COPY

SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JEAN PIERRE RICES, Defendant and Appellant.	CAPITAL CASE Case No. S175851

SUPREME COURT
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Deputy

San Diego County Superior Court
Case No.SCE266581
The Honorable Lantz Lewis, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
MICHAEL MURPHY
Deputy Attorney General
ALANA COHEN BUTLER
Deputy Attorney General
State Bar No. 200079
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 738-9227
Fax: (619) 645-2012
Email: Alana.Butler@doj.ca.gov
Attorneys for Respondent

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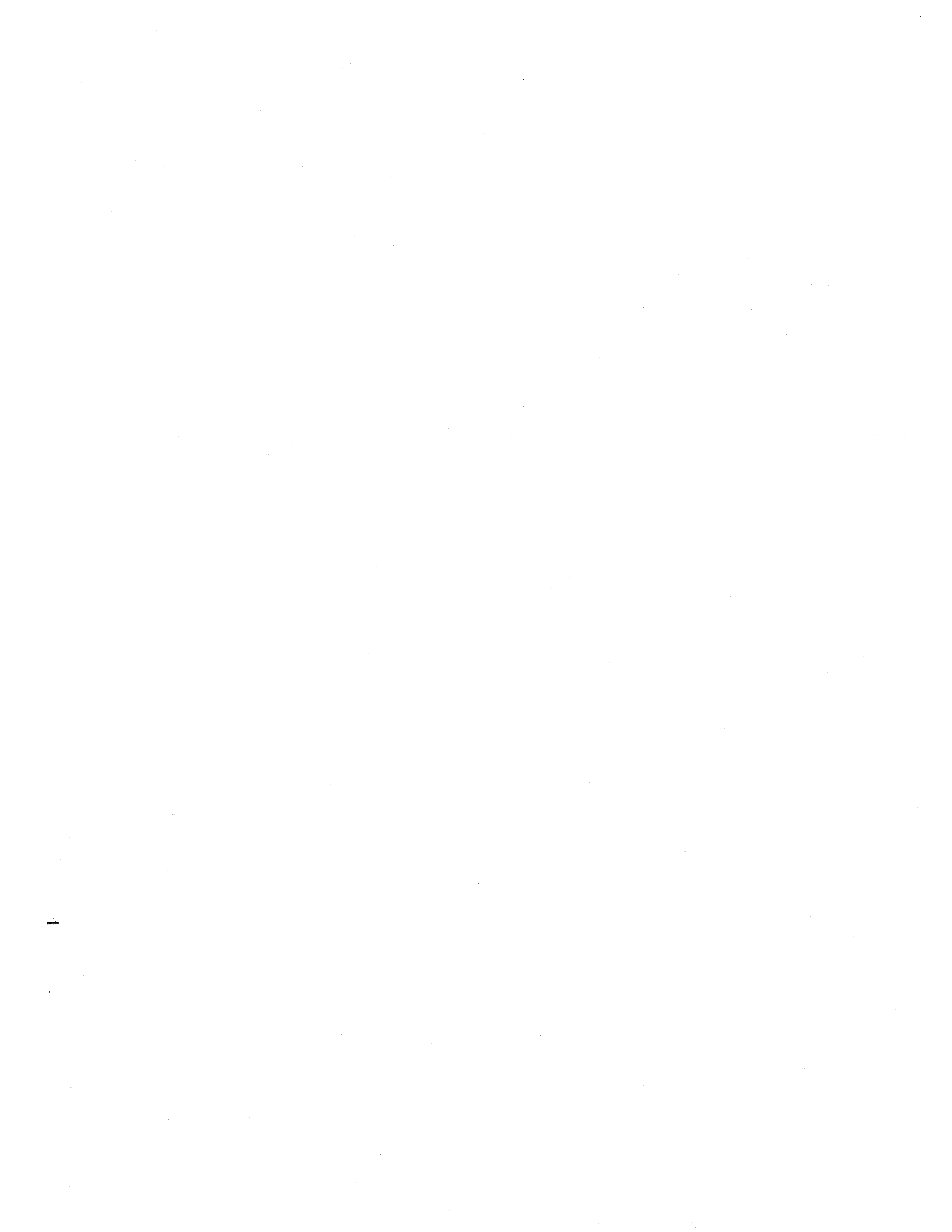

STATEMENT OF THE CASE

On August 7, 2007, the San Diego County District Attorney's office filed an information charging appellant, Jean Pierre Rices, and co-defendant, Anthony Miller, with two counts of murder in violation of Penal Code section 187, subdivision (a). The information alleged felony murder and multiple murder special circumstances, within the meaning of Penal Code section 190.2, subdivisions (a)(3) & (17). The information further alleged that appellant personally used a firearm during the commission of the murders (Pen. Code, § 12022.53(d)), had been previously convicted of a serious felony and a strike (Pen. Code, § 667, subds. (a)(1)& (b)-(i)), and had served one prior prison term (Pen. Code, § 667.5, subd. (b)). (1 CT 68-73.) The prosecution elected to seek the death penalty against appellant and an LWOP sentence against Miller. (1 CT 78-79.)

On October 6, 2008, appellant pled guilty to both counts of murder while personally using a firearm and admitted the robbery and multiple murder special circumstance allegations, in addition to admitting the serious felony and strike prior convictions. The People dismissed the burglary special circumstance allegation and the prison prior. (4 CT 716-718.)[1]

Two juries were convened, one to determine appellant's penalty, the other to determine Miller's guilt. Appellant's jury was sworn on May 27, 2009. (5 CT 1024.) On June 24, 2009, the jury determined that appellant's

[1] Appellant had two other open cases at the time of his guilty plea. In case number SCD200599, appellant pled guilty to robbery and attempted robbery with gun and prior conviction allegations. (RT 480-492.) The court later sentenced appellant to a term of 30 years to life, plus nine years on that case. (6 CT 1415) In case number CE283573, appellant pled guilty to attempted murder with weapon, great bodily injury, and prior conviction allegations. (RT 493-500.) The court later sentenced appellant to a consecutive term of 34 years and four months on that case. (6 CT 1415.)

punishment should be death. (6 CT 1252.) On August 21, 2009, the trial court denied appellant's motions for new trial and a reduction of penalty, and sentenced appellant to death on the murder convictions. (6 CT 1413-1416.) The court further imposed two additional 25-year-to-life terms of imprisonment on the firearm allegations and five years on the serious felony prior conviction allegation. (6 CT 1416.)

The instant appeal is automatic.

STATEMENT OF FACTS

Heather Mattia, a part-owner of the Granada Liquor Store in El Cajon, and her employee, Firas Eiso, were in the process of closing up shop on March 1, 2006, at approximately 11 p.m. (10 RT 1370, 1426, 11 RT 1632.) Heather and Firas exited the store and were about to leave when approached by appellant and co-defendant, Anthony Miller. (11 RT 1631-1632.) Heather and Firas were ordered to go back into the store, and told to crawl in front of the counter. Miller took money from the cash registers. He then opened the door to exit the store. As he was walking out of the store, appellant shot Heather and Firas in the back of their heads as they lay defenseless on the ground. Appellant then walked out the door with a gun in his hand. (11 RT 1631-1632, 1646.) Throughout the encounter Heather and Firas cooperated with appellant. (12 RT 1915-1916.) Before being killed, Heather pleaded with appellant not to kill her, saying she just wanted to be with her family. Firas also appealed for his life saying, "I'm young. Please don't kill me. Let me live." (12 RT 1959.) From the time Heather and Firas were forced back into the store until appellant was seen walking out the door amounted to just under four minutes. (16 RT 1648.)

Samir Yousef, Heather's cousin, was supposed to meet her for dinner after she closed the store. (10 RT 1370.) When she did not show up or answer his calls, he decided to go by the store. When he arrived, he walked

in the front door. It was dark inside and he did not see anyone. Samir called out Heather's name to no avail. He became scared and decided to go to the neighboring Domino's pizza to see if she was there. (10 RT 1372-1374, 1391.) He did not find Heather there and asked two of the Domino's employees to go back to the liquor store with him. When he returned to the store, accompanied by the two Dominos employees, he walked further inside and saw Heather and Firas lying face down, dead on the floor in a pool of blood. (10 RT 1375, 1379, 1391.) He ran out of the store, got in his car, and called 911. (10 RT 1375.)

Police and paramedics arrived at the store shortly thereafter where they found Heather and Firas dead of apparent gunshot wounds to the head. (10 RT 1412, 1415, 1423.) When Firas' body was moved, a bullet was discovered underneath him. (10 RT 1480.) When no bullet was recovered from Heather's body after the autopsy, police conducted a second search and found a bullet in a stack of beverage cans. (10 RT 1484, 1487.) Investigators surmised that the bullet went through Heather's head, grazed her wrist, struck the floor, then rebounded up to puncture a poster, strike the counter, hit the ceiling, and then finally came to rest in the stack of cans. (10 RT 1492.)

An autopsy revealed that Firas died from a gunshot wound to the head. (11 RT 1617.) The bullet entered the right back side of his head and exited near his right nostril. (11 RT 1598, 1602.) The bullet damaged his central survival functions, incapacitated him, and rendered him unconscious immediately. (11 RT 1606.) He likely only survived three to seven minutes after being shot in the head. (11 RT 1607.) Heather's autopsy revealed she also died from a gunshot wound to the head. (11 RT 1617.) In her case, the bullet entered the side of her head, behind her right ear and exited in front of her left ear. (11 RT 1610.) She had graze wounds to her forearm, wrist, and finger, likely from the same bullet. (11 RT 1612-1613.) An

examination of her lungs suggested she had continued to breathe after being shot for about 15-20 minutes and the location of the gunshot may have resulted in seizures until her brain or heart had shut down. (11 RT 1615.)

In the months following the murders, appellant admitted to several people that he committed the robbery and shot two people in the head. He also provided details, including the fact that Heather had been twitching and her legs shot up in the air after he shot her. (15 RT 2235, 2262-2263, 2265.) After being arrested, he ultimately pled guilty to the murders along with firearm allegations and robbery and multiple murder special circumstances. (15 RT 2309.)

Appellant committed a number of armed robberies both before and after the murders at the Granada Liquor Store. On February 10, 1999, appellant entered a Taco Bell with Milton Sheppard at approximately 7:30 p.m. Initially, the two men seemed to be observing the restaurant and then left. When they came back, Sheppard served as a lookout and appellant walked up to the counter with his hand in his pocket. He walked up to the shift manager, Deborah Carmichael, and said, "Back up bitch, I want the money." (15 RT 2197-2198, 2201.) Although he did not pull out a gun, she saw the butt of a gun in his pocket and its silhouette. She gave him money from the register, probably about $150. Appellant and Sheppard left the store. (15 RT 2200.) When appellant was later interviewed about the incident, he admitted committing the robbery. (15 RT 2207.)

About a month later, on March 7, 1999, Paul Hillard was sitting in his car in a parking lot at about 10:00 a.m. (15 RT 2208.) Three men approached the car, two stood on the passenger side of the car and appellant stood by the driver's side door. Appellant ordered Hillard to get out of the car and lie on the ground. (15 RT 2209.) Appellant had a gun in his hand and he pointed it at Hillard. One of the men reached in Hillard's back pocket and took his wallet, which contained about $300. After they took

his wallet, they left in his car. (15 RT 2210.) He called the police immediately, who fortuitously located the car driving off the freeway about 10 minutes after the call came in. Police stopped the car. Appellant was seated in the front passenger seat, where a gun was located underneath. (15 RT 2215, 2217-2219.) Appellant subsequently admitted that he was the person who used the gun against Hillard. (15 RT 2220.) Appellant was convicted of robbery while armed with a firearm in August of 1999, for this offense. (15 RT 2307.)

After having been released from prison, appellant and Rodney Hodges robbed the Bank of America in El Cajon on July 28, 2006, at approximately 10:30 a.m. (15 RT 2223, 2235.) The entered into the bank with shotguns and yelled for everyone to get down. Appellant fired two shots. (15 RT 2225, 2234-2235.) Heather Maxin, a teller at the bank, dropped to the ground, but was able to press her handheld alarm. (15 RT 2226.) She felt terrified to be in such a situation. (15 RT 2230.) Appellant jumped over the teller window but ultimately did not get any money. He and Hodges got in their car and left. (15 RT 2226.) In October 2008, based on this offense, appellant pled guilty to attempted robbery while being personally armed with a firearm . (15 RT 2308.)

A few days later, on July 31, 2006, appellant and Dwayne Hooks, entered the Washington Mutual in Lakeside wearing ski masks and yelled at everyone to "get the fuck down." (15 RT 2238, 2252.) Appellant, who was armed with a handgun, jumped over the teller counter, and took money from the open drawers. (15 RT 2239, 2252.) When he approached Korrine Williams, a teller whose drawer was locked, he pointed the gun a couple of inches from her head and told her to "get the fuck up, unlock the drawer." Terrified, she opened the drawer. He then told her to "get the fuck back down," which she did. (15 RT 2240, 2243-2244, 2247, 2249, 2252-2253.) As appellant was taking the money and jumping back over the counter, he

dropped his keys. (15 RT 2241, 2260.) Hooks and appellant ran out with about $25,000 in cash. (15 RT 2256.) However, unbeknownst to them, the money they stole included a dye pack, which exploded while they were driving away. (15 RT 2244-2245, 2255, 2264.) The keys appellant left behind belonged to Debbie Mays, who had given the keys to appellant before the robbery. (15 RT 2262.) When the getaway car was found and analyzed, appellant's DNA was found mixed with the dye on the driver's side door. (15 RT 2264.) Appellant pled guilty to robbery while being personally armed with a firearm for this offense. (15 RT 2308.)

While awaiting trial in this matter, appellant committed a number assaults while he was in custody, in addition to threatening staff. On January 12, 2008, appellant, along with several others, participated in assaulting inmate John Spect. (15 RT 2293-2295, 2305-2306.) On May 29, 2008, appellant and another inmate attacked fellow prisoner Darcell Moore, who sustained minor injuries as a result. (15 RT 2266-2267, 2272.) In a jail call, appellant recounted that he "beat [Moore's]face in. Stomped his bitch ass out. Just made him shit and piss all over his self [sic] in the cell." (5 CT 1135.)

On August 8, 2008, Deputy Sheriff James Clements was doing a security check in appellant's module. (15 RT 2312-2314.) As he was about to exit the module, appellant lunged at him, pushed him against the wall, and starting hitting him in the back of the head. Deputy Clements yelled for help. (15 RT 2320-2321.) Deputy Simms, who was doing a security check of the second floor, came down to assist Deputy Clements, along with two parole agents who happened to be nearby and heard the commotion. (15 RT 2322, 2349, 2354-2355.) Although he was not aware of it during the attack, appellant had cut him with a razor that had been fashioned into a knife of sorts. Deputy Clements suffered significant injuries to the back of his head as a result of the attack. He required 10

stitches and four staples to close wounds along his ear and the back of his head. He also had a three-inch laceration across his face that was glued together and other cuts along his cheek, near his ear. (15 RT 2324.) When medical personnel inquired of appellant whether he was injured he responded, "Fuck no, blood. But I blasted your cop." (15 RT 2352.) Appellant pled guilty to attempted murder of a peace officer with the infliction of great bodily injury in conjunction with this incident. (15 RT 2308-2309, 2375.)

In addition to his physically assaultive behavior in custody, appellant possessed contraband and was verbally abusive and threatening to the sheriff's deputies. Days after his assault on Deputy Clements, appellant was found in possession of a piece of metal about three inches long consisting of a heavier gauge than a coat hanger. It had been manipulated so it was straight and seemed as if it had been sharpened. (16 RT 2378-2379.) Also within the same time frame, appellant made threats against deputies as he was being transported from his cell for medical treatment. (16 RT 2385-2387.)

In addition to the offenses discussed above, appellant also suffered convictions for possession of cocaine base for sale in 2000 and possession of a deadly weapon while incarcerated in prison in 2001. (15 RT 2307.) Appellant served time in custody from March 8, 1999 to December 3, 1999, November 16, 2000 to October 1, 2005, and from August 23, 2006 to the present. (15 RT 2310.)

The defense presented evidence in mitigation, mostly focusing on appellant's childhood. Appellant was conceived when his mother, Celeste Rices, who was a PCP-using prostitute, was in a relationship with her pimp, Sammy Johnson, in Oakland. (17 RT 2448, 2452.) Once appellant was born, Celeste had a hard time taking care of him. He was physically neglected and she was not very affectionate towards him, calling him stupid

and a liar. (17 RT 2464-2465.) Celeste moved to Los Angeles for a period of time and then returned to Oakland to live with her sister when appellant was about four years old. (17 RT 2466.) Celeste was not affectionate with appellant and would berate him for his issues with incontinence. (17 RT 2468-2470, 2502.) Celeste left Oakland and returned to Los Angeles again. (17 RT 2470.)

In February of 1987, when appellant was about five years old, Celeste abandoned him at a Jack-in-the-Box fast food restaurant while she was high. During the incident, Celeste yelled at appellant to go away and threw things at him to prevent him from following her. Appellant cried and wanted to go with his mother. (17 RT 2431.) A Good Samaritan, Diane Northrop, intervened, told Celeste to stop yelling and throwing things, and tried to calm appellant. As she was attending to appellant, Celeste quickly walked away. (17 RT 2434, 2440.) Northrop waited with appellant for Celeste to return, but she did not. Northrop ultimately took appellant to the police station. (17 RT 2441.)

Social services arranged for appellant to live with his maternal grandparents in Oakland, where he lived until he was eleven years old. (17 RT 2502-2503.) Appellant exhibited behavioral issues while with his grandparents. He stole, refused to follow guidelines, and showed signs of hyperactivity. (17 RT 2503.) Nevertheless, his grandparents enrolled him in school and provided him with a loving home. His behavior improved, but was inconsistent. He won a citizenship award at school, but then would get in trouble for being disruptive. (17 RT 2504, 2511.)

When appellant was eight years old, his grandparents discovered that Celeste was comatose in a hospital in Los Angeles. She died soon thereafter. (17 RT 2505-2506.) After Celeste's death, appellant's behavior deteriorated. He became withdrawn and belligerent. He ran away from home, and created more problems at school. (17 RT 2506, 2516, 2521.)

His grandparents solicited help from social services to no avail and ultimately decided to send him to live with their other daughter in San Diego when he was about 11 years old. (17 RT 2507, 2522.) It did not appear that appellant was offered or received any therapy while he lived with his grandparents. (17 RT 2522, 2550, 2558.)

Appellant's placement with his aunt was short-lived and she eventually dropped him off at a facility. (17 RT 2575-2576.) At that point, appellant was placed at the Mozell Pennington Group Home. (17 RT 2524.) An employee of the home, Bobby Sparks, took an interest in appellant and gave him extra attention. For a period of time, appellant started progressing and changing. However, only Sparks and the facilities owner were able to interact with appellant without problems. (17 RT 2526-2527.) Sparks eventually left his position with the group home and learned that appellant took it hard and his behavior had regressed. (17 RT 2527-2528.) A new social worker was assigned to appellant's case in 1994. She recalled appellant had a great number of different placements. As a result, she would carry appellant's belongings in the trunk of her car because she was frequently picking him up from juvenile hall, the police station, and foster homes. (17 RT 2586-2587.)

Barbara Duey, a lawyer with the Children's Law Center in Los Angeles reviewed appellant's social workers' files. (17 RT 2542, 2550.) She opined that appellant should have been in therapy soon after the abandonment by his mother and then grief therapy after she died. (17 RT 2550.) She could find no notation that any services were offered to appellant or his grandparents throughout his residency there. (17 RT 2551, 2558.) Although he received therapy sporadically later in his childhood, it was not sufficiently timely. (17 RT 2567.)

Daniel Vasquez, a correctional consultant, reviewed appellant's prison records. (18 RT 2605, 2607.) Appellant was in prison from November 26,

2000, to October 1, 2005. During that time, he participated in one assault, which was later found to be a case of mutual combat. (18 RT 2611.) It was not unusual for a young prisoner to engage in that behavior. He was also found in possession of a shank, in addition to 16 other infractions, mostly dealing with possessing extra food, grooming, refusal to go to work, and making homemade brew. (18 RT 2614-2615.) During that time in prison, there were no assaults against staff. (18 RT 2615.)

Finally, Rahn Mingawa, a forensic psychologist, reviewed appellant's records and interviewed him to assess what risk factors had been present in his life and if those were counterbalanced by any protective factors that would decrease the likelihood of high risk behavior. (18 RT 2622, 2629-2630, 2635.) Appellant had many high risk factors present in his life in the area of family, peers, school, individual and community. These risk factors were substantial in light of who his parents were, the way he was treated by his mother, the area in which he was brought up, the peers he chose, and the instability created by living in different places. The protective influences were very limited. His grandparents made efforts to raise him well, but it was insufficient to overcome other influences. (18 RT 2639-2662.) Had Dr. Mingawa been given appellant's file when he was five, he would have educated his grandparents on what warning signs should be addressed, removed all contact from his mother, and offered therapy when she died. (18 RT 2663-2664.) He felt that in failing to do those things, the social workers assigned to appellant's case did not measure up well. (18 RT 2675.)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO EXCUSE PROSPECTIVE JURORS L.M. AND T.T. BECAUSE THEY WERE NOT SUBSTANTIALLY IMPAIRED

Appellant argues that his federal and state rights to an impartial jury were violated when the trial court erroneously denied his motions to excuse two jurors for cause because they believed that Black people were more violent that White people. (AOB 19-33.) The argument should be summarily denied because appellant did not properly preserve the claim for appeal when he failed to express dissatisfaction with the jury as constituted. Even if not forfeited, appellant's argument must be rejected because a fair reading of the record reveals the prospective jurors did not feel that appellant's race would affect their ability to serve on the case. Finally, should this Court find that the trial court erred, appellant's claim must be rejected because an incompetent jury was not forced upon him.

A. Facts Relating to Appellant's Claim

As part of the voir dire process, prospective jurors filled out questionnaires, which were jointly prepared by the parties. Part of the questionnaire sought to explore attitudes about race. Specifically, Question number #53 inquired, "Do you believe that certain races are more violent than others?" The questionnaire provided a line to check "yes" or "no" and then a line to explain the answer should the answer be "yes."

Appellant focuses his argument on the answers of two prospective jurors, L.M. and T.T, who after hardship screening and for-cause challenges based on the questionnaires were seated in the jury box.

