SUPREME COURT COPY

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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **LEE SAMUEL CAPERS,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S146939

SUPREME COURT
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The Honorable John M. Tomberlin, Judge

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DEATH PENALTY

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STATEMENT OF THE CASE

On March 19, 2004, the San Bernardino County District Attorney filed a first amended information charging appellant Lee Samuel Capers with first degree murder of Nathaniel Young (count 1; Pen. Code,[1] § 187, subd. (a)); first degree murder of Consuelo Patrida Young (count 2; § 187, subd. (a)); second degree robbery of Consuelo Patrida Young (count 3; § 211); second degree robbery of Nathaniel Young (count 4; § 211); arson causing great bodily injury (count 5; § 451, subd. (a)); felon in possession of a firearm (count 6; § 12021, subd. (a)(1)); and possession of a dagger in a penal institution (count 7; § 4502, subd. (a)). (2 CT 384-390.) As to count 3, the information alleged Capers personally used a firearm within the meaning of section 12022.53, subdivision (b). (2 CT 387-388.) As to counts 1 and 4, the information alleged Capers personally discharged a firearm causing great bodily injury or death within the meaning of section 12022.53, subdivision (d). (2 CT 388.) As to counts 1 and 2, the information alleged special circumstances that Capers committed multiple murders (§ 190.2, subd. (a)(1)), committed the murders during the commission of robbery (§ 190.2, subd. (a)(17)(A)), committed the murders during the commission of commercial burglary (§ 190.2, subd. (a)(17)(G)), and committed the murders during the commission of kidnapping (§ 190.2, subd. (a)(17)(B)). (2 CT 385-387.) Finally, the information alleged that Capers had 10 prior strike convictions within the meaning of section 1170.12, subdivisions (a) through (d), and section 667, subdivisions (b) through (i). (2 CT 389-390.)

On May 1, 2006, jury selection began. (3 CT 511.) On May 15, 2006, the jury was sworn. (31 CT 8875-8876.)

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[1] All further unspecified statutory references are to the Penal Code.

On June 2, 2006—following the prosecution's case-in-chief—the court granted the prosecution's motion to dismiss count 6 (felon in possession of a firearm). (31 CT 8909.) On June 5, 2006, the court partially granted the defense's section 1118.1 motion by amending count 5 to reflect a charge of simple arson in violation of section 451, subdivision (d). (31 CT 8934.) That same day, the court granted the prosecution's motion to dismiss the kidnapping-murder special circumstance alleged as to counts 1 and 2. (31 CT 8935.)[2]

On June 7, 2006, the case was submitted to the jury for guilt-phase deliberations. (31 CT 8941.) On June 12, 2006, the jury found Capers guilty as charged in counts 1 through 6. (31 CT 8978, 8983, 8986, 8988, 8990-8991.) The jury found true the multiple-murder, robbery-murder, and burglary-murder special circumstances. (31 CT 8980-8982, 8984-8985.) The jury also found true each of the firearm-enhancement allegations. (31 CT 8979, 8987, 8989.)

On June 14, 2006—during a bifurcated bench trial—the court found five of the prior strike allegations true. (31 CT 9019.) The court found insufficient evidence supported the remaining five strike allegations and found them not true. (31 CT 9019.)

On June 26, 2006, the penalty phase began. (31 CT 9029-9030.) On June 29, 2006, the case was submitted to the jury for penalty-phase deliberations. (31 CT 9039.) The jury returned a verdict of death. (31 CT 9040.)

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[2] The prosecution adopted these changes in a second amended information, which was filed, and on which defendant was re-arraigned, that same day. (31 CT 8927-8934.) In the second amended information, count 7 (possession of a dagger in a penal institution) became count 6. (31 CT 8927-8933.)

On September 22, 2006, the court imposed its sentence. As to the noncapital counts, the court sentenced Capers to 25 years to life in state prison. (32 CT 9120-9121.)[3] As to the capital murders, the court sentenced Capers to death. (32 CT 9121.)

STATEMENT OF FACTS

A. Guilt Phase Evidence

1. Introduction – Nathaniel Young & Consuelo Patrida Young

In 1998, Nathaniel Young and Consuelo Patrida Young had been married for seven years. (5 RT 1073.)[4] Shortly after they were married, they opened a t-shirt store in Barstow, California called "T's Galore 'N More." (5 RT 1049, 1073-1074.) Nathaniel also worked as a financial analyst for the Marine Logistics Base in Barstow, California. (5 RT 1045.) Although Nathaniel and Consuelo both worked at and operated the t-shirt store, Consuelo would typically run the store during the day while Nathaniel was working his other job at the base. (See 5 RT 1074.)

2. Nathaniel Young Does Not Appear For Work At The Marine Logistics Base

On Monday November 9, 1998, Nathaniel did not come in for his scheduled shift at the Marine base in the morning. (5 RT 1046.) This concerned his supervisor because in the six years Nathaniel had worked at the base he was a reliable employee who never missed work without first calling. (5 RT 1045-1047, 1056.) When Nathaniel again did not appear for

[3] The 25-year-to-life sentence was for count 6. The court stayed the sentences on the remaining noncapital counts. (32 CT 9120-9121.)

[4] For clarity, and with no intended disrespect to the victims, Nathaniel Young and Consuelo Patrida Young will be referred to by their first names.

work the following day, his supervisor called the Barstow Police Department to request a welfare check. (5 RT 1048-1049.)

Around the same time, two of Nathaniel's colleagues at the base went to the t-shirt store to check on him. (5 RT 1049-1051.) They noticed that the windows of the store appeared covered in soot which prevented them from seeing inside the business. (5 RT 1057.) The two employees returned to the base and informed Nathaniel's supervisor that it appeared there had been a fire at the store. (5 RT 1057.) This led Nathaniel's supervisor to again call the Barstow Police Department, in addition to the Provost Marshal's Office on the base, which is the equivalent of a police department for the military base. (5 RT 1050-1050.) Due to the suspected fire, the Provost Marshal's Office contacted the Barstow Fire Department. (5 RT 1051, 1061.)

3. Discovery At The T-Shirt Shop

On Tuesday November 10, 1998—the same day the fire was reported—a Division Chief from the Barstow Fire Department responded to the t-shirt store to check for signs of a fire. (5 RT 1064.) Standing outside the store, he noticed heavy soot on the inside of the store windows. (5 RT 1065.) The Division Chief checked the perimeter of the store and discovered that the back door was unlocked. (5 RT 1066.) He opened the back door and looked inside. (5 RT 1066.) As soon as he started opening the door, he could smell there had been a fire inside the building. (5 RT 1067.) Once the door was open, he saw two dead bodies. (5 RT 1067.) He closed the door, called law enforcement, and secured the store until police officers arrived. (5 RT 1067, 1071.)

Several officers from the Barstow Police Department arrived shortly thereafter. (5 RT 1071, 1087-1088.) The responding officers discovered the body of a deceased man lying face down in the rear of the store. (5 RT 1095-1096.) The body, later identified as that of Nathaniel Young, was

partially burned, had blood stains on and around it, and had duct tape wrapped around the throat and neck. (5 RT 1095-1096, 1120-1121.) The officers also discovered the "partial body" of another person lying nearby. (5 RT 1096.) The second body, later identified as that of Consuelo Patrida Young, was significantly burned. (5 RT 1096, 1100-1101.) All that remained of Consuelo's body was ashes, soot, various bone fragments, and charred body part remains. (5 RT 1096, 1100-1101.) Officers also discovered a large amount of blood and blood spatter around the bodies, two metal golf clubs covered in blood, and one .45 caliber shell casing. (5 RT 1099, 1114-1120, 1123-1124.) The heads of the two metal golf clubs both contained human hair. (7 RT 1511.) That hair was later determined to be consistent with Consuelo's head hair. (7 RT 1511-1512.) The officers contacted forensic evidence technicians to further process the scene. (5 RT 1102-1103.)

Within the crime scene, evidence technicians discovered five .45 caliber bullet projectiles. (5 RT 1134-1135.) But because only one shell casing was discovered at the scene, officers believed that the person or people involved made an effort to clean up the crime scene and remove evidence. (5 RT 1135, 1139.) Near Consuelo's body was a film of water, soot, ash, and blood, leading the officers to believe someone tried to mop up blood and other evidence. (5 RT 1139; 6 RT 1264-1265.) A bloody mop was found outside, and there was a trash can with a mixture of water and blood inside. (5 RT 1139.) In a bathroom near Consuelo's body, officers discovered a pair of women's underwear that had been cut up and flushed in the toilet. (5 RT 1140-1145.) This also indicated to the officers that someone had attempted to destroy evidence from the crime scene. (5 RT 1145.)

Arson investigators could detect the odor of gasoline near the victims. (6 RT 1186.) The investigators concluded that two separate fires

were started with gasoline, one on each victim. (6 RT 1186, 1189.) There was also a thick, greasy substance on the floor near the bodies. (6 RT 1191-1192.) Investigators determined that this substance was melted human body fat from the victims. (6 RT 1191-1192.)

4. Autopsy Results

Nathaniel Young suffered from several gunshot wounds and also had moderate charring to his body from the fire. (7 RT 1544-1546.) At the outset of the autopsy, Nathaniel was wearing blood-stained clothing, there were two loops of duct tape around his jawline and neck, and there were several areas of his body that had been burned or scorched. (7 RT 1544-1548.) Nathaniel's body was not burned as badly as Consuelo's, but there were several large areas where his skin was scorched black. (7 RT 1544-1545.) He also had several abrasions on his face consistent with blunt force trauma. (7 RT 1553.) Nathaniel was shot approximately four or five times, with a total of eight entrance and exit gunshot wounds discovered on his body. (7 RT 1576.) He had been shot multiple times in the head, with one of the bullets cutting his brain stem in two and lodging in the base of his skull, and another bullet going through his neck and severing his first cervical vertebrae underneath his skull. (7 RT 1560-1575.) He was also shot in the chest; that bullet severed an artery and broke several of his ribs. (7 RT 1575-1576.) None of Nathaniel's injuries were consistent with having been hit with a metal golf club. (7 RT 1578.) Nathaniel's cause of death was determined to be multiple gunshot wounds to the head, neck, and chest. (7 RT 1581.)

