In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **WILLIAM LEE WRIGHT, JR.,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S107900

Los Angeles County Superior Court Case No. KA048285
The Honorable Norman P. Tarle, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On April 24, 2000, the Los Angeles County District Attorney filed a complaint charging appellant with: the willful, deliberate, and premeditated attempted murders of Julius Martin, Douglas Priest, Mario Ralph, and Willie Alexander (counts 1, 2, 5, and 6; Pen. Code, §§ 664, subd. (a)/187, subd. (a));[1] the murder of Philip Curtis (count 7; § 187, subd. (a)); the second degree robberies of Sami Morgan (counts 3 and 4; § 211) and the second degree robbery of Faqir Singh (count 8; § 211). The murder charge was accompanied by special circumstance allegations of robbery murder (§ 190.2, subd. (a)(17)), burglary murder (§ 190.2(a)(17)), and street gang murder (§ 190.2, subd. (a)(22)). The complaint further alleged that: appellant personally and intentionally discharged a firearm in committing the attempted murders of Julius Martin, Mario Ralph, and Willie Alexander (counts 1, 5, and 6), causing great bodily injury (§ 12022.53, subd. (d)); appellant personally used a deadly weapon in committing the attempted murder of Douglas Priest (count 2), causing great bodily injury (§§ 12022, subd. (b)(1), 12022.7, subds. (a), (c)(23)); and appellant personally used a firearm in committing all of the alleged robberies (counts 3, 4, and 8; §§ 1203.06, subd. (a)(1), 12022.5, subd. (a)(1)). As to all counts, the complaint alleged that appellant committed the offenses for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)), and appellant suffered one prior conviction of a serious or violent felony (§§ 1170, subds. (a)-(d), 667, subds. (a)-(i)). (1CT 2-9.)

On March 8, 2001, appellant was arraigned, pled not guilty, and denied the special allegations. (1CT 27, 38.) On April 19, 2001, the preliminary hearing took place, after which the trial court dismissed the two

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

robberies of Sami Morgan (counts 3 and 4), and struck the criminal street gang allegation as to the attempted murders of Julius Martin and Douglas Priest (counts 1 and 2), and the robbery of Faqir Singh (count 8). (1CT 211-213.)

On April 30, 2001, the Los Angeles County District Attorney filed an information re-charging appellant with: the willful, deliberate, and premeditated attempted murders of Julius Martin, Douglas Priest, Mario Ralph, and Willie Alexander (counts 1, 3, 4, and 5; §§ 664, subd (a)/187, subd. (a)); the murder of Phillip Curtis (count 6; § 187, subd. (a)); and the second degree robbery of Faqir Singh (count 7; § 211). The information additionally charged appellant with the second degree robbery of Julius Martin (count 2; § 211). (1CT 214-219.) The murder charge was again accompanied by special circumstance allegations of robbery murder (§ 190.2, subd. (a)(17)), burglary murder (§ 190.2(a)(17)), and street gang murder (§ 190.2, subd. (a)(22)). The information further alleged that: appellant personally and intentionally discharged a firearm in committing the attempted murders of Julius Martin, Mario Ralph, and Willie Alexander (counts 1, 4, and 5), as well as the murder of Phillip Curtis (count 6), and the robbery of Julius Martin (count 2), causing great bodily injury and death (§§ 12022.5, subd. (a)(1), 12022.53, subds. (b)-(d)); appellant personally used a deadly weapon, to wit, a knife, in committing the attempted murder of Douglas Priest (count 3), causing great bodily injury (§§ 12022, subd. (b)(1), 12022.7, subd. (a)); and appellant personally used a firearm in committing the robbery of Faqir Singh (count 2; §§ 1203.06, subd. (a)(1), 12022.5, subd. (a)(1)). As to all counts, with the exception of the robbery of Julius Martin (count 2), the information alleged that appellant committed the offenses for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)), and that appellant suffered one prior conviction of a serious or violent felony (§§

1170, subds. (a)-(d); 667, subds. (a)-(i)). (1CT 214-221.) On June 13, 2001, appellant was re-arraigned, pled not guilty, and denied the special allegations. (1CT 225; 1RT 10-16.)

On February 20, 2002, the District Attorney filed an amended information removing the section 186.22 criminal street gang allegation from the attempted murders of Julius Martin and Douglas Priest (counts 1 and 3), and the robbery of Faqir Sing (count 7). (1CT 244-251.) The allegation remained as to the attempted murders of Mario Ralph and Willie Alexander (counts 4 and 5), and the murder of Phillip Curtis (count 6). (1CT 250.)

At the guilt phase, the trial court granted the prosecution's motion to dismiss the robbery of Faqir Singh (count 7) pursuant to section 1385. (7CT 1924; 8CT 2195.) During the guilt phase deliberations, the jury reported that it was unable to reach verdicts on the section 190.2 street gang special circumstance allegation as to the murder charge, and the section 186.22 street gang allegation as to all counts. The trial court subsequently granted the prosecution's motion to dismiss these allegations. (8CT 2019, 2023, 2195.) The trial court additionally granted the prosecution's motion to dismiss the prior serious or violent felony allegation as to all counts. (8CT 2023, 2196.) The jury subsequently found appellant guilty of first degree murder and found true the robbery and burglary special circumstance allegations as to count 6. The jury further found appellant guilty as charged in all remaining counts, and found the special allegations to be true. (8CT 2002-2024, 2110.)

At the penalty phase, the jury found that death was the appropriate punishment as to count 6. (8CT 2110-2111, 2152.) The trial court denied appellant's motions for a new trial and for modification of the penalty from death to life without parole. (8CT 2146-2152, 2188.) The trial court imposed a sentence of death as to count 6. On the remaining counts and

allegations, the court imposed four consecutive life terms plus ten years.[2] (8CT 2186-2204.) Appeal to this Court is automatic.

STATEMENT OF FACTS

A. Prosecution's Guilt Phase Evidence

1. The Attempted Murders of Julius Martin and Douglas Priest (Counts 1 and 3), and the Robbery of Julius Martin (Count 2)

On February 17, 2000, at approximately 2:00 a.m., appellant went to the Long Beach apartment of Douglas Priest and Julius Martin, where he stabbed Priest in the back, robbed Martin, and shot Martin twice in the head. (5RT 862-864, 868; 6RT 1124, 1129-1131, 1148.) Prior to the incident, Priest and Martin had been selling marijuana and cocaine out of their apartment, and appellant visited on a regular basis to purchase marijuana. (5RT 861, 865-866; 6 RT 1122-1123, 1138-1139.) Priest had known appellant for three to four months, and Martin had known appellant for approximately eight months.[3] (5RT 866; 6RT 1138.) Priest and Martin did not know appellant's legal name. Instead, they knew him by his street name, "Mad." They considered appellant to be a neighbor because he often stayed at his girlfriend's apartment in a neighboring apartment complex. (5RT 865, 870; 6RT 1040-1041.)

On the night of the incident, Priest had fallen asleep on the living room floor after consuming approximately six beers, and a "shot or two" of tequila, but he woke up when he heard appellant knock on the front door.

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[2] Life terms were imposed as to counts 1, 3, 4, and 5. Six years was imposed as to count 2; and four years was imposed for the deadly weapon and great bodily injury enhancements as to count 3. (8CT at 2186-2204.)

[3] Martin was hospitalized and unavailable to testify at the time of trial. Therefore, Martin's preliminary hearing testimony was read into the record. (6RT 1121-1122.)

(5RT 862, 886-887.) Martin answered the door and let appellant inside. (5RT 862; 6RT 1124, 1127-1128.) Appellant told Martin that he was there to buy some marijuana, and Martin told him that they did not have any. Appellant asked, "When will it be?"—referring to a time when they would have some to sell, and Martin answered, "Maybe tomorrow." (6RT 1127-128.) Priest overheard appellant's voice, and he recognized the voice because it was distinctive. (5RT 883, 888, 891.)

Appellant stood up to leave, and Martin opened the front door. Appellant turned around, said, "This is a jack move," and pulled a gun out of his waistband with one hand and a knife out with the other hand. (6RT 1127-1128.) Meanwhile, Priest remained on the floor pretending to be asleep, but he could overhear that something "wasn't right." (5RT 888.) Appellant told Martin, "You think I'm bullshitting?" And without warning, appellant suddenly stabbed Priest in the lower back with the knife. (5RT 862-863; 6RT 1128-1131, 1148.) Priest was in pain, but managed to remain motionless on the floor. (5RT 889.) Appellant then told Martin to "give it up," and Martin gave appellant $70 in cash from his pocket. Appellant asked, "Is this it?" Martin answered that it was all that he had. (6RT 1130-1131.) Appellant instructed Martin to lie face down on the floor and not to look up, and Martin complied. Appellant then shot Martin twice in the back of the head, and Martin immediately lost consciousness. (5RT 864; 6RT 1130-1131.)

Priest heard the gunshots and remained on the floor until he heard appellant leave. As appellant opened the front door to exit, Priest carefully turned his head so that he could see appellant's profile. Priest recognized the profile of the person he knew as "Mad." (5RT 863, 884, 890-91.) Once appellant was gone, Priest got up, locked the door, and called 911. (5RT 868; 6RT 1133.) Priest tried to revive Martin, and Martin eventually regained consciousness. (5RT 892; 6RT 1132.) The police and paramedics

arrived shortly thereafter, and both men were rushed to the hospital. (6RT 1133.)

While Martin was in the hospital, he told a Long Beach police officer that the shooter was an individual named "Mad." Martin also stated that Mad lived "around the corner" from Martin's apartment, but Martin did not give the officer a more specific address. (6RT 1139, 1182.)

Shortly after Priest was admitted to the hospital, a police officer attempted to interview him. Priest did not cooperate with the officer, however, because the officer "grabbed" Priest's hands to examine them for gunpowder. (5RT 902-903.) Priest felt that he was being treated as a suspect rather than a victim and stopped talking to the officer at that point. Also, Priest was in pain at the time and was being treated for his injuries. (5RT 903-904.)

About a month after the incident, appellant's photograph was shown on a television news broadcast. Priest saw the broadcast, recognized appellant, and telephoned Martin. (5RT 870; 6RT 1136.) Martin immediately watched the broadcast and also recognized appellant's photograph. The broadcast stated that appellant had been arrested by the Ontario Police Department, and the footage showed appellant being placed in the back of a patrol car. (5RT 870; 6RT 1043-1044, 1135-1136.) Martin notified the Long Beach Police Department that the individual who shot him was the same individual who was shown in the news broadcast. (6RT 1135-1136.) Priest subsequently identified appellant from a photographic lineup, and Priest and Martin both identified appellant at a live lineup, and at the preliminary hearing. (5RT 821, 874, 880; 6RT 1133-1134, 1149, 1158.) Priest additionally identified appellant at trial. (5RT 865, 871.)

At the preliminary hearing, Martin acknowledged that he had suffered two prior felony convictions, one for robbery, and one for selling cocaine. (6RT 1141.) Martin also acknowledged that he did not initially tell the

police that appellant had robbed $70 from him just prior to the shooting, nor did he tell the police that he had been selling marijuana. (6RT 1133, 1143.)

At trial, Priest acknowledged that he had told the police he did not see the shooting, and maintained that this was an accurate statement. Priest did not recall telling any police officers that he was asleep until he heard shots being fired, or that he had no idea what happened. (5RT 899-900.) Priest acknowledged that he had served time in prison for two narcotics-related felony convictions, the most recent of which occurred in 1989. (5RT 866-867, 897.) Priest also acknowledged that he did not tell the police that appellant was a neighbor, explaining that he had never been to appellant's residence. (5RT 897.)

2. The Attempted Murders of Mario Ralph and Willie Alexander (Counts 4 and 5), and the Murder of Phillip Curtis (Count 6)

On March 21, 2000, at approximately 8:00 p.m., appellant went to a house in Pomona, where he shot Mario Ralph, Willie Alexander, and Phillip Curtis.[4] Appellant fatally wounded Curtis. (6RT 1047.)

Ralph, Alexander, and Curtis had been selling rock cocaine out of the Pomona house, and appellant visited the house twice on the day of the shooting. (4RT 750, 754-755, 764; 5RT 917.) The first visit occurred between 6:00 and 7:00 p.m., and appellant purchased $50 worth of rock cocaine. (4RT 755; 5RT 791.) At the time, Ralph recognized appellant as a known member of the Duroc Crips criminal street gang. (4RT 771-772; 5RT 792.) Appellant told the group that he wanted to purchase an ounce of rock cocaine. Curtis told appellant that they did not have such a large

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[4] During his trial testimony, Ralph sometimes referred to Alexander by his nickname, "Pie," and to Curtis by his nickname, "Puppet." (5RT 855.)

quantity on hand, but they could obtain it within an hour if appellant wanted to return later. Appellant agreed to return in an hour. (4RT 757-758.)

About an hour later, appellant knocked on the front door. Ralph was resting in a bedroom at the time, but he heard the knock on the door. Ralph then heard a lot of cussing, and heard appellant say, "Mother fuckers. Duroc. Where is the dope it?" (4RT 758-759, 762-763.) Ralph then heard three gunshots. (4RT 763.)

Ralph went into the living room, where he saw that Curtis and Alexander had each been shot in the chest. Appellant was standing in the middle of the room with a gun. Curtis was leaning over a table, gasping for air, trying to retrieve a handgun from his front pants pocket. Meanwhile, Alexander was seated on the couch holding a phone. (4RT 763-766; 5RT 810, 841, 843.)

Ralph turned his back to appellant so that he could grab Curtis's handgun in order to defend himself. Appellant then shot Ralph twice in the back. (4RT 751-752, 766-767; 5RT 797, 843.) Ralph nevertheless retrieved Curtis's gun, after which he turned around and tried to shoot appellant, but he was unable to aim the gun. Ralph squeezed the trigger too hard—firing two stray bullets, and then ran out of bullets. (4RT 751-752, 767; 5RT 798, 845-846.) Ralph briefly collapsed, but fearing appellant would shoot him again, he managed to get up. (5RT 797.) As Ralph stood up, he saw appellant searching the house. Appellant lifted up the sofa cushions where Alexander was seated, and asked, "Where's the motherfuckin' dope?" (5RT 848-849.)

Ralph then ran outside through the front door in an attempt to escape, but appellant followed from behind. (5RT 798, 845-846.) Appellant ran past Ralph and got into a white Cadillac. (5RT 798-799, 809, 845-846.) The Cadillac drove away, and Ralph briefly tried to chase after it, but he

subsequently returned to the house. (5RT 746-747.) Once Ralph reached the house, he tried to conceal evidence by throwing Curtis's gun onto the roof and flushing the rock cocaine—which had been hidden in the oven—down the toilet.[5] (4RT 777-778, 780-781; 5RT 846.) Ralph was having difficulty breathing at that point, and "everything was moving slow[.]" (5RT 846-847.)

Ralph re-entered the house, and Curtis asked him, "[W]hat should I do? . . . [W]hat should I do? He shot me in the heart, shot me the heart . . . ." (5RT 845-846.) Ralph ran outside and asked a neighbor to call the police. (5RT 846.) Alexander then came outside, and Ralph and Alexander sat on the front porch waiting for the police and paramedics to arrive. (5RT 847.) Ralph thought, "it was time to die, so [he] was sitting there trying to let it happen." (5RT 847.)

Sergeant Mark Warm of the Pomona Police Department was the first police officer to arrive on the scene.[6] Ralph approached Sergeant Warm and stated that he had been shot, so Sergeant Warm called for an ambulance. Ralph was able to give Sergeant Warm a description of the shooter, but Alexander was unable to answer any questions. (4RT 691-695.) Curtis's body was later found inside of the house, and he was subsequently pronounced dead. (4RT 697.)

Ralph and Alexander were taken to the hospital. Ralph was interviewed by the police, and he admitted that he had thrown Curtis's gun on the roof and flushed narcotics down the toilet. (4RT 777-778, 780-781.)

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[5] The gun fell between the house and the neighbor's house. (4RT 732.)

[6] Sergeant Warm mistakenly stated that the shootings occurred on April 21, 2000. (4RT 692.) However, Detective Gregg Guenther of the Pomona Police Department clarified that the incident occurred on March 21, 2000. (5RT 917.)

While Ralph was in the hospital, his cousin brought him a Pomona newspaper, and in it, he saw appellant's photograph. He therefore contacted the Pomona Police Department to notify the police that the individual in the newspaper was the shooter. (4RT 768-769; 5RT 823.) Ralph subsequently viewed a photographic lineup and identified appellant's photograph as the shooter. (4RT 770.) At the time, Ralph knew appellant's nickname and gang affiliation, but did not know appellant's name. (4RT 771.) Ralph subsequently identified appellant at a live lineup, and again at the preliminary hearing and at trial. (4RT 752, 770, 772, 776.)

As a result of his gunshot wounds, Ralph was hospitalized multiple times, and underwent surgery to remove one kidney and almost 100 feet of his intestines. Ralph had difficulty digesting food and was required to use a colostomy bag. By the time of trial, Ralph had been hospitalized "on and off" for nearly two years. (4RT 767-768.)

3. Police Investigation

Following the Long Beach incident, Long Beach Police Officer Gamaliel Collazo recovered a bullet fragment from Priest and Martin's apartment. Officer Collazo found the fragment on Martin's shirt, which was left on the floor of the apartment after paramedics treated Martin at the scene. (6RT 1002-1003.) Officer Collazo also recovered two bags of marijuana and a .358 caliber revolver from a drawer in a bedroom in the apartment. (6RT 1005.) All of these items were booked into evidence. (6RT 1002-1003, 1004.)

Pomona Police Detective Gregg Guenther was the homicide detective assigned to the Pomona case. (5RT 915-916.) During the investigation, Adam McDonald, a crime scene investigator for the City of Pomona, recovered Curtis's handgun—a Davis .380 caliber semiautomatic—from a walkway area between the house and a neighboring house. (4RT 730.) Inside the house, McDonald recovered two spent .380 caliber casings from

the floor of the rear hallway. (4RT 735-738; 5RT 921, 938.) In addition, two bullets were recovered. A .380 caliber bullet was found lodged in the wall near the front door, and a .32 automatic caliber bullet was found in a rear bedroom on a closet shelf. (4RT 735-738; 5RT 915, 919-920.) With regard to the bullet found in the closet, it appeared from the trajectory of the bullet hole that the bullet was fired from the front of the house to the back of the house, and the bullet hit a partially open closet door before it went into the closet. (4RT 735, 744.)

Another bullet was recovered from Curtis's body. Dr. Ogbonna Chinway, a Deputy Medical Examiner at the Los Angeles County Coroner's Office, conducted an autopsy on Curtis's body, and concluded that Curtis died from a single gunshot wound to the heart. (5RT 908-912.) Dr. Chinway recovered a .32 automatic caliber bullet from Curtis's vertebra. The bullet entered Curtis's body through his heart, went in a downward trajectory through his upper abdomen, and lodged in his vertebra. Dr. Chinway turned the bullet over to the Los Angeles County Sheriff's Department. (5RT 912, 945, 947.)

On March 24, 2000, in an unrelated incident, Ontario Police Officer Joseph Giallo arrested appellant and his girlfriend, Janice Marrow-Wright, in an apartment in Ontario. They were the only two individuals in the apartment at the time. (6RT 1025-1028, 1043.) Officer Giallo searched the apartment in conjunction with the arrest and found a .32 caliber Smith and Wesson revolver underneath some sofa cushions in the apartment. (5RT 926-928; 6RT 1028-1029.) At trial, witness Toni Wright testified that, on March 22, 2000, she saw appellant in possession of a small dark colored handgun.[7] (6RT 1097-1098.)

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[7] Toni Wright was later identified as appellant's ex-wife during the penalty phase case-in-chief. (8RT 1591-1593.)

Ballistics expert Dale Higashi, a senior criminalist at the Los Angeles County Sheriff's Department, examined the ballistics evidence, consisting of appellant's Smith and Wesson revolver, Curtis's .380 caliber semiautomatic handgun, the spent shell casings from the Pomona residence, and the bullets recovered from both the Long Beach and Pomona shootings. (5RT 937-938, 943-944.) Higashi found that the .32 automatic caliber bullets that were fired during the Pomona incident (and recovered from the closet shelf and Curtis's body) were fired from appellant's .32 caliber revolver. (5RT 918-919, 948-949, 951-953.) Higashi further found that, even though the .32 caliber bullets were automatic bullets, and they were not the precise caliber that appellant's revolver was designed to fire, the revolver was capable of firing the automatic bullets safely. (5RT 947.) Based on Higashi's microscopic comparison of appellant's gun and the markings on the .32 caliber bullets, Higashi concluded that appellant's gun fired the bullet that killed Curtis, as well as the bullet that was found in the closet of the Pomona house. (5RT 948.) Higashi additionally examined the two spent shell casings and the .380 caliber bullet that was found in the wall of the Pomona house, and concluded that Curtis's semiautomatic handgun ejected the shell casings and fired the .380 caliber bullet. (5RT 951-953.)

Higashi was also provided with the bullet recovered from the scene of the Long Beach incident. Higashi determined that the bullet was fired by appellant's Smith and Wesson revolver.[8] (5RT 951-952.)

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[8] The prosecution additionally offered expert testimony regarding the Duroc Crip street gang from Los Angeles County Sheriff's Deputy David Bly. (6RT 1011-1024.) Respondent has omitted this testimony because the gang-related charges and enhancements were ultimately dismissed.

B. Appellant's Guilt Phase Defense

1. The Attempted Murders of Julius Martin and Douglas Priest, and the Robbery of Julius Martin

Long Beach Police Officer Joseph Seminara was one of the officers who responded to the Long Beach incident on the morning of February 17, 2000. He briefly questioned Martin and Priest in their apartment while they were being treated by paramedics. Priest told Officer Seminara that he had been asleep, and the sound of gunshots woke him up. Priest said that he had no idea how he had been stabbed, and the assailant fled the scene before Priest realized what had happened. Officer Seminara saw that Priest was suffering from a visible stab wound, and Priest was clearly in pain. (6RT 1177-1179.)

Martin spoke with Officer Seminara for less than 30 seconds. It was apparent to the officer that Martin had been shot "several times" in the head and was also in pain. Martin told the officer that he did not know how Priest had been stabbed. (6RT 1177-1178.)

That same day, Long Beach Police Detective Philip Coughesy interviewed Martin at the hospital. (6RT 1181-1183, 1186.) By that time, Martin had suffered a seizure and a doctor determined that he would require surgery. (6RT 1183-1184.) Martin nevertheless managed to provide Detective Coughesy with details regarding the shooting, stating that an individual named "Mad" shot him, he knew Mad to be a member of the Crips street gang, and he had known Mad for about one year. Martin stated that Mad came to his apartment, pulled a knife and a gun out of his waistband, and stabbed Priest in the back, and that Priest was asleep on the floor when the stabbing occurred. (6RT 1182-1185.) Martin additionally told Detective Coughesy that Mad told him to lie on his stomach on the floor while pointing a gun at him, after which Mad shot him in the head.

(6RT 1185.) Martin did not tell Detective Coughesy where Mad lived. (6RT 1185.)

The parties stipulated that Priest was interviewed at the hospital by Long Beach Police Officer Assef. Priest told Officer Assef that he had been drinking heavily on the night of the incident, and he fell asleep on the floor. Priest stated that he was awakened by gunshots, and he felt a sharp pain in his back. (6RT 1211.) Priest further stated that he had not seen anyone inside of the residence at the time of the shooting, and he had no idea what had occurred. (6RT 1211-1212.)

2. The Attempted Murders of Mario Ralph and Willie Alexander, and the Murder of Phillip Curtis

On the date of the Pomona incident, Willie Alexander was at a house with two individuals named "Puppet" and Mario, and he was shot once in the chest and once in the back. Alexander was not aware of any narcotics being sold out of the house, and he could not recall any other details of the shooting. He also did not know whether Puppet's real name was Philip Curtis. (6RT 1046-1047, 1050.)

At trial, Alexander denied identifying appellant as the shooter, stating that he had never seen appellant prior to the preliminary hearing, and he had not identified appellant as the shooter at the preliminary hearing. He further stated that appellant was not the same individual he identified as the shooter at the live lineup. (6RT 1048-1051, 1056, 1063.)

On cross-examination, Alexander testified that he was a member of the Pomona Southside Crips gang, and he was currently serving a prison sentence for selling crack cocaine out of another house in an unrelated case. (6RT 1052-1054, 1078.) Alexander stated that other inmates would retaliate against him when he returned to prison if he identified appellant as the shooter. (6RT 1054.) Alexander subsequently acknowledged that he

identified appellant at the live lineup, but stated that he made the identification only because Ralph told him to. (6RT 1056, 1058-1059, 1063.) Alexander acknowledged that, during his preliminary hearing testimony, he never stated that Ralph told him who to identify. (6RT 1076.)

