SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **MARCUS DORWIN ADAMS,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S118045

SUPREME COURT
FILED

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Deputy

Los Angeles County Superior Court Case No. BA181702
The Honorable Lance Ito, Judge

RESPONDENT'S BRIEF

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DEATH PENALTY

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STATEMENT OF THE CASE

In an information filed by the Los Angeles County District Attorney, appellant was charged with three counts of first degree murder (counts I, II, and III; Pen. Code, § 187, subd. (a)), one count of attempted murder (count IV; Pen. Code, §§ 664/184, subd. (a)), and one count of carjacking (count V; Pen. Code, § 215, subd. (a)).[1] As to the murder counts, the information alleged that appellant discharged a firearm at an occupied motor vehicle causing great bodily injury and death within the meaning of section 12022.5, subdivision (b)(1). The information also alleged a multiple murder special circumstance within the meaning of section 190.2, subdivision (a)(3). As to the attempted murder count, the information alleged that appellant personally inflicted great bodily injury upon the victim within the meaning of section 12022.7, subdivision (a). (1 CT 220-222.) Appellant pled not guilty and denied the allegations. (1 CT 233-234.)

A jury found appellant guilty as charged and found the special allegations to be true. (12 CT 3326-3331.) Following the penalty phase trial, the jury fixed the penalty for the murder counts at death. (13 CT 3468.)

The trial court denied the motions to reduce the penalty and imposed a sentence of death on counts I-III. The court also sentenced appellant to a determinate term of nine years on count IV and a term of life with the possibility of parole on count IV. (13 CT 3562-3564.) This appeal is automatic.

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[1] All further statutory references will be to the Penal Code unless otherwise indicated.

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution Evidence

a. September 7, 1994 Murders

On the afternoon of September 7, 1994, Lewis Dyer and Zenia Meeks, an occasional drug user, were standing on Western Avenue across the street from Ford's Liquor. Dyer was a member of the 46th Street Neighborhood Crips gang. They saw Dayland Hicks, Lamar Armstrong and Trevon Boyd, members of the Rollin 60's Crips gang, drive up in a Cadillac and park in front of the liquor store. At that time the two gangs were friendly. Dyer and Meeks walked across the street, and Dyer began speaking with Hicks. Meeks stayed by the hood of the car. Dyer and Hicks went into the liquor store, where Hicks bought a beer, and then they returned to the Cadillac. Hicks got into the driver's seat. Boyd was sitting in the front passenger seat, and Armstrong was sitting in the back seat. While Dyer was leaning on the passenger side of the car speaking with the men, he noticed appellant, a member of the 6 Deuce Brim Blood gang, walking down the sidewalk about five feet away. (15 RT 2493-2496, 2498-2499, 2525, 2536-2541, 2548; 16 RT 2757-2760, 2773, 2789-2790, 2797.) Dyer recognized appellant because they had previously been incarcerated at a California Youth Authority facility together. The 46th Street Neighborhood Crips gang and the 6 Deuce Brim Blood gang were enemies. (15 RT 2496, 2525-2526.)

Appellant pulled out a gun and fired once at Dyer. He then began shooting into the Cadillac. Dyer thought he was hit, so he crawled around the front of the car and ran down the street. Meeks stood still. Appellant continued shooting into the Cadillac at close range. (15 RT 2496-2497, 2548-2550; 16 RT 2763.) When appellant finished shooting, he walked

back toward an alley, got into a red four-door car, and drove down 47th Street. (16 RT 2764-2766.)

After the shootings, Armstrong and Boyd exited the Cadillac. Armstrong collapsed across the street near the corner of 47th and Western. Boyd went into the liquor store, holding his right side and saying he had been shot. He collapsed once he was in the store. Meeks followed Boyd into the liquior store and saw that he had been shot. She asked him if he wanted her to call the police or an ambulance, and he told her yes. Meeks ran across the street to a payphone, dialed 911, and reported the shootings. (15 RT 2501-2502; 16 RT 2766-2767.) Dyer, who had returned to the scene, went to the Cadillac and saw Hicks still in the driver's seat. His body was twisted and there was blood all over the car. (15 RT 2503.)

On September 7, 1994, Lisa Mallard was working in a hair salon on Western Ave. At approximately 1:45 p.m., she walked across the street to Ford's Liquor to visit her friend, Ms. Ford. (14 RT 2364-2365.) When Mallard arrived in the store, Ms. Ford, an insurance salesperson, and Jose, a store employee, were present. (14 RT 2365-2366.) About five minutes after arriving, Mallard heard three or four gunshots. Mallard ran to the back of the store. (14 RT 2367, 2384-2385.) A boy ran into the store and tried to hide. He looked terrified and could not speak. (14 RT 2367-2368.) He ran towards Mallard and passed out on her. She tried to calm him down, but he kept pointing towards the store's front door. (14 RT 2328-2369.) He died before the police arrived. (14 RT 2370.) Mallard thereafter went outside and saw a car. There was a sheet over the driver's body and another body lying on the ground nearby. (14 RT 2372-2373.)

Dyer went to a payphone and called Hicks's uncle, Gregory Shoaf. He told Shoaf that Hicks had been shot. Shoaf went to 47th and Western and saw Hicks lying on the ground next to the Cadillac. Shoaf knew that Hicks was dead. (15 RT 2504; 16 RT 2717-2718.) The police and

paramedics arrived at the scene. They worked on Armstrong and Boyd, and eventually took them to the hospital. Hicks was already dead, so a sheet was placed over his body. (15 RT 2504-2505, 2592.) Dyer did not speak to the police that day because he did not want to be branded a snitch. (15 RT 2505-2506, 2543.) He did speak with Shoaf, and told him that appellant had killed Hicks. (15 RT 2508, 2547; 16 RT 2720.)

Dr. Stephen Schultz performed an autopsy on the body of Dayland Hicks. The cause of death was determined to be multiple gunshot wounds. Hicks suffered a gunshot wound to his right upper arm. The bullet entered the back part of the arm and exited out the front of the arm. It caused soft tissue injuries. (15 RT 2453-2456.) Hicks also suffered a gunshot wound to the head, which was fatal. (15 RT 2456-2457.) A toxicology test was negative for drugs or alcohol. (15 RT 2462-2463.)

Dr. Solomon Riley performed an autopsy on the body of Lamar Armstrong. The cause of death was determined to be a gunshot wound to the chest, which perforated the liver, heart, and left lung. Armstrong also suffered a flesh wound to his right forearm. (15 RT 2616, 2618.) A toxicology test was negative for drugs or alcohol. (15 RT 2627.)

Dr. Paul Lindsey performed an autopsy on the body of Trevon Boyd. The cause of death was determined to be gunshot wounds to the right arm, right forearm, and chest. (15 RT 2631-2632.) The gunshot wounds to the arm and forearm were primary wounds. After exiting the primary wounds, the bullets re-entered the chest area. One of the bullets pierced the liver and heart. (15 RT 2632-2635.) A toxicology test was negative for drugs or alcohol. (15 RT 2638.)

On the date of the murders, police officers took Zenia Meeks to the police station for an interview. (16 RT 2768, 2783.) Although Meeks had recognized appellant, she did not want to get involved. For this reason, she told the police that she was unable to identify the shooter because she was

high and on psychiatric medication. (16 RT 2679-2770, 2794, 2796.) Over the following days the police spoke with Meeks several times. She was shown a set of photographs but did not identify anyone because of concerns about her family's safety. (16 RT 2771-2772.) A member of Meeks's family subsequently received a threatening phone call that caused Meeks to fear for the safety of her family. (16 RT 2770-2771, 2788.)

On September 14, 1994, the police contacted Dyer, but he did not give them any information. He told the police that he was inside the liquor store when the shots were fired. The following day, the police asked Dyer to come into the police station. When he arrived, Shoaf, Shoaf's sister, Temple, and Boyd's mother were also there. They had told the police that Dyer was a potential witness. Dyer was initially reluctant to talk to the police, but the family members spoke with him and convinced him to tell the police what he knew. Dyer thereafter told the police what happened and gave a written statement. (15 RT 2508-2510, 2543-2544, 2545-2548; 16 RT 2725-2727, 2729.) The officers showed Dyer a photographic lineup, and he identified appellant as the shooter. (15 RT 2510-2511.)

Dyer was subsequently arrested on a parole violation related to his juvenile conviction and taken to county jail. (15 RT 2511-2512.) Appellant was also in county jail at that time. Dyer was asked to view a live lineup. Although he saw appellant in the lineup, Dyer did not identify him because he was afraid of being labeled a snitch. (15 RT 2512-2513.) At some point after the live lineup, a sheriff's deputy came to Dyer's jail cell and took him to an office where appellant was waiting. Appellant told Dyer not to say anything and showed him a copy of the statement Dyer made to police identifying appellant as the shooter. Appellant told Dyer that the sheriff's deputy was his cousin and that appellant could have Dyer moved to any facility he wanted as long as Dyer did not identify him. (15 RT 2515-2517.) Dyer told appellant that he had not picked him out of the

lineup and that he did not intend to identify him. The sheriff's deputy then took Dyer back to his cell. (15 RT 2517-2518.)

Dyer was subsequently transferred to a California Youth Authority facility. While he was there, an investigator working on behalf of appellant came to see him. Dyer lied to the investigator, telling her that he was in the store at the time of the shootings and did not see anything. He also told her that the police brought him to the police station in handcuffs. He told the investigator that the police threatened to violate his parole or claim he was a co-conspirator if he did not cooperate. He also said that the victims' families pressured him into talking. (15 RT 2518-2519, 2543-2544, 2604-2605, 2607-2608, 2611.) He made these statements because he was in custody and did not want go back to county jail. He figured that, if he said he did not know anything, he would be left alone. The investigator told Dyer that appellant had stated Dyer was involved in the murders. (15 RT 2519.)

Dyer was released from the California Youth Authority in 1995. In 1998, he was contacted by investigators from the Santa Barbara District Attorney's Office. The investigators asked Dyer about the 1994 murders. Dyer told them about his conversation with appellant after the live lineup and the fact that he had been threatened. Dyer was trying to turn his life around and decided to cooperate with the police. He was subsequently contacted by detectives from the Los Angeles Police Department. (15 RT 2520-2522, 2590.) On August 12, 1999, Dyer attended a live lineup and identified appellant as the shooter. (15 RT 2522.) On August 20, 1999, Dyer testified at a preliminary hearing. During his testimony, he identified appellant as the person who shot and killed Hicks, Armstrong, and Boyd. (15 RT 2523-2524.)

Zenia Meeks remained uncooperative during the time period leading up to the preliminary hearing. When the police called her, she would curse

at them and tell them to leave her alone. (16 RT 2772-2773.) Meeks did not identify appellant during a 1998 live lineup. At the preliminary hearing, she falsely testified that she could not identify anyone. (16 RT 2773-2775, 2804-2805.) In 1998, she was contacted by Charles Watkins, an investigator from Santa Barbara. She told Watkins that Dyer had told her he picked someone out of a photographic lineup. (16 RT 2799-2800.) In December 2001, Meeks went to prison. While she was there, she became involved in a drug rehabilitation program. In 2002, she was visited by Detective Smith, to whom she had previously been very hostile. Because of the changes she made in her life, Meeks decided it was time to tell the truth about the murders. She told him she knew who the shooter was, and she identified appellant in a photographic lineup. (16 RT 2775-2780, 2801-2802.) She also identified appellant as the shooter at trial. (16 RT 2775.)

Kipchoge Johnson was a member of the Van Ness Gangsters, a Blood gang. His gang was friendly with appellant's gang, the 6 Deuce Brims, another Blood gang. Johnson knew appellant, and testified that younger gang members looked up to him. (15 RT 2646-2649.) In September 1994, a large amount of gang activity went on between the 6 Deuce Brims and the Crips gangs. Several of Johnson's fellow gang members were killed, and he attended their funeral. Appellant was present at one such funeral. While he was there, appellant received a telephone call. He stormed out of the building and smashed the window of his car with his fist. When he was asked what happened, he said that another gang member had been killed by some "Crabs," a derogatory name for Crips. Appellant then left. (15 RT 2649-2652.)

A few days later, Johnson was hanging out with other gang members when appellant walked over with a newspaper. He said, "This is what I did for the homies," and threw the newspaper down on the floor. Johnson

looked at the newspaper article and saw that it was about the murders of three men in an area near Western Ave. (15 RT 2653-2655, 2678.) Johnson interpreted appellant's actions as an attempt to encourage others to retaliate rather than mourn. Some of the older gang members asked what happened. Appellant told them that he drove by a Cadillac and made a Crips gang sign with his hands to ensure that the occupants were Crips. When they responded with the Crips gang sign, he drove around the corner and parked his car. He then walked up to the Cadillac from behind and gestured to a man leaning on the outside of the car to run away. After the man ran away, appellant fired five shots into the car, hitting all three occupants in the head. (15 RT 2656-2658, 2665, 2680.)

A few months later, appellant and Johnson met when they were on the same bus going to court. Appellant had a key and had unlocked his own handcuffs. He took Johnson's handcuffs off so they would be ready if they got into a fight with rival gang members. Appellant told Johnson that he had been charged with murdering the three Crips gang members. He said the man whom he had told to run away was planning to testify against him, and that he should have killed him. Appellant said he knew the man because they were in the Youth Authority together. (15 RT 2660-2662, 2663-2664, 2672.) When they got back to county jail, some Crips gang members were in a nearby cell. Appellant announced that he was a member of the 6 Deuce Brims and yelled, "I am going to beat this and get out and kill some more of your homies." (15 RT 2662.)

Christopher Fennell joined the 6 Deuce Brims gang when he was 15 years old. He knew both appellant and appellant's older brother, who was also a member of the gang. In 1995, appellant went to Fennell's home and asked for a gun. (18 RT 3185-3187, 3190.) It was common within the gang to borrow guns. (18 RT 3196-3198.) After appellant saw that Fennell had neighbors who were Crips gang members, he and Fennell discussed the

murder of the three Rollin 60's Crips gang members in 1994. Appellant brought the subject up, and told Fennell that he saw the Cadillac parked. Crips gang members were sitting inside, and one was standing outside the car. When the man standing outside saw appellant, he ran away. Appellant told Fennell that he fired shots at the man and everyone seated in the car. He said he shot and killed three people. He told Fennell that he "domed" the victims, meaning he shot them in the head. The man who ran got away. (18 RT 3189-3190, 3202.)

b. October 3, 1994 Attempted Murder and Carjacking

On the morning of October 3, 1994, Yasmine Greene went to the Telephone Employees Credit Union in Santa Monica to cash a check. On that date, Luis Hernandez was working as a security guard in the credit union's parking lot. At approximately 10:30 a.m., Greene was inside the credit union and Hernandez was standing outside. A car pulled up next to Hernandez. Three Black males were inside. The man sitting in the front passenger seat asked Hernandez if he knew the location of Santa Monica Community College. As Hernandez pointed to his left, the man told him "don't move," and pulled a gun out of the glove compartment. (17 RT 2922-2924, 2937, 2989-92, 2998-2999, 3000, 3016.) Hernandez started to run towards the credit union. He heard four gunshots, was struck, and fell down. He immediately got up and ran inside the credit union. (17 RT 2992-2993.) He collapsed once he was inside. Hernandez sustained two gunshot wounds, and was subsequently taken to the hospital where he underwent surgery. (17 RT 2993-2995.)

Inside the credit union, Green also heard the gunshots. (17 RT 2923-2925.) She looked up and saw a yellow Cadillac parked outside. A man stepped out of the car and shot at the guard. Greene heard more gunshots

and saw the guard run into the credit union. He fell down, and Greene saw a gunshot wound on his lower back. (17 RT 2924-2926, 2939-2941, 2943.) The shooter got back into the car, which drove away. The shooter was a light-skinned African American male who looked to be in his early twenties. (17 RT 2925, 2927, 2957.) In addition to the shooter, Greene saw two other African American males in the yellow Cadillac. (17 RT 2926-2927, 2951-2953.) The driver was very light-skinned and could have been Hispanic. (17 RT 2953-2954.)

Lieutenant Ray Cooper arrived at the credit union, conferred with officers on the scene, and examined the crime scene. (16 RT 2866-2867.) Six .9 millimeter shell casings, two bullet fragments, and a belt buckle were recovered from the crime scene. (16 RT 2868-2869, 2875-2876.)

Shortly after 11:00 a.m. that same morning, Socorro Navarro drove to the home of her friend, Linda Nicastro, in Santa Monica. (16 RT 2846-2847.) Nicastro's home was approximately four to five blocks away from the credit union. (18 RT 3113.) Navarro stopped her car in the street in front of Nicastro's apartment and beeped the horn. Nicastro came out and asked Navarro to wait a little while, which Navarro did. A few minutes later, Nicastro came back out and began walking toward Navarro's car. While Nicastro was walking, a light yellow car sped toward Navarro's car and stopped next to it. In the front seats were two African American men. (16 RT 2847-2849.) The driver got out of the car and walked up to Navarro. He pulled out a gun, pointed it at Navarro, and said, "Bitch, get out of the car." (16 RT 2850; 17 RT 2972-2973.) Navarro got out of the car and walked over to where Nicastro was standing. She did not look back. The women grabbed hands and walked toward Nicastro's apartment. Navarro heard the car speed away. She turned and saw her car and the yellow car drive away in the same direction. (16 RT 2851-2852, 2856-2857.)

Jerry Flannery lived across the street from Linda Nicastro. He had just parked his car and walked across the street when he heard another car approaching at a high rate of speed. He heard the car slam on its brakes and pull up next to Navarro's car. (17 RT 2970-2972, 2980.) There were three people inside the car. (17 RT 2976.) The driver was an African American male. He exited the car, walked up to Navarro, and began yelling at her to get out of the car. He said, "Get the fuck out of the car," several times, then pulled open the door and said, "Get the fuck out of the car, bitch." (17 RT 2972-2973, 2976, 2982-2983.) He then grabbed Navarro by the hair and dragged her out of the car. (17 RT 2973.) Flannery was just starting to turn around and help Navarro when the driver pointed the gun at him. It was a .9 millimeter beretta semi-automatic. Flannery dove behind the parked cars. He then went in between the apartment buildings and knocked on three or four doors in an attempt to get somebody to call the police. When he finished, he saw both cars driving away. Flannery got back into his car and tried to follow them in order to obtain the license plate numbers. He was unable to find the cars. (17 RT 2974-2976, 2981.)

On February 9, 1995, a firearms analysis was conducted on the shell casings and bullet fragments recovered from the scene of the attempted murder at the credit union. (16 RT 2887.) It was determined that all six shell casings were fired from one gun, and both bullet fragments were also fired from one gun. (16 RT 2888-2889.) Without the benefit of analyzing the actual gun, it was impossible to determine whether the shell casings and bullet fragments were fired from the same gun. (16 RT 2890.)