Consuelo Patrida Young suffered from extensive blunt force trauma and significant burning of her body from the fire. (7 RT 1584.) Consuelo's body had been so badly burned that entire limbs were disconnected from the body because all of the skin and tissue surrounding the limbs had burned away. (7 RT 1584.) A majority of her central chest, abdominal,

and pelvic areas had burned down to the bone with entire organs missing because they had burned away. (7 RT 1584, 1600.) Specifically, her right lung, left kidney, spleen, and intestines had completely burned away. (7 RT 1600.) She also suffered multiple blunt force injuries to her body, many of which were to her head, and several of which shattered her skull and facial bones in various locations. (7 RT 1591-1598.) Unlike Nathaniel's body, Consuelo's body did not reveal any gunshot wounds, and no bullet fragments were discovered in her body. (7 RT 1585.) Consuelo's cause of death was determined to be multiple blunt force head injuries. (7 RT 1621.) Her injuries were consistent with having been repeatedly struck with the golf clubs, and the pathologist opined that she was alive during the attack. (7 RT 1600-1602.) The pathologist also opined that Consuelo could have still been alive when she was burned, and that the burning of her body could have been a contributing cause of her death. (7 RT 1621-1622.)

5. Information Not Revealed To The Public

Officers from the Barstow Police Department collaborated prior to the press release and decided to withhold certain information regarding the homicides from public disclosure. (6 RT 1364-1365.) Specifically, among other information, the officers decided not to reveal to the public: (1) the caliber of the firearm used; (2) that Nathaniel's cause of death was by a firearm; (3) that Nathaniel had been bound with duct tape; (4) the women's underwear found in the toilet; (5) the bloody golf clubs; and (6) the identify of certain people the police sought to speak with during the course of their investigation. (6 RT 1365.)

6. Capers's Statements And Confessions To Law Enforcement

Detective Leo Griego from the Barstow Police Department had several conversations with Capers throughout the course of his investigation into the double homicide of Nathaniel Young and Consuelo

Patrida Young. Each of those discussions are outlined in further detail below.

a. November 15, 1998

On November 15, 1998, Detective Griego received a telephone call from another Barstow police officer who informed him that Capers wished to speak with him (Detective Griego) about the murders. (6 RT 1380-1381.) Detective Griego made contact with Capers, first at Capers's residence and later that same day at the Barstow Police Department. (6 RT 1381.) At that time, Capers denied that he was involved in the murders, but claimed that he heard about the murders and knew two of the people involved. (6 RT 1382.)

b. January 14, 1999

By January 1999, Detective Griego's investigation had focused on Capers and his younger brother, Antonio Leatham ("Eagle"), as suspects for the double homicide. (6 RT 1382-1383.) For this reason, on January 14, 1999, Detective Griego contacted Capers at Chino State Prison to question him about the crimes. (6 RT 1382-1383.) At that time, Capers continued to deny his involvement in the murders. (6 RT 1383.)

c. December 9, 1999

On December 9, 1999, Detective Griego contacted Capers to collect various biological samples from him so they could be compared to samples discovered at the crime scene. (6 RT 1383-1384.)[5]

d. January 28, 2000

On January 28, 2000, Detective Griego contacted Capers while he was in custody to question him about the double homicide. (6 RT 1384-

[5] The record does not indicate where this contact took place. (6 RT 1383-1384.)

1385.) Capers did not reveal any new information about the crimes at that time. (6 RT 1384-1385.)[6]

e. **February 1, 2000**

On February 1, 2000, Detective Griego contacted Capers while he was in custody at the San Bernardino County Sheriff's Department jail in Barstow to talk with him about the double homicide. (6 RT 1385.) Capers again did not reveal any new information about the crimes at that time. (6 RT 1385.)

f. **January 5, 2001**

Capers was interviewed twice on January 5, 2001, first by Detective Steve Shumway with the Riverside Police Department, and second by Detective Griego. (6 RT 1386-1387.) The interviews came about because one of Capers's cellmates in Riverside County Jail indicated that Capers had shared information with him about the double homicide. (6 RT 1386.)

Detective Steve Shumway interviewed Capers at the Riverside Police Department. (6 RT 1387, 1390.) Detective Griego watched the interview, which was videotaped, on a video screen in an adjoining room. (6 RT 1387-1388.)[7] At the outset of the interview, Capers acknowledged that he had requested to speak with law enforcement about the murders because it was "something that ha[d] been weighing [him] down . . ." (32 CT 9212.) Capers also stated that he wrote a letter detailing the murders, but that he wished to speak with Detective Griego about the crimes. (32 CT 9213-9214.)

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[6] The record does not indicate where Capers was in custody at the time of this contact. (6 RT 1384-1385.)

[7] A portion of the video of Detective Shumway's interview with Capers was played for the jury. (6 RT 1390; Ex. 78.) A transcript of that portion of the videotape appears at 32 CT 9210-9214.

Shortly thereafter, Detective Griego came in and talked with Capers about the crimes. (6 RT 1391-1393.) Following their brief discussion, Detective Griego transported Capers to the Barstow Police Department, where he and another officer conducted a formal, videotaped interview. (6 RT 1393-1394.)[8]

During that interview, Capers admitted that he and three other people committed the crimes. (32 CT 9219.) Capers, who was 24 years old at the time of the murders and went by the moniker "Oso," claimed that he committed the crimes with "Bam-Bam" (identified as 22-year-old Carlos Loomis), "Wino" (identified as 15-year-old Ruben Romero), and "another guy." (32 CT 9219; 6 RT 1407-1408.) Capers did not identify the fourth person in his group, but was adamant that it was not his younger half-brother "Eagle" (identified as 16-year-old Antonio Leatham). (32 CT 9219; 6 RT 1383, 1408.)

Initially during the interview, Capers claimed that he was only the lookout, while Wino and Bam-Bam were chiefly responsible for the murders. (32 CT 9219.) Capers stated that he had a "long time rivalry" with Wino, and that if law enforcement later talked to Wino, he would likely try to pin the crimes on Capers. (32 CT 9293.)

At the start of the interview, Capers claimed that he never went inside the store when Consuelo and Nathaniel were murdered. (32 CT 9229.) When pressed further, Capers admitted that he was inside the store and that he helped force the victims into the back of the store. (32 CT 9236-9237.) Specifically, Capers stated that he "grabbed [Consuelo's] leg and I pushed her through the door because she was resisting . . ." (32 CT

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[8] A portion of the video of Detective Griego's interview with Capers was played for the jury. (6 RT 1398-1399; Ex. 79.) A transcript of that portion of the videotape appears at 32 CT 9215-9299.

9237.) Capers also grabbed Nathaniel "by his throat" and "threw him in there." (32 CT 9237.)

Capers discussed how he and the others beat Consuelo and Nathaniel and how he personally punched Nathaniel several times. (32 CT 9243-9244.) In addition, Bam-Bam hit Consuelo with a long stick-like object that was about three to four feet long. (32 CT 9242-9248.) During the beating, Consuelo was pleading: "Stop please. Don't hurt me, don't hurt us. Don't hurt us." (32 CT 9242, 9263.) Nathaniel was trying to protect Consuelo, which led Capers to beat him more. (32 CT 9242-9244.)

As Consuelo was lying on the ground—beaten and severely injured, but still alive and "barely" moving—Bam-Bam raped her. (32 CT 9256-9258, 9265.) During the rape, Consuelo was screaming "for a little while." (32 CT 9268.) Nathaniel, who was still alive and watching as his wife was being raped, was yelling and screaming, but Capers beat him more to keep him quiet. (32 CT 9260, 9268-9269.)

Then, the shooting happened. Capers claimed during this interview that Wino had the gun and was the shooter. (32 CT 9238-9239.) Capers was certain that the gun was a .45 caliber. (32 CT 9286.) Capers stated: "I know my guns . . . I've been messing with guns for a long time, [so I] knew the caliber . . . right off the top." (32 CT 9286.) Capers was not specific about who was shot where or how many times, only that Wino was the shooter and that he had a .45. (32 CT 9238-9239, 9286.) Capers stated: "I was there when the murder happened. I was right there." (32 CT 9252.)

After the rape and the shooting, the group used gasoline to light Consuelo and Nathaniel on fire. (32 CT 9254, 9255.) Capers stated that some of the others "lingered" in the store after the fire was set. (32 CT 9270-9271.) But when Capers was asked whether anybody tried to clean up any of the blood at the crime scene, he responded: "Naw, clean the blood up, that draws a blank dude, right there." (32 CT 9255.) Capers did

state that someone from the group, he thought Bam-Bam, gathered up the .45 caliber shell casings and later disposed of them. (32 CT 9280-9282.)

Following the crimes, the group stole a Camaro that was parked at the store and drove it to a nearby Motel 6, where they then went their separate ways. (32 CT 9220, 9229-9230, 9271.)

At the conclusion of the interview, Capers agreed to go to the crime scene with the officers the following day to "walk [them] through" the crime "step by step." (32 CT 9296-9297.)

g. January 6, 2001 [Crime Scene Reenactment]

The following day, Detective Griego and other officers took Capers to the crime scene where Capers participated in a videotaped reenactment of the crimes. (6 RT 1413-1416.)[9] During the reenactment, Capers essentially reiterated what he told officers during the interviews the previous day, but he added some additional details. Specifically, Capers stated that during the attack Nathaniel "wouldn't shut up" so they bound his mouth. (32 CT 9311, 9351-9352.) At the end of the reenactment, Capers stated his belief that he was just as guilty as the others and that he was "expecting a conviction out of this . . ." (32 CT 9360.)

h. January 25, 2001

On January 25, 2001, Detective Griego contacted Capers's half-brother Eagle and talked with him about the murders. (6 RT 1438.) Detective Griego also transported Eagle to the Riverside Police Department and allowed him to speak with Capers. (6 RT 1437-1438.)

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[9] Portions of the videos of Capers's crime scene reenactment were played for the jury. (6 RT 1415-1417, 1432-1433; Exs. 80 and 81.) Transcripts of those portions of the videotapes appear at 32 CT 9300-9330 [Ex. 80 – part one of reenactment] and 32 CT 9331-9361 [Ex. 81 – part two of reenactment].

Following that, Detective Griego conducted another videotaped interview with Capers. (6 RT 1439.)[10] During that interview, Capers took full responsibility for the crimes, admitting that he was the one who was "calling the shots." (32 CT 9373, 9382-9383.) Capers also admitted that he was the one who had the gun and was the one who fired the fatal shots. (32 CT 9375-9377, 9382.) Capers stated that he disposed of the gun by throwing it out by some railroad tracks because he was "just trying to cover it up." (32 CT 9371-9372, 9378.) Capers also admitted disposing of the shell casings collected from the crime scene. (32 CT 9372.)

