In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **MAURICE G. STESKAL,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S122611

Orange County Superior Court Case No. 99ZF0023
The Honorable Frank F. Fasel, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On November 19, 2002, an Orange County jury convicted appellant Maurice Gerald Steskal of the first degree murder of Orange County Deputy Sheriff Bradley J. Riches (count 1; Pen. Code, § 187, subd. (a))[1] and found it to be true that there existed the special circumstance of murder of a peace officer while engaged in the performance of his duties (§ 190.2, subd. (a)(7)). The jury also found it to be true that Steskal personally used a firearm in the commission of the murder (§ 12022.5, subd. (a)) and personally used a firearm causing death (§ 12022.53, subd. (d)).[2] (5 CT 1246-1249, 1309-1310.)

On November 21, 2002, the penalty phase commenced. (5 CT 1315.) On December 2, 2002, the jury reported that it was unable to reach a penalty verdict, and the court declared a mistrial as to the penalty phase. (6 CT 1445-1446.) On December 9, 2002, the People stated their intention to retry the penalty phase (6 CT 1448), and on October 22, 2003, a new jury was sworn. (10 CT 2491-2492.)

On December 12, 2003, the jury returned a verdict finding death to be the appropriate penalty. (11 CT 2714, 2848.)

On February 6, 2004, the trial court considered and denied Steskal's motion to modify the verdict pursuant to section 190.4, subdivision (e). (11 CT 2946-2952.)

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[1] Unless otherwise indicated, all subsequent statutory references will be to the California Penal Code.

[2] The record on appeal does not include a copy of the indictment except as an exhibit to a defense motion (4 CT 792-793) and a cover-page indicating the indictment was "sealed" at some point (1 CT 4-6). The indictment itself is, as a matter of law, not sealed (see § 938.1, subd. (b)), and Steskal has relied on this portion of the public record in his Opening Brief to set out the charges in the indictment. (See AOB 1.)

On February 6, 2004, the trial court sentenced Steskal to death for the special-circumstance murder of Orange County Deputy Sheriff Bradley Riches. (11 CT 2952.) In addition, the trial court imposed but stayed pursuant to section 654: (1) an indeterminate term of 25-years-to-life for the personal use of a firearm enhancement (§ 12022.5, subd. (a)) and, (2) a determinate 10-year term for the personal use of a firearm causing death enhancement (§ 12022.53, subd. (d)). (11 CT 2952-2953; 37 RT 7143-7144.)

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution evidence

a. Steskal shoots Orange County Deputy Sheriff Bradley Riches in the early morning hours of June 12, 1999

In June 1999, Kimberly Langlois lived in an apartment at 22700 Lake Forest Drive in Lake Forest. Appellant, Maurice Steskal, lived with his wife, Nannette, in the apartment directly above Langlois's apartment. (7 RT 1238-1239, 1242.) Shortly after midnight on June 12, 1999, Langlois was awakened by the sound of banging noises coming from the Steskals' apartment. (7 RT 1239-1240.) A couple of minutes later, she heard yelling outside and looked out her bedroom window. She saw Steskal near the dumpster area. He was slamming the gate to the dumpster and yelling things like, "Fuck you, world. Fuck you, everybody. I hate everybody." (7 RT 1240, 1242, 1251.) Moments later, Steskal went up the stairs to his apartment. (12 RT 1240.) Langlois thought that Steskal might be intoxicated. (7 RT 1255-1256.)

A couple of minutes later, Langlois heard banging noises outside her door. She looked out the peep hole and saw Steskal coming down the stairs with a broken chair. He was banging it into the walls as he descended the

stairs. He then threw the chair into the dumpster. (7 RT 1241.) When Steskal started coming back up the stairs, his wife, Nannette, met him on the landing just outside of Langlois's door. Nannette was trying to soothe Steskal. (7 RT 1242-1243.) Steskal said something to the effect of, "I am sick of it," or "I am sick of them," then yelled out, "Fuck that, I have guns, I have ammunition." (7 RT 1243, 1255.) Soon thereafter, it got quiet and Langlois went back to bed. (7 RT 1243.)

Just before 1:00 a.m., Steskal walked into the 7-Eleven Store near the corner of Ridge Route and Muirlands in Lake Forest carrying a MAK-90 firearm. (7 RT 1183-1184, 1185-1186, 1204-1205.) Steskal told the store clerk, Vickie De Lara, that he wanted cigarettes. (7 RT 1183-1184.) Steskal asked De Lara if she was afraid of his gun then told her, "I brought this gun to protect myself from the fucking law." (7 RT 1184.) At this same time, Orange County Deputy Sheriff Bradley Riches was driving past the 7-Eleven in his marked patrol car. (7 RT 1198-1199.) After initially passing the store, Deputy Riches then turned his car around and turned off all of the car's lights. (7 RT 1200-1201.) Deputy Riches made a request over his police radio to clear all radio traffic, which meant that he had emergency information to pass along to the other deputies. (7 RT 1219-1222, 1224.)

Back inside the 7-Eleven, Steskal paid for the pack of cigarettes. (7 RT 1184-1185.) Deputy Riches drove into the store parking lot and turned on his lights. (7 RT 1185, 1208.) Steskal walked out of the store, immediately began shooting at Deputy Riches and then continued to shoot as he walked very close to the patrol car. (7 RT 1185, 1201, 1208.)

Robert Bombalier was working at his business located near the 7-Eleven at approximately 12:50 a.m. when he heard the sound of rapid gunfire. (7 RT 1203-1206.) Bombalier ran out of his office toward the 7-Eleven and saw a patrol car with the driver's side door partially open. (7

RT 1206-1207, 1215.) The lights of the patrol car were running, but Deputy Riches was still seated inside the vehicle and was not moving. (7 RT 1208.) Deputy Riches's left leg was cocked in a position toward the driver's door as if he was getting out of the car. (7 RT 1217.) Bombalier checked the deputy's pulse and felt one, but he could not feel or hear breathing. (7 RT 1218.) Just then, the patrol car began to roll forward. Bombalier put the car in park, and it stopped rolling. (7 RT 1210-1211, 1216, 1218.) Bombalier noticed that Deputy Riches's gun was partially out of its holster. (7 RT 1217-1218.) De Lara came out of the 7-Eleven, and Bombalier told her to call 911. (7 RT 1211.)

Orange County Deputy Sheriff Stephen Torres heard Deputy Riches's request to clear radio traffic then heard the sound of multiple gunshots. (7 RT 1219-1224.) As Deputy Torres was driving toward the direction from which he had heard the shots, his dispatcher advised him that there was a report of an officer down in the area of Ridge Route and Muirlands, which is the intersection where the 7-Eleven is located. (7 RT 1223.) Deputy Torres was the first officer to arrive at the scene. (7 RT 1223.) He found Deputy Riches slumped over in the front seat of his patrol car with his chin leaning into his chest. He had multiple gunshot wounds and was bleeding. (7 RT 1224-1225.)[3]

Orange County Sheriff's Sergeant Ron Acuna arrived at the 7-Eleven just after Deputy Torres. (7 RT 1226, 1232, 1234, 1237.) Sergeant Acuna saw that the safety strap on Deputy Riches's gun holster was unsnapped, and when Sergeant Acuna was helping the paramedics remove Deputy Riches from his patrol car, the weapon fell onto the car's seat. (7 RT 1233-1234.) This signaled to Sergeant Acuna that Deputy Riches had attempted

[3] Deputy Torres eventually went into the 7-Eleven store and recovered surveillance videos. (7 RT 1225.)

to remove his revolver. (7 RT 1237.) Sergeant Acuna testified that sheriff's deputies frequently gathered at that particular 7-Eleven store because it is one of the only businesses in the area that is open 24 hours. (7 RT 1229.)

b. Steskal is apprehended hours after he shoots Deputy Riches

After stopping him while riding as a passenger in his wife's car, Orange County Sheriff's Deputies took Steskal into custody at approximately 6:50 a.m. on June 12, 1999. (7 RT 1258-1263.) In the trunk of Steskal's wife's car, criminalist Elizabeth Thompson with the Orange County Sheriff's Crime Laboratory found a disassembled MAK-90 Sporter, with its pieces wrapped in clothing, and a Sears bag that contained 2 empty drum magazines, 7 box magazines, and 90 .39 millimeter cartridges. (7 RT 1282-1285) Thompson found a box on the rear passenger floorboard that contained a Target bag with 139 rounds of ammunition inside. (7 RT 1285.)

Thompson also examined Deputy Riches's patrol car at the scene and saw numerous bullet holes in the right side of the hood and the right side of the windshield. (7 RT 1268-1269.) Thompson collected a total of 30 .39 millimeter cartridge casings at the scene. (7 RT 1273-1275.) Inside the patrol car, Thompson found four steel bullet cores and several pieces of copper jacketing. (7 RT 1270, 1276.) There was a large bullet gouge across the front of the dashboard. (7 RT 1271.) Thompson found Deputy Riches's name tag on the driver's seat and noticed that it appeared to have been struck by a bullet. (7 RT 1275-1276.) Deputy Riches's handgun was on the front seat, and it also had damage consistent with having been struck by a bullet. (7 RT 1272, 1276.) The microphone to the patrol car's radio was on the driver's side floorboard, and the hand-held radio was on the driver's seat. (7 RT 1287.) Thompson also examined a portion of Deputy

Riches's vest and collected three large copper fragments and several small fragments from the front of the vest. (7 RT 1276-1277.)

Pathologist Richard Fukumoto performed an autopsy on Deputy Riches on June 12, 1999. (7 RT 1296-1298.)[4] Deputy Riches had been shot multiple times and had multiple gunshot wounds. (7 RT 1298.) He died as a result of the gunshot injuries to his lung, heart and brain. (7 RT 1308.)

c. Steskal's previous encounters with Orange County sheriff's deputies in the months preceding the shooting of Deputy Riches

On March 28, 1999, Orange County Sheriff's Deputy Andre Spencer stopped Steskal's vehicle after he observed that Steskal was not wearing his seat belt. (7 RT 1310-1312.) The stop was recorded by a video system inside Deputy Spencer's patrol car. (7 RT 1311.) The prosecutor played the video for the jury. (8 RT 1329.) Deputy Spencer testified that when he first got behind Steskal's car, he could see Steskal beat on the steering wheel with his hands a couple of times. (8 RT 1329-1330.) When Steskal stopped his car, he immediately jumped out and faced Deputy Spencer. (8 RT 1331.) This caused Deputy Spencer to draw his gun. (8 RT 1331.) Deputy Spencer ordered Steskal to stop walking toward him. (8 RT 1351.) At some point during the traffic stop, Deputy Spencer obtained Steskal's consent to search his person. (8 RT 1354-1355.) While they were on a public street on a Sunday morning, Deputy Spencer unfastened Steskal's belt, unbuttoned and unzipped his pants and began to search in Steskal's waistband, between his pants and his underwear. (8 RT 1358-1359.) Four other deputies were present with Deputy Spencer during this search. (8 RT 1359.) When Steskal apparently had had enough with the search, he said,

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[4] Thompson was also present during the autopsy and collected seven additional bullet cores from Deputy Riches's body. (7 RT 1285.)

"That's fucking it." At that point, several deputies, including Deputy Spencer, took Steskal to the ground. (8 RT 1360-1361.) Steskal was arrested for possession of less than an ounce of marijuana and obstructing a peace officer. (8 RT 1342.)

Deputy Spencer had another encounter with Steskal approximately one month later, when Spencer stopped Steskal for failing to signal for a turn. (8 RT 1344, 1346.) Steskal had a passenger in the car with him that time, and Deputy Spencer testified that Steskal was polite. (8 RT 1345.) Deputy Spencer did not issue Steskal a ticket. (8 RT 1344-1345.)

The parties stipulated that a fingerprint located on the right side of the wood-grained barrel hand grip of the gun seized from the trunk of Steskal's wife's car matched Steskal's known prints. (8 RT 1382; 5 CT 1130.)

2. Defense evidence

The defense theory was that Steskal's interpretation of reality was affected by his severe mental illness, and his mental illness worsened after his encounters with Deputy Spencer. In support of this theory, the defense called five mental health experts: Dr. Pettis, Dr. Asarnow, Dr. Missett, Dr. Smith and Dr. Mohandie.

Dr. Roderick Pettis, a medical doctor specializing in clinical and forensic psychiatry was asked to evaluate Steskal for the presence of a mental illness. (11 RT 2045, 2051.) To conduct the forensic evaluation of Steskal, Dr. Pettis reviewed 246 items regarding this case, including police reports, academic reports, medical psychiatric records, and interviews with various people who are acquainted with Steskal. (11 RT 2050-2051, 2062.) Dr. Pettis also interviewed Steskal on three occasions, for a total of approximately eight hours. (11 RT 2052.)

Dr. Pettis concluded there was a presence of a major mental illness, namely delusional disorder persecutory type. He described the delusional disorder as involving the inappropriate interpretation of environmental

information so that incorrect or distorted inferences are drawn from information from the environment, and the person attaches themselves to that information and it motivates their behavior, without any contact with reality and whether the information they have is true or not. (11 RT 2053.) It is a psychotic illness, and psychosis is defined as a break with reality. (11 RT 2055.)

Dr. Pettis also diagnosed Steskal with a pre-existing schizotypal personality disorder. (11 RT 2052.) In describing Steskal's schizotypal personality disorder, Dr. Pettis explained that "from early childhood, there was evidence of odd thinking, suspiciousness, distrust." People with this illness are odd and eccentric to the extent they have very few friends, they are regarded as odd with peculiar ideas, and they have "magical thinking." Dr. Pettis further opined that Steskal had poly substance abuse and dysthymic disorder, which is a chronic low level depression. (11 RT 2052.) The diagnosis of poly substance abuse was because Steskal experimented with a variety of drugs over the years, including alcohol, marijuana, L.S.D., peyote, prescription drugs, and more. (11 RT 2075.) But Dr. Pettis believed Steskal's mental illness and paranoia were not caused by his drug use. (11 RT 2110, 2113-2114.) With regard to Steskal's dysthymic disorder, Dr. Pettis explained that Steskal expressed suicidal ideas since age 14, and those ideas continued throughout his life. (11 RT 2081-2082.)

In reviewing evidence of Steskal's childhood, Dr. Pettis found that Steskal came from a dysfunctional family. (11 RT 2062.) There was physical abuse,[5] and some of the physical beating "was above and beyond." (11 RT 2063.)

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[5] Robert Steskal, Jr., Steskal's older brother by three years, testified that he singled out Steskal for abuse when they were growing up. (9 RT 1674-1676.) He was an easy target because he was weak and vulnerable.

(continued...)

Dr. Pettis found the fact that Steskal lived in a concrete bunker in Oregon[6] for some time in his adult life showed he was very reclusive and was a symptom of his mental illness. (11 RT 2090.) Dr. Pettis additionally noted that Steskal believed he was being followed and monitored through the television. (11 RT 2091.) Steskal's encounter with Deputy Spencer in March 1999 factored into Dr. Pettis's diagnosis of Steskal's mental state in June 1999. (11 RT 2095.) As Dr. Pettis explained, "There was an exacerbation of his pre-existing paranoid symptoms, going into full blown psychotic delusions. His fear moved from being followed, . . . monitored and observed, to actually feeling as if the police were going to kill him." (11 RT 2095-2096.)

Dr. Robert Asarnow, Ph.D., a psychiatry and psychology professor at the U.C.L.A. Neuropsychiatric Institute (10 RT 1771), did not interview Steskal and was not asked to give a psychological or psychiatric diagnosis.

(...continued)
(9 RT 1693.) Robert Jr. testified he constantly abused Steskal, both physically and emotionally, from the time Steskal was four years old until he was 12. (9 RT 1678, 1692.)

[6] Annalisa la Croix, Steskal's sister, testified that when she lived in Oregon in the late 1980's, Steskal lived on a 100-acre rural property that her husband owned and was approximately 15 miles away from her home. (12 RT 2159, 2161, 2171.) Steskal lived there approximately two years. While Steskal was living on the property, he lived in a small concrete bunker with no windows. It had no toilet facilities, and had only a bed and a fireplace. (12 RT 2162.) There was no running water or electricity on the property. (12 RT 2161.) Every day that Steskal was there, he was using a pick axe to dig an "escape tunnel" out of the bunker. Steskal told his sister he needed an escape tunnel because he thought people were watching him and were going to come to get him. (12 RT 2166.) La Croix testified that while he was never specific as to who was coming to get him, he did indicate at times that the government or law enforcement was watching him. (12 RT 2167.) Steskal was always armed with a gun when he went to the market or walked around the property. (12 RT 2168.)

(10 RT 1853.) However, Dr. Asarnow did give Steskal a series of neuropsychological tests, and testified that the results on some of the sensitive brain functioning tests were consistent with a schizophrenic spectrum disorder. (10 RT 1790-1791, 1860.)

Dr. Asarnow also reviewed Steskal's school records and determined they revealed he had fine motor coordination problems, which the doctor noted are commonly found in the early development history of individuals who went on to develop schizophrenia. (10 RT 1771, 1791, 1857-1859.) Dr. Asarnow acknowledged that even with a mental illness, Steskal knows the difference between right and wrong, has the ability to form an intent to kill and has the ability to premeditate and deliberate. (10 RT 1862-1863.)

James Missett, M.D., a psychiatrist, was not asked to evaluate Steskal. (11 RT 1935-1936.) However, Dr. Missett did evaluate several members of Steskal's family and found substantial evidence of mental disorders among his family members, including psychosis, personality disorders with paranoid features, delusional disorders, depression, and emotional, physical and sexual abuse. (11 RT 1935-1936, 1975-1979, 1981-1984.)

David Smith, M.D., a psychiatrist, provided expert testimony about drug addiction and mental illness. (10 RT 1885, 1894.) Dr. Smith testified about dual diagnosis, which is the process used to assess whether a drug-user's psychiatric symptoms are solely the result of drug use or drug use combined with mental illness. (10 RT 1898-1908.)

Kris Mohandie, Ph.D., a licensed psychologist, testified generally about a physiological response known as fight or flight response, which is something people experience when they are facing a dangerous situation. (11 RT 2013, 2019-2030.) This human response is sometimes accountable for excessive violence or "overkill." (11 RT 2020.) Dr. Mohandie viewed the surveillance videos from the 7-Eleven to prepare to testify in this case. (11 RT 2018.) Dr. Mohandie could not opine as to whether Steskal's

actions at the time he shot Deputy Riches could be explained by fight or flight and merely observed that the fact that he fired 30 shots may or may not indicate fight or flight. (11 RT 2037-2038.)

The defense called a sixth expert witness, Charles Duke, Jr. (9 RT 1597.) Duke had recently retired from the Los Angeles Police Department after 28 years of service. (9 RT 1597-1598.) He had extensive experience involving self-defense, excessive force and use-of-force issues. (9 RT 1600-1605.) Duke testified that he reviewed the videotape of Deputy Spencer's March 28, 1999, vehicle stop with Steskal over 100 times. (9 RT 1609-1610.) Duke has used that video while training other police officers as an example of what not to do during a traffic stop. (9 RT 1610.) Officers are trained to deescalate any potential threatening situation as they approach a vehicle. (9 RT 1611-1612.) In Duke's opinion, nearly everything Deputy Spencer did during that traffic stop was unprofessional, unnecessary, inappropriate, and served to escalate, rather than de-escalate the situation. (9 RT 1623-1624, 1627-1628, 1631-1632, 1641-1642, 1649-1651.)

The defense also called nine lay witnesses to testify about Steskal's mental state in the years, months and days leading up to the murder, and that Steskal's encounters with Deputy Spencer exacerbated his mental illness, which in turn, affected his perception of Deputy Riches when he shot him on June 12, 1999.

Cherie Le Brecht, and her son, Eric, lived in the apartment in Lake Forest with Steskal and his wife, Nannette, for three years. (8 RT 1484-1486.) Steskal did things to help out Le Brecht and even looked after Le Brecht's son on a few occasions when she was at work. (8 RT 1487-1489.) She described Steskal as a shy man who was kind of a loner. (8 RT 1488.) Le Brecht testified that Steskal sometimes drank beer at the apartment. (8 RT 1522-1523.) He was "more than a light drinker," but he did not drink

all of the time. (8 RT 1523.) Le Brecht believed that Steskal was paranoid, and when he drank, his paranoia "kind of blew out of proportion." (8 RT 1498.) He basically thought everybody was watching him. (8 RT 1499-1500.) He believed he was being watched in his apartment by the television. (8 RT 1500.) Le Brecht also believed Steskal was depressed during the three-year period that she lived with him. (8 RT 1501-1502.)

Steskal told Le Brecht about Deputy Spencer stopping him and searching him on the street. (8 RT 1500-1501, 1504.) Steskal was not angry about the encounter with Deputy Spencer. Instead, he was upset, embarrassed and humiliated by it. (8 RT 1501, 1503, 1525-1526.) Le Brecht knew that Deputy Spencer pulled over Steskal a second time, and his paranoia got worse after that encounter; he spoke more about people watching him, and was nervous about being in the car. (8 RT 1505.) Le Brecht was at the apartment on June 11, 1999, and went to bed at 11:00 p.m.. (8 RT 1490 -1491.) Nannette had gone out on a date that night, and neither she nor Steskal was at the apartment when Le Brecht went to bed. (8 RT 1514-1515.) Around 11:30 p.m., she heard Steskal's and Nannette's voices. (8 RT 1490-1491.) She could not hear all of the conversation, but she could hear Nannette telling Steskal that she loved him. (8 RT 1494.) Steskal sounded upset and Nannette was trying to figure out what was bothering him. (8 RT 1495-1496, 1515.) At some point, Le Brecht heard Steskal yelling, "Fuck 'em." (8 RT 1496.) She had heard him say this before, usually in reference to authority figures or when he was watching television. (8 RT 1496-1497, 1526.) Le Brecht said it was a phrase that he usually said after he had been drinking. (8 RT 1497.)

Over the time that Le Brecht lived with Steskal, he told her that he did not like police, but he never threatened to get even with them or kill any police officers. (8 RT 1511-1513.) Steskal never said he hated police, but he was very nervous and uncomfortable around them. (8 RT 1499, 1524.)

In March 1999, Jocelyn Avendano, a friend of Steskal and Nannette, visited and stayed at their apartment for three weeks. (8 RT 1527-1529, 1542.) While she was there visiting, two policemen came to the apartment one morning and looked around in Nannette's room, the living room and the kitchen. (8 RT 1532-1533.) Later that day, Avendano went with Nannette to pick up Steskal from jail. (8 RT 1534, 1542.) Steskal told Avendano the police pulled him over because he was not wearing his seatbelt. Steskal also told her that a police officer searched him, touched his testicles, and threw him on the ground. It appeared to Avendano that Steskal was sad and humiliated after his encounter with the police. (8 RT 1543.)

Several other defense witnesses similarly testified to Steskal's accounts of his experience with Deputy Spencer as well as their concerns over his apparent paranoia about being watched and law enforcement being after him. Those witnesses included employer David Rodering (8 RT 1544-1550), friend Michelle Houser (8 RT 1554-1561), friend Lou Norris (10 RT 1748-1755), and friend Ralph Pantoni (8 RT 1397, 1400, 1425, 1432-1433, 1446-1450). Another employer, Robert Eeg, testified to his belief that Steskal was generally paranoid and believed that law enforcement officers were out to get him. (10 RT 1757-1759, 1762, 1768-1770.)

The parties stipulated that Steskal's blood was drawn at 11:11 a.m. on June 12, 1999, and was tested for drugs and alcohol. The results were negative for all that was screened, including cocaine, methamphetamine, opiates, barbiturates, cannabinoids and alcohol. (12 RT 2175.) The parties also stipulated that Deputy Spencer recovered less than one ounce of marijuana from inside Steskal's pants pocket when Deputy Spencer searched Steskal during the March 28, 1999 traffic stop. (12 RT 2176.)