When Sergeant Warm interviewed Ralph at the scene, Ralph told him that the shooter was a Black male from the Duroc gang, and the shooter left the scene in a white Cadillac. (6RT 1106-1107.) Sergeant Warm was subsequently dispatched to the Pomona Valley Hospital, and while there, he noticed a white Cadillac in the parking lot. He took photographs of the car, wrote down the license plate number, and turned the information over to Detective Guenther. Because Sergeant Warm was not part of the ongoing investigation, he did not know the outcome of the investigation into the Cadillac. (6RT 1107-1108.)

Pomona Police Officer Duane Leonard was one of the officers who responded to the scene. When he arrived, he observed Ralph and Alexander sitting on a grass parkway area. Officer Leonard spoke to Ralph for approximately 30 to 45 seconds before Ralph was transported to a hospital.[9] Ralph stated that "some smokers from Duroc" were responsible for the shooting, and a white Cadillac was involved. Alexander was unable to speak due to his gunshot wound. (6RT 1167-1170, 1173.)

Pomona Police Officer Paul Hitt was dispatched to the hospital where Curtis's body was taken. After Curtis was pronounced dead, Officer Hitt requested that bags be placed over Curtis's hands to preserve evidence in the event that the Coroner's office wished to conduct a gunshot residue test. (6RT 1110-1111, 1116, 1119.)

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[9] Officer Leonard understood Mario Ralph's name to be "Mario Ross" and, therefore, Officer Leonard's testimony refers to "Ross." (6RT 1169.) For the sake of clarity, respondent uses the name "Ralph."

Detective Guenther conducted multiple interviews with Ralph following the shooting. On approximately 10 occasions, Ralph stated that the shooter used what appeared to be a small black semiautomatic pistol rather than a revolver. In addition, Ralph did not initially tell Detective Guenther that he fired shots with Curtis's gun. Instead, Ralph stated that he took the gun out of Curtis's hand after the shooting, and threw it onto the roof. (6RT 1189-1191) Ralph also told Detective Guenther that he was seated on the couch when the shooting began, and he was shot while running toward the front door. (6RT 1192.)

Detective Guenther could not recall whether any gunshot residue tests were ever performed on the hands of Alexander or Curtis, and he did not believe that a gunshot residue test was ever performed on Ralph's hands. (6RT 1193-1194.) Detective Guenther explained that gunshot residue tests should be performed before a suspect's hands come into contact with anything that could contaminate the evidence. Because Ralph and Alexander had already been transported to the hospital by the time Detective Guenther arrived at the scene, it was unlikely that gunshot residue tests were ever performed. (6RT 1195-1196.) Detective Guenther additionally testified that the white Cadillac documented by Sergeant Warm had nothing to do with the case. (6RT 1202.)

C. Prosecution's Guilt Phase Rebuttal

Detective Guenther first interviewed Willie Alexander while Alexander was in the hospital. Alexander told Detective Guenther that he had seen someone who had been arrested on a news broadcast, and that individual looked like the shooter. Alexander further stated that he had seen a local newspaper containing a photograph of the same individual. (6RT 1203-1204.) Detective Guenther subsequently showed Alexander a photographic lineup, from which Alexander positively identified appellant

as the shooter. Alexander subsequently identified appellant as the shooter at a live lineup. (6RT 1204-1205.)

Detective Guenther was present during the live lineup. (6RT 1200.) Detective Guenther estimated that there were six to eight police officers present during the lineup, and he did not see any of the witnesses speak to each other. (6RT 1200-1201.) Appellant's attorney, who was also present during the lineup, never made any objections during the lineup. (6RT 1201.)

Prior to appellant's preliminary hearing, Alexander was arrested for selling and possessing rock cocaine in an unrelated case. He was not offered a plea agreement in exchange for his testimony against appellant in the current case. (6RT 1205.) Alexander was subsequently incarcerated at Ironwood State Prison for the narcotics case, and Detective Guenther visited Alexander at the prison to ascertain whether Alexander was willing to testify. Alexander told the detective that he could not testify because he was in prison, and that he would face some type of retaliation if he testified against appellant. (6RT 1205-1206.)

Prior to the preliminary hearing, Detective Guenther and his partner transferred Alexander from the prison to the Pomona city jail so that he could testify without having to ride with other inmates on statewide transportation. (6RT 1206.) During the drive, Alexander told Detective Guenther that he could not testify against appellant out of concern for his own safety. (6RT 1206-1207.) Detective Guenther spoke with Alexander again on the night before the preliminary hearing, and Alexander expressed the same concerns. (6RT 1207.)

D. Prosecution's Penalty Phase Case

The prosecution introduced evidence of appellant's two prior felony convictions and several acts or threats of violence. The felony convictions consisted of a 1989 second degree robbery conviction and a 1999 conviction for evading a police officer. (11RT 2142.) The robbery incident occurred on February 28, 1989, at a hamburger restaurant in Monrovia. After ordering food from one of the restaurant employees, Anna Laura Martinez, appellant pulled out a gun, demanded money, and threatened to shoot Martinez if she did not give him the money. Martinez complied and gave appellant money. (8RT 1704-1707.)

The evading incident occurred on April 21, 1999, when San Bernardino Police Officer Patrick Pritchett witnessed appellant drive past two to three school buses in front of San Bernardino High School. Appellant failed to stop even though the buses had "their arms extended out for people to stop." (9RT 1739-1742, 1748.) Officer Pritchett attempted to initiate a traffic stop, but appellant did not respond and instead drove around the block at a high rate of speed, failing to stop at a stop sign. Appellant then stopped his car to permit a passenger to exit from the back seat. Appellant threw a plastic bag out of the window, and the passenger picked up the bag and ran away on foot. (9RT 1741-1743.) Appellant drove away, but shortly thereafter, a second passenger attempted to exit from the back seat. Appellant did not stop the car this time, and the passenger was dragged for approximately 35 to 40 feet. The passenger eventually exited the car, and appellant threw another plastic bag out of the window. The second passenger then picked up the bag and ran away. (9RT 1742-1743.)

Appellant proceeded to drive away at a high rate of speed, during which he ran another stop sign. Officer Pritchett observed that there were approximately 200 pedestrian school children in the area at the time

because the children had just been released from school. (9RT 1744.) Appellant eventually stopped his car, jumped out, and ran into a residence. (9RT 1744-1746.) Officer Pritchett pursued appellant on foot through the residence and into an alley behind the residence. After a brief foot pursuit, appellant was taken into custody by another police officer. (9RT 1746-1747.)

In addition to appellant's prior convictions, the prosecution introduced evidence of numerous acts or threats of violence that occurred between 1992 and 1994, and between 2000 and 2001. Specifically, on June 23, 1992, appellant fired gunshots at the residence of Charles Mitchell. Mitchell was a member of the West Covina Mob street gang, which was "a Blood gang." (9RT 1766-1767.) Appellant was seen firing the shots from a car, after which he stuffed his gun into some bushes. Police officers later recovered the gun with the assistance of an eyewitness. (9RT 1766-1769.)

On September 6, 1994, appellant was an inmate at New Folsom State Prison. A correctional officer witnessed appellant and another inmate attacking a third inmate with clenched fists. The officer ordered appellant to "get down," but appellant refused to comply. The officer chambered a round of ammunition into his rifle, at which point appellant stopped the attack. (9RT 1580-1583.)

On March 22, 2000, appellant shot his ex-wife, Toni Wright, in the right side of her face. Ontario Police Officer Mark Ortiz responded to the shooting, and found Ms. Wright at a phone booth in front of a hamburger stand in Ontario. Ms. Wright had the phone in her hand, and fell to the ground. Officer Ortiz observed that she was bleeding from the right side of her jaw and she was going "in and out of unconsciousness and consciousness." (8RT 1591-1593.) Ms. Wright told the officer that the shooter was her ex-husband, whom she identified as appellant. Paramedics subsequently transported Ms. Wright to the hospital. (8RT 1591-1593.)

The following day, police officers from the Ontario Police Department attempted to take appellant into custody. (8RT 1679.) From 1:00 a.m. to 4:00 a.m., appellant barricaded himself in an Ontario apartment with his girlfriend, her two five-year old twin nephews, her eleven-year-old nephew, and her mother. (8RT 1595.) While barricaded in the apartment, appellant fired approximately 14 shots at police officers. (8RT 1601, 1609, 1632-1633, 1651, 1665, 1674.) At some point, appellant released the children, after which a trained hostage negotiator spoke with appellant over the phone. The negotiator overheard appellant's girlfriend screaming at appellant to let her go, and if he would not let her go, to let her mother go, but appellant refused. (8RT 1667-1668, 1678-1680.) Appellant was eventually taken into custody after the police deployed tear gas. (8RT 1609, 1668.)

On June 28, 2001, appellant was found in possession of an inmate manufactured spear while incarcerated at the Los Angeles County jail. (8RT 1695.) The spear was recovered from the back of appellant's cell, leaning against the back of appellant's bunk, and was made from a "bundle of newspapers tightly wrapped to make a spear-like object, and . . . tied off with bed sheets." (8RT 1695-1696.) Appellant was the only inmate housed in the cell at the time, and there had been no contraband in the cell prior to appellant being housed there. (8RT 1534-1534, 1694.)

On July 10, 2001, while incarcerated at the Los Angeles County jail, appellant threw bleach on Sheriff's Deputy Steven Mikesell, causing the deputy's eyes to burn. (9RT 1715-1716, 1724.) The incident occurred at about 3:45 p.m., while Deputy Mikesell was attempting to transfer another inmate, Mr. Reeves, to the "discipline module." (9RT 1716-1717.) Reeves told Deputy Mikesell, "I'm not going anywhere. Get the fuck off my row." Inmate Reeves then threatened, "Get the fuck out of here before you get fucked up by me and my homies." (9RT 1719.) Reeves picked up an open

milk container, and Deputy Mikesell and other deputies sprayed Reeves with pepper spray. (9RT 1720.) Reeves yelled out for the other inmates on the row to "bomb these motherfuckers," and appellant threw a "white milky substance" at Deputy Mikesell from inside his cell. (9RT 1721, 1724.) The substance ran into Deputy Mikesell's eyes, causing a burning sensation. The deputy recognized the smell and color of the substance to be consistent with bleach. (9RT 1724.)

On that same date, Los Angeles County Sheriff's Deputy Thompson conducted a search of appellant's cell. The deputy recovered three altered razor blades, a fish line, and excess linen hidden under appellant's mattress. Appellant was the only inmate housed in the cell at that time, and no other inmate had access to the cell. The materials were consistent with materials used to make an inmate manufactured spear. (8RT 1515-1519.)

On October 28, 2001, appellant was housed in the "3100" unit of the Los Angeles County jail. An inmate had been stabbed. Therefore, all of the inmates in appellant's unit were removed from their cells while deputies conducted a search for weapons. During the search, Deputy David Jouzi and one other deputy stood watch over appellant and 11 other inmates who were seated in a hallway restrained by handcuffs and waist chains. (8RT 1540-1544.) Appellant suddenly stood up, stated, "I'm going to kill you Jouzi." Appellant started walking toward Deputy Jouzi followed by the other inmates. (8RT 1543-1545.) Deputy Jouzi sprayed appellant with pepper spray twice, but it did have any effect on appellant. (8RT 1547-1548.) Deputy Jouzi felt a burning sensation in his eyes and closed his eyes, at which point appellant "head butted" the deputy. (8RT 1548.) Appellant then kicked the deputy in the inner right thigh area, causing the deputy to lose his balance and fall backward. (8RT 1552-1553.) At that point, other deputies came to Deputy Jouzi's assistance and subdued appellant. (8RT 1552-1553.)

E. Appellant's Penalty Phase Case

Janice Marrow-Wright testified that she had known and dated appellant since November of 1998, that he was a decent person, and that he had never been disrespectful to anyone in her presence. (10RT 1916, 1936.) Marrow-Wright further testified that neither she nor her mother were held hostage by appellant at any time. (10RT 1916, 1921-1922, 1927.)

On cross-examination, Marrow-Wright acknowledged that she was interviewed by Ontario Police officers following appellant's arrest, and that she told a police officer that appellant was no longer her boyfriend. (10RT 1951.) She explained that she and appellant had separated for a period of time so that he could go to "construction school." (10RT 1977.) She further testified that she married appellant in 2000, but explained that there was no marriage certificate because it "was done as an agreement" as a "common law" marriage. (10RT 1977-1978.)

On cross-examination, Marrow-Wright denied telling the police that she and her mother had been through a "traumatic experience" while barricaded in the Ontario apartment with appellant, and she denied stating that appellant had abused her. (10RT 1939, 1951, 1956.) She also denied telling the police that appellant was a "gangster," or that appellant was dangerous and had dangerous friends. (10 RT 1941, 1943, 1948-1949.)

Juanita Anderson testified that she was a friend of appellant's family and had known appellant for 30 years. (10RT 1985.) According to Anderson, appellant was respectful and kind. While Anderson was under a doctor's care, appellant called her to see if she was alright. (10RT 1985-1986.) When asked whether she would recommend a sentence of life in prison or death, Anderson recommended life in prison. (11RT 2142.)

Donell Walls testified that he had known appellant since elementary school and they had grown up together. (10RT 1988-1989.) During that time, appellant had been a good friend and a generous person. (10RT 1990.)

When asked if he would recommend the death penalty or life imprisonment, Walls stated that he would recommend life imprisonment. (10RT 1994.)

On cross-examination, Walls testified that he and appellant played football together in high school. Walls thought that appellant might have had some psychological problems because appellant had difficulty paying attention on the football field. (10RT 2000-2001.) Walls thought that appellant was taking medication for his difficulties, but never discussed it with appellant. (10RT 2003.) After high school, Walls went to college and lived in Louisiana from 1992 to 1997. Walls acknowledged that he did not see appellant very often during that time. (10RT 1997-1998.) Therefore, if appellant had become involved in a gang, he did not share it with Walls. (10RT 1995-1996.)

Melinda Mix testified that she met appellant when she was in seventh grade, and they had been friends for 15 years. She knew appellant to be a good person and had never observed him to be disrespectful to anyone. (10RT 2027-2029.) On cross-examination, Mix acknowledged that she had dated appellant and still considered herself to be his girlfriend. (10RT 2030.) She was unaware that appellant had married another woman, although she was aware that there "was a relationship" with Marrow-Wright. (10RT 2030-2031.)

Dr. David Joel Jimenez, a licensed psychologist, conducted an evaluation of appellant which involved three face-to-face interviews with appellant, a review of appellant's police reports, interviews with appellant's parents, and a review of two prior psychological evaluations. (10RT 2005, 2007-2011.) During the first face-to-face interview, appellant complained of having difficulty sleeping with the antipsychotic medication that he was taking. (10RT 2009.) During the second interview, appellant was not compliant with the interview, and would not answer Dr. Jimenez's questions. (10RT 2010.) During his third face-to-face interview with

appellant, he attempted to administer two psychological tests, but appellant did not fully complete the tests. (10RT 2008-2009.) Dr. Jimenez subsequently attempted to conduct a fourth face-to-face interview with appellant, but appellant declined the interview. (10RT 2009.)

During the interviews, appellant told Dr. Jimenez that he joined the Duroc gang at the age of nine. (10RT 2012.) Dr. Jimenez opined that appellant may have suffered trauma linked to this early gang involvement because appellant stated that "one of his homeboys" died in his arms when appellant was 15 years old. (10RT 2012.) Appellant also told Dr. Jimenez that he had attempted suicide when he was 12 or 13 years old, and that he had been stabbed in the head on one occasion. Dr. Jimenez was unable to corroborate these statements as the suicide attempt was denied by appellant's family, and the stabbing could not be confirmed by medical records (10RT 2013-2014.)

Appellant additionally told Dr. Jimenez that he had used phencyclidine or "PCP" on more than a hundred occasions, that he liked rock cocaine and marijuana, and that he consumed alcohol on a daily basis. (10RT 2015.) According to reports from appellant's mother, appellant had a history of attention deficit disorder and hyperactivity, for which appellant was treated with Ritalin from the age of two. (11RT 2041-2042.)

Dr. Jimenez administered two psychological tests, but did not include the test results in his evaluation because he did not believe that appellant made "his best efforts." (10RT 2017-2019.) On at least two occasions, appellant attempted to fake a mental disorder or illness. (11RT 2045.) Because appellant did not comply fully with the evaluation process, Dr. Jimenez could not rule out a mental disorder, stating that appellant could have "a paranoia personality disorder or perhaps something as dramatic as paranoia schizophrenia with psychotic features." (11RT 2045.) In his evaluation, Dr. Jimenez noted that appellant had paranoid personality

disorder. However, the doctor explained that this was an error because he "did not have sufficient information to state at the time that [appellant] did have this disorder because in part he was feigning a mental disorder." Therefore, the doctor "need[ed] to added to add an O [to the report], which means rule out." (11RT 2046-2047.)

Also, Dr. Jimenez testified regarding appellant's history of attention deficit disorder and hyperactivity, stating that children who do not grow out of these disorders as they approach adulthood have a higher rate of problems with impulsivity and conduct disorder difficulties than the average population. Adults with these disorders have higher rates of substance abuse and breaking the law than the average population. (11RT 2061-2062.)

F. Prosecution's Penalty Phase Rebuttal

Ontario Police Officer Joseph Giallo interviewed Marrow-Wright shortly after the hostage incident in Ontario in which appellant was arrested, and that interview was videotaped. (11RT 2079-2080.) Based on a transcript of that videotape, Marrow-Wright stated that she and her mother had been through a "traumatic experience." (11RT 2081.) Marrow-Wright additionally told Officer Giallo that appellant was no longer her boyfriend, stating, "I have never been in a hostage situation. I didn't know what to do. All I kept saying was let the kids go. He's gonna kill me and my mom." (11RT 2082.)

Marrow-Wright also indicated that appellant was abusive, stating that appellant had pushed her down the previous Thursday because "he was mad." (11RT 2083.) When asked why she did not report the abuse, Marrow-Wright stated, "because you guys are dealing with a fucking gangster. And I'm gonna tell you something . . . . He has friends out there that are dangerous. And . . . he . . . said, ['']if I die tonight, I'll let people know where each and every one of you live.['']" (11RT 2084.)

Rose Ponce testified as a custodian of records for the California Department of Corrections. (11RT 2145-2146.) According to certified prison records, appellant was first received by the Department of Corrections on May 30, 1989, and he was paroled on January 20, 1991. (11RT 2145-2146.) Less than a month later, on February 13, 1991, appellant was arrested for a parole violation and remained in custody until May 13, 1992, when he was again paroled. (11RT 2146.) Appellant was returned to prison on June 23, 1992, after he violated parole a second time. He was released on November 11, 1998. (11RT 2146-2147.)

ARGUMENT

I. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING APPELLANT'S SELF-REPRESENTATION REQUEST AS UNTIMELY, AND THE REQUEST WAS EQUIVOCAL IN ANY EVENT

Appellant contends that the trial court prejudicially erred in denying, as untimely, his motion to represent himself under *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562]. Specifically, appellant contends that the timeliness requirement violates the federal Constitution because the right of self-representation is a fundamental right, and the timeliness requirement fails under a strict scrutiny analysis. He further contends that, even assuming the timeliness requirement is constitutionally sound, the trial court's reasons for finding his *Faretta* motion to be untimely were not supported by the record, he did not request self-representation to delay the trial, and there was no showing that a delay would have caused any undue disruption in the proceedings. (AOB 25-67.)

Respondent submits that the timeliness requirement is constitutionally sound, and appellant's attempt to invoke a strict scrutiny analysis is without merit. Furthermore, the record thoroughly demonstrates that there was no error or prejudice in denying appellant's *Faretta* motion as untimely, and

the question of timeliness only matters if appellant's request for self-representation was unequivocal in the first place. As set forth below, the record demonstrates that the request was equivocal. Thus, appellant's claim is without merit.

A. Factual and Procedural Background

Appellant was arraigned on March 8, 2001, and his preliminary hearing took place on April 19, 2001. (1CT 27-28, 36, 211-213.) Nearly one year later, on March 12, 2002, appellant was advised that his trial date was set for Monday, April 29, 2002, as "day 5 of 10," which meant that his trial would start on April 29, or within five days after that date.[10] In addition, the parties agreed that jury selection would commence on Wednesday, May 1, 2002, with a venire of 200 potential jurors. (1RT 35, 37-39, 54.)

On Wednesday, April 24, 2002, the trial court ordered seven state prison inmates to be transferred from state prison facilities to the custody of the Los Angeles County Sheriff for the purpose of testifying at appellant's trial. (2CT 474-487.) On that same date, appellant met with his trial counsel, Lee Coleman, and advised his counsel that he was "considering going pro per." (1RT 218.)

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[10] This refers to the prosecution's 10-day grace period in which trial must be commenced once the defense announces readiness for trial. (§ 1382, subd. (a)(2)(B); *Malengo v. Municipal Court* (1961) 56 Cal.2d 813, 815.) Because the parties agreed that Monday, April 29, 2002, would be "day 5 of 10" (see 1RT 54), the prosecution had five calendar days, or until Saturday, May 4, 2002, to commence trial. Because May 4 was not a court day, however, the last actual date to commence appellant's trial was Friday, May 3, 2002. (See Code Civ. Proc., § 12 [time is calculated using calendar days, as opposed to court days, and excludes holidays unless otherwise specified].)

The following Monday, April 29, 2002, the parties appeared for a trial readiness conference. At the beginning of that appearance, appellant's trial counsel advised the court that appellant wished to represent himself. (1RT 218.) Appellant's counsel explained that appellant made the decision to request self-representation that morning, but the issue first came up during discussions on the previous Wednesday, April 24, when appellant stated he was thinking about requesting self-representation. (1RT 218.) Appellant then advised the court that he was having a conflict with his counsel, stating, "I have a right under *Faretta*, don't I?" (1RT 218.) The court then cleared the courtroom to conduct a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. (1RT 218.)

1. Appellant's *Marsden* hearing

The court asked appellant what type of conflict he was having with counsel, and appellant stated that his counsel was not returning his girlfriend's telephone calls, and he felt that no defense was being put forward on his behalf. (1RT 218, 221-222.) Appellant explained that his girlfriend had "the addresses of the peoples that was [*sic*]—that supposed to had did [*sic*] one of these crimes, supposed to be a witness to come forth and bring up their names. I don't have them." (1RT 221.) According to appellant, his girlfriend attempted to give this information to his attorney by calling him several times, but no one returned her calls. (1RT 221.)

Appellant's counsel responded that he had spoken to appellant's girlfriend on numerous occasions, and she indicated that she had some information, but "nothing helpful has come forward." Appellant's counsel instructed appellant's girlfriend to contact his defense investigator if she had any relevant information, but she never forwarded the information to the investigator. Appellant's counsel explained that he would no longer discuss the case with appellant's girlfriend because she had become an "officious intermeddler" in the case. (1RT 220-221.) Appellant's counsel

also advised the court that appellant's girlfriend could have given the information to appellant so that he could turn it over to his counsel, but "[t]hat hasn't happened either." (1RT 222.)

With regard to appellant's complaint that no defense was being put forward on his behalf, appellant's counsel advised the court that he had reviewed the case with appellant "several times," and he had outlined the defense that would be presented through the testimony of Willie Alexander and the cross-examination of other witnesses. (1RT 222.) The court asked appellant if he had any response to his counsel's statements, and appellant indicated that he did not, noting, "I [have] already stated everything." (1RT 222.) The trial court concluded that there was insufficient evidence of a conflict between appellant and his counsel to warrant appointment of new counsel. (1RT 224.)

2. Appellant's *Faretta* hearing

Following the *Marsden* hearing, the trial court addressed appellant's *Faretta* motion. The court advised appellant about the disadvantages of self-representation, and explained to appellant that he would have two days to prepare for trial because "Wednesday is the trial date[.]" The court further stated that appellant "would not even be in the pro per module by the time" when the trial commenced, adding, "That won't happen until the weekend."[11] (1RT 225.) Appellant stated that he would need additional time to prepare for trial, and the court responded that no continuances would be granted because 200 jurors were scheduled to appear for jury selection within two days and witnesses had been subpoenad. The court then asked appellant, "Why didn't you bring this up before?" (1RT 224,

[11] The "pro per module" is a housing facility at the county jail where pro per inmates are provided with access to ancillary services reasonably necessary to prepare a defense such as access to a law library. (See *People v Blair* (2005) 36 Cal.4th 636, 734.)

226.) Appellant responded that he had recently become dissatisfied with his counsel's cross-examination of one of the law enforcement officers because he felt that his counsel was not aggressive enough. (1RT 226.) The court asked appellant whether he had any previous discussions with his counsel about self-representation, and appellant responded that he had not discussed the issue with counsel until the previous Wednesday, April 24. Appellant's counsel clarified, "Wednesday he indicated he was *thinking* about it, Judge." (1RT 227, emphasis added.)