In January and February 2000, the shell casings and bullet fragments were reanalyzed, this time along with the .9 millimeter Smith & Wesson pistol recovered at the time of appellant's arrest. (16 RT 2892-2893, 2898.) It was determined that the shell casings and bullet fragments came from the Smith & Wesson pistol. (16 RT 2896, 2898.)

In 1999, Yasmine Greene was asked to look at photographs of potential suspects in the credit union shooting. She identified appellant in the photographic lineup as the shooter. (17 RT 2928.) Greene also identified appellant at trial as the shooter. (17 RT 2397, 18 RT 3127.)

c. Appellant's Arrest and Police Interviews

In the early morning hours of October 7, 1994, Officers Thomas Kimrey and Earl Gould were on patrol in a marked police car. (15 RT 2479, 2484.) While driving north on Nicolet, they saw two men walking on the east side of the street. They illuminated the men with a light from the car, and appellant turned around. Officer Kimrey had a clear view of appellant's face, and recognized him because he was a murder suspect. (15 RT 2479-2480, 2484-2485.) Officer Kimrey exited the car with the intention of arresting appellant. Appellant put his hand on his waistband and began running north on Nicolet. Officer Kimrey pursued appellant on foot while Officer Gould followed in the car. As appellant ran towards an alley, he dropped a blue steel .9 millimeter handgun on the sidewalk. Officer Kimrey picked it up as Officer Gould drove into the alley. Officer Gould exited the car and took appellant into custody as he was trying to climb over a chain link fence. (15 RT 2480-2482, 2485-2487.) Once appellant was secured in the police car, Officer Kimrey examined the handgun. The magazine was loaded, and there was a round in the chamber ready to fire. (15 RT 2481, 2483, 2487.)

Appellant was later interviewed by Detectives Felicia Hall, Steve Watson, and John Nicol. (17 RT 3035-3036.) Appellant initially told the detectives that he knew about the murders on Western. He said the shooter put on a blue shirt to make the victims think he was a Crip gang member. He walked up to their car and "dumped on them." (Peo. Exh. 27B at 12-13.) He also told the detectives that the shooter used a .9 millimeter gun,

and fled the scene in a red car. (Peo. Exh. 27B at 13.) After discussing various other murders, the detectives returned to the murder of the three "60s" on Western Avenue. Appellant denied being present at the scene. He refused to disclose the name of the shooter, claiming that he "took care" of appellant when he was in the Youth Authority, sent him money when he was in prison, and "looked out" for him once he was out. (Peo. Exh. 27B at 58-59.) He stated that the shooter knew the Crip member who witnessed the shooting because they had been in jail together. Appellant denied knowing the witness himself. (Peo. Exh. 27B at 59-60.) Appellant denied committing the murders. (Peo. Exh. 27B at 72-73.) He told the detectives that his family fell apart after Rollin 60s gang members killed his brother. He blamed the 60s for what happened to his family. (Peo. Exh. 27B at 97-101.) Nonetheless, appellant refused to admit that he committed the murders, saying "I'm not ready." (Peo. Exh. 27B at 102-103.) He later told the detectives "you will never, never get me to admit to those murders." (Peo. Exh. 27B at 120.) He stated, "As long as I feel that I got a chance to beat these murders I will never tell that I did – I would never admit to it." (Peo. Exh. 27B at 121.) The charges against appellant were dismissed on June 22, 1995. (18 RT 3219.)

In 1999, Sergeant Gary Steiner was assigned to investigate the 1994 attempted murder and carjacking in Santa Monica. (18 RT 3113.) He heard that appellant had information about the crimes, so he interviewed appellant on January 6, 1999. (18 RT 3114-3115; Peo. Exh. 32B.) Appellant stated that on the morning of the crimes he received a page from Chauncey Bowen. Appellant met Bowen at an apartment complex 15 minutes later. (Peo. Exh. 32B at 7-11.) Bowen told appellant he was planning to rob a credit union in Santa Monica. Appellant said he would be a look-out, but he refused to go into the credit union. There were five men who were going to participate in the robbery, and appellant also brought

along a female friend. (Peo. Exh. 32B at 12-13.) The group drove to Santa Monica in two cars: appellant and his friend were in a blue Camry, and the other men were in a stolen vehicle. (Peo. Exh. 32B at 14-15.) Appellant was carrying a .45 automatic handgun. (Peo. Exh. 32B at 7-17.) Bowen had a .9 millimeter and the other men were armed with an MP-5 (small automatic submachine gun), two AR-15s (semi-automatic assault rifle), and a Tech 9 (semi-automatic .9 millimeter. (Peo. Exh. 32B at 17-19; 18 RT 3126-3127.)

They first stopped at a smaller credit union, but abandoned the plan to rob it because a person had to be buzzed in to enter the building. Bowen suggested a larger credit union close by. Appellant objected, arguing that it had too much business and too many people. (Peo. Exh. 32B at 25-27.) Bowen decided to proceed. They drove into the parking lot of the larger credit union, and appellant saw a security guard standing outside. Bowen stopped his car, got out, and started speaking with the guard. Appellant did not hear what Bowen said, but the guard started running and Bowen opened fire on him. Appellant told his female friend to back up, but she could not because another car was entering the parking lot. They followed Bowen's car out into traffic. Appellant saw Bowen shoot at the guard again as they drove by. (Peo. Exh. 32B at 27-30.) Appellant and his friend lost Bowen's car in traffic, but then saw the car stopped on a street. Bowen was making a woman get out of her car at gunpoint. Bowen and two other men got into the lady's car and drove away. Another man drove the other car away. (Peo. Exh. 32B at 30-32.) Appellant and his friend drove back to Los Angeles. They met up with Bowen, who was laughing about what had happened. Appellant was mad at Bowen. (Peo. Exh. 32B at 32-35.)

Charges against appellant were re-filed on February 17, 1999. (18 RT 3059-3065, 3219.)

2. Defense Evidence

On October 3, 1994, Daniel Gonzalez was making deposits at the Telephone Employees Credit Union in Santa Monica. When he finished his transactions, he walked out to his car and prepared to make a phone call. (19 RT 3329-3330.) He saw the security guard standing outside talking to a Black male. Gonzalez did not notice a car near the two men.[2] As Gonzalez was about to start his car, he saw the security guard running away from the other man. The man had a gun and was firing shots at the security guard. The shooter got into the right front passenger seat of an older car and continued firing shots. There were three or four people in the car. Gonzalez ducked down. He heard the car circle around as it drove past him. The driver had a "jerry curl" hairstyle. (19 RT 3332-3336, 3342, 3344, 3346-3347, 3357, 3359-3360.) The car drove to the intersection on Pico at the end of the parking lot and proceeded down a residential street. (19 RT 3336-3338, 3350, 3352.) Gonzalez initially followed the car and called 911. He stopped and drove back to the credit union when he realized the car was breaking and slowing down. (19 RT 3339-3340.) He spoke to the police once they arrived at the scene. (10 RT 3340-3341.)

On October 3, 1994, Officer Carl Heublein was patrolling Santa Monica in a marked police vehicle. (19 RT 3269-3270.) He responded to the scene at the credit union and interviewed Yasmine Greene. Although Officer Heublein had no independent recollection of the interview at the time of trial, his report indicated that Greene had told him she thought the car was a Cadillac Fleetwood or Coup Deville. She said there were four people in the car, and the driver was light-skinned and could have been

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[2] On cross-examination, Gonzalez testified that his statement to police on the date of the incident was accurate. In that statement, he said the shooter was standing next to a vehicle with its engine running. (19 RT 3348.)

Hispanic. The car was clean, and did not appear to have any damage or unusual customization. (19 RT 3270-3273.) Greene said that she saw a Black male who was sitting in the passenger seat shoot at the security guard approximately four times. (19 RT 3274, 3279.) She described the shooter as a Black male in his twenties with very short hair. He was wearing a white t-shirt. (19 RT 3279.) She told Officer Heublein that she believed she could identify the shooter. (19 RT 3279, 3284-3285.)

Sergeant Kathleen Keane participated in the investigation of the shooting at the credit union. (19 RT 3290.) As part of the investigation, she spoke with the victim, Luis Hernandez, the following day while he was in the hospital. Hernandez told Sergeant Keane that, while he was working as a security guard, he came into contact with a yellow car. The car had a dull finish and looked dirty. Five Black males were inside the vehicle. The right front passenger asked Hernandez for directions to Santa Monica High School. Hernandez said he saw the man take a gun out of the glove compartment. Hernandez began to run away. The right front passenger exited the car and shot Hernandez, who fell down. He got up and ran toward the credit union, at which time he was shot a second time. (19 RT 3291-3295, 3297.)

Detective Hall testified that prior to her interview of Lewis Dyer on September 15, 1994, he had a tape-recorded conversation with relatives of the victims. (19 RT 3307.)

3. Prosecution Rebuttal Evidence

On rebuttal, Detective Hall testified that all police reports, statements, and recordings were turned over to the defense. She also explained the meaning of some slang terms heard on the recording of the victims' relatives speaking to Lewis Dyer. (20 RT 3420-3423.)

Rory Shoaf testified that he spoke with Lewis Dyer on the date of the murders. Dyer told him that "Little Sonny" was the shooter. (20 RT 3427-3436.)

B. Penalty Phase

1. Aggravating Evidence: Prior Felony Convictions

a. January 21, 1988 Carjacking

On January 21, 1988, at approximately 5:35 p.m., Alice Rox drove her car, a Mercury Cougar, to the Slauson Swapmeet. She parked her car, and as she was getting out she heard appellant say "Let me have your keys." When Rox said no, appellant pulled out a gun and again demanded the keys. Rox complied. Appellant told her to sit down by a nearby wall, and he drove off in her car. (24 RT 4167-4170.) Rox subsequently identified appellant in a photographic lineup.[3] She also identified him at a juvenile court hearing. (24 RT 4170-4171, 4175.)

b. February 4, 1988 Carjacking

On February 4, 1988, at approximately 1:00 a.m., Dwain Edwards drove his Camaro to a gas station located on Slauson and Crenshaw. He saw appellant walking around the gas station. Appellant pointed a machine gun at Edwards and demanded his keys. He told Edwards to run away from the car and not to do anything stupid. (24 RT 4178-4180.) Edwards complied and ran approximately 50 feet. He turned around and saw appellant driving his car east on Slauson. Edward reported the incident to the police, and his car was recovered several days later. Edwards

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[3] On cross-examination, Rox testified that she could not remember if she had identified appellant from a photographic lineup. (24 RT 4175.)

subsequently identified appellant at a juvenile court hearing. (24 RT 4180-4182, 4186-4187.)

Later that morning, at approximately 9:00 a.m., H.P. Herring was working at the Foster Lane Lumber Yard, located at 1258 West 58th Street in Los Angeles. He heard helicopters circling and went outside to see what was happening. As he returned to the store, he saw a young African American man holding a small machine gun running through the lumber yard. He then ran to a tree, where he took off his shirt and put something on the ground. When he ran away, he was no longer holding the gun. Herring's friend, who had also seen the man, called Herring over. He picked up the gun and gave it to Herring, who called the police. (25 RT 4279-4285, 4293.)

Officer Tammy Dougherty received a call that same morning to proceed to John Muir Middle School. There had been a report of a man with a gun. When Officer Dougherty arrived, appellant was already in custody. (25 RT 4287-4292.) She collected evidence at the scene and interviewed several witnesses, including H.P. Herring. Herring gave her the gun he found, an Intratec .9 millimeter, which looks like an uzi. The weapon held a 50-round clip, and Officer Dougherty removed 40 rounds when she collected it. (25 RT 4292-4293.) She transported appellant to the South Bureau Crash Office, where he was booked. (25 RT 4300-4301.)

Detective Steven Haberfield spoke with appellant on February 12, 1988. (28 RT 4913.) At that time, Detective Haberfield was investigating the January 21 and February 4 vehicle robberies. Appellant admitted committing both crimes. (28 RT 4915-4921.)

c. August 8, 1997, Robbery of Vandenberg Federal Credit Union and Murder of Christine Orciuch

On the morning of August 8, 1997, 11-year-old Quentin Orciuch and his mother, Christine, were running errands together. They dropped Quentin's two older sisters off at different locations and then went to Long's Drugstore, where they bought school supplies. (27 RT 4672-4673.) Afterward, they went to Vandenberg Federal Credit Union in Lompoc, California. Christine Orciuch parked the car and Quentin waited while she walked toward the credit union. Quentin's window was rolled down, and he was reading. (27 RT 4672-4674, 4685.)

That day, Jasper Altheide was working as a teller at the credit union. Chauncey Bowen entered the credit union and walked over to a counter. He pretended to fill out a deposit slip or envelope, but Altheide knew he was not a member of the credit union. Then, out of the corner of her eye, Altheide saw appellant run up to the counter with a shotgun. He was screaming "Get the fuck down or I'll shoot you." (27 RT 4638-4640.) Appellant jumped over the counter and asked for the manager. (27 RT 4644, 4687-4688, 4690.) He told another employee, Moira Philley, to get up and kicked her in the foot. Appellant put the shotgun against Philley's back and shoved her. Philley asked appellant if she could walk down the hallway because the manager was in the back of the credit union. Appellant told her to keep her hands up and her face forward. She walked toward the back, past the vault room door, to find the branch manager. Appellant went with her. (27 RT 4644-4646, 4691-4693.) As Philley and appellant were walking through a doorway, gunshots were fired. The gunshots came from the other side of the counter near the front door. (27 RT 4646-4647, 4695-4696.) Appellant screamed "What the fuck?"

Somebody said "Let's get out of here," and the robbers left the credit union. (27 RT 4650-4652, 4662, 4695-4696, 4709.)

Octavio Gallardo went to the credit union that morning to get money. He had a broken left leg and was walking on crutches. A woman asked if he needed help and opened the front door for him. After he entered the credit union, a man wearing a mask pointed a handgun at him and told him to get down. Gallardo was about to throw himself onto the ground when the man shot him in the right thigh. The woman was behind Gallardo, but when she heard the gunshot she ran out. Gallardo fell to the ground. (28 RT 4735-4739.) The man with the gun yelled at the woman to stop and come back. Gallardo then heard another gunshot. Someone said, "Let's go," and Gallardo heard the sound of running toward the parking lot. (28 RT 4740-4741.)

Quentin Orciuch heard two gunshots, and then his mother screamed his name. He jumped out of the car and ran to the side of the bank. (27 RT 4674-4675.) He pounded on the door and screamed, "My mom's been shot." (27 RT 4675, 4699, 4712-4714.) He saw his mother lying face down on the ground. (27 RT 4676.) Some women opened the door and let him in. Quentin was crying, and tried to page his father. (27 RT 4678.)

Philley called 911, and Altheide went to the front door where she saw a man lying on the ground. He had a brace on one leg and had been shot in the other leg. Altheide's boss walked across the lobby with a little boy who wanted his mother. Altheide looked outside and saw a pair of feet lying on the sidewalk. Altheide walked outside to check on Christine Orciuch and tell her to be calm, but her lips were blue and she did not respond. Another woman said the little boy wanted to see his mother, but Altheide said no. Christine let out her last breath. Paramedics arrived and attempted to treat her. Altheide remained outside with her. Altheide remained outside even after Christine was taken to the hospital. (27 RT 4652-4655, 4696.)

Quentin tried to run outside once or twice to see his mother, but a fireman stopped him. (27 RT 4678.) He was unable to reach his father, so a fireman drove him to the hospital. He waited there for his father and sisters to arrive. After they arrived, Quentin's father told him that his mother had died. (27 RT 4679.) An autopsy determined Christine's cause of death to be a gunshot wound through the left side of the chest. (27 RT 4614.) It was a rapidly fatal injury. (27 RT 4635.)

The next morning the credit union conducted an audit. It was determined that the robbers took a little over $11,000.00 from the teller drawers. (27 RT 4717-4718.)

A few weeks before the robbery and murder, Christopher Fennelle went to Sabrina Johnson's house to speak with his brother, Chauncey Bowen, and appellant. Johnson was nicknamed "Breezo," and her boyfriend was named Marlo. She had called Fennelle to ask him to come over and speak with appellant and Bowen. The two men told Fennelle that they were planning an armed bank robbery. They said they needed cars, and that there was going to be a lot of money. They asked Fennelle if he wanted to participate. He declined, and spent five hours trying to convince them not to do it. After the robbery and murder, Fennelle knew that Bowen was wanted for murder. He tried to convince his brother to turn himself in to the police, and he subsequently testified against his brother in court. (28 RT 4887-4897.)

Appellant was subsequently arrested in Las Vegas, Nevada. (28 RT 4771-4772.) He admitted to investigators that he was present during the robbery. (28 RT 4799-4800.)

d. March 20, 1998 Attempted Escape

On the morning of March 20, 1998, Sheriff's Deputy David Rocha was working as the Floor Officer in the northwest section of the Santa

Barbara County Jail. (26 RT 4500, 4503-4504.) Shortly before their escape, appellant, Chauncey Bowen, and Mac Bonds were all in the exercise yard for the A and B module housing areas. (26 RT 4506-4507.) When Deputy Rocha received notice of the escape, he looked to the exercise yard and did not see anyone. He entered the yard with two other officers and saw a hole in the chain link ceiling. It appeared that the links had been unhooked and pulled apart, and the inmates were gone. (26 RT 4508, 4510, 4523.)

That morning, Oliver Hamilton was in the parking lot of the Sheriff's Department Furlough Farm, which is located next to the Sheriff's Department and Santa Barbara County Jail. (26 RT 4472.) Hamilton was in his car listening to the radio when he saw a man on the roof of the jail building. He was wearing a white t-shirt. He later saw the man, along with two others, on a hillside next to the parking lot. They appeared to be wearing jail uniforms. One of the men was appellant. (26 RT 4474-4476.)

In March 1998, Jane Overbaugh worked at the Santa Barbara County Department of Social Services. (25 RT 4353.) The department was inside a large office building with a parking lot. Adjacent to the parking lot was a hill, upon which the county's jail complex was located. (25 RT 4353-4355.) Overbaugh's office was located on the second floor facing the parking lot. The entire front of her office consisted of windows. (25 RT 4358.) On the morning of March 20, 1998, at approximately 11:20 a.m., Overbaugh was in her office meeting with an employee. As they were talking, she saw three African American men moving down the hill from the jail area. They appeared to be wearing inmate clothing, which there were removing. They moved down the hill quickly. (25 RT 4359-4361.) They surrounded the car of an employee who was leaving and one of the men forcefully pulled her out of the car and got into the driver's seat. The

other two men got into the car, and they exited the parking lot. Overbaugh called 911. (25 RT 4361-4363, 4366-4367.)

