In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **STEVE WOODRUFF,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S115378

Riverside County Superior Court
Case No. RIF095875
The Honorable Christian F. Thierbach, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On January 17, 2001, the District Attorney of Riverside County filed a felony complaint charging appellant, Steve Woodruff ("Woodruff"), with the murder of Charles Douglas Jacobs ("Jacobs") with the use of a firearm, causing death. (Count 1; Pen. Code[1], §§ 187, 12022.53, subd. (d) and 1192.7, subd. (c)(8)). (I CT 1.) The complaint also alleged in count 1 that Woodruff murdered Jacobs, a peace officer who was engaged in the course of the performance of his duties, for the purpose of avoiding or preventing a lawful arrest or perfecting an escape and while lying in wait. (Count 1; §§ 190.2, subd. (a)(5), (7) and (15).) (I CT 1.) Furthermore, the complaint charged Woodruff with the attempted murder of Benjamin Baker ("Baker"), with the use of a firearm. (Count 2; §§ 664/187, 12022.53, subd. (c), and 1192.7, subd. (c)(8). (1 CT 2.)

On January 24, 2001, Woodruff, represented by the Public Defender's Office, appeared for an arraignment. (1 CT 10.) Mark Blankenship, a private attorney, requested to substitute in as attorney of record for Woodruff. (1 CT 10.) The court granted the motion, and the public defender was relieved as counsel. (1 CT 10.)

The Riverside District Attorney's Office filed notice of intention to seek capital punishment on February 5, 2001. (1 CT 11; 2 CT 345.)

On February 6, 2001, Woodruff was arraigned. He pleaded not guilty to all of the charges and denied the enhancements. (1 CT 14.) A preliminary hearing was scheduled for March 8, 2001. (1 CT 14.)

A special grand jury issued an indictment on March 2, 2001, charging Woodruff, in count 1, with the deliberate and premeditated murder of Jacobs, while personally and intentionally discharging a firearm, causing

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[1] Any subsequent statutory reference is to the Penal Code unless otherwise indicated.

death within the meaning of sections 12022.53, subdivision (d) and 1192.7 subdivision (c), subsection (8). (Count 1; § 187.) (1CT 15.) The grand jury further alleged that Woodruff murdered Jacobs, a peace officer who was engaged in the performance of his duties, for the purpose of avoiding or preventing a lawful arrest or perfecting an escape and while lying in wait. (Count 1; §§ 190.2, subd. (a)(5), (7) and (15).) (1 CT 16.) The grand jury also charged Woodruff in Count II with the attempted premeditated murder of Baker, a peace officer, with the personal use of a firearm. (Count II; §§ 664/187, 12022.53, subd. (c), 1192.7, subd. (c)(8).) (1 CT 16.)

Time qualifications of jurors commenced on March 18, 2002. (2 CT 414.) On March 21, 2002, on a defense motion for continuance, the trial court found good cause to continue the trial. (2 CT 417.)

Jury trial on the guilt phase commenced on November 7, 2002. (17 CT 4873.) The jury began deliberations on January 28, 2003, at 11:27 a.m. (19 CT 5392.) At 2:30 p.m. that same day, the jury found Woodruff guilty of first-degree murder and attempted murder as charged in counts 1 and 2. (19 CT 5392-5393; 25 RT 5272-5275.) The jury also found all of the enhancements and special circumstances to be true. (19 CT 5292-5393; 25 RT 5272-5275.)

On January 29, 2003, the mental retardation phase of the trial began. (19 CT 5394.) On February 3, 2003, the jury found that Woodruff was not mentally retarded. (19 CT 5406.) The penalty phase of the trial commenced on February 4, 2003. (19 CT 5407.)

Jury deliberations as to penalty began on February 6, 2003, at 2:13 p.m. (19 CT 5473.) On February 6, 2003, at 4:40 p.m., the jury returned a verdict of death. (19 CT 5471-5474.)

Woodruff filed a motion for new trial on April 16, 2003. (19 CT 5483-5509.) The trial court denied the motion on April 17, 2003. (19 CT 5533.)

On April 17, 2003, after denying Woodruff's application to modify the penalty, the trial court imposed a death sentence on the murder count. (19 CT 5525, 5534.) The trial court also imposed the indeterminate sentence of 15 years to life for count 2 and an additional determinate term of 20 years for the personal use of a weapon enhancement in count 2. (19 CT 5534.)

STATEMENT OF FACTS

THE PROSECUTION'S CASE IN CHIEF

On January 13, 2001, Holly Menzies lived at 3142 Lemon Street in Riverside. (5 RT 1302.) Woodruff's mother, Parthenia Carr ("Carr") lived in the upstairs apartment in the house located at 3140 Lemon Street, next door to Menzies. (5 RT 1303, 10 RT 2252, 2257.) Woodruff lived in the downstairs apartment in the same house where his mother's apartment was located. (10 RT 2255.) At 1:45 in the afternoon, Menzies called the police non-emergency line to report that Carr was playing her radio very loudly for at least 45 minutes. (5 RT 1307-1308.) Menzies and her husband had already spoken to Carr about her loud music on several occasions. (5 RT 1308, 1350.) Menzies had also previously reported the loud radio to police, and police officers had spoken to Carr several times. (5 RT 1331, 1344.) Menzies had been trying to get the loud music to stop for a year. (6 RT 1349.) Another neighbor also said that Carr always played her music loudly. (8 RT 1854.)

Riverside Police Officer Benjamin Baker received a call for a music disturbance and responded to the call. (5 RT 1309, 1449.) Officer Baker was dressed in uniform and drove a marked police car. (5 RT 1310, 1447.) Officer Baker approached the house at 3140 Lemon Street, and on the landing at the top of the stairs, Officer Baker noticed a white radio playing extremely loud, with the volume turned up all the way. (5 RT 1452, 1454.)

Officer Baker saw Woodruff in the downstairs apartment and asked him if the radio belonged to him. (5 RT 1455, 6 RT 1533-1535.) Woodruff said it was his mother's radio; she lived upstairs. (5 RT 1455.)

Baker left the porch area of the house and went upstairs. (5 RT 1455-1456.) The radio was still playing very loudly, so Officer Baker turned the radio off and knocked on the door to Carr's apartment. (5 RT 1310, 1358, 1455-1456.) Carr answered the door and started screaming that it was her radio, her house, and she had the right to play the radio as loudly as she wanted. (5 RT 1359, 1456.) Officer Baker calmly explained to her that neighbors were being disturbed and had complained about the radio. (5 RT 1361, 1456.) Carr told Officer Baker that she was going to sue him for violating her constitutional right to play her radio. (5 RT 1457; 6 RT 1540.) Over his police radio, Officer Baker requested that his supervisor, Sgt. Leach, assist him. (5 RT 1457; 8 RT 1953.) Sgt. Leach responded that he was en route to the location. (5 RT 1458; 8 RT 1953; 12 RT 2662.)

In the meantime, Carr had turned the radio back on, and she continued to insist to Officer Baker that she could play her music as loudly as she wanted. (5 RT 1458.) Officer Baker told Carr that if she did not turn down the radio, she would be arrested for disturbing the peace. (6 RT 1471.) Officer Baker called dispatch to request if they could contact the complaining party, Menzies, and determine if Menzies was willing to file a citizen's complaint against Carr. (5 RT 1459.) Dispatch informed the officer that Menzies would sign a complaint. (5 RT 1366, 1460.) Officer Baker decided to go speak with Menzies and wait for Sgt. Leach. (5 RT 1460.)

Officer Baker went to Menzies' home next door and asked her if she would sign the citizen's complaint, "Order of Arrest—Private Person," against Carr. (5 RT 1313; 6 RT 1465.) Menzies agreed and signed the form; however, she wanted to speak with Carr again to work things out

before taking such drastic measure. (5 RT 1315, 1382; 6 RT 1466.) Menzies went upstairs to Carr's apartment, and Officer Baker followed her for her safety and to serve as a mediator between the neighbors. (5 RT 1373, 6 RT 1468.)

Menzies knocked on Carr's door, and Carr immediately started screaming at her, "What are you doing on my property?" (5 RT 1316; 6 RT 1469, 10 RT 2257, 11 RT 2534.) Carr pushed open the screen door, forced the door into Menzies' foot, and Carr lunged toward Menzies. (5 RT 1373, 1376, 6 RT 1469.) Menzies was startled, and she jumped back. (5 RT 1376, 6 RT 1470.) Officer Baker, who had been standing on the second step, moved up onto the landing and stepped in between Carr and Menzies. (6 RT 1470.) Menzies walked back downstairs to her house. (5 RT 1316; 6 RT 1470; 11 RT 2535.) Menzies went to her bathroom and looked out the window to see what was happening on the landing. (5 RT 1316.)

In the meantime, Officer Baker was on the landing with Carr. Officer Baker grabbed Carr's right wrist and told her he was placing her under arrest for disturbing the peace and for the battery that was committed in his presence. (6 RT 1471.) Menzies overheard Carr tell the officer that he could not arrest her. (5 RT 1316, 10 RT 2259.) When Officer Baker grabbed Carr's wrist, Carr's son, Claude Carr ("Claude"), who had apparently been asleep inside Carr's apartment, came out onto the landing, stepped in between Carr and the officer, and said, "Get your hands off my mom."[2] (6 RT 1472, 1556, 1559, 10 RT 2263, 2508, 2519.) Officer Baker let go of Carr's wrist and was about to arrest Claude for delaying a peace officer. (6 RT 1474.) Menzies heard Claude yell downstairs to his brother,

[2] From her vantage point, inside the bathroom of her home, Menzies could hear what was going on outside, and she could see the legs of Officer Baker, Carr, and Claude. (5 RT 1316, 1318, 1385, 1387.)

Woodruff. (5 RT 1388, 1393-1394.) Woodruff came out onto the porch of the house. (5 RT 1388-1389.) Then Officer Baker heard Woodruff, from the bottom of the stairs, yell in a threatening manner, "You better not touch my momma." (6 RT 1474, 1476, 1559.) Menzies heard Woodruff yell out that they could not arrest his mother. (5 RT 1316, 1394.)

Officer Baker saw Woodruff standing in the porch area below, leaning over the stairway shouting at Officer Baker. (6 RT 1475.) Officer Baker felt the situation with three people upset with him was unsafe. Therefore, he called an "11-11," which is a " request for immediate assistance or backup," over his police radio. (6 RT 1476, 1559-1560, 8 RT 1956, 10 RT 2187, 12 RT 2661.) Officer Baker then told Claude that he wanted to speak with Carr without her assaulting people. (6 RT 1477, 1562.) Claude said that was fine with him. (6 RT 1478.) Carr, in the meantime, was standing in the middle of landing, screaming at the top of her lungs, "You have no right to be here. This is my house. This is my radio." (6 RT 1478.)

Within one to two minutes of the 11-11 call, Officer Doug Jacobs, Officer Baker's beat partner who was also working the downtown Riverside area that day, responded. (6 RT 1479, 8 RT 1957; 12 RT 2663.) Officer Jacobs arrived at the house, ran across the front lawn, and went up the stairs towards Carr's apartment. (6 RT 1479; 11 RT 2535.)

Mark Delgado, a neighbor who lived across from Woodruff, was outside washing his car. (8 RT 1818-1819.) When Officer Jacobs arrived and went upstairs, Delgado saw Woodruff come out to the porch and look up the stairs. (8 RT 1828.) Delgado heard Woodruff say, "Hey, what are you doing? Don't be touchin' my momma. Leave my momma alone." (8 RT 1829.)

Officer Baker met Officer Jacobs halfway down the stairs and gave a synopsis of the situation to him. (6 RT 1481, 1612.) Officer Baker explained that Carr was playing the radio loudly, he turned the radio down,

Carr turned the radio back up, he asked her to turn it down, but Carr refused, a neighbor signed a citizen's complaint form, Claude approached Baker as he was about to arrest Carr, there were family members downstairs, and Sgt. Leach was on his way. (6 RT 1481.)

Both officers went back up stairs to the landing. Officer Baker was standing near the railing, while Officer Jacobs was standing on the right side of the second stair, nearest to the wall of the house. (6 RT 1483-1484.) Carr told the officers that if they did not get off her property, she was going back into her house. (6 RT 1484.) Officer Jacobs told Carr that she could not go back into her house. (6 RT 1484.) Carr grabbed the screen door and began to close it. (6 RT 1484.) Officer Baker put his foot in front of the screen door, grabbed Carr's right wrist, and told her she was under arrest for disturbing the peace. (6 RT 1484.) Carr yelled, "You're not going to arrest me." (6 RT 1484.)

Claude moved towards Officer Baker, and Officer Jacobs stepped in and grabbed Claude's left wrist. (6 RT 1631; 11 RT 2525.) Officer Jacobs told Claude that he was being arrested for delaying a police officer. (6 RT 1632.) While this was happening, Officer Baker decided to let go of Carr and assist Officer Jacobs. (6 RT 1485, 1636.) Carr returned to her apartment. (6 RT 1485.) Claude was pulling away from both officers. (6 RT 1636.) Officer Jacobs held Claude in a rear wristlock. (6 RT 1486.) Officer Baker reached for his handcuffs and attempted to handcuff Claude. (6 RT 1487, 1638.)

While the two officers were up on the landing with Carr and Claude, Delgado saw Woodruff go back into his apartment for a second. (8 RT 1829.) Woodruff looked at Delgado, and Delgado saw Woodruff holding a silver or chrome plated handgun in his right hand. (8 RT 1829.) When Woodruff saw Delgado, Woodruff put the gun behind his back slightly. (8 RT 1829, 1936.) Woodruff walked back to the staircase. (8 RT 1830.)

Delgado described Woodruff as looking "agitated," "mad," and "upset." (8 RT 1905.) According to Delgado, Woodruff was acting secretively; he was hiding and peeking, and he attempted to conceal the gun. (8 RT 1925.)

Menzies, who was still listening from her bathroom window heard Claude yell with anguish in his voice, in "a heartwrenching plea to his brother," "Don't" or "No, don't" or "No don't Steve."[3] (5 RT 1318, 1403, 1408, 1421.) According to Claude, Officer Jacobs' eyes looked surprised and startled, and then Officer Jacobs pushed Claude to the ground just before he heard a gun fired. (11 RT 2525, 2527, 2547, 2595; 18 CT 5105, 5114, 5130.) Delgado, who was still washing his car, saw Woodruff look up, peek over the railing, hold the gun up, and, without hesitation, shoot twice. (8 RT 1830, 1833, 1924, 1936; 10 RT 2268.) Delgado had not heard any other gunshots prior to Woodruff firing the shots. (8 RT 1831.)

Officer Baker heard a gunshot, so he let go of Claude, looked down at the bottom of the stairs and saw Woodruff leaning over the porch holding a handgun pointed in his direction. (6 RT 1487, 1645-1646.) Officer Baker saw Officer Jacobs falling into Carr's apartment; he thought Officer Jacobs was taking cover. (6 RT 1488, 1644.) Officer Baker unholstered his gun and returned fire, shooting at Woodruff three times. (6 RT 1489-1490, 1582, 1649, 1923, 10 RT 2269, 11 RT 2540.) Woodruff fired his gun at Officer Baker multiple times. (6 RT 1489.) Delgado saw Woodruff walk back to his home and shut the door after firing the gun. (8 RT 1830, 1834.)

After firing the third shot, Officer Baker retreated and realized that Officer Jacobs had been shot. (6 RT 1490.) Officer Jacobs was lying on his back, and blood was coming out of his nose "like a water faucet." (6 RT 1491; 10 RT 2269.) Officer Baker called 11-99, "officer down," on his

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[3] At trial, Claude denied saying, "Steve, no, don't," or anything to that effect. (11 RT 2538.)

radio. (6 RT 1492, 8 RT 1958.) Officer Baker tried to open Officer Jacobs' airway, but it was full of blood. He opened Officer Jacobs' shirt, took off his vest, and started chest compressions. (6 RT 1492-1493.) Officer Jacobs' pupils were "blown" and very large; he had no pulse, and his neck felt full of liquid. (6 RT 1493.) Officer Baker continued to do CPR until Lt. Mike Esparza, battalion chief of the Riverside Fire Department, arrived. (6 RT 1493, 8 RT 1961, 9 RT 2159.) Lt. Esparza did a medical check on Officer Jacobs. Officer Jacobs was not breathing, there was no pulse. There was blood in Officer Jacobs' nostril area and to the back of his head. (RT 2167.) During this time, Officer Baker did not know where Woodruff was, so he continued to protect the scene while Lt. Esparza continued CPR on Officer Jacobs. (6 RT 1494, 9 RT 2168.) Officer Jacobs did not respond to CPR. (9 RT 2168.) Lt. Esparza noticed that Officer Jacobs was in uniform, and his gun was still holstered. (9 RT 2169.) Lt. Esparza unholstered the gun and placed it on top of the television set in Carr's apartment. (9 RT 2170.)

Sgt. Leach, Officer Lavall Nelson and Officer Giovanni Ili arrived at the scene and were coming up to the house. (6 RT 1492, 10 RT 2189; 12 RT 2669.) Officer Baker yelled down that Officer Jacobs had been shot, and the suspect was still "97" meaning "at the location," and he told the arriving officers that the suspect was possibly in the lower landing or the downstairs apartment. (10 RT 2191; 12 RT 2671.) Sgt. Leach took Carr and Claude downstairs. (6 RT 1492.) Officer Nelson directed them to sit at the curb. (10 RT 2191.) As other police units arrived, Sgt. Leach began to establish a perimeter around the residence. (9 RT 1962.) Police officers and members of the SWAT Metro Team surrounded the house with guns drawn. (9 RT 1963, 10 RT 2192; 12 RT 2671, 13 RT 3012, 3017.) Detective Johnson got on the public address system and yelled, "Riverside

Police Department. We have the house surrounded, anybody inside the house come out." (13 RT 3018.)

Suddenly, someone yelled, "I'm coming out." (10 RT 2193; 11 RT 2624.) The door to the downstairs apartment flew open, and a .30 caliber M-1 carbine rifle[4] was thrown out the front door. (9 RT 1964, 10 RT 2194; 12 RT 2674, 14 RT 3186; 15 RT 3390.) Woodruff crawled out of the house onto the front lawn completely naked. (9 RT 1964, 10 RT 2194-2195, 2351; 12 RT 2675.) Officer Ili approached Woodruff, and Woodruff said, "I love you guys. God bless you." (12 RT 2677.) Officer Ili arrested Woodruff and placed him in a police car. (9 RT 1965; 12 RT 2675.)

Officer Steve Johnson told Sgt. Leach that Woodruff said at some point, "I'm sorry" or "I didn't mean to do this." (9 RT 2071.) Officer Nelson drove Woodruff to the detective bureau. (10 RT 2198.) Woodruff voluntarily said that he did not mean to shoot the cop. He panicked because they would not let his mom go. (10 RT 2198.) Woodruff said he did not mean to kill the officer. (10 RT 2199.)

Members of the SWAT Metro Team entered Woodruff's home to secure the house. (13 RT 3020, 3021; 14 RT 3132.) Woodruff's four year old daughter, Brianna, who lived with him, was found crying under the bed. (10 RT 2255, 2347; 13 RT 3023; 14 RT 3135-37.) Inside the bedroom where the child was hiding, officers found a rifle, bullets, a magazine and a hand guard to the rifle laying in the middle of the floor. (13 RT 3023.) A stainless steel Lorcin nine-millimeter handgun was located on top of the stove in Woodruff's kitchen.[5] (13 RT 3025; 14 RT 3196; 15 RT 3390.) A

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[4] A Speer nine-millimeter bullet was found jammed in the chamber. (13 RT 3187; 15 RT 3400.)

[5] The Lorcin nine-millimeter handgun was registered to Ventress Garret. (18 RT 3860.) It was stolen from his home in April 2000, and he

(continued...)

pair of boots, a shirt, a pair of jeans, red boxer shorts, a black leather jacket and glasses were laying on the kitchen floor near the gun. (13 RT 3033, 14 RT 3197.) A C.A.I. Sporter-101, .38 caliber assault rifle and a heat shield for the stock of the .30 caliber rifle Woodruff had thrown in the front yard were found on the shelf in the pantry. (13 RT 3198; 14 RT 3359; 15 RT 3390.) In the downstairs bedroom, .30 caliber rounds and a clip with eight .44 caliber rifle rounds were located on the floor inside the closet area. (14 RT 3199.) In the back yard of the apartment were an expended shotgun round and an expended .12 gauge shotgun shell. (14 RT 3200.) Two nine millimeter Speer headed casings were also found. (14 RT 3201-3202.)

During the initial crime scene investigation, officers noted a possible bullet strike to the wall. Photos were taken of the wall. (14 RT 3234.) One and half years later, a section of the north wall was cut out, and a bullet was found lodged inside the siding. (14 RT 3236; 16 RT 3551, 3555.) Apparently, the projectile went into the wall, hit the beam behind it, and then came back into the siding. (16 RT 3569.)

A pit bull was on the back patio of the house. (13 RT 3031.) The pit bull attacked a police K-9. An officer kicked the pit bull away, but the dog snarled and began to attack again. (13 RT 3031, 14 RT 3169-3170.) An officer shot the pit bull in the back of the head with a breaching round, killing the dog. (13 RT 3032.)

Woodruff was interviewed on January 13, 2001, at around 8:00 or 9:00 p.m. by Detectives Keith Kensinger and Bob Shelton. (12 RT 2839; 18 CT 5151-5212.) Earlier that day, Woodruff called his brother, John, and told him to come over because police officers were at Carr's house because

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(...continued)
filed a police report with the Pomona Police Department. (18 RT 3861-3862.)

she was playing her music too loudly again. (18 CT 5166.) When Officer Baker called for backup, Woodruff yelled, "You're gonna take her to jail for playin' her music?" (18 CT 5170.) At that point, Woodruff went into the house and retrieved a gun from the closet of his bedroom. (18 CT 5171.) Woodruff racked the gun. (18 CT 5174.) Woodruff stood by the front screen door inside his house and watched Officer Jacobs run upstairs. (18 CT 5174.) Woodruff already had the gun at that point. (18 CT 5176.) According to Woodruff, he ran out of the house and listened to the officers say they were going to take his mother to jail if she did not turn down her music. (18 CT 5176.) Woodruff had the gun, but no one could see his gun. (18 CT 5176.) Woodruff "waited and watched." (18 CT 5183; 13 RT 2936.) He then leaned over, pointed up the stairs and shot three times. (18 CT 5181.) Woodruff had to lean over the railing to see, and he put his arm out and shot. (18 CT 5159.) Woodruff said he "got mad." (18 CT 5188.) "It wasn't no accident that I shot the gun, it wasn't a accident that I shot the gun." (18 CT 5190.) Woodruff admitted that he meant to shoot at the officers. (18 CT 5199; 13 RT 2886.) Woodruff stated that Officer Jacobs was not holding his mother or his brother when Woodruff shot him; Jacobs was just standing there. (18 CT 5159.)

An autopsy was conducted on Officer Jacobs on January 15, 2001, by Dr. Mark Fajardo, a forensic pathologist with the Riverside Sheriff's Coroner's Office. (16 RT 3498; 18 RT 3909, 3911.) Officer Jacobs sustained a gunshot wound to his left nostril. (18 RT 3912-3913.) The bullet entered Officer Jacobs' nose, went through the midface, and entered the base of the brain where the brain sits upon the skull, the brain stem. (18 RT 3915.) The brain stem is responsible for the heart, lungs, and a person's consciousness. (18 RT 3915.) The bullet passed through a large portion of the brain stem, making a large hemorrhagic wound track and skimmed the underpart of the right occipital lobe. (18 RT 3915.) Fifty percent of the

brain stem was obliterated. (18 RT 3916.) The bullet stopped at the right side of the back of the skull. (18 RT 3916.) Officer Jacobs was rendered immediately unconscious. His heart and breathing stopped immediately. (18 RT 3917.) Dr. Fajardo opined that the cause of Officer Jacobs' death was a penetrating gunshot wound of the head. (18 RT 3919.)

A Speer bullet was removed from the back of Officer Jacobs' skull. (16 RT 3499.) Richard Takenaga, a senior criminalist for the Department of Justice laboratory, examined the firearms evidence in this case. (17 RT 3653-3654.) After comparing the bullets test fired from the Lorcin recovered from Woodruff's kitchen with the bullet taken from Officer Jacobs' skull, Takenaga opined that the Lorcin discharged the bullet taken from Officer Jacobs' skull. (17 RT 3673-3674.) Takenaga also examined the bullet found in the siding of the wall. (17 RT 3682.) The bullet was intact but fairly damaged, making comparison of the bullets difficult because the identifying marks were wiped out or obliterated from traveling through the fiber of the wall. (17 RT 3684-3685.) Takenanga opined that the characteristics observed from the bullet recovered from the wall were similar to test fires from the Lorcin pistol. (17 RT 3687, 3842, 3843.) The bullet recovered from the wall could not have been fired from a .40 caliber handgun such as the handguns carried by Officers Baker and Jacobs because the bullet from the wall had barrel rifling impressions. If the bullet had been shot through a .40 caliber gun, there would not have been any rifling impressions because the diameter of a .40 caliber gun is too large. (17 RT 3840.)

DEFENSE CASE

Stella Alvarez, Woodruff's elderly neighbor who admitted suffering from memory problems, testified that on the day of the shooting she was in her kitchen when she heard three shots. (19 RT 3949, 3957, 3963, 3969.) However, while she saw Woodruff run in and out of his home, she did not

see him with a gun in his hand. Alvarez did not see Woodruff fire any shots. (19 RT 3964.)

John Woodruff ("John"), Woodruff's brother, testified that prior to the date of the incident, police had been harassing his mother. (19 RT 4024-4025.) In the month and half before the shooting, police had been to her home about three or four times. (19 RT 4024.) He had even filed a complaint with internal affairs because of all the police harassment. (19 RT 4025.)

Woodruff testified in his own defense. (20 RT 4129-4322.) Woodruff described how his mother had suffered from a nervous breakdown and was hospitalized in the 1990s. (20 RT 4134.) The radio held sentimental meaning to Carr because her son John had given it to her. It calmed her down and made her happy. (20 RT 4154.)

According to Woodruff, the police were harassing his family. (20 RT 4145.) For instance, his brother, Jimmy Taylor, was arrested for urinating on a tree. (20 RT 4145-4146.) Officers had come to their house several times because of the radio. (20 RT 4159-4167.) Woodruff was also aware that Riverside Police officers had shot Tyisha Miller, a young African-American woman, to death, and he felt that they had murdered her. (10 RT 2322, 2362; 20 RT 4174-4175.) Woodruff then felt that the Riverside Police Department had no respect or regard for black people. (20 RT 4174.)

On the date of the shooting, Woodruff was inside cleaning his home. (20 RT 4168.) Carr was upstairs, and he did not know Claude was up there as well. (20 RT 4169.) Woodruff saw police pull up. Officer Baker asked Woodruff if he had called the police, and Woodruff told him that the next-door neighbor had called the police. (20 RT 4170.) Woodruff called his mother on the intercom to tell her police were there about the radio again, but Carr did not answer. (20 RT 4172.)

Woodruff went outside and saw Officer Baker speaking to Carr. He saw the officer call someone on his radio. (20 RT 4176.) At this point, Woodruff did not hear any arguing. (20 RT 4177.) Suddenly, he saw Officer Jacobs running fast. Officer Jacobs was in uniform, and he had a gun. (20 RT 4178.) Woodruff felt like something was wrong. (20 RT 4179.) Then Woodruff heard, "I thought you were going to wait for a sergeant," and "I ain't waitin' on nobody." (20 RT 4180.) At that point, Woodruff went and retrieved his gun because he was afraid there were "crooked, disrespectful and prejudiced" police at his house. (20 RT 4181.) Woodruff was worried about his mother because when she yelled, "You're hurtin' me," it was the most upset Woodruff had ever seen her. (20 RT 4184.) Chills went down his body, and Woodruff ran out of the house with a gun. (20 RT 4186.) Woodruff heard his mother scream like a "horror movie scream," so he ran across the porch, put the gun on the handrail, and saw Officer Baker. (20 RT 4191.) Woodruff denied saying, "Don't touch my momma." (20 RT 4191.) According to Woodruff, Officer Baker saw Woodruff's gun, so Officer Baker went for his gun. (20 RT 4191.) Officer Baker shot at Woodruff. (20 RT 4191.) When Officer Baker reached for his gun, Woodruff yelled, "No," then shot his gun because he feared for his life. (20 RT 4192, 4193.) According to Woodruff, he did not fire the first shot; he just shot over Officer Baker's head after Baker had shot at him. (20 RT 4191.)

Woodruff retreated to his home because he knew they would "come get him." (20 RT 4194.) Woodruff went into the kitchen and got his rifle off the rack in the pantry. (20 RT 4194.) He ran to the front door and saw police everywhere. (20 RT 4195.) Woodruff took off all of his clothes, yelled, "I give up," slid the gun out the door, and crawled out of the house. (20 RT 4195.)

Woodruff denied killing Officer Jacob, telling the jury: "I didn't kill that officer, you know...Officer Baker killed your son, Mrs. Jacobs, not me." (20 RT 4213.)

Dr. Curtis Booraem, a clinical psychologist, assessed Woodruff in March 2002. (21 RT 4512.) After a mental status examination and a malingering test, Dr. Booraem found Woodruff was able to participate in a psychological examination and was not malingering. (22 RT 4526- 4529.)

Dr. Booraem administered the Wechsler Intelligence Scale—Third Edition ("Wechsler"), the most frequently used instrument to measure intelligence in adults, to Woodruff. (22 RT 4530.) The test measures verbal ability and performance ability. (22 RT 4530.) Dr. Booraem testified that Woodruff's full-scale intelligence quotient ("IQ") was 66. (22 RT 4543.) Woodruff's verbal score was 68, and his performance score was 69. (22 RT 4543.) Dr. Booraem concluded that Woodruff was mentally retarded. (22 RT 4580.)

Dr. Booraem testified that this conclusion was consistent with Woodruff's school and medical history. For instance, Woodruff received mostly D's and F's in middle school and almost all F's in high school. (22 RT 4546, 4552.) When Woodruff was 16 years old, the Chino School district administered the Peabody Individual Achievement Test and Wide Range Achievement Test. Woodruff scored in the third grade four months level in math, first grade one-month level in reading, the fourth grade sixth month level in spelling, and the fourth grade four-month level in general information. These test scores were consistent with someone being mentally retarded. (22 RT 4550-4551.)

Dr. Booraem also felt that Woodruff's medical history, which indicated possible brain injury, was clinically significant. (22 RT 4561.) According to John, Woodruff's brother, and medical records, Woodruff was hit by a car in 1985, and he was disoriented, not responsive and

suffered a large scalp laceration, perianal laceration, blunt trauma to the face, head, chest, abdomen, and extremities. (22 RT 4557-4558, 4560-4562.)

During his interview of Woodruff, Dr. Booraem also indicated that Woodruff's affect was flat, which is an indication of a variety of mental illness or brain dysfunction. (22 RT 4571.) Dr. Booraem also testified that when Detective Kensinger interrogated Woodruff, Woodruff was emotional and distraught. These emotions decrease one's intellectual functioning, causing a person to say whatever the interviewer wants to hear. (22 RT 4582-3.)

Dr. Booraem testified that it would be inappropriate for the prosecution's expert to administer the Wechsler test to Woodruff several months after he had already taken the test. (22 RT 4538.) According to Dr. Booraem, if a person is suspected to be on lower end of the intelligence spectrum, below 75 or 80, this test is not the appropriate test to give. Rather, the Stanford-Binet Intelligence test should be administered. (22 RT 4536.)

Dr. Joseph Wuu, M.D. is an Assistant Professor at UC Irvine College of Medicine and Clinical Director of UC Irvine Brain Imaging Center, who specializes in Positron Emissions Tomography ("PET") Scan brain imaging. (21 RT 4428, 4333.) Dr. Wuu was retained by the defense to perform a PET scan to see if Woodruff had any kind of brain abnormality that would be consistent with brain injury. (21 RT 4335.) A PET scan shows brain function or activity by looking at the distribution of sugar in the brain and how much sugar is metabolized in the brain. (21 RT 4336, 22 RT 4716.)

In conducting his evaluation of Woodruff, Dr. Wuu relied on information from Dr. Booraem that Woodruff had been run over by a car, admitted to a hospital, was in an unresponsive state, was disoriented, and

suffered a scalp laceration. (21 RT 4352- 4353, 4417.) Woodruff was also allegedly assaulted and suffered a closed head trauma in 1989. (21 RT 4352-4353.) Finally, Woodruff has a family history of schizophrenia. (21 RT 4352-4353.)

Dr. Wuu performed a PET scan of Woodruff on July 16, 2002. (21 RT 4363.) Woodruff's scan was then compared to 56 controls of "normal" people who did not have any history of psychiatric or medical illnesses. (21 RT 4355.) Woodruff's PET scan revealed abnormalities in the temporal lobe areas of the brain, abnormal decreases in the interior cortex of the brain, as well as abnormal decreasing in white matter area of the central cortex. (21 RT 4366.) The temporal lobe is involved with the regulation of emotion in an appropriate fashion; therefore, abnormality in the temporal lobe is manifested by problems controlling anger and with processing information. (21 RT 4378.) Woodruff's scan also showed a hypo-frontal pattern or more activity in the front of the brain than in the back. (21 RT 4381.) According to Dr. Wuu, a person with hypo frontal pattern would have inability to make abstract inferences and think appropriately or correctly; he would tend to be more reactive than proactive. (21 RT 4382.)

Dr. Wuu opined that Woodruff's PET scan was consistent with brain damage and traumatic brain injury with persistent residual deficits. (21 RT 4366-4368, 4391.)

PROSECUTION'S REBUTTAL

Dr. Alan Waxman is a medical doctor, Director of Nuclear Medicine and Co-Chair of the Department of Imaging for Cedars-Sinai Medical Center in Los Angeles. (22 RT 4704.) Dr. Waxman reviewed the PET scans performed on Woodruff by Dr. Wuu, as well as the 56 normal controls with which Dr. Wuu compared Woodruff's scans. (21 RT 4715.)

Dr. Waxman opined that Woodruff's PET scan did not reveal any abnormalities of his brain function. (22 RT 4738, 4750.) According to Dr. Waxman, the PET scan just revealed classic typical morphing artifacts, and Woodruff had fewer areas of deviation than the average individual. (22 RT 4743- 4744.) There were no irregularities in Woodruff's brain; he has a normal brain. (22 RT 4750.)

Dr. Waxman criticized Dr. Wuu's conclusions because Dr. Wuu did not compare "apples to apples." (22 RT 4751.) Instead of comparing Woodruff to individual norms, Dr. Wuu combined the 56 controls to form a perfect brain, which is a warped atlas of information. According to Dr. Waxman, Dr. Wu's method almost guarantees abnormalities in every person tested. (22 RT 4751.) Dr. Waxman also pointed out that Dr. Wuu's scanning machine was antiquated and did not correct for variances in the shapes of skulls, but rather assumed that the skull was symmetrical. (22 RT 4728-4729.)

Dr. Craig Rath, a clinical psychologist, evaluated Woodruff in July 2002 to determine if he is mentally retarded. (23 RT 4862, 4864.) Dr. Rath found that he and Woodruff had a good rapport. Woodruff engaged in regular, ongoing conversation; he understood Dr. Rath's questions "perfectly," and he gave appropriate answers to the questions. (23 RT 4864.) Woodruff was an accurate historian about himself, going into great detail on some issues with very minor inaccuracies. (23 RT 4865.) After conducting a mental status examination, Dr. Rath found Woodruff moderately depressed about the situation and a little anxious about court, but was alert and oriented. Woodruff was not mentally ill. (23 RT 4866.)

Woodruff told Dr. Rath that he did not agree with his defense counsel's trial strategy of showing he is mentally retarded. Woodruff did not want to be labeled mentally retarded. Woodruff admitted that he did not try very hard when Dr. Booraem administered the Wechsler test the

first time. Woodruff told Dr. Rath that he would try harder this second time. (23 RT 4867.)

Dr. Rath administered the Wechsler test to Woodruff in August 2002.[6] (23 RT 4895-4896.) Woodruff's full-scale IQ was 78.[7] He scored a verbal quotient of 80 and a performance score of 79. (17 CT 4849; 23 RT 4901.) Dr. Rath also administered the Vineland Adaptive Scale. (23 RT 4898.) An average test score is 85 or above, borderline is 70 to 84, and mentally retarded is a score below 69. (23 RT 4898.) Woodruff received a score of 86 in the overall adaptive behavior composite on the Vineland Adaptive Scale. (17 CT 4850; 23 RT 4898.) Woodruff's score put him in the low average range. (17 CT 4850.) This was due mainly to lower writing and spelling scores, not because of his performance in auditory processing. (23 RT 4899.)

Dr. Rath concluded that while Woodruff has a relatively slight learning disability in mathematics, Woodruff is not mentally retarded. (23

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[6] Dr. Rath testified that despite taking the test five months earlier, there was no problem giving Woodruff the test a second time. Dr. Rath administered the Wechsler's test because it is the most widely accepted and recognized IQ test. Moreover, Woodruff had indicated that he did not put forth optimal effort the first time he was tested. (23 RT 4899.) Finally, Dr. Rath took into consideration that this was a retest when scoring the results. A retest can require a correction of 2.5 to 3.2 points if given within a couple of months. (23 RT 4900.) Usually, with retests, performance scores increase because the test taker performs the puzzles faster due to familiarity with the puzzle. However, Woodruff's performance scores did not increase. Instead, verbal and comprehension scores increased because Woodruff tried harder the second time, not because it was a retest. (23 RT 4900.)

[7] According to Dr. Rath, a score of 78 is an underestimated score for Woodruff because he does well on vocabulary and general information. (23 RT 4902.) Moreover, studies have shown that IQ tests underestimate individuals of color in their functioning by up to 15 to 16 points. (23 RT 4880.)

RT 4902.) Dr. Rath based his opinion on the results of Woodruff's IQ test, which was above the 69 cutoff for mental retardation, as well as Woodruff's adaptive skills. (23 RT 4902.)

Additionally, Woodruff's personal self-help skills, domestic ability, and degree of socialization were unimpaired. (23 RT 4902.) For instance, Woodruff's employment history does not support a finding that he is mentally retarded. Woodruff worked at Manpower Temporary Agency as an electrician. He also worked assembly in a factory, was a driver for the Press Enterprise newspaper, and was lead man for the newspaper, in charge of a crew that counted the papers. (23 RT 4873.) Woodruff also did commercial electrical work for Copper Lantern, which wired buildings such as Fantastic Sams and Mailboxes, Etc. Woodruff wired rooms, ran wires, fixed switches, installed receptacles, and did "troubleshooting." (23 RT 4875.) Woodruff also received disability for a back injury. He was ruled capable of handling his own money, so the disability checks went directly to him instead of a third party payee. (23 RT 4874.)