B. Penalty Phase

1. Prosecution's case-in-aggravation

The prosecution presented evidence in aggravation in the penalty phase retrial that included evidence of the murder of Deputy Riches, Steskal's assault on a Maryland State Trooper, Steskal's attempted escape from jail, his possession of weapons in jail, his felony conviction for marijuana cultivation, and victim impact testimony from Deputy Riches's parents, friends and co-workers.

a. The circumstances of the crime

Because a different jury determined Steskal's guilt for the murder of Deputy Riches, the prosecutor presented substantially the same evidence from the guilt phase proving the murder and special circumstance that is summarized hereinabove.[7] The prosecution also called several new witnesses, but only a few of those witnesses added to what was already presented at the guilt phase. For instance: Supervising Probation Officer Christopher Bieber testified that he was involved in the stop of the vehicle Steskal was in on the morning of June 12, 1999, and he noticed that Steskal had a freshly shaved mustache. (22 RT 4315.) Additionally, Orange County Sheriff's Department homicide investigator Ken Hoffman testified that he reviewed the surveillance video from the 7-Eleven and noticed that Steskal was wearing a shirt with some sort of emblem on the front center

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[7] The facts and circumstances of the murder was presented to the penalty phase retrial jury through the testimony of Kimberly Langlois (23 RT 4434-4458), David Cavallo (20 RT 4081-4093), Vickie De Lara (20 RT 4093-4102; 21 RT 4111-4150), Robert Bombalier (21 RT 4150-4172), Deputy Steven Torres (21 RT 4183-4200, 4205-4214), Sergeant Ron Acuna (21 RT 4215-4238), Deputy Adam Powell (22 RT 4320-4345), Elizabeth Thompson (22 RT 4375-22 RT 4414), Richard Fukumoto (20 RT 4014-4045), Ronald Moore (23 RT 4505-4543).

area. When he subsequently searched Steskal's apartment hours after the murder, he found a shirt in a wastebasket and the front center portion of the shirt had been cut out. (23 RT 4459, 4464.) Finally, during the pathologist's testimony regarding the cause of Deputy Riches's death, a mannequin was used to demonstrate the trajectory of the bullets that entered Deputy Riches's body. The mannequin was dressed in the uniform Deputy Riches was wearing when he was murdered. (20 RT 4011-4013, 4021-4022.)[8]

b. Other crimes evidence

(1) Steskal's attempt to escape from Santa Ana jail

Steskal was housed in the administrative segregation unit at the Santa Ana jail between his penalty phase trial and his penalty phase retrial. On August 25, 2003, a detention officer found in Steskal's shirt pocket a sharp piece of metal from a set of hair clippers and the top part of a nail clipper. (24 RT 4574-4576, 4585-4586.) This prompted other detention officers to search Steskal's cell where they found a hole in the wall. (24 RT 4612, 4619, 4622-4623.) Detenion Officer Kelvin LeGeyt described the hole as a "chipped away" area "approximately 12 inches by eight, and it was probably a third of an inch or so into the wall." (24 RT 4623-4624.) As the officers continued their search of the cell, they found a piece of metal attached to a paper handle. (24 RT 4625.) The metal appeared to have come from a hair clipper. (24 RT 4625, 4628.) LeGeyt opined that the object could be used as a digging instrument and could have been used to chip away at the cell wall. (24 RT 4626-4627.) LeGeyt opined that it could also be used as a weapon— "a slashing tool." (24 RT 4627.)

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[8] The prosecution did not use this mannequin when the pathologist testified at the guilt phase of the trial.

Under Steskal's bunk, the officers found a vitamin bottle that had a piece of metal sticking out of it. The metal was embedded in a battery that had been placed into the bottle, and there were napkins around the battery to ensure that the metal would not move around. (24 RT 4628-4630.) LeGeyt said this object was a shank, which "is basically the name given to any jail-made weapon." (24 RT 4632.) He explained that the object had "good potential" to be a dangerous weapon because it could be used in "a sticking motion." (24 RT 4632.) He further testified it "could be used in any kind of sticking motion such as in the stomach or neck area, whichever area the person decides to go for." (24 RT 4633.)

Later that day, a different detention officer was called to Steskal's cell to take pictures of the contraband that had been found. (24 RT 4648-4649.) When he was looking at the mattress, he notice that it appeared to have been altered. When he opened up the mattress, he pulled out several strands of bed sheets that had been torn. (24 RT 4650-4651.) There were 21 strips inside of the mattress and each strip was approximately seven to eight feet long. (24 RT 4651-4652, 4655.) If the strips that were found in Steskal's mattress were tied together, they would be about 147 feet long. (24 RT 4683.)

Chief of Security and Correctional Supervisor for the Santa Ana jail, Amelia Saunders, testified that she was involved in the construction of the jail. (24 RT 4670-4671.) The right side of the building is the police department and the left side, which is higher, is the jail. (24 RT 4672.) Saunders explained that immediately next to Steskal's cell is a mechanical room that contains the ventilation system. (24 RT 4610, 4621, 4675-4678.) The wall between Steskal's cell and mechanical room is about 24 inches thick. (24 RT 4684.) Saunders testified that someone could climb up to the bottom of the roof by climbing on the pipes in the mechanical room. (24 RT 4679-4680.) The distance from the roof of the jail down to the ground

level was approximately 80 feet. (24 RT 4684.) Saunders testified that if someone climbed from the roof of the jail down the wall, they would be in an area that is frequently traveled by police officers who are coming and going to work at the police department that shares the building with the jail. (24 RT 4687.)

(2) Steskal's conviction for manufacturing marijuana

On August 23, 1983, in the Calvert County Maryland circuit court, Steskal was convicted of manufacturing marijuana. (24 RT 4572; 27 RT 5186, 5189-5190; 32 RT 5982, 5990, 6020, 6151.)

(3) Steskal's assault on a Maryland State Trooper

On July 26, 1980, Maryland State Trooper John Hassler was on routine patrol in Calvert County Maryland when he observed across the highway a motorcycle and a Datsun racing each other and traveling in excess of 100 miles per hour. He made a U-turn, activated his lights and siren and began to pursue both vehicles. (20 RT 4046-4048, 4052-4053.) Hassler stopped the Datsun and cited its driver, Scott Steskal,[9] for reckless driving and exceeding the posted speed limit. (20 RT 4051-4052.) As Hassler was writing the citations, he saw the motorcycle drive up behind him, then pull over into a parking lot across the street from where Hassler was with Scott Steskal. (20 RT 4051.) After issuing the citations to Scott, Hassler drove into the parking lot where the motorcycle was waiting. State Trooper Hassler got out of his vehicle and at that time, the motorcycle operator accelerated at a high rate of speed straight toward Hassler. (20 RT 4053.) Hassler had to jump out of the way to avoid being hit. (20 RT

[9] Scott Steskal is the brother of appellant Maurice Steskal. (20 RT 4060, 4066.)

4054.) Hassler managed to get back into his vehicle and pursued the motorcycle until he lost sight of it. (20 RT 4054.) A few minutes later, Hassler learned from another trooper that an abandoned motorcycle had been found on the beach. He went to that area and as he walked out onto the beach, he saw Steskal walking up the beach toward him. (20 RT 4055.) State Trooper Hassler took Steskal into custody on the beach and Steskal was cooperative. (20 RT 4077-4078.) Hassler gave Steskal "numerous traffic citations" and he was charged with assault on a police officer. (20 RT 4080.)

c. Victim impact evidence

James Henery is a fire captain with the Santa Ana Fire Department. He testified that he and Riches were "real close" and were best friends. (24 RT 4691.) Henery testified that after Riches's death, there is "a hole in [his] heart" and "it doesn't seem to [be] getting much better." (24 RT 4692.) Henery and Riches first met when they were 17 years old, when they were both in an after-school program that related to the fire service. (24 RT 4693.) In the 1980's, Henery and Riches were roommates while they were volunteer firefighters for the Orange County Fire Department. (24 RT 4694.) Riches took extra training and became an engineer. (24 RT 4694.) Riches cared about people and had empathy. (24 RT 4693-4694.) Henery recalled a time when he and Riches were responding to an early morning call about an elderly man who had passed away in the night. When they arrived, the man's wife was very upset. Riches sat with the lady and held her hand as she told him about meeting her husband and how many years they had been married. Henery wanted to leave as soon as he could because he did not want to see the woman's grief, but Riches just sat with the woman because he was that kind of person. (24 RT 4695.) Henery also described Riches as honest, easy to talk to, very dependable, loyal and non-judgmental. (24 RT 4697-4698, 4706, 4719-4720.) Henery

testified that at one point early in their relationship, he and Riches had a job working with disabled people. (24 RT 4721.) There was a girl in a group home that was deaf and it bothered Riches that he could not talk to her, so Riches learned sign language so he could talk to the girl. (24 RT 4721-4722.) "That just is the kind of guy he was." (24 RT 4722.)

Scott Vanover is a deputy sheriff for Orange County. (24 RT 4724.) Vanover met Deputy Riches in 1998, and they became "really good friends in a very short time." (24 RT 4725.) They both were interested in traveling and talked about traveling to different places together in the future. (24 RT 4726.) Vanover and Riches took a trip to England to visit Deputy Riches's mother. (24 RT 4726.) Even in London, Deputy Riches would just walk up to complete strangers and start talking with them. (24 RT 4727.) It always amazed Vanover how Deputy Riches could walk up to a complete stranger and start a conversation and the way the stranger would respond to him. (24 RT 4728.) Deputy Riches was non-judgmental and never said a negative thing about anyone or anything. (24 RT 4728.)

Eric Hendry is an Orange County Deputy Sheriff and was Deputy Riches's training officer, co-worker and friend. (24 RT 4729.) They met in the early part of 1999. (24 RT 4729-4730.) According to Hendry, "no bond is tighter than a training officer and the trainee." (24 RT 4731.) Hendry described Depuy Riches as a soft-spoken, "gentle giant." (24 RT 4732.) Hendry was deeply impacted by Deputy Riches's death, and he testified it affected his marriage, and his relationship with his children, his co-workers and with God. He said it was like losing a family member. (24 RT 4733.)

Joseph Hoskins, an investigator for the Orange County Sheriff's Department, knew Deputy Riches for nine years and testified that Riches "represented everything that we are supposed to be in law enforcement, all that is good," and he was "a friend, first and foremost." (24 RT 4744,

4746.) Deputy Riches would give you the shirt off of his back. (24 RT 4746.) Deputy Riches's death "hurts" him, like "a kick to the gut. And it hasn't stopped." (24 RT 4747.) Hoskins described a time when both he and Deputy Riches were fresh out of the academy and there was an inmate who was having a seizure. Hoskins was nervous and unsure if he was doing what he was supposed to be doing, but he heard Deputy Riches giving him words of encouragement, and it helped get him through the situation. (24 RT 4747-4748.) Afterwards, Deputy Riches patted Hoskins on the back, gave him a thumb's up, and told him that he saved the inmate's life. (24 RT 4748.) That was the start of their friendship, and Hoskins testified that "as a young man in this profession, . . . you needed a partner like that." (24 RT 4748-4749.)

Bruce Riches is Riches's father. (24 RT 4750.) His son's death has "greatly impacted" him and has been "very difficult to deal with." (24 RT 4751.) He testified that Riches "was a very good person." (24 RT 4751.)

Meriel Riches is Riches's mother. (24 RT 4754.) She was in a significant amount of pain from a progressive spinal disease and muscular cramps, but it was important for her to be in attendance and to speak to the jury. (24 RT 4754.) She described Riches as an "unusual, wonderful man" with whom she had a special relationship. (24 RT 4755.) She testified that Riches had suffered a brain trauma at birth that caused some difficulties in his early years in education, but it never held him back and "he made things work." (24 RT 4755.) He was a very determined individual and whatever he tackled, "he had to work twice as hard for." (24 RT 4757.) He began volunteering at a very early age. His mother recalled a time when Riches was six or a little older, and he helped an elderly couple rebuild their chicken coop. (24 RT 4758.) As Ms. Riches explained, Riches would pass the couple's house every day on his way to school and they had chickens in the yard and a chicken coop that was in poor shape. One evening on the

way home from school, Riches knocked on the door and asked them if he could come over the next morning to fix the coop. The next day, he assembled all the materials that he needed and went to their house and fixed the chicken coop. (24 RT 4758.)

Ms. Riches testified that Riches's father "is totally and utterly devastated" by Riches's death. He has been clinically depressed and never spends a day without crying. (24 RT 4759.) He can no longer work. (24 RT 4760.)

2. Defense case-in-mitigation

At the penalty phase, the defense presented the testimony of five of the same expert witnesses it had presented at the guilt phase: Dr. Asarnow, Dr. Smith, Dr. Missett, Dr. Mohandie, and Dr. Pettis. Their extensive testimony was consistent with the testimony they provided at the guilt phase.

The defense also called an additional expert who did not testify at the guilt phase: Dr. Mark Cunningham. Dr. Cunningham is a clinical and forensic psychologist in private practice. (33 RT 6305-6306.) He was asked by the defense to review all of the information that had been gathered by the different experts who had looked at this case, as well as by third parties, and try to synthesize that information to understand how Steskal came to commit the tragic offense for which he was on trial. (33 RT 6317.) Prior to testifying in this case, Dr. Cunningham reviewed the lengthy reports that had been prepared by Dr. Pettis, Dr. Asarnow, and Dr. Missett. He also reviewed Steskal's school records, criminal records, jail records, and the records pertaining to the investigation into Deputy Riches's murder. He reviewed the investigation summaries prepared by the defense, which included summaries of interviews with Stesksl's mother and father, brothers Mark, Bobby, Christopher, Scott, and Scott's wife, Robin, and Steskal's sister, Annalisa. (33 RT 6314.) Dr. Cunningham also reviewed

summaries of interviews from other relatives and friends, including Steskal's wife, Joy Avendano, Michelle Hauser, Cherie LeBrecht and her son Erik, Lou Norris, Ralph Pantoni, Dave Rodering, and Robert Eeg. (33 RT 6314-6316.) Finally, he reviewed transcripts of interviews the police had done with Steskal and other witnesses involved in this case. (33 RT 6316.) He did not interview Steskal or anyone else. (33 RT 6316.)

Once Dr. Cunningham had reviewed all of the information, he concluded that Steskal was "impaired," which meant "that across a number of different primary life areas, he is deficient. He is ill, if you will. And that is exhibited . . . in a number of different primary life functioning areas. And I think that the nature of that illness is best characterized as an impairment." (33 RT 6319.) There were four specific areas of impairment: neuropsychologically, developmentally, socially, and psychologically. (33 RT 6319-6320.) According to Dr. Cunningham, there is evidence that Steskal's neuropsycholgical processes in the brain have functioned in a faulty way since early childhood. This was evident from Steskal's school records which showed he was retained in the first grade and then again in the second grade. He was described as lethargic and day-dreamy and difficulty focusing his attention. (33 RT 6320.) The same kinds of problems appear later in his life, when he is attempting to maintain employment. (33 RT 6321.) With regard to Steskal being developmentally impaired, Dr. Cunningham explained that his conclusion was based on the environment Steskal lived in as a child. His father was an alcoholic and was emotionally absent from the home. His parents' marriage was dysfunctional and they were in counseling for years. (33 RT 6327.) In addition, Steskal was being brutalized by his brother, Bobby. (33 RT 6328.) As far as Steskal being impaired socially, Dr. Cunningham explained that Steskal did not know how to relate to other people. (33 RT 6330-6331.) According to Dr. Cunningham, that was "a manifestation of

being on this schizotypal schizophrenic continuum." (33 RT 67331.) With regard to the fourth area of impairment, psychologically, Dr. Cunningham opined that Steskal exhibited paranoia since he was a teenager, his personality structure was profoundly impaired, he was depressed, and he began self-medicating with heavy alcohol and elicit drug abuse. (33 RT 6336.)

Dr. Cunningham opined that on June 12, 1999, Steskal operated under this delusional system that involved both his psychotic delusional belief that had been aggravated by his recent traumatic police contacts. That fueled his fear and feelings of vulnerability and hypervigilance such that he decided to arm himself when he went out to get cigarettes. (33 RT 6380-6381.) According to Dr. Cunningham, "out of that comes this offense." (33 RT 6381.)

Deputy Spencer was called as a defense witness at the penalty phase retrial. (26 RT 4994.) Deputy Spencer reviewed the videotape of his March 28, 1999, vehicle stop on Steskal (26 RT 5031-5032) and agreed that several things he wrote in his report about the incident were inconsistent with the things that actually occurred during the stop and as seen in the video. (26 RT 5016, 5035-5038, 5050.) Deputy Spencer agreed that many of the things he did during the stop were unprofessional and actually escalated the situation, contrary to what he had been trained to do. (26 RT 5046, 5060, 5067.)

Deputy Spencer also testified that just after Deputy Riches was murdered, his sergeant requested that he review the 7-Eleven surveillance tapes because Deputy Spencer used to patrol that area, and may have been able to identify the shooter. (26 RT 4997.) When Deputy Spencer watched the video, he recognized Steskal from the previous patrol stops and the arrest. (26 RT 4998.)

To present evidence of Steskal's character, mental instability, and the effects of Deputy Spencer's contacts with him in the early part of 1999, the defense called eight of the same nine witnesses who testified on this subject at the guilt phase; their testimony at both phases of the trial was consistent.[10] The defense did call one witness that was not called at the guilt phase—Erik Le Brecht. He testified that in 1998 and 1999, he and his mother, Cherie LeBrecht, lived with Steskal and Nannette at their apartment in Lake Forest. (34 RT 6475-6476.) Steskal was nice to Erik and Erik felt very comfortable and safe around Steskal. (34 RT 6478-6479.) Erik learned things from Steskal and Steskal helped Erik fix his bike. (34 RT 6477-6478.)

3. Prosecution rebuttal evidence

Huntington Beach Police Lieutenant Janet Perez was the jail manager of the Huntington Beach Municipal Jail for three of the four and a half months Steskal was incarcerated there. Steskal was at that jail from June 18, 1999 until he was transferred out on November 1, 1999. (35 RT 6573-6578.) Perez talked to Steskal "a handful of times" while he was there under her supervision. (35 RT 6578.) She never saw Steskal exhibit any abnormal mental activities during that time. (35 RT 6579.) She was able to have "very normal" conversations with him. (35 RT 6580.) She never saw anything that indicated to her that Steskal needed mental health treatment.

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[10] Evidence pertaining to Steskal's character, mental instability and his reaction to his encounters with Deputy Spencer was presented to the penalty phase retrial through the testimony of Bobby Steskal (25 RT 4879-4976), Robert Eeg (28 RT 5441-5459), Annalisa La Croix (34 RT 6479-6531), Dave Rodering (27 RT 5191-5207), Ralph Pantoni (25 RT 4765-4878), Jocelyn Avendano (27 RT 5207-5220), Cherie LeBrecht (27 RT 5152-5190), and Lou Norris (28 RT 5427-5441).

(35 RT 6581.) Steskal's parents visited him while he was at the Huntington Beach jail and his wife did "a number of times" as well. (35 RT 6583.)

Huntington Beach Police Sergeant Guy Clifton Dove, III, took over as the jail manager in September 1999, after Lieutenant Perez left. (35 RT 6584-6585.) Steskal was coherent when they spoke, and they had conversations about the weather, television programs, visitation, and Steskal's accommodations at the jail. Although Sergeant Dove was not a trained psychologist or psychiatrist, he spoke with Steskal several times during the six-week period Steskal was housed there and observed his demeanor. Sergeant Dove testified there was never any indication to him that Steskal had any type of mental problems or mental health issues. (35 RT 6586-6588, 6591.) Steskal had a television in his cell and never did anything bizarre with respect to the television. (35 RT 6590.)

Senior Detention Officer at the Huntington Beach Jail, Marvin Sather, worked at the jail the entire four and a half months Steskal was housed there. He had daily contact with Steskal and never saw anything that would indicate to him that Steskal had mental health issues. (35 RT 6594-6595.) Officer Sather had conversations with Steskal in which they talked about fishing, hunting, family, and once they talked about Bigfoot. (35 RT 6595.) Steskal was always polite, respectful, and cooperative while he was at that jail. (35 RT 6597-6598.)

On the night of July 15, 1988, Orange County Sheriff's Investigator Mark Daigle was on patrol in San Juan Capistrano when he saw a small pickup driving without its lights on. (35 RT 6602-6606.) As Daigle followed the truck and activated his overhead lights, Steskal, who was the sole occupant of the vehicle, accelerated and drove erratically, swerving through his travel lane almost hitting the curb several times. (35 RT 6608-6609.) Daigle saw an arm come out the driver's side window and then the driver, later identified as Steskal, began emptying plastic baggies that

contained marijuana along the road. He continued to empty bags as he drove for approximately one mile, and did this approximately 6 to 10 times. (35 RT 6609-6611, 6633.) When Steskal finally stopped the truck, he opened the driver's door and turned and his feet came out of the truck. Steskal's hands were still inside the truck so Daigle yelled for Steskal to let him see his hands. Steskal began yelling back at him, saying, "Shoot me, kill me," over and over. (35 RT 6611-6612.) Steskal continued to argue with Daigle as they stood outside the truck. A backup deputy arrived and grabbed Steskal's arm. Another deputy arrived and the three of them wrestled Steskal to the ground. (35 RT 6614.) When he searched Steskal, he found a Swiss Army knife in his pants pocket and a marijuana cigarette. He found another marijuana cigarette in Steskal's shirt pocket and $251.62 in cash. (35 RT 6616, 6622.) Steskal was acting very agitated and refused to tell Daigle his name. (35 RT 6617-6618.) Daigle canvassed the area Steskal had been seen emptying the baggies, and he found several large clumps of marijuana. The total amount was approximately a half an ounce. (35 RT 6633.) Steskal was arrested for evading, driving under the influence, and possession of marijuana for sale. (35 RT 6614, 6616.)

ARGUMENT

I. THE TRIAL COURT PROPERLY REFUSED THE DEFENSE REQUEST TO INSTRUCT THE JURY ON VOLUNTARY MANSLAUGHTER

Steskal claims that because there was evidence he had a severe mental illness which manifested itself in a psychotic delusion that members of the Orange County Sheriff's Department were seeking to kill him and that he armed himself on the night of the shooting to protect himself from law enforcement, the trial court erred by refusing his request to instruct the jury on voluntary manslaughter based on imperfect self-defense. He further contends the court's error violated his rights to due process and a reliable

determination of guilt under the Fifth, Eighth and Fourteenth Amendments. (AOB 99-114.) Steskal's contention is without merit, as substantial evidence did not warrant an instruction on voluntary manslaughter based on imperfect self defense. Assuming arguendo it was error not to give such instructions, the error was harmless.

"Murder is the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) Manslaughter, by contrast to murder, is the "unlawful killing of a human being without malice." (§ 192.) "'[O]ne who holds an honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury does not harbor malice and commits no greater offense than manslaughter.'" (*People v. Elmore* (2014) 59 Cal.4th 121, 134, citing *People v. Flannel* (1979) 25 Cal.3d 668, 672; see also *In re Christian S.* (1994) 7 Cal.4th 768, 783.) Imperfect self-defense is "'not a true defense; rather it is a shorthand description of one form of voluntary manslaughter.' [Citation.]" (*People v. Elmore, supra*, 59 Cal.4th at p. 134.)

Voluntary manslaughter arising out of a killing perpetrated in imperfect self-defense is a lesser offense included in the crime of murder. (*People v. Barton* (1995) 12 Cal.4th 186, 201-202.) A trial court must instruct on all lesser included offenses supported by substantial evidence. (*People v. Duff* (2014) 58 Cal.4th 527, 561.) "Whenever there is substantial evidence that the defendant killed in unreasonable self-defense, the trial court must instruct on this theory of manslaughter." (*People v. Elmore, supra*, 59 Cal.4th at p. 134.) Substantial evidence is evidence "sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." (*People v. Barton, supra*, 12 Cal.4th at p. 201, fn. 8.) The trial court has no duty to instruct on imperfect self-defense when the evidence suggesting the defendant killed in imperfect self-defense is "minimal or insubstantial." (*Id.* at p. 201.) A reviewing

court applies the de novo standard of review to a claim that the trial court erred in failing to instruct on a lesser included offense. (*People v. Souza* (2012) 54 Cal.4th 90, 113.)

Steskal requested instructions on voluntary manslaughter[11] and imperfect self-defense.[12] (5 CT 1178-1181; 12 RT 2207-2212.) The trial

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[11] Specifically, Steskal requested the trial court give CALJIC Nos. 8.40, 8.72, and 8.73. CALJIC No. 8.40 [Voluntary manslaughter – defined] provides, in pertinent part: "Every person who unlawfully kills another human being without malice aforethought but with an intent to kill, is guilty of voluntary manslaughter in violation of Penal Code section 192 (a). [¶] There is no malice aforethought if the killing occurred . . . [in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury]. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A human being was killed; [¶] 2. The killing was unlawful; and [¶] 3. The killing was done with the intent to kill." (5 CT 1179.)

CALJIC No. 8.72 [Doubt whether murder or manslaughter] provides: "If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder." (5 CT 1180.)

CALJIC No. 8.73 [Evidence of provocation may be considered in determining degree of murder] provides: "If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation." (5 CT 1181.)