The court advised appellant that he could represent himself, but the trial would nevertheless go forward in two days. The court explained that the case had been "going on" for "about a year" and appellant had waited until "two days before trial" to make his first request for self representation. (1RT 227.) The court then recessed for 15 minutes to permit appellant time to fill out a *Faretta* advisement form and waiver of his right to counsel, and to give appellant time to "think about it." (1CT 488-491; 1RT 227-228.)

Following the recess, the court asked appellant, "What kind of continuance are you asking for?" Appellant responded, "I don't know. A month, [or] 2." (1RT 229.) The court then denied the *Faretta* motion during the following colloquy:

The Court: Now, Mr. Coleman was your attorney at the time of the preliminary hearing, wasn't he?

[Appellant]: Yes.

The Court: And you had a chance to evaluate [your counsel's] ability to cross-examine witnesses at that time?

[Appellant]: Yes.

The Court: Why didn't any of this come up at that time?

[Appellant]: Because I didn't notice it until the last time. [¶] If the court is going to deny me time to prepare for my case, I will proceed with Mr. Coleman.

The Court: I am going to deny you time to prepare for your case because I do think it is untimely. [¶] I do see areas [on the advisement form] that you failed to initial, and it seems to me that you don't thoroughly understand what you are getting yourself into. [¶] . . . That is not really the issue. The issue is the time limits. [¶] The reason for the request, although you don't need reasons for the request, I don't think are adequate. [¶] It seems to me Mr. Coleman is doing a very good job for you. He has filed and argued numerous motions on your behalf. He has been able to keep out some of the penalty phase evidence that the People, after being forced to review it by Mr. Coleman, have decided not to bring forward. The Court denied the request for one piece of penalty phase evidence, so he is doing a good job. [¶] His job is also to evaluate the evidence before putting it on. And I think, again, he— Mr. Coleman is doing a fine job. He has experience in the area. He knows what he is doing. [¶] The Court is going to deny the request for pro per status based on the fact that it is untimely, and the defendant clearly would need time to prepare.

(1RT 229-231.)

B. Applicable Law

In order to assert the constitutional right to self-representation, a defendant must make an unequivocal assertion of that right within a reasonable time prior to the commencement of the trial. (*People v. Jenkins* (2000) 22 Cal.4th 900, 959; see *People v. Welch* (1999) 20 Cal.4th 701, 729.) In determining whether a *Faretta* motion is timely, the trial court must consider the totality of the circumstances, including: (1) the time between the motion and the scheduled trial date; (2) whether trial counsel is

ready to proceed to trial; (3) the number of witnesses and the reluctance or availability of crucial trial witnesses; and (4) the complexity of the case, any ongoing pretrial proceedings, and whether the defendant had earlier opportunities to assert his right of self-representation. (*People v. Lynch* (2010) 50 Cal.4th 693, 726, overruled on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 636-643.)

An untimely *Faretta* motion is addressed to the trial court's discretion. (*People v. Windham* (1977) 19 Cal.3d 121, 128-129.) In this context, the court may consider the following factors: (1) the quality of defense counsel's representation; (2) the defendant's proclivity to substitute counsel; (3) the reasons for the request; (4) the length and stage of the proceedings; and (5) the disruption or delay which might reasonably be expected to follow the granting of such a motion. (*Ibid.*) The court may also deny the request if it is made for the purpose of frustrating the orderly administration of justice or delay trial. (*People v. Lynch*, *supra*, 50 Cal.4th at p. 722; *People v. Marshall* (1997) 15 Cal.4th 1, 23; *People v. Howze* (2001) 85 Cal.App.4th 1380, 1397.) The court need not state its reasons for denying an untimely *Faretta* motion; instead, its denial "is properly affirmed if substantial evidence in the record supports the inference that the court had [the above] factors in mind when it ruled." (*People v. Bradford* (2010) 187 Cal.App.4th 1345, 1354.)

C. The Timeliness Requirement Is Constitutionally Sound

As a preliminary issue, this Court must reject appellant's contention that the "reasonable time" requirement is unconstitutional under a strict scrutiny analysis. (AOB 39-45.) Specifically, appellant claims that California law makes a distinction between an unconditional right of self-representation (if the *Faretta* motion is asserted within a reasonable time prior to trial) and a discretionary right of self-representation (if the *Faretta* motion is untimely), and that this distinction is unconstitutional because the

Faretta decision does not require timeliness. (AOB 42-43.) Appellant reasons that, because the right of self-representation is a fundamental right, California cannot impose this timeliness distinction unless it satisfies a compelling governmental interest under the strict scrutiny standard of review. (AOB 43-44.) Appellant's claim fails for several reasons.

First, contrary to appellant's contention that nothing in the rationale of *Faretta* suggests that timeliness is required, federal courts have widely accepted that *Faretta* announced the principle of timeliness, and many federal courts have enforced the timeliness requirement as applied to pre-trial *Faretta* motions. (See *Marshall v. Taylor* (9th Cir. 2005) 395 F.3d 1058, 1061 [noting that *Faretta* stressed the issue of timeliness and established that requests made "weeks before trial" are timely]; see also, e.g., *Wood v. Quarterman* (5th Cir. 2007) 491 F.3d 196, 201-202 [holding that state courts are not obligated to permit self-representation when defendant fails to make timely *Faretta* motion]; *United States v. Edelmann* (8th Cir. 2006) 458 F.3d 791, 808 [affirming district court's denial of *Faretta* motion as untimely where motion was made five days prior to trial]; *Hamilton v. Groose* (8th Cir. 1994) 28 F.3d 859, 862 [affirming denial of *Faretta* motion three weeks prior to trial because the timing suggested that the defendant was attempting to delay the start of the trial].) Furthermore, the Ninth Circuit has observed that the "timeliness element in a *Faretta* request is 'clearly established Federal law, as determined by the Supreme Court.'" (*Marshall v. Taylor*, *supra*, at p. 1061.) Subsequent to its holding in *Faretta*, the United States Supreme Court acknowledged the timeliness requirement in *Martinez v. Court of Appeal of California* (2000) 528 U.S. 152, 161-162 [120 S.Ct. 684, 145 L.Ed.2d 597], where the Court observed that a "defendant must 'voluntarily and intelligently' elect to conduct his own defense, . . . and most courts require him to do so in a *timely manner*." (Emphasis added.)

> "The high court has observed that lower courts generally require a self-representation motion to be timely, a limitation that reflects the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer."

(*People v. Lynch*, *supra*, 50 Cal.4th at p. 722, internal quotation marks and citations omitted.)

Second, not all limitations on fundamental rights are subject to strict scrutiny review.[12] Admittedly, the right of self-representation is a fundamental right. (*Faretta v. California*, *supra*, 422 U.S. at p. 806.) In the area of criminal law, however, the United States Supreme Court has established that strict scrutiny only extends to fundamental rights that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental [and] implicit in the concept of ordered liberty, such that neither liberty or justice would exist if they were sacrificed." (*Washington v. Glucksberg* (1997) 521 U.S. 702, 721 [117 S.Ct. 2258, 138 L.Ed.2d 772]; *Medina v. California* (1992) 505 U.S. 437, 445 [112 S.Ct. 2572, 120 L.Ed.2d 353]; see *Patterson v. New York* (1977) 432 U.S. 197, 201-202 [97 S.Ct. 2319, 53 L.Ed.2d 281] ["we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally within the power of

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[12] Federal courts have applied a number of more lenient standards of review in fundamental rights cases. (See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, 873 [112 S.Ct. 2791, 120 L.Ed.2d 674] [Not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right."]; *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791 [109 S.Ct. 2746, 105 L.Ed.2d 661] [applying intermediate scrutiny to restrictions on speech]; *United States v. Marzzarella* (3d Cir. 2010) 614 F.3d 85, 96 ["Strict scrutiny does not apply automatically any time an enumerated right is involved"]; *United States v. Chester* (4th Cir. 2010) 628 F.3d 673, 682 ["We do not apply strict scrutiny whenever a law impinges upon a right specifically enumerated in the Bill of Rights"].)

the State to regulate procedures under which its laws are carried out".) The right of self-representation does not rise to this level. "[I]t is well established that self-representation does not further the fairness or accuracy of the proceedings." (*People v. Fraser* (2006) 138 Cal.App.4th 1430, 1447, citations and internal quotation marks omitted.) As this Court has recognized, "the rule announced for the first time in *Faretta* is not one which followed from constitutional concepts . . . [affording] . . . protections designed to aid in the search for truth or to insure the integrity of the fact-finding process." (*People v. McDaniel* (1976) 16 Cal.3d 156, 164-165.) "[T]he rule is not intended . . . to enhance the reliability of the truth-determining or fact-finding process . . . and indeed . . . compliance will most likely have the directly opposite effect." (*Id.* at p. 166.) *Faretta* observed that "it is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts . . . ." (*Faretta v. California*, *supra*, 422 U.S. at p. 834.)

This point is further illustrated by the Supreme Court's observation that "*Faretta* itself and later cases have made clear that the right [of self-representation] is not absolute." (*Indiana v. Edwards* (2008) 554 U.S. 164, 171 [128 S.Ct. 2379, 171 L.Ed.2d 345].) "The defendant must 'voluntarily and intelligently' elect to conduct his own defense." (*Martinez v. Court of Appeal of California*, *supra*, 528 U.S. at pp. 161-162, quoting *Faretta*, 442 U.S. at p. 835.) "And most courts require him to do so in a timely manner." (*Id.* at p. 162.) "He must first be 'made aware of the dangers and disadvantages of self-representation.'" (*Ibid.*, quoting *Faretta*, *supra*, at p. 835.) "A trial judge may also terminate self-representation or appoint 'standby counsel'-even over the defendant's objection—if necessary. (*Ibid.*, quoting *Faretta*, *supra*, at p. 834, fn. 46.) "We have further held that standby counsel may participate in the trial proceedings, even without the express consent of the defendant . . . ." (*Ibid.*, citing *McKaskle v. Wiggins*

(1984) 465 U.S. 168, 187 [104 S.Ct. 944, 79 L.Ed.2d 122].) "Additionally, the trial judge is under no duty to provide personal instruction on courtroom procedure or to perform any legal 'chores' for the defendant that counsel would normally carry out." (*Ibid.*, quoting *Wiggins*, *supra*, at pp. 183-184.) "Although we found in *Faretta* that the right to defend oneself at trial is "fundamental" in nature, it is clear that it is representation by counsel that is the standard, not the exception." (*Id.* at p. 161, quoting *Faretta*, at p. 817.) Given these well established limitations, it cannot be said that the right of self-representation is the type of fundamental right that is essential to the fairness of the proceedings. (*Washington v. Glucksberg*, *supra*, 521 U.S. at p. 721.)

Third, even assuming that the right of self-representation could be considered essential to fundamental fairness, the timeliness requirement is constitutionally sound. It is well settled that, under the federal Constitution, a state law or statutory classification that significantly limits or interferes with the exercise of a fundamental right cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests. (*Zablocki v. Redhail* (1978) 434 U.S. 374, 388 [98 S.Ct. 673, 54 L.Ed.2d 618].) But not every limitation or incidental burden on a fundamental right is subject to the strict scrutiny standard. (*Fair Political Practices Commission v. Superior Court* (1979) 25 Cal.3d 33, 47.) Where a regulation has an effect on a protected right that is merely incidental, strict scrutiny is not applied. (See *Zablocki*, *supra*, 434 U.S. at pp. 385-389 [addressing regulations affecting the right to marry]; *Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 303-305 [finding limitations on the placement of newspaper racks to be reasonable]; *Gould v. Grubb* (1975) 14 Cal.3d 661, 670 [rational basis standard applicable to numerous statutes detailing the mechanisms of the right to vote].) It is only where there is a real and appreciable impact on, or a

significant interference with, the exercise of the fundamental right that the strict scrutiny doctrine will be applied. (*Zablocki*, *supra*, 434 U.S. at pp. 386-387; *Gould*, *supra*, 14 Cal.3d at p. 670.)

Here, the only relevant limitation or interference imposed on the right of self-representation is the requirement that a *Faretta* motion be asserted within a "reasonable time" prior to trial. (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 959.) Although appellant attempts to make a distinction between the mandatory right of self-representation (for timely *Faretta* motions) and the discretionary right (for untimely *Faretta* motions), this distinction is of no consequence. The discretionary right of self-representation does not impose any additional limitations on the right of self-representation beyond the "reasonable time" requirement. If anything, it has the opposite effect because it permits a trial court to exercise discretion to grant an untimely *Faretta* motion.[13] Furthermore, the "reasonable time" requirement does not significantly interfere with the right of self-representation. This is especially true under the circumstances of the present case where appellant had ample time to make a timely *Faretta* request because his case had been pending for nearly a year as further discussed below. (See *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 610 [93 S.Ct. 2908, 37 L.Ed.2d 830] [a party may not facially challenge a law that is constitutional as applied to him].) Thus, strict scrutiny cannot apply because the "reasonable time" requirement does not place such a real or appreciable impact that the right of self-representation is severely limited.

Finally, no matter what standard of review applies, California's interest in maintaining prompt trials and in preventing the abuse of *Faretta*

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[13] Even assuming that a trial court's exercise of discretion could be viewed as an additional limitation, appellant's claim fails for the same reasons discussed herein in addressing the "reasonable time" requirement.

motions is sufficiently compelling and important to survive appellant's constitutional challenge. Courts have long recognized "the compelling interest in prompt trials[.]" (*United States v. Austin* (9th Cir. 2005) 416 F.3d 1016, 1020, quoting *Flanagan v. United States* (1984) 465 U.S. 259, 265 [104 S.Ct. 1051, 79 L.Ed.2d 288].) In fact, "delay may prejudice the prosecution's ability to prove its case, increase the cost to society of maintaining those defendants subject to pretrial detention, and prolong the period during which defendants released on bail may commit other crimes." (*United States v. MacDonald* (1978) 435 U.S. 850, 862 [98 S.Ct. 1547, 56 L.Ed.2d 18].) The requirement of timeliness also prevents a defendant from misusing a *Faretta* motion to unjustifiably delay the trial or obstruct the orderly administration of justice. (*People v. Marshall*, *supra*, 15 Cal.4th at p. 23.) Thus, "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." (*Martinez v. Court of Appeal of California*, *supra*, 528 U.S. at p. 161.) In *Barker v. Wingo* (1972) 407 U.S. 514, 515 [92 S.Ct. 2182, 33 L.Ed.2d 101], the Court explained that "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." Lengthy pretrial incarceration "contributes to the overcrowding and generally deplorable state" of local jails, "has a destructive effect on human character," and imposes significant "cost[s]" on society in the form of maintenance expenses and lost wages. (*Id.* at pp. 520-521.) In addition, deprivation of the right to a speedy trial "may work to the accused's advantage," as "[d]elay is not an uncommon defense tactic." (*Id.* at p. 521.)

The timeliness requirement is also narrowly tailored to achieve the State's interest. As stated, the trial court must consider the individual circumstances of the case, such as the remaining time before the scheduled trial date, whether counsel is ready to proceed, the impact of any delay

upon witnesses, the complexity of the case, and whether the *Faretta* motion could have been made at an earlier time. (*People v. Lynch*, *supra*, 50 Cal.4th at p. 726.) The timeliness requirement is "based not on a fixed and arbitrary point in time, but upon consideration of the totality of the circumstances that exist in the case at the time the . . . motion is made." (*Id.* at p. 724.) This standard is narrowly tailored to effectuate only the interest in "prevent[ing] the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice." (*Ibid*, internal citation and quotation marks omitted.)

Appellant nevertheless argues that only "factors identified by the high court that lead to disruption of a trial—obstruction of justice and, possibly delay" may justify a compelling government interest in imposing limitations on right of self-representation. (AOB 41-42.) Appellant's interpretation of law in the context of criminal procedure is incorrect. Under appellant's theory, all criminal laws would be presumptively unconstitutional unless they were based on factors specifically identified by the United States Supreme Court.[14] On the contrary, as stated, the applicable legal standard is whether the complained-of limitation or interference with a fundamental right is supported by a sufficiently important state interest that is narrowly tailored to effectuate only that interest. (*Zablocki v. Redhail*, *supra*, 434 U.S. at p. 388.) And as demonstrated above, the "reasonable time" requirement is sufficiently narrowly tailored to effectuate the State's interest in prompt trials and preventing abuse of *Faretta* motions. As such, appellant's constitutional challenge must be rejected.

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[14] Even assuming that this theory applies, appellant has not shown how the State's interest here runs contrary to the above factors.

D. The Trial Court Acted Within Its Discretion in Denying Appellant's *Faretta* Motion As Untimely

The trial court properly concluded that appellant's *Faretta* motion was untimely, and in turn, properly exercised its discretion to deny the motion based on the factors set forth above (see part I.B., *ante*). First, the court considered the timing of the motion in conjunction with appellant's request for a continuance. (See *People v. Lynch*, *supra*, 50 Cal.4th at p. 726 [the timing of the motion in relation to the trial date must be considered].) This Court has repeatedly held that "*Faretta* motions made on the eve of trial are untimely." (*Id.* at p. 722; see *id.* at p. 719 [denying *Faretta* motion made three weeks before trial]; see *People v. Burton* (1989) 48 Cal.3d 843, 852-853 [*Faretta* request made after the case had been called for trial and transferred to trial department, both counsel had answered ready, and defendant asserted he needed unspecified period for preparation, was clearly directed to the trial court's discretion].) When a *Faretta* motion is conditioned on the grant of a continuance, the court may consider the request for a continuance as a factor in determining whether the motion was made within a reasonable period before the commencement of trial. (*People v. Frierson* (1991) 53 Cal.3d 730, 742 [*Faretta* motion two days before trial with request for 60-day continuance untimely]; *People v. Moore* (1988) 47 Cal.3d 63, 78-79 [*Faretta* motion made on the Friday before the following Monday that the trial was scheduled to begin was untimely because the defendant also requested a continuance to prepare for trial]; *People v. Ruiz* (1983) 142 Cal.App.3d 780, 784-791 [*Faretta* motion made six days before scheduled trial date was untimely because the motion was conditioned on a continuance].) It is only after a *Faretta* motion has been granted that the trial court is obligated to ensure a defendant representing himself has sufficient time to prepare for trial. (*People v. Bigelow* (1984) 37 Cal.3d 731, 741, fn. 3; *People v. Maddox* (1967) 67 Cal.2d 647, 653.)

Here, appellant made his *Faretta* motion just two days prior to jury selection and four days prior to the last possible date that trial could commence. (See footnote 5, *ante*.) Appellant also conditioned the motion on the grant of a continuance. (1RT 230.) When asked how much time he would need to prepare for trial, appellant offered the vague statement, "I don't know. A month, [or] 2." (1RT 229.) The reasonable import of this statement is that appellant required an undetermined amount of time to prepare for trial. Thus, the trial court's denial of the motion based on the delay that would be required in granting the *Faretta* motion and the uncertainty caused by such delay was proper. (See *People v. Lynch*, *supra*, 50 Cal.4th at p. 728.)

Second, the record demonstrates that appellant's counsel and the prosecutor were ready to proceed to trial, and appellant gave no plausible explanation as to why he had waited until two days prior to jury selection to seek self-representation. (See *People v. Lynch*, *supra*, 50 Cal.4th at p. 726 [court must consider whether counsel is ready to proceed to trial].) Appellant nevertheless contends that neither party had announced that they were ready to proceed to trial, and this "is particularly significant because . . . the court had not asked counsel about their concerns regarding late discovery and trial readiness." (AOB 53.) Appellant further argues that there had been no discussion regarding the timing of the trial or witness issues. (AOB 28.) Appellant is incorrect. The parties made three appearances prior to the date of the *Faretta* hearing during which they addressed discovery, witness issues, and trial readiness. On March 26, 2002, the parties reviewed all outstanding discovery items, agreed that the majority of discovery had been provided as of that date, and that any remaining discovery items would be addressed on April 11, 2002. (1RT 98-105.) On April 11, 2002, the parties advised the court that all remaining issues of discovery had been resolved, and the case was continued to April

15, 2002. (1RT 105, 207.) On April 15, 2002, the parties discussed the juror questionnaires and the question of whether appellant would be shackled at trial. At the conclusion of the April 15th appearance, the parties indicated that there were no outstanding issues to address. (1RT 212-214.) The proceedings were then continued to Monday, April 29, 2002, the date of appellant's *Faretta* hearing. (1RT 212-214, 216-217.) At the April 29th appearance, the court advised the parties that it was "a clean-up day [to] make sure we are ready to go [to trial], that there are no problems." (1RT 217.) The court then asked the parties if there were any remaining issues to discuss, at which point appellant's counsel advised the court that appellant wished to represent himself. (1RT 218.) During the *Faretta* hearing, the court advised appellant numerous times that his case would go forward two days later, on Wednesday, May 1, 2002. At no point during the proceedings did appellant's counsel or the prosecutor advise the court that either party was not ready to proceed to trial. (See 1RT 224-229.) Given this sequence of events, it was reasonable for the court to conclude that the parties were ready to proceed to trial.

Third, any delay would have adversely impacted the victims and witnesses in the case. (See *People v. Lynch*, *supra*, 50 Cal.4th at p. 726 [court must consider the number of witnesses and the reluctance or availability of crucial witnesses].) One of the prosecution's crucial witnesses, Julius Martin, had suffered ongoing medical complications and hospitalizations as the result of being shot twice in the head. (6RT 1121-1122.) The victims and the prosecution have a right to a speedy trial. (Cal. Const., art. I, § 29; § 1050, subd. (a); see *Morris v. Slappy* (1983) 461 U.S. 1, 14 [103 S.Ct. 1610, 75 L.Ed.2d 610] ["in the administration of criminal justice, courts may not ignore the concerns of victims"].) Although Martin's testimony from the preliminary hearing was ultimately read into the record due to his hospitalization, this circumstance was unknown at the

time of appellant's *Faretta* motion, and prosecution had a right to present Martin's live testimony as the preferred form of evidence. (See *People v. Reed* (1996) 13 Cal.4th 217, 225 ["The fundamental purpose of the unavailability requirement is to ensure that prior testimony is substituted for live testimony, the generally preferred form of evidence, only when necessary"].) Furthermore, the court ordered witnesses to be transferred from various state prisons for the purpose of testifying at trial. Therefore, a delay would have caused an inconvenience to the prison and judicial systems, and it would have impacted the state's monetary cost of transporting and housing these witnesses.

Fourth, appellant's case was complex, and he failed to demonstrate that he was even minimally capable of handling his own defense. (See *People v. Lynch*, *supra*, 50 Cal.4th at p. 726 [court must consider the complexity of the case].) Appellant was charged with one count of murder and four counts of attempted murder arising out of two separate incidents. Concomitant with these counts were charges of robbery, allegations that appellant personally inflicted great bodily injury on the victims with use of a firearm and a knife, and special circumstance allegations of street gang murder, burglary murder, and robbery murder. The prosecution's witnesses included a gang expert and the coroner who had performed the autopsy on Phillip Curtis's body. (5RT 908-912; 6RT 1011-1024.) And as the trial court noted, appellant appeared to have difficulties with comprehension and focus. He did not fully complete the *Faretta* advisement form, and it appeared that appellant did not "thoroughly understand what [he was] getting himself into." (1RT 230.) The record also demonstrates that appellant suffered from attention deficit disorder (11RT 2041, 2049-2050, 2199), had an extensive history of drug abuse (10RT 2015; 11RT 2042-2043), and spent the majority of his adult life in state prison (8CT 2203; 11 RT 2145-2147). Given appellant's background and the complex nature of

the case, preparation for trial would have been inherently difficult. (See *People v. Lynch, supra*, 50 Cal.4th at pp. 721-722 [defendant's lack of competency may be considered in denying *Faretta* motion].)

Finally, contrary to appellant's contention, he failed to show that he made the *Faretta* motion as soon as practicable. (See *People v. Lynch, supra*, 50 Cal.4th at p. 726 [court must consider whether the defendant had earlier opportunities to assert his right of self-representation].) Appellant contends that he made the motion after "learning that [counsel] had not developed the third party culpability defense and he intended to present the defense primarily through cross examination." (AOB 48.) The record does not support this assertion. Appellant never advised the court as to *when* he learned of counsel's alleged deficiencies. To the extent appellant complained to the trial court that his girlfriend was unable to relay important information to his counsel regarding a possible third party culpability defense, appellant failed to advise the court as to when his girlfriend obtained such information or why she did not turn the information over to counsel during the nearly one-year period that the case was pending. In addition, appellant failed to explain why he himself did not obtain the information from his girlfriend and turn it over to his counsel.

With regard to appellant's complaint that he was dissatisfied with his counsel's cross-examination skills and there was no defense strategy, these complaints could have been raised at an earlier date. As the trial court noted, appellant had been represented by the same counsel since his first arraignment, and he had observed his counsel's ability to cross-examine witnesses at the time of the preliminary hearing. Furthermore, appellant's counsel stated that he reviewed the case "numerous times" with appellant and appellant said nothing to refute this statement. (1RT 222.) On the contrary, when the trial court asked why he did not make the *Faretta*

request at an earlier date, appellant responded that he "didn't notice it until the last time." (1RT 229-231.) This response was insufficient to demonstrate timeliness.[15] Accordingly, the trial court properly found appellant's *Faretta* motion to be untimely based on the totality of the circumstances.