Moreover, according to Dr. Rath there were too many contra-indications to Woodruff being mentally retarded. (23 RT 4903.) Woodruff's abstract reasoning ability was much too high. (23 RT 4903.) For example, when Dr. Rath asked Woodruff, "Why do we study history?" Woodruff responded, "So that we can tell where we've been, learn who we are, and find out where we're going." (23 RT 4903.) Woodruff also told Dr. Rath that he read the Bible. (23 RT 4882.) This surprised Dr. Rath because his school records had indicated that Woodruff read at a third grade level. However, when questioned, Woodruff was able to speak in great detail about the Book of Matthew and various Biblical themes such as Jesus coming, repenting sins, and about Adam and Eve and original sin. (23 RT 4882.) Dr. Rath testified that it was inconsistent for someone who is mentally retarded to speak about these subjects in this manner. (23 RT

4882.) Woodruff was also able to write about 20 letters from jail. He knew how to buy stamps from the commissary, and that he needed thirty-seven cent stamps to mail a letter. (23 RT 4846, 4885.) Finally, Dr. Rath based his opinion on Woodruff's vocabulary. Woodruff used vocabulary words such as pelvis, jittering, catheter, defecate, impotent, jeopardy and harassing, which are not used by a mentally retarded person. (23 RT 4904.) Based on Woodruff's Wechsler score, Woodruff's employment history, adaptive and life skills and reasoning ability, Dr. Rath opined that Woodruff is not mentally retarded.

RETARDATION PHASE

In addition to evidence presented in the guilt phase, Woodruff recalled Dr. Booraem during the retardation phase. (26 RT 5298-5325.) Dr. Booraem testified that according to the American Psychiatric Association, mental retardation is defined as (1) an IQ score below 70 as determined by the administration of one of the accepted tests of general intelligence, and (2) the absence or deficiency in adaptive functioning as defined by poor academic performance, poor work performance, essential communication skills, adaptive behavior, psychometric behavior, and a person's actual behavior in the community. (26 RT 5298-5299.) If a person's IQ score is under 70, a deficiency in only two areas of adaptive behavior is required for a finding that a person is mentally retarded. (26 RT 5300.) Dr. Booraem opined that Woodruff was mildly retarded. (26 RT 5306.)

Dr. Booraem admitted that while Woodruff is able to communicate effectively, comprehend other's speech, speak with a normal vocabulary, care for himself and his home, has good social interpersonal skills and community resource skills, Woodruff has deficiencies in self-direction, academic performance and work performance. (26 RT 5302-5305.) For

example, Woodruff scored poorly, with a 65[8], on the Vineland adaptive behavior scale. (26 RT 5302.) Woodruff had no self-motivation, as evidenced by absence of follow through in the vocational domain. (26 RT 5304-5305.) He had a poor work history with many periods of unemployment. (26 RT 5304-5305.) Woodruff's academic history was low, and he was functioning at a third or fourth grade level or less in general information, spelling, reading comprehension and reading. (26 RT 5304-5305, 5308-5309.) Woodruff's middle school grades were mostly C's, D's and F's, while his high school grades were mostly F's. (26 RT 5308-5309.)

PENALTY PHASE

Prosecution's Evidence in Aggravation

Evidence of the presence of criminal activity by Woodruff which involved the use or attempted use of force or violence or the express or implied threat to use force or violence was also presented during the penalty phase trial. On September 7, 1988, Patricia Woodson lived with Woodruff in Riverside. (26 RT 5425.) Woodruff and Woodson got into a verbal argument which led to pushing and shoving, which began when Woodson first shoved Woodruff. (26 RT 5426.) Woodruff pushed Woodson into a wall. (26 RT 5426.) He pushed her more than one time. (26 RT 5627.) At some point, Woodruff pushed Woodson, she fell back, and her arm went through a window. (26 RT 5427.) Woodson went to the hospital, and she required stitches, but she refused the treatment because she was scared of needles. (26 RT 5429.)

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[8] According to Dr. Rath, however, Woodruff scored an 86 on the overall adaptive behavior composite on the Vineland test. (17 CT 4850; 23 RT 4898.) Woodruff did score a 65 on the communicaiton domain of the Vineland test. (17 CT 4849.)

On May 24, 1989, Clinton Williams and Arnold Palmer went to Riverside to see Palmer's probation officer. (26 RT 5440.) Palmer's sister, Tamara, and other family members including children went with them to go shopping. (26 RT 5467.) The group stopped at Western Liquor on University Avenue. (26 RT 5452, 5468.) Palmer and Williams got out of the car, and a girl called Palmer to come behind the store with her. (26 RT 5468.)

Woodruff, his cousin by marriage, Dennis Smith[9], another friend who was passed out in the back of the car, and two children were also at Western Liquor. (26 RT 5501, 5502, 5503.) According to Tamara, Smith got out of his car, asked Palmer why he went to the back of the store with the girl, and they got into an argument. (26 RT 5468, 5469.) Smith claimed that Palmer and Williams took money out of Smith's hands. (26 RT 5503.) Williams and Smith exchanged punches. (26 RT 5469.) Palmer then hit Smith, and Smith, in a daze, hit the ground. (26 RT 5470.)

Next Smith jumped out, pulled an AK-47 assault rifle out of his car, and started shooting at Palmer and Williams. (26 RT 5471, 5504.) In the meantime, Palmer and Williams went to their trunk to look for a gun. (26 RT 5454.) Smith testified that he started shooting only after Williams and Palmer started shooting at him. (26 RT 5504.) Williams was shot in the stomach, but he did not see who shot him. (26 RT 5454.) Palmer told Tamara that his arm was going to fall off. (26 RT 5471.) Tamara told Palmer to get in the car, but Palmer declined and ordered her to lock the car. (26 RT 5472.) Woodruff[10] stood in front of Tamara's car and started

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[9] Smith, who was in custody for domestic violence at the time of trial, was granted immunity from prosecution for the Western Liquor case and testified for the prosecution. (26 RT 5495, 5502.)

[10] Smith testified that Woodruff was there, but Smith was not paying attention to him. (26 RT 5507.) Tamara testified that the person who stood (continued...)

shooting at Palmer. (26 RT 5472, 5489.) Tamara begged him to stop shooting, as children were in the car. Woodruff responded, "F—those kids," and continued shooting. (26 RT 5472.)

Palmer ran off toward University. (26 RT 5472.) Smith and Woodruff jumped into their car and drove away. (26 RT 5473.) Woodruff was grazed by a bullet on his left shoulder.[11] (26 RT 5507.) Tamara jumped out of her car to find Williams in the trunk of her car with a bullet wound to his stomach. Tamara left Williams in the trunk and drove down University to try to find Palmer. (26 RT 5473.) Tamara found two police officers, told them about the shooting, and took Williams out of the trunk. (26 RT 5473.) Tamara returned to the liquor store to follow the trail of blood and try to find her brother. (26 RT 5473.) Tamara found Palmer had been shot and was "in bad condition." (26 RT 5473-5474.) Palmer died from his injuries. (26 RT 5474.) Smith and Woodruff went to Arizona. (26 RT 5509.)

On May 29, 1989, Sgt. Sam Powers of the Maricopa County, Arizona Sheriff's Department performed a traffic stop where Smith was arrested for providing false information. (27 RT 5564.) Woodruff was the passenger in the car. (27 RT 5564.) Sgt. Powers searched the car and found a Carter Arms .38 caliber revolver five shot on the floorboard of the car where Woodruff was sitting. (27 RT 5566.) Underneath Woodruff's seat, the officer recovered a .30 caliber M-1 carbine that had been taken apart. (27 RT 5566.) The barrel had been sawed off, the serial number ground off, and other parts of the gun were found inside a blue bag that was found at

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(...continued)
in front of her car and shot at them was not Smith, who she had seen previously because he lived near her. (26 RT 5472, 5479.)

[11] DA Investigator Silva took a photograph of Woodruff in jail that showed a scar above his left triceps. (27 RT 5575.)

Woodruff's feet. (27 RT 5566.) Woodruff was arrested for having a concealed weapon and for altering a firearm. (26 RT 5509; 27 RT 5566.) The charges were later dropped. (27 RT 5569.)

Paul Spicer testified that he was robbed and assaulted by Woodruff and his cohort on December 8, 1993, outside of Pizza Plus in Rubidoux. (26 RT 5380-5381, 5396-5397.) Spicer, who lives across from Pizza Plus, was ordering a pizza when Woodruff entered the store and looked at Spicer, who was dressed nicely and wearing a gold chain and diamond rings. (26 RT 5381.) Spicer was walking across the street to his house when Woodruff and another man ran up to him, snatched his necklace, punched him in the face, threw him to the ground, and started kicking him. (26 RT 5381.) Spicer fractured his wrist, and his bag and money were taken from him. (26 RT 5381.) Ben Lococo, the owner of Pizza Plus, knows Woodruff because his brothers and cousins worked for him. (26 RT 5396.) Lococo heard a commotion in the parking lot, ran outside, and saw Woodruff and Spicer outside. (26 RT 5381, 5397.) One of Lococo's employees called 9-1-1, and Spicer went to the hospital. (26 RT 5282, 5397.)

On February 20, 1999, Jurupa Valley Deputy Sheriff Mike Dittenhofer received a call from Melvina Crowden to help her move out of her apartment peacefully. (26 RT 5411-5412.) Apparently, Woodruff was upset with Crowden, and he had shown her a gun in his waistband. (26 RT 5412.) Deputy Dittenhofer went to Crowden's apartment and saw Woodruff in the parking lot. (26 RT 5413.) Knowing Woodruff had a gun, the deputy asked Woodruff if he could search him for officer safety. (26 RT 5413.) Woodruff consented, and Deputy Dittenhofer found a .380 caliber Kahrarms blue steel semiautomatic handgun in Woodruff's front waistband. (26 RT 5413-5414.) A magazine with eight bullets was also

found inside a holster. (26 RT 5414.) Woodruff was arrested for carrying a concealed weapon. 26 RT 5415.)

On December 23, 1999, Freddy Williamson, a friend of Woodruff and Dennis Smith,[12] testified that he went to 850 East Monterey Avenue in Pomona with Mario Brooks and some girlfriends to buy marijuana. (26 RT 5520, 5523, 5558; 27 RT 5571-5572.) One to four black males, including Woodruff, came out of the house and surrounded Williamson's van. (26 RT 5526-5527; 27 RT 5559.) Brooks was sitting in the passenger's side when Woodruff, with whom Brooks had argued two to three days earlier over a girl, approached the van and attempted to hit Brooks with an object. (26 RT 5525, 27 RT 5559, 5572.) One to two males tried to open the side door of the van and pull Brooks out. (27 RT 5559.) Brooks moved to the driver's side of the van and attempted to drive away. (26 RT 5526; 27 RT 5559.) Woodruff and two other men started chasing after Brooks and shot at the van. (26 RT 5527; 27 RT 5572, 5573.) Brooks got shot and crashed into a car. (26 RT 5528; 27 RT 5559.)

In addition to this evidence of past violence, the impact of Woodruff's crimes on Officers Jacobs and Baker's families was also presented at the penalty phase trial. Tammy Jacobs met Jacobs in 1995, and they were married in July 1998. (27 RT 5594, 5595.) Jacobs was funny, caring and chivalrous. (27 RT 5595.) He was working on his Master's Degree when he was killed. (27 RT 5597.) Jacobs had been promoted to detective, but still had to work patrol because of a shortage of officers. (27 RT 5601.)

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[12] While Williamson denied that he told DA Investigator Silva that Woodruff admitted that he was involved in a shooting at Western Liquor (26 RT 5522), Investigator Silva testified that Williamson told him during an interview that Woodruff had admitted that he and Smith were involved in the Western Liquor shooting. (27 RT 5574.) Woodruff told Williamson that he was in a "shoot out" with gang members and suffered a graze to the left shoulder or arm during the shootout. (27 RT 5574.)

Jacobs' mother, Cathy Miller, described Jacobs as an easy going, fun, and active child. (27 RT 5607.) He had been interested in becoming a police officer since he was nine years old because Jacobs' grandfather was a police officer. (27 RT 5609.) Miller was a single mother to Jacobs and his brother and sister. (27 RT 5611.) Jacobs was a good role model for his siblings and helped take care of them. (27 RT 5611.)

Tammy has a son from a previous relationship, Nicholas, who has Attention Deficit Disorder and is on medication. (27 RT 5596.) Jacobs and Nicholas became very close, and with Jacobs' help, Nicholas' grades and behavior improved. (27 RT 5596.) Since Jacobs' murder, Nicholas has continued on a downward spiral. (27 RT 5596.) Nicholas is very angry, misbehaves constantly, is now in Special Education classes, and has been prescribed depression medication. (27 RT 5597.)

Jacobs and Tammy also have a daughter, Rachel, who was born in May 2000. (27 RT 5597.) Rachel was only seven months old when her father was murdered. (27 RT 5597, 5616.) At the time of trial, Rachel had just begun to realize that she was different from other children because her dad was dead. (27 RT 5598.) Rachel wants to go to heaven to speak to her daddy, and she always wants a helium balloon so she can fly up to see her daddy. (27 RT 5598.) Tammy testified that the hardest part about Jacobs' death is having to raise a daughter who has no memory of her father. (27 RT 5606.)

Defense Evidence in Mitigation

Woodruff's brother, John, testified that Woodruff was born prematurely, at five months, and had to be hospitalized for two months after birth. (27 RT 5635.) According to John, Woodruff had a happy, normal childhood that included sports and school. (27 RT 5637.) Their family was close; Woodruff was a fun and generous brother. (27 RT 5640-5641.)

Woodruff was run over by a car when he was younger. He was knocked unconscious and spent a month in the hospital. (27 RT 5638.) As a result of the accident, Woodruff had to learn to walk again. (27 RT 5638.)

Despite being five years older than John, Woodruff could not help John with his homework because Woodruff could not read or write.[13] (27 RT 5637-5638.) Woodruff was either kicked out or dropped out of high school. (27 RT 5639.) When they were older, Woodruff needed help filling out forms. While he could read some of the forms, he could not comprehend the forms. (27 RT 5646.)

Their mother, Carr, was diagnosed with paranoid schizophrenia. (27 RT 5642.) Woodruff visited her often because he was worried about her mental problems, and he moved into the apartment downstairs to care for her. (27 RT 5656.) Carr distrusted the police, and the entire family felt that the police harassed their family. (27 RT 5657.) Woodruff was concerned when he called John on January 13, 2001. He was afraid that Carr would not listen to police, they would abuse her, hit her, or take her to jail. (27 RT 5658.)

John and his wife, Chanda, both testified that Woodruff has a great relationship with his daughter, Brianna. (27 RT 5650, 5672.) He shows her a lot of love and affection, and he has never been violent with her. (27 RT 5650, 5672.) Woodruff also had a loving and kind relationship with his adopted son, Pete Smith. (27 RT 5650, 5671.)

Dr. Joseph Wu, who previously testified in the guilt phase that Woodruff suffered brain injury to frontal and temporal lobes, expounded on

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[13] John later testified, however, that Woodruff wrote letters to their mother when Woodruff was going to school at the Boys' Republic. (27 RT 5639.)

this testimony by explaining that damage to these lobes increase the likelihood of having an impairment on the ability to regulate emotions. (27 RT 5676.) The traditional role that the frontal lobe plays is to inhibit inappropriate aggression. (27 RT 5676.) When under stress, Woodruff might be unable to respond proportionately to the stressor. (27 RT 5678.) However, Woodruff is not going to have a disproportionate response every time he is provoked. (27 RT 5678.)

Dr. Curtis Booraem testified that Woodruff's reactionary capacity in an emotional situation is that of a nine or ten year old in the fourth or fifth grade. (27 RT 5683.) Someone at this age would act impulsively, would not make good decisions, and would be reactive to the environment, or the person responds emotionally either through fight or flight instead of intellectually. (27 RT 5684-5685.) Dr. Booraem, based on the records he reviewed, opined that Woodruff had a mental defect such that he could not appreciate the criminality of his conduct, and it was impossible for him to conform his conduct to the requirements of the law in the same way a normal person would. (27 RT 5687.) According to Dr. Booraem, if Woodruff did engage in the shooting, he did not appreciate that what he was doing was criminal; Woodruff was just reacting. (27 RT 5687.)

ARGUMENTS

A. PRE-TRIAL ISSUES

1. THE TRIAL COURT PROTECTED WOODRUFF'S RIGHTS TO A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS.

Woodruff contends the trial court erred in claiming it lacked authority to remove defense counsel for ineffective assistance of counsel. (AOB 40-43, Claim A.1.a.) Woodruff also asserts that the court's inquiry into whether Woodruff wanted to continue with Attorney Mark Blankenship as his counsel was inadequate. (AOB 45-48, Claim A.1.c.) Finally, Woodruff argues that the trial court abused its discretion when it allegedly discouraged defense counsel from seeking second counsel, and Blankenship was ineffective for failing to request co-counsel. (AOB 43-45, claim A.1.b.) The trial court understood its authority to remove an incompetent defense counsel, but found Blankenship had provided effective assistance of counsel. The trial court adequately inquired into Woodruff's choice of counsel and took valid waivers from Woodruff that he wanted to continue with Blankenship as counsel. Finally, the trial court properly set forth the standards for obtaining second counsel, and defense counsel was not ineffective for choosing not to request co-counsel. Accordingly, Woodruff's contentions should be rejected.

a. Factual and procedural background

The trial court noted that this case was a "unique situation" because Defense Counsel, Mark Blankenship, was not appointed nor officially retained by Woodruff, but rather, Blankenship was representing Woodruff pro bono. (A RT 34.) Blankenship indicated that he was "retained...[] [but] not paid." (A RT 40.) On September 14, 2001, the prosecution brought a motion to "Request Inquiry And Waiver Regarding Attorney's Qualifications." (A RT 29.) In making the request, the prosecutor wanted

to make clear that he was not trying to remove Blankenship nor interfere with Woodruff's choice of counsel. (A RT 29.) The prosecutor was simply concerned that certain events that would normally occur during capital litigation were not taking place, so the prosecutor requested that the trial court get reassurances from Woodruff that he understood Blankenship's qualifications to try a capital case and would still like for Blankenship to represent him with knowledge of those qualifications. (A RT 30.) Blankenship called the prosecutor's motion "specious," and argued it infringed on Woodruff's constitutional right to counsel of his choice. (A RT 31.)

Blankenship then set forth his qualifications. He received his undergraduate degree at Yale University, and his law degree from Tulane University School of Law. (A RT 32.) Blankenship had been practicing law since 1987. (A RT 33.) Blankenship admitted that he had been suspended from the California State Bar, and had been on probation and honored the terms of probation.[14] (A RT 33.) According to Blankenship, Woodruff was aware of these issues. (A RT 33.) Blankenship had not handled a capital case, but he handled a variety of criminal trials including an "attempted 187, a bunch of 245's, and 422," in which the defendants in those cases were acquitted. (A RT 33.)

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[14] On August 30, 2011, Woodruff filed a request in this Court for judicial notice of State Bar records for defense counsel Blankenship, arguing the records are relevant to the claims of ineffective assistance of counsel he raises in his direct appeal. (Req. Jud. Not. at 2; see AOB claims A1-4, B5, B7 and C2.) On September 14, 2011, Respondent filed a response opposing this request because claims on direct appeal are necessarily limited to the record on appeal. Any judicial notice should take place in the trial court or in conjunction with a petition for writ of habeas corpus, and a request for judicial notice on appeal on this issue represents an improper attempt to go outside the four corners of the record on appeal.

The trial court addressed Woodruff and told him to "pay very close attention" to this hearing because while Blankenship's academic credentials were excellent, the trial judge was not familiar with Blankenship because he had specialized in civil litigation. (A RT 36.) The trial court questioned Blankenship on why he had not filed certain motions normally filed in capital cases such as a motion pursuant to section 955, a motion for a change of venue, and a *Pitchess*[15] motion. (A RT 35-37, 42, 43.) Blankenship answered that he was not a "believer in filing those kinds of motions because [he was] a person that is seeking to try the case in front of a jury. So that's a strategical decision on my part." (A RT 37.) Blankenship stated that he preferred not to show his hand to the prosecutor but rather wait until trial, and also he did not feel motions in criminal cases were worthwhile. (A RT 37-38.) Blankenship also stated that he had just represented Woodruff's mother, Carr, at her trial so he was very familiar with the facts of the case and the people involved. (A RT 38.) Blankenship had not requested a change of venue because he believed the issues in this case, namely the use of force by the Riverside Police Department, were relevant to the Riverside community and thus should be tried in Riverside county. (A RT 42.) With respect to the *Pitchess* motion, Blankenship stated he intended to file that motion.[16] (A RT 43.) The trial court also asked Blankenship if he intended to present an insanity defense. (A RT 44.) Blankenship responded, "I'm absolutely confident that Mr. Woodruff is 100 percent competent," and "not insane. I don't think he has an insanity defense at all." (A RT 44.)

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[15] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

[16] Woodruff did file a *Pitchess* motion, and it was denied. (B RT 459.)

The trial court again addressed Woodruff because it was concerned that Blankenship had done little to investigate any of the factors set forth in section 190.3. (A RT 45.) The trial court also explained that section 987.9 made money available to indigent defendants to fund investigations. (A RT 46-49.)

The trial court also asked Blankenship if he was going to bring in co-counsel. (A RT 39.) The trial court instructed that *Keenan*[17] counsel can be appointed in certain circumstances. (A RT 39-40.) Blankenship informed the court that he had been in touch with some people who might serve as co-counsel but he had not yet evaluated these inquiries or found a person to serve as co-counsel. (A RT 41.)

The trial court explained at length the facts of two cases, *Smith v. Superior Court* (1968) 68 Cal.2d 547 and *People v. Escarega* (1986) 186 Cal.App.3d 379, which dealt with a trial court's power to remove counsel of defendant's choice because of the ineffective assistance of counsel or counsel's lack of experience in criminal matters. (A RT 51-59.) The trial court then informed Woodruff that he had the right to be represented by an attorney, and if he could not afford to hire an attorney, the court would appoint one for him. (A RT 59.) The trial court asked Woodruff if he understood these rights, and Woodruff answered, "yes." (A RT 60-61.) The trial court later asked, "Based on what I have told you, is it your desire to proceed with Mr. Blankenship representing you?" Woodruff responded, "Yes. I'll assure you Judge, that, you know, there is a higher up that sent Mr. Blankenship to me, and he must be the one to represent me, you know, because there's someone over you and that you work for. . . " (A RT 62-63.)

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[17] *Keenan v. Superior Court* (1982) 31 Cal.3d 424.

The trial court again addressed Woodruff and expressed concern because trial counsel was not familiar with the process to get funds to conduct investigations and had not received any funds, while this would be a fundamental concept for other lawyers who are experienced in capital litigation. (A RT 66.) Woodruff indicated that he understood this. (A RT 67.) The trial court reinforced to Woodruff that his life was "on the line," so it would appoint an attorney who was experienced in handling death penalty cases at no cost to Woodruff, as Blankenship's experience in criminal law was not "extensive." (A RT 67, 68.) Woodruff said he understood this. (A RT 68.) The trial court finally asked, if Woodruff wanted to "continue to proceed with Mr. Blankenship representing [him]." Woodruff answered, "If possible, yes." (A RT 68.) Woodruff asked the trial court if it would be trying his case as well, to which the trial court answered affirmatively. (A RT 69.) Woodruff responded, "Well, I'm satisfied." (A RT 69; 2 CT 417.)

On March 18, 2002, the prosecutor again expressed concern about Blankenship's representation of Woodruff and requested that the trial court obtain a waiver from Woodruff. (1 RT 429-433.) The trial court explained to Woodruff that many motions normally filed in death penalty cases such as motions to attack the makeup of the grand jury, motion to challenge the sufficiency of evidence presented to the grand jury, and motion for a change of venue, have not been filed by Blankenship in this case for tactical reasons. (1 RT 440.) Additionally, the trial court noted that Blankenship still had not requested funds to retain experts or indicated if experts were even considered. (1 RT 440.) Blankenship again gave explanations or tactival reasons for why he chose not to file certain motions. (1 RT 443-444.) The trial court asked Woodruff if he was "comfortable with the way [his] case is being handled thus far?" Woodruff answered, "Yes." (1 RT 451.)

The trial court, citing *People v. McKenzie*, (1983) 34 Cal.3d 616, stated that "there's no question in my mind that the representation being provided thus far to Mr. Woodruff is zealous, and thus far, within the bounds of the law." (1 RT 452.) The trial court noted, "the Court feels that there may well be sound, tactical reasons behind the failure to pursue certain motions...All of these, in my opinion, had such motions been brought they would have been denied." (1 RT 455-456.) "Mr. Woodruff has made, in my estimation, a sound and informed decision to continue on with counsel of his choice, and I cannot conclude that there has been ineffective assistance at this point." (1 RT 456-457.)[18]

b. The trial court acted within its discretion when it allowed Blankenship to continue to represent Woodruff

Woodruff argues that the trial judge misapprehended its authority to remove Blankenship for ineffective assistance of counsel. (AOB 40-43.) He also contends that the trial court made an inadequate inquiry into whether Woodruff wanted to continue with Blankenship as counsel. (AOB 45-48.) To the contrary, the trial court did not err in understanding its duties or fail to make an adequate inquiry. Rather, the trial court correctly found that Blankenship was providing constitutionally effective assistance of counsel, and therefore, it would not remove Blankenship as counsel, as Woodruff had affirmed on multiple occasions, after being advised of his constitutional rights, that he wanted to be represented by Blankenship, the

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[18] Woodruff also waived any potential conflict of interest because Blankenship represented his mother at her misdemeanor trial (B RT 483-484) and because Blankenship represented a trial witness, Dennis Smith (B RT 485, 585). (See, *People v. McDermott* (2002) 28 Cal.4th 946, 990 [the right to conflict-free counsel can be waived in capital cases].) As discussed herein in Argument A.3, Woodruff's waiver of conflict free counsel was knowing, intelligent, and voluntary.

counsel of his choice. Under the circumstances, the trial court did not abuse its discretion.

A criminal defendant has a right to "assistance of counsel" under the Sixth and Fourteenth Amendments of the federal Constitution (*United States v. Gonzalez–Lopez* (2006) 548 U.S. 140, 126 S.Ct. 2557, 2561, 165 L.Ed.2d 409; *McMann v. Richardson* (1970) 397 U.S. 759, 771, fn. 14, 90 S.Ct. 1441, 1449, fn. 14, 25 L.Ed.2d 763; *Reece v. Georgia* (1955) 350 U.S. 85, 90, 76 S.Ct. 167, 170, 100 L.Ed. 77; *Powell v. Alabama* (1932) 287 U.S. 45, 71, 53 S.Ct. 55, 65, 77 L.Ed. 158), and under article I, section 15 of the California Constitution (*People v. Jones* (2004) 33 Cal.4th 234, 244). The right to assistance of counsel includes the right to "effective assistance of counsel" (*Strickland v. Washington* (1984) 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674; *People v. Ledesma* (1987) 43 Cal.3d 171, 215), and a "correlative right to representation that is free from conflicts of interest" (*Wood v. Georgia* (1981) 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220; *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 612, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Subject to certain limitations, the Sixth Amendment also guarantees a criminal defendant the right to be represented by counsel of his choice. (*Wheat v. United States* (1988) 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140.) "'[T]he Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.' " (See *Gonzalez–Lopez*, *supra*, 126 S.Ct. at p. 2561, quoting *Caplin & Drysdale, Chartered v. United States* (1989) 491 U.S. 617, 624–625, 109 S.Ct. 2646, 105 L.Ed.2d 528.) In addition, this Court has recognized that, "once counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less

inviolable than if counsel had been retained. To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused." (*Smith v. Superior Court* (1968) 68 Cal.2d 547, 562.)[19]

However, under California law, a trial court may relieve counsel for a defendant, on its own motion and over the objection of the defendant or his counsel, "'to eliminate potential conflicts, ensure adequate representation, or prevent substantial impairment of court proceedings.'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1187, citing *People v. McKenzie* (1983) 34 Cal.3d 616, 629, disapproved on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364–365.) But California decisions "limit severely the judge's discretion to intrude on defendant's choice of counsel in order to eliminate potential conflicts, ensure adequate representation, or serve judicial convenience." (*Maxwell v. Superior Court*, *supra*, 30 Cal.3d at p. 613.) Our state courts have rejected *Wheat*'s "paternalistic treatment" of a criminal defendant's right to counsel of his choice, and make the defendant the "master of his own fate." (*Alcocer v. Superior Court* (1988) 206 Cal.App.3d 951.) Under the California Constitution, "the involuntary removal of any attorney is a severe limitation on a defendant's right to counsel and may be justified, if at all, only in the most flagrant circumstances of attorney misconduct or incompetence when all other judicial controls have failed." (*Cannon v. Commission on Judicial*

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[19] In *Smith*, the trial court summarily dismissed the defendant's appointed counsel, with whom the defendant had an established attorney-client relationship, based on its belief that counsel was "incompetent" to represent the defendant. The *Smith* court held that the trial court exceeded its inherent and statutory authority in ordering the attorney's removal, and that its order also constituted "'an unreasonable interference'" with the defendant's constitutional right to counsel. (*Smith, supra*, 68 Cal.2d. at pp. 561–562.)

Qualifications (1975) 14 Cal.3d 678, 697.) California courts recognize that the right of a defendant "to decide for himself who best can conduct the case must be respected wherever feasible." (*Maxwell v. Superior Court*, *supra*, 30 Cal.3d at p. 615; *People v. Easley* (1988) 46 Cal.3d 712, 729 [criminal defendant may knowingly and intelligently waive his right to conflict-free counsel].) "[T]he state should keep to a necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best ... [and] that desire can constitutionally be forced to yield only when it will result in significant prejudice to the defendant ... or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case." (*People v. Crovedi* (1966) 65 Cal.2d 199, 208; *People v. McKenzie*, *supra*, 34 Cal.3d at pp. 629–630.) On appeal, a trial court's decision regarding removal of counsel for an indigent criminal defendant is reviewed for abuse of discretion. (*People v. Alexander* (2010) 49 Cal.4th 846, 873; *People v. Cole, supra*, 33 Cal.4th at p. 1187.)

Here, contrary to Woodruff's assertion that the trial court felt it "lacked authority to do anything about Woodruff's representation by incompetent counsel" (AOB 40), the trial court clearly understood its role to balance Woodruff's right to counsel of his choice and his right to effective assistance of counsel. (1 RT 452, 454.) The trial court, citing the United States Supreme Court's decision in *Wheat v. United States, supra*, 486 U.S. 153, explained that that the Sixth Amendment was "concerned more with the effective representation than with preferred representation" and "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." (1 RT 454.) The trial court went on to find that Blankenship's

representation at that point in the trial had not been ineffective. The trial court found that Blankenship had tactical reasons for not pursuing certain motions that are normally filed in capital cases. (1 RT 455-456.) Blankenship explained that filing certain motions were an "exercise in futility." (1 RT 443.) Moreover, Blankenship had read the grand jury testimony and wanted to impeach those witnesses at trial rather than argue about them at pretrial motions. (1 RT 443-444.) Blankenship chose not to file a section 995 motion because he preferred to try his case in front of the jury and not telegraph his trial strategy to the prosecution before trial. (A RT 37.) A change of venue motion was not filed because Blankenship felt that the issues involved in the case such as the use of force by Riverside Police needed to be tried by the community in which this incident occurred. (A RT 42.) Therefore, the trial court properly found that Blankenship had not been deficient, as it is not deficient performance for a criminal defendant's counsel to make a reasonable tactical choice. (*People v. Thompson* (2012) 49 Cal.4th 79, 97; *Strickland v. Washington* (1984) 466 U.S. 668, 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674.)

Moreover, trial counsel's performance in deciding against making the various motions did not prejudice Woodruff because as the trial court noted, those motions, had they been brought, would have been denied. (1 RT 456.) It is clear from the record that the trial court understood that it had the discretion to remove Blankenship for ineffective assistance of counsel, but the trial court did not find counsel to have provided incompetent representation. The trial court found that Blankenship's representation had been "zealous, and thus far, within the bounds of the law." (1 RT 452.)

Moreover, the trial court made an adequate inquiry regarding whether Woodruff wanted Blankenship to represent him even after the trial court and the prosecutor advised Woodruff of Blankenship's inexperience in

criminal law, generally, and capital litigation, in particular, as well as counsel's failure to file certain motions. As the trial court found, Woodruff made a "sound and informed decision" to continue with Blankenship. To be valid, however, "waivers of constitutional rights must, of course, be 'knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences[,]' ... [and] must be unambiguous and 'without strings.' " (*People v. Bonin* (1989) 47 Cal.3d 808, 837.) Before it accepts a waiver offered by a defendant, the trial court need not undertake any "particular form of inquiry ..., but, at a minimum, ... must assure itself that (1) the defendant has discussed the potential drawbacks of [potentially conflicted] representation with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences of [such] representation in his case, (3) that he knows of his right to conflict-free representation, and (4) that he voluntarily wishes to waive that right." (*Ibid.*)

Here, Woodruff was fully advised of his right to the effective assistance of counsel, the perceived shortcomings of his present counsel, and Woodruff's right to the appointment of another attorney if he wished. The trial court addressed Woodruff and told him to "pay very close attention" to this hearing because while Blankenship's academic credentials were excellent, the trial judge was not familiar with Blankenship because he had specialized in civil litigation, had not filed certain common motions, and had not requested funds to conduct investigations. (A RT 36, 45-49.) The trial court explained to Woodruff that it was within the trial court's power to remove counsel if counsel was ineffective or counsel lacked experience in criminal matters. (A RT 51-59.) The trial court then informed Woodruff that he had the right to be represented by an attorney, and if he could not afford to hire an attorney, the court would appoint one for him. (A RT 59.) The trial court asked Woodruff if he understood these

rights, and Woodruff answered, "yes." (A RT 60-61.) Woodruff, time and time again, expressed his preference that Blankenship remain his attorney. (A RT 59-61, 69; 1 RT 451.) Woodruff assured the trial court that he desired to proceed with Blankenship. (A RT 61-62.) The trial court later addressed Woodruff and expressed concern because trial counsel was not familiar with the process to get funds to conduct investigations and had not received any funds, while this would be a fundamental concept for other lawyers who are experienced in capital litigation. (A RT 66.) Woodruff indicated that he understood this. (A RT 67.) The trial court reinforced to Woodruff that his life was "on the line," so it would appoint an attorney who was experienced in handling death penalty cases at no cost to Woodruff, as Blankenship's experience in criminal law was not "extensive." (A RT 67, 68.) Woodruff said he understood this. (A RT 68.) The trial court finally asked, if Woodruff wanted to "continue to proceed with Mr. Blankenship representing [him]." Woodruff answered, "If possible, yes." (A RT 68.) Woodruff continued, saying he was "satisfied" that Blankenship was his defense counsel. (A RT 69.)

On March 18, 2002, after again explaining to Woodruff that there was concern that Blankenship had not filed motions normally filed in death penalty cases such as motions to attack the makeup of the grand jury, motion to challenged the sufficiency of evidence presented to the grand jury, and motion for a change of venue, that Blankenship still had not requested funds to retain experts or if experts were even considered (1 RT 440), the trial court asked Woodruff if he was "comfortable with the way [his] case is being handled thus far?" Woodruff answered, "Yes." (1 RT 451.)

The trial court acted within its discretion when it found that Woodruff had made a "sound and informed decision to continue on with counsel of his choice." (1 RT 456-457.) Woodruff's waiver was "knowing, intelligent

[] done with sufficient awareness of the relevant circumstances and likely consequences,"and was "unambiguous and 'without strings.' " (*People v. Bonin, supra*, 47 Cal.3d at p 837.) The trial court and the prosecutor carefully and thoughtfully explained to Woodruff on numerous occasions their concerns about Blankenship. The trial court impressed upon Woodruff that his life was "on the line," and Woodruff had a right to have counsel appointed to him at no cost. Woodruff repeatedly acknowledged that he understood the court's concerns but that he was satisfied with his choice of counsel. (ART 68; I RT 451.) After all of these advisements, Woodruff, on every occasion, expressed his choice to be represented by Blankenship.

Woodruff argues that the trial court "made no attempt to determine Woodruff's mental ability to knowingly and intelligently waive his rights." (AOB 47.) To the contrary, both Woodruff's participation in the dialogue with the court and Blankenship's express respresentations pointed to Woodruff's competence. At the time of the ruling, nothing in the record indicated that Woodruff lacked the mental capacity to knowingly and intelligently make a choice to continue to be represented by Blankenship. The trial court had previously asked Blankenship if he intended to present an insanity defense. (A RT 44.) Blankenship responded, "I'm absolutely confident that Mr. Woodruff is 100 percent competent," and "not insane. I don't think he has an insanity defense at all." (A RT 44.) Moreover, the quality of Woodruff's responses to the trial court indicated that he understood the questions the trial court was asking him, and he was able to answer appropriately. Woodruff assured the trial court, "I'll assure you, Judge, that you know, there is a higher up that sent Mr. Blankenship to me. . . . " (A RT 61-62.) When asked if he wanted to continue with Blankenship, he stated, "if possible, yes." (A RT 68.) Woodruff even asked the trial court if it would be trying his case as well, to which the trial

court answered affirmatively. (A RT 69.) Woodruff responded, "Well, I'm satisfied." (A RT 69; 2 CT 417.) Woodruff's interactions with the trial court show that his choice of counsel was knowing and intelligent and made with awareness of the circumstances, and there is no basis for Woodruff's suggestion the trial court erred in failing to question whether Woodruff was mentally competent to elect continued representation by Blankenship. (See, *Indiana v. Edwards* (2008) 554 U.S. 164, 174, 128 S.Ct. 2379, 171 L.Ed.2d 345; *Godinez v. Moran* (1993) 509 U.S. 389, 398, 113 S.Ct. 2680, 125 L.Ed.2d 321; *People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1006.)

c. The record does not support Woodruff's claim that the trial court discouraged him from seeking second counsel, and defense counsel was not ineffective for choosing not to request second counsel

Woodruff contends in claim A.1.b. that the trial court abused its discretion when it discouraged defense counsel from asking for second counsel, and defense counsel was ineffective for failing to request co-counsel. (AOB 43-45.) The trial court did not discourage defense counsel from requesting second counsel. Rather, the record shows that the trial court stated the correct legal standard for appointment of second counsel and openly welcomed counsel to bring the matter to the court's attention. Moreover, defense counsel rendered effective assistance of counsel in deciding not to request appointment of second counsel pursuant to section 987.

"The appointment of a second counsel in a capital case is not an absolute right protected by either the state or the federal Constitution. [Citations.]" (*People v. Clark* (1993) 5 Cal.4th 950, 997, fn. 22; accord, *People v. Williams* (2006) 40 Cal.4th 287, 300, 52 Cal.Rptr.3d 268, 148 P.3d 47.) Rather, an indigent criminal defendant's right to a second attorney in a capital case is statutory, not constitutional. (*People v. Doolin*

(2009) 45 Cal.4th 390, 431.) The right of a capital defendant to the resources necessary for a full defense must be carefully considered, and the demands of pretrial preparation in a complex case weigh in favor of appointing an additional attorney. (*Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430–432.) Nevertheless, it is the defendant's burden to make a specific showing of necessity. (*People v. Roldan* (2005) 35 Cal.4th 646, 687, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The appointment of second counsel is committed to the discretion of the trial court. (*People v. Roldan, supra*, 35 Cal.4th at p. 688.)