[12] Specifically, Steskal requested CALJIC No. 5.17, which provides: "A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of [voluntary] [or] [involuntary] manslaughter. [¶] As used in this

(continued...)

court denied the request after it determined there was not substantial evidence of any objective circumstances that Steskal acted under an unreasonable mistake of fact.

The trial court properly refused these instructions because there is no evidence that the contact between Steskal and Deputy Riches caused Steskal to honestly, but unreasonably, believe he needed to defend himself against peril of death or great bodily injury. To the contrary, the evidence showed that Steskal emerged from the 7-Eleven and immediately opened fire on Deputy Riches. (7 RT 1185, 1201, 1208.) Deputy Riches never got out of his patrol car before Steskal shot him to death. (7 RT 1217, 1224.) In fact, Deputy Riches never even had time to remove his gun from its holster. (7 RT 1217-1218, 1233-1234, 1237.) Thus, there was no evidence, much less substantial evidence, supporting a reasonable inference of an actual and honest belief on the part of Steskal that Deputy Riches posed an apparent, present, immediate threat.

Steskal claims the court's ruling was erroneous because he presented evidence that at the time of the shooting, he was operating under a psychotic delusion that members of the Orange County Sheriff's Department were seeking to kill him, and due to this delusion, Steskal armed himself on the night of the murder, to protect himself from law enforcement. (AOB 104-110.) This claim fails as a matter of law. In *People v. Elmore, supra*, 59 Cal.4th 121, this Court, after thoroughly

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(...continued)
instruction, an "imminent" [peril] [or] [danger] means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer. [¶] [However, this principle is not available, and malice aforethought is not negated, if the defendant by [his] [her] [unlawful] [or] [wrongful] conduct created the circumstances which legally justified [his] [her] adversary's [use of force], [attack] [or] [pursuit]." (5 CT 1178.)

reviewing the law of murder and manslaughter and the evolution of unreasonable self-defense, held that unreasonable self-defense is not available when the belief in the need to defend oneself is purely delusional. (*People v. Elmore, supra*, 59 Cal.4th at pp. 129-130, 132-139.) In so holding, this Court explained that "unreasonable self-defense involves a mistake of fact. (*In re Christian S., supra*, 7 Cal.4th at p. 779, fn. 3.) A purely delusional belief in the need to act in self-defense may be raised as a defense, but that defense is insanity. Under our statutory scheme, a claim of insanity is reserved for a separate phase of trial. At a trial on the question of guilt, the defendant may not claim self-defense based on insane delusion." (*People v. Elmore, supra*, 59 Cal.4th at p. 130.)

In *Elmore*, this Court expressly approved of the decision in *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, which held that purely delusional acts are excluded from the scope of unreasonable self-defense. (*People v. Elmore, supra*, 59 Cal.4th at p. 136.) The court in *Mejia-Lenares* reasoned that, "a mistake of fact is predicated upon a negligent perception of facts, not, as in the case of a delusion, a perception of facts not grounded in reality. A person acting under a delusion is not negligently interpreting actual facts; instead, he or she is out of touch with reality." (*People v. Mejia-Lenares, supra*, 135 Cal.App.4th at pp. 1453-1454.) Agreeing with the *Mejia-Lenares* court, this Court in *Elmore* concluded that unreasonable self-defense does not apply when the defendant's actions are entirely delusional. (*People v. Elmore, supra*, 59 Cal.4th at pp. 136-137.) This is because a defendant who makes a factual mistake misperceives the objective circumstances, whereas a delusional defendant holds a belief that is divorced from the circumstances. This Court asserted that the line between mere misperception and delusion is drawn at the absence of an objective correlate. "A person who sees a stick and thinks it is a snake is mistaken, but that misinterpretation is not delusional. One

who sees a snake where there is nothing snakelike, however, is deluded. Unreasonable self-defense was never intended to encompass reactions to threats that exist only in the defendant's mind." (*People v. Elmore, supra*, 59 Cal.4th at p. 137.)

Realizing that *Elmore* defeats his claim, Steskal argues that his case is distinguishable from *Elmore* because he actually perceived Deputy Riches as exactly what he was – a deputy with the Orange County Sheriff's Department, and therefore, his misperception was not "purely delusional," "divorced from the circumstances," or featuring "an absence of an objective correlate," as noted by *Elmore*. (AOB 110-111, citing *People v. Elmore, supra*, 59 Cal.4th at pp. 136-137.) Steskal is wrong. His alleged belief in the need to defend himself from a deputy with the Orange County Sheriff's Department because that deputy would kill him was purely delusional. As previously discussed, absolutely nothing objective supported such a belief—Steskal began shooting immediately upon exiting the 7-Eleven, and Deputy Riches never even had the opportunity to emerge from his patrol car much less draw his weapon. As a result, the trial court had no duty to instruct on voluntary manslaughter or imperfect self-defense.

Steskal argues that "CALJIC No. 5.17 does not require that there *be* an imminent threat of harm – it requires only that the defendant hold the actual but unreasonable *belief* that there is an imminent threat." (AOB 109-110; emphasis in Opening Brief.) Even if Steskal thought Deputy Riches was going to kill him because of an alleged delusion that members of the Orange County Sheriff's Department were seeking to kill him, there was no evidence that Steskal *believed* Deputy Riches posed an imminent danger to Steskal's life as he sat is his patrol car in the 7-Eleven parking lot. As this Court recently explained,

> To satisfy the imminence requirement, "[f]ear of future harm – no matter how great the fear and no matter how great the

> likelihood of the harm – will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury. '"[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with.*' . . . Put simply, the trier of fact must find an actual fear of an imminent harm."

(*People v. Trujeque* (2015) 61 Cal.4th 227, 270-271, citing *In re Christian S., supra*, 7 Cal.4th at p. 783; emphasis in original.)

As set forth above, the evidence showed that Deputy Riches did not even have time to get his gun out of his holster before Steskal killed him. Steskal never saw a gun pointed at him, and the deputy's mere presence in the 7-Eleven parking lot was not enough to make Steskal believe, even unreasonably, that he needed to defend against imminent peril to life or great bodily injury. In light of the foregoing, the trial court had no duty to instruct on voluntary manslaughter based on imperfect self-defense.

Finally, even if the court erred by refusing to instruct on voluntary manslaughter based on imperfect self-defense, the error was harmless. It is well established that "[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (*People v. Lancaster* (2007) 41 Cal.4th 50, 85, citing *People v. Lewis* (2001) 25 Cal.4th 610, 646.) Here, the jury's verdict finding Steskal guilty of the first degree murder of Deputy Riches shows the jury implicitly rejected Steskal's version of events.[13]

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[13] The trial court gave CALJIC No. 3.32 [Evidence of Mental Disease – Received for Limited Purpose], which told jury it could consider evidence of Steskal's mental disease, defect or disorder "solely for the purpose of determining whether the defendant actually formed the required specific intent, premeditated, deliberated or harbored malice aforethought (continued...)

Accordingly, it is clear that the jury would have returned the same verdict had it been instructed regarding voluntary manslaughter based on imperfect self-defense. And because there was not substantial evidence to support the instruction, Steskal's constitutional rights were not violated by the court's refusal to instruct on voluntary manslaughter. (See *People v. Sakaria* (2000) 22 Cal.4th 596, 621 [no state or federal constitutional error occurs requiring reversal for failure to instruct the jury regarding a lesser included offense, when the evidence in support of that offense "was, at best, extremely weak"].)

Moreover, CALJIC No. 5.17 expressly states that the principle of imperfect self defense is not available, and malice is not negated, if the defendant by his unlawful or wrongful conduct created the circumstances which legally justified his adversary's use of force, attack or pursuit. (See *People v. Hardin* (2000) 85 Cal.App.4th 625, 634 [imperfect self-defense "is not available . . . if the defendant [intruder] by his unlawful or wrongful conduct created the circumstances which legally justified his adversary's use of force"].) Here, Steskal – by carrying a loaded MAK-90 in public, and in particular, into a convenience store late at night – created the circumstances of the shooting because the evidence indicates it was *because* Deputy Riches saw Steskal inside of the 7-Eleven with a gun that Deputy Riches drove into the parking lot, where he was immediately shot and killed. Thus, even if the court instructed the jury on imperfect self-defense, the jury could not reasonably have found that it applied since Steskal created the circumstances which legally justified Deputy Riches's entrance into the 7-Eleven parking lot.

(...continued)
which is an element of the crime charged in Count One, namely, murder." (5 CT 1217.)

II. THE TRIAL COURT DID NOT IMPROPERLY RESTRICT THE TESTIMONY OF DEFENSE FORENSIC PSYCHIATRIST DR. PETTIS

Steskal contends the trial court erred when it excluded, on hearsay grounds, Dr. Pettis's testimony regarding three statements Steskal made to him on which he based his opinion, in part. Steskal further contends this error violated his right to present a complete defense under the Fifth, Sixth and Fourteenth Amendments. (AOB 115-124.) These contentions are without merit, and even if there was error, Steskal was not prejudiced.

As noted in the statement of facts, Dr. Pettis opined that Steskal suffered from a psychotic disorder that centered on the delusion that members of the Orange County Sheriff's Department were trying to kill him; he testified that Steskal suffered a "break with reality" on the night of the crime. (11 RT 2052, 2055, 2093-2096.)

Steskal challenges three instances in which the trial court sustained the prosecutor's hearsay objections to Dr. Pettis's testimony regarding statements Steskal made to him during their interviews. Steskal's first complaint concerns an exchange between defense counsel and Dr. Pettis on direct examination when defense counsel asked Dr. Pettis whether he received information about Steskal that would have enabled him to form an opinion as to Steskal's mental state on June 12, 1999. (11 RT 2104.) The prosecutor objected on the basis of lack of foundation and the court sustained that objection. Defense counsel asked if Dr. Pettis received information about Steskal and his behavior on June 12, 1999, to which Dr. Pettis replied, "yes." Counsel asked if part of that information was that Steskal was living in the mountains, and Dr. Pettis said, "correct." (11 RT 2104.) Counsel then asked whether the doctor received information that Steskal left the mountains on the morning of June 12, 1999, to come to Orange County because he had some legal obligations to tend to as a result

of the March 24, 1999 stop by Deputy Spencer. (11 RT 2105.) Dr. Pettis replied, "that's correct." (11 RT 2015.) Counsel asked whether what the doctor learned about Steskal's behavior that morning factored into his diagnosis of the mental illness, and if he learned Steskal was suicidal that morning. The doctor replied in the affirmative to both. (11 RT 2105.) The following colloquy then occurred:

> Q: And you learned that Mr. Steskal had heard, was listening to the radio, and heard what he thought were messages that caused him to act in a psychotic manner?
>
> Prosecutor: I am going to object, lack of foundation as to where he heard that.
>
> The court: Sustained.
>
> Q: [by defense counsel]: Where did you hear that?
>
> A: (No audible response).
>
> Q: Is it part of the information you received about the morning of June 12, 1999, information that you heard from Mr. Steskal?
>
> A: That's correct.
>
> Prosecutor: And I am going to object to that as hearsay, Your Honor.
>
> The court: Sustained.

(11 RT 2105-2106.)

Steskal's second complaint concerns defense counsel's questioning, just moments after the above complained-of selection, in which counsel asked Dr. Pettis whether he and Steskal discussed Steskal's behavior on June 12, 1999, and whether the doctor learned of any behavior he thought might have been significant. (11 RT 2106.) Counsel then asked "was there anything about what you learned, any information you gathered about June 12, 1999, that morning or afternoon, that led you to believe that Mr. Steskal was just angry about the fact that he had to go to a class requirement?" The

prosecutor objected that the question called for hearsay and the court sustained the objection. (11 RT 2106.)

Steskal's third complaint involves an objection a few questions later, after counsel asked Dr. Pettis if he received information that later on the night of June 12, 1999, Steskal was heard screaming by the dumpster about hating the world and having weapons and ammunition. (11 RT 2107.) Dr. Pettis testified that Steskal's behavior at that time was "reflective of the instability, the general instability and exacerbation of the mental illness" and that Steskal was in "extreme despair" and was "extremely upset about the need to come down from the mountains. And the anxiety level and the stress is extremely high at this point." (11 RT 2107.) Defense counsel asked, "Is there anything about the behavior that is heard and observed in Mr. Steskal in the early morning hours while he is at the apartment complex that leads you to believe that all that is happening is that he is just angry?" (11 RT 2107-2108.) The prosecutor objected on two grounds: first, that the question assumed facts not in evidence, i.e., that Steskal was at the apartment in the early morning hours, and second, that the question called for hearsay. The court sustained the objection without identifying the particular basis. (11 RT 2108.)

Steskal claims that by sustaining the prosecutor's hearsay objections to the three questions cited above, the court violated Evidence Code sections 801 and 802 and his federal right to present a complete defense. (AOB 117-120.) Evidence Code section 801, subdivision (b), requires that expert opinion testimony be "[b]ased on matter . . . perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." So long as the material is reliable, "even matter that is ordinarily inadmissible can form the proper basis for an expert's opinion

testimony." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) This includes reliable hearsay. (*Id.* at pp. 618-619.)

Evidence Code section 802 permits an expert to testify about out-of-court statements that formed the basis of his or her opinion. (*People v. Catlin* (2001) 26 Cal.4th 81, 137.) Nevertheless, "a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact." (*People v. Gardeley, supra*, 14 Cal.4th at p. 619.) Accordingly, trial courts have long instructed juries that out-of-court statements related by experts in forming their opinions may not be considered for the truth of the matter stated, but only for the purpose of evaluating the expert's opinion. (See *People v. Montiel* (1993) 5 Cal.4th 877, 919 ["Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of [the] opinion and should not be considered for their truth"].)

But this Court has also recognized that a limiting instruction is not always sufficient to alleviate the risk that jurors will use out-of-court statements admitted to explain the basis of an expert's opinion as independent proof of disputed factual issues. (*People v. Coleman* (1985) 38 Cal.3d 69, 92, disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32.) Therefore, "California law gives the trial court discretion to weigh the probative value of inadmissible evidence relied upon by an expert witness as a partial basis for [the expert's] opinion against the risk that the jury might improperly consider it as independent proof of the facts recited therein." (*People v. Coleman, supra*, 38 Cal.3d at p. 91; see also *People v. Bell* (2007) 40 Cal.4th 582, 608.)

In the present case, it is clear that the trial court's sustaining of the prosecutor's objections was wholly appropriate. Steskal sought to have Dr. Pettis disclose at trial Steskal's case-specific statements to Dr. Pettis that he was not motivated by anger, but by a psychosis in which he received and

acted upon messages from the radio. Those statements related to the specific events at issue in the trial, and were directly relevant to the charge of premeditated murder. Because of this overlap between the statements forming the basis of Dr. Pettis's opinion and the disputed issues at trial, there was a substantial risk that the jury would consider Steskal's out-of-court statements as independent proof of what happened the day of the shooting. Moreover, Steskal's out-of-court statements were unreliable – a self-serving substitute for trial testimony tested "in the crucible of cross-examination." (*Crawford v. Washington* (2004) 541 U.S. 36, 61 [124 S.Ct. 1354, 158 L.Ed.2d 177]; see also *People v. Bell, supra*, 40 Cal.4th at p. 608.) Further, the hearsay had little "proper probative value" (*People v. Montiel, supra*, 5 Cal.4th at p. 919), because Dr. Pettis was permitted to testify to a substantial body of other information underlying his diagnosis of the psychotic disorder with which Steskal was suffering. That Dr. Pettis was not permitted to testify to certain details did not undermine the power of his opinion.

This case is similar to *People v. Bell, supra*, 40 Cal.4th 582. In *Bell*, the trial court excluded under Evidence Code section 352 proposed testimony by a defense psychologist recounting the defendant's statements about the murder for which he was being tried. (*Id.* at p. 607.) The trial court permitted the expert to testify to the defendant's statements about his "'psychological background,'" but the court reasoned that a "limiting instruction would be insufficient to prevent the jury from considering defendant's statements about the crimes themselves . . . as evidence of the truth of the events, effectively permitting defendant to testify to his version of events without being subject to cross-examination. The potential for such prejudice was less as to defendant's psychological history, the court found, because that issue was less central to the case." (*Id.* at p. 608.) This Court affirmed, explaining, "Though the excluded statements were not

particularly inflammatory, for the jury to separate their proper and improper uses would have been difficult." (*Id.* at p. 609.)

Here, as in *Bell*, the court properly excluded Steskal's statements to Dr. Pettis about the crime because allowing the out-of-court statements would effectively be permitting Steskal to testify to his version of events without being subject to cross-examination. (*People v. Bell, supra*, 40 Cal.4th at p. 608; see *People v. Hughes* (2002) 27 Cal.4th 287, 338-339 [trial court properly exercised discretion by precluding expert from disclosing, as the basis of his opinion, defendant's statements to defense investigator about charged offense, which differed from his statements to the police].) Accordingly, the trial court did not abuse its discretion in precluding Dr. Pettis from testifying to Steskal's hearsay statements.

In any event, any error in the court's rulings was harmless. The trial court gave defense counsel wide latitude in eliciting Steskal's statements relied upon by Dr. Pettis in forming his opinion about Steskal's alleged mental illness. In light of this, the jury was fully informed of statements by Steskal forming the basis for the experts' opinions that Steskal killed Deputy Riches while in a psychotic state and while suffering from a "break with reality." The jury was not reasonably likely to reach a different verdict had it also considered, as a basis for Dr. Pettis's expert opinion, Steskal's statements that he was not motivated by anger, but by a psychosis in which he received and acted upon messages from the radio. Therefore, there is no reasonable likelihood that admission of additional testimony by Dr. Pettis on this point would have changed the jury's verdicts. (*People v. Watson* (1956) 46 Cal.2d 818, 834.)

Furthermore, the evidence that Steskal knew very well what he was doing when he repeatedly shot the victim was compelling. After the shooting, Steskal left the scene, went to his wife's apartment to change his clothes, destroy evidence of the crime, and shave off his mustache. He then

asked his wife to drive him to the mountains, where one could reasonably infer he planned to dispose of the firearm. However, his escape attempt was thwarted when he was stopped by police. This undisputed course of events shows Steskal calculatingly murdered the victim to seek revenge for being humiliated and harassed by Deputy Spencer months before. There was no prejudice.[14]

III. THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT IN THE GUILT PHASE

Steskal claims that multiple instances of prosecutorial misconduct during the guilt phase closing argument deprived him of a fair trial. Specifically, he contends the prosecutor improperly appealed to the passions of the jury and improperly commented on Steskal's failure to call his wife as a witness. (AOB 125-138.) As the prosecutor properly comment upon, and argued reasonable inferences from, the evidence presented at trial, Steskal's claims of prosecutorial misconduct are meritless.

"Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under [California] law

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[14] Steskal argues the court's ruling violated his right to present a complete defense. (AOB 120-124.) He has forfeited his right to raise this claim on appeal because he did not object on this ground below. (*People v. Davis* (1995) 10 Cal.4th 463, 501, fn. 1.) Even if this claim was properly before this Court, it is without merit. As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's constitutional right to present a defense. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611; *People v. Hawthorne* (1992) 4 Cal.4th 43, 55-56.) As noted, the court did not prevent Steskal from presenting his defense that his acts were the result of severe mental illness. The defense elicited evidence that Steskal suffered from a psychotic disorder, was in a psychotic state at the time of the crime, and that he had delusions that members of the Orange County Sheriff's Department were out to kill him. Thus, the trial court's ruling did not deprive Steskal of his right to present a complete defense.

only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v Morales* (2001) 25 Cal.4th 34, 44; see also *People v. Tully* (2012) 54 Cal.4th 952, 1009-1010.) When the issue involves the prosecutor's comments before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Clair* (1992) 2 Cal.4th 629, 663.) Prosecutorial misconduct under state law at the guilt phase is cause for reversal only when it is reasonably probable that a result more favorable to the defendant would have occurred had the prosecutor not committed the misconduct. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133; *People v. Bolton* (1979) 23 Cal.3d 208, 214; P*eople v. Watson, supra*, 46 Cal.2d at p. 836.)

Under the federal constitution, prosecutorial misconduct is reversible only if it "infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales, supra*, 25 Cal.4th at p. 44; accord *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed. 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [94 S.Ct. 1868, 40 L.Ed.2d 431].) Misconduct at the guilt phase that infringes on a defendant's federal constitutional rights mandates reversal unless the reviewing court determines beyond a reasonable doubt that the misconduct did not affect the jury's verdict. (*Chapman v. California* (1967) 386 U.S. 18, 23-24 [87 S.Ct 824, 17 L.Ed.2d 705].)

A. The Prosecutor Did Not Commit Misconduct by Referring to the Victim as a "Hero Cop" During Closing Argument

During closing argument, the prosecutor told the jury that the reason Deputy Riches turned on his patrol car lights when he entered the 7-Eleven store's parking lot was because Deputy Riches saw Steskal in the store with the gun, making Deputy Riches "a hero cop." (12 RT 2237-2238.)

Defense counsel objected, claiming the remark was improper argument and asked to be heard at side bar. (12 RT 2238.) At side bar, defense counsel told the court that by referring to the victim as a "hero cop," the prosecutor improperly appealed to the passions and emotions of the jury. The court stated that it had not "heard that yet." The court then observed that the prosecutor had also written "hero cop" on a board he was displaying before the jury during the argument. (12 RT 2239.) The trial court found that the prosecutor's comment was proper and overruled the defense objection. (12 RT 2239-2240.) However, out of an abundance of caution, the trial court told the prosecutor to explain to the jury that he was not asking for sympathy for the victim and to remove the board when he was finished. (12 RT 2240-2242.) The prosecutor then told the jury:

> The point I was trying to make is that in trying to determine what Brad Riches was doing there – and, of course, I am not asking anyone – this is about whether the defendant committed this crime. We are not talking about sympathy for Brad Riches. That's not what this is about. [¶] But, in trying to determine what was going on there, . . . what actually happened, we know as Brad Riches comes up that ramp that the lights go on. And when you ask yourself why would Deputy Riches do that, . . . [¶] What would any one of our conclusions be? That the store clerk is in danger, right? [¶] He draws the defendant out by turning those lights on. He draws the defendant out at risk to his own life.

(12 RT 2242.)

Generally, counsel is given great leeway in closing argument. (*People v. Farnam* (2002) 28 Cal.4th 107, 200.) "[T]he prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper." (*People v. Lewis* (1990) 50 Cal.3d 262, 283; see also *People v. Ledesma* (2006) 39 Cal.4th 641, 726.) "'It is, of course, improper to make arguments to the jury that give it the impression

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

Steskal claims that by calling Deputy Riches a "hero cop" and writing the words "hero cop" on the board displayed before the jury during closing argument, the prosecutor committed misconduct[15] by improperly appealing to the passions of the jury and by making an improper appeal for sympathy for the victim. (AOB 125-128.) He further asserts it is reasonably likely that the jurors understood the prosecutor's argument to mean that the jurors should consider Deputy Riches's heroism in the line of duty in determining

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[15] Because there is no evidence the prosecutor intentionally or knowingly committed misconduct, Steskal's claim should be characterized as one of prosecutorial "error" rather than "misconduct." (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 ["We observe that the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error"]; see also ABA House of Delegates, Resolution 100B (August 9-10, 2010) (adopting resolution urging appellate courts to distinguish between prosecutorial "error" and "misconduct").)

what degree of murder Steskal committed. (AOB 128.) But comments will not be construed as an improper appeal to the passions and prejudices of the jury unless a reasonable juror would have so interpreted them. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1379.)

The prosecutor's reference to Deputy Riches as a "hero cop" was not an improper appeal for sympathy for the victim or an appeal to the passions of the jury. "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." (*Donnelly v. DeChristoforo, supra*, 416 U.S. at p. 647.) Here, the evidence showed that Deputy Riches must have seen Steskal armed with a gun and confronting the store clerk as the deputy drove by the 7-Eleven store, because Deputy Riches then made a U-turn, made the radio call, turned into the 7-Eleven parking lot and activated his lights. The prosecutor did no more than argue a reasonable interpretation of this evidence—that the deputy entered the 7-Eleven in the hopes of diverting a gunman's attention away from a lone store clerk, and instead, onto himself. When read in context, it is clear that this remark was intended to set the scene and was nothing more than a fair comment on the evidence. Therefore, the trial court properly determined no misconduct occurred. (12 RT 2239.) Moreover, to be sure, the trial court directed the prosecutor to explain to the jury that he was not asking for sympathy for the victim and to remove the board when he was finished with that portion of the argument.

