a deadly slashing weapon made with two razor blades connected with tape in his cell, and stabbing inmate Carroll numerous times during a fight. (1RT 195-196; see 1CT 284-285.)

Defense counsel did not dispute or contradict the evidence of Poore's violent altercations with other inmates or possession of weapons while in custody. Instead, Poore's counsel argued that Poore was not a member of the AB but had friends or associates in the AB. (1RT 197-198.) Defense counsel stated that during the 23 months that Poore had been in court he had been respectful and not caused any problems. (1RT 198.) Defense counsel argued that the prosecutor was overestimating Poore's aggressive tendencies. (1RT 201.)

Here, the cited incidents of violent or nonconforming custodial behavior including possession of weapons and threats to kill witnesses indicate a particularized showing of manifest need for physical restraints. There was no abuse of discretion in the trial court's shackling order. (*People v. Stevens* (2009) 47 Cal.4th 625, 632 (*Stevens*); *Duran*, *supra*, 16 Cal.3d at p. 293, fn. 12.)

Poore contends that less restrictive alternatives were available than restraining Poore to a chair that would have been effective prevent a courtroom assault. (AOB 122-125.) Poore argues that the placement and presence of additional courtroom deputies or obstacles in the courtroom would have been adequate to prevent any attempted assault in the courtroom. (AOB 125.) However, the record shows the trial court considered the benefits and burdens of restraining Poore to a chair against other possible alternatives. In general, "when physical restraints are called for, a trial court should impose 'the least obstructive or restrictive restraint' that will ensure effective security." (*Lomax*, *supra*, 49 Cal.4th at p. 562.)

On appeal, this Court will "consider whether the trial court made the findings necessary to impose a particular security measure – that there was a manifest need, and that the measure chosen was the least obstructive that would still be effective – and further whether those findings were supported by substantial evidence." (*People v. Gamache* (2010) 48 Cal.4th 347, 368.)

Here, the trial court considered the testimony of Correctional Corporal Jose Miramontes who testified that, given Poore's ability to assault and attack inmates, slip handcuffs, secrete weapons, and his threats to cause bodily harm on witnesses who testified against him, the safety of witnesses or persons in the courtroom would be ensured if Poore was wearing a REACT belt and was restrained to a chain that was bolted to the floor. (2RT 229, 231, 235-237, 240, 244.)

Captain Patrick Terrell of the Riverside County Sheriff's Department is assigned to court services and familiar with the types of restraints available for prisoners during transportation and in the courtroom. (2RT 260-261.) Captain Terrell testified that courtroom staff would have to be concerned for courtroom safety because Poore had been housed at PBSP which houses the most dangerous criminals in California and two or more trial witnesses had been labeled as "snitches." (2RT 264.) Based on his experience in courtroom services, Captain Terrell opined that a delay between a courtroom deputy's perception of an attack and activation of the REACT stun belt could give a defendant enough time to initiate the attack. (2RT 266, 270.) Accordingly, it would be safer to have the Poore's seat chained to the floor to prevent him from getting access to or grabbing a witness or anyone in the courtroom. (*Id.*)

Leo Duarte, a special agent with the Law Enforcement Investigations Unit of the California Department of Corrections, testified that his review of the documentation, his preliminary hearing testimony, and the recorded jailhouse telephone calls supported his opinion that Poore would carry out

an assault against someone in the courtroom or jail facility regardless of the consequences to Poore. (2RT 312.) Agent Duarte opined that, given Poore's record of assaultive behavior and background, based on his training and experience he recommended that Poore be fully restrained as he was in the courtroom with waist chains and handcuffs or utilizing a stun belt. (2RT 313, 317.)

The prosecutor also demonstrated use of the restraint chair in the courtroom. (2RT 454.) The prosecutor noted he was able to stand up relatively easy, and argued it was his preference that the chair be weighted or bolted down to the floor to provide the best level of courtroom security. (*Id.*)

Of primary importance, and consistent with California law, substantial evidence supported the trial court's finding of manifest need. (*People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1031 ["This requirement is satisfied by evidence that the defendant has threatened jail deputies, possessed weapons in custody, threatened or assaulted other inmates, and/or engaged in violent outbursts in court"].) Based on the evidence presented, the trial court ruled that good cause was shown that there was a manifest need to use the modified security chair and the REACT stun belt to restrain Poore during courtroom proceedings. (2RT 454-455.) The court clearly found that additional courtroom personnel would be insufficient because the court ordered that there be additional courtroom security personnel during the proceedings. (2RT 454.) The trial court properly exercised its broad discretion to evaluate the evidence and determine the appropriate security measures in the courtroom. (*Stevens*, *supra*, 47 Cal.4th at p. 642.) Accordingly, Poore has not demonstrated an abuse of discretion.

D. Poore Cannot Demonstrate Prejudice

Poore contends that the trial court's decision to impose restraints prejudiced him by causing him pain, impairing his right to participate in his

trial and consult with his counsel, and violated the dignity and decorum of the courtroom. (AOB 127-145.) Poore's claims are devoid of support in the record and such speculation cannot support his assertions of prejudice.

Reversal of a judgement is unwarranted when the record on appeal lacks evidence that the unjustified use of shackles or a stun belt had any adverse effect on the proceedings. This Court has "consistently held that courtroom shackling, even if error, [is] harmless if there is no evidence that the jury saw the restraints, or that the shackles impaired or prejudiced the defendant's right to testify or participate in his defense." (*People v. Anderson* (2001) 25 Cal.4th 543, 596 (*Anderson*).)

Poore contends that he was in pain as a result of the trial court's decision to restrain him and that he repeatedly complained about the pain but the trial court "remained intractable" despite its offer to revisit its decision if additional evidence was presented. (AOB 133, citing 8RT 1863; 9RT 1895.) Poore's contention is not supported by the record.

About a month after the trial court's order regarding courtroom restraints, Poore moved to have the height raised of the restraint chair. (9RT 1985.) Poore's counsel proffered that the height of the chair had been lowered so that Poore could not lean back and his knees were up under counsel table. (*Id.*) Poore's counsel said that Poore had "problems" in jail for which he was medicated for a bad back and sitting in the lower restraint chair would aggravate the pain. (9RT 1986.) Defense counsel argued that the trial court could not "just abrogate its responsibilities" to courtroom security staff and suggested raising the restraint chair by two inches or lowering all of the chairs at counsel table so they are at the same level. (*Id.*)

The prosecutor commented that the trial court had not allowed courtroom staff to determine security measures but the chair was in that position because during a previous demonstration the prosecutor was able

to stand up and security staff noted that would be more difficult if the chair was in the lowest position. (9RT 1986-1987.) The trial court stated there had been a lengthy discussion about security measures which led to the court's specific orders regarding the restraints on Poore. (9RT 1987.) The trial court noted that the orders always included use of the REACT stun belt and the security chair. (*Id.*) The trial court stated, "I was always under the impression that the security chair was at its lowest point during its usage." (*Id.*) The trial court stated that if the security chair had been raised, it was contrary to the court's order and at all times in use should have been "at its lowest point." (9RT 1987.) The following discussion occurred:

> The Court: With respect to the issue of there being jail records about Mr. Poore not being able to get out of bed, well, I will accept that at this point. And as far as I am concerned, that is not evidence of a condition being in existence. Or not sufficient evidence.
>
> And the record will also reflect that the chair in which Mr. Poore is seated is the same type of chair as the other chairs that are used at counsel table. It is slightly lower than the other chairs, and it does allow for Mr. Poore to place his legs underneath the table, the counsel table, which is approximately four feet in depth. There is quite sufficient room for his legs there.
>
> And the defendant at this point, as I am looking at counsel and the defendant, actually appears to be sitting taller than everyone else at the table. So it does not appear that there is any difference, since he is substantially taller than the others who are now sitting at the table.
>
> All right. Anything else that we need to talk about?
>
> (The defendant conferred with Mr. Hemmer[4].)
>
> Mr. Hemmer: Yes, Your Honor, I have a request. Mr. Poore has indicated to me that he would like to voluntarily absent himself from the proceedings until he can sit up. And he says that the pain is bad. He's uncomfortable. He had problems last night,

[4] Defense counsel.

> and he would like to voluntarily absent himself from the proceedings.
>
> The Court: People, any comment?
>
> Mr. McNulty:[5] No, Your Honor.
>
> The Court: Well, the defendant can certainly voluntarily absent himself from the proceedings at any time. And if he wants to do that, he can do that.
>
> Anything else?
>
> Mr. Hemmer: Not at the moment, Your Honor.
>
> The Court: Okay. We will be in recess.

(9RT 1988-1989.)

The next morning, the trial court noted that the parties were present and that Poore had "voluntarily absented himself from the proceedings." (9RT 1900.) Defense counsel stated that Poore instructed his counsel and co-counsel to "sit here and not put on a defense" even though they were ethically obligated to do so. (*Id.*) Defense counsel said, "So at this point I don't think it bothers us today, since it is simply hardship [excusal of prospective jurors]. Probably won't bother us tomorrow. But at some point we need to have Mr. Poore here to decide what he's going to do in life – or in this trial, I suppose I should say." (9RT 1990-1991.) The trial court acknowledged that there were trial decisions that only Poore could make, such as putting on a defense in the penalty phase if they got to that point. (9RT 1991.) The trial court noted that Poore could legally voluntarily absent himself from trial as the court had previously informed Poore. (*Id.*) Defense counsel stated that he would be seeing Poore that afternoon but "in the meantime, I can – intend to continue representing him to the best of my

[5] The prosecutor.

ability." (9RT 1991.) Thereafter, the trial court and parties discussed transportation orders for witnesses and resumed determining hardship excusals of prospective jurors. (9RT 1995-2004.)