Matilde Ulrich, another employee of the Department of Social Services was driving out of the parking lot when the men came running toward her car. (25 RT 4369-4370.) One man stopped in front of her car and signaled for her to stop, while another entered the front passenger seat and told Ulrich to get out of the car. (25 RT 4371-4372, 4374, 4387.) She tried to grab the keys, but the keychain broke. The man inside the car pushed her out while the man outside the driver's side pulled her. (25 RT 4374-4376, 4387-4388.) Ulrich suffered scratches from being pulled to the ground. (25 RT 4380, 4382.) After the men drove off, Ulrich walked to the Social Services building to get help. (25 RT 4383.)

Shortly thereafter, Sheriff's Deputy Glen Monk was driving across the 101 Freeway on an overpass on his way home from work. The overpass was located one-half to three-quarters of a mile from the jail. Deputy Monk saw a car pass him on the right at a high rate of speed and almost hit the frame of his truck. (25 RT 4392-4394.) The car swerved over three lanes of traffic and waited to turn left onto the southbound 101 Freeway. Deputy Monk pulled alongside the car and looked inside. He saw two African American men, and possibly a third. The driver was not wearing a shirt, and at least one person was lying down in the front passenger seat or back seat. They looked very suspicious. Deputy Monk drove home and called the watch officer at the Sheriff's Department. He reported the license plate number of the car, the direction it was traveling, and the number of occupants in the car. (25 RT 4394-4397.)

At approximately 1:23 p.m., Tactical Flight Officer Louis Jon Simon was flying in a helicopter when he received a call regarding a jail escape and carjacking. As Officer Simon and his partner were flying southbound, they heard over the police radio that the California Highway Patrol had

located the car on the southbound 101 Freeway. It was approximately eight or nine miles away from the jail. They flew to the location, found the car, and tape recorded the incident. The car was stopped by a spike strip, and the occupants were ordered out and arrested.

Officer Simon and his partner subsequently flew to the Santa Barbara Airport, and Officer Simon gave the video to the sergeant in the major crimes unit. (25 RT 4403-4407, 4413.)

Sergeant Mark Liddi interviewed appellant following his arrest. (26 RT 4525.) Appellant told Detective Liddi that he forced Chauncey Bowen to participate in the escape attempt. (26 RT 4526-4528.)

2. Aggravating Evidence: Acts of Violence While in Custody

a. March 10, 1994 Incident

In March 1994, Antoine Phillips was an inmate at Avenal State Prison. Appellant was also in custody at that facility. At the time, both men belonged to Blood gangs. Appellant started an argument with Phillips regarding the murder of one of appellant's "homegirls" by a member of Phillips's gang. The men agreed to a fight. A few weeks later, they were in the prison yard. Phillips was lying on the ground when appellant walked up and kicked him in the mouth. Later that evening Phillips confronted appellant, and the two men fought again. During the second fight, appellant broke Phillips's jaw. (24 RT 4204-4210, 4212-4213.)

b. November 28, 1997 Incident

On November 28, 1997, Sheriff's Deputy Brian Parker was working in the Santa Barbara County Jail. While doing a security check, he found appellant in his cell. Appellant had secured several items into his cell wall, which was a violation of the jail rules. Deputy Parker told appellant to

remove the items. Appellant called Deputy Parker a "punk bitch mother fucker," and challenged him to enter the cell and fight. (28 RT 4752-4753.)

c. November 17, 1998 Manufacture of Weapon

On November 17, 1998, appellant was transported to the Santa Maria Courthouse for trial. Sheriff's Deputy Robert Garnica placed him in a holding cell, which was equipped with a camera. While watching appellant via the camera, Deputy Garnica saw him break a white plastic coat hanger that was holding his civilian clothes. He took a large piece of the broken coat hanger and began sharpening it to a point on the concrete floor. He hid the other pieces in clothing in the corner of the cell. Deputy Garnica called for backup, entered the cell, and took the sharpened piece of plastic, as well as the hidden pieces, away from appellant. (26 RT 4533-4538.)

d. September 16, 2000 Incident

On September 16, 2000, Sheriff's Deputy Joseph Rubio was working in the Los Angeles County Men's Central Jail. At approximately 8:45 p.m., Deputies Rubio, Phillips, and Musharbash were escorting a nurse who was passing out medication to the inmates. (29 RT 5030-5033.) When they reached appellant's cell, appellant asked for his medication. Deputy Phillips told appellant that the nurse did not have his medication, and appellant became upset. (29 RT 5034.) When Deputy Phillips told him to calm down, appellant said, "Well, I will go to the hole if you come in and get me." (29 RT 5035, 5039.) Appellant continued to challenge Deputy Phillips, threatening to "fuck [him] up." (29 RT 5036.) At some point, appellant threatened all three deputies, saying "Why don't all three of you come in. You all be able to beat my ass, but I will be able to get one of you." (29 RT 5036, 5045-5046.)

e. February 17, 2001 Incident

On February 17, 2001, Sheriff's Deputy John Hermann was working in the Los Angeles County Men's Central Jail. When Deputy Hermann went to give appellant his dinner, appellant handed him a note and told him to post it in the guard booth to make sure everyone could see it. Appellant specifically said he wanted Senior Deputy Lindenmayer to see the note. Deputy Hermann looked at the note, which consisted of a stick figure cartoon drawing. The cartoon had five panels depicting the following: appellant in his cell cursing at Deputy Lindenmayer; the gate of appellant's cell gate opening and appellant saying "on 62 Duce Brim. Its on, Blood. I'm gonna dic your punk ass out, Lindenmyer"; Deputy Lindenmayer asking for mercy and appellant saying "Where your boys at now? Huh? Huh?"; Deputy Lindenmayer asking for mercy as other inmates yelled, "Rest in shit" and "Get him. Fuck him up"; and appellant spitting on Deputy Lindenmayer's body and saying, "I told you on Bloods. I was gonna kill you punk ass or bitch ass." (29 RT 5050-5056.) Deputy Hermann considered this a threat to Deputy Lindenmayer. (29 RT 5056.) Deputy Hermann put the note on the desk in the booth and told his partners about the incident. (29 RT 5051.)

Supervising Deputy Leonard Lindenmayer testified that he was assigned to Men's Central Jail. He was on duty on February 18, 2001, the day after appellant gave Deputy Hermann the note. (29 RT 5064, 5066.) The note was shown to him, and he was told that appellant had given it to another deputy. (29 RT 5066-5067.) The note caused him concern because he took it as a threat to his safety. (29 RT 5067.) Appellant's previous behavior toward Deputy Lindenmayer had been "[h]ostile, uncooperative, impulsive, violent, threatening." (29 RT 5070.) Deputy Lindenmayer was afraid for his safety after seeing the note. (29 RT 5070.) After this incident, he insisted that two deputies be present to move appellant. He

also had minimal contact with appellant after the incident, and believed appellant was "out to do bodily harm to me if given the opportunity." (29 RT 5071-5072.)

f. July 18, 2001 Incident

On July 18, 2001, Sheriff's Deputy Charles Nowotny conducted a search of appellant's jail cell. During the search, he found a handmade club in a manila envelope with appellant's personal property. The club consisted of a tightly rolled up newspaper with a torn white sheet wrapped around it. This was a contraband item that could be used as a weapon. (26 RT 4586-4588.)

g. September 8, 2001 Incident

On September 8, 2001, Sheriff's Deputy Robert Galbraith and another deputy were escorting appellant from the medical clinic to his cell. (26 RT 4548.) Appellant was handcuffed, shackled, and was wearing a waist chain. When they arrived at the cell, appellant saw that a third deputy was removing contraband photographs from his cell. Appellant began cursing, and refused to go into the cell until his photographs were returned. A sergeant eventually talked appellant into going back inside the cell. While the deputies were in the process of removing the handcuffs and waist chain, appellant pulled the chain into his cell and began swinging it around, yelling "I am going to tear this place apart," and "If I get out of here, I am going to tear you apart, too." (26 RT 4550-4552, 4590-4591.) The deputies were able to close the gate and secure the latch so appellant could not hit them with the chain. After about 45 minutes, another sergeant talked appellant into handing over the chain. During this entire time, appellant was cursing and threatening people. (26 RT 4553-4555, 4563.)

h. September 27, 2001 Incident

On September 27, 2001, Sheriff's Deputy James Brown was working in the Los Angeles County Men's Central Jail. At approximately 5:15 p.m., he, along with Deputies Martinez and Cheatham, approached appellant's cell to give him food. (29 RT 5016-5018.) When they opened the tray slot, appellant refused his food, saying "fucking deputies." (29 RT 5019-5020.) Appellant then threw a liquid substance at the deputies, hitting Deputy Martinez in the face and chest. Deputy Brown pepper sprayed appellant so Deputy Martinez could close the food tray, remove his keys, and exit the cell area. Appellant threw more liquid, which hit Deputy Brown in the face and chest. (29 RT 5020-5022.) Appellant then said, "fucking bitches." (29 RT 5023.) The deputies exited the area and reported the incident to a sergeant. Deputy Brown took a shower and changed his uniform. (29 RT 5022-5023.)

Deputy Alejandro Martinez also testified about the incident. As he opened the food tray slot in appellant's cell door, appellant threw a white watery liquid at him. It struck Deputy Martinez in the face and upper body. (26 RT 4567-4571.) Appellant said, "Take that, fuckin' deputy." (26 RT 4572.) Another deputy sprayed pepper spray into the cell so Deputy Martinez could close it off. As he was closing the slot, appellant threw more liquid at the other deputy, saying "You fuckin' bitches." (26 RT 4572-4573.) Deputy Martinez sprayed more pepper spray. The deputies left and notified a sergeant. Deputy Martinez did not know what the liquid was, and it caused him concern. (26 RT 4573-4574.)

i. February 26, 2002 Incident

On February 26, 2002, Sheriff's Deputy Alejandro Martinez was working at the Men's Central Jail. Deputy Martinez saw appellant at the beginning of his shift when he was doing his 30-minute check. (29 RT

5154.) Appellant said that Deputy Valente kept "fucking with [him] and [he was] going to get him." (29 RT 5154.) Appellant also gave Deputy Martinez a note that he wanted him to give to the supervisor, Sergeant Stokes. The note said "I give you my word as a man that I will slice or stab this guy the first chance I get." (29 RT 5155, 5158.) After giving Deputy Martinez the note, appellant said he would "gas" a deputy if he were given the chance. (29 RT 5156.)

j. June 10, 2002 Incident

On June 10, 2002, Sheriff's Deputy Damien Ortega was working in the Highpower Module of the Men's Central Jail. (28 RT 4928.) At approximately 6:30 p.m., Deputy Ortega was assigned to "row clean-ups." (28 RT 4929.) During this time, jail trustees picked up trash and food trays along the walkway in the cell block. Douglas Lance was the trustee picking up trash on this date. (28 RT 4931.) As Lance picked up a trash bag attached to appellant's cell, appellant reached out across Lance's neck. Lance called for help and cried out in pain. Deputy Ortega, who was four cells away, came over and asked what happened. As he did so, he heard the toilet flush in appellant's cell. Lance told Deputy Ortega that appellant had cut him. He had a two and a half inch laceration from under his ear to the front part of his neck. The laceration was about a quarter of an inch deep, and Lance was bleeding heavily. He was taken to the medical clinic, and subsequently transferred to an emergency room for treatment. (28 RT 4933-4937.)

k. January 7, 2003 Incident

On January 7, 2003, Sheriff's Deputy Mat Taylor was working at the Men's Central Jail. (29 RT 5161.) At approximately 7:00 p.m. he was sitting at his computer in the control booth. He heard a loud thud against

the concrete wall in one of the rows of cells. He looked down the row, but initially did not see anything strange. (29 RT 5166.) He heard noises and stood up, at which time he saw appellant savagely beating another inmate. (29 RT 5169-5170.) Appellant was on top of the other inmate, Richard Aguirre, and hitting him with a jail-made weapon. Aguirre was curled up in a ball. Appellant was supposed to be locked in his cell, but managed to "rack[] his gate" and exit his cell. Deputy Taylor had seen appellant do this on a prior occasion. Deputy Taylor alerted his partner. They went down the row and ordered appellant to stop fighting. Appellant ignored the order and continued to attack Aguirre. Deputy Taylor pepper sprayed appellant and Aguirre, but appellant continued to hit Aguirre. He then ran back to his cell. (29 RT 5171-5175, 5177.)

Aguirre was covered in blood. He was not carrying any weapons. He was taken to the medical clinic and then transferred to the trauma center at USC Medical Center. (29 RT 5176.) His clothing had multiple slash marks from the weapon appellant used during the attack, as well as blood stains. (29 RT 5183-5191.)

There was blood spatter on appellant's clothing. (29 RT 5192-5193.) On several occasions after the assault on Aguirre, appellant made comments to Deputy Taylor such as, "I should have finished the job on Aguirre," and "I would have dragged him back to his cell and finish the job." (29 RT 5194.) Appellant also asked Deputy Taylor why he did not let him "finish the job," and said he should have "done the job right the first time." (29 RT 5194-5195.)

I. March 20, 2003 Incident

On March 20, 2003, Sheriff's Deputy Thomas Davis was working at the Men's Central Jail. That morning, Deputy Davis was assigned to search appellant and his property before he went to court. (29 RT 5116-5117.)

During his search, he found a handwritten note on the bottom of a transcript. Appellant said, "Let me have that back so I can flush it down the toilet." (29 RT 5119-5120.) Deputy Davis refused. Appellant then said, "Well, let me have it back so I can erase it." (29 RT 5120.) Deputy Davis again refused. Appellant then refused to go to court until he spoke with a sergeant. Deputy Davis contacted a sergeant, who spoke with appellant. Appellant said he would go to court if he was given a copy of his note. The sergeant told Deputy Davis to make a copy, which he did. He then gave the note back to appellant. In addition to various gang terms, the note said "Breezo and Marlo need to die." (29 RT 5120-5122.)

Sergeant Harry Heidt testified that on August 8, 1997, he was assigned to investigate the robbery and murder that took place at Vandenberg Credit Union. On December 16, 1997, Sergeant Heidt had a telephone conversation with Sabrina Johnson ("Breezo"). The conversation was transcribed by the FBI, and a copy was eventually given to appellant's attorneys in connection with the case. When it was provided to the defense, it did not contain any handwritten notes. During the telephone conversation, Johnson discussed the conversation that took place at her apartment between Christopher Fennelle, appellant, and Chauncey Bowen. (29 RT 5128-5132.) Sergeant Heidt testified that the handwriting and notes on the copy of the transcript introduced at trial indicated that the writer wanted to have Sabrina Johnson killed. (29 RT 5132-5136.) Sergeant Heidt also identified the note found during the March 20, 2003, search as being a page from the transcript of his December 16, 1997, conversation with Johnson. (29 RT 5136.)

m. Confiscated Mail

Sheriff's Deputy Tim Canova testified that he worked in the Jail Liaison Unit of the Men's Central Jail. He and his partner, Deputy Gilbert,

were in charge of housing the special needs inmates, including "keep away" inmates, high powered inmates, and high profile inmates. As part of his job, Deputy Canova occasionally monitored the inmates' phone calls and written correspondence. (30 RT 5286-5287.) This procedure was done with appellant. (30 RT 5288.)

On September 24, 2002, a letter that appellant wrote to a person named Dominique Reedburg was photocopied. In the letter, appellant stated that he had been on lockdown "for cutting this white boy with a razor blade in the face, plus some other bullshit I did." (30 RT 5289-5292.) In a letter appellant wrote to a person named Ebony Johnson, which was photocopied on October 15, 2002, appellant referenced the robbery of a credit union. (30 RT 5295-5296.) In another letter, photocopied on January 24, 2003, appellant wrote to a person named Richard Cooper that, "it is own [sic] with these Mexicans. I cut up one really bad and kicked his ass, and you know, I am hitting harder than Ali." (30 RT 5298-5299.) In a letter appellant wrote to a person named Nate Dennis, also photocopied on January 24, 2003, he stated, "I cut this hat dancer up real bad on January 8, fucked him up." (30 RT 5312.) The letter went on to state, "I sliced him up good. Every Mexican in 1750 will want to kill me. F'um. I told them to get in line." (30 RT 5312.) In a letter addressed to a person named Trina Harris, photocopied on February 4, 2003, appellant wrote that he was in lockup and that he "cut up another Mexican. F'um." He also wrote that his trial was about to start. (30 RT 5313.)

3. Aggravating Evidence: Unadjudicated Criminal Activity

a. September 27, 1994, Robbery of the Marine Corps West Federal Credit Union

On the morning of September 27, 1994, the Marine Corps West Federal Credit Union, located in Oceanside, California, received a shipment of money from an armored transport. The money was placed in the main vault. (23 RT 3897, 3963.) Melissa Lopez was working as the head teller and assistant manager at the credit union. The manager, Lucy Alvarez, was not there that morning. (23 RT 3962-3963.) At approximately 11:30 a.m., Lopez was standing near the front door of the credit union. (23 RT 3964-3965, 3968.) The glass double doors flew open and three or four African American men ran inside. They were carrying semi-automatic handguns, which they pointed at the tellers. Two of the men jumped over the teller stations and ordered everyone to the ground. Everyone obeyed. One of the men asked who was in charge, and Lopez told him the manager was out of the office and that she was in charge. Lopez was ordered to get up. Appellant led her to the vault at gunpoint and told her to open it. (23 RT 3968-3970, 3972, 3978, 3980, 4000, 4003.) Lopez fumbled with the keys, and appellant put his gun next to her temple and said he would shoot her if she did not hurry. (23 RT 3970, 3972-3973, 3981, 3986.) After Lopez opened the vault, appellant placed the currency in a bag. Lopez could hear another man on the other side of the credit union ordering tellers to open their drawers. (23 RT 3971, 3982.) The men left the bank, and someone called 911. (23 RT 3975-3976.) After the robbery, the credit union manager, Lucy Alvarez, performed an audit and determined that $161,589.23 had been taken. (23 RT 3897-3898.)

On that morning, Michael Loughran was working at New Cars, Incorporated, which was located inside the credit union. (24 RT 4062.)

Between 11:30 and 11:45 a.m. he heard a commotion in the credit union. He looked around his door and saw an African American man pointing a gun at him. The man told Loughran to go inside the credit union and lie down. Loughran heard sounds from the vault area, and then appellant jumped over the counter. He was holding a large bag. Appellant landed next to Loughran, put his knee to Loughran's chest, and asked if he had any money. Loughran reached into his right top pocket where he usually kept his money and handed the contents to appellant. Instead of money, it was business cards. Appellant hit Loughran in the head with a gun and said, "Give me all your money, white boy." Loughran remembered the money was in his left pocket. He handed appellant two 100 dollar bills. Appellant also took Loughran's pager. (24 RT 4063-4066, 4069-4070, 4074.) He then stood up and walked out the door of the credit union. (24 RT 4067.)