And even if the prosecutor's comment could be interpreted as an improper appeal for sympathy for the victim, it was not reasonably probable that the verdict would have been more favorable to Steskal had the prosecutor not made the brief reference to the commonsense notion that Deputy Riches's actions in attempting to stop a gunman were heroic. (See

People v. Pearson (2013) 56 Cal.4th 393, 441-442 ["prosecutor's fleeting appeal to the jury's sympathy for the victims" was harmless].)

B. The Prosecutor's Remarks About Steskal's Failure to Call His Wife as a Witness Did Not Constitute Misconduct

During the guilt phase rebuttal argument, the prosecutor argued that Steskal could have a mental illness and still be able to form the mental states required for the charged crimes. (13 RT 2365-2366.) While discussing Steskal's "perpetual delusional disorder" and paranoia, the prosecutor noted, "we are going back at least until 1985, because that's when we hear from the employer that the defendant began carrying around an AK-47, or some other such high powered rifle, and so this fear was going on for at least 14 or 15 years." (13 RT 2366-2367.) The prosecutor continued,

> And I guess we are supposed to believe that that was always there. And that even though it was always there, and even though he is armed, he didn't act on it. It took 14 or 15 years to act on. [¶] And yet we are not told the trigger of why that day, out of 14 years, all of a sudden the defendant decided to act out. We are not told. Okay. [¶] They look to tell us that sort of the intermediate trigger was the encounter with Deputy Spencer. I understand that. But we are not told what happens after that. [¶] Now, the person that was perhaps the best witness to talk about the defendant before the murder and after the murder, who I can't call because of the marital privilege, they don't call. They don't call Nannette Steskal.

(13 RT 2367.)

Defense counsel objected that this was "improper argument" and asked to be heard side bar. (13 RT 2368.) In a side bar discussion, defense counsel claimed that Nannette Steskal had a "Fifth Amendment problem" because she could be implicated as an accessory under section 32 since she was driving Steskal away from their house hours after the murder, and the murder weapon was in the back of her car. Counsel added, "And so to say

that we didn't call her, and because he couldn't call her because of marital privilege, is just malarkey." (13 RT 2368.)

The prosecutor replied that he could properly comment on the defendant's failure to call logical witnesses, and he was unaware of any Fifth Amendment issue because the statute of limitations for charging her as an accessory "is long gone." (13 RT 2368.) The court asked, "Was a lawyer ever appointed to represent her, did anybody get close enough to that, I didn't hear any issues like that?" (13 RT 2369.) The prosecutor explained, "She is on the defense witness list, she is a witness they could have called, they didn't call her for obvious reasons, and I think I can talk about it. I don't want to spend a lot of time talking about it, but it is not improper to make the comment I made." (13 RT 2369.)

Defense counsel retorted, "I don't care if the statute of limitations has run or not, that still creates potential criminal liability problems, and implicates the Fifth Amendment." (13 RT 2369-2370.) The prosecutor responded that defense counsel could have avoided any Fifth Amendment problem by explaining that the statute of limitations had run; and the trial court would have agreed, and she would have been ordered to testify. (13 RT 2370.) The court asked, "If she were available for this trial at this point in time, the statute having run, I mean the defense could have called her, could they not?" (13 RT 2370.) The prosecutor and defense counsel argued back and forth about the applicable statute of limitations before the court stopped them and explained, "This is a collateral issue, this court doesn't want to make a finding that . . . she had the privilege, didn't have the privilege, statute of limitations sounds like it may have been run, but maybe there would be some other considerations." (13 RT 2370-2371.)

The prosecutor explained he was willing to move on. After defense counsel submitted the matter to the court, the court stated, "All I will do, based on the record we made, I will sustain the objection as to any further

comments as to why they did or did not, why she did not testify." (13 RT 2371.) Defense counsel requested the court strike the prosecutor's comments about the defense and the fact that the defense could have called Nannette Steskal. (13 RT 2371-2372.) The prosecutor argued that there was nothing to strike because there was no error. "They could have called this witness. And the law is clear that I can comment on failure to call logical witnesses, and she is a logical witness that was on their witness list that I expected them to call." (13 RT 2372.) The court stated, "I think I will just decline striking anything at this point in time. The record speaks for itself as relates to our conversation." (13 RT 2372.)

Steskal claims the prosecutor's comment on Steskal's failure to call his wife as a witness is improper for two reasons: (1) a new trend in the law suggests this Court should disapprove of its prior decisions holding that a prosecutor may comment on a defendant's failure to call logical witnesses (AOB 129-133), and because (2) he could not compel his wife to testify because under Evidence Code section 980, Nannette Steskal had a privilege not to testify (AOB 134-135).

Steskal has forfeited his right to raise this claim on appeal because he did not object on the basis of prosecutorial misconduct (only on the vague ground of "improper argument") and he did not request an admonition. (*People v. Friend* (2009) 47 Cal.4th 1, 29.) To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely objection and request an admonition, unless an admonition would not have cured the harm. (*Ibid.*) Even if his objection was sufficient to preserve the issue for appeal, it is without merit.

1. The prosecutor properly commented on Steskal's failure to call a logical witness

Steskal claims the prosecutor committed misconduct by improperly inviting the jurors to draw an adverse inference from his failure to call his

wife as a witness. (AOB 129-133.) This Court has previously rejected arguments substantially similar to Steskal's. (See *People v. Bradford, supra*, 15 Cal.4th at p. 1340 [prosecutor's brief comments during closing argument noting the failure of the defense to introduce material evidence or alibi witnesses could not be fairly interpreted as referring to defendant's failure to testify]; *People v. Wash* (1993) 6 Cal.4th 215, 263 ["prosecutorial comment upon a defendant's failure 'to introduce material evidence or to call logical witnesses' is not improper"].) While Steskal concedes that this Court has held that it is not improper for a prosecutor to comment on the defendant's failure to call logical witnesses (AOB 129-130, citing *People v. Wash, supra*, 6 Cal.4th at p. 263; *People v. Bradford, supra*, 15 Cal.4th at p. 1340), he argues "the trend of the law has been to substantially narrow the circumstances under which a prosecutor can comment on a defendant's failure to call a particular witness." (AOB 130, citing and discussing *Jackson v. State* (Fla. 1991) 575 So.2d 181, 188; *State v. Brewer* (Me. 1985) 505 A.2d 774, 777; see also AOB 131-133, citing and discussing *State v. Hill* (N.J. 2009) 974 A.2d 403, 411-412; *State v. Tahair* (Vt. 2001) 772 A.2d 1079, 1084-1085.)

None of the decisions Steskal cites is controlling law in California and two of the cases he cites (*Jackson v. State, supra*, 575 So.2d 181 and *State v. Brewer, supra*, 505 A.2d 774) predate this Court's decisions in *Wash* and *Bradford*. Further, Steskal offers no convincing reason why this Court should abandon its prior decisions. In fact, this Court recently reaffirmed the principle in *People v. Gonzales* (2012) 54 Cal.4th 1234, 1275 ("it is neither unusual nor improper to comment on the failure to call logical witnesses," citing *People v. Castaneda* (2011) 51 Cal.4th 1292, 1333). Accordingly, Steskal's claim must be rejected.

2. Evidence Code section 980's confidential marital communications privilege did not render the prosecutor's comment misconduct

Steskal claims that in addition to his complaint above about the prosecutor's comment on his failure to call his wife as a witness, the comment was also improper pursuant to the confidential marital communications privilege set forth in Evidence Code section 980,[16] under which, Nannette Steskal had a privilege not to testify, and Steskal could not compel her testimony. (AOB 134-135.)

Nannette Steskal was on the defense's witness list. (5 CT 1101.) And, based on the circumstances of Steskal's arrest after the murder, she was a logical witness. Yet, at no time during the trial did defense counsel mention the confidential marital communication privilege (Evid. Code, § 980) or ask the court to rule on the admissibility of Steskal and Nannette's communications. Defense counsel's failure to secure a ruling on the admissibility of these communications or to object to their admissibility on this basis during trial when the prosecutor made the challenged remark compels the conclusion that the issue was not preserved for appellate review. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1171; Evid. Code, § 353.)

Even if Steskal has preserved the issue for review, his claim fails because the prosecutor did not comment on any confidential

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[16] Evidence Code section 980 provides: "Subject to Section 912 [(concerning waiver of a privilege)] and except as otherwise provided in this article, a spouse (or his guardian or conservator when he has a guardian or conservator), whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife."

communication as to which Nannette Steskal could have claimed a marital privilege. Rather, the prosecutor commented on the defense's failure to call Nannette to testify about her perception of Steskal's mental state on the night of the murder (i.e., her observations about how he was behaving). Such observations are not communications made in confidence between Steskal and his wife. Consequently, it was not a communication that would have been privileged under Evidence Code section 980.

Furthermore, the prosecutor's comment was a reference to Steskal's failure to call Nannette *for* the defense and *for* Steskal's benefit. But the marital privilege speaks to a spouse's privilege not to testify against her spouse (Evid. Code § 970) or be called as a witness by an adverse party in a case in which her spouse is a party (Evid. Code § 971). (*People v. Coleman* (1969) 71 Cal.2d 1159, 1167.) "Comment on a wife's failure to testify for her defendant husband does not, therefore, constitute comment on . . . his failure to call a witness that he cannot compel to testify on his behalf." (*Ibid.*) Since Steskal's failure to call Nannette was a failure to call a material and important witness to his defense, the prosecutor's comment was not improper. (*Ibid.*)

3. There was no prejudice

Even if the prosecutor's comment was improper, it did not constitute reversible error. The jury was instructed that the parties were not required to call as witnesses all persons who may appear to have some knowledge of these events.[17] Further, the fleeting remark did not render the trial

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[17] The trial court instructed the jury pursuant to CALJIC No. 2.11 as follows: "Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events. Neither side is required to produce all objects or documents mentioned or suggested by the evidence." (5 CT 1200.)

fundamentally unfair, nor is there a reasonable probability the outcome would have been more favorable to Steskal in the absence of the prosecutor's brief comment suggesting yet another reason to disbelieve the defense theory of the case.

C. There Was No Pattern Of Misconduct

The prosecutor told the jury that after the murder, Steskal "dr[ove] off like a coward." (12 RT 2247.) Defense counsel objected, and the court sustained the objection and told the jurors not to consider the word "coward." (12 RT 2247.) The court however, refused defense counsel's request to tell the jury that the prosecutor had committed misconduct. (12 RT 2249.) According to Steskal, the prosecutor's reference to him as a coward and the court's failure to correct the error, when coupled with the two instances of alleged prosecutorial error described above, constituted a pattern of misconduct which deprived him of a fundamentally fair trial in violation of his right to due process. (AOB 136-137.)

The prosecutor's remark was proper. "[T]he use of derogatory epithets to describe a defendant is not necessarily misconduct," if "[t]he prosecutor's remarks . . . were founded on evidence in the record and fell within the permissible bounds of argument." (*People v. Friend, supra,* 47 Cal.4th at p. 32, citations omitted [prosecutor did not commit misconduct when he stated that defendant was "living like a mole or the rat that he is"]; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1172 [prosecutor did not commit misconduct by calling defendant in penalty phase of capital case "especially evil" and a "dangerous sociopath"]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1030 [prosecutor did not commit misconduct by calling defendant "a snake in the jungle," since it was based on the evidence, and our high court noted, citing precedent, that a prosecutor may properly call defendant an "animal" in the appropriate context],

disapproved on other grounds by *People v. Loyd* (2002) 27 Cal.4th 997, 1008, fn. 12.)

In the instant case, the prosecutor's referring to Steskal as a coward under the circumstances of his case—fleeing from the scene—was not misconduct, but was "founded on evidence in the record and fell within the permissible bounds of argument." (*People v. Friend, supra*, 47 Cal.4th at p. 32; see also *People v. Young* (2005) 34 Cal.4th 1149, 1224 ["'Closing argument may be vigorous and may include opprobrious epithets when they are reasonably warranted by the evidence'"].) The prosecutor's remark amounted to an argument that Steskal's unprovoked shooting of Deputy Riches and immediate flight following the act was a cowardly display of his animosity toward law enforcement. This was a legitimate conclusion based on the facts. Thus, Steskal's claim must be rejected.

Equally unavailing is Steskal's contention that the prosecutor's "coward" remark when considered in conjunction with the two instances of purported prosecutorial error described above constituted a pattern of misconduct. (AOB 136-137.) As set out above, the prosecutor did not commit misconduct during closing argument in the guilt phase, thus, there was no "pattern of misconduct." Even if the prosecutor did engage in misconduct, none of the complained-of conduct was so egregious that it infected the trial with such unfairness as to make Steskal's convictions a denial of federal due process. (*Donnelly v. DeChristoforo, supra*, 416 U.S. at p. 643.) Reversal is not required because misconduct, if any at all, was harmless beyond a reasonable doubt in light of the nature of the claimed errors and the overwhelming evidence of Steskal's guilt. (*Chapman, supra*, 386 U.S. at p. 18.)

IV. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING THE JURY TO VIEW THE VICTIM'S PATROL CAR

Steskal claims the trial court abused its discretion under Evidence Code section 352 by overruling his objection and allowing the jury to view Deputy Riches's bullet-riddled patrol car because the car had no substantial probative value and was extremely prejudicial. Steskal further claims the evidence was so inflammatory that he was denied his right to due process. (AOB 139-148.) His contentions are without merit as the trial court properly permitted the jury to view the patrol car.

A trial court may permit the jury to view a crime scene pursuant to section 1119, which provides:

> When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, or any personal property which has been referred to in the evidence and cannot conveniently be brought into the courtroom, it may order the jury to be conducted in a body, in the custody of the sheriff or marshal, as the case may be, to the place, or to the property, which must be shown to them by a person appointed by the court for that purpose; and the officer must be sworn to suffer no person to speak or communicate with the jury, nor to do so himself or herself, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time.

A court's ruling on a party's motion for a jury view is reviewed for abuse of discretion (*People v. Davis* (2009) 46 Cal.4th 539, 610), "'i.e., whether the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice.'" (*People v. Lawley* (2002) 27 Cal.4th 102, 158, citing *People v. Sanders* (1995) 11 Cal.4th 475, 512.)

Prior to trial, the prosecutor filed a motion to permit a jury view of Deputy Riches's patrol car. (5 CT 1078; 3 RT 487.) Defense counsel objected on Evidence Code section 352 grounds and argued the prejudicial

impact that would result from viewing the car outweighed any probative value. (3 RT 487.) Defense counsel had personally viewed the vehicle and stated that she could not "imagine anyone viewing that patrol car and not gasping and being overwhelmed with a whole variety of emotions." (3 RT 487.) Defense counsel further argued that a jury view of the car would evoke a strong emotional bias against Steskal because it was "tantamount to viewing Deputy Riches' initial grave site." (3 RT 488.)

The prosecutor responded that a jury view of the patrol car was probative of the deputy's position in the car when he was shot and where the bullets went through the car. (3 RT 490.) Defense counsel argued that a jury view would be cumulative to the surveillance videos from 7-Eleven and the photographs that would be admitted. (3 RT 491, 493.)

The trial court noted that the patrol car was a "horrible piece of evidence," but added that there are jury instructions regarding the jurors' duty to make factual findings without emotion. (3 RT 492.) The court also noted that although defense counsel thought the prosecutor did not need to have the jury view car in order to prove its case, the court understood that from the prosecutor's perspective, "nothing is a given." (3 RT 492.) The court felt "it would be improper and inappropriate" to "keep it out on the supposition that maybe some people would be too sensitive to look at it." As the court explained, "if Mr. Steskal did it, he is the guy that blew up the car, I don't know why the jury shouldn't see it. It is not like looking at Deputy Riches' body. We are keeping out most of those photographs." (3 RT 492.) Thus the court overruled defense counsel's objections, finding

that the probative value of a jury view outweighed any prejudicial impact.[18] (3 RT 494.)

During the first day of testimony, defense counsel made another motion for reconsideration after the prosecutor asked the court if the jury could view the patrol car at that time. (7 RT 1288.) Defense counsel argued that because the prosecutor had just shown photographs of the patrol car to the jury during testimony, a jury view of the car would be cumulative and more prejudicial than probative. (7 RT 1290.) The court reviewed the photographs the prosecution had just shown and explained:

> The photographs in and of themselves aren't cumulative, and the photographs that the court just reviewed certainly are probative, but the photographs only show a portion of the vehicle – I take that back, there may have been one or two photographs that showed the entire vehicle, but from the higher type of angle than a person would get if actually standing in front of the vehicle. [¶] And the short of it is, I am probably convinced that seeing the car is not only more probative than cumulative, but very beneficial to the trier of fact, because it gives you the perspective of the shooter and the victim that you don't get looking at the photographs, and that's based on the court's viewing.

(7 RT 1290-1291.)

Thereafter, the jury was escorted by a bailiff to the basement of the courthouse to view the patrol car. (5 CT 1122; 7 RT 1294.) The court admonished the jury not to talk, gesture, or consider the car, if at all, until deliberations. (7 RT 1294-1296.) The jurors viewed the car for six minutes (from 2:52 pm until 2:58 p.m.). (5 CT 1123.) Steskal waived his presence at the jury view. (7 RT 1295-1296.)

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[18] Approximately two weeks later, the trial court heard Steskal's motion for reconsideration of the jury view; the trial court denied the motion based upon the same reasoning. (7 RT 1141-1142.)

Contrary to Steskal's claim, the trial court properly exercised its discretion in permitting the jury to view Deputy Riches's patrol car. The record shows the trial court carefully considered defense counsel's numerous objections challenging its initial ruling permitting the jury to view the car and thus, fulfilled its obligations under Evidence code section 352 to weigh the probative value against the potential for prejudice.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." This Court has noted that "'[t]he prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.'" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) "'[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.'" (*People v. Doolin* (2009) 45 Cal.4th 390, 439.)

Trial courts have "broad discretion" in deciding whether the probability of a substantial danger of prejudice substantially outweighs probative value. (*People v. Perry* (2006) 38 Cal.4th 302, 318; *People v. Michaels* (2002) 28 Cal.4th 486, 532.) A trial court's exercise of discretion will not be disturbed except on a showing the court exercised its discretion in an arbitrary, capricious or patently absurd manner which resulted in a miscarriage of justice. (*People v. Lawley, supra,* 27 Cal.4th at p. 158; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Steskal asserts that the jury view had no substantial probative value on any disputed material issue in the case and was cumulative to the surveillance videos, witness testimony about the condition of the patrol car and photographs of the car. (AOB 142- 146.) The jury view of the car had significant probative value in that it enabled the jury to see the damage and devastation to the patrol car from the same level that Steskal was at when he fired the shots. This showed to the jury, more accurately than other testimony or evidence, that Steskal was focused on the driver's side of the car (where Deputy Riches was seated) when he fired the 30 shots. The number of shots fired into the patrol car was indicative of premeditation and deliberation – that is, "the manner of killing was so particular and exacting that [Steskal] must have intentionally killed according to a 'preconceived design' to take his victim's life." (*People v. Anderson* (1968) 70 Cal.2d 15, 27.)

Additionally, the jury heard testimony about the numerous bullet holes in the car, including one that went into the driver's seat headrest. (7 RT 1268-1276.) The jury view of the patrol car enabled the jury to view the tangible things about which it had heard testimony, and therefore, assisted each juror's understanding of that testimony. Moreover, the jury view of the patrol car enabled the jurors to see that the front seat area of the patrol car was not very large or roomy. This helped the jurors to understand how helpless and vulnerable Deputy Riches was as he sat inside of his car and Steskal continued to aim his gunfire on him.[19]

Steskal's assertion that the jury view of the patrol car was cumulative to the other evidence is unconvincing. (AOB 143-145.) Evidence is not

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[19] Because the patrol car was in the courthouse, transporting the jury to it required minimal travel arrangements and consumed a mere six minutes and therefore, it did not involve an undue consumption of time.

cumulative simply because the facts have been established by testimony. (*People v. Wilson* (1992) 3 Cal.4th 926, 938.) Moreover, unlike what the jury could appreciate by viewing the actual patrol car, the other evidence could not possibly have depicted the totality of the devastation to the area where Deputy Riches was seated as the photographs showed only individual portions of the car. Thus, the entirety of the result of Steskal's shooting spree could only be fully observed by seeing the car in person.

Respondent does not disagree with Steskal's characterization of the patrol car as "real" and "a death scene." (AOB 146-147.) But these characteristics do not render the jury view of the car "extremely prejudicial." (AOB 146.) """[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.' The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues."""" (*People v. Karis, supra*, 46 Cal.3d at p. 638.) As this Court has explained in the context of gruesome crime scene photographs, "'The photographs at issue here are gruesome because the charged offenses were gruesome, but they did no more than accurately portray the shocking nature of the crimes.'" (*People v. Zambrano, supra*, 41 Cal.4th at p. 1150.) Here, the patrol car was "a horrible piece of evidence, " as the trial court observed (3 RT 492), because it was the very place where Deputy Riches was murdered. But, it did no more than accurately portray the shocking nature of the crimes Steskal committed. Thus, the fact that the jury view of the patrol car may have been damaging to Steskal's case did not make it improper since viewing the car was material to the issue of premeditation and deliberation and did not evoke an emotional bias against Steskal as an individual.

Further, while Steskal now claims the court's error violated his right to a fair trial (AOB 147), he did not object on this ground at trial, and has therefore forfeited the constitutional claim he now seeks to raise. (*People v. Carter* (2003) 30 Cal.4th 1166, 1201.) Even if the claim were properly preserved for appeal, it lacks merit. "'The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair.'" (*People v. Partida* (2005) 37 Cal.4th 428, 439, quoting *People v. Falsetta* (1999) 21 Cal.4th 903, 913.) As explained above, the evidence was relevant and the trial court properly determined the probative value of the jury view outweighed any potential prejudice. Therefore, the court's decision permitting a jury view of the patrol car did not render Steskal's trial fundamentally unfair.

Finally, even if the court erred in allowing the jury view, Steskal was not prejudiced by this evidence. Steskal claims that in light of his severe mental illness, the jury could reasonably find the prosecution had not met its burden to prove beyond a reasonable doubt that Steskal had the mental state required for premeditated and deliberate murder. (AOB 148.) However, one of Steskal's own mental health experts admitted that even with his mental problems, he knew the difference between right and wrong, had the ability to form an intent to kill, and would have been able to premeditate and deliberate. (10 RT 1862-1863 [Dr. Asarnow].) The evidence overwhelmingly established that Steskal committed first degree murder because he armed himself with a lethal weapon, went to a location where law enforcement officers frequently gathered, exited the store as soon as he saw a patrol car enter the parking lot, focused his aim on the deputy inside the car and fired at least 30 shots at Deputy Riches. As such, there is no reasonable possibility the outcome would have been different had the jury view been prohibited. (*People v. Salcido* (2008) 44 Cal.4th 93, 158-159.)

V. AS THERE ARE NO ERRORS TO CUMULATE, STESKAL'S GUILT PHASE CUMULATIVE-ERROR CLAIM FAILS

Steskal argues the cumulative effect of the various guilt phase errors claimed on appeal denied him of his right to due process and requires reversal of the judgment. (AOB 149-150.) As demonstrated above, all of Steskal's various claims of guilt phase error lack merit. Accordingly, there is no error to cumulate. (*People v. Gray* (2005) 37 Cal.4th 168, 238; *People v. Koontz* (2002) 27 Cal.4th 1041, 1094.)

This Court has recognized that multiple trial errors may have a cumulative effect. (*People v. Hill, supra,* 17 Cal.4th at pp. 844-848; *People v. Holt* (1984) 37 Cal.3d 436, 458-459.) In a "closely balanced" case, this cumulative effect may warrant reversal of the judgment "where it is reasonably probable" that it affected the verdict.[20] (*People v. Wagner* (1975) 13 Cal.3d 612, 621.)

To the extent that error occurred, and even if error is assumed, Steskal has failed to show prejudice. Consideration of the cumulative effect of any possible errors does not alter the analysis: Steskal received a fair trial and was not prejudiced by the asserted errors, whether considered individually or cumulatively. (See *People v. Bolden* (2002) 29 Cal.4th 515, 567-568; *People v. Koontz, surpa*, 27 Cal.4th at p. 1094.) The judgment should be affirmed.

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[20] A criminal defendant is entitled to a fair trial, but not a perfect one, "for there are no perfect trials." (*United States v. Payne* (9th Cir. 1991) 944 F.2d 1458, 1477, quoting *Brown v. United States* (1973) 411 U.S. 223, 231-232 [93 S.Ct. 1565, 36 L.Ed.2d 208]; see also *People v. Bradford* (1997) 14 Cal.4th 1005, 1057; *Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1485.)