1. Prospective Juror L.M.

L.M. was a 39-year-old white woman, who worked at a bank. Her sister was a federal probation officer, her brother-in-law was a police officer with the El Cajon Police Department, and her brother was a police

officer for the San Diego Police Department. (19 CT 4470-4471.) In the "Race/Ethnicity" portion of her questionnaire, L.M. indicated that she had a lot of social contact with people of races and ethnicities other than her own. She had not had a negative experience with an African-American individual nor were there any racial or ethnic groups with which she felt uncomfortable. She had not been afraid of someone of another race. In answering Question number #53, she responded "yes" that certain races were more violent than others, explaining, "Hispanic/African-Americans....people involved in gangs." She answered "no" when asked if there was anything about appellant being African-American that might affect her ability to serve as a juror on the case. (19 CT 4479.)

During voir dire, counsel asked the panel whether he would have an uphill battle asking them to consider life without the possibility of parole as a punishment. Eight jurors, including L.M., raised their hands. (7 RT 1167.) Counsel asked her whether there was a reasonable possibility that she could vote for life in prison? She answered, "Yeah. It depends on the circumstances but I think I'd lean more towards the death penalty. I'd lean more towards the death penalty." (7 RT 1189.)

Counsel moved to excuse her for cause. (7 RT 1231.) He argued that L.M. leaned very strongly in favor of the death penalty which would put the burden on the defense. (7 RT 1233.) The court denied the request because L.M. stated she would not automatically vote for death. (7 RT 1235.)

2. Prospective Juror T.T.

T.T. was a 46-year old white woman, who worked with disabled children. (25 CT 6228) She worked for the sheriff's department for five years, her father was a reserve officer with the sheriff, and she had a close friend that was a retired sheriff's deputy. (25 CT 6229, 6232.) She did not have a lot of contact with people outside her ethnic or racial group, but grew up with a mix of people in her neighborhood. She never had a

negative experience with an African-American person, did not feel uncomfortable with people of other races, and had not been afraid of someone of another race. (25 CT 6237.) In response to Question number #53, she answered "yes" that certain races or ethnicities are more violent than others. She explained, "I believe black & mexican [sic] are more likely to be violent. But any race has violent people." She answered "no" when asked if there was anything about appellant being African-American that might affect her ability to serve as a juror on the case. (25 CT 6237.)

As noted before, counsel asked the panel whether he would have an uphill battle to convince them that life without the possibility of parole was the proper punishment. T.T. raised her hand. (7 RT 1167.) When asked, T.T. explained, "I believe that with what we have so far, that I believe the death penalty would be it. I would have to see all of the evidence and be swayed that life in prison would be a better choice. So I'm not definite for the death penalty, but from what we know at this point, I would say the death penalty, but I could make a better decision after hearing everything." When asked, she said she would listen to both sides and consider both sides in formulating a decision. (7 RT 1172.)

The prosecutor later followed-up with T.T. He asked whether she would be willing to remain open to hearing both evidence in aggravation and mitigation before making up her mind. She responded, "Yes. Like I said, with what I know, I would say the death penalty, but I am willing to hear everything before I make a final decision on something like this." (7 RT 1212.) The prosecutor acknowledged that it was natural to lean towards one punishment over the other but again inquired whether she could agree to consider all the evidence before coming to a decision. T.T. indicated that she would. (7 RT 1212.)

Appellant moved to excuse T.T. for cause. (7 RT 1231.) Counsel argued that she raised her hand that the defense had an uphill battle, leaned

towards the death penalty based on what she had heard so far, and believed strongly in the death penalty. (7 RT 1232.) The court ruled, "[T.T] I am simply denying. I listened carefully. I looked at the questionnaire. I believe this juror is open to all options." (7 RT 1234.)

3. Defense Motion for Reconsideration

Prior to the exercise of peremptory challenges, the defense filed a motion asking the court to reconsider its for-cause rulings or in the alternative grant the defense additional peremptory challenges.[2] (4 CT 931, 8 RT 1245-1246.) In the motion, the defense argued L.M. should have been excused because she believed that Hispanic and African-Americans involved in gangs were more likely to be violent, that appellant deserved the consequences of the charged crime since he pled guilty, and she was in favor of the death penalty if a person was guilty of murder. (4 CT 938.) The defense also asserted that T.T. should have been excused because she had an implied bias towards law enforcement, believed that Blacks and Mexicans were more likely to be violent, and could not fairly consider evidence in mitigation. (4 CT 937-938.) After having considered the moving papers, the court denied the motion. (8 RT 1253.)

Following the denial of that motion and other discussions, the court seated the potential jurors in the order of the random list previously created by the jury commissioner. (8 RT 1271.) Appellant exercised all 20 of his peremptory challenges, including two to remove prospective jurors L.M. and T.T. (8 RT 1280.) As the court discussed the procedure for selecting

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[2] Prior to the parties exercising their challenges, the clerk indicated that she had spoken to L.M. the previous Friday and indicated concern over fertility treatments she was undergoing and it would be difficult for her to participate in the trial. (8 RT 1247.) The defense stipulated to remove her, but the prosecution opposed. (8 RT 1253.) The court then noted that the request to remove L.M. for cause was denied. (8 RT 1254.)

alternates, appellant renewed his motion for additional peremptory challenges based upon the motion it filed earlier that morning. The court denied the motion. (8 RT 1281.)

B. Appellant Has Not Preserved the Issue on Appeal Because He Did Not Express Dissatisfaction with the Jury as Constituted

In order to preserve a claim of error alleging the improper denial of a challenge for cause, a defendant must (1) use a peremptory challenge to remove the juror in question; (2) exhaust his peremptory challenges or justify the failure to do so; and (3) express dissatisfaction with the jury ultimately selected. (*People v. Souza* (2012) 54 Cal.4th 90, 130.)

Here, appellant used peremptory challenges to remove the jurors in question. (8 RT 1276, 1277.) He also exhausted all his peremptory challenges. (8 RT 1280.) However, he did not express dissatisfaction with the jury ultimately selected. Appellant argues otherwise, claiming that the motion for reconsideration of the court's for-cause rulings and the request for additional peremptory challenges satisfies this requirement. (AOB 29-30.) However, it should be noted that the written motion was filed *before* the panel was randomly seated and a single peremptory challenge was exercised. Thus, counsel made the motion before the jury was constituted. (8 RT 1245-1246.) After the jury (not including the alternates) was seated, appellant renewed his request for additional peremptory challenges based upon the motion it had filed earlier in the morning. (8 RT 1281.) The renewal of that motion did not express dissatisfaction with the jury as constituted because it referenced a motion that, again, was filed before a single juror had been seated for final selection.

Appellant attempts to overcome this shortcoming by asserting that counsel may express dissatisfaction with the jury by conduct; in this case by requesting additional peremptory challenges. (AOB 29-30.) However,

this Court has found that when cases are tried after 1994, the requirement of an express dissatisfaction applies to the case. (*People v. Mills* (2010) 48 Cal.4th 155, 186-187.) Because appellant did not express dissatisfaction with the jury as constituted and merely made reference to a motion filed prior to the random seating of the remaining jurors and the exercise of peremptory challenges, he has not preserved this issue for appeal.

C. The Trial Court Did Not Abuse Its Discretion When It Denied Appellant's Motion to Remove L.M. and T.T. for Cause

A criminal defendant is afforded the right to an impartial jury under the Sixth Amendment to the United States Constitution. (*People v. Earp* (1999) 20 Cal.4th 826, 852.) In order to safeguard this right, a prospective juror may be excused for cause if his views would "prevent or substantially impair" the performance of his duties as a juror in accordance with his instructions and oath. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].) A prospective juror is properly excluded if she is unable to conscientiously consider all the sentencing options. (*People v. Stewart* (2004) 33 Cal.4th 425, 441.) The reviewing court must generally defer to the trial judge who sees and hears the prospective jurors in question. (*People v. Hamilton* (2009) 45 Cal.4th 863, 891.) This is particularly true when the juror has made statements that are conflicting, ambiguous, or equivocal. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 441.) In fact, when a prospective jurors' responses are equivocal or conflicting, the trial court's assessment of the juror's state of mind is generally binding. (*People v. Welch* (1999) 20 Cal.4th 701, 746.)

Here, it cannot be said that L.M.'s views on race would have rendered her unable to consider all sentencing options and perform her duties as a juror. L.M. offered a specific answer to a specific question about race and violence, explaining, "Hispanic/African-Americans....people involved in

gangs" were more violent than others. On the other hand, she had a lot of social contact with people of other races and ethnicities, was not uncomfortable with or scared of any racial or ethnic groups, nor had she ever had a bad experience with an African-American individual. Most importantly, she answered "no" when asked if there was anything about appellant being African-American that might affect her ability to serve as a juror on the case. (19 CT 4479.) Although she was not questioned about these statements in voir dire, when asked about imposing the death penalty, she admitted she leaned in that direction. However, she demonstrated that she had an open mind as she could vote for life without the possibility of parole depending on the circumstances. (7 RT 1189.) When her responses are viewed as a whole, she did not harbor any bias that would have prevented her from being an impartial juror.

The same conclusion should be reached with respect to T.T. She felt that certain races were more violent than others, explaining, "I believe black & mexican [sic] are more likely to be violent. But any race has violent people." Nevertheless, she grew up with a mix of people in her neighborhood, never had a negative experience with an African-American person, did not feel uncomfortable with people of other races, and had not been afraid of someone of another race. (25 CT 6237.) And again, most importantly, she answered "no" when asked if there was anything about appellant being African-American that might affect her ability to serve as a juror on the case. (25 CT 6237.) Her statements during voir dire regarding the death penalty evidence that she was unbiased and willing to consider the evidence before arriving at a decision. She stated she would listen to both sides and needed to hear all the evidence before being swayed one way or the other. (7 RT 1172, 1212.) Like L.M., when her statements are viewed as a whole, it cannot be said that the court erroneously refused to excuse her.

The decision in *People v. Jackson* (1996) 13 Cal.4th 1164 is instructive. There, the defendant argued that the trial court abused its discretion when it denied his for-cause motion to dismiss a juror who professed a racial bias against Black people. (*Id.* at p. 1199.) The juror in question had been raised with racial prejudice but had "grown out of it." He also expressed that Blacks were more likely to commit crimes than Whites, an opinion he derived from the media. Nevertheless, he felt he could judge each case individually. This Court found that the juror's answers were equivocal. (*Id.* at p. 1200.) The Court noted that where a juror's answers are equivocal, the trial court's determination of the prospective juror's state of mind is binding on the appellate court. (*Ibid*, citing *People v. Beardslee* (1991) 53 Cal.3d 68, 103.) Given the equivocal nature of the juror's answers, the Court could not find that the trial court abused its discretion when it denied the defendant's challenge for cause. (*People v. Jackson*, *supra*, at p. 1200.)

The same reasoning should be applied here. Although T.T. and L.M. may have made a statement evidencing a belief in a racial stereotype, it was plain from their other answers that neither held any animus towards any race nor possessed any bias that would prevent them from rendering a fair decision after consideration of the evidence. Thus, the trial court's denial of appellant's motions to remove L.M. and T.T. for cause should not be disturbed.

D. Even Assuming the Court Should Have Excused L.M. and/or T.T., Appellant Cannot Show the Rulings Violated His Right to a Fair and Impartial Jury

Should this court find that the trial court erred when it denied appellant's motion to move one or both jurors, appellant must nevertheless demonstrate that the court's rulings affected his right to a fair and impartial jury. (*People v. Black* (2014) 58 Cal.4th 912, 920; *People v. Yeoman*

(2003) 31 Cal.4th 93, 114.) Here, neither L.M. nor T.T. sat on appellant's jury. Although appellant used two of his peremptory challenges to remove the two prospective jurors, the loss of those challenges "is grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 487, quoting *Ross v. Oklahoma* (1988) 487 U.S. 81, 89 [108 S.Ct. 2273, 101 L.Ed.2d 80].) In other words, appellant must show that a juror who should have been removed for cause sat on the jury that ultimately decides the case. (*People v. Black*, *supra*, (2014) 58 Cal.4th 912, 920.)

Appellant argues that counsel would have wanted to remove Juror No. 4, Juror No. 10, and Juror No. 6 had it not been for the court's erroneous denial of his two other motions for cause.[3] (AOB 31-32.) However, appellant challenged none of those jurors for cause. He may not claim that these jurors were incompetent or should have been removed for cause absent having made such a motion in the trial court. (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 114.) Consequently, appellant has not shown that any error made in refusing to excuse prospective jurors L.M. and T.T. has affected his right to a fair trial and his argument must be rejected.

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[3] Appellant also references his inability to excuse Juror No. 1, who complained of financial hardship on several occasions and implies that the jury returned a verdict in just two hours because Juror No. 1 had such a hardship. (AOB 32 at fn. 2.) Appellant does not assert that Juror No. 1 was excusable for cause at the time of voir dire, thus, this assertion could not support appellant's claim that the jury was biased. Moreover, the court received assurances from Juror No. 1 that a note from the court would help matters with his employer and he would not have a divided mind between work at the trial. (6 RT 947.)

II. The Trial Court Properly Denied Appellant's Motion to Excuse Prospective Jurors V.B. and T.T. Because the Record Reveals They Were Not Substantially Impaired by Expressing an Opinion on Evidence Pertaining to Appellant's Childhood and Upbringing

Appellant argues that his constitutional rights to a reliable penalty determination were violated when the trial court denied his request to excuse two jurors, V.B. and T.T., because they indicated unwillingness to weigh and consider a defendant's childhood and upbringing as factors in reaching a decision on penalty. (AOB 34-40.) Appellant's argument may be summarily denied because he failed to preserve the issue for appeal when he did not express dissatisfaction with the jury as constituted. Notwithstanding the forfeiture, the claim should be rejected on the merits because the jurors in question expressed a willingness to be open-minded, and this Court should defer to the trial court's findings to that effect.

A. Facts Related to Appellant's Claim

Question number #90 in the questionnaire asked,

> "In determining whether life in prison with no possibility of parole or death is the appropriate penalty, would you be willing to weight and consider the defendant's childhood and upbringing as factors in reaching your decision."

Jurors were given a box to check "yes" or "no" and several blank lines for any explanation. (6 CT 1281.)

Prospective Juror V.B. was a 58-year-old White male with a career in biotechnology. (10 CT 2099.) In response to Question number #90, he checked "no" and explained, "Everyone has to be responsible for their actions." (10 CT 2114.) During voir dire, neither lawyer followed-up substantially with V.B. Counsel for appellant confirmed that V.B. felt that "an eye for an eye" was appropriate. Counsel also asked whether he had the ability to vote for life in prison for a double murder and V.B.

responded, "Yes, I do." When asked how, he replied, "by weighing the mitigating circumstances." What occurred next seems to be a miscommunication on counsel's part. It can be reasonably inferred that counsel sought to confront V.B. about his answer to Question number #90, but misspoke and referred to Question number #88 instead. V.B., who likely consulted the questionnaire, said "I answered 'no' to that. I answered 'no' because I didn't think the death penalty should be automatic."[4] (7 RT 1090.) Counsel then said, "Okay. I understand that. Thank you, sir." (7 RT 1091.) Later, the prosecutor asked V.B. whether he saw himself as someone who could choose either punishment, to which V.B. answered, "yes." (7 RT 1131.) Appellant challenged V.B. for cause on the grounds that he believed in an "eye for an eye." (7 RT 1141, 1145.) The court denied the request. (7 RT 1146.)

Appellant also complains again about Prospective Juror T.T., on a different basis than discussed in Argument I. In response to Question number #90, she checked "no" when asked if she would be willing to weigh and consider the defendant's childhood and upbringing as factors in the decision regarding penalty. She explained,

> "I think childhood upbringing has a lot to do with it but everyone has the choice to make positive changes in their life. A lot of people have horrible childhoods and become wonderful adults. Childhood upbringing should not be an excuse for bad choices in life." (25 CT 6243, 6245.)

On voir dire, counsel asked T.T. about her views on the death penalty. She responded,

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[4] Question number #88 did indeed ask whether the prospective juror would automatically vote for the death penalty in a case where the defendant has pled guilty to first degree murder, no matter what evidence was presented in the penalty phase. (10 CT 2091.)

> "I believe that with what we have so far, that I believe the death penalty would be it. I would have to see all of the evidence and be swayed that life in prison would be a better choice. So I'm not definite for the death penalty, but from what we know at this point, I would say the death penalty, but I could make a better decision after hearing everything."

When asked, she said she would listen to both sides and consider both sides in formulating a decision. (7 RT 1172.)

The prosecutor followed-up with T.T. He asked whether she would be willing to remain open to hearing both evidence in aggravation and mitigation before making up her mind. She responded, "Yes. Like I said, with what I know, I would say the death penalty, but I am willing to hear everything before I make a final decision on something like this." (7 RT 1212.) T.T. agreed that she would consider all the evidence before arriving at a decision. (7 RT 1212.)

Appellant moved to excuse T.T. for cause. (7 RT 1231.) Counsel argued that she raised her hand indicating that the defense had an uphill battle, leaned towards the death penalty based on what she had heard so far, and believed strongly in the death penalty. (7 RT 1232.) The court ruled, "[T.T] I am simply denying. I listened carefully. I looked at the questionnaire. I believe this juror is open to all options." (7 RT 1234.)

Appellant filed a motion for reconsideration of his for-cause challenges prior to the final random seating of the panel and the exercise of peremptory challenges. In appellant's motion for reconsideration, he noted that V.B. believed in the death penalty and the three strikes law which stemmed from the notion of an "eye for an eye if the evidence shows it." Appellant also asserted V.B. was unwilling to fairly assess mitigating evidence. (4 CT 937.) The defense argued that T.T. should have been excused because she had an implied bias towards law enforcement, believed that Blacks and Mexicans were more likely to be violent, and

could not fairly consider evidence in mitigation. (4 CT 937-938.) The court denied the motion. (8 RT 1253.)

Following the denial of that motion and other discussions, the court seated the potential jurors in the order of the random list previously created by the jury commissioner. (8 RT 1271.) Appellant exercised all 20 of his peremptory challenges, including two to remove prospective juror V.B. and T.T. (8 RT 1280.) As the court discussed the procedure for selecting alternates, appellant renewed his motion for additional peremptory challenges based upon the motion it filed earlier that morning. The court denied the motion. (8 RT 1281.)

B. Appellant's Claim Is Not Preserved on Appeal Because He Failed to Express Dissatisfaction of the Jury as Constituted

As discussed in Argument I, appellant must (1) use a peremptory challenge to remove the juror in question; (2) exhaust his peremptory challenges or justify the failure to do so; and (3) express dissatisfaction with the jury ultimately selected, in order to preserve a for-cause denial on appeal. (*People v. Souza* , *supra*, 54 Cal.4th at p. 130.) Appellant did not express dissatisfaction with the jury ultimately selected. The motion for reconsideration of the for-cause challenges was filed before the jury was chosen and any renewal of that motion is insufficient to meet this requirement. Because appellant did not express satisfaction with the jury as constituted, this issue should be deemed forfeited. (*People v. Mills*, *supra*, 48 Cal.4th at pp. 186-187.)

C. The Trial Court Did Not Abuse Its Discretion when It Denied Appellant's Motion to Remove V.B. and T.T. for Cause

As set forth previously in Argument I, a prospective juror may be excused for cause if his views would "prevent or substantially impair" the performance of his duties as a juror in accordance with his instructions and

oath. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) The trial court's decisions are reviewed deferentially, particularly when the juror gives conflicting, ambiguous, or equivocal answers. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 891; *People v. Stewart*, *supra*, 33 Cal.4th at p. 441.)

This Court's decision in *People v. Riggs* (2008) 44 Cal.4th 248 is instructive on this issue. In that case, the defendant argued that the trial court should have excused a seated juror because, among other things, the juror had indicated in her questionnaire that she did not "see why someone's past has anything to do with what they are charged with today or when they committed the crime." During voir dire, she initially stated that she would not consider the defendant's background as a factor for her decision since it was not pertinent to the crime and would give the evidence no weight at all. Nevertheless, the juror acknowledged that she could reject the death penalty in an appropriate case based on the evidence that was brought forth to show the defendant did not deserve the death penalty. (*Id.* at p. 286.)

This Court rejected the contention that the juror should have been excused based on her view of the merit of the defendant's background information as evidence in mitigation. (*People v. Riggs*, *supra*, 44 Cal.4th at p. 286.) The decision reasoned that the juror's statement was merely an explanation of her then-existing view of a type of evidence and should not be read literally, "but rather we interpret this comment in relation to her statement that she did not, at the time, see the relevance of such evidence." (*Id.* at p. 287.) The Court went on to find that when a

> "juror expresses a negative opinion about the persuasive value – in theory – of a certain class of mitigating evidence, [it] does not establish that the juror's performance of his or her duty will be substantially impaired."

The Court noted that the juror in question said she would weigh the aggravating and mitigating evidence in reaching her decision. Further,

> "[h]er statements concerning personal background evidence only meant that Juror A.M. – a layperson who had never before been involved in a capital trial – did not at the time see the relevance of such evidence in the determination of the appropriate sentence. The fact that this preexisting view might have made it more difficult for defendant to *convince* Juror A.M. of the relative strength of a mitigation case that included evidence of defendant's background does not prove she would automatically vote for the death penalty, or that her belief prevented or substantially impaired the performance of her duties as a juror to follow the court's instructions to weigh the evidence to be offered." (*Id.* at p. 287, emphasis in original.)

The decision in *Riggs* should be applied here. Both V.B. and T.T. were merely expressing their lay opinions in answering Question number #90. However, their answers during voir dire demonstrate that both prospective jurors were open to imposing either punishment and were willing to listen to all the evidence before arriving at a decision. Specifically, V.B. expressed that he had the ability to vote for life in prison where a double murder was involved by weighing the mitigating circumstances. (7 RT 1090.) He stated that he saw himself as someone who could choose either punishment. (7 RT 1131.) T.T. likewise indicated that she would have to see "all the evidence" before determining punishment and would "make a better decision after hearing everything." (7 RT 1172.) She repeated that sentiment when questioned by the prosecutor, stating she would remain open to hearing both evidence in aggravation and mitigation and was "willing to hear everything" before making a final decision. (7 RT 1212.)