On the date of the robbery, Eriana Guerrero lived on Ivy Road in Oceanside near the Marine Corps West Federal Credit Union. At approximately 11:30 a.m. she heard noises outside her house and saw a light-colored car and a blue or gray-colored car parked directly in front of her house. (23 RT 4007-4009.) African American men were inside the cars. (23 RT 4010-4011.) Guerrero was concerned because she was home alone, so she called her sister, Martha Jimenez. Jimenez and her husband, Robert, went to Guerrero's house. (23 RT 4012-4013, 4019.) When they arrived, they drove into the driveway. Martha went inside with Jimenez and Robert remained outside. (23 RT 4019-4020.) At some point, Martha went outside with her husband and they walked up the street. (23 RT 4020.) At the end of the street, Martha looked left onto Estero and saw a white car on the right side of the street. (23 RT 4020-4024.) She turned to walk back to Guerrero's house and saw a red van drive past her very quickly. She heard car doors opening and slamming shut, and then two

cars sped past her as she was walking into her sister's driveway. (23 RT 4025-4027.)

At approximately 11:45 a.m., Officer Douglas Baxter responded to a call of an armed robber at the Marine Corps West Federal Credit Union. He checked the nearby residential area to look for the getaway vehicle that had been described in the dispatch. He found the vehicle, a white LTD, parked on Estero. The unoccupied car was unlocked, and the keys were in the ignition. (23 RT 4031-4033.) Officer Baxter subsequently spoke with Martha and Robert Jimenez, who had seen an African American woman in the driver's seat of a red or maroon van. The woman appeared nervous. As they walked back down Ivy Road, they saw a large white Ford and a small blue Japanese car drive up the street. They told Officer Baxter that there were four African American men in the white car and in the blue car. The white car drove onto Estero, and they heard car doors open and slam shut. The blue car made a u-turn and waited on Ivy Road with the engine running. The red van drove down Ivy Road and was followed by the blue car. (23 RT 4034-4037.)

b. October 21, 1995, Attempted Murder of George Minor

On the night of October 21, 1995, George Minor, a drug dealer, was at home with his sisters and nieces. While he was standing in the front yard speaking with neighbors, appellant and two other Black males approached Minor. One of the men asked for an individual named "Ray Ray." (23 RT 3907-3911, 3915, 3931-3932, 3938.) Minor and said Ray Ray was not there. Appellant, who was holding a gun, stepped up to Minor, said "You Ray Ray." (23 RT 3910.) Appellant said he was "East Coast," and he and one of the other men began shooting at Minor. Minor ran behind a car in the driveway, but he was shot in the arm and leg. (23 RT 3911.) Minor's

wife, Saudia, arrived home and saw appellant and another person shooting at her husband. (23 RT 3947-3948, 3956.) When the gunfire ceased, everyone ran away. Minor ran into his house, and someone called 911. (23 RT 3912-3913.) Although a number of bullets went through the walls of the house, nobody inside was injured. (23 RT 3915.)

At approximately 9:30 p.m., Sheriff's Deputies Angel Jaimes and Ernie Magana were on patrol on 121st Street when they heard gunfire. They drove toward the sound and turned on 122nd Street, where they saw a man waiving at them. The man told the deputies that he saw the shooters drive west toward San Pedro Street. (24 RT 4079-4082.) The witness got into the back seat of the patrol car, and they approached San Pedro Street. They saw a white Cadillac, and the witness pointed at it and said, "That's him, that's him." (24 RT 4082-4083.) The deputies requested assistance and conducted a felony traffic stop. Appellant and another man exited the Cadillac. Deputy Jaimes searched the car and found two hidden handguns. One was a .9 millimeter automatic and the other was a .380 caliber colt automatic.[4] Both men were taken into custody and were subsequently identified by the witness. (24 RT 4084-4086, 4090-4092, 4094.) During booking, appellant's hands were tested for gunshot residue. (24 RT 4115-4120.) An analysis determined that gunshot residue was present on both of appellant's hands. (25 RT 4253-4256.)

Detective Eduardo Hernandez responded to the scene of the shooting and conducted an initial investigation. He recovered six expended .9 millimeter bullet casings from the yard at 340 East 122nd Street. He recovered seven .380 caliber expended bullet casings from the home's driveway. Detective Hernandez also recovered an expended bullet from a

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[4] The criminalist who performed the firearm analysis testified that the guns were semi-automatic. (28 RT 4854-4860.)

wall in the living room. (24 RT 4098-4099.) A subsequent firearms analysis determined that four of the .9 millimeter bullet casings were fired from the .9 millimeter semi-automatic handgun recovered from the white Cadillac; two casings had the same general characteristics, but failed to retain individual characteristics to enable a positive identification. The firearms analysis also determined that six of the .380 caliber bullet casings were fired from the colt semi-automatic handgun recovered from the white Cadillac; one casing had the same general characteristics, but lacked sufficient individual characteristics to enable a positive identification. (28 RT 4853-4859.)

Detective Hernandez spoke with George Minor, who was being treated by paramedics for a gunshot wound to the left leg. He was in pain and shock. Minor reported that two men approached him and asked "Where's Ray Ray?" Minor told the men "Ray Ray" did not live there. One of them men said Minor was "Ray Ray," at which point they both pulled out guns and opened fire. (24 RT 4106-4109.)

Minor was hospitalized for about two weeks as a result of his injuries. (23 RT 3913, 3951.) During his hospitalization, he identified appellant from a photographic lineup. He testified at trial that he had no doubt that appellant was the person who shot him. (23 RT 3929-3930.) After Minor was discharged from the hospital, he was served with a subpoena to appear in court. (23 RT 3915.) He received a phone call that he thought was from somebody in County Jail. The person told him not to go to court. (23 RT 3941-3942.) Saudia Minor also received several telephone calls from someone she believed was in jail. The caller wanted Saudia to testify at his hearing that he was misled into participating in her husband's shooting. (23 RT 3952-3953.) During another call, the caller told Saudia that he knew where her daughter went to school, which scared her. When she appeared

in court, she saw appellant. She was startled and left the courthouse. Saudia was very concerned about her family's safety. (23 RT 3954-3955.)

4. Aggravating Evidence: Victim Impact Testimony

a. Victim Impact Testimony Related to Charged Crimes

(1) Gregory Shoaf

Gregory Shoaf testified that he was Dayland Hicks's uncle. (25 RT 4317.) Hicks was respectful, quiet, and "very lovable." (25 RT 4320.) He liked to play basketball and football. He also liked gaming on Nintendo and Playstation, as well as dancing, singing, and going to church. He was "learning the Bible and understanding the works of the Lord." (25 RT 4320-4321.) Shoaf was shocked when he heard of Hicks's murder. (25 RT 4321.) He received a phone call and drove to the crime scene. When he arrived, he saw the yellow Cadillac parked on the street. Hicks was lying dead on the ground. (25 RT 4321, 4323.) Shoaf screamed, "Who killed my nephew?" (25 RT 4324.) A man walked up to him and said it was "Little Sonny from 6 Deuce Brims." (25 RT 4324.) Shoaf thought of Hicks every day. Hicks's son was five months old when Hick was murdered. By the time of trial, he was nine. Shoaf was concerned that he would grow up without a father. (25 RT 4328-4329, 4331-4332.) Shoaf missed Hicks's smile and the time they spent together. (25 RT 4330.)

(2) Jamise Shoaf

Jamise Shoaf testified that Dayland Hicks was her brother. He was 22 years old when he was murdered. He was a good older brother. She found out about his death when her grandmother and aunt picked her up from school. Her aunt sat her down on a bench and told her that her brother had been killed. Jamise started crying. She felt an empty feeling because she

only had her brother. Later that night she learned the details of her brother's murder. It was hard to continue going through life without him. Jamise thought about her brother's death every day, and felt she had to excel in school for him and the rest of her family. She missed his laugh, his silliness, and watching television with him. (29 RT 5096-5102.)

(3) Doris Hayes

Doris Hayes testified that she was Lamar Armstrong's mother. (30 RT 5332.) Armstrong was a good son. He liked to play football, baseball, and run track. He had a stuttering problem when he was young and kids would tease him. He was beaten up because of this problem. His stuttering improved, but he retained the problem. Armstrong was in the process of getting his GED when he was killed. He worked part-time at Home Base, a building supply store. Hayes spoke with her son on the morning he was killed. They had plans to go shopping for a new car, and they agreed that Armstrong would pick Hayes up at 2:00 p.m. Shortly after 2:00 p.m., Hayes received a phone call from the hospital. Hayes called her husband and told him they needed to go to the hospital. When they arrived at the hospital, they were told that Armstrong was in surgery. They were thereafter told that he had died. Hayes went to see his body; Armstrong looked like he was sleeping. She had difficulty believing that he was actually dead. She could not plan the funeral, and she suffered from nightmares. (30 RT 5332-5339.)

Hayes missed everything about Armstrong. Holidays were difficult. (30 RT 5340-5341.) She testified, "My hurt is all the time. I hurt." (30 RT 5341.) She had not celebrated her birthday in nine years. Her family tried to function, but she was not the same person she was before Armstrong's death. Hayes was involved in her grandchildren's lives. She saw them

often but they did not replace Armstrong. Everything made Hayes think of her son. (30 RT 5341-5343.)

(4) Dan Hayes

Dan Hayes testified that he was Lamar Armstrong's stepfather. He raised Armstrong from the time he was an infant. Armstrong was a "good kid," who enjoyed athletics. Armstrong had two daughters whom he never met. Hayes learned of Armstrong's death when he received a phone call at work that Armstrong had been shot and was on his way to the hospital. When Hayes arrived at the hospital, Armstrong was in surgery. Hayes and his wife waited, and were subsequently told that he died. (26 RT 4463-4464.) It was "an empty feeling." (26 RT 4465.) Hayes testified that it was still hard to believe that Armstrong was dead. It was very difficult holding his family together after Armstrong's death. Hayes's wife had "problems" on the anniversary of his death, on his birthday, and on every holiday. (26 RT 4465) It "has been a nightmare." (26 RT 4465.) Armstrong's two children cried on Father's Day because they did not understand why they could not see their father. (26 RT 4466.) Hayes thought about Armstrong every day. He last spoke with him the day before he died. (26 RT 4467.)

(5) Milika McCoy

Milika McCoy testified that she was Lamar Armstrong's girlfriend. On the date of his murder, she was eight months pregnant. The night before, they had attended a Lamaze class together. Armstrong worked at Home Base, and had just been promoted. He was a very nice person, and was excited about McCoy's pregnancy. On the date of Armstrong's murder, McCoy was at his house with his mother. They were waiting for Armstrong to take them to look for a new car for his mother. At some

point, they received a phone call from the hospital and were told that Armstrong had been shot. McCoy was very scared and prayed for him to be alive. They drove to the hospital, and when they arrived they were taken into a room. Someone told them that Armstrong had died, and McCoy collapsed. (28 RT 4962-4966.) They were taken to see Amstrong's body. She kissed his cheeks. After his death, McCoy did not want to wake up in the morning. Her daughter, Cherish, was born a little over a month later. (28 RT 4966-4967.)

At the time of trial, Cherish was eight years old. McCoy testified that Cherish asked about her father "all the time." (28 RT 4968.) She had a difficult time when her class made Father's Day cards the previous year, and told McCoy it was not fair that she did not have a daddy. She "cried and she cried and she cried." (28 RT 4968-4969.) McCoy had a hard time raising Cherish by herself. Every holiday, Cherish wanted to look at Armstrong's picture. (28 RT 4969.) McCoy thought about Armstrong every day. She did not think she would ever find another man like him. He was her best friend. (28 RT 4970-4971.)

(6) Carolyn Boyd

Carolyn Boyd testified that she was Trevon Boyd's mother. Trevon was a beautiful person. He enjoyed writing music, sports, fishing, and dancing. She learned about his death when one of her neighbors told her to go to the hospital. Her husband was already at Daniel Freeman Hospital. When Boyd arrived at the hospital, her husband was there. He already knew that Trevon had died. When Boyd found out, it felt like a part of her was gone. (29 RT 4998-5000.) She could not eat or sleep. It was very difficult for her to make the funeral arrangements. It was also difficult to testify in court. Boyd missed everything about her son. Her family "will never be whole, never be whole again." (29 RT 5003-5004.) Holidays

were difficult for her family. She thought about her son every day. (29 RT 5004.)

(7) Olive Burgess

Olive Burgess testified that Trevon Boyd was her cousin. He was a "sweet kid." (29 RT 5007.) He meant everything to her. His death made her feel numb. The family still cried at night. (29 RT 5008-5009.) The hardest thing for Burgess to do after Boyd's death was to explain it to her children. They were all close to Boyd. It was also difficult learning to cope with his death. Burgess testified that every day was a struggle. She missed Boyd's smile. She thought of him when she saw her own children growing up. (29 RT 5011-5013.)

b. Victim Impact Testimony Related to Aggravating Evidence

(1) Melissa Lopez

Melissa Lopez testified that as a result of the September 27, 1994, robbery of the Marine Corps West Federal Credit Union, she immediately began looking for a different job. She required six months of post traumatic stress syndrome therapy, which consisted of meeting with a therapist twice a week. She suffered nightmares for a long period of time after the robbery. At the time of trial, 11 years after the robbery, she was still frightened of doors opening quickly and of people who looked "suspicious." She did not trust people and avoided public areas after dark. (23 RT 3999.) She "freaked out" whenever she saw someone who resembled appellant. (23 RT 4000.)

(2) Jasper Altheide

Jasper Altheide testified that she had a very difficult time after the Vandenberg Credit Union robbery and murder of Christine Orciuch. She

felt directly responsible for Orciuch's death because she had the keys to the vault and could have given appellant the money. She had just had a baby and was very scared. She felt very guilty about not allowing Orciuch's son to see her. Altheide had nightmares, was overly protective of her children, and had difficulty working at the credit union. (27 RT 4656-4657, 4660.) She stated, "the innocence of living is gone." (27 RT 4657.)

(3) Quentin Orciuch

Quentin Orciuich testified that everything was "hard" after his mother's murder. He thought about her every day. He spent approximately one and a half years in counseling after her death. (28 RT 4808-4809.)

(4) Chester Orciuch

Chester Orciuch was the widower of Christine Orciuch. At the time of her murder, they had three children: Sabrina, age 17; Erika, age 14; and Quentin, age 11. (28 RT 4808-4809.) That morning, Christine woke up and made Chester breakfast. She also packed his lunch and helped him off to work. At about 9:25 a.m., he received a call on his pager, but did not recognize the number. When he tried to call back, he received a message that the call could not be completed. He subsequently received a second page from the Lompoc Hospital. He called the number and was told that his wife had been in an accident. He was asked to come to the hospital immediately. When he arrived at the emergency room, he inquired about his wife. He was taken to a room and told that his wife had been fatally shot. (28 RT 4811-4813.) He screamed "Oh, no," and asked for his family. (28 RT 4813.) He was taken to another room where Sabrina was trying to comfort Quentin. Quentin was asking, "What happened to mommy? Is mommy okay?" (28 RT 4813-4814.) Chester told his children that

Christine had "gone to Heaven." (28 RT 4814.) They went to the emergency room and said a prayer at her body. (28 RT 4814.)

Chester testified that Christine's death was extremely difficult for him and his family. She was the family "caretaker." (28 RT 4815-1816.) She home schooled the children and was very dedicated to the family. Chester had difficulty as a single dad. The family had counseling, but "there is an awful lot of anger in our family." (28 RT 4816.) Sometimes things got overwhelming. Chester testified that there were times he woke up in the morning and had dry heaves. There were also times that he woke up in the middle of the night screaming. He lacked focus at home and at work. (28 RT 4816-4817.)

(5) Moira Philley

Moira Philley testified that the robbery of the credit union had a tremendous effect on her life. Her marriage almost "fell apart." (27 RT 4699.) Philley would not open the front door, she had an alarm system installed, and her children were scared. She eventually received trauma counseling. Philley had nightmares, and felt guilty because she survived and Christine Orciuch did not. She knew the Orciuch family, and felt terrible about what happened. She had anxiety attacks when she went to work. (27 RT 4699-4703.)

(6) Octavio Gallardo

Octavio Gallardo testified that the shooting caused him to be very "fearful." He was afraid to leave his apartment. In addition, he required medical attention for his gunshot wound. His leg still hurt when the weather was very cold. (28 RT 4747-4748.)

5. Mitigating Evidence

a. Appellant's Childhood and Background

(1) Reginald Campbell

Reginald Campbell had known appellant since they were children. They were like brothers. They used to go to the mall together and play football and track. They remained friends until they were teenagers, at which time they went "separate ways." (30 RT 5358-5359.) Some people who lived in the same neighborhood as Campbell and appellant joined gangs. Campbell never joined a gang himself, but he was around them. His mother and aunt worked very hard to keep him out of a gang. Appellant's family did not try to keep him out of a gang. (30 RT 5359-5361.) Their neighborhood was "rough" and had many different gangs. (30 RT 5361-5362.) The gangs actively recruited members, and there was a lot of violence in the area, including shootings, stabbings, and carjacking. (30 RT 5362-5363.) When Campbell was 11 and appellant was 10, they saw a man pulled out of a house and stabbed. (30 RT 5364.) Appellant was beaten up by gang members when he would come home from school. (30 RT 5370.)

Appellant's older brother, Big Sonny, was in the 6 Deuce Brims gang. He was well-known in the neighborhood. He was a violent person. Campbell saw him shoot a man in the head. He also saw him shoot at appellant after they had an argument. (30 RT 5366-5367, 5381.) Appellant admired Big Sonny, and saw him as a brother and father. At some point Big Sonny was killed. Campbell testified that this had a tremendous effect on appellant. He changed. Appellant's mother began smoking cocaine. (30 RT 5368-5369, 5383, 5391.) Campbell saw appellant's mother and step-father hit appellant several times. (30 RT 5371-5372.) He never saw appellant's grandmother hit him. (30 RT 5387-5388.) Appellant

eventually joined the same gang as his brother and took the nickname "Little Sonny." (30 RT 5384.)

As a child, appellant had a lot of energy. Campbell thought he was hyperactive and should have been on medication. He liked to swim. On one occasion when Campbell was eight, he was trying to learn how to swim at the pool at Harvard Park. One of the other boys told him to just jump in and move his hands and feet. Campbell dove into the pool and started to sink. Appellant jumped in the water and pulled him to the side of the pool. He got out and pulled Campbell out of the water. (30 RT 5374-5375.)

Appellant did not like Crips gang members. He hated a certain Crips member who picked on appellant and Campbell. After Big Sonny was killed, appellant hated more Crips members. (30 RT 5385-5386.) Campbell tried to help appellant straighten out his life. Appellant also had girlfriends who tried to help him. He did not listen to any of them. (30 RT 5393-5394.)