VI. IMPOSITION OF THE DEATH PENALTY IN THIS CASE IS NEITHER CRUEL NOR UNUSUAL AND IS NOT DISPROPORTIONATE TO STESKAL'S CULPABILITY

Steskal claims that because he murdered Deputy Riches "as a direct result of a severe mental illness," executing him would violate the Eighth Amendment and the equal protection clause. He also claims the trial court erroneously denied his motion to modify the verdict and that the imposition of the death penalty is unconstitutional in this case because it is disproportionate to his level of culpability. (AOB 151-189.) His contentions must be rejected because the execution of those with mental illness does not violate the constitution, the trial court properly denied his motion to modify the verdict and his death sentence is not disproportionate to his culpability.

A. Steskal's Death Sentence Does Not Constitute Cruel and Unusual Punishment

Relying primarily on *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335],[21] Steskal contends that execution of persons who suffer from severe mental illness at the time of their crimes is cruel and unusual punishment in violation of the United States and California Constitutions. (AOB 151-185.) Because Steskal never claimed to be mentally retarded and offered no evidence of mental retardation[22] at trial,

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[21] *Atkins* establishes a categorical rule that executing mentally retarded persons (now referred to as persons with intellectual disabilities) violates the Eighth Amendments prohibition against cruel and unusual punishment. (*Atkins, supra*, 536 U.S. at p. 318.)

[22] *Atkins* employed the term "mentally retarded" as did opinions from this Court. However, more recently, the United States Supreme Court has used the term "intellectual disability" to describe the identical phenomenon. In 2012, the California Legislature amended section 1376, which establishes procedures for the determination of mental retardation in

(continued...)

he has not demonstrated ineligibility for the death penalty under *Atkins*. Steskal identifies no controlling federal authority barring imposition of the death penalty on mentally ill offenders. As for California law, this Court recently explained that "we, along with other state courts, have refused to extend the holding of *Atkins* to certain types of personality disorders or to mental illness in general." (*People v. Boyce* (2014) 59 Cal.4th 672, 722; see also *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1250-1252 [this Court refused to extend the holding of *Atkins* to defendant who had cyclothymic disorder and bipolar disorder, before and during the commission of his crimes, as well as a borderline personality disorder with antisocial traits]; *People v. Castaneda, supra,* 51 Cal.4th at p. 1345 [this Court refused to extend the holding of *Atkins* to defendant with antisocial personality disorder].)

As this Court explained in *Hajek, supra*, 58 Cal.4th 1144 at page 1252,

> [T]he circumstance that an individual committed murder while suffering from a serious mental illness that impaired his judgment, rationality, and impulse control does not necessarily mean he is not morally responsible for the killing. There are a number of different conditions recognized as mental illnesses, and the degree and manner of impairment in a particular individual is often the subject of expert dispute. Thus, while it may be that mentally ill offenders who are utterly unable to control their behavior lack the extreme culpability associated with capital punishment, there is likely little consensus on which individuals fall within that category or precisely where the line of impairment should be drawn. Thus, we are not prepared to

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(...continued)
preconviction capital cases, and replaced the term "mentally retarded" with the term "intellectual disability" without substantively changing the definition. (*People v. Boyce* (2014) 59 Cal.4th 672, 718, fn. 24.) This Court noted in *Boyce* that it would also use the term "intellectual disability." (*Ibid.*)

> say that executing a mentally ill murderer would not serve societal goals of retribution and deterrence. We leave it to the Legislature, if it chooses, to determine exactly the type and level of mental impairment that must be shown to warrant a categorical exemption from the death penalty. [¶] There is no dispute that evidence concerning an individual capital defendant's mental illness may be relevant in the guilt phase to the mental state issues (§§ 28, 29) and in the penalty phase to the issue of mitigation (§ 190.3, factors (d)(, (h)). Hajek, however, has not established the propriety of extending the categorical prohibition against executing mentally retarded offenders to the broader category of mentally ill defendants, or that imposition of the death penalty is inappropriate in his particular case.

(*Hajek, supra*, at p. 1252.)

Here, as in *Hajek*, Steskal has not established the propriety of extending the categorical prohibition against executing mentally retarded offenders to the broader category of mentally ill defendants, or that imposition of the death penalty is inappropriate in his particular case.

Steskal did not refer to this Court's decision in *Hajek* in his opening brief and this Court decided *Boyce* shortly after he submitted his opening brief to this Court. In a supplemental brief, Steskal asserts that this Court should overrule *Hajek* and *Boyce* and hold that execution of severely mentally ill offenders violates the United States and California Constitutions. (SAOB 1-16.)[23] Specifically, he claims that in *Hajek*, this Court failed to analyze the issue in a manner that comports with United States Supreme Court precedent. He also claims that because "*Boyce* relied on the faulty constitutional reasoning of *Hajek*, it is defective for precisely the same reasons." (SAOB 2, 8.) Steskal offers no rational or persuasive basis for this Court to reconsider its decisions in *Hajek* and *Boyce*.

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[23] Respondent refers to Steskal's supplemental brief as "SAOB."

Steskal also contends that the execution of the severely mentally ill violates federal and state guarantees of equal protection. (AOB 184-185.) This Court rejected a similar claim in *Boyce*, and explained,

> "The equality guaranteed by the equal protection clause of the federal and state Constitutions is equality under the same conditions, and among persons similarly situated." [Citation.] "It does not mean, however, that ' "things . . . different in fact or opinion [must] be treated in law as though they were the same." [Citation.]'" [Citation.] As *Atkins* recognized, defendants with established intellectual disabilities present unique circumstances. By contrast, the Legislature could rationally conclude the permissible goals of retribution and deterrence are furthered by imposing the death penalty on murderers whose mental states do not amount to an intellectual disability.

(*People v. Boyce, supra*, 59 Cal.4th at pp. 722-723.)

In any event, Steskal's claim of cruel and unusual punishment predicated on mental illness is factually unsupported. As the trial court noted in denying Steskal's automatic motion to modify the death judgment,

> Evidence of the defendant's minimal mental defect was not sufficient to establish either a defense or constitute a mitigating factor sufficient to outweigh the callousness of the circumstances of the crime. The defendant was not under the influence of drugs or alcohol. His mental disorder explains but does not excuse his behavior. [¶] The defendant did not have such a mental defect to such a degree that, at the time the offense was committed, he didn't appreciate the criminality of his conduct or wasn't able to conform his conduct to the requirements of the law. [¶] Nothing affected the defendant's ability to choose a course of action. . . . He was able to premeditate, deliberate, and form the specific intent to kill, and he did so.

(37 RT 7123.)

B. The Trial Court Properly Denied Steskal's Motion to Modify the Death Sentence and His Sentence Is Not Disproportionate to His Culpability

Steskal claims the trial court erroneously denied his motion to modify the verdict (§ 190.4, subd. (e)), and therefore, this Court should reverse the judgment of death. (AOB 186.) In the alternative, Steskal asks this Court to conduct intracase proportionality review. (AOB 186.) The trial court properly denied Steskal's automatic motion to modify the death verdict, and Steskal's claim that imposition of the death penalty in his case is disproportionate to his level of culpability is without merit.

1. The trial court properly denied Steskal's motion to modify the death sentence

Steskal contends the trial court erroneously denied his motion to modify the verdict. (AOB 186-189.) He did not object below, and has therefore forfeited his claim. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1316.) In any event, the record of the section 190.4, subdivision (e) hearing belies any claim of error.

Section 190.4, subdivision (e) provides that in every case in which a jury returns a verdict of death, the defendant is deemed to apply for a modification of such verdict. The judge shall

> review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented.

(§ 190.4, subd. (e).)

The trial court must independently reweigh the aggravating and mitigating evidence and determine whether, in its independent judgment, the evidence supports the death penalty. (*People v. Steele* (2002) 27 Cal.4th 1230, 1267.) The trial court must state its reasons on the record.

(*Ibid.*) This Court independently reviews the trial court's ruling but does not determine the penalty de novo. (*Ibid.*)

Here, the trial court independently weighed the aggravating and mitigating factors and found that the jury's determination was appropriate. (37 RT 7117-7125.) With regard to the aggravating factors, the court first noted the circumstances of the crime – namely, that Steskal drove to a nearby 7-Eleven market with a fully loaded semi-automatic assault rifle and when an on-duty uniformed Orange County sheriff's deputy drove up to the front of the store in a marked Orange County sheriff's patrol car, Steskal walked out of the store and to within a short distance of the right front of the car and proceeded to fire 30 rounds of ammunition into the vehicle before the deputy was able to exit his vehicle. (37 RT 7118.) The trial court also noted Steskal's other crimes, including his 1983 felony conviction for manufacturing marijuana, his assault on a Maryland State police officer in 1980, his recent possession of weapons in jail and his attempted escape from jail. (37 RT 7118-7119.)

The court then noted it had considered "all possible mitigating evidence," including but not limited to Steskal's emotional outburst and disturbance at his wife's apartment shortly before the murder, the testimony of Steskal's friends and relatives regarding their opinions that he was "generous, respectful, helpful, giving, understanding, hard-working, supportive, shy, reclusive, [and] sensitive," Steskal's early difficulties in elementary school, his drug use and suicidal ideation, the physical abuse inflicted upon him by his father and brother Robert, the employment difficulties Steskal had as an adult and the periods of time he was homeless, the marital problems he was enduring as of June 12, 1999, Steskal's apparent dependence on marijuana during his adult life, and the opinions of various psychiatrists and psychologists. (37 RT 7120-7122.) The court

also considered in mitigation Steskal's fear of the police, and the effect of Deputy Spencer's two previous car stops on Steskal. (37 RT 7121-7122.)

Finally, the court concluded that death was warranted instead of life without parole because the aggravating circumstances were so substantial in comparison to the mitigating circumstances. (37 RT 7124.) The trial court properly weighed the aggravating and mitigating factors and determined death was the appropriate penalty. Steskal's conclusion otherwise is not supported by the record.

2. Steskal's punishment is not grossly disproportionate to his individual culpability

Steskal's claim that the imposition of the death penalty is unconstitutional because it is disproportionate to his level of culpability must be rejected. (AOB 186.) Upon request, a capital defendant is entitled to a determination of whether the death penalty is grossly disproportionate to his personal culpability. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1130.) As this Court recently explained in *Boyce*,

> ""The cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution prohibits the imposition of a penalty that is disproportionate to the defendant's 'personal responsibility and moral guilt.' [Citations.] Article I, section 17 of the California Constitution separately and independently lays down the same prohibition."' [Citations.] To determine whether a sentence is cruel or unusual under the California Constitution as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including . . . age, prior criminality, and mental capabilities. [Citation.] If the penalty imposed is 'grossly disproportionate to the defendant's individual culpability' [citation], so that the punishment ""shocks the conscience and offends fundamental notions of human dignity"" [citation], the

> court must invalidate the sentence as unconstitutional." ([*People v.] Lucero* [2000] 23 Cal.4th [692], 739-740.)

(*People v. Boyce, supra*, 59 Cal.4th at pp. 718-719.)

This Court has previously rejected claims that "a defendant's low IQ, brain damage, and/or mental illness render his capital sentence grossly disproportionate to his crime." (*People v. Boyce, supra*, 59 Cal.4th at p. 719, citing *People v. Young, supra*, 34 Cal.4th 1149.) In *Young*, the 20-year-old defendant callously murdered three men while acting alone. The defendant shot one of the victims in the back of the head as he tried to run away. The defendant shot the second victim in his back as he begged for his life on his hands and knees. The defendant shot the third victim in the back after he jumped from a window in an attempt to escape. The defendant also tried to murder two other people. This Court upheld the death sentence "despite evidence that the defendant had an IQ of 75, lifelong learning disabilities, and a probable mental disorder." (*People v. Boyce, supra*, 59 Cal.4th at p. 719, citing *People v. Young, supra*, 34 Cal.4th at pp. 1231-1232.)

Similarly, in *People v. Poggi* (1988) 45 Cal.3d 306, the defendant's death sentence for a brutal rape and murder was upheld notwithstanding that the defendant had "suffered organic brain damage, had a history of mental illness, was schizophrenic, and mentally ill on the day of the murder." (*Id.* at p. 348.) This court concluded that "those factors do not sufficiently reduce his culpability to make the sentence disproportionate. . . . [A] defense psychiatrist . . . testified that 'his mental illness was not of such a nature and degree . . . as to negate or diminish his criminal culpability.' [¶] Defendant acted as he did evidently to eliminate a witness and thereby avoid apprehension. He was unspeakably brutal. He was the sole and actual perpetrator, and he killed an innocent young woman." (*Ibid.*)

Here, the evidence established that Steskal was 39 years old at the time of the crimes. He armed himself with a lethal weapon and went to a place that was likely to be visited by law enforcement officers at the same time he was there. When Steskal saw an Orange County Deputy Sheriff's patrol car enter the parking lot of the 7-Eleven, he readied his weapon for use, quickly exited the store, and focused his aim on the driver's compartment of the patrol car where the deputy was still seated. He fired at least 30 shots at his unresisting victim. Afterwards, Steskal recognized the need to flee and destroy evidence. Thus, he drove back to his wife's apartment, shaved off his mustache, destroyed the shirt he wore during the brutal attack, dismantled his gun, and told his wife to drive him back to the mountains, presumably to avoid apprehension. Although the defense presented evidence that Steskal was suffering from a delusional disorder at the time of the shooting, and continued to suffer from that delusion even after he killed Deputy Riches, this is belied by the fact that Steskal dismantled and placed in the trunk of the car and thus out of his reach, the very weapon he would have needed to continue to protect himself from this perceived threat that members of the Orange County Sheriff's Department were out to kill him. As in *Poggi*, Steskal was the sole and actual perpetrator, and he killed an innocent victim. (*People v. Poggi, supra*, 45 Cal.3d at p. 348.)

Steskal's "individual culpability . . . places him well within the class of murderers for whom the Constitution and the statute permit a sentence of death." (*People v. Boyce, supra*, 59 Cal.4th at p.721, citing *People v. Arias* (1996) 13 Cal.4th 92, 194; accord, *People v. Crittenden* (1994) 9 Cal.4th 83, 158 [the facts that defendant planned a burglary, rendered the victims helpless, and committed gratuitous and unnecessary acts of cruelty, culminating in their deaths, refuted his claim that the death sentence was arbitrary, discriminatory, and disproportionate].) Given the brutality of

Deputy Riches's murder and the callousness with which it was committed, the death penalty is not disproportionate punishment for Steskal's crimes.

Moreover, as noted above, the trial court found that Steskal's crimes were not the result of any mental illness, but were planned by him and knowingly committed in a callous manner. (See 37 RT 7123.) The evidence supports the trial court's finding in this regard. Thus, the trial court did not err in concluding that despite evidence of Steskal's mental illness, the death penalty was not disproportionate to his personal culpability.

VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE PROSECUTOR TO CROSS-EXAMINE DEFENSE EXPERT DR. PETTIS ABOUT HIS CONCLUSIONS IN TWO OTHER DEATH PENALTY CASES IN WHICH THE EXPERT HAD TESTIFIED

Steskal claims the trial court abused its discretion under Evidence Code section 352 by allowing the prosecutor to question defense expert Dr. Pettis about his testimony in two other death penalty cases, arguing that the cases were irrelevant to any disputed issue in his trial and involved evidence so inflammatory as to deny him a fair penalty trial. (AOB 190-202.) Steskal's contention is without merit as the prosecutor's questions focused directly on Dr. Pettis's bias, and were therefore relevant. Even if the trial court erred in allowing such testimony, Steskal was not prejudiced.

A. The Cross-Examination of Dr. Pettis

During cross-examination, Dr. Pettis testified that he had testified for the defense in at least two other capital cases, the "Horace Kelly case" and "Mr. Scott's case." (30 RT 5795-5796.) Dr. Pettis testified that his involvement in the *Kelly* case "had nothing to do with the case itself, but had to do with [the defendant's] competency at the time for execution." (30 RT 5797.) When the prosecutor began to ask about the details of that case, defense counsel objected based on relevance. The court overruled the

objection. (30 RT 5797.) The prosecutor then asked, "Mr. Kelly had raped and murdered two women, among others; isn't that correct?" (30 RT 5797.) Defense counsel objected on relevance grounds again and the court overruled the objection. (30 RT 5797.) Dr. Pettis responded, "You know, I can't tell you that I remember exactly what he did. Again, my involvement was not at the trial level, it was about whether he was competent at the time that he was going to be executed, so I was not involved at the trial level or at the, you know, the habeas level on a mitigation basis." (30 RT 5797.) The prosecutor asked, "And so on that case you were testifying that Mr. Kelly didn't know what was going on, and didn't know he was – why he was being executed?" (30 RT 5797.) Dr. Pettis replied, "That's right." (30 RT 5798.) The prosecutor then asked Dr. Pettis, "Do you have a bias against the death penalty . . . as a punishment?" Dr. Pettis replied that he did not. (30 RT 5798.)

When the prosecutor began to ask Dr. Pettis about the *Scott* case, defense counsel objected based on relevance. (30 RT 5798.) The court overruled the objection. Dr. Pettis explained that the *Scott* case was a habeas case in which he was asked to review the trial record and the defendant's mental history records to determine whether the attorneys missed any mental health issues that may have been relevant to the penalty phase of the trial. (30 RT 5798-5799.) When the prosecutor asked Dr. Pettis about the essence of his testimony on the *Scott* case, defense counsel objected based on relevance. (30 RT 5799.) The court overruled the objection. (30 RT 5799.) Dr. Pettis seemed unable to remember the details until the prosecutor showed him a case report on the *Scott* case and asked him to read it to himself. (30 RT 5799.) The following exchange between the prosecutor and Dr. Pettis then occurred:

> Q: What was the essence in the *Scott* case, it was Mr. Scott raped a woman?

A: Yes.

Q: And then lit her on fire, didn't he?

A: That's my recollection, from having read that, yes.

Q: And what was the essence of your testimony with respect to Mr. Scott after a jury had put him up on death row?

A: That he was suffering at the time from a mental illness.

Q: Okay. And that he didn't know that he had raped the lady; is that what it was?

A: You know, I'd have to read that to see whether specifically I said that or not. But, you know, at the time he was suffering from a mental illness.

Q: Right here (indicating).

A: Can you show me where you are?

Q: Right where we were before, I thought it said it in here didn't it: "Dr. Pettis' diagnosis was that on the night of the murder, petitioner was in a disorganized and dissociative state, and that events on his mind were not going in a normal linear fashion, but rather things are popping up and down and going out of order."

A: Now, I must say that is a very loose paraphrase of my testimony, but that he was in a disorganized dissociative state, yes, but popping up and out of order is not.

Q: Did I read it correctly though?

A: You did read it correctly, yes.

(30 RT 5800-5801.)

The following morning, and outside the presence of the jury, defense counsel renewed his objections to the prosecutor's questioning of Dr. Pettis. (31 RT 5814-5819.) Specifically, defense counsel argued the questions regarding the circumstances of the *Kelly* and *Scott* cases and Dr. Pettis's involvement in them was irrelevant to Dr. Pettis's credibility in this case.

Defense counsel claimed the prosecutor was trying "to somehow dirty [Dr. Pettis] up" with collateral and immaterial information. Defense counsel also asserted that allowing the evidence violated his federal constitutional rights to a fair trial, due process and a reliable penalty verdict. (31 RT 5815-5816.) The prosecutor explained that his questions were relevant to Dr. Pettis's bias with respect to death penalty cases and his questioning was "done in a very abbreviated way." (31 RT 5820.) The trial court stated that it weighed the prejudicial effect against the probative value when it overruled defense counsel's objections the previous day and "the objections are still overruled." (31 RT 5821.)

B. The Cross-Examination Was Proper as it Was Relevant to Show Dr. Pettis's Bias

"The 'existence or nonexistence of a bias, interest, or other motive' on the part of a witness ordinarily is relevant to the truthfulness of the witness's testimony (Evid. Code, § 780, subd. (f)), and "'the credibility of an adverse witness may be assailed by proof that he cherishes a feeling of hostility towards the party against whom he is called . . .'" (3 Witkin, Cal. Evid., [(4th ed. 2000)] Presentation at trial, § 277, p. 349.)" (*People v. Williams* (2008) 43 Cal.4th 584, 634.) "The trial court has considerable discretion in determining the relevance of evidence." (*Ibid.*)

"'[T]he scope of cross-examination of an expert witness is especially broad." (*People v. DeHoyos* (2013) 57 Cal.4th 79, 123.) "'[T]he prosecution [is] entitled to attempt to discredit the expert's opinion.'" (*Ibid.*) "In cross-examining a psychiatric expert witness, the prosecutor's good faith questions are proper even when they are, of necessity, based on facts not in evidence." (*People v. Shazier* (2014) 60 Cal.4th 109, 136.) Questions seeking to elicit a partisan expert's philosophical views on capital punishment might disclose some bias bearing on the expert's credibility as a witness. (*People v. Mickle* (1991) 54 Cal.3d 140, 196.)

"The prosecutor may properly cross examine a witness to show bias . . . that would bear on the credibility of the witness. An expert's testimony in prior cases involving similar issues is a legitimate subject of cross-examination when it is relevant to the bias of the witness." (*People v. Shazier, supra*, 60 Cal.4th at p. 136.) A trial court's ruling on the admissibility of expert testimony is reviewed for abuse of discretion. (*People v. Watson* (2008) 43 Cal.4th 652, 692.)

Steskal claims that whether or not the defendants in the *Kelly* and *Scott* cases committed rapes and murders had no tendency in reason to show Dr. Pettis harbored a bias against the death penalty. (AOB 196.) Steskal is wrong. The prosecutor asked the complained-of questions in an attempt to elicit Dr. Pettis's philosophical views on capital punishment because his views on the subject were relevant to his bias and credibility as a witness in Steskal's capital case. (*People v. Mickle, supra*, 54 Cal.3d at p. 196.) Dr. Pettis had testified in those capital cases, much like his testimony in the instant case, that the defendants did not know what they were doing at the time they committed their horrifically violent crimes. A rational inference that a juror could draw from such evidence would be that Dr. Pettis had a bias against the death penalty and a propensity to advocate for criminal defendants facing it.

In *Shazier, supra*, 60 Cal.4th 109, a sexually violent predator ("SVP") case, this Court found that the prosecutor did not commit misconduct by inquiring about a defense expert witness's conclusions in other SVP matters where he had testified for the defense. (*Id.* at p. 140.) This Court noted that it was proper for the prosecutor to provide a brief recitation of the salient facts of the other cases in order to attempt to refresh the recollection of the witness and to give the witness a chance to defend his conclusions, if he could. (*Id.* at p. 137.) The prosecutor was entitled to use this

information to explore the expert's bias and the validity of his professional approach. (*Ibid.*)

Similarly, in *People v. Zambrano, supra*, 41 Cal.4th 1082, the prosecutor cross-examined a defense prison expert about his opinion in a previous case that the defendant, who was convicted of four separate murders and six attempted murders, would adjust well to prison life. (*Id.* at p. 1165.) This Court held that despite arguable differences in the two cases, they involved similar issues regarding the expert's views on prison adjustment and "[t]he prosecutor was entitled to expose bias in the witness by showing his propensity to advocate for criminal defendants even in extreme cases." (*Id.* at pp. 1164-1165.)

Contrary to Steskal claim that the court abused its discretion under Evidence Code section 352 because the evidence had no probative value whatsoever, just as in *Zambrano* and *Shazier*, Dr. Pettis was properly cross-examined about his propensity to advocate for criminal defendants even in extreme cases—those facing capital punishment. The record shows the court carefully balanced the probative value against the potential for prejudice, and properly concluded the evidence had significant probative value in establishing Dr. Pettis's philosophical views on capital punishment that tended to disclose bias bearing on his credibility in the instant case.