Capes explained that Bam-Bam poured gasoline on the victims, and "Wino lit them on fire and he was feeding the fire with uh, whatever, some type of, throwing stuff on them to burn them, you know." (32 CT 9376.) Capers also admitted that Eagle was the fourth member of the group, but claimed that Eagle stayed outside during the time of the murders. (32 CT 9378.)

i. April 16, 2002

Detective Griego next interviewed Capers on April 16, 2002. (6 RT 1441.) The initial interview took place at North Kern State Prison, after which Detective Griego transported Capers to the Barstow Police Department where the interview continued and was videotaped. (6 RT 1441-1442.)[11]

During the interview, Capers provided yet more details about the crimes. Specifically, he discussed how he and the others met ahead of time

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[10] A portion of the video of Detective Griego's interview with Capers was played for the jury. (6 RT 1439; Ex. 82.) A transcript of that portion of the videotape appears at 32 CT 9362-9383.

[11] A portion of the video of Detective Griego's interview with Capers was played for the jury. (6 RT 1443; 7 RT 1446; Ex. 83.) A transcript of that portion of the videotape appears at 32 CT 9384-9422.

and planned out the robbery. (32 CT 9391.) During the crime, Capers stated that he went through Nathaniel's pockets and took $100 in cash and the keys to the Camaro, which they later took as they fled the scene. (32 CT 9401-9404.) Capers also stole the wedding ring that Consuelo had been wearing, which he later traded for "dope." (32 CT 9403, 9406, 9417.) When Nathaniel would not stop yelling during the attack, they bound him with duct tape. (32 CT 9405.) Capers then poured gasoline on both Consuelo and Nathaniel and told them that if they did not tell him where their money was located, he was going to light them on fire. (32 CT 9406-9408.) Capers thereafter used a lighter to set them both on fire, and used t-shirts to keep the fire going. (32 CT 9406-9409.) When Capers was asked whether he felt bad for the victims and their families, he responded: "You know, I don't, I don't feel bad because I know, I'm gonna have to do prison time . . ." (32 CT 9410.)

7. Capers's Statements To Lisa Martin

Lisa Martin met Capers through mutual friends in December 1999, the month after the murders. (7 RT 1449.) Martin considered Capers a friend so she let him sleep on her couch for about a month. (7 RT 1449-1450.) On about four or five different occasions during that month, Capers talked about how he killed a man and a woman in Barstow. (7 RT 1451-1452.) Capers described his role in detail, including that he personally shot the man and that he poured gasoline on both victims and lit them on fire. (7 RT 1452.) Capers stated that he thought it was "funny" that the woman had been "pleading and begging for her life." (7 RT 1453.) Capers also stated his belief that Consuelo and Nathaniel "deserved what they got." (7 RT 1453.) Capers kept the lighter he used to set the victims on fire as a memento and would show it off to others in a laughing and joking manner. (7 RT 1453-1454.)

8. Capers's Statements To Blake Martin

Blake Martin, the son of Lisa Martin, was 15 years old during the time that Capers was sleeping on their couch. (7 RT 1497.) During the time Capers was staying at their house, he frequently talked about the murders and described his personal role in killing the victims. (7 RT 1498-1500.)[12]

9. Additional Evidence Relating To The Murders

Ramon Tirado, who lived right behind the t-shirt shop where the double homicide occurred, had known Capers and his half-brother Eagle for "years." (8 RT 1773-1774.) About a week before the homicides, Capers, Eagle, and two other people stopped by Tirado's home to ask him whether he knew of "any places they could rob . . ." (8 RT 1775-1776, 1778.) Capers and Eagle specifically asked Tirado about the t-shirt shop, about who ran the shop, and about whether he thought they had any money inside the shop. (8 RT 1775-1778.) The group was also looking to "recruit" people to do home invasions and robberies with them, and they asked Tirado if he wanted to join them in robbing the couple at the t-shirt shop. (8 RT 1775-1778.) Tirado declined the invitation. (8 RT 1775-1776.)

Shortly after the murders, law enforcement officers discovered Consuelo Patrida Young's Camaro in a Motel 6 parking lot about two miles away from the crime scene. (5 RT 1145-1146.) This was consistent with Capers's subsequent statements regarding stealing the Camaro and driving

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[12] Defense counsel sought to discredit the testimony of Lisa Martin and Blake Martin by cross-examining them about an armed home-invasion robbery that Capers and two others committed at their residence in January 2000, shortly after he moved out. (7 RT 1468-1471, 1500-1503.) Capers was convicted for his role in that home-invasion and was sentenced to 23 years in prison. (See 7 RT 1659.)

it to the Motel 6 when they fled the scene. (See 32 CT 9220, 9229-9230, 9271, 9401-9404.)

10. Possession Of A Dagger In A Penal Institution

In September 2002, a deputy sheriff searched Capers's jail cell and located a homemade shank commonly used as a weapon. (7 RT 1517-1519.) Capers admitted that he "wouldn't hesitate to use" the shank and that if it was taken away "he would make another one the next day." (7 RT 1521.)

11. Defense

Capers did not testify or present any witnesses on his behalf. (See 8 RT 1790.)

B. Penalty Phase Evidence

1. Evidence in Aggravation

a. Criminal History Evidence

Lisa Martin and her mother Penny Bartis testified about Capers and two other men bursting into their home with guns and committing a home-invasion robbery. (10 RT 2339-2353, 2368-2377.) Specifically, Martin said that in January 2000, shortly after Capers moved out, she was living with her two children, her mother (Penny Bartis), and a friend. (10 RT 2339-2340.) In the early evening of January 4, 2000, Capers knocked at the front door. (10 RT 2340.) When Bartis answered the door, Capers burst in, put a gun to her head, and pushed her down the hallway toward a back bedroom. (10 RT 2341-2342.) Two other men, also with guns, entered behind Capers, grabbed Martin and her children, and forced them into the same back bedroom. (10 RT 2341-2345.) The assailants threatened to kill the hostages if they moved. (10 RT 2345.) They demanded money and ransacked the house looking for money and property to steal. (10 RT 2345-2347.) In total, Capers and his group stole jewelry, cash, and a safe. (10

RT 2349-2350, 2352.) As Capers was leaving, he told Martin that he would kill her and her family if she called the police. (10 RT 2353.)

Misty Sedillo testified that in 1993, when she was 16 years old, she was riding in a car with Capers and some other friends. (10 RT 2318-2321.) Capers and his friends wanted to shoot at a house, but Sedillo asked them not to because some children and her brother were playing in the front yard of the house. (10 RT 2324-2325.) Later during the ride, Capers pointed a gun at Sedillo's head. (10 RT 2327.)

A deputy sheriff working at the jail where Capers was housed during the trial testified that while searching Capers's cell in March 2006, she found a shank under his bed. (10 RT 2420-2421.) Capers admitted that he had been smuggling the shank into court with him for two months during the trial with the intention of stabbing one of the witnesses who was testifying against him. (10 RT 2422.)

Another deputy sheriff working at the jail testified that he was responsible for reviewing incoming and outgoing inmate mail. (10 RT 2330-2332.) During the course of reviewing Capers's mail, he discovered a letter that Capers had written and attempted to mail to Michael Ramos, the elected District Attorney of San Bernardino County. (10 RT 2332-2333.) Within that letter, which was read for the jury and admitted into evidence, Capers stated: "This letter is basically advising you and the State to give me the death penalty. If you don't, a lot of blood will be on the County's hands. Fair warning. It starts here and now." (10 RT 2334; 33 CT 9479-9481; Ex. 108.)

Finally, the prosecution admitted into evidence a prior conviction packet containing materials pertaining to Capers's 1994 felony conviction for receiving stolen property. (10 RT 2426; 33 CT 9482-9497; Ex. 109.)

b. Victim Impact Evidence

Charlene Garcia, the daughter of Nathaniel Young and the step-daughter of Consuelo Patrida Young, testified about how the murder of her parents had a significant negative impact on her life and the lives of her family members. (10 RT 2389-2397, 2401-2404, 2407-2408, 2411-2414, 2416-2417.)

2. Evidence in Mitigation

Albert Capers testified that Capers was his adopted grandson. (10 RT 2479.) He stated that he loved Capers and indicated his belief that Capers was not a racist person. (10 RT 2480-2481.)

ARGUMENT

I. THE FEDERAL CORROBORATION RULE, WHICH IS A COMMON LAW PRINCIPLE INAPPLICABLE TO STATE PROSECUTIONS, IS LESS STRINGENT THAN CALIFORNIA'S CORPUS DELICTI RULE; IN ANY EVENT, THERE WAS AMPLE INDEPENDENT EVIDENCE CORROBORATING CAPERS'S ADMISSIONS

Capers contends his convictions must be reversed because his numerous admissions were not sufficiently corroborated. (AOB 34-60.) Specifically, Capers argues that the federal "corroboration rule," which simply requires an admission be trustworthy and reliable, should be applied in lieu of California's more stringent corpus delicti rule, which requires proof of every element of the crimes independent of the defendant's admissions. (AOB 34-60.)

Capers's argument fails for a number of reasons. First, the federal corroboration rule—which is neither statutory nor constitutional, but rather a common law principle—is inapplicable in California prosecutions. Second, both the federal corroboration rule and California's corpus delicti rule are equally aimed at precisely the same goal: ensuring that the alleged crime *actually occurred*. Indeed, it is well settled that no independent

evidence corroborating a defendant's extrajudicial statements is needed to establish the perpetrator's identity. Third, the federal corroboration rule is less stringent than, and wholly subsumed by, California's corpus delicti rule, which was properly applied in this case. Finally, and in any event, there was a wealth of independent evidence corroborating Capers's admissions, including a preserved crime scene containing the victims' deceased bodies, and Capers's specific knowledge of physical evidence, potential suspects, and circumstances of the crime not revealed to the public. For these reasons, Capers's argument is without merit.

A. Capers's Convictions And Death Sentence Must Be Upheld Because California's Corpus Delicti Rule Was Properly Applied

In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself—i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. (E.g., *People v. Alvarez* (2002) 27 Cal.4th 1161, 1168.) Under California law, the prosecution cannot satisfy this burden by relying exclusively upon the extrajudicial statements, confessions, or admissions of the defendant. (E.g., *People v. Ochoa* (1998) 19 Cal.4th 353, 404; *People v. Jones* (1998) 17 Cal.4th 279, 301; *People v. Jennings* (1991) 53 Cal.3d 334, 364; 1 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) Elements, § 45, p. 250.) Though not mandated by statute, and never deemed a constitutional requirement, the rule requiring some independent proof of the corpus delicti has roots in the common law. (Crisera, *Reevaluation of the California Corpus Delicti Rule: A Response to the Invitation of Proposition 8* (1990) 78 Cal. L.Rev. 1571, 1571-1573.) California decisions have applied it at least since the 1860's. (*People v. Alvarez, supra,* 27 Cal.4th at p. 1169, citing Comment, *California's Corpus Delicti Rule: The Case for Review and Clarification* (1973) 20 UCLA L.Rev. 1055.)