(2) Raylene Bell

Raylene Bell was appellant's half-sister. They share the same father, Frank "Too Sweet" Jennings, who was a boxer. She first met appellant when he was nine and she was a teenager. Though Frank Jennings played some role in her life, he was not involved in appellant's life. As children, Bell and appellant played together, rode bikes, ate dinner together, and went to church. (30 RT 5398-5400, 5408.) Raylene did not live in appellant's neighborhood. She wished he did not live there because it had gangs and crime. (30 RT 5400.) Appellant was a quiet but energetic kid. He was always busy. He liked to play outside. (30 RT 5401.) Appellant never told Bell that he was in a gang. He never wanted to talk about Big Sonny after he was killed. (30 RT 5404-5405.) Someone once told her that appellant was in a gang, but she thought it was a joke. (30 RT 5405-5406.)

Bell last heard from appellant in 1993. (30 RT 5414.) She tried to be a good influence on him. (30 RT 5414.)

(3) Linda Woods

Appellant grew up in the neighborhood where Linda Woods lived. She knew him because he played with her children. She saw appellant often from the time he was nine years old until he was 16 or 17. As a child, appellant needed guidance. (31 RT 5540-5543.) Their neighborhood had problems with drugs and gangs. (31 RT 5545-5546.) Appellant's mother had mental and financial issues, as well as a drug problem. Her addiction became apparent after appellant's older brother, Big Sonny, one of the "elders" in the gang, was killed. (31 RT 5544-5545, 5549.) There were periods of time when appellant's mother was not around. Appellant loved his family and was very protective of his mother and sisters. (31 RT 5550-5551.) He looked up to Big Sonny, and was devastated by his death. Appellant became involved in a gang when he was 13 or 14. (31 RT 5552-5553.) He never complained about being abused by his family. (31 RT 5557.)

(4) Pearl Thomas

Pearl Thomas was appellant's mother. She grew up with her grandparents in New Orleans. When she was eight or nine years old, she began living with her mother in Los Angeles. When Thomas was 11 years old, her mother married a man named Thomas Parks. When she was 12 or 13, Thomas's mother accused her of sleeping with Parks. Thomas ran away from home, and was eventually placed at the Ventura School for Girls when she was 15. (31 RT 5570-5573.) Thomas found out she was pregnant shortly thereafter. She was 17 years old when she had her first child, John C. Jones, who was later known as Big Sonny. (31 RT 5574.)

Thomas continued to get in trouble with the law and was arrested six times between 1966 and 1970. (31 RT 5575-5576, 5580.)

Appellant was born on August 1, 1970. (31 RT 5576.) At the time he was conceived, she was taking "red devil" barbiturates. She stopped taking these drugs when she found out she was pregnant. (31 RT 5584-5585.) Appellant's father was Frank Jennings. At the time of his birth, Thomas did not know who his father was. (31 RT 5591.) Jennings never lived in the same house as appellant. He sometimes visited or dropped off a Christmas present. When appellant was two years old, Thomas learned that Jennings was a heroin addict. (31 RT 5593.)

In 1971, Thomas married Ronald Biggles. They had a daughter together, Lahronda Biggles. The marriage ended after two years. It was not a happy marriage. Biggles drank and favored Lahronda over appellant and his brother. He was abusive in front of the children. He would also bring other women into the home when Thomas was in jail. (31 RT 5594-5597.) Thomas later married James Wright and had a daughter, Nakei. (31 RT 5608.) Wright did not get along with appellant and hit him a few times. He also whipped appellant. (31 RT 5608-5609, 5656.)

Thomas supported her children by stealing. She also received welfare and aid to families with dependent children. She received general relief when she was on drugs. (31 RT 5598.) Thomas was arrested approximately 47 times in her life. She spent periods of time incarcerated in both county jail and state prison. (31 RT 5601-5602.) Thomas tried to be a good mother to appellant. He always had food to eat, and she kept their house clean. She hit and whipped appellant because that was the way she was raised. (31 RT 5618-1519.)

Appellant had learning disabilities in elementary school. (31 RT 5609.) He was evaluated and sent to a school called Vista Del Mar. He also attended the Kedrin Center. Thomas took him there because he was

starting fires, stealing, and leaving without telling anyone where he was going. She checked him out against medical advice because she missed him. (31 RT 5612-5613, 5638.) Appellant cried a lot for his mother when she left him. Thomas took him to a doctor for his hyperactive behavior, and he was prescribed medications. The medications made him act like a "zombie." (31 RT 5614-5615.) He was required to take the medication while he attended Vista del Mar. He then attended the Slauson Learning Center for a year. The family then moved to Texas, and Thomas took appellant off the medication. (31 RT 5616, 5641, 5655-5656.)

Thomas's older son, Big Sonny, was "hard core" into his gang. (31 RT 5620.) He did not spend a lot of time with appellant because he did not want appellant to be in a gang. (31 RT 5620.) Two days before Big Sonny's death, appellant was arrested for throwing glass at a marked police truck conducting surveillance on Big Sonny. Big Sonny was subsequently shot and killed in a gang-related incident. Appellant attended the funeral with a sheriff escort. (31 RT 5628-5630.) Thomas began using rock cocaine after Big Sonny's murder. Over the following 12 years she went to prison four times. (31 RT 5630.) Thomas was last paroled in 1997, and as of the time of trial she had been clean for six years. (31 RT 5632, 5652.)

Appellant became involved in gangs after Big Sonny's murder. (31 RT 5645.)

(5) Beverly Parks

Beverly Parks was married to appellant's uncle. She first met appellant in 1976 when he was six years old. (32 RT 5769-5770.) At that time, she moved into the house where appellant was living with his grandparents, Amy and Thomas Parks, his aunts, Crystal and Linda Parks, his uncle, Thomas Parks, his brother, Sonny, and his two sisters, Lahronda and Raylene. Appellant spent most of his childhood living with his

grandmother, and his mother was often in jail. (32 RT 5770-5772.) The neighborhood was "rough," with a lot of gangs and violence. (32 RT 5771.) Appellant was a "hyper" child. (32 RT 5772.) He was very active and tried to get negative attention. On one occasion, he struck matches in the closet and almost started a fire. (32 RT 5772-5773.) Another time, when he was seven or eight, he stole his grandmother's gun and ran down the street with it. (32 RT 5773.) Appellant was beaten by family members almost every day. (32 RT 5774-5775.) These beatings were very excessive. (32 RT 5775.) Sometimes he was beaten with extension cords, belts, and switches. He cried for his mother during the beatings. He also cried himself to sleep. (32 RT 5776.)

Appellant's grandmother, Amy Parks, seemed to hate appellant and his sister, Larhonda. Larhonda was also beaten. (32 RT 5776-5777.) Parks "did a lot of evil things." (32 RT 5777.) When she drank, she became a different person and "was wild and violent, brutally violent." (32 RT 5778.) She also mentally abused the children by calling them names. She scared appellant and Lahronda by turning off the lights and following them around with a long knife. (32 RT 5778-5780, 5790-5791.) She believed in voodoo and performed "curses" on people. (32 RT 5779-5780.)

(6) Linda Gavin

Linda Gavin had known appellant since he was born. She was his godmother. (32 RT 5814-5815.) Gavin first noticed problems with appellant when he was five years old. He set fires, broke antennas off of cars, and cried a lot. (32 RT 5817.) As a child, appellant fought and stole things. (32 RT 5818-5819.) He was "very hyper." (32 RT 5819.) Appellant's grandmother was "an evil woman." (32 RT 5820.) She showed her "evilness" to anyone she did not like, particularly appellant and Lahronda. (32 RT 5820-5821.) She referred them as "MFs," meaning

"motherfuckers" and would call Gavin and tell her to pick them up. (32 RT 5821.) On occasion, she was able to do so. (32 RT 5822.) Appellant idolized his older brother Sonny. (32 RT 5823.) He disliked the men his mother dated or married. One of his mother's husbands, Ronnie Biggles, was physically abusive towards appellant. (32 RT 5824.)

b. Educational Evaluation

Dr. Nancy Cowardin held a Ph.D. in educational psychology and special education.

She worked in private practice, providing educational training and forensic assessment and consultations. She also testified as an expert witness regarding learning disabilities. (31 RT 5451.) She performed an assessment on appellant, which included meeting with him and reviewing documents regarding his educational history. She also reviewed documents regarding his personal background, including documents from the California Youth Authority, and a neuropsychological evaluation. A 1984 Individual Education Program (IEP) from the Los Angeles Unified School District diagnosed appellant as being Seriously Emotionally Disturbed (SED), and suffering from Attention Deficits Disorder (ADD) and Learning Disabilities (LD). (31 RT 5456-5462, 5472, 5477-5478.) A second IEP was conducted the following year at the Slauson Learning Center. It consisted of one-year review of the initial IEP. The diagnosis was, again, SED. It was noted that appellant had taken Ritalin for a short period of time. (31 RT 5466.) Documentation from the Youth Authority indicated that appellant had impulsive behavior and lacked "decision-making skills." (31 RT 5473.) Dr. Cowardin spent approximately one hour reviewing the documents provided by defense counsel, and approximately four and a half hours meeting with appellant and conducting her assessment. (31 RT 5509.)

Dr. Cowardin's assessment concluded that appellant continued to suffer from ADD as an adult. It was more "subdued," and he was able to control it for periods of time. He also had an "auditory processing problem," which accounted for his learning disabilities. He was able to work on his reading and writing skills. (31 RT 5480, 5497-5498.) During Dr. Cowardin's testing, appellant was cooperative and interactive. (31 RT 5485.) The results showed that he had attention deficits, but that he tried hard to regain control and do well. (31 RT 5485-5486.) Appellant's IQ was average. He scored better on the non-verbal portion of the IQ test. (31 RT 5487.) He was "more than literate," and his writing skills were at a fourth grade level. (31 RT 5491, 5493-5495.) His math literacy was "borderline." (31 RT 5496.) Appellant's learning deficits could affect academic performance and performance in daily life. (31 RT 5503-5504, 5512.) None of these deficits, though, would make it impossible for appellant to plan a bank robbery, murder, or carjacking. (31 RT 5530-5531, 5533.)

c. Neurological Evaluation

Appellant underwent electrophysiologic testing on August 10, 2000, under the direction of Dr. Arthur Kowell, M.D., Ph.D. (32 RT 5679-5680.) The test consisted of four sections: a standard electroencephalogram, and electroencephalogram spectral analysis, an auditory invoked potential test, and a visual invoked potential test. Only the results of the visual invoked potential test were abnormal. (32 RT 5680-5681.) This result indicated that there was some abnormal functioning of the brain. It did not indicate how long the abnormality had been present or how it occurred. (32 RT 5682.) The areas of appellant's brain that functioned abnormally were the vertex, the right parietal region, and the right frontal region. The vertex deals with motor behavior and initiation of activity. The right parietal

region deals with sensory functions. The frontal lobe deals with impulse control. (32 RT 5683-5684.) These abnormalities did not predict behavior. (32 RT 5684, 5725, 5737.)

In 2003, Dr. Kowell reviewed appellant's academic records, mental health records, medical records, and court records. (32 RT 5694-5695.) These records indicated that appellant had a history of ADD and learning disability. This was consistent with the results of the testing performed by Dr. Kowell. (32 RT 5696, 5712-5713.) The results of two positron emission tomography scans, a magnetic resonance imaging scan, and a neuropsychological evaluation were also consistent with Dr. Kowell's findings. (32 RT 5696-5710.) Dr. Kowell opined that appellant's mother's use of "red devil" barbiturates in the early stages of pregnancy could possibly be the cause of appellant's brain dysfunction. (32 RT 5714-5715.)

On cross-examination, Dr. Kowell testified that the abnormalities seen on the study he performed could be consistent with a patient with a history of substance abuse. (32 RT 5718-5719.) Abnormalities could also be the result of a congenital abnormality, brain tumor, head trauma, a degenerative process of the brain, and multiple sclerosis. Dr. Kowell did not know the cause of appellant's abnormality. (32 RT 5719.)

d. Genetic Evidence

Dr. Carl Osborn, Ph.D., opined that appellant "has a particular type of gene that has very recently been showed to be associated in concert with childhood maltreatment with severe antisocial behavior." (32 RT 5856.) This opinion was based on interviews he read which indicated that appellant was abused as a child, as well as results from genetic testing performed at the Orphan Disease Testing Laboratory at the University of Southern California. (32 RT 5856.)

6. Rebuttal Aggravating Evidence

Sergeant Frank Carey was assigned to investigate the attempted murder of George Minor. As part of his investigation he prepared photographic lineups, which included photographs of the suspects in the case, appellant and Ronald Green. Sergeant Carey personally took the photographs of the suspects and put them in separate lineups. He brought the lineups to Minor, who was still in the hospital. Sergeant Carey gave Minor the standard instructions prior to showing him the lineups. Minor picked appellant out of one lineup. He did not to pick Green out of the other lineup. (33 RT 5970-5974.)

While he was in the hospital, Sergeant Carey learned that Minor's wife, Saudia Minor, was a potential witness. He drove to her house and showed her the photographic lineups. She identified appellant, but not Green. Sergeant Carey thereafter tried to bring the Minors into court to testify by serving them with subpoenas. They did not appear in court. (33 RT 5974-5976.)

ARGUMENT

I. APPELLANT FAILED TO OBJECT TO THE ADMISSION OF THE CHALLENGED EVIDENCE, AND THEREFORE THIS CLAIM HAS BEEN FORFEITED; IN ANY EVENT, THE EVIDENCE WAS PROPERLY ADMITTED

Appellant first argues that the trial court violated his rights to due process and a fair trial under the Fourteenth Amendment when it admitted evidence regarding witness intimidation. Specifically, he argues that the prosecutor's opening and closing arguments during the guilt phase trial were improper and prejudicial, that the testimony of Lewis Dyer and Zenia Meeks was unsubstantiated, and that evidence related to safety precautions taken with regard to other witnesses was also improper. He also argues that the trial court improperly instructed the jury on consciousness of guilt.

(AOB 79-99.) As a preliminary matter, appellant failed to object at the time of trial to the prosecutor's arguments, the intimidation and precautions evidence, and the consciousness of guilt instruction. Therefore, these claims have been forfeited. In any event, the witness intimidation and safety precautions evidence was properly admitted, the prosecutor fairly commented on this admissible evidence, the jury was properly instructed, and any alleged error was harmless. Therefore, this claim should be rejected.

A. The Prosecution's Opening and Closing Arguments

Although appellant does not specifically characterize this claim as one of prosecutorial misconduct, in substance it is exactly that. He contends that the prosecutor improperly argued that Lewis Dyer and Zenia Meeks were the subject of witness intimidation, thereby explaining their initial reluctance to cooperate with the police. He also claims that the witness intimidation was never "substantiated," and that the prosecutor improperly vouched for the credibility of these witnesses. (AOB 79-90.) Appellant even characterizes the prosecutor's opening statement remarks as an "egregious violation" of his constitutional rights. (AOB 88.) As a result of such arguments, appellant alleges he was "irretrievably prejudiced." (AOB 84.)

It is well established that "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 v. Hill* (1998) 17 Cal.4th 800, 820, internal quotation marks omitted.) This rule does not apply if it would have been futile for the defendant to object and request an admonition, if an objection and admonition would not have cured the harm that the misconduct caused, or if the defendant could not

ask for an admonition because the trial court overruled his objection. (*People v. McDermott* (2002) 28 Cal.4th 946, 1001.) Here, appellant failed to object to the prosecutor's arguments or request an admonition. The failure to both object and request an admonition at any time bars relief as to all alleged instances of misconduct, as there is no showing the alleged harm could not have been cured by an admonition to disregard the arguments if they were deemed improper. (*People v. Harrison* (2005) 35 Cal.4th 208, 244.) Therefore, this claim has been forfeited.

In any event, this claim lacks merit. A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Cole* (2004) 33 Cal.4th 1158, 1202.) A prosecutor's misconduct that does not render a trial fundamentally unfair under the federal standard may nevertheless violate California law if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*Ibid.*) Where the issue focuses on comments that a prosecutor made before the jury, the question is whether it is reasonably likely that the jurors construed or applied the remarks at issue in an objectionable fashion. (*Id.* at pp. 1202-1203.) A prosecutor is given wide latitude during argument, and the "argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*People v. Hill, supra*, 17 Cal.4th at p. 819, quoting *People v. Wharton* (1991) 53 Cal.3d 522, 567 568.) Moreover, during closing argument, counsel may state matters "not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature." (*Ibid.*) But it is misconduct for a prosecutor to argue facts not directly in evidence. (*Id.* at pp. 827-828.) A reviewing court views the challenged statement in

the context of the argument as a whole. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

Here, the evidence at trial established that Lewis Dyer and Zenia Meeks were intimidated, and because of this intimidation they initially failed to cooperate with investigators. Dyer testified that he was asked to view a lineup when he was in county jail. He knew that appellant was also in county jail at the time. (15 RT 2512-2513.) Dyer testified that although he saw appellant in the lineup he did not identify him, stating, "(b)ecause I was in custody, and like I said before, when you are in custody, when you are labeled as a snitch, anything might happen to you while you are in custody." (15 RT 2513.) Dyer testified that after the lineup a deputy sheriff came to his jail cell and took him to an office where appellant was waiting. Appellant told Dyer not to say anything and showed him a copy of the statement Dyer made to police identifying appellant as the shooter. Appellant told Dyer that the deputy sheriff was his cousin and that appellant could have Dyer moved to any facility he wanted as long as Dyer did not identify him. (15 RT 2515-2517.) Dyer testified that this caused him concern, "(b)ecause if that paperwork get around the jail, then I got to watch out for me getting killed or something happening to me wrong." (15 RT 2516.) Dyer told appellant that he had not picked him out of the lineup and that he did not intend to identify him. The deputy sheriff then took Dyer back to his cell. (15 RT 2517-2518.) Dyer subsequently testified that in the summer of 1995, while he was incarcerated in a Youth Authority facility, he was interviewed by an investigator working on behalf of appellant. Dyer lied to the investigator, telling her that he did not see the shooting and that the police and the victims's families pressured him into talking. He lied because he was in custody and did not want go back to county jail. He believed that if he said he did not know anything, he would be left alone. (15 RT 2518-2519.) Dyer testified that he became even more

worried about his safety when the investigator told him that appellant had said Dyer was involved in the murders. (15 RT 2519.) Dyer testified that he decided to cooperate with detectives three years later. At that time he was trying to change his life. He told the detectives that he had previously been threatened by appellant. (15 RT 2520-2522, 2590.) On August 12, 1999, Dyer attended a live lineup and identified appellant as the shooter. (15 RT 2522.) On August 20, 1999, Dyer testified at a preliminary hearing. During his testimony, he identified appellant as the person who shot and killed Hicks, Armstrong, and Boyd. (15 RT 2523-2524.)