E. There Was No Abuse of Discretion or Prejudice

The trial court also acted well within its discretion in denying appellant's untimely *Faretta* motion. The court reasonably found that defense counsel was acting competently on appellant's behalf; and appellant failed to show otherwise at the *Marsden* hearing. (See *People v. Windham, supra*, 19 Cal.3d at pp. 128-129 [consideration of quality of defense counsel's representation is proper]; see Arg. II, *infra*].) In addition, as discussed above, the court properly considered the reasons for the request, the length and stage of the proceedings, and the disruption and delay that would follow if appellant's *Faretta* motion was granted. (See Arg. I.D., *ante*.)

Furthermore, because appellant's request was conditioned on a continuance, the record further suggests that appellant's purpose was to delay the proceedings. (See *Fritz v. Spalding* (9th Cir. 1982) 682 F.2d 782, 784-85 [if a defendant accompanies his motion to proceed with a request for a continuance "[this] would be strong evidence of a purpose to delay."];

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[15] Appellant asserts that the reasonableness of appellant's concerns is supported by the trial court's observation that his counsel's cross-examination of witnesses at the April 11, 2002, *Phillips* hearing was "anemic." (AOB 51, fn. 18, citing 11RT 2137.) Appellant misconstrues the record. The trial court observed that it had limited defense counsel's cross-examination based on the purpose of the hearing (see 1RT 117) and "the cross-examination by counsel of this witness, as well as other witnesses . . . was anemic. And it was this way I think because of the court's comment [at the *Phillips* hearing]." (11RT 2136-2137.)

see *People v. Burton* (1989) 48 Cal.3d 843, 854 [defendant's pretrial delays and motion for continuance is evidence of purpose to delay].) Thus, given the circumstances, the trial court did not abuse its discretion in denying appellant's untimely request for self-representation. (See, e.g., *People v. Lynch, supra*, 50 Cal.4th at p. 728; *People v. Valdez* (2004) 32 Cal.4th 73, 103.)

In the alternative, appellant cannot show it is reasonably probable he would have obtained a more favorable verdict had he represented himself at trial, especially in light of the strong evidence of guilt and appellant's lack of competence to represent himself. (See, e.g., *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1058 [The erroneous denial of untimely *Faretta* motion was harmless under *Watson* test]; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050-1053 [error in denying untimely *Faretta* motion was harmless under *Watson* test; "It is candidly recognized that a defendant who represents himself virtually never improves his situation or achieves a better result than would trained counsel"].) Thus, any error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

F. Appellant's Request for Self-Representation Was Equivocal in Any Event

Finally, appellant's request for self-representation was equivocal in any event. In ascertaining whether a self-representation request is unequivocal, the Court reviews the entire record de novo. Therefore, even if a trial court denies a *Faretta* request for an improper reason, if the record as a whole establishes the request would have been properly denied on other grounds, the judgment will be affirmed. (*People v. Dent* (2003) 30 Cal.4th 213, 218; see *People v. Danks* (2004) 32 Cal.4th 269, 295-296 [citing de novo standard of review where trial court failed to rule or make factual findings regarding alleged *Faretta* request, and holding that *Faretta* request was not unequivocal].)

The requirement that a *Faretta* motion be unequivocal "is necessary in order to protect the courts against clever defendants who attempt to build reversible error into the record by making an equivocal request for self-representation." (*People v. Marshall, supra*, 15 Cal.4th at p. 22.) Unlike the right to representation by counsel, the right of self-representation is waived unless defendants articulately and unmistakably demand to proceed pro se. (*Id.* at pp. 20-21; see *id.* at p. 23 ["the court should draw every reasonable inference against waiver of the right to counsel"]; see *Brewer v. Williams* (1977) 430 U.S. 387, 391, 404 [97 S.Ct. 1232, 51 L.Ed.2d 424] ["courts indulge in every reasonable presumption against waiver" of the post-arraignment right to counsel].)

A reviewing court must examine the defendant's words and conduct to decide whether that defendant truly desired to give up counsel and represent himself or herself. (*People v. Marshall, supra*, 15 Cal.4th at pp. 25-26.) A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied. (*Id.* at p. 23; see *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1002 [Equivocation of the right of self-representation may occur where the defendant['s] . . . actions are the product of whim or frustration."]; *Jackson v. Ylst* (9th Cir. 1990) 921 F.2d 882, 888 [a "trial court properly may deny a request for self-representation that is 'a momentary caprice or the result of thinking out loud'"].) In addition, a motion for self-representation made immediately following an unsuccessful *Marsden* motion may be seen as equivocal. (See *People v. Danks, supra*, 32 Cal.4th at pp. 295-296 [self-representation request was equivocal, born out of frustration regarding defendant's dissatisfaction with trial counsel and desire to avoid psychiatric examination]; *People v. Barnett* (1998) 17 Cal.4th 1044, 1087 [self-representation request deemed an equivocal, emotional reaction to the trial

court's denial of a motion for substitute counsel]; *People v. Scott* (2001) 91 Cal.App.4th 1197, 1205-1206; *Jackson*, *supra*, 921 F.2d at p. 888 [motion for self-representation was not unequivocal where record shows that motion was an emotional and/or impulsive response to trial court's denial of request for substitute counsel].)

In the present case, the record indicates that appellant's *Faretta* request was motivated not by his true desire for self-representation. Rather, it was based on his frustration with trial counsel immediately following his unsuccessful *Marsden* hearing because his counsel had deemed his girlfriend to be an "intermeddler" in the case. (See 1RT 221-222.) Although appellant raised complaints regarding counsel's cross-examination skills and the lack of a defense strategy, he made no mention of these issues until after the disagreement with defense counsel regarding his girlfriend's involvement in the case. Thus, the record implies that the crux of the complaint was appellant's lack of control over the circumstances involving his girlfriend. Furthermore, appellant did not state what he planned to do differently from counsel with regard to his defense strategy, and he offered no argument in response to his counsel's explanation of the defense strategy. Although appellant now asserts that he intended to raise a third-party culpability defense (see AOB 60), he failed to make such a specific assertion at the time of the *Faretta* motion. Rather, he merely stated that his girlfriend possessed addresses or information regarding an individual that "was supposed to" have done "*one* of these crimes." (1RT 221, emphasis added.) Appellant did not specify which crime he was referring to, nor did he give any other specific details. In addition, the court advised appellant that he could "just have [his girlfriend] come into court, and she can give the addresses to the prosecution—to the defense attorney." (1RT 222.) However, the record is devoid of any showing that appellant's girlfriend ever attempted to provide such

information. Appellant also quickly abandoned his *Faretta* motion when his request for a continuance was denied. (1RT 230.) Thus, in light of the foregoing circumstances, appellant's *Faretta* request was not an unequivocal request for self-representation.

II. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR SUBSTITUTION OF COUNSEL

According to appellant, the trial court abused its discretion in denying his motion to substitute counsel because the record established ineffective assistance. In the alternative, appellant argues that the court abused its discretion in failing to conduct an adequate and meaningful evaluation of the specifics of the conflict between appellant and his counsel. Specifically, appellant contends that the trial court failed to determine what steps defense counsel had taken to obtain relevant information regarding a third party defense or why counsel had not investigated the defense. Appellant further claims that his counsel never refuted his claim that counsel failed to investigate a third party culpability defense. (AOB 68-84.) These contentions are thoroughly refuted by the record.

A. Applicable Law

In *Marsden*, this Court held that a defendant seeking a substitution of counsel must be permitted by the trial court to specify the reasons for his or her request. (*People v. Marsden, supra*, 2 Cal.3d at p. 124.) A *Marsden* hearing is not a full-blown adversarial proceeding, but an informal hearing in which the court ascertains the nature of the defendant's allegations about counsel's representation and decides whether the allegations have sufficient substance to warrant counsel's substitution. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 803.) Once the defendant is afforded this opportunity, the decision to allow a substitution of the appointed attorney is within the discretion of the trial court. In turn, such decision should not be disturbed unless the defendant has made a substantial showing that failure to order

substitution was likely to result in constitutionally inadequate representation or that the defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. (*Ibid*; *People v. Roldan* (2005) 35 Cal.4th 646, 681, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Hines* (1997) 15 Cal.4th 997, 1025.) A trial court need not find an "irreconcilable conflict" where the defendant had not made a sustained good faith effort to work out the disagreements with counsel and had not given counsel a fair opportunity to demonstrate trustworthiness. (*People v. Crandell* (1988) 46 Cal.3d 833, 860.)

B. The Trial Court Conducted an Adequate Inquiry and Acted Within Its Discretion in Denying the Motion

The record shows the trial court provided appellant with a forum to set forth his complaints about counsel and listened to his reasons for those complaints. First, appellant complained that his counsel had failed to communicate with his girlfriend, who had the address of a third party who had committed one of the offenses. Second appellant complained that no defense was being put forward. (1RT 219-222.)

In response to appellant's complaints, appellant's counsel advised the court that he had spoken with appellant's girlfriend on numerous occasions and instructed her to contact his defense investigator if she possessed relevant information regarding appellant's defense, but she had failed to provide any helpful information. (1RT 220-221.) With regard to appellant's complaint that no defense was being put forward, counsel advised the court that he discussed the defense strategy with appellant several times and that the defense would be presented through the direct testimony of Willie Alexander and the cross-examination of other witnesses. (1RT 222.)

After hearing appellant's complaints and counsel's position and explanations, the court offered appellant the option of having his girlfriend appear in court where she could provide defense counsel with any relevant information, but no helpful information was ever given to counsel by either appellant or his girlfriend. (1RT 222.) The court additionally observed that appellant's counsel had argued several motions on appellant's behalf and successfully "kept out some of the penalty phase evidence." (1RT 229-231.)

Once the court had inquired of and listened to appellant, "nothing more was required of the court as far as recognizing appellant's dissatisfaction." (*People v. Penrod* (1980) 112 Cal.App.3d 738, 745; see, e.g., *People v. Smith* (2006) 135 Cal.App.4th 914, 926.) Nevertheless, as stated, the court thoroughly questioned counsel and ascertained that counsel had adequately communicated with appellant, had no conflict with appellant, and was ready to represent appellant at trial. The court also determined counsel was providing effective assistance and had made reasonable tactical choices as to his trial defense. As such, the record utterly defeats appellant's claim that the court did not adequately and meaningfully evaluate the specifics of his complaints against trial counsel. (See, e.g., *People v. Gutierrez*, *supra*, 45 Cal.4th at p. 804; *People v. Abilez* (2007) 41 Cal.4th 472, 488-489.) Needless to say, the court was entitled to believe counsel and to disbelieve appellant with respect to any disputed issue. (*People v. Taylor* (2010) 48 Cal.4th 574, 600 ["After then considering counsel's responses to each of defendant's grievances, the trial court was entitled to credit counsel's explanations and to conclude that defendant's complaints were unfounded"]; *Abilez*, *supra*, at p. 488 [to the extent there was a credibility question between defendant and counsel at the hearing, court was entitled to accept counsel's explanation].)

Appellant's complaint regarding which defense and witnesses should have been presented at trial amounted to a disagreement over trial tactics. It did not show that there was a real breakdown in the attorney-client relationship, nor did it show that counsel was not adequately prepared to represent appellant at trial. (See, e.g., *People v. Jackson* (2009) 45 Cal.4th 662, 686-688 ["Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict'"]; *People v. Carter* (2005) 36 Cal.4th 1114, 1199-1200 [defendant not entitled to new counsel based on disagreement over trial tactics]; *People v. Dickey* (2005) 35 Cal.4th 884, 946 ["We do not find *Marsden* error where complaints of counsel's inadequacy involve tactical disagreements"]; *People v. Cole* (2004) 33 Cal.4th 1158, 1192 ["'defendant does not have the right to present a defense of his own choosing'"].) Alleged disagreements over trial tactics or inability to get along with counsel are insufficient to compel appointment of substitute counsel. Otherwise, appellant would effectively have a veto power over any appointment. (See, e.g., *People v. Abilez*, *supra*, 41 Cal.4th at p. 489; *People v. Cole*, *supra*, at p. 1192; *People v. Memro* (1995) 11 Cal.4th 786, 857.) Similarly, the disagreements over the amount of time spent together or the way they related to each other is insufficient to establish incompetence. (See, e.g., *People v. Gutierrez*, *supra*, 45 Cal.4th at p. 804; *Cole*, *supra*, at p. 1192; *Smith*, *supra*, 135 Cal.App.4th at p. 926.) Thus, as the trial court reasonably concluded, appellant provided no valid reason to substitute counsel.

Accordingly, the trial court conducted an adequate *Marsden* hearing and acted well within its discretion in denying that motion. (See, e.g., *People v. Gutierrez*, *supra*, 45 Cal.4th at pp. 803-804; *People v. Cole*, *supra*, 33 Cal.4th at pp. 1190-1193; *People v. Hart* (1999) 20 Cal.4th 546,

603-604; *People v. Avalos* (1984) 37 Cal.3d 216, 231; *People v. Smith, supra*, 135 Cal.App.4th at p. 926.)

In the alternative, even if the trial court could have conducted a more extensive *Marsden* hearing as alleged by appellant, he is not entitled to any relief. *Marsden* does not establish a rule of per se reversible error. (*People v. Chavez* (1980) 26 Cal.3d 334, 348 349; *People v. Henning* (2009) 178 Cal.App.4th 388, 404-405; *People v. Washington* (1994) 27 Cal.App.4th 940, 944.) Here, appellant has not established that the *Marsden* hearing would have or should have produced a different result if it had been adequately heard. As shown above, the trial court already listened carefully to appellant's complaints about counsel, ascertained counsel was ready for trial, and found no valid reason to grant any relief. To the extent appellant honestly complained about counsel's representation, his complaints as to counsel's failure to rely on the defense proposed by appellant essentially involved tactical disagreements, which do not by themselves constitute an "irreconcilable conflict" and do not warrant the appointment of new counsel. Thus, there is no reason to believe more comprehensive hearings would have resulted in a different ruling. (See, e.g., *People v. Jackson, supra*, 45 Cal.4th at pp. 686-688; *People v. Carter, supra*, 36 Cal.4th at pp. 1199-1200; *People v. Dickey, supra*, 35 Cal.4th at p. 946.) Moreover, there is no showing that, but for the alleged error, appellant would have obtained more favorable verdicts. (See, e.g., *Henning, supra*, at p. 405; *Washington, supra*, at p. 944; *People v. Williamson* (1985) 172 Cal.App.3d 737, 746.) As such, appellant is not entitled to any relief on the basis of the alleged *Marsden* error.

III. APPELLANT FORFEITED HIS CLAIMS OF VINDICTIVE PROSECUTION AND PROSECUTORIAL MISCONDUCT; IN ANY EVENT, THERE WAS NO VINDICTIVENESS OR PREJUDICIAL MISCONDUCT

Appellant appears to contend that the prosecutor engaged in vindictive prosecution during the guilt phase. (AOB 87-89.) He also claims that prosecutor committed prejudicial misconduct. (AOB 85-112.) Appellant is not entitled to relief because he forfeited these claims, and the record demonstrates that there was no vindictiveness or prejudicial misconduct in any event.

A. To the Extent Appellant Is Raising a Vindictive Prosecution Claim, He Is Not Entitled to Relief

Appellant asserts that the prosecutor charged him with capital murder in retaliation for appellant obtaining federal habeas corpus relief and having a prior murder conviction overturned in an unrelated case. (AOB 87-89.) If appellant is actually claiming that the prosecutor engaged in vindictive prosecution, appellant forfeited this claim. And contrary to appellant's assertion, the filing of new charges after a reversal of separate charges does not, without more, give rise to a presumption of vindictiveness. Furthermore, appellant has not met his burden of demonstrating a reasonable likelihood of vindictiveness.

1. Factual background

On July 26, 2001, the District Attorney's office death penalty committee determined that the death penalty would be sought in the instant case. (1CT 226.) On February 27, 2002, appellant's counsel filed a "Motion to Discover Prosecution Standards for Charging Special Circumstances." (2CT 392; 1RT 74.) At the hearing on the motion, appellant's counsel argued that discovery was necessary based on "invidious discrimination" grounds because the District Attorney's death

penalty committee had decided to seek the death penalty based solely on appellant's race. (2CT 393; 1RT 74.) In response, the prosecutor stated that appellant was incarcerated for a prior murder conviction, and he was released in 1998 after a federal court reversed the murder conviction on federal habeas corpus review. (1RT 76-77.) The prosecutor explained that, in the present case, the death penalty committee based its decision on appellant's behavior during the short period of time following his release from prison, explaining as follows:

> What the court knows about this case, I think the court might well understand how our committee in an unbiased view of the facts surrounding Mr. Wright's life could have come to the conclusion that this was a death penalty case. [¶] First of all, I will point out every victim involved in this case, except the victim at the 7-eleven, is Black. This isn't a situation where there were any White victims. Every victim is Black.
>
> But as I indicated to the court the last time we were here, in 1993, Mr. Wright was sentenced to life in state prison without the possibility of parole, as the result of a murder that he was convicted of. [¶] There were two defendants on that murder. The evidence was basically the same as to both defendants. That conviction was affirmed by the California Court of Appeal. The California Supreme Court refused to hear the defendant's appeal and habeas corpus petitions were denied in state court.
>
> Each of the defendants then filed a habeas corpus petition in U.S. District Court. One went to one judge, one went to another judge. [¶] The issues were basically the same. Mr. Wright's co-defendant on that case is still serving life in prison without the possibility of parole. [¶] Mr. Wright's habeas corpus petition went to a very outspoken judge who is very outspoken against the death penalty, even though that was not a death penalty case, and very outspoken about the way California state courts deal with prosecuting murder cases. [¶] That judge not only granted Mr. Wright's habeas corpus petition, but found him factually innocent so that he couldn't be retried. [¶] Mr. Wright was released from prison.

> It's my understanding Mr. Wright, since 1988, has been on the street for less than two years . . . and within a very short period of time, he was involved in an extremely serious high speed pursuit in San Bernardino. He was involved in the incidents in Long Beach here where one man was shot in the head at least twice, another man was stabbed in the back, both were left to die. He was involved in the robbery in Pomona where three people were shot, all of them multiple times. One man died. Mr. Ralph, who was here earlier this morning, still may have to undergo some additional surgeries. He has major injuries which have impacted on the quality of his life. While we did not charge them, Mr. Wright was a suspect in more than 60 armed robberies during the period of time he was out. He was involved in shooting his ex-wife in the head three or four times. By the grace of God, she survived. Then he was involved in a shootout with the Ontario police, where he had a woman and several small children held as hostage. During the hostage negotiations on tape, they were recorded, he told the hostage people ["]Come in and get me, we will shoot it out, we will kill each other right now.["]
>
> So I think that Mr. Wright's conduct over the course of his years, some of the incidents, as the court well knows we intend to introduce at [the] penalty phase, are stabbing, an assault he was involved in, in prison, a number of incidents of assaultive conduct in prison. He was caught bringing a gun into the Pasadena courthouse with some other gang members I believe in 1992. He's been to prison for robbery. Mr. Wright has got an extremely serious background. So to say that this is, it's an unusual case because the People are seeking death where Mr. Wright is charged with one murder, I think when you look at the totality of the circumstances, and Mr. Coleman was given written notice of our committee's hearing, and given the opportunity to present anything he wanted to present before that committee. It's my understanding that he did not present anything.

(1RT 76-79.)

At that point, appellant's counsel expressed concerns that there was "some resentment in the District Attorney's office" over the federal court's decision to reverse appellant's prior murder conviction. (1RT 80.) The

prosecutor responded that there was "no resentment in the D.A.'s office," stating:

> The only reason I bring that decision up is so that the court can understand some of the circumstances and some of the things that Mr. Wright has been involved in. [¶] . . . [¶] I think . . . [it] is appropriate for the court to be aware of so when counsel says simply this is just a one victim murder case, . . . there is substantially more to that. Mr. Wright has been involved in a career of crime that goes back to the mid 1980s. And that crime, it goes on and on and on.

(1RT 80-82.) The Court then denied the discovery motion, concluding that appellant's counsel had failed to make a prima facie showing of invidious discrimination on the basis of appellant's race. (1RT 83-84.)

On March 7, 2002, appellant's counsel filed a Motion to Strike Special Circumstances" in which he challenged section 190.3 as unconstitutional. The motion did not make any vindictive prosecution allegations. (See 2CT 412-416.)

2. Appellant forfeited his claim

A claim of vindictive prosecution may not be raised for the first time on appeal. (*People v. Ledesma* (2006) 39 Cal.4th 641, 730; *People v. Lucas* (1995) 12 Cal.4th 415, 477; *People v. Edwards* (1991) 54 Cal.3d 787, 827.) The failure to challenge the charging decision on the ground of vindictive prosecution in the trial court deprives the People of the opportunity to provide a record of the reasons for the charging decision, assuming a presumption of impropriety has arisen. (*People v. Maury* (2003) 30 Cal.4th 342, 438-439; *Edwards, supra,* at pp. 826-827.)

At no time did appellant move to dismiss the charges on the ground of vindictive prosecution. Although appellant's counsel expressed a concern that the District Attorney's office had retaliated against appellant based on the federal court's reversal of appellant's prior murder conviction, this

concern was raised during the discovery hearing only. (1RT 80.) As such, appellant forfeited this claim.

3. In any event, the claim fails on the merits

Even assuming that the claim was properly preserved for appellate review, it fails on the merits. As a general matter, "[a]bsent proof of invidious or vindictive prosecution" . . . "a defendant who has been duly convicted of a capital crime under a constitutional death penalty statute may not be heard to complain on appeal of the prosecutor's exercise of discretion in charging him with special circumstances and seeking the death penalty." (*People v. Lucas*, *supra*, 12 Cal.4th at p. 477.) However, the due process clauses of the federal and state Constitutions (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §§ 7, 15) forbid the prosecution from taking certain actions against a criminal defendant, such as increasing the charges in retaliation for the defendant's exercise of a constitutional right. (*People v. Jurado* (2006) 38 Cal.4th 72, 98.)

Absent a presumption of vindictiveness, a defendant must "prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something the law plainly allowed him to do." (*People v. Jurado*, *supra*, 38 Cal.4th at p. 98.) "In the pretrial setting, there is no presumption of vindictiveness when the prosecution increases the charges or . . . the potential penalty." (*Ibid.*, citing *United States. v. Goodwin* (1982) 457 U.S. 368, 381-382 [102 S.Ct. 2485, 73 L.Ed.2d 74] and *People v. Michaels* (2002) 28 Cal.4th 486, 515.) In the post-trial setting, a presumption of vindictiveness arises only where the prosecutor has increased the criminal charge or punishment under circumstances which "are deemed to present a reasonable likelihood of vindictiveness." (*In re Bower* (1985) 38 Cal.3d 865, 877; see *United States v. Goodwin*, *supra*, 457 U.S. at p. 272 [emphasizing that, in cases alleging post-trial

vindictiveness, the Court presumes an improper vindictive motive only in cases in which "a reasonable likelihood of vindictiveness exists"].)

The filing of new charges after an acquittal on *separate* charges does not, without more, give rise to a presumption of vindictiveness. (*People v. Valli* (2010) 187 Cal.App.4th 786, 804 [no presumption arose in the filing of new charges of evading arrest after acquittal in the defendant's murder trial, even though the prosecution was aware of the evading offenses at the time of the murder trial, and even though defendant admitted to the evading in the murder trial]; *United States v. Johnson* (2d Cir. 1999) 171 F.3d 139, 141 [the presumption does not arise even when the prosecution chooses to charge a defendant on individual acts that arose out of the same nucleus of facts which resulted in an earlier acquittal]; *United States v. Khan* (2d Cir. 1986) 787 F.2d 28, 32-33 [declining to presume vindictiveness in prosecution of additional charges following mistrial, in part because it is "unrealistic to assume that the government's probable response to a defendant's choice to exercise his fundamental right to a trial would be to seek to penalize and deter"]; see also *United States v. Wall* (10th Cir. 1994) 37 F.3d 1443, 1449; *United States v. Rodgers* (8th Cir. 1994) 18 F.3d 1425, 1430-31; *United States v. Esposito* (3d Cir. 1992) 968 F.2d 300, 306 [the government indicted a defendant on substantive drug offenses after the defendant had been acquitted in an earlier trial where the same drug transactions had been listed as predicate acts].)

> When a State brings another indictment supported by evidence against a defendant after an acquittal, the acquittal is a legitimate prosecutorial consideration because the State is not levying punishment for a right exercised but rather for the crimes he committed.

(*United States v. Esposito* (3d Cir. 1992) 968 F.2d 300, 304.)