Virtually all American jurisdictions have some form of rule against convictions for criminal conduct not proven except by the uncorroborated extrajudicial statements of the accused. (E.g., 1 McCormick on Evidence (5th ed. 1999) Confessions, § 145, pp. 521-522; Crisera, *supra,* 78 Cal. L.Rev. 1571, 1572–1573.) The rule is aimed at ensuring that a person will not be falsely convicted, by his or her untested words alone, of a crime that never happened. (*People v. Ochoa, supra,* 19 Cal.4th at p. 405; *People v. Jones, supra,* 17 Cal.4th at p. 301; *People v. Jennings, supra,* 53 Cal.3d at p. 368.)

A majority of jurisdictions, like California, require some independent proof of the corpus delicti itself, i.e., injury, damage, or loss by a criminal agency. (1 McCormick, *supra*, Confessions, § 146, pp. 525–527, 528, fn. 4.) The requisite independent proof may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. (*People v. Jennings, supra,* 53 Cal.3d 334, 364; *People v. Ruiz* (1988) 44 Cal.3d 589, 610-611; *People v. Towler, supra,* 31 Cal.3d 105, 117.) There is no requirement of independent evidence "of every physical act constituting an element of an offense," so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency. (*People v. Jones, supra,* 17 Cal.4th 279, 303.) In every case, once the necessary quantum of independent evidence is present, the defendant's extrajudicial statements may then be considered for their full value to strengthen the case on all issues. (*People v. Robbins, supra,* 45 Cal.3d 867, 885-886; *People v. Alcala, supra,* 36 Cal.3d 604, 624-625.)

California courts have addressed the independent-proof requirement in various contexts. It has been held that a defendant may not be held to answer if no independent evidence of the corpus delicti is produced at the preliminary examination. (*Jones v. Superior Court* (1979) 96 Cal.App.3d

390, 393; see *People v. Jones, supra,* 17 Cal.4th 279, 300-301.) At trial, the defendant's extrajudicial statements have been deemed inadmissible over a corpus delicti objection absent some independent evidence of the crime to which the statements relate (see, e.g., *People v. Ochoa, supra,* 19 Cal.4th 353, 404-405; *People v. Wright, supra,* 52 Cal.3d 367, 404; *People v. Robbins* (1988) 45 Cal.3d 867, 885-886), and this Court has said that the corpus delicti rule is one governing the admissibility of evidence (*People v. Diaz* (1992) 3 Cal.4th 495, 529; see also *People v. Rogers* (1943) 22 Cal.2d 787, 806). Whenever an accused's extrajudicial statements form part of the prosecution's evidence, the cases have additionally required the trial court to instruct sua sponte that a finding of guilt cannot be predicated on the statements alone. (E.g., *People v. Beagle, supra,* 6 Cal.3d 441, 455; *People v. Howk* (1961) 56 Cal.2d 687, 706-707; *People v. Holbrook* (1955) 45 Cal.2d 228, 234; see *People v. Carpenter* (1997) 15 Cal.4th 312, 393-394.) Finally, appellate courts have entertained direct claims that a conviction cannot stand because the trial record lacks independent evidence of the corpus delicti. (E.g., *People v. Wright, supra,* 52 Cal.3d 367, 403-405; *People v. Morales* (1989) 48 Cal.3d 527, 552-553; *People v. Alcala* (1984) 36 Cal.3d 604, 624-625; *People v. Towler* (1982) 31 Cal.3d 105, 115.)

In federal prosecutions, as well as in a minority of states, the rule is simply that the accused's incriminating statement cannot be proof the crime occurred unless there is some independent evidence that the statement is trustworthy. (*Opper v. United States* (1954) 348 U.S. 84, 93 [75 S.Ct. 158, 99 L.Ed. 101]; see, e.g., *Armstrong v. State* (Alaska 1972) 502 P.2d 440, 447; *State v. Zysk* (1983) 123 N.H. 481, 465 A.2d 480, 483; *State v. Lucas* (1959) 30 N.J. 37, 152 A.2d 50, 57-61; *Fontenot v. State* (Okla.Crim.App.1994) 881 P.2d 69, 77-78.)

In the present case, Capers attempts to invoke the federal corroboration rule in an effort to claim that his multiple admissions should

be factually discredited. (AOB 34-60.)[13] The first problem with Capers's argument is that the federal corroboration rule is inapplicable in California prosecutions. That is because neither due process nor any other federal constitutional guarantee requires corroboration of a defendant's extrajudicial statements. (See, e.g., *People v. Alvarez, supra,* 27 Cal.4th at p. 1169.) The rule is likewise not mandated by any statute. (*Ibid.*) Rather, the independent-proof requirement is rooted in the common law, and has been historically and properly applied in California via the corpus delicti rule. (*Id.* at pp. 1168-1171.)

In any event, although there is slight variation between California's corpus delicti rule and the federal corroboration rule, both rules are equally aimed at protecting the same interest: that a person not be falsely convicted, by his or her untested words alone, of a *crime that never occurred.* (*People v. Alvarez, supra,* 27 Cal.4th at p. 1169; *People v. Ochoa, supra,* 19 Cal.4th at p. 405; *United States v. Lopez-Alvarez* (9th Cir. 1992) 970 F.2d 583, 592, citing *Opper v. United States* (1954) 348 U.S. 84 [75 S.Ct. 158, 99 L.Ed. 101], and *Wong Sun v. United States* (1963) 371 U.S. 471 [83 S.Ct. 407, 9 L.Ed.2d 441].) Whether this goal is achieved through California's corpus delicti rule (requiring independent proof of every element of the charged crimes), or through the federal corroboration

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[13] Capers does not argue his admissions were improperly admitted. Rather, his claim is solely that his admissions were not sufficiently corroborated to be deemed trustworthy and reliable under the federal corroboration rule. (AOB 34-60.) This is likely because Capers did not object on these grounds in the trial court, and instead has elected to raise the issue for the first time on appeal. As is well established by this Court, absent an objection in the trial court, a defendant is not permitted to argue for the first time on appeal that his or her extrajudicial statements were improperly admitted without independent proof of the corpus delicti. (*People v. Alvarez, supra,* 27 Cal.4th at p. 1172, fn. 8, citing *People v. Wright* (1990) 52 Cal.3d 367, 404-405.)

rule (requiring the statement be trustworthy), the overarching aim remains ensuring that a crime actually occurred. (*People v. Alvarez, supra,* 27 Cal.4th at p. 1169; *People v. Ochoa, supra,* 19 Cal.4th at p. 405.)

Here, there is no question, and Capers does not dispute, that a crime undoubtedly occurred. Indeed, the evidence presented at trial included, among other things, testimony regarding a preserved crime containing the deceased bodies of Nathaniel Young and Consuelo Patrida Young. (E.g., 5 RT 1095-1096, 1100-1101, 1120-1121.) Both of the victims had been burned by a fire intentionally started with gasoline. (See 6 RT 1186-1189.) Consuelo Patrida Young had additionally suffered from extensive blunt force trauma. (7 RT 1584.) Her injuries in this regard were consistent with having been repeatedly bludgeoned with the bloody golf clubs discovered near her body. (5 RT 1099, 1122-1123; 7 RT 1600-1602.) Nathaniel Young had additionally been shot several times. (7 RT 1544-1546.) This was consistent with the multiple .45 caliber bullet projectiles discovered at the crime scene and the .45 caliber shell casing discovered at the crime scene. (See 5 RT 1114-1115, 1134-1135.)

This evidence, among other evidence admitted at trial, established precisely what both the federal corroboration rule and California's corpus delicti rule are equally aimed at establishing: the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. (See *People v. Alvarez, supra,* 27 Cal.4th at p. 1169; *United States v. Lopez-Alvarez, supra,* 970 F.2d at p. 592.) For this reason, there is no concern in the present case that Capers was convicted, based solely on his extrajudicial statements, of a crime that never occurred. (See *People v. Alvarez, supra,* 27 Cal.4th at p. 1169; *People v. Ochoa, supra,* 19 Cal.4th at p. 405; *United States v. Lopez-Alvarez, supra,* 970 F.2d at p. 592.)

Following from this purpose of protecting against a conviction based solely upon extrajudicial statements regarding a nonexistent crime is the

well-settled principle that no independent evidence corroborating a defendant's extrajudicial statements is needed to establish the perpetrator's identity. (E.g., *People v. Valencia* (2008) 43 Cal.4th 268, 296; *People v. Kraft* (2000) 23 Cal.4th 978, 1057; CALCRIM No. 359 ["The identity of the person who committed the crime may be proved by the defendant's statement alone"]; CALJIC No. 2.72 ["The identity . . . may be established by a confession or admission"].) Capers disregards this rule when he argues that his extrajudicial statements are unreliable because he was simply trying to protect the true perpetrator, his younger brother Antonio Leatham (aka "Eagle"). (See AOB 57-58.) Capers's argument in this regard would be appropriately directed toward the jury in an effort to minimize the weight the jury should afford Capers's extrajudicial statements. Indeed, defense counsel argued this point extensively during his closing argument. (E.g., 8 RT 2008-2010.) But this line of reasoning has no bearing on whether a crime actually occurred, and thus whether the use of Capers's extrajudicial statements ran afoul of the corpus delicti rule or the federal corroboration rule. (*People v. Valencia, supra,* 43 Cal.4th at p. 296; *People v. Kraft, supra,* 23 Cal.4th at p. 1057.)

Similarly, no independent evidence corroborating a defendant's extrajudicial statements is needed to establish the degree of the charged crime (e.g., *People v. Cooper* (1960) 53 Cal.2d 755, 765), or a special circumstance alleged under section 190.2 (*People v. Ray* (1996) 13 Cal.4th 313, 341, fn. 13). Capers again disregards this well-established rule when he argues that even if his murder convictions are upheld, his statements lack the reliability necessary to uphold his death judgment. (AOB 60.) Again, this line of reasoning has no bearing on whether a crime actually occurred, and thus whether the use of Capers's extrajudicial statements ran afoul of the corpus delicti rule or the federal corroboration rule. (*People v.*

Ray, supra, 13 Cal.4th at p. 341, fn. 13; *People v. Cooper, supra,* 53 Cal.2d at p. 765.)

