In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **DEWEY JOE DUFF,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S105097

Sacramento County Superior Court
Case No. 98F01583
The Honorable Thomas M. Cecil, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

The district attorney filed an amended information in Sacramento Superior Court on October 25, 2000, charging appellant Dewey Joe Duff with two counts of murder (§ 187[1]), robbery (§ 211), and possession of a handgun and reloadable ammunition by a felon (§§ 12021, subd. (a) & 12316, subd. (b)(1)). (1 CT 47-49; 2 CT 343.) The information alleged enhancements for multiple murders (§ 190.2, subd. (a)(3)), personal use of a handgun (§12022.53, subd. (d)), murder committed during commission of a robbery (§ 190.2, subd. (a)(17)), and a prior serious felony within five years that qualified as a strike (§§ 667, subds. (a)-(i), 667.5, subd. (b), & 1170.12). (1 CT 47-50.)

On November 6, 2000, the charge of possessing reloadable ammunition by a felon (§ 12316, subd. (b)(1)) was dismissed at the prosecutor's request. (2 CT 352.) On September 10, 2001, jury selection began.[2] (3 CT 634.) On October 24, 2001, the attorneys gave opening statements and testimony began. (4 CT 1008.) On November 16, 2001, the jury convicted appellant of all charges and enhancements, finding the murders to be in the first degree and the robbery to be in the second degree. (4 CT 1069-1078.) That same day appellant admitted the strike prior. (4 CT 1069.)

On December 18, 2001, after 16 days of the penalty phase of trial, the jury imposed a sentence of death. (4 CT 1179-1181.) On March 8, 2002, the trial court sentenced appellant to death based on the jury finding him guilty of two counts of first degree murder (§ 187) and finding true the

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[1] Statutory references are to the Penal Code unless noted otherwise.

[2] In November 2000, jury selection originally commenced. (2 CT 353.) On November 28, 2000, the court granted a request by appellant's lead attorney to be relieved as counsel and the matter was reset for trial. (2 CT 540.)

special circumstances of multiple murders and murder committed during commission of a robbery (§ 190.2, subd. (a)(3) & (17)). (5 CT 1279-1286.) On the murder counts, additional temporarily stayed terms were imposed: two consecutive sentences of 25-years-to-life for the gun enhancements, plus five years for the prior serious felony (§§ 12022.53, subd. (d) & 667, subd. (a)). (5 CT 1284.) The temporary stay will become permanent once the pending appeal on the murder counts is completed. (*Ibid.*)

On the remaining counts, appellant was sentenced to additional stayed terms: for second degree robbery, the upper term of five years, doubled to 10 years due to a strike prior (§§ 667, subds. (b)-(i) & 1170.12), plus 25-years-to-life for use of a gun during a robbery that resulted in great bodily injury (§ 12022.53, subd. (d)); and an upper term of three years for gun possession, doubled to six years due to the strike prior (§§ 667(b)-(i) & 1170.12). (5 CT 1283-1284.)

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

STATEMENT OF FACTS

A. Guilt Phase Facts

Appellant was convicted of shooting and killing Roscoe Riley and Brandon Hagan outside Sacramento's Taylor's Corner Bar on the afternoon of February 23, 1998. Appellant told others he helped broker a gun-for-drugs deal for Riley and was mad because he did not get a cut of the deal.

Appellant told police, in a videotaped interview played for the jury, that he and the two victims were driving to Rio Linda to trade five guns for an "ounce of dope." (21 CT 6228-6229, 6234-6236; 15 RT 5222-5223.) The group, with Riley driving and Hagan in the front passenger seat, stopped at Taylor's Corner bar so appellant could use the restroom.

Appellant said it was only the second time he had met Hagan.[3] (21 CT 6224.)

Appellant claimed that when he returned to the car after using the restroom, Riley and Hagan pulled out guns and demanded his money and gun. (21 CT 6225-6229, 6233, 6238.) Appellant told police that Riley had one gun and Hagan had a gun in each hand. (21 CT 6227-6226.) He "freaked" when the guns were pulled on him and he started to get out of the car. (21 CT 6238.) "I said, 'Wait man. I don't want no problems. I'm gettin' out of the fuckin' car.' And they said, 'Stay in the car.' And I -- I says, 'I'm getting out,' like this. And fuckin' boom. I hear a fuckin' shot go off." (21 CT 6241.) He added, "I just grabbed this fuckin' door handle, and as soon as I opened the door to get out, boom. Okay? And the next thing I know is just a bunch of fuckin' shootin', and I'm fuckin' shootin'." (21 CT 6242.)

Appellant claimed he was half in and half out of the car when he fired his gun. (21 CT 6243.) Appellant said he ran around to the driver's side of the car, pushed Riley out of the driver's seat, and drove off. (21 CT 6245-6246.)

Bartender Diana Flint testified that at about 3:30 p.m. on February 23, 1998, a man walked into the bar. She said hello and he "went right to the bathroom." (12 RT 4268-4270, 4273-4274.) The man was five-foot-eight and weighed about 175 pounds, with a full beard, long brown hair, dark glasses, Levis and a gray and maroon plaid shirt. (12 RT 4271, 4273.) While the man was in the bathroom, the car he got out of, which had initially parked in front of the bar, re-parked on the side of the bar by backing in. (12 RT 4270.)

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[3] Hagan's name is misspelled in the AOB.

The man walked back out of the bar without buying a drink and "went out the door and walked up the sidewalk. And when he got around the corner I heard a gunshot." (12 RT 4270, 4274.) Flint opened a bar window blind and saw, from about 15 feet away, a "guy standing at the back of the car shooting into the car." (12 RT 4275-4276.) She did not see a gun, but she heard gunshots and the man was holding at least one hand out, perhaps both, and making a jerking motion as if he were firing a gun. (12 RT 4278, 4324.) She heard two gunshots while she was looking out the window. (12 RT 4278, 4345.)

The shooter then ran around to the driver's side of the car, pushed something out of the driver's seat and got in the car. (12 RT 4279.) After the shooter got in the car, the car rolled back and struck an exterior wall of the bar, before being driven off. (12 RT 4280.) When the car got a half block away Flint heard another shot. (12 RT 4281-4282.) The car did not damage the bar when it rolled back into it. (12 RT 4283.) Flint called 9-1-1 and reported the shooting and the car license plate number. (12 RT 4286.)

Bar customer Filomeno Julian Lujan testified that he heard two shots and ran to a bar window and saw two young men slumped over in a car and a person holding a gun getting in the car. (12 RT 4356-4358.) The person with the gun had trouble getting the car out of reverse and dropped his gun as the car rolled back into the building. (12 RT 4371-4372.) Lujan testified that the man got the car in gear and drove off. When the car was about 100 feet away Lujan heard another shot. (12 RT 4372.) Lujan told police that when the shooter ran around to the driver's side he removed a .45 from a vehicle passenger. (16 RT 5543-5545.)

Criminalist Faye Springer testified the evidence was consistent with three of the shots coming from a Rohm .38 and three from a Ruger .357, with three shots being fired from close range, two from a distance of at least two feet or more, and one from an undetermined distance, though it

was not a contact wound. (16 RT 5425-5441; 22 CT 6214-6217.) Springer's bullet trajectory diagrams showed three of the shots being fired from the .38 from behind the victims, as if fired from the rear passenger-side seat or door of the car. (16 RT 5433-5434, 5437, 5464-5465; 21 CT 6214.)

Riley, the driver, suffered four gunshot wounds: 1) right cheek that exited the left side of his neck (.38; distant); 2) base of skull that exited at hairline (possibly .357; contact); 3) upper back (.38; distant); and 4) back of the head (probably .357; undetermined distance, but not contact). Hagan was shot twice: 1) left jaw, with part of the bullet exiting his neck (.357; contact); and 2) behind the right ear from close range (possibly .38; one to six inches). (15 RT 5073-5134; 16 RT 5424-5441, 5462-5465; 21 CT 6214-6217.)

Springer also said the evidence was consistent with the shot that went through Riley's right cheek, and exited his neck, being the bullet found in the speedometer and the jacket found in the front passenger door map holder. (16 RT 5393, 5405-5408, 5436.) The fact that the matching bullet and jacket were found on opposite sides of the car "doesn't make a lot of sense." (16 RT 5411.) There were no bullet holes in the rear of the car. (16 RT 5413.)

All the bullets recovered were nominal .38 caliber and could be fired by either a .38 or a .357. (16 RT 5424.) A determination of which gun fired each bullet was based in part on the rifling characteristics of the bullets recovered. (16 RT 5426-5427.) Springer agreed with appellant's trial counsel that some of the bullet trajectories were consistent with Riley pulling out a .357 and appellant grabbing Riley's gun, it going off and hitting Hagan, and appellant then retreating and shooting Riley with a .38. (16 RT 5525-5529.) The scenario did not explain Hagan being shot with the .38 or Riley being shot with the .357. (16 RT 5529-5530.)

The .38 was in poor condition and was missing an ejector screw and to be fired had to be held with two hands and not tipped to the side. (16 RT 5421-5424.) Riley had an elastic strap on him that was consistent with having been a part of a gun holster. (16 RT 5389.) The .357 matched the wear pattern on the brown leather holster found. (16 RT 5417-5418.) The .357 had blood in three of its chambers. (16 RT 5462.) One of the victims had dice in his lap. (16 RT 5386.)

Appellant told police that after the shooting he drove around until the car got stuck. (21 CT 6247.) The car was found stuck in a muddy field behind the home of his friends, Sheri Sanchez and Walter Payne (Payne house), where he sometimes lived. (12 RT 4420; 14 RT 4924.) Appellant was arrested that night when he ran from police officers searching for a felon involved in a domestic violence incident near his mother's house. (14 RT 4921-4922, 4938, 4943-4946, 4951.) Appellant was seen running by officers and was captured after briefly resisting arrest. (14 RT 4921-4922, 4950-4951, 4958-4963.)

Appellant's friend Cynthia Fernando testified that she had known appellant for a couple of months prior to the shooting, and stayed with him at the Payne house. (12 RT 4418-4420.) Riley owed him $100 for a .357 appellant had sold him, and appellant was "very angry" because Riley ignored him and disrespected him. (13 RT 4507-4508, 4516, 4542; 14 RT 4823-4824, 4834-4838.) Appellant repeatedly mentioned setting up Riley to steal a pound of dope from him and kill him, and started talking about it a month or two before the killing. (13 RT 4509-4510; 14 RT 4859.) She thought it was a joke because "if somebody was going to do something like that, you wouldn't go around telling your friends." (13 RT 4509, 4517.)

Prior to the shooting, she saw appellant with four different guns, including a .357 and a .38 that had something wrong with it. (13 RT 4511-4514.) A couple of days prior to the shooting, she saw him shooting a

small, silver semi-automatic at the Payne house. (13 RT 4515.) One day, she called a friend, Gary Rose, and appellant came on the telephone and told her she needed to drop what she was doing and come over. (12 RT 4426; 13 RT 4519, 4522.) When she got there, appellant was trying on clothes and had a box that he said contained his clothes. (13 RT 4524, 4527-4528.). He gave her a hug and said, "I did it." "[H]e had killed those guys." (12 RT 4427-4428; 13 RT 4525; 14 RT 4840.) Appellant said he had killed two people because someone was there who was not supposed to be there. (13 RT 4525, 4538; 14 RT 4840-4841.) Appellant said the bodies were in a car in back of the Payne house. (13 RT 4526, 4536.) Appellant did not say the shooting occurred in self-defense or that the others had pulled guns on him. (13 RT 4538.) Rose testified that appellant, carrying two to three pistols, came over to change his clothes because they were wet. (13 RT 4656-4657.)

After the killing, appellant told Fernando "there was supposed to have been some dope, money, and jewelry inside the car." (13 RT 4510.) Appellant gave her a $20 bag of methamphetamine he had taken from the victims and said he was surprised because there was supposed to be more drugs. (13 RT 4573.) Items he said he had taken from Riley's car—guns, pager, jewelry, cell phone and other odds and ends—were spread out on the bed. (13 RT 4524, 4536; 14 RT 4841-4844.) The guns included the .357 appellant had sold Riley, a .25/.22, a .38, and a .9-mm. (14 RT 485.) The .357 had blood on it. (14 RT 4851.) Fernando told police that the .357 and holster belonged to the victim, and that appellant had them the night of the shooting. (15 RT 5316-5317.) The jewelry included a men's diamond pinkie ring, a gold dress watch, and a women's diamond sapphire cross. (13 RT 4538-4539, 4542-4543.) Appellant kept the .357, and Fernando kept the jewelry and three guns, giving the .22 and .38 to appellant's brother, Lloyd "Pumpkin" Duff. (13 RT 4555, 4562; 14 RT 4853.)

Fernando said the .9-mm and the jewelry were stolen from her. (13 RT 4567-4569.)

Police received a tip about a car with bodies in it. (15 RT 5156.) Because of the wet, muddy conditions of the field where the car was found, the car was towed to the crime laboratory at 11 p.m. on February 25, 1998, with the bodies still inside. (16 RT 5383.) The victims were removed and the car examined for evidence the next morning. (16 RT 5384.) Springer said no gunshot residue tests were conducted on items inside the car, including the hands of the victims, since the victims had been shot inside the car, there would be gunshot residue on everything inside the car. (16 RT 5392-5393.) Springer also did not do blood splatter analysis because there was no issue that would have been resolved by it. (16 RT 5395.) There was heavy blood splatter on the inside of the front passenger window and door. (16 RT 5403.)

Lloyd Dunham, a friend of appellant's brother Pumpkin, testified that after the bodies were found, Pumpkin figured police might be coming to his house and the guns would be a parole violation, so he got two guns and broke them down and cleaned them with Windex. (13 RT 4686.) Dunham put the .22 and .38 in a trash bag and put them in a hole in the backyard and put a plant on top of them. (13 RT 4688-4692.) Dunham eventually took the guns to his aunt's house in West Sacramento, where police found them on March 6, 1998. (13 RT 4696-4701; 14 RT 4902, 4904-4907.)

In addition to Fernando, there was testimony that appellant told three others about his plan to commit the robbery. Appellant asked Dunham for his help in robbing Riley. (13 RT 4718-4720.) Appellant was angry because he had arranged a gun for drugs deal and had not received a kickback from Riley, so he planned to set up a drug buy and rob Riley. (13 RT 4715-4720.) Appellant also planned to steal Riley's diamond pinkie ring even if he had to cut off Riley's finger to get it. (13 RT 4717-4718.)

Appellant's nephew, Lloyd "Cottontop" Duff, told police that a week before the shooting appellant claimed he would "rob someone" and would "soon be coming up fat" with "two Gs," and that he would "leave no witnesses" and "take them out." (16 RT 5358-5362.)

Appellant's friend, Ronald Greathouse, testified that about two weeks prior to the bodies being found appellant asked him to help with a robbery and to shoot someone in the buttocks. (12 RT 4450-4452.) Appellant wanted to rob someone of their drugs and jewelry because "they were kind of lame and easy to do." (12 RT 4451-4452.) Appellant said he was going to "set up a deal with [Riley] for a certain amount of drugs and jewelry, and rob them." (12 RT 4461.) When appellant discussed the robbery he had a chrome .25 and a western style .38. (12 RT 4459.) In the weeks prior to the shooting, Greathouse also saw him with a chrome .357 and a .9-mm. (12 RT 4460-4461.) About two weeks later, he received a telephone call from appellant who said he had a ring for Greathouse to sell. (12 RT 4454.) Greathouse sold the ring for $30, splitting the money with appellant, and discarded five spent shells in a gutter for appellant. (12 RT 4454-4456.)

About an hour or two after appellant was arrested he called his friend Patricia Murphy and told her that she should bring Cynthia Fernando to the Payne house so he could call and talk to her. (13 RT 4600.) He told Murphy to tell Fernando that she should get some gas and get the car off the street. (13 RT 4601.)

An officer searched appellant's room at his mother's house after his arrest, finding a box of .22 caliber rounds. (14 RT 4952.) When arrested, appellant had in his possession a Fossil watch, a Zippo lighter, two rings including Riley's Marine ring, Riley's cell phone, five .9-mm bullets, and a necklace. (14 RT 4766-4767, 4954; 15 RT 5307-5309.) An officer searched the area where appellant was arrested and found the .357 revolver and the brown leather holster. (14 RT 4973.) Appellant later told police

the gun had belonged to Riley. (21 CT 6251-6252.) Riley's friend, Tessa Marie Trimble, identified the rings (exh. 22-B and exh. 22-C) as rings worn by Riley. (14 RT 4766-4767.) She said Riley carried a Zippo lighter. (14 RT 4767.)

A neighbor of Payne, Victoria Foster-Brooks, called police when she saw a car parked in her neighbor's yard and thought the car might be stolen. (12 RT 4382-4383.) The day before she saw a man target practicing at a tree with a handgun in the same yard. The man, who people called Joseph, was around five-foot-seven, medium build with a long beard. (12 RT 4384-4385.) The man appeared to be living at the Payne house because she had seen him there during the previous 30 days, often in the company of a heavy-set female with a dog. (12 RT 4387.) Fernando said she kept her dog with her 24 hours a day. (13 RT 4518.)

B. Defense

The defense called one witness, detective Winfield, who testified that Fernando told her that appellant first mentioned doing something three or four days prior to the shooting. (16 RT 5554.) Fernando also told the detective that appellant and Riley made a trade about a week prior to the shooting, with appellant getting a pearl-handled .22, a diamond ring and methamphetamine in exchange for a .9-mm. (16 RT 5557-5558, 5566.) Appellant was also owed money. (16 RT 5558.) A day before the shooting, appellant was "setting it up" by calling Riley to determine when they could meet the following day. (16 RT 5565.)

After the shooting, appellant led her believe that Riley and his "old lady" were killed. (16 RT 5559.) Fernando also said that she saw mud on a weapon, but she did not see blood. (16 RT 5559.) She also told the detective that when she was walking down the street with appellant she was pushing a shopping cart and had two guns on her, a .38 and a .9-mm. (16 RT 5560.) She also mentioned a .357. (16 RT 5561.)

C. Penalty Phase

1. Prosecution

a. Appellant's Criminal Conduct

The parties stipulated that appellant suffered eight felony convictions: possession of an illegal dagger in 1996 (§ 12020, subd. (a)); assault with a semi-automatic rifle in 1994 (§ 245, subd. (b)); theft with priors in 1992 (§ 666); vehicle theft in 1992 (§ 10851); possession of methamphetamine in 1990 and 1991 (Health & Safety Code, § 11377); assault on a police officer in 1990 (§ 243, subd. (c)); and false imprisonment in 1978 (§ 236). (22 CT 6343.)

Witnesses testified in regard to appellant's prior convictions and other prior bad acts. A woman, J.F., testified that in July 1978, then age 16, she was grabbed from behind by the throat and mouth by appellant and dragged into a Sacramento-area alley. (19 RT 6285-6291.) She kicked, fought and screamed and broke free when a neighbor heard her screams and appellant ran off. (19 RT 6289-6290.)

In October 1978, appellant repeatedly exposed himself, masturbated and made pelvic thrusts toward a 13-year-old girl at a Stockton drive-in restaurant. He also grabbed the breasts of two other customers and stuck his erect penis through the window of a car. (18 RT 6243-19 RT 6252.)

A retired Sacramento police officer, Steve Reed, testified that in 1990 appellant slipped his left hand out of a handcuff while being arrested for a Vehicle Code violation and struck Reed in the neck. (19 RT 6383.) Reed's ring got caught in the handcuff and, after a struggle, he fell back and hit his head on a telephone pole and tore some ligaments in a finger. (19 RT 6383-6384.)

On April 23, 1994, appellant was arrested after being seen inside a North Highlands house with a gun. Janet Lietzke testified she was at home

with her husband and six children doing arts and crafts at the kitchen table when one of her children walked in and with a "shaky voice" she said, "mom, there is a man in the house with a gun." (19 RT 6328.) Her daughter "was very shocked, very disturbed and pale white, like she was going to pass out." (19 RT 6328.) Lietzke saw the shirtless man with a gun down a hallway. (19 RT 6330-6331.) Her daughter called the police and the family waited outside for officers. (19 RT 6329, 6333-6334.) While outside, she saw the man, who she later identified as appellant, jump over a fence. (19 RT 6335-6337.) Appellant and a sawed-off rifle were found under a nearby house that was under construction. (19 RT 6358-6361.) The incident continued to have an impact on the Lietzke family. One of her daughters locked every window and door at night. (19 RT 6337-6338.)

That same night, three Sacramento teenagers were confronted by a man resembling appellant who walked up to one of them, cocked a rifle, pointed it at one of them and asked what he was doing or said "hey, dude" or "what's up dude?" (19 RT 6297-6300, 6319-6320, 6324.) One of the teenagers called the police. "I was crying," Tanya Ruiz testified. "I was hysterical, because I thought I was going to die." (19 RT 6321.)

A 25-year-old Sacramento woman testified that on January 6, 1996, appellant held a knife to her neck and raped her. The woman, K.Z., testified that she had a methamphetamine problem at the time and was on a bicycle stealing mail early in the morning. (19 RT 6389, 6415, 6418.) She stopped at a closed gas station to look through stolen mail when appellant stopped on a motorcycle and asked her if she wanted to come to his house and party. (19 RT 6390-6391, 6395.) K.Z. told appellant she had some mail to go through and he helped her go through the mail. (19 RT 6395.)

Appellant told her he had additional credit cards and checks at home he could give her, but K.Z. told him no. (19 RT 6395.) K.Z. was straddling her bicycle, preparing to leave and steal additional mail, when

appellant hit in her the head from behind, knocking her to the ground. (19 RT 6398.) Appellant directed her to a small fenced area where a dumpster and milk crates were stored and threw her bicycle in the dumpster. (19 RT 6399, 6403, 6407, 6465.) She tried to run, but appellant caught her, grabbed her hair and held a knife to her neck and told her if she tried to run or scream, he would kill her. (19 RT 6401-6402.) Appellant made her orally copulate him and then raped K.Z. for what she estimated was a couple of hours. (19 RT 6505-6506.) K.Z. admitted she lied when she told police that appellant forced methamphetamine down her throat and that she was returning from bingo when the attack occurred. (19 RT 6411.)

Sacramento Sheriff Sgt. Todd Lewis testified that after he received the radio dispatch call at 4:40 a.m. in regard to the rape. He spotted appellant on a motorcycle. (19 RT 6519.) Appellant fled, driving in.excess of 70 mph in "extremely foggy" conditions with visibility at 25 feet. (19 RT 6521.) Appellant crashed on a traffic island. (19 RT 6523.) A bayonet-style knife, 12 to 16 inches long, was found on appellant. (19 RT 6525.)

Sacramento prosecutor Thomas A. Johnson testified that appellant pled guilty to possession of a dirk or dagger, with the rape charge being dropped over a concern the victim lied about ingesting methamphetamine and the consensual nature of the initial contact. (20 RT 6649, 6655.)

Fernando testified that the night before the shooting, appellant beat her for from 15 to 30 minutes, cracking her ribs. (20 RT 6666.) She also saw appellant fire a gun at Ronnie Greathouse, grazing his head, but she did not specify when the shooting occurred. (20 RT 6667.)

A neighbor, Foster-Brooks, saw the beating, testifying that appellant struck what she assumed was his girlfriend "all over. And she fell to the ground. He picked her up and he beat her some more." (20 RT 6672.) The woman fell to the ground four times and appellant kicked her four times. (*Ibid.*) "She was screaming for Joseph to stop hitting her." (20 RT 6673.)

b. Victim Impact Testimony

Marie M. Correa testified that she is the mother of two children fathered by Riley. (20 RT 6699.) It was difficult to tell her two children that their father was dead. (20 RT 6701.) She paid for him to be cremated. (20 RT 6700.) She was not married to Riley nor living with him when he died. (20 RT 6701.)

Makala D. Tiller testified that Hagan was her best friend. (20 RT 6702.) She was not living with him when he died. (*Ibid.*) She fainted when she learned of his death. (20 RT 6704.) She had a bedroom bookshelf dedicated to his memory. (*Ibid.*)

2. Defense

A private investigator, Frank Huntington, testified he discovered evidence that appellant's mother was married at least four times, though not to appellant's father, had six kids and was pregnant 13 or 14 times. (20 RT 6719-6724.) Huntington "interviewed numerous people, researched many records" and made three separate trips to Missouri where appellant lived prior to moving to the Sacramento area at age 14. (20 RT 6716.) He found evidence of 21 separate incidents involving appellant's mother and the Springfield, Missouri, police department during appellant's childhood, and that appellant lived 31 places in Springfield and nearby towns. (20 RT 6725, 6739-6741.)

Huntington said he did not receive any hard evidence of the identity of appellant's father, but the rumor in town was that he was a married man with whom appellant's mother had an affair. (20 RT 6719.) He also was told appellant's mother involved family members in bringing men home from bars to rob them and neglected appellant to the point appellant was forced to steal food from dumpsters and clothes from stores. (20 RT 6719-6724, 6780-6785, 6803, 6838-6841.) Huntington also obtained appellant's

school records, police and probation records for family members, and divorce paperwork for appellant's mother. (20 RT 6724-6729, 6741-6747; 22 CT 6462-23 CT 6663; 24 CT 6977-6991.)

Appellant's older half-brother, Max Layton, testified that it was rumored that appellant fell on his head when he was about age three and was much slower afterward. (20 RT 4819-4820.) Layton said that his mother had been married at least eight times, and was pregnant 12 or 13 times. (20 RT 6780-6785.)

Family members said that back in Missouri, the family would lure men home from bars, and rob them if they passed out. (20 RT 6839-6841.) Layton said he was also involved in a drug distribution enterprise with other family members, including his mother. (20 RT 6829-6833.)

A second private investigator, Anna Taylor, testified that appellant was married for 10 years from 1978 to 1988, fathering three girls, ages 15 to 21 at the time of trial. (20 RT 6753-6755.)

Psychiatrists and teachers testified to appellant's low intelligence. Defense forensic neuropsychologist John J. Wicks opined that appellant had a learning disability, attention deficit disorder and a mild brain impairment that caused his learning disabilities and problems with attention and concentration. (22 RT 7140, 7206.) Wicks testified that appellant had an overall IQ of 87, which is the "low or dull normal range of intelligence" in the borderline retarded range of functioning, consisting of a verbal comprehension IQ of 82, perceptual organizational skill IQ of 99, and a processing speed IQ of 79. (22 RT 7157-7158.) He said his findings were consistent with testing done on appellant at age 12. (22 RT 7162-7163.)