At the next court hearing, defense counsel told the trial court that he went to the jail the previous day to see if Poore was going to return to the trial. (9RT 2036.) Defense counsel was not able to speak with Poore because he had been taken somewhere to get x-rays. Counsel said he would attempt to speak with Poore that afternoon. (*Id.*)

After a week of voir dire of prospective jurors, defense counsel said that he received a collect call from Poore who could barely speak and was going to see Poore after the jury selection proceedings concluded. (13RT 2895.) Defense counsel said that Poore voluntarily waived his appearance while they selected the jurors but counsel thought that Poore had to be present for the final peremptory challenge and selection of jurors. (13RT 2895-2896.)

The prosecutor wanted the record to reflect that Poore had not been present during voir dire of prospective jurors because Poore had voluntarily absented himself from the proceedings. The prosecutor stated that jury selection would be considered a critical stage of the proceedings and he wanted to determine if Poore was choosing not to be present or it was because Poore was ill. (13RT 2897.) Defense counsel stated, "*I agree that, Your Honor, he did voluntarily absent himself for the remainder of this voir dire*." Defense counsel argued as to whether Poore would show up to court the following day "is another story." (*Id.*, emphasis added.)

The following day, defense counsel told the trial court that the prior evening he went to see Poore who "appeared very, very ill" to defense counsel. (13RT 2901.) Defense counsel said that Poore told him that Poore saw a doctor who gave him some aspirin. (*Id.*) The courtroom deputy confirmed that he had called the jail and was told that Poore was ill.

(*Id.*) The courtroom deputy said he was informed that Poore had not seen a doctor. (13RT 2902.) The deputy was told that Poore told a nurse that he was sick, she gave him aspirin and the nurse was trying to determine if Poore was ill. (*Id.*) Defense counsel argued that jury selection was a stage of the proceedings which required Poore's presence. (13RT 2903.) The trial court stated that they did not know if, in fact, Poore was ill, but they knew Poore was given aspirin by a nurse and had not seen a doctor. (*Id.*) The trial court requested that the jail be called to have Poore evaluated by a doctor to have an answer. (13RT 2904.) The court said that, even if they selected a jury, they could not be ordered to return to court for instructions and opening statements until they knew when Poore was going to be present in court. (13RT 2906.) The trial court declared that they would take a recess. (*Id.*)

When proceedings resumed out of the presence of the jury, the trial court stated it had read *People v. Jackson* (1996) 13 Cal.4th 1164 (*Jackson*), which referenced section 977, which allowed a criminal defendant to be absent if there is an executed written waiver. (13RT 2906.) The court noted that the *Jackson* case also referenced section 1043, and cases citing that section, which indicated that a capital defendant could be absent from the trial if he was removed by the court for disruptive behavior. (13RT 2907.) The trial court noted it had not made a finding of disruptive behavior and it would be "very risky" for the court to proceed with the case without Poore's presence. (13RT 2908.)

The trial court stated that the courtroom deputy had received a communication from the jail. (13RT 2908.) The courtroom deputy reported that Poore had advised a nurse that he was sick and needed to see a doctor but the doctor was leaving the jail. (*Id.*) The deputy said that a registered nurse at the jail examined Poore and determined that Poore was not congested and his nose and ears were clear. (*Id.*) Poore then

complained of nausea and felt that he wanted to vomit. (*Id.*) The courtroom deputy reported that despite Poore's complaint, he did not turn in a request to see the doctor and, at that time, Poore had not requested to see a doctor. (*Id.*) The courtroom deputy said that jail staff would expedite placing Poore on sick call so he could see a doctor who was arriving at noon. (13RT 2909.)

The trial court then ordered the prospective jurors to be brought into the courtroom. (13RT 2915.) In the presence of counsel and the prospective jurors, the trial court informed them that Poore might be ill and was going to be examined by a doctor. (13RT 2916.) The trial court ordered the prospective jurors to return at 1:30 p.m. in the hope that they could complete jury selection that afternoon. (13RT 2916-2917.)

When the 85 prospective jurors returned to the courtroom, the trial court noted for the record that all the parties were present, which presumably included Poore. (13RT 2928.) Thereafter, the parties exercised peremptory challenges and the jury and alternate jurors were selected and sworn in. (13RT 2928-2957.)

While shackles and stun belts certainly "have the potential to impair an accused's ability to communicate with counsel or participate in the defense," the erroneous imposition of those restraints may be harmless where the record "does not reveal that any such impairment occurred." (*People v. Ervine* (2009) 47 Cal.4th 745, 773-774 [shackling]; *People v. Manibusan*, (2013), 58 Cal.4th at 40, 85-86 [stun belt]; (*Manibusan*) *People v. Howard* (2010) 51 Cal.4th 15, 30 Howard [stun belt]; *People v. Lerner and Tobin*, *supra*, 50 Cal.4th at p. 156 ["no evidence in the record demonstrating that [the defendant's] ability to participate was affected in any manner by his wearing the leg brace"]; *People v. Wallace, supra* 44 Cal.4th at p. 1051 [no evidence that shackling caused defendant to suffer from mental impairment, physical pain, or obstruction of communication

with counsel, or that it influenced his decisions regarding testifying]; *Combs*, *supra*, 34 Cal.4th at p. 839 [noting no evidence or claim that the defendant's leg restraints influenced him not to testify, or that the restraints "distracted him or affected his demeanor before the jury"].)

Here, the record does not support Poore's claim that he was in pain as a result of the trial court's decision to restrain him and that he repeatedly complained about the pain but the trial court "remained intractable." (AOB 133.) After Poore's initial complaint of back pain and being uncomfortable until he could sit up in the restraint chair (9RT 186-189), Poore cannot establish any nexus between his claimed pain and the restraints. In fact, Poore thereafter voluntarily absented himself from the courtroom for a significant period when the voir dire of prospective jurors was conducted. The prosecutor then noted Poore had been voluntarily absenting himself from the proceedings and wanted to determine if it was because Poore was choosing not to be present or was actually ill. (13RT 2987.) Defense counsel acknowledged that Poore "did voluntarily absent himself for the remainder of this voir dire." (*Id*.)

Poore contends that the "undue pain and suffering" caused by the shackles caused him to be absent from the courtroom. (AOB 134.) The record supports a reasonable conclusion that Poore was voluntarily absenting himself from trial because of possible disagreement with his defense counsel and because he was malingering. After Poore's initial absence, his trial counsel indicated that "Poore voluntarily absented himself from the proceedings" and instructed his counsel to "sit here and not put on a defense" which his counsel was not bothered by because they were conducting hardship excusal of prospective jurors. (9RT 1990-1991.)

About a week later, defense counsel said that Poore could "barely speak" and noted he was taking Echinacea because he had been sitting near Poore. (13RT 2985.) The following day, defense counsel told the court he

saw Poore who appeared to be "very, very ill." (13RT 2901.) After calling the jail, the courtroom deputy confirmed that Poore told a nurse he was sick, the nurse gave him aspirin and Poore had not seen a doctor. (13RT 2902-2903.) The trial court noted they were close finishing voir dire of prospective jurors and requested that the jail be called so that Poore could be evaluated by a doctor to determine if Poore could be present in court. (13RT 2904.) The trial court was informed that the doctor was leaving the jail so Poore was examined by a registered nurse who determined that Poore was not congested and his nose and ears were clear. (13RT 2908.) Poore then complained to the nurse of nausea and wanting to vomit, but he did not request to see a doctor. (13RT 2909.) The courtroom deputy called jail staff to expedite placing Poore on sick call. (13RT 2909.) The record does not reflect if Poore was seen by a doctor, but he appeared in court in time for peremptory challenges and final jury selection. (13RT 2928.)

Poore argues the trial court violated sections 977 and 1043 because he had not been disruptive in court and there was no written waiver regarding his absence.[6] (AOB 140.) However, Poore's constitutional rights were not violated.

Section 1043, subdivision (a) states that "the defendant in a felony case shall be personally present at the trial" except as otherwise provided. Section 1043, subdivision (b) states that a trial started in a defendant's presence may continue in his absence if, under subdivision (b)(1), a defendant is removed for "disruptive behavior," or, under subdivision

[6] Poore was disruptive in the presence of the jury during the cross-examination of White when he said, "You are so full of shit. You have been involved in how many murders?" (15RT 3255.) The trial court admonished Poore to not have any more outbursts in court. (*Id.*) Outside the presence of the jury, the trial court warned Poore that any further outbursts would result in his removal from the courtroom pursuant to section 1043. (15RT 3263-3264.)

(b)(2), in "[a]ny prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent."

Section 977, subdivision (b)(1) provides that a defendant charged with a felony "shall be present at the arraignment, at the time of plea, during the preliminary hearing, *during those portions of the trial when evidence is taken before the trier of fact*, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute a written waiver of his or her right to be personally present, as provided by paragraph (2)." (Italics added.)