C. The Prosecutor's Cross-Examination of Dr. Pettis Did Not Violate Steskal's Rights to Due Process and a Fair Trial

Steskal contends that because the evidence was inherently inflammatory, it violated his federal constitutional right to due process. (AOB 199.) He also argues the court's ruling rendered the penalty retrial unfair because it invited the jurors to disregard Dr. Pettis's carefully drawn conclusions because he was the kind of doctor who helps death row inmates who commit rape and murder. (AOB 200.) Contrary to Steskal's

contention, "[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights." (*People v. Prince* (2007) 40 Cal.4th 1179, 1229.) Thus, Steskal's claims "are without merit for the same reasons that [Steskal's] state law claims" are without merit. (*Ibid.*)

D. Steskal Was Not Prejudiced by the Cross-Examination of Dr. Pettis

Even if the trial court erred in allowing the prosecutor to cross-examine Dr. Pettis about his involvement in the *Kelly* and *Scott* cases, there is no reasonable possibility the error affected the verdict. (*People v. Cowan* (2010) 50 Cal.4th 401, 491.) Dr. Pettis explained his role in the *Kelly* and *Scott* cases was different from his role in this case. (30 RT 5797-5798, 5799-5800.) He did not diagnose either of the defendant's in the *Kelly* and *Scott* cases. Instead, in the *Kelly* case, he testified as to the defendant's competency at the time set for execution. (See 30 RT 5797.) In the *Scott* case, he reviewed multiple volumes of records to see if there were any mental health issues that were overlooked by counsel and that might have made a difference to the outcome of those trials. (30 RT 5798-5799.) In contrast, in the instant case, Dr. Pettis actually diagnosed Steskal with mental illness after many hours of personal interviews with Steskal and extensive review of police reports, school records, records from the jail and records of other interviews with Steskal that were provided to him by the defense. Given this distinction, the jury was not likely to completely discredit the doctor's testimony based solely upon his conclusions for different purposes in two other cases. Thus, there is no reasonable possibility the jury would have chosen life without the possibility of parole

if only it had not known about Dr. Pettis's testimony in the *Kelly* and *Scott* cases.[24]

VIII. THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING THE PENALTY PHASE RETRIAL

Steskal claims the prosecutor committed misconduct during closing argument of the penalty phase retrial by arguing that Steskal's mental health mitigation evidence was actually aggravating and by arguing facts not in evidence regarding an agreement between Steskal and his wife to lie to law enforcement officers in an effort to cover up Steskal's crime. (AOB 203-215.) Steskal has forfeited his right to raise these claims on appeal because he did not object at trial. Even if the claims are properly before this Court, they must be rejected because the prosecutor properly argued that evidence concerning Steskal's mental illness failed to carry extenuating weight when considered in the broader factual context, and the comment about an agreement between Steskal and his wife was a proper comment on the evidence.

Respondent set forth the standard to review claims of prosecutorial misconduct in Argument III, *supra*. To briefly reiterate, under state law prosecutorial misconduct implies the use of deceptive or reprehensible methods to persuade the court or jury. (*People v. Jones* (1997) 15 Cal.4th 119, 187.) The same standard is applied on appeal to evaluate a claim of prosecutorial misconduct in the penalty phase. (*People v. Ledesma, supra,* 39 Cal.4th at p. 740.) Wide latitude is given to prosecutors during closing

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[24] Contrary to Steskal's assertion, the fact that the first penalty jury voted 11 to 1 in favor of LWOP and this jury voted for death does not mean that prosecutor's cross-examination of Dr. Pettis was prejudicial here. (See AOB 202.) All that can *reasonably* be inferred from the first jury's failure to agree on a penalty is that the jurors differed as to Steskal's moral culpability for any number of reasons. (*People v. Hawkins* (1995) 10 Cal.4th 920, 968.)

argument at the penalty phase. (*People v. Schmeck* (2005) 37 Cal.4th 240, 298-299.) To that end, it must be remembered that argument should not be given undue weight, inasmuch as jurors are warned in advance it is not evidence and jurors understand argument to be statements of advocates. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224, fn. 21.)

To demonstrate a federal constitutional violation based on conduct of the prosecutor, the defendant must establish conduct so egregious that it infects the trial with such unfairness as to make the resulting conviction a denial of due process. (*People v. Padilla* (1995) 11 Cal.4th 891, 939.) In determining whether such prejudice existed, courts apply the "reasonable likelihood" standard. (*People v. Clair, supra,* 2 Cal.4th at pp. 662-663; see also *People v. Cain* (1995) 10 Cal.4th 1, 48; *People v. Memro* (1995) 11 Cal.4th 786, 874.)

A. The Prosecutor Did Not Commit Misconduct in Closing Argument by Arguing That Steskal's Mental Illness Was Actually Aggravating Evidence

Steskal highlights three excerpts from the prosecutor's closing argument in which he contends the prosecutor argued that Dr. Pettis's testimony supported the prosecution's case in aggravation more than it supported the defense case in mitigation. (AOB 204-209.) The complained of remarks arose as the prosecutor discussed the evidence of Steskal's attempted escape from jail and weapon possession. As the prosecutor said,

> This is the hair clipper that was missing, and you can see some of the tines are broken off. You can imagine the amount of time that it took to make this. Remember, the defendant had put a little paper over the bottom half of his window, a part of his window, so corrections couldn't see in to where he had been digging through the wall. The wall is, what, 24 inches thick? He doesn't know that. He has no clue of that. [¶] What he is trying to do is he is trying to escape from . . . one of the highest tech jails in California. . . . . This is known as a shank. To the side of the neck anywhere, or as a stabbing instrument, absolutely deadly weapon. [¶] Do you think for a moment that

> the defendant wouldn't use that? Look back at Dr. Pettis' testimony with respect to the defendant's encapsulated delusion. He said the defendant is very mild and meek, that kind of thing, except when he is into this delusion thing, and then he just goes all out of control is what Pettis says. [¶] So if you tend to believe this, if you think the evidence supports Pettis, you have a person right now that is capable and willing to kill someone in authority.

(36 RT 6830-6831.)

Later, the prosecutor reviewed for the jury the list of factors the jury could consider in mitigation. (36 RT 6847-6848.) The prosecutor said, "In looking at the mitigation, a lack of mitigation in those factors does not mean aggravation. But there are things that you can consider in mitigation that would reduce mitigation, or that might reduce mitigation. For instance, Dr. Pettis." (36 RT 6847-6848.) The prosecutor then read an excerpt from his questioning of Dr. Pettis in which he quoted from Dr. Pettis's report as follows:

> Question: It says, quote, outside of this delusional sphere Maurice can appear to be no more than eccentric and quiet. It is not until he interacts with authority figures, which plays a large role in his delusional system, that he becomes irrational and unreasonable in a way that characterizes a psychotic disorder.

(36 RT 6848.) Immediately thereafter, the prosecutor continued,

> That says a lot. [¶] So it looks to me like the evidence shows at this point that there is significant evidence that might indicate to you that there is no psychiatric or psychological disorder in this defendant, when you look at all of the ways these doctors collected their information, and you look at everything, including Huntington Beach and all of that. [¶] Some of you, however, may feel that there may be some psychiatric issues here. If you have, if Dr. Pettis has some credibility with you, you may want to look at this part of his testimony, where he is saying that the defendant, outside of the delusional sphere, can appear no more than eccentric and quiet. But when he gets confronted with authority figures, you see what happens. [¶]

That would be less than mitigating, if that is in fact true, I would suggest to you.

(36 RT 6848-6849.)

Steskal claims the prosecutor's use of Dr. Pettis's testimony regarding Steskal's mental illness as support for his argument that death was the appropriate punishment "transgressed established boundaries and comprised prosecutorial misconduct under settled law." (AOB 206.) Steskal did not object to any of the above remarks. (See 36 RT 6830-6831, 6848-6849.) This Court has held that except in extraordinary circumstances, allegations of prosecutorial misconduct are cognizable on appeal only if at the time of the improper remark, trial defense counsel made a timely and specific objection to the prosecutor's alleged misconduct and requested an admonition regarding it. (*People v. Frye* (1998) 18 Cal.4th 894, 969-970; *People v. Montiel, supra,* 5 Cal.4th at pp. 914-915.) Thus, Steskal's lack of objection on specific grounds at trial forfeits his ability to raise this claim on appeal.

On the merits, the claim fails as well. A prosecutor is not permitted to argue that the defense's mitigating evidence of circumstances that extenuate the gravity of the crime (§ 190.3, factor (k)) should be "used affirmatively as a circumstance in aggravation." (*People v. Thomas* (2012) 54 Cal.4th 908, 945.) However, a prosecutor is permitted to argue to the jury that the defendant's mitigating evidence "fails to carry extenuating weight when evaluated in a broader factual context." (*Ibid*, citing *People v. Hawthorne* (2009) 46 Cal.4th 67, 92.) This is what the prosecutor did here. The prosecutor argued that Dr. Pettis's testimony that Steskal "goes all out of control" when he is confronted by authority should not carry any extenuating weight when evaluated in the broader factual context of the circumstances of the offense and other factors in aggravation. (*People v. Young, supra*, 34 Cal.4th at pp. 1219-1220.) The comments were entirely

proper. And prior to the complained-of remarks, the prosecutor told the jury,

> So what we will be asking you to do is to take all the evidence that you have heard and divide it into these factors. And then, you consider each of those factors any way that you want to do, whether it is mitigating or whether it is aggravating. [¶] There is one caveat to that. *The only factors that you can consider that are aggravating would be (a), the crime and the special circumstance; (b), other acts of criminal-type conduct; (c), the felony conviction; and, (i) [age of defendant at time of crime]. The remaining factors can only be considered as mitigation. They cannot be considered as aggravation.* Lack of a factor cannot be considered as aggravation.

(36 RT 6786-6787; emphasis added.)

This clearly conveyed to the jury that Steskal's mental illness could only be considered as a factor in mitigation. Moreover, defense counsel, in closing argument, referenced the complained-of remarks and pointed out to the jury what they could consider in aggravation and what they could consider in mitigation and alerted them to the fact they could not use mitigating factors as aggravating factors. (36 RT 6981-6985.) In light of the entire arguments of both parties and the court's instructions, there is no reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.

B. The Prosecutor Did Not Commit Misconduct by Suggesting in Closing Argument That Steskal and His Wife Had an Agreement to Lie to Law Enforcement Officers to Cover up Steskal's Crime

During closing argument, the prosecutor discussed the potential credibility problems with the defense expert witnesses. (36 RT 6792.) For example, the prosecutor asked the jury, "Do you want to base your decision here on doctors that weren't given information from . . . the psychiatrist in the jail that had conversations with the defendant on the six days that he

was in the Orange County Jail right after the killing of Deputy Riches." (36 RT 6792-6793.) The prosecutor then argued,

> Other things that the doctors did base their opinion upon would be interviews of the defendant's wife. Are you comfortable relying on the doctors' testimony when they rely on interviews such as the defendant's wife gave? [¶] You recall those. June 12th, 1999, with the sheriff's office that was tape-recorded. Replete with lies that she and the defendant had worked out earlier that day after he killed Brad Riches. [¶] The second interview of Mrs. Steskal, June 15th, three days later. Replete with lies. Once again, working on that agreement that she had with her husband to try to cover this up.

(36 RT 6793.) Defense counsel objected that the prosecutor's comment "assumes a fact not in evidence." (36 RT 6793.) The court overruled the objection.

Steskal claims the prosecutor committed misconduct when he argued there was a cover-up agreement between Steskal and his wife, under which Nannette Steskal lied to the police at her husband's request. (AOB 210.) According to Steskal, the prosecutor's argument was based on speculation and not based on facts in evidence. (AOB 211.) Steskal further asserts this was prosecutorial misconduct because "a prosecutor's misconduct in representing the evidence, and arguing facts not in evidence, is inherently deceptive." (AOB 211.)

Steskal has forfeited his right to raise this claim on appeal because he did not object to the alleged misstatement on the basis of prosecutorial misconduct. Instead, he objected only on the grounds that the prosecutor's comment assumed facts not in evidence. (36 RT 6793.) As explained above, allegations of prosecutorial misconduct are cognizable on appeal only if at the time of the improper remark, trial defense counsel made a timely and specific objection to the prosecutor's alleged misconduct and requested an admonition. (*People v. Frye, supra*, 18 Cal.4th at pp. 969-

970.) Thus, Steskal's lack of objection on specific grounds at trial forfeits his ability to raise this claim on appeal.

Even if Steskal's claim is cognizable on appeal, it should be rejected. These comments were proper because they were "reasonably warranted by the evidence." (*People v. McDermott* (2002) 28 Cal.4th 946, 1002.) Indeed, Steskal concedes that Dr. Pettis admitted on cross-examination that it was "conceivable" Steskal and his wife entered into an agreement to lie to police (AOB 210, citing 33 RT 6242), and that Dr. Pettis opined that Steskal's wife did lie to police (AOB 210, citing 31 RT 5863). This testimony from Dr. Pettis shows the prosecutor's comments were a proper comment on the evidence. (See *People v. Washington* (1969) 71 Cal.2d 1061, 1085-1086; *People v. Eggers* (1947) 30 Cal.2d 676, 693.) Steskal asserts that just because "an agreement is 'conceivable' does not mean that an agreement has, in fact, been made." (AOB 210.) Nonetheless, the prosecutor's comments were a reasonable interpretation of the evidence and certainly did not involve the use of "deceptive or reprehensible methods to attempt to persuade the jury," because they were actually based on Dr. Pettis's testimony. Rather than making an intentional misstatement with the intent to mislead the jury, it is more likely that the prosecutor based his comments on Dr. Pettis's acknowledgement that Steskal and Nannette could have conceivably had an agreement to lie to police (33 RT 6242) and Dr. Pettis's own opinion that Nannette had lied to the police (31 RT 5863).

Even assuming Steskal properly preserved the appellate claim and misconduct occurred, he could not have been prejudiced by these brief and not particularly inflammatory comments. (*People v. Fuiava* (2012) 53 Cal.4th 622, 682.) This is especially so in light of the trial court's instruction to the jury just prior to the complained-of remarks that the

statements of the attorneys did not constitute evidence.[25] (*Ibid.*) It is presumed the jury followed the court's instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.) Even if the jury ignored the trial court's instructions and considered as evidence a cover-up agreement between Steskal and his wife, Steskal could not have been prejudiced by the remark. Simply put, given the facts in aggravation that the jury had already heard, including that Steskal did not dispute that he shot at Deputy Riches 30 times, the mention of a cover-up agreement with his wife did not deprive Steskal of a fair trial or result in a miscarriage of justice. (*People v. Hinton* (2006) 37 Cal.4th 839, 864.) Accordingly, Steskal's contention should be rejected.

C. Steskal Was Not Deprived of a Fair Penalty Phase Retrial

Steskal argues that because the court gave no curative instruction after either of the two instances of alleged misconduct discussed above, because both instances involved misstatements of evidence, and because the weight of the evidence against him was not great, especially in view of Steskal's strong showing of mitigation, the prosecutor's misconduct violated his rights to a fair penalty phase under the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 212-213.) This claim has been forfeited because he did not raise it below. (*People v. Frye, supra*, 18 Cal.4th at pp. 969-970.)

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[25] Just moments before the prosecutor made this comment that Steskal challenges on appeal, the court told the jury: "[T]he lawyers are arguing what they perceive to be the facts. They are probably also going to argue inferences from these facts as they perceive them. You get to decide the facts, not the lawyers. So if they say something that may appear to be inconsistent with your recollection, it is your recollection that, obviously, you rely on and is important." (36 RT 6791-6792.) At the conclusion of the closing arguments, the jury was told that "statements made by the attorneys during trial are not evidence." (11 CT 2672 [CALJIC No. 1.02].)

Even if it was properly preserved for appeal, the claim must be rejected. As explained above, the prosecutor did not commit misconduct and Steskal's argument concerning the relative strengths and weaknesses of the prosecution and the defense cases is inadequate to demonstrate that the complained-of instances of alleged misconduct, when considered individually or cumulatively, deprived him of a fair penalty trial. (See *People v. Fuiava, supra,* 53 Cal.4th at p. 692.)

D. The Trial Court Properly Denied Steskal's Motion for Mistrial Based on the Prosecutor's Remark About Dr. Pettis's Testimony Being Less Than Mitigating

Steskal claims the prosecutor's argument in which he told the jurors that if they believed Dr. Pettis, then "you have a person right now that is capable and willing to kill someone in authority" (36 RT 6831) was so egregious and a perversion of the purpose of mitigating evidence, that no juror could ignore it with or without an admonition. Therefore, Steskal asserts that the court abused its discretion by failing to grant his motion for a mistrial. (AOB 213-214, citing 36 RT 6936.) Contrary to Steskal's assertion, the trial court properly exercised its discretion when it denied his motion for a mistrial based on the alleged prosecutorial misconduct. (See *People v. Stansbury*, *supra*, 4 Cal.4th at p. 1060 ["'the trial court is vested with considerable discretion in ruling on mistrial motions'"].) The court heard Steskal's complaint and responded that the prosecutor's remarks about specific evidence being "less than mitigating" was not the same as saying that this evidence was aggravating. (36 RT 6936.) Because a mistrial motion "presupposes error plus incurable prejudice" (*People v. Woodberry* (1970) 10 Cal.App.3d 695, 708), and neither misconduct nor prejudice occurred in this case, the trial court acted within its discretion by denying Steskal's motion for a mistrial.

IX. THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTOR TO INTRODUCE INTO EVIDENCE A MANNEQUIN WEARING THE VICTIM'S UNIFORM

Steskal claims the trial court violated Evidence Code section 352 and his rights to due process and a reliable penalty verdict when it allowed the prosecutor to introduce into evidence a lifelike mannequin wearing the same uniform Deputy Riches was wearing when he was murdered. (AOB 216-234.) Contrary to Steskal's claim, the trial court properly exercised its discretion in admitting the mannequin, and, in any event, any error was harmless.

During his testimony, pathologist Dr. Fukumoto used a mannequin to demonstrate the trajectory of several bullets in Deputy Riches's body. (20 RT 4019-4035 [People's Exh. No. 51].) The prosecutor also referred to the mannequin in closing argument. (36 RT 6837-6838.) The mannequin had hair and facial features and was wearing the uniform Deputy Riches was wearing when he was killed. (20 RT 3935-3936, 4010-4013; 35 RT 6653-6655.) As noted by the trial court, Deputy Riches's shirt had "some dried blood and/or vomit." (20 RT 3935.)

At least three times during the penalty phase retrial, Steskal objected to the prosecutor's use of a mannequin on the grounds that it, and the uniform it was wearing, were irrelevant to the issues at the penalty phase, cumulative, and more prejudicial than probative. (16 RT 3056-3060, 3063-3064, 3067-3068, 3220, 3228; 20 RT 3936-3937, 4010-4012; 35 RT 6653-6655, 6660.) The trial court carefully considered all of the objections and then overruled them. (16 RT 3229; 20 RT 3937, 4014; 35 RT 6656-6661.)

Steskal claims the trial court abused its discretion under Evidence Code section 352 by admitting the mannequin because it had little to no probative value on contested issues and was cumulative and prejudicial.

(AOB 226-233.) The trial court did not abuse its discretion by overruling defense counsel's objection.

Evidence Code section 352 gives trial courts the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice." A trial court's exercise of discretion under Evidence Code section 352 will not be disturbed on appeal unless the court abused its discretion, that is, unless it exercised its discretion in an arbitrary, capricious, or patently absurd manner. (*People v. Thomas* (2012) 53 Cal.4th 771, 806.) Evidence Code section 352 is not intended to avoid the "prejudice or damage to a defense that naturally flows from relevant, highly probative evidence," but instead is intended to prevent "prejudging" a person or cause on the basis of extraneous factors. (*People v. Zapien* (1993) 4 Cal.4th 929, 958.)

"Mannequins may be used as illustrative evidence to assist the jury in understanding the testimony of witnesses or to clarify the circumstances of a crime." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1291.) Here, the mannequin with rods showing the trajectory of the bullets was relevant to assist the jury in understanding the complex medical testimony describing the placement and nature of the fatal wounds. The use of the mannequin to show the trajectory of the bullets provided the jury with probative evidence regarding Steskal's deliberation and intent to kill the deputy when he shot at him, and provided the jury with one basis to consider in determining whether the death penalty was appropriate in this case. (See *People v. Eubanks* (2011) 53 Cal.4th 110, 148 [crime scene reconstruction expert's testimony regarding bullet trajectories and relative positions of victims and shooter properly admitted because it assisted trier of fact and provided jury with probative evidence regarding defendant's determination to shoot one victim in the head and with a basis to consider whether death penalty was

appropriate].) Moreover, because the mannequin was dressed to show how Deputy Riches looked when he was shot, it was relevant to the charged special circumstance of killing a peace officer performing his duties. (*People v. Brown* (1988) 46 Cal.3d 432, 442-443.)

In *Brown*, the court upheld the prosecutor's use of a mannequin dressed in a police officer's full uniform to illustrate the placement of wounds received by the victim to support the theory that the defendant knew when he shot the victim that he was an officer. This Court concluded in *Brown* the "use of the mannequin was a perfectly proper method of introducing highly relevant evidence." (*People v. Brown, supra*, 46 Cal.3d at p. 443.) Here, too, the mannequin in Deputy Riches's uniform was relevant to the special circumstance finding that Steskal killed a peace officer in the performance of his duties. Evidence that bears directly on the defendant's state of mind contemporaneous with the capital murder is relevant under factor (a) as circumstances of the crime. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1154.) Furthermore, there was testimony that Steskal used bullets that were specifically designed to penetrate body armor (see, e.g., 35 RT 6663), and the bullet-proof vest the mannequin was wearing – that showed where bullets penetrated it – was relevant to show that Steskal intended to kill the officer because Steskal's bullets went through the deputy's vest and into his body.

This Court has upheld the similar use of mannequins in prior cases, including *People v. Gonzales, supra,* 54 Cal.4th at p. 1273; *People v. Hinton, supra*, 37 Cal.4th at p. 896; *People v. Medina II* (1995) 11 Cal.4th 694, 754; *People v. Robillard* (1960) 55 Cal.2d 88, 99-100. Steskal concedes that this Court has upheld the admission of mannequins against defense claims of statutory and constitutional error, but he argues that his case is different because the lifelike mannequin used here was not relevant to any contested issue and was likely to engender an emotional response

from the jurors since it was far more shocking and egregious than mannequins used in other cases. (AOB 219-225.) However, the fact this Court has not specifically ruled on a mannequin exactly like the one used in Steskal's case does not mean the mannequin used here was any more likely to engender an emotional response from the jury.

Steskal attempts to analogize his case to that in an out of state case – *People v. Blue* (Ill. 2000) 189 Ill.2d 99. (AOB 223-226.) But *Blue* does not assist Steskal because it is not binding on this court. Moreover, it is distinguishable because it involved an officer's uniform that was covered with the dead officer's brain matter, and the jurors, who were given gloves to wear during the view, were in the presence of the mannequin for an extended period of time. The Illinois Supreme Court found it was error to admit the mannequin with the brain matter on its uniform into evidence and concluded, "the nature and presentation of the uniform rendered the exhibit so disturbing that its prejudicial impact outweighed it probative value." (*People v. Blue, supra*, 724 N.E.2d at p. 934.) In the instant case, the uniform did not contain brain matter, and there is no indication the jury was in its presence for an extended period. Moreover, the record shows the trial court carefully reviewed the uniform before he allowed the prosecutor to put it on the mannequin. (20 RT 3933, 3935, 3937, 4011-4014.)

Steskal further contends the admission of the mannequin was a denial of due process that rendered his trial fundamentally unfair. (AOB 232-233.) Since, as explained above, there was no error and no prejudice, the jury's consideration of the mannequin did not render his trial fundamentally

unfair so as to offend due process. (*People v. Hawthorne, supra,* 46 Cal.4th at p. 103.)[26]

Steskal also claims the admission of the mannequin rendered the penalty phase trial unreliable and fundamentally unfair in violation of the Eighth and Fourteenth Amendments. (AOB 233.) However, Steskal did not object on this ground at trial; thus he has forfeited the claim on appeal. (*People v. Tafoya* (2007) 42 Cal.4th 147, 166.) In any event, there is no merit to this constitutional contention because the application of the ordinary rules of evidence generally does not impermissibly infringe upon a capital defendant's constitutional rights. (*People v. Kraft* (2000) 23 Cal.4th 978, 1035-1036.) The trial court did not err under state law, and Steskal does not provide any persuasive reason for this Court to conclude the application of California's rules of evidence violated his constitutional rights, nor does he establish any basis for concluding that the admission of the mannequin rendered the jury's death penalty verdict unreliable.

Even if the court erred by admitting the mannequin, there is no reasonable possibility it affected the jury's verdict. (*People v. Chism* (2014) 58 Cal.4th 1266, 1323, citing *People v. Gay* (2008) 42 Cal.4th 1195, 1223.) Defense counsel also referred to the mannequin in his cross-examination of the pathologist (see 20 RT 4038), and the doctor's answers about what could be seen from the mannequin were actually beneficial to Steskal. For example, defense counsel asked the pathologist, "You would agree with me, that that number of rounds fired as reflected on that manikin [sic], might actually show the person that fired those rounds in the big picture here, was in fact mentally ill?" The pathologist replied, "yes." (20

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[26] Steskal's complaint about the mannequin resembling a religious figure has been forfeited by his failure to object on this basis at trial. (See AOB 232, fn. 99.)