Meeks testified that she did not identify appellant as the shooter on the date of the murders because she did not want to get involved and was afraid for herself and her family. (16 RT 2769.) She was also afraid that if she identified appellant, he would "come after" Dyer. (16 RT 2769.) Meeks testified that over the following days she spoke with the police several times. She was shown a set of photographs but did not identify anyone because of concerns about her family's safety. (16 RT 2771-2772.) A member of Meeks's family received a phone call during which the caller stated he or she knew that Meeks had information about the crime and that he or she knew where Meeks lived. (16 RT 2770-2771, 2788.) Meeks testified that in 2002, she was visited by Detective Smith, to whom she had previously been very hostile. Because of the changes she made in her life, Meeks decided it was time to tell the truth about the murders. She told him she knew who the shooter was, and she identified appellant in a photographic lineup. (16 RT 2775-2780, 2801-2802.) She also identified appellant as the shooter at trial. (16 RT 2775.)

The prosecutor's statements during opening and closing arguments regarding witness intimidation were fair comments on evidence presented at trial. (14 RT 2308, 2316-2320.) As set forth above, the Dyer testified that he initially did not want to get involved in this case, and therefore

failed to cooperate with the police. He testified that appellant confronted him in county jail and told him that the deputy sheriff was his cousin. He also testified that when he decided to cooperate he told the detectives that he had been threatened. Meeks also testified that she initially did not want to cooperate with the detectives, and she did not want to get Dyer involved. She also testified that a relative received a threatening phone call. As this evidence was presented at trial, it was entirely appropriate for the prosecutor comment upon it during argument. There is no evidence that the jury was confused by the comments or applied them in an objectionable fashion. To the extent appellant argues that it was improper for the prosecutor to comment upon the witness intimidation evidence because it was "unsubstantiated," he fails to cite any authority requiring such evidence to be "substantiated." Therefore, there was no misconduct.

Moreover, appellant cannot establish that he suffered any prejudice as a result of the prosecutor's arguments. The trial court instructed the jury with CALJIC No. 1.02, which stated in part, "Statements made by the attorneys during the trial are not evidence." (29 RT 3549; 12 CT 3311.) The trial court also instructed the jury with CALJIC No. 2.06, which stated, "If you find that a defendant attempted to suppress evidence against himself in any manner, such as by the intimidation of a witness, this attempt may be considered by you as a circumstance tending to show consciousness of guilt. However, *this conduct is not sufficient by itself to prove guilt*, and its weight and significance, if any are for you to decide." (21 RT 3552; 12 CT 3312; emphasis added.) The jury is presumed to have understood and followed the court's instructions. (*People v. Hinton* (2006) 37 Cal.4th 839, 864; *People v. Smithey* (1999) 20 Cal.4th 936, 961.) Therefore, this claim must be rejected.

Appellant also claims that CALJIC No. 2.06 was improperly given. (AOB 89). Appellant failed to object to this instruction at trial, and

therefore this claim has been forfeited. (*People v. Arias* (1996) 13 Cal.4th 92, 171.) In any event, the giving of this instruction was supported by evidence of witness intimidation and appellant's connection to this intimidation. (15 RT 2512-2522, 16 RT 2770-2772, 2788.) Moreover, the instruction asked the jury to determine first whether appellant himself tried to suppress evidence, and also clarified that the intimidation evidence was not sufficient to prove guilt itself. (21 RT 3552.) Thus, there was no instructional error. (*People v. Rodrigues* (1994) 8 Cal. 4th 1060, 1140 [CALJIC No. 2.06 was properly given where "the jury could reasonably infer from [the] evidence that defendant attempted to suppress evidence"].)

B. Evidence Regarding the Intimidation of Lewis Dyer and Zenia Meeks Was Properly Admitted

Appellant next contends that the trial court erred when it admitted "unsubstantiated" intimidation testimony by Dyer and Meeks. (AOB 90-97.) Appellant failed to object to this evidence at the time of trial, and therefore this claim has been forfeited. In general, questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be argued on appeal. (*People v. Alvarez* (1996) 14 Cal.4th 155, 186; see also § 353.) Therefore, this claim must be summarily rejected.

In any event, appellant's contentions are meritless.

> Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. (*People v. Malone* (1988) 47 Cal.3d 1, 30 [252 Cal. Rptr. 525, 762 P.2d 1249]; *People v. Warren* (1988) 45 Cal.3d 471, 481 [247 Cal. Rptr. 172, 754 P.2d 218]; see generally Evid. Code, § 780.) An explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court. (*People v. Feagin* (1995) 34 Cal.App.4th 1427, 1433 [40 Cal. Rptr. 2d 918]; see *People v. Avalos* (1984) 37 Cal.3d 216, 232 [207 Cal. Rptr. 549, 689 P.2d 121].)

(*People v. Burgener* (2003) 29 Cal.4th 833, 869.) "It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible." (*People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1587-1588.) Evidence Code section 1101, subdivision (c) makes clear that that "[n]othing in [section 1101] affects the admissibility of evidence offered to support or attack the credibility of a witness."

Here, there was a substantial delay between the date the murders were committed and the dates Dyer and Meeks began cooperating with investigators. As summarized above, both witnesses testified that they initially failed to cooperate with investigators because they were afraid for their own safety and/or the safety of their families. The intimidation evidence was relevant to their credibility, and therefore admissible. (See, e.g., Evid. Code, § 780; *People v. Burgener, supra,* 29 Cal.4th at p. 869; *People v. Warren* (1988) 45 Cal.3d 471, 481; *People v. Malone* (1988) 47 Cal.3d 1, 30.)

Moreover, defense counsel thoroughly cross-examined both witnesses and disputed their credibility during argument. By claiming the witnesses' testimony was "unsubstantiated" and should not have been accepted by the jury, appellant is simply attempting to persuade this Court to reach a different determination than the jury. This is improper. (See *People v. Snow* (2003) 30 Cal.4th 43, 66 [the credibility of a witness is with the purview of the jury].)

In any event, any alleged error in the admission of the intimidation evidence was harmless. Under Evidence Code section 353 and section 13 of article VI of the California Constitution, a judgment shall not be set aside for the erroneous admission of evidence unless the error resulted in a miscarriage of justice. (*People v. Breverman* (1998) 19 Cal.4th 142, 172-173; *People v. Watson* (1956) 46 Cal.2d 818, 836.) As explained in *People*

v. Watson, *supra*, at page 836, under the miscarriage of justice standard, a defendant is not entitled to reversal unless, but for the complained of error, there is a reasonable probability the defendant would have received a better result. Here, any error was harmless under this standard. Dyer and Meeks both positively identified appellant as the shooter at trial. (15 RT 2523-2524; 16 RT 2775.) Kipchoge Johnson and Christopher Fennelle testified that appellant admitted he committed the murders, and even bragged about it. (15 RT 2653-2658, 2660-2662, 2663-2665, 2672, 2678, 2680; 18 RT 3189-3190, 3202.) Moreover, appellant provided details about the crime to the investigators during his October 7, 1994 interview that only the killer would know, such as the type of gun used, the color of the getaway car, and his history with Lewis Dyer. (Peo. Exh. 27B at 12-13, 58-60.) Therefore, there is no reasonable probability that appellant would have received a better result if the intimidation evidence had been excluded. Therefore, any error was harmless. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) For the same reasons, any federal constitutional error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d. 705].)

C. Evidence Regarding Special Precautions Taken with Regard to Other Witnesses Was Properly Admitted

Appellant next argues that the trial court improperly admitted evidence regarding special precautions taken to ensure the safety of Kipchoge Johnson and Christopher Fennelle because there was no evidence that appellant was threatening or intimidating them. (AOB 97-99.) As with appellant's other claims, this argument has been forfeited. "[T]o the extent [appellant] asserts a different theory for exclusion than he asserted at trial, that assertion is not cognizable [on appeal]." (*People v. Partida* (2005) 37 Cal.4th 428, 438.) As set forth below, appellant objected to this evidence

on the ground of relevance, which is a different theory from the instant argument on appeal. Therefore, this claim must be summarily rejected.

Moreover, appellant's contention is meritless. At trial, the prosecution asked Detective William Smith what precautions were taken to ensure the safety of Johnson and Fennelle both during and after trial. Defense counsel objected on the ground of relevance. The trial court overruled the objection, and Detective Smith explained that both witnesses were inmates with the California Department of Corrections. Instead of transporting the witnesses to court in a bus along with other inmates, Detective Smith arranged for investigators from the Office of the District Attorney to transport Johnson by private vehicle. Detective Smith flew to the prison where Fennelle was incarcerated and brought him to Los Angeles County. The witnesses were thereafter taken to jails in suburban communities. Their locations were only known by Detective Smith, the District Attorney, and the Sheriff's Department. They would return to prison via the same methods. As both witnesses were scheduled to be released within a year of the trial, Detective Smith offered them relocation assistance. (18 RT 3214-3216.)

Evidence regarding special precautions taken to ensure the safety of Johnson and Fennelle was relevant to their credibility and therefore admissible. These witnesses were admitted gang members and former associates of appellant who were in custody at the time of their testimony. The safety precautions taken underscore the risks they took in testifying against appellant. In other words, the witnesses' willingness to testify against appellant despite justifiable concerns about their safety, which led to the safety precautions, tended to enhance their credibility. (See *People v. Verdugo* (2010) 50 Cal.4th 263, 285.) With regard to Fenelle's testimony that he was not concerned about his safety as a result of testifying against

appellant, Fennelle explained that this was because he was already in protective custody. (18 RT 3205.)

Moreover, any error in the admission of this evidence was harmless. Dyer and Meeks both positively identified appellant as the shooter at trial. (15 RT 2523-2524; 16 RT 2775.) Kipchoge Johnson and Christopher Fennelle testified that appellant admitted he committed the murders, and even bragged about it. (15 RT 2653-2658, 2660-2662, 2663-2665, 2672, 2678, 2680; 18 RT 3189-3190, 3202.) Moreover, appellant provided details about the crime to the investigators during his October 7, 1994 interview that only the killer would know, such as the type of gun used, the color of the getaway car, and his history with Lewis Dyer. (Peo. Exh. 27B at 12-13, 58-60.) Therefore, there is no reasonable probability that appellant would have received a better result if the safety precaution evidence had been excluded. Therefore, any error was harmless. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) For the same reasons, any federal constitutional error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

II. APPELLANT FAILED TO OBJECT TO THE PROSECUTOR'S REMARKS ABOUT HIS ALLEGED CHILDHOOD ABUSE, AND THEREFORE THIS CLAIM HAS BEEN FOR FORFEITED; IN ANY EVENT, THE PROSECUTOR'S COMMENT DID NOT AMOUNT TO PREJUDICIAL MISCONDUCT

Appellant next contends that the prosecutor committed misconduct during the penalty phase closing argument by implying that had appellant's sisters testified at trial, they would not have corroborated Beverly Parks's testimony that appellant suffered childhood abuse at the hands of his grandmother. He claims that the prosecutor knew this was untrue because he had copies of reports from interviews appellant's sisters gave to a defense investigator, which confirmed the abuse. (AOB 100-106.)

Appellant failed to object to the prosecutor's statement at the time of trial, and therefore this claim has been forfeited. In any event, the prosecutor's comment did not amount to misconduct, and appellant suffered no prejudice. Therefore, this claim should be rejected.

A. Procedural History

During the penalty phase closing argument, the prosecutor discussed the mitigating evidence presented by the defense regarding appellant's alleged childhood abuse. Referring to the testimony of Beverly Parks, the prosecutor stated,

> And you remember her demeanor. You remember her testimony. She testified to a few things that she didn't even observe, that she had heard, but you saw her answers, so you have to weigh how much that evidence really meant and you also have to consider the fact that no one else from that household – her daughters, Mrs. Park's daughters didn't testify and they were there. Jimmy Parks, her husband, didn't testify, and he could have testified that the grandmother beat on the defendant, nor did any of the defendant's sisters testify that the grandmother mistreated the defendant.

(35 RT 6232-6233.) Defense counsel did not object to the prosecutor's statement. The jury subsequently reached a verdict of death. (36 RT 6464-6466.)

On June 11, 2003, appellant filed an application for a new penalty phase trial. (13 CT 3477C-3477P.) The application argued in part that appellant was entitled to a new trial because the prosecutor improperly "mentioned defendant's sisters as failing to corroborate the witness who did testify" about the abuse. (13 CT 3477D.) He argued that the prosecutor was in possession of investigation reports regarding interviews appellant's sisters gave to a defense investigator. These reports included allegations that appellant's grandmother physically abused appellant. Copies of the reports were attached to the application. (13 CT 3477I-3477P.)

On June 18, 2003, the trial court denied the application, stating,

> I think that in this particular matter the evidence that was submitted in aggravation, I think the crimes in and of themselves support the jury's verdict. And I think the evidence – the additional evidence in aggravation was substantial. And I think that any error that may have occurred in making that argument would not have affected the outcome of this case, so I am going to deny the motion.

(37 RT 6478-6479.)

B. Appellant Failed to Object to the Prosecutor's Comments, and Therefore This Claim Has Been Forfeited

As previously stated, it is well established that "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 v. Hill*, *supra*, 17 Cal.4th at p. 820, internal quotation marks omitted.) This rule does not apply if it would have been futile for the defendant to object and request an admonition, if an objection and admonition would not have cured the harm that the misconduct caused, or if the defendant could not ask for an admonition because the trial court overruled his objection. (*People v. McDermott*, *supra*, 28 Cal.4th at p. 1001.) Here, appellant did not object at trial to the prosecution's comment. (35 RT 6232-6233.) None of the exceptions to the forfeiture rule apply herein because an admonition could have cured the alleged misconduct. Accordingly, appellant has forfeited this claim. (*People v. Burney* (2009) 47 Cal.4th 203, 266.)

C. The Prosecutor's Comments Did Not Amount to Misconduct and Appellant Suffered No Prejudice

As previously stated, a prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1202.) A prosecutor's misconduct that does not render a trial fundamentally unfair under the federal standard may nevertheless violate California law if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*Ibid.*) Where the issue focuses on comments that a prosecutor made before the jury, the question is whether it is reasonably likely that the jurors construed or applied the remarks at issue in an objectionable fashion. (*Id.* at pp. 1202-1203.) A prosecutor has wide latitude to discuss and draw inferences from the evidence; whether these inferences should be accepted is for the jury to decide. (*Id.* at p. 1203.) A reviewing court views the challenged statement in the context of the argument as a whole. (*People v. Dennis*, *supra*, 17 Cal.4th at p. 522.)

"That a prosecutor's knowing use of false evidence or argument to obtain a criminal conviction or sentence deprives the defendant of due process is well established." (*People v. Sakarias* (2000) 22 Cal.4th 596, 633.) In the instant case, the prosecutor did no such thing. While the prosecutor may have had copies of the reports alleging abuse at the hand of appellant's grandmother, there is absolutely no evidence that such allegations were actually true, or that the prosecutor believed them to be true. The statements were made to a defense investigator. They were not made under penalty of perjury, not admitted into evidence, and appellant's sisters did not submit sworn declarations attesting to the truth of the statements. Therefore, unlike the cases cited by appellant in support of his argument, there is no basis to conclude that the prosecutor believed the

veracity of the statements. Moreover, the prosecutor did not imply that appellant's sisters would have contradicted Beverly Parks, he simply pointed out that they did not testify in support of appellant's mitigation case. (35 RT 6232-6233.) This is entirely appropriate. It is well established that a prosecutor may comment "upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339 [prosecutor's comments during closing argument noting the absence of evidence contradicting the prosecution's case and the defendant's failure to "introduce material evidence or any alibi witnesses" did not violate *Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106].)

Appellant's claim that his Sixth Amendment right to cross-examine witnesses was violated is similarly meritless. The prosecutor did not tell the jury what appellant's sisters would have said if called to testify, and he did not claim or imply that they had never reported any abuse. Instead, he correctly pointed out that they did not testify to corroborate Beverly Parks. (35 RT 6232-6233.) Thus, appellant's reliance on *People v. Gaines* (1997) 54 Cal.App.4th 821, 825 (AOB 104-105) is misplaced, as that case is readily distinguishable.

In any event, even if the prosecutor's comment did amount to misconduct, appellant cannot establish that it infected the penalty phase trial with such unfairness as to make the verdict a denial of due process. In the context of the entire argument, the prosecutor's comment was brief, and it did not involve any significant or inflammatory evidence. In fact, the prosecutor commented on the absence of evidence. In addition, the trial court instructed the jury with CALJIC No. 1.02, which states in part, "Statements made by the attorneys during the trial are not evidence." (35 RT 6204; 13 CT 3436.) The jury is presumed to have understood and followed the court's instructions. (*People v. Hinton, supra*, 37 Cal.4th at p.

864; *People v. Smithey*, *supra*, 20 Cal.4th at p. 961.) In addition, as the trial court noted in its denial of appellant's motion for a new trial on this ground (37 RT 6478-6479), the prosecution presented substantial evidence in aggravation such that the outcome would not have been different absent the prosecutor's comment. (See Statement of Facts, *ante*.) Therefore, this claim must be rejected.

III. APPELLANT FAILED TO OBJECT TO THE PROSECUTOR'S REMARKS REGARDING CHRISTINE ORCIUCH'S MURDER, AND THEREFORE THIS CLAIM HAS BEEN FORFEITED; IN ANY EVENT, THE PROSECUTOR'S COMMENTS DID NOT AMOUNT TO PREJUDICIAL MISCONDUCT

Appellant next contends that the prosecutor committed misconduct during the penalty phase closing argument when he allegedly argued that appellant should be sentenced to death for the murder of Christine Orciuch, a victim in one of appellant's prior felony convictions presented at the penalty phase, as well as the other "factor (b) crimes." (AOB 107-111.) Appellant failed to object to the prosecutor's comments at the time of trial, and therefore this claim has been forfeited. In any event, the prosecutor's comments did not amount to misconduct, and appellant suffered no prejudice. Therefore, this claim should be rejected.

A. Procedural History

During penalty phase closing argument, the prosecutor discussed each of the section 190.3, subdivision (b), crimes that that were presented to the jury. (35 RT 6258-6267.) When he reached the robbery of the Vandenberg Federal Credit Union and murder of Christine Orciuch, he explained appellant's guilt under the felony murder rule. (35 RT 6268.) He then argued,

> If all of the previous aggravating evidence doesn't outweigh the mitigating evidence, another robbery and another

> murder certainly do. And if you choose the other direction, then you are basically saying this is a freebie, we are not going to impose any additional punishment on this defendant for the murder of Christine Orciuch. We are still going to give him life in prison without the possibility of parole. This is a freebie. I don't think that you are going to come to that conclusion, ladies and gentlemen.