Wicks testified he gave appellant a total of 22 tests, and the I.Q.-related scores ranging from 62 to 94. (22 RT 7164-7165.) Appellant also showed the signs of dyslexia or learning disabilities, had mild brain processing problem and did math at a fourth-grade level and read at a

seventh-grade level. (22 RT 7165, 7172, 7174.) Wicks opined that people like appellant with learning and attention deficit disorders have a much higher rate of personality disorders, delinquency and impulsive acting out behavior. (22 RT 7206-7207.) He told jurors that appellant had a "mild brain impairment" that was "characterized by a learning disability and problems with attention and concentration." (22 RT 7206.)

A correctional consultant, James Esten, who spent nearly 20 years with the California Department of Corrections, testified that appellant was the type of person "we generally refer to as a good inmate and a lousy citizen." (22 RT 7251.) He opined that appellant, who spent much of the period from 1992 to 1998 in prison, will adjust well to prison and will not be a problem for other inmates or staff. (22 RT 7244-7251.) During prior stints behind bars, appellant "had a minimum of disciplinary reports." (22 RT 7240.)

The majority of appellant's prior inmate discipline was for "minimum to infraction level" violations and appellant "will pose no problem to staff or inmates while housed in a maximum security" prison. (22 RT 7244-7245.) If sentenced to life without the possibility of parole "he will fit right in and continue to serve his time until such time as he expires a natural death in state prison." (22 RT 7245.)

Appellant had been "written up" while in jail for 1) trying to force another inmate to have sex with him; 2) helping another inmate escape, spitting on another inmate's cell window; 3) trying to incite racial tensions by making disparaging remarks about African-Americans; and 4) smuggling food and cigarettes. (22 RT 7259-7269.) Esten said the jail allegations were not investigated to determine if they were valid, and that his assessment appellant was not a danger was based on appellant's prison records, not his jail records. (22 RT 7260-7261.)

Esten testified that under the current regulations, if appellant were sentenced to life without the possibility of parole he would be assigned to a maximum-security prison, where supervision would be constant and direct for at least 18 years. (22 RT 7237-7239.)

ARGUMENT

I. PROSPECTIVE JURORS WERE NOT IMPROPERLY EXCUSED DUE TO THEIR VIEWS ON THE DEATH PENALTY

Appellant claims three prospective jurors were improperly excused based on their views on the death penalty. (AOB 13-21.) Respondent disagrees. Appellant waived the issue when he agreed to dismissal of the jurors. Further, there is no evidence the jurors were dismissed due to their views on the death penalty. The three had questionnaire answers, and one voir dire responses, that provided adequate grounds for the dismissals.

A. Background

Two of the three jurors, CL and DL, were dismissed based on their written questionnaire answers. There was no further questioning by the court or the attorneys.[4] (6 RT 2481-2483; 7 RT 2776-2777.) The trial court questioned the third juror.

Prospective Juror DL

DL, age 73, wrote in his questionnaire that his wife of 48 years had died two months earlier and that he was "still in the process of healing" and "unable to concentrate." (9 CT 2604, 2622.) Both sides agreed to his dismissal without asking any further questions. (7 RT 2776-2777.) He was neutral on the death penalty and was willing to impose it if warranted. (9 CT 2618-2620.)

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[4] Initials are used in place of juror names, including in quotations from the reporter's transcript.

Prospective Juror CL

CL wrote that she had formed an opinion about the case and it involved "killing queer guys." (5 CT 1378.) She had written "1,000s of letters to the editor" on the subject of "how come nobody wanted me?" She had been a "'visitor to a jail. I was in jail for breaking my mothers' windows & slashing her favorite painting." (5 CT 1395.)

She listed her race as "American" and her occupation as a disabled nurse's aide. (5 CT 1379, 1381.) She said she had broken both arms and a hand and suffered burn trauma due to suffering "sexual attacks/assaults by other females." (5 CT 1381.) She reported she had suffered "sexual assaults & batteries" at the ages of 16, 26 and 34, that a man had choked her and knocked out teeth and that women had grabbed her nipples. (5 CT 1383.) She also reported strong feelings about the criminal justice system, explaining it was "attitudes mine vs. theirs – others." (5 CT 1385.)

To the question of how she would feel if evidence emerged during trial that appellant abused alcohol or drugs, she wrote: "Guilty & should be treated." (5 CT 1392.) She stated of alcohol abusers: "They are the heirarchy [*sic*] in this society." (5 CT 1391.) She wrote drug abuse was because people "want to be skinny." (*Ibid.*) She also wrote she had personal experiences with drugs users: "Roommates' 'friends' users calling/ringing the doorbell all hours of the day & night for money and rides to get drugs." (5 CT 1391.)

When asked her feelings on psychiatrists being paid to testify, she wrote: "Baseing [*sic*] my opinions and person[al] experiences psychosis drug induced or not might have a bearing." (5 CT 1390.) Her religion was "Humanist," she had a neutral view of the death penalty and she thought it was better than life in prison. (5 CT 1393.)

CL also checked that she had mental or physical health problems that would limit her ability to concentrate on trial evidence, writing that court testimony, a judge reading and courtrooms make her sleepy and that she had "a tooth that hurts." (5 CT 1398.) Both sides agreed to her dismissal without asking any further questions. (6 RT 2481-2483.)

Prospective Juror SK

SK wrote in her jury questionnaire answers that she had a neutral view of the death penalty and had "never thought about it." (6 CT 1562.) She said her religion was "Russian Orthodox" and she started her day with prayer and felt it was "God's right to give life or to take it." (6 CT 1562-1563.) She did not feel obligated to accept the position of her religion on the death penalty in this case. (6 CT 1563.)

Voir dire of SK occurred on September 17, 2001, and the court asked first about the previous week's terrorist attacks. (6 RT 2521.) SK, who was born and raised in Russia, said the attack "[t]ouched me very much because I'm citizen of this country and very upset with these events." (6 RT 2521.) When asked whether the events would impact her ability to serve, she replied: "No. No. It's serious. It's like – you know, it's like a sickness. It's mad people." (6 RT 2522.)

The court, after commenting it understood why SK was upset over the events of September 11, 2001, asked if the events changed her questionnaire answer of never having thought about the death penalty.

> Q: Okay. You've indicated on the questionnaire that you haven't thought much about the death penalty or life without the possibility of parole.
>
> Have you had any further thoughts in the last week in terms of your view on penalty issues?
>
> A: I think it's different.
>
> It's war -- the events of last week. War.

Q: Sure.

A: It's – It's – It's – didn't think exactly it's something can, you know, influence me.

Q: Did you understand the explanation I gave this morning about the way the second phase of this trial works if in fact we have one?

A: Yes.

Q: So I mean you understand that there'll only be a second phase if the jury determines that the defendant in fact is guilty of the crimes charged.

I mean you understand that?

A: Yes.

But I think it will need to be more details, more explanation, because I didn't – I'm not familiar with jurisdiction and law and everything.

Q: Hm-hmm (affirmative).

Well –

A: I'm a civilian.

Q: The only way that there would be a penalty phase would be if the jury reached a conclusion unanimously that the defendant is guilty of the charges that he is confronted with.

And if that occurred, you would then be hearing additional evidence, different kinds of evidence from both the prosecutor and the defense lawyer on the issue of what the penalty should be.

A: Hm-hmm (affirmative).

Q: And our question – do you think that you could do that and be open-minded listening to both sides presenting their evidence –

A: Yes.

Q: -- in that part of the trial?

A: Yes.

Of course.

THE COURT: Mr. Bogh or Mr. –

MR. BOGH: Yeah.

THE COURT: Mr. Bogh.

Mr. BOGH: I believe we have reached a stipulation, Your Honor.

THE COURT: Is that correct?

MR. SAWTELLE [Prosecutor]: I agree.

THE COURT: All right. Ma'am, we are going to excuse you from service on this jury.

THE JUROR: Okay.

THE COURT: I appreciate your time.

I appreciate your candor and in terms of the emotions that you are feeling with regard to the events that are occurring in the country and elsewhere.

(6 RT 2522-2524.)

B. Analysis

Appellant contends that the trial court improperly excused the three prospective jurors due to their death penalty views. (AOB 16.) Appellant waived this claim when he agreed the prospective jurors should be excused. (*People v. Holt* (1997) 15 Cal.4th 619, 654-658.) If not waived, the claim is without merit. The three were dismissed based on issues unrelated to their position on the death penalty.

Prospective jurors may be excused if their views would "'prevent or substantially impair'" the performance of their duties. (*Wainwright v. Witt*

(1985) 469 U.S. 412, 424.) Because this determination involves an assessment of the juror's demeanor and credibility, it is one "peculiarly within a trial judge's province." (*Id.* at p. 428.) "When applying these rules, the trial court's assessment of a prospective juror's state of mind will generally be binding on the reviewing court if the juror's responses are equivocal or conflicting." (*People v. Hayes* (2000) 21 Cal.4th 1211, 1285.)

"Generally, error in excusing jurors for reasons not related to their views regarding the death penalty does not require setting aside the judgment." (*People v. Kelly* (2007) 42 Cal.4th 763, 777.) The general rule is that the erroneous exclusion of a juror for cause provides no basis for overturning a judgment. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1037, internal quotation marks and citations omitted.) Appellant "has a right to jurors who are qualified and competent, not to any particular juror." (*People v. Holt, supra*, 15 Cal.4th at p. 656.)

DL's wife of 48 years had recently died and he was "unable to concentrate." (9 CT 2604, 2622.) A "juror's inability to concentrate is the good cause resulting in legal necessity." (*Mitchell v. Superior Court* (1984) 155 Cal.App.3d 624, 629.) The death or impending death of a family member is also good cause for dismissal of a juror. (*People v. Zamudio* (2008) 43 Cal.4th 327, 349-350 [juror's father near death]; *People v. Leonard* (2007) 40 Cal.4th 1370, 1409-1410 [death of juror's father-in-law]; *People v. Cunningham* (2001) 25 Cal.4th 926,-1028-1030 [juror's father near death after suffering stroke]; *People v. Ashmus* (1991) 54 Cal.3d 932, 986-987, disapproved on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117 [death of juror's mother]; *In re Mendes* (1979) 23 Cal.3d 847, 852 [death of juror's brother].)

CL, who thought the case involved "killing queer guys," had written "1,000s of letters to the editor" on the subject of "how come nobody wanted me?" She had been " a 'visitor' to a jail . . . for breaking my

mothers' windows & slashing her favorite painting." (5 CT 1378, 1395.) She claimed to have suffered repeated sexual assaults and batteries and stated that her mental or physical health problems limited her ability to concentrate on trial evidence. (5 CT 1383, 1393, 1398.)

Juror CL's questionnaire answers evidenced mental impairment and instability. The demeanor of a juror is an appropriate consideration for the trial court in determining whether to grant a challenge for cause. (*Uttecht v. Brown* (2007) 551 U.S. 1 (*Uttecht*).) As with DL, her inability to concentrate was also good cause for the dismissal. (*Mitchell v. Superior Court, supra*, 155 Cal.App.3d at p. 629.) A defendant has a due process right to a mentally sound tribunal. (See *Peters v. Kiff* (1972) 407 U.S. 493, 501 (plur. opn.); *id.* at p. 509 (dis. opn.); *Jordan v. Com. of Massachusetts* (1912) 225 U.S. 167, 176; *People v. Millwee* (1998) 18 Cal.4th 96, 144.)

With SK, the court commented that she was upset by the events of September 11, 2001. (6 RT 2522.) When the court asked if she understood its comments about the guilt and penalty phases of the trial, she replied, "I think it will need to be more details, more explanation, because I didn't – I'm not familiar with jurisdiction and law and everything. . . . I'm a civilian." (6 RT 2523.) It was appellant's trial counsel who first stated: "I believe we have reached a stipulation" to dismiss SK. The prosecutor agreed. (6 RT 2524.)

The record does not reflect that SK was dismissed for any reason other than her demeanor and her voir dire answers, a reason that all involved concluded warranted dismissal. The assessment by the parties and the trial court that SK had an inability to carry out her duties in a rational manner was supported by the record.

The trial court and attorneys did not err in dismissing the three prospective jurors. Permitting the three to remain on the jury may have impaired the defendant's right to be tried by a competent tribunal and

jeopardized the verdict. "When the statements of a prospective juror are conflicting or ambiguous, a trial court's assessment of the juror's state of mind binds this court." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1279.)

Appellant relies on *People v. Stewart* (2004) 33 Cal.4th 425. He contends: "In this case, just like in *Stewart*, the trial court erred in excusing three prospective jurors, based solely on their checked answers and brief written comments concerning capital punishment on juror questionnaires." (AOB 18-19.) In *Stewart*, the trial court erred by excusing prospective jurors based solely on written questionnaire that was unclear as to whether the juror could vote to impose the death penalty despite being personally opposed to it. (*People v. Stewart, supra*, 33 Cal.4th at pp. 444-446.) Here, the three jurors here were not excused because of their views on the death penalty. The undisputed and unanimous assessment of the parties and the trial court was that the prospective jurors had an inability to carry out their duties. That assessment is adequately supported by the record.

II. A PROSPECTIVE JUROR WAS NOT IMPROPERLY EXCUSED DUE TO HER RELIGIOUS BELIEFS

Appellant claims a prospective juror was improperly excused due to her religious beliefs. Not so. The juror's ability to impose the death penalty was substantially impaired.

A. Background

On her written questionnaire, juror SL described herself as a devout Catholic "somewhat opposed" to the death penalty. (CT 2450-2451.) She wrote she was "not sure if I could live with myself if I had to send someone to their death" and that religion played a role in 100 percent of her life. (CT 2451.) She wrote that because of her beliefs, she was leaning toward life in prison, but would "follow the law if it dictates otherwise." (CT 2452.) She said her "personal preference is not to serve on this case." (CT 2451, 2454.)

During voir dire, the court and attorneys explored the tension between SL's desire to follow the law and her religious beliefs in opposition to the death penalty. She started by saying that it would have to be "something pretty strong" for her to vote for the death penalty, but by the end of her voir dire, after stating the process had made her "think a lot about a lot of things," she said she could not live with herself if she voted for the death penalty.

> Q [THE COURT]. Do you think your opposition to the death penalty -- your fundamental religious opposition to the death penalty is of such a magnitude that [prosecutor] Mr. Sawtelle should be concerned that you can't be fair to his side as the prosecutor?
>
> A. I don't think that I would intentionally not choose it because of my belief that it's wrong. But I can't say that in logic or weighing the evidence one way or the other that wouldn't influence what I think would be strong evidence in favor of it. I mean to me I would think that it would have to be something pretty strong for me to vote that way just because of how I feel. Does that make sense to you?
>
> [¶]. . .[¶]
>
> A. I think that if it was -- like you said it would have to be something that would be so completely -- I could -- I'm not sure how well I would live with myself after that. But I think that I could. That's my job and my responsibility to do that.
>
> Q. [Defense Counsel] So there would -- your -- I think what you're saying then is that that there is -- is that case scenario where you could actually vote for the death penalty even though it might be unpleasant for you to do so?
>
> A. I believe so, yes.
>
> MR. BOGH: Okay. Thank you.
>
> THE COURT: Mr. Sawtelle.
>
> Q. (BY MR. SAWTELLE) You know there is unpleasant and then there is an inability to move on with your life. And --

A. Hm-hmm (affirmative).

Q. And, you know, we're not going to force you to be on this jury if you can't -- if you can't really do this.

A. Hm-hmm (affirmative).

Q. As I read your jury questionnaire here for example you put -- how often is the death penalty imposed? And you put too often. You circled too often.

A. Hm-hmm (affirmative).

Q. And yet you also wrote that you didn't think California has actually ever imposed it on anybody. That would suggest to me that --

A. Well --

Q. -- you don't think California as actually imposed -- executed anybody. But they have -- not too many. So with that frame of mind how is it this you can honestly and truthfully say you can actually vote for the death penalty in this case when it means that he'll be executed one day?

A. Well, my -- when I answered that question I'm assuming that I was on the jury. And I'm going to be on the jury -- I've been picked for the jury. It's not something that I would want to do or like to do. But if I'm picked to be put on the jury, I -- I have to do what I'm put there to do. And I have to do it to the best of my ability. And I would. I wouldn't necessarily like it if that was the outcome. But I would do what I'm supposed to do.

Q. The Catholic faith obviously opposes it -- the death penalty -- opposes the death penalty period.

A. Hm-hmm (affirmative).

Q. Right?

A. (Juror nodding head affirmatively.)

Q. You are aware that's what the Pope says?

A. Right.

Q. You're aware probably what your own priest says?

A. Yes.

Q. And that is as you put 100 percent of your life. I mean that is the --

A. Yes.

Q. You live it on a daily basis; right?

A. Yes.

Q. You're not out just giving lip service to it --

A. Right.

Q. -- obviously. Now, if that is the position of the church and you -- and you personally believe that as well –

A. Just this entire situation has made me have to think a lot about a lot of things and face a lot of things that I have never really had to do before. I usually could just get by with a pat answer. And now I really have to dig deep and decide what I --

Q. Right.

A. -- what I believe and what I don't believe in in this case. I don't believe that killing somebody is correct regardless of the circumstances. I lean towards the other -- myself towards life in prison. But again if I'm put in the situation where I have to make that decision, I would do the best that I could to make it honestly. And I could make it and -- and do what I thought was the right thing to do.

Q. But correct me if I'm wrong.

A. I --

Q. You're saying -- you have told us that you think it is wrong to put someone to death; right? Based on your religious beliefs it is wrong to do that?

A. I think so.

Q. How then could you ever be in a position to actually say it is right to put this person to death?

A. Truthfully I don't know. I've never faced this before. I've never been in a position to have to do that before. I -- I could only tell you that I would do the best that I could do if I was put in this position.

Q. I guess I'm asking you to articulate -- you have a very complicated -- you have a very complicated position –

A. I do.

Q. -- which is I think it is morally wrong to put something -- someone to death. And yet your telling us that you honestly would be fair, that you're totally open minded on this. But it doesn't sound like you are open minded?

A. No. I don't think I'm totally open minded to it. I don't believe that. I believe that I would do the best that I could. But I don't believe it would not influence me. I mean I'm not trying to say because I -- like I said it -- it is part of my whole life. And everything that I make my decisions on is based through that. So knowing that, I would do the best that I could to be as open minded as I could and do the right thing. But I don't know that it would not influence me in any way, shape, or form. That's not possible.

Q. It wouldn't -- wouldn't the right thing be to always vote for life if you think that death is morally wrong?

A. That would be the right thing to do. I'm sorry. I don't mean to be --

Q. I understand.

A. -- wishy-washy about it. It's just again a lot of things I've never had to face -- never had to make decisions. I -- I -- I am conflicted in that I was raised not only as a Catholic to do the right things by the way I was raised in church, but also that I have to adhere to the law and -- 100 percent and it's not acceptable not to. So I guess basically my conflict resides in that doing the right thing could mean not doing something correct in the law. I don't know.

Q. Well, I guess -- how could the right thing according as you -- your beliefs in the Bible -- in other words, which –

A. Hm-hmm (affirmative).

Q. -- is from God -- right?

A. Right.

Q. -- the right thing -- that you feel that God is telling people on earth here that we should not put someone to death?

A. Right.

Q. Well, essentially if you vote for the death penalty in this case, wouldn't you be directly violating what God told you not to do?

A. Yes.

Q. And again I'm not going to get -- ask you -- it's okay to tell us that you can't do this. If you can't do -- if you think that it would be wrong for you to sit on this jury, that you would not --

A. Well, I do think it would be wrong for me to sit on the jury. It is just because I don't think that -- I know what I'm capable of doing. I don't know that I would 100 percent be capable of doing this.

Q. I mean -- and you -- as you mentioned earlier you could not really live with yourself if you actually vote for the death penalty?

A. Yeah. That's true.

MR. SAWTELLE: No more questions.

(7 RT 2759-2760, 2764-2770, some paragraph breaks in quotations from the reporter's transcript have been eliminated.)

The trial court, in ruling the juror should be dismissed for cause, stated:

It's fairly rare we get somebody who is as thoughtful and candid as she is.

> Notwithstanding all of that it's clear to me that she is extremely conflicted. She has her religious beliefs, her moral beliefs, and she has her citizen beliefs. She has made clear in her responses to Mr. Sawtelle that she is not open minded. She has been very candid about that. She's made it very clear that she is religiously and philosophically opposed to the death penalty both in writing and orally. She has articulated her belief that she might be able to do it. But she doesn't know how she could live with that decision. She has articulated that this is not something that she should do.
>
> And although they can articulate till the cows come home that she is willing to weigh I think what she expressed very eloquently is that we need to understand that her weighing process is not on an equal playing field by any means. She is willing to consider factors which in her particular philosophy tilt substantially in favor of life without the possibility of parole.

(RT 2771-2772.)

B. Law

While "a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment," the "State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." (*Uttecht, supra,* 551 U.S. at p. 9.) A "juror who is substantially impaired in his or her ability to impose the death penalty" may be excused. (*Ibid.*) A prospective juror can be excused for cause if "unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate." (*People v. McWhorter* (2009) 47 Cal.4th 318, 340.)

Excluding potential jurors for cause simply because they voice general objections to the death penalty is improper because a person "who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State." (*Uttecht, supra,* 551 U.S. at p. 6.) Those who firmly oppose the death penalty may nevertheless serve as jurors in a capital case as long as they state clearly that they are

willing to temporarily set aside their own beliefs and follow the law. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176; *People v. Avila* (2006) 38 Cal.4th 491, 529.)

There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity. Rather, "the trial judge need only determine that the prospective juror would be unable to faithfully and impartially apply the law in the case before him or her." (*People v. McWhorter, supra,* 47 Cal.4th at p. 340.) It is "sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror." (*People v. Abilez* (2007) 41 Cal.4th 472, 497-498.) Indeed, the trial court's finding may be upheld even in the absence of a clear statement since prospective jurors "simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." (*Uttecht v. Brown, supra*, 551 U.S. at p. 7.) Thus, when there is ambiguity in the prospective juror's statements, the trial court, aided by its first-hand assessment of demeanor, is entitled to resolve it in favor of the State. (*Ibid.*) This is true even if the prospective juror's answers do not by themselves compel the conclusion that the person could not under any circumstance recommend the death penalty, since "so much may turn on a potential juror's demeanor." (*Id.* at p. 8.)

The trial court's determination is given deference and is reviewed for abuse of discretion. "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, supra*, 551 U.S. at p. 9; .) This Court's decisions are in accord: "Any ambiguities in the record are to be

resolved in favor of the trial court's determinations, and the reviewing court determines only whether the trial court's findings are fairly supported by the record." (*People v. McWhorter, supra,* 47 Cal.4th at p. 341.)

C. Analysis

Appellant contends that SL was improperly excluded based on her religious affiliation. Not so. She was excused because her religious beliefs substantially impaired her ability to return a verdict of death. The excusal was warranted.

SL, as she answered questions from the court and counsel, said that for the first time she was wrestling with the tension between her Catholicism and her desire to follow the law. If she voted for the death penalty she was "not sure I could live with myself after that." (7 RT 2764.) "I don't believe that killing somebody is correct regardless of the circumstances." (7 RT 2766-2767.) She concluded that she would be violating the word of God if she voted for the death penalty and would not be able to live with herself. (7 RT 2769.) She did not know if she was capable of voting for the death penalty. "I do think it would be wrong for me to sit on the jury. . . . I don't know that I would be 100 percent capable of doing this." (7 RT 2769.)

Appellant claims that SL stated with "some equivocation" that "she would follow the law and impose the death penalty if appropriate." (AOB 30.) SL could not commit that she would be able to follow the law and impose the death penalty. She said she might not be able live with herself if she voted to impose the death penalty. The juror was substantially impaired such that she would not have been able to do her duty and properly weigh whether to impose a death sentence. (See P*eople v. McWhorter, supra,* 47 Cal.4th at p. 341 [juror could not commit that he could vote for death where "appropriate"].) Excusing the juror here for cause was warranted.

III. THREE PROSPECTIVE AFRICAN-AMERICAN JURORS WERE NOT IMPROPERLY EXCUSED DUE TO THEIR RACE

Appellant contends the prosecutor made improper race-based peremptory challenges to three prospective African-American jurors. Respondent disagrees. The trial court found the reasons for the prosecutor's challenge of two of the prospective jurors was "quite clear." The third juror was challenged after she failed to show for the final day of jury selection. Appellant failed to establish a prima facie case of systematic discrimination. In addition, there was no evidence that the grounds articulated by the prosecutor for the dismissals were pretextual.

A. Background

Questionnaires were filled out by 180 prospective jurors. Ten listed their "race or ethnic background" as African-American.[5] Of those 10, Juror No. 66 appeared initially and filled out a questionnaire, but respondent could not determine what occurred further with that juror (10 CT 2892; 5 RT 2242, 2320-2326; 6 RT 2574-2575; 7 RT 2883-2884); Juror Nos. 31 and 152 could not impose the death penalty and were dismissed for cause based on a stipulation by counsel (9 RT 3473-3474); Juror No. 163 appeared initially and filled out a questionnaire and underwent the initial for-cause voir dire and was told to come back, but was not referenced, including as being absent, on the days when counsel selected the jury (9 RT 3564-10 RT 3577, 3798-3803; 11 RT 3880-3885, 4099-4101); Juror No. 166 filled out questionnaires and underwent the initial for-cause voir dire, but was absent on the day when counsel began exercising peremptory challenges and selecting the jury (10 RT 3580-3585; 11 RT 3885); Juror No. 129 was dismissed as not needed after it became

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[5] Two prospective jurors did not supply their race (Juror Nos. 41 and 171) and one replied "American" (Juror No. 29).

apparent there would be enough jurors (10 RT 3597-3600), Juror No. 135 appears to have still been in the jury pool when the alternates were selected (10 RT 3378, 11 RT 3885[6]); and three--Juror Nos. 84 (TM), 89 (TT), and 91 (TM)--were subject to the prosecutor's peremptory challenge and are at issue here. (11 RT 4046, 4113).[7]

African-American juror TM was placed on the jury after the prosecutor exercised his twelfth challenge; African-American juror TT was placed on the jury after the prosecutor's fourteenth challenge. (11 RT 4045-4046.) The prosecutor excused TT next with his fifteenth challenge, and TT was replaced by LT, who was excused next with the prosecutor's sixteenth challenge. (11 RT 4046.) After additional voir dire that Thursday, the court recessed until the following Monday without the prosecutor exercising additional challenges. Juror TM failed to show up that Monday, and a piece of paper was used to represent her presence in the jury box. She was excused next by the prosecutor with his seventeenth challenge. (11 RT 4099, 4113.) The prosecutor exercised one additional challenge prior to the 12-member panel being selected. (11 RT 4113-4114.) He utilized one challenge in selecting the five alternates. (11 RT 4114-4136.)