It should also be considered that the court provided the prospective jurors with an abbreviated statement regarding the law that applied during a penalty trial after they completed the questionnaires. The court instructed the prospective jurors that they "must consider and weigh aggravating and mitigating circumstances, which will be shown during the evidentiary

portion of the trial." (7 RT 1067.) The court defined a mitigating circumstance as any "fact, condition or event that makes the death penalty less appropriate as a punishment, even though it does not legally justify or excuse the crime." (7 RT 1068.)

The court provided examples of such circumstances including "sympathy or compassion for the defendant or anything you consider a mitigating factor." (7 RT 1069.) Having been so instructed about their duty to consider both types of evidence, it is fair to infer that V.B. and T.T. better understood their roles as jurors and would not automatically discount any evidence in mitigation that was presented to them.

Consequently, this Court should defer to the trial court's decision to deny appellant's motion to excuse these two jurors for cause.

D. Even Assuming the Court Should Have Excused V.B. and/or T.T., Appellant Cannot Show the Rulings Violated His Right to a Fair and Impartial Jury

As discussed in Argument I, appellant bears the burden of demonstrating that the trial court's rulings affected his right to a fair and impartial jury to justify reversal. (*People v. Black*, *supra*, 58 Cal.4th at p. 920; *People v. Yeoman*, *supra*, 31 Cal.4th at p. 114. Neither of the complained-of jurors remained on the seated jury. Although appellant used two of his peremptory challenges to remove V.B. and T.T., he has not shown that an incompetent juror was forced upon him as a consequence. (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 487.) In other words, he must show that a juror who should have been removed for cause sits on the jury that ultimately decides the case. (*People v. Black* (2014) 58 Cal.4th 912, 920.) As noted earlier, appellant challenged none of the jurors for cause whom he complains of now. He may not claim that these jurors were incompetent or should have been removed for cause absent having made such a motion in the trial court. (*People v. Yeoman*, *supra*, 31 Cal.4th at p.

114.) Therefore, appellant has not shown that any error made in refusing to excuse prospective jurors V.B. and T.T. affected his right to a fair trial and his argument must be rejected.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PRECLUDED THE DEFENSE FROM ASKING HYPOTHETICAL QUESTIONS BASED ON SPECIFIC FACTS OF THE CASE ON VOIR DIRE

Appellant complains that the trial court improperly restricted his opportunity to voir dire prospective jurors when it did not permit him to explore whether jurors would consider a life sentence if they knew appellant had prior convictions for attempted murder of a peace officer and carjacking. (AOB 41-52.) Appellant is incorrect. The trial court did not abuse its discretion when it struck the proper balance of permitting the defense to identify the jurors whose views on appellant's history would prevent or substantially impair their performance as a juror while at the same time not allowing prospective jurors to prejudge the penalty based on a summary of the factors likely presented in the case. Even assuming error, appellant can show no prejudice because he was not unduly restricted and did not express dissatisfaction with the jury that was ultimately selected.

A. Facts Related to Appellant's Claim

Prior to voir dire, the court addressed the prosecutor's suggestion that the court go into some detail about the aggravating and mitigating factors. Initially, the court had intended to give an abbreviated summary of the death penalty instruction without any detail. The court considered adding some of the applicable specific factors, including the conviction of felonies, among others. (6 RT 864.) Counsel agreed with the court's analysis. (6 RT 864-865.)

The court provided the first and second panels with examples of aggravating and mitigating circumstances, including whether the defendant

had engaged in violent criminal activity other than the underlying conviction or whether he had been convicted of any other prior felony. (6 RT 881, 976.)

During voir dire of the first panel, counsel asked a prospective juror,

> "If the evidence shows that an individual executed two people at a liquor store on the floor by shooting each one of them in the back of the head one time, the evidence shows that an individual attacked and attempted to murder - -."

At that point the court interrupted and stated,

> "Mr. Chambers, we're not going to get into an assessment of aggravating and mitigating evidence. I'm not going to permit it. You can inquire about the fundamental facts of the case as already described by the court." (6 RT 892.)

Counsel then began to ask,

> "Ma'am, we have a situation where an individual has murdered twice, attempted to murder a deputy sheriff - -." The court then called for a sidebar conference. (6 RT 892.)

Counsel acknowledged that although the court had summarized facts, the defense needed to ascertain whether the convictions for attempted murder, possession of a shank in prison, and carjacking would prohibit the jurors from handing down a life sentence. (6 RT 893.) The court responded that voir dire was an inquiry in the abstract. In a normal case, neither party would be able to give a summary of the evidence that would be presented. Rather, voir dire was the opportunity to explore attitudes by using a bare bones summary of the facts of the case. Counsel countered that he wanted to explore attitudes about violent conduct that appellant had been previously convicted of. In doing so, counsel offered to omit that the attempted murder victim was a deputy sheriff. The court responded,

> "No. You're going to leave it all off...This is not the way *Witt* type of voir dire is conducted. These are not opportunities to figure out which jurors are going to side with you based upon the evidence you can summarize and which jurors are going to

be kind of agin [sic] you. This kind of inquiry is to ensure that we have people who are open to both penalties, not based upon the specific evidence, but based upon a general assessment of their thinking, their principles." (6 RT 894.)

Counsel objected, arguing that the inquiries were based upon determining whether the jurors were substantially impaired. He believed he had the right to ask in the abstract whether the combination of the underlying murders along with the other crimes would render jurors substantially impaired. The court reiterated its ruling, that the questioning could be done in the abstract and no hypotheticals would be permitted. In other words, the attorneys could not summarize their case and then take a poll. The aggravating and mitigating circumstances could be discussed in the abstracted but not specifically based on the evidence presented. (6 RT 895-896.)

Counsel responded,

"[w]hat I'm asking to be allowed to do is put in, in the abstract, the conviction of the two murders, the attempted murder, the conviction of the carjacking, the conviction of the shank in prison. These are all convictions that are going to come in that are facts that the court has already instructed the jurors on.

I understand the court's ruling that I'm not allowed to go there, but this is not a fact-specific exercise. This is a general exercise as to convictions in these areas. And based upon the court's direction, I won't go into them.

But my understanding is that since we have asked them in regards to premeditated murder, I can ask about the two convictions of premeditated murder."

The court assented to that. (6 RT 896-897.)

After a break the court reiterated,

"Hypothetical questions are not going to be permitted. If a juror expresses, and it seems to be a fairly clear expression, that you know, 'I can't do it,' I'm not going to allow hypotheticals to try to talk them out of that position. Same would go for someone

> who says, you know, 'I'm open to both sides. Even though I don't have a problem with the death penalty, I would consider the evidence.' I'm not going to allow hypotheticals then get them to make a commitment as to what type of case, what type of situation, as to whether they would vote for death or life in prison without possibility of parole. I'm citing to *People v. Mattson* 50 Cal.3d 826 at 846." (6 RT 907.)

During voir dire of the second panel, counsel asked a prospective juror who had a close law enforcement friend, "Would an attack on a law enforcement officer cause you to be biased against...my client?" The juror answered he would be strongly biased and it would probably affect his ability to be impartial. (6 RT 979-980.) Counsel asked another juror with law enforcement ties whether an attack on a law enforcement officer would bias his opinion. The juror said no, that everybody deserved a fair trial. (6 RT 980.) A third juror with law enforcement connections was asked whether the assault on a peace officer would affect his ability to be impartial in the case. The juror expressed that it depended on the evidence that was presented. Counsel started to hypothesize about the evidence when the court interrupted him. (6 RT 994.)

The following day, prior to voir dire of the third panel, the court revisited the issue. It observed that counsel seemed frustrated about its ruling. The court reiterated that neither side should be able to advise the jurors about what they were going to hear and then solicit an advisory opinion on the case. (7 RT 1056.) At that point, appellant renewed his request to ask the panel about the attempted murder on a law enforcement officer to see whether they could impose life under that circumstance. Appellant also sought to ask those with law enforcement ties if they could remain impartial with such evidence. (7 RT 1057.) He clarified that he was not intending to set forth specifics of the incident, but rather, he sought explore the feelings about appellant's guilty plea to premeditated attempted murder of a law enforcement officer while on duty. (7 RT 1058.) The

court again expressed concern that then the prosecution could ask specifics about mitigation evidence and open the door to advisory opinions regarding evidence that was going to be presented. The court stated, "I simply cannot allow that." (7 RT 1058.) The court told counsel, "Mr. Chambers, if you don't like this approach, take another approach. But my ruling is the same: no specifics." (7 RT 1059.)

For each of the remaining two panels, the court instructed the prospective jurors that one of the factors in aggravation included whether or not the defendant had engaged in violent criminal activity other than the crimes charged and whether or not the defendant has been convicted of any prior felony. (7 RT 1068, 1161.)

During voir dire of the third panel, the court inquired,

> "Ladies and gentlemen, in this case, there may be evidence, I'll call it, the possibility of aggravated evidence that relates to violence against civilians or even law enforcement personnel, and I've noted yesterday and some of you today have connections to law enforcement, friends or family members who are law enforcement officers.
>
> So, a general question would be, is there anyone who has law enforcement family members, law enforcement close friends, who feels, you know,
>
> 'if there is evidence of violence against civilians or violence against law enforcement officers, I don't believe I could fairly evaluate the evidence regarding law enforcement officers. I'm so connected that I know I would have an emotional reaction. I couldn't do it fairly. I couldn't weigh it fairly if it involved some type of violence against a law enforcement officer?' Anyone have that feeling? Okay. I see no hands." (7 RT 1072.)

At one point during voir dire in the third panel, counsel had an exchange with a prospective juror:

> "Q What about what the court indicated, that there might be – would you be upset if a law enforcement officer were the target of violence?

A	Law enforcement officers are targets of violence every day.

Q	Would that impact your decision-making process in deciding whether to send someone to life in prison or death?

A	No.

The Court: Mr. Chambers, again, you can inquire about bias, but please don't ask for an advisory opinion." (7 RT 1088-1089.)

During the prosecution's voir dire, appellant requested a side bar conference. At that time, counsel argued that the prosecutor was asking the jurors to prejudge the case and give a verdict based upon assumptions when the court had restricted the defense from doing so. (7 RT 1099-1100.) The court found that the questions asked by the prosecutor were appropriate as he merely asked jurors if, after listening to aggravating and mitigating evidence, they had an ability to return a verdict. The court distinguished the prosecutor's questioning from asking,

> "If you learn Mr. Rices robbed a bank, slashed the throat of a deputy sheriff, could you weigh that and consider that as an aggravating circumstances? That's a prejudgment. There is a distinction."

(7 RT 1100.)

After further discussion regarding the prosecutor's questioning the court stated,

> "But, Mr. Chambers, I want to make it clear that you can get to the bottom line with these people, but you just can't give them hints as to what they are going to be hearing about, other than this generic [sic] that I have come up with. If I open the door to you giving little tidbits, Mr. McAllister gets to give his tidbits...and then what we have is a jury panel that have all made up their minds, and then you get to say, 'I want all those people who would vote for death off,' and Mr. McAllister can say, 'Get rid of all the life without the possibility of parole.'

That's not the objective here. It's to see if these people truly can weigh both options." (7 RT 1101-1102.)

Prior to voir dire of the fourth panel, the court again informed the jurors that they might hear evidence of violence against civilians or law enforcement and asked if anyone would be affected by that. Four prospective jurors raised their hands. (7 RT 1165-1166.) During voir dire of that panel, counsel inquired about violence and law enforcement, asking whether that would affect the juror's ability to be fair. The juror responded that she had no concrete position on it. (7 RT 1180.) Counsel also inquired of another juror about his feelings about the use of force against a law enforcement officer. That juror responded that he would feel sentimental for the officer and might credit law enforcement more than the defense. (7 RT 1184-1185.) Upon being asked, another juror admitted it would be hard for her to be impartial because her husband was a sheriff and had been attacked before. (7 RT 1186.)

B. The Trial Court Did Not Abuse Its Discretion When It Prevented the Defense from Asking Jurors to Prejudge the Case

A prospective juror may be excluded from service on a capital case if the person's attitudes toward the death penalty would prevent or substantially impair his or her ability to follow the court's instructions and the juror's oath. (*Wainwright v. Witt*, *supra*, at p. 841].) Voir dire in a capital case seeks to determine prospective jurors' attitudes about capital punishment "only in the abstract, and whether, without knowing the specifics of the case, they have an open mind on penalty." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1120, quoting *People v. Clark* (1990) 50 Cal.3d 583, 597.) This Court has found on many occasions that a defendant has no right to ask specific questions that invite jurors to

prejudge the penalty based on a summary of aggravating and mitigating evidence. (E.g. *People v. Cash* (2002) 28 Cal.4th 703, 720-721.)

A balance must be struck during the death qualification procedure which must avoid two extremes. The voir dire must not be so abstract that it fails to identify the jurors whose views on the death penalty, or other topics, would prevent or substantially impair their performance as a juror. On the other hand, voir dire must not be so specific that it requires prospective jurors to prejudge the penalty based on a summary of the factors likely presented in the case. (*People v. Coffman* (2004) 34 Cal.4th 1, 47.) The trial court enjoys "considerable discretion" to contain voir dire within reasonable limits, which extends to how to strike the proper balance between abstraction and specificity. (*People v. Cash*, *supra*, 28 Cal.4th at pp. 721-722; *People v. Ramos* (1997) 15 Cal.4th 1133, 1158.)

Here, the trial court struck the proper balance. To begin with, it provided all four panels with examples of aggravating and mitigating circumstances that might apply, including the fact that appellant may have engaged in violent criminal activity and suffered prior felony convictions other than what occurred in this case. (6 RT 881, 976, 7 RT 1068, 1161.) Counsel had every opportunity to explore the jurors' attitudes or biases with respect to those issues.

The court only intervened when appellant began to ask jurors hypothetical questions. Counsel asked,

> "If the evidence shows that an individual executed two people at a liquor store on the floor by shooting each one of them in the back of the head one time, the evidence shows that an individual attacked and attempted to murder - -" and "Ma'am, we have a situation where an individual has murdered twice, attempted to murder a deputy sheriff - -." (6 RT 892.)

These questions represent an attempt to give a detailed account of the facts and seek a commitment from a juror as to how they would vote if

presented with certain facts. It is not error for a court to prevent counsel from proffering questions designed to commit the jurors to vote in a particular way based on the facts of the case. (*People v. Jenkins* (2000) 22 Cal.4th 900, 990-991.) While it is permissible to ask prospective jurors whether they are able to consider both penalties when certain circumstances are present, it is impermissible to ask them to prejudge the penalty phase. (*People v. Debose* (2014) 59 Cal.4th 177, 194-195.)

Once the court made its ruling, the defense was by no means precluded from making a reasonable inquiry into the fitness of the prospective jurors. The defense specifically asked several jurors in a proper manner if they would be biased against appellant should they learn of an attack against a law enforcement officer. (6 RT 979-980, 994.) Also on the second day of voir dire, counsel inquired about potential bias stemming from violence against law enforcement officers. (7 RT 1088-1089, 1180, 1184-1186.)

It must also be considered that while the defense cannot be categorically denied the opportunity to inform prospective jurors of case-specific factors which might cause them to vote one way or another, such an opportunity arises

> "where the trial court instructs all prospective jurors on case-specific factors before any death qualification begins. It is logical to assume that when prospective jurors are thereafter asked (orally or in writing) whether they would automatically vote for life or death regardless of the aggravating or mitigating circumstances, they have answered the question with those case-specific factors in mind, and are aware of the factual context in which the exchange occurs."

(*People v. Carasi* (2008) 44 Cal.4th 1263, 1287.)

Here, the trial court informed all four panels of the venire that they might hear evidence that appellant had prior felony convictions and had engaged in violent criminal activity other than the underlying case. (6 RT

881, 976, 7 RT 1068, 1161.) During the voir dire of two of the four panels, the court specifically inquired if any of the prospective jurors would have a difficult time fairly considering a case that involved acts of violence against civilians or law enforcement officers. (7 RT 1072, 1165.)

Under the circumstances, it cannot be said that the trial court abused its discretion when it did not permit counsel to ask questions that would require jurors to commit to a certain punishment if confronted by certain facts. The court struck the proper balance by allowing appellant to inquire about jurors' potential biases if confronted with an act of violence perpetrated against law enforcement. Appellant had ample opportunity to question jurors about whether certain aggravating circumstances would render them unable to fairly consider both penalties in accordance with their oath as a juror. Moreover, the court's general admonition to the panel as a whole, and then its later inclusion of the specific question relating to acts of violence to the final two groups, likewise gave appellant ample opportunity to gather information on potential bias.

By way of contrast, the decision in *People v. Cash*, *supra*, 28 Cal.4th at p. 703, illustrates the absence of error here. In that case, the prosecution presented evidence in the penalty phase that the defendant previously killed his elderly grandparents when he was a juvenile. (*Id.* at pp. 714.) On appeal, Cash claimed the court erred by refusing to allow defense counsel to ask prospective jurors whether they would automatically vote for death if the defendant had previously committed another murder. During jury selection, the trial court had imposed a blanket rule restricting voir dire solely to the facts appearing on the face of the charging document. (*Id.* at p. 719.) This Court reversed, concluding that the court erred when it refused to permit voir dire on the prior murder. The Court rested its decision on two bases.

First, a trial court cannot absolutely bar mention of any fact or circumstance solely because it is not expressly pleaded in the charging document. (*Id.* at p. 722.) Second, a prior murder was

> "a general fact or circumstance that ... could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances...."

(*Id.* at p. 721.)

The trial court's ruling here is in stark contrast with what occurred in *Cash*. In this case, the trial court did not categorically bar questions on matters other than those appearing on the face of the charging document. To the contrary, the court permitted counsel to inquire about bias or attitude towards appellant's prior acts of violence. Indeed, the trial court itself inquired on these matters on the second day of voir dire. The court only sought to limit counsel's attempt to present jurors with hypothetical situations where they were asked to commit to one punishment or the other based on specific facts. In sum, the trial court did not abuse it's discretion by not permitting appellant to obtain a commitment from prospective jurors about which punishment they would chose if confronted with certain facts.

C. Even Assuming Error, Appellant Has Not Established Prejudice to Justify Reversal

Even if the court abused its discretion during part, or even all of voir dire by limiting the questioning on some of the aggravating circumstances, there was no prejudice. In *People v. Bittaker* (1989) 48 Cal.3d 1046, 1086, this Court found that it should "limit reversals to those cases in which the erroneous ruling affected defendant's right to a fair and impartial jury." In order to assess prejudice, the Court will look to how restrictive the trial court's ruling was. (*People v. Carpenter* (1997) 15 Cal.4th 312, 354.) Here, the court's ruling was not unduly restrictive as it permitted appellant to ask about the aggravating factors, but simply in a more generalized

fashion aimed towards assessing bias. The court's questioning on the second day of voir dire also reduced any potential prejudice. This Court may also consider whether the defendant claimed any juror was incompetent or not partial when the jury was finally selected. (*People v. Bittaker*, *supra*, 48 Cal.3d at p. 1087.) As discussed in Argument I, appellant sought reconsideration of some of the court's for-cause rulings before voir dire commenced. Once the jury was seated, he did not express dissatisfaction with the jury as sworn. Under these circumstances, any error was not prejudicial.

IV. The Trial Court Properly Excused Prospective Juror Wadhams Because Her Answers and Demeanor Demonstrated That She Was Substantially Impaired

Appellant argues that reversal is required because the trial court improperly excused a prospective juror for cause who indicated that she could impose the death penalty and thus, she not was substantially impaired as required. (AOB 53-63.) A fair reading of the record, in addition to the trial court's observations regarding the prospective juror's demeanor, supports the trial court's ruling, which is entitled to deference from this Court. [5]

A. Facts Relating to Ms. Wadham's Dismissal

At the time of trial prospective juror Wadham was a 24-year-old woman who was a special education assistant. (26 CT 6470-6471.) When asked about her general feelings about the death penalty, she wrote, "I am somewhat biased against the death penalty. I think it's harsh & severe. No

[5] In the event that the Court should find that the court's dismissal of Ms. Wadhams was erroneous, any error is not subject to a harmless error analysis and compels reversal. (*Gray v. Mississippi* (1987) 481 U.S. 648, 659-667 [107 S.Ct. 2045; 95 L.Ed.2d 622]; *People v. Riccardi* (2012) 54 Cal.4th 758, 778.)

going back." She could point to no specific experience that lead her to that belief, nor had her views on the death penalty changed over time. Although instructed to skip the question if she opposed the death penalty, she answered "yes" that if she favored the death penalty she could see herself as someone who could personally vote to impose it in the appropriate case. She felt that the death penalty was imposed too often, although did not know how often it was imposed. (26 CT 6484.) She would not automatically impose either punishment where the defendant pled guilty to first degree murder. (26 CT 6484-6485.) She expressed willingness to consider the defendant's childhood and upbringing because, "I think childhood experiences & circumstances are very important to growth, maturity & life as an adult." The same held true of considering mental health issues. She believed it would be difficult to remain impartial after hearing victim impact testimony. (26 CT 6485.)

During voir dire, the defense broadly asked whether it would have an uphill battle because the jurors did not see themselves voting for anything but death. (7 RT 1075.) It would appear that Ms. Wadhams raised her hand. (7 RT 1079.) She explained,

> "I remember this robbery happening very well. I kind of live near the community, and I remember seeing funeral cars. And I just have a very unsettling feeling in my stomach. I do not feel I could make a fair assumption....The girl that was shot shares the same first name as me, and we're about the same age, and it's just – I do not want the stress of having to make a verdict on her death." (7 RT 1079.)

She said it would be a difficult decision to make. (7 RT 1080.) When questioned by the prosecutor, Ms. Wadhams stated that she could legitimately consider the death penalty as an option in this case. (7 RT 1133.) When asked if she could render a verdict of death at the end of the trial, she thought it would depend on the evidence, which she was open to.

(7 RT 1133.) Making such a decision would be stressful for her because rendering a verdict would be a heavy burden. (7 RT 1134)

The following exchange then took place,

> "Q But you think you are up to it? This is the whole thing. I see the hesitation. I guess the point I am trying to make is, some people can serve on a case like this and some people can't.
>
> A I think I am willing to. I just don't know subconsciously if I have other beliefs.
>
> Q Well, that's important.
>
> A Yeah.
>
> Q That's important because that - - that's what I meant by this is reality. We are really here. Because if you were, for example - -
>
> Mr. Chambers: Your Honor, I am going to renew my objection at this point.
>
> The Court: I'll allow one more question, hopefully for some clarification, and that would be it.
>
> By Mr. McAllister:
>
> Q If you were, for example, to be sitting there, saying to yourself, 'I just - - you know I just don't think I could take the stress of even considering imposing the death penalty,' then the time to tell us, I guess, is now.
>
> A I do believe it would be stressful on me, and I don't know if I can make a fair assumption, but I would try." (7 RT 1134-1135.)