> The presence of a punitive motivation, therefore, does not provide an adequate basis for distinguishing governmental action that is fully justified as a legitimate response to perceived

> criminal conduct from governmental action that is an impermissible response to noncriminal, protected activity.

(*United States v. Goodwin*, *supra*, 457 U.S. at pp. 372-373.) Generally, it is the prosecutor's "attempt to retry the appellant, seeking a heavier penalty for *the same acts* as originally charged [that] is inherently suspect . . . ." *United States v. Preciado-Gomez* (9th Cir. 1976) 529 F.2d 935, 939, emphasis added; see *People v. Valli*, *supra*, 187 Cal.App.4th at p. 804.) "If . . . the second charge is unrelated to the first, the presumption does not arise." (*United States v. Martinez* (9th Cir. 1986) 785 F.2d 663, 669; see also *United States v. Kasprowicz* (9th Cir. 2011) 447 Fed. Appx. 821, 822.)

In the present case, appellant asserts that the prosecutor's motive for retaliation was the reversal of his prior murder offense in a separate case. As stated, this is insufficient to create a presumption of vindictiveness. (See *People v. Valli*, *supra*, 187 Cal.App.4th at p. 804.) Thus, appellant has the burden of proving "objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something the law plainly allowed him to do." (*People v. Jurado*, *supra*, 38 Cal.4th at p. 98.) As the Ninth Circuit has explained, "the appearance of vindictiveness results only where, as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or a punitive animus towards the defendant because he has exercised his specific legal rights." (*United States v. Gallegos-Curiel* (9th Cir. 1982) 681 F.2d 1164, 1169.)

Appellant has failed to meet this burden. First, he has not shown any correlation between his decision to exercise a constitutionally protected right and the District Attorney's decision to seek the death penalty in the instant case. Appellant relies on the subjective statements of the trial prosecutor, in which the prosecutor expressed disagreement with the federal court's decision to reverse appellant's prior conviction. However, at most,

these statements reflected the prosecutor's disappointment with the federal court's decision rather than any motive to retaliate against appellant for exercising a constitutional right. Furthermore, the trial prosecutor did not have decision-making authority to seek the death penalty. As the prosecutor explained, the decision was made by the District Attorney's death penalty committee, and it was based on the nature of the charged offenses and appellant's involvement in numerous additional acts of violence and criminal activity during a short period of time following his release from the prison after federal habeas corpus relief was granted. (1RT 76-79, 80-82.) As such, the decision was based on objective circumstances that occurred subsequent to the federal court's reversal of appellant's prior murder conviction. (See *In re Bower*, *supra*, 38 Cal.3d at p. 87 [finding that there was no vindictiveness where there was an objective change in circumstances or in the state of the evidence subsequent to the defendant's exercise of a constitutional right that legitimately influenced the charging process].)

This conclusion is further supported by the timing of the decision. The initial complaint was filed on April 24, 2000. (1CT 2-9.) More than a year later, on July 26, 2001, the death penalty committee reached its decision to seek the death penalty. (1CT 226.) This suggests that the committee did not make a hasty decision for the purpose of retaliation. Rather, the committee was doing exactly what it should—declining to seek the death penalty until it had gathered and reviewed all of the relevant information necessary to make the determination.

Second, there is no likelihood that the death penalty committee would have decided against the death penalty if appellant had chosen not to seek relief in his prior federal case. The charges in the instant case amply supported the decision to seek the death penalty, and the committee would have undoubtedly used appellant's prior murder conviction as an additional

factor weighing against appellant if that conviction had not been reversed. As such, there is no "reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility . . . towards the defendant because he has exercised his specific legal rights." (*United States v. Gallegos-Curiel*, *supra*, 681 F.2d at p. 1169.) Therefore, appellant is not entitled to relief for his vindictive prosecution claim.

B. Appellant Forfeited His Prosecutorial Misconduct Claims, and There Was No Misconduct or Prejudice in Any Event

Appellant additionally alleges two instances of prosecutorial misconduct. First, he contends that the prosecutor impermissibly asked Toni Wright if she saw appellant pointing a gun at someone, in violation of the trial court's order. (AOB 89-92.) Second, appellant contends that the prosecutor impermissibly implied that appellant had been previously incarcerated during the questioning of Detective Bly. (AOB 92-96.) Appellant forfeited these claims by failing to request a curative instruction, and there was no misconduct or prejudice in any event.

1. Factual background

a. Testimony of Toni Wright

The prosecutor made an in limine motion to introduce appellant's prior act of violence against Toni Wright, in which he shot her in the head two days after the shooting incident in Long Beach. (5RT 965-966.) As an offer of proof, the prosecutor argued that the evidence was relevant to appellant's intent and identity as the shooter in the Long Beach incident because both incidents involved the victim being shot in the head with a small dark-colored revolver. (5RT 966.) The trial court ruled that the shooting incident was inadmissible under Evidence Code section 352 because it was unduly prejudicial, but ruled that the prosecutor could elicit testimony from Ms. Wright that she saw appellant "hold a black handgun."

(5RT 971.) The prosecutor subsequently elicited the following testimony from Ms. Wright:

[Prosecutor]: On March 22nd of the year 2000 did you see William Wright with a small, dark-colored handgun?

[Ms. Wright]: Yes.

[Prosecutor]: Did you see him point that gun at somebody?

[Ms. Wright]: Yes.

[Prosecutor]: Do you see Mr. Wright in the courtroom today?

[Ms. Wright]: Yes.

[Prosecutor]: Could you point him out for the ladies and gentlemen of the jury.

[Ms. Wright]: He's right there.

The Court: Indicating William Wright, the defendant in this case.

[Prosecutor]: When you saw him point the handgun at somebody, was that in the City of Ontario?

[Ms. Wright]: Yes.

[Prosecutor]: hat was not—

[Defense Counsel]: Your honor, may we approach? I have an objection.

The Court: Okay.

(The following proceedings were held at sidebar:)

[Defense Counsel]: Your honor, again, this is a motion for a mistrial. Mr. Monaghan previously—when he said he was going to put this witness on, he was going to ask her if she had seen Mr. Wright in the possession of a

> handgun. He has changed the question around and asked her if she has seen him point the gun at somebody. I think that is prejudicial to my client and against what he agreed he was going to ask this witness.

(6RT 1097-1099.) The court denied the motion for a mistrial, holding as follows that any error was harmless:

> I did indicate yesterday that the only purpose for bringing her in would be to indicate that he had possession of the gun and that she saw the gun. [¶] But I think at this point there is—any prejudice to the guilt of the defendant is harmless. [¶] I am going to ask Mr. Monaghan not to go any further though, to ask any questions about how the gun was used or anything like that. I think that the fact that it was pointed at this point just indicates to the jurors how she was able to see it. Beyond that, I don't want to go anywhere.

(6RT 1099-1100.)

b. Testimony of Detective Bly

Detective Bly testified on behalf of the prosecution as an expert witness on the Duroc Crips gang. (6RT 1006-1017.) On cross-examination, appellant's counsel questioned the detective as to whether he ever had any personal contact with appellant, during the following colloquy:

> [Defense Counsel]: Now you indicated that you had reviewed some records in regards to the Duroc Crips.
>
> [Detective Bly]: Yes, sir.
>
> [Defense Counsel]: Now have you ever interviewed my client, Mr. Wright?
>
> [Detective Bly]: No sir. I don't believe so.
>
> [Defense Counsel]: So you have no personal, you have had no personal contact with him as a Duroc gang member, have you?

[Detective Bly]: I don't believe so.

[Defense Counsel]: Now you indicated that you have met a number of Duroc gang members; is that correct?

[Detective Bly]: Yes, sir.

[Defense Counsel]: Approximately how many?

[Detective Bly]: Over a hundred, say a hundred to 200.

(6RT 1017-1018.) On redirect, the prosecutor elicited the following testimony:

[Prosecutor]: Sir, if there is a particular member that is not in the community for a long, long time, you might not come in contact with him, is that correct?

[Detective Bly]: Correct.

[Prosecutor]: If he is living somewhere else or if he is incarcerated perhaps or something like that, you wouldn't know; is that correct?

(6RT 1020.)

Defense counsel objected on the ground that the prosecutor was "trying to give the insinuation that my client was in custody." (6RT 1020.) The prosecutor responded that Detective Bly was never asked on direct examination if he had personal contact with appellant. The prosecutor argued that defense counsel had opened the door by asking the question during cross-examination, and the prosecutor therefore had the right to inquire whether the detective would normally come into contact with an individual who was not in the community—either living someplace else or in custody. (6RT 1020-1021.) The prosecutor added, "I didn't simply say in custody." (6RT 1021.) The court overruled the objection, holding that the prosecutor's question was within the scope of defense counsel's cross-

examination, and the prosecutor was not "honing in" on the issue of custody. (6RT 1021.)

2. Appellant forfeited his claims by failing to request curative admonitions

Appellant forfeited his claims of prosecutorial misconduct by failing to request curative admonitions at the time of his objections. The general rule is that a defendant cannot complain on appeal of the prosecutor's misconduct at trial unless he timely objects on grounds of prosecutorial misconduct, and requests that the jury be admonished to disregard the impropriety. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) An exception lies where a timely objection and/or request for admonition would be futile, or if an admonition would not have cured the harm caused by the misconduct. (*Id.* at pp. 820-821.)

In order to make a timely objection for prosecutorial misconduct, more than an ordinary objection must be made to preserve the issue for appeal. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215.) In order to preserve alleged misconduct for review, the defendant must "assign misconduct and request appropriate admonitions." (*Ibid.*) To determine whether an admonishment would have been effective, the statements of the prosecutor must be considered in context. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1030.) If there was an objection, or if an objection would not have cured the harm, the reviewing court must look to see whether the improper conduct was prejudicial, i.e., whether it is reasonably probable that a jury would have reached a more favorable result absent the misconduct. (*People v. Haskett* (1982) 30 Cal.3d 841, 866.) Only misconduct that prejudices a defendant requires reversal, and a timely admonition from the court generally cures any harm. (*People v. Gallego* (1990) 52 Cal.3d 115, 200; *People v. Fields* (1983) 35 Cal.3d 329, 363).)

Here, appellant's counsel made objections in each circumstance based on the prosecutor's alleged misconduct, but he did not request curative admonitions. Appellant also makes no argument that a request for an admonition would have been futile, but such an argument must be rejected because any alleged harm arising out of the complained-of testimony would have been readily curable by an appropriate and timely admonition. (See *People v. Delgado* (1993) 5 Cal.4th 312, 331 [the jury is presumed to follow the court's instruction to ignore testimony that is ordered stricken by the court].) The evidence in question was not so inflammatory that the jury could not have followed curative admonitions. (See Arg. III.C., *infra*.) Accordingly, appellant forfeited his prosecutorial misconduct claims.

3. There was no misconduct or prejudice in any event

Assuming arguendo that appellant did not forfeit his claims, there was no misconduct.

a. Applicable law

It is well settled that a prosecutor's conduct violates the federal Constitution only "when it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales* (2001) 25 Cal.4th 34, 44; see *People v. Earp* (1999) 20 Cal.4th 826, 858; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 [94 S.Ct. 1868, 40 L.Ed.2d 431].) "[C]onduct 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."'" (*Earp*, *supra*, at p. 858, citations omitted.) As stated, a defendant's conviction will not be reversed for prosecutorial misconduct absent a showing of prejudice, i.e., it is reasonably probable that a jury would have reached a more favorable result

absent the misconduct. (*People v. Haskett*, *supra*, 30 Cal.3d at p. 866; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

b. Toni Wright's testimony did not render appellant's trial fundamentally unfair

With regard to Toni Wright's testimony, appellant contends that the testimony was prejudicial because it implied that "appellant was the type of person who used guns against people." (AOB 92.) While the testimony may have reflected badly on appellant, it did not rise to the level of a due process violation.

> Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.' [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.

(*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384.)

Here, the testimony that appellant pointed a gun at someone did not necessarily violate the trial court's ruling (barring evidence that appellant shot Ms. Wright), and it was highly relevant to the question of whether appellant possessed a gun that fit the description of the one used in the Long Beach and Pomona shootings. Although Ms. Wright's testimony might have implied that appellant used a gun to threaten someone, it did not suggest that any actual violence occurred against her or anyone else. More importantly, however, the evidence was not particularly inflammatory in light of the overwhelming evidence that appellant used a gun and a knife to commit the charged offenses. The jury heard evidence that appellant stabbed Douglas Priest in the back with a knife (5RT 862-863; 6RT 1128-1131, 1148), shot Julius Martin twice in the back of the head as he lie defenseless on the floor (5RT 864; 6RT 1130-1131), shot Willie Alexander

and Phillip Curtis each in the chest, fatally wounding Curtis (4RT 763-766; 5RT 841, 843), and shot Mario Ralph twice in the back (4RT 751-752, 767; 5RT 797, 843). Thus, the impact of Toni Wright's testimony was minimal in light of the other evidence of appellant's use of weapons.

Furthermore, this was not a purely circumstantial case in which it was reasonably likely the jury convicted appellant on the basis of his prior bad acts rather than a careful review of the evidence relating to each charge. The jury heard eyewitness testimony from Priest, Martin, and Ralph describing the crimes and identifying appellant as the assailant. (4RT 751-752, 758-767; 5RT 797, 810, 841-843, 863-864, 867, 883-888, 890-891; 6RT 1128-1131.) The jury further heard testimony that Priest and Martin initially recognized appellant from television footage as the assailant, after which they identified appellant during lineups and in court. (5RT 821, 865, 871, 874, 880; 6RT 1133-1134, 1149, 1158.) Ralph also identified appellant after seeing his photograph in a newspaper, after which Ralph identified appellant at a lineup and in court. (4RT 752, 768-770, 772, 776.)

In addition, the jury heard testimony that the bullets recovered from the body of Curtis and each of the crime scenes were fired from the gun found in appellant's possession at the time of his arrest. (5RT 918-919, 947-949, 951-953.) And while the jury convicted appellant of the charged crimes, it was unable to reach a verdict on the gang-related special circumstance allegation and enhancements. (8CT 2019, 2023, 2195.) This indicates the jury carefully reviewed the evidence against appellant. (See *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1312 ["that defendant was acquitted of any of the offenses suggests the lack of prejudice and the jury's clear ability to consider each count on the evidence presented and nothing else"].) Thus, even if the challenged evidence tended to show bad character, it is not reasonably likely the jury convicted appellant on the

basis of his character as opposed to careful analysis of the evidence relating to each count.

In sum, there was no prosecutorial misconduct as to Toni Wright's testimony. Furthermore, appellant was not prejudiced because it is not reasonably probable that a jury would have reached a more favorable result absent the alleged misconduct for the reasons previously stated. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

c. Detective Bly's testimony did not render appellant's trial fundamentally unfair

Appellant's challenge to the prosecutor's questioning of Detective Bly is also without merit. First of all, appellant's trial counsel made the strategic decision to ask Detective Bly whether he had ever come into contact with appellant as a member of the Duroc Crips gang. When the detective stated that he had not, appellant's counsel elicited further testimony that the detective had interviewed approximately 200 members of the Duroc Crips gang. (6RT 1017-1018.) This line of questioning suggested that, if appellant was a member of the Duroc Crips gang, the detective would have come into contact with him during his frequent contacts with gang members during the time period in question. Therefore, it was permissible for the prosecutor to rebut this inference on redirect examination by offering another plausible explanation for the detective's lack of personal contact with appellant. The defense opened the door to appellant's whereabouts and status as a gang member during the time period in question. (*People v. Dykes* (2009) 46 Cal.4th 731, 766 [defense counsel opened the door to the prosecutor's comment on the same point].) As such, the prosecutor was entitled to explore that assertion.

Second, the prosecutor's question was brief and did not focus on appellant's prior incarceration specifically or suggest that either the prosecutor or the detective had personal knowledge of any prior

incarceration. Rather, the question was posed as a hypothetical and was ambiguous in nature. The prosecutor asked about gang members who were "not in the community" and provided examples, such as gang members who were "living elsewhere" or "incarcerated perhaps" or "something like that." (6RT 1020.) The prosecutor did not suggest that one example was more likely than the others, and this was not a circumstance in which there were "no permissible inferences" that the jury could draw from the evidence. (*Jammal v. Van de Kamp*, *supra*, 926 F.2d at p. 920.) The jury could reasonably infer that one reason the detective had not come into contact with appellant was because appellant had been away from the community for some unknown reason.

To the extent that that the jury could have inferred that appellant had been incarcerated, there was no reversible error. Although the evidence of a defendant's prior criminality is inadmissible when offered to show that the defendant had the criminal disposition to commit the crime charged, "this rule does not prohibit admission of evidence of [prior] misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393, fn. omitted; see Evid. Code, § 1101, subds. (a), (b).) Nothing in the Evidence Code "prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . . .) (Evid. Code, § 1101, subd. (b).) Here, to the extent that the prosecutor's question suggested that appellant was previously incarcerated, it was relevant to prove the absence of a mistake by Detective Bly with regard to appellant's status as a gang member, as it explained why the gang expert had not seen appellant among other gang members.

Even assuming that an error or misconduct occurred, it was harmless. The erroneous introduction of evidence of a defendant's criminality has been found to have been harmless in numerous cases, such as: *People v. Ledesma* (2006) 39 Cal.4th 641, 681-683 (finding that a reference to the defendant being on death row after earlier conviction in same case was harmless); *People v. Avila* (2006) 38 Cal.4th 491, 572-574 (improper reference to defendant's recent imprisonment was harmless); *People v. Valdez*, *supra*, 32 Cal.4th at pp. 124-125 (police officer's inadvertent disclosure that he had interviewed defendant in prison was harmless); *People v. Bolden* (2002) 29 Cal.4th 515, 554-555 (police officer's testimony that he went to parole office to get defendant's address was harmless); and *People v. Harris* (1994) 22 Cal.App.4th 1575, 1580-1581 (witness's testimony that the defendants' parole officers called her was harmless error).

Generally, "[i]mproper evidence of prior offenses results in reversal only where the appellate court's review of the trial record reveals a closely balanced state of the evidence. [Citations.]" (*People v. Stinson* (1963) 214 Cal.App.2d 476, 482.) "The same error, viewed in the light of a record which points convincingly to guilt, is consistently regarded as nonprejudicial." (*Ibid.*) In the present case, as discussed above (see part III.B.3.b., *ante*), the record does not reveal a closely balance state of the evidence. The record suggests that the jury largely disregarded Detective Bly's testimony because the jury was unable to reach verdicts on the gang-related enhancements and special circumstance allegation. Furthermore, the record overwhelmingly supported the jury's findings of guilt on the charged offenses. In sum, it cannot be said that the present case was such a close case that the prosecutor's questions rendered appellant's trial fundamentally unfair. For the same reasons, appellant was not prejudiced as it is not reasonably probable that the jury would have reached a result

more favorable to appellant in the absence of the complained-of questions. (*People v. Haskett*, *supra*, 30 Cal.3d at p. 866.)

IV. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN REJECTING APPELLANT'S PROSECUTORIAL VOUCHING CLAIM

Appellant next contends that the trial court abused its discretion in denying his motion for a mistrial because the prosecutor impermissibly vouched for the credibility of Mario Ralph by asking Ralph if, on one occasion, the prosecutor had introduced Ralph to the prosecutor's daughter. Appellant contends that the question vouched for Ralph's credibility by suggesting to the jury that Ralph was trustworthy. (AOB 99-112.) This contention is unavailing.

A. Factual and Procedural Background

The following colloquy occurred during the prosecutor's direct examination of Mario Ralph:

[Prosecutor]: Did you initially admit to the police or tell the police that you had flushed some narcotics down the toilet?

[Ralph]: Not initially.

[Prosecutor]: At some point in time, did you admit that?

[Ralph]: Yes, I did.

[Prosecutor]: And at the time that you admitted that, was I present?

[¶] . . . [¶]

[Ralph]: I don't remember that.

[Prosecutor]: You and I have talked about this case on several occasions; is that correct?

[Ralph]: Yes.

[Prosecutor]: Have I ever allowed you to read the reports or any of the interviews you have had with the police?

[Ralph]: No.

[Prosecutor]: Have I ever allowed you to read the reports of any part of this investigation?

[Ralph]: No.

[Prosecutor]: Have I ever allowed you to read your preliminary hearing, your testimony at the preliminary hearing?

[Ralph]: No.

[Prosecutor]: But you and I have talked about the case?

[Ralph]: Yes, we have.

(4RT 780-781.)

On cross-examination, the defense questioned Ralph as follows regarding his previous conversations with the prosecutor, including one incident in which the prosecutor removed Ralph from the courtroom:

[Defense]: Mr. Ralph, yesterday when the District Attorney was asking you questions, the District Attorney asked you if you had read any reports or preliminary hearing transcripts in this case, correct?

[Ralph]: Yes, Sir.

[Defense]: And you indicated you had not, is that correct?

[Ralph]: Yes, Sir.

[Defense]: The District Attorney also asked you if you had talked with him on a number of times, correct?

[Ralph]: Yes, Sir.

[Defense]: And you indicated that you had, correct?

[Ralph]: Many times we have talked.

[Defense]: Approximately how many times?

[Ralph]: Every time I went to court.

[Defense]: And when he talked to you, did he talk to you about your testimony?

[Ralph]: No.

[Defense]: Did he talk to you about basketball?

[Ralph]: No.

[Defense]: What did you talk about?

[Ralph]: Mainly how I was doing. And sometimes I asked him certain things on, you know, what's going on and I guess like sometimes I told him that I don't want to be here involved with this. I wished at the last testimony I told y'all, the last courtroom, y'all could have taken that and let me live my life. I don't want to be doing this.

[Defense]: I don't mean to interrupt you. [¶] You remember testifying in a preliminary hearing?

[Ralph]: Yes, sir.

[Defense]: You w[ere] on a witness stand and you remember being, testifying, the District Attorney stopped the testimony, carried you out and talked to you and brought you back and put you back on the stand; did that happen?

[Ralph]: Yes, sir.

[Defense]: Now I think you testified yesterday that that at one point you went back in the house and you flushed some drugs down the toilet, correct?

[Ralph]: Yes, sir.

[Defense]: Why did you do that?

[Ralph]: Because I felt the police [were] going to come, and I already knew it was already three people shot up. I didn't need them to catch all that dope then. I would be doing some time. So I flushed the dope.

(4RT 805-807.)

On redirect examination, the prosecutor elicited testimony from Ralph as follows, clarifying the nature of his conversations with Ralph, and explaining what had occurred when Ralph was carried out of the courtroom during the preliminary hearing:

[Prosecutor:] Now each time the case has been set . . . you have come to court and the judge would tell you what day you would have to return; is that correct?

[Ralph]: Yes.

[Prosecutor:] And I would be there on those occasions, is that correct?

[Ralph]: Yes.

[Prosecutor:] And we would have general conversations?

[Ralph]: Yes.

[Prosecutor:] I asked you about your health?

[Ralph]: Yes.

[Prosecutor:] How work is going, things like that?

[Ralph]: Yes.

[Prosecutor:] On one occasion did I introduce you to my daughter?

[Ralph]: Yes, you did.

[¶] . . . [¶]

[Prosecutor:] You testified at the preliminary hearing; is that correct?

[Ralph]: Yes.

[Prosecutor:] And I'm going to show you a copy of the transcript and that was dated on April 19 of the year 2001; is that correct?

[¶] . . . [¶]

[Prosecutor:] Now, initially when you were on the stand that day, you did not want to testify, did you?

[Ralph]: No.

[Prosecutor:] And you indicated that; is that correct?

[Ralph]: Yes.

[Prosecutor:] And I know counsel asked you this morning in front of the jury if at some point I carried you out of the courtroom. Within the first couple minutes of your testimony, did the court take a brief recess and did you and I go out in the hallway and talk?

[Ralph]: Yes.

[Prosecutor:] And did I indicate to you that this was your opportunity to lay out what had happened to you?

[Ralph]: Yes.

[Prosecutor:] And that it was up to you, you either answer the questions or you didn't answer the questions, you were the one that was shot, not me?

[Ralph]: Yes.

[Prosecutor:] And did we speak outside in the hallway for a few moments?

[Ralph]: Yes.

[Prosecutor:] And did we then go back inside the courtroom?

[Ralph]: Yes.

[Prosecutor:] And did you then answer the questions that were put forward to you as best you could?

[Ralph]: Yes.

(4RT 824-830.)

Following the prosecutor's question regarding his daughter, the defense moved for a mistrial on the ground of prosecutorial misconduct, claiming that the prosecutor's statement regarding his daughter impermissibly bolstered Ralph's credibility. (4RT 826.) The court denied the motion, holding as follows:

> [T]he questions on cross-examination went to the conversations between the prosecutor and the witness. He is entitled to go into what the conversations were, whether they were innocent or whether they directed the witness to testify in a certain way. [¶] . . . [¶] You asked the witness what the subject was. This is part of the subject. I don't think—I think he is entitled to go into each of the items that were discussed so that . . . he can cover all the areas that were discussed.