Moreover, the requirements of the federal corroboration rule are less stringent in practical application than those of California's corpus delicti rule. As stated, California law requires independent proof of the corpus delicti itself, i.e., injury, damage, or loss by a criminal agency. (*People v. Alvarez, supra,* 27 Cal.4th at p. 1169, fn. 3, citing 1 McCormick, *supra,* Confessions, § 146, pp. 525-527, 528, fn. 4.) CALCRIM No. 359 [Corpus Delicti: Independent Evidence of a Charged Crime] sets forth that a "defendant may not be convicted of any crime based on (his/her) out-of-court statement[s] alone." Similarly, CALJIC No. 2.72—with which the jury was properly instructed in this case (31 CT 8953)—states the following: "No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any confession or admission made by him outside of this trial." (31 CT 8953.)

Conversely, under federal law, "the rule is simply that the accused's incriminating statement cannot be proof the crime occurred unless there is some independent evidence that the statement is *trustworthy.*" (*People v. Alvarez, supra,* 27 Cal.4th at p. 1169, fn. 3, emphasis in original, citing *Opper v. United States, supra,* 348 U.S. at p. 93.) As such, under federal law, the corpus delicti, or fact that a "crime occurred," can be established simply by independent evidence that the defendant's extrajudicial statement bears indicia of trustworthiness. (*People v. Alvarez, supra,* 27 Cal.4th at p. 1169, fn. 3, citing *Opper v. United States, supra,* 348 U.S. at p. 93.) Thus, the federal corroboration rule is satisfied so long as the extrajudicial statement is deemed trustworthy, even absent proof of each element of the crime independent of that extrajudicial statement. (*People v. Alvarez, supra,* 27 Cal.4th at p. 1169, fn. 3, citing *Opper v. United States, supra,* 348 U.S. at p. 93.) As set forth, California's corpus delicti rule, which was

properly applied in the present case, requires more. Specifically, under California law, even an extrajudicial statement deemed trustworthy would run afoul of California's corpus delicti rule unless there is proof of every element of the charged crimes independent of that extrajudicial statement. (*People v. Alvarez, supra,* 27 Cal.4th at p. 1169, fn. 3; citing *Opper v. United States, supra,* 348 U.S. at p. 93.)

B. Substantial Independent Evidence of the Crimes Corroborated Capers's Admissions

Finally, notwithstanding whether the federal corroboration rule is applied or the more stringent California corpus delicti rule is applied, there was a wealth of independent evidence corroborating Capers's admissions. As discussed above, significant evidence was admitted regarding the preserved crime scene containing the victims' deceased bodies. (E.g., 5 RT 1095-1101, 1120-1123; 6 RT 1186-1189; 7 RT 1544-1546, 1584, 1600-1602.) The crime-scene evidence also indicated that efforts were made by the perpetrators to conceal the fact of the crime by mopping up the victims' blood, removing shell casings from the scene, and destroying Consuelo Patrida Young's underwear. (E.g., 5 RT 1134-1135, 1139, 1140-1145; 6 RT 1264-1265.)

In addition, Detective Leo Griego from the Barstow Police Department specifically stated that the law enforcement officers investigating the crimes collaborated and decided to withhold certain information from the public. (6 RT 1365.) This included, among other information, the caliber of the firearm used, that Nathaniel Young's cause of death was by a firearm, and that Nathaniel Young had been bound by duct tape. (6 RT 1365.) But yet this was all information Capers was aware of and relayed to law enforcement, lending further corroboration to his statements. (E.g., 32 CT 9286, 9311, 9351-9352, 9405.)

There was additional evidence corroborating Capers's various statements. For example, Capers admitted that he and his cohorts stole the victim's Camaro and drove it to a nearby Motel 6. (32 CT 9220, 9229-9230, 9271, 9401-9404.) Shortly after the murders occurred, law enforcement officers discovered Consuelo Patrida Young's Camaro in a Motel 6 parking lot about two miles away from the crime scene. (5 RT 1145-1146.) Ramon Tirado testified that about a week before the murders Capers and his brother talked with him about robbing the t-shirt shop and invited Tirado to join them for the crime. (8 RT 1775-1778.) This was consistent with Capers's admission that he and his cohorts met ahead of time and planned out the robbery. (32 CT 9391.) Capers discussed at length how he and his accomplices removed shell casings from the scene and disposed of those shell casings and the gun in an effort to cover up the crime. (E.g., 32 CT 9280-9282, 9371-9372, 9378.) This was consistent with shell casings and the gun not being discovered by law enforcement at the crime scene. (E.g., 5 RT 1135, 1139.)

The above-outlined evidence, in addition to other corroborating evidence introduced during the trial, was more than sufficient to meet the low threshold of independent evidence needed to support Capers's extrajudicial statements. As stated above, the requisite independent proof may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible. (*People v. Jennings, supra,* 53 Cal.3d 334, 364.) There is no requirement of independent evidence "of every physical act constituting an element of an offense," so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency. (*People v. Jones, supra,* 17 Cal.4th 279, 303.) In every case, once the necessary quantum of independent evidence is present, the defendant's extrajudicial statements may then be considered for their full value to

strengthen the case on all issues. (*People v. Robbins, supra,* 45 Cal.3d 867, 885-886; *People v. Alcala, supra,* 36 Cal.3d 604, 624-625.)

For the foregoing reasons, California's corpus delicti rule was properly applied, and therefore, Capers's convictions and sentence of death must be upheld.

II. The Trial Court Did Not Violate Capers's Due Process Right To Present A Defense By Excluding Renteria's Testimony Because Renteria Invoked A Valid Fifth Amendment Privilege Against Self-Incrimination

Capers claims the trial court violated his federal due process right to present a defense by excluding evidence that Amber Renteria overheard Carlos Loomis say he and Ruben Romero were involved in the robbery of the t-shirt shop. (AOB 61-78.) Specifically, Capers argues that the trial court erred when it concluded that Renteria had a valid basis to invoke her Fifth Amendment right against self-incrimination. (AOB 79-82) Respondent disagrees. As the trial court properly concluded, Renteria had a valid right to invoke her Fifth Amendment privilege against self-incrimination because her testimony could have exposed her to potential criminal liability. Indeed, it was on this basis that Renteria invoked her Fifth Amendment privilege, an invocation in which Renteria's counsel joined. Furthermore, exclusion of this evidence was not a deprivation of Capers's due process right to present a defense because it was not the type of evidence that was so vital to the defense that due process principles required its admission. Rather, not only did the evidence fail to exonerate Capers, it supported the prosecution's case by corroborating Capers's admission that he committed the murders with Loomis and Romero. For these reasons, Capers's argument is without merit.

A. Relevant Proceedings

On June 1, 2006—during the people's guilt phase case-in-chief, but outside the presence of the jury—defense counsel indicated that he sought to call Amber Renteria as a defense witness. (8 RT 1702-1703.) Renteria, who was present in court, was in custody at that time for an unrelated case. (8 RT 1702-1703.) At the outset of the hearing, the court appointed Supervising Deputy Public Defender Mark Shoup to represent Renteria and determine whether she had a basis to invoke her Fifth Amendment right against self-incrimination. (8 RT 1703.) Shoup represented to the court that based on his conversation with Renteria he believed she had a valid claim of privilege and that if called to testify she would invoke her right against self-incrimination under the Fifth Amendment. (8 RT 1703-1704.)

The court conducted an Evidence Code section 402 hearing during which Renteria testified. (8 RT 1708-1709.) When Renteria was questioned about her previous interview with law enforcement relating to the t-shirt shop murders, she repeatedly invoked her Fifth Amendment privilege against self-incrimination. (8 RT 1710-1712.) When the court questioned Shoup (Renteria's counsel) about Renteria's basis for invoking the privilege, Shoup stated that Renteria's testimony could potentially expose her to liability under section 148 for giving false information to a peace officer. (8 RT 1713-1714.) Defense counsel (for Capers) expounded that Renteria made a number of inconsistent statements to law enforcement officers. (8 RT 1720.) Based on that, the court indicated there was a valid basis for Renteria to invoke her privilege against self-incrimination, but stated that it would revisit the issue should defense counsel discover additional applicable authority. (8 RT 1720.)

Later that same day—after the prosecution and the defense had both rested their cases for the guilt phase—defense counsel revisited the issue. (8 RT 1798.) Specifically, defense counsel stated that Renteria's most

recent interview with law enforcement—which was the most recent act that could potentially expose her to liability—was in October of 2003. (8 RT 1798.) Because it was then June of 2006, the statute of limitations would have run on any potential misdemeanor offense with which she could be charged under section 148. (8 RT 1798.) When the court asked the prosecutor for input, the prosecutor indicated that Renteria's attorney would be in the best position to determine what possible liability Renteria's testimony could expose her to, but also suggested the possibility that Renteria could potentially be exposed to liability as an accessory after the fact, which would be a felony and for which the statute of limitations would not yet have expired. (8 RT 1799.)

Based on defense counsel's argument, the court conducted an additional hearing outside the presence of the jury during which Renteria's counsel (Supervising Deputy Public Defender Mark Shoup) was present. (8 RT 1810.) At the outset of the hearing, the prosecutor expressed his belief that Renteria could potentially be held liable as an accessory after the fact under section 32. (8 RT 1811-1812.) Shoup agreed. (8 RT 1812-1813.) Defense counsel for Capers argued that Renteria's conduct did not satisfy the elements for a violation of section 32 and that state evidentiary rules should not infringe his ability to present a defense. (8 RT 1813-1817.)

Defense counsel also argued that the Renteria statement implicating Loomis and Romero would completely exonerate Capers. (8 RT 1817-1818.) Defense counsel specifically referred to Renteria's telling law enforcement: "I heard Bam-Bam (Loomis) and Wino (Romero) did that shit." (8 RT 1819.) The prosecutor pointed out that the quoted statement did not exonerate Capers, but was actually consistent with Capers's admission that Loomis and Romero were a part of his group that committed the robbery and murders. (8 RT 1819.)