Prior to challenges for cause, the court noted it had planned to call Ms. Wadhams back to discuss her travel issues, but felt prepared to rule on her. (7 RT 1140.) The prosecutor moved to excuse Ms. Wadhams for cause. (7 RT 1142.) The defense argued that the prosecutor attempted to rehabilitate her and get her to believe that she could not handle being on the jury. Counsel believed she "toughed it out" and directed the court's

attention to her questionnaire where she wrote she was able to impose the death penalty. (7 RT 1147-1148.) The court excused Ms. Wadhams, stating,

> "[i]n listening to her, watching her body language, it does appear to me that she likewise would be substantially impaired in her ability to return a verdict of death." (7 RT 1150.)

B. The Court Should Defer to the Trial Court's Finding That Prospective Juror Wadhams Was Substantially Impaired

Although,

> "a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause,"
>
> "the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes."

(*Uttecht v. Brown* (2007) 551 U.S. 1, 9 [127 S.Ct. 2218, 167 L.Ed.2d 1014.) To account for the State's interest, a juror who is substantially impaired in his or her ability to impose the death penalty may be excused for cause. (*Ibid*; *Wainwright v. Witt*, *supra*, 469 U.S. at p. 841] [inquiry is whether the prospective juror's views on the death penalty "prevent or substantially impair the performance" of the juror's duties in accordance with the court's instructions and his oath].)

The *Witt* standard does not require that a juror's bias be proven with "unmistakable clarity" because such a bias may not always be "unmistakably clear" upon questioning. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) Indeed, the High Court has acknowledged that prospective jurors "may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." (*Id.* at p. 425.) This is why special deference is afforded to the trial courts when assessing a juror's statements that are not entirely

clear. The trial court is in the best position to determine a potential juror's true state of mind because it has observed firsthand the prospective juror's demeanor and responses. (*People v. Clark* (2011) 52 Cal.4th 856, 895.) In other words

> "[d]eference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors."

(*Uttecht v. Brown, supra*, 551 U.S. at p. 9.)

It has been recognized that even when the prospective juror

> "has not expressed his or her views with absolute clarity, the court may be left with the definite impression that the person cannot impartially apply the law. Thus where, after reasonable examination, the prospective juror has given conflicting or ambiguous answers, and the trial court has had the opportunity to observe the juror's demeanor, we must accept as binding the court's determination of the juror's true state of mind."

(*People v. Tate* (2010) 49 Cal.4th 635, 666.)

This Court should defer to the trial court's determination in this case. Although Ms. Wadhams questionnaire indicated she could impose the death penalty, she was somewhat biased against it. (26 CT 6484.) Having familiarity with the case, and even having seen funeral cars related to it, left Ms. Wadhams with "a very unsettling feeling in my stomach" and stress of having to render a verdict involving the death of the murder of a girl her same age and even with the same name. She stated that she did not want that stress. She also said she did not feel she could make a "fair assumption." (7 RT 1080.) When questioned by the prosecutor, the prosecutor noticed Ms. Wadhams' hesitancy in stating that she could impose the death penalty. She explained that she was willing to serve but "I just don't know subconsciously if I have other beliefs." (7 RT 1134) Again, when asked if she could handle the stress of imposing the death

penalty she answered, "I do believe it would be stressful on me, and I don't know if I can make a fair assumption, but I would try." (7 RT 1134-1135.) Evidently, it did not appear to the trial court that Ms. Wadhams was a close call because he declined to hear any further issues she had regarding hardship. The court's comments echoed the prosecutor's observation of Ms. Wadham's hesitancy. The court stated,

> "[i]n listening to her, watching her body language, it does appear to me that she likewise would be substantially impaired in her ability to return a verdict of death." (7 RT 1150.)

Under these circumstances, this Court should be bound by the trial court's ruling. Ms. Wadhams' verbal responses reflected severe conflict and stress. Apparently, her body language and tone also conveyed her internal conflict. The record is simply not able to reflect whether Ms. Wadhams paused before answering, struggled to find the words to express her opinions, had difficulty maintaining eye contact or any other telltale signs that she would unduly struggle to be a fair and impartial juror. It would appear that both the prosecutor and the trial court picked up on these nonverbal cues, which ultimately justifies the trial court's ruling. Because the trial court who "observes and speaks with a prospective juror ... gleans valuable information that simply does not appear on" the cold record, its decision should be binding on this Court. (*People v. Souza*, *supra*, 54 Cal.4th at p. 123; *People v. Stewart*, *supra*, 33 Cal.4th at p. 425.)

In the alternative, should this Court find that substantial evidence did not support the court's finding, the Court could reasonably find that Ms. Wadhams was substantially impaired to render *any* verdict in this case due the emotional response she felt about the victim and her inherent opposition to the death penalty. "A juror whose personal views *on any topic* render him or her unable to follow jury instructions or to fulfill the juror's oath is unqualified." (*People v. Clark*, *supra*, 52 Cal.4th at p. 901, emphasis

added.) In light of Ms. Wadhams' pervasive misgivings about making "fair assumptions" and concerns about her "subconscious" beliefs, in addition to the trial court's observations, there was ample basis for the trial court to grant the prosecutor's motion on the grounds that Ms. Wadhams simply was unable to perform her duties as a juror.

Although trial court's ruling is amply supported, appellant nevertheless relies substantially on *Adams v. Texas* (1980) 448 U.S 38 [100 S.Ct. 2521, 65 L.Ed.2d 581]) to support his claim that the juror here was improperly excluded. (AOB 59-62.) However, that case does nothing to compel reversal here as it was decided on a very narrow issue not applicable to this case. In *Adams*, the High Court addressed a *Witherspoon*[6] claim in the context of Texas' capital-sentencing system, under which jurors did not directly impose the death penalty, but instead, answered three specific questions.[7] If all three questions were answered in the affirmative, the court would impose the death penalty, whereas if one or more of the three were answered in the negative, the court would impose a life sentence. (*Id.* at p. 40.) At that time, statutory authority excluded a prospective juror who was unwilling or unable to take an oath that the

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[6] It should be noted that *Adams* was decided before the Court clarified the standard to be used in dismissing jurors in capital cases in *Witt*. *Adams* simply addressed the decision in *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522 [88 S.Ct. 1770, 20 L.Ed.2d 776], which generally held that jurors could not be excluded simply because they voiced general objections to the death penalty or expressed religious or moral reservations to it.

[7] The three questions were: (1) whether the defendant's conduct causing the death at issue was deliberate, (2) whether the defendant's conduct in the future would constitute a continuing threat to society, and (3) whether his conduct in killing the victim was unreasonable in response to the victim's provocation, if any. (*Adams v. Texas*, *supra*, at pp. 40-41.)

mandatory penalties of death or life in prison would not affect their deliberations on any issue of fact. (*Id.* at p. 42.)

The Court concluded that this oath was applied to exclude prospective jurors on grounds impermissible under *Witherspoon* because the Texas law permitted exclusion on grounds broader than what *Witherspoon* permitted. (*Adams v. Texas, supra,* 448 U.S. at p. 49.) The focus of the inquiry under the Texas statute did not ascertain whether potential jurors could and would follow their instructions and answer the three penalty questions in the affirmative if they honestly believed the evidence warranted. Rather, the inquiry became whether the fact that the imposition of the death penalty would follow automatically from affirmative answers to the questions would have any effect at all on the jurors' performance of their duties. The Court found that Texas' system resulted in the exclusion of jurors who expressed that they could be affected by the responsibility and seriousness of the task at hand. (*Ibid.*) In other words,

> "[N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths..."

(*Id.* at p. 50.)

Nevertheless, the Court reaffirmed the notion that a State may "bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths." (*Ibid.*)

With little discussion, the Court found that several jurors were improperly excluded, some of which, appellant attempts to compare to the dismissal of Ms. Wadhams. The Court characterized the dismissals as improper because the jurors either meant that the potentially lethal consequences of their decision would "invest their deliberations with greater seriousness and gravity or would involve them emotionally" or "because they were unable to positively state whether or not their

deliberations would in any way be 'affected.'" (*Adams v. Texas, supra*, 448 U.S at pp. 49-50, fns. 7, 8.) Not only was there no mention of any findings on the juror's demeanor in those instances, it is plain in this case that Ms. Wadhams was not excused merely because she took the matter seriously in light of the punishment or might be affected during deliberations. To the contrary, in addition to her demeanor, she repeatedly expressed concern whether she could make fair assumptions and put aside her subconscious leanings. Moreover, the inquiry in this case was aimed at the proper focus, i.e., *Witt/Witherspoon*, and not unduly broad as the statute at issue in *Adams*. Consequently, *Adams* is of no assistance to appellant in this case.

In sum, based on Ms. Wadhams answers and the court's observations of her demeanor, this Court should defer to its ruling and reject appellant's argument.

V. APPELLANT'S RIGHT TO AN IMPARTIAL JURY TRIAL IS NOT VIOLATED BY PERMITTING THE COURT TO EXCLUDE JURORS WHO ARE UNABLE TO FOLLOW THE LAW

Appellant challenges the "substantial impairment" standard used to disqualify jurors in capital cases because it is inconsistent with the Framers' intent, and therefore violates his Sixth Amendment right to jury trial.[8] Without any authority on point, appellant asserts his is entitled to reversal of the penalty phase because the incorrect standard was used. (AOB 64-83.) To begin with, appellant has forfeited this argument by failing to raise it below. Moreover, no reversal or reconsideration of this issue is necessary, as appellant's right to an impartial jury does not encompass

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[8] As set forth in previous arguments, a prospective juror may be excluded for cause because of his or her views on capital punishment if the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainright v. Witt, supra*, 469 U.S. at p. 424.)

permitting jurors to disregard the law as provided by the judge and merely follow their conscience.

Appellant's claim that the trial court utilized an unconstitutional standard in dismissing jurors for cause is forfeited because he did not raise it below. (See *People v. Mendoza* (2016) 62 Cal.4th 856, 913, citing *People v. Tully* (2012) 54 Cal.4th 952, 1066; *People v. Howard* (2010) 51 Cal.4th 15, 26; *People v. Jennings* (2010) 50 Cal.4th 616, 687-688; and *People v. Gurule* (2002) 28 Cal.4th 557, 597.)

Even if the Court considers the claim on the merits, appellant's claim has no merit. Appellant discusses at length a shift in Sixth Amendment jurisprudence in different contexts over the past 15 years towards assessing the Framer's intent as opposed to the balance of competing interests. (AOB 67-75.) He then extrapolates that he has a constitutional right to a capital determination by jurors who would refuse to follow the law as a matter of conscience. He is wrong.

Under this theory, appellant elevates jury nullification to a constitutional right. The Sixth Amendment, however, provides for "an impartial jury"—not a lawless one. (U.S. Const., 6th Amend.) Although in a slightly different context, and prior to the time frame upon which appellant focuses, the High Court has implicitly rejected appellant's argument. In *Lockhart v. McCree* (1986) 476 U.S. 162, 165 [106 S.Ct. 1758, 90 L.Ed.2d 137], the Court considered whether a defendant's constitutional rights were violated when a jury is death-qualified prior to the penalty phase. It found that death qualification of a jury does not violate a defendant's right to an impartial jury, stating,

> "We have consistently rejected this view of jury impartiality, including as recently as last Term when we squarely held that an impartial jury consists of nothing more than 'jurors who will conscientiously apply the law and find the facts.'"

(*Lockhart v. McCree*, *supra*, 476 U.S. at p. 178, quoting *Wainwright v. Witt*, *supra*, 469 U.S. at 423.)

There is simply nothing that has occurred subsequent to that decision in the context of Sixth Amendment jurisprudence which would call into question that very fundamental principle. Indeed, as this Court has pointed out,

> "Disqualified jurors are properly excused for cause, not on the basis of their personal, moral beliefs regarding the death penalty, but because of their inability to 'temporarily set aside their own beliefs in deference to the rule of law.'"

(*People v. Taylor* (2010) 48 Cal.4th 574, 604.) Simply put, there is no Sixth Amendment right to trial by jurors who would refuse to follow the law. (*People v. Williams* (2001) 25 Cal.4th 441, 449-463 [rejecting jury nullification as Sixth Amendment right and reviewing the "deep roots" of authority supporting dismissal for cause of jurors unwilling to follow instruction].) The current well-established system strikes a balance between properly excusing a juror who expresses an inability to serve as a juror in a capital case because he or she could not follow the law and jurors who cannot be excused for cause merely because he or she has complicated ideas regarding the death penalty. (*People v. Pearson* (2012) 53 Cal.4th 306, 331.)

Appellant's reliance on secondary sources likewise does not call into question the *Witt*/*Witherspoon* standard for dismissal or the longstanding authority finding unwillingness to follow instruction as cause for dismissal. (See *People v. Williams* (2001) 25 Cal.4th 441, 449-463.) Also, his reliance on *Unites States v. Burr* (1807) 8 U.S. 455, 25 F.Cas. 49, 50, compels no different result as that case addresses the province of the jury to determine factual questions distinct from the province of the judiciary to determine issues of law. (*Sparf v. U.S.* (1895) 156 U.S. 51, 64-67 [15 S.Ct. 273, 39 L.Ed. 343].)

In conclusion, appellant's novel theory that the Constitution's Framers intended to establish a legal system that permitted jurors to disregard the rule of law is meritless. His claim that dismissal for cause under the *Witt/Witherspoon* rule is inconsistent with the Sixth Amendment right to an impartial jury must be rejected.

VI. The Trial Court Properly Denied Appellant's Motion for a Change of Venue Because There Was No Reasonable Likelihood That He Could Not Receive a Fair Trial in San Diego County

Appellant contends that his right to a fair and impartial jury was violated when the trial court denied his request for a change of venue. (AOB 84-103.) Appellant has failed to meet his burden to show there was a reasonable likelihood that he could not obtain a fair trial in San Diego County as there was nothing remarkable about the publicity surrounding this case, particularly in light of the size of the county. Moreover, appellant has not established any prejudice because he cannot show that he was deprived of a fair trial as a result of the case being tried in San Diego County.

A. Facts Related to Appellant's Motion

Appellant filed a "Motion for Change of Venue or in the Alternative Transfer the Trial to Another Judicial District Within the County." (2 CT 183, 192-445.) The People filed an opposition. (3 CT 559-571.) The court heard the motion on November 17, 2008, and prior to argument, issued a tentative opinion denying the motion. The court stated that it relied primarily on the following factors: 1. The population base of East County San Diego is large and diverse; 2. Although there was extensive pretrial media coverage, it was not unusual for the type of case filed nor was the press coverage unduly inflammatory; and 3. The public opinion survey

presented by the defense indicated that 70-75% of prospective jurors had no firm opinions on the case and could try the case impartially. (4 RT 605.)

During argument, counsel represented that both the defense and prosecution sought to draw prospective jurors from the entire county. (4 RT 621.) The defense argument largely focused on the media, that is, at the preliminary hearing "they were elbow to elbow with cameras in the courtroom" and it was broadcast on all the news stations, either as the lead story or close to it. In the event that the court denied the motion, appellant requested that it be denied without prejudice with leave to renew. The defense reasoned that once the jury questionnaires were returned, it would become evident that the case should be transferred outside San Diego. He also noted that the news coverage had been "really slanted towards the victims" and referred to the killing as an "execution style slaying." (4 RT 622, 623-624.) Counsel for Miller focused on the Iraqi and Chaldean communities' interest in this case in light of the victims' backgrounds. He noted that those communities had a large presence in the East County. Counsel for Miller echoed appellant's request that the pool be drawn from a county-wide list. (4 RT 623.)

The court inquired whether the analysis was changed by the fact that there would be no guilt phase. It wondered if the dynamic would be different because the more important inquiry would revolve around the jurors' attitudes towards the death penalty, whereas the case specific facts were not as important and the news coverage not as influential. The circumstances permitted the parties to speak more candidly about the facts of the case in voir dire. Counsel felt that the plea added to the reasonable likelihood of bias and that the plea did nothing to change the impact on the Chaldean community. (4 RT 624-626.)

The prosecution pointed out that the polling numbers were moot because people were asked whether they thought that appellant was guilty

of the crime. Because appellant pled guilty, the polling data was no longer relevant. The prosecution also argued that the pretrial publicity should not be viewed in a vacuum, but in light of the size of the community. San Diego County was the third largest county in the state so the publicity did not present the same problem as it would in a smaller community. The prosecution relied on two cases, *People v. Harris* (1981) 28 Cal.3d 935 and *Odle v. Superior* Court (1983) 32 Cal.3d 932. The prosecutor argued that the Court in *Harris* found venue change was unnecessary in a capital murder case in San Diego County in spite of pretrial publicity because the community was large. *Odle* discussed the delay between the commission of the crimes and trial, which in this case was about three years. The prosecutor also noted that there was nothing so inflammatory about the press coverage that would render the jury pool unfair. The fact that the crime was described as an execution style shooting was the only way the media could describe a victim being shot in the back to the head. Assuming the court drew from the entire county, there was little risk of getting a disproportionate number of people from the Chaldean community. Finally, the prosecutor pointed out there was no constitutional right to have a trial in any particular judicial district. (4 RT 626-629.)

The court then indicated it had done some research into the population of the East County of San Diego and estimated it was about a quarter of a million people and that the Chaldean population was in the range of 5,000 people. Defense counsel responded that East County San Diego is comprised of 17 percent of the county's population. But in his mind, the issue would be resolved if the pool could be drawn from the entire county. (4 RT 629, 633.) The prosecutor believed that the court's estimation of the East County population was low, perhaps even double what the court estimated, because the area extended beyond the largest three communities. (4 RT 634.)

The court addressed the difficulty with a countywide draw. It had consulted with the jury commissioner, who pointed out the logistical issues involved. Because San Diego County had a policy that permitted summoned jurors to report to any court house on the date summoned, the commissioner was unsure how that rule could be changed for a special draw. In other words, for example, if a summons was issued to a resident in North County San Diego to appear in East County, some might refuse to appear in light of the rule. In light of the policy, the court believed that they would get people who did not live in East County even without a special draw. (4 RT 630-631.)

The court later made its findings and denied the motion. (4 RT 642-647.) The court found that appellant killed two people during an armed robbery, so the crimes were grave and extremely serious. However, the court found that the crimes were not sensational in nature, as they did not involve serial killings, sexual assaults, or children. (4 RT 642.) The court also addressed the nature and extent of the pretrial news coverage. It acknowledged that the case had received extensive coverage, but it was not sensational or inflammatory. (4 RT 642.) It noted there had not been a "drum beat" of continued publicity. While there had been extensive coverage surrounding court appearances, there were also periods of time when there was no mention of the case and the coverage itself was fairly straightforward. The court also pointed out that the crimes provoked a large level of grief from the close-knit Chaldean community, but again, the coverage simply reported what happened and was straightforward, not sensational or calculated to inflame additional reaction. (4 RT 643.)

The court also took into account the results of the public opinion survey submitted by the defense. Although there was a greater degree of recognition of the crimes within the East County, it did not support any pervasive bias against appellant. The data revealed that three-quarters of

those who might be summoned from the East County did not have firm attitudes about the case. (4 RT 643.)

The court considered the size of the community, which after hearing argument, it believed to be approximately half a million people. In addition to the size of population to be drawn from, it also took into account the fact that potential jurors summoned from other parts of the counties might choose the East County as the location where they serve. (4 RT 644.)

The status of the defendant did not alter the analysis, as appellant had no special prominence or notoriety prior to the commission of the crimes. The pretrial publicity did not have the effect of creating an image that appellant was a particularly loathsome or threatening person. Rather, the publicity was typical of what might be expected in a case that alleged a double murder. (4 RT 644.)

As far as the status of the victims in the community, their youth and Chaldean heritage triggered an extraordinary degree or sympathy and grief within the Chaldean community, which was covered by the media. Although the Chaldean community was a significant part of the East County society and culture, it likely did not exceed five percent of the population of that part of the county and could not be considered sizeable. The victims only became prominent as a result of the crimes and the subsequent coverage, but were not highly visible before. (4 RT 645.)

Although it was not a significant factor in the court's decision, it did consider that the issue of guilt had been resolved by appellant's plea. It found that opinions of guilt are usually most vulnerable to pretrial publicity. In dealing with penalty phase issues, most prospective jurors' attitudes would likely be shaped before being exposed to any news coverage regarding the crimes. Based on that, and the other factors, the court found that appellant did not meet his burden to show that there was a reasonable

likelihood that a fair and impartial trial could not be conducted in East County San Diego. (4 RT 645-646.)

The court also denied, without prejudice, the defense request to move the case to North County San Diego, relying primarily on the fact that there was a large population of approximately one-half million in East County and there would also be individuals who come from other districts who might appear on the jury panel. (4 RT 646.) It reiterated the same reasons for refusing to change venue, again finding that the publicity was "somewhat standard for this type of case" and not "unduly inflammatory." (4 RT 647.)

Appellant renewed the motion during voir dire. He argued that 56% of those who completed the questionnaires had contact with or heard of the murders, thus tainting the jury pool. (8 RT 1258.) The court denied the motion. It reviewed Question number #79 in the questionnaire, which asked if there was any reason why a juror could not be fair in this case based upon what he or she had read or heard. In the court's recollection, there were but a handful of people who said "yes," and recalled that the answer was almost uniformly "no." The court did not feel the pool of prospective jurors was tainted by publicity in any fashion. Moreover, most of them vaguely remembered something, but it had been over three years. (8 RT 1259.)

B. General Legal Principles Related to Change of Venue Motions

A defendant's motion for a change of venue must be granted when "there is a reasonable likelihood that a fair and impartial trial cannot be had in the county" where the charges were filed. (Pen. Code, § 1033, subd. (a).) A "reasonable likelihood" in this context has been found to be less than "more probable than not," but more than something "merely possible." (*People v. Proctor* (1992) 4 Cal.4th 499, 523.) The burden rests on the

defendant. (*People v. Harris* (2013) 57 Cal.4th 804, 822.) When faced with a motion for a change of venue, the trial court will consider,

> "(1) the nature and gravity of the offense; (2) the nature and extent of the media coverage; (3) the size of the community; (4) the community status of the defendant; and (5) the prominence of the victim."