"[W]hen read together, sections 977 and 1043 permit a capital defendant to be absent from the courtroom only on two occasions: (1) when he has been removed by the court for disruptive behavior under section 1043, subdivision (b)(1), and (2) when he voluntarily waives his rights pursuant to section 977, subdivision (b)(1)." (*Jackson*, *supra*, 13 Cal.4th at p. 1210; see *People v. Davis* (2005) 36 Cal.4th 510, 531.) Section 1043, subdivision (b)(2) "bars a defendant in a capital case from being voluntarily absent from trial." Under these provisions, Poore could not have properly absented himself from the evidentiary portion of the penalty trial as recognized by the trial court. (See 13RT 2906.) Even assuming Poore could have executed a written waiver of his presence under section 977, subdivision (b), he did not do so here.

Notwithstanding the statutory violation, Poore cannot show error of constitutional dimension. "A defendant has the right, under the Sixth Amendment of the federal Constitution, to be present at trial during the taking of evidence. Nonetheless, as a matter of both federal law and state constitutional law, a capital defendant may validly waive his presence at the critical stages of the trial. [Citations.] Defendant's waiver was valid; accordingly, his constitutional rights were not violated." (*People v. Dickey* (2005) 35 Cal.4th 884, 923.) (13RT 2897.) Poore's counsel clearly told the

trial court that, "I agree [with the prosecutor] that, Your Honor, [Poore] did voluntarily absent himself for the remainder of this voir dire." (13RT 2897.) Poore cites no authority for the proposition that, even when the need for shackling is manifest, the restraints must be modified or removed if they cause any pain or discomfort. In any event, the record is devoid of evidence that Poore "repeatedly complained about the pain" to the trial court or that his voluntary absence was due to pain or discomfort that resulted from the restraints. Accordingly, no due process or other constitutional violation can be conjured from this scenario.

Poore acknowledges that the record does not establish that any juror observed Poore wearing or sitting with restrains. (AOB 141.) Poore argues such a possibility existed because the trial court admitted the jury could see a bulge in Poore's jacket from the stun belt. (AOB 141, citing 3RT 542-543.) Poore's mischaracterization of the trial court's comments and speculation are insufficient to establish prejudice.

While restraints have the potential to bias jurors against the defendant (*People v. Hernandez* (2011) 51 Cal.4th 733, 742; *Duran*, *supra*, 16 Cal.3d at p. 290), their use may be harmless when there is no indication the jurors saw the restraints. (See *Manibusan, supra,* 58 Cal.4th at p. 85 [finding of harmlessness based in part on circumstance that "[n]othing in the record suggests that any juror saw the belt . . ."]; *People v. Lerner and Tobin* (2010) 50 Cal.4th 99, 155 ["we do not presume the prospective jurors viewed the restraint, and there is no evidence in the record demonstrating they did observe it"].) Here, Poore's acknowledgement that the record does not disclose any evidence that the jury saw the restraints would render harmless any error regarding the courtroom shackling of Poore. (*People v. Williams* (2015) 61 Cal.4th 1244, 1259 (*Williams*).)

Further, the record does not support Poore's speculation that a "possibility existed" that the jurors saw the restraints. During a hearing

where Poore was "dressed out" for court, the trial court stated, "It does not appear anyone will be able to ascertain that Mr. Poore is restrained, nor that he's wearing a REACT belt." (3RT 528.) The trial court said it could not view anything from his location and would walk around the courtroom. (*Id.*) The trial stated that there was a "slight bulge" on the rear left side which could be detectable if Poore was not wearing a coat. (3RT 528.) Poore's counsel stated that Poore would be wearing a suit or a sports coat during trial. (*Id.*) The trial court wanted the record to reflect that the chair Poore was sitting in was virtually identical to all the other chairs at counsel table. (*Id.*) The court noted that Poore was sitting in the chair wearing the REACT stun belt and "from the vantage point of the jurors from the jury box, they certainly won't be able to view anything that Mr. – that is related to Mr. Poore other than his general appearance if he is wearing a coat." (3RT 528-529.)

The following day, Poore's counsel noted that the REACT stun belt was obvious when Poore stood up even when he was wearing a suit so he continued to object to use of the stun belt. (3RT 541-542.) The trial court responded that Poore and counsel would not be standing during the ingress and egress of prospective jurors. (3RT 542.) The trial court asked Poore to stand up, and the court noted that jacket Poore was wearing was "too small for him." (*Id.*) Defense counsel said the jacket was a good size but "the back just sticks out." (*Id.*) The trial court noted that that the stun belt pack was noticeable in the back and unless they obtained a larger jacket Poore would not be able to stand during the formal opening given to the prospective jurors. (3RT 542-543.) The prosecutor argued that Poore should be restrained to the chair in light of the fact counsel and Poore would not be standing during the formal opening. (3RT 543.) The trial court and courtroom deputy acknowledged that Poore would be restrained

to the chair. (*Id.*) Defense counsel told the trial court that they were getting a larger coat for Poore to wear. (3RT 586.)

Given the particularized finding of need in this case, the possibility that some jurors may have perceived Poore was wearing some type of device does not establish a constitutional violation. (*Deck*, *supra*, 544 U.S. at p. 629.) Even if Poore could establish an abuse of discretion, the record fails to reflect any prejudice, Poore's generic assertions to the contrary notwithstanding. (See *People v. Hernandez, supra,* 51 Cal.4th at p. 746; *People v. Watson* (1956) 46 Cal.2d 818, 837.) This Court cannot presume that jurors saw Poore's restraints (*People v. Lerner and Tobin*, *supra*, 50 Cal.4th at p. 155), and any claimed error is harmless because there is no indication that the jurors saw the restraints (*Manibusan*, *supra*, 58 Cal.4th at p. 85).

Poore also generally contends that "cumulative effect" of the unnecessary physical restraints affected Poore's ability to participate in trial proceedings or consult with his counsel. (AOB 144.) Poore's generic and speculative assertion does not establish prejudice. While restraints can impair a defendant's ability to testify effectively (*Duran*, *supra*, 16 Cal.3d at p. 296), their use may be harmless when the defendant chose not to testify at trial, and there is nothing in the record suggesting a nexus between that decision and the forced wearing of the restraint. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1271; see *People v. Combs* (2004) 34 Cal.4th 821, 838-839 (*Combs*); *Anderson*, *supra*, 25 Cal.4th at p. 596.) This court "'[has] consistently held that courtroom shackling, even in error, [is] harmless if there is no evidence that the jury saw the restraints, or that the shackles impaired or prejudiced the defendant's right to testify or participate in his defense.'" (*Williams*, *supra*, 61 Cal.4th at p. 1259.) Poore testified at trial, and the record is devoid of any instance showing any

impairment of Poore's participation in his defense as a result of the courtroom restraints.

Based on the foregoing, the trial court's decision to restrain Poore with the stun belt and restraining him to a security chair was not an abuse of discretion. Reversal of a judgement is also unwarranted because the record on appeal lacks evidence that the claimed unjustified use of courtroom restraints had any adverse effect on the proceedings.

II. The Excusal of Two Prospective Jurors for Cause Was Proper Because They Expressed an Inability to Apply the Law as Instructed

Poore contends that the trial court violated his federal and state constitutional rights by excusing two prospective jurors for cause because their views about the death penalty would have prevented or substantially impaired their performance as jurors at trial. (AOB 145-187, Arg. II.) Poore's contention lacks merit as the record shows the two prospective jurors were excused because they expressed an inability to faithfully and impartially apply the law as instructed by the trial court.

A. Background

Prior to voir dire of a panel of prospective jurors, the trial court instructed the prospective jurors including as to the penalty phase of the trial as follows:

> I'm going to give you a brief outline of the guidelines that you will be given if we get to that penalty trial. If you find that the mitigating evidence or the good things are greater than the aggravating evidence or the bad things, you have no choice in the law. You must reject death and vote for life without the possibility of parole.
>
> If you find that the mitigating or good evidence and the aggravating or bad evidence are about the same, again, the law leaves you with no choice. You must reject death and vote for life in prison without the possibility of parole.

> Only if the aggravating or bad evidence is greater than the mitigating or good evidence do you have a choice. I will not tell you what decision to make, and the law will not tell you what to do. You, individually, must weigh the two types of evidence. *You can only vote for the death penalty when the aggravating evidence is so substantial compared to the mitigating evidence that the death penalty is warranted.* (7RT 1517-1518, emphasis added.)

The trial court subsequently instructed the prospective jurors as follows:

> If you cannot or would not consider mitigating or aggravating evidence concerning the defendant's background and character in determining the appropriate penalty, you cannot serve as a juror in this case. Let me explain this, as it is very critical.
>
> In the first trial, you must make your decision without any regard for the consequences. I know I have said that three times. You must call it as you see it. If there is a second trial, *you must make your decision on the appropriate penalty based on the aggravating and mitigating evidence*, the good and bad things, presented to you by the attorneys. You cannot just say, "Well, we've already found a first-degree murder and found the special circumstances to be true, and that's all I need to hear." This is what faces you. (7RT 1519-1520, emphasis added.)

Prospective jurors initially completed a juror questionnaire. The trial court then conducted voir dire, during which potential jurors were asked about their views regarding the death penalty. (See *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80-81.) Prospective jurors N.S. and J.W.[7] were questioned by the trial court. Question number 53 on the juror questionnaire asked the prospective jurors to "[b]riefly describe your general feelings about the death penalty." (9CT 4191 [N.S.], 4308 [J.W.].) N.S. responded, "For it." (9CT 4191.) The trial court noted that N.S had "the briefest response I have seen" on question number 53 and asked if that

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[7] The prospective jurors are being referred to by their initials to keep their information confidential.

was her current feeling about the death penalty. (7RT 1535.) N.S. answered, “If the case is right, yeah. I mean, I’m not — I’m kind of — I got— I mean, under certain circumstances, sure, I’m for the death penalty.” (7RT 1535.) As to question number 53, J.W. responded: “If I felt the defendant was guilty beyond any doubt, I would vote for the death penalty — but would rather vote for life in prison.” (9CT 4306.) When questioned by the court, J.W. said that was her current general feeling about the death penalty. (7RT 1565.)