Following additional argument, the court issued its ruling. At the outset, the court noted that Renteria's statement implicating Loomis and Romero actually corroborated Capers's admissions to law enforcement wherein he stated that Loomis and Romero were a part of his group that committed the crimes. (8 RT 1845-1846.) Notwithstanding that observation, the court stated that based on the beliefs of the prosecutor and Renteria's counsel that Renteria could potentially be exposed to liability under section 32, Renteria had a valid basis to invoke her Fifth Amendment privilege against self-incrimination. (8 RT 1846.) The court also noted it was unnecessary to analyze every possible area of liability to which Renteria could be exposed, or analyze every element of every crime for which she could potentially be liable. (8 RT 1847.) Rather, it was sufficient that Renteria had invoked her Fifth Amendment privilege, an invocation supported by the beliefs of her attorney that her testimony could incriminate her. (8 RT 1847-1851.) Based on that, the court ruled that Renteria had a valid basis to invoke her Fifth Amendment privilege against self-incrimination. (8 RT 1847-1851.) The court stated that its ruling was "tentative" and that it would be willing to revisit the issue. (See 8 RT 1852.)

After the jury returned guilty verdicts, but before the start of the penalty phase, defense counsel asked to revisit the issue. (9 RT 2215-2216, 2218-2219.) During the arguments that followed, defense counsel conceded that nothing in Renteria's statement indicated that Loomis had a gun, was the shooter, or personally killed anyone. (9 RT 2229.) The prosecutor reiterated that Renteria's statement not only failed to exonerate Capers, but was actually consistent with Capers's prior statements to law enforcement. (9 RT 2229-2230.)

Out of an abundance of caution, the court had Renteria come back into court for additional Evidence Code section 402 testimony. (9 RT 2236-2237, 2248-2249.) Specifically, the court sought to determine

whether Renteria was invoking her Fifth Amendment privilege in respect solely to a misdemeanor violation under section 148.5, or also in consideration of a felony violation of section 32. (9 RT 2236-2237.) Renteria was again sworn and testified outside the presence of the jury. (9 RT 2249.) Renteria again invoked her privilege against self-incrimination under the Fifth Amendment, and her counsel again joined in her invocation of the privilege. (9 RT 2249-2259.)

At the outset of the court's ruling, the court pointed out the many differences between the facts of the present case and the facts of *Chambers v. Mississippi* (1973) 410 U.S. 284, a case upon which defense counsel relied to argue that exclusion of Renteria's statement amounted to a violation of Capers's due process right to present a defense. (9 RT 2274-2280.) Based on that, in addition to Renteria's valid basis for invoking her Fifth Amendment privilege, the court ruled that Renteria's statement was not admissible. (9 RT 2280.)

Defense counsel subsequently made an oral motion for new trial based on the court's exclusion of Renteria's statement. (9 RT 2293.) The court denied the motion. (9 RT 2295-2296.)

B. The Trial Court Properly Concluded That Renteria Had A Valid Basis To Invoke Her Fifth Amendment Privilege Against Self-Incrimination

It is a bedrock principle of United States (and California) law, embedded in various state and federal constitutional and statutory provisions, that witnesses may not be compelled to incriminate themselves. (*People v. Seijas* (2005) 36 Cal.4th 291, 304; U.S. Const., 5th Amend.; Cal. Const., art. I, § 15.) As the United States Supreme Court has stated, this privilege "must be accorded liberal construction in favor of the right it was intended to secure." (*Hoffman v. United States* (1951) 341 U.S. 479, 486 [71 S.Ct. 814, 95 L.Ed. 1118].) A witness who has "reasonable cause to

apprehend danger from a direct answer" may assert the privilege. (*Ibid.*; accord, *Ohio v. Reiner* (2001) 532 U.S. 17, 21 [121 S.Ct. 1252, 149 L.Ed.2d 158].) However, "[t]he witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself—his say-so does not of itself establish the hazard of incrimination." (*Hoffman v. United States, supra*, 341 U.S. at p. 486.)

The trial court may require the witness to answer only if "'it clearly appears to the court that he is mistaken.'" (*Hoffman v. United States, supra,* 341 U.S. at p. 486.) For a witness to sustain the privilege, it need only be evident from the "implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." (*Id.* at pp. 486-487.) In order for a trial court to deny an assertion of the privilege, "the judge must be '"perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency" to incriminate.'" (*Malloy v. Hogan* (1964) 378 U.S. 1, 12 [84 S.Ct. 1489, 12 L.Ed.2d 653], quoting *Hoffman v. United States*, supra, 341 U.S. at p. 488.)

California's Evidence Code states the test broadly in favor of the privilege:

> Whenever the proffered evidence is claimed to be privileged under Section 940 [the privilege against self-incrimination], the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence *cannot possibly have a tendency to incriminate the person claiming the privilege.*

(Evid. Code, § 404, italics added.)

This Court has explained that California Evidence Code section 404 incorporates the standard of *Hoffman v. United States, supra*, 341 U.S. 479.

(*People v. Seijas, supra,* 36 Cal.4th at p. 305, citing *People v. Ford* (1988) 45 Cal.3d 431, 441-442, and *People v. Cudjo* (1993) 6 Cal.4th 585, 617.)

Applying these standards, the trial court correctly concluded that Renteria had a valid basis to invoke her privilege against self-incrimination. This was because—as the prosecutor and Renteria's counsel agreed—Renteria's act of lying to the police could potentially expose her to liability as an accessory after the fact in violation of section 32. (See, e.g., 8 RT 1811-1813.)

Section 32 states:

> Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

(§ 32.)

CRIM No. 440 [Accessories] sets forth the elements as follows:

> (1) Another person committed a felony;
>
> (2) The defendant knew that the perpetrator had committed a felony;
>
> (3) After the felony had been committed, the defendant either harbored, concealed, or aided the perpetrator; and
>
> (4) When the defendant acted, she intended that the perpetrator avoid or escape arrest, trial, conviction, or punishment.

(CALCRIM No. 440.)

As the prosecutor and Renteria's counsel indicated, if Renteria was lying to police when she retracted her statement regarding the involvement

of Loomis and Romero, it could be perceived that she was doing so to aid Loomis and Romero. (See, e.g., 8 RT 1811-1813.) Capers dissects the elements of section 32 and argues that Renteria's conduct does not factually satisfy the elements of the crime. (AOB 71-73.) He points out that the trial court expressed skepticism that Renteria would actually be prosecuted as an accessory under section 32. (AOB 73.) This approach is misguided.

As this Court has explained, "the privilege against self-incrimination does not require, or even permit, the court to assess the likelihood of an actual prosecution in deciding whether to permit the privilege." (*People v. Seijas, supra,* 36 Cal.4th at p. 305 (*Seijas*).) Indeed, in *Seijas*, the prosecutor repeatedly assured the trial court that the People had no intention of pressing charges against the witness. (*Ibid.*) This Court stated:

> The court may not force a witness to make incriminating statements simply because it believes an actual prosecution is unlikely. The test is whether the statement might tend to incriminate, not whether it might tend to lead to an actual prosecution or, stated slightly differently, whether the statement could, not would, be used against the witness.

(*Ibid.*, citing Evid. Code, § 404.) Requiring a witness to make potentially incriminating statements "whenever the court feels that actual prosecution is unlikely would impermissibly weaken the privilege against self-incrimination." (*People v. Seijas, supra,* 36 Cal.4th at p. 305.) "Use of incriminating statements must be forbidden, as by a grant of immunity, and not merely unlikely, before the court may force a witness to make them." (*Ibid.*)

This Court went even further in stating that it is unnecessary to definitively determine whether the witness's testimony would even reveal that the witness had committed any crime. (*People v. Seijas, supra,* 36 Cal.4th at p. 306.) The issue is not whether the witness's testimony actually incriminates, but rather whether it tends to. (*Ibid.*) As the United

States Supreme Court has held, the appropriate test is whether the witness had "reasonable cause to apprehend danger from the testimony." (*Ibid.*, citing *Hoffman v. United States, supra,* 341 U.S. at p. 486.) Under the facts of the present case—including the fact that the prosecution and Renteria's own attorney believed that her testimony might be incriminating—the trial court correctly concluded that Renteria reasonably apprehended danger if she testified.

Similarly lacking merit is Capers's claim that the trial court violated his due process right to present a defense by infringing on his ability to compel the presence of a witness in his favor. (AOB 68-70.) In support of this position, Capers cites and heavily relies upon *Washington v. Texas* (1967) 388 U.S. 14 [87 S.Ct. 1920, 18 L.Ed.2d 1019 (*Washington*). (AOB 68-70.) But *Washington* simply stands for the proposition that a defendant's due process right to compel the presence of a witness in his or her favor is applicable in state prosecutions via the 14th Amendment of the United States Constitution. (*Washington v. Texas, supra,* 388 U.S. at pp. 22-23.) In fact, the United States Supreme Court expressly stated in *Washington* that the right to compulsory process does not include the right to compel a witness to waive his or her Fifth Amendment privilege against self-incrimination. (*Id.* at p. 23, fn. 21.) As such, Capers's reliance on *Washington* is misplaced.

C. Any Error Was Harmless

Finally, even assuming the trial court violated Capers's due process right to compulsory process by not overriding Renteria's invocation of her privilege against self-incrimination, any 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].)

Initially, even if the trial court had required Renteria to testify notwithstanding the invocation of her privilege, it is not clear that her

testimony would have been admissible over a state-law hearsay objection. Renteria's testimony involved out-of-court statements purportedly made by Loomis, which would in and of themselves amount to inadmissible hearsay. (Evid. Code, § 1200.) Defense counsel below was preparing to argue that the statement should be admissible under the hearsay exception for declarations against interest under Evidence Code section 1230. (See 8 RT 1830-1831.) And even though defense counsel went so far as to ensure Loomis would be deemed an unavailable declarant (8 RT 1843-1844), it remains, as the prosecutor below argued, that Loomis's out-of-court statement was not made to law enforcement or any other entity that would expose him to potential penalty, but rather to a fellow gang associate ("Midget") in the presence of a civilian acquaintance (Renteria), both of whom he apparently trusted to not repeat the statement. (8 RT 1840-1841.)

Had the issue been reached below, and the underlying facts fully fleshed out, the trial court could very well have concluded that Loomis was simply boasting or bragging about the crime to impress "Midget" and Renteria, which would not qualify as a declaration against interest. (See, e.g., Evid. Code, § 1230; *People v. Frierson* (1991) 53 Cal.3d 730, 745 [in determining whether a statement is truly against interest, and hence sufficiently trustworthy to be admissible, the court should take into account not just the words, but the circumstances under which they were uttered and the possible motivation of the declarant].) Thus, even had the trial court overruled Renteria's privilege, there is good chance the statement would have nonetheless been excluded as inadmissible hearsay. It is well established that application of ordinary rules of evidence under state law does not violate a criminal defendant's federal constitutional right to present a defense, "because trial courts retain the intrinsic power under state law to exercise discretion to control the admission of evidence at trial."