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[6] Juror LW's name appears to be incorrectly listed as "Signa Crutcher" in the reporter's transcript of voir dire. (9 RT 3378, 3382.)

[7] Appellant describes the jury pool as consisting of eight African-American jurors, rather than 10. (AOB 32). He also states that all but three of the African-American jurors were excused for hardship, for cause, or as not needed. (AOB 32.) The absence of three prospective African-American jurors was not elaborated on (Jurors No. 66, 163 and 166), with the absence of two of those not being mentioned in the record (Juror Nos. 66 and 163). (7 RT 2883-2884; 9 RT 3564-10 RT 3576, 3798-3803; 11 RT 3880-3885, 4099-4101) This would seem to indicate the absence of Juror Nos. 66 and 163 was not unexpected to the trial court. The third (Juror No. 166), like TM, appears to have failed to show on the final day of jury selection. (11 RT 3885.)

Juror TT

Prospective juror TT, 33, wrote that he was a medical biller for UC Davis. He described himself as neutral on the death penalty. He wrote: "I'm kind of scared at the possible thought of that. But I think that something is needed as a deterrent. It's unfortunate when it's the only option." (12 CT 3446, 3458.) He also said he was unsure whether the prosecutor's burden of proof should be higher in a murder case. (12 CT 3452.)

TT's brother had spent about six years in prison, and had gotten out two months earlier. (12 CT 3449.) He was not sure what his brother had done because his family did not talk about it. (*Id.*)

TT listed himself as single, and stated he had been living with a significant other for two years. (12 CT 3444) On the portion of the form for "your spouse or cohabitant's present or past occupations," TT listed that person as a male who worked as a senior analyst for UC Davis. (12 CT 3448) TT also reported that two years earlier he had been "assaulted by my spouse's ex-lover after he broke into our house" and had obtained a restraining order against him.[8] (12 CT 3448.)

The prosecutor stated that TT's "body language during voir dire was incredibly timid" and he was "probably the quietest person that we interviewed. He was very quiet, and I characterized him as being timid." (10 RT 4124.) TT described himself as a follower. "I just don't like the responsibility. I work better that way." (12 CT 3452.)

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[8] Appellant states the assault was perpetrated by TT's "wife's ex-lover." (AOB 35.) However, it appears unclear from the record whether TT's former partner is male or female; his current partner/cohabitant is male. (12 CT 3444, 3446, 3448.)

During voir dire, the court and appellant's trial counsel asked TT questions, but the prosecutor asked him no questions.

Q. [BY THE COURT] Does this particular -- well, how do you feel about the prospect of being selected to serve on this jury?

A. How do I feel about it?

Q. Yeah.

I mean does it make you nervous? Make you happy?

A. A little nervous considering this is the first time that I have done it.

But I mean -- ever being on the jury.

But I -- in considering the situation.

But it's not something that I don't -- feel I can't do.

THE COURT: Counsel, I don't believe I have any other questions.

Mr. Bogh.

MR. BOGH: Yes.

Just a couple, Your Honor.

Q. (BY MR. BOGH) On -- on page 11, question 34, there was a question that you perhaps didn't know how you wanted to answer.

And it was do you believe the people's burden of proof should be higher than proof beyond a reasonable doubt in cases involving a charge of murder? And there was a yes or no. And you you wrote I don't know. I think murder is a serious charge and I'm not sure about the question.

Do you kind of recall trying to deal with that one?

A. I was -- it was just kind of a long day and I was trying to -- you know, didn't want to just give an answer.

Q. Sure.

A. I figured -- if I left it blank, I figured you would ask me -- if it was an important question, you'd ask me again.

I was kind of confused about the people -- I mean the people -- who the people were. And -- I just wasn't sure and I didn't want to speculate. So I just thought that you would ask.

Q. Okay. And I understand that.

You know, the people are the prosecutor here.

A. Okay.

Q. The district attorney.

Do you think because this is as you know a very serious murder charge that -- that the district attorney's burden of proof should be higher than proof beyond a reasonable doubt?

A. Considering the -- the -- I guess the -- the -- what am I trying to say?

Considering the penalty I guess.

Q. You know, seriousness of the charge.

A. Seriousness of the crime.

Q. Okay.

A. I think it would be, yeah -- or would have to prove it -- well, no.

I would just say it would have to be proven without a reasonable shadow of a doubt.

Q. I am sorry.

You kind of dropped your voice down there.

A. Okay. With beyond a reasonable shadow of a doubt like I said.

So are you saying it would have to be more or less or the same?

Q. Okay. I'm telling you what the burden is supposed to be.

I just want to know if you think it should be more than beyond a reasonable doubt.

That's my question.

A. Oh.

I really don't know.

I mean I'm not sure what you're asking me.

Q. Okay. You indicated that you thought on the -- on the death penalty it was -- that it's something that's needed as a deterrent.

A. Hm-hmm (affirmative).

Q. Okay. Have you ever thought about life without the possibility of parole as a deterrent?

A. Yeah.

Q. Do you think that that is a pretty harsh sentence?

A. Yeah.

Q. I mean you never get out. You just go there and that's it.

A. Yeah.

Q. So would you be able to -- do you see that as a -- as a reasonable alternative to the death penalty?

A. Once again it would depend on the situation.

I mean I think both -- that as well as the death penalty are deterrents, the death penalty being a stronger deterrent.

But I mean if you're going to commit the crime, that just depends on the situation and person that's doing it.

So I don't expect that -- for me personally life in prison is a reasonable deterrent.

For me the death penalty -- that's an even further deterrent.

It just depends on the personality. I mean I don't know -- I don't want to speculate on it. Each individual person is -- a person is

going to initially for whatever reason put themselves to not even think about those. You know, I can't speculate on this.

For me as a person, you know, I wouldn't even need to think about the death penalty or life in prison because that's enough.

Q. Okay. If -- if you got to the penalty phase, which would mean that you would have already have found Mr. Duff guilty of a -- at least one first degree murder along with the special circumstance such as robbery, you will be going into the penalty phase.

Okay?

A. Hm-hmm (affirmative).

Q. Would you be able to look at both forms of punishment on a -- on a equal basis -- at least as when you -- when you went into the second phase as -- as you wouldn't be strongly in favor of one or the other until you heard the evidence?

A. At this point I would say I would not be able to think of it.

I mean I would -- just wouldn't even think either or.

It's just because what I'm told to do.

So I mean I'm trying to understand what you're asking me.

Q. Okay. What I'm saying is -- you would have already gone through the first phase.

A. Right.

Q. Okay. And so there you are. You are sitting -- you say, well, I found him guilty of first degree murder.

A. Okay. I see what you're saying.

Q. Okay. We've -- we've -- we've ruled out --

A. Sorry.

Q. Defenses we've ruled out. We have found him guilty.

A. Hm-hmm (affirmative).

Q. Okay. So now we're going to start up the second phase --

A. So you're saying --

Q. -- and go -- you know, you're going to -- going to hear evidence about mitigating and aggravating.

My question is before you even hear that type of evidence are you going to be leaning toward the death penalty because you feel that that is more severe punishment to where you favor it to some degree?

A. No.

I would just -- so make sure I understand what you are saying.

You're saying that you are going to present evidence if that was the case -- if he was proven guilty, you would present evidence to basically show whether he would be deserving of either or -- life in prison or the death penalty.

Is that what you're saying?

Q. Correct?

A. Okay. No.

I wouldn't -- I would just listen to what you have to say.

Q. Okay. Thank you.

A. Hm-hmm (affirmative).

THE COURT: Mr. Sawtelle.

MR. SAWTELLE: I have no questions.

(8 RT 3074-3079.)

The prosecutor excused TT, and later explained that he was worried because TT appeared scared and timid and may not have fit in with the remainder of the jury.

I'd like to point out TT on question number 36 of his questionnaire, indicates his brother has been in prison on a prior occasion, about 6 years ago. He just got out two months ago.

So it would appear that he did about a 6-year term in state prison.

TT also had an issue where he was unsure on question 54 about the People's burden of proof and whether or not two it should be higher in a case involving murder, which was of some concern to me.

In addition, TT initially marked neutral on question number 95 as his opinion for the death penalty. I noted that when we individually voir dired him that he -- his body language was incredibly timid, I would say.

And I am sure that the court will probably remember as well during voir dire, he was, I think, probably the quietest person that we interviewed. He was very quiet, and I characterized him as being timid.

He indicated actually on question number 94 he was scared. Quoting, I am kind of scared of the possible thought of that, referring to the question about the death penalty.

And he reiterated that here in court, as I recall, at least according to my notes. He seemed scared about that idea he might have to vote for the death penalty, even though he indicated he could do it.

I am obviously looking for jurors that are strong people and who can make a tough decision if it comes down to that.

Another thing that concerned me is, he was -- he was in the -- on one of the days last week that we were here, when I went out into the hallway, TT was sitting outside in one of the -- just one of the benches on the outside, and he was stretched out on the benches with his sunglasses on, and looked like he was snoozing.

Frankly, that just bothered me from a point of view of being able to fit in with the rest of the jurors. Seemed a little bit unusual to me.

I know people do it occasionally, but it seemed – it was something I noted, I will just say that. Is that somebody that might not fit in with this jury.

(11 RT 4124-4125.)

Neither the court nor the defense attorneys made any further comments in regard to the peremptory challenge exercised on TT.

Juror LT

LT, 30, a software engineer who worked at Intel, described himself as neutral on the death penalty. (CT 3506.) He thought it should be "evaluated on a case by case basis," and had "no hard rule in my mind when to apply." (*Id.*) He added that there were "too many variables in life to apply a constant such as this in all cases." (*Id.*)

He had been arrested in 1994 for driving with a suspended license in a car with suspended registration. He wrote he was "not happy about paying fine & fact that I lost my car, but good thing in the long run." (CT 3497.)

He did not know if the People's burden of proof should be higher in murder cases and thought a person's background and upbringing could affect a person's adult life. "But it can have either a positive or negative affect. Basically [a] person decides to follow the example set or go against it." (12 CT 3500, 3509.)

LT also wrote that he felt that defense attorneys and prosecutors are a "necessary function of the judicial system, but make way too much money." (CT 3498.) During voir dire in which the court and the attorneys asked questions, LT said he welcomed the opportunity to sit on the jury and he backed away from his comment about attorneys making too much money.

> Q. [BY THE COURT] How do you feel in general about the prospect of serving on this particular case?
>
> A. To be honest I'm actually kind of looking forward to it.
>
> I've wanted to be in jury duty for some time now, and I feel that it's the perfect thing here. The first time around I get a case where I get to really get involved in and understand the legal system a little more. So I welcome the chance.

THE COURT: Okay. Mr. Mahle.

MR. MAHLE: Thank you, Your Honor.

Q. (BY MR. MAHLE) . . . You know, there is a large job to be done here in the guilt phase and the penalty phase.

Mr. Sawtelle has a lot of things to do. We have a lot of things to do?

A. Hm-hmm (affirmative).

Q. And -- and to be quite honest your opinion of the lawyers in general is probably not as high as it possibly could be.

Is that a fair comment or -- I'll look at question 42.

You referred to the money aspect of this.

A. I don't think my opinion of -- I don't necessarily think my opinion of the lawyers is a bad one. There are just certain things that I feel in our -- in our society that are necessary and not -- I guess not everyone gets access to the same level of quality. And that's why I say that I believe lawyers are somewhat -- in some levels are paid a bit more money than the job -- I think that when you set the high price tags on a quality level lawyer, then not everyone is given the same access to the resource.

Q. So it's -- it's an issue of access --

A. Yeah.

I think more my thing --

Q. -- okay -- for all levels of society?

A. Yeah.

Q. Okay.

A. I think more what I was trying to get to there.

Q. I know on a particular case that would relate to – to where -- where the defense in a case would be at a disadvantage if you were sitting as a juror?

A. You're asking me can I think of a case?

Q. I mean are you referring in your mind to a certain case?

A. Oh, no.

Just general impressions.

I have no specific case on there -- just my general impression.

And realize that some of that is also I'm sure tainted by television and everything else that we see in society.

Q. Okay. Knowing what you know, LT, so far about this case -- and I know you mentioned you were anxious or willing -- more than willing to sit on this case -- could you sit on this case and be fair to both sides knowing what you know at this point in time?

A. I think so.

Q. Okay. If you were Mr. Duff sitting in his seat -- I don't want to put in there. If you were there and you switched places, would you feel comfortable having you as a juror in this case?

I know I worded that badly.

But do you understand what I mean?

A. Yeah.

I understand what you mean.

Q. Just can Mr. Duff feel comfortable that he's going to get fair shake from LT as a juror in this serious case?

A. Yes.

I think he would.

[MR. MAHLE]: Thank you.

Nothing further.

THE COURT: Mr. Sawtelle.

MR. SAWTELLE: Yeah.

Q. (BY MR. SAWTELLE) I got some follow -- up questions.

Excuse me.

Did -- you put on criminal defense attorneys they're necessary but they make way too much money and then you said your opinion of prosecuting attorneys is the same as that.

Where did you get the impression that we make all this money?

A. As I say what you see on TV, what you -- what pieces of cases you do see.

It seems to me lawyers do make a exorbitant amount of money.

But I can make the same arguments for television personalities. I can make the same arguments for football players, baseball players -- the same thing.

Q. Okay. Do you understand I'm just --

A. I'm not necessarily trying to pick on lawyers.

But there -- I think in all honesty when I get back to that question -- I really took a lot of it seriously, and it took me quite a while to finish this survey. And I -- those two questions exactly -- I remember coming back to them at the very end and couldn't think of anything to say there. I really couldn't. And so that was what popped in there.

I think it was an attempt at levity as also going through my mind.

So I apologize if that --

Q. Would it -- well, here is what I am concerned about.

You're looking over at him and maybe thinking Mr. Duff here is -- is -- maybe in this case he doesn't have -- maybe the lawyers aren't getting paid enough for the proper access.

Are you concerned about that?

A. Not concerned in any way. Honestly I didn't -- I don't know how much lawyers are making. I -- I don't know what yours are making.

I think in -- in retrospect the way I answered that question probably wasn't the best.

Q. All right.

A. You understand my -- no.

Q. To allay your concerns all of us are -- whatever we get is all pre-determined as a set government rate that we all get.

Does that help you out a little bit?

A. Sure. I can live with knowing that.

Q. All right. Good enough.

MR. SAWTELLE: I'll pass for cause.

THE JUROR: Thanks, guys.

MR. MAHLE: Can I -- one more question, Your Honor, in general.

I should have said this earlier.

RIGHT1: Well, go ahead.[9]

RIGHT2: Go ahead.

I am sorry.

MR. BOGH: No ask your question.

Q. (BY MR. MAHLE) Is it -- there a -- some sort of concern that there are two lawyers in this particular case on the defense -- is that something that is -- interested you or not?

A. There's no concern on that honestly.

Q. Okay. I can --

A. Like I say in retrospect I probably wanted to rescind what I said in this question.

---

[9] RIGHT1 appears to be Bogh and RIGHT2 Mahle.

MR. MAHLE: Thank you, Your Honor.

THE COURT: I want to talk about software people and how much they make.

MR. MAHLE: Intel?

THE JUROR: Touche. Touche. Touche.

. . .

Q. You were arrested a number of years ago for driving on a suspended license and pulled [over] because of expired tags.

A. Correct.

Q. Did you end up going [to] court and paying a fine?

A. Yeah.

Q. Anything remarkable about that?

I mean did the officer take you out and beat you?

A. No. No.

It was a case of -- you instructed us at the beginning to be very honest and forthcoming. And I did not want it to be a situation of me to say no in that case and maybe some research determines that later and it adversely effects the trial. So that was my -- my reason for putting that there.

Q. And we appreciate that.

You also put down here below you lost your car as a result of that?

A. Yeah.

How did that happen?

A. It was impounded because it didn't have the tag. And I was a poor, broke college student who didn't have the funds to pay the impound fee. So the car's gone.

Q. Let's hope it was a crummy car.

A. Yeah.

It was about a ten year old Camaro at that time. So it had given it's life valiantly.

Q. You refer here to your brother, and there is bunch of question marks.

So --

A. Actually -- I actually realize I wrote down brother. I meant my mother's brother. He -- it's actually my only --

I'm the only male in my family.

Q. Okay. Your mother's brother has had one or more encounters with the justice system?

A. Correct.

Q. You have these question marks.

Is it fair for us to presume that you don't know exactly what the charges are?

A. That is correct.

I know that they are drug related. After that I don't know any other information.

Q. And is this old news or something still going on?

A. Old news to me because I don't associate with him very often.

But he has been in and out a few times.

Q. And when you say in and out -- in and out of rehab? In and out of jail?

A. Prison.

Q. In and out of prison?

A. In and out of prison.

Q. Okay.

A. So --

Q. Anything about -- I realize you're making it very clear that he's not a associate of yours or you're not particularly close to him. You don't have a lot of information.

But do you have any strong feelings as a result of whatever you know about him and his experiences while incarcerated that you think would come into play in this kind of case?

A. I don't think so.

THE COURT: LT, I can't think of another thing to ask you.

Any counsel have any additional questions?

MR. SAWTELLE: None.

MR. MAHLE: No, Your Honor.

THE COURT: All right. Pass for cause, Mr. Sawtelle?

MR. SAWTELLE: Yes.

THE COURT: Mr. Bogh?

MR. BOGH: Pass.

THE COURT: Mr. Mahle?

MR. MAHLE: Pass for cause.

THE COURT: Thank you, LT.

(8 RT 3087-3098.)

The prosecutor explained his reasons for challenging LT.

I really probably don't need to say much at all. You look through his questionnaire, some of his answers, they jump out at you as being unusual.

He was, I believe, also late to court one day by about 30 minutes late to court. He was, in fact, I think, the last one to arrive on a day when we had several people late.

> But he thinks that the DA and the defense attorney both make way too much money. He mentioned in his questionnaire, and he indicated when he was in here during questioning, that he welcomed the chance to be on this jury.
>
> And his whole attitude was one that screamed out that he wanted to be on this jury. That always bothers me when someone is really trying to get onto a jury. He had not only unusual answers in here, but also in court.
>
> I thought his mannerism was very unusual. And I know Skip, the bailiff, had mentioned a couple of times that he had -- he kept having lots of questions, and he seemed in general an annoyance, and someone that seemed to me that was going to be a -- potentially a big problem on this jury.

(11 RT 4125-4126.)

Juror TM

TM, 39, wrote on her questionnaire that as an African-American, she had seen "racial profiling, brutality and unfair treatment." (12 CT 3333.) She wrote she was neutral on the death penalty. "I am an average working citizen, mother, wife & daughter. I have no explanation for something I have never encountered." (12 CT 3338.)

TM thought that "people generally are products of their environment." (12 CT 3341.) She was the mother of three children living at home, ages 10 months to 12 years old, and two step children who did not live at home. (12 CT 3325.)

During voir dire, only the court asked TM questions. (8 RT 3041-3043.) TM was seated as one of the 12 jurors in the jury box on the second to last day of jury selection. On the final day of jury selection, she was not present. The judge reported that TM "called to report she has been stood up by her baby-sitter, and she has no ability to get anyone to care for her child or children." (11 RT 4086.) After conferring with the attorneys, a piece of paper was used to represent her place in the jury box. After the

prosecutor challenged the absent TM and one additional juror, the final panel was selected. (11 RT 4113-4114.) Counsel then selected five alternates. (11 RT 4114-4119, 4134-4136.)

Appellant claimed the prosecutor was "kicking minority jurors who might be more favorable to the defense, although there is nothing in their questionnaires that – where I see there would be a problem." (11 RT 4121.)

The trial court then commented that the prosecutor had exercised 17 peremptory challenges, including three in a row against prospective African-American jurors, TT, LT and TM. (11 RT 4122.) The trial court found that the defense had not "established a prima facie case for the systematic exclusion of a suspect class, specifically African Americans." (11 RT 4122.) The trial court added that "the record, quite frankly, is quite clear with regard to TT and TL. But with regard to TM, if you are inclined to elaborate, feel free." (11 RT 4123.)

The prosecutor then explained his reasoning for challenging TT, LT (quoted above) and TM. The prosecutor agreed that TM may have appeared "somewhat neutral," but thought she posed potential problems for the prosecution as a juror.

> But they obviously -- the defense obviously wanted TM on this jury. I think that's clear by the fact they did not exercise a peremptory.
>
> And of course, I think that's an interesting point. They obviously see some of the same things I am concerned about, and by them not kicking her off, they have indicated they think she is totally neutral.
>
> However, I would point out number 61 of the questionnaire, she indicated that being of African American [descent], she has seen racial profiling, brutality, and unfair treatment.
>
> One of the issues in this case that the court is not aware of at this point probably is that I believe there will be some evidence

coming into court here about possible police brutality against Mr. Duff.

Not only does he mention it repeatedly, or I guess alluded to during his interview that the court has already seen with Mr. Woods, Detective Woods.

He indicates that when he was arrested, he was beaten by the police officer who arrested him. He mentioned during his interview his ribs are hurting.

Later in some jail tapes to his girlfriend and his mother, he continually complains that -- about the cops and the way they beat him up and hurt him.

I don't know what role that might play for the defense in this case, but I think it's an issue out there that could be of concern, particularly when there is a taped statement of the defendant or confession, that I will call confession anyway, by the defendant, there could be concerns, or could even be an issue that he made an involuntarily statement or made a statement in order to avoid getting hurt by the police.

Those are things that I think someone like TM, because perhaps of her life experiences, and at least her attitude or -- excuse me, her opinion here that she has seen brutality, which is a pretty tough word to put down on this questionnaire.

I don't remember anybody else using this word. She might be more likely to listen to, more open to, the idea that the defendant was, in fact, brutalized by a police officer or hurt by a police officer, and that could ultimately effect not only her opinion in the guilt phase, but maybe effect her opinion in the penalty phase as well.

I would also note that she went from being neutral on the death penalty in her questionnaire -- oh, excuse me. I am looking at one -- another one, that's not her.

Another answer that perhaps wouldn't be a big deal with most jurors, but in combination with the other issues that I am concerned about with TM, number 116, she indicates that people generally are products of their environment.

Of course under Factor K, and I -- out of fairness, many people put that similar answer under 116, but under Factor K, the defense will be able to argue pretty much almost anything.

But one of their main issues is going to be that the defendant is, in fact, a product of his own environment, that he was -- that he was mistreated when he was younger, that he had a bad childhood, and that it's no wonder that he ended up in the place he is.

And I think that kind of an argument, just from my reading of the questionnaire and watching TM, listening to the answers she gave in court, I think she is going to be more susceptible to that kind of an argument.

And I think that will complete my answers or my comments for the record.

THE COURT: Just so it's clear, well, I think it is clear, I asked Mr. Sawtelle if he wanted to put anything on the record, and he has done so. Mr. Bogh, if there is anything you want to put on the record, I will give you an opportunity, although as I said, Mr. Sawtelle did not have to do what he just did.

MR. BOGH: Well, just looking at TM, the call of the question was about races being treated unfairly, and Mr. Duff is obviously white.

And, you know, I think the question is very clear that she talked about because if you were black or some other race, you know, you are treated unfairly. And I don't think that that is any revelation on her part.

How you can worry about that being transferred to Mr. Duff who is white, I think that appears unsupported.

And I would submit that probably close to 90 percent of the people that answered the questionnaires felt that the person's background was something that they could look at, and had a similar answer that she did. That's my observations.

MR. SAWTELLE: There is one other thing, I should make one more comment. Pretty obvious, I believe it's clear from the record, I think we put it all on the record, TM wasn't here even today.

> And it was also pretty clear, I thought, when we departed last week, that today was the final day for jury selection, and I think that's another important point.
>
> That, at least, makes a difference to me, that somebody on the very last day of a long process of jury selection did not make an effort, and I guess we don't know exactly what efforts she made to actually get here today, but that concerns me that she didn't even show up today.
>
> THE COURT: Mr. Bogh, anything else?
>
> MR. BOGH: Well, emergencies will come up, and she did the best she could to call the court. I think she showed the proper degree of responsibility.

(11 RT 4126-4130.)

Appellant's trial counsel claimed that the prosecutor was improperly excusing minority jurors. (11 RT 4121.) The trial court found that appellant had not established a prima facie case that the prosecutor had improperly excluded the three prospective African American jurors. It allowed the prosecutor to elaborate on the reasons for his peremptory challenges. (11 RT 4122-4123.) The prosecutor also explained that while three of his final four peremptory challenges to regular jurors (not counting alternates) were used on African-Americans, that occurrence was "essentially just a coincidental luck of the draw," with TT and LT following each other into the same seat in the jury box at the end of the previous court day, and TM then failing to show for the last day of jury selection. (11 RT 4046, 4122-4124.) Neither the trial court nor defense counsel challenged any of the prosecutor's comments as factually inaccurate.

Court Ruling

The trial court initially stated it did not "believe defense has established a prima facie case for the systematic exclusion of a suspect

class, specifically African Americans. [¶] However, having read the cases, Mr. Sawtelle, if you would like to say something with regard to TM, that would be fine. I think the record, quite frankly, is quite clear with regard to TT and LT. But with regard to TM, if you are inclined to elaborate, feel free." (11 RT 4122-4123.)

After the prosecutor elaborated on the reasons for his peremptory challenges to all three of the African-American jurors, the trial court also pointed out that appellant's trial counsel had also challenged members of minority groups.