Question number 60 on the questionnaire asked the prospective juror on a scale of 1 to 5 to indicate his or her views regarding the death penalty. (9CT 4193.) N.S checked response number 3 which states, “I have no position for or against the death penalty; however, would consider the imposition of the death penalty in some cases.” (*Id.*) When questioned by the court if that was her view regarding the death penalty, N.S responded, “Yes.” (7RT 1535.) As to question number 60, J.W. checked response number 4 which states: “I am in favor of the death penalty but will not always vote for death in every case of murder with special circumstances. I can and will weigh and consider the aggravating and mitigating circumstances.” (9CT 4308.) When questioned by the court, J.W. confirmed response number 4 reflected her current view regarding the death penalty. (7RT 1565.)

Later in voir dire, the prosecutor questioned a prospective juror who had expressed being generally opposed to the death penalty but under certain circumstances could vote for death. (7RT 1598-1599.) The prosecutor asked that prospective juror if given her general opposition to the death penalty she could “still openly and conscientiously weigh aggravating factors and mitigating factors, and assuming the aggravating is so grossly outweighing mitigating, you could impose death?” The prosecutor juror answered, “Yes.” (7RT 1599.)

The prosecutor then asked if there was "[a]nybody here that generally opposed it or feels weekly against that . . . ?" (7RT 1599.) The prosecutor saw N.S and asked, "Yes, ma'am?" (*Id.*) N.S. stated, "I'm for the death penalty, but I would have to be honest and say that if it got down to the point that I had to say, 'Kill him,' I really can't honestly say. I don't know if I could do it or not." (7RT 1600.) The prosecutor said, "All right. Thank you for offering that. I appreciate that." (*Id.*) J.W. interjected, "Sir, I feel the same way as she does." (*Id.*) The prosecutor said, "All right. When it comes down to it, you're not sure." (*Id.*) J.W. stated, "I am not sure if when it comes to down to the nitty-gritty, whether I could do that, vote to kill him." (7RT 1600-1601.) The prosecutor said, "All right. Thank you." (7RT 1601.)

The prosecutor asked N.S. if she was "indifferent to sitting as a juror." (7RT 1601.) N.S. answered, "I — I will sit if I'm needed or wanted." (*Id.*) The prosecutor asked N.S., "Would it be fair to say that this is a case that you really don't want to sit on?" (*Id.*) N.S. said, "Well, because of — of the death penalty thing, I really. — I — I would — might be doing an injustice, because even though he was found 100 percent guilty in every respect, I don't know if I could live with myself after saying that I am putting someone to death. I don't know if I could live with myself." (*Id.*) The prosecutor stated, "All right." (*Id.*) N.S. commented, "So, as I said, I might be able to do it, but I don't know." (7RT 1601.)

Outside the presence of the prospective jurors, the prosecutor challenged N.S. for cause "on the *Witt* standard." (7RT 1606.) The trial court stated, "[N.S.] What did she say?" (*Id.*) The prosecutor stated that N.S., "said she can't be sure that she could give death." (*Id.*) The trial court asked, "Is she the one who said 'I don't know if I could vote for the death penalty?'" (*Id.*) The prosecutor answered, "Yes." (*Id.*) The trial court commented, "And [J.W.] said that too." (7RT 1606.) The prosecutor

said, “Yes. I haven’t gotten to her, but she would be the next challenge for cause as well.” (*Id.*)

The trial court subsequently stated that it was not going to excuse a different prospective juror for cause but “[t]he others I will.” (7RT 1607.) Defense counsel asked, “Your Honor, you’re going to excuse [N.S.] and [J.W.]?” (*Id.*) The trial court said, “Yes.” (*Id.*) Defense counsel said, “I think they just said they didn’t know. I think most of the jurors don’t know. I would object to that, for the record.” (*Id.*) The trial court said, “All right. The record will so reflect.” (7RT 1608.) The prospective jurors entered the courtroom. (7RT 1608.) The trial court excused four prospective jurors for cause including N.S. and J.W. (*Id.*)

B. Legal Principles

“[T]he Sixth Amendment’s guarantee of an impartial jury confers on capital defendants the right to a jury not ‘uncommonly willing to condemn a man to die.’” (*White v. Wheeler* (2015) 577 U.S. ___ [193 L.Ed.2d 384, 136 S.Ct. 456, 460], quoting *Witherspoon v. Illinois* (1968) 391 U.S. 510, 521 [20 L.Ed.2d 776, 88 S.Ct. 1170] (*Witherspoon*).) To accommodate this right, “[t]he federal constitutional standard for dismissing a prospective juror for cause based on his or her views of capital punishment is ‘“[w]hether the juror’s views would prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath.”’” (*People v. Friend* (2009) 47 Cal.4th 1, 56, quoting *Uttecht v. Brown* (2007) 551 U.S. 1, 7 [167 L.Ed.2d 1014, 127 S.Ct. 2218]; *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [83 L.Ed.2d 841, 105 S.Ct. 844] (*Witt*); *People v. Crittenden* (1994) 9 Cal.4th 83, 121; *People v. Mincey* (1992) 2 Cal.4th 408, 456.) “A prospective juror is properly excluded if he or she is unable to conscientiously consider all of

the sentencing alternatives, including the death penalty where appropriate." (*People v. Pearson* (2012) 53 Cal.4th 306, 327.)

"'[N]ot all who oppose the death penalty are subject to removal . . . ; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.' (*Lockhart v. McCree* (1986) 476 U.S. 162, 176 [90 L.Ed.2d 137, 106 S.Ct. 1758] (*Lockhart*).) 'The critical issue is whether a life-leaning prospective juror – that is, one that generally (but not invariably) favoring life in prison instead of the death penalty as an appropriate punishment – can set aside his or her personal views about capital punishment and follow the law as the trial judge instructs.'" (*People v. Jones* (2017) 3 Cal.5th 583, 614 (*Jones*).) Jurors are not required to like the law, but they are required to follow the law. A prospective juror who will not, or cannot, follow a statutory framework is not qualified to serve as a juror in a capital case. As long as a prospective juror can obey the trial court's instructions and determine whether death is appropriate based on a sincere consideration of aggravating and mitigating circumstances, that juror is not ineligible to serve. (*People v. Stewart* (2004) 33 Cal.4th 425, 447 (*Stewart*); *People v. Lewis* (2001) 25 Cal.4th 610, 633.) This Court had held that "either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence." (*People v. Cash* (2002) 28 Cal.4th 703, 720-721.)

Whether a prospective juror is substantially impaired is an issue for the trial court's determination; and the court's ruling is entitled to deference. (*People v. Souza* (2012) 54 Cal.4th 90, 122.) A prospective

juror's impairment does not have to be proven with "'unmistakable clarity.'" (*Witt*, *supra*, 469 U.S. at p. 424.) Excusal is permitted when the trial judge has been "left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." (*Id*. at p. 426; accord *People v. Thompson* (2016) 1 Cal.5th 1043, 1066.) This Court reviews the trial court's ruling for an abuse of discretion. (*People v. Scott* (2015) 61 Cal.4th 363, 378 (*Scott*); *People v. Jones* (2012) 54 Cal.4th 1, 41.)

C. Prospective Jurors N.S. and J.W. Were Excused Because They Were Unable to Faithfully and Impartially Apply the Law

Poore argues that, based on the responses given, prospective jurors N.S. and J.W. "could 'conscientiously consider' all of the sentencing alternatives, including death." (AOB 155.) The record, however, indicates that both N.S. and J.W. expressed that they would be unable to follow the court's instructions and vote for death if the aggravating factors substantially outweighed the mitigating factors.

On both the jury questionnaire and when questioned by the court, N.S. expressed that she had no position for or against the death penalty, but would consider imposing the death penalty in some cases. (9CT 4191, 4193; 7RT 1535.) J.W. indicated in both the questionnaire and voir dire by the court that she was in favor of the death penalty, but would not always vote for it in every murder case and would consider the aggravating and mitigating factors. (9CT 4306, 4308; 7RT 1565.)

After the prosecutor asked the prospective jurors if there was something that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence, both N.S. and J.W. expressed their views that they would not be able to do so. (See 7RT 1599.) N.S. said that although she was in favor of

the death penalty, "I would have to be honest and say that if it got down to the point that I had to say, 'Kill him,' I really can't honestly say. I don't know if I could do it or not." (7RT 1600.) J.W. told the prosecutor, "I feel the same way that she does." (*Id.*) J.W. explained, "I am not sure if when it comes down to the nitty-gritty, whether I could do that, vote to kill him." (7RT 1600-1601.) The prosecutor asked N.S. if this was a case where she would not want to participate as a juror. (7RT 1601.) N.S. responded that because of the death penalty "she might be doing an injustice" and not be able to vote for death because she did not know if she could live with herself if she did so. (*Id.*)

When the prosecutor challenged N.S. for cause on the *Witt* standard, the trial court clarified that N.S. was the prospective juror who said that she did not know if she could vote for the death penalty. (7RT 1606.) The trial court then commented that J.W. "said that too" before the prosecutor challenged J.W. for cause. (*Id.*) Under *Witherspoon* and *Witt*, the state is permitted to cull from the jury pool only those prospective jurors who would be unable to set aside their personal views and follow the law and the court's instructions. (*Lockhart*, *supra*, 476 U.S. at p. 176; *Jones*, *supra*, 3 Cal.5th at p. 614; *Stewart*, *supra*, 33 Cal.4th at pp. 446-447.) Here, the prosecutor demonstrated thorough questioning that potential jurors N.S. and J.W. lacked impartiality – i.e., that their views would substantially impair their ability to follow the trial court's instructions and vote for death in appropriate cases. (*Witt*, *supra*, 469 U.S. at p. 423.) The trial court was in a position, which a reviewing court is not, to view the demeanor of prospective jurors N.S. and J.W., and its determination of their state of mind is binding. "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 US. at p.