(4RT 826.) Appellant's counsel made a further objection, again arguing that the prosecutor was attempting to bolster Ralph's credibility. (4RT 826-827.) The court responded that the prosecutor's statement was proper in the context of rehabilitating the witness:

> I think you are right in and of itself, that would be improper, but it's an overlap area, and I think he is entitled to, on his effort to rehabilitate the witness, to go into every area that they discussed. Otherwise the area, it's open for, you know, any type of inference by the jury. So the objection is overruled.

(4RT 827.)

B. Appellant Forfeited His Claim by Failing to Request a Curative Admonition

As stated, a defendant cannot complain on appeal of the prosecutor's misconduct at trial unless he timely objects, and requests that the jury be admonished to disregard the impropriety. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820; see *People v. Price* (1991) 1 Cal.4th 324, 460 [finding prosecutorial vouching claim forfeited, noting "any prejudice could have been averted by an admonition."].) Here, although appellant objected and requested a mistrial, he failed to request a curative instruction. He now contends that such a request would not have cured the harm. He further contends that such a request would have been futile because the trial court found that no misconduct occurred, and the court would have given a curative instruction sua sponte if the court deemed one to be necessary. (AOB 108-109.) In support of this proposition, he relies on *People v. Haskett*, *supra*, 30 Cal.3d at p. 854, stating the trial court "had a duty to decide whether the prejudice could be cured by 'admonition or instruction.' It was therefore incumbent on the court to provide any necessary admonition." (AOB 110.)

There is no support for appellant's position. First, the court could have timely admonished the jurors to disregard the complained-of evidence. (See *People v. Delgado*, *supra*, 5 Cal.4th at p. 331 [the jury is presumed to follow the court's instruction to ignore testimony that is ordered stricken by the court].) Second, even though the trial court denied the mistrial motion, there is no indication from the record that the court would not have entertained a request for a curative instruction had one been requested. On the contrary, the trial court noted that –when considered in isolation—the prosecutor's statement would have been improper. (4RT 827.)

Finally, appellant's reliance on *People v. Haskett*, *supra*, 30 Cal.3d at p. 854, is misplaced. *Haskett* provides that a mistrial motion should be granted in certain circumstances—when "the court is apprised of prejudice that it judges incurable by admonition or instruction." (*Ibid.*) However, *Haskett* does not mandate that a trial court take any particular action, such as giving a curative instruction, when a mistrial motion is denied. It is well established that "a trial court has no sua sponte duty to control prosecutorial misconduct . . . ." (*People v. Carrera* (1989) 49 Cal.3d 291, 321; *People v. Montiel* (1993) 5 Cal.4th 877, 914.) As such, appellant had an obligation to request a curative instruction, and the trial court's denial of his mistrial motion and objection did not relieve appellant of this obligation. (*People v. Bonin* (1988) 46 Cal.3d 659, 689 ["Simply to object or make an assignment of misconduct without seeking a curative admonition is ... not enough"]; see *People v. Collins* (2010) 49 Cal.4th 175, 198 [defendant forfeited claim that trial court erred in denying mistrial motion because defendant failed to make assignment of prosecutorial misconduct and failed to request that jury be admonished]; *People v. Bennett* (2009) 45 Cal.4th 577, 611 [defendant's failure to submit proposed instruction after denial of mistrial motion forfeited claim on appeal].) Accordingly, appellant forfeited his claim of prosecutorial vouching.

C. The Trial Court Acted Within Its Discretion in Finding That No Improper Vouching Occurred

Even if appellant's claim is not forfeited, it must be rejected on the merits. A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. (*People v. Frye* (1998) 18 Cal.4th 894, 971; *People v. Sully* (1991) 53 Cal.3d 1195, 1235.) Nor is a prosecutor permitted to place the prestige of the government behind a witness by offering the impression that he or she has taken steps to assure a

witness's truthfulness at trial. (*People v. Frye*, *supra*, at p. 971.) However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief," the prosecutor's comments cannot be characterized as improper vouching. (*Ibid.*; *People v. Medina* (1995) 11 Cal.4th 694, 757.)

"Prosecutorial misconduct may constitute an appropriate basis for a mistrial motion." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1154.) However, a trial court should grant a motion for mistrial only when a party's chances of receiving a fair trial have been irreparably damaged. (*People v. Bolden* (2002) 29 Cal.4th 515, 555; *People v. Ayala* (2000) 23 Cal.4th 225, 282.) That is, if it is "apprised of prejudice that it judges incurable by admonition or instruction." (*People v. Haskett*, *supra*, 30 Cal.3d at p. 854.) "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*Ibid.*) Accordingly, a trial court's ruling on a motion for mistrial is reviewed for an abuse of discretion. (*People v. Valdez*, *supra*, 32 Cal.4th at p. 128.)

Here, when viewed in context, the complained-of reference to the prosecutor's daughter did not place the prestige of the government behind Ralph through the prosecutor's personal assurances of veracity, nor did it suggest that information not presented to the jury supported Ralph's testimony. The prosecutor's isolated statements must be viewed in the context of the overall subject matter as a whole. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) When viewed in context, the defense clearly opened the door by eliciting testimony regarding the subject matter of the discussions that took place between Ralph and the prosecutor over the course of the preliminary hearing and trial. Thus, it was proper for the

prosecutor to address the same subject matter on redirect examination. (See *People v. Friend* (2009) 47 Cal.4th 1, 35 [rejecting claim of misconduct where defense opened the door to the complained-of subject]; *People v. Dykes*, *supra*, 46 Cal.4th at p. 766 [same].)

In addition, the prosecutor's question regarding his daughter did not suggest that the prosecutor had any purported personal knowledge or belief based on facts not presented to the jury. Rather, the prosecutor sought to introduce testimony that he did not direct Ralph to testify in a particular way. The prosecutor elicited testimony from Ralph that they engaged in polite informal conversation and discussed topics such as Ralph's health. The jury could have reasonably inferred that the prosecutor's introduction of his daughter to Ralph was merely a gesture of manners during the course of such innocuous or trivial discussions. Thus, this was not a circumstance in which there were "no permissible inferences" that the jury could draw from the statement. (*Jammal v. Van de Kamp*, *supra*, 926 F.2d at p. 920.) Courts "'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 970.) When viewed in context, the statement does not suggest that the prosecutor introduced Ralph to his daughter because he believed Ralph to be honest or trustworthy, but, instead, tended to support a finding that the off-the-record discussions between the prosecution and Ralph involved informal or trivial matters. Thus, the trial court did not abuse its discretion in finding that the comment could not be characterized as improper vouching.

Even assuming that there were no permissible inferences that the jury could draw from the prosecutor's question, appellant was not prejudiced by the question. The jury heard evidence that Ralph was a drug dealer who associated with gang members (4RT 750, 754-755, 771-772; 6RT 1052-1054), that he attempted to destroy evidence by flushing drugs down the

toilet and trying to hide Curtis's gun (4RT 777-778, 780-781), and that Ralph failed to tell investigating officers about the drugs or the fact that he fired Curtis's gun at appellant before attempting to get rid of it. (6RT 1189-1191.) Nevertheless, Ralph's testimony was corroborated by the evidence recovered from the scene as well as the gun found in appellant's possession as discussed above. (See Arg. III.B.3.b., *ante*.) In light of this evidence, it is not likely that the jury gave special weight to the prosecutor's question regarding his daughter as evidence of Ralph's trustworthiness, nor is it reasonably probable that a jury would have reached a more favorable result absent the alleged misconduct. (*People v. Haskett*, *supra*, 30 Cal.3d at p. 866; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

V. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE PROSECUTION'S EXPERT TESTIMONY REGARDING THE ABSENCE OF FINGERPRINT EVIDENCE

Appellant next contends that the trial court abused its discretion by permitting an expert witness to testify that fingerprints are rarely recovered from firearms and shell casings. Appellant claims that this testimony was not relevant, and even it was, it was unfairly prejudicial. (AOB 113-120.) Respondent disagrees. The average layperson might well expect a gun or shell casings that have been handled to bear fingerprints. Therefore, the testimony was relevant to explain how appellant could have possessed or loaded a firearm without leaving fingerprints. With regard to appellant's claim of prejudice, he forfeited this claim by failing to make a specific objection on the same grounds below, and no prejudice occurred in any event.

A. Factual and Procedural Background

Near the close of the prosecution's case-in-chief, the prosecutor proposed to call Peter Kergil of the Los Angeles County Sheriff's Department as an expert witness to testify that fingerprints are rarely recovered from firearms and shell casings. Appellant's counsel objected to this testimony, arguing that there had been no mention of fingerprints during the trial, and such testimony was therefore irrelevant. (7RT 1258-1259.) As an offer of proof, the prosecutor explained that the testimony was relevant to counteract any favorable inference that could be made by the absence of fingerprints on the firearm found in appellant's possession or on the shell casings and other items recovered from the crime scenes. The prosecutor further explained that the expert's testimony would assist the jury in understanding that, despite what they might see on popular television crime shows, certain objects may not be conducive to fingerprints. (7RT 1258-1259.) The prosecutor maintained that, while there had been no mention of fingerprints in the case, the subject had been implied by a previous discussion of gunshot residue evidence, explaining, "We did get into GSR the other day, and they will say, 'if Mr. Wright was in that apartment, they would have put evidence [that] his fingerprints were on the gun.'"[16] (7RT 1259.)

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[16] Appellant's counsel had previously asked Sergeant Hitt if he swabbed Phillip Curtis's hands for a gunshot residue test. Sergeant Hitt responded that he directed hospital personnel to bag Curtis's hands for the possibility of a test, but he did not know whether a test had ever been performed. (6RT 1116-1117.)

The trial court overruled appellant's objection, finding:

> The People are required to prove it beyond a reasonable doubt. And if they want to shut down any doors of concern by the jurors, I think that is fine. [¶] Also, it seems to me, that if anybody is going to argue fingerprints, that this gives them a basis in fact to do that.

(7RT 1259.)

Kergil then provided expert testimony, stating that, in his 33 years of experience as a forensic identification specialist in processing crime scene investigations, it was difficult to obtain fingerprints—offering numerous reasons why. (7RT 1256-1257, 1260-1261.) He explained that, in general, fingerprints were recoverable only about 30 percent of the time, and fingerprints were recoverable from firearms only about 8 to 10 percent of the time. (7RT 1260-1263.) With regard to spent shell casings, Kergil opined that fingerprints were recoverable only a "very minimal" percent of the time. (7RT 1265-1266.) The prosecution clarified that Kergil was not assigned to appellant's case and, as such, he was not familiar with the specifics of the case. (7RT 1257.)

B. Applicable Law

Evidence Code section 350 provides that only relevant evidence is admissible. Evidence Code section 210 defines relevant evidence as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." "[A] trial court has broad discretion in determining the relevance of evidence." (*People v. Smithey* (1999) 20 Cal.4th 936, 973.) If a trial court determines that evidence is relevant, it must then determine if the probative value of the evidence is "'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404; Evid. Code § 352.)

This Court has explained:

> The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. "[All] evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.' The 'prejudice' referred to in Evidence Code section 352 applies to evidence *which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues*. In applying [Evidence Code] section 352, 'prejudicial' is not synonymous with "damaging."

(*People v. Karis* (1988) 46 Cal.3d 612, 638, quoting *People v. Yu* (1983) 143 Cal.App.3d 358, 377, italics added.)

A trial court's rulings under Evidence Code sections 210 and 352 are reviewed for an abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637.) A trial court's exercise of discretion will not be disturbed except upon a showing that it "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

C. The Trial Court Acted Within Its Discretion in Concluding That the "Negative Fingerprint" Testimony Was Relevant

The trial court did not abuse its discretion in admitting the "negative fingerprint" testimony. (7RT 1258-1259.) Appellant contends that evidence is irrelevant if it is not targeted to a specific misconception suggested by the evidence. (AOB 117.) However, it is well settled that the absence of evidence is relevant to the issue of guilt. "[I]t is the absence of evidence upon such matters that may provide the reasonable doubt that moves a jury to acquit." (*United States v. Poindexter* (6th Cir. 1991) 942 F.2d 354, 360; see also *United States v. Latimer* (10th Cir. 1975) 511 F.2d 498, 502-503 [defense counsel may comment on government's failure to

introduce surveillance tapes of bank robbery for which appellant was charged]; *United States v. Hoffman* (D.C. Cir. 1992) 964 F.2d 21, 26 ["It is permissible for a defense attorney to point out to the jury that no fingerprint evidence has been introduced and to argue that the absence of such evidence weakens the Government's case"]; *United States v. Obiukwu* (6th Cir. 1994) 17 F.3d 816, 821 [accepting without comment that defense counsel could argue to the jury that no fingerprint evidence had been introduced]; see also *People v. Ochoa* (2011) 191 Cal.App.4th 664, 667-668 [defendant found not guilty of probation violation due to absence of fingerprints and DNA on gun].)

Courts regularly admit expert testimony regarding the difficulty of recovering fingerprints from handguns and ammunition in order to rebut the inference that the absence of fingerprints suggests that the item was not touched or handled. See, e.g., *United States v. Coffee* (6th Cir. 2006) 434 F.3d 887, 897 [permitting expert testimony that "fingerprints are rarely identified on firearms, the absence of fingerprints does not mean that an item has not been touched, and mechanics' cracked and gouged hands (defendant was a mechanic) are less likely than those of members of other professions to leave fingerprints"]; *United States v. Carpenter* (1st Cir. 2005) 403 F.3d 9, 10, fn. 1 ["the government adduced expert testimony to the effect that it is exceedingly difficult to lift viable fingerprints from the surfaces of this particular weapon"]; *United States v. Castillo* (7th Cir. 2005) 406 F.3d 806, 810 [government expert testified that "guns and ammunition are not very receptive surfaces for leaving fingerprints"]; *United States v. Williams* (D.C. Cir. 2004) 358 F.3d 956, 960 [government introduced expert testimony that "it was difficult to recover a useful fingerprint from a gun and that the absence of any fingerprints on the gun recovered . . . was not unusual"]; *United States v. Burdeau* (9th Cir. 1999) 168 F.3d. 352, 357 ["identifiable fingerprints are almost never found on guns and only rarely

found on other objects submitted for testing"]; *Commonwealth v. Evans* (Mass. 2003) 786 N.E.2d 375, 391 [permitting state's fingerprint expert to testify that guns yield identifiable fingerprints in only about two percent of cases].

Courts have found such testimony to be proper even where the defense has not yet opened the door to the absence of fingerprint evidence. For example, in *United States v. Feldman* (9th Cir. 1986) 788 F.2d 544, the Ninth Circuit upheld the district court's admission of precisely the sort of testimony at issue here. There, an FBI agent provided testimony explaining why "fingerprints were recovered in less than five percent of the time" in the agent's experience with 200 bank robberies. (*Id.* at pp. 554-555.) The defense objected to the testimony as improper because it was used to "forestall [the defendant's] use of the absence of any such probative evidence here." (*Id.* at p. 554.) The court disagreed, finding that such testimony was proper, and noting that "drawing the 'sting' from the opposing party's anticipated arguments through the presentation of one's own case is a standard and proper litigation technique." (*Id.* at p. 555.)

In a similar case, the Ninth Circuit rejected the defendant's claim that expert testimony was irrelevant. (*United States v. Burdeau*, *supra*, 168 F.3d at pp. 356-357.) The court held that expert testimony that "identifiable fingerprints are almost never found on guns and only rarely found on other objects submitted for testing" is relevant and important to "aid[] the jury in understanding why [defendant's] fingerprints might not be found on items that the jury knew [defendant] had touched, which explanation could not otherwise have been readily apparent." (*Id.* at p. 357; see *United States v. Glover* (7th Cir. 2007) 479 F.3d 511, 518 [expert testimony regarding the absence of fingerprints "assisted the jury in understanding that, despite what they might see on popular television crime shows, certain objects are not particularly conducive to finding prints.

Without [the expert]'s testimony, the jury may not have understood how [the defendant] could have possessed the weapon without leaving prints."]; see also *United States v. Hornbeck* (9th Cir. 2004) 63 Fed. Appx. 340, 342 ["expert testimony concerning the absence of fingerprints . . . [i]s relevant and not unfairly prejudicial"];[17] *United States v. Christophe* (9th Cir. 1987) 833 F.2d 1296, 1300 [proper to admit testimony explaining why latent fingerprints were obtained "in only ten percent of the bank robbery cases" because FBI agent was qualified as a skilled witness and it was "not so easy [for the jury] to infer why no fingerprints were found at the bank]; see, e.g., *People v. Stanley* (2006) 39 Cal.4th 913, 953 [rejecting a claim of prosecutorial misconduct where "the prosecutor was merely expounding on the testimony of the fingerprint expert who testified that not everyone who handles an object will leave discernible fingerprints on the object].)

The foregoing authority establishes that Kergil's testimony regarding the absence of fingerprint evidence was relevant to assist the jury in determining a fact in issue, that is, that the absence of fingerprints on the shell casings and firearm found in appellant's possession did not necessarily raise an inference that appellant did not touch or possess these items. And contrary to appellant's suggestion, Kergil's testimony was not speculative. (AOB 118-119.) Rather, it was based on years of personal experience in investigating crimes, as well his knowledge of documented studies and statistics regarding fingerprint evidence. (7RT at 1263-1266.) As such, Kergil's opinion was relevant. It placed the evidence and factual

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[17] Although the Court may not rely on unpublished California cases, "the California Rules of Court do not prohibit citation to unpublished federal cases, which may properly be cited as persuasive, although not binding, authority." (*Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP* (2010) 183 Cal.App.4th 238, 251, fn. 6, citing Cal. Rules of Court, rule 8.1115.)

issues in context for the jury because the average juror is unlikely to know that fingerprints are not commonly recovered from firearms and shell casings.

D. Appellant's Claim of Prejudice Is Forfeited

Appellant forfeited his claim of prejudice by failing to raise it below. Evidence Code section 353 provides in relevant part:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and *so stated as to make clear the specific ground of the objection or motion* . . . .

(Italics added.) "In accordance with this statute, [this Court has] consistently held that the 'defendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable." (*People v. Partida* (2005) 37 Cal.4th 428, 433-434; *People v. Green* (1980) 27 Cal.3d 1, 22 [objection on ground that questions were leading does not preserve appellate argument that the evidence was impermissible evidence of other crimes].) The objection requirement is necessary in criminal cases because a "contrary rule would deprive the People of the opportunity to cure the defect at trial and would 'permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal.'" (*Partida*, *supra*, 37 Cal.4th at p. 434, quoting *People v. Rogers* (1978) 21 Cal.3d 542, 548.)

Evidence Code section 353 does not require any particular form of objection. Rather, "the objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility." (*People v. Partida*, *supra*, 37 Cal.4th at pp. 434-435; *People v. Williams* (1988) 44 Cal.3d 883, 906.) What is important is that

the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling. (*Partida*, *supra*, at p. 435.) If the trial court overrules the objection, "the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial." (*Ibid.*) "A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct." (*Ibid.*)

Appellant's claim of prejudicial error is based on Evidence Code section 352 and the due process clauses of the California and federal Constitutions. (AOB 118-119.) However, appellant objected solely on the ground of relevancy in the trial court. (7RT 1258.) He did not raise a due process claim or an Evidence Code section 352 claim, nor did he alert the trial court to the nature of his claim by asserting that the complained-of testimony was prejudicial. As such, appellant's claim of prejudice is forfeited. (*People v. Partida*, *supra*, 37 Cal.4th at pp. 435-436.)

E. Appellant's Claim of Prejudice Lacks Merit in Any Event

Even assuming that appellant's claim of prejudice is not forfeited, it lacks merit. Kergil's explanations as to why particular surfaces were not conducive to latent fingerprints was not to the type of "unique evidence" that would tend to evoke "an emotional bias" against appellant as a person within the meaning of Evidence Code section 352. (*People v. Karis*, *supra*, 46 Cal.3d at p. 638.) Furthermore, any prejudicial effect of the testimony was mitigated because the jury was made aware of the limits of the Kergil's testimony—specifically, that he was not assigned to appellant's case and was not familiar with the specifics of the case.

Appellant's due process claim also fails. In light of the eyewitness identifications, and the presence of a firearm in appellant's possession that was identified as the same weapon used in the shootings, there was overwhelming evidence that appellant used this firearm to commit the charged offenses. (See Arg. III.C.2., *ante*.) The mere absence of fingerprints, no matter what the reason, did not encourage the jury to speculate about any irrelevant matter. To the contrary, the expert's opinion was intended to stop any speculation about the absence of fingerprints. Accordingly, there was no reasonable probability that the alleged error affected the result. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

VI. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NO. 2.02 REGARDING CIRCUMSTANTIAL EVIDENCE

Appellant contends that the trial court should have instructed the jury with CALJIC No. 2.01, the general instruction regarding circumstantial evidence, rather than CALJIC No. 2.02, the more specific circumstantial evidence instruction regarding the use of circumstantial evidence to prove the defendant's mental state. Appellant argues that the trial court had a sua sponte duty to instruct the jury with CALJIC No. 2.01 because the prosecution substantially relied on circumstantial evidence to prove appellant's guilt. (AOB 121-133.)

Appellant is incorrect. The prosecution's case for guilt was based primarily on eyewitness identifications with circumstantial evidence being used to corroborate the eyewitness testimony. On the other hand, circumstantial evidence was used to establish the requisite intent required for the special circumstance allegations. Therefore, the facts supported the instruction on CALJIC No. 2.02, as opposed to CALJIC No 2.01, and as such, there was no instructional error.

A. Factual and Procedural Background

During a discussion regarding jury instructions, the court advised counsel that it could not instruct the jury with both CALJIC No. 2.01[18] and CALJIC No. 2.02 with regard to circumstantial evidence because recent case law suggested that only one of the two instructions should be given. (6RT 1222.) The court then suggested that CALJIC No. 2.01 was proper because it included the language of CALJIC No. 2.02, and the court "thought there was quite a bit of circumstantial evidence" in the case. (6RT 1221-1222.) Appellant's counsel agreed that the jury should be instructed

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[18] CALJIC No. 2.01 provides as follows:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.
>
> Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to his guilt.
>
> If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

with CALJIC No. 2.01. (6RT 1223.) However, the prosecutor disagreed, arguing that the case was "an eyewitness identification case" and not "substantially a circumstantial evidence case." (6RT 1223-1224.) The prosecutor explained that, if the prosecution relied on the circumstantial evidence alone without the eyewitness identification testimony, "the court probably wouldn't let it go to the jury." (6RT 1223-1224.) The prosecutor further argued that CALJIC No. 2.01 could pose a conflict with the instruction regarding eyewitness identification evidence set forth in CALJIC No. 2.91,[19] adding, "I don't believe that this case rests substantially on circumstantial evidence." (6RT 1223.)

The court agreed with the prosecutor, finding:

> I believe that, I prefer having 2.02 in there and 8.83.1.[20] I do believe that the circumstantial evidence is tangential or corroborative. The main thrust of all this is really whether they can believe the witnesses[']' eyewitness testimony. And I do agree with the argument. I hadn't thought of it before that it seems somewhat inconsistent with the eyewitness identification instruction.

(6RT 1232-1233.) The court later instructed the jury with CALJIC No. 2.02 as follows:

> The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, a finding of guilt as to any crime or special circumstance or special allegation may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant had the

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[19] CALJIC No. 2.91 instructed the jury that the prosecution had the burden of proving beyond a reasonable doubt the identification of appellant as the individual who committed the charged crimes. (7CT 1950; 7RT 1290-1291.)

[20] CALJIC No. 8.83.1 instructed the jury regarding the sufficiency of circumstantial evidence to prove the required mental state for the special circumstance allegations. (7CT 1956-1957; 7RT 1305-1306.)

required specific intent or mental state but (2) cannot be reconciled with any other rational conclusion.

Also, if the evidence as to any specific intent or mental state permits two reasonable interpretations, one of which points to the existence of specific intent or mental state and the other to its absence, you must adopt that interpretation which points to its absence. If on the other hand, one interpretation of the evidence as to the specific intent or mental state appears to you to be reasonable and the other unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(7CT 1945-1946; 7RT 1281-1282.)

B. The Trial Court Properly Instructed the Jury With CALJIC No. 2.02, as Opposed to CALJIC No. 2.01

The court properly instructed the jury with CALJIC No. 2.02. A trial court is required to instruct a jury with CALJIC No. 2.01 only where the prosecution substantially relies on circumstantial evidence to establish the elements of the case, but not when the circumstantial evidence is incidental to and corroborative of direct evidence. (*People v. Yrigoyen* (1955) 45 Cal.3d 46, 49; *People v. Malbrough* (1961) 55 Cal.2d 249, 250-251; *People v. Watson*, *supra*, 46 Cal.2d at p. 831.) "CALJIC No. 2.02 was designed to be used in place of CALJIC No. 2.01 when a defendant's specific intent or mental state is the only element of the offense that rests substantially or entirely on circumstantial evidence." (*People v. Honig* (1996) 48 Cal.App.4th 289, 341; accord, *People v. Hughes* (2002) 27 Cal.4th 287, 347.) Thus, where the prosecution primarily relies on direct evidence that the accused committed the acts constituting the crime and only relies on circumstantial evidence to establish specific intent, CALJIC No. 2.02 should be given instead of the more general CALJIC No. 2.01. (*People v. Anderson* (2001) 25 Cal.4th 543, 582.)