> THE COURT: Just so it's clear, I understand what I am about to say has absolutely no impact, and it's not meant to shore up Mr. Sawtelle's explanation which he voluntarily gave.
>
> In Joan's conversation with TM, she said something to the effect that she was supposed to be on vacation this week, and that her baby-sitter apparently got confused and didn't show up because the baby-sitter thought she was going to be on vacation this week.
>
> So I am just adding that since I failed to mention it. But I guess I am adding it for the clear purpose of saying, you know, if you are on a jury selection process of this length, you, one would think, you'd made fairly sure with 5 kids, including a 10-month-old, your baby-sitter was squared away.
>
> I also want to add for the sake of the record, that it is not Mr. Sawtelle and Mr. Sawtelle alone who has been excusing people who are non-white.
>
> As Mr. Bogh correctly stated, an Asian female has been excused as well as three African Americans. On the defense side, first peremptory used by the defense, I believe is a mid-eastern, Mr. Phommarth.

> In addition, a black female, Moran[10], hispanic male, Varela, and Hispanic male, Pannell, and I only put him like that because that's what I thought he looked like. His questionnaire may bear out I am out to lunch.
>
> But at any rate, I believe that there is no prima facie case that has been demonstrated. Mr. Sawtelle is correct in terms of his rendition of how TT and then LT were seated.
>
> That is not a case where either of them had been sitting for long periods of time, and suddenly in the wake of passes by the defense, Mr. Sawtelle chooses to eliminate African Americans on the panel. The motion is accordingly denied.

(11 RT 4130-4131.)

B. Law

A prosecutor "may exercise a peremptory challenge to excuse a juror for any permissible reason or no reason at all." (*People v. Huggins* (2006) 38 Cal.4th 175, 227.) "The purpose of peremptory challenges is to allow a party to exclude prospective jurors who the party believes may be consciously or unconsciously biased against him or her." (*People v. Jackson* (1992) 10 Cal.App.4th 13, 17.) Race-based peremptory challenges violate the federal constitutional equal protection guarantee and the state constitutional right to a jury drawn from a representative cross-section of the community. (*Batson v. Kentucky* (1986) 476 U.S. 79, 89, 96; *People v. Wheeler* (1979) 22 Cal.3d 258, 276-277, overruled in part by *Johnson v. California* (2005) 545 U.S. 162; see also *People v. Mills* (2010) 48 Cal.4th 158, 173; *People v. Bonilla* (2007) 41 Cal.4th 313, 341.)

The trial court analyzes a *Batson/Wheeler* challenge with a three-step inquiry: "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory

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[10] Moran lists her race as Hispanic in her questionnaire. (5 CT 1500.)

challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*Rice v. Collins* (2006) 546 U.S. 333, 338, citations omitted.) The three-step procedure also applies to state constitutional claims. (*People v. Mills, supra,* 48 Cal.4th at p. 173; *People v. Lenix* (2008) 44 Cal.4th 602, 612-613.)

A prosecutor is presumed to exercise peremptory challenges in a constitutional manner. (*People v. Alvarez* (1996) 14 Cal.4th 155, 193, citing *Wheeler, supra*, 22 Cal.3d at p. 278.) A prosecutor's explanation for the exercise of peremptory challenges can be considered in assessing whether a prima facie case was established. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 723-724 [relying in part upon justifications offered by prosecutor in support of trial court's determination that no prima facie case had been made under *Wheeler*].) The three-step *Batson* analysis "is not so mechanistic that the trial court must proceed through each discrete step in ritual fashion. Thus, the trial court may invite the prosecutor to state race-neutral reasons for the challenged strikes before announcing its finding on whether a defendant met the first step of the *Batson* test by making out a prima facie case of discrimination." (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 500-501.)

Indeed, "it is the better practice for the trial court to have the prosecution put on the record its race-neutral explanation for any contested peremptory challenge, even when the trial court may ultimately conclude no prima facie case has been made out. This may assist the trial court in evaluating the challenge and will certainly assist reviewing courts in fairly assessing whether any constitutional violation has been established."

(*People v. Bonilla, supra*, 41 Cal.4th at p. 343, fn. 13; see also *People v. Adanandus, supra*, 157 Cal.App.4th at pp. 500-501 [quoting *Bonilla*]; *People v. Mayfield, supra,* 14 Cal.4th at pp. 723-724 [even where no prima facie case found, court may properly consider reasons actually given by the prosecutor].)

Only at the third step of the *Batson/Wheeler* analysis does the persuasiveness of the prosecutor's proffered justification become relevant. (*Johnson v. California, supra*, 545 U.S. at p. 171.) An implausible or fantastic justification will often be found to be pretext for purposeful discrimination. (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) The third stage "comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 339.) "In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office who employs him or her." (*People v. Lenix , supra*, 44 Cal.4th at p. 613, fn. omitted.)

The law recognizes that a peremptory challenge may be predicated on a broad spectrum of evidence suggestive of juror partiality, ranging from the obviously serious to the apparently trivial, from the virtually certain to the highly speculative. (*Wheeler, supra*, 22 Cal.3d at p. 275; *People v. King* (1987) 195 Cal.App.3d 923, 933.) Furthermore, "the question is not whether we as a reviewing court find the challenged prospective jurors similarly situated, or not, to those who were accepted, but whether the record shows that the party making the peremptory challenges honestly

believed them not to be similarly situated in legitimate respects." (*People v. Huggins, supra,* 38 Cal.4th at p. 233.)

There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the opposing party bears the burden to demonstrate impermissible discrimination. The party raising the *Batson-Wheeler* challenge bears the ultimate burden of persuasion. (*Johnson v. California, supra*, 545 U.S. at pp. 168-171; *People v. Bonilla, supra*, 41 Cal.4th at p. 341.) In contrast, "[t]he party seeking to justify a suspect excusal need only offer a genuine, reasonably specific, race- or group-neutral explanation related to the particular case being tried." (*People v. Arias* (1996) 13 Cal.4th 92, 136.) The justification proffered for the particular excusal "need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (*Ibid.*)

"What is required are reasonably specific and neutral explanations that are related to the particular case being tried." (*People v. Johnson* (1989) 47 Cal.3d 1194, 1218.) " '[T]he trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine.' Inquiry by the trial court is not even required. 'All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory.' A reason that makes no sense is nonetheless 'sincere and legitimate' as long as it does not deny equal protection." (*People v. Stanley* (2006) 39 Cal.4th 913, 936.)

The trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. (*Snyder v. Louisiana* (2008) 552 U.S. 472, 477.) These determinations lie "peculiarly within a trial judge's

province," and "in the absence of exceptional circumstances," this Court defers to the trial court. (*Ibid.*) "So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal." (*People v. Mills, supra,* 48 Cal.4th at p. 175, 184, quoting *People v. Lenix, supra*, 44 Cal.4th at pp. 613-614.)

At the time of trial in 2001, California courts required a showing of a strong likelihood of discrimination to establish a prima facie *Batson/Wheeler* challenge. (*People v. Box* (2000) 23 Cal.4th 1153, 1188, fn. 7, disapproved on other grounds in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn.10; *Wheeler, supra*, 22 Cal.3d at pp. 280-281.) In *Johnson v. California, supra,* 545 U.S. 162, the United States Supreme Court rejected the "strong likelihood" standard, and held that a prima facie challenge required only that the evidence or circumstances give rise a "reasonable inference" of discrimination. (*Id.* at pp. 166-168.)

Since the trial here occurred before *Johnson*, and nothing in the trial judge's comments indicates the standard it applied, this Court reviews the record independently to determine whether there is a "reasonable inference" that the prosecutor excused the jurors on a prohibited discriminatory basis. (*People v. Howard* (2008) 42 Cal.4th 1000, 1016-1018.)

C. Analysis

An independent review of the record shows appellant did not establish a prima facie case that the prosecutor's peremptory challenges created a "reasonable inference" of discrimination. This Court can consider the race-neutral reasons given by the prosecutor for his challenges.

The circumstances that caused three prospective African-American jurors to be excused in a row near the end of jury selection were adequately explained. The prosecutor provided race-neutral reasons for excusing the three jurors.

With TT, the prosecutor explained: 1) He was scared at the thought of imposing the death penalty; 2) He was "probably the quietest person that we interviewed" and was "timid;" 3) His brother had gotten out of prison two months earlier after a six-year prison term; 4) He was unsure of the prosecution's burden of proof and whether it should be higher in murder cases; and 5) During a break, the prosecutor observed him stretched out on a bench outside the courtroom, wearing sunglasses and apparently sleeping. (11 RT 4123-4125; 12 CT 3449, 3452, 3458.) The prosecutor added he was "looking for jurors that are strong people and who can make a tough decision" and that TT might not be "able to fit in with the rest of the jurors." (11 RT 4125.)

Peremptory challenges may be exercised for some demeanor-based reasons. (*People v. Reynoso* (2003) 31 Cal.4th 903, 925-926.) "A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 613; see also *People v. Lancaster* (2007) 41 Cal.4th 50, 76["[a] tendency toward equivocation" may be legitimately found objectionable by a prosecutor]; *People v. Johnson, supra,* 47 Cal.3d at p. 1219 [trivial reasons such as "body language" and "mode of answering questions" legitimate grounds "so long as asserted in good faith"].)

A juror's shy and withdrawn demeanor may be considered among other valid reasons. (*People v. Barber* (1988) 200 Cal.App.3d 378, 396-397 [excused "shy and withdraw" juror also wore a "Coors jacket" and had a brother who pled guilty to theft within the past 18 months]; see also *Wheeler, supra*, 22 Cal.3d at p. 276 ["bare looks and gestures" can be evidence of a specific "bias relating to the particular case on trial or the parties or witnesses"]; *People v. Johnson, supra,* 47 Cal.3d at pp. 1217-1219 ["tired" appearance, defensive body position, sympathetic looks at defendant] .)

Race-neutral reasons for peremptory challenges "often invoke a juror's demeanor (e.g., nervousness, inattention)." (*Snyder v. Louisiana, supra,* 552 U.S. atp. 477.) Such subjective matters, such as timidity in the way questions are answered, are appropriate grounds for a peremptory challenge. "[I]f jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge [them] even though similar types remain." (*People v. Johnson, supra*, 47 Cal.3d at p. 1220.) As our Supreme Court has explained: "[N]othing in *Wheeler* disallows reliance on the prospective jurors' body language or manner of answering questions as a basis for rebutting a prima facie case." *(People v. Fuentes* (1991) 54 Cal.3d 707, 715.)

TT also had a brother who several months earlier had been released from prison after serving six years, though TT said he did not to know the crime his brother committed, but he was guilty and deserved to be punished. (12 CT 3449.) This alone would serve as a valid race-neutral reason to excuse him since the revelation by a prospective juror of prior negative contact between a close relative and the criminal justice system may provide "reasons other than racial bias for any prosecutor to challenge" a prospective juror. (*People v. Adanandus, supra*, 157 Cal.App.4th at pp. 504-505, 509; see also *People v. Avila* (2006) 38 Cal.4th 491, 554-555 [reasons other than racial bias for challenge included juror's "experience with her brother's involvement in the criminal justice system, notwithstanding [her] assurances that her prior experiences would not carry over to this case if she were chosen as a juror"]; *People v. Cornwell* (2005) 37 Cal.4th 50, 70, overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, ["[V]oir dire disclosed a large number of reasons other than racial bias for any prosecutor to challenge [prospective juror], including but not limited to her personal experience with an allegedly unfair homicide prosecution of a close relative and her express distrust of

the criminal justice system and its treatment of African-American defendants]"; *People v. Farnam* (2002) 28 Cal.4th 107, 138 ["close relative's adversary contact with the criminal justice system" is one ground upon which the prosecutor might reasonably have challenged prospective jurors]; *People v. Cummings, supra,* 4 Cal.4th at p. 1282 [prospective juror's brother convicted of a crime]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1049 [prosecution properly challenged juror whose uncle had been convicted of murder].)

Finally, TT was unsure of the prosecution's burden of proof and whether it should be higher in murder cases. Uncertainty as to the prosecution's burden of proof or the thought that the prosecution should bear a higher burden in murder cases is also an adequate race-neutral reason to excuse a juror. (*People v. Mills, supra,* 48 Cal.4th at p. 176-177, and cases cited therein.)

The prosecutor's concerns with LT included that he: 1) Gave unusual answers on his jury questionnaire; 2) Wanted to be on the jury; 3) Was about 30 minutes late to court one day; 4) Thought that prosecutors and defense attorneys both make "way too much money;" 5) Had unusual "mannerism," seemed to be "potentially a big problem on this jury." The bailiff mentioned a couple of times that LT had "lots of questions" and he (11 RT 4125-4126.) On his questionnaire, LT described having to forfeit his car for driving with a suspended and stated that he did not know if the People's burden of proof should be higher in murder cases, that defense attorneys and prosecutors "make way too much money," and that a person's background and upbringing could affect a person's adult life. (12 CT 3497-3498, 3500, 3509.)

LT's demeanor was unusual enough that, according to the prosecutor, the bailiff mentioned it several times. The prosecutor's statement is uncontested. If appellant's defense counsel had not observed this fact, it

would have been natural for them to have put that on the record. LT's demeanor, experiences with the criminal justice system and the concern he would make the jury less cohesive were all legitimate grounds for the prosecutor to exercise a peremptory challenge with LT.

With TM, the prosecutor's reasons for the challenge were that 1) She was not there on the final day of jury selection; 2) She indicated that "being of African American decent, I have seen racial profiling, brutality, and unfair treatment." A potential defense issue was possible police brutality against appellant, and she might have been more susceptible to an argument appellant's statement to police was involuntary; and 3) She indicated that people generally are products of their environment, which could make her more susceptible to an argument the crimes were a result of appellant's upbringing. (11 RT 4126-4128.)

The prosecutor offered legitimate grounds to challenge TM. She was not present on the final day of jury selection, so not challenging her would have necessarily delayed the trial. She also indicated she had a negative view of law enforcement in terms of treatment of minorities and that people generally are products of their environment. A peremptory challenge based on a negative experience with law enforcement has been repeatedly upheld as a proper race-neutral reason to challenge a juror. (*People v. Turner* (1994) 8 Cal.4th 137, 171, overruled on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

The trial court's remarks indicated that the grounds for dismissing two of the three jurors required no explanation. The trial court commented that the record was "quite clear with regard to TT and TL," but offered to allow the prosecutor to comment on excusing TM. (11 RT 4123.) At a minimum, the trial court found that, under the prior test, appellant did not show a strong likelihood of discrimination. "Moreover, the trial court's implied finding that the prosecutor's stated reasons were sincere and genuine is

entitled to great deference where, as here, the reasons are based on the prospective juror's appearance and demeanor." (*People v. Ward* (2005) 36 Cal.4th 186, 202.)

Appellant claims the prosecutor dismissed the only three prospective African-American jurors who remained in the jury pool, and that this established a prima facie case. "These bare facts present a statistical disparity which, in and of itself, establishes a prima face case." (AOB 42.) First, as noted above, Respondent's review of the voir dire indicates slightly different numbers, including that a potential African-American juror was still available at the end of jury selection. Neither the numbers nor the circumstances here established a prima facie case.

In *Bonilla*, the prosecutor excused the two African-American jurors in the jury pool. This Court found that "the small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible. . . . As a practical matter, however, the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion.' " (*People v. Bonilla, supra*, 41 Cal.4th at p. 343.) Similarly, given the circumstances and numbers here, a pattern of discriminatory challenges cannot be discerned from the three challenges.

Appellant also attempts to turn on its head the standard this Court should apply when a trial court made a pre-*Johnson* finding of no prima facie case. "Unless this Court can be satisfied based upon its independent review of the record that the defendant produced insufficient evidence at the outset to permit even a bare inference of discrimination, the Court must assume that the defendant did indeed" establish a prima facie case. (AOB 43.) Not so. Where, as here, it is not clear whether the trial court used the current reasonable inference standard or the then applicable strong likelihood standard, this Court reviews the record independently to determine whether the record supports an inference that the prosecutor

excused a juror on a prohibited discriminatory basis. (*People v. Bonilla, supra*, 41 Cal.4th at pp. 341-342; *People v. Howard, supra*, 42 Cal.4th at p. 1018.) No such inference is present here.

The prosecutor articulated race-neutral grounds and the trial court concluded that the prosecutor's explanation was genuine. In assessing the subjective genuineness of the prosecutor's explanation, the trial court had the benefit of its contemporaneous observations of the voir dire and the prosecutor's exercise of his peremptory challenges. Nothing in the record suggests that the prosecutor offered "sham excuses" rather than "bona fide reasons" for his challenges. Further, appellant is white, and one of the victims is African-American, lessening any motive the prosecutor would have for making race-based challenges. (*People v. Bell* (2007) 40 Cal.4th 582, 597.) No inference of discrimination has been raised.

IV. DESTRUCTION OF THE CAR IN WHICH THE SHOOTING OCCURRED DID NOT DEPRIVE APPELLANT OF A FAIR TRIAL

Appellant claims the judgment should be reversed since the trial court failed to impose sanctions because the car in which the shooting occurred was destroyed. Respondent disagrees. There was no showing of bad faith or that anything in the car was exculpatory. Denial of the *Trombetta* [11] motion was proper.

A. Background

Appellant made a *Trombetta* motion seeking sanctions against the prosecution because the car in which the shooting occurred was destroyed before appellant's forensic expert could examine it. (4 CT 963-969; 10 RT 3644.) The trial court denied the motion. (10RT 3759.)

The two bodies were found in a 1982 Nissan Stanza that belonged to a third party. (10 RT 3689.) Sacramento police detective Jeffrey Gardner

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[11] *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*).

testified that police used a superglue process to check for fingerprints in the car. (10 RT 3690.) Because that process utilized carcinogenic chemicals, the vehicle owner agreed to allow the city to purchase the car from her. (10 RT 3690, 3693, 3699.)

The car was videotaped several times and numerous photographs were taken, resulting in a six-inch stack of 300-400 photographs, and the car was then towed in March 1998 from the police facility. (10 RT 3661, 3691-3694, 3696-3697, 3699-3701.) The plan called for the car to be crushed, but a registration printout listed it as a junked car at a Rancho Cordova Pick 'n' Pull lot as of September 14, 1998. (10 RT 3695, 3701.) There was no testimony on the final disposition of the car.

Detective Gardner said he did not "remember ever having a car impounded and super glued and released back" to its owner. "What I recall is per the city safety officers, that the vehicle is to be destroyed, and it's not to be released back to the individual who the car was taken from." (10 RT 3693.)

The prosecutor who was handling the case at that time did not recall whether appellant's defense attorney at the time, who had subsequently died, was notified of the intention to destroy the car. (10 RT 3704-3705.)

Appellant called forensics consultant Robert P. Venkus who faulted the police criminologist for not doing gunshot residue testing inside the vehicle or on the hands of the victims. (10 RT 3646, 3651-3652.) "Chemically there is several tests that they can do to extract these compounds and tell concentrations in various portions of the vehicle. When a gun is fired in the vehicle there's going to be concentrations by which this becomes an indication of ambient or background noise if you will. And then you look for higher levels to determine approximately where the gun was at when it was fired." (10 RT 3651.)

He said the "quality of the video and the quality of the photography is real lacking." (10 RT 3652.) Venkus claimed that if the car had not been destroyed, he would have been able to determine the trajectory of one or two of the bullets. (10 RT 3653-3654.)

Venkus was provided about a six-inch stack of photographs totaling three to four hundred photographs, a large number of those of the interior and exterior of the car. (10 RT 3661.) He said there were only "three or four of the dash panel and of the -- the right front interior quarter panel. And that's what we were interested in as far as the -- the places where rounds were recovered." (10 RT 3661.)

Venkus developed a video reenactment based on the physical evidence, interviews of appellant and appellant's statement to police. (10 RT 3706-3725.) A car similar to the one in which the bodies were found was used for the video reenactment. (10 RT 3720.) Appellant played the video and showed the slides to the court as part of his *Trombetta* motion, but withdrew his motion to play the video for the jury. (10 RT 3706- 3732, 3745-3748.)

On cross-examination, Venkus said that besides the absence of any bullet holes on the rear portion of the car, the physical evidence was not inconsistent with appellant's version of events. (10 RT 3669.) Venkus said that Springer of the Sacramento crime laboratory was a world-renowned expert who did a "very good job" in this case. (10 RT 3661, 3664.)

> Q. Would you agree from your experience working as a – as an expert in the field of firearms that -- that Fay Springer from the crime lab is considered a -- a national, if not international, expert on these very subjects?
>
> A. Certainly.
>
> Q. Okay. Now, you've indicated that you feel that there might be more information -- well, let me ask you. You put it in your own words.

What is it exactly that you think that you could have obtained from this car that does not currently exist?

A. More precise trajectories on at least the bullet defect in the speedometer housing, possibly a trajectory from the defects in the right lower door panel, gunshot residue concentrations. And I've also seen reports and talked to criminalists coming out of the crime lab where they have gone back into vehicles and found additional bullet defects to the vehicle that they missed the first time. So I don't know what else might have been there.

Q. Okay. So three things you mentioned. Let's start with the -- there may have been other bullet holes in the car.

In other words, Fay Springer for example could have made a mistake is what you're saying and she may have missed a bullet hole in the car?

A. It's possible.

Q. And the second issue is G.S.R. concentrations. Now, would you agree that G.S.R. is -- even in the best of conditions G.S.R. can be problematic; right?

A. Certainly.

Q. Now, in a small car with approximately six shots being fired from two separate guns would you agree that the ability to interpret G.S.R. is highly questionable?

A. It gets difficult.

Q. Particularly if for example guns were fired from different locations in the car?

A. That's correct.

Q. Now, when you consider the fact that most likely from the police reports you're talking about guns being fired from different locations -- two separate guns being fired from two separate locations in the car and the fact that you are in a fairly small, contained universe there in the car –

A. Correct.

Q. -- that any G.S.R. that could have been given -- any sort of testing that could be done is really -- really highly unlikely that it would have been of any particular value to you?

A. I don't know if I would say highly unlikely. It's -- we don't know, you know, the results. We might have come up with something. They might have been totally suspect.

Q. Okay. Well, what kind of results would you go look for?

A. Higher concentrations in certain areas that have an ambient or a background level from the contamination that would have spread throughout the vehicle.

But around the actual muzzle or cylinder you would have higher concentrations.

Q. Well, for example some of the concentrations would have been on the victims -- themselves -- right?

A. Correct.

Q. -- which are not part of the car.

And they were in fact removed; right?

A. Correct.

Q. Are you aware that all the victims' clothing is still in existence in the evidence?

A. It's my understanding that wasn't (verbatim).

Q. Did you specifically ask to have any of that clothing from evidence so you can perform any sort of G.S.R. testing on the clothing?

A. I again made a recommendation to Mr. Riley that -- you know, not a recommendation, but a comment that G.S.R. testing of the victims would have been very helpful.

Q. And yet you have not done any; correct?

A. No.

Q. Are you aware of any other defense experts who have done G.S.R. testing on any of the victims' clothing?

A. In this particular case?

Q. Well, yeah.

A. Okay.

Yeah.

No. I'm not aware of anyone that has.

Q. Did you attempt to do any G.S.R. testing on any samples of either the headliner or fabric that were taken from the car?

A. No.

Q. Now, when you indicated -- you think that the third thing that would have been helpful for you was to find perhaps a more precise -- excuse me -- trajectory for the two bullets that were found in the car.

When you say more precise are you talking just a minimally more precise or are you thinking that you can actually come up with any exact positioning of the gun?

A. Well, you can never come up with anything exact.

But I mean you can come up with a pretty fair approximation.

Q. Would you agree that there already is a pretty fair approximation that has been done by Miss Springer which you yourself agreed with in your report?

A. I hate to rely just on someone else's report without having seen it myself. I mean that's my job -- to take a look and see whether I agree or I disagree.

She gave some interpretations that seem pretty reasonable.

Q. So the -- the only thing that it sounds like you really need in terms of trajectory is you wish you could have looked a little closer in the hole that was made in the housing of the speedometer as well as the hole that was made in the -- I guess it was the passenger -- right front passenger door?

A. Correct.

That and if there was any corresponding marks behind that.

Q. But as to whether there were any corresponding marks behind that you've never sat down with Miss Springer to ask her those questions?

A. No, I haven't.

Q. One second, please.

Is part of your opinion that you needed to see this car -- is it based on your statements -- or -- excuse me -- your conversations with the defendant?

A. No.

Q. Okay. So totally separate from any conversations you've had with the defendant you think it's important to look at the car?

A. Correct.

Q. Now, you are familiar then with the defendant's statement in the police report; correct?

A. Yes.

Q. And would you agree that the -- with the exception of the fact that there are no signs of bullet holes coming from the front seat towards the back would you agree that the physical evidence documented about the car is consistent with the defendant's statement to the detectives?

A. Yes.

(10 RT 3664-3669.)

The defense consultant also stated that he did not attempt to sit down with the police criminologist in order to gain additional information on the photographs and videotape. (10 RT 3659-3661.) He said gunshot residue dissipates over time. (10 RT 3673.)

The trial court denied appellant's *Trombetta* motion, ruling that there was no evidence of bad faith by police and no indication the car would have yielded exculpatory evidence. The court further ruled that appellant failed to explore alterative ways to obtain the information, such as interviewing or obtaining the notes from a crime scene investigator or obtaining the car while it remained on a Pick 'n' Pull lot. (10 RT 3759-3762.) The trial court pointed out that even the defense expert thought gunshot residue tests on the interior of the car would likely have minimal value. (10 RT 3760.) The court was "not persuaded that everything that could have been has been done." (10 RT 3761.)

> And quite frankly there are a number of things that Mr. Venkus and or the defense in general could have done, which have not been done and certainly still could be done, including in depth conversations with the lab people or the C.S.I. people or wherever Fay Springer and those folks come from in terms of getting into more detail, because as we all know not everything is reported in their notes. And I think before you come into court and say that the work was incomplete it is insufficient to simply say that had you put a probe into the defect for instance and had there been something it would have been in the notes. I don't think that we can make that presumption at least as it's part of a *Trombetta* motion.

(10 RT 3761.)