9.) "Hence, the trial judge may be left with the "'definite impression' that that person cannot impartially apply the law even though, as if often true, [he or she] has not expressed [his or her] views with absolute clarity." (*People v DePriest* (2007) 42 Cal.4th 1, 21.) A trial court can abuse its discretion by applying an erroneous legal standard or by making a ruling unsupported by substantial evidence. (*Hiraguchi v. Superior Court* (2008) 43 Cal.4th 706, 712.) Here, substantial evidence supports the trial court's determination that prospective jurors N.S. and J.W. views on the death penalty would prevent or substantially impair their ability to serve as a juror. Because substantial evidence supports the trial court's finding, the trial court properly excused prospective jurors N.S. and J.W. for cause.

III. DEATH QUALIFICATION VOIR DIRE IS CONSTITUTIONAL; AND POORE HAS FORFEITED THIS CLAIM BY FAILING TO RAISE IT WITH THE TRIAL COURT

Poore contends that death qualification voir dire to exclude prospective jurors who are unwilling or unable to impose a death sentence violated the federal constitution as understood by the framers and requires reversal of the guilt and penalty judgment. (AOB 188-203, Arg. III.) Poore's claim is forfeited by Poore's failure to raise it below. (*Howard, supra,* 51 Cal.4th at p. 26.) It also lacks merit.

Poore relies on a law review article to argue that death qualification was not used in Colonial America, and it is "antithetical to the Framer's understanding of an 'impartial jury'" to permit for cause challenges of jurors because of their views regarding the death penalty. (AOB 193-195, citing Quigley, Exclusion of Death-Scrupled Jurors and International Due Process (2002) Ohio St. J. Crim. L. 261, 269.) Law review articles and treatises are not binding authority and do not compel a particular result. (See *Brady v. Calsol, Inc.* (2015) 241 Cal.App.4th 1212, 1225, fn. 3; *People v. Wilcox* (2013) 217 Cal.App.4th 618, 626.)

This Court has held that a defendant's constitutional rights are not violated by the prosecutor's use of peremptory challenges to exclude jurors with reservations about capital punishment. (*Howard*, *supra*, 51 Cal.4th at pp. 26-27; see *People v. Taylor* (2010) 48 Cal.4th 574, 602-603 (*Taylor*).) In *Howard*, supra, 51 Cal.4th a pp. 26-27, this Court summarized:

> "The death qualification process is not rendered unconstitutional by empirical studies concluding that,
>
> because it removes jurors who would automatically vote for death or for life, it results in juries biased against the defense, [Citations.] [¶] *Lockhart*[, *supra*,] 476 U.S. 162 . . . , which the death qualification process, remains good law despite some criticism in law review articles. [Citations.] 'We may not depart from the high court ruling as to the United States Constitution, and defendant presents no good reason to reconsider our ruling[s] as to the California Constitution.' [Citation.] The impacts of the death qualification process on the race, gender, and religion of jurors do not affect the constitutionality. [Citations]. Nor does the process violate a defendant's constitutional rights, including the Eighth Amendment right not be subjected to cruel and unusual punishment, by affording the prosecutor an opportunity to increase the chances of getting a conviction. [Citations.] Defendant claims the voir dire process itself produces a biased jury. We have held otherwise. [Citation.] [¶] Death qualification does not violate the Sixth Amendment by undermining the functions of a jury as a cross-section of the community participating in the administration of justice. [Citations.] Finally, a defendant's constitutional rights were not violated by the prosecutor's use of peremptory challenges to exclude jurors with reservations about capital punishment. [Citation.]

This Court has also rejected an argument for reconsideration of death qualification voir dire based on the basis of "current empirical studies" assertedly demonstrating that death-qualified juries are conviction and death prone. (*Taylor*, *supra*, 48 Cal.4th at p. 602.) A prosecutor's use of peremptory challenges to excuse death doubtful prospective jurors is not

improper. (*People v. Gurule* (2002) 28 Cal.4th 557, 597; see *Jackson*, *supra*, 13 Cal.4th at pp. 1198-1199 [even if death-qualified juries are shown to be more conviction prone, it does not follow that the process is constitutionally prohibited]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1279 [death-qualification process does not violate the 14th Amendment right to a fair trial]; *People v. Carrera* (1989) 49 Cal.3d 291, 331 [death qualification does not violate the right to a fair and impartial jury].)

Accordingly, Poore's "constitutional rights were not violated by the prosecutor's use of peremptory challenges to exclude jurors with reservations about capital punishment." (*Howard*, *supra*, 51 Cal.4th at pp. 26-27; see *Taylor*, *supra*, 48 Cal.4th at pp. 602-603.) This Court should adhere to the views expressed in these decisions and reject Poore's claim.

IV. THE TRIAL COURT'S ACQUIESCENCE IN POORE'S REFUSAL TO ALLOW HIS COUNSEL TO PRESENT A PENALTY PHASE DEFENSE DID NOT VIOLATE POORE'S CONSTITUTIONAL RIGHTS

Poore contends the trial court erred by acquiescing to his refusal to allow his counsel to present a penalty phase defense because it prevented the jury from considering any mitigating evidence which rendered his death sentence constitutionally unreliable. (AOB 203-224, Arg. IV.) Poore's contention lacks merit as this Court has consistently held that a defendant retains control in the decision whether or not to present a defense at the penalty phase, and the choice not to do so is not a denial of the right to a reliable penalty determination.

A. Background

After the jury returned its verdicts, defense counsel told the court that Poore wanted a hearing to seek self-representation pursuant to *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525] (*Faretta*). Defense counsel asserted that, based on his conversations with Poore, the

time estimate for their penalty phase presentation would be "zero." (27RT 5825.) Defense counsel said he provided Poore with a *Faretta* advisal form so Poore could be ready for the hearing. (27RT 5827.)

The following day, defense counsel told the court that he had advised Poore about positive and negative aspects of representing himself pursuant to *Faretta*. (27RT 5829.) The trial court noted that Poore did not have a right to represent himself during the middle of the trial. (27RT 5829.) Defense counsel argued delay would not be a factor on the *Faretta* motion because Poore indicated to counsel that Poore would not present any mitigating evidence if he represented himself, and that if counsel was retained, Poore had directed counsel not to present any evidence during the penalty phase. (27RT 5380.) Defense counsel stated that he informed Poore they had witnessed they could call and that was possible mitigation evidence. (27RT 5837.) Defense counsel noted, however, that under applicable legal precedent, if Poore directed counsel not to present any mitigating evidence he had to follow Poore's direction. (*Id*.)

The trial court asked the Poore for the reason why he was making the request to represent himself during the penalty phase. (27RT 5831.) Poore said that he felt he had more insight as to questions he could pose to adverse witnesses and wanted to "take the case in a different direction" than his counsel. (*Id*.) The trial court then inquired if Poore wanted to take the penalty phase in a different direction or if Poore's beliefs conflicted with his counsel's beliefs. (27RT 5832.) Poore responded that his attorney would attempt to present mitigating factors that Poore did not approve of. (27RT 5832.) Poore said that his approach would be that, other than defending against any gang allegations, Poore did not intend to present any mitigating evidence which contradicted his counsel's desire to present mitigating evidence. (*Id.*) Poore stated he would not need additional time to prepare other than use of an investigator to serve transportation order

potentially for two incarcerated witnesses[8] for the gang-related issues. (27RT 5832-5833.)

The trial court stated that, pursuant to *People v. Bradford* (1997) 15 Cal.4th 1229 and *People v. Lang* (1989) 49 Cal.3d 991 (*Lang*), Poore could insist that his trial counsel not present any mitigating evidence. However, Poore's request to represent himself under *Faretta* was untimely. (27RT 5834.) The court wanted to know, pursuant to *People v. Bloom* (1989) 48 Cal.3d 1194 (*Bloom*), if Poore wanted his counsel to respect his wishes not to present any mitigating evidence and asked counsel to inquire. (27RT 5835.) Defense counsel asked Poore that if counsel remained on the case would Poore ask him not to present any mitigating evidence. Poore said, "Yes." (*Id.*) The trial court asked Poore if he wished to express anything else regarding his request to represent himself. Poore responded, "Nothing other than what I have already stated, Your Honor." (27RT 5836.) As to factors to be considered for a *Faretta* motion, the trial court noted for the record that defense counsel's representation of Poore had been "excellent." (27RT 5838.) Defense counsel stated that was the initial attorney appointed; and Poore acknowledged he had not asked to be represented by other counsel. (27RT 5838-5839.) The trial court denied Poore's *Faretta* motion because it was made after the jury had announced its verdict and in consideration of all the other factors. (27RT 5840.)