Furthermore, the general instructions of CALJIC No. 2.01 should not be given simply because the incriminating evidence is indirect. Rather, it is appropriate only when proof of guilt depends upon a pattern of incriminating circumstances. (*People v. Heishman* (1988) 45 Cal.3d 147, 167; *People v. Gould* (1960) 54 Cal.2d 621, 629.) "Indeed, where circumstantial inference is not the primary means by which the prosecution seeks to establish that the defendant engaged in criminal conduct, [CALJIC No. 2.01] may confuse and mislead, and thus should not be given." (*People v. Anderson, supra*, 25 Cal.4th at p. 582.)

Here, appellant's guilt was not premised on circumstantial evidence, but on the eyewitness accounts of Martin, Priest, and Ralph. Priest identified appellant as the person he saw and overheard just prior to hearing gunshots being fired from appellant's location, after which he found Martin being shot twice in the head (count 1). (5RT 863-864, 867, 883-888, 890-891.) Martin identified appellant as the individual who pulled out a gun and knife, told Martin to "give up" his money (count 3), asked Martin to lie on the floor, and shot Martin in the head (count 1). (6RT at 1130-31.) Martin further identified appellant as the individual he saw stab Priest in the back (count 2). (6RT 1128-1131, 1148.) With regard to the Pomona incident, Ralph identified appellant as the individual who shot him (Ralph) twice in the back (count 4). (4RT 751-752, 766-767; 5RT 797, 843.) Ralph further identified appellant as the individual who shot Alexander and Curtis, testifying that he overheard appellant's voice just prior to hearing gunshots coming from appellant's direction, after which he witnessed that Alexander and Curtis had been shot and appellant was holding a gun (counts 5 and 6). (4RT 758-766; 5RT 810, 841, 843.) Priest plainly identified appellant as the person who shot Martin from television footage, a photographic lineup, a live lineup, at the preliminary hearing, and at trial. (5RT 821, 865, 871, 874, 880.) Martin identified appellant as the person

who shot him and stabbed Priest from television footage, at the live lineup and at the preliminary hearing. (6RT 1133-1134, 1149, 1158.) Ralph also identified appellant from a photograph that he saw in a newspaper, at the live lineup, and again at the preliminary hearing and at trial. (4RT 752, 768-770, 772, 776.)

In contrast, proof of appellant's intent rested substantially, if not entirely, on circumstantial evidence. As the prosecutor argued during closing argument,

> Mr. Martin was shot in the back of the head. Obviously shooting somebody in the back of the head with a gun, your intent is clear.
>
> The shooting at the house in Pomona, shooting at people at close range, firing multiple shots at them, your intent is clear.
>
> All that I can tell you is this ladies and gentlemen, clearly, the intent that Mr. Wright had when you look at all the circumstances is to kill Mr. Priest. Because why would he want to leave Mr. Priest alive to testify against him that he shot Mr. Martin in the head a couple times? It doesn't make sense. So clearly his intent, his intent was to kill him. Yes, he wanted to make a point to Mr. Martin. I am so serious that you better do exactly what I tell you, if you have any hope of getting out of this, but he really wasn't giving Mr. Martin any hope of getting out because he knew he was going to shoot him.

(7RT 1346-1347.)

As discussed above, the prosecutor additionally presented ballistics evidence at trial that the bullets recovered from the scene and from Curtis's body were fired from the gun found in appellant's possession. (See Arg. III.C.2., *ante*.) However, this evidence merely corroborated the eyewitness testimony. Proof that appellant fired the gun did not rest on the ballistics evidence or a pattern of circumstantial evidence. (*People v. Haskett, supra,* 30 Cal.3d at p. 866; *People v. Watson*, *supra*, 46 Cal.2d at p. 836; see

People v. Anderson, *supra*, 25 Cal.4th at p. 582 [prosecution did not "substantially rely" on circumstantial evidence to prove the defendant committed the murder; circumstantial evidence "merely" corroborated the eyewitness testimony].)

In sum, proof of the intent and mental state elements of the charged offense and special allegations rested substantially, if not entirely, on circumstantial evidence, but proof of the other elements and the identity of the perpetrator rested on direct evidence. Thus, CALJIC No. 2.02 was properly given in lieu of CALJIC No. 2.01.

C. Any Error Was Harmless

Even assuming the trial court erred by failing to instruct the jury with CALJIC No. 2.01, any error was harmless. In *People v. Rogers* (2006) 39 Cal.4th 826, the trial court in a murder case failed to instruct the jury with CALJIC No. 2.01, but it gave CALJIC No. 2.02. *Rogers* held the court should have given the more inclusive instruction since the prosecution relied on circumstantial evidence to prove both the killer's identity and mental state. However, *Rogers* held the error was harmless under *People v. Watson*, *supra*, 46 Cal.2d at p. 836, because the circumstantial evidence of the defendant's identity as the killer was very strong. (*Rogers, supra*, 39 Cal.4th at pp. 885-886.) *Rogers* further held that the court's failure to give the more inclusive circumstantial evidence instruction, which included language about reasonable doubt, did not rise to the level of federal constitutional error since the court separately instructed the jury on reasonable doubt. (*Id.* at p. 886.) "We doubt the common law right to a circumstantial evidence instruction rises to the level of a liberty interest protected by the due process clause. [Citation.]" (*Id.* at pp. 886-887.)

In determining whether there was prejudicial instructional error, a reviewing court examines the entire charge to the jury. (*People v. Hayes* (1990) 52 Cal.3d 577, 639.) Here, aside from CALJIC No. 2.02, the trial

court gave CALJIC No. 2.00, which defines and contrasts direct and circumstantial evidence, as well as instructions on reasonable doubt and the presumption of innocence (CALJIC No. 2.90; 7CT 1949-1950; 7RT 1290), witness credibility (CALJIC No. 2.20; 7CT 1946-1947; 7RT 1283), and weighing conflicting testimony (CALIC 2.22; 7RT 1947; 7RT 1285).

Furthermore, during closing arguments, both the prosecutor and appellant's trial counsel applied the circumstantial evidence rule. Each side argued that their view of the evidence was the more credible and reasonable explanation for the evidence. (4RT 667-685 [prosecutor's opening argument], 686-690 [defense counsel's opening statement]; 7RT 1319-1360 [prosecutor's closing argument] 1361-1393 [defense counsel's closing argument], 1393-1407 [prosecutor's final closing argument].)

Based on the instructions and arguments of counsel, the jury was adequately advised on how to evaluate circumstantial evidence, and was instructed to draw reasonable inferences and weigh the competing inferences from the evidence. Certainly, the absence of CALJIC No. 2.01 did not invite the jury to make impermissible inferences, nor did it prevent the jury from making reasonable inferences about the gun possession and ballistics evidence. Furthermore, as the evidence of appellant's guilt, including his identity as the perpetrator in the shooting and stabbing incidents, was overwhelming. (*See* Arg. III.B.3.a, *ante*.) As explained, appellant's identity as the assailant was based primarily on direct evidence. Based on the foregoing, the court's refusal to give CALJIC No. 2.01 was harmless error as it is not reasonably likely that that instruction would have affected the outcome in appellant's favor. (See *People v. Watson, supra*, 46 Cal.2d at p. 836.)

VII. APPELLANT FORFEITED HIS CHALLENGE TO CALJIC NO. 2.92 REGARDING EYEWITNESS TESTIMONY; IN ANY EVENT, THE INSTRUCTION WAS PROPER AND THE ALLEGED ERROR WAS HARMLESS

Appellant contends that the trial court committed prejudicial error by instructing the jury with CALJIC No. 2.92 regarding factors to consider in proving identity by eyewitness testimony because the instruction improperly suggested to the jury that it should consider an eyewitness's confidence or certainty in his identification, as expressed by that witness at trial, as a relevant factor in assessing the accuracy of the witness's identification testimony. (AOB 134-155.) Appellant forfeited this claim, and the claim lacks merit in any event. Furthermore, any error was harmless in light of the evidence presented.

A. Factual and Procedural Background

Without objection, the trial court instructed the jury with CALJIC No. 2.92 as follows:

> Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness's identification of the defendant, including, but not limited to, any of the following:
>
> The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;
>
> The stress, if any, to which the witness was subjected at the time of the observation;
>
> The witness's ability, following the observation, to provide a description of the perpetrator of the act;
>
> The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;

The cross-racial or ethnic nature of the identification;

The witness's capacity to make an identification;

Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup;

The period of time between the alleged criminal act and the witness's identification;

Whether the witness had prior contacts with the alleged perpetrator;

The extent to which the witness is either certain or uncertain of the identification;

Whether the witness's identification is in fact the product of his own recollection; and

Any other evidence relating to the witness's ability to make an identification.

(7RT 1291-1292; 7CT 1950-1951.)

B. Appellant Forfeited His Claim

As a preliminary matter, appellant has forfeited this claim because he did not object to CALJIC No. 2.92 below when the parties and trial court discussed jury instructions, or when the instruction was read to the jurors. (6RT 1219-1234, 7RT 1271-1317.) The "[f]ailure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights." (§ 1259; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192-1193.)

By failing to object or to request a clarifying or amplifying instruction or admonition in the trial court, appellant forfeited his claim on appeal. (See, e.g., *People v. Bolin* (1998) 18 Cal.4th 297, 327 ["The instruction correctly states the law, and defendant did not request clarification or amplification. He has therefore waived the issue on appeal."]; *People v. Johnson* (1993) 6 Cal.4th 1, 52 [same]; *People v. Daya* (1994) 29

Cal.App.4th 697, 714 ["a defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions."].)

Although instructional errors affecting a defendant's substantial rights are generally not waived (§ 1259), this rule does not apply where the asserted error involves a claim that an instruction was not supported by scientific facts outside the record. At trial, appellant provided no evidence that any of the factors listed in CALJIC No. 2.92 were unreliable. (See *People v. Waidla* (2000) 22 Cal.4th 690, 743 [Appellate jurisdiction is limited to the four corners of the record on appeal].) Further, the amicus curia briefing cited by appellant in support of his claim refers to a particular position taken by one portion of the scientific community. (See AOB 137-138.) Even if the materials were evidence of a definitive agreement in the scientific community that there is no correlation between witness certainty and identification accuracy, this is not the proper forum for its consideration. Evidence is to be introduced at trial, not on appeal, so that both parties have the opportunity to test it for reliability and credibility. (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 292 [consideration of exhibits offered on appeal not proper; their foundation had not been tested in the trial court]; *People v. Nolan* (2002) 95 Cal.App.4th 1210, 1215 [place to present evidence challenging accuracy of scientific procedure is in the trial court].) Without proper development of the relevant facts in the trial court, including permitting the prosecution to challenge the factual accuracy of the studies relied upon by the defendant, it would be improper for this court to consider the issue for the first time on appeal. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 743.)

C. In Any Event, the Trial Court Properly Instructed the Jury With CALJIC No. 2.92

Even if this claim is cognizable, it is without merit. This Court has approved CALJIC No. 2.92 in numerous cases where identification was an issue. (See *People v. Ward* (2005) 36 Cal.4th 186, 213; *People v. Johnson* (1992) 3 Cal.4th 1183, 1234; *People v. Wright* (1988) 45 Cal.3d 1126, 1141-1144.) In *Wright*, this Court explained that "a proper instruction on eyewitness identification factors should focus the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence." (*Wright, supra*, at p. 1141.) CALJIC No. 2.92 "provides sufficient guidance on eyewitness identification factors." (*Id.* at p. 1141.) The weight to be given and effect of any particular factor was best left to "argument by counsel, cross-examination of the eyewitnesses, and expert testimony where appropriate." (*Id.* at p. 1143.) The *Wright* majority rejected the dissent's suggestion that inclusion of neutral factors without further explanation, including the certainty factor, rendered the instruction deficient. (*Id.* at p. 1141.) Subsequently, in *People v. Johnson, supra*, 3 Cal.4th at pp. 1230-1232, this Court approved CALJIC No. 2.92 and specifically rejected a challenge to the portion of the instruction concerning witness certainty. In *Johnson*, this Court found no error in the eyewitness certainty instruction despite the fact that the defense had presented expert testimony "without contradiction" at trial that "a witness's confidence in an identification does not positively correlate with its accuracy." (*Id.* at p. 1231.)

Appellant nevertheless relies on *Neil v. Biggers* (1972) 409 U.S. 188, 199-200 [93 S.Ct. 375, 34 L.Ed.2d 401] in which the United States Supreme Court set forth several factors to be considered in assessing an eyewitness's reliability. Appellant argues that CALJIC No. 2.92 misstates

the factors set forth in *Biggers* because *Biggers* referred to the degree of confidence at the time of the initial confrontation between the witness and the suspect. (AOB 135-137.)

Appellant's reliance on *Biggers* is unavailing. In assessing the reliability of an eyewitness identification for the purposes of its admissibility, the United States Supreme Court has stated that the factors to be considered "include the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Manson v. Brathwaite* (1997) 432 U.S. 98, 114 [97 S.Ct. 2243, 53 L.Ed.2d 140]; see *Neil v. Biggers*, *supra*, 409 U.S. at pp. 199-200.) Nothing in either *Manson* or *Biggers* suggests that these factors only apply to pretrial identifications and not to identifications at trial, and appellant's argument has been repeatedly rejected by the federal courts.[21] (See *Ferrill v. Malfi* (C.D. Cal. March 21, 2010, No. CV 07-6844-CJC (AGR)) 2010 WL 4718475, at p. *6 [rejecting challenge to CALJIC No. 2.92 based on argument that *Biggers* factor about witness certainty "should apply only to pretrial identifications and not to identifications at trial" because "argument is not supported by any Supreme Court authority"]; see also *Jordan v. Hedgpeth* (C.D. Cal. May 27, 2011, No. CV 07-3461-ABC (PLA)) 2011 WL 2160357, at p. *9 [petitioner's argument that CALJIC No. 2.92 improperly required jurors to associate witness's certainty of identification with accuracy "is undermined by Supreme Court precedent" in *Biggers*].) Although *Biggers* "refers to the confrontation that takes place between a

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[21] As stated, the California Rules of Court do not prohibit citation to unpublished federal cases, which may properly be cited as persuasive authority. (See *Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP*, *supra*, 183 Cal.App.4th at p. 251, fn. 6.)

defendant and a witness during an identification procedure, [citation] . . . nothing in *Biggers* would prevent a witness at trial from testifying as to his certainty concerning an earlier identification." (*Prado v. McEwen* (C.D. Cal. June 3, 2013, No. CV 12–1447–JGB (JPR)) 2013 WL 2417951, at p. *21.)

Finally, it should be noted that *Biggers* addressed the admissibility of eyewitness identifications where pre-trial identification procedures were unduly suggestive. (*Neil v. Biggers*, *supra*, 509 U.S. at p. 198-200; *Manson v. Brathwaite*, *supra*, 432 U.S. at p. 114.) Appellant does not assert that any pre-trial identification procedures in the present case were suggestive, and there is no basis upon which to draw such a conclusion.

In sum, appellant has not provided any valid reason or legal authority for this Court to reconsider *People v. Johnson*, *supra*, 3 Cal.4th at p. 1234, or *People v. Wright*, *supra*, 45 Cal.3d at pp. 1141-1144. Therefore, appellant's claim must be rejected.

D. Any Error Was Harmless

In any event, any error was harmless. Given the numerous factors relevant to eyewitness credibility listed in CALJIC No. 2.92, it is not reasonably probable that the elimination of the certainty factor in the instruction would have changed the outcome of the trial. Furthermore, it is reasonable to infer from the strength of the evidence against appellant that he would not have obtained a more favorable result without the complained of instruction. As discussed, Priest, Martin, and Ralph each identified appellant as the assailant. (See Arg. III.C.2., *ante*.) All of the witnesses testified that they had prior contact with appellant before he committed the instant offenses. (4RT 771-771 [Ralph]; 5RT 866 [Priest]; 6RT 1138 [Martin].) In addition, Priest and Martin independently contacted law enforcement prior to identifying appellant at any lineups because they had seen footage of appellant on a television news broadcast and recognized

him as the same person who stabbed Priest and shot Martin. (5RT 870; 6RT 1136, 1043-1044, 1135-1136.) Ralph independently contacted law enforcement prior to any lineups because he saw a photograph of appellant in a newspaper and recognized appellant as the individual who shot him. (4RT 768-769; 5RT 823.)

In light of the fact that the eyewitnesses were familiar with appellant before the charged crimes occurred, this is not a case in which the defense made a mistaken identity argument, and the certainty of the identifications was not a significant issue at trial. Instead, as acknowledged by appellant (AOB 144-147), the defense theory was that these witnesses fabricated their testimony and falsely accused appellant.

Given the state of the evidence, the credibility or reliability of the eyewitnesses was more directly addressed by the witness credibility instructions. The jurors were instructed that they were the "sole judges of the believability of the witness and the weight to be given the testimony of each witness." (7CT 1946; 7RT 1283.) Despite Alexander's testimony that appellant was not the shooter during the Pomona incident (6RT 1048-1051, 1056, 1062), the jury nevertheless found appellant guilty. Moreover, given Alexander's testimony—which contradicted his previous identification of appellant as the shooter at the live lineup, CALJIC No. 2.92, as provided, may have even been helpful to the defense. Therefore, nothing in the record indicates appellant would have received a more favorable result had CALJIC No. 2.92 been modified to excluded the certainty factor. Appellant's claim must therefore be rejected. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

VIII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH FIRST DEGREE MURDER

Appellant next contends that the trial court prejudicially erred in instructing the jury with first degree felony murder because the information charged him only with second degree malice murder in violation of section 187 and not with first degree murder in violation of section 189. According to appellant, the trial court exceeded its jurisdiction in instructing the jury on first degree murder. Appellant also maintains the error violated his constitutional rights "to due process and trial by jury" because it allowed a jury to convict him without finding that malice was an essential element of the crime alleged in the information. (AOB 149-155.)

As set forth below, this Court has previously rejected this same argument in several cases. Appellant offers no valid reason why this Court should depart from its prior holdings.

A. Factual and Procedural Background

In count 6, the amended information charged appellant with murder as follows:

> On or about March 21, 2000, in the County of Los Angeles, the crime of MURDER, in violation of PENAL CODE SECTION 187(a), a Felony, was committed by WILLIAM LEE WRIGHT, JR, who did unlawfully and with malice aforethought, murder PHILLIP CURTIS, a human being.

(1CT 249.) Count 6 further alleged that appellant committed the murder while engaged in the commission of the crimes of robbery and burglary, within the meaning of section 190.2, subdivision (a)(17). (1CT 249.)

The jury was instructed as follows:

> [CALJIC No. 8.10] The defendant, William Lee Wright, Jr., is accused in Count 6 of having committed the crime of murder, a violation of Penal Code section 187. [¶] Every person who unlawfully kills a human being during the commission or attempted commission of robbery or burglary,

> is guilty of the crime of murder in violation of section 187 of the Penal Code. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A human being was killed; [¶] 2. The killing was unlawful; and [¶] 3. The killing occurred during the commission or attempted commission of a robbery or burglary.
>
> [CALJIC No. 8.21] the unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of robbery or burglary is murder of the first degree when the perpetrator had the specific intent to commit that crime. [¶] The specific intent to commit robbery or burglary and the commission or attempted commission of such crime must be proved beyond a reasonable doubt.

(7CT 1987-1988.)

The jury subsequently found appellant guilty of first degree murder, finding true the allegations that appellant murdered Curtis while engaged in the commission or attempted commission of the crimes of robbery and burglary. (8CT 2007.)

B. The Trial Court Properly Instructed the Jury With First Degree Felony Murder

The instruction on first degree felony murder was proper. The information charged both a burglary and a robbery special circumstance, putting appellant on notice that the prosecution was proceeding on a felony-murder theory even if section 189 was not mentioned in the information. (See *People v. Carey* (2007) 41 Cal.4th 109, 132 [burglary and robbery special circumstance allegations were sufficient to put defendant on notice of first degree felony murder theory]; see *People v. Williams* (2006) 40 Cal.4th 287, 305 [evidence in aggravation of premeditation and deliberation in the circumstances of a murder is not subject to notice requirement of § 190.3, and therefore absence of notice does not deny due process]; *People v. Nakahara* (2003) 30 Cal.4th 705, 712 [felony murder and premeditated

murder need not be separately pleaded].) Given that appellant was charged with committing the murder while engaged in both a robbery and a burglary, and section 189 specifies that such murders are in the first degree, appellant offers no persuasive reason for finding that the information did not charge him with first degree murder. (See, e.g., *Carey*, *supra*, at p. 132.

Appellant nevertheless contends that this Court's decision in *People v. Witt* (1915) 170 Cal. 104, 107-108, which held that a defendant may be convicted of felony murder even though the information charged only murder with malice, was implicitly overruled by *People v. Dillon* (1983) 34 Cal.3d 441. Appellant contends that *Dillon* held that felony murder and premeditated murder are separate crimes. (AOB 152.) However, this Court rejected the same contention in *People v. Carey*, *supra*, 41 Cal.4th 109, holding:

> Since deciding *People v. Dillon*, *supra*, 34 Cal.3d 441, 194 Cal.Rptr. 390, 668 P.2d 697, we have reaffirmed our holding in *People v. Witt*, *supra*, 170 Cal. at pages 107-108, 148 P. 928, in a number of decisions. [citations] We have held that when an accusatory pleading charges "murder, without specifying the degree," it will be sufficient to charge murder in any degree.

(*Id.* at p. 132, quoting *People v. Anderson* (2002) 28 Cal.4th 767, 776.) In addition, this Court has held that felony murder and premeditated first degree murder are not separate crimes, but rather different varieties of the same crime. (*People v. Valdez*, *supra*, 32 Cal.4th at p. 114, fn. 17; *People v. Silva* (2001) 25 Cal.4th 345, 367.)

This Court has also rejected appellant's jurisdictional argument, finding that, in instructing a jury on first degree murder when the information charged malice murder under section 187, a trial court does not violate a defendant's federal constitutional rights to due process, notice, proof beyond a reasonable doubt, or a unanimous verdict. (*People v. Hughes* (2002) 27 Cal.4th 287, 369-370.) Accordingly, appellant is not

entitled to relief on this claim, as he has not provided this Court with any valid reason to reconsider this issue.

IX. THE CHALLENGED GUILT PHASE INSTRUCTIONS DID NOT UNDERMINE THE PROSECUTION'S BURDEN OF PROOF

Appellant argues that five of the standard jury instructions (CALJIC Nos. 2.02, 2.21.1, 2.21.2, 2.22, and 2.27) individually and collectively reduced the prosecution's burden of proving his guilt beyond a reasonable doubt pursuant to *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368]. He acknowledges this Court has rejected previous challenges to these instructions based on the same theory, but requests that the Court reconsider its position as to each instruction. (AOB 156-166.) Appellant's claims must be rejected as appellant does provide any valid reason for this Court to revisit its prior holdings rejecting the same arguments.

A. CALJIC No. 2.02 Did Not Dilute the Prosecution's Burden of Proof

Appellant challenges the portion of CALJIC No. 2.02 that instructs the jury that if "one interpretation of the evidence as to the specific intent or mental state appears to you to be reasonable and the other unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (7CT 1945-1946; 7RT 1281-1282.) Appellant argues that reference to "reasonable" inferences diluted the proof-beyond-a-reasonable-doubt standard because "[t]his instruction informed the jurors that if appellant reasonably appeared to be guilty, they could find him guilty—even if they entertained a reasonable doubt as to guilt." (AOB 157-160.)

This Court rejected the same challenge in *People v. Brasure* (2008) 42 Cal.4th 1037, 1058, where it held that the instruction told the jurors they must accept a reasonable inference pointing to guilt only where any other inference that could be drawn from the evidence was unreasonable. This

Court further held that this direction is entirely consistent with the rule of proof beyond a reasonable doubt, because an unreasonable inference pointing to innocence is, by definition, not grounds for a reasonable doubt. (*Ibid.;* see also *People v. Guerra* (2006) 37 Cal.4th 1067, 1139, overruled on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

Moreover, the trial court also gave instructions on reasonable doubt, the prosecution's burden of proof, and the presumption of innocence (CALJIC No. 2.90; 7CT 1949-1950; 7RT 1290). As this Court has explained, an "examination of the full instructions shows defendant's concern to be groundless." (*People v. Jones* (2013) 57 Cal.4th 899, 972; see also *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 ["The instructions as a whole correctly instructed the jury on the prosecution's burden of proof"].) As such, the circumstantial evidence instruction did not dilute the prosecution's burden of proof. To the extent that there was any error, it was harmless in light of the instructions as a whole. (*People v. Watkins* (2012) 55 Cal.4th 999, 1030.)