In addition, the physical evidence obtained from the car was not inconsistent with appellant's self-defense claims. The court commented: "I think perhaps the most telling thing about this situation is that even according to Mr. Venkus the physical evidence that was captured and preserved on videotape by notes and by photographs is entirely consistent with the statement the defendant gave." (10 RT 3760.)

Finally, the trial court found there was no evidence of "objective or subjective bad faith and the legitimate reasons that were given for the loss of the evidence, the destruction of the car, and lastly and perhaps most

importantly the extreme lack of likelihood that anything -- anything of material exculpatory value has been lost or was lost by the destruction of that car." (10 RT 3762.)

B. Law

Law enforcement agencies must preserve evidence that possesses exculpatory value that is not obtainable by other reasonably available means. (*People v. DePriest* (2007) 42 Cal.4th 1, 41-42, citing *Trombetta, supra*, 467 U.S. at p. 489.) "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." (*Trombetta, supra*, 467 U.S. at pp. 488-489, fn. omitted; accord, *People v. DePriest, supra,* 42 Cal.4th at p. 41.)

Unless appellant shows "bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*People v. Roybal* (1998) 19 Cal.4th 481, 510, quoting *Arizona v. Youngblood* (1988) 488 U.S. 51, 58.) There is no impermissible destruction of evidence if material is destroyed in good faith and in accord with normal practices. (*Trombetta, supra*, 467 U.S. at p. 487.)

The state's responsibility is further limited when the defendant challenges the failure to preserve evidence "of which no more can be said than that it could have been subjected to tests" that might have helped the defense. (*Arizona v. Youngblood, supra,* 488 U.S. at p. 57.) In such a case, unless the defendant can show "bad faith" by the police, failure to preserve "potentially useful evidence" does not violate his due process rights. (*Id.* at p. 58.)

C. Analysis

Appellant speculates that items of evidence were possibly missed in the car and that would have shown the victims fired weapons. He also

claims gunshot residue testing could have shown the victim's fired weapons. Since there was no showing that anything in the car was exculpatory, appellant needed to show bad faith in the failure to preserve the car. He did not. In addition, since the prosecution's theory was that appellant fired from the backseat area and the driver's side/seat, it is not plausible that GSR evidence could have proved exculpatory. It would have been consistent with either the defense or prosecution theory of how the shooting occurred.

Detective Gardner testified during the *Trombetta* hearing that in his 22 years with the police department he did not "remember ever having a car impounded and super glued and released back" to its owner. (10 RT 3693.) He testified he was acting under the direction of the city safety officer in not releasing the car back to the owner. (10 RT 3694.)

Appellant made no showing of bad faith. The city was simply attempting to get a car tainted with carcinogenic chemicals out of circulation. While the car apparently ended up on a Pick 'n' Pull lot where it would have been accessible to appellant, there was no showing the city was not in good faith attempting to get a car tainted with carcinogenic chemicals out of circulation. Even if the car ending up in a junkyard was inconsistent with the city safety officer's directive, there is no evidence of bad faith. The failure to more quickly destroy the car meant it was available to appellant for a longer period of time.

According to evidence at the *Trombetta* hearing, appellant had a six-inch stack of photographs and video tapes of the interior of the car. While he complains about the quality of that material, he made no real effort to supplement that material. He did not discuss much of it with the criminologist or pathologist, test the clothing of the victims or the portions of the car that remained. (10 RT 3658-3665.) Hagan was wearing gloves when found, which could have been tested by appellant for GSR evidence.

(16 RT 5486.) In addition, the car was still in existence in September 1998, some seven months after the shooting, and so it could have potentially been subject to defense testing if appellant had been more diligent in pursuing it. The fact it was not a critical piece of evidence is also illustrated by the fact appellant did not ask to examine the car until more than a year after the shooting. (10 RT 3658.)

Further, except for the lack of bullet holes in the rear of the car, the physical evidence was consistent with appellant's version of events. Appellant claimed he fired from the backseat as he exited the rear of the car and fired again when he was in the driver's seat. (20 CT 5915-5926, 5940-5943.) That was consistent with the testimony of the prosecution criminologist. Blood splatter evidence and the dashboard may have further pinpointed where appellant fired from, but the prosecution criminologist conceded at trial nothing about the physical evidence was inconsistent with appellant shooting from the rear seat.

Appellant claims that his inspection of the car may have discovered evidence, missed by the police criminologist, that would have supported his claim that the victims repeatedly fired at him. There was absolutely no indication from either the witnesses or the physical evidence that the victims fired. Appellant's expert conceded during the *Trombetta* hearing the renowned qualifications of the police criminologist on the case. There is not any reasonable possibility that the victims repeatedly fired at appellant, yet there was no evidence of that in photographs and videotapes nor found in the car or on the buildings where the shooting occurred.

There was no showing of bad faith or that anything exculpatory would have been found in the car. The trial court properly denied the request for sanctions.

V. APPELLANT'S ADMISSION TO COMMITTING THE SHOOTING WAS NOT OBTAINED IN VIOLATION OF HIS *MIRANDA* RIGHTS

Appellant was read his *Miranda*[12] rights and was asked whether he wanted to talk. He replied, "I don't know. Sometimes they say it's -- it's better if I have a – lawyer." He claims this invoked his *Miranda* right to counsel. Respondent disagrees. The statement was equivocal. Appellant later waived his *Miranda* rights. There was no *Miranda* violation.

A. Background

Appellant was questioned by Sacramento police Detective Winfield on February 26, 1998. (20 CT 5780.)

> WINFIELD: . . . So, you know, I'm gonna advise you of your rights. If there's any point or anything that you don't understand, please -- uh -- you know, don't hesitate to stop me. Sometimes I talk -- I'm fast, or whatever. I want to make sure that you understand me and everything.
>
> DUFF: Well -- uh --
>
> WINFIELD: Okay?
>
> DUFF: Yeah.
>
> WINFIELD: So you know where we're at and, where we're -- where we're headed, and that, you know, basically -- um -- that -- that would be the purpose to try to get -- uh -- your information about your locations, and things like that.
>
> DUFF: Yeah.
>
> WINFIELD: Okay?
>
> DUFF: Okay.
>
> WINFIELD: Okay. You know that, you know, you have the right to remain silent, that anything you say can and will be used against you in a court of law, that you have the right to talk with

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[12] *Miranda v. Arizona* (1966) 384 U.S. 436.

an attorney and have him present with you while you're being questioned. If you can't afford to hire an attorney, one will be appointed to represent you free of charge, if you wish. And you can decide at any time to not answer any questions or make any statements. So that is, like, let's say at some point you decide you didn't want to answer a question. "Well, I --" Like, you know, "Well, I don't want to answer that question," or -- you know, or whatever. You can stop --

DUFF: Okay.

WINFIELD: -- the situation. Okay? So just keep that in mind. Um -- and so -- uh -- is there anything about any of those rights that you don't understand?

DUFF: No. I understand 'em.

WINFIELD: Okay. And -- um -- having those rights in mind do you want to -- uh -- talk with me about when your -- where you were, and that kind of thing during that period?

DUFF: I don't know. Sometimes they say it's -- it's better if I have a -- lawyer.

WINFIELD: You know, sometimes they do. Yeah. Yeah. You know, but sometimes -- uh -- a lot of times people want to talk and -- and want to -- uh -- clarify, let's say for instance -- um -- where they were during that period of time. Because, really, you could provide me -- and it's entirely up to you. It's -- it really is. You can provide me with individuals who could verify where you were that I wouldn't otherwise get. You know what I mean? And so that's -- um -- that's kind of -- uh -- you know, the way it -- the -- the way it works. And in -- in most cases, the individuals that I talk to do, in fact, give me -- um -- other circumstances for me to go and check out. That's why one person's interview leads to another person's, and another's, and another's, and we end up, you know, doing a lot of interviews. So that's why I told you I've all -- I've -- I have already spoken with quite a few people. And that's what, eventually, you know, led us to trying to talk to you.

DUFF: Yeah.

WINTFIELD: And if at any time -- like I say, if at anytime you want to stop the interview and say, "Hey, I don't -- I don't -- I don't feel like answering that question," then you have that option.

DUFF: Okay. Okay. I understand.

WINFIELD: You understand?

DUFF: Yeah.

WINFIELD: Okay. So you are willing to talk about the -- you know, where you were and that kind of a thing?

DUFF: Yeah. (Unintelligible).

WINFIELD: Okay. I mean, I just want you to feel confident with that. You do feel -- you feel confident with that?

DUFF: Yeah.,

WINFIELD: Okay. All right. So -- um -- then you keep your rights in mind. And if at some time, you know, you don't feel like answering another question, then you -- you just tell me no. Okay?

DUFF: Okay.

WINFIELD: All right. Um -- so where -- um -- were you -- where were you living --uh -- you know, at the time that you were arrested? You remember what night you were arrested?

(20 CT 5785-5789.) Later in the statement appellant admitted he shot the pair, but claimed he shot in self-defense. (20 CT 5915-5926, 5940-5943.)

Appellant made a pre-trial motion to suppress his statement. The motion was denied. The trial court found that the manner in which the detective clarified appellant's ambiguous statement did not violate *Miranda* and its progeny. The trial court ruled the detective was not required to directly ask appellant "does that ambiguous statement mean that you want to cease this interview and have a lawyer present?" (11 RT 4153.) The detective could "see whether or not he wanted to talk without having to ask

him specifically to clarify his ambiguous statement any more than he did by continuing to talk." (*Ibid.*)

B. Law

The Fifth Amendment of the United States Constitution states that no person "shall be compelled in any criminal case to be a witness against himself." In *Miranda*, the Supreme Court concluded that, "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." (*Miranda, supra*, 384 U.S. at p. 467.)

The Supreme Court's fundamental aim was "to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." (*Miranda, supra*, 384 U.S. at p. 469; see also, *Colorado v. Spring* (1987) 479 U.S. 564, 572.) Accordingly, the Court formulated "procedural safeguards effective to secure the privilege against self-incrimination." (*Miranda, supra*, 384 U.S. at p. 444.) A person undergoing custodial interrogation must be advised of his right to remain silent, that any statement made can be used against him and that he has the right to the presence of an attorney, including an appointed one if he cannot afford to hire one. (*Miranda, supra*, 384 U.S. at p. 444; *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1122 (*Gonzalez*).)

A waiver of *Miranda* rights may be express or implied and does not require any particular words or phrases. (*People v. Cruz* (2008) 44 Cal.4th 636, 667.) A suspect's "expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights." (*Id.* at pp. 667-668.) A suspect "must unambiguously request counsel." (*Davis v. United States* (1994) 512 U.S. 452, 459 (*Davis*); *Gonzalez, supra*, 34 Cal.4th at p. 1124.) "Faced with an ambiguous or equivocal statement, law

enforcement officers are not required under *Miranda* [citation], either to ask clarifying questions or to cease questioning altogether." (*People v. Rundle* (2008) 43 Cal.4th 76, 115, disapproved on other ground by *People v. Doolin* (2009) 45 Cal.4th 390, 416, 421 fn. 22.) "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." (*Gonzalez, supra*, 34 Cal.4th at p. 1124-1125; quoting *Davis, supra*, 512 U.S. at pp. 461-462.) Thus, the suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Davis, supra*, 512 U.S. at p. 459; see also *Gonzalez, supra*, 34 Cal.4th at p. 1126 [*Davis* requires that the "defendant *unequivocally* request the *immediate* presence of an attorney" (emphasis original).])

Gonzalez articulated the standard of review for determining whether a suspect's statement constituted a request for counsel.

> Consistent with *Davis*, a reviewing court-like the trial court in the first instance-must ask whether, in light of the circumstances, a reasonable officer would have understood a defendant's reference to an attorney to be an unequivocal and unambiguous request for counsel, without regard to the defendant's subjective ability or capacity to articulate his or her desire for counsel, and with no further requirement imposed upon the officers to ask clarifying questions of the defendant. [Citation.] In reviewing the issue, moreover, the reviewing court must 'accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. [The reviewing court] independently determine[s] from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.' [Citation.]

(*Gonzalez, supra*, 34 Cal.4th at p. 1125.)

"Although there is a threshold presumption against finding a waiver of *Miranda* rights [citation], ultimately the question becomes whether the

Miranda waiver was knowing and intelligent under the totality of the circumstances surrounding the interrogation. [Citations.]" (*People v. Cruz, supra*, 44 Cal.4th at p. 668.) The totality of the circumstances approach "permits-indeed, it mandates-inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the [defendant's] age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." (*Fare v. Michael C.* (1979) 442 U.S. 707, 725.)

If a suspect unambiguously invokes his right to counsel, the interrogation must cease. (*Miranda, supra*, 384 U.S. at pp. 473-474; *Davis, supra*, 512 U.S. at p. 458.) The suspect is not to be further interrogated until counsel has been made available, unless the accused initiates further communication. (*Davis, supra*, 512 U.S. at p. 458; *Edwards v. Arizona* (1981) 451 U.S. 477, 481-485; *Gonzalez, supra*, 34 Cal.4th at p. 1122.)

On appeal, this Court must accept the trial court's resolution of disputed facts and evaluations of credibility, if supported by substantial evidence, based on a preponderance of evidence standard. (*Gonzalez, supra*, 34 Cal.4th at p. 1125.) This Court then independently determines from the undisputed facts and those facts properly found by the trial court the ultimate legal question of whether the requirements of *Miranda* were satisfied. (*Ibid.*)

C. Analysis

Appellant did not unambiguously invoke his right to counsel. There was nothing inappropriate about the colloquy that followed appellant's statement that "sometimes they say" it is better to have a lawyer. The detective confirmed that appellant was willing to continue the interview and was not invoking his *Miranda* rights. As the trial court ruled, the detective could continue to talk to appellant to see if he was invoking his *Miranda*

rights having or he wanted to talk. She did not need to specifically ask him to clarify his ambiguous statement any more than he did by continuing to talk. (11 RT 4153.)

In *Davis,* the statement "Maybe I should talk to a lawyer" was not a request for counsel. (*Davis, supra*, 512 U.S. at p. 455.) A suspect must express a desire for the assistance of an attorney. If "a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning." (*Id.* at p. 459.) Rather, a "suspect must unambiguously request counsel. As we have observed, 'a statement either is such an assertion of the right to counsel or it is not.' [Citation.] " (*Davis, supra*, 512 U.S. at p. 459.)

This Court has also found similar statements to be ambiguous. In *People v. Michaels* (2002) 28 Cal.4th 486, defendant was asked to describe the killing of his girlfriend's mother. He hesitated, saying "I don't know if I should without an attorney." The interrogating officer replied that defendant could stop talking, and that he did not have to answer any question he disliked. Defendant said, "Okay, that one." (*Id.* at p. 509.) Defendant contended that even if his reference to counsel was ambiguous, he clearly invoked his right to silence when he said "Okay, that one." This Court rejected the claim, finding the defendant "did not assert a right to refuse to answer any questions, ask that the questioning come to a halt, or request counsel." (*People v. Michaels, supra*, 28 Cal.4th at p. 510.)

In *Gonzalez, supra*, 34 Cal.4th 1111, the defendant admitted being at a party where a police officer was shot, but denied committing the shooting. He was asked to take a lie detector test. He responded, "That um, one thing I want to ask you to that, if for anything you guys are going to charge me I want to talk to a public defender too, for any little thing. Because my

brother-in-law told me that if they're trying to charge you for this case you might as well talk to a public defender and let him know cause they can't [Untranslatable]." (*Id.* at 1119.) The detective replied, "Well, you can do that anytime you want to. [¶] The thing is, that-that we're going to book you tonight," but he would be released if he was being truthful about not participating in the shooting. (*Id.* at p. 1119.) The next day, Gonzalez was interrogated by a polygraph examiner. At the outset he was asked if he was waiving his rights. He replied yes, and asked "is there any, like-cause they told me about a public defender." The examiner replied, "What about a public defender?" Defendant said, "They said that he would show up for anything." The examiner told him, "Oh, you have a right to a public defender. That's why I asked you did they-they told you about your rights." Defendant replied, "They read my rights, yeah." There was no further mention of a public defender. (*Gonzalez, supra*, 34 Cal.4th at p. 1120.)

After defendant admitted to the examiner he had shot the officer, he was again interrogated by a detective. He repeated his admission. Toward the end of the interrogation, he said, "I don't have no public defender." The detective replied, "You didn't get one? You didn't get one," but was interrupted by another detective on an unrelated matter. Following the interruption, the detective said, "All right. What were you saying? You said something about a public defender?" Defendant said, "Yeah." The detective told him. "You can have one any time you want, man. I told you that when I first advised you." Defendant said, "Yeah, but already a lot of things went by, and I haven't had a public defender." The detective said, "You want one right now? I mean, if that's the thing, then we're [done] talking. And I'm out of here." Defendant said, "Really?" The detective told him, "I can't talk to you until you talk to this-whoever you're going to talk to, so it's up to you. [¶] I'm just looking for some answers to the blanks here. I already know what happened. I know where you were

standing from [where] you shot. I know what distance it was. You know, I've got all the evidence from this crime scene. [¶] I just need to know what your intent was. You've already said you wanted to scare the cop, the police; right?" Defendant said, "My intent wasn't to kill him. My intent wasn't to hit a cop." (*Gonzalez, supra*, 34 Cal.4th at p. 1120.)

This Court in *Gonzalez* concluded the defendant's statement was ambiguous and therefore would not have put a reasonable officer on notice he wanted to speak with a lawyer before answering any more questions. The question is whether a reasonable officer in the circumstances would have understood defendant to be making a request for counsel. (*Gonzalez, supra*, 34 Cal.4th at p. 1127.)

> On its face, defendant's statement was conditional; he wanted a lawyer *if* he was going to be *charged*. The conditional nature of the statement rendered it, at best, ambiguous and equivocal because a reasonable police officer in these circumstances would not necessarily have known whether the condition would be fulfilled since, as these officers explained, the decision to charge is not made by police. Confronted with this statement, a reasonable officer would have understood only that "the suspect *might* be invoking the right to counsel," which is insufficient under *Davis* to require cessation of questioning. (*Davis, supra*, 512 U.S. at p. 459, 114 S.Ct. 2350.) Here, moreover, the detectives responded to defendant's statement by explaining to him the difference between being arrested and booked and being charged, thus providing him with an opportunity to clarify his meaning, but at no point in this initial exchange did defendant *unequivocally* request the *immediate* presence of an attorney before he would answer any more questions. It is this type of statement *Davis* requires before the police must terminate the interrogation.

(Gonzalez, supra, 34 Cal.4th at p. 1126; *People v. Stitely* (2005) 35 Cal.4th 514, 534-536 ["I think it's about time for me to stop talking" held an expression of apparent frustration, but not a request to end the interview]; *People v. Crittenden* (1994) 9 Cal.4th 83, 123-124, 130-131 ["Did you say I could have a lawyer" was not an unequivocal request for an attorney];

People v. Johnson (1993) 6 Cal.4th 1, 27-30, overruled on other grounds in *People v. Rogers* (2006) 39 Cal.4th 826, 878-879) ["Maybe I ought to talk to my lawyer, you might be bluffing, you might not have enough to charge murder" was not a sufficient invocation]; see also *People v. Simons* (2007) 155 Cal.App.4th 948, 954-958 [Defendant four times asked how long it would take to get an attorney. "His questions regarding how long it would take for an attorney to get there if he asked for one would lead a reasonable officer to understand only that defendant might want an attorney if it would not take too long, which is not enough to require cessation of the interrogation."]; *People v. Roquemore* (2005) 131 Cal.App.4th 11, 25, and cases cited therein ["[C]an I call my lawyer or my mom to talk to you?" not an unequivocal request for counsel].)

Appellant's statement--"I don't know. Sometimes they say it's -- it's better if I have a – lawyer"--would lead a reasonable officer to understand only that defendant was considering whether to ask for an attorney, which is not enough to require cessation of the interrogation. (*Davis, supra*, 512 U.S. at p. 459.) It is clear from the exchange that appellant understood he had a right to an attorney.

There was nothing inappropriate about the colloquy that followed appellant's inquiry. It was not misleading and it verified that appellant understood his rights and wished to continue the interview. Appellant willingly answered questions without mentioning a lawyer or returning to the subject, further demonstrating that he did not intend to invoke his right to counsel. Like the defendant in *Gonzalez*, appellant had an extensive criminal history. He told the detective at the start of the interview that he had been to prison three times. (20 CT 5783.) Appellant, age 41 at the time, had done stints in prison and had a number of interactions with police officers. He even requested to talk to a certain detective. The officers

could reasonably assume that appellant was capable of making an unequivocal request for counsel if he so desired, but he was not.

Appellant's statement did not constitute a sufficiently unequivocal invocation of his right to have an attorney present during questioning to require cessation of the interrogation. Accordingly, appellant's statement was not the product of a *Miranda* violation and the trial court did not err in denying appellant's motion to exclude the statements on that ground. Accordingly, appellant's statement was not the product of a *Miranda* violation and the trial court did not err in denying defendant's motion to exclude the statements on that ground.

VI. PHOTOGRAPHS AND VIDEOTAPES OF THE VICTIMS WERE NOT GRUESOME SUCH THAT THEIR USE WAS PREJUDICIAL

Appellant claims that the trial court abused its discretion in finding the probative value of videotapes and photographs showing the bodies of the victims outweighed its prejudicial effect. (AOB 78-83.) Not so. Appellant has waived this claim in regard to the photographs. Also, the photographs and videotapes were not so gruesome such that their use was prejudicial.

A. Background

At trial, appellant made a motion to limit the prosecution's use of a videotape taken of the removal of the bodies from the car in which they were found.

The trial court ruled:

> THE COURT: Record will reflect that the jury has departed. This morning prior to getting started, because we got off to a late start due to transportation problems, I had an opportunity to review People's Exhibit Number 2, which is a crime scene videotape that has an audio track with it.
>
> It is a videotape that was shot by law enforcement of the vehicle in which the decedents were located. And I have watched that tape in its entirety. I have done so without listening to the audio track.

First order of business, since I believe Mr. Sawtelle has a desire to play it, is to listen to what Mr. Bogh's objections to it are.

MR. BOGH: My objections to it are that I don't object to the parts of the vehicle, the blood spatter, the areas in the car. What I object to is any close-ups of the wounds on the people that were inside the car.

There is other photographs of that, those that can show those wounds.

THE COURT: I am sorry. There has already been an agreement of, regardless of what is shown, if anything, the audio track will not be played?

MR. SAWTELLE: Correct.

THE COURT: Because you had some concerns about the audio track as well?

MR. BOGH: Yes.

THE COURT: Okay. Anything you'd like to – anything you'd like to add to People's number 2 in terms of your opposition to those segments of it?

MR. BOGH: No.

THE COURT: Mr. Sawtelle.

MR. SAWTELLE: I am asking that I be allowed to play it in its entirety. The defense is the one who has placed most of what is presented in that tape, they placed it in controversy by their opening statement. Has indicated there is a self-defense case, one.

And number two, they said that the DA destroyed the car without -- so that proper evidence could be preserved. This videotape shows not only a detailed view of the interior of the car, blood spatter evidence. It shows the position of the bodies at the time they are found.

It goes, I believe, to malice. It also goes – will allow me to establish proper trajectory. And it also documents the interior

position, I guess, the position of the bodies. Helps me explain why money wasn't taken out of the victim's wallet.

It helps me explain why certain items weren't removed from inside. It helps me establish that self-defense in this case is an impossibility.

And as far as the blood, this is a homicide, more specifically, it's a double homicide. It's not pretty. And it's not even close to as bloody as about half of the homicides that I have dealt with, and I am sure the defense is in the same position.

So I don't know what we are to do to sanitize, you know, a bad crime, but I need it.

THE COURT: Mr. Bogh, anything else?

MR. BOGH: Except I don't know what we are talking about, trajectories. We have certainly diagrams, and obviously the bodies have been disturbed in some fashion since the time of the original shooting at Taylors Corner.

We have the bodies in the back seat now. We have, you know, body slumped over. We -- I don't know how you say that we can determine all this trajectory by that playing of the position of the bodies.

THE COURT: Mr. Sawtelle, anything else?

MR. SAWTELLE: No.

THE COURT: All right. Folks, having reviewed the tape, let me say the following. I think that the – clearly the bodies that are demonstrated in the videotape are not attractive.

But on the other hand, they are not bloated, they are not fly infested, they are not oozing with bugs and other critters.

It's never pleasant to look at bodies. There are just a couple of close-ups of wounds. It seems to me that Mr. Sawtelle is correct in terms of the tape being more probative than prejudicial in light of two things.

Well, a number of things. Number one is the argument of self-defense. I don't know if this completely negates that, and makes

it impossible, but clearly the positioning of the bodies is something that is relevant to the People's case.

And it is also something that is very difficult to explain in any way, shape, or form orally as opposed to seeing it on film.

I just -- I just give a tiny example. I was surely tempted to have Officer Bernasconi -- I was going to invite him to demonstrate these holds and pressures on either Mr. Sawtelle or Mr. Mahle. We got a graphic example of how difficult it is to describe body movements and body positions.

Secondarily, it is corroborative of the testimony of the pathologist, I am sure, based upon what Mr. Sawtelle has previously said his pathologist is going to be saying.

The defense has raised an in limine, and in their opening statement, the issue of destruction of evidence, and in many respects, it casts dispersions upon the quality of the work that has been done.

I guess that's a little bit overstated, since even the expert didn't complain about the quality of what was done, they complained about things that weren't done.

Mr. Sawtelle has pointed out things that the expert of the defense could have done had he opted to do so, or had he been approved to get funding or something. I am not quite sure how that all translates.

But bottom line is, the thoroughness of the videotaping, I believe, is something that is far more appropriate than prejudicial.

Even if the bodies were moved, as Mr. Bogh just suggested, even if that were true, and I guess, Mr. Bogh, you are referring to the body that's in the back, which would be Roscoe Riley, that in and of itself is corroborative of the testimony, and if I recall correctly, of at least the bar manager.

And since we have fairly different versions of what was occurring outside the bar, what occurred after the bar, some people having Mr. Duff running alongside the moving car, other people having him leaning into the car, and pushing something out of the way, I am just hazarding a guess that Mr. Sawtelle is

going to be promoting the second version, not the first version. That would be the version of the sober person, not the alcoholic.