In this case, the record shows that the trial court did not discourage trial counsel from requesting second counsel; rather, the trial court was merely stating the accurate legal standard for appointment of counsel, and the trial court was open to any motion by counsel. During a pretrial hearing on March 8, 2001, the prosecutor asked whether defense counsel would be seeking *Keenan* counsel since Woodruff could not afford to pay another attorney. (A RT 6.) The trial court responded, "If he will, if there is such a request, I will consider anything you wish to bring to my attention." (A RT 7.) Blankenship responded that he needed to consult with his client on the matter. (A RT 7.) The trial court stated:

> I'm sure once you conduct your evaluation you'll discover that the justification for appointing second counsel—or as it's referred to, *Keenan* counsel, is limited to some rather narrowly defined situations, particularly regarding the complexity of the case, the types of issues that will be raised during the course of the case, and various related factors. So once you've had a chance to evaluate that, by all means bring it to my attention.

(A RT 7.) From these comments, Woodruff contends the trial court discouraged his defense counsel from seeking second counsel. (AOB 43-44.)

Contrary to Woodruff's contentions, the trial court was merely stating the correct legal standard for appointing Keenan counsel. As this Court noted in *People v. Doolin*:

> In ruling on an application for second counsel, the trial court must be guided by the need to provide a capital defendant with a full and complete defense. (*Keenan, supra*, 31 Cal.3d at p. 431.) In exercising its discretion, the trial court must weigh "the importance this court has attached to pretrial preparation in providing a criminal defendant effective legal assistance" (*ibid.*) and "focus on the complexity of the issues involved, keeping in mind the critical role that pretrial preparation may play in the eventual outcome of the prosecution" (*id.* at p. 432). The initial burden is on the defendant to present a specific factual showing of "genuine need" for the appointment of second counsel. (*Id.* p. 434.)

People v. Doolin, supra, 45 Cal.4th at p. 432 (parallel citations omitted). Here, the trial court noted that some factors to consider in appointing second counsel were "the complexity of the case, the types of issues that will be raised during the course of the case, and various related factors." (A RT 7.) These factors are similar to those set forth by this Court in *Keenan* and *Doolin*. Moreover, it is clear from the trial court's language that it was open to the request, telling defense counsel that it would "consider anything you wish to bring to my attention," and "by all means bring it to my attention." (A RT 7.)

Moreover, Blankenship was not ineffective when he decided not to request appointment of second counsel pursuant to section 987. The record indicates that Blankenship had already "assembled a fairly elaborate team of investigators and assistants, as well as several lawyers, that are now working actively on behalf of Mr. Woodruff." (A RT 73.) In a later hearing, Blankenship revealed that Attorney Ellen Winterbottom was voluntarily assisting Blankenship during the trial. (A RT 114.) Because Blankenship had a team of investigators, assistants and other attorneys

assisting him during pretrial preparations and during trial, it was reasonable that Blankenship did not feel the need to request the trial court to appoint Keenan counsel. In addition, the record shows that Woodruff was not prejudiced by the decision not to request second counsel. As will be set forth throughout this brief, Blankenship presented an adequate defense which included the testimony of percipient witnesses, family members, and expert witnesses. Woodruff received constitutionally effective assistance of counsel. (*Strickland, supra*, 466 U.S. at p. 686.)

2. BECAUSE THERE WAS INSUBSTANTIAL EVIDENCE TO PROVE THAT WOODRUFF WAS INCOMPETENT TO STAND TRIAL, THE TRIAL COURT DID NOT ERR IN FAILING TO SUSPEND CRIMINAL PROCEEDINGS FOR THE PURPOSE OF INQUIRING INTO WOODRUFF'S MENTAL COMPETENCE

Woodruff argues in Claim A.2. that he was denied his federal and state constitutional rights to a fair trial, reliable determinations of guilt and sentencing and due process of law because the trial court failed to conduct a hearing on his mental competency to stand trial. (AOB 49-52.) Because there was insubstantial evidence that Woodruff was incompetent to stand trial, the trial court acted within its discretion in not suspending criminal proceedings to conduct a competency hearing.

"The criminal trial of a mentally incompetent person violates due process." (*People v. Blacksher* (2011) 52 Cal.4th 769, 797, quoting *Cooper v. Oklahoma* (1996) 517 U.S. 348, 354, 116 S.Ct. 1373, 134 L.Ed.2d 498; *People v. Young* (2005) 34 Cal.4th 1149, 1216.) However, a defendant is not incompetent if he can understand the nature of the legal proceedings and assist counsel in conducting a defense in a rational manner. (*People v. Blacksher, supra*, 52 Cal.4th at p. 797; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1047; see *Dusky v. United States* (1960) 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824.) A defendant is presumed competent unless the contrary is proven by a preponderance of the evidence by the party

contending he or she is incompetent. (§ 1369, subd. (f); *Medina v. California* (1992) 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353; *People v. Blacksher, supra*, 52 Cal.4th at p. 797; Cal. Rules of Court, rule 4.130(e)(2).)

If presented with "evidence that raises a reasonable doubt about a defendant's mental competence to stand trial," a trial court must suspend the criminal proceeding and hold a hearing to determine the defendant's mental competence. (*People v. Ary* (2011) 51 Cal.4th 510, 517.) "A trial court is required to conduct a competence hearing, sua sponte if necessary, whenever there is substantial evidence of mental incompetence." (*People v. Howard* (1992) 1 Cal.4th 1132, 1163.) Indeed, if there is substantial evidence the defendant may not be competent, even if there is conflicting evidence, the trial court must conduct a full competency hearing. (*People v. Young* (2005) 34 Cal.4th 1149, 1216-1217.) "Substantial evidence for these purposes is evidence that raises a reasonable doubt on the issue." (*People v. Howard, supra*, 1 Cal.4th at p. 1163.) "A trial court's decision whether or not to hold a competence hearing is entitled to deference, because the court has the opportunity to observe the defendant during trial." (*People v. Rogers* (2006) 39 Cal.4th 826, 847.)

Here, defense counsel at no time expressed any doubts about Woodruff's understanding of the proceedings or his ability to assist in his defense. (See *People v. Elliott, supra*, 53 Cal.4th at p. 583; *People v. Rogers, supra*, at p. 848.) In fact, when the trial court asked defense counsel if they were going to pursue and insanity defense, defense counsel emphatically replied, "I'm absolutely confident that Mr. Woodruff is 100 percent competent." (A RT 44.)

Woodruff claims his incompetence was exhibited when asked several times by the trial court if he understood the proceedings, he answered that he "don't understand nothin'" (A RT 57), or "I don't really understand

what is really going on here" (A RT 61). Woodruff made those comments, however, after the trial court had discussed various motions and cases to counsel and Woodruff. (A RT 51-56, 59-61.) Woodruff's failure to understand this discussion was not indicative of incompetence, but rather, that the legal discussion between the trial court and counsel were simply confusing to a layman. As Woodruff aptly put it, "I'm not a lawyer, you know. I'm listening. I just don't understand." (A RT 57.)

Woodruff also equates being religious with mental incompetency when he cites his statement that "there is a higher up that sent Mr. Blankenship to me" (A RT 61), as an example that he was not competent to stand trial. (AOB 50.) Just the opposite, this statement shows that Woodruff understood the court's question regarding whether he wanted Blankenship to continue as his attorney, and Woodruff was able to answer appropriately. Moreover, under the applicable substantial evidence test, "more is required to raise a doubt than mere bizarre ... statements." (*People v. Davis* (1995) 10 Cal.4th 463, 527.)

Finally, Woodruff claims that testimony at trial showed that he was not competent to stand trial. (AOB 50.) Woodruff relies on what he concedes was a lengthy explanation of the law, which Woodruff indicated he had not understood. (AOB 49, citing RT A57.) He also relies on Woodruff indicating he was not able to understand materials he read on his own in the law library at the jail. (AOB 50, citing 20 RT 4226.) These were isolated and unsurprising instances of a layperson not understanding the law, hardly evidence of a lack of competency to stand trial.

The record shows that Woodruff understood the nature of the legal proceedings and was able to assist counsel in conducting a defense in a rational manner. (*People v. Blacksher*, *supra*, 52 Cal.4th at p. 797.) Woodruff's mother testified that Woodruff was able to take care of her and himself by going to the store, knowing how to use money, preparing meals

and reminding Carr to take her medication. (11 RT 2378-2379, 2403.) Carr and Woodruff himself testified that he read the Bible. (11 RT 2434, 2444; 20 RT 4225.) Dr. Rath testified that Woodruff's ability to read the Bible surprised him, as his school records showed his reading level at the third grade. However, according to Dr. Rath, Woodruff had a detailed and sophisticated knowledge of the Bible and Biblical themes. (23 RT 4882.) During Woodruff's trial testimony, he also said he wrote letters and had a subscription for a newspaper while in custody. (20 RT 4225.) Woodruff admitted that in high school, he received an A and a C in reading, a B in math, and a C in world history. (20 RT 4222, 4315.) His employment history also did not indicate incompetence, as he worked as a plumber, electrician on commercial jobs, and for the Press Enterprise newspaper as a driver and lead man, making sure the lines ran and the papers came out of the conveyor belts properly. (20 RT 4280.) He also supervised a crew of people. (23 RT 4873.) Woodruff also testified that he was in the process of buying a house when the shooting occurred, and he understood what escrow was. (20 RT 4147.) Woodruff told the prosecutor on cross examination that he understood the questions his lawyer had asked him during direct, and understood that he had to wait for the court to rule on objections before answering the question. (20 RT 4221-4222.) The detective who interviewed Woodruff also testified that during the interview, Woodruff understood the questions, answered the questions appropriately, understood the ramifications of his acts, and there was no doubt that Woodruff had a clear mind and could follow thought patterns. (13 RT 2977, 2979; 14 RT 3007.)

Dr. Rath also testified on rebuttal that while Woodruff had a slight learning disability, he was not mentally retarded. (23 RT 4902.) According to Dr. Rath, Woodruff's reasoning ability was very high. (23 RT 4903.) When asked why history was studied, Woodruff replied, "So

that we can tell where we've been, learn who we are, and find out where we're going." (23 RT 4903.) Woodruff had an extensive vocabulary, possessed many life skills, had a good employment history, and his Wechsler score of 78 was above the cut-off for mental retardation. (23 RT 4901, 4904.) There was insubstantial evidence that Woodruff was mentally incompetent to stand trial. (*People v. Young*, *supra*, 34 Cal.4th at pp. 1216-1217.) Accordingly, the trial court acted within its discretion in declining to suspend criminal proceedings for the purpose of inquiring into defendant's mental competence.

3. WOODRUFF KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS RIGHT TO CONFLICT-FREE COUNSEL

Woodruff contends that his state and federal constitutional rights to counsel, a fair trial, reliable determinations of guilt and sentence and due process of law were violated because the trial court solicited three pretrial waivers of the right to unconflicted counsel without showing Woodruff made knowing, intelligent and voluntary choices. (AOB 53-66.) Woodruff also claims that his defense counsel violated his duty of loyalty. (AOB 53.) Woodruff's arguments are without merit. Not only did the trial court conduct an adequate inquiry into the conflict and obtain knowing and intelligent waivers on multiple occasions from Woodruff, but the "conflicts" were based solely on prior representation and not competing interests. In other words, there were no competing loyalties.

"Conflicts of interest may arise in various factual settings. Broadly, they 'embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests.' [Citation.]" (*People v. Jones* (1991) 53 Cal.3d 1115, 1134.) When a trial court knows or should know that defense counsel has a possible conflict of interest with his client, it must

inquire into the matter (*Ibid.*; *People v. Bonin, supra*, 47 Cal.3d at p. 836; *Wood v. Georgia* (1981) 450 U.S. 361, 272, 101 S.Ct. 1097, 1103; see *Holloway v. Arkansas* (1978) 435 U.S. 475, 484, 98 S.Ct. 1173, 1178, 55 L.Ed.2d 426) and act in response to what its inquiry discovers (*People v. Bonin, supra,* at p. 836). If the trial court determines that a waiver of a conflict of interest by the defendant is called for, although no formal inquiry is required in this regard, it must assure itself that "'(1) the defendant has discussed the potential drawbacks of [potentially conflicted] representation with his attorney, or if he wishes, outside counsel, (2) that he has been made aware of the dangers and possible consequences of [such] representation in his case, (3) that he knows of his right to conflict-free representation, and (4) that he voluntarily wishes to waive that right.' [Citations]." (*People v. Bonin, supra*, at p. 837; *People v. Jones, supra*, 53 Cal.3d at p. 1137.) The defendant's waiver must be a knowing, intelligent act done with awareness of the circumstances and likely consequences, and it must be unambiguous. [Citation.]" (*People v. McDermott* (2002) 28 Cal.4th 946, 989-990.) A trial court's failure to inquire into the possibility of a conflict of interest or to adequately respond to its inquiry is reversible error only if the defendant shows "that an actual conflict of interest existed and that that conflict adversely affected counsel's performance." (*People v. Bonin, supra*, at p. 837–838.)

Here, Blankenship represented Woodruff's mother in the misdemeanor trial that arose out of the present incident. (B RT 483.) The trial court asked Woodruff:

> Mr. Blankenship, as you know, represented your mother in her trial. And this is more of a housekeeping issue than anything else, but by representing her, it is possible, if not probable, that some issues may have arisen during the course of his representation of her that may conflict with your interests. And what I need to know of you is whether you are willing to waive any potential conflict of interest that may exist based upon Mr.

Blankenship's representations of your mother. [¶] Do you understand what I am saying?

(B RT 483.) After shaking his head negatively, the following colloquy took place between the trial court and Woodruff:

THE COURT: . . . Your mother was charged with a misdemeanor offense of disturbing the peace and resisting arrest. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: She went to trial. You understand that?

THE DEFENDANT: Uh-huh.

THE COURT: Is that "yes"?

THE DEFENDANT: Yes.

THE COURT: Now, at this trial she was represented by your attorney, Mr. Blankenship. Now, I don't know exactly what evidence was produced at this trial, but it is possible they had some evidence that may have been produced during the course of that trial that would be in conflict, or against your best interests. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: All right. Now, again, I don't know if that happened or not. If it did, I need to get on the record from you a waiver of any conflict of interest that may have arisen as a result of Mr. Blankenship's representation of your mother. [¶] In other words, if you want Mr. Blankenship to continue representing you, you have to waive, or agree that even if there was a conflict of interest in this representation of your mother, you're willing to waive, or give up, any right to contest that conflict. [¶] Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Okay. And are you willing to waive, or give up, any right to argue any conflict of interest –

THE DEFENDANT: Yes, sir.

THE COURT: -- that may exist?

THE DEFENDANT: I'm satisfied with Blankenship.

THE COURT: All right. The Court accepts that as a waiver of conflict of interest.

(B RT 483-484.)

The trial court addressed another conflict of interest based on Blankenship's prior representation of Dennis Smith, a potential prosecution witness during the guilt and penalty phases of the trial. (B RT 484, 578.) According to Blankenship, he represented Smith in two trials in December 2001. Blankenship was relieved as counsel for Smith in February 2002. (B RT 485-485.) Blankenship stated that the subject matter about which Smith would be testifying at Woodruff's trial has "nothing to do with any of my involvement with Mr. Smith whatsoever." (B RT 485.) Blankenship also later said that he had "no confidential information of anything that I think would be impeachable. I don't want to be in a conflict situation. I don't want to hurt Mr. Smith, and I don't want to hurt Mr. Woodruff." (B RT 587.) The trial court addressed Woodruff as follows:

THE COURT: Mr. Woodruff, Mr. Soccio indicates if we get to a penalty phase, he intends to call Mr. Smith to testify. Now, I don't know what Mr. Smith is going to testify to, but it has been represented that there may be a conflict of interest based upon the fact that Mr. Blankenship once represented Mr. Smith. There may have been some issues that arose that may conflict with your best interest, and so all I need to simply ask you again as with respect to your mother: Do you waive, or give up, any right to contest an issue related to a conflict of interest based upon Mr. Blankenship's prior representation of Mr. Smith?

THE DEFENDANT: I am satisfied.

THE COURT: I will take that as a "yes."

THE DEFENDANT: Yes.

THE COURT: You waive any conflict of interest?

THE DEFENDANT: Yes.

THE COURT: The Court will accept that waiver.

(B RT 486.)

On October 11, 2002, the trial court revisited the issues regarding witness Dennis Smith, who the prosecution then intended to call in the guilt and penalty phase of trial.[20] (B RT 578.) Blankenship clarified for the trial court that he represented Smith on a case involving a violation of section 12021[21] and a fraud or theft charge. (B RT 579.) The trial court asked Woodruff:

> THE COURT: Mr. Woodruff, let me once again address you in this manner. Mr. Blankenship, your attorney, has represented Mr. Smith in the past on a criminal matter. In that capacity, information of some sort, I'm sure, was exchanged or divulged to Mr. Blankenship. If Mr. Smith were to testify against you in either the guilt phase or the penalty phase, there is a potential that he could provide damaging information against you, incriminating evidence, or perhaps evidence in the penalty phase that would suggest a more aggravated sentence would be appropriate in your case.
>
> As your attorney, Mr. Blankenship would be under an obligation to try to discredit him. And as his attorney in a prior criminal case, he would have at his disposal any information about any potential crimes or criminal liability that would affect Mr. Smith, and in normal circumstances he would be able to inquire of Mr. Smith about that. But because he has represented Mr. Smith and Mr. Smith does not wish to waive his attorney/client privilege, Mr. Blankenship would not be able to make those inquiries on your behalf, and that would be – could

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[20] Dennis Smith only testified during the penalty phase of the trial. (26 RT 5492-5512.)

[21] The trial court correctly noted that a violation of section 12021 is not a crime of moral turpitude, so Smith would not be subject to impeachment by Blankenship on that conviction. (B RT 585.)

be detrimental to you, detrimental to your defense. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Knowing that, knowing that potentially a prosecution witness could not be discredited by your attorney because of this thing we call the "attorney/client privilege," is it still your desire to have Mr. Blankenship continue to represent you in this case?

DEFENDANT WOODRUFF: Yes.

THE COURT: All right. I think that is the third time I've taken a waiver from him, and I'm satisfied that he understands what he has done.

(B RT 584-585.)

The trial court continued its colloquy of Woodruff with respect to a conflict of interest due to a Blankenship's prior representation of Smith and due to an incident which involved Smith and Woodruff. (B RT 586-587.) The trial court explained that the prosecution intended to question Smith about specifics of criminal conduct Woodruff and Smith engaged in together, and Blankenship might have obtained knowledge of that conduct in the course of representing Smith that is protected by the attorney-client privilege. (B RT 586.) Specifically, the trial court stated:

If someone else was representing you, someone who had absolutely no connection with Mr. Smith over here, someone else was representing you, that attorney could make, if he had the same knowledge about this prior criminal conduct, he could inquire to his heart's content about information that was exchanged between Mr. Smith and someone else, anybody else, without fear of any conflict of interest, without fear of any attorney/client privilege. But because Mr. Blankenship represented Mr. Smith, he would be unable to make inquiry of Mr. Smith regarding specific criminal conduct. Even if it may have occurred, even if he knew it occurred, he couldn't do that, and that could potentially help you. [¶] But because of his role in representing both you and Mr. Smith, he can't do that. So, to

that extent, your defense could, and under those circumstances, would be compromised. Do you understand that?

DEFENDANT WOODRUFF: Yes.

THE COURT: And knowing that, is it still your desire that Mr. Blankenship represent you in this case?

DEFENDANT WOODRUFF: Yes.

(B RT 586-587.)

It is well settled that """[a] waiver need not be in any particular form, nor is it rendered inadequate simply because all conceivable ramifications are not explained."""" (*People v. Roldan*, *supra*, 35 Cal.4th at p. 728.) In determining whether a defendant understands the nature of a possible conflict of interest with counsel, a trial court need not separately explore each foreseeable conflict and consequence. (*People v. Jones*, *supra*, 53 Cal.3d at p. 1137.) For a waiver to be valid, the potential dangers of joint representations need only be "disclosed generally" to the defendant. (*Maxwell v. Superior Court*, *supra*, 30 Cal.3d at p. 619.)

In this case, the trial court conducted an adequate inquiry into the alleged conflict, and the record in this case shows that Woodruff knowingly and intelligently waived his right to conflict-free counsel several times. While the record does not indicate whether or not Woodruff spoke with Blankenship about these issues, the trial court explained in depth what the dangers and possible consequences of the conflicts regarding Blankenship's prior representations of Carr and Smith were. The trial court informed Woodruff of his rights to conflict free representation. (*People v. Bonin*, *supra*, 47 Cal.3d at p. 836.) The trial court ensured that Woodruff understood his rights and what he was giving up if he waived his rights. When Woodruff responded that he did not understand the first time the trial court inquired, the trial court then went step by step to explain the situation to Woodruff and the dangers and consequences of the conflict involving his

mother. (B RT 483-484.) With respect to Smith, the trial court made clear the dangers and consequences that may occur if Woodruff proceeded with Blankenship as his attorney. The trial court explained in detail that Blankenship had once represented Smith. If Smith testified against Woodruff, he would potentially provide damaging information about Woodruff which might suggest a more aggravated sentence would be appropriate. Blankenship, as Woodruff's attorney should try to discredit Smith. However, because he had formerly represented Smith and Smith will not waive the privilege, Blankenship would not be able to make those inquiries on Woodruff's behalf. (B RT 584-586.) The trial court later went into more detail about an incident in which both Smith and Woodruff committed a crime together, and Blankenship might have privileged information about that incident. Again he would not be able to make specific inquiry into that conduct because he had previously represented Smith. (B RT 586-587.) Even after these detailed explanations about the dangers and possible consequences about proceeding with Blankenship, Woodruff knowingly and intelligently waived the conflict – and did so on multiple occasions. (B RT 483-484, 486, 584-587.)

Woodruff also argues that the trial court failed to inquire whether his waivers were voluntary, knowing and intelligent, as he had low IQ scores, low reading levels, and told the court that he did not understand what was going on. (AOB 65.) As discussed in Arguments A1. and A2 above, Woodruff had the mental capacity to make a knowing and intelligent waiver. When the trial court asked defense counsel about Woodruff's competency, counsel answered, "I'm absolutely confident that Mr. Woodruff is 100 percent competent." (A RT 44.) Moreover, Woodruff's interaction with the trial court throughout pretrial and trial indicated that he was making knowing and intelligent waivers. He answered the court and the lawyers' questions appropriately. (A RT 61-62, 68-69.) When

Woodruff did not understand, he told the court, and the court explained the situation in a detailed step-by-step manner. (A RT 57; B RT 483-484.) Woodruff's lack of understanding was not because he lacked the mental capacity to do so, but rather, because he was "not a lawyer." (A RT 57.) Testimony at trial also showed that he was mentally capable of understanding his attorney's conflict, the consequences of the conflict, and waiving his right to conflict-free representation. Both he and his mother testified that Woodruff read the Bible. (11 RT 2434, 2444; 20 RT 4225.) Dr. Rath testified that Woodruff had a sophisticated understanding of the Bible. (23 RT 4882.) Woodruff was in the process of purchasing a home, and understood complicated concepts such as escrow. (20 RT 4147.) Woodruff's employment history also shows his mental capacity. Woodruff admitted during trial that he understood his defense counsel's questions. (20 RT 4221-4222.) Finally, according to Dr. Rath, Woodruff's reasoning ability was very high; his IQ was 78. (23 RT 4901, 4903, 4904.) Woodruff had the mental capacity to give a knowing, intelligent, and voluntary waiver of his right to conflict-free counsel. If a defendant is competent to stand trial, and therefore competent to waive counsel entirely (*Indiana v. Edwards* (2008) 554 U.S. 164, 174, 128 S.Ct. 2379, 171 L.Ed.2d 345; *Godinez v. Moran* (1993) 509 U.S. 389, 398, 113 S.Ct. 2680, 125 L.Ed.2d 321), Woodruff was surely competent to waive a conflict.

Even if Woodruff did not validly waive his right to conflict-free counsel, he fails to sustain his burden of demonstrating that an actual conflict arose as a result of defense counsel's previous representations of Carr and Smith that adversely affected his performance. To make this showing, Woodruff must point to evidence in the record indicating "that counsel 'pulled his punches,' i.e., failed to represent defendant as vigorously as he might have had there been no conflict." (*People v. Doolin*, *supra*, 45 Cal.4th at p. 418.)

Here, Blankenship said his representation of Smith did not disclose anything regarding what Smith would be testifying to at trial. (B RT 485.) Blankenship said he had "no confidential information of anything that I think would be impeachable." (B RT 587.) Woodruff claims that Blankenship's duty of loyalty to Smith prevented Blankenship from properly impeaching Smith about his prior criminal record. (AOB 62.) While Blankenship did not question Smith about the prior arrest about which Blankenship represented Smith, the prosecutor had already elicited that testimony from Smith. Smith testified that he was arrested for possession of a concealed firearm. (26 RT 5509.) Sgt. Sam Powers of the Maricopa County Sheriff's Department also testified that on May 29, 1989, he arrested Smith for providing false information and concealed weapons were recovered from the car Smith was driving. (27 RT 5564-5567.) Smith was therefore impeached regarding his prior convictions. Moreover, Blankenship was able to elicit important information from Smith that he did not see Woodruff fire a gun at all that day. (26 RT 5511.) Therefore, Blankenship did not fail to represent defendant as vigorously as he might have had there been no conflict. (*People v. Doolin*, *supra*, 45 Cal.4th at p. 418.)

Finally, Woodruff claims that Blankenship failed to exercise his duty of loyalty to Woodruff when Blankenship attempted to represent the interest of Woodruff's then six year old daughter, Brianna. (AOB 57-59, 61.) Brianna was called to testify in an Evidence Code section 402 hearing to determine her competency to testify. (4 RT 1229.) Blankenship intervened "on behalf of Mr. Woodruff as a parent," claiming the "process [was] ill-timed and ill-advised." (4 RT 1230.) Blankenship was concerned about the psychological impact on Brianna about testifying about the "tragic event that occurred when she was four." (4 RT 1231-1232.) Contrary to Woodruff's claim on appeal, there is no basis for assuming that

acting consistent with Woodruff's interest as a father when he objected to Brianna testifying, conflicted with Woodruff's defense. The trial court ultimately found Brianna competent to testify, but Brianna was never called as a witness. (4 RT 1247.) Accordingly, even assuming an actual conflict, Woodruff cannot show prejudice. Woodruff's claims should thus be rejected.

4. THE TRIAL COURT DID NOT ERR IN EXCUSING PROSPECTIVE JURORS W.C. AND D.K. FOR CAUSE BECAUSE THEY COULD NOT FAIRLY DISCHARGE THEIR DUTIES OF CAPITAL JURORS, JUROR NO. 3 WAS NOT BIASED AND THE PROSECUTOR DID NOT IMPROPERLY CHALLENGE PROSPECTIVE AFRICAN-AMERICAN JURORS

Woodruff argues that his death sentence must be reversed because his state and federal constitutional right to be tried by an impartial jury were violated when: (1) the trial court erred in dismissing prospective jurors W.C. and D.K. for cause without questioning them on voir dire (AOB 67-76, Claim A.4.a.): (2) an allegedly biased juror was seated (AOB 76-88); and (3) the prosecutor improperly exercised peremptory challenges (AOB 88-101, Claim A.4.c.i and ii). Woodruff's claims are meritless. The record fairly supports the trial court's ruling granting the prosecution's challenge for cause because prospective jurors W.C. and D.K.'s answers clearly indicated that their views on capital punishment would prevent or substantially impair the performance of their duties as a juror. Moreover, Juror Number 3 was not biased, and the trial prosecutor did not exercise improperly challenge prospective African-American jurors.

a. Prospective Jurors W.C. and D.K. were properly excused for cause

One hundred and fifty nine prospective jurors completed a twenty-one page jury questionnaire. (17 CT 4971.) On November 14, 2002, the trial court, prosecutor, and defense counsel went through the questionnaires and

discussed which prospective juror should be disqualified by stipulation or without any further action. (3 RT 803.)

The prosecutor sought to excuse prospective juror W. C. for cause. (3 RT 814.) The prosecutor pointed out that on his jury questionnaire, W.C. stated that "I don't feel it's right to take someone's life away," "It's wrong to kill someone," and the death penalty "serves no purpose." (3 RT 815.) The trial court denied the prosecutor's request, noting that it was primarily interested in jurors who could be disqualified by stipulation by the parties. (3 RT 815.)

The prosecutor also moved to dismiss prospective juror D.K. for cause because he stated in his questionnaire that "Only God can take a life," and he did not believe in the death penalty. (3 RT 829.) Again the trial court denied the prosecutor's motion because D.K. indicated that he would follow the law, and the court felt that there was no harm in questioning D.K. further. (3 RT 829-830.)

On November 19, 2002, the prosecutor filed a Motion to Reconsider Removal of Prospective Jurors for Cause. (17 CT 4971-4976.) The prosecutor pointed out that 36 members of the jury venire were excused as a result of answers on their questionnaires. (17 CT 4972.) Fourteen members were excused by stipulations and 22 were removed for cause, only one of the 36 prospective jurors was African-American. (17 CT 4972.) The prosecutor challenged nine additional prospective jurors for cause, and four of these nine were African Americans. (17 CT 4972.) The prosecutor argued that because the trial court wanted to retain African-American jurors in the jury pool, potential jurors were allowed to remain in the jury venire despite answers in their questionnaires that indicated opposition to the death penalty, thereby placing the prosecution in a disadvantaged position. (17 CT 4971.) Specifically, the prosecutor would now have to make challenges in front of other prospective jurors risking not

only *Wheeler*[22] motions, but also "insulting or inflaming other prospective jurors or actual members who are seated in this jury." (17 CT 4972.) The prosecutor argued that all prospective jurors should be judged by the same standard for jury qualification regardless of race. (17 CT 4974.)

After hearing arguments by both counsel, the trial court reconsidered its previous ruling on prospective jurors W.C. and D.K. and granted the prosecution's challenge for cause with respect to those jurors. (3 RT 871-872.) The trial court reasoned that there is "not even a theoretical possibility of evidence that would allow them to vote for the death penalty." (3 RT 872.) The trial court pointed out that W.C. stated in his questionnaire, "I don't believe in the death penalty. I don't feel it's right to take someone's life." W.C. stated it would be difficult for him to vote for the death penalty, and he favors life without parole as opposed to the death penalty. (3 RT 871.) With respect to D.K., the trial court noted that D.K. stated, "I don't believe in the death penalty. Men are equals. Only God can make these choices." (3 RT 872.)

The right to an impartial jury afforded by the state and federal Constitutions mandates that persons who oppose the death penalty are not disqualified from serving as a juror in a capital case simply by virtue of their personal views on that punishment. (*People v. Fuiava* (2012) 53 Cal.4th 622, 656, citing *Uttecht v. Brown* (2007) 551 U.S. 1, 6, 127 S.Ct. 2218, 167 L.Ed.2d 1014; *People v. Martinez* (2009) 47 Cal.4th 399, 425.) A "criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause." (*Uttecht v. Brown, supra*, 551 U.S. at p. 9, citing *Witherspoon v. Illinois* (1968) 391 U.S. 510, 521, 88 S.Ct. 1770, 20 L.Ed.2d 776.) A trial judge may properly exclude a prospective juror in

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[22] *People v. Wheeler* 91978) 22 Cal.3d 258, 280.

a capital case if the juror's views on capital punishment would prevent or substantially impair the performance of his or her duties as a juror in accordance with the court's instructions and the juror's oath. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; *People v. Haley* (2004) 34 Cal.4th 283, 306; *People v. Jones* (2003) 29 Cal.4th 1229, 1246.) "'A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate.'" (*People v. Heard* (2003) 31 Cal.4th 946, 958, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 975.) "'The real question is """whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror."""' [Citations.]" (*People v. Vieira* (2005) 35 Cal.4th 264, 284, quoting *People v. Cash* (2002) 28 Cal.4th 703, 719-720.)

A prospective juror's bias against the death penalty, however, need not be proved with "unmistakable clarity." (*People v. McKinnon* (2011) 52 Cal.4th 610, 625-626; *People v. McWhorter* (2009) 47 Cal.4th 318, 340.) Moreover, "a prospective juror in a capital case may be discharged for cause based solely on his or her answers to the written questionnaire if it is clear from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law." (*People v. Avila* (2006) 38 Cal.4th 491, 531; accord, *People v. Wilson* (2008) 44 Cal.4th 758, 787.)

The erroneous exclusion of a prospective juror under *Witherspoon/Witt* compels reversal of the penalty verdict regardless of whether the prosecutor had remaining peremptory challenges. (*People v. Heard* (2003) 31 Cal.4th 946, 965, 4 Cal.Rptr.3d 131, 75 P.3d 53; see *Gray v. Mississippi* (1987) 481 U.S. 648, 666–668, 107 S.Ct. 2045, 95 L.Ed.2d 622.) On appeal, this Court independently reviews a trial court's decision to excuse for cause a prospective juror based solely upon that juror's written responses to a questionnaire de novo, without affording the deference that

would apply had the court observed the prospective juror in person. (*People v. McKinnon, supra*, 52 Cal.4th at p. 643; *People v. Russell* (2010) 50 Cal.4th 1228, 1261, citing *Avila, supra*, 38 Cal.4th at p. 529.)

A trial court may excuse a prospective juror solely on the basis of answers to a written questionnaire, without observing the prospective juror's demeanor under oral examination in open court if the questionnaire affords "sufficient information regarding the prospective juror's state of mind to permit a reliable determination" whether the juror's views would "'"prevent or substantially impair"' the performance of his or her duties...." (*People v. McKinnon, supra*, 52 Cal.4th at p. 647, quoting *People v. Stewart* (2004) 33 Cal.4th 425, 445.) This Court recently held that a prospective juror may be disqualified on his or her questionnaire responses alone "if it is clear from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law." (*People v. McKinnon, supra*, 52 Cal.4th at p. 647, quoting *Avila, supra*, 38 Cal.4th at p. 531; see *Russell, supra*, 50 Cal.4th at p. 1262; accord, *Wilson, supra*, 44 Cal.4th at p. 787 [excusal on questionnaire answers alone "is permissible if, from those responses, it is clear (and 'leave[s] no doubt') that [the] prospective juror's views about the death penalty would satisfy the *Witt* standard [citation] and that the juror is not willing or able to set aside his or her personal views and follow the law"]; *People v. Thompson* (2010) 49 Cal.4th 79, 97 [same].)

The questionnaire responses of D.K. and W.C. make it clear that they were substantially impaired within the meaning of *Witt* and thus, unable to serve as capital jurors. Prospective Juror W.C.'s questionnaire responses are replete with indications that he was vehemently and unalterably opposed to capital punishment. Question 53 of the juror questionnaire stated, "Briefly describe your feelings about the death penalty." Prospective Juror W.C. answered, "I don't believe in the death penalty."

(12 CT 3501.) A separate inquiry on the questionnaire (question 53 a.) particularly highlighted the intensity of W.C.'s attitudes. Asked to rate the strength of his views on a scale of one to ten, with one representing the strongest opposition to the death penalty, five having no opinion, and ten representing the strongest support for the death penalty (the 1 to 10 scale), W.C. rated himself a "1." Prospective Juror W.C. explained that his feeling on the death penalty is because he does not "feel it is right to take someone's life away." (12 CT 3502, question 53 b.) W.C. expressed that it would be difficult for him to vote for the death penalty in this case, regardless of what the evidence was because "it is wrong to kill someone." (12 CT 3502, question 53 c.) When asked what purpose the death penalty serves, W.C. responded, "I honestly believe it serves no purpose because it doesn't seem to deter violent crimes." (12 CT 3502, question 53 g.) Prospective Juror W.C. also stated that he "favor[s] [life in prison without parole] opposed to the death penalty." (12 CT 3502, question 53 h.)

Prospective Juror W.C. indicated, in question 55, that he "would consider all of the evidence and the jury instructions as provided by the court and impose the penalty I personally feel is appropriate," and when asked, in question 57, if he could follow an instruction to assume that if a person is sentenced to death, the sentence will be carried out, W.C. checked, "Yes." (12 CT 3503.) As this Court stated in *McKinnon*, "this response hardly constituted a clear and unqualified statement of [the prospective juror's] willingness and ability, despite his opposition to capital punishment, to apply the law and evaluate the penalty choices fairly. [The prospective juror's] response could plausibly have conveyed only his understanding that, after 'consider[ing]' the evidence and instructions, he was free to impose the penalty he 'personally [felt] [was] appropriate.'" (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 649.) In light of W.C.'s

intense anti-death-penalty views, as exhibited in his response to questions 53 a., 53 c., 53 g. and 53 h., it is difficult to see how he could "personally feel" the death penalty was "appropriate" in any case. The trial court could properly conclude that W.C.'s answers to questions 55 and 57 did not overcome what were otherwise uniform and clear statements of entrenched resistance to imposing a judgment of death. Indeed, taken together, W.C.'s answers clearly demonstrate that, because of his views on capital punishment, he was unable to deliberate fairly on the issue of penalty.

Similarly, Prospective Juror D.K.'s responses to questions in the juror questionnaire indicate that his views on capital punishment would prevent or substantially impair the performance of his or her duties as a juror in accordance with the court's instructions and the juror's oath. (*Witt, supra*, 469 U.S. at 424.) Like, W.C., D.K. indicated a willingness to follow the court's instruction (question 53 c.[23], 57), and he "would consider all of the evidence and the jury instructions as provided by the court and impose the penalty I personally feel is appropriate." (10 CT 2927, 2928, question 55.) However, D.K.'s clear opposition to the death penalty rendered him unable to serve as a capital juror. For instance, question 53 of the juror questionnaire stated, "Briefly describe your feelings about the death penalty." Prospective Juror D.K. answered, "I don't believe in death penalty." (10 CT 2926.) Question 53 a. further asked, "On a scale of 1-10, with 10 being strongly in favor of the death penalty, 5 having no opinion, and 1 being strongly against the death penalty, how would you rate yourself?" D.K. rated himself as a "1." (10 CT 2926.) D.K. also exhibited unyielding general opposition to the death penalty based on his religious

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[23] Question 53 c. asked, "If you are against the death penalty, would your opinion make it difficult for you to vote for the death penalty in this case, regardless of what the evidence was?" Prospective juror D.K. checked, "No," and explained, "I would follow the law." (10 CT 2927.)

and moral beliefs. When asked if there was a particular reason he felt the way he did about the death penalty, D.K. explained, "Men are equals. Only God can make those choices." (10 CT 2927.) For question 53 g., "What purpose do you think the death penalty serves," D.K. responded, "None." (10 CT 2927.) Taken together, D.K.'s questionnaire answers make it clear that he would be unable to set aside his religious convictions against the death penalty and follow the law in determining penalty. The trial court properly dismissed him for cause.