(*People v. Famalaro* (2011) 52 Cal.4th 1, 21; *People v. Proctor*, *supra*, 4 Cal.4th at p. 523.)

On appeal, appellant retains the burden to show both that the trial court erred and prejudice ensued. To do so, appellant must prove that at the time of the motion it was reasonably likely that a fair trial could not be had in the county and it was reasonably likely that a fair trial was not had. (*People v. Harris*, *supra*, 57 Cal.4th at p. 822.) In assessing the motion, the appellate court will defer to the trial court's determination of facts if supported by substantial evidence, but will independently assess the court's ultimate determination if there was a reasonable likelihood of a fair trial. (*Ibid.*)

C. Appellant Did Not Meet His Burden to Show There Was a Reasonable Likelihood That a Fair and Impartial Trial Could Not Be Held in East County

Here, the trial court properly considered all the factors to ascertain whether appellant could receive a fair trial and correctly found that he could. First, the court considered the seriousness of the charged offenses. It must be considered that some level of sensationalism is inherent in any capital murder case and does not alone necessitate a change of venue. (*People v. Harris*, *supra*, 57 Cal.4th at p. 825, quoting *People v. Adcox* (1988) 47 Cal.3d 207, 231.) Because all capital offenses involve serious charges, this factor is not dispositive. (*People v. Hart* (1999) 20 Cal.4th 546, 598.) This Court should also consider the trial court's point that although serious, the case did not involve sex crimes, crimes against

children, or serial killings. Thus, the seriousness of the charged offenses does not alone, or in combination with other factors, justify a change in venue in this case.

The second factor, the nature and extent of pretrial publicity, was the foundation for appellant's motion below. Heavy media coverage may weigh in favor of a change of venue, but does not necessarily compel it. (*People v. Harris*, *supra*, 57 Cal.4th at p. 825.) When considering pretrial publicity, a reviewing court should place "primary reliance" on the judgment of the trial court in light of its familiarity with the locale where the publicity is said to have had its effect and its "own perception of the depth and extent of the news stories that might influence a juror." (*People v. Famalaro*, *supra*, 52 Cal.4th at p. 24.) The trial court's findings that the coverage was straightforward should be relied upon in rejecting appellant's argument.

Although pre-trial polling revealed there was substantial familiarity with the case, particularly out of the East County area (70%), this Court has routinely declined to find a change of venue was necessary in cases where the recognition was even higher than what was seen here. (See e.g. *People v. Ramirez* (2006) 39 Cal.4th 398, 433 [94 percent recognition]; *People v. Roundtree* (2013) 56 Cal.4th 823, 836 [81 percent recognition]; *People v. Leonard* (2007) 40 Cal.4th 1370, 1396 [85 percent case recognition].)

Also of import, the bulk of the publicity was remote and any effects were attenuated by the passage of time. (*People v. Jennings* (1991) 53 Cal.3d 334, 361; *Odle v. Superior Court*, *supra*, 32 Cal.3d at p. 943.) In his motion below, appellant cited to 27 print articles and 67 pieces of news footage as evidence of pervasive coverage. (2 CT 193.) Of those 27 articles, thirteen of them were published in March of 2006. (2 CT 218-248.) Seven were from 2007. (2 CT 249-257.) The jury was not empaneled until May of 2009, years after the bulk of the coverage had

largely subsided. (5 CT 1024.) Similarly, of the 67 pieces of news footage set forth by appellant, 41 of them aired in 2006, with the remainder being aired in 2007. (2 CT 261-262.) This mitigates the effects of any inadmissible evidence that was contained in the media reports. Given the long period of time that passed between the initial reports of the crime and trial, it cannot be said that the trial venue was "saturated with hostile publicity" as appellant claims. (AOB 92.) As the trial court stated there was no "drum beat" of continued publicity. (4 RT 643.) Along similar lines, the volume of media coverage was far less extensive than other cases where a change of venue was deemed unnecessary. (E.g. *People v. Prince* (2007) 40 Cal.4th 1179, 1210-1214 [270 newspaper articles and extensive television coverage]; *People v. Sully* (1991) 53 Cal.3d 1195, 1237 [193 newspaper articles and 300 pages of television transcripts].)

Contrary to appellant's argument, the content of the media coverage was not so inflammatory to necessitate a change of venue. (AOB 85.) Although the murders were often described as "execution-style," and a few accounts described the murders as "brutal," "cold blooded," "horrible," or "horrific," these descriptions do not in and of themselves outweigh the many other factors that weigh against a change of venue. (*People v. Lewis* (2008) 43 Cal.4th 415, 449.)

And, as the trial court pointed out, the procedural posture of the case also rendered the publicity less of a factor in this case. Because the jury was not charged with finding facts regarding appellant's guilt due to his plea, the trial court astutely pointed out that jurors would be far more influenced by their personal beliefs on capital punishment rather than anything they had heard on the news about the case.

The size of the community also strongly weighs against a change of venue. Although the size of the county is not dispositive, the larger the population, the more likely any pretrial publicity will be diluted or

neutralized. (*People v. Proctor*, *supra*, 4 Cal.4th at p. 525.) Here, San Diego County is among the most populous counties in California. This Court has previously found that size of the community in San Diego was not a factor supporting a change of venue motion. (*People v. Harris*, *supra*, 28 Cal.3d at p. 949.) Here, the court estimated that the East County Population alone amounted to roughly a half-million people. This Court has upheld denials of change of venue motions in cases where the entire county population was less than just the East County population alone. (See, e.g., *People v. Vieira* (2005) 35 Cal.4th 264, 280–283 [Stanislaus County, population 370,000]; *People v. Weaver* (2001) 26 Cal.4th 876, 905 [Kern County, population exceeding 450,000]; *People v. Hayes* (1999) 21 Cal.4th 1211, 1250–1251 [Santa Cruz County, population under 200,000].) The size of the community supports the trial court's denial of the motion.

Likewise, appellant's community status did not support appellant's motion. Prior to the commission of the crime, appellant had no particular status in the community, neither good nor bad. He was not known to the public prior to the time of his arrest, which does not tend to support a motion for a change of venue. (*People v. Harris*, *supra*, 57 Cal.4th at p. 828.) Similar to appellant's lack of community status, the victims likewise did not have any particular prominence in the community prior to their murders. A victim is not considered to be prominent in the community if he or she becomes known as a result of being a murder victim and not his or her preexisting status. (*People v. Panah* (2005) 35 Cal.4th 395, 449.)

Appellant relies on several cases in an attempt to illustrate why a change of venue was compelled here. (AOB 95-98.) Those cases are inapposite. For example, in *Martinez v. Superior Court* (1981) 29 Cal.3d 574, 578, this Court found that a change of venue was necessary. Although pretrial publicity was a factor the Court considered, the opinion also largely rested on the fact that the crimes were committed in Placer County, which

at the time had a population of only 106,500 people, and that fact "composes an important factor which in the present case weighs toward the necessity of a change of venue." (*Id.* at p. 581.) Indeed, the Court acknowledged the denial of a motion for change of venue is properly rejected when the trial is scheduled in a "populous urban area" "despite extensive and even sensational coverage." (*Ibid.*) Nothing in the opinion in *Martinez* compels a different finding here.

The decision in *People v. Williams* (1989) 48 Cal.3d 1112 likewise offers no meaningful support for appellant's argument. Like *Martinez*, that case was set for trial in Placer County, which at the time had a population of 117, 000. (*Id.* at p. 1126.) The Court found the publicity was sensational, with articles noting that the victim's body was "bullet-riddled," that the murder was done "execution style" and the victim had been raped. (*Id.* at p. 1127.) The Court also noted that the woman killed was a local resident who came from a family with long and extensive ties to the community. The defendant, on the other hand, was considered an "outsider." Racial overtones were also a concern because the woman was a young White woman and the defendant was a Black male. (*Id.* at p. 1129.) The court concluded by noting that the combination of the small size of the county, the nature of the crimes, the status of the victim, the extensive pretrial publicity, and the prospective jurors' "widespread familiarity with the crime, the victim, the district attorney and the prosecution witnesses" required that the venue be changed. (*Id.* at p. 1131.) Many of those factors are simply not present here, and again, there was nothing about the nature of the publicity in this case that rendered it so sensational that the one factor alone would support a change in venue.

Finally, *Rideau v. Louisiana* (1963) 373 U.S. 723 [83 S.Ct. 1417, 10 L.Ed.2d 663] does not help appellant. In that case, the defendant's filmed jail house confession admitting he had committed a bank robbery,

kidnapping, and murder was broadcast three times on television to audiences of 24,000 the first time, 53,000 the second time, and 20,000 the third time. The crime was committed, and the trial was held, in Calcasieu Parish, which had a population of about 150,000. (*Id.* at p. 724-725.) With little discussion, the Court summarily reversed the conviction finding that the defendant's motion for change of venue should have been granted when the community "had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes which he was later to be charged." The Court characterized the broadcast as Rideau's trial and the subsequent proceedings to be a "hollow formality." (*Id.* at p. 726.) This case is distinguishable on many grounds, including the size of the county, and certainly the content of the pretrial publicity which did not show appellant in jail flanked by police admitting to everything he had done.

Although there was some publicity which would be typical for a murder case of this magnitude, this case does not present a circumstance where such publicity would rise to the level of necessitating a change in venue. Appellant's argument should be rejected.

D. Appellant Has Not Established Prejudice

Appellant also fails to demonstrate a reasonable likelihood that he was prejudiced, that is, that he did not in fact receive a fair and impartial trial. (*People v. Proctor*, *supra*, 4 Cal.4th at p. 523.) To ascertain whether pretrial publicity had a prejudicial effect on the jury, the reviewing court will look to juror responses on voir dire. (*Id.* at p. 524.) A fair examination of the seated jurors' questionnaire responses demonstrates that appellant has failed to meet his burden.

Of the first twelve jurors seated, five jurors had heard nothing about the case in the press.[9] (7 CT 1495 [Juror No. 3], 7 CT 1539 [Juror No. 5], 8 CT 1627 [Juror No. 9], 8 CT 1649 [Juror No. 10], 8 CT 1695 [Juror No. 12].) Of the alternates, one had not heard of the case at all. (8 CT 1781 [Alternate Juror. No. 4].) Of those who had heard of the case from the media, several only recalled news coverage when the crimes had occurred and were unaware that an arrest had even been made. (7 CT 1561 [Juror No. 6], 7 CT 1605 [Juror No. 8], CT 1759 [Alt. Juror No. 3], 8 CT 1803 [Alt. Juror No. 6].) The remaining jurors had heard of the case but seemed to only have a passing familiarity with the general facts of the case. (7 CT 1451-1453 [Juror No. 1 heard about the case but had no opinions about the case in general], 7 CT 1473-1474 [Juror No. 2 heard information on the local news but could not recall specifics], 7 CT 1517-1518 [Juror No. 4 heard the case mentioned on the radio and may have commented on it to her husband], 7 CT 1583-1584 [Juror No. 7 watched the local news and is interested in crimes that occur in his neighborhood], 8 CT 1671 [Juror No. 11 heard of the case on the news and was aware of the general facts], 8 CT 1715-1716 [Alternate Juror No. 1 heard the general facts of the case but had not heard anything about it in a while], 8 CT 1738 [Alternate Juror No. 2 heard two men robbed a store and killed two clerks].)

All the jurors indicated that there was no reason why he or she could not be a juror on the case based on what he or she had heard or read about it. (7 CT 1453 [Juror No. 1], 7 CT 1475 [Juror No. 2], 7 CT 1497 [Juror No. 3], 7 CT 1519 [Juror No. 4], 7 CT 1541 [Juror No. 5], 7 CT 1563 [Juror No. 6], 7 CT 1585 [Juror No. 7], CT 1607 [Juror No. 8], 8 CT 1629 [Juror No. 9], 8 CT 1651 [Juror No. 10], 8 CT 1673 [Juror No. 11], 8 CT 1695

[9] It does not appear that any of the seated jurors were asked about their exposure to the media during voir dire.

[Juror No. 12], 8 CT 1717 [Alt. Juror No. 1], 8 CT 1739 [Alt. Juror No. 2], 8 CT 1761 [Alt. Juror. No. 3], 8 CT 1783 [Alt. Juror No. 4], 8 CT 1805 [Alt. Juror No. 6].)

A large portion of the seated jurors knew nothing about the case and the remaining jurors who were aware of the case did not appear to form "such fixed opinions" that they could not impartially judge the appropriate penalty. (*People v. Famalaro*, *supra*, 52 Cal.4th at p. 31, quoting *Patton v. Yount* (1984) 467 U.S. 1025, 1035 [104 S.Ct. 2885, 81 L.Ed.2d 847.) Even when most of the seated jurors have some prior knowledge of the case, a change of venue is not compelled. (See *People v. Roundtree*, *supra*, 56 Cal.4th at p. 840 [eight of the 12 jurors had heard something about the case].) Finally, the jurors' assertion that publicity would not prevent him or her from serving as unbiased jurors is a significant factor to consider in determining whether prejudice has been established. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1215.)

In light of the questionnaires of the jurors who actually sat on the case, appellant has not shown he suffered any prejudice as a result of the trial court's denial of his motion to change venue.

VII. APPELLANT HAS NOT DEMONSTRATED THAT HIS ATTORNEY LABORED UNDER A CONFLICT BETWEEN TESTIFYING AS A WITNESS FOR THE DEFENSE AND REMAINING AS COUNSEL IN ORDER TO COLLECT HIS FEE

Appellant contends that one of his attorneys, Mark Chambers, had a conflict of interest that violated his constitutional right to conflict-free counsel. Specifically, appellant claims that Mr. Chambers should have withdrawn from representation and testified on appellant's behalf that appellant sought help prior to attacking a sheriff's deputy in jail. Because doing so would have created a financial loss, appellant extrapolates that counsel was conflicted. Appellant also faults the trial court for not having inquired into the conflict and urges the court to remand the matter for a

hearing. Finally, appellant urges the Court to reverse the penalty phase verdict because his right to a reliable penalty determination under the Eighth Amendment was violated. (AOB 104-130.)

Appellant's argument should be rejected because he has not established that counsel labored under a conflict of interest. Counsel was not a material witness in the case merely because appellant made statements to him regarding his alleged mental condition. There is nothing to suggest that counsel should have withdrawn but failed to do so in order to receive compensation and then elected not to present evidence as a result of the alleged conflict. Other witnesses were available to testify about appellant's complaints and it would seem counsel elected not to present this evidence because it lacked credibility. Moreover, appellant has not shown that even if a conflict were present, there is a reasonable probability that he would have obtained a more favorable result had counsel withdrawn and testified on his behalf. In light of the tenuous nature of the conflict claim, the trial court had no obligation to inquire about a conflict and remand is not necessary. Because there was no error, appellant's right to a reliable penalty was not violated.

A. Facts Relating to Appellant's Conflict Claim

After the public defender's office declared a conflict, defense attorney, Mark Chambers, was appointed. (2 RT 45-47.) In January of 2008, Mr. Chambers entered into a fee agreement whereby he would be paid a total of $137,000, with $40,000 to be paid at the commencement of pretrial motions and another $40,000 to be paid after a jury was impaneled. William Wolfe was also appointed to be second chair at that time. (33 CT 7750-7752.)

On April 29, 2008, appellant moved to substitute Mr. Chambers with new counsel. (3C RT 415.) Appellant explained he had been hearing voices telling him to kill people and slash people's throats. He brought his

concern to a sheriff deputy's attention, but did not feel that he could be completely forthright with him. (3C RT 416-417.) He also acted violently towards people in the jail but could not remember what he had done. He called Mr. Chambers to inform him of the situation. He agreed that Mr. Chambers could tell the watch commander that he needed to seek psychiatric help. However, according to appellant, Mr. Chambers instead told the deputies that he wanted to kill somebody or was trying to kill himself and as a consequence he had been placed in a "rubber room." (3C RT 417-418.) Appellant felt Mr. Chambers had violated the attorney/client privilege by disclosing what he had told him. He also felt that Mr. Chambers was not taking him seriously when he told him he was not in his right mind. (3C RT 418-419.)

The court observed that appellant seemed to be "tracking pretty well," was "pretty sharp," and articulate. "You seem to be able to size up the situation in terms of your particular situation and welfare, and you're communicating real well." (3C RT 419.) Appellant admitted he was able to talk and do "regular stuff" but that did not mean he was not thinking "all kids of thoughts." (3C RT 419.)

Mr. Chambers recalled that appellant had previously been evaluated for competency. Appellant had met with "one of our doctors, Dr. Solvang," who informed him of what appellant had told the court. Appellant and Mr. Chambers agreed that he would attempt to hasten his request to see a mental heath provider at the detention facility. Mr. Chambers called the watch commander and told him that appellant "had the potential of acting out" which led to appellant being seen that afternoon. (3C RT 420.) He also submitted a funding request to acquire a defense psychologist because the defense did not have one "in that slot at this point." (3C RT 421.)

Appellant then explained he could barely read or write or function in his unit because of the voices inside his head. (3C RT 421.) The court

again remarked that appellant seemed to be tracking well and presented as articulate. The court denied the request to relieve Mr. Chambers. Appellant then moved to represent himself and the court calendared a new date for that motion. (3C RT 422.) At that later hearing, appellant withdrew his request. (3 RT 426.)

Appellant attacked a sheriff's deputy while he was in custody about three months later. Evidence of such was adduced by the prosecution at the penalty phase. (15 RT 2312-2324.) During closing argument, counsel argued that the attack was not unprovoked because Corporal Clements treated appellant disrespectfully by throwing his food on the floor. (19 RT 2765.)

B. Counsel Was Not a Material Witness for the Defense and Thus Did Not Labor Under a Conflict

Under the federal and state constitutions, a defendant has a right to counsel in criminal cases. That right includes the right to conflict-free representation. A conflict in representation is one which might compromise an attorney's loyalty to the client and impair counsel's efforts on the client's behalf. (U.S. Const. 6th Amend; Cal. Constitution Article I, section 15; *Glasser v. United States* (1942) 315 U.S. 60, 69–70 [62 S.Ct. 457, 86 L.Ed. 680]; *People v. Doolin* (2009) 45 Cal.4th 390, 417.) To demonstrate a conflict of interest under the Sixth Amendment, a defendant is generally required to show that counsel labored under an actual conflict that prejudicially affected his performance. A theoretical division of loyalties is not sufficient. (*Mickens v. Taylor* (2002) 535 U.S. 162, 171 [152 L.Ed.2d 291, 122 S.Ct. 1237].) Under the state Constitution, a defendant must show that counsel labored under a potential conflict of interest, which raises an informed speculation that the potential conflict adversely affected counsel's performance. (*People v. Rundle* (2008) 43 Cal.4th 76, 175.)

Conflicts of interest may arise in various factual settings. Generally, they

> "embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests."

(*People v. Bonin* (1989) 47 Cal.3d 808, 835.) A conflict involving an attorney's own interests may include when representation implicates counsel's personal, professional, or financial interests. (*Mickens v. Taylor*, *supra*, 535 U.S. at p. 174.)

Appellant asserts that counsel labored under a conflict because he was a material witness for the defense due to his awareness that appellant sought treatment for mental issues prior to the time he attacked a sheriff's deputy in custody. According to appellant, counsel's testimony would have mitigated appellant's acts. Appellant alleges that counsel was conflicted because he should have withdrawn from the case but his fee agreement, under which he still had an outstanding $80,000 to earn, prevented him from relinquishing his appointment . (AOB 110-111.) Appellant's argument fails on numerous and significant grounds.

To begin with, counsel was not a material witness in this case. Appellant's argument is premised on the idea that Mr. Chambers should have testified regarding appellant's plea for help with the voices prior to the attack on the sheriff's deputy. However, counsel could not have testified to appellant's statements because they constituted inadmissible hearsay. (Evid. Code, § 1200.) While appellant has the right to present all mitigating evidence counseling against the death penalty, a capital defendant does not have the right to admit inadmissible hearsay not subject to cross-examination. (*People v. Peoples* (2016) 62 Cal.4th 718, 757-758.) Supposing the statement could be admitted under Evidence Code section 1250, as evidence of appellant's state of mind, it lacked the indicia of

trustworthiness required by Evidence Code section 1252, as even on the cold record it apparent that appellant was malingering. Because appellant's statements to counsel would not have been admitted, he was not a material witness and had no conflict necessitating his withdrawal from the case.

Even assuming counsel could have testified to the statements appellant made to him, he still has not established a conflict. The rules of professional conduct require that an attorney must withdraw from representation, even without the client's informed written consent, whenever he knows or should know that he ought to be a material witness in his client's case. (Rules of Prof. Conduct, rule 5-210.) However, in spite of that rule, there is no categorical mandate preventing a party from calling an attorney as a witness in a criminal proceeding in which the attorney is acting as counsel. (*People v. Earp*, *supra*, 20 Cal.4th at p. 879.) Indeed, under some circumstances a defendant may call his own attorney to testify notwithstanding the Rules of Professional Conduct. (*People v. Marquez* (1992) 1 Cal.4th 553, 574.) A conflict does not exist here because counsel was not precluded from testifying if necessary and remaining on the case, particularly in light of the fact that appellant was also represented by a second attorney, Mr. Wolfe.

Moreover, the fact that an attorney stands to financially gain by continuing to represent his client does not automatically create a conflict. This Court has observed that, "almost any fee arrangement between attorney and client may give rise to a 'conflict.'" (*People v. Doolin*, *supra*, 45 Cal.4th at p. 416, quoting *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 618-619 fn. 8.) In spite of the "infinite" possibilities for conflict under these arrangements, the Court recognized that "most attorneys serve their clients honorably despite the opportunity to profit by neglecting or betraying a client's interest." (*Ibid.*)

It is also crucial to consider that Mr. Chambers was not the only source of the information concerning appellant's mental state and attempts to seek help in custody. One factor the court may consider in evaluating whether a defense attorney should withdraw for being a material witness is whether the evidence in resolving a factual issue can be independently shown using other witnesses. (*People v. Dunkle* (2005) 36 Cal.4th 861, 915, citing *People v. Comden* (1978) 20 Cal.3d 906, 913.) Here, during the *Marsden* motion, counsel indicated that one of the defense's doctors met with appellant and counsel had received the same information from the doctor that appellant had conveyed to the court. (3C RT 420.) Also, appellant told the court,

> "[f]irst I brought it to the attention to the sheriff's deputy, Deputy Rodriguez. I told him that I was, like, hearing voices, you know what I mean? In my head. I told him I needed some, you know, psych detention, you know what I mean?"