Even that, although it may weaken any probative nature of the wounds to Roscoe Riley in terms of trajectory, certainly serves to corroborate the testimony of the bar manager whose name is - -

MR. SAWTELLE: Diana Flint.

THE COURT: Diana Flint. I understand that the perspective that some of us in the courtroom have of the graphic nature of things might be a tad skewed based upon our experience here as lawyers or as judges, and understand the jurors may have a slightly different reaction, which is understandable.

I don't find these photos to be especially graphic or disturbing, and clearly I find them more probative than prejudicial.

(14 RT 5005-5010.)

The pathologist identified the bullet wounds shown in the photographs. (15 RT 5071, 5075-5076, 5080-5092, 5098-5099; 5102-5111; 20 CT 5996-21 CT 6022.) Videotapes of the car at the scene with the bodies still in it and at the crime lab with the bodies removed were played for the jury. (15 RT 5173-5186; Exhibits No. 2-4.)

B. Analysis

Appellant failed to object to the photographs at trial, waiving his objection. At trial, he claimed the videotape, where it showed close-ups of wounds, was not necessary because it was duplicative of the photographs, impliedly conceding the use of the photographs was proper. (14 RT 5006.) Further, appellant objected to the videotape that showed close-ups of the wounds. (14 RT 5006.) The tapes played for the jury do not appear to show close-ups of the wounds. (Exhibits 2-4.) Generally, the failure to object waives a claim of evidentiary error on appeal. (*People v. Williams* (1988) 44 Cal.3d 883, 906.) Appellant's objection to the photographs here has been waived.

Further, while appellant mentions the videotape here along with the photographs, he includes no analysis of that portion of his claim. This court need not consider a contention for which a party offers no authority or reasoned argument. (See *People v. Turner, supra,* 8 Cal.4th at p. 214, fn. 19 [issues perfunctorily asserted need not be considered].)

If appellant's objection to use of the photographs and videotapes is not waived, it is without merit. The trial court, given the photographs and videotapes were not unduly gruesome and were relevant to show the prosecutor's portrayal of the events was accurate. The trial court did not abuse its discretion in allowing their use. The admission of allegedly gruesome photographs and videotapes is basically a question of relevance over which the trial court has broad discretion. (*People v. Scheid* (1997) 16 Cal.4th 1, 13-14.)

"A trial court's decision to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly outweighs their probative value." (*People v. Moon* (2005) 37 Cal.4th 1, 34.) The same legal standard applies to a court's decision to admit a videotape into evidence, and the trial court's ruling "will not be disturbed on appeal unless there is a manifest abuse of that discretion resulting in a miscarriage of justice." (*People v. Cain* (1995) 10 Cal.4th 1, 33.)

Appellant contends "the prosecutor showed the jury an entire series of photographs of the decedents' bloody wounds and some of the photos contained a 'revolting portraiture' of their 'horribly contorted facial expressions' over and over again in the most gruesome way and the way most likely to inflame the passions of jurors and cause them to vote guilty regardless of the evidence." (AOB 82.) Not so. Neither the photographs nor videotapes are unduly gruesome. (20 CT 5996-21 CT 6022; Exhibits 2-4.)

An examination of the photographs and videotapes shows the trial court did not abuse its discretion. They are not unduly bloody or gruesome and are relevant to the manner in which the victims were killed. The photographs did not show a considerable amount of bleeding caused by the wounds had some relevance to the manner in which appellant committed the killings. The photographs in particular show that the criminalist's descriptions of the muzzle distances for the various wounds was accurate. This being so, the ruling cannot be said to have been erroneous since the photographs were not unduly prejudicial. While the photographs show the bullet wounds, the wounds are not at all bloody or gruesome. They were not. They do not depict a considerable amount of blood or gruesome injuries. While a videotape does show dark stains on clothing, it does not appear unnecessarily or particularly bloody. The photographs and videotapes were unlikely to have triggered an emotional reaction against appellant that would tend to cause the trier of fact to decide the case on an improper basis. (See *People v. Walker* (2006) 139 Cal.App.4th 782, 806.)

As this Court has often observed, murder is seldom pretty "[b]ut as unpleasant as these photographs are, they demonstrate the real-life consequences of [defendant's] actions. The prosecution was entitled to have the jury consider those consequences." (*People v. Bonilla, supra*, 41 Cal.4th at p. 354.) The evidence presented was not unduly gory. (*People v. Heard* (2003) 31 Cal.4th 946, 976, 977.) The use of more gruesome photographs has been held not to have been improper. (*People v. Riggs* (2008) 44 Cal.4th 248, 258, 304 [body "lying facedown in a ditch . . . severely decomposed and desiccated"]; *People v. Griffi, supra,* 33 Cal.4th at p. 580 [child victim's body with throat slashed and body cavity cut open]; *People v. Brasure* (2008) 42 Cal.4th 1037, 1053-1054 [victim's body, partially decomposed and eaten by animals, showing evidence of burning and torture].) "The jury can, and must, be shielded from depictions that

sensationalize an alleged crime, or are unnecessarily gruesome, but the jury cannot be shielded from an accurate depiction of the charged crimes that does not unnecessarily play upon the emotions of the jurors." (*People v. Ramirez* (2006) 39 Cal.4th 398, 454; see also *People v. Anderson* (1987) 43 Cal.3d 1104, 1149-1150 [upholding trial court's finding that four crime scene photographs, which included a photograph of one victim's head in a large pool of blood and of another victim lying face up with bleeding wounds, were "not gruesome"]; *People v. Allen* (1986)42 Cal.3d 1222, 1258 [victims' bodies were not depicted "in a badly decomposed condition or grossly disfigured from autopsy"].)

Appellant contends the photographs were shown "over and over again in the most gruesome way." (AOB 82.) He argues that the photographs are cumulative to the coroner's and criminologist's testimony. There is no evidence that the photographs were shown repeatedly or that it was done in a manner that made them more gruesome. The photographs were not cumulative to the coroner's and criminologist's testimony, but they did illustrate that the testimony was accurate. That the challenged videotape and photographs may not have been strictly necessary to prove the People's case does not mean the trial court abused its discretion in admitting them. This Court has "often rejected the argument that photographs of a murder victim should be excluded as cumulative if the facts for which the photographs are offered have been established by testimony." (*People v. Wilson* (1992) 3 Cal.4th 926, 938; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1199; *People v. Heard, supra*, 31 Cal.4th at p. 978; *People v. Gurule* (2002) 28 Cal.4th 557, 625.) Photographs depicting a victim's wounds that support the prosecution's theory of the case, even if graphic, are admissible. (*People v. Lewis* (2001) 25 Cal.4th 610, 641-642; accord, *People v. Perry* (2006) 38 Cal.4th 302, 318; *People v. Hart* (1999) 20 Cal.4th 546, 616 [upholding the trial court's ruling admitting into evidence

16 photographic slides, three photographs, and one videotape]; *People v. Medina* (1995) 11 Cal.4th 694, 754-755; *People v. Price* (1991) 1 Cal.4th 324, 441; *People v. Thompson* (1988) 45 Cal.3d 86, 115 ["Even somewhat cumulative photographic evidence may be admitted if relevant"].)

The trial court's decision to admit the photographs and videotapes fell well within its broad discretion. The photographs and videotapes were not gory or inflammatory. While one videotape shows the victims being removed from the car, the blood primarily appears as a dark stain on their clothing. While they may be unpleasant, they are not necessarily unduly prejudicial.

The cases relied on by appellant are distinguishable. (AOB 78-81.) In *People v. Burns* (1952) 109 Cal.App.2d 524 (AOB 78), the trial court admitted into evidence post-autopsy photographs of very limited probative value.

> They were particularly horrible because the head was completely shaved. The head shows large incisions which had been made for the autopsy and were thereafter sewn together. In two pictures the lips were practically turned inside out and held with instruments to show the cuts. Both arms showed marks or punctures made by the surgeon, one being particularly ugly. . . . The completely bald head, the surgical cuts and sutures, the ugly punctures, the inverted lips with the instruments attached, make the body so grotesque and horrible that it is doubtful if the average juror could be persuaded to look at the pictures while the witness pointed out the bruises and abrasions. In view of the fact that no question was raised as to these bruises and abrasions, and the fact that a view of them was of no particular value to the jury, it is obvious that the only purpose of exhibiting them was to inflame the jury's emotions against defendant. . . . Surely, there is a line between admitting a photograph which is of some help to the jury in solving the facts of the case and one which is of no value other than to inflame the minds of the jurors. That line was crossed in this case.

(*People v. Burns, supra*, 109 Cal.App.2d at p. 541.)

The photographs here have none of the gruesomeness of the *Burns* photographs. In addition, the photographs here helped prove the prosecution's theory of the case.

In *People v. Smith* (1973) 33 Cal.App.3d 51 (AOB 79), three photographs taken at the scene of the crime were "gruesome; their impact is heightened by vivid coloration; the two pictures of [the victim's] seminude, terribly mutilated, bloody corpse have a sharp emotional effect, exciting a mixture of horror, pity and revulsion." (*Id.* at p. 69.) The prosecution, both in the trial court and on appeal, did not offer any evidentiary purpose in presenting these pictures to the jury. (*Ibid.*)

In *People v. Gibson* (1976) 56 Cal.App.3d 119 (AOB 79), two of the photographs used were "gruesome, revolting, and shocking to ordinary sensibilities" and in light of the many other photographs of the deceased victim used they were "cumulative evidence of slight relevancy." (*Id.* at p. 135.) In *People v. Poggi* (1988) 45 Cal.3d 306 (AOB 80-81), a photograph of the victim while alive and another showing a tracheotomy incision were deemed irrelevant to any disputed material fact. (*Id.* at pp. 322-323.)

The pictures here could not be described as revolting and shocking (*Gibson*), as causing a reaction of horror, pity and revulsion (*Smith*), or as irrelevant and failing to show the wounds suffered (*Poggi*). The pictures here had evidentiary value and were not nearly as gruesome as those in the cases cited by appellant.

Three additional cases relied on by appellant show the trial court here did not abuse its discretion. In *People v. Love* (1960) 53 Cal.2d 843 (AOB 79), "not exceptionally gruesome" photographs of the victim of a shotgun slaying were not improperly admitted. "The position, nature, and shape of [the victim's] wound indicates that she was killed by a shotgun fired at very close range into her back from a point to her left. The photographs tend to prove how the shooting occurred and corroborate evidence that defendant

intentionally held the gun close to his wife's body to avoid injuring others. Although this photographic evidence was largely cumulative and might properly have been excluded, the trial court did not abuse its discretion in admitting it." (*Id.* at pp. 852-853.) However, the trial court erred when it admitted in the penalty phase a photograph of the deceased's face that "tended to prove only the [the victim] died in unusual pain." (*Id.* at p. 856.)

Similarly, in both *People v. Ramos* (1982) 30 Cal.3d 553, 576-578 and *People v. Hendricks* (1987) 43 Cal.3d 584, 594-595 (AOB 80), photographs of the murder victims were not unduly gruesome and were properly admitted to corroborate the prosecutor's theory (photographs of the victims alive were irrelevant, but harmless error). Here, the photographs were not exceptionally gruesome and they tended to corroborate how the shootings occurred. The photographs did not show that the victims died in unusual pain or in any manner similarly prejudicial. *Love*, *Ramos*, and *Hendricks* show the trial court here did not abuse its discretion in admitting the photographs.

Jurors here knew they were sitting on a case that involved two murder victims and a potential death sentence. The photographs and videotapes were not gruesome and they supported the version of events as portrayed by the coroner and criminologist, rather than appellant's claim of shooting in self-defense. The trial court did not abuse its discretion by ruling in an arbitrary, capricious, or patently absurd manner. (*People v. Moon, supra*, 37 Cal.4th at p. 35.) Appellant's claim fails.

Any error in admitting the photographs and videotape was harmless. (See *People v. Allen, supra*, 42 Cal.3d 1222, 1258, applying the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) "Under the *Watson* standard, the erroneous admission of a photograph warrants reversal of a conviction only if the appellate court concludes that it is reasonably probable the jury would have reached a different result had the photograph

been excluded." (*People v. Scheid, supra*, 16 Cal.4th 1, 21.) Although the photographs were not pleasant, they were not unusually disturbing or unduly gruesome, and were not inflammatory. It was not reasonably probable that the admission of the photographs affected the jury's verdict. (*People v. Gurule, supra*, 28 Cal.4th 557.)

VII. EXCLUSION OF PHOTOGRAPH OF VICTIM'S TATTOO WAS NOT FUNDAMENTALLY UNFAIR NOR A DUE PROCESS VIOLATION

Appellant contends a photograph of the tattoo on Riley's shoulder of a handgun being pointed at the observer was admissible to show appellant's "perception of Riley as being armed and dangerous." (AOB 84.) Not so. There was testimony Riley was armed with a .357 Magnum. The fact that Riley had a tattoo would not have shown he was dangerous.

A. Background

The trial court and attorneys on two different days discussed the pistol tattoo. (12 RT 4169-4173, 4189-4199.) The defense wanted to show the gun tattoo because it was "highly suggestive of someone that either carries guns, has an affinity for guns or aggressiveness in the gun area. . . . This is a gun tattoo. It relates to what he does, he carries weapons. He is armed. Those propensities would be shown through those witnesses, and possibly defense witnesses as to the propensity for violence or for use of guns." (12 RT 4170.)

The prosecutor objected to the jury learning of Riley's tattoo, arguing that there was no evidence appellant was aware of it, it could imply Riley was a gang member and that, because some people dislike tattoos, it could make jurors "have contempt for the victims." (12 RT 4170, 4190.) The prosecutor argued that his theory of the case was that Riley was armed and that appellant took Riley's gun from him after the initial shooting. (12 RT 4192.) "I think it is indisputable on the day in question that Roscoe Riley was, in fact, armed. That's going to be my theory of the case anyway."

(*Ibid.*) The defense was "using it to show he is a violent person, not to show he is armed that day, because there is no dispute that he's armed that day." (*Ibid.*)

> THE COURT: I guess by -- here's my sort of gut level feeling. If the People are going to say in their opening statement, if they are going to, as Mr. Sawtelle just did acknowledge, that you are perfectly free to, even if he doesn't, to ask his witnesses, isn't it true that Mr. Riley always carried a gun, by that, I mean a physical gun, I am just not sure how -- assuming the nexus is there, why isn't it either simply cumulative and irrelevant, or two, why isn't that more of a propensity to be a shooter, which is what Mr. Sawtelle, I guess would say, would be opening the door to the negative aspects of your client's background.
>
> Is that a fair statement, Mr. Sawtelle?
>
> MR. SAWTELLE: Yes.
>
> THE COURT: And while you are discussing it, let me say one more thing. This is a different issue. If your client testifies, and your client testifies that he's known Riley long enough to have seen him with his shirt off, knows about the tattoo, and how he personally feels about it, et cetera, I mean, I have no quarrel with that.
>
> But to slip this in -- I don't mean to say it like that. To attempt to insinuate this particular thing when it appears to be a non-issue for the purposes for which you claim to want it in, I don't think it's appropriate. Now I will be quiet, and you can talk to one another.
>
> MR. MAHLE: I was going to try to use the analogy of the indicators that the justice system uses for validating a gang member, and I think if I remember right, seriously, 9 or 10 indicators.
>
> One is seeing one in a picture, another one is having a gang tattoo, an indicator of -- just an indicator of what -- apparently they use that as an indicator of one of the two or three -- you only need two or three to be a validated gang member.
>
> [¶]...[¶]

MR. BOGH: I would say this, Your Honor. That we would like to reserve the right to possibly bring that in later, depending on what develops.

And also I would like to reserve the right to, at least, question the coroner or pathologist if there is anything of any evidentiary value of that photo certainly without posting it to the jury.

If he says no, it's just a picture, I mean, I'd like to take Mr. Sawtelle's word for but, I don't know if he actually knows for certain if there is something in that photo.

Because I have been told by Mr. Sawtelle that's the only area of that body, and certainly if somebody looks at it, and says well, see, this shows this, and that is how I deduce that, it might be of some value.

And of course if it needs to be covered up, they can testify without that, then we will address that issue, so –

THE COURT: I don't want to create the wrong impression. I think under the right circumstances there may indeed be value to that photograph.

I just don't see it at the moment based upon the concessions and the position that Mr. Sawtelle has taken.

MR. BOGH: The only other problem that I have is that we certainly will probably both tell the jury that what we say in statements or argument is not evidence, and Mr. – if Mr. Sawtelle says, well, I am going to tell the jury in my opening statement that Mr. Riley was armed, well, that's not any evidence.

And he can sit there and say, well, I am going to play Mr. Duff's tape to where Mr. Duff says that, and the jury can believe or disbelieve Mr. Duff.

So it's not like I am getting any type of tangible thing short of a stipulation.

MR. SAWTELLE: When we find Mr. Riley's body, it does, in fact, have a shoulder strap. I will be calling a criminalist who will match up the holster to the shoulder strap, and she will

testify that it was a cut or ripped off of the same shoulder strap that Mr. Riley was wearing.

So again, it will be my position, with the evidence I present, that the 357 and the holster was on Roscoe Riley at the time of the shooting.

THE COURT: I tell you, with all of that, I don't think the tattoo's going to be the make or break as to whether or not the jury's confused about this issue.

MR. BOGH: Yes, Your Honor.

(12 RT 4195-4199.)

The prosecutor, during his opening statement, told jurors Riley was armed. (12 RT 4246.) Jurors also heard evidence that on Riley's body was an elastic strap that was consistent with having been a part of a gun holster and that the .357 matched the wear pattern on the holster found. (16 RT 5389, 5417-5418.) The criminologist testified she was made aware "the .357 pistol was attributed to Roscoe Riley." (16 RT 5492.)

B. Analysis

As the discussion above shows, appellant in the trial court argued the tattoo showed the victim had a propensity to carry a gun. He avoided the contention made here that it showed that the victim was violent. (12 RT 4192.) He cannot proffer that argument on appeal when he specifically avoided making it in the trial court. The issue has been waived. (*People v. Anderson* (2001) 25 Cal.4th 543, 580; Evid. Code, § 354, subd. (a) [no judgment may be reversed for the erroneous exclusion of evidence unless "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means"]; *People v. Schmies* (1996) 44 Cal.App.4th 38, 53 ["An offer of proof should give the trial court an opportunity to change or clarify its ruling and in the event of appeal would provide the reviewing court with

the means of determining error and assessing prejudice. [Citation.] To accomplish these purposes an offer of proof must be specific."].) The fact that appellate counsel has conjured up a new basis for admissibility is of no moment.

The claim is also without merit. Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence means evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Mills* (2010) 48 Cal.4th 158, 193; *People v. Williams* (2008) 43 Cal.4th 584, 633-634.) A trial court has broad discretion in determining whether evidence is relevant and whether Evidence Code section 352 precludes its admission. (*People v. Mills, supra*, 48 Cal.4th at p. 195; *People v. Williams, supra*, 43 Cal.4th at p. 634.) This court applies an abuse of discretion standard to a trial court's rulings on the admissibility of evidence, including those turning on the relevance or probative value of the evidence in question. (*People v. Hamilton* (2009) 45 Cal.4th 863, 930; *People v. Harris* (2005) 37 Cal.4th 310, 337.)

The prosecutor stated there would be evidence linking Riley to the holster and the .357. The jury heard such evidence. The gun tattoo, even if it was considered evidence the victim was armed, was thus cumulative and not relevant. As the trial court ruled, the prosecutor's agreement that there would be testimony that the victim was armed made appellant's need for the evidence a "non-issue for the purposes for which [appellant] claim[ed] to want" to use it. (12 RT 4196.) The trial court also offered to reconsider its ruling if there was evidence appellant was aware of the tattoo.

In addition, even assuming such tattoo evidence is relevant to a claim of provocation, there still must be some basis for admitting the evidence. (See *People v. Hoyos* (2007) 41 Cal.4th 872, 913 ["even if the murder victim were the most violent person in the world, that fact would not be

relevant if the evidence made it clear that the victim was taken by surprise and shot in the back of the head"].) There was no evidence beyond appellant's statement to police that the shooting was done in self-defense. The criminologist testified one of the victims had dice in his lap. (16 RT 5386.)

In any event, exclusion of the evidence was not prejudicial. Any error in excluding relevant evidence must be shown to result in a miscarriage of justice. Evidence Code section 354 provides that no verdict shall be set aside "by reason of the erroneous exclusion of evidence unless" the error "resulted in a miscarriage of justice" and the "substance, purpose, and relevance of the excluded evidence was made known to the court."

The fact the victim had a gun tattoo did not diminish the overwhelming evidence against appellant. Given the jury also heard evidence linking Riley to the holster and the .357, and the prosecutor conceded as much, it is not reasonably probable that the jury would have returned a verdict more favorable to appellant if evidence of the victim's tattoo had been admitted. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611; *Watson, supra,* 46 Cal.2d at p. 836.)

VIII. DISMISSAL OF TWO JURORS DURING TRIAL WAS WARRANTED

During trial, the court dismissed two jurors after they called in sick. Appellant contends it was reversible error to dismiss the jurors without a hearing to demonstrate good cause for the dismissal. (AOB 89-100.) A juror calling in sick, especially when unable to commit on a return date, is adequate grounds for dismissal without a further hearing. The juror is either sick or lying about the illness. Either provides grounds for dismissal.

A. Background

On the morning of October 30, 2001, juror No. 6 called in sick with a stomach flu, stating she had just come down with it and would be out that

day and in all likelihood the next. (14 RT 4778.) It was a Tuesday, and the defense requested the case be continued to Thursday. (14 RT 4779.) The prosecutor advocated replacing the juror with an alternate. (14 RT 4779-4780.) He was concerned about a witness, Fernando, who was there that day, but because of the "transient nature of her lifestyle," was unreliable in terms of getting to court and could not be relied upon to be present in the future. (14 RT 479.) Her testimony was earlier interrupted because she was in pain and could not get out of bed, but she was there that day and ready to testify. (14 RT 4587-4588.) The prosecutor was also worried a delay would mean the guilt phase would not finish before a planned Thanksgiving break and this would result in jurors being lost because it would cause additional delays in the guilt and penalty phase. (14 RT 4780.) The court replaced the absent juror with an alternate.

> THE COURT: . . . My concerns are identical, well, in part, to what Mr. Sawtelle said, in terms of losing these witnesses and throwing us off. It's not just a matter of two days.
>
> This potentially puts us in a position of having to go dark early in November rather than have -- I just can't imagine that anybody wants one argument to occur before Thanksgiving, and the other argument to occur after Thanksgiving.
>
> I also can't imagine that you want to argue, have them go out for a morning or afternoon, and then take 10 days off, and come back. I mean, that sort of dilutes the impact of your arguments.
>
> So I can envision a scenario where we shut down this trial like on November 14th instead of November 15th. In other words, we quit a couple of days early, and then take a 10 or 12-day break, come back, instruct, argue, and deliberate.
>
> And then you have got a whole bunch of time in between the last presentation of evidence and these peoples' abilities to deliberate effectively.

And I see that as a problem. Mr. Bogh, would you agree with me that this is -- although I have solicited your input, this is essentially my decision?

MR. BOGH: I am sorry. You said this is your decision?

THE COURT: Yes. No, I haven't told you what my decision is.

MR. BOGH: Yes, certainly. The ball is in your court, Your Honor.

THE COURT: Okay.

MR. BOGH: Looking at the situation here, I don't know if it would be possible, because in all honesty, I am not trying to delay this trial, not trying to cause any problems here.

But I am thinking, you know, is it possible to consider a one-day continuance as opposed to two? You know -- I don't know, you know.

Just because the District Attorney has, you know, a flaky witness, that, you know, it seems like we have to keep adjusting our schedules to suit her flakiness, and, you know -- you know, that's a concern to the court that she may disappear.

Mr. Sawtelle has the same feeling. And I think the tail is wagging the dog here with the concerns about her.

And so, you know, I am willing to at least say, okay, what about one day. Maybe this lady will be back together in a day's time. She apparently wasn't sure of that.

And, you know, it's just so much guesswork to just -- to just know when we are going to finish this case.

I know we have this doctor, or this Ph.D coming in, and Mr. Sawtelle has indicated that there is going to be consequences about that which may have to be litigated, so that's going to possibly take some additional time.

There certainly are things that we could do. And it was a few days ago, just to throw something else into the mix here, that I talked to Mr. Sawtelle about the crime scene videos, and there is something that I am going to need the court to review.

That probably won't take a lot of time, but I am just talking about if we do go over until tomorrow, there is some matters that I need to take up outside the jury's presence.

THE COURT: Well, what's the issue with the crime scene? That's okay.

MR. BOGH: I have a list here.

MR. SAWTELLE: Well, without going into that, he is right. It's not a long video to watch.

But this seems a tad disingenuous for the defense to argue that what -- Cindy Fernando shouldn't make a difference in this, when yesterday they were highly upset about the fact that she wasn't here, and I don't blame them for that, but nonetheless, now they want to risk going a second day.

And it seems like that is incredibly risky. And let's face it, they are going to ask for a mistrial if she doesn't show up. It's going to happen. They would be crazy not to ask for one.

And even if the court doesn't grant that, her testimony is stricken, so that hurts me. And I think it's so speculative whether or not tomorrow, if we take a day off, then we have lost a day if she doesn't show up tomorrow.

We are talking about two days, when in reality if she has really got a bad case of the flu, your clerk was gone for more days than that last week, I believe. I mean, it can last 3 days or 4 days, so we should forge ahead.

MR. BOGH: An option, if this witness is obviously a very material witness, and so flaky and unreliable and subject to fleeing, that perhaps she can have the accommodations of the Gray Bar Hotel.

THE COURT: Gray Bar Motel. That's a very special thought.

Mr. Sawtelle, anything else?

MR. SAWTELLE: No.

THE COURT: Mr. Bogh, anything else?

MR. BOGH: No, Your Honor.

THE COURT: Folks, I have a multitude of reasons, but let me put it this way. I don't know what Mr. Huntington, who is in the audience, learned from his conversation with Cindy Fernando.

I know that we have referred to Miss Fernando as flaky, as unreliable. Mr. Bogh just labeled her a flight risk, suitable for jailing, until such time as she is needed to testify.