The record as a whole thus allowed a reliable determination, and clearly established that W.C. and D.K. could not fairly discharge the duties of capital jurors. (*People v. Thomas* (2012) 53 Cal.4th 771, 791.) The trial court did not err in excusing them for cause.

b. Juror No. 3 was not a biased juror, and trial counsel, who made a tactical decision not to object to the challenge for cause, did not render ineffective assistance of counsel

Woodruff argues that his convictions and death sentence should be overturned because an allegedly biased juror, Juror No. 3, was seated in violation of his Sixth, Eighth and Fourteenth Amendment rights to a fair trial and he contends he was denied effective assistance of counsel when his attorney failed to challenge the juror for cause. (AOB 76-88.) The trial court, after having the opportunity to observe Juror No. 3's demeanor and responses regarding his possible bias in favor of law enforcement, made a factual determination that the juror could be fair and impartial which was proper and binding on this Court. Moreover, trial counsel was not ineffective for choosing, for strategical reasons, not to challenge Juror No. 3 for cause.

Juror No. 3 identified himself as a 31 year old, African-American male from Alabama. (6 CT 1740; 3 RT 989.) He was a former Marine Lance Corporal and presently worked for a pharmaceutical company. (6

CT 1742, 1744; 3 RT 989.) In his questionnaire, Juror No. 3 indicated that his mother is a correctional officer. (6 CT 1747, question 20.) When asked if the nature of the charges would make it difficult to be fair and impartial, Juror No. 3, checked "Yes," and explained that it would be "difficult to be fair. My mother and uncle are peace officers." (6 CT 1751.) He went on to state in question 39, "I am not sure if I can be fair and impartial," and in question 50, Juror No. 3 indicated that he was unsure if he could give the defendant and People a fair trial. (6 RT 1752, 1754.) When asked to describe his general feelings about the death penalty in question 53, Juror No. 3 replied, "If the defendant is guilty of murder he/she should get the death penalty." (6 RT 1754.)

During voir dire, defense counsel asked Juror No. 3 if he wanted to serve on the jury, to which Juror No. 3 answered, "Umm, I don't want to, but if I have to, if I have to do my duty, then that's what I have to do." (3 RT 989.) Defense counsel followed up this response by asking the juror to what "duty" he referred, and Juror No. 3 responded, "To try to be fair and impartial serving on a jury." (3 RT 989.) Defense counsel questioned the prospective juror if his mom's occupation as a correctional officer would make it hard for him to be "fair in a case involving the death of an officer. (3 RT 989-990.) Juror No. 3 answered, "I'm thinking how I'd be leaning towards, you know, guilt. You know, if, umm, you know, to tell you the truth, I couldn't really tell you if I could [sic] fair and impartial." (3 RT 990.) Juror No. 3 admitted it would be possible that he both could and could not be fair and impartial. (3 RT 990.) Juror No. 3 also claimed that he would be "willing to evaluate options before making conclusions," and his duty would "involve being open-minded and listening to all the evidence." (3 RT 990.)

When questioned by the prosecutor if he could be fair, Juror No. 3 stated, "Like I said, I would try to be fair and impartial," but "I'd be

strongly on the side of him being guilty." (3 RT 1007.) Juror No. 3 did explain, however, that he would not vote to convict if he thought it was the wrong person being accused of the crime. Juror No. 3 concluded by saying, "It would be difficult to be fair, you know what I'm saying? I'm saying to you that I would try to be fair." (3 RT 1007.)

The prosecutor challenged Juror No. 3 for cause because the juror expressed that it would be difficult for him to be fair because his mother was a law enforcement officer. (3 RT 1022.) Defense counsel objected to dismissing Juror No. 3 for cause. (3 RT 1022.) Defense counsel reasoned that this juror's demeanor did not even approximate the "standard of bias" of another prospective juror who was allowed to remain in the jury venire. (3 RT 1022.) Defense counsel noted that Juror No. 3 is African-American. (3 RT 1022.)

The trial court denied the prosecutor's challenge for cause, reasoning, "I'm gonna deny the challenge for cause because I believe his responses, albeit hesitatingly, indicated that he would do his best to be fair in both guilt and penalty phases.. . . [H]is responses were such as to convince me that he could, or at least would make his best effort to be fair in all phases of the trial." (3 RT 1023-1024.) The trial court clarified stating, "[L]et me make it abundantly clear for the record that my decision had nothing to do with his race, but rather my conclusion that his responses to the follow-up questions led me to conclude that he could be fair." (3 RT 1024.)

i. The trial court's factual finding that Juror No. 3 could be fair and impartial is binding

Although Woodruff did not challenge this seated jurors for cause and did not exhaust the peremptory challenges available to him (3 RT 1022; 4 RT 1136), he contends the verdicts must be set aside because Juror No. 3 was biased against him. Because Woodruff failed to object to the qualifications of a juror, he is without remedy unless he proves actual bias.

(*People v. Foster* (2010) 50 Cal.4th 1301, 1325, citing *Johnson v. Armontrout* (8th Cir.1992) 961 F.2d 748, 754.) "Actual bias" is "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (Code Civ. Proc., § 225, subd. (b)(1)(C); *People v. Foster*, *supra*, 50 Cal.4th at p. 1325; *People v. Hillhouse* (2002) 27 Cal.4th 469, 488.) "On review of a trial court's ruling, if the prospective juror's statements are equivocal or conflicting, that court's determination of the person's state of mind is binding. If there is no inconsistency, the reviewing court will uphold the court's ruling if substantial evidence supports it. [Citation.]" (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 488.) When a prospective juror expresses views about the defendant or the case that would suggest a bias, but the voir dire suggests that the person can put aside that bias, impartially determine the facts, and apply the law to reach a just verdict, the trial court can reasonably deduce that the person would do so. (See *People v. Kipp* (1998) 18 Cal.4th 349, 366; *People v. Carter* (1961) 56 Cal.2d 549, 573-574; *United States v. Quintero-Barraza* (9th Cir.1995) 78 F.3d 1344, 1349-1350.)

Woodruff contends Juror No. 3 could not be impartial in light of his stated bias in favor of law enforcement. (AOB 76-82.) But as the trial court explained, Juror No. 3 provided assurance that he could set aside his biases and be fair and impartial. In his juror questionnaire, Juror No. 3 said he could be fair and impartial as a juror where the defendant was either of the same or different race. (6 CT 1748, question 27 a. & b.) When asked if he was given an instruction on the law that differs from his beliefs or opinions, Juror No. 3 stated that he would follow the law as the judge instructs him. (6 CT 1752, question 40.) He also indicated that he would not believe or disbelieve the testimony of a law enforcement officer simply

because he or she is a law enforcement officer (6 CT 1753); thus showing that Juror No. 3 could set aside any bias in favor of law enforcement. Finally, in question 55, jurors were asked:

> It is important that you have the ability to approach this case with an open mind and a willingness to fairly consider whatever evidence is presented as opposed to having such strongly held opinions that you would be unable to fairly consider all the evidence presented during the possible penalty phase. [¶] There are no circumstances under which a jury is instructed by the court that they must return a verdict of death. No matter what the evidence shows, the jury is always given the option in a penalty phase of choosing life without the possibility of parole. Assuming a defendant was convicted of a special circumstance murder..."

(6 CT 1756.) Juror No. 3 responded that he "would consider all the evidence and the jury instructions as provided by the court and impose the penalty I personally feel is appropriate." (6 CT 1756.)

In addition to his responses in the juror questionnaire that showed Juror No. 3 did not have an actual bias and would be fair, as the trial court found after listening to the juror's responses in voir dire, Juror No. 3 could, or at least would make his best effort, to be fair in all phases of the trial. (3 RT 1024.) Defense counsel asked Juror No. 3, during voir dire, if he wanted to serve on the jury. Juror No. 3 answered, "Umm, I don't want to, but if I have to, if I have to do my duty, then that's what I have to do." (3 RT 989.) When asked what he meant by "duty," Juror No. 3 responded, "To try to be fair and impartial serving on a jury." (3 RT 989.) Juror No. 3 also admitted it would be possible that he both could be fair and impartial. (3 RT 990.) Juror No. 3 also said that he would be "willing to evaluate options before making conclusions," and his duty would "involve being open-minded and listening to all the evidence." (3 RT 990.) When questioned by the prosecutor if he could be fair, Juror No. 3 stated, "Like I said, I would try to be fair and impartial," but "I'd be strongly on the side of

him being guilty." (3 RT 1007.) Juror No. 3 did admit, however, that he would not vote to convict if he thought it was the wrong person being accused of the crime. (3 RT 1007.) Finally, Juror No. 3 concluded by saying, "It would be difficult to be fair, you know what I'm saying? I'm saying to you that I would try to be fair." (3 RT 1007.)

Since Juror No. 3's statements were equivocal or conflicting, and the trial court had the opportunity to observe the juror's demeanor, the trial court's determination of his state of mind is binding. (*People v. Thomas* (2012) 53 Cal.4th 771, 790; *People v. DePriest* (2007) 42 Cal.4th 1, 20–21; *People v. Coffman* (2004) 34 Cal.4th 1, 49; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 488.) Here, the trial court after observing Juror No. 3's demeanor and his responses to the questions by both defense counsel and the prosecutor, properly found that Juror No. 3 could be fair and impartial and properly denied the prosecution's challenge for cause.

ii. Trial counsel rendered effective assistance of counsel

Woodruff contends that during jury selection defense counsel failed to provide him with the effective assistance to which he was entitled under the state and federal Constitutions (AOB 83-84.) In particular, Woodruff contends that his trial counsel should have challenged Juror No. 3 or, at the very least, refrain from objecting to the prosecutor's challenge, and counsel should have asked the prospective juror whether he would automatically vote for the death penalty if the defendant was found guilty of murder. (AOB 83-84, 86-88.)

To establish a violation of the constitutional right to effective assistance of counsel, a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant in the sense that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied

on as having produced a just result." (*Strickland v. Washington, supra*, 466 U.S. at p. 686; see also *People v. Kipp* (1998) 18 Cal.4th 349, 366-367.) It is not deficient performance for a criminal defendant's counsel to make a reasonable tactical choice. (*People v. Thompson* (2012) 49 Cal.4th 79, 97; *People v. Ochoa* (1998) 19 Cal.4th 353, 445-446; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1243.) Reasonableness must be assessed through the likely perspective of counsel at the time. (*People v. Ochoa, supra*, 19 Cal.4th at p.445.) "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (*Strickland v. Washington, supra*, 466 U.S.at p. 689.)

It is clear from the record that defense counsel chose not to challenge Juror No. 3 and objected to the prosecution's challenge of this juror for cause because of reasonable trial strategy. Defense counsel specifically stated that his actions with respect to Juror No. 3 were "strategic decisions," and he had his "own approach for this case." (3 RT 1025.) Defense counsel noted that this juror was "perfectly accessible to my opinion, and he has not answered in a way that he could not be fair." (3 RT 1025.) One of the defense strategies of the trial was to show that Woodruff and his whole family, especially his mother, felt harassed by the police. (20 RT 4145-4146.) Woodruff and his family felt that the Riverside Police

Department had no respect or regard for black people. (20 RT 4174.) Because of this, Woodruff responded by shooting Officer Jacobs when he felt his mother was being harassed by police officers. Defense counsel obviously believed that an African-American juror would be better suited to understand this perspective. Thus, because Juror No. 3 stated that he would try to be fair, would be "willing to evaluate options before making conclusions," and his duty would "involve being open-minded and listening to all the evidence" (3 RT 990), defense counsel made a reasonable tactical decision to try to keep the prospective juror as part of the jury venire. As noted above, it is not deficient performance for a criminal defendant's counsel to make a reasonable tactical choice. (*People v. Thompson*, *supra*, 49 Cal.4th at p. 97.) Counsel, therefore, was not ineffective.

Woodruff also claims (AOB 86-88) that no one, including defense counsel, questioned Juror No. 3's answer to question 53, "If the defendant is guilty of murder he/she should get the death penalty." (6 CT 1754.) However, in follow up question 55, Juror No. 3 indicated that assuming a defendant was convicted of special circumstance murder, he would not always vote for the death penalty, but rather would consider all the evidence and the jury instructions as provided by the court and impose the penalty I personally feel is appropriate. (CT 1756.) During defense voir dire, Juror No. 3 also said he would be willing to evaluate all options before making conclusions and he would be open-minded. (3 RT 990.) Therefore, Woodruff's characterization that Juror No. 3 was an "automatic vote for death" is not supported by the record. Trial counsel was not deficient in failing to specifically question Juror No. 3 on his answer to that particular question, as the juror's position was later clarified by other questions and in voir dire.

Juror No. 3 was not a biased juror, the trial court's determination that the juror could be fair and impartial was proper and binding on this Court,

and trial counsel rendered effective assistance of counsel. Woodruff's claims should be rejected.

c. Woodruff's *Wheeler* motions were properly denied

Woodruff contends in claims A.4.c.i. and A.4c.ii. that his state and federal constitutional right to be tried by an impartial jury were violated by the prosecutor's discriminatory use of a peremptory challenge in contravention of *People v. Wheeler* (1978) 22 Cal.3d 258, and *Batson v. Kentucky* (1986) 476 U.S. 79 (106 S.Ct. 1712, 90 L.Ed.2d 69).[24] (AOB 27-36.) Specifically, in claim 4.c.i., Woodruff claims reversal is required because the trial court erroneously denied his *Wheeler* motion when it failed to find that a prima facie case of discrimination was established after the prosecutor used his peremptory challenges to excuse prospective juror S.J. (AOB 88-95.) In claim 4.c.ii., Woodruff argues that the trial court erred in concluding that the prosecutor's reasons for excusing prospective juror M.M. was race-neutral and denying Woodruff's second *Wheeler* motion. (AOB 96-101.) The trial court properly found that Woodruff failed to establish a prima facie case giving rise to the inference of a discriminatory purpose. Finally, the prosecutor offered a reasonable, race-neutral explanation for the excusal of M.M., and the trial court's decision that Woodruff had not proved purposeful racial discrimination is supported by substantial evidence in the record. Woodruff's claims should be rejected.

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[24] Although at trial defense counsel referred only to *Wheeler* (3 RT 1032, 1034) below, an objection under *Wheeler* suffices to preserve a *Batson* claim on appeal. (*People v. Lancaster* (2007) 41 Cal.4th 50, 73; *People v. Young* (2005) 34 Cal.4th 1149, 1174; *People v. Cornwell* (2005) 37 Cal.4th 50, 66, fn. 3.)

i. The trial court properly found that Woodruff failed to establish a prima facie case giving rise to the inference of a discriminatory purpose on the part of the prosecution in exercising its peremptory challenge against two African-American potential jurors

The trial court did not err when it found that Woodruff did not make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." If the trial court is found to have erred, a remand to conduct the second and third steps of the Batson analysis, and not a reversal, is required.

It is well settled that

> [a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias-that is, bias against members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds-violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.] Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution. [Citations.]

(*People v. Hamilton* (2009) 45 Cal.4th 863, 898; see also *Batson v. Kentucky* (1986) 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69; *People v. Wheeler* (1978) 22 Cal.3d 258, 280.)

> When a defendant asserts at trial that the prosecution's use of peremptory strikes violates the federal Constitution, the following procedures and standards apply. First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]

(*People v. Cowan* (2010) 50 Cal.4th 401, 447; *Johnson v. California* (2005) 545 U.S. 162, 168, 125 S.Ct. 2410, 162 L.Ed.2d 129, fn. omitted; see also *Snyder v. Louisiana* (2008) 552 U.S. 472, 476-477, 128 S.Ct. 1203, 1207, 170 L.Ed.2d 175; *Miller-El v. Dretke* (2005) 545 U.S. 231, 239, 125 S.Ct. 2317, 162 L.Ed.2d 196.) The identical three-step procedure applies when the challenge is brought under the California Constitution. (*People v. Salcido* (2008) 44 Cal.4th 93, 136.)

In *Wheeler, supra*, 22 Cal.3d at page 280, the California Supreme Court held that Batson's threshold step of showing a prima facie case required the defendant to "show a strong likelihood" of discriminatory group-bias. The United States Supreme Court in *Johnson* later held that *Wheeler*'s "strong likelihood" standard was "an inappropriate yardstick by which to measure the sufficiency of a prima facie case" under *Batson.* (*Johnson v. California, supra*, 545 U.S. at p. 168.) The high court clarified that *Batson's* first step was not intended "to be so onerous that a defendant would have to persuade the judge-on the basis of all the facts, some of which are impossible for the defendant to know with certainty-that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Id.* at p. 180.) "An 'inference' is generally understood to be a 'conclusion reached by considering other facts and deducing a logical consequence from them.'" (*Id.* at p. 168, fn. 4.)

In cases like the present one, in which it is not clear whether the trial court applied the proper standard, a reviewing court "independently determine[s] whether the record permits an inference that the prosecutor excused jurors on prohibited discriminatory grounds." (*People v. Thomas* (2012) 53 Cal.4th 771, 794; *People v. Carasi* (2008) 44 Cal.4th 1263,

1293.) In doing so, this Court must consider "all relevant circumstances." (*People v. Thomas*, *supra*, 53 Cal. 4th at p. 794, citing *Batson, supra*, 476 U.S. at p. 96, 106 S.Ct. 1712.) Here, the trial court did not state what standard it used to deny Woodruff's motion. (3 RT 1035-1036.) It merely stated that it did not "find a prima facie showing of systematic exclusion of African Americans." (3 RT 1035.) Under independent review, the totality of the facts do not give rise to an inference of a discriminatory purpose. (*People v. Thomas*, *supra*, 53 Cal. 4th at p. 794.)

In this case, Woodruff is African-American, while the victims, Officers Jacobs and Baker are Caucasian. After voir dire by both defense counsel (3 RT 918-919) and the prosecutor (3 RT 944-945), the prosecutor used a peremptory challenge to excuse L.T. (3 RT 976) and S.J., both African-Americans.[25] (3 RT 1028.) Defense counsel made an oral *Wheeler* motion alleging that the prosecutor was "making an effort to exclude jurors based on race" because the prosecutor used peremptory challenges on two African-American prospective jurors, L.T. and S.J. Specifically, defense counsel noted that the prosecutor used a disproportionate amount of inquiry questioning "people from other races regarding for cause issues." (3 RT 1033.) At that point, the prosecutor had used its peremptory challenges to excuse two African-American jurors, while the prosecutor had passed and accepted a jury which contained, an African-American juror, who was eventually seated as Juror No. 3. (3 RT 976, 1028, 1030.)

The trial court denied the motion, finding that Woodruff had failed to make a prima facie showing of systematic exclusion of African-Americans. (3 RT 1035, 1036.) The trial court reasoned that the prosecutor had passed

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[25] Prospective juror S.J. completed a juror questionnaire, where he listed his race and ethnic origin as "Black American." (8 CT 2177.) Prospective juror L.T. also completed a juror questionnaire, and listed her race and ethnic origin as "African-American." (8 CT 2108.)

and accepted the jury panel which included an African-American; thus, "it kind of shoots the theory that he's systematically excluding African-Americans in the foot." (3 RT 1034.) The trial court also pointed out that with respect to L.T., she had some religious beliefs that might conflict with her ability to render a death penalty verdict. She specifically stated in her questionnaire that she would not follow the law as the judge instructs "if it goes against [her] religious beliefs." (8 CT 2120; see also 8 CT 2122 ("my religious beliefs, of course, prohibit murder/killing.") Additionally, L.T. might have had dissatisfaction with law enforcement because the person who shot into her house was not prosecuted, and finally, L.T. was uncomfortable with violence and viewing autopsy photos. (3 RT 1035; see 3 RT 938, 958-962; 8 CT 2113-2114.) In her juror questionnaire, L.T. stated that she felt "that the Riverside Police Dept. did not handle the case appropriately." (8 CT 2114.) Regarding prospective juror S.J., the trial court explained that S.J. had equated serving on a jury with having a root canal, and his reluctance to serve was an appropriate reason to use a peremptory challenge.[26] (3 RT 1035.)

These circumstances do not raise an inference that the prosecutor exercised peremptory challenges based on race. There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination. (*Purkett v. Elem.* (1995) 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834; *People v. Griffin* (2004) 33 Cal.4th 536, 554.) It is "presumed that the prosecutor uses peremptory challenges in a constitutional manner." (*People v. Burgener* (2003) 29 Cal.4th 833, 864.) As defense counsel even admitted at trial, at that point only "two

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[26] The discussion to which the trial court referred was not, in fact, with S.J., but rather with prospective juror, D.B. (3 RT 932.)

[peremptory challenges] have been utilized against African Americans, and they have been strategically placed, I will agree with that. So it is hard to develop a prima facie case." (3 RT 1036.) While "'even the exclusion of a single prospective juror may be the product of an improper group bias. As a practical matter, however, the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion.'" (*People v. Bonilla* (2007) 41 Cal.4th 313, 343, quoting *People v. Bell* (2007) 40 Cal.4th 582, 598, quoting *People v. Harvey* (1984) 163 Cal.App.3d 90, 111.) Woodward failed to establish a prima facie case of group bias. The prosecutor's use of a peremptory challenge to excuse prospective jurors L.T. and S.J. did not establish a prima facie case of group bias.

On appeal, Woodruff attempts to compare S.J.'s answers in his juror questionnaires with that of other prospective jurors. (AOB 93-94.) However, this type of comparative juror analysis is inappropriate in this case. (*People v. Taylor* (2010) 48 Cal.4th 574, 644.) Like *Bonilla, supra*, 41 Cal.4th 313 and *Howard, supra*, 42 Cal.4th at p. 1019, this is a "first-stage" *Wheeler/Batson* case, in that the trial court denied Woodruff's motion after concluding he had failed to make out a prima facie case. (3 RT 1034-1036.) It is not a "third-stage" case, in which a trial court concluded a prima facie case had been made, solicited an explanation of the peremptory challenges from the prosecutor, and only then determined whether defendant had carried his burden of demonstrating group bias. (*People v. Howard, supra*, 42 Cal.4th at p. 1019.)

> We have concluded that *Miller-El v. Dretke* (2005) 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 does not mandate comparative juror analysis in these circumstances (*Bell, supra*, 40 Cal.4th at p. 601), and thus we are not compelled to conduct a comparative analysis here. Whatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his strikes are pretextual, it has little or no use where the analysis does not

> hinge on the prosecution's actual proffered rationales, and we thus decline to engage in a comparative analysis here."

(*People v. Bonilla, supra*, at p. 350.) Here, the trial court's statement that a justification is evident in the record (3 RT 1034), does not convert a first stage *Wheeler/Batson* case into a third stage one. (*People v. Clark, supra*, 52 Cal.4th at p. 908, fn. 13; *People v. Howard, supra*, 42 Cal.4th at p. 1019.) Therefore, comparative analysis is inappropriate.

While the trial court did not find a prima facie case had been proven and therefore did not request the prosecutor to provide reasons for the challenges of L.T. and S.J., L.T.'s responses on voir dire showed a race-neutral reason for excusing the prospective juror. (*People v. Thomas*, supra, 53 Cal. 4th at p. 794; See *People v. Cornwell* (2005) 37 Cal.4th 50, 70 [excused juror's voir dire disclosed numerous reasons for a prosecutor to excuse her, including personal experience with an allegedly unfair homicide prosecution of a close relative].) Like the juror in *Cornwell*, L.T. was a victim of a shooting into her home. (3 RT 958.) No one was prosecuted for the crimes, and it was possible that she had a bias against law enforcement. (3 RT 959.) Moreover, L.T. expressed hesitation in viewing photographs that exhibited violence, including autopsy photographs. (3 RT 960-961.) As the trial court aptly found, the prosecutor had several race-neutral reasons for challenging L.T.

Although no obvious reason appears why the prosecutor would have chosen to strike S.J., neither were his answers so favorable to the prosecution that it would be reasonable to infer, solely on that basis, that he was excused because of his race.[27] It is possible that the prosecutor was

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[27] S.J. was a 54 year old African-American male who worked as an aircraft mechanic for UPS. (8 CT 2177, 2179.) He had "no feeling" about the death penalty and he was neither strongly in favor or strongly against the death penalty. (8 CT 2191.) During voir dire, S.J. said he was familiar (continued...)

concerned that S.J. stated in voir dire that he was unsure if he would be able to evaluate fairly the issue regarding whether the death penalty should be imposed if the defendant's mental state was affected. (3 RT 922.)

In any event, the absence of a reason why the prosecutor would have chosen to strike S.J. that is apparent on the record does not, in the context of all the other circumstances, suggest that the reason was race. (*People v. Thomas*, *supra*, 53 Cal.4th at p. 794.) Here, "the prosecution's pattern of excusals and acceptances during the peremptory challenge process reveals no obvious discrimination" against African–American jurors. (*Ibid.*; *Carasi*, *supra*, 44 Cal.4th at p. 1294.) The trial court observed that the prosecution accepted the panel with an African-American male, who eventually became Juror No. 3, as part of the panel. (3 RT 1030, 1034.) Although the circumstance that the jury included a member of the identified group is not dispositive (*People v. Snow* (1987) 44 Cal.3d 216, 225–226), "it is an indication of good faith in exercising peremptories" and an appropriate factor to consider in assessing a *Wheeler/ Batson* motion. (*People v. Clark* (2011) 52 Cal.4th 856, 906.) The prosecution at this point had exercised two of its peremptory challenges on two African-American prospective jurors. This disparity is not significant enough, in itself, to suggest discrimination. (*People v. Thomas*, *supra*, 53 Cal.4th at p. 796; See Carasi, supra, at pp. 1291, 1295 [no prima facie case of gender discrimination even though prosecutor used 20 out of 23 peremptory challenges against female prospective jurors]; *People v. Bonilla* (2007) 41

(...continued)
with the shooting of Tyisha Miller by the Riverside Police Department, but had no opinion regarding how the case was handled. (3 RT 918, 945.) S.J. did admit he was unsure if he would be able to evaluate fairly the issue regarding whether the death penalty should be imposed if the defendant's mental state was affected. (3 RT 922.)

Cal.4th 313, 345 [no prima facie case of gender discrimination even though women represented 38 percent of the jury pool and the prosecutor used 67 percent of his strikes against women].)

The totality of facts in this case did not give rise to an inference of discrimination. The record shows that the trial court correctly determined that Woodruff failed to make a prima facie showing of a *Batson/Wheeler* violation, as he failed to show that "the totality of the relevant facts [gave] rise to an inference of discriminatory purpose." (*Batson, supra,* 476 U.S. at p. 94; *Johnson, supra,* 545 U.S. at p. 168.)

In the event that this Court determines that the trial court erroneously found that Woodruff had not presented a prima facie case, the case should be remanded to allow the trial court to conduct the second and third steps of the *Batson* analysis. (*People v. Johnson* (2006) 38 Cal.4th 1096, 1103.) Woodruff argues to the contrary, claiming that reversal is required. (AOB 95.) The trial court did not err in finding that Woodruff failed to make out a prima facie showing of an inference of discriminatory purpose against a cognizable group in the prosecutor's use of a peremptory challenge to excuse prospective jurors L.T. and S.J. But assuming error, the matter should be remanded to the trial court and not reversed.

ii. M.M.'s educational background in sociology and employment as a social worker was a valid race-neutral explanation for excusing the prospective juror; the trial court did not err in finding that no purposeful racial discrimination was proven

Woodruff argues in claim 4.c.ii. that the trial judge erred in denying his second *Wheeler* motion and concluding that the prosecutor's reason for excluding prospective juror M.M., a black male originally from Congo, Africa (10 CT 2925), was race neutral. (AOB 96-101.) The prosecutor offered a reasonable, race-neutral explanation for the excusal of M.M., and

the trial court's decision that Woodruff had not proved purposeful racial discrimination is supported by substantial evidence in the record.

The prosecutor used one of its peremptory challenges to excuse prospective juror M.M. (4 RT 1135.) Woodruff made an oral motion under *Wheeler* with respect to M.M. (4 RT 1137.) The trial court found a prima facie showing that the facts gave rise to an inference of discriminatory purpose, and required the prosecutor to give his reasons for excusing M.M. (4 RT 1137.) The prosecutor gave his reasons as follows:

> MR. SOCCIO: He said he did his dissertations based on the colonization, that he found it to be a brainwashing to exploit his country, I guess. [¶] He has a Master's Degree in sociology. I have grave concerns about anybody who has a social services work background, or at least trained in it. [¶] Then, he actually works for a social service agency. I am familiar with the GAIN program in – Well, not in Los Angeles, but out here with the social services work mindset, and I didn't think he would make a good juror.

(4 RT 1137-1138.) Defense counsel then moved for a mistrial, claiming that the prosecutor's "act is the straw that breaks the camel's back, which is his decision to exclude M.M. given the pattern that's gone on through the whole course of this selection thus far." (4 RT 1138.) The trial court denied the motion for a mistrial, ruling that the prosecutor's justification for excluding M.M. was race-neutral. (4 RT 1139.) The trial court noted that it suspected the prosecutor would have excluded M.M. even if he was Caucasian because prosecutors "generally will excuse people with social welfare type of backgrounds. And the reason for that ...is that they are very much inclined to hold the prosecution to a higher standard than that required by the law. In other words, something more than proof beyond a reasonable doubt." (4 RT 1139-1140.) The trial court concluded that it was

> satisfied that the explanation that Mr. Soccio gave is race neutral. That race was not a factor in excluding M.M. Juror No.

> 3 remains on the jury panel. He is African-American. [¶] I cannot, in any sense of the concept, conclude there has been a systematic effort to exclude people based on race. All three of the African-Americans excused, via peremptory challenge, were done so for race neutral reasons. That's my conclusion.

(4 RT 1139-1140.)

As stated in Argument 4.c.i. *ante*., motions under *Batson/Wheeler* are governed by the following three-step procedure: (1) the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose; (2) once the defendant has made out a prima facie case, the burden shifts to the State to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes; (3) if a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination. (*People v. Elliott* (2012) 53 Cal.4th 535, 559.) "We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]" (*People v. Watson* (2008) 43 Cal.4th 652, 671; *People v. Burgener* (2003) 29 Cal.4th 833, 864.) On appeal, this Court reviews a trial court's ruling at step three for substantial evidence. (*People v. Elliott*, *supra*, 53 Cal.4th at p. 559, citing *People v. Lewis* (2008) 43 Cal.4th 415, 470; *People v. Watson*, *supra*, 43 Cal.4th at p. 671.)

While the trial court did not find the totality of the relevant facts provide a basis for inferring that the prosecutor challenged two prospective jurors, L.T. and S.J., as discussed above, because of their race, the trial court did find a prima facie case was presented after the prosecutor excused M.M. (4 RT 1137.) As the trial court aptly found, the prosecutor offered a

non-race-based rationale for exercising the peremptory challenge on M.M. The prosecutor noted the prospective juror's educational background, namely a master's degree in sociology (10 CT 2936, 4 RT 1107, 1127), and his current employment as a human services administrator for Los Angeles County Social Services as his reason for excusing M.M. (4 RT 1137.) M.M. was a GAIN supervisor, an employment service that trains people how to get a job. (4 RT 1127.) M.M. also wrote a thesis on how colonial education was "just a brainwash to allow the education of Africa." (4 RT 1126.) The prosecutor explained that he had "grave concerns about anybody who has a social services work background," and he did not think that someone with a "social services work mindset" would "make a good juror." (4 RT 1137-1138.)

On this record, the prosecutor's concern about M.M.'s ability to remain objective in light of his background as a social worker was race neutral. A prosecutor may challenge a potential juror whose occupation, in the prosecutor's opinion, would not render him the best type of juror to sit on the case for which a jury is being selected. (*People v. Reynoso* (2003) 31 Cal.4th 903, 924–925.) Courts have deemed a peremptory challenge to a prospective juror with a background in psychiatry or psychology or social work to be race neutral. (*People v. Watson* (2008) 43 Cal.4th 652, 676; *People v. Landry* (1996) 49 Cal.App.4th 785, 790.) Potential jurors with certain backgrounds, including those related to psychology or social services, can reasonably be assumed to be more defense oriented. (See, e.g., *People v. Trevino* (1997) 55 Cal.App.4th 396, 411 [providers of social services]; *Landry*, *supra*, 49 Cal.App.4th at pp. 790–791 [background in psychiatry or psychology]; *People v. Perez* (1996) 48 Cal.App.4th 1310, 1315 [those working in social services field].)

Additionally, other circumstances appearing in the record dispel any purposeful racial discrimination by the prosecutor's use of peremptory

challenges. Notably, the prosecutor repeatedly passed with Juror No. 3, an African–American man, on the panel. (*People v. Cornwell*, *supra*, 37 Cal.4th at pp. 69–70 [no inference of bias in excusing one of two African–American prospective jurors, given that the other African–American prospective juror was passed repeatedly by the prosecutor and sat on the jury].) As previously stated, although the circumstance that the jury included a member of the identified group is not dispositive (*People v. Snow*, *supra*, 44 Cal.3d at pp. 225–226), "it is an indication of good faith in exercising peremptories" and an appropriate factor to consider in assessing a *Wheeler/Batson* motion. (*People v. Clark*, *supra*, 52 Cal.4th at p. 906.) Moreover, statistics do not show purposeful racial discrimination by the prosecutor. Notably, African–Americans were represented by eight point three percent of the selected jury. (See *Id.* at p. 905.)

Finally, contrary to Woodruff's assertions (AOB 98), a comparative juror analysis does not reveal purposeful discrimination. Woodruff points out that the prosecutor did not excuse Juror Nos. 2 and 11, who were white, even though they were employed as a college research assistant and second grade teacher, respectively. (AOB 98.) However, Juror No. 2, was a research assistant who specialized in entomology and did research on insects, not a social worker who had a master's degree in sociology. (6 CT 1719; 2 RT 892.) Juror No. 11 was a second grade teacher. (7 CT 1903.) While she took a psychology class, it was an introductory psychology class, as opposed to receiving a graduate degree in sociology. Moreover, M.M.'s current employment was as a social worker. Neither of these two jurors shared M.M.'s extensive background in social work.

Because the prosecutor's reasons for excusing M.M. were race-neutral and were borne out by the record, the trial court's determination was supported by substantial evidence. (*People v. Watson*, *supra*, 43 Cal.4th at p. 676.) Woodruff's claim should be rejected.

5. THE PROSECUTOR'S COMMENTS DURING VOIR DIRE DID NOT CONSTITUTE PROSECUTORIAL ERROR, AND IT IS UNLIKELY THAT ANY COMMENT DURING VOIR DIRE UNDULY INFLUENCED THE JURY'S VERDICT IN THIS CASE

Woodruff contends he was denied a fair trial and the due process of law because the prosecutor made an improper insinuation during juror voir dire that Woodruff asked for trial, and had declined to plea bargain. (AOB 102-105.) The prosecutor did not commit error during comments he made to D.M. during voir dire. Moreover, even assuming error, it is unlikely that error during voir dire questioning unduly influenced the jury's verdict.

During voir dire of prospective juror D.M., D.M. stated that she had been a witness in a case. (3 RT 1072.) The prosecutor asked D.M. how it felt to be on the stand. (3 RT 1072.) D.M. responded, "We didn't go that far, I was just – I told what I saw to the D.A., and the D.A. took it to the other attorney. And the guy said okay, I did it." (3 RT 1073.) The prosecutor then responded, "Do you understand, though, that even somebody who did it can ask for a trial? Do you understand that?...That it's a constitutional right for everybody, even if they did it, to ask for a trial? Will you not hold that against the defendant?" (3 RT 1073.)

Defense counsel later objected claiming that the prosecutor implied Woodruff was given a plea bargain, but Woodruff requested a trial. (4 RT 1092.) The trial court recounted that the prosecutor's questions were to the effect of "even if the guy is caught on tape, a presumption of innocence applies, and you have to follow the law. You are not gonna hold it against the defendant because we're having a trial." (4 RT 1094.) The trial court found there was no prejudice to Woodruff by the prosecutor's comments. In fact, they "ingrain in the minds of the jurors that they're to follow the law, to accord him the presumption of innocence that the law requires." (4 RT 1094.)

"In general, a prosecutor commits misconduct by the use of deceptive or reprehensible methods to persuade either the court or the jury." (*People v. Thomas*, *supra*, 53 Cal.4th at p. 797; *People v. Price* (1991) 1 Cal.4th 324, 447.) Bad faith is not necessary for a showing of prosecutorial misconduct, which, as this Court has observed, is more aptly described as prosecutorial error. (*People v. Hill* (1998) 17 Cal.4th 800, 823 & fn. 1.)[28] "When, as here, the point focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Thomas*, *supra*, 53 Cal.4th at p. 797; *People v. Berryman* (1993) 6 Cal.4th at p. 1072.)

Here, while the trial court set forth the wrong factual scenario when it denied Woodruff's objections to the prosecutor's comments on voir dire, the trial court's ruling was proper. The prosecutor's comments reinforced that a defendant is presumed innocent, even if he confesses. (3 RT 1073.) This comment was made after D.M. stated that in the case where she was a witness, the defendant said he had done it, and the case was over and the trial did not proceed. (3 RT 1073.) In this case, the prosecutor wanted to stress that every person has the right to a trial, no matter what the circumstances. (3 RT 1073.) Although one of the conclusions a juror might have drawn from the prosecutor's example was that the presumption of innocence does not mean that the defendant actually is innocent, the main point of the prosecutor's example was that the presumption of innocence applies in court once the person has been charged with a crime, regardless of the circumstances. (*People v. Thomas, supra*, 53 Cal.4th at p.

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[28] Woodruff claims the prosecurtor committed misconduct (AOB 104); however, as this Court has noted, error by a prosecutor is more aptly described as prosecutorial error.

797.) As this Court pointed out in *Thomas*, this Court "found no misconduct in a case in which a prosecutor made a comparable comment during voir dire, stating that "even Jack Ruby (whose killing of Lee Harvey Oswald was broadcasted on national television) had the right to a jury trial." (*Ibid.*, quoting *People v. Seaton* (2001) 26 Cal.4th 598, 636.) The prosecutor's statements "were not legally erroneous, and defendant had ample opportunity to correct, clarify, or amplify the prosecutor's remarks through his own voir dire questions and comments." (*People v. Thomas*, supra, 53 Cal.4th at p. 797, citing *People v. Medina* (1995) 11 Cal.4th 694, 741.) Likewise, in the present case, the prosecutor's comments simply reinforced a defendant's right to trial. It was not reasonably likely that the jury construed or applied any of the prosecutor's remarks in an objectionable fashion." (*People v. Thomas*, *supra*, 53 Cal.4th at p. 797.)

"Moreover, as a general matter, it is unlikely that errors or misconduct occurring during voir dire questioning will unduly influence the jury's verdict in the case. Any such errors or misconduct 'prior to the presentation of argument or evidence, obviously reach the jury panel at a much less critical phase of the proceedings....' " (*People v. Thomas*, *supra*, 53 Cal.4th at p. 797; *People v. Medina*, *supra*, 11 Cal.4th 694, 741.) Similarly, in the present case, because any alleged prosecutorial errors occurred during voir dire, Woodruff was not prejudiced.

B. GUILT PHASE ISSUES

1. THE RECORD DOES NOT SHOW THAT THE PRESENCE OF UNIFORMED OFFICERS RESULTED IN A DENIAL OF A FAIR TRIAL

Woodruff contends that the trial court erred in claiming it did not have authority to limit the number of uniformed police officers in the courtroom, thereby creating an intimidating atmosphere in the courtroom. (AOB 106-111.) The trial court acted within its discretion in denying Woodruff's

request to exclude all uniformed officers from the courtroom, as their presence was not inherently prejudicial.