(35 RT 6271.) Appellant raised no objection to the argument.

The prosecutor went on to discuss appellant's subsequent arrest and attempted escape from jail, and his multiple acts of violence while in custody. (35 RT 6271-6282.) He argued,

> As I mentioned before, all these other additional crimes that – of the robberies, the carjackings, the other bank robberies, all of these are just additional, an additional, additional and additional crimes. And if you are to decide that life without the possibility of parole is the correct verdict, you are basically going to say, as I mentioned before, this is a freebie, the defendant gets this for free. The murder of Christine Orciuch, we are just going to ignore that.
>
> And I think when you review all of the evidence in this case – and it doesn't matter which aggravating factors, under the section B or C you want to use, because there is plenty under A alone to justify a death verdict – but even with the additional B factors, easily put you over that edge, that balance, that weight which would then justify the appropriate verdict, which is death.

(35 RT 6284.) Appellant raised no objection.

The prosecutor concluded his argument by emphasizing the fact that the aggravating factors outweighed the mitigating factors, stating,

> And when all is said and done, ladies and gentlemen, no matter how you count up the aggravating factors, how much weight you assign to them, when you compare them with any of the mitigating factors in this case, there isn't even a close comparison. They far, far and away outweigh the mitigating circumstances.

(35 RT 6290-6291.)

As previously stated, appellant filed an application for a new penalty phase trial on June 11, 2003. (13 CT 3477C-3477P.) The application argued in part that the prosecutor improperly stated that appellant would "escape punish for the murder of Christine Orciuch" if the jury did not return a verdict of death. The application also claimed that the prosecutor improperly argued that appellant should be punished for "factor (b) crimes and violence (citation)." (13 CT 3477F-3477G.)

As previously stated, the trial court denied the application on June 18, 2003, stating,

> I think that in this particular matter the evidence that was submitted in aggravation, I think the crimes in and of themselves support the jury's verdict. And I think the evidence – the additional evidence in aggravation was substantial. And I think that any error that may have occurred in making that argument would not have affected the outcome of this case, so I am going to deny the motion.

(37 RT 6478-6479.)

B. Appellant Failed to Object to the Prosecutor's Comments, and Therefore This Claim Has Been Forfeited

As previously stated, it is well established that "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 v. Hill*, *supra*, 17 Cal.4th at 820, internal quotation marks omitted.) This rule does not apply if it would have been futile for the defendant to object and request an admonition, if an objection and admonition would not have cured the harm that the misconduct caused, or if the defendant could not ask for an admonition because the trial court overruled his objection. (*People v. McDermott*, *supra*, 28 Cal.4th at 1001.) Here, appellant did not

object at trial to the prosecutor's comments. (35 RT 6232-6233.) And none of the exceptions to the forfeiture rule apply herein, as an objection and admonition would have cured the alleged error. Accordingly, appellant has forfeited this claim. (*People v. Burney*, *supra*, 47 Cal.4th at p. 266.)

C. The Prosecutor's Comments Did Not Amount to Misconduct and Appellant Suffered No Prejudice

As previously stated, a prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1202.) A prosecutor's misconduct that does not render a trial fundamentally unfair under the federal standard may nevertheless violate California law if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*Ibid.*) Where the issue focuses on comments that a prosecutor made before the jury, the question is whether it is reasonably likely that the jurors construed or applied the remarks at issue in an objectionable fashion. (*Id.* at pp. 1202-1203.) A prosecutor has wide latitude to discuss and draw inferences from the evidence; whether these inferences should be accepted is for the jury to decide. (*Id.* at p. 1203.) A reviewing court views the challenged statement in the context of the argument as a whole. (*People v. Dennis*, *supra*, 17 Cal.4th at p. 522.)

Here, the prosecutor's comments did not amount to misconduct. First, he did not claim that appellant would escape punishment for the death of Christine Orciuch unless it returned a verdict of death. The prosecutor specifically stated that the "freebie" would be the lack of any "*additional punishment* for the murder of Christine Orciuch" if the jury voted for life without the possibility of parole. (35 RT 6271, emphasis added.) In other words, Orciuch's murder should matter in deciding to impose the greater

punishment of death for the charged murders. Second, when read in the context of his entire argument, it is abundantly clear that the prosecutor was not arguing that appellant should be punished with death for the section 190.3, subdivision (b), crimes, in particular the murder of Orciuch. Instead, he clearly argued that the subdivision (b) crimes were part of the aggravating evidence presented during the penalty phase trial, and that the aggravating evidence outweighed any mitigating evidence. For this reason, he properly encouraged the jury to return with a verdict of death for the charged murders. (35 RT 6257-6291.)

Contrary to appellant's implication, the prosecutor's argument was entirely consistent with this Court's statement in *People v. Stanley* (1995) 10 Cal.4th 764, 822, that "(e)vidence of prior unadjudicated violent conduct is admitted not to impose punishment for that conduct, but rather, in part, to give the jury in the capital case a true picture of the defendant's history since there is no temporal limitation on evidence in mitigation offered by the defendant." (*Ibid*, internal quotation marks and citation omitted.) Here, just as in *Stanley*, the prosecutor's comments about appellant's prior violent and criminal conduct, including the murder of Orciuch, gave the jury a " true picture" of appellant's violent history. As stated above, the purpose of this argument was to persuade the jurors to return a verdict of death for the charged crimes, not for the criminal history evidence presented during the penalty phase.

Moreover, even if the prosecutor's comments did amount to misconduct, appellant cannot establish that they infected the penalty phase trial with such unfairness as to make the death verdict a denial of due process. The jury was instructed on how to properly evaluate the aggravating and mitigating factors. (35 RT 6156-6162, 6165-6167; 13 CT 3416-3418, 3420; CALJIC Nos. 8.85, 8.86, 8.87, 8.88.) CALJIC No. 8.85 specifically explained that factor (b) crimes were to be considered by the

jury in determining the appropriate sentence. (35 RT 6157-6158; 13 CT 3416-3417.) The jury was also instructed that it needed to accept and follow the law as it was stated to them by the trial court. (35 RT 6156-6157; 13 RT 3415; CALJIC No. 8.84.1.) The jury is presumed to have understood and followed the court's instructions. (*People v. Hinton*, *supra*, 37 Cal.4th at p. 864; *People v. Smithey*, *supra*, 20 Cal.4th at 961.) Accordingly, there was no reasonable possibility that the prosecutor's statements affected the jury's penalty determination or its proper use of the factor (b) crimes. (See *People v. Bonin* (1988) 46 Cal.3d 659, 702, overruled on another ground in *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1 [prosecutor's misstatement of law regarding aggravating and mitigating factors was neutralized by trial judge's instruction to jury to "accept and follow the rules of law as I state them to you"]; see also *People v. Seaton* (2001) 26 Cal.4th 598, 661 [prosecutor's misstatement of law during guilt-phase argument evaluated in terms of correct instructions given by trial court, and found to be harmless].) In addition, as the trial court noted in its denial of appellant's motion for a new trial on this ground (37 RT 6478-6479), the prosecution presented substantial evidence in aggravation such that the outcome would not have been different absent the prosecutor's comment. (See Statement of Facts, *ante*.) Therefore, this claim must be rejected.

IV. THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT EVIDENCE

Appellant argues that the trial court, relying on *People v. Garceau* (1993) 6 Cal.4th 140, 200, and *People v. Mickle* (1991) 54 Cal.3d 140, 187, improperly admitted the victim impact testimony of Melissa Lopez, Jasper Altheide, Moria Philley, Quentin Orciuch, and George Orciuch, because this testimony involved victims of section 190.3, subdivision (b) crimes and

violence. He contends that the admission of such evidence violated his rights under the Eighth and Fourteenth Amendments and went beyond what was admissible under *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720]. (AOB 112-115.)

This claim has been repeatedly and expressly rejected by this Court. (*People v. Brady* (2010) 50 Cal.4th 547, 581-582 ["The circumstances of uncharged violent criminal conduct, including its impact on the victims of that conduct, are admissible under section 190.3, factor (b)"], citing *People v. Bramit* (2009) 46 Cal.4th 1221, 1241]; *People v. Demetruilias* (2006) 39 Cal.4th 1, 39 ["[T]he circumstances of the uncharged violent criminal conduct, including its direct impact on the victim or victims of that conduct, are admissible under factor (b)."]; see also *People v. Halloway* (2004) 33 Cal.4th 96, 143; *People v. Mendoza* (2000) 24 Cal.4th 130, 185-186.) Although appellant invites this Court to revisit and reject its prior decisions, he presents no compelling reason for this Court to do so. Therefore, this claim must be rejected.

V. CALJIC NO. 8.85 DID NOT VIOLATE APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A RELIABLE SENTENCING DETERMINATION

Appellant contends the failure of CALJIC No. 8.85 to identify statutory mitigating factors that were relevant solely as potential mitigators precluded a fair, reliable, and evenhanded administration of the death penalty. (AOB 116-118.) Appellant further argues the inclusion of "extreme mental or emotional disturbance" as a mitigating factor under factor (d) of section 190.3 and CALJIC No. 8.85, precluded the jury from considering as mitigating evidence a mental or emotional disturbance that was less than extreme. He claims the use of the terms "extreme" and "substantial" violated his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 118-121.) Appellant recognizes that

in *People v. Farnam* (2002) 28 Cal.4th 107, 191-192, this Court rejected this argument, but suggests this Court has not "adequately addressed the underlying reasoning presented by appellant" and asks this Court to reconsider its decision in *Farnam*. (AOB 116.) Appellant's arguments are without merit.

First, appellant did not request the trial court modify the instructions now challenged on appeal. Thus, this claim is not preserved for this appeal. (*People v. Carpenter* (1997) 15 Cal.4th 312, 391.) Second, as explained below, CALJIC No. 8.85, as given here, did not violate constitutional principles.

CALJIC No. 8.85, the implementing instruction for the aggravating and mitigating factors set forth in section 190.3, was given in relevant part as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.
>
> (b) The presence or absence of criminal activity by the defendant, other than the crime for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

. . .

> (k) Any other circumstances which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentences less than death, whether or not related to the offense for which he is on trial. You must disregard any instruction given to you in the guilt or innocence phase of this trial which conflicts with that principle.

(8 RT 1973-1976; 5CT 931-932.) This instruction was proper.

This Court has repeatedly held that the failure to identify which factors are aggravating and which are mitigating is not error -- "the aggravating and mitigating nature of the factors is self-evident within the context of each case." (*People v. Dickey* (2005) 35 Cal.4th 884, 928; see also *People v. Moon* (2005) 37 Cal.4th 1, 41-42; *People v. Farnam*, *supra*, 28 Cal.4th at p. 191; *People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) Appellant has provided no new and valid reason for this Court to depart from these decisions. Certainly, there was no showing the jury herein was misled or confused, as speculated by appellant.

Appellant also complains that the jury could only consider mental illness or duress that was "extreme" and being under the domination of another person only if it was "substantial." (AOB 118-120; see 35 RT 6157-6160; 13 CT 3416-3417.) This Court has established that while factor (d) of section 190.3 and CALJIC No. 8.85 only permit consideration of "extreme mental or emotional disturbance," factor (k), the catch-all provision, permits "consideration of nonextreme mental or emotional conditions." (*People v. Turner* (1994) 8 Cal.4th 137, 208, quoting *People v. Clark* (1992) 3 Cal.4th 41, 163; see also *People v. Moon*, *supra*, 37 Cal.4th at p. 42; *People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Yeoman* (2003) 31 Cal.4th 93, 165; *People v. Weaver* (2001) 26 Cal.4th

876, 993; *People v. Mayfield* (1997) 14 Cal.4th 668, 806; *People v. Davenport* (1995) 11 Cal.4th 1171, 1203.) Appellant's argument to the contrary is thus clearly at odds with the decisions of this Court.

Furthermore, in *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 308 [110 S.Ct. 1078, 108 L.Ed.2d 255], the United States Supreme Court held that a similar catch-all provision in Pennsylvania's jury instruction comported with the Eighth Amendment. The corresponding California provision, factor (k) of section 190.3 and CALJIC No. 8.85, was similarly upheld as constitutional in *Boyde v. California* (1990) 494 U.S. 370, 381-383 [110 S.Ct. 1190, 108 L.Ed.2d 316]. Thus, the aggravating and mitigating factors set forth in section 190.3 and CALJIC No. 8.85 are not "unconstitutionally vague, or arbitrary, or render the sentencing process unreliable under the Eighth and Fourteenth Amendments." (*People v. Moon, supra*, 37 Cal.4th at p. 42.) Therefore, appellant's argument must be rejected.

VI. CALJIC NO. 8.88, AS GIVEN, WAS VALID AND PROPERLY DEFINED THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS

Appellant challenges CALJIC No. 8.88 in several respects. (AOB 122-157.) Appellant acknowledges his challenges have been previously rejected by this Court, but submits this Court incorrectly decided those cases and should now reconsider its decisions. (AOB 123.) Appellant's failure to object to the instruction or request it be modified on these grounds bars him from raising this issue on appeal. (*People v. Arias, supra,* 13 Cal.4th at p. 171.) Nevertheless, there is no reason for this Court to reconsider its numerous cases rejecting arguments identical to those made by appellant.

The jury was instructed pursuant to CALJIC No. 8.88 as follows:

It is now your duty to determine which of the two penalties, death or imprisonment in the state prison for life without possibility of parole, shall be imposed on the defendant.

After having heard all the evidence, and after having heard and considered the arguments of the counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of the aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole.

In order to make a determination as to the penalty, all twelve jurors must agree.

(23 RT 3857-3859; 13 CT 3420.)

A. CALJIC No. 8.88 Properly Informed the Jury of Its Responsibility in Determining Whether to Impose Death or a Sentence of Life without the Possibility of Parole

Appellant claims that CALJIC No. 8.88 did not convey to the jury that a life sentence was required if the aggravating factors did not outweigh the mitigating factors. (AOB 124-127.)

The trial court need not expressly instruct the jury that a sentence of life imprisonment without parole is mandatory if the aggravating circumstances do not outweigh those in mitigation (*People v. Kipp* (1998) 18 Cal.4th 349, 381; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) As previously noted, this Court has found that CALJIC No. 8.88 gives the jury adequate instruction on how to return a life sentence (*People v. Taylor* (2001) 26 Cal.4th 1155, 1181; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1138; *People v. Frye* (1998) 18 Cal.4th 894, 1023-1024; see *People v. Arias*, *supra*, 13 Cal.4th at pp. 170-171) and the standard instruction has been consistently upheld. (*People v. Moon*, *supra*, 37 Cal.4th at p. 43; *People v. Smith* (2005) 35 Cal.4th 334, 370; *People v. Medina* (1995) 11 Cal.4th 694, 781-782; *People v. Duncan*, *supra*, 53 Cal.3d at p. 978.) CALJIC No. 8.88 permits a death penalty only if aggravation is so substantial in comparison with mitigation that death is warranted; if aggravation failed even to outweigh mitigation, it could not reach this level. (*People v. Smith*, *supra*, 35 Cal.4th at p. 370.) The instruction was proper.

B. CALJIC No. 8.88 Properly Imparted to the Jury that It Could Return a Sentence of Life without the Possibility of Parole Even in the Absence of Mitigating Factors

Next, appellant contends that because CALJIC No. 8.88 did not inform the jurors that they had the discretion to impose a sentence of life without the possibility of parole even in the absence of mitigating factors,

the instruction improperly reduced the prosecution's burden of proof in violation of appellant's rights to due process and a reliable penalty determination under the Eighth and Fourteenth Amendments. (AOB 128-129.) This Court has repeatedly rejected his contention, which does not merit reconsideration. (See *People v. Lindberg* (2008) 45 Cal.4th 1, 52; *People v. Moon*, *supra*, 37 Cal.4th at p. 43; *People v. Ray* (1996) 13 Cal.4th 313, 355; *People v. Duncan*, *supra*, 53 Cal.3d at pp. 978-979).

C. CALJIC No. 8.88 is Not Unconstitutionally Vague in Instructing the Jury that It Must be Persuaded that Aggravating Circumstances Must be "So Substantial" in Comparison to Mitigating Factors before It can Impose Death Instead of Life without the Possibility of Parole

Next, appellant claims that CALJIC No. 8.88 is unconstitutionally vague and violates his rights under the Eighth and Fourteenth Amendments by informing the jury that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole." (AOB 129-131; see 23 RT 3859, 35 RT 6166-6167; 13 CT 3420.) The phrase in the instruction telling the jurors that the aggravating factors must be "so substantial" as compared to the mitigating factors that death is warranted is not impermissibly vague.

This Court has previously held that the phrase "so substantial" in the last paragraph of the instruction properly instructs the jury that aggravating circumstances must outweigh mitigating ones. (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 52; *People v. Moon*, *supra*, 37 Cal.4th at p. 43; *People v. Young* (2005) 34 Cal.4th 1149, 1227; *People v. Arias*, *supra*, 13 Cal.4th at p. 171.) CALJIC No. 8.88 is not vague and adequately guides the jury's sentencing discretion. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1028 ["Is not overly vague for using the words 'so substantial' as a modifying

phrase"]; *People v. Smith*, *supra*, 35 Cal.4th at p. 369; *People v. Carter* (2003) 30 Cal.4th 1166, 1226 [rejecting argument that phrase "so substantial" contained in CALJIC No. 8.88 was unconstitutionally vague, conducive to arbitrary and capricious decision making, and created an unconstitutional presumption in favor of death].)

Further, the United States Supreme Court has stated that once the jury finds the defendant is within a category of persons eligible for the death penalty, the sentencer may be given "'unbridled discretion' in determining whether the death penalty should be imposed." (*Tuilaepa v. California* (1994) 512 U.S. 967, 979-980 [114 S.Ct. 2630, 129 L.Ed.2d 750].) Indeed this Court has cited the *Tuilaepa* case in rejecting a claim that the phrase "so substantial" is too vague. (*People v. Davenport*, *supra*, 11 Cal.4th at p. 1231.) As appellant presents no persuasive reason for this Court to revisit any of its past rulings, his claims should be rejected. (See *People v. Frye*, *supra*, 18 Cal.4th at p. 1024; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1193.)

D. CALJIC No. 8.88 Does Not Violate the Eighth and Fourteenth Amendments by Use of the Term "Warrants" Rather than "Appropriate"

Appellant next attacks CALJIC No. 8.88 for instructing the jury that to impose the death penalty, it must find the aggravating circumstances so substantial compared to those in mitigation that it "warrants death instead of life without parole." (AOB 131-132.) Appellant claims the term "warrants," violates his Eighth and Fourteenth Amendment rights arguing that "just because death may be warranted, or authorized, in a given case does not mean it is necessarily appropriate." (AOB 132.)