Additionally, counsel indicated that based upon his call, appellant was seen in the psychiatric unit the very same day, thus another witness was privy to appellant's mental condition at the time and his attempts to seek help. (3C RT 420.) Thus, it would appear that there were at least three other witnesses the defense could have called to show that appellant was reaching out prior to the attack on the deputy, which obviated any need for Mr. Chambers to testify.

In assessing whether a conflict exists, the Court will also assess whether the record shows that counsel "pulled his punches," in other words, failed to represent his client as vigorously as he might have had there been no conflict. In doing so, the record should be examined to see whether there were actions not taken by counsel which would have likely been taken by counsel without a conflict and whether there may have been a tactical reason other than the conflict which might have caused the omission. (*People v. Almanza* (2015) 233 Cal.App.4th 990, 1002, citing *People v.*

Rundle, *supra*, 43 Cal.4th at pp. 169-170.) Here, appellant claims that counsel did not adequately defend against the evidence that appellant attacked a sheriff's deputy without provocation, as the prosecution asserted, but was the product of a mental disorder which appellant previously sought help for. However, counsel's decision not to admit evidence that appellant sought help prior to the attack after hearing voices was more likely attributed to the fact that appellant's claims were not credible, rather than counsel's desire to forfeit a viable circumstance in mitigation rather than lose his fee. Counsel's decision was likely reinforced by the fact that counsel had obtained expert opinion regarding appellant's mental health, which did not support any psychiatric disorder and counsel's testimony would have been weak on its own.[10] Also, there were several other witnesses counsel could have called to set forth this evidence had he tactically felt it was important. The record reveals that appellant had consulted with one doctor already, appellant saw medical professionals in jail, and at the time of the *Marsden* motion appellant had submitted a request for funding to get an additional defense psychologist. (3C RT 420-421.) Counsel did not need to "pull any punches" in order to present this evidence without calling himself as a witness.

The decision in *People v. Dunkle*, *supra*, at p. 861, is very instructive here. In that case, the defendant argued that counsel labored under a conflict of interest during the penalty phase because counsel did not withdraw from representation and testify at the penalty phase as to facts

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[10] As noted before, counsel was aware that appellant had been assessed for competency. Appellant had also met with one of the defense's doctors at the time of the *Marsden* hearing, in addition to jail staff. Counsel had also requested funding for another defense psychologist. (3C RT 420-421.) Under those circumstances, it is reasonable to infer that the defense did not find any useable evidence of psychiatric disorder that would bolster appellant's claims of mental disorder at the time of the *Marsden* hearing.

known to him regarding the defendant's mental state. (*Id.* at pp. 913-914, 915.) The defendant argued, like here, that there was a conflict between the obligation to serve as a witness and the attorney's self-interest in maintaining employment on the case. (*Id.* at p. 915.)

This Court rejected that argument. Although Penal Code section 190.3, factor (k), permits the jury to consider

> "a virtually unlimited range of mitigating evidence [citation], and trial counsel in every case has unique personal knowledge of the defendant that conceivably might be relevant or useful in the penalty phase[,] [w]e have never suggested that counsel must withdraw from penalty phase representation and testify on the defendant's behalf, and we reject any such implication now."

(*People v. Dunkle*, *supra*, 36 Cal.4th at p. 916.) Under *Dunkle*, Mr. Chambers was under no obligation to withdraw from the case and testify, thus no conflict was present here.

Even assuming a conflict could be shown, appellant has not demonstrated a reasonable probability that the outcome would have been more favorable to appellant absent the conflict. (*People v. Doolin*, *supra*, 45 Cal.4th at p. 421; *People v. Almanza*, *supra*, 233 Cal.App.4th at pp. 1006-1007.) Assuming counsel had withdrawn and testified that appellant had sought help prior to attacking the prison guard, the outcome would have been no different. Counsel's testimony on appellant's statements without any support from a mental health expert would not have made any meaningful impact on the jury. Against the mountain of aggravating evidence against appellant, this small point would have made no difference in light of the callous nature of the offenses whereby appellant senselessly executed Heather and Firas while robbing the liquor store. As if the nature of the offenses were not bad enough, he committed many violent crimes before and after the robbery, including having inflicting substantial injuries upon a sheriff's deputy after an unprovoked attack. Although counsel

endeavored to garner sympathy for appellant by showing the difficult circumstances of his childhood and how his case was mismanaged by social services, that effort was insufficient to counterbalance the serious and multiple bad acts committed by appellant. There is simply no reasonable probability that the outcome would have been different had counsel withdrawn from the case and offered the evidence that appellant suggests.

In sum, there is nothing about the circumstances surrounding Mr. Chambers representation and his awareness that appellant claimed he was hearing voices and sought help that rises to the level of a prejudicial conflict of interest.

C. The Trial Court Had No Duty to Inquire About Any Potential Conflict

Appellant also argues that the matter should be remanded so that the trial court can conduct a proper inquiry into the conflict. (AOB 123-125.) However, the trial court had no obligation to conduct an inquiry at the time appellant made his *Marsden* motion.

When a trial court knows, or reasonably should have know, of the possibility of a conflict of interest involving defense counsel, it is required to make inquiry into the matter. (*Wood v. Georgia* (1981) 450 U.S. 261, 272 [67 L.Ed.2d 220, 101 S.Ct. 1097].) A court should be held to have knowledge or notice of the possibility of a conflict only when it is provided with evidence of the existence of a conflict. Otherwise,

> "it would effectively be burdened with undertaking an inquiry in virtually all cases since it can almost always conclude that a conflict is 'possible' as a matter of speculation. Such a burden, however, would be intolerable."

(*People v. Bonin*, *supra*, 47 Cal .3d at p. 838.)

Here, the trial court did not know, nor reasonably should have known, about the possibility of any conflict. At the time of the *Marsden* motion, the court learned that appellant claimed he was hearing voices, that he was

concerned about violent behavior, and he was upset with Mr. Chambers for having disclosed some of his discussion to the jail. The court also knew that appellant had previously been seen by a defense doctor, mentioned the issue to a deputy at the jail, and had been seen by a professional for his issue at the jail. At the time the *Marsden* motion was held, appellant had not yet attacked the sheriff's deputy so the court had no notice that counsel could potentially offer testimony as to the motive for the attack, particularly when it was clear that others were aware of appellant's attempt to seek help. Although the attack on the deputy was later the subject of a plea and presented as evidence in aggravation against appellant, the court could not be reasonably expected to inquire whether counsel could offer any evidence in mitigation regarding that attack based upon what had occurred during the *Marsden* motion. Because there was no actual conflict and the trial court was not on notice that one potentially existed, remand is unnecessary to explore this issue any further.

D. The Circumstances Surrounding This Issue Do Not Constitute an Eighth Amendment Violation

Appellant argues that his Eighth Amendment right to a reliable penalty determination was violated as a result of the alleged conflict and the trial court's failure to inquire about any conflict. (AOB 121-123.) However, the Eighth Amendment's reliability requirement is met when the prosecution discharges its burden of proof pursuant to the rules of evidence and within the guidelines of the death-penalty statute, the death verdict is rendered under proper instructions and procedures, and the trier of the penalty has duly considered relevant mitigating evidence, if any, which was presented. (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1044.) Those requirements were met. Given the showing that counsel did not actually labor under a conflict and the trial court had no duty to inquire, reversal is not compelled or appropriate.

VIII. REMAND FOR A FURTHER HEARING IS UNNECESSARY TO EXPLORE ANY CONFLICT THAT INDEPENDENT COUNSEL HAD WHEN HE CONSULTED WITH APPELLANT REGARDING TRIAL COURT'S QUALIFICATIONS

Appellant argues that the matter should be remanded for a hearing because the trial court did not adequately inquire into the conflict that Don Levine, a lawyer appointed to consult with appellant regarding concerns over trial counsel's qualifications, may have had. (AOB 131-146.) Further proceedings are not warranted. The court was aware of the conflict and reasonably chose not to inquire further or engage in any action in light of the narrow role Mr. Levine played in assisting appellant in a situation that involved none of his federal or state constitutional rights. Moreover, because appellant had no right to counsel in this situation, his refusal to have another lawyer appointed was sufficient to qualify as a waiver. Finally, even assuming this Court finds that the trial court should have inquired further, remand is not compelled because appellant has failed to demonstrate that Mr. Levine's conflict affected the consultation with appellant.

A. Facts Related to the Appointment of Don Levine to Advise Appellant of Issues Pertaining to Mr. Chambers's Qualifications

When Mr. Chambers was initially assigned to the case, the People had not yet elected to seek the death penalty. When the prosecution made that election, attorneys with the Private Conflicts Counsel (hereinafter PCC) sought a hearing. At the hearing, a representative from PCC, Patricia Robinson, indicated that Mr. Chambers could not represent appellant as first chair in a capital case because he was not classified as a Class Six Attorney as determined by the PCC, who could handle a capital case. (3A

RT 329.) Mr. Chambers declined the invitation to serve as second chair. (3A RT 330.)

Ms. Robinson asked the court to inform appellant of the situation and then obtain a waiver on the issue of his attorney's qualifications. (3A RT 331.) Sandra Resnick, also with PCC, suggested that independent counsel be appointed to discuss appellant's options and the nature of the issue. (3A RT 332.)

Mr. Chambers explained that no problems pertaining to his appointment as first chair and Mr. Wolfe's appointment as second chair had initially arisen, even after the People announced its intention to seek the death penalty. (3A RT 333.) Later, the PCC committee voted and determined that Mr. Chambers was not qualified under the A.B.A. Guidelines. Mr. Chambers disagreed with that assessment and asserted he was qualified under those guidelines and California Rules of Court, rule 4.117. Based on his experience, he was not comfortable acting as second chair with a new attorney out of concern there would be conflict within the defense team. (3A RT 334.)

After some quibbling between Mr. Chambers and Ms. Resnick as to his prior experience in capital cases, and some further clarification from Mr. Wolfe, who was presently second chair, appellant asked to speak. (3A RT 335-339.) Although he was repeatedly cautioned not to, the court relented and permitted him to express his opinion. (3A RT 339-340.) Appellant said, "I don't want to speak with another attorney. I already heard everything that's going on. I don't need to talk to him." He indicated that he did not want to switch attorneys for a third time. He stated there was, "an understanding, mutual respect here, and I trust him, and my family trusts him, and we got a certain point in the case to where it's crucial stuff that's going on right now" and he did not want to start all over. (3A RT 341.) He felt that it was "crucial" for Mr. Chambers to stay on the case

and replacing him would be a "setback" and if he was removed "I feel like I'm going to lose." (3A RT 342.) He particularly felt this way because a new lawyer would give him the runaround, need time to get familiar with the case, and did not attend the preliminary hearing. (3A RT 343.)

Ms. Robinson acknowledged the close relationship that appellant had built with Mr. Chambers. (3A RT 343.) She reiterated her request that appellant speak with another lawyer. The court agreed and set a hearing date for several weeks later. (3A RT 344, 346.) The court sought to appoint independent counsel, who should not sit on the PCC capital committee and should be capital case qualified. The parties agreed on Don Levine. (3A RT 351-352.) The court ordered a transcript prepared and provided to Mr. Levine so he could advise appellant. (3A RT 354.)

Court reconvened on January 11, 2008. Prior to holding the closed hearing, the prosecutor advised the court that Mr. Levine represented an individual who had cooperated on the case and provided information concerning appellant. The prosecutor learned that Mr. Levine would be speaking to appellant in some capacity. She wanted the court to be aware of the situation in the event Mr. Levine might possibly become involved in defending appellant. (3 RT 356-357.)

After the courtroom had been cleared, Mr. Levine indicated that he had spoken to appellant and reviewed the transcripts from the prior hearing. He and appellant generally discussed the format and procedures of a capital cases and his satisfaction with his current representation. They also talked about the concerns that Ms. Robinson expressed at the last hearing regarding Mr. Chambers' qualifications under the PCC guidelines. (3B RT 358-360.)

According to Mr. Levine, appellant believed Mr. Chambers was working in his best interests and developed a rapport with witnesses, which in appellant's estimation was difficult. (3B RT 359.) As to the question of

qualifications, appellant understood PCC's concerns, but would nevertheless object to Mr. Chambers being relieved as counsel and would elected to go pro per should that occur. (3B RT 360.)

The court asked appellant if he had anything to add. Appellant asked why he was provided with a lawyer who represented a confidential informant or a cooperating witness. (3B RT 362.) The court stated it was unaware of any conflict but "would be happy to appoint another lawyer to talk to you about this issue, if you believe that you would like that." (3B RT 362.) Appellant refused the offer, but continued to ask why someone with a conflict had been appointed. (3B RT 362.) The court again asked, "Did you wish me to appoint some other attorney to talk to you, Mr. Rices, because I'm happy to do that, if you would prefer that." Appellant responded, "No, I don't prefer it." When asked if he wanted Mr. Chambers and Mr. Wolfe to remain on the case, appellant answered, "I would like both of them." (3B RT 363.)

The court made a record regarding PCC's qualification process, PCC's opinion that Mr. Chambers was not qualified to be lead counsel, and all that had occurred to date. Mr. Chambers and Ms. Robinson also offered their input as the court made its record. The court denied PCC's motion to remove appellant's attorneys and affirmed the appointment of Mr. Chambers and Mr. Wolfe. (3B RT 363-366.)

B. The Court Conducted an Adequate Inquiry into Any Potential Conflict with Mr. Levine

As discussed previously, when a trial court knows, or reasonably should have know, of the possibility of a conflict of interest involving defense counsel, it is required to make inquiry into the matter. (*Wood v. Georgia*, *supra*, 450 U.S. at p. 272.) Once a court learns of a potential conflict, it must also act in response to what it has discovered. (*Holloway v. Arkansas* (1978) 435 U.S. 475, 484 [98 S.Ct. 1173, 55 L.Ed.2d 426];

People v. Bonin, *supra*, 47 Cal.3d at p. 836.) In doing so, the court may make arrangements for conflict-free counsel or may decline to take any action if it determines that the risk of a conflict is too remote. (*Ibid.*) Once the information is before the court, a defendant may choose the course of action he wishes to take, which includes waiving his right to the assistance of an attorney unhindered by any conflict. (*Holloway v. Arkansas*, *supra*, 435 U.S. at p. 484; *People v. Bonin*, *supra*, 47 Cal.3d 837.)

Here, the prosecutor alerted the court that Mr. Levine had represented a cooperating witness. (3 RT 356-357.) Having learned that fact, the court reasonably sought to do nothing in light of the fact that Mr. Levine's input was very limited and had no bearing on any of appellant's constitutional rights. Guidelines pertaining to the qualifications of capital counsel "are not congruent with constitutional standards for effective legal representation." (*People v. Williams* (2013) 56 Cal.4th 630, 692, quoting *In re Reno* (2012) 55 Cal.4th 428, 467.) All that is constitutionally required is the admission to the state bar. (*People v. Williams*, *supra*, 56 Cal.4th at p. 691-692, citing *People v. Majors* (1998) 18 Cal.4th 385, 430-431.) For that reason, appellant had no right to independent counsel on such a collateral point so any conflict did not implicate appellant's constitutional rights. (See *People v. Hines* (1997) 15 Cal.4th 997, 1024 [no right to independent counsel for a *Marsden* because such a hearing "is not a full-blown adversarial proceeding, but an informal hearing in which the court ascertains the nature of the defendant's allegations regarding the defects in counsel's representation."].) Thus, the trial court's initial decision not to inquire any further was not in error because any risk that Mr. Levine operated under divided loyalty was remote in light of the issue he was tasked to advise appellant upon.

Although appellant argues otherwise (AOB 141-144), his refusal to speak to another lawyer about Mr. Chamber's qualifications should be

considered a waiver. Appellant inquired why he had been appointed a lawyer who represented a cooperating witness, the court twice gave him the option to have new counsel appointed. Appellant declined on both occasions. (3B RT 362, 363.) It is without dispute that a waiver of a constitutional right must be knowing and intelligent with sufficient awareness of the relevant circumstances and likely consequences. (*Brady v. United States* (1970) 397 U.S. 742, 748 [90 S.Ct. 1463, 25 L.Ed.2d 747].) With respect to waivers involving a conflict of counsel, no specific inquiry is mandated, but the court must assure itself that, (1) the defendant has discussed the potential drawbacks involving the representation with the conflicted attorney or outside counsel; (2) he has been made aware of any dangers or potential consequences that conflicted representation might involve; (3) he is made aware of his right to conflict-free representation; and (4) his waiver of that right is voluntary. (*People v. Bonin*, *supra*, 47 Cal.3d at p. 837.) Admittedly, appellant's refusal to consult with a different lawyer did not precisely follow within this framework. However, as discussed above, the appointment of Mr. Levine on an issue not affecting any of appellant's rights was not constitutionally mandated, thus the requirements of the waiver should be relaxed in this situation. (See *People v. Clark* (1996) 51 Cal.App.4th 575, 582-583 [full admonition of rights not necessary for probation revocations admissions as fewer fundamental rights are implicated in those proceedings than a criminal prosecution.].) It is clear that appellant was aware of the potential conflict yet elected not to speak with new counsel when given the option. Under these circumstances, his repeated refusal to consult different counsel should be consider to be a waiver.

Even assuming appellant has shown that the trial court's inquiry into Mr. Levine's involvement was insufficient, he still must demonstrate the prejudicial impact of the conflict on counsel's performance. (*People v.*

Nguyen (2015) 61 Cal.4th 1015, 1071.) Neither Due Process nor the Sixth Amendment compel an automatic remand for a further hearing whenever the trial court's inquiry was inadequate into a potential conflict of interest. (*Id.* at pp. 1071-1072, quoting *People v. Cornwell* (2005) 37 Cal.4th 50, 78.) Absent a demonstration of prejudice, the Court will not remand to the trial court for further inquiry. (*Ibid.*) Here, appellant did not want to consult with independent counsel to begin with and wanted Mr. Chambers to remain on his case. (3A RT 341-343.) The issue upon which Mr. Levine consulted with appellant was largely academic and bureaucratic in nature. The fact that Mr. Levine represented a cooperating witness does not lead to the conclusion that he felt a true division of loyalty where a conflict would have impacted the advice or information he provided appellant on an issue that can only be described as a tempest in a teapot. Moreover, appellant's presence in court guaranteed that he understood the nature of the issue raised by PCC and he steadfastly maintained throughout that he wanted to remain with Mr. Chambers and Mr. Wolfe. Thus, appellant has not and cannot demonstrate that any conflict Mr. Levine had impacted his consultation with appellant on the issue of Mr. Chamber's qualifications.

IX. THE TRIAL COURT PROPERLY DENIED APPELLANT'S *MARSDEN* MOTION

Appellant contends that reversal is required because the trial court abused its discretion when it denied his *Marsden* motion. He argues that his relationship with counsel had broken down after counsel warned the jail that appellant might be violent, which breached appellant's trust. (AOB 147-151.) Appellant is incorrect and has not shown that the trial court abused its discretion in refusing to find that there was an irreconcilable conflict. Counsel called the jail at appellant's request in order to obtain quicker access to mental health treatment. In doing so, counsel had obtained appellant's consent to inform the jail of appellant's issues. Based

on those circumstances, appellant's claim that he could no longer trust his lawyer was insufficient to support the motion. Even assuming the court should have granted the motion, any error was harmless beyond a reasonable doubt because the record reveals appellant suffered no prejudice.

A. Facts Related to Appellant's Motion to Substitute Counsel

As discussed in a different context in Argument VIII, on April 29, 2008, appellant moved to substitute Mr. Chambers with new counsel. (3C RT 415.) Appellant explained that he could not work with Mr. Chambers because,

> "I let him know some information about my mental state and how I was feeling, and he seems to either think I'm joking or he's not taking me serious. [sic] And I'm trying to tell him I've got a problem, but it seems like I'm not getting through to him." (3C RT 416.)

Appellant told the court he was hearing voices, which he reported to one of the deputies at the jail. (3C RT 416.) The voices were telling him to kill people and slice their throats open. He could see himself doing that. He had also engaged in violent conduct in jail but could not remember what he was doing. (3C RT 417.)

He called Mr. Chambers and asked him to come to the jail to speak to him. As a result of that conversation, according to appellant, Mr. Chambers told the deputies that he wanted to kill somebody or was attempting to kill himself. Appellant felt that Mr. Chambers violated the attorney-client privilege, even though he had given Mr. Chambers permission to speak to the watch commander about arranging a psych consult. (3C RT 417.) As a result of the conversation, the sheriff's deputy told him he was going to be held in a "rubber room" because his attorney had told the authorities that he felt like being violent towards other people. Appellant felt that Mr.

Chambers misrepresented him. Although he had been struggling for a couple of weeks, he did not have those issues now. Rather, the voices "spurt[ed] in and out." (3C RT 418.)

Appellant reiterated that he felt that Mr. Chambers violated the attorney-client privilege by reporting his concerns to the sheriff's department. As a result, the deputies were "really on me," which was unnecessary since he just had a mental problem. He was not trying to be violent for no reason, he was just trying to get help. As he explained to Mr. Chambers, he was not in his "right mind" and could not help him with the case. Appellant reiterated that Mr. Chambers did not take him seriously and seemed to believe there was nothing wrong with him. Just because he was not acting crazy, did not mean he was all right and not hearing voices. When the court observed that he seemed sharp, articulate, and appeared to be tracking well, appellant responded by saying that his outward appearance did not mean he was not thinking thoughts or having a problem. (3C RT 418-419.)

Mr. Chambers responded that appellant had been evaluated for competency earlier and had met with one of the defense doctors, who Mr. Chambers had received information from. Once he spoke to appellant, they agreed that Mr. Chambers would call the jail to try to expedite a meeting with the health provider. He specifically outlined what he did,

> "...I called the watch commander and lieutenant and told the lieutenant, as Mr. Rices had agreed, that he had the potential of acting out, was the descriptive phrase that I used to the watch commander."