During a pretrial hearing on December 2, 2002, defense counsel requested an order limiting or prohibiting the presence of uniformed peace officers at the trial. (4 RT 1256.) Defense counsel was concerned that the presence of officers in the courtroom would be intimidating and distracting to the jury. (4 RT 1256.) The trial court stated that it would exclude anyone for "inappropriate courtroom behavior." (4 RT 1257.) However, with respect to a blanket restriction on uniformed officers, the trial court denied defense counsel's motion, reasoning, "I have no right to tell them how to dress when they come in here. This is a public proceeding and they can come in here." (4 RT 1257.) The trial court continued, "[F]or me to issue an order excluding uniformed officers from attending would be illegal. I don't have authority to do that, so I'm not gonna issue such an order." (4 RT 1258.)

During his testimony, Officer Baker testified that he "had a uniform on like a number of officers do in this room. I had a uniform on." (5 RT 1447.) On defense counsel's motion, the trial court struck Officer Baker's reference to other officers in the room, and instructed the jury to disregard his comment. (5 RT 1447.) In response to defense counsel's question on cross examination, Officer Nelson and Officer Ili testified that they wore a blue wristband in memory of Officer Jacobs. (10 RT 2247; 12 RT 2686-2687.)

A fair trial is a fundamental due process right guaranteed under the Fourteenth Amendment. (*Holbrook v. Flynn* (1986) 475 U.S. 560, 570, 106 S.Ct. 1340, 89 L.Ed.2d 525.) Whether the presence of uniformed police officers in a courtroom is so inherently prejudicial as to render a trial unfair is largely a matter of degree. The test is whether the police officers' presence creates an "'unacceptable risk ... of impermissible factors coming

into play.'" (*Ibid.*) In *Holbrook*, the United States Supreme Court ruled that four uniformed state troopers sitting in a spectators' row immediately behind the defendant to supplement the court's ordinary security personnel did not create such an inherent risk of prejudice that it denied the defendant a fair trial. (*Holbrook, supra*, 475 U.S. at p. 570.) At the same time, the court cautioned that "a roomful of uniformed and armed policemen might pose [a risk] to a defendant's chances of receiving a fair trial." (*Id.* at pp. 570–571.)

In *People v. Cummings* (1993) 4 Cal.4th 1233, this Court addressed the issue of police officer spectators at trial. Cummings, charged with the capital murder of a police officer in the performance of his duties, objected to the presence of numerous uniformed officers among the spectators at trial. (*Id.* at pp. 1255, 1298.) The court expressed doubt that the officers' presence would unduly influence the jury, but suggested that officers attending the trial henceforth wear civilian clothes and invited the defense to renew the objection were the situation to recur. (*Id.* at p. 1298.)

This Court rejected Cumming's contention that the court abused its discretion when it overruled defendant's objection. This Court held:

> The right to a public trial is not that of the defendant alone.... Only if restriction is necessary to preserve a defendant's right to a fair trial may the court restrict attendance by members of the public. Because a First Amendment right of access to judicial proceedings is also recognized, they may not be closed 'unless specific, on the record findings are made demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest."' [Citation.] [¶] In this case there was no effort to close the proceedings. Nonetheless, Cummings sought to exclude a segment of the public. As members of the public, the police officers had both common law and constitutionally based rights to attend the trial. Exclusion of any group on the basis of the members' status would be impermissible. The trial court sought to balance the rights of those officers whose duty assignments precluded attendance in civilian clothes against the possibility that seeing large numbers

> of uniformed officers among the spectators would somehow influence the jury. The concerns expressed by Cummings were not sufficient to establish that excluding all uniformed officers was essential to a fair trial, and the record does not support his claim of actual prejudice.

(*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1298-1299.)

Here, the trial court acted within its discretion in denying Woodruff's request to issue a blanket exclusion of all uniformed officers from the courtroom. It is undisputed that police officers sat in the courtroom audience, at least at some parts of trial. At the same time, the record does not support any conclusion concerning the number of officers present at any given point. Woodruff has failed to show any basis for concluding that any juror was distracted or intimidated by the presence of officers in uniform. The cases relied upon by Woodruff (AOB 109) are readily distinguishable, as there was no evidence that in this case, officers sat directly behind counsel table to serve to intimidate jurors. In fact, the only reference to officers in the courtroom was stricken from the record during Officer Baker's testimony. (5 RT 1447.) There is nothing to show that any of the officer spectators acted in any inappropriate way.[29]

Woodruff points to the testimony by Officers Nelson and Ili to show that wearing blue bands in memory of Officer Jacobs somehow served to intimidate the jurors. (AOB 107.) However, attention was brought to those

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[29] Even if there was actual misconduct by any police officer spectators, Woodruff has forfeited any claim of on appeal because it was incumbent upon him to object, request an evidentiary hearing below to determine if any such misconduct occurred, and request an admonition if any harm from such misconduct could be cured by an admonition. (*People v. Chatman* (2006) 38 Cal.4th 344, 368; *People v. Hinton* (2006) 37 Cal.4th 839, 898.) Woodruff's claim is limited to the subject matter of his motion below: whether or not uniformed officers could be present in the courtroom as spectators.

bands only because defense counsel questioned the officers about these bands during cross examination. (10 RT 2247; 12 RT 2686-2687.) Woodruff should be foreclosed from now objecting to these bands since he was the one who alerted the jury to the bands in the first place. It is unlikely that the jurors would have even noticed a wrist band on a uniformed officer. Even if they had, a blue band with Jacobs' name, date of birth, and end of watch, would not inherently prejudice Woodruff. (*Carey v. Musladin* (2006) 549 U.S. 70, 80, 127 S.Ct. 649, 166 L.Ed.2d 482 [defendant not inherently prejudiced when spectators wore buttons depicting the murder victim].)

Finally, Woodruff points out that on December 5, 2002, as the room was vacating, a person who was seated in the back row, who Woodruff identified as Heath Baker, Officer Baker's brother, "ma[d]e a pointing motion at [Woodruff] like he was pointing a gun at [Woodruff]." (7 RT 1732.) The trial court asked the Sheriff's Department to investigate the incident. The trial court stated that it would "not tolerate any disruptive or intimidating or other inappropriate conduct by anyone in the audience." (7 RT 1733.) The trial court indicated that that person would be removed from the courtroom or "sterner measures" would be taken. (7 RT 1733.) The matter was never discussed again.

"Misconduct on the part of a spectator is a ground for mistrial if the misconduct is of such a character as to prejudice the defendant or influence the verdict." (*People v. Lucero* (1988) 44 Cal.3d 1006, 1022.) The trial court is afforded broad discretion in determining whether spectator conduct is prejudicial (*ibid.*), and "'it is generally assumed that such errors are cured by admonition, unless the record demonstrates the misconduct resulted in a miscarriage of justice.'" (*People v. Hill* (1992) 3 Cal.4th 959, 1002, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) The record shows that the trial court addressed the

matter. If any inappropriate behavior by any spectator, civilian or officer – uniformed or not, occurred, it was incumbent upon Woodruff to object. *People v. Chatman*, *supra*, 38 Cal.4th at p. 368; *People v. Hinton*, *supra*, 37 Cal.4th at p. 898.) Notwithstanding Woodruff's insistence to the contrary, there was no spectator misconduct, and no miscarriage of justice.

The record does not show that the presence of uniformed officers resulted in a denial of a fair trial. The record does not suggest that the presence of uniformed police officers overshadowed Woodruff's trial, nor does it suggest a possibility that the outcome of his trial may have been affected by the presence of uniformed officers as spectators.

2. THE PRESUMPTION OF INNOCENCE WAS NOT IMPAIRED BY THE ADMISSION OF PHOTOGRAPHS OF WOODRUFF IN AN ORANGE JUMPSUIT AT THE TIME OF HIS ARREST

Woodruff argues in Claim B.2. that the trial court abused its discretion when it permitted jurors to view photographs of Woodruff in an orange jail jumpsuit which were taken on the date of his arrest. (AOB 112-115.) Woodruff's contention is without merit, as a brief reference as to how Woodruff appeared at the time of his arrest and two photographs of Woodruff in an orange jumpsuit did not raise an inference that Woodruff was in custody, nor could he have been prejudiced by the admission of the photographs.

During in limine motions, defense counsel objected to People's Exhibit Numbers 27 and 28 which were photos of Woodruff close up and full body in an orange jumpsuit. (4 RT 1207.) The prosecutor explained that she intended to use those photographs to counter any defense argument that Woodruff was injured at the time of his arrest. Because Woodruff was naked when he was arrested, his booking photograph was of him in a standard jail jumpsuit. (4 RT 1208.) The trial court denied defense counsel's objection and ruled that it could anticipate a defense argument

that the officers exceeded the scope of their authority. (4 RT 1208.) The trial court also noted that there was nothing prejudicial about either photograph. One of them was a close up of Woodruff's neck and front of his face, and the other was a full body shot. (4 RT 1209.)

A defendant may not be compelled to stand trial before a jury while dressed in identifiable jail clothing because "[j]urors may speculate that the accused's pretrial incarceration, although often the result of his inability to raise bail, is explained by the fact he poses a danger to the community or has a prior criminal record." (*Estelle v. Williams* (1976) 425 U.S. 501, 518, 96 S.Ct. 1691, 48 L.Ed.2d 126, dissenting opn. of Brennan, J.; see also *People v. Taylor* (1982) 31 Cal.3d 488, 494.) "The Supreme Court has observed that the defendant's jail clothing is a constant reminder to the jury that the defendant is in custody, and tends to undercut the presumption of innocence by creating an unacceptable risk that the jury will impermissibly consider this factor. [Citation.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1336, quoting *People v. Taylor*, *supra*, 31 Cal.3d at p. 494.)

The information received by the jurors at this juncture in the present case, however, could not possibly have had that effect. Woodruff wore civilian clothing at his trial (8 RT 1819; 10 RT 2195; 26 RT 5380, 5411; 27 RT 5565), and contrary to his suggestion, there is no reason the jury would have inferred that he remained in custody, posed a danger to the community or had a prior criminal record as opposed to having been released on bail. The prosecutor did not refer expressly to the circumstance that Woodruff was in custody when he questioned Officer Nelson and showed him the photograph of Woodruff. The prosecutor simply asked if the photograph depicted how Woodruff looked on the date of arrest. As the trial court noted, there was nothing prejudicial about the photographs. In fact, one photograph was a close up of Woodruff's face and neck; therefore, the jail jumpsuit was only minimally visible, if at all. These two photographs and

one simple question about Woodruff's appearance at the time the photograph was taken did not necessarily raise the inference that Woodruff was in fact in custody.

Even if it had, it established nothing more than Woodruff was in custody on the date of his arrest for the shooting of a police officer. Awareness of a defendant being in custody on the date of his arrest simply does not create the potential for the impairment of the presumption of innocence that might otherwise arise. (See, *People v. Bradford*, *supra*, 15 Cal.4th at p. 1336 [an isolated comment that a defendant is in custody simply does not create the potential for the impairment of the presumption of innocence that might arise were such information repeatedly conveyed to the jury]; see also, *People v. Cunningham* (2001) 25 Cal.4th 926, 988 ["Brief glimpses of a defendant in restraints have not been deemed prejudicial"].) Additionally, the evidence of Woodruff's guilt was overwhelming, as discussed below. Therefore, it is not reasonably probable the jury would have reached a more favorable verdict had those photographs of Woodruff at the time of his arrest not been shown to the jury. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

3. WOODRUFF WAIVED THE CLAIM THAT HE WAS PREJUDICED BY A DETECTIVE'S INADVERTENT REMARK ABOUT WOODRUFF'S PRIOR ARREST; IN ANY EVENT, THE STATEMENT WAS NOT PREJUDICIAL

Woodruff claims that Detective Kensinger improperly referred to Woodruff's previous arrest record, in violation of Woodruff's state and federal rights to a fair trial and due process. (AOB 116-120.) Woodruff waived this claim because he failed to object or seek an admonition which would have cured any harm. Moreover, the brief, inadvertent remark by the detective did not prejudice Woodruff.

During cross examination, defense counsel questioned Detective Kensinger why he did not question Claude Carr further after Claude said,

"My brother is a family man." (13 RT 2949-2950.) The following exchange took place:

> Q. The issue wasn't what was going on in Mr. Woodruff's mind? He's a family man and cares about his family. You didn't think that was relevant that he started talking about he's a family man?
>
> A. He simply states he's a family man. He hasn't done anything wrong. Are we talking about what he was like in the past and his previous arrest record?
>
> Q. You know the rules. Are you bringing up previous arrest records?
>
> A. We're talking about generality.
>
> Q. Whose previous arrest record?
>
> A. Apparently, I am not allowed to answer that.
>
> Q. So you're letting the jury know something they're not supposed to know?
>
> A. So, one, we talk about a myriad of things. Why would we ask if he's a family man?
>
> Q. You crossed the line here a little bit.

(13 RT 2950.) The prosecutor then objected, and the trial court sustained the objection. (13 RT 2950.)

Although most cases involve prosecutorial or juror misconduct as the basis for the motion, a witness's volunteered statement can also provide the basis for a finding of incurable prejudice. (*People v. Wharton* (1991) 53 Cal.3d 522, 565-566 [motion for mistrial properly was denied because court's admonition and witness's later testimony under cross-examination dispelled prejudice], citing *People v. Rhinehart* (1973) 9 Cal.3d 139, 152 [witness's inadvertent answer, if error, was not sufficiently prejudicial to justify mistrial].) The principal concern in evaluating this issue is whether the witness's remarks created an incurable prejudice such that the defendant

could not receive a fair trial. (*People v. Price* (1991) 1 Cal.4th 324, 428; *People v. Wharton, supra*, 53 Cal.3d at p. 565.)

In this case, Woodruff waived this claim because he did not object to the detective's inadvertent testimony, nor did he seek an admonition to cure any harm. (Evidence Code section 353; *People v. Jennings* (1991) 53 Cal.3d 334, 375.) Here, defense counsel asked Detective Kensinger about why he did not question Claude further about Woodruff as a "family man." The detective responded, "He simply states he's a family man. He hasn't done anything wrong. Are we talking about what he was like in the past and his previous arrest record?" (13 RT 2950.) Defense counsel did not object nor did he request a curative admonition. Therefore, the issue is waived. (*People v. Jennings, supra*, 53 Cal.3d at p. 375 ["Because defendant fails to establish that testimony revealing his ex-convict status, and his prior arrest, is so prejudicial that its admission must always result in reversal of the judgment, we hold counsel's failure to object or seek some other form of remedial action waived the issue for appeal."].)

Woodruff claims that no objection, motion to strike or admonition could have cured the prejudicial effect of the gratuitous comment. (AOB 119.) But as this Court stated, "[W]e do not presume that knowledge that a defendant previously has been convicted is incurably prejudicial." (*People v. Ledesma* (2006) 39 Cal.4th 641, 683; see *People v. Jennings, supra*, 53 Cal.3d at p. 375; see also *People v. Anderson* (1990) 52 Cal.3d 453, 468 [claim that trial court improperly disclosed to jury that the defendant previously had been sentenced to death for the same offense was waived by counsel's tactical failure to object, and was not prejudicial].)

Here, any mention of Woodruff's prior arrests was very brief, rather vague, and did not even specify if the prior arrest referred to Woodruff's prior arrests or perhaps Claude's prior arrest record. Moreover Detective Kensinger's reference was an insignificant part of the case. Neither party

ever solicited mention of Woodruff's prior arrests nor was it ever discussed or elicited in testimony again during the guilt phase. The trial court shortly thereafter sustained the prosecution's objection to the line of questioning by defense counsel, and defense counsel moved on to a different topic.

Moreover, the evidence against Woodruff was overwhelming. Officer Baker saw Woodruff leaning over the stairway, and heard Woodruff yell threateningly, "you better not touch my momma." (6 RT 1474- 476, 1559.) Menzies also heard Woodruff yell out that the officer could not arrest his mother. (5 RT 1316, 1394.) Delgado, a neighbor, saw Woodruff yell up at the officers about leaving his mother alone. (8 RT 1829.) Delgado then saw Woodruff go into his home and retrieve a silver or chrome plated handgun. (8 RT 1829.) Woodruff concealed the gun behind his back and secretively peeked up the staircase. (8 RT 1829-1830, 1925, 1936.) Menzies heard Claude yell to Woodruff something to the effect of, "No, don't Steve." (5 RT 1318, 1403, 1421.) Delgado saw Woodruff look up the stairs, peek over the railing, and shoot the gun two times. (8 RT 1830, 1833, 1924, 1936; 10 RT 2268.) Officer Baker looked down the stairs and saw Woodruff pointing the gun at him. (6 RT 1487, 1645-1646.) A stainless steel nine millimeter was found in Woodruff's kitchen, and bullets fired from this gun matched the bullet recovered from the back of Officer Jacobs' skull. (13 RT 3025; 14 RT 3196; 15 RT 3390; 16 RT 3499; 17 RT 3673-3674.) During an interview with detectives, Woodruff admitted that he had a gun and "waited and watched." (18 CT 5183; 13 RT 2936.) Then he leaned over, pointed the gun up the stairs and shot three times. (18 CT 5159.) Woodruff admitted that "he got mad;" "It wasn't no accident that [he] shot the gun." (18 CT 5188, 5190.) Woodruff also admitted that he meant to shoot at the officers. (18 CT 5199; 13 RT 2886.)

Since the evidence against Woodruff was overwhelming, and the incidental reference to his previous arrest was vague and brief, Woodruff's

trial was not so infused with prejudicial evidence as to be fundamentally unfair. As discussed above, this Court in *Jennings* concluded that the defendant's failure to object or request a curative admonition constituted a waiver of the issue since the defendant failed to establish that the testimony revealing his ex-convict status and prior arrest was not so prejudicial that its admission "must always result in reversal." (*People v. Jennings*, *supra*, 53 Cal.3d at p. 375.) Under these circumstances, it is not reasonably probable Woodruff would have obtained a more favorable result had the remark regarding Woodruff's previous arrests had not been made. (*Ibid.*)

4. WOODRUFF'S CLAIM THAT THE PROSECUTOR COMMITTED MISCONDUCT BY QUESTIONING CARR ON HER PRIOR CONVICTIONS WAS FORFEITED, AND HE WAS NOT PREJUDICED BY THE PROSECUTOR'S QUESTION

Woodruff argues that the prosecutor committed prejudicial misconduct by questioning Carr about her convictions which arose from the same incident as the shooting of Officer Jacobs. (AOB 121-126, claim B.4.) This claim is forfeited because Woodruff did not request an admonition. In any event, the claim is without merit, as Woodruff was not prejudiced because the trial court sustained the objection, the jury was given pretrial instructions on sustained objections, and the evidence of Carr's arrest on these charges was already known to the jury because they were central to the facts of this case.

During direct examination of Carr, the prosecutor asked her if Blankenship had represented her in criminal proceedings involving the incidents before Woodruff shot Officer Jacobs. (10 RT 2251.) The prosecutor asked the following questions:

> Q. In fact, you were convicted of disturbing the peace and resisting a police officer in the performance of his duties, weren't you.
>
> MR. BLANKENSHIP: Objection—motion to strike.

THE COURT: The objection is sustained.

MR. BLANKENSHIP: I'd like counsel to be admonished to not bring it up.

THE COURT: I sustained your objection.

Q. (BY MR. SOCCIO): Did you go through a trial regarding the events that occurred at your house on January 13, 2001?

MR: BLANKENSHIP: Objection – 352.

THE COURT: Overruled.

THE WITNESS: Yes.

(10 RT 2252.) The prosecutor then asked if Carr testified at the trial and whether Blankenship represented her. (10 RT 2252.)

The law applicable to prosecutorial misconduct claims is well settled. As this Court has stated:

> Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights . . . is not a constitutional violation unless the challenged action ' "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' [Citation.]

(*People v. Fuiava* (2012) 53 Cal.4th 622, 679-680, quoting *People v. Riggs* (2008) 44 Cal.4th 248, 298.)

A defendant generally "'"may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" ' [Citation.]" (*People v. Riggs*, *supra*, 44 Cal.4th at p. 298.) A defendant's failure to object and to

request an admonition is excused only when "an objection would have been futile or an admonition ineffective." (*People v. Fuiava, supra*, 53 Cal.4th at p. 679, quoting *People v. Arias* (1996) 13 Cal.4th 92, 159.)

Here, Woodruff immediately objected when the prosecutor asked Carr whether she was convicted of disturbing the peace and resisting arrest. (10 RT 2252.) The trial court sustained the objection before Carr answered the question. (10 RT 2252.) Later in the proceedings, defense counsel re-raised the issue about the prosecutor asking Carr about her prior convictions. (10 RT 2284.) The prosecutor argued that resisting arrest was a crime of moral turpitude, and he should be allowed to question Carr on this conviction and underlying conduct. (10 RT 2284.) The trial court stated that it sustained Woodruff's objection, neither crime involves moral turpitude, and in any event, the convictions would not be admissible, only the underlying conduct. (10 RT 2284-2285.) Defense counsel wanted to preserve the issue because he might move for a mistrial. (10 RT 2286.) The trial court stated that it sustained the objection and it had instructed the jury in pretrial instructions to disregard any question to which an objection was sustained and not to speculate as to what the answer would have been. (10 RT 2286.)

In the present case, Woodruff did not request that the trial court admonish the jury any further after the objection was sustained, nor did he assert that the pretrial admonitions the trial court did give on when objections are sustained were insufficient. Therefore, he has forfeited this appellate claim of prosecutorial misconduct. (*People v. Fuiava, supra*, 53 Cal.4th at p. 680.)

Moreover, the trial court sustained defendant's objection to the question before Carr answered, eliminating any possibility of prejudice. (*People v. Dykes* (2009) 46 Cal.4th 731, 763.) As the trial court noted, it had also instructed the jury to disregard any question to which an objection

was sustained, a question is not evidence and not to speculate as to what the answer would have been. (5 RT 1265-1266; 10 RT 2286.) " 'It must be presumed that the jurors acted in accordance with the instruction and disregarded the question and answer.' " (*People v. Alexander* (2010) 49 Cal.4th 846, 915.) Additionally, Carr's involvement in the incident was already known to the jury. Menzies testified that she called police to complain that Carr would not turn off her radio, and testified that Carr told Officer Baker that he could not arrest her. (5 RT 1309, 1316.) Officer Baker testified that he attempted to arrest Carr for disturbing the peace and battery. (6 RT 1471, 1484.) Therefore, the jurors were already aware that Carr was likely charged with some crimes as a result of this incident. Finally, as set forth in Argument 3 above, the evidence of Woodruff's guilt was overwhelming. Therefore, the prosecutor's question to Carr about whether Carr was convicted of disturbing the peace and resisting arrest did not prejudice Woodruff. (*People v. Fuiava, supra*, 53 Cal.4th at p. 680.) Accordingly, Woodruff's claim should be rejected.

5. DEFENSE COUNSEL WAS NOT INEFFECTIVE WHEN HE ATTEMPTED TO EXPOSE SILVA'S BIAS IN FAVOR OF THE PROSECUTION; THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT DURING REDIRECT OF SILVA; AND THE TRIAL COURT PROPERLY INSTRUCTED THE JURY TO DISREGARD SILVA'S OPINION TESTIMONY

Woodruff asserts that his counsel was ineffective, the prosecutor committed misconduct, and the trial court erred in failing to intervene when DA Investigator Silva testified on cross and redirect examination that he believed Woodruff was guilty and explained his reasons for that belief. (AOB 127-141.) Woodruff's claims are without merit. He received constitutionally effective assistance of counsel, the prosecutor did not commit prejudicial error, and the trial court intervened and told the jury to

disregard Silva's opinion that Woodruff was guilty and the basis for Silva's opinion.

Martin Silva, a Senior Investigator with the Riverside District Attorney's Office, was called to testify for the prosecution about his investigation of a possible bullet strike or ricochet at 3140 Lemon Street. (16 RT 3549.) Silva had a portion of the wall cut out, and a bullet was found lodged in the siding. (16 TY 3553.) On cross examination by defense counsel, counsel asked if Silva believed the bullet that hit Officer Jacobs did not ricochet. (16 RT 3591.) Silva answered affirmatively, and defense counsel asked him the factual basis for his belief. (16 RT 3591.) Silva answered:

> Just the obvious physical evidence and the totality of the circumstances. Both circumstances of the circumstantial evidence, physical evidence, statements by the defendant, statements by the witnesses, the fact that we found a projectile inside Doug, the fact that it was matched up to the Lorcin pistol that was used by Mr. Woodruff, and, I mean, I could go on. [¶] There's just the totality of the investigation without a doubt appears to show that the projectile inside Doug was fired into his head unobstructed.

(16 RT 3591.) Defense counsel then asked follow-up questions regarding whether Silva had interpreted the facts of the case in this way since the beginning of the investigation without thinking of an "alternative equally plausible version of the facts that might explain what happened." (16 RT 3592.) Defense counsel also asked, "Does it still mean he murdered Mr. Jacobs, in your experience as a seasoned homicide investigator, if a person says he didn't aim? Did he still commit murder?" (16 RT 3593.) Silva answered, "I think he fired the gun that killed Doug Jacobs, the projectile that killed Doug Jacobs, yes." (16 RT 3593.)

During redirect examination, the prosecutor followed up the defense line of questioning as follows:

BY MR. SOCCIO: Q. Mr. Silva, the day you got the call, you didn't have an opinion one way or the other whether the defendant was guilty, did you?

A. No sir.

Q. After you listened – Did you listen to his interview with Detective Kensigner? Did you monitor that interview?

A. Yes, sir.

Q. And as he talked about going in and getting a gun, loading it, waiting, coming out on the porch, going back and getting the gun, and then shooting and killing the officer, did you think at that point that he did it?

A. Yes, sir.

Q. And as the evidence began to develop over the course of the next year, did some physical evidence come about to also reaffirm your belief? You were asked your opinion today?

A. Yes, sir.

Q. What kinds of things added to the defendant's own admission that he had done this?

A. Well, the big one was the fact that the Department of Justice determined that the projectile inside the victim was an exact match with moral certainty to that particular gun found inside of Mr. Woodruff's house, which was the 9 mm Lorcin.

Q. Also, did you have occasion to listen or talk to Mark Delgado when he described watching the defendant shoot the gun?

A. Yes, sir.

Q. And did you talk to Holly Menzies?

A. Yes, sir.

Q. Did those things play any part in your belief and opinion that this defendant is guilty of murder?

A. Absolutely.

Q. And having investigated six to 700 murders that, since you were asked, do you have any doubt that the defendant's guilty?

A. Absolutely not.

Q. So when you work on cases, if you find evidence that you think shows that an innocent person has been charged with a crime, do you bring it forward?

A. Absolutely.

Q. When you went out to look or to take this portion of the wall off the house, if you had found evidence that you believed to be exculpatory, that is, that would help the defense, would you have turned that over?

A. Absolutely.

MR. SOCCIO: I have no further questions.

(16 RT 3593-3595.) On recross examination, defense counsel, explored again whether Silva ever investigated this case through a defense perspective such as looking for evidence that would support a defense of others defense. (16 RT 3595-3602.) Defense counsel asked whether letting a bullet sit in a wall for 14 months impaired the integrity of the investigation. (16 RT 3598.) Defense counsel also asked if Silva could "identify for the jury and for the record one thing that [he] did involving the identification, collection and preservation of evidence that was designed to extract or distill any evidence that would exculpate or exonerate Mr. Woodruff?" (16 RT 3600.) Defense counsel continued to ask Silva about any potential defenses or mitigating factors he investigated. (16 RT 3601.)

Outside the presence of the jury, the trial court addressed Woodruff as follows:

Mr. Woodruff, I want you to listen to me very carefully. I am deeply, deeply troubled by what occurred here over the last half an hour during the cross-examination, redirect and recross

> of Mr. Silva. [¶] During your counselor's cross-examination and recross-examination of Mr. Silva, he attempted successfully, in my opinion, to show that Mr. Silva had a bias in favor of the prosecution and against you. But in so doing, I will characterize this as inadvertent, I believe your case was prejudiced extremely by Mr. Silva being asked by your counsel and allowed to answer without objection as to his opinion as to your guilt. And in so doing, Mr. Silva not only expressed an opinion but set forth numerous reasons to support that opinion, virtually all of which were inadmissible hearsay. Nonetheless, he was allowed to express that opinion repeatedly in front of the jury.
>
> Now, your attorney may well be able to argue, and maybe successfully, that such testimony shows a bias on behalf of Mr. Silva, but in my opinion someone who has testified as he does about his experience in investigating some six to 700 homicides, that background alone carries a certain amount of automatic credibility when thinking in the minds of ordinary citizens who are sitting as jurors. And to allow him, with that background, or, for that matter, any witness to express an opinion as to the ultimate question the jury must decide, that is, whether you're guilty or not guilty, is extremely prejudicial to your case, in my opinion.

(16 RT 3611.) The trial court asked Woodruff if he understood, and Woodruff replied, "I don't know what I can do about it." (16 RT 3611.) After Woodruff stated he did not understand, the trial court again asked Woodruff what he did not understand. Woodruff replied, "Well, you spoke about his credibility, you know, was it supposed to be – I mean, was it supposed to be a seal of approval or something?" (16 RT 3612.) The trial court then said:

> That's exactly what I'm kind of getting at. This man is an experienced law enforcement officer. He's an experienced homicide investigator, both for the police department and with the district attorney's office. And when he sat up here and told the jury that he had absolutely no doubt you were guilty of murder, and when your attorney asked him what his opinion was and gave it, and what the reasons for that opinion were and he waxed on – and by "waxing on," means he listed a whole series of reasons in support of the opinion that he gave. I'm telling

> you, in my opinion as a neutral observer here, I think that prejudiced your case.

(16 RT 3612.) Woodruff asked what he could do about it, and the trial court responded, "Well, I'm going to ask you, based on my opinion that that hurt your case, prejudiced your case, do you still wish to continue with this trial with Mr. Blankenship representing you." (16 RT 3613.) Woodruff answered, "God, no. I want to get this over with, man. I been through enough." (16 RT 3613.) The trial court reiterated that it understood Woodruff's position, "But in [it's] opinion--and I'm not saying this was done intentionally; I think what it was done in the context of trying to point out the bias on the part of the prosecution witness – but in so doing, certain information came out of the mouth of that witness which prejudices, hurts your case. . . ." (16 RT 3613.) The trial court again asked Woodruff if he wanted Mr. Blankenship to continue to represent him. (16 RT 3614.) Woodruff responded, "Yes." (16 RT 3614.)

Blankenship then made the following statement for the record:

> [I]t's not my opinion tactically that anything Mr. Silva said had any prejudice at all with respect to Mr. Woodruff's case, given that this is the 13th day of testimony and given that one of the themes of the defense is that the prosecution and the investigators chose one version of their perspective of the truth and endorsed it at the exclusion of others. And the only way to drag it out of Mr. Silva was to create the contrast that I did and the biases that I did. [¶] If you listen carefully to his testimony and you listen to what he was saying, any opinion that he gave was clearly based on his bias. I thought it was an absolutely useful and cunning way to bring out his bias.

(16 RT 3614.) After further discussion about defense counsel's tactics, the trial court finally ruled that defense counsel had given tactical reasons for his actions, and while the trial court felt that the testimony prejudiced Woodruff's case, the trial court believed that "Woodruff has given an appropriate waiver. It is [its] conclusion that [Woodruff] understand the

issues that I have raised with him today and previously, and I believe the waiver that he has given and the expression of his desire that you continue with his representation is valid." (16 RT 3618.) The trial court then closed off any further examination into the reasons for Silva's opinions, including delving into Woodruff's background. (16 RT 3618.)

a. Woodruff received constitutionally effective assistance of counsel

Woodruff argues that Blankenship was ineffective when he cross-examined Silva and subsequently failed to object to the prosecution's redirect examination of Silva. (AOB 134-137.) This claim should be rejected. Defense counsel was not deficient in his performance, Woodruff was not prejudiced by any alleged deficient performance, and Woodruff gave a knowing and intelligent waiver that he wanted Blankenship to continue to represent him.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." (*People v. Hernandez* (2012) 53 Cal.4th 1112, 139 Cal.Rptr.3d 606, 609-610.) When a criminal defendant complains that trial counsel was ineffective, the defendant must first show the legal representation fell below an objective standard of reasonableness. (*Strickland v. Washington* (1984) 466 U.S. 666, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674; *People v. Benavides* (2005) 35 Cal.4th 69, 92–93.)

> The Sixth Amendment . . . relies . . . on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions [citation]. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

(*Strickland v. Washington, supra*, 466 U.S. at p. 688; see *People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

Reviewing courts generally defer to tactical decisions made by trial counsel. These decisions must be viewed through counsel's perspective at the time they were made and will not ordinarily be second-guessed. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 689-691.)

> A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.... If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citations.]

(*People v. Gamache* (2010) 48 Cal.4th 347, 391.) The *Strickland* standard is "highly demanding" and imposes upon a defendant the burden to prove "gross incompetence." (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 382, 106 S.Ct. 2574, 91 L.Ed.2d 305.) A defendant alleging counsel had no tactical reason for a particular act or omission must present evidence to support his claim. (*People v. Williams* (1988) 44 Cal.3d 883, 920.)

The defendant must also demonstrate prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217; *People v. Fosselman* (1983) 33 Cal.3d 572, 584.) Prejudice exists only when it is reasonably probable that a result more favorable to the defendant would have occurred absent the challenged act or omission. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217-218.) The defendant must show that counsel's incompetence resulted in a fundamentally unfair proceeding or an unreliable verdict. (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 369-370,113 S.Ct. 838, 122 L.Ed.2d 180; In re Hardy (2007) 41 Cal.4th 977, 1019.)

> [T]o be entitled to reversal of a judgment on the grounds that counsel did not provide constitutionally adequate assistance, the [defendant] must carry his burden of proving prejudice as a

"demonstrable reality," not simply speculation as to the effect of the errors or omissions of counsel [citation].

(*People v. Williams*, *supra*, 44 Cal.3d at p. 937.)

If a defendant fails to show that the challenged acts or omissions were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697; *In re Scott* (2003) 29 Cal.4th 783, 830.)

In this case, defense counsel rendered the constitutionally effective assistance of counsel, as his actions and inactions can be explained as a matter of sound trial strategy. (*People v. Gamache, supra*, 48 Cal.4th at p. 391.) As both defense counsel and the trial court pointed out, defense counsel successfully highlighted Silva's bias in favor of the prosecution. (16 RT 3611, 3614.) One of the theories of defense was that the police rushed to judgment and focused on Woodruff without thoroughly investigating other possible scenarios. (24 RT 5146 (defense closing argument).) This theory was supported by the fact that police did not even retrieve, until 14 months after the shooting, a bullet from the wall that could have been a possible ricochet or a bullet fired from Officer Baker's gun. (16 RT 3549.) Therefore, by questioning Silva about his reasons for assuming the bullet came from Woodruff and not objecting to the prosecution's questions in this regard, defense counsel was able to successfully show that Silva harbored a bias in favor of the prosecution that could have possibly affected the investigation of this case. Trial counsel was therefore not deficient in his performance.

Moreover, Woodruff fails to show that he was prejudiced by defense counsel's performance, as it is not reasonably probable that a result more favorable to the Woodruff would have occurred absent the challenged act or omission by defense counsel. (*Strickland v. Washington*, *supra*, 466 U.S. at

p. 694; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217-218.) While Silva's testimony about his opinion that Woodruff was guilty and the basis for his opinion was harmful to Woodruff, it was not prejudicial. The next court day after Silva's testimony and before Silva resumed his testimony, the trial court specifically instructed the jury:

> Any witness who has testified in this proceeding and who may have voiced an opinion as to the question of guilt or innocence of the defendant, that testimony is not to be considered by you.

(17 RT 3641.) When Silva resumed his testimony, the prosecutor asked, "When you were asked by defense counsel about whether or not you had an opinion on this case, you gave an answer, correct?" (17 RT 3641-3642.) Defense counsel objected and moved to strike, and the trial court sustained the objection stating:

> Sustained. The jury has just been instructed to disregard any opinion any witness may have testified to as to the guilt of the defendant.
>
> Further, I will instruct you, members of the jury, that only you will ultimately make that determination that is the ultimate question of fact before you, and only you, the members of the jury will make that determination.

(17 RT 3642.) " 'It must be presumed that the jurors acted in accordance with the instruction and disregarded the question and answer.' " (*People v. Alexander*, *supra*, 49 Cal.4th at p. 915.) The trial court's instructions to disregard Silva's testimony and that the jury was the ultimate fact finder in this case dispelled any prejudice caused by defense counsel's questions of Silva and his failure to object to the prosecutor's earlier questions. Additionally, while the reasons that Silva gave for his opinion were hearsay, the evidence that served as a basis for Silva's opinion had already been properly introduced to the jury through other witnesses. The videotaped interview when Woodruff told detectives that he went into his

house, got a gun, "waited and watched," and shot the gun three times because "he meant to shoot at the officers" was played to the jury. (18 CT 5151-5212; 13 RT 2841.) Delgado and Menzies both testified as to what they witnessed that day. (5 RT 1300-1440; 8 RT 1816-1943.) A criminalist opined that the Lorcin found in Woodruff's house was the same gun that fired the bullet taken from Officer Jacobs' skull. (17 RT 3673-3674.) Moreover, as discussed in further detail *ante*, the evidence of Woodruff's guilt was overwhelming, therefore it is not reasonably probable that a result more favorable to the Woodruff would have occurred absent the challenged act or omission by defense counsel. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; *People v. Ledesma, supra*, 43 Cal.3d at pp. 217-218.) Woodruff did not receive constitutionally ineffective assistance of counsel.

b. The prosecutor did not commit prejudicial error

Woodruff argues in Claim B.5.b. that the prosecutor committed misconduct when he deliberately elicited inadmissible evidence during the redirect examination of Silva. (AOB 138-139.) The claim is waived because Woodruff failed to object or request an admonition. Moreover, the prosecutor did not commit prejudicial error.

The law applicable to prosecutorial misconduct claims is set forth in Argument B.4. *ante*. The prosecutor in this case did not use "deceptive or reprehensible methods" when attempting to persuade the jury. (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 679.) Defense counsel opened the door to the prosecutor's line of questioning when he exposed Silva's bias in favor of the prosecution. The prosecutor was attempting to rehabilitate Silva's credibility during redirect when he asked whether Silva had already formed an opinion as to Woodruff's guilt when he was called upon to investigate a possible bullet strike on the wall of the house where the shooting occurred. (16 RT 3593.) The prosecutor did not commit error.

In any event, a defendant generally " 'may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" ' [Citation.]" (*People v. Riggs*, *supra*, 44 Cal.4th at p. 298.) A defendant's failure to object and to request an admonition is excused only when "an objection would have been futile or an admonition ineffective." (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 679.) Woodruff's asserts that any objection would have been futile. (AOB 138.) However, when defense counsel objected to the same line of questioning later, the trial court not only sustained the objection, it also instructed the jury to disregard Silva's testimony. (17 RT 3641-3642.) An objection and a request for admonition would not have been futile; therefore, Woodruff's present claim of prosecutorial misconduct is waived.