After the *Faretta* motion was denied, Poore's counsel noted that his tactical decision was not to call the two incarcerated witnesses; and pursuant to Poore's request defense counsel would not be presenting any mitigating evidence. (27RT 5840-5841.) The trial court stated that it

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[8] The reference was to inmates Richard Terflinger and Joseph Hayes who testified at foundational hearings but did not testify at trial. (See 24RT 5188-5235.)

wanted to determine if Poore had made a knowing and intelligent decision to waive presentation of mitigating evidence. (27RT 5841-5842.)

After a recess, defense counsel stated that he read the cases cited by the court, Poore told him that he did not want counsel to present any mitigating evidence, and counsel said he could comply with Poore's decision. (27RT 5844.) Defense counsel stated, "And, of course, if he wants me not to do that, I will not do that, and I will sit here and say no questions, no objections and no final argument, I suppose." (27RT 5845.) The following exchange occurred:

> The Court: Mr. Poore, you've heard what your attorney has just said; correct;
>
> The Defendant: Yes.
>
> The Court: Is that what you wish him to do?
>
> The Defendant: Yes.
>
> The Court: You understand that there may be some evidence which is mitigating evidence?
>
> The Defendant: Yes.
>
> The Court: And you understand that there may be some argument that your attorney can make which may convince the jurors that life without the possibility of parole would be the appropriate penalty rather than death?
>
> The Defendant: Yes.
>
> The Court: But you don't wish him to make that argument; is that correct?
>
> The Court: So it is your position that you are ordering your attorney not to present any mitigating evidence; correct?
>
> The Defendant: Correct.
>
> The Court: Knowing that the jury may order the death penalty, you do not wish to resist that; is that correct?

> The Defendant: Correct.
>
> The Court: People, any other questions that you think should be asked?
>
> Mr. McNulty: No, Your Honor.
>
> The Court: All right. Well, under the circumstances, I think that is sufficient. (27RT 5845-5846.)

After the People rested their penalty phase case, defense counsel told the court that the defense did not intend to call any witnesses and was resting its case. (28RT 6262.) The trial court informed the jury that the parties had rested their cases and dismissed the jury. (*Id.*)

The following day the court and parties discussed exhibits and jury instructions outside the presence of the jury. (28RT 6265.) After that discussion, the trial court again wanted to discuss Poore's decision not to present mitigating evidence. (28RT 6268.) The trial court provided the parties *People v. Sanders* (1990) 51 Cal.3d 471 (*Sanders*), and *Bloom* as legal references. (28RT 6282-6283.) The trial court again wanted to determine if Poore's decision was knowing and voluntary; and the court expressed that it wished Poore would change his mind and consult with counsel before making a final decision. (28RT 6283.) The proceedings were adjourned. (28RT 6284.)

The following day, the trial court again held a hearing regarding Poore's decision to not present mitigating evidence. (28RT 6285.) Defense counsel said he spoke with Poore and discussed the witnesses that could be presented in mitigation; however, Poore maintained his position that Poore did not want counsel to present mitigating evidence or cross-examine any witnesses. (28RT 6285.) Defense counsel said that the court might want to inquire that with Poore (28RT 6285), and the following discussion occurred:

The Court: All right. Mr. Poore, you understand that you have the right to present mitigating evidence in this case?

The Defendant: Yes.

The Court: You also understand that you have the right not to present mitigating evidence if you choose not to do so?

The Defendant: Yes.

The Court: What are your wishes in that respect?

The Defendant: To not present any mitigating evidence at all.

The Court: Is there anything which the court can do to convince you that you should present mitigating evidence in this case?

The Defendant: No.

The Court: Is there anything which has improperly influenced you not to present mitigating evidence?

The Defendant: No.

The Court: Has anyone made you any promises to not present mitigating evidence?

The Defendant: No.

The Court: Have you discussed with Mr. Hemmer and Mr. Koosed[9] the existence of specific mitigating evidence?

The Defendant. Yes. Thoroughly.

The Court: Have you discussed their readiness to present mitigating evidence?

The Defendant: Yes.

The Court: Have you discussed with Mr. Hemmer and Mr. Koosed their recommendations that mitigating evidence be presented?

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[9] Defense co-counsel.

The Defendant: Yes.

The Court: I previously encouraged you to consult further with counsel before making a final decision concerning the presentation of mitigating evidence.

Have you had an opportunity to speak with counsel concerning that?

The Defendant: Yes.

The Court: On more than one occasion?

The Defendant: Yes.

The Court: Has there been any change in your stance whatsoever with respect to the presentation of mitigating evidence?

The Defendant: None, Your Honor.

The Court: You understand that your decision may, in fact, result in a verdict of death?

The Defendant: Yes.

The Court: You understand also that this decision to not present mitigating evidence may not only result in a verdict of death, but it will not be a basis for reversal on appeal?

The Defendant: Yes.

The Court: And knowing all of that, you still choose not to present any mitigating evidence?

The Defendant: Yes. (28RT 6285-6288.)

The court asked defense counsel if, other than Poore's insistence, was there any reason not to present mitigating evidence in this case. Defense counsel responded, "No, Your Honor." (28RT 6288.) Defense counsel explained that, if he remained as counsel, he would not have called the two incarcerated witnesses for tactical reasons because counsel felt that they would not assist Poore's penalty phase case. (*Id.*) Poore's counsel

subsequently acknowledged that he would not be presenting a closing argument. (28RT 6294.)

B. Legal Principles

"It is settled that the failure to present any mitigating evidence on behalf of the defendant at the penalty phase of a capital murder trial does not, in and of itself, render a judgment of death constitutionally unreliable. (*People v. Lang* (1989) 49 Cal.3d 991, 1029-1033 [](*Lang*); *People v. Bloom* (1989) 48 Cal.3d 1194, 1228 [](*Bloom*).) As we observed in *Lang*, "To require defense counsel to present mitigating evidence over the defendant's objection would be inconsistent with an attorney's paramount duty of loyalty to the client and would undermine the trust, essential for effective representation, existing between attorney and client." (*Lang*, *supra*, at p. 1031.)." (*People v. Snow* (2003) 30 Cal.4th 43, 112.)

C. The Trial Court Properly Determined That Poore Controlled the Decision Whether or Not to Present a Defense at the Penalty Phase and His Choice Did Not Deny His Right to a Reliable Penalty Determination

Poore acknowledges this Court has held that he as the right to waive presenting mitigating evidence at the penalty phase, and that it is not ineffective assistance for counsel to accede to the defendant's wishes even if mitigating evidence is available. (AOB 203-204, citing *People v. Mai* (2013) 57 Cal.4th 986, 1020-1023.) Nevertheless, Poore faults the trial court for allowing the defense to forego presenting mitigating evidence at the penalty phase as proffered by his trial counsel and claims it rendered his judgment constitutionally unreliable. (AOB 208-221.) Poore's claim lacks merit.

In *People v. Amezcua and Flores* (2019) 6 Cal.5th 886, 920-927 (*Amezcua and Flores*), this Court rejected a claim that the trial court erred by acquiescing in the defendants' refusal to allow their counsel to present a

defense at the penalty phase upon circumstances nearly identical to those in Poore's case. In that case, the day before closing guilt phase arguments the defendants and their four counsel asked to meet with the trial court in camera. Counsel told the court their each of their clients had repeatedly and emphatically informed them that they did not want any evidence presented should there be a penalty phase. (*Amezcua and Flores*, *supra*, 6 Cal.5th at p. 920.) During that hearing, counsel for each defendant proffered that they had family members and expert witnesses they could present in mitigation but each defendant refused to allow their counsel to present the witnesses. (*Id.* at pp. 921.) The trial court told each defendant that, "It's also important for me to establish that your decision is knowing and voluntary." The court also explained, "I am also charged with the responsibility of trying to persuade one or both of you to change your mind, to encourage you to consult further with your attorney before making any final decision." The court also told the defendants that "a decision not to put on mitigating evidence could result in a verdict of death" and would "not be a basis for a reversal of that verdict." (*Id.*)

The following morning the court met with both defendants and all their counsel. The court asked defendants if they had a chance to think about the previous day's discussion and whether either defendant had changed his mind. (*Amezcua and Flores*, *supra*, 5 Cal.5th at p. 924.) The defendants said they thought about the discussion and their minds were unchanged. Both defendants expressed that they did not want any mitigation evidence presented, no prosecution witness cross-examined, and no arguments made on their behalf by their counsel. (*Id.*) The trial court then discussed the *Sanders* case, where the defendant in that case made a similar choice. The trial court again asked each defendant if it was his choice to have no evidence or argument presented, or any cross-examination of prosecution witnesses. Again, each defendant stated they

had had so chosen, and their counsel agreed those decisions reflected the sincere beliefs of their clients. (*Id.*) The trial court accepted the statements of the defendants and their counsel. The penalty phase proceeded as directed by defendants; and when their counsel requested certain penalty phase instructions each defendant objected and the instructions were not given. (*Amezcua and Flores*, *supra*, 5 Cal.5th at pp. 924-925.)