(*People v. Abilez* (2007) 41 Cal.4th 472, 503, citing *People v. Lawley* (2002) 27 Cal.4th 102, 155.)

In any event, even had Capers been permitted to present Renteria's statement—notwithstanding the invocation of her Fifth Amendment privilege and the hearsay nature of the statement—it would not have benefited the defense case. That is because, as the trial court mentioned at length during the proceedings below, the statement did nothing to exonerate Capers or otherwise diminish his involvement in the crimes. (See, e.g., 8 RT 1845-1846.)

The specific statement at issue came about when Renteria was interviewed in May of 1999 by Detective Griego. Detective Griego drafted the following relevant summary of the statement:

> I told Renteria of the different murder investigations that I was conducting. When I mentioned the murders of Nathaniel Young and Consuelo Young, Renteria said, "I heard Bam-Bam and Wino did that shit." I asked Renteria how it was that she knew that it was "Bam-Bam" and "Wino" were involved. Renteria told me that she had overheard "Bam-Bam" say that he had to "get out of town" because he and his "Homie," "Wino," had "robbed a place on Main Street" and "the place burned down."

(1 CT 32 [Detective Griego police report].) Detective Griego went on to report that Renteria told him that she had overheard Bam-Bam (Loomis) say the above statements to someone who went by the moniker "Midget" who was associated with the "Los Gents" criminal street gang. (1 CT 32-33.)

Had the court overruled Renteria's Fifth Amendment privilege, and overruled a hearsay objection by the prosecution, the defense would have been permitted to call Renteria as a witness during its case-in-chief. If Renteria had taken the stand, she either would have testified to having overheard the above statements (in which case the prosecution would have

been able to impeach her with her recantation), or she would have maintained her recantation and testified that she never overheard such statements (in which case the defense would have been able to impeach her with her prior interview with Detective Griego).

Either way, the admission of Renteria's testimony in this regard would have done nothing to exonerate Capers. That is because, as the prosecutor and the trial court noted below, Capers repeatedly admitted to law enforcement that he committed the crimes with Loomis and Romero. (E.g., 32 CT 9219, 9376-9378; 6 RT 1407-1408.) If Renteria had testified that she overheard Loomis state that he and Romero were involved in the crimes, it would have served to specifically corroborate a point that Capers maintained all along: Loomis and Romero were a part of his group who committed the crimes. Not only would Renteria's testimony in this regard have failed to exonerate Capers, it would have strengthened the prosecution's case (by corroborating Capers's admissions) and weakened the defense case (by undercutting the defense's efforts to discredit Capers's admissions).

For these reasons, the admission of Renteria's testimony would not have had the vital, outcome-changing impact that Capers now claims. Stated another way, even had Renteria's testimony been admitted, the outcome would have been identical. Because any error in the exclusion of Renteria's testimony in this regard was harmless beyond a reasonable doubt, the judgment must be affirmed. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

III. Renteria Had A Valid Privilege Against Self-Incrimination Because Her Actions In 2003 Exposed Her To Potential Liability Under Section 32

Likely recognizing the shortcoming in his above argument, Capers goes on to claim that even if Renteria could be held liable under section 32, the statute of limitations had nonetheless expired for that crime as well. (AOB 79-82.) Specifically, Capers claims that the clock for the statute of limitations should be deemed to have started in October 1999 when Renteria sent a retraction letter to the police (AOB 79, citing 1 CT 36), not when she presumably lied to the police during her interview in October 2003 (AOB 79, citing 31 CT 8923-8924). Capers again misconstrues the law applicable to a witness's privilege against self-incrimination.

Initially, notwithstanding the lengthy discussion devoted to this issue in the trial court, Capers made no mention of the October 1999 retraction letter, and never once argued below that the statute of limitations started in 1999 rather than 2003. Capers concedes as much and argues that his claim in this regard should not be deemed forfeited because it is based on "undisputed facts." (AOB 80.) But the only "undisputed facts" supporting Capers's claim is one sentence—among thousands of pages of discovery—contained within one of Detective Griego's reports that states: "Renteria later (on 10-29-99) sent me a letter at the Barstow Police Department 'retracting' her statements." (1 CT 36.) Had Capers raised this issue below, the prosecution would have been presented with an opportunity to flesh out the precise nature of Renteria's letter and what impact, if any, it would have had on Renteria's ability to invoke her privilege against self-incrimination.

In any event, regardless of the precise contents of the supposed 1999 letter, it remains that the reason Renteria invoked her privilege against self-incrimination—and the reason the prosecutor, Renteria's attorney, and the trial court all believed she had a valid privilege—was due to her

statements to law enforcement in October 2003. As discussed above, if Renteria was lying to law enforcement during her 2003 interview with the intention of aiding Loomis and Romero, it could potentially expose her to liability based on her conduct on that date. Under these circumstances, it does not clearly appear that the testimony could not possibly tend to incriminate Renteria. (Evid.Code, § 404.) As stated, the appropriate test is whether Renteria reasonably apprehended danger should she testify. (*People v. Seijas, supra,* 36 Cal.4th at p. 306; *Hoffman v. United States, supra,* 341 U.S. at p. 486.) Because she undoubtedly did, the trial court correctly ruled that she had a valid basis to invoke her privilege against self-incrimination.

IV. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Capers claims that California's death penalty statue, as interpreted by this Court and applied at his trial, violates the United States Constitution. (AOB 83-102.) Specifically, Capers raises several routine challenges to the constitutionality of California's death penalty statute, challenges which he acknowledges have been repeatedly rejected by this Court. (AOB 83-102.) Capers has not presented sufficient reasoning to revisit these issues; therefore, extended discussion is unnecessary and appellant's claims should all be rejected consistent with this Court's previous rulings. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.)

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Capers claims that Penal Code section 190.2 is impermissibly broad because it "does not meaningfully narrow the pool of murderers eligible for the death penalty" in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 267-268.) He contends the reach of Penal Code section 190.2 has been extended so far that it now encompasses nearly every first degree murder, and that the

statute now "makes almost all first degree murder[er]s eligible for the death penalty." (AOB 267-268.) These claims have been rejected in numerous decisions, and Capers gives this Court no reason to reconsider them. (See, *People v. Carrasco* (2014) 59 Cal.4th 924, 970; *People v. Myles* (2012) 53 Cal.4th 1181, 1224; *People v. Zamudio* (2008) 43 Cal.4th 327, 373; *People v. Snow* (2003) 30 Cal.4th 43, 125.)

B. Penal Code Section 190.3, Subdivision (a), Does Not Allow The Arbitrary And Capricious Imposition Of The Death Penalty

Capers claims that Penal Code section 190.3, subdivision (a), due to its lack of narrowing, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the "concept of 'aggravating factors' has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as 'aggravating.'" (AOB 85.) This challenge has been repeatedly rejected by this Court. (See, e.g., *People v. Curl* (2009) 46 Cal.4th 339, 362; *People v. Loker* (2008) 44 Cal.4th 691, 755; *People v. Salcido* (2008) 44 Cal.4th 93, 166; *People v. Mendoza* (2007) 42 Cal.4th 686, 708; *People v. Guerra* (2006) 37 Cal.4th 1067, 1165; see also *Tuilaepa v. California, supra*, (1994) 512 U.S. at p. 976 [explaining that Penal Code section 190.3, subdivision (a), was "neither vague nor otherwise improper under our Eighth Amendment jurisprudence"]). As explained in *Tuilaepa*, a focus on the facts of the crime permits an individualized penalty determination. (*Tuilaepa v. California, supra*, 512 U.S. at p. 972; *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 304, 307 [110 S.Ct. 1078, 108 L.Ed.2d 255].) Thus, possible randomness in the penalty determination disappears when the aggravating factor does not require a "yes" or "no" answer, but only points the sentencer to a relevant subject matter. (*Tuilaepa v. California, supra*, 512 U.S. at pp. 975-976.)

Capers points to no factors in his own case that were arbitrarily or capriciously applied, nor does he specify which aggravating factors in his case "ha[ve] been applied in a wanton and freakish manner. . ." Capers does not, and cannot, demonstrate that factor (a) was presented to the jury in his case in other than a constitutional manner. Noticeably missing from Capers's analysis is any showing that the facts of his crime or other relevant factors were improperly relied on by the jury. Accordingly, this claim should be rejected.

C. California's Death Penalty Statute And The Accompanying Jury Instructions Set Forth The Appropriate Standards

1. The trial court was not required to instruct the jury that it may impose a sentence of death only if it was persuaded beyond a reasonable doubt that aggravating factors outweighed mitigating factors

Capers contends that his death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt. (AOB 86-88.) Specifically, Capers complains that his rights under the Sixth, Eighth, and Fourteenth Amendments were violated because the "jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence." (AOB 86-88.)

This Court has repeatedly reaffirmed its rulings that instructions on burden of proof or persuasion are not required at this stage of the proceedings, and should not be given. (See *People v. Boyce* (2014) 59 Cal.4th 672, 723–724; *People v. Carrington, supra*, 47 Cal.4th at p. 200; *People v. Hoyos* (2007) 41 Cal.4th 872, 926, disapproved of on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919-920 ; *People v. Blair* (2005) 36 Cal.4th 686, 753, disapproved of on another ground in *People v. Black, supra*, 58 Cal.4th at p. 919 .) In addition, this Court has rejected the

claim made by Capers that *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], mandate that the prosecution bear the burden of proof. (*People v. Boyce, supra,* 59 Cal.4th at pp. 723–724 ; citing People v. DeHoyos (2013) 57 Cal.4th 79, 149–150; *People v. Cowan* (2010) 50 Cal.4th 401, 508-509; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Capers presents no persuasive reason why this Court should revisit the issue and his claim should thus be denied.

2. California's death penalty law is not unconstitutional for failing to impose a burden of proof

Capers claims that the jury should have been instructed that the State bore the burden of proof. (AOB 88-89.) Specifically, Capers contends that his "jury should have been instructed that the state had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence." (AOB 88.) In the alternative, he argues if there is no burden of proof, then the trial court should have informed the jury of the absence of any burden of proof. (AOB 88-89.)