Furthermore, any alleged error by the prosecutor in his questioning of Silva was not prejudicial, as Woodruff fails to show that "it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted" or that the "challenged action '"so infected the trial with unfairness as to make the resulting conviction a denial of due process."'" (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 680.) As previously noted, the trial court sustained the objection and later admonished the jury to disregard any opinion any witness may have testified to as to the guilt of the defendant. (17 RT 3641-3642.) The trial court further instructed the jury that only they would make the ultimate question of fact before them. (17 RT 3642.) Jurors are presumed to follow instructions given. (*People v. Alexander*, *supra*, 49 Cal.4th at p. 915.) Moreover, as previously discussed, Silva only listed evidence that had already been presented to the jury to support his belief of Woodruff's guilt. As the prosecutor pointed out to the court, Silva had much more information about Woodruff that he did not

divulge at that time. (16 RT 3617.) Finally, the evidence of Woodruff's guilty is overwhelming, as previously discussed. (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 680.) Therefore, the prosecutor did not commit prejudicial error.

c. The trial court acted within its discretion in instructing the jury to disregard Silva's opinion testimony

Woodruff also argues in Claim B.5.c. that the trial court erred in failing to intervene on its own motion to prevent the jury from hearing Silva's opinion and basis of his opinion including hearsay evidence of Woodruff's statements, the eyewitness accounts of Menzies and Delgado, and the ballistics results of the bullet recovered from Officer Jacobs' skull. (AOB 139-141.) While the trial court did not immediately stop either party from asking Silva the questions or Silva's opinion, the trial court did address the issue shortly thereafter and later instructed the jury to disregard Silva's testimony in that regard. Therefore, contrary to Woodruff's argument, the trial court did intervene. Moreover, as discussed above, Woodruff was not prejudiced by the testimony. The trial court properly instructed the jury, the jury had already heard this evidence from other witnesses, and the evidence of Woodruff's guilt is substantial. Therefore, any error by the trial court was harmless. (*People v. Watson, supra*, 43 Cal.4th at p. 676.)

6. NEITHER THE PROSECUTOR NOR THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY PURPORTEDLY MOCKING DEFENSE COUNSEL IN FRONT OF THE JURY

Woodruff argues that the prosecutor and the trial judge committed misconduct by repeatedly mocking defense counsel in front of the jury. (AOB 142-163.) Woodruff's claims are without merit. Neither the prosecutor nor the trial court committed prejudicial misconduct.

a. The prosecutor did not commit prejudicial prosecutorial error

According to Woodruff, the prosecutor mocked defense counsel's physical appearance (4 RT 1132), accused defense counsel of impropriety in cross-examining a witness (14 RT 3254), dishonesty in handling evidence (15 RT 3355), and called defense counsel "shameful" and "despicable" in closing argument (24 RT 5128, 25 RT 5243). (AOB 142.) Woodruff claims that the prosecutor's repeated disparaging comments about defense counsel represented a pattern of egregious conduct that invited the jury to condemn the defense counsel, and ultimately, Woodruff. (AOB 150-151.) Woodruff has forfeited several of these claims by failing to object and request an admonition that could have cured the harm. Moreover, the prosecutor did not commit prejudicial misconduct.

As set forth *ante*, the law applicable to prosecutorial misconduct claims is well settled. As this Court has stated, a prosecutor's conduct violates California law if it involves the use of deceptive or reprehensible methods to attempt to persuade the jury. (*People v. Benavides* (2005) 35 Cal.4th 69, 108.) It violates the United States Constitution "when it infects the trial with such unfairness as to make the conviction a denial of due process." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642–643, 94 S.Ct. 1868, 40 L.Ed.2d 431; *People v. Morales* (2001) 25 Cal.4th 34, 44.) But in either case, only misconduct that prejudices a defendant requires reversal. (*People v. Fields* (1983) 35 Cal.3d 329, 363), and a timely admonition from the court generally cures any harm. (See *People v. Gallego* (1990) 52 Cal.3d 115, 200.)

When the claim "focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) To answer that question, a reviewing court examines the prosecutor's

statement in the context of the whole record, including arguments and instructions. (*People v. Hill* (1998)17 Cal.4th 800, 832.) "In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

"A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel. 'An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum, it is never excusable.'" (*People v. Hill*, *supra*, 17 Cal.4th at p. 832, internal citations omitted.) Prosecutors may vigorously argue the facts surrounding their cases, but personal attacks on defense counsel are irrelevant to the issues before the jury, and are improper. (*People v. Friend* (2009) 47 Cal.4th 1, 30.) The People did not violate these rules in this case, nor was Woodruff prejudiced by any error committed by the prosecutor.

During jury selection, the prosecutor asked a prospective juror, "Not to point you out from anybody in the courtroom, but would anybody's haircut influence you in any way?" (4 RT 1132.) The prospective juror answered in the negative, and the prosecutor stated, "Maybe I can get a ponytail by the end of this trial." (4 RT 1132.) Woodruff objected, and the trial court sustained the objection. (4 RT 1132.) While the prosecutor should not have commented on defense counsel's ponytail, the statement did not constitute prejudicial misconduct. Woodruff's counsel promptly objected, and the trial court sustained the objection. (4 RT 1132.) The jury was later instructed to disregard any questions in which the trial court sustained an objection and do not assume to be true any insinuation suggested by a question, as a question is not evidence. (24 RT 5080.) A timely admonition from the court generally cures any harm. (See *People v.*

Gallego, *supra*, 52 Cal.3d at 200.) Moreover, the prosecutor's isolated reference to counsel's hair style was not so "egregious" or "reprehensible" as to rise to the level of prejudicial misconduct (*People v. Navarette* (2003) 30 Cal.4th 248, 506; *People v. Morales* (2001) 25 Cal.4th 34, 44), nor did the prosecutor's comment infect the trial with such unfairness as to make defendant's conviction a denial of due process (see *Darden v. Wainwright* (1986) 477 U.S. 168, 181, 106 S.Ct. 2464, 2471-2472, 91 L.Ed.2d 144) or to render the verdicts unreliable (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130 -1131). Here, the mistake was fleeting and therefore was harmless. (*People v. Young*, *supra*, 34 Cal.4th at pp. 1189-1190, citing *People v. Kipp*, *supra*, 26 Cal.4th at p. 1130 [prosecutor's comment was harmless because it was brief, not repeated, and did not contribute to other errors].) Finally, "as a general matter, it is unlikely that errors or misconduct occurring during voir dire questioning will unduly influence the jury's verdict in the case. Any such errors or misconduct 'prior to the presentation of argument or evidence, obviously reach the jury panel at a much less critical phase of the proceedings....'" (*People v. Thomas*, *supra*, 53 Cal.4th at p. 797; *People v. Medina*, *supra*, 11 Cal.4th 694, 741.) Similarly, in the present case, because any alleged prosecutorial errors occurred during voir dire, Woodruff was not prejudiced.

Woodruff next contends that that prosecutor committed misconduct when he requested, in front of the jury, that the court issue sanctions against defense counsel. (AOB 143-144.) During cross-examination of Detective Sanfilippo, defense counsel questioned the detective about his efforts to retrieve bullets from the ground and in trees. (14 RT 3253.) Detective Sanfilippo indicated that officers or evidence technicians dug a hole in the area to look for bullets. (14 RT 5253.) Defense counsel asked, "Same way you looked for the bullet in Exhibit 105, right?" (14 RT 5253.) The prosecutor's objection was sustained as being argumentative. (14 RT

3254.) Blankenship next asked, "Same group of people, the way you looked for the bullet in 105, right?" The prosecutor objected stating, "Objection—I'll ask for sanctions." (14 RT 3254.) The trial court said, "All right. You'll not do that in front of the jury. And you'll move on to a new area. I think you've established your point." (14 RT 3254.)

Sometime later, the trial court addressed the prosecutor's request for sanctions as follows:

> Mr. Soccio, you requested sanctions. I am not gonna impose sanctions on anybody today, but both of you listen very carefully. Mr. Soccio, I recognize the tough job you have to do, the strain you're under. But some of the techniques employed by defense counsel ought to readily bring to mind to you, because you've been around long enough to remember a gentleman named Robert Keller – Mr. Keller took great delight in getting reactions from opposing counsel and from judges and anybody who he happened to be targeting on any given day. I don't presume to give you advice, but you're reacting to him, and you're letting it show. And I can only suggest that you exercise as much restraint as you can. . . .
>
> I don't want to hear motions for sanctions in front of the jury again. And I don't want to hear any more speaking objections from anybody, unless I ask for some further information.
>
> Mr. Blankenship, you're – Sometimes the drama is – I think maybe you let it go too far sometimes. I mean, I can see what you're doing. You obviously have a lot of ability. You're an extremely intelligent gentleman. But I'm gonna start cracking down on the editorializing before you ask your questions. Just keep that in mind.

(14 RT 3262-3263.) Defense counsel then said, "For the record, I think it's prosecutorial misconduct for the prosecutor to ask you to sanction me in front of the jury, especially given the nature of the case." (14 RT 3263.)

A defendant generally "'"may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the

defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" ' [Citation.]" (*People v. Riggs*, *supra*, 44 Cal.4th at p. 298.) A defendant's failure to object and to request an admonition is excused only when "an objection would have been futile or an admonition ineffective." (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 679, quoting *People v. Arias* (1996) 13 Cal.4th 92, 159.) Here, while defense counsel later objected after the trial court brought up the issue outside the presence of the jury, defense counsel never asked the trial court to admonish the jury to disregard the prosecutor's comments. The trial court brought up the issue on its own and spoke to both parties about the inappropriate comment, and it would not have been futile for defense counsel to request an admonition. Therefore, this claim is forfeited on appeal.

In any event, Woodruff was not prejudiced by the prosecutor's brief comment. (*People v. Young*, *supra*, 34 Cal.4th at pp. 1189-1190; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1130.) As evidenced by the trial court's comments to the prosecutor, the prosecutor's comment was possibly more damaging to the prosecutor than to defense counsel. The trial court noticed that defense counsel seemed to be getting under the prosecutor's skin, and causing a reaction from the prosecutor. Moreover, because of the overwhelming evidence of Woodruff's guilt, it is unlikely that the prosecutor's comment infected the trial with such unfairness as to make defendant's conviction a denial of due process. (See *Darden v. Wainwright*, supra, 477 U.S. at p. 181.)

Woodruff also contends that the prosecutor committed misconduct by accusing defense counsel of mishandling evidence. (AOB 144-146.) The prosecutor was conducting a redirect examination of Detective San Fillippo when the prosecutor attempted to locate a photographic exhibit of the landing. (15 RT 3354.) The following exchange occurred:

Q. [by the prosecutor] In fact, standing up on a little raised area one or two feet off the ground there seems to be some type of ledge around the front porch?

MR. BLANKENSHIP: Objection – assumes facts not in evidence.

THE COURT: Why don't we put the photograph in front of you.

MR. SOCCIO: I'm sure I'll never see it again.

MR. BLANKENSHIP: Your Honor, motion to strike as "I'm sure I'll never see it again" comment he made.

MR. SOCCIO: I need the other one on the front porch.

THE COURT: referring to – I have II and JJ.

MR. SOCCIO: Your Honor, that's what I'm talking about, trying to find the photos.

MR. BLANKENSHIP: Motion to strike that, as well.

THE COURT: Ladies and gentlemen, I'm gonna ask you to leave the courtroom for about five minutes. Don't stray too far. I need to have a little chat with the attorneys.

(15 RT 3354-3355.) Outside the presence of the jury, the trial court addressed both the prosecutor and defense counsel:

> I told you both at the beginning of the trial, in fact, before this trial ever started I would not tolerate talking back and forth to each other. I will not tolerate editorializing, and both continue to disobey that directive. [¶] Now, I'm telling you both, the next time it happens, I don't care who does it, you're gonna get sanctioned. Now knock it off, both of you.

(15 RT 3355.)

The prosecutor's comments did not rise to the level of prejudicial prosecutorial misconduct. The comment, standing alone, does not insinuate that the defense counsel mishandled evidence. In fact, it made the prosecutor look disorganized because he could not find the exhibit. At no

time did the prosecutor accuse defense counsel of misplacing or hiding the evidence, as Woodruff suggests. (AOB 145.) While the prosecutor did assert previously that defense counsel took two exhibits, and the trial court confirmed that a clerk verified that two exhibits were missing, this discussion occurred outside the presence of the jury. (15 RT 3300-3303.) The jury was, therefore, unaware of the context of the prosecutor's comment, "I'm sure I'll never see it again." (15 RT 3355.) The comment, by itself, was not harmful to defense counsel. Defense counsel immediately objected, and the trial court cut off all discussion of the issue before the jury. Therefore, the prosecutor's comment did not infect the trial with such unfairness as to make Woodruff's convictions a denial of due process. (See *Darden v. Wainwright*, *supra*, 477 U.S. at p. 181.)

Finally, Woodruff claims that the prosecutor committed misconduct during closing argument. (AOB 146, 149-150.) The prosecutor, in discussing the defense theories, stated:

> What do we have in this case? You have witnessed a trial that has shifted and moved like sand. The defendant has cloaked himself in infirmities of people that are legitimate infirmities.
>
> Race. Now, as you're sitting here, was this case ever based on race? Was it? But it's the kind of thing that raises emotions. And the only hope of the accused who has actually done it is to try to fool a jury. Where was race here? Because he's of a different race? No.
>
> Mental retardation? How shameful. [¶] There are people who struggle every day to live because of their mental conditions who can't understand, who can't function, who need people to care for them. How shameful to pretend to be a member of their population to avoid responsibility.
>
> There are people who fought the Civil Rights Movement for years, noble people, from well-known people with high morality and issues that try to make equality about something for all of us in society, to people who we never ever know who suffered and maybe died because of their attempts. And to cloak this trial in

the Civil Rights Movement in Mississippi is despicable. This case is about killing.

(24 RT 5128.)

Woodruff also complains that the prosecutor committed misconduct during rebuttal argument when he stated, in response to defense counsel's accusations during closing argument that the prosecutor "dial[ed] into emotions" of its police witnesses (24 RT 5158, 5179; 25 RT 5203), "And shame on them for making any comment about police officers who cried or were tearful about a fallen friend. Despicable. Turned on emotions? Dialed up emotions. How insulting?" (25 RT 5243.)

Preliminarily, as set forth above, a claim of prosecutorial misconduct is waived if a defendant fails to object to the prosecutor's remarks and request an admonition to cure the harm. (*People v. Riggs*, *supra*, 44 Cal.4th at p. 298.) Here, Woodruff did not object to nor request an admonition after either of the comments about which he now complains. Contrary to Woodruff's assertions, nothing in the record supports his claim that any request would have been futile. As shown above, the trial court admonished both the prosecutor and defense counsel for their "editorializing" and ordered both parties to "knock it off." Clearly, the trial court was amenable to admonishing the prosecutor if defense counsel had requested it do so.

Although it is misconduct to attack the defendant's attorney personally (*People v. Hill*, *supra*, 17 Cal.4th at p. 832), including challenging the attorney's personal honesty (see *People v. Bemore* (2000) 22 Cal.4th 809, 846), it is not misconduct to disparage the merits of the defense or artful tactics used to make the defense seem stronger than it is. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1154-1155, disapproved on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.) Here again, the prosecutor was not attacking defense counsel's integrity. Rather,

the prosecutor was urging the jury to not be misled by the defense theory of race and mental retardation. A prosecutor does not commit misconduct when he "anticipates the flaws likely to appear in counsel's closing argument based on evidence that was introduced," or "criticizes the defense theory of the case because it lacks evidentiary support." (*People v. Bemore*, *supra*, 22 Cal.4th at p. 846.) Here, the prosecutor's remarks concerning the immateriality of race in this case and the lack of evidence that Woodruff is mentally retarded was a fair comment on the state of the evidence and a response to the defense's emphasis on racial conflict. There was no evidence that race played any part in the murder of Officer Jacobs or the officers' response to the radio call; or that Woodruff is mentally retarded. It was clearly shown by his interview, trial testimony, and the expert opinions by the prosecution's expert witnesses that Woodruff is not mentally retarded. (See *People v. Bemore*, *supra*, 22 Cal.4th at pp. 846-847 [prosecutor may fairly anticipate flaws likely to appear in counsel's closing argument based on evidence that was introduced]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1302, fn. 47 ["[a]n argument which does no more than point out that the defense is attempting to confuse the issues and urges the jury to focus on what the prosecution believes is the relevant evidence is not improper"]; *People v. Marquez* (1992) 1 Cal.4th 553, 575-576 [prosecutor's reference to defense as "smokescreen" not misconduct]; *People v. Young*, *supra*, 34 Cal.4th at p. 1193 [prosecutor's characterization of defense counsel's argument as "idiocy" was fair comment on counsel's argument].) There is no reasonable likelihood the jury would have understood the remark to impugn counsel's integrity. (*People v. Osband* (1996) 13 Cal.4th 622, 696; *People v. Mayfield* (1993) 5 Cal.4th 142, 179.)

With respect to the prosecutor's rebuttal argument about dialing up emotions (25 RT 5243), a reviewing court determines whether the prosecutor's comments were a fair response to defense counsel's remarks.

(*People v. Young*, *supra*, 34 Cal.4th at p. 1189; *People v. Frye*, *supra*, 18 Cal.4th at p. 978.) Here, the prosecutor was responding to defense counsel who argued several times that the prosecutor dialed up emotions of its police witnesses in an effort to present a stronger case. Again, the prosecutor was not attacking defense counsel's integrity. The prosecutor was urging the jury to not be misled by defense counsel's argument. Moreover, a jury is capable of understanding "the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (*People v. Sanchez* (1995) 12 Cal.4th 1, 70, overruled on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th 390, 421, fn. 22.) Suggesting that defense counsel has been misleading does not amount to the necessary prejudice, as the jury would view the statement as mere rhetoric. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1302 [concluding prosecutor's accusation that defense counsel was hiding the truth, in context, would be understood by the jury as urging that it not be misled by the evidence]; *People v. Sandoval* (1992) 4 Cal.4th 155, 183-184 [concluding that remarks that are a small part of a prosecutor's lengthy review of evidence are diluted, and more recognizable as "an advocate's hyperbole"].)

Woodruff's claims of prosecutorial misconduct fail, as the prosecutor's conduct did not involve the use of deceptive or reprehensible methods to attempt to persuade the jury (*People v. Benavides*, *supra*, 35 Cal.4th at p. 108), nor did it infect the trial with such unfairness as to make the conviction a denial of due process (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at pp. 642–643.) The evidence of Woodruff's guilt was overwhelming, and only misconduct that prejudices a defendant requires reversal. (*People v. Fields*, *supra*, 35 Cal.3d at p. 363.)

b. The trial court did not commit prejudicial judicial misconduct.

Defendant contends the trial court treated defense counsel differently and made disparaging remarks to defense counsel, thus aligning itself with

the prosecution in violation of defendant's federal constitutional right to due process and a fair trial. (AOB 151-163.)

Woodruff cites twelve instances, ten of which were in front of the jury, where he believes the trial court made a personal attack on defense counsel. Except the first instance where the trial court asked defense counsel if he was going to run through the whole Evidence Code (5 RT 1422), and defense counsel objected (5 RT 1428-1429), defense counsel did not object to any of the other eleven instances he cites where the trial court allegedly erred. Moreover, Woodruff failed to request an admonition to the jury after any of the cited incidents. Because Woodruff raised no objection below on the grounds he now raises on appeal and did not ask for a jury admonition to address the court's alleged intemperance towards his defense attorneys, he has forfeited these claims. (*People v. McWhorter*, *supra*, 47 Cal.4th at p. 373.)

In any event, Woodruff's claims fail on the merit. The majority of the instances Woodruff cites involve the trial court rebuking defense counsel for trying to admit inadmissible evidence, failing to cite proper grounds for objections, or inappropriate questions or behavior. In the first instance Woodruff cites, the prosecutor asked Menzies what made her think Woodruff had a weapon. (5 RT 1422.) The following exchange took place between defense counsel and the trial court:

> MR. BLANKENSHIP: Objection – asked and answered.
>
> THE COURT: Overruled on that basis.
>
> MR. BLANKENSHIP: Objection -- leading. Objection — vague. Objection – foundation.
>
> THE COURT: Are you gonna run through the whole evidence codes?
>
> MR. BLANKENSHIP: Might as well.

THE COURT: Well, I haven't heard a legitimate one yet, so overruled.

(5 RT 1422.) Defense counsel later objected to the trial court's comments, and the trial court apologized and said it was not its intent to be demeaning, and it would have sustained an objection based on speculation. (5 RT 1428-1429.)

In another situation, defense counsel crossed examined Officer Goodner and asked if it was "possible that some of them were around the vicinity of Lemon Street at the time of the 11-99." The witnessed replied he had no idea. When defense counsel asked, "They could have been anywhere, right?" the trial court stated, "Obviously, they were somewhere." (14 RT 3144.) The trial court also warned defense counsel on several times to ask probative, relevant questions. For instance the trial court said, "If you're going to continue along with this, I'm going to cut you off right now. Let's move on to something probative." (18 RT 3859.) The trial court also told defense counsel, "Ask relevant questions or we'll conclude this faster than you like." (23 RT 4910.) Moreover, the trial court warned defense counsel, "The curtain is about to drop on this act. Let's start asking some questions leading to probative evidence, or we will cut this off. (24 RT 4987.) Finally, the trial court said to counsel, "You're one more argumentative question away from having me close this down." (24 RT 4998.)

In addition to warning defense counsel about improper objections and questions which called for irrelevant and nonprobative answers, the trial court also told defense counsel not to engage in inappropriate courtroom behavior. In chambers, the trial court told counsel, "I don't like misbehavior, and I told you at the start of this trial, I told you I wouldn't hesitate to dress you down or embarrass you in front of the jury." (10 RT 2241.) The trial court continued, that he could be "as zealous and vigorous

and as aggressive as you want, but do it professionally.. . . It's my obligation to control what's going on in this courtroom. If I think you're being unprofessional or acting inappropriately, I'll call you on it." (10 RT 2242-2243.) Later on, defense counsel asked the trial court to explain to the jury to disregard an answer, and the trial court instructed counsel, "I'll tell you what, I'll do the explaining and you won't." (14 RT 3187.) The trial court also warned defense counsel not to testify when it said, "And you're testifying. Unless you want to raise your right hand and take the oath, don't do it again." (21 RT 4444.) Additionally, the trial court told defense counsel, "The only editorializing I have heard is in your statement. You will conduct yourself professionally. Zealousness is fine. Sarcasm and editorializing is not appropriate." (23 RT 4755.) The trial court also warned defense counsel not to be argumentative when it said, "No. He wants to argue with you." (23 RT 4784.)

As this Court has held regarding issues of alleged judicial misconduct:

> Although the trial court has both the duty and the discretion to control the conduct of the trial [citation], the court "commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution" [citation]. Nevertheless, "[i]t is well within [a trial court's] discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior." [Citation.] Indeed, "[o]ur role ... is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial." [Citation.]

(*People v. Blacksher* (2011) 52 Cal.4th 769, 824, quoting *People v. McWhorter* (2009) 47 Cal.4th 318, 373; *People v. Snow* (2003) 30 Cal.4th 43, 78.) Here, the trial court acted within its discretion in rebuking, albeit

sometimes harshly, defense counsel's attempt to ask inappropriate, irrelevant and nonprobative questions. To the extent the court's comments to Blankenship were a reflection of frustration and irritation at counsel's repeated efforts to elicit inadmissible hearsay, irrelevant questions, or make argumentative comments, they were not improper. "[S]uch manifestations of friction between court and counsel, while not desirable, are virtually inevitable in a long trial." (*People v. Snow*, *supra*, 30 Cal.4th 43, 78–79.)

None of these incidents that Woodruff now cites, including the discussions held within chambers and not in front of the jury (10 RT 2241, 24 RT 5011), were so prejudicial that they denied Woodruff a fair, as opposed to a perfect, trial. (*People v. Blacksher, supra*, 52 Cal.4th at p. 824.) As discussed above, the trial court was within its discretion in trying to control its courtroom and the proceedings. The trial court did not mock defense counsel, but rather, made correct evidentiary rulings. Moreover, incidents two and twelve which Woodruff contends show the trial court's antagonism and contempt for defense counsel were not made in front of the jury, and therefore could not conceivably prejudiceWoodruff. Moreover, because there was overwhelming evidence presented of Woodruff's guilt, it is not reasonably probable that he would have received a more favorable result even if the trial court had not made its comments. (*People v. Watson*, supra, 46 Cal.2d at p. 836.)

7. WOODRUFF RECEIVED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL

Woodruff argues that he received the ineffective assistance of counsel because Blankenship made numerous false or misleading statement which diminished the defense's credibility with the trial court and the jury. (AOB 164-174.) This claim should be rejected, as Woodruff received constitutionally effective assistance of counsel.

To prevail on a claim of ineffectiveness of counsel, a defendant must show two things. *Strickland v. Washington*, *supra*, 466 U.S. at p. 687. First, he must establish that counsel's performance was "deficient" in that it fell below an "objective standard of reasonableness" under prevailing professional norms. *Id.* at pp. 687–88. Second, he must demonstrate that the deficient performance prejudiced the defense. *Id.* at p. 687. To satisfy the first prong, the acts or omissions must fall "outside the wide range of professionally competent assistance." *Id.* at p. 690. A defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. A deficient performance prejudices a defense if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. See *Id.* The second prong of *Strickland* thus "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

> [T]o be entitled to reversal of a judgment on the grounds that counsel did not provide constitutionally adequate assistance, the [defendant] must carry his burden of proving prejudice as a "demonstrable reality," not simply speculation as to the effect of the errors or omissions of counsel [citation].

(*People v. Williams*, *supra*, 44 Cal.3d at p. 937.) If a defendant fails to show that the challenged acts or omissions were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697; *In re Scott* (2003) 29 Cal.4th 783, 830.)

Here, Woodruff fails to show that he was prejudiced by any alleged deficient performance by defense counsel. In the first two instances that Woodruff cites as incidents where Blankenship allegedly misrepresented

the facts, the jury was not present, as they occurred pre-trial. On March 7, 2002, weeks before jury selection began, Blankenship told the trial court that discovery from the prosecution was "trickling in." (A RT 97.) The prosecutor answered that Blankenship's representation was "inaccurate, not false," and explained that discovery has been available but defense has not picked it up. (A RT 97.) In a second instance, on October 11, 2002, Blankenship told the trial court that while he knew Smith might testify during the penalty phase, he was unaware that Smith would testify at the guilt phase. (B RT 581-582.) The trial court pointed out that the prosecutor did inform defense and the court that might call Smith in the guilt phase if Woodruff testified. (B RT 582.)

Woodruff cites two other examples where defense counsel claimed he did not receive discovery or he allegedly lied that he delivered items to the prosecution. (AOB 170-171.) When cross examining forensic analyst Takenaga about the Polaroid photographs taken when the bullet was extracted from a wall, Blankenship asked, "So that would mean you're the only person that has the Polaroids at this point?" (18 RT 3822.) The prosecutor, at a side bar conference, pointed out that the defense was provided with copies of the Polaroids. (18 RT 3823.)

During redirect of Dr. Wu, Blankenship asked if the prosecutor had subpoenaed the records from UC Irvine and whether Blankenship allowed Dr. Wu to deliver the records to the prosecutor. (21 RT 4464-4465.) The prosecutor objected during side-bar, and claimed that while he subpoenaed the records, he did not receive all of the records. Blankenship said he did not have the file Dr. Wu had with him while testifying either, and his question was in response to the prosecutor's questions during cross-examination regarding which records he had with him and which he did not have. (21 RT 4464, 4466.)

Defense counsel's statements do not even rise to the level of deficient performance, as they were not "outside the wide range of professionally competent assistance" (*Strickland, supra*, at p. 690). It is possible that Blankenship did not remember that the prosecutor had said Smith might testify in the guilt phase, or he was not familiar with the way the prosecution delivers discovery. With respect to Blankenship's question to Dr. Wu about records being subpoenaed, this was in response to the prosecutor's objection during defense counsel's direct examination of Dr. Wu about a report that the prosecutor never received. (21 RT 4385.) Blankenship was acting as a strong advocate by trying to rehabilitate Dr. Wu by showing that the prosecution subpoenaed the records, and they were provided with the records. Blankenship was not deficient in his performance.

In any event, a reviewing court may reject the claim on the ground that Woodruff has failed to show that the challenged acts or omissions were prejudicial without determining whether counsel's performance was deficient. (*Strickland v. Washington, supra*, 466 U.S. at p. 697; *In re Scott, supra*, 29 Cal.4th at p. 830.) In the first two instances, the jury was not present, as trial had not even begun. In the second two instances, the discussions were held in side bar. There were no prejudicial consequences to Blankenship's statements, as the jury was never aware that Blankenship made any of the alleged misrepresentations of facts. The trial court sustained the objections. Woodruff fails to show how he was remotely prejudiced by Blankenship's statements. This is especially true because of the very strong evidence of Woodruff's guilt. Woodruff received constitutionally effective assistance of counsel.

Woodruff also claims that Blankenship misrepresented Officer Baker's response in his interview with detectives that he called for Officer Jacobs to back him up prior to going to Menzies home. (7 RT 1715.)

Blankenship apparently quoted Officer Baker out of context because he did not read the entire paragraph to Officer Baker. (2 CT 529-530.) After Officer Baker pointed the misrepresentation out to Blankenship (7 RT 1715), Blankenship asked, "Well, isn't it true, Mr. Baker, that I didn't lie to you, you lied to the jury?" (7 RT 1715.) Baker answered no, and defense counsel continued, "Isn't it true that when it comes to lies – Which of your versions of the story would you consider to be the truth?" (7 RT 1715-1716.) The prosecutor's objection was sustained. (7 RT 1716.)

Woodruff also claims Blankenship misrepresented Baker's previous assertions that he knew where the gunshot came from when he asked on cross-examination, "Isn't it true that you said you heard a gunshot, but you weren't sure where it came from?" (7 RT 1715.)

In another example that Blankenship allegedly misrepresented facts during cross-examination, defense counsel asked Detective Sanfilippo, "Now are those stinger balls, are they – Do you think they would cause a danger to a four year old?" (15 RT 3376.) The objection on relevance grounds was sustained. (15 RT 3376.) Woodruff argues that Blankenship deceptively asked this question even though previous testimony indicated that Brianna had already been removed from the house. (AOB 169.)

The cross-examination of witnesses is a matter falling within the discretion of counsel, and rarely provides an adequate basis on appeal for a claim of ineffective assistance of counsel. [Citation.]" (*People v. Frye*, *supra*, 18 Cal.4th at p. 985.) In any event, Woodruff again fails to show how he was prejudiced by these alleged misrepresentations. The prosecutor's objections were immediately sustained. The jury was instructed to disregard the questions about which an objection is sustained. (24 RT 5080.) Moreover, the jury heard Officer Baker's interview, so they knew what he stated to the detectives. (7 RT 1669.) Most importantly, whether Officer Baker called for back up before or after Menzies going

over there and whether the stinger balls could hurt a child were really immaterial to the case, especially in light of the extremely overwhelming amount of evidence presented of Woodruff's guilt.

In evaluating claims of ineffective assistance of counsel, Woodruff's reliance on cases involving attorney discipline by the state bar (AOB 172-173) are inapposite to the present case. The standard for disbarment or suspension does not apply to an ineffective assistance claim in a criminal case. A reviewing court "'"address[es] not what is prudent or appropriate, but only what is constitutionally compelled." ... [Citation.]'" (In re Andrews (2002) 28 Cal.4th 1234, 1255.) In this case, even if Blankenship made misrepresentations during the course of the trial, none of them rose to the level that counsel's errors were so serious as to deprive the Woodruff of a fair trial, a trial whose result is reliable. (*Strickland*, at p. 687.) Woodruff has failed to meet his "burden of proving prejudice as a "demonstrable reality," not simply speculation as to the effect of the errors or omissions of counsel." (*People v. Williams*, *supra*, 44 Cal.3d at p. 937.) Therefore, his claims have no merit.

8. THE PROSECUTOR DID NOT COMMIT PREJUDICIAL ERROR DURING CLOSING ARGUMENTS IN THE GUILT PHASE

Woodruff contends that the prosecutor committed prejudicial misconduct during the guilt phase rebuttal closing argument by improperly appealing to jurors' emotions when he used the "golden rule" argument to urge jurors to place themselves in the shoes of the victims, prosecution witnesses, Woodruff's neighbors and defense expert witnesses' patients. (AOB 175-183.) Woodruff's contentions are without merit. He did not object to any of the prosecutor's statements or request an admonition. Moreover, the prosecutor did not improperly appeal to the jurors' emotions by asking them to place themselves in the shoes of the victim, and any error was not prejudicial to Woodruff.

Generally, counsel is given great leeway in closing argument. (*People v. Farnam* (2002) 28 Cal.4th 107, 200.) "'It is, of course, improper to make arguments to the jury that give it the impression that "emotion may reign over reason," and to present "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response." [Citation.]'" (*People v. Redd* (2010) 48 Cal.4th 691, 742.) "It has long been settled that appeals to the sympathy or passions of the jury are inappropriate at the guilt phase of a criminal trial." (*People v. Fields* (1983) 35 Cal.3d 329, 362.) This Court has held that "during the guilt phase of a capital trial, it is misconduct for a prosecutor to appeal to the passions of the jurors by urging them to imagine the suffering of the victim. 'We have settled that an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial; an appeal for sympathy for the victim is out of place during an objective determination of guilt.'" (*People v. Jackson* (2009) 45 Cal.4th 662, 691, quoting *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057.)

In this case, Woodruff claims that the prosecutor committed misconduct during closing argument in the guilt phase because the prosecutor "would describe a situation from the facts of the trial, and then suggest that the jurors consider how they would react in that situation." (AOB 175.) A defendant generally "'"may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" ' [Citation.]" (*People v. Riggs*, *supra*, 44 Cal.4th at p. 298.) A defendant's failure to object and to request an admonition is excused only when "an objection would have been futile or an admonition ineffective." (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 679.) Here, as Woodruff acknowledges (AOB 181), defense counsel neither objected to these arguments nor

requested an admonition. Woodruff argues that an objection and a request for admonition would have been futile, as the trial court had overruled defense counsel's other five objections during closing argument, and no admonition could possibly have cured the prosecutor's misconduct. (AOB 182.) However, nothing in the record indicates that the trial court would not have sustained an objection or admonished the jury. Simply because the trial court overruled Woodruff's objections to the prosecutor's argument on other occasions does not necessarily mean that it would have overruled objections based on the golden rule argument grounds. Because Woodruff neither objected nor requested an admonition, he has forfeited the claims on appeal.

In any event, the prosecutor's statements did not constitute misconduct, as he did not improperly ask the jury to view the crime through the victim's perspective. Woodruff claims that the following arguments by the prosecutor improperly asked the jurors to view the crime through the eyes of the victim, an improper appeal for sympathy for the victim. (AOB 178-179.)

> Menacing Ben Baker." I loved that term when the defense used it. If you were gonna be cited for some misdemeanor mild conduct, wouldn't you want to be treated like he treated Parthenia Carr? He comes up to her radio and he turns it down and asks her just to turn it down. Nothing's gonna happen. Nothing has escalated.

(25 RT 5231.) During this statement, the prosecutor did not call the jury to imagine the suffering of the victim through their own perspective. (*People v. Jackson* (2009) 45 Cal.4th 662, 691.) The prosecutor was merely responding to Woodruff's defense theory that he was trying to protect his mother from abusive treatment by the hands of Officer Baker. The prosecutor was pointing out that Officer Baker responded calmly and appropriately during the loud radio call by turning the radio down. A

prosecutor does not commit misconduct when he "criticizes the defense theory of the case because it lacks evidentiary support." (*People v. Bemore* (2000) 22 Cal.4th 809, 846.)

Woodruff next contends that the prosecutor improperly asked the jury to put themselves in the shoes of Carr's neighbors when he argued:

> Defense said yesterday more people should listen to the radio like she does. How would you like them as your neighbors, the Woodruff/Carr clan? Each of them in trouble with the law. Everyday near your bedroom a radio blasts for hours, and it's gone on for years and you had the gall to call the police three times? Shame on you for wanting peace and quiet in your own home.

(25 RT 5232.) The prosecutor discussed Menzies specifically when he argued:

> Let's talk abut Holly Menzies for a minute, attacked by the defense and accused of having set these terrible things in motion. How much more cruel could somebody be? A person who was afraid of her own neighbors and rightfully so. A person who could not get any peace in her own home, would then be drug into the public later on and accused of just wanting to sell her house.
>
> Assume that were true. That wouldn't be a bad reason, but wouldn't you want to sell your house, too, if you lived there? Would you want somebody out on this stoop listening to Oldies there and four hours a day and drinking beer? No. Would you be accused and faulted for calling the police? Yes, if you were a witness in this trial.

(25 RT 5235.) The prosecutor later spoke about the fact that Menzies left the landing after trying to speak with Carr and returned to her home. The prosecutor stated:

> Yesterday, you were asked why did she want to run away. Would you want to stay up there with her and a police officer? Who would feel safe? The door had already been pulled away from her. She was already yelled at. Would you stay? Not if you had any sense.

(25 RT 5236.) None of these arguments ask the jury to put themselves in the shoes of the victim, Officer Jacobs. The prosecutor was rebutting the claim made by defense counsel that insinuated that Menzies was unreasonable for calling the police because Carr was listening to her radio loudly. The prosecutor also pointed out that Menzies was reasonable for wanting to leave the landing when Carr pushed the door open, lunged at and yelled at Menzies. In none of these statements did the prosecutor ever appeal to the sympathy and passion of the jury by asking them to step in the shoes of Officer Jacobs and imagine his suffering. A prosecutor has broad discretion to state its views as to what the evidence shows and what inferences may be drawn from it. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1052; accord, *People v. Cunningham* (2001) 25 Cal.4th 926, 1026.) The statements do not constitute misconduct.

Similarly, Woodruff argues that the prosecutor erred by asking the jury to put themselves in the shoes of the expert witnesses' patients when the prosecutor argued:

> Let's talk about the doctors for a minute. You met Einstein the other day. If you had a brain problem or suspected problem, would you want him to be the one to interpret your scan? If you had a child who was sick, would you want Dr. Wu to be the one to take the picture and talk about what it meant? [¶] Would you want Dr. Booraem to be your psychologist? Won't take a statement from you because he's decided you can only answer in one word. How fooled was he?

(25 RT 5244.)

Again, this statement did not appeal to the sympathy or passions of the jury by asking them to put themselves in the victim's shoes. Moreover, a prosecutor is given wide latitude during closing argument. (*People v. Harrison* (2005) 35 Cal.4th 208, 244.) The argument may be vigorous as long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom. (*Ibid.*) '"A prosecutor

may 'vigorously argue his [or her] case and is not limited to "Chesterfieldian politeness.'" (*Ibid.*) Here, the prosecutor was properly commenting on the deficiencies of the defense experts arguments which the prosecution rebutted through the testimonies of its own experts, Dr. Rath and Dr. Waxman.