On appeal, this Court addressed the defendant's claim that, "In their view, the court's permitting them to override their attorney's efforts to present a penalty phase, including the selection of jury instructions, denied them of their rights to counsel and a reliable penalty determination. They also assert that the state's independent interest in fair, accurate, and reliable penalty verdicts was violated." (*Amezcua and Flores*, *supra*, 5 Cal.5th at p. 925.) This Court rejected their claims as follows:

> Defendant's arguments are unpersuasive. Thirty years of precedent, beginning with *Bloom*, *supra*, 48 Cal.3d 1194, has consistently held, among the core of fundamental questions over which a represented defendant retains control is the decision whether or not to present a defense at the penalty phase of a capital trial, and that the choice not to do so is a denial of the right to counsel or a reliable penalty determination. (See *People v. Snow* (2003) 30 Cal.4th 43, 119-121 []; [*People v.*] *Deere* [(1991)] 53 Cal.3d [705,] 717 []; *Sanders*, *supra*, 51 Cal.3d at pp. 526-527; *Lang*, *supra*, 49 Cal.3d at p. 1030; *Bloom*, at p. 1228.) "'[T]he required reliability is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present. A judgment of death rendered in conformity with these rigorous standards does not violate the Eighth Amendment reliability requirements.'" (*Sanders*, at p. 526, fn. omitted.) Nor is a defendant deprived of his Sixth Amendment right to counsel by virtue of counsel's acquiescence in the defendant's own decision that no defense shall be presented on

> his behalf. That decisions is the defendant's to make. (*Lang*, at pp. 1030-1031.) Despite the general rule that counsel is responsible for the selection of jury instructions, the requested instructions were properly refuted in the face of defendant's objection. As the court implicitly recognized, the only reason for requesting them would be to seek a sentence of life without parole rather than death, the very decision that law commits to the defendant personally.

(*Amezcua and Flores*, *supra*, 5 Cal.5th at pp. 925-926.)

This Court noted that in *McCoy v. Louisiana* (2018) 584 U.S. ___ [200 L.Ed.2d 821, 138 S.Ct. 1500] (*McCoy*), the United States Supreme Court recognized the same allocation of responsibilities between counsel and client. This Court discussed that, in *McCoy*, "the high court distinguished between the different purviews of counsel and client. Trial management is controlled by counsel. It encompasses such functions as determining "'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.'" (*Id*., at p. ___ [138 S.Ct. at p. 1508].) Choice of the defense objective is the client's prerogative. (*Ibid.*)" (*Amezcua and Flores*, *supra*, 5 Cal.5th at p. 926.) As in that case, accepting Poore's claim "would be to read out existence the allocation of responsibilities the high court recognized in *McCoy*." (*Id.*)

Similar to *Amezcua and Flores*, in Poore's case the record showed the trial court "engaged in extensive and careful colloquy" with Poore and his counsel to ensure that Poore understood the consequences involved in pursuing his choice to forego presentation of mitigating evidence or argument and preventing cross-examination of the prosecution's penalty phase witnesses. The trial court also confirmed that Poore's counsel had available mitigation evidence it could present; and the court gave Poore ample opportunity to explain his choice. As this Court stated in *Amezcua and Flores*, the trial court "took the same kind of care that is required when

ensuring that the waiver of any substantial right is personally and properly made" and that Poore "had made his own choice knowingly and voluntarily. (*Amezcua and Flores*, *supra*, 5 Cal.5th at p. 926.) The procedures used by the trial court in Poore's case "satisfied the state's interest in assuring the fairness and accuracy of the death judgment[] consistently with *McCoy*. (*Id.*) Accordingly, the trial court did not err by permitting Poore to override his attorneys' efforts to present a penalty phase defense or cross-examine any prosecution witnesses, or deny Poore of his rights to counsel and a reliable penalty determination.

V. THE DEATH PENALTY AS ADMINISTERED IN CALIFORNIA IS NOT UNCONSTITUTIONAL

Poore contends that the death penalty as administered in California "has not been, and cannot be, administered or executed with reasonable consistency" such that it is cruel and unusual punishment under the Eighth Amendment. (AOB 224-240, Arg. V.) Poore's claim lacks merit.

The claim Poore presents was rejected by this Court in *People v. Seumanu* (2015) 61 Cal.4th 1293, 1368.) As this Court explained,

> That some inmates will exhaust their appeals and collateral attacks sooner than others, that some will obtain relief on appeal or on habeas corpus and others not, is inevitable given the complexity of the judicial review process. These differences are not necessarily attributable to arbitrariness in the process of review under state law, but may instead represent the legitimate variances present in each individual case. Such differences may include variances in the nature of the underlying facts, the length of record, the quality of the briefing, and the complexity and number of issues raised by the parties. For some defendants the appointed attorneys will need more time to prepare and file an opening brief or habeas corpus petition due to the relative complexity of the issues involved, and the Attorney General will for the same reasons in some cases need additional time to respond. In some cases the trial record will take longer to certify as correct due to length or legitimate accuracy concerns. That capital case appeals and habeas corpus petitions are not decided

> in a purely chronological first in, first out manner may simply reflect the variation in the cases and this court's individual consideration of each case, and thus not demonstrate any intrinsic arbitrariness within the meaning of the Eighth Amendment.

(*Id*. at pp. 1374-1375.) "[S]uch delays are the product of 'a constitutional safeguard, not a constitutional defect [citations], because [they] assure[ ] careful review of the defendant's conviction and sentence.' " (*Id*. at p. 1374, quoting *Anderson, supra,* 25 Cal.4th at p. 606; accord *People v. Clark* (2016) 63 Cal.4th 522, 645.) Poore cites to nothing in his own case to support of his arbitrariness argument, instead setting forth a generic Eighth Amendment claim such as that raised and rejected on direct appeal in *Seumanu*. Accordingly, Poore presents no reason to revisit the issue and his death sentence should be affirmed.

VI. POORE NOT BEING PROVIDED WITH HABEAS COUNSEL DOES NOT RENDER HIS JUDGMENT AND SENTENCE UNCONSTITUTIONAL

Poore contends that California's failure to timely provide capital case defendants with habeas counsel violates due process and the equal protection guarantees of the federal and state constitutions and requires reversal of his convictions. (AOB 240-242, Arg. VI.) Poore's contention lacks merit.

Poore acknowledges this Court rejected a similar claim in *People v. Williams* (2013) 56 Cal.4th 165, 202, which held as follows:

> Finally, without supporting authority, defendant asserts that the state's likely failure to provide him with habeas corpus counsel in a timely manner violates his right to counsel, confrontation, and to appear and defend under the Sixth Amendment. He contends this situation constitutes cruel and unusual punishment under the Eighth Amendment, and a violation of due process under the Fourteenth Amendment. These claims are entirely speculative. We reject them.

As in *Williams*, Poore's claims are entirely speculative.[10] As a general matter, in the context of postconviction relief, the United States Supreme Court has accorded states substantial flexibility in deciding what procedures are needed because the presumption of innocence no longer applies. (*District Attorney's Office for the Third Judicial District v. Osborne* (2009) 557 U.S. 52, 69 [174 L.Ed.2d 38, 129 S.Ct. 2308].) Accordingly, "'when a State chooses to offer help to those seeking relief from convictions,' due process does not 'dictat[e] the exact form such assistance must assume.'" (*Ibid.*, quoting *Pennsylvania v. Finley* (1987) 481 U.S. 551, 559 [95 L.Ed.2d 539, 107 S.Ct. 1990].) The focus is whether the state's post-conviction procedure "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'" (*Ibid.*, quoting *Medina v. California* (1992) 505 U.S. 437, 448 [120 L.Ed.2d 353, 112 S.Ct. 2572].) As this Court has noted and explained in detail:

> [California and this Court itself has] assume[d] a generous postconviction position: vis-à-vis other states, [the Court] authorizes more money to pay postconviction counsel, authorize[s] more money for postconviction investigation, allow[s] counsel to file habeas corpus petitions containing more pages, and permit[s] more time following conviction to file a petition for what is, after all, a request for collateral relief.

(*In re Reno* (2012) 55 Cal.4th 428, 456-457, fns. omitted.)

Poore cites to nothing in his own case to support a denial of due process or equal protection because he has not yet been assigned habeas

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[10] Policy 3, Standard 1-1.1 of the Supreme Court Policies Regarding Cases Arising from a Judgment of Death provides that a habeas petition is presumed to be filed without substantial delay if it is filed within either 180 days of the final due date of the reply brief in the direct appeal or 36 months after appointment of habeas counsel, whichever is later.

counsel. Accordingly, Poore presents no reason to revisit this Court's conclusion in *Williams* and his death sentence should be affirmed.

VII. THE DEATH PENALTY STATUTE AS INTERPRETED BY THIS COURT AND APPLIED AT POORE'S TRIAL IS CONSTITUTIONAL

Poore raises a number of challenges to the constitutionality of California's death penalty scheme which he claims that, alone or in combination with each other, violate the United States Constitution. (AOB 242-278, Arg. VII.) Poore summarily presents these arguments to preserve them for review under the procedure authorized by *People v. Schmeck* (2005) 37 Cal.4th 240.[11] This Court has previously considered and consistently rejected these contentions in previous cases. Poore presents no reasons that compel reconsideration of those decisions.

Poore generally contends that California's death penalty scheme lacks safeguards to prevent avoid arbitrary and capricious sentencing in violation of the Sixth, Eighth and Fourteenth Amendments of the United States Constitution. (AOB 249-278.) Regarding Poore's specific challenges, they should be rejected as previously addressed by this Court.