This Court has previously held that there is no requirement that the jury be instructed during the penalty phase regarding the burden of proof for finding aggravating and mitigating circumstances in reaching a penalty determination. The only burden of proof that is applicable in the penalty phase relates to aggravating evidence of other crimes under factor (b) (See, *People v. Foster* (2010) 50 Cal.4th 1301, 1364; and aggravating evidence of prior convictions under factor (c) (See, *People v. Williams* (2010) 49 Cal.4th 405, 459); otherwise there is no burden of proof applied to

aggravating evidence. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1319; *People v. Burney, supra*, 47 Cal.4th at p. 268; *People v. Morgan, supra*, 42 Cal.4th at p. 626; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Nor was the court required to articulate the converse, i.e., that there is no burden of proof at the penalty phase. (*People v. Streeter* (2012) 54 Cal.4th 205, 268.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias, supra*, 13 Cal.4th at p. 190.) Capers has offered no persuasive reason to reconsider this argument so his claim must be rejected.

3. Unanimous jury findings are not required in the penalty phase of a capital trial

a. Aggravating Factors

Capers claims that his death sentence violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because his death verdict was not premised on unanimous jury findings and therefore "there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty." (AOB 89.) This Court has consistently rejected these claims. (*People v. Hamilton* (2009) 45 Cal.4th 863, 960; *People v. Kelly, supra*, 42 Cal.4th at pp. 800-801; *People v. Ward* (2005) 36 Cal.4th 186, 221-222; *People v. Riggs* (2008) 44 Cal.4th 248, 329; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 228.)

Capers further contends that this "failure to require that the jury unanimously find the aggravating factors true also violates the Equal Protection Clause of the federal constitution." (AOB 90.) Here, too, this Court has held on numerous occasions that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Vines* (2011) 51 Cal.4th 830, 891-892; *People v. Nelson* (2011) 51 Cal. 4th 198, 227; *People*

v. Manriquez (2005) 37 Cal.4th 547, 590; *People v. Hinton* (2006) 37 Cal.4th 839, 912; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Boyette, supra*, 29 Cal.4th at pp. 465-467.) Capers's claims should therefore be denied.

b. Unadjudicated Criminal Activity

Capers also argues the jury should have been instructed that it was required to unanimously find that his prior criminality was true. (AOB 91.) This Court has consistently held that the jury need not unanimously find unadjudicated criminal activity true beyond a reasonable doubt before individual jurors may consider it. (*People v. Foster* (2010) 50 Cal.4th 1301, 1364; *People v. Ward, supra*, 36 Cal.4th at pp. 221-222; *People v. Anderson* (2001) 25 Cal.4th 543, 590 and cases cited therein.) As this Court stated in *Anderson*, "We have consistently applied the rule that while an individual juror may consider violent 'other crimes' in aggravation only if he or she deems them established beyond a reasonable doubt, the jury need not unanimously find other crimes true beyond a reasonable doubt before individual jurors may consider them." (*People v. Anderson, supra*, 25 Cal.4th at p. 590.)

4. The words "so substantial" in CALJIC No. 8.88 did not render the penalty phase instructions constitutionally deficient

Capers claims that the instructions caused the penalty determination to turn on an impermissibly vague and ambiguous standard. (AOB 92.) Specifically, Capers contends that the phrase "so substantial" (in CALJIC No. 8.88) violates the Eighth and Fourteenth Amendments to the United States Constitution because it "is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing." (AOB 92.)

This Court has previously found that the "so substantial" language embodied in the penalty phase instructions was not impermissibly vague and ambiguous. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1179; see *People v. Boyette, supra*, 29 Cal.4th at pp. 464-465; see also *People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Thus, CALJIC No. 8.88, as it related to the comparison of aggravating and mitigating factors, was not unconstitutionally vague or overbroad.

5. The jury need not be instructed that it is required to return a sentence of life without the possibility of parole when it determines mitigation outweighs aggravation

Capers contends the jury should have been instructed that if it determined mitigation outweighed aggravation it was required to return a verdict of life without the possibility of parole. (AOB 92-93.) This Court has held that because a jury is instructed that death can be imposed only if aggravation outweighs mitigation, it is unnecessary to instruct the jury on the converse principle. (*People v. Kopatz* (2015) 61 Cal.4th 62, 95 [no constitutional infirmity for failing to instruct "life without parole is mandatory if mitigation outweighs aggravation"]; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) Capers does not provided any reason to reconsider this principle so his claim must be rejected.

6. The jury need not be instructed that the beyond-a-reasonable-doubt standard and requirement of jury unanimity do not apply to mitigating factors

Capers claims the jury should have been instructed regarding the standard of proof and the lack of a need for jury unanimity as to mitigating circumstances. (AOB 93-94.) This precise argument has been repeatedly rejected by this Court. (*People v. Kopatz* (2015) 61 Cal.4th 62, 95, citing *People v. Streeter* (2012) 54 Cal.4th 205, 268.) Capers does not provide any persuasive reason for this Court to revisit this precedent.

7. The trial court properly refrained from instructing the jury on the "presumption of life"

Capers claims the jury should have been instructed on the "presumption of life" because "[t]he presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case" and "[i]n the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence." (AOB 95.) Capers recognizes that this Court has rejected this claim in *People v. Arias, supra*, 13 Cal.4th at p. 190, but insists this case was wrongly decided because "California's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment." (AOB 95.) Capers has not presented any compelling reason for this Court to revisit its previous holdings.

D. The United States Constitution Does Not Require Jurors To Return Written Findings During The Penalty Phase

Capers claims that failing to require the jury to make written findings during the penalty phase violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review. (AOB 96.) This contention has also been repeatedly rejected by this Court, and Capers offers no persuasive reason to revisit this issue. (See, e.g., *People v. Gonzales* (2011) 51 Cal.4th 894, 957; *People v. Cook* (2006) 39 Cal.4th 566, 619; *People v. Robinson* (2005) 37 Cal.4th 592, 655; *People v. Zamudio, supra*, 43 Cal.4th at p. 373.)

E. The Trial Court Properly Instructed The Jury On Mitigating And Aggravating Factors

Capers claims the trial court erred by including certain adjectives within the list of mitigating factors, by failing to "delete" certain "inapplicable" sentencing factors, and by not instructing the jury that statutory mitigating factors were relevant solely as potential mitigators. (AOB 96-98.) These arguments have all been previously rejected by this court. (*People v. Avila* (2006) 38 Cal.4th 491, 614; *People v. Ghent, supra*, 43 Cal.3d at pp. 776-777; *People v. Cook, supra*, 39 Cal.4th at p. 619; *People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) Capers has provided no reason to revisit these arguments, and his claim should therefore be denied.

F. California's Capital Sentencing Scheme Does Not Require Inter-Case Proportionality Review

Capers claims that the prohibition against inter-case proportionality review results in arbitrary and disproportionate imposition of the death penalty. (AOB 98.) This Court has rejected the argument that inter-case proportionality analysis is required under California's death penalty law or by the federal or state constitutions. (See, e.g., *People v. Hillhouse, supra*, 27 Cal.4th at p. 511; see also *People v. Foster, supra*, 50 Cal.4th at p. 1368). Capers's claim should be denied.

G. California's Capital Sentencing Scheme Does Not Violate The Equal Protection Clause

Capers claims that California's capital sentencing scheme violates the Equal Protection Clause because it "provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with noncapital crimes. . ." (AOB 98-99.) However, because capital defendants are not similarly situated to noncapital defendants, the Equal Protection Clause does not require that Capers receive the same procedural rights as noncapital defendants. (*People v.*

McKinnon (2011) 52 Cal.4th 610, 698; *People v. Manriquez, supra*, 37 Cal.4th at p. 590.) Capers's claim should be denied.

H. California's Use Of The Death Penalty Does Not Violate International Law

Capers claims that California's use of the death penalty as a regular form of punishment falls short of international norms. (AOB 99.) This Court has previously held that international law does not compel the elimination of capital punishment in California. (*People v. Vines, supra*, 51 Cal.4th at pp. 891-892; *People v. Snow, supra*, 30 Cal.4th at p. 127; see also *People v. Ghent, supra*, 43 Cal.3d at pp. 778-779.) Capers's arguments must be denied.

V. THERE WAS NO CUMULATIVE ERROR

Capers claims that his convictions and death sentence must be reversed because the errors at his trial were cumulatively prejudicial. (AOB 100-102.) However, because no error was committed or, to the extent error did occur, Capers has failed to demonstrate prejudice, reversal of Capers's convictions and death sentence is not warranted and Capers's claim should be denied.

Where no single error warrants reversal, the cumulative effect of all the errors may, in a particular case, require reversal in accordance with the due process guarantee. (See *Chambers v. Mississippi* (1973) 410 U.S. 284, 298 [93 S.Ct. 1038, 35 L.Ed.2d 297] [finding that the combined effect of all the individual errors denied the defendant his right to due process and a fair trial]; *People v. Hill, supra,* 17 Cal.4th at p. 844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"].)

However, even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1009.) Where, as in the present case, few or no errors have occurred, and where

any such errors found to have occurred were harmless, the cumulative effect does not result in the substantial prejudice required to reverse a defendant's conviction. (*People v. Price, supra*, 1 Cal.4th at p. 465.) The essential question is whether the defendant's guilt was fairly adjudicated, and in that regard a court will not reverse a judgment absent a clear showing of a miscarriage of justice. (*People v. Hill, supra*, 17 Cal.4th at p. 844; see also *People v. Cunningham, supra*, 25 Cal.4th at p. 1009.)

For the reasons explained above, there was no error in this case, and even if there was error it was harmless. (See *People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692; *People v. Ochoa* (1998) 19 Cal.4th 353, 447, 458.) Thus, even considered in the aggregate, the alleged errors could not have affected the outcome of Capers's trial. Capers received a fair trial, there was no miscarriage of justice, and his claim of cumulative error should therefore be rejected.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the judgment be affirmed in its entirety.

Dated: February 16, 2016

Respectfully submitted,

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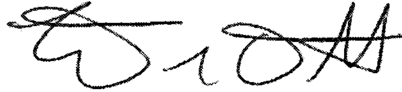

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CERTIFICATE OF COMPLIANCE

I certify that the attached respondent's brief uses a 13 point Times New Roman font and contains 16,466 words.

Dated: February 16, 2016

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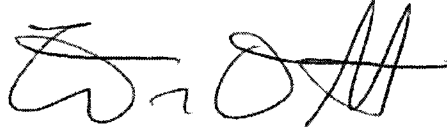

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Lee Samuel Capers**
No.: **S146939**

I declare:

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

On February 16, 2016, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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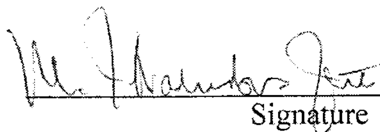
and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document on February 16, 2016 to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 16, 2016, at San Diego, California.

M. I. Salvador-Jett
Declarant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