Appellant denied having agreed to that. Mr. Chambers pointed out that as a result of the call, appellant was seen that afternoon. (3C RT 420.) Mr. Chambers also noted that he and appellant had discussed getting a defense psychologist on board and was awaiting an answer on a funding request. (3C RT 421.)

Appellant expressed his frustration that he could "barely function" because of the voices in his head. His problems were preventing him from reading and writing. Just because he could "talk regular" did not mean that something was not wrong with him. (3C RT 421.)

The court again found that appellant presented as articulate and "tracked real well." Based on the work Mr. Chambers had performed on his behalf, "I do not believe there are grounds for granting your request to relieve your attorney." (3C RT 421, 422.) Appellant then indicated that he wanted to represent himself because he did not trust Mr. Chambers. The court set another hearing date to hear appellant's motion. (3C RT 422.) At that later hearing, appellant withdrew his request to represent himself (3 RT 426) and made no further complaints regarding Mr. Chambers representation throughout the course of the trial.

B. The Trial Court Did Not Abuse Its Discretion when It Denied Appellant's Motion to Substitute Counsel

When a defendant seeks substitution of appointed counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118,

> "the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. The defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result."

(*People v. Taylor* (2010) 48 Cal.4th 574, 599, quoting *People v. Smith* (2003) 30 Cal.4th 581, 604.) The denial of a *Marsden* motion is reviewed for an abuse of discretion. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1070.) The court does not abuse its discretion unless the defendant shows that the failure to replace the appointed attorney would substantially impair the defendant's right to the assistance of counsel. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.)

Here, the trial court gave appellant the opportunity to air his complaints as required. He raised two complaints upon being asked: 1.) That counsel did not seem to be taking his mental health complaints seriously; and 2.) That counsel disclosed his issues to the sheriff's department, breaching the attorney client privilege. Appellant only focuses on the second basis.

Appellant has not met his burden to show that he and counsel became involved in an irreconcilable conflict. Appellant frames the issue in terms of counsel having disclosed appellant's statement in an attempt to prevent death or great bodily injury. According to appellant, this disclosure deteriorated the relationship between him and Mr. Chambers. (AOB 149.) That interpretation is not supported by the record. Rather, a fair reading of the record demonstrated that appellant contacted Mr. Chambers to discuss issues relating to his mental health and his objective of being quickly seen by a professional. Mr. Chambers gave no indication that appellant's statements caused him concern for the safety of others.[11] Rather, in order to expedite the treatment appellant requested, they agreed that Mr. Chambers would call the jail and tell them appellant "had the potential of acting out." (3C RT 420.) Although appellant denied he had agreed to that, the trial court was entitled to accept counsel's explanation.[12] (*People v. Smith*

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[11] Indeed, as appellant pointed out during the hearing, it seemed that counsel did not take his complaints all that seriously. (3C RT 418.)

[12] The trial court's implicit finding that appellant's version of events was not credible was reasonable. In spite of claiming grave mental illness, he presented as articulate and alert. Moreover, appellant was inconsistent in his own statements. On one hand he claimed he was having problems with his mental health at that time. (3C RT 416 [having a problem with his mental health right now]; 3C RT 419 ["I'm telling him I really got a problem right now.].) On the other hand, he also disclaimed having felt like being violent at the present time. 3C RT 418 [I didn't tell him I was feeling like that at the present time.].)

(1993) 6 Cal.4th 684, 697, quoting *People v. Webster, supra*, 54 Cal.3d at p. 436.) Under the circumstances, it cannot be said that there was a breakdown of the relationship after Mr. Chambers simply sought to effectuate appellant's wishes by taking a course of action appellant consented to. No ineffective representation was likely to result based on appellant's allegations.

Moreover, the fact that appellant stated twice in passing that he no longer trusted Mr. Chambers is insufficient to reverse the trial court's findings here.

> "If a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment, and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law."

(*People v. Crandall* (1988) 46 Cal.3d 833, 860, abrogated on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364.) The record is insufficient to support a finding that appellant's lack of trust amounted to an irreconcilable conflict.

Also, any alleged conflict between appellant and Mr. Chambers did not affect appellant's substantial rights in light of the limited nature of what Mr. Chambers told the jail. He merely told the watch commander that appellant "had the potential of acting out." (3C RT 420.) This vague and non-specific statement could not have reasonably prejudiced appellant in any way or had a meaningful effect on his relationship. Further, in light of the fact appellant was facing capital murder charges, in addition to bank robbery charges, and had served a prior prison term for carjacking, jail personnel were likely to have been aware that appellant had a capacity for acting out. Simply put, Mr. Chambers' conduct in contacting the jail at appellant's behest while providing them vague information did not create

an irreparable conflict and the trial court did not abuse its discretion when it denied the motion.

Even assuming the Court should have granted appellant's motion, any error is not reversible because the record shows beyond a reasonable doubt that appellant was not prejudiced. (*People v. Lewis* (1978) 20 Cal.3d 496, 499.) Here, the *Marsden* motion was held in April of 2008, well in advance of the trial, which commenced in May of 2009. Both prior to trial, during trial, and after trial appellant raised no further issues pertaining to any conflicts with counsel and a fair examination of the record reveals that appellant clearly suffered no prejudice as a result of the denial of the motion. Mr. Chambers performance during the penalty phase showed that no ineffective representation occurred as a result of a minor disagreement that occurred over a year earlier. Appellant's claim should be rejected.

X. APPELLANT HAS NOT MET HIS BURDEN TO SHOW THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO HIS JURY HEARING CODEFENDANT MILLER'S TESTIMONY, NOR HAS HE DEMONSTRATED PREJUDICE

Appellant argues that counsel was ineffective when he failed to object to his jury being present during codefendant Miller's testimony because only the state can present aggravating evidence against a defendant. According to appellant, he suffered prejudice from counsel's omission because Miller's testimony played an important role in the jury's death verdict. (AOB 152-175.) Appellant is incorrect. Counsel had no proper basis upon which to object because Miller's testimony was relevant and admissible, thus any objection would have been futile. Moreover, he has not demonstrated prejudice because Miller's testimony was not particularly damaging to appellant in light of his credibility issues and also considering the substantial evidence in aggravation the jury had before it.

A. Facts Relating to Miller's Testimony

Prior to appellant's guilty plea, the prosecution expressed its desire to try appellant and Miller together using two juries in order to admit Miller's statements against Miller only. Other than Miller's statements, the prosecution felt the rest of the evidence was factually the same. (3 RT 381.) Counsel for Miller briefly raised the issue of severance at a hearing on a motion to continue. The prosecutor again expressed his position that the defendants should be tried together using separate juries in order to introduce Miller's statements only against him. (3 RT 400-401.)

During a proceeding to confirm the trial date, the parties broadly discussed procedures. The court confirmed that portions of Miller's trial could constitute part of penalty phase evidence relating to circumstances of the crime. (4 RT 710.) The prosecutor explained that both juries would hear evidence relating to the robbery, and then the Rices jury would be excused while evidence pertaining to Miller only was presented. The Rices jury would then return for the evidence related to aggravation. (4 RT 710-711.) The parties did not address the possibility of Miller testifying on his own behalf.

Not knowing whether Miller would testify, the court set forth a tentative schedule whereby both juries would initially be present for evidence on the circumstances of the crime followed by a period of time where only the Miller jury was present for his defense evidence. (5 CT 1020.)

The prosecution presented evidence regarding the robbery and murders to both juries. (10 RT 1367-1649.) During the presentation of evidence, scheduling issues continued to be discussed. The prosecution informed the court that it anticipated that the Rices jury would no longer be present at the conclusion of the first part of Detective Hoefler's testimony until the penalty phase, unless Miller decided to testify. (11 RT 1565.)

After the detective concluded his testimony, scheduling issues were revisited. The court suggested placing the Rices jury on stand-by in the event that Mr. Miller would testify as "we would want both juries." (11 RT 1653.) Counsel for appellant acknowledged from a scheduling perspective that testimony from Miller would trigger an earlier call to the Rices jurors. (11 RT 1654.)

During the presentation of evidence to the Miller jury, Miller confirmed he was going to testify. (12 RT 1849.) The court stated that Miller would testify in front of both juries and then the Rices jury would be sent away again until the Miller case was completed. (12 RT 1850.) Counsel for appellant did not object. (12 RT 1850-1851.)

Miller testified on his own behalf. In sum, he testified that he met up with appellant and Nicole Hopson the evening of the crimes. (13 RT 1895-1900.) Eventually, they ended up at the liquor store to buy alcohol. (13 RT 1904.) When appellant and Miller got out of the car, appellant pulled a gun out of his waistband. According to Miller, he had not seen a gun before that point. (13 RT 1907.) Appellant told him, "You're about to take somebody's money for me," which scared Miller. Appellant instructed him to put on a ski mask and gloves. Miller felt like he had no choice but to participate. (13 RT 1908-1909.)

Miller could not recall a lot of the details of the robbery, only that when he walked into the liquor store Heather and Firas were already on the ground and he headed towards the cash register. (13 RT 1910-1912.) Appellant told him to grab the cash but he did not know where to look. (13 RT 1913.) Heather and Firas cooperated, telling appellant and Miller to take the money and leave them alone. (13 RT 1916.) Appellant went to the counter to help him find the money and put it in a bag. He left the store once he had the money in hand. (13 RT 1918.) He got in the car and told Hopson to start the car. He did not hear gunfire, but Hopson had. About

90 seconds after he got in the car, appellant got in and told Nicole to drive. (12 RT 1919-1920.) He later refused to take proceeds from the robbery because he wanted no part of it and was scared for his life knowing appellant's reputation. (13 RT 1927-1928.)

In his first statement to police, Miller admitted that he was not truthful when he said he had not gone in the liquor store with appellant, rather it was someone named "nut-nut." (13 RT 1933-1935.) He also falsely told police that he had robbed a 7-11 with appellant seven years earlier. (13 RT 1936-1937.)

Miller further explained he feared appellant based on his reputation as a gang member. Counsel objected and the court admonished the Rices jury to disregard the gang reference and treat it as though they had not heard it. (13 RT 1939-1940.) During a sidebar conference, appellant made a motion for mistrial based on the gang reference, which was denied. Counsel also asserted his preference to have the Rices jury present for the prosecution's cross-examination, but absent for any further testimony regarding gang membership. (13 RT 1944-1945.) The prosecution agreed not to ask about gang membership, but felt that any threats Rices made against Miller was an aggravant and should be admissible. The judge agreed. (13 RT 1946.)

Early in the prosecution's cross-examination, counsel objected to Miller's prior statements being played for the jury because appellant had already pled guilty to the murders and the amount of evidence regarding the circumstances of the crime was becoming overly prejudicial, insurmountable, and constituted a "piling-on effect." (13 RT 1955-1956.) The court disagreed and stated that Miller's testimony could consist of what he saw and heard at the store, his impressions, and what he claims appellant did. (13 RT 1956.)

On cross-examination, the prosecution mostly focused on Miller's prior statements to police. Specifically, Miller told police that he heard

Heather say, "Please don't kill me. I just want to be with my family." Although Miller recalled making that statement, in reality he did not actually hear Heather say that. Rather, he just told police that to get them to believe him. (13 RT 1958-1959.) Initially, Miller did not recall telling police that Firas say, "I'm young. Please don't kill me. Let me live." The prosecutor refreshed his recollection that the statement was made, but again, Miller denied that it actually happened and he had been lying to the police. (13 RT 1959-1960.) Additionally, the prosecutor impeached him with other statements that he had seen the gun before the robbery, had touched the gun at some point, and spent time with Heather before the robbery. (13 RT 1965, 1969.)

Miller also admitted that appellant never threatened him in order to get him to commit the robbery. (13 RT 1973.) In fact, Miller considered appellant to be like a brother. (13 RT 1974.) In fact, appellant had agreed to say he had forced Miller into the robbery so he could be exonerated. (13 RT 1980.) He continued to correspond with him while in jail and referred to himself as appellant's "protégé." (13 RT 1982.)

Counsel for appellant declined to ask Miller any questions. (13 RT 1983.)

During closing argument, the prosecution mentioned Miller's testimony sparingly and on only one occasion to point out that the victims begged for their lives before appellant shot them. In doing so, the prosecutor noted that Miller did not directly testify to that, rather he impeached Miller with his prior statement to police. (19 RT 2747.) Defense counsel addressed Miller's testimony, equally briefly. In doing so, he focused on Miller's inconsistencies and summed up his testimony by asserting, "I don't think we can rely on anything that man said on the stand." (19 RT 2763-2764.) On rebuttal, the prosecutor, again, briefly acknowledged appellant's argument and admitted that Miller was "pretty

incredible about some things, pretty darn incredible." (19 RT 2779-2780.) The prosecutor urged the jury to find Miller's statements made to police to be credible and not his in-court testimony because he was trying to help appellant. (19 RT 2780.) During the defense's rebuttal argument, counsel specified the inconsistencies in all of Miller's statements, including initially blaming an innocent person of having committing the crime. Counsel characterized all of Miller's statements as a "package of lies" and urged the jury disregard Miller's statements due to his lack of credibility. (19 RT 2788.)

B. Appellant Has Not Demonstrated that Counsel was Ineffective for Failing to Object to the Introduction of Miller's Testimony to His Jury

In assessing claims of ineffective assistance of trial counsel, a reviewing court will consider whether the defense has met its burden to show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.) The appellate court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions or inactions can be explained as a matter of sound trial strategy. (*Strickland v. Washington*, *supra*, at p. 687; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.)

If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Otherwise, the claim is more appropriately raised in a petition for writ of

habeas corpus. (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) Here, appellant's argument should be summarily rejected on this basis. It is wholly conceivable that counsel may have wanted Miller's testimony before the jury in order to remind it that appellant did not act alone and shared responsibility with another individual. Counsel may have also believed that Miller would have come off so poorly, it likewise would have diluted the jury's feelings about appellant's participation in the crime. Because counsel was not given the opportunity to explain his decision and may have chosen not to object on tactical grounds, this Court should summarily reject this claim.

Should the Court delve deeper into the issue, appellant still fails to meet his burden to show deficient performance. "Failure to object rarely constitutes constitutionally ineffective legal representation." (*People v. Boyette* (2002) 29 Cal.4th 381, 424.) The decision not to object to the admission of evidence is considered inherently tactical, which is why a failure to object will seldom establish ineffective assistance. (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1092.)

Although appellant can provide no meaningful authority to support his proposition, he complains that counsel should have objected to the introduction of Miller's testimony on the grounds that only the State can present aggravating evidence during the penalty phase. (AOB 160.) Appellant's argument belies logic and well-established authority to the contrary, thus failing to meet his burden to show that counsel was ineffective for failing to object. (*People v. Diaz* (1992) 3 Cal.4th 495, 562 [the failure to object to admissible evidence does not constitute ineffective assistance of counsel when to do so would have been futile.]

As the trial court found, and appellant concedes (AOB 160), Miller's testimony constituted relevant evidence of circumstances of the crime. A defendant being subject to his codefendant's testimony is common and is

most often discussed in the context of severance. Indeed, the High Court has recognized that an important element of a fair trial is that a jury should consider relevant and competent evidence, and the right to a fair trial does not include the right to exclude such evidence. (*Zafino v. United States* (1993) 506 U.S. 534, 540 [113 S.Ct. 933, 122 L.Ed.2d 317].) The Court went on to note, "A defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials, and we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant." (*Ibid.*)

Also in the context of severance, the Court has repeatedly recognized that severance is not appropriate in instances where a testifying codefendant gives testimony that is damaging to the other and thus helpful to the prosecution. (*People v. Keenan* (1988) 46 Cal.3d 478, 500, citing *People v. Turner* (1984) 37 Cal.3d 302, 312.) Put another way,

> "we are aware of no principle which gives the defendant the right to insulate himself, by the tactical device of severance, from the relevant and admissible testimony of his codefendant."

(*People v. Keenan*, *supra*, 46 Cal.3d at p. 500 fn. 5.) In light of this authority, it simply cannot be said that counsel was ineffective for failing to object to the jury's presence for Miller's testimony. Miller was the only living person outside appellant who was in the liquor store that night and his testimony, although riddled with inconsistencies, was highly relevant to the circumstances of the crime.

Appellant seems to assert that counsel could have objected on statutory grounds. (AOB 162-166.) It is without controversy that private prosecutions are not permitted and all prosecutions are conducted in the name of the People of the State of California by those entrusted with that authority. (Govt. Code, §§ 100, subd. (b), 26500; Pen. Code, § 684.) In this situation, it cannot be reasonably argued that the prosecutor's duty was

delegated to a private party in the commonplace situation where a codefendant testifies against a defendant. In fact, this Court has repeatedly rejected defense arguments that codefendants' counsel have acted as "second prosecutors" in a variety of situations merely because a codefendant tries to shift blame from themselves to the defendant. (E.g. *People v. Montes* (2014) 58 Cal.4th 809, 835; *People v. Bryant* (2014) 60 Cal.4th 335, 380.) It should also be noted that Miller was not testifying against appellant as a witness for the prosecution, but was testifying on his own behalf on matters that were relevant to the circumstances of the crime.

Appellant also argues that the codefendant's testimony should not have been before his jury because that evidence is not subject to the same discovery and ethical protections that the prosecution is subject to. (AOB 163-165.) It is true that a codefendant has no discovery or ethical obligation to his codefendant with respect to his own statements. His statements are protected by the Sixth Amendment. However, the defendant is usually in a better position than the prosecution to address a codefendant's testimony as he or she was typically present at the time that the crime was committed and can offer counsel insight that the prosecution lacks, as to areas of cross-examination. Discovery obligations and ethical duties relate to the duty of the prosecutor and do not attach themselves to a particular piece of evidence. And again, there is no established law of which Respondent is aware that prohibits the situation as presented here, thus counsel cannot be found ineffective for failing to raise this issue before the court.

Appellant relies primarily on two cases in an attempt to show there was a basis for counsel's objection. First, appellant asserts that the decision in *People v. Wardlow* (1981) 118 Cal.App.3d 375, illustrates how a dual jury should be conducted. (AOB 169-170.) However, that case does nothing to show counsel was ineffective here. In *Wardlow*, two defendants

were tried simultaneously using two juries. (*People v. Wardlow*, *supra*, 118 Cal.3d at p. 380.) The prosecution introduced evidence of codefendant Wilson's statements implicating Wardlow to Wilson's jury only. (*Id.* at p. 383.) Both defendants testified in the presence of both juries. (*Id.* at p. 382.) However, after a hearing pursuant to Evidence Code section 402 concerning Wilson's statement incriminating Wardlow and the circumstances surrounding it, the trial court elected to remove the Wardlow jury during the portion of Wilson's testimony "which might have prejudiced Wardlow." (*Id.* at p. 386.)

On appeal, Wardlow argued that the use of the dual juries violated his rights under *People v. Aranda* (1965) 63 Cal.2d 518, 530-531, which set forth options for how to deal with situations where the prosecution seeks to introduce a statement of one defendant that implicated a codefendant. (*People v. Wardlow*, *supra*, 118 Cal.App.3d at p. 386.) The court rejected the argument on several bases, one of which appeared to be the fact that the Wardlow jury did not hear the portions of Wilson's testimony that might have incriminated him. (*Ibid.*)

The decision in *Wardlow* does not compel a finding that counsel was ineffective for failing to object in this case. In passing and without authority, the decision simply approved of the trial court's decision to remove a jury from a portion of codefendant's testimony that contained an incriminating extrajudicial statement. That case does not stand for the proposition that a codefendant may not testify in the presence of a defendant's jury. Thus, the decision is of no help to appellant. (*People v. Avila* (2006) 38 Cal.4th 491, 566 [cases are not authority for propositions not considered].) Also, the decision does not reference the contents of Wilson's statements or why they were found to be prejudicial, thus the case can have no application to the issue here. Finally, it would seem that the court's approval on the removal of the Wardlow jury may have been

misplaced because only statements of a *nontestifying* codefendant may not be introduced against a defendant. (*Bruton v. United States* (1968) 391 U.S 123, 135-136 [88 S.Ct. 1620, 20 L.Ed.2d 476].) In *Wardlow* it would seem that excluding the jury for any extrajudicial statements made by Wilson incriminating Wardlow was unnecessary as Wilson was subject to cross-examination on those points and the evidence likely was relevant and admissible against Wardlow. The decision in *Wardlow* offers not basis for a defense objection to exclude the Rices jury from Miller's testimony.

The only other authority supplied by appellant hails all the way from Florida and is contained in a sparse, five-paragraph appellate opinion. (AOB 170-171.) Not only does that case offer no guidance in this situation, but the fact that appellant finds it necessary to reach so far afield demonstrates that counsel's failure to object was not below professional norms.

In *Watson v. State* (1994) 633 So.2d 525, Watson and his co-defendant, Tomingo, were tried together using two juries. On appeal, Watson complained that his jury heard testimony from Tomingo's case, which inculpated him, but exculpated Tomingo. (*Id.* at pp. 525-526.) Specifically, Tomingo called an eight-year-old girl as a witness, who testified that Watson was the triggerman of the failed robbery. Watson's counsel did not object. (*Id.* at p. 526.) The court found that it was error to allow Watson's jury to remain in the courtroom during the testimony, but affirmed because the failure to object constituted a waiver. (*Id.* at pp. 525, 526.)

Watson offers no meaningful guidance here and certainly does not establish that counsel was ineffective for failing to object in this case. The decision provides no insight into why the court found that the girl's testimony should not have been admitted against Watson. Also, *Watson* did not address a situation where a codefendant testified in front of the

other codefendant's jury. Appellant provides no authority, and Respondent is aware of none, that would prohibit such a situation particularly when defendants frequently testify in the presence of the other's jury or before the same jury.

In sum, counsel was not ineffective for failing to object because there was no reasonable basis upon which to do so. Counsel's failure to object did not fall below professional norms as he was not obligated to raise the unsupported and novel argument appellant sets forth here.

C. Appellant Has Likewise Not Demonstrated Prejudice

In determining whether a defendant suffered prejudice, the court will assess whether there was a reasonable probability that the result of the proceedings would have been different but for counsel's omission. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 686, 104 S.Ct. 2052; *People v. Cash*, *supra*, 28 Cal.4th at p. 734.) It is not sufficient to show that the alleged omission may have some conceivable effect on the trial's outcome. Rather, counsel's error must be so serious, the defendant was deprived of his right to a fair and reliable trial. (*Harrington v. Richter* (2011) 562 U.S. 86, 104 [131 S.Ct.770, 178 L.Ed.2d 624].) Appellant has not sustained his burden.