In *People v. Breaux* (1991) 1 Cal.4th 281, 315-316, this Court termed this same contention "spurious." The Court held that use of the term "warrants" is not a considerably broader term than "appropriate," as the

defendant argued and that the language of CALJIC No. 8.84.2 (the precursor to CALJIC No. 8.88), essentially informed the jury that "it could return a death verdict only if the aggravating circumstances predominated and death [was] the appropriate verdict." (*People v. Breaux*, *supra*, 1 Cal.4th at p. 316; accord, *People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 122 [relying on *Breaux* to reject identical challenge to CALJIC No. 8.88]; *People v. Crew* (2003) 31 Cal.4th 822, 858; *People v. Boyette* (2002) 29 Cal.4th 381, 464-465.)

> "By advising that a death verdict should be returned only if aggravation is 'so substantial in comparison with' mitigation that death is 'warranted,' the instruction clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty."

(*People v. Smith*, *supra*, 35 Cal.4th at p. 370, citing *People v. Arias*, *supra*, 13 Cal.4th at p. 171.)

CALJIC No. 8.88 gives the jury adequate instruction on how to return a life sentence. (*People v. Taylor*, *supra*, 26 Cal.4th at p. 1181; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1138; *People v. Frye*, *supra*, 18 Cal.4th at pp. 1023-1024.) Further, there is certainly no federal claim involved here since the United States Supreme Court has approved language providing that if the aggravating circumstances outweigh the mitigating circumstances the jury "shall impose a sentence of death." (*Boyde v. California*, *supra*, 494 U.S. at pp. 373-377.) The jury in this case was told, "In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." (23 RT 3859, 35 RT 6166; 13 RT 3420.) Appellant has neither acknowledged, nor attempted to demonstrate why this Court should reconsider, its prior decisions rejecting his contention.

E. Burden of Proof

1. The Failure to Have a Penalty Phase Instruction on the Burden of Proof Does Not Violate the United States Constitution

Appellant contends that his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated because the jury was not instructed in the penalty phase that all aggravating factors had to be proven by the prosecution beyond a reasonable doubt. (AOB 133-139.) This Court has consistently rejected similar contentions. (See *People v. Hovarter*, *supra*, 44 Cal.4th at p. 1028 [CALJIC No. 8.88 "is not flawed for failing to assign the burden of proof to one of the parties"]; *People v. Moon*, *supra*, 37 Cal.4th at pp. 43-44; *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 417-418 [because the penalty decision is "inherently moral and normative" rather than factual, instruction on the burden of proof is not required]; *People v. Osband* (1996) 13 Cal.4th 622, 709-710 [rejecting claim that federal Constitution required penalty phase jury to be instructed that all aggravating factors and decision to impose death penalty had to be supported by proof beyond a reasonable doubt].)

Appellant argues, however, that this Court should revisit this issue in light of the United States Supreme Court's decisions in *Jones v. United States* (1999) 526 U.S. 277 [119 S.Ct. 1215, 143 L.Ed.2d 311], *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], and *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]. (AOB 133-139.) Recently, this Court did reexamine its decisions in light of *Apprendi*, *Ring*, and the more recent decision in *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]. This Court determined that those cases have not altered the Court's conclusion that no burden of proof is required in the penalty phase of a capital trial. (*People v. Salcido* (2008) 44 Cal.4th 93, 167.)

> [U]nder the California death penalty scheme, once a defendant has been found guilty of first degree murder and one or more special circumstances have 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.) The Court need not reexamine its decisions yet again.

2. The Trial Court was Not Required to Instruct the Jury on Burden of Persuasion

Appellant also contends the failure to instruct the jury that the prosecution bears "some burden" of persuasion at the penalty phase violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 140-142.) Appellant acknowledges this Court has rejected this contention. (AOB 140, citing *People v. Hayes* (1990) 52 Cal.3d 577, 643.)

This Court has repeatedly held that "[b]ecause the determination of penalty is essentially moral and normative [citation omitted] and therefore different in kind from the determination of guilt, there is no burden of proof or burden of persuasion." (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643; *People v. Blair*, *supra*, 36 Cal.4th at p. 753; *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 417-418.) There is no compelling reason to reexamine this Court's decisions.

3. The Trial Court Was Not Required to Instruct the Jury on the Burden of Proof on Mitigating Circumstances or That There Was No Unanimity Requirement Regarding the Mitigating Circumstances

Appellant further claims the instructions violated the Fifth, Sixth, Eighth, and Fourteenth Amendments by failing to instruct the jury on the standard of proof required for mitigating circumstances, i.e., that the defendant bears no particular burden to prove mitigating factors and that the jury was not required to unanimously agree on the existence of mitigation. He urges the failure to so instruct caused structural error mandating reversal. (AOB 142-147.)

As with appellant's other arguments, this Court has repeatedly held the California death penalty statute is not unconstitutional because it does not contain a requirement that the jury be given burden of proof or standard of proof instructions for finding aggravating and mitigating circumstances in reaching a penalty determination. (*People v. Stitely* (2005) 35 Cal.4th 514, 574; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Vieira* (2005) 35 Cal.4th 264, 300; *People v. Morrison* (2004) 34 Cal.4th 698, 730-731; *People v. Welch* (1994) 20 Cal.4th 701, 767-768) Because appellant offers no meritorious reason for this Court to reconsider this rule, his claim should be rejected.

Similarly, appellant's claim that the jury should have been instructed that he bore no particular burden to prove mitigating factors and that the jury was not required to unanimously agree on the existence of mitigation has also been rejected by this Court. In *Breaux*, the defendant claimed that the trial court improperly rejected his proposed jury instruction that unanimity was not required for consideration of mitigating evidence. (*People v. Breaux*, *supra*, 1 Cal.4th at p. 314.) This Court disagreed, explaining:

> There was nothing in the instructions to limit the consideration of mitigating evidence and nothing to suggest that any particular number of jurors was required to find a mitigating circumstance. The only requirement of unanimity was for the verdict itself. [Citation.] [¶] The instructions that were given in this case unmistakably told the jury that each member must *individually* decide each question involved in the penalty decision. They were told to consider all the evidence, specifically including any circumstance in mitigation offered by defendant. We find no error in the court's refusal to give defendant's proposed instruction.

(*Id.* at p. 315, italics in original.)

Such was the case here. As in *Breaux*, there was nothing in the given instructions that limited the jurors' consideration of mitigating evidence or that suggested that "any particular number of jurors was required to find a mitigating circumstance." (See *People v. Breaux*, *supra*, 1 Cal.4th at p. 315.) Also, similar to the instructions in *Breaux*, the jurors were instructed with CALJIC No. 8.88, which told them that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole." (23 RT 5839, 35 RT 6166-6167; 13 CT 3420.) Appellant has provided no persuasive reason for this Court to reexamine this holding.

F. Jury Unanimity on Aggravating Factors Is not Constitutionally Compelled

Again recognizing that this Court has previously rejected his claim that the federal Constitution requires a jury unanimously find aggravating circumstances (AOB 148, citing *People v. Bacigalupo* (1991) 1 Cal.4th 103, 147 & *People v. Taylor* (1990) 52 Cal.3d 719, 749), appellant nevertheless asserts that the failure to require unanimity as to aggravating circumstances "encouraged the jurors to act in an arbitrary, capricious and

unreviewable manner, and slanted the sentencing process in favor of execution." (AOB 148.) He asserts the United States Supreme Court's decision in *Ring* "undercuts the constitutional validity of this Court's ruling in *Bacigalupo*." (AOB 149.) This Court has already rejected appellant's argument.

In *People v. Griffin* (2004) 33 Cal.4th 536, 593, this Court expressly held that the federal Constitution does not require jury unanimity as to the existence of aggravating factors. In *People v. Blair*, *supra*, 36 Cal.4th at page 753, this Court reaffirmed its holding after considering the ramifications of *Apprendi*, *Ring*, and *Blakely*. It need not do so again in this case.

G. Written Findings Regarding Aggravating Factors Are Not Required

Appellant argues that CALJIC No. 8.88, as given at trial, violated his rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment and article I, sections 7 and 24 of the California Constitution, because the jury was not require to make explicit written findings as to which factors in aggravation it relied upon in imposing the death penalty. (AOB 151-156.) As with appellant's previous challenges to California's death penalty scheme, this Court has repeatedly rejected the claim that unanimous written findings regarding aggravating factors are constitutionally required. (See e.g., *People v. Blair*, *supra*, 36 Cal.4th at p. 753; *People v. Griffin*, *supra*, 33 Cal.4th at pp. 593-594; *People v. Maury* (2003) 30 Cal.4th 342, 440; *People v. Snow, supra,* 30 Cal.4th at p. 126.) Having offered no compelling reasons for reconsideration, appellant's contention fails.

H. The Trial Court Was Not Required to Instruct the Jury on Presumption of Life without Possibility of Parole

Finally, appellant contends the trial court should have been required to instruct the jury with the presumption of life. He maintains that the court's failure to instruct the jury with the presumption of life violated his right to due process under the Fifth and Fourteenth Amendments, his Eighth Amendment rights to a reliable penalty determination and to be free from cruel and unusual punishment, and to his Fourteenth Amendment right to equal protection. (AOB 156-157.)

This Court has repeatedly rejected this challenge, holding a trial court is not required to instruct on a "'presumption of life.'" (*People v. Dunkle* (2005) 36 Cal.4th 861, 940 citing *People v. Combs* (2004) 34 Cal.4th 821, 868; *People v. Arias*, *supra*, 13 Cal.4th at p. 190.) There being no requirement for the trial court to do so, appellant's constitutional challenges must fail.

VII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE MEANING OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

Appellant claims neither CALJIC No. 8.88 nor any other instruction informed the jurors that a sentence of life without the possibility of parole meant that appellant would "*never*" be considered for parole. (AOB 158, emphasis in original.) Thus, he maintains "the trial court had a sua sponte duty to instruct on the true meaning of this sentence." (AOB 158.) Appellant recognizes this Court previously rejected this argument, finding inaccurate and not constitutionally required a proposed instruction that "A sentence of life without the possibility of parole means that the Defendant will remain in state prison for the rest of his life and will not be paroled at any time." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1277; see also *People v. Thompson* (1988) 45 Cal.3d 86, 130-131.) However, he suggests

this Court should reconsider these decisions in light of *Simmons v. South Carolina* (1994) 512 U.S. 154 [114 S.Ct. 2187, 129 L.Ed.2d 133], and *Kelly v. South Carolina* (2002) 534 U.S. 246 [122 S.Ct. 726, 151 L.Ed.2d 670]. (AOB 121-124.) This Court has considered the impact of *Simmons* and *Kelly* in rejecting this argument and need not reconsider its decisions. (*People v. Duenas* (2012) 55 Cal.4th 1, 28 [*Simmons* and *Kelly* do nothing to alter the conclusion that CALJIC No. 8.84 adequately informs jury that a defendant sentenced to life without the possibility of parole is ineligible for parole]; *People v. Smith* (2003) 30 Cal.4th 581, 635-363; *People v. Smithey, supra,* 20 Cal.4th at pp. 1008-1009; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1271; *People v. Arias, supra,* 13 Cal.4th at pp. 172-174.) The trial court is not required to instruct the jury that life without the possibility of parole means the defendant will never be paroled. (*People v. Dunkle, supra*, 36 Cal.4th at p. 940.) Thus, appellant's contention should be summarily rejected.

VIII. BECAUSE APPELLANT HAS NOT DEMONSTRATED ANY ERRORS, THERE ARE NO ERRORS WHICH TAKEN CUMULATIVELY REQUIRE REVERSAL OF APPELLANT'S CONVICTIONS AND DEATH SENTENCE

Appellant alleges that even if an error does not individually require reversal of his murder convictions and special circumstance finding and/or his death sentence, when taken together the cumulative effect of such errors requires reversal. (See AOB 165-167.) None of appellant's claims demonstrates any error at any stage of trial. Moreover, even assuming there were any errors, taken individually or together, those errors do not require reversal of appellant's murder convictions, the special circumstance findings, or the jury's determination that death was the appropriate penalty for appellant's crimes. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1223; *People v. Koontz* (2002) 27 Cal.4th 1041, 1094 [guilt phase instructional

error did not cumulatively deny defendant a fair trial and due process]; *People v. Cooper* (1991) 53 Cal.3d 771, 830 ["little error to accumulate"].)

The evidence against appellant was overwhelming in both the guilt and penalty phases of trial. Even if this Court finds there were few errors, whether considered individually or for their cumulative effect, any error or combination of errors could not have affected the outcome of the trial. (See *People v. Seaton, supra,* 26 Cal.4th at pp. 675, 691-692; *People v. Ochoa* (2001) 26 Cal.4th 398, 447, 458; *People v. Catlin* (2001) 26 Cal.4th 81, 180.) "The pertinent question in determining whether there is cumulative error is whether the defendant's guilt or innocence was fairly adjudicated." (*People v. Hill, supra*, 17 Cal.4th at p. 844.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1214, 1219.) Even if appellant has demonstrated a few errors, which he has not, there is no reasonable possibility that the sentencing jury would have reached a different result absent any of the alleged errors. (*People v. Maury, supra*, 30 Cal.4th at p. 444; *People v. Jones* (2003) 29 Cal.4th 1229, 1268; *People v. Burgener, supra,* 29 Cal.4th at p. 884.)

IX. BASED ON THE NUMEROUS DECISIONS OF THIS COURT REJECTING CONSTITUTIONAL CHALLENGES TO CALIFORNIA'S CAPITAL SENTENCING STATUTE, THIS COURT SHOULD REJECT APPELLANT'S CHALLENGES AS WELL

Appellant claims the use of the death penalty as a regular form of punishment, and the failure to provide intercase proportionality review, violate the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments. (AOB 168-174.) Because this Court has repeatedly rejected such challenges, it should reject appellant's challenges as well. (See, e.g., *People v. Dickey, supra*, 35 Cal.4th at p. 931 [law not defective in failing to require intercase proportionality review];

People v. Brown (2004) 33 Cal.4th 382, 402; *People v. Lewis* (2001) 26 Cal.4th 334, 394-395.)

Nor has appellant demonstrated the death penalty scheme in California is used "for a substantial number of crimes" in violation of the Eighth and Fourteenth Amendments. (AOB 133.) Appellant cannot make this showing as this Court has repeatedly held that the special circumstances provision of California's death penalty law adequately narrows the class of death-eligible offenders. (*People v. Brown*, *supra*, 33 Cal.4th at p. 401; *People v. Frye*, *supra*, 18 Cal.4th at p. 1028 [rejecting challenge that special circumstance provisions perform no narrowing function; nor have they been construed in an "overly expansive manner"].)

Based on the foregoing, all of appellant's challenges to California's capital sentencing scheme must again be rejected by this Court.

X. APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE INTERNATIONAL LAW

Finally, appellant contends that his death sentence violates international law. (AOB 175-177.) However, as appellant acknowledges, this Court has previously rejected the claim that California's death penalty scheme and an individual death sentence violates Article VII of the International Covenant of Civil and Political Rights (ICCPR), and the Eighth Amendment of the United States Constitution (AOB 176-177, citing *People v. Ghent* (1987) 43 Cal.3d 739, 778-779; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511); appellant urges this Court to reconsider its holdings and find appellant's death sentence violates international law. (AOB 177.) First, there is no reason for this Court to reexamine its rulings. (*People v. Dickey*, *supra*, 35 Cal.4th at p. 932.) Second, appellant does not have standing to allege a violation of the ICCPR. Even if he did, no international law violation occurred because neither California's capital

sentencing scheme nor appellant's death sentence violates the state or federal Constitution. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1055.) Appellant's Eighth Amendment claim should also be rejected because appellant has failed to establish the existence of a national consensus against executing those who commit crimes like the ones committed by appellant.

The United States is, as appellant points out, a signatory to the ICCPR. (*People v. Brown*, *supra*, 33 Cal.4th at pp. 402-403.) But because treaties generally apply only to disputes between sovereign governments, appellant lacks standing to challenge the death penalty under the ICCPR. (*Hanoch Tel Oren v. Libyan Arab Republic* (D.D.C. 1981) 517 F.Supp. 542, 545 547; but see *United States v. Duarte Acero* (11th Cir. 2000) 208 F.3d 1282, 1286 ["The clear language of the ICCPR manifests that its provisions are to govern the relationship between an individual and his state"].) Even assuming appellant does have standing, his claim fails on the merits.

"International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511; accord, *People v. Cook* (2006) 39 Cal.4th 566, 620; *People v. Boyer* (2006) 38 Cal.4th 412, 489.) With respect to the ICCPR, as this Court recently observed:

> [The United States] signed the [ICCPR] on the express condition "[t]hat the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." (138 Cong. Rec. S4781 01 (Apr. 2, 1992); see Comment, The Abolition of the Death Penalty: Does "Abolition" Really Mean What You Think it

Means? (1999) 6 Ind. J. Global Legal Studies 721, 726 & fn. 33.)

(*People v. Brown*, *supra*, 33 Cal.4th at pp. 403-404.)

As discussed *infra*, there were no state or federal constitutional law violations in this case. Consequently, this Court need not consider whether such violations "would also violate international law[.]" (*People v. Dickey*, *supra*, 35 Cal.4th at p. 932; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511; accord, *People v. Brown*, *supra*, 33 Cal.4th at p. 404 [declining to find law defective based on international law where no other defect in imposing the death penalty against defendant was found].)

Appellant's related Eighth Amendment claim also does not provide a basis for relief. The problem with appellant's argument is that it is not the international community's views that are relevant to the Eighth Amendment analysis; "it is American conceptions of decency that are dispositive[.]" (*Stanford v. Kentucky* (1989) 492 U.S. 361, 370 [109 S.Ct. 2969, 106 L.Ed.2d 306].) Because appellant has failed to show there is a national consensus against imposing a sentence of death in cases like his, his international law and related Eighth Amendment claims fail. (Compare *Atkins v. Virginia* (2002) 536 U.S. 304, 314-316, 321 [122 S.Ct. 2242, 153 L.Ed.2d 335] [holding the execution of a mentally retarded prisoner violates the Eighth Amendment's ban on cruel and unusual punishment after noting a national consensus against this practice had emerged].)

CONCLUSION

For the foregoing reasons, Respondent respectfully request that the judgment and sentence be affirmed.

Dated: December 14, 2012 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 29,163 words.

Dated: December 14, 2012

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DECLARATION OF SERVICE

Case Name: **PEOPLE v. MARCUS ADAMS** Case No.: **S118045**

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 December 14, 2012, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On December 14, 2012, I caused the original and thirteen (13) copies of the **RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, San Francisco, CA 94102, by Overnight Delivery.

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 December 14, 2012, at Los Angeles, California.

J. Villegas
Declarant


Signature

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