RT 4038.) Defense counsel then asked, "And same question, not only was that person mentally ill, but that they were paranoid and delusional at the time those rounds were fired?" (20 RT 4038.) The pathologist answered, "yes." (20 RT 4039.) For these reasons, in addition to the horrific circumstances of the crime and the other aggravating evidence, it is clear that any error in admitting the mannequin had no reasonable possibility of affecting the penalty verdict. (*People v. Chism, supra*, 58 Cal.4th at p. 1323.)

X. THE TRIAL COURT PROPERLY ALLOWED THE JURY TO VIEW THE VICTIM'S PATROL CAR AT THE PENALTY PHASE RETRIAL

Steskal claims the trial court abused its discretion by allowing the jurors to view Deputy Riches's patrol car during the penalty phase retrial. Steskal also argues the evidence was so inflammatory and unduly prejudicial that it denied him of his federal constitutional rights to due process and a fair and reliable penalty phase retrial. (AOB 235-242.) His contentions are without merit as the trial court properly permitted the jury to view the patrol car.

As thoroughly set forth in Argument IV, pursuant to section 1119, the trial court may allow the jury to "view the place in which the offense is charged to have been committed, or in which any other material fact occurred." A trial court's ruling on a party's motion for a jury view is reviewed for abuse of discretion. (*People v. Davis, supra,* 46 Cal.4th at p. 610.)

Here, the jury was taken to the loading dock area of the courthouse to view Deputy Riches's patrol car after forensic criminalist Ronald Moore testified about bullet cores and bullet jacket fragments that were recovered from the patrol car. (23 RT 4536, 4538-4539 [People's Exh. No. 74 (23 RT

4539; 35 RT 6661)].) The jury view lasted only 10 minutes. (10 CT 2550.)[27]

Defense counsel objected to the jury view, claiming it was cumulative to other evidence, including the mannequin and photographs and witness testimony concerning the condition of the vehicle after the shooting. (23 RT 4529; 10 CT 2598.) The prosecutor replied that the jurors saw photographs of individual areas of the car, but they did not have any evidence showing the entire car. Thus, he argued a jury view of the patrol car was relevant and more probative than prejudicial. (23 RT 4534-4535.) The court overruled defense counsel's objections after it found the probative value of a jury view outweighed any prejudicial effect. (23 RT 4535.)

Steskal claims the jury view was not relevant to any contested issue of fact at the penalty phase retrial. (AOB 237.) He is wrong. Evidence that bears directly on the defendant's state of mind contemporaneously with the capital murder is relevant under factor (a) as circumstances of the crime. (*People v. Guerra, supra,* 37 Cal.4th at p. 1154.) As explained in Argument IV, *supra*, the number of shots fired into the patrol car was indicative of premeditation and deliberation – that is, "the manner of killing was so particular and exacting that [Steskal] must have intentionally killed according to a 'preconceived design' to take his victim's life." (*People v. Anderson, supra*, 70 Cal.2d at p. 27.) The jury view also enabled the jurors to see that Deputy Riches was trapped inside the car and helpless once Steskal began firing at him because the passenger compartment was not very large and the bullets came in through the passenger window and the windshield. Moreover, the patrol car "demonstrated graphically the circumstances of the crime and therefore was relevant to a determination of

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[27] Steskal waived his presence at the jury view. (23 RT 4538.)

the appropriateness of the death penalty." (*People v. Raley* (1992) 2 Cal.4th 870, 914.)

Nor did the trial court abuse its discretion when it determined a jury view of the patrol car would not be unduly prejudicial. A jury view of the car was highly probative to the circumstances of the crimes and therefore, the appropriateness of death. (*People v. Benson* (1990) 52 Cal.3d 754, 786.) Moreover, the record reveals that the court carefully considered defense counsel's lengthy objection to allowing a jury view during the penalty retrial. (See 23 RT 4529-4535.) The court's ruling shows it reasoned that the probative value of the jurors viewing the patrol car in person could not be duplicated by photographs and witness testimony or the mannequin. Steskal fails to demonstrate any prejudice outweighing the probative value of the jury view of the patrol car. This Court has observed that "graphic items of evidence in murder cases are always disturbing" (*People v. Smithey* (1999) 20 Cal.4th 936, 974) and "murder is seldom pretty, and . . . physical evidence in such a case [is] always unpleasant" (*People v. Pierce* (1979) 24 Cal.3d 199, 211). Although the patrol car did show a gruesome scene, it was also highly probative to Steskal's mental state and other circumstances of the crime at the time of the shooting. The trial court reasonably concluded that the prejudicial nature did not substantially outweigh the probative value. (*People v. Benson, supra*, 52 Cal.3d at p. 786.)

Equally unavailing is Steskal's claim that the court abused its discretion by allowing the jury view of the patrol car because it was cumulative to the other evidence and testimony presented. (AOB 237-239.) The court considered and rejected this argument at trial. (23 RT 4535.) The parties to a criminal proceeding are not required to rely solely on oral testimony. (*People v. Pride* (1992) 3 Cal.4th 195, 243.) Physical evidence may be introduced to substantiate oral testimony. (*People v.*

Price (1991) 1 Cal.4th 324, 433-435.) "Evidence does not become irrelevant simply because other evidence may establish the same point." (*People v. Smithey, supra*, 20 Cal.4th at p. 973.)

Steskal claims that because the only purpose of the jury view of the patrol car was to incite the jury, it violated the federal due process guarantee of fundamental fairness and rendered the verdict unreliable and unable to survive Eighth Amendment scrutiny. (AOB 239-240.) But he did not claim at trial that the view violated his right to fundamental fairness or a reliable penalty verdict, and therefore, he has forfeited his right to raise these claims on appeal. (*People v. Benson, supra*, 52 Cal.3d at p. 786, fn. 7; see also *People v. Carter, supra*, 30 Cal.4th at p. 1201.) And, because the jury view was permissible under section 1119, it did not deprive Steskal of due process. (*People v. Riccardi, supra,* 54 Cal.4th at pp. 809-810 [the "routine and proper application of state evidentiary law does not impinge on a defendant's due process rights"].)

Finally, Steskal claims the jury view was prejudicial because it is impossible for the jurors to separate themselves emotionally from viewing the car in the way they could after viewing a photograph. (AOB 242.) But the view of the patrol car was brief, lasting only 10 minutes, and no additional testimony was taken in conjunction with the view. The jurors were instructed that they "must determine . . . the facts . . . from the evidence received" and "must neither be influenced by bias nor prejudice against the defendant." (36 RT 7003; 11 CT 2670.) It is presumed the jurors followed this instruction. (*People v. Gray, supra,* 37 Cal.4th at p. 231.) For these reasons, it is clear that any error in permitting the jury to view the patrol car had no reasonable possibility of affecting the penalty verdict. (*People v. Chism, supra*, 58 Cal.4th at p. 1323.)

XI. THE TRIAL COURT PROPERLY ADMITTED PHOTOGRAPHS OF DEPUTY RICHES'S HAND AND HIS PATROL CAR

Steskal claims the trial court abused its discretion by allowing the prosecutor to admit three photographs taken at the autopsy that showed injuries to Deputy Riches's right hand (People's Exh. Nos. 31-33), ten photographs of Deputy Riches's patrol car (People's Exh. Nos. 10-17, 25-26), and two photographs that showed bullet holes in the business adjacent to the 7-Eleven store (People's Exh. Nos. 23-24) because these photographs were cumulative and prejudicial. He further claims the admission of the photographs rendered his trial fundamentally unfair and violated his right to a reliable capital sentencing determination. (AOB 243-248.) Steskal's arguments should be rejected as the trial court properly determined the probative value of the challenged photographs outweighed any prejudicial impact.

When Dr. Fukumoto testified about the wounds on Deputy Riches's body, he identified People's Exhibit 31 as a photograph of the top of Deputy Riches's right wrist (20 RT 4035), and People's Exhibits 32 and 33 as photographs of Deputy Riches's right hand as it appeared at the autopsy (20 RT 4035-4036).[28] Defense counsel objected to the admission of People's Exhibits 31 through 33 on the grounds of relevance, Evidence Code section 352 and due process. (35 RT 6665.) The prosecutor argued the challenged photographs were illustrative of Dr. Fukumoto's testimony. (35 RT 6666.) The court overruled defense counsel's objections to People's Exhibits 31 and 32 after it found the probative value outweighed

[28] People's Exhibit 31 actually depicts a gunshot wound to Deputy Riches's right wrist (11 CT 2862), People's Exhibit 32 depicts a different wound to the deputy's right hand and People's Exhibit 33 shows yet another gunshot wound to Deputy Riches's right index finger (11 CT 2864).

any potential prejudice. (35 RT 6666.) The court indicated that People's Exhibit 33 would be admissible for the same reasons, but the court was concerned about some text on the photograph, indicating that Deputy Riches's hand was shot as he was going for his gun and his index finger was amputated. (35 RT 6666-6667.) After the prosecutor stated he would fix the photograph to eliminate the text, the court ruled it was admissible. (35 RT 6667.)

Forensic Scientist Elizabeth Thompson testified and identified the photographs of Deputy Riches's patrol car (People's Exh. 10 -17, 25-26). (22 RT 4392-4393, 4408-4409, 4414.)[29] She also identified two photographs that showed bullet holes in the windows of the dry cleaners' business, which is next to the 7-Eleven (People's Exhs. 23-24). (22 RT 4489-4490.) Defense counsel objected to the admission of People's Exhibits 10 through 17 and 23 through 26, claiming the photographs were

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[29] People's Exhibit 10 is a photograph of the right side of the patrol car's hood and windshield. People's Exhibit 11 is a photograph of the driver's headrest inside of the patrol car, and it shows a steel bullet core underneath the headrest. People's Exhibit 12 is a photograph of the patrol car's radio microphone and it is on the driver's side floorboard. People's Exhibit 13 is a photograph of a portion of the interior of the car, showing the dashboard with "very deep bullet holes in it." People's Exhibit 14 is a photograph of the hood and the dashboard with trajectory probes in it and it was taken from the front right corner of the car. People's Exhibit 15 is a photograph of the interior of the patrol car and shows the windshield and dashboard. People's Exhibit 16 is a photograph of the driver's door of the patrol car with the window's glass taped in place to preserve the bullet hole pattern in the glass. People's Exhibit 17 is a photograph of the driver's seat of the patrol car with Deputy Riches's pack set and gun on it. (22 RT 4408-4409, 4414; 35 RT 6672; 11 CT 2862.) People's Exhibit 25 was a photograph of the trajectory rods sticking out of bullet holes in the windshield and the right side of the hood of the patrol car and People's Exhibit 26 was "basically the same picture" but taken from the front right bumper of the patrol car. (22 RT 4392-4393; 11 CT 2863.)

irrelevant and cumulative to the other evidence presented. (35 RT 6672.) The prosecutor responded that there was nothing cumulative about the photographs because they all showed "separate views." (35 RT 6673.) The court overruled defense counsel's objections after it found the probative value outweighed any prejudicial effect. (35 RT 6673.)

Admission of photographs is discretionary, and a trial court's ruling will not be disturbed on appeal unless the probative value of the photographs is clearly outweighed by their prejudicial effect. (*People v. Moon* (2005) 37 Cal.4th 1, 34; *People v. Sanchez* (1995) 12 Cal.4th 1, 64; *People v. Crittenden, supra,* 9 Cal.4th at pp. 132-134.) "Murder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant." (*People v. Moon, supra*, 37 Cal.4th at p. 35, internal citation and quotation marks omitted.) "[E]xcept in rare cases of abuse, demonstrative evidence that tends to prove a material issue or clarify the circumstances of the crime is admissible despite its prejudicial tendency." (*People v. Adamson* (1946) 27 Cal.2d 478, 486.)

The trial court did not abuse its discretion when it determined that the challenged photographs were relevant. (See AOB 244-245, asserting the photographs were irrelevant because there was no dispute as to the shooter's identity, the cause of death, the nature and number of gunshot wounds, and whether the victim was an officer engaged in the performance of his duties.) "Generally, photographs that show the manner in which a victim was wounded are relevant to the determination of malice, aggravation and penalty." (*People v. Wader* (1993) 5 Cal.4th 610, 655; see also *People v. Farnam, supra,* 28 Cal.4th at p. 186.) Prosecutors are not obliged to prove their case with evidence solely from live witnesses, and the jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case. (*People v. Gurule* (2002) 28 Cal.4th 557, 624; *People v. Scheid* (1997) 16 Cal.4th 1, 16.)

Phrased another way, "[e]vidence does not become irrelevant simply because other evidence may establish the same point." (*People v. Smithey, supra,* 20 Cal.4th at p. 973; *People v. Weaver* (2001) 26 Cal.4th 876, 933 ["The state is not required to prove its case shorn of photographic evidence merely because the defendant agrees with a witness or stipulates to a fact" and "[T]he jury was entitled to see the physical details of the crime scene and the injuries the defendant inflicted on his victim"].)

Here, the photographs of the injuries to Deputy Riches's hand and finger (People's Exh. Nos. 31-33) were helpful to the jury in understanding the pathologist's testimony, and the photographs showing the damage to the patrol car and the neighboring business (People's Exh. Nos. 10-17, 23-26) assisted the jury in understanding the forensic scientist's testimony. Moreover, all of the challenged photographs were highly probative of issues that were both material and disputed, namely, the circumstances of the crimes and therefore, the appropriateness of death. (*People v. Benson, supra,* 52 Cal.3d at p. 786; see also *People v. Raley, supra,* 2 Cal.4th at p. 914.) Consequently, the trial court did not abuse its discretion when it determined the photographs in question were relevant.

Steskal's assertion that the photographs were cumulative to other testimony and evidence as related to the cause of death and nature and extent of the victim's wounds should also be rejected. (AOB 244-245.) This Court has "often rejected the argument that photographs of a murder victim should be excluded as cumulative if the facts for which the photographs are offered have been established by testimony." (*People v. Wilson, supra*, 3 Cal.4th at p. 938, citing *People v. Price, supra,* 1 Cal.4th at p. 441; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1216; *People v. Crittenden, supra,* 9 Cal.4th at pp. 132-133; *People v. Kaurish* (1990) 52 Cal.3d 648, 684.)

Finally, Steskal's claim that the photographs were unduly prejudicial should also be rejected. The trial court expressly engaged in weighing the probative value of the challenged photographs against their potential prejudicial impact. (35 RT 6666-6667, 6673.) The photographs were not gruesome and were highly probative. When as here, a party complains photographs are unduly prejudicial, it has aptly been noted that, "[a] juror is not some kind of dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box." (*People v. Guiuan* (1998) 18 Cal.4th 558, 576, J. Kennard, concurring and quoting *People v. Long* (1994) 38 Cal.App.3d 680, 689.)

In short, the photographs admitted were relevant, not cumulative and not prejudicial. As a result, the trial court properly exercised its discretion when it ruled the photographs admissible. (*People v. Sanchez, supra*, 12 Cal.4th at pp. 64-65.) Consequently, Steskal's challenge against their admission and his additional constitutional arguments (AOB 243, 247-248) should be rejected.[30] (See *People v. Lucas* (1995) 12 Cal.4th 415, 448-449.)

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[30] With respect to the photographs of the patrol car (People's Exh. Nos. 10-17, 23-26), Steskal forfeited his right to raise any constitutional challenges on appeal because he did not object to the admission of these photographs on those grounds at trial. (See 35 RT 35 RT 6672.) He did raise a due process objection with respect to the photographs of Deputy Riches's right hand (35 RT 6665), but he did not object on the basis that his right to a reliable penalty determination was violated and has therefore forfeited his right to raise that contention on appeal. (*People v. Carter, supra,* 30 Cal.4th at p. 1201.)

XII. STESKAL'S RIGHT TO A FAIR PENALTY PHASE RETRIAL WAS NOT VIOLATED BY THE PROSECUTION'S PRESENTATION OF VICTIM IMPACT EVIDENCE

Steskal claims the presentation of victim impact evidence was so prejudicial that it made his penalty phase retrial fundamentally unfair. (AOB 249-253.) To the contrary, the trial court acted well within its broad discretion, committed no error, and denied Steskal no constitutional right in admitting victim impact evidence pursuant to section 190.3, subdivision (a).

Victim impact evidence is admissible under federal law "unless such evidence is so unduly prejudicial that it results in a trial that is fundamentally unfair," and under state law "so long as it is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*People v. Taylor* (2010) 48 Cal.4th 574, 645-646, quotation marks omitted.)

Prior to the penalty phase retrial, the prosecution filed a notice of potential witnesses it intended to call. (8 CT 2091-2093.) Steskal filed a motion for limitation and exclusion of victim impact evidence under section 190.3, subdivision (a). (9 CT 2179-2346.) At a hearing on the motion (16 RT 3072-3136, 3202-3217), the court listened to the prosecution's offers of proof as to 12 proposed victim impact witnesses. After carefully weighing the probative value of the proposed testimony against its potential for prejudicial effect, the trial court excluded six of the prosecutor's witnesses. (16 RT 3128-3136, 3214, 3217.)

At the penalty phase retrial, as summarized in detail above in the statement of facts, the prosecution called six witnesses who provided victim impact testimony—Steskal's mother and father, and four non-family members who were Deputy Riches's friends and co-workers. The victim impact witnesses testified about the impact the murder had on their lives. (24 RT 4691-4702, 4705-4706, 4718-4724 [James Henry], 24 RT 4724-

4728 [Scott Vanover], 24 RT 4729-4734, 4736-4738 [Eric Hendry], 24 RT 4744-4750 [Joseph Hoskins], 24 RT 4750-4752, 4753 [Bruce Riches – victim's father], 24 RT 4754-4761 [Meriel Riches – victim's mother].) The prosecutor also showed a total of five photographs during the victim impact testimony. (24 RT 4692-4761.)

Steskal argues that the quantity of victim impact evidence introduced exceeded that permitted under *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 115 L.Ed.2d 720].) (AOB 252-253.) He also argues that the admission of testimony from nonrelatives "far outweighed" that authorized by *Payne*. (AOB 252.) Contrary to Steskal's contentions, this evidence was entirely within the limitations on victim impact evidence enunciated by this court, as well as by the United States Supreme Court. *Payne* does not impose a constitutional limitation based on the number of witnesses. Under *Payne*, the admission of victim impact evidence is limited by ensuring it is not cumulative, irrelevant, or "so unduly prejudicial that it renders the trial fundamentally unfair." (*Payne v. Tennessee, supra,* 501 U.S. at pp. 825, 829.) And in California, Penal Code section 190.3, subdivision (a), specifically permits the prosecution to establish aggravation by the circumstances of the crime. The word "circumstances" does not mean merely immediate temporal and spatial circumstances, but also extends to those which surround the crime "materially, morally, or logically." Factor (a) thus allows evidence and argument on the specific harm caused by the defendant, including the psychological and emotional impact on surviving victims and the impact on the family of the victim. (*People v. Edwards* (1991) 54 Cal.3d 787, 833-836; see also *People v. Brown* (2004) 33 Cal.4th 382, 398; *People v. Taylor* (2001) 26 Cal.4th 1155, 1171; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063; *People v. Pinholster* (1992) 1 Cal.4th 865, 959.) There is no

constitutional, statutory, judicial law, or even sound policy reasoning to limit such victim impact evidence to a single witness.

Moreover, this Court has rejected Steskal's argument that victim impact evidence from a close friend or coworker is inadmissible. (See *People v. Brady* (2010) 50 Cal.4th 547, 573-581 [where victim was police officer, trial court properly allowed two days of testimony from four of his sisters, his fiancée, the treating physician, two fellow officers, and his police chief, as well as two videotapes and numerous photographs]; see also *People v. Ervine* (2009) 47 Cal.4th 745, 792 [where victim was a police officer, trial court properly allowed coworker's testimony regarding effect of victim's death on all members of "very close" police department and their families].)

Steskal claims that this Court's decisions like *Brady* and *Ervine*, which approve of victim impact testimony from non-family members should be overruled because they are inconsistent with the United States Supreme Court's opinion in *Payne*. (AOB 253.) His argument is erroneous as victim impact evidence may include the effects of the victim's death on the victim's friends, coworkers, and the community (*People v. Pollock* (2004) 32 Cal.4th 1153, 1183; see also *U.S. v. Battle* (11th Cir. 1999) 173 F.3d 1343, 1349 [three prison guards permitted to testify about effect of fellow officer's death]; *U.S. v. Cheever* (D. Kan. 2006) 423 F.Supp.2d 1181, 1210-1211 [fellow officers properly testified about impact of sheriff's death on department]) and this is not inconsistent with *Payne* (see *People v. Ervine, supra*, 47 Cal.4th at p. 792.) Because the evidence in this case did not exceed the bounds of admissible victim impact evidence, Steskal's arguments to the contrary should be rejected.

Even if the court erred by admitting the evidence, reversal is not required. Erroneous admission of victim impact evidence is subject to a harmless-error analysis. (*People v. Lewis* (2006) 39 Cal.4th 970, 1058.)

Here, there is no reasonable possibility that any error in admitting the victim impact evidence affected the verdict. (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11.) Moreover, any federal constitutional error would also be harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.) First, the testimony of the six victim impact witnesses was brief, taking less than half a day to present, and consuming less than 50 pages of the reporter's transcript. (24 RT 4691-4761.) Second, the victim impact evidence "paled in comparison to the other evidence in aggravation," which included evidence about the circumstances of Steskal's senseless and brutal capital crime and evidence of his other criminal endeavors, including his attempted escape from jail and his assault on a Maryland State police officer. (See *People v. Lewis, supra,* 39 Cal.4th at p. 1058 [surviving victim's request for jury to "do the right thing" was harmless because it was brief and mild in comparison to circumstances of capital crime, tragic impact on the victims, and both defendants' history of violence].) In other words, the "challenged evidence could not have tipped the balance in favor of death." (*Ibid.*)

Furthermore, the trial court instructed the jury not to be influenced by bias or prejudice against Steskal (36 RT 7003; 11 CT 2670 [CALJIC No. 8.84.1]) and told the jurors they were "free to assign whatever moral or sympathetic value you deem appropriate to each and all the various factors you are permitted to consider." (36 RT 7034; 11 CT 2709-2710 [CALJIC No. 8.88].) The jury is presumed to have followed these instructions. (*People v. Delgado, supra,* 5 Cal.4th at p. 331.) In light of the brevity of the victim impact evidence, the other evidence in aggravation, and the instructions given, it is clear the admission of the victim impact evidence in this case did not result in prejudice.

Finally, Steskal cannot establish that the victim impact evidence presented here was so prejudicial that it rendered his trial fundamentally

unfair. (*People v. Cowan, supra,* 50 Cal.4th at p. 484.) The evidence admitted in his case was the type of "personal perspectives" and testimony concerning "the kinds of loss that loved ones commonly express in capital cases." (*People v. Taylor, supra,* 48 Cal.4th at p. 646.) The witnesses' testimony, although emotional, was not surprising, shocking or inflammatory. Instead, it was a tragically obvious and predictable consequence of Steskal's murder of Deputy Riches. (See *People v. Sanders, supra,* 11 Cal.4th at p. 550.) Although jurors may never be influenced by passion or prejudice in considering the impact of a defendant's crimes, they may "exercise sympathy for the defendant's murder victims and . . . their bereaved family members." (*People v. Zamudio* (2008) 43 Cal.4th 327, 368-369.)

Accordingly, in light of the relative brevity of the victim impact evidence, the considerable evidence in aggravation and the instructions given, it is clear the admission of the victim impact testimony did not undermine the fundamental fairness of the penalty determination. Even if the victim impact evidence had been excluded, the outcome would have remained the same. Steskal's death sentence does not rest with unduly prejudicial victim impact evidence; rather, the sentence rests squarely with the evidence in aggravation, including the circumstances of his senseless, brutal crime.

XIII. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF STESKAL'S ATTEMPTED ESCAPE FROM JAIL AND THE JURY WAS PROPERLY INSTRUCTED

Steskal claims the trial court's admission of evidence concerning his attempted escape from jail and possession of two weapons while in jail violated section 190.3, factor (b) and his constitutional rights to due process, a fair trial and a reliable penalty trial. Steskal also claims the trial court incorrectly instructed the jury on attempted escape and unlawful

possession of weapons by a prisoner. (AOB 254-264.) There is no merit to Steskal's claims of statutory or constitutional error because the trial court properly admitted the evidence and properly instructed the jury. Furthermore, any conceivable error was harmless.