Woodruff also argues that the prosecutor erred in arguing how Officer Baker felt while he was on the landing with Carr and Claude:

> So, Ben Baker, meeting with a lady like that, calls his sergeant. Doesn't take action. Doesn't grab her. Doesn't cite her. The only time he ever lays a hand on Mrs. Carr is when she attempts to take the evidence, the radio, back in the house, and he tells her not to. And even then she pulls away.
>
> And what happens? You can make fun of Claude Carr for being 4-foot-11. He's no weakling, and he's a parolee. He's been around. He's been in the joint. He's been in prison. He knows what to do. He doesn't like law enforcement. You saw his attitude. Can you imagine a more deadly place to be trapped with an angry parolee than on a three-foot by six-foot landing, suspended, what, fifteen feet above the ground? Where do you go? Screen door is behind you. The mother is to one side. If you're pushed, hit, you're tall – shorter would have been better up there. Railing at least could have been a little bit safe.

(25 RT 5232-5233.) Again, the prosecutor was making a fair comment of the evidence, setting the scene, as Officer Baker was faced with a situation that started as a loud radio call to a situation in which he felt was unsafe for himself and explained why he called for backup. This argument countered the defense theory that the officers did not act properly, but rather, excessively, and therefore, Woodruff was justified in his reaction in shooting Officer Jacobs. The prosecutor's argument did not improperly appeal for sympathy for the victim, but rather properly commented on the evidence and pointed out flaws in the defense theory. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1026; *People v. Bemore*, *supra*, 22 Cal.4th at pp. 846-847; *People v. Mitcham*, *supra*, 1 Cal.4th at p. 1052.)

Next Woodruff argues that the prosecutor committed misconduct when he invited the jurors to imagine the gun had been pointed at them (AOB 177):

> And let's talk about aiming for a minute. I'll just pace it off. He may have been about as far as I am from you when he shot and killed Doug Jacobs. Is that very far to take a gun and point it at you and shoot? To scare? To scare who? What story do you want to believe? And the latest version here in court, the defendant gets up and he says, Umm, no, he shot at me first.

(25 RT 5238-5239.) Woodruff takes the prosecutor's argument out of context when he argues that the prosecutor asked the jury to imagine the gun pointed at them. The prosecutor was commenting on the changing defense strategy of first saying he did not aim at Officer Jacobs but wanted to scare Officer Baker, and then to his most recent version that Officer Baker shot at him first.

Finally, Woodruff argues that the prosecutor placed himself in the role of the killer and improperly placed the jurors as the victim when he argued:

> Be real careful with which instructions you were being talked to about, okay? I just can't say – or I can say it. I can say anything I want, that I was in fear for my life so I had to kill you. Well, number one, it assumes I killed you. Now, he's told you he didn't, so he should be entitled to that instruction based on his version. He says he didn't do it. You know he did. So what are going to do, play defense lawyer and say, Well, let's try to apply this.
>
> Well, assume you did, for a minute. Is there any credible evidence, even the slightest, that he thought his life was in danger any of that time? He was in the house. How is his life in danger?

(25 RT 5239-5240.) It is clear from the context of the whole argument that the prosecutor was not casting himself in the role as killer and the jurors as the victim. Although a defendant may single out certain comments made by the prosecutor during argument in order to demonstrate misconduct, the

reviewing court "must view the statements in the context of the argument as a whole." (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.) Here, the prosecutor was talking about Woodruff's view and discussing his defense that he shot Officer Jacobs because he was in fear for his life. Again, this argument was a comment on the evidence and did not ask appeal to the sympathy of jurors. The prosecutor did not commit misconduct during closing argument.

Moreover, when the alleged misconduct " 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citations.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 244.) 'A defendant's conviction will not be reversed for prosecutorial misconduct ... unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.' (*Ibid.*) As discussed above, the prosecutor did not improperly ask the jurors to place themselves in the shoes of the victim. In any event, the trial court instructed the jury that the statements of attorneys are not evidence. (24 RT 5080.) The trial court also instructed the jury that they should not be influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. (24 RT 5079.) The jury is presumed to follow the trial court's instructions. (*People v. Alexander*, *supra*, 49 Cal.4th at p. 915.) Finally, the misconduct was not prejudicial, as this was not a close case; evidence of defendant's guilt was overwhelming, as previously discussed. (*People v. Mendoza* (2007) 42 Cal.4th 686, 704.)

9. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S TRUE FINDING OF THE LYING IN WAIT SPECIAL CIRCUMSTANCE

Woodruff argues that there was insufficient evidence to support the jury's special circumstance finding of lying in wait. (AOB 184-189.) Woodruff's claim should be rejected, as substantial evidence supports the jury's true finding of the special circumstance that Woodruff murdered Officer Jacobs while lying in wait.

The law regarding challenges to sufficiency of evidence is well established. As this Court has held:

> In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]

(*People v. Livingston* (2012) 53 Cal.4th 1145, 140 Cal.Rptr.3d 139, 164, quoting *People v. Albillar* (2010) 51 Cal.4th 47, 59–60.) The same test applies to the review of special circumstantial findings. (*People v. Livingston*, *supra*, 140 Cal.Rptr.3d at p. 164, citing *People v. Stevens* (2007) 41 Cal.4th 182, 201 ["A sufficiency of evidence challenge to a special circumstance finding is reviewed under the same test applied to a conviction. (*People v. Mayfield* (1997) 14 Cal.4th 668, 790.)"].)

Woodruff was charged with murdering Officer Jacobs while lying in wait. (Count 1, § 190.2, subd. (a) (15).) (1 CT 16.) The trial court instructed the jury on the special circumstance of lying in wait as follows:

To find that the special circumstance referred to in these instructions as murder by means of lying in wait is true, each of the following facts must be proved:

1. The defendant intentionally killed the victim; and

2. The murder was committed by means of lying in wait.

Murder which is immediately preceded by lying in wait is a murder committed by meaning of lying in wait.

The term "lying in wait" is defined as a waiting and watching for an opportune time act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.

(24 RT 5097-5098.) The jury found the special circumstance of lying in wait, among others, to be true. (19 CT 5374, 25 RT 5274.) The jury's true finding is supported by substantial evidence.

The purpose of the watching and waiting element is to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse. (*People v. Stevens, supra*, 41 Cal.4th at p. 202; *People v. Moon* (2005) 37 Cal.4th 1, 24.) This period need not continue for any particular length "'of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.'" (*People v. Sims* (1993) 5 Cal.4th 405, 433-434.) """The element of concealment is satisfied by a showing that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim."""" (*People v. Stevens,*

supra, 41 Cal.4th at p. 202, quoting *People v. Hillhouse* (2002) 27 Cal.4th 469, 500.) The factors of concealing murderous intent, and striking from a position of advantage and surprise, "are the hallmark of a murder by lying in wait." (*People v. Stevens, supra*, 41 Cal.4th at p. 202, quoting *People v. Hardy* (1992) 2 Cal.4th 86, 164.)

The evidence in this case clearly supports a finding that Woodruff killed intentionally. Indeed, the jury found that Woodruff premeditated the killing, a finding the evidence strongly supports. Woodruff concealed his purpose and, during the time just before the actual shooting, his physical presence, until he suddenly appeared at the bottom of the stairs and fired three shots at the officers on the upstairs landing. While Officers Baker and Jacobs were on the landing upstairs, Delgado saw Woodruff go back inside his house. (8 RT 1829.) When he came back out, Woodruff looked at Delgado who saw Woodruff holding a chrome plated handgun in his right hand. (8 RT 1829.) When Woodruff saw Delgado, Woodruff secreted the gun behind his back. (8 RT 1829, 1936.) Delgado described Woodruff as acting secretively, hiding and peeking as he walked to the stairs and looked up, all the while attempting to conceal the gun. (8 RT 1925.)

Woodruff's actions showed substantial waiting and watching for an opportune time to act. In his statement to detectives, he admitted he watched Officer Jacobs run upstairs while he watched from his screen door inside his house. (18 CT 5174.) Woodruff already had the gun racked at that point. (18 CT 5174, 5176.) Woodruff then ran outside of his house and listened to the officers upstairs. Woodruff said he had the gun at that time but nobody could see the gun from the stairway. (18 CT 5176.) Woodruff admitted that he stood on the porch for two minutes watching what was happening. (18 CT 5179.) In Woodruff's own words, he "waited and watched." (18 CT 5183, 13 RT 2936.) There was no struggle between the officers and his brother Claude. (18 CT 5179.) At that time, Woodruff

leaned over the side of the railing and shot the gun three times. (18 CT 5181.) Delgado witnessed Woodruff look up, peek over the railing and hold the gun up and fired the gun. (8 RT 1830, 1833, 1924, 1936; 10 RT 2268.) Delgado then saw Woodruff walk back to his house and shut the door. (8 RT 1830, 1834.) According to Woodruff's own admission, he "waited and watched" for an opportune time to act. (18 CT 5183; 13 RT 2936.) As Woodruff stated, "It wasn't no accident that I shot the gun." (18 CT 5190.) The jury could reasonably infer it was the time for which Woodruff had been waiting and watching.

Finally, the evidence showed that immediately after this period of waiting and watching, when the time became opportune, Woodruff made a surprise attack on unsuspecting victims from a position of advantage. Woodruff was downstairs watching the officers while the officers were distracted by Carr and Claude. While Officer Baker knew that Woodruff was downstairs because Woodruff had previously yelled up, Officer Baker had no idea that Woodruff was armed or that he would react so violently to the officers trying to stop Carr from playing her music loudly. Moreover, a victim can be taken by surprise even though the victim is aware of the murderer's presence. (24 RT 5097-5098.) The inference of surprise is inescapable; Woodruff's victims were entirely unsuspecting. (*People v. Livingston, supra,* 140 Cal.Rptr.3d at p. 166; *People v. Stevens, supra*, 41 Cal.4th at p. 201.) According to Claude, Officer Jacobs' eyes looked surprised and startled right before Woodruff fired the first shot. (11 RT 2525, 2527, 2547, 2595; 19 CT 5105, 5114, 5130.) Woodruff also attacked from a position of advantage—shooting from the porch below, leaning over the railing, and aiming at the landing upstairs. This evidence is ample to support the lying in wait special circumstance.

C. RETARDATION PHASE

1. THE PROCEDURE USED BY THE TRIAL COURT TO CONDUCT THE RETARDATION PHASE OF THE TRIAL WAS PROPER

Woodruff argues that the trial court, without guidance from higher courts or the state legislature, arbitrarily established its own format for the mental retardation phase of his trial, which denied him due process and equal protection of the laws. (AOB 190-201.) The procedure used by the trial court to conduct the retardation phase of the trial was proper.

On June 20, 2002, the United States Supreme Court held that execution of a mentally retarded person constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution in *Atkins v. Virginia* (2002) 536 U.S. 304, 319–321, 122 S.Ct. 2242, 153 L.Ed.2d 335. The next day, defense counsel alerted the trial court that he would file a motion to dismiss the death penalty charge after he received the report from Dr. Booraem. (B RT 510.) The trial court opined that counsel's motion was premature at that point, as that motion should be filed after Woodruff is convicted and if any special circumstance is found true. (B RT 511.)

On July 2, 2002, defense counsel gave both the prosecutor and the trial court a copy of Dr. Booraem's report and requested that the trial court set a hearing to deal with the *Atkins* issue before selecting death-qualified jurors if the death penalty is not in issue. (B RT 513, 516.) The trial court also ordered that Woodruff submit to psychological testing by the prosecution's expert, Dr. Rath. (B RT 514.)

On November 7, 2002, Woodruff filed an Ex Parte Application for Order Staying the Selection of Death Penalty Qualified Jurors Pending Adjudication by Jury Trial of whether or not Defendant is Mentally Retarded. (17 CT 4819-4871.) Woodruff argued that his mental

retardation fell within the purview of *Atkins*, a jury should adjudicate whether or not he is mentally retarded before impaneling a death penalty qualified jury, and that the prosecution had the burden of proof to negate Woodruff's mental retardation beyond a reasonable doubt. (17 CT 4825-4832.)

The trial court denied Woodruff's motion, ruling that the guilt phase would be conducted first, and if the jury finds Woodruff guilty of first degree murder and finds a special circumstance true, the same jury would decide the question of mental retardation. (2 RT 617-618.) The trial court reasoned:

> I've read your motion, Mr. Blankenship, and I'm going to deny the request. I intend to proceed as indicated I was going to proceed at the last hearing, and that is as, follows: There will be a guilt phase and, if necessary, a separate phase related to the issue of retardation. And we get do [sic] that phase only if the jury finds the defendant guilty of first-degree murder and finds at least one of the special circumstances true. Only in that way would the potential death penalty be triggered and thus the issue of mental retardation.
>
> If it thus becomes relevant, I do believe Mr. Woodruff is entitled to a jury determination on that question, and it is my intent that the same jury that will ultimately be responsible for making a recommendation on the penalty be the same jury that makes a determination whether he's eligible for the death penalty. And, in that regard, then, I have determined that's the proper way to proceed.
>
> And I acknowledge for the record that the higher courts have given us absolutely no guidance on this, despite the United States Supreme Court's proclamation in the last paragraph of the *Atkins* opinion that we leave it to the States to determine how we should proceed in these matters.
>
> And since the legislature of the State of California has not acted, nor has any appellate court, including the State Supreme Court given us any guidance, I feel this is the fairest and most equitable way to proceed. Obviously, we are breaking new

> ground here. The only other case here in California currently in progress with this issue is the one that I'm sure you're both aware of in Imperial County which generated substantial press recently, most notably the Daily Journal. Somewhere down the line I may be proven wrong, but that's why we have higher courts.
>
> It is both instinctually my feeling, as well as, I think, sound legal reasoning to proceed in this fashion. If, of course, the jury makes a determination that the defendant is mentally retarded, that will be done in a separate verdict and, obviously, that renders the question of punishment moot. The Court feels that the retardation phase, the burden of proof would rest with the defendant by a preponderance of .the evidence to show that the defendant is mentally retarded, much like it would in a sanity phase, if that were an issue here. But that's how the Court intends to proceed.

(2 RT 617-619.)

During the trial, defense counsel proposed that the guilt phase and the retardation phase should be merged together. (19 RT 4064.) The trial court dismissed defense counsel's suggestion, and noted that the only other option besides separate phases would be to combine the retardation and penalty phase. (19 RT 4064.) After expressing its continued frustration at the lack of guidance from the United States Supreme Court and state legislature, the trial court stated:

> But my personal feeling is that were the retardation issue combined into the penalty phase, the defendant's case would be prejudiced in that the jury would be hearing all of the evidence of the aggravating factors that the prosecution intends to introduce. So, I think – and it's just me, and it's my call – I think fairness dictates that issue be decided independently of the penalty phase issues. But I am not gonna combine it. It would be inappropriate for me to combine that in the guilt phase or hear evidence of it.

(19 RT 4065.) The trial court also stated that the burden of proof of retardation rests with the defense, using a preponderance of the evidence standard. (19 RT 4066.)

Prior to the start of the retardation phase, the trial court reiterated that without guidance from the United States Supreme Court and the state legislature, it chose not to combine the retardation and penalty phases because of the possible prejudice to Woodruff. (25 RT 5284-5285.) As set forth in the statement of facts, Dr. Booraem testified during the retardation phase, while the prosecution did not call any additional witnesses, relying on previously presented evidence in the guilt phase. (26 RT 5298-5325, 5330, 5333.)

Without any objection by either party[30], the trial court instructed the jury, using the American Psychiatric Association's definition of mental retardation set forth in *Atkins, supra*, 536 U.S. at p. 308, fn. 3, as follows:

> In this phase of the trial, you will be required to determine whether the defendant, Steve Woodruff, is mentally retarded. In order to reach a verdict on this question, the defendant, by a preponderance of the evidence, must prove the following:
>
> 1. That defendant is significantly sub average in general intellectual functioning and that he is significantly limited in adaptive functioning in at least two of the following skill areas:
>
> A. Communication; B. Self care; C. Home Living; D. Social and/or interpersonal skills; E. Use of community resources; F. Self direction; G. Functional academic skills; H. Work; I. Leisure; J. Health; K. Safety.

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[30] When the trial court asked the parties if they had any thoughts or objections to the instruction, defense counsel said, "I'm fine with that, with the way you read it. It's fine with me." (26 RT 5328.)

2. That the onset of this occurred before the age of 18.

(26 RT 5333-5334.)

In *Atkins, supra*, 536 U.S. at pp. 319–321, the United States Supreme Court held that execution of a mentally retarded person constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution. The United States Supreme Court left to the states the proper procedures for effectuating its holding. (*Id.* at p. 317.) Effective January 1, 2004, the Legislature adopted Penal Code section 1376, which defines "mentally retarded" and sets forth procedures for determining whether a defendant is mentally retarded for purposes of eligibility for the death penalty.[31] Section 1376 grants a defendant "[i]n any case in which the prosecution seeks the death penalty ... a jury hearing to determine if the defendant is mentally retarded" if the defendant first submits "a declaration of a qualified expert stating his or her opinion that the defendant is mentally retarded." (*People v. Jackson* (2009) 45 Cal.4th 662, 679.)

This Court held that section 1376 applied only to preconviction proceedings and adopted a similar procedure for defendants challenging a judgment of death. (*In re Hawthorne* (2005) 35 Cal.4th 40, 47.) This Court held there was "no constitutional mandate" to have a jury determine whether a defendant facing a judgment of death is mentally retarded, noting that the high court in *Atkins* "expressly left to the states the responsibility of ' "developing appropriate ways to enforce the constitutional restriction

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[31] Section 1376 defines "mentally retarded" to mean "the condition of significantly sub average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." (Stats. 2003, ch. 700, § 1.) If the prosecution seeks the death penalty, the defendant may elect to have the court determine whether the defendant is mentally retarded prior to trial, or have the jury determine the issue following a conviction of murder with special circumstances. (§ 1376, subd. (b)(1).)

upon [their] execution of sentences." [Citation.]' [Citation.]" (*Id.* at p. 50.) *In Schriro v. Smith* (2005) 546 U.S. 6, 126 S.Ct. 7, 163 L.Ed.2d 6, the high court reaffirmed that its decision in *Atkins* does not give a capital defendant a right to have a jury determine whether he or she is mentally retarded. (*People v. Jackson*, *supra*, 45 Cal.4th at p. 679.)

Woodruff claims he was denied due process of law because the trial judge divined an ad hoc procedure without guidance from the United States Supreme Court, California Supreme Court or the state legislature. Woodruff claims he was entitled to a pretrial hearing on retardation as set forth in section 1376. (AOB 199.) However, as this Court held in *Hawthorne*, "[b]y its terms, section 1376 applies only to preconviction proceedings." (*In re Hawthorne, supra*, 35 Cal.4th at p. 44.) The decision in *Atkins* did not require that Woodruff's trial be conducted in any particular fashion. The decision in *Atkins* simply held that a defendant could not be executed if he is mentally retarded.

Woodruff also claims that he was denied the equal protection of laws.[32] (AOB 190.) Not granting him the procedural protections of section 1376 did not deny Woodruff the equal protection of the law, because he is not similarly situated "to a preconviction defendant," as he is now facing a judgment of death. (*People v. Jackson*, *supra*, 45 Cal.4th at p. 680.) Nor was he similarly situated "to a preconviction defendant" for purposes of section 1376 during the trial because section 1376 had not yet been enacted. (*Ibid.*)

Here, the trial court did not abuse its discretion by ruling that Woodruff was entitled to a post-conviction determination of mental retardation by a jury. Even though section 1376 does not apply to

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[32] Woodruff does not elaborate on how his equal protection rights were violated.

Woodruff, the procedure followed by the trial court did comport with the procedure passed by the state legislature after Woodruff's trial. Woodruff claims he was entitled to a pre-conviction hearing. However, section 1376 provides a defendant the right to elect to have the court determine whether he is mentally retarded prior to trial, or have the jury determine the issue following a conviction of murder with special circumstances. (§ 1376, subd. (b)(1).) Clearly, Woodruff had no right to a pre-conviction jury trial on the issue of mental retardation before section 1376 was enacted.

The trial court properly conducted a jury trial to determine the issue of mental retardation in a separate trial after the guilt phase. This follows the procedure afforded to a defendant after the enactment of section 1376. In any event, the decision in *Atkins* did not require that a defendant's trial be conducted in any particular fashion. (*People v. Jackson, supra*, 45 Cal.4th at p. 680.) Woodruff does not state with any specificity what exactly was wrong with the procedure used in his trial. He does not question the instructions given except to say they were vague and did not "mention IQ level at all." (AOB 197, 200.) Woodruff acknowledges that the instructions given closely tracked the wording of the American Psychiatric Association definition set forth in *Atkins*. (AOB 197.) Moreover, as this Court has explained, "unlike some states, the California Legislature has chosen not to include a numerical IQ score as part of the definition of mentally retarded." (*In re Hawthorne, supra*, 35 Cal.4th at p. 48.)

Finally, Woodruff argues that if he had been afforded a pretrial hearing, none of the prejudicial statements that the prosecution expert elicited from Woodruff such as Woodruff's hesitance to be labeled mentally retarded, would have been admissible in the guilt phase. (AOB 199.) However, Dr. Rath testified during the guilt phase to rebut Dr. Booraem's testimony that Woodruff did not have the mental capacity to form the requisite intent, not in a determination about whether or not

Woodruff was mentally retarded. Therefore, a pretrial hearing would not have necessarily kept that information from trial.

It is not reasonably probable that Woodruff would have received a different result had the trial court allowed him to have a pretrial determination by the court on the issue of mental retardation. According to the Wechsler test Dr. Rath administered to Woodruff, Woodruff's full-scale IQ was 78. He scored a verbal quotient of 80 and a performance score of 79. (17 CT 4849; 23 RT 4901.) Dr. Rath also administered the Vineland Adaptive Scale. (23 RT 4898.) An average test score is 85 or above, borderline is 70 to 84, and mentally retarded is a score below 69. (23 RT 4898.) Woodruff received a score of 86 in the overall adaptive behavior composite on the Vineland Adaptive Scale. (17 CT 4850; 23 RT 4898.) Woodruff's score put him in the low average range. (17 CT 4850.)

Dr. Rath concluded that Woodruff is not mentally retarded, based on the results of Woodruff's IQ test, which was above the 69 cutoff for mental retardation, as well as Woodruff's adaptive skills. (23 RT 4902.)

Additionally, Woodruff's employment history does not support a finding that he is mentally retarded. Woodruff worked at Manpower Temporary Agency as an electrician. He also worked assembly in a factory, was a driver for the Press Enterprise newspaper, and was lead man for the newspaper, in charge of a crew that counted the papers. (23 RT 4873.) Woodruff also did commercial electrical work for Copper Lantern, which wired buildings such as Fantastic Sams and Mailboxes, Etc. Woodruff wired rooms, ran wires, fixed switches, installed receptacles, and did "troubleshooting." (23 RT 4875.) Woodruff also received disability for a back injury. He was ruled capable of handling his own money, so the disability checks went directly to him instead of a third party payee. (23 RT 4874.)

Moreover, according to Dr. Rath there were too many contra-indications to opine that Woodruff is mentally retarded. (23 RT 4903.) Woodruff's abstract reasoning ability was much too high. (23 RT 4903.) For example, when Dr. Rath asked Woodruff, "Why do we study history?" Woodruff responded, "So that we can tell where we've been, learn who we are, and find out where we're going." (23 RT 4903.) Woodruff also told Dr. Rath that he read the Bible, and he was able to demonstrate a sophisticated understanding of the Bible. (23 RT 4882.) Woodruff was also able to write about 20 letters from jail. He knew how to buy stamps from the commissary, and that he needed thirty-seven cent stamps to mail a letter. (23 RT 4846, 4885.) Finally, Dr. Rath based his opinion on Woodruff's vocabulary. Woodruff used vocabulary words such as pelvis, jittering, catheter, defecate, impotent, jeopardy and harassing, which are not used by a mentally retarded person. (23 RT 4904.) Based on Woodruff's Wechsler score, Woodruff's employment history, adaptive and life skills and reasoning ability, Dr. Rath opined that Woodruff is not mentally retarded. The trial court, therefore, did not violate the holding in *Atkins* by proceeding to trial in the absence of guidance from the Legislature on how to implement the holding in that case. (*People v. Jackson, supra*, 45 Cal.4th at p. 678.) The trial court did not err in employing the procedure it used in conducting the retardation phase of the trial.

2. THE PROSECUTOR DID NOT COMMIT PREJUDICIAL ERROR DURING CLOSING ARGUMENT IN THE RETARDATION PHASE

Woodruff contends that the prosecutor committed prejudicial misconduct by appealing to juror prejudices and stereotypes about mental retardation during closing argument of the retardation phase. (AOB 202-208.) The issue is waived because defense counsel did not object and did not request an admonition. In any event, the prosecutor did not commit

prejudicial misconduct. Therefore, Woodruff's contention that trial counsel was ineffective for failing to object (AOB 207) is unavailing.

During closing argument in the retardation phase, the prosecutor said, "If a person doesn't look retarded or act retarded, it's because they're not retarded. It doesn't take any professional to let you know that." (26 RT 5344.) Defense counsel did not object. The prosecutor went on to discuss that in this case more evidence was presented that Woodruff is not mentally retarded than just how he acted at trial, there was the expert testimony of Dr. Rath. (26 RT 5344.)

Woodruff argues that the prosecutor's comment was misconduct because the prosecutor urged the jury to rule against Woodruff not on the basis of the evidence presented, but based on the juror's prejudices about how he looked. (AOB 206.) Woodruff's claim is without merit.

A defendant "may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.]" (*People Riggs, supra*, 44 Cal.4th at p. 298.) Here, defense counsel did neither of those things. Therefore, the issue is waived on appeal. In any event, because the comments did not rise to the level of prosecutorial misconduct, as discussed below, contrary to Woodruff's assertion (AOB 207), defense counsel did not render constitutionally ineffective assistance of counsel for failing to object. (*Strickland, supra*, 466 U.S. at p. 686.)

> Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment

> upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action ' "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' [Citation.]"

(*People v. Fuiava* (2012) 53 Cal.4th 622, 679-680, quoting *People v. Riggs* (2008) 44 Cal.4th 248, 298.)

When the claim "focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.) To answer that question, a reviewing court examines the prosecutor's statement in the context of the whole record, including arguments and instructions. (*People v. Hill, supra*, 17 Cal.4th at p. 832.) "In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye, supra*, 18 Cal.4th at p. 970.)

Woodruff improperly isolates one sentence to provide a skewed interpretation of the prosecutor's argument. When the challenged remarks are properly considered in context, it is readily apparent that the prosecutor did not appeal to the basest of the jurors' prejudices (AOB 206) or urge the jurors to ignore evidence of mental retardation (AOB 207) when he said, "If a person doesn't look retarded or act retarded, it's because they're not retarded." (26 RT 5344.) The prosecutor was alluding to the old saying, "if it looks like a duck, and quacks like a duck, it's a duck." However, the prosecutor did not intend for the jury to disregard evidence and base their decision on retardation on how Woodruff looked. Rather, his statement was referring to evidence presented that Woodruff was able to understand, and answer appropriately, questions posed to him during his interview with detectives and during the trial by both the prosecutor and defense counsel.

By his own admission and through his mother's testimony, evidence was presented that Woodruff was in the process of buying a home, understood money, could read the Bible, write letters, take care of himself, his mother, and his daughter, and be gainfully employed. Later in the argument, the prosecutor did specify these acts of Woodruff that show that he is not mentally retarded, such as the letter he wrote, his own testimony, and his work history. (26 RT 5346-5347.) The prosecutor simply argued that evidence presented at trial belied Woodruff's claim that he is mentally retarded. The prosecutor in this case did not commit misconduct, as a prosecutor has broad discretion to state its views as to what the evidence shows and what inferences may be drawn from it. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1052; *People v. Sandoval* (1992) 4 Cal.4th 155, 184; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 1026.) The prosecutor did not appeal to the jurors' basest prejudice.

Moreover, the prosecutor did not urge the jury to ignore evidence. Rather, right after the sentence to which Woodruff cites, the prosecutor states that there is "even more" evidence. (26 RT 5344.) The prosecutor then discussed Dr. Rath's testimony that Woodruff scored a 75 on the Wechsler test, and tried to counter defense evidence that Woodruff is retarded because he scored a 66 on the test. (26 RT 5345.) At no time did the prosecutor urge jurors to disregard evidence; the prosecutor was attempting to point out logical flaws in the defense arguments and evidence that countered defense claims—which is proper in rebuttal.

Finally, it is not reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted, nor did it so infect the trial with unfairness as to make the resulting conviction a denial of due process. (*People v. Fuiava, supra*, 53 Cal.4th at p. 680.) As set forth above, the evidence that Woodruff was not mentally retarded was overwhelming. His IQ level was above 70, the threshold for mental

retardation set by *Atkins, supra*, 536 U.S. at p. 308, fn. 3. (23 RT 4901-4902.) Woodruff score of the Vineland Adaptive scale was 85, which put him above the mentally retarded score of 69. (23 RT 4898.) Woodruff's personal self-help skills, domestic ability and degree of socialization were unimpaired. (23 RT 4902.) His employment history does not support a finding that he is mentally retarded, as Woodruff supervised a crew and worked as an electrician on commercial jobs. Woodruff's abstract reasoning ability was high, he was able to understand sophisticated Biblical themes, he wrote 20 letters from jail, and used a higher level vocabulary. (23 RT 4882, 4903-4904.) Woodruff was therefore not prejudiced by any error committed by the prosecutor during closing argument in the retardation phase.

D. PENALTY PHASE ISSUES

1. THE PROSECUTOR DID NOT COMMIT PREJUDICIAL ERROR DURING PENALTY OPENING STATEMENTS BECAUSE HE DID NOT URGE JURORS TO CONSIDER THEIR RELIGIOUS VALUES IN DETERMINING PENALTY OR DETERMINE PENALTY WITHOUT HEARING EVIDENCE

Woodruff contends that the prosecutor committed misconduct during his penalty phase opening statement by suggesting that the jurors could consider their religious values in determining the proper penalty phase verdict and make up their minds about the penalty without hearing any evidence. (AOB 209-213; Claim D.1.) Because Woodruff neither objected nor requested an admonition, the claim is forfeited on appeal. In any event, the prosecutor's comments did not constitute prejudicial misconduct.

Woodruff contends the italicized portions of the following statement at the end of the penalty phase opening statements constitute prosecutorial error:

> One of the circumstances you can consider, one of the factors, as we call them, in this type of trial is simply, or not so

simply, the circumstances and the facts surrounding this killing. *That's all. That, in and of itself. Doesn't have to say that he had a bad history, doesn't have to have been a bad man, doesn't matter whether he's a Christian, non-Christian. Those things are for you to take and to weigh for yourselves.*

What I'm saying to you, though, is when the Judge gives you the law, understand that anything that's presented to you is presented as a package for you to look at and to try to get a balanced picture before making such a big decision about somebody.

You will most likely hear from the defense. You will most likely hear about sadness from their family. You'll hear about – I don't know, childhood issues. Those are all proper for you to consider.

And when the witnesses are all done, one more time the defense and I will speak to you and ask you to reach a verdict.

The Judge will instruct you and will tell you what kind of things to consider. And then you'll be asked, death or not death. *By then, you'll know, if you don't already, what the correct verdict will be.* Thank You.

(26 RT 5378, italics added.)

Preliminarily, the issue is forfeited because Woodruff did not object nor request a curative admonition after either of the prosecutor's statements. (*People v. Fuiava, supra*, 53 Cal.4th at p. 726.) Nothing in the record indicates that an objection or a request for admonition would have been futile. For the reasons set forth below, defense counsel was not ineffective for failing to object to the statements because the prosecutor did not err, nor was Woodruff prejudiced. (*Strickland, supra*, 466 U.S. at p. 687.)

This Court has held that a prosecutor's reliance on religious authority as justification for imposing capital punishment is improper. (*People v. Williams* (2010) 49 Cal.4th 405, 465; *People v. Zambrano, supra*, 41 Cal.4th at p. 1169; *People v. Roldan* (2005) 35 Cal.4th 646, 743,

disapproved on another point in *People v. Doolin*, *supra*, 45 Cal.4th at p. 420; *People v. Vieira* (2005) 35 Cal.4th 264, 298.) This type of argument is problematic because it tends to undermine the jurors' sense of responsibility for imposing a death sentence in a particular case, and "impl[ies] that another, higher law should be applied...displacing the law in the court's instructions." (*People v. Wrest* (1992) 3 Cal.4th 1088, 1107.) It is permissible, however, for a prosecutor to invoke religious imagery when arguing that jurors should not reach a penalty verdict in reliance on divine teachings, because such argument reinforces the notion that the penalty decision must be an individual determination under the instructions given by the court. (*People v. Williams*, *supra*; 49 Cal.4th at p. 466; *People v. Hughes* (2002) 27 Cal.4th 287, 392.) Prosecutors also may point to the Bible as demonstrating "historical acceptance of capital punishment." (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 116, citing *People v. Williams* (1988) 45 Cal.3d 1268, 1325.)

In this case, the prosecutor did not cite the Bible or religion as a basis to impose the death penalty. Woodruff contends that the prosecutor's comment, "That's all. That, in and of itself. Doesn't have to say that he had a bad history, doesn't have to have been a bad man, doesn't matter whether he's a Christian, non-Christian. Those things are for you to take and weigh for yourself," constituted improper argument because it suggested "jurors ought to consider whether Woodruff was a Christian or non-Christian in their penalty decision" and was "an appeal for insiders to shun an outsider." (AOB 211.) Woodruff argues that the prosecutor engaged in the "rhetorical device" of "paraleipsis:" stating one thing but suggesting the opposite to plant the first suggestion that it was acceptable for the jurors to consider whether Woodruff was Christian or non-Christian in their penalty determination. (See *People v. Blacksher* (2011) 52 Cal.4th 769, 844; see also *People v. Wrest* (1992) 3 Cal.4th 1088, 1107.). (AOB

210.) Splicing together various phrases from the prosecutor's argument, Woodruff claims that the prosecutor argued that it "'doesn't matter' whether Mr. Woodruff had a bad history, was a bad man or 'whether he's a Christian, non-Christian.'" (AOB 210-211.)

However, taken in context, the prosecutor argued just the opposite. The prosecutor told jurors that one of the factors that they could consider in deciding penalty was the circumstances and the facts surrounding the killing. (26 RT 5378.) Then the prosecutor said that they did not have to show that Woodruff was a bad man or had a bad history, nor did his religious affiliation matter at all. (26 RT 5378.) At no time did the prosecutor make an appeal to religious intolerance, as Woodruff now suggests. The prosecutor's references were part of a straightforward argument that the ultimate penalty decision was an individual determination. The prosecutor did not imply or suggest that another, higher law should be applied instead of the court's instructions; rather, the prosecutor told the jury that the "Judge will instruct you and will tell you what kind of things to consider." (26 RT 5378; see also 26 RT 5370.)

Next, Woodruff claims that because the prosecutor said, "And then you'll be asked, death or not death. By then, you'll know, if you don't already, what the correct verdict will be" (26 RT 5378), the prosecutor in essence told the jurors that they "may have enough information to vote for the death penalty without hearing any evidence regarding aggravating and mitigating facts to suggest some crimes carry an automatic death penalty, regardless of evidence in mitigation." (AOB 211.) Reviewing the prosecutor's statement in the context of the whole argument (*People v. Hill*, *supra*, 17 Cal.4th at p. 832), it is clear that the prosecutor did not tell the jury to disregard all mitigation evidence and automatically vote for death. Again, just the opposite of Woodruff's claim, the prosecutor specifically told the jury that it was "proper for [them] to consider" evidence presented

by the defense such as "childhood issues" and "sadness from their family." (26 RT 5378.) The prosecutor also previously told the jurors to "understand that anything that's presented to you is presented as a package for you to look at and to try to get a balanced picture before making such a big decision about somebody." (26 RT 5378.) The prosecutor also told the jurors that the trial court would instruct them on what factors they could consider in deciding penalty. (26 RT 5370, 5378.) The prosecutor did not instruct the jury to decide penalty without hearing any penalty phase evidence. To the contrary, the prosecutor told the jurors to look at the whole "package" (26 RT 5378) and consider both aggravating and mitigating factors before deciding on penalty.

Even if the prosecutor erred, in this instance any error was not prejudicial. Under California law, and in the context of capital sentencing, reversal for prosecutorial misconduct requires a reasonable possibility of an effect on the outcome. (*People v. Williams*, *supra*, 49 Cal.4th at p. 467; *People v. Riggs*, *supra*, 44 Cal.4th at p. 315.) It is not reasonably possible that a result more favorable to Woodruff would have been reached in the absence of the prosecutor's alleged religious reference and closing statement, in light of the clear guidance afforded to the jury by the court's instructions (27 RT 5701-5723), the brevity of the challenged remarks in comparison to the prosecutor's reference to the statutory factors that the trial court would provide them (26 RT 5370, 5378), and the overwhelming nature of the factors in aggravation, including the facts underlying both the charged crime and the prior acts of violence. (See, e.g., *People v. Williams*, *supra*, 49 Cal.4th at p. 467; *People v. Abilez* (2007) 41 Cal.4th 472, 527; *People v. Zambrano*, *supra*, 41 Cal.4th 1082, 1170; *People v. Wrest*, *supra*, 3 Cal.4th at p. 1107.) Therefore the prosecutor did not commit prejudicial misconduct.

2. THE ERRONEOUS ADMISSION OF OFFICER MACHADO'S TESTIMONY ABOUT BROOKS' STATEMENTS WAS HARMLESS BEYOND A REASONABLE DOUBT

Woodruff claims that the trial court erred in admitting hearsay testimony from two law enforcement officers who had interviewed an unavailable witness about an alleged prior violent incident in which Woodruff was involved, in violation of the Confrontation Clause. (AOB 214- 220, Claim D.2.) While the admission of Mario Brooks' statements to Officer Machado did violate the Confrontation Clause, the admission of his testimony on this issue was harmless beyond a reasonable doubt.

During the penalty phase of the trial, Freddy Williamson, Woodruff's friend, testified that on December 23, 1999, he went to 850 Monterey in Pomona with Mario Brooks and some girlfriends to buy marijuana. (26 RT 5523.) There was a scuffle on the passenger side of the van between Brooks and a male wearing a red bandana on his face. (26 RT 5525.) Williamson testified that four black males came out of the house and started chasing their van. (26 RT 5526.) Woodruff might have been one of the four males. (26 RT 5527.) Someone started shooting at the van, and Brooks was shot and crashed the van. (27 RT 5528.)

DA Investigator Silva testified that Williamson told Silva that he saw Woodruff at 850 Monterey. (27 RT 5572.) Williamson said that there were four men who came out of the house, one of the men went up to the van. There was a ruckus on the passenger side of the van, and Brooks moved to the driver's side of the van and drove away. (27 RT 5573.) Later three of the men chased the van, and Woodruff was not one of the ones who stayed on the driveway. (27 RT 5573.)