We have chuckled at her pillow for comfort, but as far as I am concerned, she is like any other witness, and that is, she has problems in her life.

It sounds to me as though she has been victimized, and I don't want to personally label her as flaky. I think I want to label her as somebody who has proven to be difficult to get into court.

But separate and apart from Cindy Fernando are the other issues. I understand we may have some productive things to do, but I mean, we have picked 5 alternates so that we could forge ahead if necessary, and we have made it through a pretty substantial period of time and a couple of weekends.

I realize we have lots of time left, and I certainly don't want to curse our good fortune, but I am prepared to -- prepared at this point, and I hereby relieve, remove, juror number 6, and will substitute in SF who is alternate number 1.

This is a decision within the control of the court. I appreciate your input. I certainly don't want to attribute you with any negative motivations to any of this.

I know the defense is -- they like all of these people, they don't want to lose anybody. I understand that.

But I also know from experience, when you start cancelling days, it tends to have a fairly negative impact on the remaining jurors.

So they get a little upset, a little less reliable than they have been heretofore. And I don't want to risk that either.

Mr. Bogh, you have had a chance to confer with Mr. Huntington. Is there anything I need do with Miss Fernando, assuming she is still out in the hall?

MR. BOGH: I think we obtained enough information to investigate further, and so we have had our way with her as far as discussing her problems.

THE COURT: Okay. Folks, the announcement I just made, I am not going to finalize until I see 16 jurors come into this room.

For all I know, we have got other people missing. I know juror number 4 was running late. Because of our talking here, she ought to be here by now.

But I am not finalizing anything until I see these bodies. Because obviously, if it turns out somebody else is missing, I am not about to lose two jurors, one for an unknown reason, and lose two alternates. Okay?

MR. BOGH: That's fine.

(14 RT 4784-4789.) Only juror No. 6 was missing that day, and she was replaced with the first alternate. (14 RT 4791.)

On Wednesday, November 28, 2001, during the penalty phase, juror No. 3 called in sick. (18 RT 6187.) The juror reported she had been sick the prior weekend, and had missed work due to her illness on Monday and Tuesday.

MR. SAWTELLE: Well, I flew two people in at substantial cost today. One had to be on a chartered plane from Brawley, California, and both of these people are scheduled to go back again later tonight.

And I would ask that we proceed, because it's really going to be a problem if we don't, at least for me in terms of my witness presentation.

THE COURT: Mr. Mahle.

MR. MAHLE: Your Honor, Mr. Bogh may have other comments. We have reviewed juror number three, her questionnaire. We have reviewed the questionnaire of the alternate that may be placed -- may be replacing number three.

Without going into exactly our strategy here, obviously there has been deliberations done with these 12 individuals. I know there

is a couple of ways you can interpret that. I think you can interpret it good or interpret it bad in a way.

But I -- obviously we have gone through some expense next week, but there is more involved here than just the expense of a private chartered flight. That flight has to go back anyway obviously, or unless they are going to fly back and forth one day.

But what I am going to say is this. We have had one replacement, we are on schedule. We have done -- all done our parts to keep on schedule here.

This juror -- what I am hearing was she is initially ill on Saturday, she hasn't gone to her doctor yet. I would ask she go to her doctor today, and let us know in some way if she can't go forward.

What the alternate has missed, although the deliberations were only like a day and a quarter, there is possibly things that were said in there that can directly relate to the second phase in more ways than one.

And I -- Mr. Bogh may have other comments there. We will never know exactly what was said, but I can imagine something like this.

Alternate one comes in to the mix, and they go back in the deliberation room, and continually, well, you weren't here when we discussed the other phases, or you weren't here when we talked about these other factors. You weren't here -- and this is going to be a kind of a continuing theme, and that would be one interpretation.

These 12 people have gone through these deliberations, they talked about different factors that may leave them in one spot or another spot, but this is now very, very crucial.

They have obviously paid attention, and I think you could take a position that alternate 1, 2 or 3 would have paid slightly less attention possibly to the proceedings, so this is a very delicate, crucial mix now.

And we are now talking to 12 people who have already talked about the initial guilt fate of Mr. Duff, and now we are going to

be talking to them same 12 people about their role in the penalty phase.

And the alternates -- certainly the court has the power to put in an alternate, but we haven't even tried. We haven't even tried one day to see if she can see her doctor, and be back here.

It sounds like she wants to be. And I know the schedule is driving and it's driven us all the way through this, but there is factors more important than that.

I'd like to keep the same mix. And some critics may say, well, you have had an initial verdict against you, Mr. Mahle or Mr. -- against defense team.

And I would say, in a way, maybe that discussion that took place might assist us in the penalty situation. Again, we weren't in there, we don't know exactly what was said.

But you can take it in different ways there, that this could possibly be helpful now that they have heard everything that's going to be said in the deliberations part, the alternate would not have heard that.

Mr. Duff -- I mean, Mr. Bogh.

MR. BOGH: Yeah. I certainly concur in what Mr. Mahle says, and if this juror said, yeah, I have no clue, I don't think I can come back, you know, I am just so sick, and -- but she has indicated that strong willingness to be back tomorrow.

And I don't know if the court could encourage her to see her doctor today, or whether leave her on her own, but I know it's going to set things in somewhat inconvenience for some people, but I don't think that 24 hours when we are dealing with these stakes is that much of an inconvenience.

THE COURT: Mr. Sawtelle.

MR. SAWTELLE: I think we are dealing with the same problem we had the last time we had to remove a juror for illness. None of us know how long she could be out. She has been out five days already.

I don't think I heard anything from the clerk that said she is going to be here tomorrow. I mean, it's just, there is no way to know. I don't want her to feel like she has got to come in here and infect the rest of the jurors, and we have another problem.

We chose the alternates because apparently both sides thought she'd be okay on this jury, too, and we need to presume she listened to everything just as attentively as everybody else did. There is no reason to think otherwise.

MR. BOGH: I think if you use that illness as a yardstick and, gee, I just came down with the flu, I know I am going to be out for the rest of the week, but I have had a few jury trials, and I have certainly been there when a juror gets ill or incapacitated, but that's not, you know, no one ever knows for certain if they are going to be there the next day. But I think we owe it to at least give her that opportunity of one day.

We are not asking for an indefinite period of time. If she is not here tomorrow, then we press on.

THE COURT: Mr. Bogh, Mr. Mahle, anything further?

MR. MAHLE: No.

THE COURT: Mr. Sawtelle.

MR. SAWTELLE: Submitted.

THE COURT: Counsel, I understand the feelings on both sides here. I am not usually hell-bent on adhering to schedules, but I mean, we have been on a substantial break, I have lost track of how many days.

THE CLERK: Since the 16th.

THE COURT: 11 days between the last time we saw these jurors and today. I realize I heard the juror's voice that is on the voice mail that Bob forwarded to me.

I also recall her concerns about her health that she articulated during voir dire, and I am prepared and [am] going to move forward replacing her with an alternate.

(18 RT 6187-6191.)

B. Law

"A juror may be replaced if ill." (*People v. Roberts* (1992) 2 Cal.4th 271, 324 (*Roberts*).) Section 1089 states that if "at any time, whether before or after final submission of the case to the jury, a juror dies or becomes ill, . . . the court may order the juror to be discharged." Whether to replace an ill juror lies within the sound discretion of the trial court. (*Roberts, supra*, 2 Cal.4th at p. 325.) "A juror's disqualification is discretionary with the court." (*People v. Dell* (1991) 232 Cal.App.3d 248, 255.)

There is "no statutory procedure for determining the existence of a ground of discharge. In the absence of a stipulation by counsel, 'the judge must act on his own motion, expeditiously. His summary determination, on the basis of any evidence . . . will seldom be successfully challenged.' [Citation.] [¶] When the juror is not present in the courtroom it would appear unreasonable to require the sick or hospitalized juror to come into the courtroom in order to hold a hearing to substantiate the factual basis for the juror's claim of illness." (*People v. Dell, supra*, 232 Cal.App.3d at p. 256, footnote omitted, ellipsis original.) A "hearing would have been pointless and perhaps callous." (*Ibid.*, quoting *In re Mendes* (1979) 23 Cal.3d 847, 852.)

"The court's discretion is not unbounded: it must determine whether good cause exists to discharge the juror, and its reasons for discharge must appear in the record as a demonstrable reality." (*Roberts, supra*, 2 Cal.4th at p. 325.) "Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1053.)

C. Analysis

The first juror who called in sick expected to be gone that day, and at least the next, which meant the court reasonably needed to postpone trial at least two days in hopes the juror might have been able to return. Seven witnesses testified that day, including Fernando, and nine the next, including a carryover witness, so even a two-day delay would have meant rescheduling a significant number of witnesses.

The second juror had already been sick five days with an illness serious enough that she went to the emergency room vomiting. She was considering going to her regular physician that day, a further indication she was not significantly better.

The trial court, armed with these facts and the absence of the jurors, reasonably determined that the jurors were unable to continue their jury service due to illness. The trial court acted well within its discretion in dismissing the two jurors and replacing them with alternates. At best, the trial would have been delayed one or two days with no real assurance when the jurors would be able to return. Putting pressure on the jurors to return prior to being completely better ran the risk of making other jurors sick.

Appellant claims that the trial court replaced the jurors "without conducting an adequate inquiry or determining the facts, and without a good cause showing of the jurors' inability to perform their duties as a demonstrable reality." He argues: "The court, rather than speaking to the jurors, relied exclusively upon their voice mails and the clerk's multiple-hearsay understanding." (AOB 96.)

The trial court here did not need to conduct additional inquiry. The first juror here reported being ill with a stomach flu that would in all likelihood keep her out at least through the next day. The second juror, during the penalty phase, reported she was on a fifth day of a serious illness that caused her to seek hospital emergency room treatment and had her

considering going to her doctor and would likely keep her out at least that day and the next. While appellant was willing to delay the trial at least one day to see if the jurors were able to return, the trial court was not, especially since in both cases the ill jurors were not expected back the next day. In addition, in both cases the prosecutor had legitimate witness issues that caused him to argue against delaying the trial.

It would have been unreasonable to require a sick juror to come to court in order to hold a hearing to substantiate the factual basis for the juror's claim of illness. (*People v. Dell, supra*, 232 Cal.App.3d at p. 256, *In re Mendes, supra*, 23 Cal.3d at p. 852.) The determination of good cause for dismissal after a juror's request to be dismissed does not require a hearing. In *Dell*, two jurors were dismissed, one who was sick during trial and called the clerk and "indicated that he had an attack of phlebitis and he wished to be excused because he was feeling very ill." (*Dell, supra*, 232 Cal.App.3d at p. 254, 256.) A second juror's cousin called and indicated the juror was in an accident and was being taken to the hospital. The caller indicated the juror was sore and she would try to come in tomorrow but could not promise since she was being taken to the hospital and was in bad shape that day. The telephone call was deemed sufficient evidence a juror was too ill to continue functioning as a juror "[i]n the absence of any contrary showing." (*Dell, supra*, 232 Cal.App.3d at pp. 254, 256.) The Court of Appeal noted that, in the case of an ill juror, "[w]hen the juror is not present in the courtroom it would appear unreasonable to require the sick or hospitalized juror to come into the courtroom in order to hold a hearing to substantiate the factual basis for the juror's claim of illness." (*Id.* at p. 256.)

It was appropriate for the court here to rely on voice mail messages and on messages relayed from the court clerk. This Court under similar circumstances has found that such messages constitute a demonstrable

reality that discharge of a juror was warranted. (*Dell, supra*, 232 Cal.App.3d at pp. 253-254 [messages from the two sick jurors were relayed to the judge by the clerk]; *People v. Bell* (1998) 61 Cal.App.4th 282, 286-288, [only African-American male juror dismissed for cause after he called the clerk and reported he had to take his son to the doctor for an unspecified medical emergency that might take only the morning, but the timing of the juror's return was uncertain and other jurors and witnesses were waiting]; *People v. Hall* (1979) 95 Cal.App.3d 299, 305-306 [juror on a Friday altered court in person his wife might need cataract surgery that Monday, and then called court on Monday to state he was required to drive his wife to the hospital for surgery and wished to remain with her].)

Accordingly, it was within the court's discretion to dismiss the jurors and replace them with alternates. The trial court, armed with these facts and the absence of the jurors, determined that they were unable to continue their jury service due to illness.

In addition, appellant does not show he was actually prejudiced from the substitution of jurors nor does it appear he could reasonably make such an argument. (*Dell, supra*, 232 Cal.App.3d at p. 256-257.) "It is long-established law in California that where an alternate juror, approved by defendant in voir dire, is allowed to deliberate on the jury panel, the defendant bears a heavy burden to demonstrate that he was somehow harmed thereby." (*People v. Hall, supra*, 95 Cal.App.3d at p. 307.)

Alternates were selected from the same source, in the same manner, with the same qualifications and were subject to the same challenges. The alternates had an equal opportunity to observe the entire proceedings and take the same oath as the regular jurors. In this case, appellant had ample opportunity to voir dire the alternates and use his allotted peremptory challenges. There is no allegation the alternates were either incompetent or biased. Appellant cannot show prejudice.

IX. JURY INSTRUCTIONS ON IMPERFECT SELF-DEFENSE OR HEAT OF PASSION INVOLUNTARY MANSLAUGHTER WERE NOT WARRANTED BY THE EVIDENCE

Appellant claims the trial court erred when it "refused defense counsel's request to instruct on second-degree murder or imperfect self-defense and heat of passion voluntary manslaughter." (AOB 102.) There was no evidence to support such instruction. There was no evidence that could have absolved appellant of guilt of the greater offense but not also of the lesser offenses. The trial court did not err.

A. Background

The prosecutor argued that the evidence at trial supported a verdict of either "complete acquittal by self-defense or a first degree murder." (16 RT 5641.) The murder was either "felony murder robbery or premeditated and deliberated murder" since four witnesses testified that appellant told them he was going to rob Roscoe Riley, kill him and "leave no witnesses behind at the robbery." (*Ibid.*) There was no evidence of an imperfect self-defense and "no heat of passion, quarrel, argument, and there is no expressed or -- no implied malice, certainly under a second, that I can see. This is a gunshot, six gunshots. [¶] I don't see any implied malice there. And I don't see any theory even that allows for expressed malice in this case. [¶] It's done as part of a robbery, or it's a self-defense. I mean, it's one of those two things." (16 RT 5642.) "[I]t seems very clear that on a felony murder case, that no lessers are required unless there is substantial evidence to support one of the lesser verdicts. . . . I don't think we are even approaching that in this case." (*Ibid.*)

The defense sought instruction on second-degree murder and voluntary manslaughter, arguing the evidence was not as clear cut as the prosecution contended. The "jury could certainly find that something went on in that car other than a robbery" and that the killing resulted from

"reckless conduct" but not "premeditated murder." (16 RT 5646-5647.) The jury could have believed that appellant, "troubled by the lack of compensation" in the gun deal, could have caused the parties to get into an argument in the car. (16 RT 5648.) The defense added that the circumstances of the shooting are

> subject to a lot of interpretation by the jury as to whether or not the killing of Mr. Hagan was intentional or accidental. . . . I don't think that -- that the defense should be boxed into just saying to the jury you have to swallow this giant pill of self defense. I think the jury should be be given the options to -- to look at this case and look at all the evidence and make up their minds as to what happened inside that vehicle. It might not -- it may well not be felony murder. It may well not be premeditated, willful, deliberate murder. It may not be self defense. It may be somewhere in between.

(17 RT 5673.)

The trial court agreed with the prosecutor's analysis that there was "no evidence whatsoever in support of either of the lessers advocated by the defense." (17 RT 5674-5675.) The defense was "asking the court to give the jury an out, a potential way of exercising some discretion that isn't supported by the evidence but by mere conjecture or speculation. [¶] In a death penalty case I view that in part as [an] invitation to the jury to find a way not to have a second phase of this trial, a way to essentially ignore the legal principles that apply to this particular case given the evidence that has been produced. And I don't believe that that is appropriate nor lawful." (17 RT 5675-5676.)

B. Law

In criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. Instruction on lesser included offenses is required whenever evidence that a defendant is only guilty of the lesser offense is "substantial

enough to merit consideration" by the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) A criminal defendant is entitled to an instruction on a lesser included offense only if there is evidence which, if accepted by the trier of fact, would absolve the defendant from guilt of the greater offense but not the lesser. (*People v. Memro* (1995) 11 Cal.4th 786, 871.)

The court need not instruct on a lesser offense when there is no evidence the offense was less than that charged. (*People v. Barton* (1995) 12 Cal.4th 186, 194-195.) The "trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman, supra*, 19 Cal.4th at p. 162.) "[T]he existence of 'any evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*Ibid.*, citation omitted.) Substantial evidence is evidence from which a jury composed of reasonable persons could conclude "that the lesser offense, but not the greater, was committed." (*Ibid.*) If the evidence which supports a lesser included offense is "minimal and insubstantial," the trial court need not instruct on that offense. (*People v. Jackson* (1980) 28 Cal.3d 264, 306, disapproved on another point in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.) "The essential point is that instructions, whether sua sponte or otherwise, are instructions only on the *evidence received at trial*, rather than instructions on all possible theories which might have been, but were not, presented by the evidence submitted to the jury's consideration." (*People v. Lopez* (1993) 13 Cal.App.4th 1840, 1847, emphasis original.)

C. Analysis

The trial court instructed the jury on the elements of first degree murder, felony murder and self-defense. There was no evidence to support instruction on second-degree murder, imperfect self-defense or heat of passion voluntary manslaughter.

Appellant told police that Riley and Hagan pulled out guns and demanded his money and gun. (21 CT 6225-6229, 6233, 6238; 15 RT 5225-5235.) Appellant claimed he began shooting after one or both of the victims began shooting at him. (21 CT 6241-6244.)

The prosecution evidence pointed to the killing as premeditated. Appellant, who had talked about killing Riley for some time, walked out of the bar and to the car and began shooting shortly thereafter. There was no evidence presented to the jury that could have absolved defendant of first-degree murder, but not the lesser offenses of second-degree murder, imperfect self-defense or heat of passion voluntary manslaughter. There was no evidence that appellant committed the shooting because he actually, but unreasonably, believed in the need to defend himself from imminent death or great bodily injury and would thus be deemed to have acted without malice. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116.)

Appellant cites *Beck v. Alabama* (1980) 447 U.S. 625 in asserting that the trial court's failure to instruct on the lesser offenses violated his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. (AOB 103-105.) First, *Beck* and its progeny do not require a court to instruct upon a lesser included offense for which substantial evidence is lacking. (*People v. Prince* (2007) 40 Cal.4th 1179, 1269.) Second, as this Court in *Prince* noted, unlike the situation in the *Beck* case, California does not "prohibit the giving of lesser included offense instructions in capital cases. Nor under our state law can the absence of a lesser included offense instruction force the jury into a choice

between acquittal and a murder conviction that necessarily would lead to the death penalty; even after finding true an alleged special circumstance, a California jury may elect to sentence the defendant to life in prison without the possibility of parole." (*Ibid.*) The principle of *Beck* is not implicated here. (*Ibid.*, see also *People v. Valdez* (2004) 32 Cal.4th 73, 118 ["Because there was no substantial evidence supporting an instruction on second degree murder, the high court's decision in *Beck* is not implicated"]; *People v. Waidla* (2000) 22 Cal.4th 690, 736.)

The trial court here satisfied its obligation to instruct on the general principles of law relevant to the issues raised by the evidence. The trial court instructed the jury on the elements of murder and self-defense. (4 CT 1043-1049.) The trial court satisfied its obligation to instruct on the general principles of law relevant to the issues raised by the evidence.

In any event, any error was harmless. A trial court's error in failing to instruct the jury sua sponte on a lesser included offense is reviewed for prejudice under *Watson, supra,* 46 Cal.2d at p. 836. (*Breverman, supra*, 19 Cal.4th at pp. 165; *People v. Joiner* (2000) 84 Cal.App.4th 946, 972.) It is not reasonably probable that the jury would have convicted defendant of the lesser offenses if the trial court had given instructions on them. In *People v. Manriquez* (2005) 37 Cal.4th 547, the defendant confronted the victim in a parking lot and shot him. There was testimony that the victim usually carried a gun, but there was no evidence that the defendant thought the victim was armed. This Court found no imperfect self-defense instruction was required, but also found that, even assuming one was required, failure to instruct was harmless since the jury convicted the defendant of first degree murder. By making that finding, the jury "implicitly rejected defendant's version of the events, leaving no doubt the jury would have returned the same verdict had it been instructed regarding imperfect self-defense. [Citation.]" (*Id.* at p. 582.) The absence of

evidence to support any theory appellant committed a lesser offense compels a conclusion there is no reasonable likelihood that a jury would conclude otherwise. Any error was harmless.

X. THERE WAS NO CUMULATIVE ERROR

Appellant contends that the cumulative effect of the alleged guilt phase errors deprived him of a fair trial. (AOB 115.) Respondent disagrees. The various issues raised by appellant do not demonstrate error by the trial court.

On rare occasions, a series of trial errors, though independently harmless, may in some circumstances combine to the level of reversible and prejudicial error. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Hill* (1998) 17 Cal.4th 800, 844.)

In this case, as has been discussed throughout respondent's brief, the various issues raised by appellant do not demonstrate error by the trial court. The instructions given here, under the circumstances, were not error. "Any number of 'almost errors,' if not 'errors', cannot constitute error." (*Hammond v. United States* (9th Cir. 1966) 356 F.2d 931, 933.)

The claimed errors here are not the type that are harmless individually, but prejudicial cumulatively. Appellant has not established that there was a cumulative effect of multiple errors, the only situation in which the cumulative error doctrine applies. Appellant's contention there was cumulative error should therefore be rejected.

XI. ESTABLISHED PRECEDENT ALLOWING USE OF PRIOR CRIMES DURING THE PENALTY PHASE SHOULD NOT BE REVERSED

Appellant contends this Court should reconsider its prior precedent allowing a jury to consider in aggravation the "presence or absence of criminal activity by the defendant which involve the use or attempted use of force or violence or the expressed or implied threat to use force or

violence." (§190.3, subd. (b); AOB 128-131.) Not so. California does not need to reverse the penalty-phase procedures utilized in capital cases.

A. Background

The parties stipulated that appellant suffered eight felony convictions: possession of an illegal dagger in 1996 (§ 12020, subd. (a)); assault with a semi-automatic rifle in 1994 (§ 245, subd. (b)); thefts with priors in 1992 (§ 666); vehicle theft in 1992 (§ 10851); possession of methamphetamine in 1990 and 1991 (Health & Safety Code, § 11377); assault on a police officer in 1990 (§ 243, subd. (c)); and false imprisonment in 1978 (§ 236). (22 CT 6343; 20 RT 6697-6698, 24 RT 7895.)

Appellant objected to the Penal Code section 190.3 evidence on "state and federal constitutional grounds and under Evidence Code [section] 352." (18 RT 6055-6059.) The court allowed witnesses to testify about appellant's criminal activity from 1978 until the night before the fatal shooting. (18 RT 6050-6051.) The acts included:

• In July 1978, he grabbed a Sacramento 16-year-old from behind by the throat and mouth and dragged her into an alley. (19 RT 6285-6289.) The victim kicked, fought, and screamed and broke free when a neighbor heard her screams. (19 RT 6289-6290.)

• In October 1978, appellant repeatedly exposed himself, masturbated and made pelvic thrusts toward a 13-year-old girl at a Stockton drive-in. He also grabbed the breasts of two other customers and stuck his erect penis through the window of a car. (18 RT 6243-19 RT 6252.)

• In January 1990, while appellant was being arrested by a Sacramento police officer, he slipped his hand out of a handcuff and struck the officer in the neck. (19 RT 6383.) The officer fell back and hit his head on a telephone pole and tore ligaments in a finger. (19 RT 6383-6384.)

• In April 1994, he was arrested after he went into a North Highlands house with a gun. Six children were in the house at the time. (19 RT 6328-

6337.) Earlier that night, a man matching appellant's description confronted three Sacramento teenagers with a gun. (19 RT 6297-6300, 6319-6321, 6324.)

• In January 1996, he raped a 25-year-old Sacramento woman at knife point. (19 RT 6387-6406.)

• Fernando testified that the night prior to the shooting appellant beat her for 15 to 30 minutes, cracking her ribs. (20 RT 6666.) She also saw appellant fire a gun at Ronnie Greathouse, grazing his head, but did not specify when the shooting occurred. (20 RT 6667.) A neighbor saw appellant beating a woman. He struck her "all over. And she fell to the ground. He picked her up and he beat her some more." (20 RT 6672.) The woman fell to the ground four times and appellant kicked her four times. (*Ibid.*)

B. Analysis

Appellant's trial counsel made only an overly generalized objection on "state and federal constitutional grounds," conceding the cases weighed heavily in favor of allowing the prosecution to use the evidence. (18 RT 6054-6055, 6059.) He did not make any specific objections, such as on due process grounds, forfeiting review of his claim here. In his opening brief, appellant concedes he failed to make a proper objection at trial.[13] (AOB 122) The failure to object below on the constitutional ground advanced here operates to forfeit the issue on appeal. (*People v. Bolden* (2002) 29 Cal.4th 515, 546 [due process claim not preserved].)

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[13] Appellant states: "While trial defense counsel failed to object to the introduction of the above described other crimes evidence on Evidence Code section 352 or Due Process grounds below, this issue has not been forfeited." (AOB 122.) Trial counsel does appear to object on "state and federal constitutional grounds" and pursuant of Evidence Code section 352. (18 RT 6055, 6059.)

If not forfeited, appellant's claim is without merit. Appellant claims the evidence was improper for four reasons: 1) Two of the prior crimes never resulted in formal charges; 2) Crimes over a 20-year period were "lumped together and introduced en masse;" 3) Appellant was not convicted of many of the charges; and 4) The evidence was "enormously prejudicial" and probably caused jurors to conclude that appellant "deserved to die simply because he was a 'bad' person," and not because he shot Riley and Hagan. (AOB 129-130.) Appellant further contends that this Court should reconsider its holdings allowing use of such evidence. (*People v. Balderas* (1985) 41 Cal.3d 144 (*Balderas*).)