In determining whether to impose the death penalty, the jury may consider as an aggravating factor "criminal activity by the defendant which involved the use or attempted use of force or violence or . . . the express or implied threat to use force or violence." (§ 190.3, factor (b); *People v. Jackson, supra,* 45 Cal.4th at p. 693.) A trial court's decision to admit evidence under factor (b) is reviewed for abuse of discretion. (*People v. Lancaster, supra,* 41 Cal.4th at p. 93.)

As noted in the statement of facts, the trial court admitted evidence that Steskal, while in an administrative segregation cell at the Santa Ana jail, possessed two weapons and attempted to escape by chipping away at the wall that separated his cell from a mechanical room which provided access to the roof of the building. The court admitted this evidence under section 190.3, factor (b), as "criminal activity . . . which involved the . . . implied threat to use force or violence." (16 RT 3243.)

A. The Trial Court Properly Admitted Evidence Pertaining to Steskal's Attempted Escape From Jail

Steskal contends that because there was no evidence that he intended to use the "tools" in his possession as weapons against a person or that his escape plan included the use or threatened use of force or violence against any person, the trial court erred by admitting evidence concerning his attempted escape from jail. (AOB 256-262.) This Court rejected a virtually identical claim in *People v. Mason* (1991) 52 Cal.3d 909, 955-957.

In *Mason,* the defendant tried to escape from jail on two separate occasions while he was awaiting retrial of his penalty phase and was found on three occasions to be in possession of a weapon. (*Id.* at pp. 954-955.)

The defendant objected to the court's admission of this evidence because there was no evidence his escape attempt would involve the use of force or violence. The *Mason* court noted that "whether a particular instance of criminal activity 'involved . . . the express or implied threat to use force or violence' (§ 190.3, factor (b)) can only be determined by looking to the facts of the particular case." (*Id.* at p. 955; see also *People v. Boyde* (1988) 46 Cal.3d 212, 250 [where facts showed defendant's escape plan called for the use of a gun to subdue the guard, if necessary, this Court held the attempt to escape involved an implied threat to use force].) The *Mason* court pointed out that in the case before it, there was testimony that showed that "an escape from the administrative segregation cell would almost certainly have involved defendant in a confrontation with a guard." (*People v. Mason, supra*, 52 Cal.3d at pp. 955-956.) Because uncontradicted testimony showed that it would be impossible for the defendant to carry out such a time-consuming and complicated plan, this Court held that the evidence was properly admitted. (*Id.* at p. 956.)

In this case, Amelia Saunders, the chief of security and the correctional supervisor for the Santa Ana jail, testified that the police department was in the same building as the jail. (24 RT 4672.) She also testified that if Steskal repelled from the roof of the jail on the sheet ladder he planned to make, he would have been seen by police officers or other people coming into and out of the police department. (24 RT 4687.) This testimony showed that "an escape from the administrative segregation cell would almost certainly have involved defendant in a confrontation with a guard." (See *People v. Mason, supra*, 52 Cal.3d at pp. 955-956.) Accordingly, consistent with this Court's decision in *Mason*, the trial court properly admitted the evidence.

The court's admission of evidence pertaining to Steskal's possession of two weapons in jail was also proper. (See AOB 259-261.) Detention

Officer Kelvin LeGeyt testified that the two objects found in Steskal's cell could both be used as weapons. (24 RT 4627, 4632.) While he did testify that one of the objects also could be used for digging, he explained that the same object could be used as a weapon if it was "used as a slashing tool." (24 RT 4627.) Steskal argues the evidence showed the tools *were* used for digging or chipping. (AOB 260.) But, "[t]he availability of an innocent explanation for criminal activity, however, does not make the evidence of criminal activity inadmissible. Instead, the innocent explanation merely raises an ordinary evidentiary conflict for the trier of fact." (*People v. Mason, supra*, 52 Cal.3d at p. 957, citing *People v. Ramirez* (1990) 50 Cal.3d 1158, 1186-1187.) "Moreover, in previous cases [this Court has] not required evidence beyond a prisoner's possession of a deadly weapon to show an implied threat of violence." (*People v. Mason, supra*, 52 Cal.3d at p. 957.)

This Court's decision in *Mason* is illustrative on this point as well. In *Mason*, the defendant also claimed the trial court erred by admitting evidence of his weapon possession because there was evidence that showed he possessed them for a non-violent purpose. (*People v. Mason, supra*, 52 Cal.3d at p. 956.) In rejecting the claim, this Court explained that the availability of an innocent explanation did not make the evidence of weapon possession inadmissible. (*Id.* at p. 957.) Instead, "the innocent explanation merely raises an ordinary evidentiary conflict for the trier of fact." (*Ibid.*) Accordingly, the trial court properly admitted the evidence that Steskal possessed two weapons while he was confined in jail.

Even assuming the evidence regarding his attempted escape and weapon possession was erroneously admitted, the record does not demonstrate prejudice under California's penalty phase harmless error test, nor does it rise to the level of any federal constitutional violation. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1169; *People v. Brown, supra*, 46

Cal.3d at p. 449.) The jurors heard about the circumstances of the crime (§ 190.3, factor (a)), including the manner in which Steskal shot at Deputy Riches more than 30 times as he sat in his patrol car in the parking lot of a convenience store. The jurors were also presented evidence of other incidents in aggravation, which included Steskal's assault on a Maryland State Trooper and his conviction for manufacturing marijuana. In light of all the evidence, it was not reasonably probable that the jurors could have drawn any more damaging inferences from the evidence of Steskal's attempted escape than had already been established by the circumstances of the underlying crimes and Steskal's other criminal conduct. Therefore any erroneous admission of the evidence was harmless. (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1170; *People v. Brown, supra*, 46 Cal.3d at p. 449.)

B. The Court Properly Instructed the Jury

Steskal claims that because there was no evidence that he actually used the weapons with force or violence against another person, the trial court's instructions on attempted escape, prisoner in possession of a deadly weapon, and prisoner in possession of a stabbing instrument on the theory that the offenses involved the express or implied use of force or violence or the threat of force or violence were erroneous. (AOB 262-263.)[31] Steskal neither objected to these instructions nor requested that the court modify them. (See 36 RT 7017-7028.) Accordingly, he has forfeited his complaints about the instructions. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260; see also *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 ["Generally, a party may not complain on appeal that an instruction correct

[31] Steskal does not refer to the instructions by number but it appears that he is challenging CALJIC Nos. 7.30 [§ 4532], 7.34.02 [§ 4574], 7.38 [§ 4502]; see 11 CT 2694-2697.

in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language"].)

Even if the claim is properly before the Court, it is without merit. Steskal concedes this Court has repeatedly held that a defendant's knowing possession of a potentially dangerous weapon in custody is admissible under factor (b). (AOB 262, citing *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589; *People v. Bacon* (2010) 50 Cal.4th 1082, 1127.) He "respectfully suggests, however," that these cases are wrong because in cases where the objects are being used as digging tools instead of weapons, there can be no support for a conclusion that the tools were used or intended to be used in a violent way. (AOB 263.) Steskal's suggestion should be rejected because he offers no persuasive reasons for reconsidering this Court's decisions. (See *People v. Nakahara* (2003) 30 Cal.4th 705, 720.) Moreover, the trier of fact is free to consider any "innocent explanation" for Steskal's possession of the items, but such inferences did not render the evidence inadmissible or the instructions erroneous. (See *People v. Tuilaepa, supra*, 4 Cal.4th at p. 589.) In any event, "the asserted nature of his possession of the weapons is a distinction without a difference." As this Court recently reaffirmed in *People v. Bryant* (2014) 60 Cal.4th 335, 453, "[T]he possession of a weapon by a prisoner implies a threat to use force or violence." (*Id.* at p. 453, citing *People v. Lewis* (2008) 43 Cal.4th 415, 529-530.)

Additionally, even if the evidence supported a reasonable inference that Steskal was using the objects as digging tools when his escape plan was foiled, the evidence also supported the reasonable inference that Steskal would use those objects as weapons if confronted by guards or police during the escape attempt. Steskal was no stranger to committing violent acts on law enforcement officers. He had driven a motorcycle at a high rate of speed directly at a Maryland State Trooper who had to jump

out of the way to avoid being hit. (20 RT 4053-54.) And of course, at the time of his escape attempt Steskal had been convicted of the first degree murder of a police officer. He was awaiting retrial of the penalty phase where he faced either life without the possibility of parole or the death penalty, so he had little to lose. Accordingly, there was no error in the court's instructions to the jury.

C. Steskal Forfeited Any Constitutional Claims by Failing to Object on Those Grounds at Trial, and in Any Event, His Constitutional Rights Were Not Violated

Steskal claims the erroneous instruction and the admission of the evidence involving his attempted escape and weapon possession violated his constitutional rights to due process and a fair and reliable penalty phase trial. (AOB 262-263.) Steskal did not object based on these provisions below and may not do so for the first time on appeal. (*People v. Sanders, supra,* 11 Cal.4th at p. 510, fn. 3; *People v. Davis, supra,* 10 Cal.4th at p. 501, fn. 1.) In any event, there is no merit to these claims because, as explained above, the evidence was properly admitted and the jury was properly instructed.

XIV. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON UNADJUDICATED OFFENSES

Steskal contends that the trial court erred by instructing the jury pursuant to CALJIC No. 8.87 because the instruction on evidence pertaining to other criminal activity is flawed in several respects. (AOB 265-271.) His claim fails because he did not object below, and this Court has previously rejected his arguments.

The trial court instructed the jury with CALJIC No. 8.87 as follows:

> Evidence has been introduced for the purpose of showing that the defendant, Maurice Gerald Steskal, has committed the following criminal acts: Assault on a peace officer, attempted escape, prisoner in possession of a deadly weapon, prisoner manufacturing or in possession of a stabbing instrument known

> as a shank, which involved the express or implied use of force or violence or the threat of force or violence. [¶] Before a juror may consider any criminal act as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant . . . did, in fact, commit the criminal act. [¶] A juror may not consider any evidence of any other criminal acts as an aggravating circumstance. It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(36 RT 7017-7019; 11 CT 2691.)

Steskal's failure to object to alleged instructional error or to request clarification of the instruction forfeits his claim on appeal. (*People v. Lucas* (2014) 60 Cal.4th 153, 291.) Even if Steskal had objected to the instruction, his arguments of instructional error have all been rejected by this Court. For example, he claims that by defining the alleged criminal activities as acts that did involve the actual threat or implied use of force or violence, CALJIC No. 8.87 directed a verdict and created a mandatory presumption. (AOB 266-268.) This Court rejected this claim in *People v. Burney* (2009) 47 Cal.4th 203.) As this Court explained in *Burney*, "'We have held, however, that the characterization of other crimes as involving express or implied use of force or violence, or the threat thereof, is a legal question properly decided by the court.'" (*Id.* at p. 259, citing *People v. Loker* (2008) 44 Cal.4th 691, 745; see also *People v. Monterroso* (2004) 34 Cal.4th 743, 793; *People v. Nakahara, supra*, 30 Cal.4th at p. 720 ["CALJIC No. 8.87 is not invalid for failing to submit to the jury the issues whether the defendant's acts involved the use, attempted use, or threat of force or violence].)

Steskal also argues the instruction impermissibly increased the weight of the evidence by "escalating the defined level of force from an implied

threat to an actual threat or implied use of force or violence." (AOB 266.) This Court recently rejected this contention in *People v. Bryant, supra*, 60 Cal.4th 335. As the Court explained, "The jury likely interpreted the phrase "express or implied" to apply to *both* the use of the force or violence *and* the threat to use force or violence. However, even if the instruction did not clearly define the types of possible threats, it did not explicitly tell the jury that a threat to use force or violence necessarily was an actual threat, rather than an implied one. Defendants were not precluded from arguing that their offenses involved only implied threats and that the jury should give less aggravating weight to that evidence." (*Id.* at p. 452, emphasis in original.) Steskal offers no persuasive reasoning for this Court to abandon its prior decisions approving of CALJIC No. 8.87.

Even if the instruction was erroneous in the manner Steskal suggests, there is no reasonable possibility the error resulted in prejudice. (See *People v. Gray, supra,* 37 Cal.4th at p. 236.) Possession of a weapon by a prisoner implies a threat to use force or violence. (*People v. Lewis, supra*, 43 Cal.4th at pp. 529-530.) Further, the jury heard uncontroverted testimony from jail staff that Steskal would have encountered a conflict with law enforcement personnel if he attempted to leave the jail through the roof or the mechanical room door. Furthermore, the jury possessed ample evidence showing Steskal's willingness to commit violent acts toward law enforcement officers, including his prior assault on the Maryland State Trooper and his shooting at Deputy Riches 30 times. (*People v. Gray, supra*, 37 Cal.4th at p. 236.) Therefore, any error was harmless under any standard.

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

Steskal raises various challenges under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the validity of the statutory scheme under which he was sentenced to death. (AOB 272-306.) Steskal acknowledges that these arguments have been repeatedly rejected by this Court. (AOB 272, citing *People v. Schmeck, supra,* 37 Cal.4th at pp. 303-304.) As Steskal presents no new arguments or persuasive reasons to revisit these issues, respondent urges this Court to reaffirm its prior holdings, finding California's death penalty statute and relevant instructions constitutional.

A. Section 190.2 is Not Impermissibly Broad

Contrary to Steskal's assertion (AOB 274-276), "[s]ection 190.2, which sets forth the circumstances in which the penalty of death may be imposed, is not impermissibly broad in violation of the Eighth Amendment." (*People v. Farley* (2009) 46 Cal.4th 1053, 1133; see *People v. Thomas* (2011) 51 Cal.4th 449, 506.) This Court has repeatedly rejected the claim that California's death penalty statutes are unconstitutional because they fail to sufficiently narrow the class of persons eligible for the death penalty. (*People v. Virgil, supra,* 51 Cal.4th at p. 1288; *People v. Verdugo* (2010) 50 Cal.4th 263, 304; *People v. Schmeck, supra,* 37 Cal.4th at p. 304; *People v. Wilson* (2005) 36 Cal.4th 309, 361-362; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Arias, supra,* 13 Cal.4th at p. 187.) Steskal's claim fails because he gives no justification for this Court to depart from its prior rulings on this subject.

B. Section 190.3, Subdivision (A) is Not Impermissibly Broad

Equally unavailing is Steskal's argument that the application of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (AOB 276-278.) Allowing a jury to find

aggravation based on the "circumstances of the crime" under section 190.3, factor (a), does not result in an arbitrary and capricious imposition of the death penalty. (*People v. Virgil, supra*, 51 Cal.4th at p. 1288; see also *People v. Gonzalez and Soliz* (2011) 52 Cal.4th 254, 333.) As the United States Supreme Court noted in *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750], "[t]he circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence." (*Id.* at p. 976.)

"Nor is section 190.3, factor (a) applied in an unconstitutionally arbitrary or capricious manner merely because prosecutors in different cases may argue that seemingly disparate circumstances, or circumstances present in almost any murder, are aggravating under factor (a)." (*People v. Carrington* (2009) 47 Cal.4th 145, 200; see also *People v. D'Arcy* (2010) 48 Cal.4th 257, 308.) Instead, "'each case is judged on its facts, each defendant on the particulars of his [or her] offense.'" (*People v. Carrington, supra*, 47 Cal.4th at p. 200, quoting *People v. Brown, supra*, 33 Cal.4th at p. 401.)

C. The Standard Penalty Phase Instructions Do Not Impermissibly Fail to Set Forth the Appropriate Burden of Proof

Steskal makes a number of claims that the death penalty statute and accompanying jury instructions fail to set forth the appropriate burden of proof. None of his contentions have merit.

1. There is no requirement the jury find aggravating factors outweigh the mitigating factors beyond a reasonable doubt and there is no requirement the jury unanimously determine which aggravating factors they relied upon

Citing *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Blakely v. Washington* (2004) 542 U.S. 296, 303-305 [124 S.Ct. 2531, 159 L.Ed.2d 403], and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], Steskal claims the jury needed to make factual findings beyond a reasonable doubt that (1) aggravating factors were present and (2) the aggravating factors were so substantial as to make death the appropriate punishment, and the failure to do so violated the Due Process Clause and the Eighth Amendment to the Constitution. (AOB 279-289.)

California's death penalty statute is constitutional, and this Court has determined that the United States Supreme Court decisions in *Apprendi* and *Ring* do not alter that conclusion. As this Court's precedent makes clear:

> The death penalty law is not unconstitutional for failing to impose a burden of proof–whether beyond a reasonable doubt or by a preponderance of the evidence–as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence. [Citation.] Unlike the statutory schemes in other states cited by defendant, in California 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification. [Citations.] ¶ The jury is not constitutionally required to achieve unanimity as to aggravating circumstances. [Citation.] ¶ Recent United States Supreme Court decisions in *Apprendi* . . . and *Ring* . . . have not altered our conclusions regarding burden of proof or jury unanimity.

(*People v. Brown, supra*, 33 Cal.4th at pp. 401-402.)

In California "once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole." (*People v. Ward* (2005) 36 Cal.4th 186, 221 quoting *People v. Prieto* (2003) 30 Cal.4th 226, 263.) The United States Supreme Court's decisions, including *Cunningham*, "interpreting the Sixth Amendment's jury trial guarantee [citations] have not altered our conclusions in this regard." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 227-228.) *Cunningham* "involves merely an extension of the *Apprendi* and *Blakely* analyses to California's determinate sentencing law" (*People v. Prince, supra*, 40 Cal.4th at p. 1297), and thus has no bearing on this Court's earlier decisions upholding the constitutionality of the state's capital sentencing scheme (*People v. Stevens* (2007) 41 Cal.4th 182, 212). Thus, California's death penalty withstands constitutional scrutiny, even after reexamination in light of *Apprendi* and *Cunningham*. Steskal has not presented any reason to reconsider this issue.

Steskal also contends his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution were violated because there is no assurance that the jury found either unanimously or by a majority which aggravating circumstances warranted the death penalty, and that he engaged in prior criminality. (AOB 289-292.) There is no constitutional requirement that a capital jury reach unanimity on the presence of aggravating factors. (*People v. Martinez* (2009) 47 Cal.4th 399, 455; *People v. Burney, supra*, 47 Cal.4th at p. 268.) Nor is there a constitutional requirement that a capital jury unanimously agree that prior criminal activity has been proven. (*People v. Martinez, supra*, 47 Cal.4th at p. 455; *People v. Dykes* (2009) 46 Cal.4th 731, 799.) Nor was Steskal's right to Equal Protection violated by not requiring unanimity on the presence of

aggravating factors. (*People v. Cook* (2007) 40 Cal.4th 1334, 1367; *People v. Griffin* (2004) 33 Cal.4th 536, 598.)

2. Written findings are not constitutionally required

Steskal claims the Constitution requires written jury findings regarding the factors the jury considered in deciding to impose the death penalty. (AOB 293-295.) Contrary to Steskal's assertion, "[t]he law does not deprive defendant of meaningful appellate review and federal due process and Eighth Amendment rights by failing to require written or other specific findings by the jury on the aggravating factors it applies." (*People v. Riggs* (2008) 44 Cal.4th 248, 329; *People v. Dunkle* (2005) 36 Cal.4th 861, 939, overruled on another ground in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22; accord *People v. Montes* (2014) 58 Cal.4th 809, 899; *People v. Foster* (2010) 50 Cal.4th 1301, 1365-1366; *People v. Gamache* (2010) 48 Cal.4th 347, 406.) Nor does the absence of such findings violate equal protection (*People v. Parson* (2008) 44 Cal.4th 332, 370) or a defendant's right to trial by jury (*People v. Avila* (2009) 46 Cal.4th 680, 724). As this Court explained in *People v. Nelson* (2011) 51 Cal.4th 198, "[n]othing in the federal Constitution requires the penalty phase jury to make written findings of the factors it finds in aggravation and mitigation[.]" (*Id.* at p. 225.) Steskal offers no compelling reason for this Court to reconsider its previous decisions.

3. Intercase proportionality review is not constitutionally required

Steskal claims California's capital sentencing scheme is unconstitutional because it does not allow for comparative proportionality review to guarantee against arbitrary imposition of the death penalty. (AOB 295-297.) Intercase, or comparative, proportionality review is not required by the federal Constitution, and this Court has consistently declined to undertake it. (*Pulley v. Harris* (1984) 465 U.S. 37, 43-54 [104

S.Ct. 871, 79 L.Ed.2d 29]; *People v. Boyce, supra*, 59 Cal.4th at p. 725; *People v. Gonzales* (2011) 51 Cal.4th 894, 957.) Intercase proportionality review is not required for due process, equal protection, the prohibition against cruel and unusual punishment, or the guarantee of a fair trial. (*People v. Murtishaw* (2011) 51 Cal.4th 574, 597; *People v. Foster, supra,* 50 Cal.4th at p. 1368.) Steskal offers no compelling reason for this Court to depart from its prior holdings.

4. There is no requirement that unadjudicated criminal activity be found to be true beyond a reasonable doubt by a unanimous jury

Steskal claims the prosecution violated his constitutional rights by relying on unadjudicated criminal activity as an aggravating circumstance in the penalty phase of the trial. (AOB 297-298.) He is wrong. A penalty phase jury properly may consider a defendant's unadjudicated criminal activity. (*People v. Lucas, supra*, 60 Cal.4th at p. 333.) Further, the trial court need not instruct the jury that it could consider the unadjudicated criminal activity only if it unanimously found such crimes had been proved beyond a reasonable doubt. (*Ibid*; see also *People v. Barnwell* (2007) 41 Cal.4th 1038, 1059; *People v. Hoyos* (2007) 41 Cal.4th 872, 927.)

5. There is no constitutional requirement for the court to designate which factors are mitigating

Steskal contends the jury should have been advised which factors in CALJIC No. 8.85 were solely to be used in mitigation, and the trial court's failure to do so resulted in a violation of his Eighth and Fourteenth Amendment rights. (AOB 298-301.) This Court has previously rejected this claim, holding that CALJIC No. 8.85 is not unconstitutional for failing to inform the jury which factors can only be used as mitigating factors. (*People v. Perry, supra,* 38 Cal.4th at p. 319; *People v. Moon, supra*, 37 Cal.4th at p. 42.)

D. California's Capital Sentencing Scheme Does Not Violate Equal Protection

Steskal claims California's capital sentencing scheme violates equal protection because it affords non-capital defendants more procedural protections than capital defendants. (AOB 301-303.) This claim has been repeatedly rejected (*People v. Lucas, supra*, 60 Cal.4th at p. 333; *People v. Russell* (2010) 50 Cal.4th 1228, 1274; *People v. Jennings* (2010) 50 Cal.4th 616, 690; *People v. Verdugo, supra*, 50 Cal.4th at p. 305; *People v. Lomax* (2010) 49 Cal.4th 530, 594), and Steskal provides no reason for this Court to reconsider these decisions.

E. California's Death Penalty Law Does Not Violate International Law or the Federal Constitution

Steskal contends that California's use of the death penalty violates the Eighth and Fourteenth Amendments because it falls short of international norms of humanity and decency, and otherwise violates international law. (AOB 304-306.) This Court has repeatedly rejected similar arguments that California's death penalty scheme is contrary to international norms of humanity and decency, and therefore violates the Eighth and Fourteenth Amendments of the United States Constitution. (*People v. Lucas, supra*, 60 Cal.4th at p. 333.) Moreover, this Court should again reject the argument that the use of capital punishment "as regular punishment" (see AOB 305-306), violates international norms of humanity and decency and hence violates the Eighth Amendment of the United States Constitution. " . . . California does not employ capital punishment in such a manner. The death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions that differ from those applying to 'regular punishment' for felonies. [Citations.]" (*People v. Jennings, supra*, 50 Cal.4th at pp. 690-691.)

XVI. THERE IS NO REVERSIBLE CUMULATIVE ERROR

Steskal contends that the cumulative effect of errors at the penalty phase retrial warrants reversal of the death judgment. (AOB 307-308.) However, as respondent has explained above, no error occurred, and even if error occurred, Steskal has failed to show prejudice. (See *People v. Alfaro* (2007) 41 Cal.4th 1277, 1316; *People v. Abilez* (2007) 41 Cal.4th 472, 523.) As a result, Steskal's claim of cumulative error should be rejected.

CONCLUSION

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

Dated: August 3, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 38,078 words.

Dated: August 3, 2015

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

Case Name: **People v. Steskal** No.: **S122611**

I declare:

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

On August 3, 2015, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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Orange County Superior Court
Central Justice Center
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 3, 2015, at San Diego, California.

Bonnie Peak
Declarant

Bonnie Peak
Signature

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