The prosecution sought to call Pomona Police Officer Machado to testify about a statement he took from Eddie Phillips a.k.a. Mario Brooks at

the hospital shortly after the shooting.[33] The trial court ruled that evidence was admissible under Evidence Code section 1370[34] because Brooks was

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[33] Investigator Silva interviewed Brooks but did not testify about any statements Brooks made to him. He only testified that he spoke to Brooks in Mississippi. (27 RT 5570.) Silva also testified about statements made by another prosecution witness, Freddy Williamson, who did testify at trial and was subject to cross examination. So there was no Confrontation Clause violation with respect to Silva's testimony.

[34] Evidence Code section 1370 provides:

(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met:

(1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

(2) The declarant is unavailable as a witness pursuant to Section 240.

(3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section.

(4) The statement was made under circumstances that would indicate its trustworthiness.

(5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.

(b) For purposes of paragraph (4) of subdivision (a), circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:

(1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

(2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

(3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.

(c) A statement is admissible pursuant to this section only if the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.

unavailable as a witness under Evidence Code 240.[35] (26 RT 5535; 27 RT 5556.) Defense counsel objected to the admission of the statements because they were hearsay, untrustworthy, because Woodruff does not have the ability to confront the declarant, and under Evidence Code section 352. (27 RT 5539, 5545, 5570-5572.) The trial court limited the officer's testimony to Brooks telling him that Woodruff threatened Brooks several days before, the identification of Woodruff at the scene because of his car and license plate, Woodruff attempted to strike Brooks that day, and three individuals attempted to pull Brooks out of the van. (27 RT 5550.)

Officer Machado testified that he interviewed Phillips a.k.a. Brooks at Pomona Valley Hospital, where he was being treated for a gunshot wound. (27 RT 5557.) Brooks had an argument with Woodruff two to three days earlier. (27 RT 5560.) Brooks was sitting in the passenger side of a van when Woodruff attempted to hit Brooks with a bottle. (27 RT 5559.) Other men tried to open the side door and pull Brooks out of the van. (27 RT 5559.) Brooks tried to back the van out and crashed into another car. (27 RT 5559.)

The Sixth Amendment to the United States Constitution guarantees the accused in criminal prosecutions the right "to be confronted with the witnesses against him." (*People v. Livingston* (2012) 53 Cal.4th 1145, 140 Cal.Rptr.3d 139, 155.) In *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, the high court held that this provision prohibits the admission of out-of-court testimonial statements offered for their truth, unless the declarant testified at trial or was unavailable at trial and the defendant had had a prior opportunity for cross-examination. (See

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[35] Brooks was in a VA hospital in Mississippi on a mandatory hold after a psychotic episode, and traveling to testify was against medical advice. (26 RT 5464; 27 RT 5556.)

Davis v. Washington (2006) 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224; *People v. Livingston*, *supra*, 140 Cal.Rptr.3d at p. 155; *People v. Cage* (2007) 40 Cal.4th 965, 969.) The Crawford rule applies to cases like this, which are still on appeal, even though it was announced after the trial. (*People v. Livingston*, *supra*, 140 Cal.Rptr.3d at p. 155; *People v. Cage*, *supra*, at p. 974, fn. 4.)

In *Davis v. Washington*, *supra*, 547 U.S. 813, 126 S.Ct. 2266, the court explained the difference between testimonial and nontestimonial statements made to the police. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at p. 822, 126 S.Ct. 2266; accord, *Michigan v. Bryant* (2011) 562 U.S. ——, ——, 131 S.Ct. 1143, 1154, 179 L.Ed.2d 93 [quoting *Davis*].)

When statements admitted under Evidence Code section 1370 are determined to be "testimonial," it appears that the statute as applied conflicts with the holding in *Crawford.* Evidence Code section 1370 was enacted in 1996 and is not a firmly rooted hearsay exception for confrontation purposes. (Stats.1996, ch. 416, § 1, p. 2686; *People v. Kons* (2003) 108 Cal.App.4th 514, 523.) Since the decision in *Crawford*, the viability of the statute has been undermined, and testimonial statements admitted under Evidence Code section 1370 would now "only be consistent with the confrontation clause of the Sixth Amendment of the United States Constitution if [the defendant] had a prior opportunity to cross-examine [the declarant]. [Citation .]" (*People v. Livingston*, *supra*, 140 Cal.Rptr.3d at p. 155; *People v. Price* (2004) 120 Cal.App.4th 224, 238-239.)

Statements obtained through police questioning in the field are non-testimonial when the primary purpose of the questioning is to deal with a contemporaneous emergency. (*People v. Cage* (2007) 40 Cal.4th 965, 984.) This Court, however, concluded otherwise regarding the statements made by the victim to a police officer who had interviewed the victim at the hospital during the same period of time because, viewed objectively, the conversation had not been to facilitate the victim's emergency treatment in accordance with the holding in *Davis v. Washington* (2006) 547 U.S. 813, 126 S.Ct. 2266, which clarified the distinction between testimonial and nontestimonial hearsay for purposes of the post- *Crawford*-era. (*People v. Cage*, *supra*, at pp. 970, 979-985.)

Applying this interpretation in the instant case, Brooks' statements to Officer Machado were testimonial, and Woodruff did not have an opportunity to cross-examine Brooks. Therefore, admitting the Officer Machado's testimony about Brooks' statement over Woodruff's objection violated his federal constitutional right to confront witnesses.

However, "'Confrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].' [Citation.] We ask whether it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error." (*People v. Livingston*, *supra*, 140 Cal.Rptr.3d at p. 155, quoting *People v. Loy* (2011) 52 Cal.4th 46, 69–70.) Whether the error was harmless beyond a reasonable doubt depends on factors including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684; 106 S.Ct. 1431, 89 L.Ed.2d 674.)

Here, the error was harmless beyond a reasonable doubt. Officer Machado's testimony about Brooks' statement was mostly cumulative of Williamson's testimony. Williamson already testified that he and Brooks went to Pomona to buy weed. (26 RT 5523.) When they arrived, four men came out of the house, and there was a scuffle at the side of the van between Brooks and a male wearing a bandana on his face. (26 RT 5525-5526.) Some of the men started chasing the van, shots were fired at the van, and Brooks was shot. (26 RT 5527-5528.) Williamson told Silva that Woodruff was not one of the men who stayed on the driveway during the chase and shooting of the van. (26 RT 5526-5527; 27 RT 5572-5573.) The only fact that was not presented through other witnesses was the fact that Woodruff tried to hit Brooks with a bottle at the side of the van. However, there was already other evidence to show that Woodruff was involved in chasing the van and was with the group that fired shots at Brooks. Therefore, Officer Machado's testimony was not prejudicial.

Moreover, the overall strength of the prosecution's case in aggravation was substantial. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 684.) Overwhelming evidence of criminal activity by Woodruff which involved the use or attempted use of force or violence, besides this instance, was presented. Woodson, who lived with Woodruff testified that he pushed her more than once, causing her arm to go through a window. (26 RT 5427.) Woodruff and Dennis Smith were involved in a shooting of Williams and Palmer at Western Liquor, where Palmer was killed. (26 RT 5468-5474.) Woodruff was arrested in Arizona for having a concealed weapon and for altering a firearm. (26 RT 5509, 27 RT 5566.) Woodruff snatched Spicer's necklace and money, punched Spicer in the face, threw him to the ground and started kicking him. (26 RT 5381.) Woodruff was also arrested for carrying a concealed weapon in 1999 in Jurupa Valley. (26 RT 5415.)

Because the erroneously admitted evidence was mostly cumulative and because the overall strength of prosecution's case in aggravation was substantial, it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error. (*People v. Livingston*, *supra*, 140 Cal.Rptr.3d at p. 155.)

3. WOODRUFF WAIVED HIS CLAIM THAT THE TRIAL COURT ERRED IN CONSIDERING THE STATEMENT OF THE VICTIMS' RELATIVES OR THE PROBATION REPORT IN DENYING THE MOTION FOR MODIFICATION OF JURY'S DEATH VERDICT, AND ANY ERROR BY THE TRIAL COURT WAS NOT PREJUDICIAL

Woodruff contends that his federal and state constitutional rights were violated because the trial court considered the testimony of the victims' relatives and the probation report before ruling on the automatic motion to modify the penalty verdict. (AOB 221-230.) Woodruff claims that his case should be remanded to the trial court for reconsideration of the automatic motion to reduce the jury's verdict. (AOB 230.) This claim is waived because Woodruff failed to object below. In any event, there is not a reasonable possibility that the trial court's alleged error affected the ruling.

At the Automatic Motion to Reduce the Jury's Recommendation of the Death Penalty on April 17, 2003, the prosecutor presented relatives of the victims, Officers Jacobs and Baker, to address the trial court. (28 RT 5816.) Charles Jacobs, Officer Jacobs' father, Cathy Miller, Officer Jacobs' mother, Tamara Jacobs, Officer Jacobs' widow, Tara Schofield, Officer Jacobs' sister, and Yvonne Baker, Officer Baker's wife, all testified and urged the trial court to uphold the jury's death verdict for Woodruff. (28 RT 5816-5831.) For the defense, John Woodruff, Woodruff's brother, asked the trial court not to impose the death penalty on Woodruff. (28 RT 5831-5834.) Woodruff also addressed the court, denying any wrongdoing. (28 RT 5834-5838.)

The trial court denied the automatic motion for modification of the jury's verdict. (28 RT 5850.) The trial court stated that it made an independent determination of the propriety of the penalty and independently reviewed the aggravating and mitigating factors relating to the punishment imposed. (28 RT 5843.) The trial court reasoned that Woodruff's emotional state did not rise to the level of extreme disturbance under factor 190.3, subdivision (d), there was little evidence to support that Woodruff believed there was a moral justification for his conduct under factor 190.3, subdivision (f), nor did the evidence support that Woodruff was mentally retarded under factor 190.3, subdivision (h). (28 RT 5843-5846.) After independent review of the evidence, the trial court also concluded that the factors in aggravation contemplated by section 190.3, subdivisions (a) and (b) far outweighed any actual or even potential factors in mitigation. (28 RT 5846.) The trial court found the circumstances of the crime, especially the testimony of Officer Baker and Delgado which showed a "cold, calculated, premeditated and deliberate ambush murder of a police officer engaged in the performance of his routine duty" was a strong factor in aggravation. (28 RT 5846.) The trial court also considered evidence of Woodruff's history of engaging in criminal conduct involving the use of force or violence under factor 190.3, subdivision (b). The trial court recounted the testimony of Spicer and the evidence presented in the shooting of Brooks as examples of Woodruff's history of violence. (28 RT 5848-5849.) However, the trial court did not consider the shooting at Western Liquor Store to be a factor in aggravation because there was evidence that Woodruff was justified in shooting under the theory of self defense or defense of others, nor did the trial court consider the domestic violence testimony by Woodson. (28 RT 5849-5850.)

Immediately after denying the automatic motion for modification of the jury's verdict imposing the death penalty, the trial court pronounced

sentence. (28 RT 5850.) Before sentencing on the non-capital count in Count 2, the trial court stated that it read and considered a probation report. (28 RT 5850.)

Woodruff now argues that the trial court erred in considering the testimony of the relatives of Officers Jacobs and Baker in denying the automatic motion for modification of the jury's death verdict and for considering the probation report in imposing sentence. (AOB 225- 230.) Preliminarily, these issues are waived because Woodruff did not object at trial. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1183; *People v. Hill* (1992) 3 Cal.4th 959, 1013.) Not only did Woodruff not object, he himself presented witnesses to address the trial court to urge that the death penalty verdict be reduced. Woodruff should therefore be foreclosed from arguing on appeal against the procedure used by the trial court.

Woodruff's contention that his federal constitutional rights were violated by the trial court's consideration of the testimony by the victims' relatives should be rejected. (AOB 225-226.) The decisions in *Booth v. Maryland* (1987) 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440, and *South Carolina v. Gathers* (1989) 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876, broadly hold that it is generally violative of a criminal defendant's rights under the cruel and unusual punishments clause of the Eighth Amendment to present information concerning such matters as the victim's personal characteristics, the emotional impact of the crime on his family, and the opinions of family members about the crime and the criminal. (*People v. Benson* (1990) 52 Cal.3d 754, 811.) But this Court has concluded that the broad holding of *Booth* and *Gathers* does not extend to proceedings relating to the application for modification of a verdict of death under section 190.4, subdivision (e). (*Ibid.*, citing *People v. Jennings* (1988) 46 Cal.3d 963, 994.) Nor does the record indicate that fundamental fairness was

undermined in Woodruff's trial under the due process clause of the Fourteenth Amendment.

However, consideration of statements of the victims' relatives amounted to error under state statutory law (*People v. Benson, supra*, 52 Cal.3d at p. 812), because in ruling on the application for modification of a death penalty verdict, the trial court can consider "only that which was before the jury" (*People v. Ramos, supra*, 15 Cal.4th at p. 1133; *People v. Jennings, supra*, 46 Cal.3d at p. 995), and must determine "whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented." (§ 190.4, subd. (e); *People v. Ramos, supra*, 15 Cal.4th at p. 1133.)

Nevertheless, any error was not prejudicial. "The trial court's ruling must be set aside, the penalty judgment vacated, and the cause remanded for reconsideration of the verdict-modification application if and only if the "error" was prejudicial. (See, e.g., *People v. Ramirez* (1990) 50 Cal.3d 1158, 1201–1202.)" (*People v. Benson, supra*, 52 Cal.3d at p. 812.) The question of prejudice is "resolved under the so-called 'reasonable possibility' test—i.e., is there a reasonable possibility that the error affected the decision?" (*Ibid.*) Here, there was no prejudice. In support of its ruling, the court provided an extensive statement of reasons which shows that the trial court made its decision solely in light of the applicable law and the relevant evidence. (28 RT 5843-5850.) Even if this Court assumes that the trial court considered the statements of the victims' relatives, the record does not show that the trial court actually took those statements into account in making its decision. Rather, the trial court viewed the statements of the victims' relatives addressing the question of sentencing broadly, and not as evidence or argument bearing on the verdict-modification application itself. (*People v. Benson, supra*, 52 Cal.3d at p. 813.) Moreover, the victims' relatives' statements would not have affected

the outcome even if they had been taken into account, as the trial court specifically stated "after independently reviewing the evidence presented in all phases of the trial, it is this Court's conclusion that factors in aggravation, as contemplated by Penal Code Section 190.3 subdivision (a) and 190.3 subdivision (b), far outweigh any actual or even potential factors in mitigation." (28 RT 5846; see also 28 RT 5850 ["the circumstances surrounding the commission of the crimes for which the defendant was convicted, the presence of the special circumstances which were found true, and the defendant's history of engaging in violent criminal conduct, present aggravating factors that far outweigh any actual or even potential mitigating factors."].) Woodruff was not prejudiced by the trial court's alleged consideration of the statements of the relatives of Officers Jacobs and Baker.

The record in the present case reveals that the trial court reviewed the factors in aggravation and mitigation and then denied the automatic motion for modification. The trial court thereafter proceeded to sentence Woodruff. (28 RT 5850.) Immediately prior to sentencing, the court noted that it would first address the non-capital count and has read and considered the probation report. (28 RT 5850.) Because there was no recess between the proceedings at which the trial court considered the motion to modify and the proceedings at which it imposed sentence, it appears that at the time it reviewed and ruled upon the application for modification of the penalty the court already had read and considered the probation report.

In ruling on a modification motion, a trial court must not consider extraneous material or facts not presented to the jury, such as a probation report. (*People v. Farnam* (2002) 28 Cal.4th 107, 196; *People v. Coddington* (2000) 23 Cal.4th 529, 644.) Nonetheless, in the event the trial court has considered the report, a reviewing court assumes the court was

not improperly influenced thereby, absent evidence in the record to the contrary. (*People v. Crittenden* (1994) 9 Cal.4th 83, 151.)

The court's consideration of the probation report before ruling on the automatic motion to modify the verdict (§ 190.4, subd. (e)) is not presumptively prejudicial. (*People v. Pride* (1992) 3 Cal.4th 195, 269; *People v. Livaditis* (1992) 2 Cal.4th 759, 787.) Here, the trial court did not allude to the probation report during its review and determination of the motion to modify the death verdict. (28 RT 5843-5850.) As set forth above, the court reviewed each of the potentially aggravating and mitigating factors, and in determining the nature of, and weight attributable to, each factor, articulated detailed reasons based upon the evidence presented during the trial. (28 RT 5843-5850.) The trial court made its determination in reliance upon the evidence submitted at trial, placing great weight upon the circumstances of the crime and Woodruff's history of violence. (*People v. Crittenden, supra*, 9 Cal.4th at p. 151-152.) There is no reasonable possibility that any alleged error by the trial court in considering the probation report affected its decision. (*Ibid.*)

E. ANY ERROR IN THE REPORTER'S TRANSCRIPT DID NOT PREJUDICE WOODRUFF, AS HE HAS BEEN ABLE TO PROCEED WITH HIS APPEAL ON A RECORD ADEQUATE TO PERMIT MEANINGFUL REVIEW

Woodruff argues that his state and federal constitutional right to a fair trial was violated because the trial record was falsified in multiple places, creating an illusion of a complete transcript when in reality it was a "cut and paste" of what had been reported earlier. (AOB 231-242.) The alleged errors were not intentional, and the majority of the errors occurred during the first time qualification of jurors hearing which was eventually abandoned so Woodruff could pursue other pre-trial motions. The appellate record was not rendered inadequate for meaningful appellate review.

Woodruff cites to eleven instances of transcription error in his Opening Brief. (AOB 232-234.) The majority of the alleged errors derived from the time-qualifying proceedings of March 18, 19, and 21, 2002. On March 18, 2002, the trial court gave an opening statement to the potential jurors. (1 RT 143-144.) During this colloquy, the trial court misspoke, stating, "Further, that in the commission of that offense, the defendant knew or personally – excuse me, knew or reasonably should have known that the victim was a peace officer engaged in the performance of his duties. (1 RT 144.) According to the trial transcript, the trial court repeated this mistake to the second through fifth panels of prospective jurors. (1 RT 201, 250, 298, and 346.) Woodruff also cites to other minor mistakes that were repeated in the transcript of the hearing on the other panels, such as a reference to "murders" instead of "murderers" (1 RT 193, 242, 289, 337 and 370), "probability of parole" versus "possibility of parole" (1 RT 193, 242, 289, 337, 370), and "jury find" rather than "jury finds" (1 RT 195, 244, 291, 339, 372). These time qualification proceedings were ultimately abandoned to allow Woodruff to pursue a *Pitchess* motion and engage in further trial preparation. (1 RT 374-457.) The jurors time-qualified in the March proceedings were excused (1 RT 456-457), and the time qualification process resumed on November 7, 2002 (2 RT 617-801).

Woodruff also cites to two other examples of discrepancy in the trial transcript of November 7, 2002, when the second time-qualification hearing occurred. (AOB 233-234.) The trial court told the second panel of prospective jurors,

> In Count II, the Grand Jury alleges that -- I'm sorry. Before we get to Count II, the Grand Jury further charges that in the commission of the offense set forth in Count I, the defendant murdered Charles Douglas Jacobs for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect

an escape from lawful custody within the meaning of Penal Code Section 190.2 Subdivision (a) Subsection (5).

(2 RT 627-628.) The trial court's exact comment was repeated to the third and fourth panels as well. (2 RT 715, 761.) The transcript also shows that the trial court told the final panel, "You are the first of potentially five panels of jurors this size who will be in this courtroom throughout the day" (2 RT 761), the same comment the trial court made to the first panel that morning (2 RT 629). Woodruff argues that these repeated discrepancies throughout voir dire evidences that the court reporter "cut and pasted" the courts comments, rather than transcribe the court's comments verbatim in addressing subsequent panels. (AOB 231, 240.)

A criminal defendant is entitled under the Eighth and Fourteenth Amendments to an appellate record that is adequate to permit meaningful review. (*People v. Young*, *supra*, 34 Cal.4th at p. 1170; *People v. Alvarez* (1996) 14 Cal.4th 155, 196, fn. 8; *People v. Howard* (1992) 1 Cal.4th 1132, 1166.) An appellate record is inadequate "only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal." (*People v. Young*, *supra*, 34 Cal.4th at p. 1170; *People v. Alvarez*, *supra*, 14 Cal.4th at p. 196, fn. 8.) The defendant bears the burden of demonstrating that the record is not adequate to permit meaningful appellate review. (*People v. Young*, *supra*, 34 Cal.4th at p. 1170; *People v. Samayoa* (1997) 15 Cal.4th 795, 820.) Inconsequential inaccuracies or omissions are insufficient to demonstrate prejudice. (*People v. Young*, *supra*, 34 Cal.4th at p. 1170; *People v. Howard*, *supra*, 1 Cal.4th at p. 1165.) If the record can be reconstructed with other methods, such as "settled statement" procedures (see Cal. Rules of Court, rules 7, 32.3), the defendant must employ such methods to obtain appellate review (*People v. Young*, *supra*, 34 Cal.4th at p. 1170, citing *People v. Hawthorne* (1992) 4 Cal.4th 43, 66).

In the present case, Woodruff fails to demonstrate prejudice. As the trial court noted when it denied Woodruff's motion for new trial based on the indication of the court reporter cutting and pasting the court's comments instead of transcribing verbatim the comments as they were made to each of the subsequent panels:

> Most of your concern is directed towards proceedings that took place in March. And we're all well aware, that involved time-qualifying of multiple pages of prospective jurors. And therein lies most of the assertions of fraud and intentional distortion of the record contained in your motion. [¶] What's of concern to me is that those proceedings had absolutely no bearing on the outcome of this case. The prospective jurors who were involved in those proceedings were excused, and as you know, the case continued for eight months to allow defense counsel time to further prepare and conduct addition information (sic), file motions – that well I'm not going to get started on that. [¶] But it seems to me the vast majority of your concerns are directed to those preliminary proceedings which really have no bearing on the trial.

(SRT [March 12, 2009] 8.) Even the two errors in transcription which occurred in November 7, 2002, were minor or "inconsequential inaccuracies" and did not establish prejudice.

This Court has reiterated that even when there are established deficiencies in the record, which the trial court in this case found were not deliberate falsifications of the transcript (SRT [March 12, 2009] 14), the reviewing court will decline to vacate a conviction unless the defendant establishes that he is "unable to proceed with his appeal on a record adequate to permit meaningful review." (*People v. Osband* (1996) 13 Cal.4th 622, 663 [despite misconduct by employees in the clerk's office resulting in the loss of approximately 80 trial exhibits, and despite the failure to reconstruct several exhibits, the parties were able to reconstruct or issue a settled statement regarding virtually the entire record, leaving the record adequate to permit meaningful appellate review]; see also *People v.*

Zambrano, *supra*, 41 Cal.4th at pp. 1192-1194; *People v. Young*, *supra*, 34 Cal.4th at pp. 1169-1170; *People v. Pinholster* (1992) 1 Cal.4th 865, 919-923 [122 sidebar conferences were unreported, but the Court concluded that conferences were insubstantial in light of entire record which covered over 7500 pages of reporter's transcripts and record was adequate for meaningful appellate review].)

Here, while it seems the court reporter did cut and paste from earlier proceedings, the trial court did order the court reporter's original notes be provided to both defense counsel and the prosecutor. (SRT [March 12, 2009] at 14.) The parties then conducted a thorough record corrections hearing, and the record was ultimately certified complete and adequate for appellate review. (SRT [January 8, 2010] 2-3.)

Woodruff cannot point to any other discrepancy in the appellate record except for the occasions already cited where the time-qualification hearing was abandoned and all of the prospective jurors excused and the two minor instances in the second time-qualification hearing. The occurrences of discrepancies involve the trial court's opening statement to the prospective jurors during time qualification, not a critical juncture in the trial. However, Woodruff simply asserts that the prejudice comes from "the realization that the entire trial record is untrustworthy." (AOB 240.) This Court has held, however, that a defendant's mere speculative assertions of prejudice are insufficient to warrant reversal of the judgment. (See *People v. Zambrano*, *supra*, 41 Cal.4th at pp. 1193-1194; *People v. Young*, *supra*, 34 Cal.4th at p. 1170; *People v. Pinholster* (1992) 1 Cal.4th 865, 923.) The "burden is [on defendant] to show that the deficiencies in the record are prejudicial to him." (*People v. Osband*, *supra*, 13 Cal.4th at p. 663.)

This Court held, "[a]lthough the record as reconstructed remains deficient, defendant has not met his burden of showing the deficiencies. . .

have left him unable to proceed with his appeal on a record adequate to permit meaningful review." (*Ibid.*) *In People v. Young*, *supra*, 34 Cal.4th at p. 1149, despite a record correction and settlement proceedings, the parties were unable to fully reconstruct all of the proceedings, and the record on appeal did not include reporter's transcripts for defendant's arraignment, a portion of voir dire, conferences between parties and trial court where potential jurors were excused by stipulation, conferences on jury instructions, and a conversation between the trial court and jury foreman. (*Id.* at p. 1169.) This Court held that "in essence, defendant argues that merely showing that the missing material may have contained matter that demonstrated error or reflected a constitutional violation satisfies his burden of establishing prejudice. But this amounts to nothing more than speculation, which is insufficient." (*Id.* at p. 1170.) Likewise, in *People v. Zambrano*, this Court found as inconsequential, omissions of reporter's notes of certain proceedings and some proceedings unreported, and there was "no realistic chance" that anything occurred during the omitted proceedings which warranted reversal or affected the fairness of the trial. (*People v. Zambrano*, *supra*, 41 Cal.4th at pp. 1193-1194.) Finally, in *People v. Samayoa, supra*, 15 Cal.4th 795, this Court found that the defendant had failed to demonstrate that any of the 138 off-the-record discussions pertained to an issue raised on appeal: "Defendant fails to identify any claim with respect to which the record is inadequate for determination of the issue, or as to which he has been prejudiced by the state of the record." (*Id.*, at pp. 820-821.)

Here, Woodruff has wholly failed to demonstrate that the alleged errors cited in the time qualification transcripts permeated the remaining almost 6,000 pages of transcript. Woodruff's claims of error are speculative, and Woodruff has not met his burden of showing the deficiencies have left him unable to proceed with his appeal on a record

adequate to permit meaningful review. He has not identified any claim with respect to which the record is inadequate for determination of the issue. Moreover, the instances of error occurred during "inconsequential" proceedings which did not affect the fairness of the trial. (*People v. Zambrano*, *supra*, 41 Cal.4th at pp. 1193-1194.) Woodruff's claim should be rejected, as he has been able to proceed with his appeal on a record adequate to permit meaningful review.

F. CONSTITUTIONAL ISSUES

1. CALIFORNIA'S DEATH PENALTY LAW DOES NOT VIOLATE THE FEDERAL CONSTITUTION

In a series of arguments that have been repeatedly rejected by this Court, Woodruff contends California's death penalty scheme violates the Constitution. (AOB 243265, Claim F.1.) He provides no basis for this Court revisiting the merits of the arguments he raises.

Contrary to Woodruff's assertion (AOB 244-246, Claim F.1.a.), "[s]ection 190.2, which sets forth the circumstances in which the penalty of death may be imposed, is not impermissibly broad in violation of the Eighth Amendment." (*People v. Farley* (2009) 46 Cal.4th 1053, 1133; see *People v. Jones* (2012) 54 Cal.4th 1, 179-180.) This Court has repeatedly rejected the claim that California's death penalty statutes are unconstitutional because they fail to sufficiently narrow the class of persons eligible for the death penalty. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1288; *People v. Verdugo* (2010) 50 Cal.4th 263, 304; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304; *People v. Wilson* (2005) 36 Cal.4th 309, 361-362; *People v. Panah*, *supra*, 35 Cal.4th at p. 499; *People v. Welch*, (1999) 20 Cal.4th 701; *People v. Arias* (1996) 13 Cal.4th 92, 187.) Woodruff's claim fails because he gives no justification for this Court to depart from its prior rulings on this subject.

Equally unavailing is Woodruff's claim that the application of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (AOB 246-248, Claim F.1.b.) Allowing a jury to find aggravation based on the "circumstances of the crime" under section 190.3, factor (a), does not result in an arbitrary and capricious imposition of the death penalty. (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1288. As the United States Supreme Court noted in *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750], "The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence."

"Nor is section 190.3, factor (a) applied in an unconstitutionally arbitrary or capricious manner merely because prosecutors in different cases may argue that seemingly disparate circumstances, or circumstances present in almost any murder, are aggravating under factor (a)." (*People v. Carrington* (2009) 47 Cal.4th 145, 200.) Instead, "'each case is judged on its facts, each defendant on the particulars of his [or her] offense.'" (*Ibid*, quoting *People v. Brown* (2004) 33 Cal.4th 382, 401.)

In his next argument challenging California's death penalty scheme, Woodruff asserts that California's death penalty statute "contains no safeguards to avoid arbitrary and capricious sentencing and deprives defendants of the right to a jury determination of each factual prerequisite to a sentence of death." (AOB 248-263, Claim F.1.c.) To support this argument, he offers four sub-arguments which have all been rejected by this Court.

In his first sub-argument, he claims that he was entitled to have the jurors unanimously find beyond a reasonable doubt that one or more aggravating factors existed and outweighed any mitigating factors. (AOB 249-250, Claim F.1.c.i.) This Court has previously held that there is no

requirement that the jury be instructed during the penalty phase regarding the burden of proof for finding aggravating and mitigating circumstances in reaching a penalty determination, other than other crimes evidence, or that no burden of proof applied. (See *People v. Clark* (2011) 52 Cal.4th 769, 849; *People v. Lewis* (2009) 46 Cal.4th 1255, 1319; *People v. Burney* (2009) 47 Cal.4th 203, 268; *People v. Morgan* (2007) 42 Cal.4th 593, 626; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Moreover, the Eighth and Fourteenth Amendments do not require the jury to unanimously find the existence of aggravating factors or that aggravating factors outweigh mitigating factors. (*People v. Nelson* (2011) 51 Cal.4th 198, 225; *People v. Hoyos*, *supra*, 41 Cal.4th at p. 926.) Woodruff has offered no persuasive reason to reconsider this argument.

In his second sub-argument, Woodruff contends the failure to assign a burden of proof in California's death penalty scheme should be revisited in light of the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435; *Ring v. Arizona* (2002) 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556; *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403; and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]. (AOB 251-254.) However, this Court, with benefit of considering the Supreme Court cases cited by Woodruff, has determined on many occasions that section 190.3 and the pattern instructions are not constitutionally defective because they fail to require the state to prove beyond a reasonable doubt that an aggravating factor exists, and that aggravating factors outweigh mitigating factors. This Court has also consistently rejected the claim that the pattern instructions are defective because they fail to mandate juror unanimity concerning aggravating factors. (See, e.g., *People v. Russell* (2010) 50 Cal.4th 1228, 1271-1272;

People v. Bramit (2009) 46 Cal.4th 1221, 1249-1250; *People v. Burney* (2009) 47 Cal.4th 203, 267-268.) "[U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole.' [Citation]." (*People v. Ward* (2005) 36 Cal.4th 186, 221-222, quoting *People v. Prieto* (2003) 30 Cal.4th 226, 263].) As this Court explained in *Prieto*, "in the penalty phase, the jury merely weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.'" (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263, quoting *Tuilaepa v. California* (1994) 512 U.S. 967, 972 [114 S.Ct. 2630, 129 L.Ed.2d 750; accord *People v. Virgil*, *supra*, 51 Cal.4th at pp. 1278-1279.) Woodruff gives this Court no reason to reconsider its previous holdings.

In his third sub-argument, Woodruff asserts that the California death penalty law violates his federal due process and right to meaningful appellate review because it does not require that the jury base a death sentence on "written findings regarding aggravating factors." (AOB 255-257, Claim F.1.c.ii.) Contrary to his assertion, "[t]he law does not deprive defendant of meaningful appellate review and federal due process and Eighth Amendment rights by failing to require written or other specific findings by the jury on the aggravating factors it applies." (*People v. Riggs* (2008) 44 Cal.4th 248, 329; *People v. Dunkle* (2005) 36 Cal.4th 861, 939, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; accord *People v. Foster* (2010) 50 Cal.4th 1301, 1365-1366; *People v. Gamache* (2010) 48 Cal.4th 347, 406.) Nor does the absence of such findings violate equal protection (*People v. Parson* (2008) 44 Cal.4th 332, 370) or a defendant's right to trial by jury (*People v. Avila* (2008) 46

Cal.4th 680, 724.) "Nothing in the federal Constitution requires the penalty phase jury to make written findings of the factors it finds in aggravation and mitigation[.]" (*People v. Nelson* (2011) 51 Cal.4th 198, 225.) Woodruff offers no compelling reason for this Court to reconsider its previous decisions.

Woodruff next contends in Claim F.1.c.iii., that alleged criminal activity could not serve as a factor in aggravation unless found to be true beyond a reasonable doubt by a unanimous jury. (AOB 257-259.) He is incorrect. This Court has repeatedly upheld the admission of unadjudicated criminal activity as evidence in aggravation. (*People v. Hinton*, *supra*, 37 Cal.4th at p. 913; *People v. Dunkle*, *supra*, 36 Cal.4th at p. 940; *People v. Brown*, *supra*, 33 Cal.4th at p. 402; *People v. Avena* (1996) 13 Cal.4th 394, 428; *People v. Hawthorne* (1992) 4 Cal.4th 43, 76-77; *People v. Balderas* (1985) 41 Cal.3d 144, 201; see also *Tuilaepa*, *supra*, 512 U.S. at p. 976.) There is no constitutional requirement that a capital jury reach unanimity on the presence of aggravating factors. (*People v. Martinez* (2009) 47 Cal.4th 399, 455; *People v. Burney*, *supra*, 47 Cal.4th at p. 268.) Nor is there a constitutional requirement that a capital jury unanimously agree that prior criminal activity has been proven. (*People v. Martinez*, *supra*, 47 Cal.4th at p. 455; *People v. Dykes* (2009) 46 Cal.4th 731, 799.) Nor does the failure to require jury unanimity as to aggravating factors violate Woodruff's federal constitutional rights. (*People v. Cook* (2007) 40 Cal.4th 1334, 1367; *People v. Griffin* (2004) 33 Cal.4th 536, 598.)

Woodruff also claims that the trial court failed to instruct the jury that statutory mitigating factors were relevant solely as potential mitigation evidence. (AOB 260-263, Claim F.1. c.iv.) The trial court was not required to instruct the jury as to which of the listed sentencing factors are aggravating, which are mitigating, and which could be either mitigating or aggravating, depending upon the jury's appraisal of the evidence. (*People*

v. Jones, *supra*, 54 Cal.4th at p. 183; *People v. Manriquez* (2005) 37 Cal.4th 547, 590; see also *People v. Hillhouse* (2002) 27 Cal.4th 469, 509 ["The aggravating or mitigating nature of the factors is self-evident within the context of each case."].) Additionally, contrary to Woodruff's assertions, "the statutory instruction to the jury to consider 'whether or not' certain mitigating factors were present did not unconstitutionally suggest that the absence of such factors amounted to aggravation." (*People v. Jones*, *supra*, 54 Cal.4th at p. 184, quoting *People v. Whisenhunt* (2008) 44 Cal.4th 174, 228.) Rather, this Court has repeatedly held that "CALJIC No. 8.85 is both correct and adequate." (*People v. Jones*, *supra*, 54 Cal.4th at p. 184 quoting *People v. Valencia* (2008) 43 Cal.4th 268, 309.)

Lastly, Woodruff contends the death penalty violates international law, the Eighth and Fourteenth Amendments and "evolving standards of decency." (AOB 263-265.) This Court has repeatedly rejected similar arguments that California's death penalty scheme is contrary to international norms of humanity and decency, and therefore violates the Eighth and Fourteenth Amendments of the United States Constitution. (*People v. Jones*, *supra*, 54 Cal.4th at p. 184; *People v. Avila* (2009) 46 Cal.4th 680, 725.) "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." (*People v. Jones*, *supra*, 54 Cal.4th at pp. 184-185, quoting *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Moreover, this Court should again reject the argument that the use of capital punishment "as regular punishment" violates international norms of humanity and decency and hence violates the Eighth Amendment of the United States Constitution. " ... California does not employ capital punishment in such a manner. The death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory

provisions different from those applying to 'regular punishment' for felonies. [Citations.]" (*People v. Jones*, *supra*, 54 Cal.4th at p. 185, quoting *People v. Demetrulias* (2006) 39 Cal.4th 1,43–44, 45 Cal.Rptr.3d 407, 137 P.3d 229.)

2. THERE WAS NO CUMULATIVE ERROR

Woodruff argues that the cumulative effect of the claimed errors in this case warrants reversal of the judgment and sentence. (AOB 266-267, Claim F.2.) As discussed above, there are no errors to cumulate. (See *People v. Thornton* (2007) 41 Cal.4th 391, 453.)

"Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice. (Cal. Const., art. VI, § 13; see also *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 24 A.L.R.3d 1065] [harmless-beyond-a-reasonable-doubt standard applies to review of federal constitutional error].)" (*People v. Hill* (1998) 17 Cal.4th 800, 845; see also *Schneble v. Florida* (1972) 405 U.S. 427, 432 [92 S.Ct. 1056, 31 L.Ed.2d 340]; see, e.g., *United States v. Hasting* (1983) 461 U.S. 499, 508-509 [103 S.Ct. 1974, 76 L.Ed.2d 96] ["[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and...the Constitution does not guarantee such a trial."].)

Any claim based on cumulative error must be assessed to see if the defendant's guilt or innocence was fairly adjudicated. (*People v. Hill*, *supra*, 17 Cal. 4th at p. 845.) Notwithstanding Woodruff's arguments to the contrary, the record contains no errors and no prejudicial error has been shown. To the extent any error arguably occurred, the effect was harmless, as Woodruff's guilt and penalty was clearly adjudicate fairly. Review of the record without the speculation and interpretation offered by Woodruff shows that he received a fair and untainted trial. The Constitution requires

no more. Thus, even cumulatively, any errors are insufficient to justify a reversal of the judgment of conviction or sentence of death.

CONCLUSION

Respondent respectfully requests the judgment of conviction and sentence of death be affirmed in its entirety.

Dated: June 14, 2012

Respectfully submitted,

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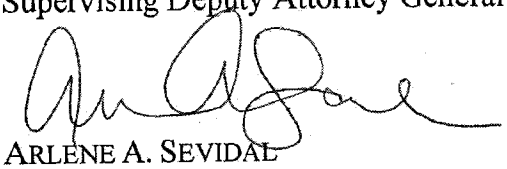

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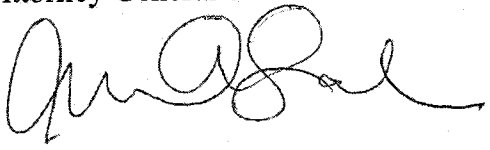
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 58,961 words.

Dated: June 14, 2012

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People V. Woodruff**
No.: **S115378**

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 June 14, 2012, 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 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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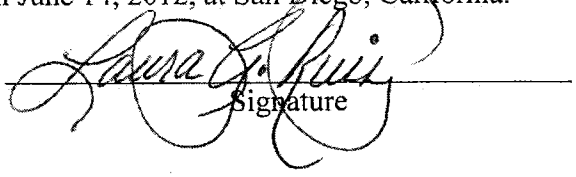
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 14, 2012, at San Diego, California.

Laura Ruiz
Declarant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