Appellant's arguments are without merit. "The plain meaning of subdivisions (b) and (c) of section 190.3 is that the jury must consider any violent criminal activity by the defendant, whether or not it led to prosecution and conviction, and any 'prior felony conviction,' whether the underlying offense was violent or nonviolent." (*Balderas, supra*, 41 Cal.3d at p. 201.) "The penalty phase is unique, intended to place before the sentencer all evidence properly bearing on its decision under the Constitution and statutes. Prior violent criminality is obviously relevant in this regard; the reasonable doubt standard ensures reliability; and the evidence is thus not improperly prejudicial or unfair." (*Id.* at p. 205, fn. 32.)

The section imposes "no time limitation on the introduction of 'violent' crimes; the jury presumably may consider criminal violence which has occurred at any time in the defendant's life." (*Balderas, supra*, 41 Cal.3d at p. 202.) It also does not require that the criminal conduct result in a conviction. The statute, and cases such as *Balderas*, specifically allow use of unadjudicated offenses. (*Balderas, supra*, 41 Cal.3d at p. 201.)

"[T]he state has a legitimate interest in allowing a jury to weigh and consider a defendant's prior criminal conduct in determining the appropriate penalty, so long as reasonable steps are taken to assure a fair and impartial

penalty trial." (*People v. Tafoya* (2007) 42 Cal.4th 147, 186 [15 year-old rape for which defendant was not convicted]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1161 [12 year-old rape for which defendant was not convicted].) Remoteness of the prior criminal conduct affects the weight of the evidence, not its admissibility. (*Ibid.*) The criminal conduct here was not too remote.

The evidence utilized during the penalty phase did not cause the jury to sentence appellant to death because he was a bad person. (AOB 130.) The jury properly sentenced appellant to death because he had a history of violent criminal conduct that culminated in a double-murder.

Appellant provides no compelling reasons for this Court to reexamine *Balderas* and its holdings that allow for the introduction in the penalty phase of prior unadjudicated crimes. Appellant claims that it was not until after the trial here that this Court in *People v. Griffin* (2004) 33 Cal.4th 536, allowed the use of penalty phase evidence that was "not unfairly persuasive, in that it generally was detailed, internally consistent, and not in conflict with any other evidence presented." (AOB 123, 127-128, citing *People v. Griffin, supra*, 33 Cal.4th at p. 588.) The record belies any characterization of the testimony here as unfairly persuasive, in that, like in *Griffin*, it was generally detailed, internally consistent, and not in conflict with any other evidence presented. The trial court here commented that it needed to "make a determination as to whether the utility of that particular evidence outweighs its prejudicial effect." (18 RT 6091.) The trial court rejected appellant's challenge pursuant to Evidence Code section 352, that the evidence's probative value was outweighed by its undue prejudice. The penalty phase was conducted consistent with this Court's jurisprudence. Appellant's claim should be rejected.

XII. THE TRIAL WAS NOT RENDERED FUNDAMENTALLY UNFAIR BY THE EXCLUSION OF REBUTTAL VICTIM IMPACT EVIDENCE

Appellant contends that the trial court violated his constitutional right to a fair penalty determination when it refused to allow him to show that the victims had been "repeatedly arrested for a variety of violent felonies and domestic offenses" and "were anything but the loving 'family men' the prosecution intended to portray them as." (AOB 132.) Not so. The rebuttal evidence was irrelevant given the very limited and very circumscribed victim impact evidence used by the prosecutor.

A. Background

In the penalty phase of the trial, appellant sought to utilize reverse victim impact evidence. "The defense has uncovered extensive criminal backgrounds on each victim which would rebut evidence of good character. Further, if the victims are going to be portrayed as 'family men', the defense will show that they shunned their duties for support and frequently beat their co-habitants." (4 CT 1082-1083.)

Riley, approximately age 32 when killed, had a prior record of at least 11 arrests for offenses including vehicular manslaughter, vehicle theft, possession of a stolen motorcycle, drugs, weapons, and domestic violence involving Correa. (4 CT 1088-1096.)

Hagan, age 21 when killed, had a record, starting at age 12, that included some nine arrests for auto theft. (4 CT 1098.) He was also arrested for rape, driving without a license, assault on a police officer with a car and for being under the influence of a controlled substance. (4 CT 1097-1102.) During a hearing outside the presence of the jury, Makala Tiller testified that neither her nor her son were ever assaulted by Hagan and that she had not done drugs with him. (18 RT 6689-6692.)

During several court sessions, the trial court and attorneys discussed the potential for the prosecution to "open the door" for rebuttal victim

impact evidence. (18 RT 6068-6075, 6126-6155; 19 RT 6531-20 RT 6554, 6616-6625, 6677-6696.) The defense argued that testimony by those who knew the victims could open the door for bad character testimony regarding Brandon Hagan and Roscoe Riley.

The prosecutor intended to call Maria Correa, with whom Riley fathered two children, and his sister Stephanie Riley. He conceded: "Roscoe Riley he has multiple arrests for beating Maria Correa, which is one of the victim impact people that I am preparing to call." (18 RT 6069.) The prosecutor wanted to limit the evidence "to the impact this had on the survivor's life -- either their life or the life of the children of the decedents. And they should I believe be able to tell the jury that impact without opening any doors." (18 RT 6070.)

The defense argued that if the prosecutor portrayed the victims as loving partners or caring parents, either through testimony or photographs, it should be able to introduce contrary evidence, such as domestic violence incidents, the failure to support children and feelings of relief they were gone. (18 RT 6127-6156; 19 RT 6531-20 RT 6554, 6616-6625, 6677-6696.) The defense contended that

> Correa stated that when she learned of Riley's death it seemed like a thousand pound weight had been lifted off her chest. Correa explained that she was angry and said that her children's father had been killed, but felt like a great burden had been lifted. Correa added that she thanked God that her oldest son, whom Riley had a great deal of influence over did not turn out like him. She stated that she has done a lot of explaining to all of her children that Riley's actions and life was not the way it was supposed to be. Correa stated that her oldest daughter does understand the problems that her father had.
>
> We should be able to get into that. It is going to be touchy and it's not something we would desire. But this opens the door. I just can't touch on it lightly and get in and get out. That would be my impression.

(20 RT 6622.)

The trial court made it clear to the prosecutor that he would open the door to rebuttal victim impact evidence if his portrayal of the impact the deaths on the families of the victims was incomplete or misleading. The trial court ruled that "bottom line is as I have stated on a number of occasions to the extent that the door's open I will allow the defense to explore issues. But the way Mr. Sawtelle has crafted his particular examination, starting with Maria Correa, I don't believe these doors are open." (20 RT 6683.) For instance, since Correa's children had witnessed prior acts of domestic violence involving Riley and Correa, it was not "appropriate that the children's reaction be limited and sterilized to the point that they were sad" about the death of their father. (20 RT 6679-6680.)

Based on the trial court's rulings, the prosecutor opted to offer very limited victim impact. Correa testified that she is the mother of two children fathered by Riley, but she was not married to him nor living with him, that it was difficult to tell the children he was dead and that she paid for him to be cremated. (20 RT 6699-6701.) Tiller testified that Hagan was her best friend, that she fainted when she learned of his death and that she had a bedroom bookshelf dedicated to his memory. (20 RT 6702-6704.) A picture of Correa with her children and of Tiller's bookshelf were used by the prosecution. (20 RT 6699, 6704.)

Appellant's trial counsel also complained that the photograph of Correa and her children made it appear Riley and Correa had "a loving family and -- and that's the way it's presented. . . . [T]hey have a loving pose here and it's going to be reflected in their presentation that it's kind of a loving family unit. And it's this daughter on the right apparently who saw her mother hit." (18 RT 6695.) The trial court again overruled the objection to the photograph. (18 RT 6696.) The judge stated: "I don't

view that as a loving family unit. I view that simply as a picture of the mother with her two daughters. It does not contain Mr. Riley. It brings life to the fact that these two children exist and allows the jury to see what they looked like on the date the photo was taken." (*Ibid.*)

B. Law

Just as the sentencer should consider the murderer as an individual, "so too the victim is an individual whose death represents a unique loss to society and in particular his family." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825 (*Payne*).) Victim impact evidence is admissible at the penalty phase under § 190.3, factor (a), as a circumstance of the crime, provided the evidence is "not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*Payne v. Tennessee, supra*, 501 U.S. at p. 825.)

In a capital trial, testimony by family members and close friends of the victim showing the direct impact of the defendant's acts on the victims' friends and family is not barred by the Eighth or Fourteenth Amendments to the federal Constitution. (*People v. Pollock* (2004) 32 Cal. 4th 1153, 1180.) "Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a)." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056-1057.) "The federal Constitution bars victim impact evidence only if it is 'so unduly prejudicial' as to render the trial 'fundamentally unfair.'" (*Id.* at p. 1056, quoting *Payne v. Tennessee, supra,* 501 U.S. at p. 825.)

Only relevant evidence is admissible at trial. (Evid. Code, § 351.) Relevant evidence is that which has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The court is not required to admit evidence that merely makes the victim of a crime look bad." (*People v.*

Stitely (2005) 35 Cal.4th 514, 548; *People v. Kelly* (1992) 1 Cal.4th 495, 523.) In a criminal action, evidence of the victim's character is admissible to prove that the victim acted in conformity with that character. (Evid. Code, § 1103, subd. (a)(1).) "It has long been recognized that where self-defense is raised in a homicide case, evidence of the aggressive and violent character of the victim is admissible." (*People v. Rowland* (1968) 262 Cal.App.2d 790, 797.)

Trial courts are "vested with wide discretion in determining the relevance of evidence," but have "no discretion to admit irrelevant evidence." (*People v. Babbitt* (1988) 45 Cal.3d 660, 681.) The "exclusion of evidence that produces only speculative inferences is not an abuse of discretion." (*Id.* at p. 684.)

Even where evidence is relevant, Evidence Code section 352 bars its admission when the relevance is substantially outweighed by potential undue prejudice or the likelihood of undue consumption of time or the jury being confused or misled. Because the exclusion or admission of evidence lies within the sound discretion of the trial court, the trial court's ruling should not be overruled absent "a manifest abuse of that discretion resulting in a miscarriage of justice." (*People v. Cain, supra,* 10 Cal.4th at p. 33.)

C. Analysis

Appellant fails to show the trial court abused its discretion by excluding his proposed reverse victim impact evidence. The evidence proffered by appellant on the negative impact the victims had on their partners and families, and the criminal histories of the victims, was irrelevant given the narrowly tailored victim impact evidence offered by the prosecutor.

The trial court did not abuse its broad discretion in concluding that the evidence lacked probative value given the manner in which the prosecutor narrowly tailored the victim impact evidence he offered. The trial court

went to great lengths to properly balance the various interests and insure the prosecution's limited victim impact evidence did not create a false impression of the victims.

The state "has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." (*Payne, supra*, 501 U.S. at p. 825.) Turning the victim into a "faceless stranger at the penalty phase of a capital trial . . .deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder." (*Ibid.*)

It cannot be said that the trial judge's ruling on this evidence, of which the probative value was slight and the chance of prejudice and confusion substantial, struck an improper balance and thereby constituted an abuse of discretion. The conclusion reached by the court that the prosecution's narrowly tailored victim impact evidence did not open the door to denigrate the character of the victims was not an abuse of discretion.

Appellant contends that he should have been able to compare his character to that of the victims and that "under *Payne,* a defendant in a capital case penalty phase must be given the broadest latitude in cross-examining prosecution victim impact witnesses and presenting relevant rebuttal evidence." (AOB 138-139.) Appellant misperceives the purpose of victim impact evidence. It is designed to show the uniqueness of victims, and not their worth as human beings. It is not designed to make character comparisons between the victims and the defendant.

Payne addressed the concern that victim impact evidence permitted the jury to find a defendant whose victims were assets to their community are more deserving of punishment than those whose victims are perceived

to be less worthy. (*Payne*, *supra*, 501 U.S. at p. 823.) *Payne* dismissed this concern by stating that the purpose of victim impact evidence is not to encourage comparative judgments of this kind.

"As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind-for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead each victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be." (*Payne*, *supra*, 501 U.S. at p. 823.)

The comparative judgment that appellant proposes is thus inappropriate. A defendant should not receive a lesser sentence merely because of how his character stacks up against the victim's character. No evidence should be utilized that would encourage such a comparison.

Finally, any error in excluding the evidence was harmless. (*People v. Cudjo, supra,* 6 Cal.4th at p. 611 [applying *Watson* standard to erroneous exclusion of defense evidence under § 352].) Given the circumstances of the shooting, the jury no doubt realized the victims were not the most upstanding members of society. The specific manner in which that manifested itself in their conduct and relationships would not have caused the jury to make a different assessment of the appropriate penalty.

XIII. APPELLANT WAIVED HIS OBJECTION TO THE PROSECUTOR'S USE OF BOOKS BY AUTHORS APPELLANT SAID HE READ; IF NOT WAIVED, IT IS WITHOUT MERIT

Appellant complains the prosecutor committed misconduct by his closing argument use of two books by Dean Koontz, "Mr. Murder" and "The Bad Place." (AOB 142-155.) Appellant waived his objection by failing to request further curative procedures. In addition, use of the books was not prosecutorial misconduct. Even if misconduct, it was harmless.

A. Background

The prosecutor, in arguing appellant's IQ was at the "upper end of low normal," used five books to illustrate appellant liked to read popular novels.

> Now, I want to talk to you a little bit about this IQ concept that we discussed earlier. I am not pulling out Mr. Bogh's common sense box, I am just pulling out some books. The books that I just pulled out are a Stephen King novel, couple John Grisham books, couple Dean Koontz books.
>
> All these books, not necessarily these particular books, but are books that apparently the defendant likes to read. Doctor Globus told us that although he has this incredibly low IQ, he actually enjoys reading novels. He reads these.
>
> He reads -- some of his favorite authors are, I don't know, Grisham, Dean Koontz and Stephen King, and I think he mentioned L. Ron Hubbard also. Books he reads, books he can digest, books he has the mental capacity to understand.
>
> Probably some or all of you have read some of these authors, and what does that tell us. Really when you come down to it, what does it say about his IQ. So his IQ is 87, upper end of low normal. You make whatever you want out of his IQ.

(24 RT 7984-7985.)

At the next break, the defense complained that the jury could see the book titles and would conclude appellant was in prison reading about ways to commit murder.

> MR. BOGH: Yes. I would like to note for the record, because I doubt if Mr. Sawtelle is willing to give up the books that he posed to the jury, which are in clear view for the jury to read the spines.
>
> One is Dean Koontz called the Bad Place. The other one is Dean Koontz's, and I certainly would have objected to this had I been able to see it. It's Mr. Murder, which I think is highly improper to pose that to the jury.

It's one thing -- I think the doctor said he reads Dean Koontz, he reads John Grisham, but to specifically pick out Mr. Murder and pose that to the jury, I find that rises to the level of conduct by the District Attorney that causes rise for my request for a mistrial.

It's like Mr. Duff is sitting in jail reading about ways to commit murder or something of that nature. I think that was highly improper to pose that. The next one – I mean, it just keeps getting worse. John Grisham, The Runaway Jury, what is that designed for.

I mean, you know, there was a subliminal message that's being posed to the jury by the Bad Place. I don't know what that conjures up, but these were specifically picked to give not just a message about who he reads, The Bad Place, Mr. Murder, The Runaway Jury, those are the top three. The next one just poses John Grisham. And the other one, the Tommyknockers, which I think I know what that's about.

But I strongly object to that type of conduct, and would have certainly made the motion at the very instant had I seen what he was doing there. With that, I just submit it, Your Honor.

THE COURT: Tommyknockers, by the way, is about aliens taking over the earth and taking possession of coke machines. I am aware of that.

MR. BOGH: Okay.

THE COURT: Mr. Sawtelle, anything you wish to put on the record?

MR. SAWTELLE: If I may add. Everything I have ever read, most of Dean Koontz, and they are all about murder, and mayhem and killing, and the Grisham books are all about law.

And I grabbed the books that I happened to personally own off my shelf, and I think I was very fair about telling the jury that I am not saying the defendant reads these particular books.

I think the record will reflect I actually said that.

And the point of it is that I, as I think the record will clearly reflect -- is that I am saying that if he can read these books, this

whole IQ thing is somewhat silly, and that was the point of it, and anyway -- nothing else to add.

THE COURT: Mr. Mahle, you look like you need to speak.

MR. SAWTELLE: I will add if the defense would feel better, I am more than happy to have the court admonish the jury again, repeat what I said, that in no way is there a suggestion Mr. Duff has ever read these particular books if that will make them feel better.

(24 RT 8003-8005.)

The trial court denied a defense mistrial motion. (24 RT 8008-8010.) Appellant's trial counsel then addressed the issue during his penalty phase closing argument.

Then he brings up some books here. And I have to comment on them because they were sitting here for about an hour. And first one -- Dean Koontz, The Bad Place -- a good choice for the type of environment here. The Bad Place.

What we found out during the break here -- during lunch -- is -- all of these books here didn't come from Mr. Duff obviously -- they came from Mr. Sawtelle's personal library. So he's -- these selections have nothing to do with Mr. Duff. But they're interesting choices by Mr. Sawtelle to put them here. So we have The Bad Place. We have Mr. Murder by Dean Koontz. We have The Runaway Jury by John Grisham. And we have Stephen King The Tommyknockers anyway.

I will say this. What you hear the doctor say was when he talked to Mr. Duff he was reading the Bible. We don't have the Bible here. But -- I guess that that should have been placed on there by Mr. Sawtelle. But he chose not to. But this is what you do -- kind of bolster your case with little bitty gimmicks here -- the books, the photos, which really don't have much to do with anything.

(24 RT 8019.)

After the death verdict in the penalty phase, the defense made a motion for a new penalty phase trial, arguing among other things that the prosecutor's use of the books was "meant to influence the jury in a negative

way." (4 CT 1191.) The trial court found that the "objection was waived by the defense's failure to seek a curative instruction. Nevertheless, I think that the remedy that was employed was far more effective than whatever curative instruction I would have given, and that was essentially to embarrass Mr. Sawtelle in front of the jury by having to admit that all of those books were his." (25 RT 8120.)

B. Law

The applicable federal and state standards regarding prosecutorial misconduct are well established. A prosecutor's misconduct violates the federal Constitution by utilizing a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Hill, supra,* 17 Cal.4th at p. 819; *People v. Gimis, supra*, 9 Cal.4th at p. 1215..)

A prosecutor is given "wide latitude" during argument, and the argument "may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*People v. Hill, supra*, 17 Cal.4th at p. 819, quoting *People v. Wharton* (1991) 53 Cal.3d 522, 567-568.) It is also "clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature." (*Id.*)

A prosecutor's intemperate behavior violates the federal Constitution if it is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process. Prosecutorial misconduct that falls short of rendering the trial

fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury. (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.)

C. Analysis

Appellant's trial counsel accepted the admonition offered at trial, and failed to request a further admonition, waiving the issue on appeal. There is no reason to believe a request for a further admonition to cure the alleged misconduct would have been futile or that an admonition to the jury to disregard the books would not have been effective. (*People v. Benavides* (2005) 35 Cal.4th 69, 108 [claim that prosecutor improperly appealed to the passions and prejudices of the jury waived on appeal because defendant did not object and an admonition would have cured any harm]; *People v. Brown* (2003) 31 Cal.4th 518, 553 ["To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury."].) If not waived, the claim is without merit.

The prosecutor utilized the books while trying to put appellant's IQ in context for the jury. He told the jury appellant reported to the doctor he liked to read novels by "Grisham, Dean Koontz and Stephen King, and I think he mentioned L. Ron Hubbard," and he said "not necessarily these particular books" when he pulled out the books to illustrate his point. (24 RT 7984.) The defense further pointed out to the jury that the books came from the prosecutor's "personal library." (24 RT 8019.)

It was not improper for the prosecutor to illustrate his argument on appellant's IQ by utilizing the types of books appellant preferred to read. Use of the popular fiction books from a genre appellant liked to read helped illustrate the prosecutor's point that appellant's intelligence was at the upper end of low normal.

Finally, any error was harmless. Prosecutorial misconduct does not require reversal unless it is reasonably probable that, but for the misconduct, the defendant would have received a better result. (*People v. Crew* (2003) 31 Cal.4th 822, 839.) Here, the jury knew these books belonged to the prosecutor, and were not books anyone was claiming were read by appellant. Given the jury knew these were books read by the prosecutor, and not the appellant, no adverse impression of appellant was created by use of the books. No contrary argument was made. The prosecutor's use of the books could not be characterized as so prejudicial or so egregious as to deny appellant a fair trial.

In addition, as previously noted, the evidence of appellant's guilt was overwhelming. "Whatever the test of prejudice this court applies to the present case, it is certain that any reasonable jury would have reached the same verdict even in the absence of the prosecutor's" use of the books. (*People v. Bolton* (1979) 23 Cal.3d 208, 214.) The jury's verdict was based on the strength of the evidence, not on any prejudice or negative feelings towards appellant aroused by the prosecutor's use of the two books.

XIV. THERE WERE NO PENALTY PHASE ERRORS TO ACCUMULATE

Appellant contends, as he did with respect to the guilt phase, that even if no single penalty phase error, standing alone, warrants reversal of the penalty phase judgment, the cumulative effect of a number of errors does. (AOB 156.) On the contrary, there were no errors to accumulate here.

As previously noted, the present case was not a close one, and appellant has not demonstrated that there were errors at the penalty phase to accumulate. Moreover, if there were any errors, they were plainly harmless even if viewed cumulatively. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1215 ["[w]e have found no error that, even in cumulation, was prejudicial"]; *People v. Pride* (1992) 3 Cal.4th 195, 269 ["[a]ny errors that did occur, whether viewed singly or in combination, were inconsequential"]; see also

People v. Welch (1999) 20 Cal.4th 701, 775 [no cumulative error with respect to guilt and penalty phases].) Appellant received a fair penalty phase trial. Accordingly, his claim of cumulative error at the penalty phase must be rejected.

Appellant was entitled to a fair trial, not a perfect one. (*People v. Welch, supra*, 20 Cal.4th at p. 775.) Even assuming errors existed, appellant has at most shown that his trial was not perfect, and few of them are perfect. (*People v. Cooper* (1991) 53 Cal.3d 771, 839, citation omitted.) There was no prejudicial error either individually or collectively. Appellant received a fair trial. His claim fails.

XV. THE DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL AS APPLIED HERE OR AS INTERPRETED BY THIS COURT

Appellant claims California's death penalty statute suffers from the following constitutional infirmities:

- Fails to adequately narrow the class of persons eligible for the death penalty, making the statute impermissibly broad, arbitrary and capricious. (AOB 157-165.)
- Allows a death verdict premised on findings not made beyond a reasonable doubt by a jury in violation of *Apprendi v. New Jersey* (2000) 530 U.S. 466, and its progeny. (AOB 165-177.)
- Fails to require that the jury find that the aggravating circumstances outweighed mitigating beyond a reasonable doubt. (AOB 178-181.)
- Does not require the jury to provide written findings. (AOB 181-184.)
- Forbids intercase proportionality. (AOB 184-186.)
- Permits consideration of unadjudicated criminal activity that is not found true beyond a reasonable doubt. (AOB 186-187.)

• Improperly uses of restrictive adjectives such as "extreme" and "substantial," acting as a barrier to the consideration of mitigation. (AOB 187.)

• Improperly uses of "whether or not" in consideration of mitigating factors, causing the jury to conclude it was a factor in aggravation if not present. (AOB 188-191.)

• Violates equal protection principles by requiring that enhancing allegations with noncapital defendants be found true unanimously and beyond a reasonable doubt, but not requiring the same with capital defendants. (AOB 191-194.)

• Violates international norms. (AOB 194-197.)

Appellant's contentions have been repeatedly rejected by this Court. (See *People v. Mills, supra,* 48 Cal.4th at pp. 210-215; *People v. Abilez* (2007) 41 Cal.4th 472, 533-535, and cases cited therein.)

• Finally, appellant contends this Court should "undertake an **intra case** proportionality review and conclude that the death sentence imposed in this particular case was unconstitutionally disproportionate to his personal culpability in light of all the circumstances." (AOB 197.) Appellant claims the circumstances here are similar to *People v. Dillon* (1983) 34 Cal.3d 441, 477-489, and that the penalty is disproportionate to his individual culpability. This court should reject this claim on its merits.

A punishment may not be "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted; see *People v. Dillon, supra*, 34 Cal.3d at p. 487, fn. 38.) "Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment. [Citations.]" (*People v. Martinez* (1999) 76 Cal.App.4th 489, 496.) Because it is the Legislature that determines the appropriate

penalty for criminal offenses, appellant must overcome a "considerable burden" in convincing this Court his sentence was disproportionate to his level of culpability. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196-1197.)

This Court utilizes a two-prong analysis to assess whether a sentence is disproportionate to culpability. First, the crime itself must be reviewed, both in the abstract and in view of the totality of the circumstances surrounding its commission, "including such factors as its motive, the way it was committed, the extent of defendant's involvement, and the consequences of his acts." Second, the nature of the offender is assessed to determine "whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Weddle, supra*, 1 Cal.App.4th at pp. 1197-1198.)

Appellant, age 41 at the time of the crime here, ambushed two people as they sat in a car apparently playing dice. It was a cold-blooded, calculated killing. While one of the victims had a handgun, there was never any contention, beyond appellant's initial statement to the police, that the victims were any sort of threat to appellant. Appellant for at least weeks prior to the shooting told others he intended to commit the killing, apparently incensed over a petty grudge. Appellant had eight felony convictions, and four prior prison commitments, for past criminal activity that, according to testimony, included rape, assault on a police officer, assault with a semi-automatic rifle, false imprisonment, possession of an illegal dagger, thefts, and drugs.

The death sentence was not unconstitutionally disproportionate to appellant's culpability.

CONCLUSION

Respondent respectfully requests that the judgment be affirmed.

Dated: July 2, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 43,706 words.

Dated: July 2, 2010

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Attorney General of California

JOHN A. BACHMAN
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Duff**
No.: **S105097**

I declare:

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

On July 8, 2010, I served the attached RESPONDENT'S BRIEF by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 8, 2010, at Sacramento, California.

_____
Declarant

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