Poore contends his death penalty judgment is invalid because section 190.2 is "impermissibly broad." (AOB 245-246.) This Court has held that section 190.2 is not impermissibly broad. Specifically, the various special circumstances are not so numerous as to fail to perform the constitutionally required narrowing function. (*People v. Winbush* (2017) 2 Cal.5th 402, 488; *People v. Thomas* (2011) 52 Cal.4th 336, 365.) Section 190.2 sets out the special circumstances that if found true render a defendant eligible for

[11] Under *Schmeck*, a defendant may present and preserve for review "routine or generic claims" repeatedly rejected by this Court by doing no more than (i) identifying the claim in the context of the facts, (ii) noting that this Court previously has rejected the same or a similar claim in a prior decision, and (iii) asking the court to reconsider that decision. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.)

the death penalty, adequately narrows the category of death-eligible defendants in conformity with the requirements of the federal Constitution. (*People v. Hoyos* (2007) 41 Cal.4th 872, 926.)

Poore argues that section 190.3, factor (a), as applied allows the arbitrary and capricious imposition of death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (AOB 247-249.) "Section 190.3, factor (a), which allows the jury to consider, in choosing the appropriate penalty, "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to section 190.1' does not violate the Eighth or Fourteenth Amendments to the United States Constitution merely because those circumstances differ from case to case, or because factor (a) does not guide the jury in weighing those circumstances. [Citations.]" (*People v. Farley* (2009) 46 Cal.4th 1053, 1133.) "Section 190.3, factor (a), . . . is not unconstitutionally vague, arbitrary, or capricious. [Citations.]" (*People v. Cowan* (2010) 50 Cal.4th 401, 508 (*Cowan*).)

Poore contends that United States Supreme Court authority requires unanimous jury findings of aggravating circumstances, and whether aggravating factors outweigh mitigating factors be proved beyond a reasonable doubt and that death is the appropriate penalty. (AOB 253-266.) This Court has held that jury need not make written findings, achieve unanimity as to specific aggravating circumstances, find beyond a reasonable doubt that an aggravating circumstance is proved (except for § 190.3, factors (b) & (c)), find beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances, or find beyond a reasonable doubt that death is the appropriate penalty. (*Scott, supra* 61 Cal.4th at p. 407; *People v. Williams* (2010) 49 Cal.4th 405, 459; *People v. Morrison* (2004) 34 Cal.4th 698, 730–731.) Moreover, the jury need not be

instructed as to any burden of proof in selecting the penalty to be imposed. (*People v. Burgener* (2003) 29 Cal.4th 833, 885.) The United States Supreme Court's decisions interpreting the United States Constitution Sixth Amendment's jury trial guarantee (*Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856, 127 S.Ct. 856]; *United States v. Booker* (2005) 543 U.S. 220 [160 L.Ed.2d 621, 125 S.Ct. 738]; *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403, 124 S.Ct. 2531]; *Ring v. Arizona* (2002) 536 U.S. 584 [153 L.Ed.2d 556, 122 S.Ct. 2428]; *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S.Ct. 2348]) have not altered this Court's conclusions in this regard. (*Scott*, *supra*, 61 Cal.4th at p. 407; *People v. Townsell* (2016) 63 Cal.4th 25, 72; *People v. Gonzalez and Soliz* (2011) 54 Cal.4th 254, 333.) That certain noncapital sentencing proceedings may assign a burden of proof to the prosecutor does not mean the death penalty statute violates a [capital] defendant's rights to equal protection or due process. (*People v. Dement* (2011) 53 Cal.4th 1, 55.)

Poore contends that the failure to require written findings by the jury of aggravating factors violates the Sixth, Eighth and Fourteenth Amendments of the federal Constitution. (AOB 264-267.) However, this Court has held that written findings by the jury are not constitutionally required. (*People v. Salazar* (2016) 63 Cal.4th 214, 256; *People v. Morrison, supra*, 34 Cal.4th at p. 730.)

Poore argues that lack of intercase proportionality review guarantees arbitrary, discriminatory or disproportionate imposition of the death penalty in California. (AOB 267-268.) However, the absence of a requirement of intercase proportionality review does not violate the Eighth Amendment. (*People v. Vines* (2011) 51 Cal.4th 830, 891; *People v. Thompson* (2010) 49 Cal.4th 79, 143 (*Thompson*).)

Poore contends that the prosecution's use of unadjudicated criminal activity as a factor in mitigation violated his rights to due process and

resulted in cruel and unusual punishment because it rendered his sentence unreliable. (AOB 268-269.) "Use of prior criminal activity in aggravation was proper." (*People v. Livingston* (2012) 53 Cal.4th 1145, 1180.) The jury may properly consider evidence of unadjudicated criminal activity under section 190.3, factor (b). (*People v. Friend, supra*, 47 Cal.4th at p. 90.) "[T]he jury's consideration of unadjudicated criminal conduct pursuant to section 190.3, factor (b), does not offend the Fifth, Sixth, Eighth, or Fourteenth Amendments to the federal Constitution or analogous provisions of the California Constitution." (*People v. Young* (2005) 34 Cal.4th 1149, 1226.)

Poore argues that the use of restrictive adjectives such as "extreme" and "substantial" impermissibly acted as barriers to the jury's consideration of mitigating evidence. (AOB 270.) As previously discussed, Poore directed his trial counsel not to present any mitigating evidence which would render this claim moot. In any event, "[t]he use of certain adjectives such as 'extreme' and 'substantial' in the list of mitigating factors in section 190.3 does not render the statute unconstitutional." (*Thompson*, *supra*, 49 Cal.4th at p. 143, quoting *People v. Prieto* (2003) 30 Cal.4th 226, 276.) The inclusion of such adjectives do not act as a barrier to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*People v. Foster* (2010) 50 Cal.4th 1301, 1365.)

Poore contends the failure to instruct the jury that certain sentencing factors were relevant solely as potential mitigators precluded a fair, reliable and evenhanded death sentence. (AOB 270-273.) However, this Court has held that the trial court is not required to instruct that certain factors, specifically section 190.3, factors (d), (e), (f), (g), (h), and (i) that are introduced the phrase "whether or not," are relevant only as potential mitigators. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1097; *People v. Thomas* (2011) 51 Cal.4th 449, 506.)

Poore argues that California's death sentencing scheme violates the Equal Protection Clause of the federal Constitution by failing to give capital defendants procedural safeguards given to noncapital defendants. (AOB 273-276.) The California sentencing scheme does not violate the equal protection clause of the Fourteenth Amendment by denying capital defendants certain procedural safeguards afforded to noncapital defendants. (*People v. Johnson* (2016) 62 Cal.4th 600, 657; *People v. Letner and Tobin*, *supra*, 50 Cal.4th at p. 208 ["'There is no violation of the equal protection of the laws as a result of the statutes' asserted failure to provide for capital defendants some procedural guarantees afforded to noncapital defendants.'"].)

Poore contends that California's use of the death penalty "as a regular form of punishment" violates international law and the Eighth and Fourteenth Amendments of the United States Constitution. (AOB 276-278.) The death penalty is not per se unconstitutional. (*Gregg v. Georgia* (1976) 428 U.S. 153, 187 [49 L.Ed.2d 859, 96 S.Ct. 2909], *People v. Zambrano* (2007) 41 Cal.4th 1082, 1187.) "The death penalty, when applied in accord with state and federal statutory and constitutional requirements, does not violate international law. [Citation.] International norms of human decency do not render the death penalty, applied as a regular form of punishment, violative of the Eighth Amendment. [Citations.]" (*Cowan*, *supra*, 50 Cal.4th at p. 510.) This Court has rejected the argument that the use of capital punishment "'as a regular punishment'" violates international norms of humanity and decency and hence violates the Eighth Amendment of the United States Constitution. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 43.) "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." (*Id*. at pp. 43-44.)

Finally, this Court has not found a state or federal constitutional violation when the asserted defects in California's death penalty scheme are considered collectively. (*People v. Lucero* (2000) 23 Cal.4th 692, 741.) In *People v. Anderson* (2018) 5 Cal.4th 372, this Court rejected a similar argument. "Even considering the arguments in combination, and viewing the death penalty law as a whole, it is not constitutionally defective. Defendant's challenges to California's death penalty scheme 'are no more persuasive when considered together,' than when considered separately." (*Id*. at p. 426.)

VIII. THERE WAS NO CUMULATIVE ERROR

Poore contends that the claimed errors in his trial, even if not sufficiently prejudicial to require reversal of the judgment when considered individually, warrants reversal when asserted cumulatively. (AOB 278-280.) However, there is nothing to accumulate because there were no prejudicial guilt phase or penalty phase errors.

A defendant's cumulative error claim should be rejected where the individual claims of error are meritless. (*Anderson, supra,* 25 Cal.4th at p. 606; *People v. Bolin* (1998) 18 Cal.4th 297, 335.) This principle applies to claims seeking to overturn a death judgment by combining alleged guilt and penalty phase errors as well. (See *People v. Williams* (2015) 61 Cal.4th 1244, 1291; *People v. Bonilla* (2001) 41 Cal.4th 313, 360.) Accordingly, whether considered individually or cumulatively, Poore's claimed errors do not warrant reversal. (See *Amezcua and Flores*, *supra*, 6 Cal.5th at p. 930.)

CONCLUSION

Based on the foregoing, respondent respectfully requests that the judgment and death sentence be affirmed.

Dated: April 19, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 29,866 words.

Dated: April 19, 2019

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STATE OF CALIFORNIA
Supreme Court of California

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4/19/2019

Date

/s/Anthony Da Silva

Signature

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