B. CALJIC Nos. 2.21.1, 2.21.2, 2.22, and 2.27 Did Not Individually or Collectively Dilute the Prosecution's Burden of Proof

Appellant further argues that CALJIC Nos. 2.21.1, 2.21.2, 2.22, and 2.27 "individually and collectively diluted the constitutionally mandated reasonable doubt standard."[22] (AOB 161.) According to appellant, "[e]ach of these instructions, in one way or another, urged the jury to decide

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[22] CALJIC No. 2.21.1 instructed the jury regarding discrepancies in a witness's testimony (7CT 1982; 7RT 1284-1285), CALJIC No. 2.21.2 instructed the jury regarding a witness who is willfully false (7CT 1983; 7RT 1285), CALJIC No. 2.22 instructed the jury regarding the weight to be given to witness testimony (7CT 1983; 7RT 1285), and CALJIC No. 2.27 instructed the jury regarding the sufficiency of the testimony of one witness. (7CT 1948.)

material issues by determining which side had presented relatively stronger evidence," thereby replacing the "reasonable doubt" standard with the "preponderance of evidence" test. (AOB 161.) He argues that the error violated his right to due process of law under the federal Constitution and requires reversal without an inquiry into prejudice. (AOB 165, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 [113 S.Ct. 2078, 124 L.Ed.2d 182].)

As appellant concedes, this Court has rejected this precise argument as applied to the same instructions on numerous occasions (e.g., *People v. Whalen* (2013) 56 Cal.4th 1, 70; *People v. Tate* (2010) 49 Cal.4th 635, 697-698; *People v. Kelly* (2007) 42 Cal.4th 763, 792), but he argues this Court should reexamine its prior precedents because they have incorrectly relied on the plain meaning of an instruction's language rather than considered how a reasonable juror would have applied the instruction. (AOB 164, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 116 L.Ed.2d 385].)

As this Court explained in *People v. Jones* (2013) 57 Cal.4th 899:

> [This] argument is untenable. For example, we explained in *People v. Jennings* (1991) 53 Cal.3d 334, 386, 279 Cal.Rptr. 780, 807 P.2d 1009, that "[t]he plain meaning of these instructions merely informs the jury to reject unreasonable interpretations of the evidence and to give the defendant the benefit of any reasonable doubt. *No reasonable juror would have interpreted these instructions* to permit a criminal conviction where the evidence shows defendant was 'apparently' guilty, yet not guilty beyond a reasonable doubt." (Italics added.) Accordingly, we conclude, consistent with past authority (*People v. Watkins* (2012) 55 Cal.4th 999, 1030, 150 Cal.Rptr.3d 299, 290 P.3d 364), that none of the identified pattern jury instructions violated defendant's constitutional rights.

(*Id.* at pp. 972-973.) Moreover, each of the complained-of instructions "is unobjectionable when, as here, it is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof." (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 715.)

In sum, appellant has provided no persuasive reasons for this Court to revisit this issue. Thus, none of the identified jury instructions violated appellant's constitutional rights. And again, to the extent that there was error, it was harmless in light of the overall instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof. (*People v. Watkins*, *supra*, 55 Cal.4th at p. 1030.)

X. CALIFORNIA'S DEATH PENALTY STATUTE SATISFIES THE UNITED STATES CONSTITUTION

Appellant next raises a series of challenges to the constitutionality of California's death penalty as set forth below. (AOB 157-182.) This Court has repeatedly rejected appellant's laundry-list of alleged problems, and appellant has not provided any new and valid reasons for this Court to revisit any of these claims.

A. California's Special Circumstances Adequately Narrow the Class of Murderers Eligible for the Death Penalty

Appellant argues that the list of special circumstances qualifying first degree murder for capital sentencing as set forth in section 190.2 is impermissibly broad because it does not meaningfully narrow the pool of murders eligible for the death penalty. Appellant further contends that the statutory scheme makes almost all first degree murders eligible for the death penalty. (AOB 167-168.) This contention has been repeatedly rejected by this Court. (*People v. Williams* (2013) 56 Cal.4th 165, 201; *People v. Homick* (2012) 55 Cal.4th 816, 903; *People v. Tully* (2012) 54 Cal.4th 952, 1067; *People v. Lightsey* (2012) 54 Cal.4th 668, 731; *People v. McDowell* (2012) 54 Cal.4th 395, 443; *People v. Streeter* (2012) 54 Cal.4th

205, 267.) This Court has repeatedly held that the list "of special circumstances qualifying a first degree murder for capital sentencing (§ 190.2) is not impermissibly broad." (*People v. Lightsey*, *supra*, 54 Cal.4th at p. 731; *People v. Souza* (2012) 54 Cal.4th 90, 142; *People v. Dykes*, *supra*, 46 Cal.4th at p. 813.) Thus, this claim lacks merit.

B. Penal Code Section 190.3, Factor (a), Does Not License the Arbitrary or Capricious Imposition of the Death Penalty.

This Court must also reject appellant's contention that section 190.3, factor (a), which permits the jury to consider the circumstances of the crime in deciding whether to impose the death penalty, "has been applied in such a wanton and freakish manner" such that all murders can be characterized has having aggravating circumstances. (AOB 168-169.) This Court has expressly rejected this contention, holding that "[s]ection 190.3, factor (a) (the circumstances of the capital crime) is not so broad as to be applied in a wanton or freakish manner." (*People v. Contreras* (2013) 58 Cal.4th 123, 172, citing *People v. Garcia* (2011) 52 Cal.4th 706, 763.) Nor is the statute "so broad as to make imposition of a death sentence arbitrary and capricious." (*People v. Moore* (2011) 51 Cal.4th 386, 415.) The range of factual circumstances involved in the murders in which the death penalty has been upheld establishes that the sentencing scheme properly allows for each case to be judged on its facts, and each defendant on the particulars of his offense." (*People v. Lightsey*, *supra*, 54 Cal.4th at p. 731.) As such, this claim must also be rejected.

C. Nothing in the State or Federal Constitution Requires That the Penalty Jury Find Aggravating Circumstances True Beyond a Reasonable Doubt

Appellant contends that California prosecutors should be required to prove beyond a reasonable doubt the factors relied upon to impose a death sentence. He argues that the Supreme Court's holdings in *Blakely v.*

Washington (2004) 542 U.S. 296, 303-305 [124 S.Ct. 2531, 159 L.Ed.2d 403], *Ring v. Arizona* (2002) 536 U.S. 584, 604 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478 [120 S.Ct. 2348, 147 L.Ed.2d 435], require that any fact used to increase a sentence other than a prior conviction must be proved beyond a reasonable doubt. (AOB 170.) Appellant acknowledges that, in *People v. Prieto* (2003) 30 Cal.4th 226, 263, this Court held that imposition of the death penalty does not constitute an increased sentence within the meaning of *Blakely*, *Ring*, and *Apprendi*, and therefore the reasonable doubt standard is not imposed on penalty phase proceedings. (AOB 171.) Appellant nevertheless contends that California jurors are required to engage in fact-finding as to aggravating factors in the penalty phase, this fact-finding is part of the eligibility phase, and these factual determinations should be made unanimously and beyond a reasonable doubt (AOB 171-172.)

Appellant's contention has been repeatedly rejected by this Court. (*People v. Russell* (2010) 50 Cal.4th 1228, 1272; *People v. Jennings* (2010) 50 Cal.4th 626, 689 ["Unlike the guilt determination, the sentencing function is inherently moral and normative, not factual . . . and hence, not susceptible to a burden-of-proof quantification"; internal quotation marks omitted]; *People v. Salcido* (2008) 44 Cal.4th 93, 167 [*Apprendi* and its progeny do not justify reconsideration of prior rulings]; *Tuilaepa v. California* (1994) 512 U.S. 967, 979 [114 S. Ct. 2630, 129 L.Ed.2d 750] ["A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision"].) This contention must be rejected again as appellant provides no valid reasons for this Court to revisit its prior holdings.

D. Nothing in the State or Federal Constitution Requires an Instruction on the Burden of Proof at the Penalty Phase

In the alternative, appellant maintains that the jury should have been instructed that either some burden of proof or no burden of proof was required when deciding the appropriate penalty. He complains that this Court has failed to consider the applicability of Evidence Code section 520, which provides that the prosecution always bears the burden of proof, to a death penalty determination. (AOB 171-172.) Appellant's contention has been repeatedly rejected by this Court, and he provides no valid reasons for this Court to reconsider its prior holdings. Evidence Code section 520 is inapplicable herein because it refers to the burden to prove guilt. Accordingly, the contention must be rejected again. (*People v. Lynch*, *supra*, 50 Cal.4th at p. 766; *People v. Brady* (2010) 50 Cal.4th 547, 590; *People v. Smith* (2005) 35 Cal.4th 334, 374 ["Because no burden of proof is required at the penalty phase . . ., the law is not invalid for failing to require an instruction on burden of proof"]; accord, *Tuilaepa v. California*, *supra*, 512 U.S. at p. 979.)

E. There is No Requirement of Juror Unanimity as to Aggravating Factors or Unadjudicated Criminal Activity

Appellant also claims California law violates the United States Constitution by failing to require unanimous jury agreement on aggravating factors as well as prior unadjudicated criminal activity. He again cites to *Ring v. Arizona*, *supra*, 536 U.S. 584, as well as *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], and *Blakely v. Washington*, *supra*, 542 U.S. 296 as requiring this Court to reexamine its precedent to the contrary. (AOB 172-175.) This contention has been repeatedly rejected by this Court, and he provides no new and valid reasons for this Court to revisit its prior holdings. (*People v. Nelson* (2011) 51

Cal.4th 198, 226 [jury may properly consider unadjudicated criminal activity at the penalty phase and need not make a unanimous finding on each instance of such activity; *Apprendi* and its progeny do not compel a different result]; *People v. Bacon* (2010) 50 Cal.4th 1082, 1129; *People v. Dykes*, *supra*, 46 Cal.4th at pp. 799-800 [*Apprendi*, *Ring*, and *Cunningham* do not require juries to enter unanimous findings concerning aggravating factors]; *People v. Williams*, *supra*, 40 Cal.4th at p. 338 [*Ring* does not mandate jury unanimity as to aggravating factors]; *People v. Elliot* (2005) 37 Cal.4th 453, 488 [jury's consideration of unadjudicated criminal activity is not unconstitutional, and the jury need not make a unanimous finding that defendant was guilty of the unadjudicated crimes].) Therefore, the contention must be rejected again.

F. CALJIC No. 8.88 is Not Impermissibly Vague or Ambiguous for Using the Phrase "So Substantial"

Appellant next contends that CALJIC No. 8.88 violated the Constitution because it is impermissibly vague and ambiguous for using the phrase "so substantial," and it failed to inform the jury that it must find that death was an appropriate penalty. (AOB 175-176.) Specifically, appellant contests CALJIC No. 8.88's instruction that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are *so substantial* in comparison with the mitigating circumstances that it warrants death instead of life without parole." (8CT 2086; 11RT 2218, emphasis added.)

As appellant acknowledges, this Court has repeatedly found that the "so substantial" language in the penalty phase instructions is not impermissibly vague or ambiguous. (*People v. Cook* (2007) 40 Cal.4th 1334, 1367-1368 [the term "substantial" provides adequate guidance to the jurors]; *People v. Smith*, *supra*, 35 Cal.4th at p. 370 [CALJIC No. 8.88 "permits a death penalty only if aggravation is so substantial in comparison

with mitigation that death is warranted; if aggravation failed even to outweigh mitigation, it could not reach this level"]; *People v. Boyette* (2002) 29 Cal.4th 381, 465 [the phase "so substantial" in this context is not unconstitutionally vague]; *People v. Bolin, supra*, 18 Cal.4th at p. 343 ["the 'so substantial' instruction 'clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty'"].) This Court has also found that the instruction does not improperly fail to inform the jury that the central determination is whether death is the appropriate punishment. Rather, the instruction properly explains to the jury that it may return a death verdict if the aggravating evidence "warrants" death. (*People v. Mendoza* (2007) 42 Cal.4th 686, 707; *People v. Arias* (1996) 13 Cal.4th 92, 171.) Thus, appellant's argument lacks merit.

G. CALJIC No. 8.88's Instruction Regarding Aggravating Factors Does Not Conflict With Penal Code Section 190.3

Appellant next contends that CALJIC No. 8.88 fails to conform to the mandate of section 190.3[23] because it fails to direct the jury that it must impose a sentence of life without parole when the mitigating circumstances outweigh the aggravating circumstances. He further contends that the instruction violated the federal Constitution by impermissibly giving the jury the impression that the defense bore the burden of proving facts in mitigation. (AOB 176-177.)

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[23] Section 190.3 provides in relevant part: "If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances[,] the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole."

Again, this Court has repeatedly have rejected these arguments. (*People v. Roundtree* (2013) 56 Cal.4th 823, 862-863 [CALJIC No. 8.88's failure to instruct the jury that a sentence of life is mandatory if mitigation outweighs aggravation does not render the instruction invalid]; *People v. Rogers* (2009) 46 Cal.4th 1136, 1179 [same].) As this Court stated in *People v. Duncan* (1991) 53 Cal.3d 955, 978:

> The instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating. There was no need to additionally advise the jury of the converse (i.e., that if mitigating circumstances outweighed aggravating, then life without parole was the appropriate penalty).

There is also not requirement that jurors must be informed that the defendant does not have the burden of persuasion that death is not the appropriate penalty. (*People v. Boyette*, *supra*, 29 Cal.4th at pp. 464-465; *People v. Gurule* (2002) 28 Cal.4th 557, 661-662.) This Court has rejected the claim that either party has the burden of persuasion at the penalty phase. (*People v. Hayes* (1990) 52 Cal.3d 577, 643.) Thus, appellant's contentions must be rejected again.

H. There is No Requirement That the Jury Be Instructed on a Presumption that Life Without Parole is the Appropriate Sentence

Appellant also claims that California's death penalty statute violated his federal due process and Eighth Amendment rights because it fails to require the jury to be instructed on a presumption that life without parole is the appropriate sentence. Appellant acknowledges that this Court rejected this contention in *People v. Arias*, *supra*, 13 Cal.4th at p. 190. (AOB 178-179.)

Following the *Arias* decision, this Court has repeatedly rejected the argument that the penalty jury must be instructed that a presumption exists favoring life imprisonment. (*People v. Valdez* (2012) 55 Cal.4th 82, 179;

People v. McKinzie (2012) 54 Cal.4th 1302, 1366; *People v. Zamudio* (2008) 43 Cal.4th 327, 373; *People v. Taylor* (2001) 26 Cal.4th 1155, 1178.) Again, appellant offers no compelling reason for reconsidering these cases. Thus, this claim must be rejected.

I. The Jury is Not Required to Make Written Findings

Appellant further claims the failure to require written or other specific findings by the jury regarding aggravating factors deprived him of his federal due process and Eight Amendment rights to meaningful appellate review. (AOB 179.) Appellant's contention has been repeatedly rejected by this Court, and he provides no valid reasons for this Court to revisit its prior holdings. Thus, the contention must be rejected again. (*People v. Russell*, *supra*, 50 Cal.4th at p. 1274; *People v. Bennett*, *supra*, 45 Cal.4th at p. 632; *People v. Loker* (2008) 44 Cal.4th 691, 755; *People v. Williams*, *supra*, 40 Cal.4th at p. 337.)

J. Appellant's Rights Were Not Violated By the Use of the Words "Extreme" and "Substantial" in Listing Potential Mitigating Factors

In conclusory fashion, appellant claims the inclusion of the adjectives "extreme" and "substantial" in the list of potential mitigating factors acted as barriers to the consideration of mitigation, in violation of his federal constitutional rights.[24] (AOB 179-180.) Appellant's contention has been repeatedly rejected by this Court, and he provides no new and persuasive reasons for this Court to revisit its prior holdings. Accordingly, the contention must be rejected again. (*People v. Russell*, *supra*, 50 Cal.4th at

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[24] CALJIC No. 8.85 told the jury to consider, among other factors, whether the murder was committed while appellant was under the influence of "extreme" mental or emotional disturbance and whether appellant committed the murder under "extreme" duress or under the "substantial" domination of another person. (8CT 2084; 11RT 2162.)

p. 1274; *People v. Williams*, *supra*, 40 Cal.4th at p. 338; *People v. Smith*, *supra*, 35 Cal.4th at p. 374.)

K. Appellant Forfeited His Claim That the Trial Court Was Required to Remove Inapplicable Sentencing Factors From CALJIC No. 8.85; and the Claim Lacks Merit in Any Event

Appellant contends that the trial court erred in not deleting from the instruction of CALJIC No. 8.85 those factors having no relevance to this case.[25] (AOB 180.) Appellant forfeited this claim because he did not request any clarifying change to the instruction. (9RT 1825.) As stated, generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1347-1348 [holding that defendant forfeited claim that CALJIC No. 8.85 should have been modified to delete inapplicable factors by failing to object].)

Furthermore, this Court has repeatedly held that the instructions in the language of CALJIC No. 8.85 do not violate the Eighth and Fourteenth Amendments by failing to delete inapplicable sentencing factors. (*People v. Castaneda*, *supra*, 51 Cal.4th at p. 1348; *People v. Ramirez* (2006) 39 Cal.4th 398, 469; see also *People v. Hartsch* (2010) 49 Cal.4th 472, 516 [the court is not required to delete inapplicable statutory factors]; *People v. Taylor* (2009) 47 Cal.4th 850, 899 [same].) Thus, because the instruction is a correct statement of the law and appellant did not request different language, he has forfeited his claim that the instruction should have been

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[25] CALJIC No. 8.85 instructed the jury to "consider all of the evidence which has been received during any part of the trial . . . . You shall consider, take into account and be guided by the following factors, if applicable:" (8CT 2083; 11RT 2161.)

modified. And because the instruction does not otherwise violate his constitutional rights, his claim also fails on the merits.

L. Appellant Forfeited His Claim That the Jury Must be Instructed as to Which Factors in CALJIC No. 8.85 Were Mitigating Factors and Which Were Aggravating Factors; and the Claim Lacks Merit in Any Event

Appellant also asserts the jury should have been instructed which of the listed sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either mitigating or aggravating depending upon the jury's appraisal of the evidence. He speculates the jury could have aggravated his sentence based on non-aggravating factors. (AOB 180-181.)

Again, appellant has forfeited this claim because he did not request any clarifying change to the instruction. (*People v. Castaneda*, *supra*, 51 Cal.4th at pp. 1347-1348; see e.g., *People v. Whalem* (2013) 56 Cal.4th 1, 83-84 [defendant forfeited claim that court erred by failing to specify which factors were aggravating and which were mitigating because defendant proposed the modified version of CALJIC No. 8.85 that was given.) Furthermore, this contention lacks merit because it has been repeatedly rejected by this Court, and appellant provides no persuasive reasons for this Court to revisit its prior holdings. (*People v. Booker* (2011) 51 Cal.4th 141, 196-197; *People v. Russell*, *supra*, 50 Cal.4th at p. 1274; *People v. Jennings*, *supra*, 50 Cal.4th at p. 690; *People v. Brady*, *supra*, 50 Cal.4th at p. 590; accord, *Tuilaepa*, *supra*, 512 U.S. at p. 979.) As such, appellant is not entitled to relief.

M. There is No Requirement of Intercase Proportionality Review

According to appellant, "the failure to conduct intercase proportionality review violates the Fifth, Sixth, Eight, and Fourteenth Amendment prohibitions against proceedings conducted in a

constitutionally arbitrary, unreviewable manner or that violate equal protection and due process." (AOB 181.) Appellant's contention has been repeatedly rejected by this Court, and he provides no new and valid reasons for this Court to revisit its prior holdings. So, the contention must be rejected again. (*People v. Russell*, *supra*, 50 Cal.4th at p. 1274; *People v. Loker*, *supra*, 44 Cal.4th at pp. 755-756; *People v. Williams*, *supra*, 40 Cal.4th at p. 338; accord, *Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [104 S.Ct. 871, 79 L.Ed.2d 29] [federal Constitution does not require intercase proportionality review].)

N. California's Death Penalty Scheme Does Not Violate the Equal Protection of the Laws

Appellant next contends that California's death penalty scheme violates equal protection of the laws by providing significantly fewer procedural protections for those charged with capital murder than for those charged with noncapital crimes. (AOB 181-182.) This Court has consistently held California's death penalty law does not violate the equal protection rights of capital defendants because it provides a different method of determining the sentence than is used in noncapital cases. (*People v. Bennett* (2009) 45 Cal.4th 577, 632; *People v. Smith*, *supra*, 35 Cal.4th at pp. 374-375.) This Court has specifically found that "capital and noncapital defendants are not similarly situated and therefore may be treated differently without violating constitutional guarantees of equal protection of the laws or due process of law." (*People v. Manriquez* (2005) 37 Cal.4th 547, 590; see also *People v. Lynch*, *supra*, 50 Cal.4th at p. 767; *People v. Loker*, *supra*, 44 Cal.4th at p. 756.) As in his other challenges to California's death penalty law, appellant asserts arguments that have been soundly and repeatedly rejected by this Court and does not provide any new or valid reasons for this Court to revisit its prior holdings. Thus, the

contention must be rejected once again. (See, e.g., *People v. Jennings*, *supra*, 50 Cal.4th at p. 690; *People v. Brady*, *supra*, 50 Cal.4th at p. 590.)

O. California's Use of the Death Penalty Does Not Violate International Norms Of Humanity and Decency

Appellant contends California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency and violates the Eighth and Fourteenth Amendments. Although appellant acknowledges this Court has rejected this claim in numerous holdings, he asks this Court to consider the international community's rejection of the death penalty as a form of punishment. (AOB 182.)

This Court has already rejected the contention that, because our death penalty allegedly violates international norms of humanity and decency, it also violates the Eight and Fourteenth Amendments. (*People v. Jennings*, *supra*, 50 Cal.4th at pp. 690-691; *People v. Bennett*, *supra*, 45 Cal.4th at p. 632; *People v. Mungia* (2008) 44 Cal.4th 1101, 1143 ["California's status as being in the minority of jurisdictions worldwide that impose capital punishment, especially in contrast with the nations of Western Europe, does not violate the Eighth Amendment]; *People v. Kelly*, *supra*, 42 Cal.4th at p. 801 ["a sentence of death that complies with state and federal constitutional and statutory requirements does not violate international law"]; *People v. Cook* (2006) 39 Cal.4th 566, 619-620 ["international law does not bar imposing a death sentence that was rendered in accord with state and federal constitutional and statutory requirements"]; *People v. Moon* (2005) 37 Cal.4th 1, 48 ["Although defendant would have us consider that the nations of Western Europe no longer have capital punishment, those nations largely had already abolished it officially or in practice by the time the United States Supreme Court, in the mid-1970's, upheld capital punishment against an Eighth Amendment challenge"].) Appellant raises arguments that have been soundly rejected by this Court in the past and

does not provide any valid reason for this Court to revisit its prior holdings. Thus, the contention must be rejected once again. (See, e.g., *People v. Russell*, *supra*, 50 Cal.4th at p. 1275; *People v. Brady*, *supra*, 50 Cal.4th at pp. 590-591; *People v. Loker*, *supra*, 44 Cal.4th at p. 756.)

XI. APPELLANT IS NOT ENTITLED TO RELIEF AS A RESULT OF THE CUMULATIVE EFFECT OF THE ALLEGED ERRORS

In his final contention, appellant claims that he was prejudiced as a result of the guilt and penalty phase errors alleged herein. (AOB 183-185.) As explained above, there were no errors in this case and, thus, appellant is not entitled to any relief as a result of the cumulative effect of any inexistent errors. (See, e.g., *People v. Russell*, *supra*, 50 Cal.4th at p. 1274; *People v. Bacon*, *supra*, 50 Cal.4th at p. 1129; *People v. Lynch*, *supra*, 50 Cal.4th at p. 767; *People v. Loker*, *supra*, 44 Cal.4th at pp. 756-757.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: February 21, 2014

Respectfully submitted,

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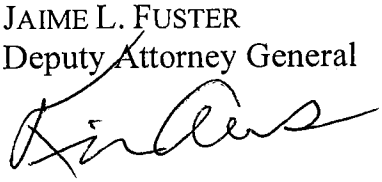

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains **36,198** words.

Dated: February 21, 2014

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

Case Name: **PEOPLE v. WILLIAM LEE WRIGHT, JR.** Case No.: **S107900**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On February 21, 2014, I electronically filed the attached **RESPONDENT'S BRIEF** with the Clerk of the Court using the Online Form provided by the California Supreme Court.

On February 21, 2014, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On February 21, 2014, I caused eight **(8)** copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **U. S. MAIL**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 21, 2014, at Los Angeles, California.

Vanida S. Sutthiphong
Declarant

Signature

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