To begin with, as discussed previously, appellant had no established grounds upon which to base his objection. Had he objected, given the state of the law, any objection would have invariably been overruled, thus there is no reasonable probability the outcome would have been different.

Even assuming the trial court would have sustained any objection, there is no reasonable probability the jury would have come to a different conclusion even without Miller's testimony. Miller's testimony was not particularly damaging to appellant in light of the many inconsistencies with his prior statements, the implausibility of his explanations for those inconsistencies, and his obvious bias. Moreover, he did not actually testify

that the victim's begged for their lives, in fact, he denied that happened. Rather, he was impeached with a prior statement to that effect. (13 RT 1958-1959.) The prosecution relied very little on Miller's testimony during its closing arguments and did not use duress or threats as an aggravant against appellant. (19 RT 2747, 2779-2780.)

Although Miller's testimony arguably added an additional emotional component to the crime, it is not reasonably likely that fact alone pushed the jury towards a death sentence. Appellant shot Heather and Firas in the back of the head at the conclusion of the robbery. They were defenseless and the murders were absolutely senseless. The jury saw surveillance video of the robbery and murder and could see that Heather and Firas cooperated and offered no resistance. (11 RT 1630-1632, 1636-1639.)

The prosecution presented much more than the callous nature of the crimes in support of its case for a death sentence. Seven years earlier, appellant committed an armed robbery at a Taco Bell while armed with a gun telling the manager, "Back up bitch, I want the money." (15 RT 2197-2201.) Just a month after that, appellant carjacked Paul Hillard with a gun. (15 RT 2208-2210.) Appellant was convicted of robbery while armed with a firearm in August of 1999, for this offense. (15 RT 2307.) Appellant served time in custody from March 8, 1999 to December 3, 1999. (15 RT 2310.)

Appellant suffered a conviction for possession of cocaine for sale and was in prison from November of 2000 until October of 2005. (15 RT 2307, 2310.) While in prison he was convicted for possession of a deadly weapon. (15 RT 2307.) He committed the instant offense on March 1, 2006. (10 RT 1370.) After having murdered two people, he then robbed the Bank of America, having fired shots while in the bank and attempting to obtain cash. (15 RT 2223, 2226, 2234-2235.) Just a few days after that,

appellant robbed a Washington Mutual, again, using a gun, managing to steal about $25,000. (15 RT 2238-2244, 2252-2253, 2256.)

His violent behavior continued while in custody awaiting trial on these and other charges. He engaged in two attacks on other inmates. (15 RT 2266-2267, 2272, 2293-2295, 2305-2306.) He also pled guilty to attempted murder of a peace officer when he attacked a deputy at the jail with a razor, causing substantial injuries to the deputy. (15 RT 2308-2309, 2320-2321, 2324.)

In light of the circumstances of the crime and appellant's extremely violent and dangerous behavior both before and after the crimes were committed, there is simply no reasonable likelihood that counsel's failure to object to the jury's presence during Miller's testimony would have changed the outcome. This argument should be rejected as neither deficient performance nor prejudice has been established.

XI. The Trial Court Had No Sua Sponte Obligation To Provide Discovery It Had Permitted The Prosecution To Delay Disclosing

Appellant contends that the trial court had a sua sponte duty to provide the defense with a transcript of co-defendant Miller's "free talk," an interview that the trial court had previously permitted the prosecution to delay discovering, upon Miller's election to testify. According to appellant, the failure to do so violated his 6th Amendment right to counsel because counsel would have objected to Miller testifying before appellant's jury had he been aware of the contents of the interview. (AOB 176-190.)

Appellant's argument should be rejected. To begin with, this issue is not best considered on direct appeal because the record does not contain sufficient information upon which to properly address this claim. Even if appellant's claim is considered on this record, the trial court did not interfere with appellant's right to counsel by granting the prosecution's

discovery motion and not revisiting the issue on its own. Finally, assuming there was an error, appellant cannot establish prejudice.

A. Facts Relating to Miller's Free Talk

As part of the initial investigation, the police conducted an interview with codefendant Miller. Miller admitted that he and appellant had discussed places they could rob. Miller suggested they rob the Granada Liquor Store because he knew the owner, who kept a lot of cash on the premises. Miller and appellant waited in their car outside the liquor store for the employees to walk out. While they waited, appellant took out his gun and Miller saw it. Once Heather and Firas walked out of the store, Miller and appellant accosted them, and forced them back in the store. Once inside, Miller took money from the register and some cigarettes. Appellant told him to get in the car because he had to "handle some business" before killing Heather and Firas. (See 37 CT 8373-8374, 8388-8634.)

On July 23, 2007, the prosecution engaged in a "free talk" with codefendant Miller. (40A CT 8885.) As part of the interview, the prosecution agreed that any statements made by Miller would not be used against him in the prosecution's case-in-chief. However, any statements could be used as impeachment should he testify inconsistently in court. Miller was also advised that any exculpatory statements regarding other charged codefendants would be turned over to the court and counsel. (40A CT 8886.)

In essence, Miller recalled appellant possessed the items to commit the robbery in his car and told him what they were going to do. Miller tried to talk him out of it. When they pulled up to the liquor store, Miller continued to try to dissuade appellant because Miller had shopped at that store with some frequency and used to live around the corner. Appellant insisted on going forward with the robbery and told Miller to help him.

Miller said he was scared because he had never committed such a crime and felt intimated by appellant, but felt he had no choice. Miller recalled that appellant forced the victims back into the store when they were locking up for the evening. At that point, Miller walked in to help and eventually retrieved the money from the register. After that, appellant told Miller that he was going to "smoke 'em" because they had seen his face. Miller said he tried to talk him out of it, but appellant told him to go outside. Miller then got into the car, appellant eventually followed, and they went back to Miller's house. (40A CT 8888-8889, 8901, 8910, 8916-8918.)

On July 30, 2008, the People moved that statements made by "John Doe #1" not be disclosed to the defense pursuant to Penal Code section 1054.7 due to threats or possible danger to the safety of a witness. (3 CT 590-591.) The defense filed an opposition to the motion arguing that the defense would be impeded from adequately preparing for trial without knowing the identity of John Doe #1. (3 CT 689-692.) The court held an in camera hearing on November 17, 2008, and the sealed transcript of that hearing is contained in Reporter's Transcript 4B.

Following the hearing, the trial court served an order on both parties stating in pertinent part:

> "People's motion is granted in part. There is good cause to defer disclosure of the name, address, and statement of John Doe #1. In reaching this conclusion, the Court has weighed the following: a) the possibility of danger to John Doe #1 if his identity is disclosed immediately; b) the nature of the statements attributed to John Doe #1; c) the inculpatory information provided by John Doe #1 would not serve the interests of Defendant Rices on the issue of penalty; d) the information contained in the statements is available in other materials already disclosed to the defense; e) the representation of the People that John Doe #1 will not be called as a witness by the People; and f) the absence of detriment to defendant's right of confrontation if disclosure is delayed." (4 CT 769.)

Respondent has not located additional information in the record that indicates any further discussion regarding the disclosure of the transcript. Miller testified on his own behalf. In doing so, he essentially testified consistently with the free talk interview.

B. Direct Appeal is Not the Proper Vehicle for this Claim

In this argument, appellant engages in substantial speculation as to what counsel would have done had the transcript of Miller's free talk been provided to him. Specifically, appellant asserts that counsel would have objected to the presence of the Rices jury during Miller's testimony had it obtained a copy of the free talk interview. (AOB 177, 178, 184.) Not only does appellant fail to identify upon what basis this objection would have been forthcoming, but there is simply no factual basis upon this record to offer such a conclusion. Moreover, in light of appellant's continued communication with Miller while in custody, it is possible, if not likely, that counsel knew about the contents of the free talk prior to Miller's testimony. (See 13 RT 1981-1982 [Miller's testimony regarding his letter to appellant contained in Exhibits 65 and 65A]; 6 CT 1258 [Exhibit list containing reference to Exhibits 66 and 66A, another letter from Miller to appellant].) Because the record on appeal fails to provide a sufficient factual basis to support appellant's argument, direct appeal is not the proper vehicle for this claim to be litigated. (Cf. *People v. Mendoza Tello*, *supra*, 15 Cal.4th at pp. 266-267 [where facts have not been developed below, ineffective assistance of counsel claims are usually more appropriately litigated in a habeas corpus proceeding].)

C. The Trial Court Did Not Interfere with Appellant's Right to Counsel When It Did Not Disclose Miller's Free Talk Sua Sponte Prior to Miller's Testimony

Under Penal Code section 1054.1, subdivision (b), the prosecution must disclose to the defense the statements of all defendants. That

disclosure must be made at least 30 days prior to trial. (Pen. Code, § 1054.7.) However, if good cause is shown, the disclosure may be "denied, restricted, or deferred." (*Ibid.*) A trial court is vested with the discretion to make such decisions concerning the regulation of discovery. (*People v. Suff* (2014) 58 Cal.4th 1013, 1059.) Appellant correctly does not argue that the trial court abused its discretion when it ordered that discovery of the free talk could be deferred under Penal Code section 1054.7. (AOB 190.) Instead, appellant argues that the trial court interfered with his right to the effective assistance of counsel when it did not discover the free talk with Miller to the defense in advance of Miller's testimony. According to appellant, counsel would have objected to the presence of the Rices jury for Miller's testimony had the transcript been provided. That argument fails on numerous grounds.

The trial court did not interfere with appellant's right to counsel. Rather, the court's order merely permitted the prosecution, to whom the discovery obligation belonged, to defer the disclosure of Miller's statement. Appellant has cited no authority, nor is Respondent aware of any, that confers a sua sponte duty on the trial court to provide discovery in instances where it has permitted the prosecution to defer providing it. To the contrary, authority exists which tends to refute the existence of such a responsibility. In the context of discovery violations, a trial court has no sua sponte duty to try to impose a remedy. (E.g. *People v. Alcala* (1992) 4 Cal.4th 742, 482 [court is under no obligation to volunteer that the defense could have a continuance]; *People v. Ayala* (2000) 23 Cal.4th 225, 299 [court has no duty to give discovery violation instruction].) In fact, there are a whole host of situations where the trial court is under no obligation to act without a request from a moving party. (See, e.g. *People v. Martinez* (2009) 47 Cal.4th 399, 421 [court has no duty to conduct *Marsden* motion based on information provided by a third party]; *People v. Webster* (1991)

54 Cal.3d 411, 455 [court has no sua sponte responsibility to empanel a new jury after counsel withdrew from representation]; *People v. Cook* (2006) 39 Cal.4th 566, 583-584 [court was not obligated to exclude the prosecution from a hearing on the defendant's severance motion on its own initiative].) Likewise, the court had no responsibility to provide discovery in this case.

The cases upon which appellant relies to show that the trial court violated appellant's right to counsel are all inapposite. For example, appellant asserts that this situation represents an occasion where the government, i.e., the trial court, violated the right to effective assistance of counsel by interfering with the ability of counsel to make independent decisions on how to conduct the defense, citing to *Strickland, supra*, 466 U.S. at p. 686. However, the cases upon which both appellant and *Strickland* rely all represent occasions where the trial court *actively interfered* with counsel's representation and/or strategic decisions. For example, in *Geders v. United States* (1976) 425 U.S. 80, the judge issued an order following the defendant's direct examination that precluded counsel from conferring with his client during a 17-hour overnight recess. (*Id.* at p. 84, 88.) The Court found that such recesses are a time of "intensive work, with tactical decisions to be made and reviewed," and that the court's order placed a "sustained barrier to communication between a defendant and his lawyer." (*Id.* at pp. 88, 90.) No such overt act of interference occurred here. To the contrary, the court merely issued an order allowing the prosecution to delay pretrial discovery. Any omission on its part to then provide such discovery, which again is not a judicial function, did not interfere with representation in the same manner as *Geders*.

The same reasoning should be employed when considering *Herring v. New York* (1975) 422 U.S 853 [95 S.Ct. 2550, 45 L.Ed.2d 593]. In that case, the defendant waived a jury trial. (*Id.* at p. 854.) After the defense

concluded its case and unsuccessfully moved to dismiss the charges, counsel requested to be heard on the facts. The court refused to allow the defense to make a summation and subsequently found the defendant guilty. (*Id.* at p. 856.) The Court held that making a closing argument is a "basic element of the adversary factfinding process in a criminal trial," and concluded the trial court's interference denied the defendant the assistance of counsel. (*Id.* at p. 857, 864.) Again, no such deprivation took place here. By granting the prosecution's motion to defer discovery and then not providing discovery on its own motion, the court did not deprive appellant of any "basic element of the adversary factfinding process," as appellant was not in any way limited in his presentation of his case. The decision in *Herring* does nothing to advance appellant's argument.

Likewise, in *Brooks v. Tennessee* (1972) 406 U.S. 605 [92 S.Ct. 1891, 32 L.Ed.2d 358], the court affirmatively interfered with the manner of the presentation of the defense. There, a Tennessee statute required that a defendant testify before other defense witnesses. The defense moved to delay the defendant's testimony until another witness had testified with the prosecutor's consent. The court refused and ultimately the defense called two witnesses, but the defendant did not take the stand. (*Id.* at p. 606.) The High Court reversed in part based upon counsel's inability to plan its case and guide the defendant during the proceedings without the chance to evaluate the worth of its evidence which implicated the right to counsel. (*Id.* at p. 613.)

The statute at issue in *Brooks* deprived counsel of his ability to advise the defendant on which informed choices should be made regarding the presentation of his defense. No such showing has been made here. Appellant merely speculates that had the transcript been provided, counsel would have objected to the presence of his jury during Miller's testimony. He fails to explain on what legal basis counsel would have done so.

Moreover, any omission by the trial court here is in stark contrast to the actual interference in the presentation of the defense case. The decision in *Brooks* does not compel a finding of error here.

The Ninth Circuit cases cited by appellant (AOB 181) likewise do not support a finding that appellant's right to counsel was violated when the court did not provide deferred discovery to the defense. (*Sheppard v. Reese* (9th Cir. 1989) 909 F.2d 1234, 1237 [defendant was not given adequate and timely notice of charges against him]; *United States v. Gaskins* (9th Cir. 1988) 849 F.2d 454, 458 [court provided aiding and abetting instruction to the jury which it previously stated it would not]; *United States v. Harvill* (9th Cir. 1974) 501 F.2d 295, 296 [court indicated it would provide instruction on specific intent but then failed to do so after closing arguments]; *Hintz v. Beto* (5th Cir. 1967) 379 F.2d 937, 942 [court improperly denied a motion to continue to evaluate defendant's psychiatric report prior to trial].) These cases present situations where there was some showing that counsel's ability to prepare the defense was impaired. No such showing has been made here with appellant's unsupported claim that counsel would have made a groundless objection had he been provided with Miller's transcript. His argument should be rejected.

D. Any Error in Failing to Disclose the Free Talk Was Harmless

Even assuming the court should have provided the defense with Miller's free talk transcript prior to his testimony, any error was harmless. Before discussing the absence of prejudice, it should be noted that appellant argues that prejudice should be presumed, and not proven by the defense, because ineffective assistance of counsel was caused by state action. (AOB 184-190.) Prejudice should not be presumed in this case.

Most constitutional errors can be harmless. (*Neder v. United States* (1999) 527 U.S. 1, 8 [119 S.Ct. 1827, 144 L.Ed.2d 35].) Prejudice is

presumed only in the most egregious situations where the state interferes with the right to counsel to the extent that there is a complete deprivation of counsel during a critical stage in the proceeding. (*Bell v. Cone* (2002) 535 U.S. 685, 696 [122 S.Ct. 1843, 152 L.Ed.2d 914].) The alleged deprivation of counsel here pertaining to the failure to provide a transcript is easy to contrast with other situations were prejudice was presumed as it cannot fairly be stated that a violation of state discovery law amounted to a complete deprivation of counsel. (e.g. *Herring v. New York, supra*, 422 U.S. at p. 857 [counsel prevented from giving closing argument]; *Hamilton v. Alabama* (1961) 368 U.S. 52, 55 [82 S.Ct. 157, 7 L.Ed.2d 114] [defendant had no counsel at arraignment in a capital case]; *Ferguson v. Georgia* (1981) 365 U.S. 570 [81 S.Ct. 756, 5 L.Ed.2d 783] [counsel barred from conducting any direct examination of the defendant].) It would be inappropriate to presume prejudice in this case.

Any prejudice is properly analyzed under the *Chapman* standard, i.e., whether any error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) As noted previously, appellant has failed to identify upon which grounds he could object to the presence of the Rices jury upon examining the free talk interview and why that objection would have been sustained. Miller's testimony constituted evidence of circumstances of the crime which was permissible under Penal Code section 190.3. The mere fact that Miller provided a statement prior to his testimony, which was ultimately consistent with what he said on the stand, provides no legal basis for an objection.

In the event discovery of the transcript somehow would have prompted appellant to object and lead the court to sustain the objection, the outcome would have been no different. As discussed in detail in Argument X, Miller's testimony was not particularly damaging to appellant. He presented his story with inherent bias by minimizing his accountability, his

prior statement to police was largely inconsistent with his trial testimony, and his explanations for those inconsistencies were far fetched. The prosecution did not emphasize Miller's testimony during its closing arguments. When Miller's testimony is fairly balanced against the brutality of the crime, appellant's criminal background and his violent behavior in custody, any error in not providing counsel with a transcript of the free talk which would have allegedly prompted an objection to the admissibility of Miller's testimony against appellant was harmless beyond a reasonable doubt.

XII. ANY ERROR IN RESPONDING TO THE JURY'S REQUEST FOR UNADMITTED EXHIBITS OUT OF THE PRESENCE OF COUNSEL AND APPELLANT WAS HARMLESS

Appellant contends that he was deprived his right to counsel and to be present at a critical stage of trial when the court responded ex parte to a jury request asking for exhibits. According to appellant, this deprivation requires reversal of the penalty phase. (AOB 191-216.) Although the trial court should have consulted with counsel in appellant's presence before responding, in light of the fact that the exhibit had not been admitted and added little to no value to the defense case in mitigation, any error was harmless beyond a reasonable doubt.

A. Facts Relating to the Trial Court's Response to the Jury's Request for Exhibits 65, 65A

As discussed previously, Anthony Miller testified on his own behalf in front of appellant's jury. When appellant initially pulled out a gun and told him that he was going to take somebody's money, he was scared. (13 RT 1907-1908.) He felt like he had no choice but to participate because appellant had a gun. (13 RT 1909.) Once in the store, he eventually found the cash, put it in a bag, and went back out to the car. (13 RT 1917-1920.) Later, when appellant offered him proceeds from the robbery, he refused.

(13 RT 1927-1928.) He did not call the police because he feared for his life based on appellant's reputation. He felt he could have been put in the same position as the victims had he walked away from the robbery. That fear led him to participate in the robbery. (13 RT 1928, 1938-1940, 1947.)

The prosecution cross-examined Miller on his fear of appellant, among other things. In doing so, the prosecutor noted that Miller had not initially told police that he had felt threatened by appellant. (13 RT 1978.) The prosecution also referenced a jail call where Miller told a friend that appellant was going to say he had forced him into the robbery so Miller would be exonerated. (13 RT 1980.) Finally, the prosecution referred to a letter that Miller had written while in custody. Exhibits 65 and 65a were marked for identification.[13] (13 RT 1981.) Miller confirmed the exhibits represented a letter he had written to appellant. (13 RT 1981-1982.) Part of the letter said, "I love you, boy, and the struggle only gets better. Until pencil meets paper again, your protégé, with love, lil bro [sic], Ant." (13 RT 1982.)

During an initial discussion regarding exhibits, the court confirmed that the prosecution was offering all the exhibits that had been referred to and marked. (16 RT 2393.) The defense offered its objections to the exhibits the prosecution sought to introduce. (16 RT 2393-2394.) Counsel noted that there was some question as to the cross-admissibility of Exhibits 49-65A between the two different juries. (16 RT 2394.) Counsel noted that it was objecting to Exhibits 67-89. The court received the exhibits counsel objected to, but took exhibit 88 under submission. (16 RT 2394.) The court went on to ensure the record reflected that the People rested

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[13] Respondent will be making a motion to transmit the exhibits pursuant to California Rules of Court, rule 8.224. Although marked with two numbers, the exhibit represents the one letter written by Miller. The envelope and letter are blown up and mounted on two large poster boards.

conditioned upon the admission of additional exhibits that were offered in front of both juries. (16 RT 2394.)

Exhibits were vaguely discussed again after the defense rested its case in mitigation. (18 RT 2677, 2678.) There was no dispute as to the defense exhibits. The prosecutor then noted that several of the People's exhibits still needed to be discussed, specifically, "63, [and] some others." (16 RT 2680-2681.) After having discussed instructions, several other exhibits were addressed, but not Exhibits 65 or 65A. (18 RT 2713-2714.) The court concluded by stating, "We'll take up 88, 88A, 90, 91, and 63 tomorrow. And that would resolve all of the pending issues regarding People's evidence?" The prosecution agreed it would. (18 RT 2714.)

The following day, exhibits were addressed again. The court acknowledged that it tried to make notes of what exhibits remained unaddressed, but its notes might be inaccurate, so it consulted with the clerk's exhibit list. The court made rulings on the remaining exhibits but made no mention of 65 or 65A. (19 RT 2715-2718, 2722-2724.)

The reporter's transcript does not reflect that Exhibits 65 or 65A were received into evidence in appellant's case. The court's exhibit list reflecting the People's exhibits used for both defendants shows that Exhibits 65 and 65a were marked on June 16, 2009, and received on June 17, 2009. (6 CT 1258.) However, it would appear that the appellant's jury was not in session on June 17, 2009, rather the case against Miller proceeded on that date. Proceedings involving appellant did not commence again until the following morning. (14 RT 3801; 5 CT 1102, 1186.) Exhibits 65 and 65a were admitted into evidence by the People on that date in Miller's trial only. (27 RT 3803.)

Neither counsel referred to Exhibits 65 or 65A during closing argument. The parties agreed that all physical exhibits that had been received into evidence would be placed in the jury room and any exhibit

that required an electronic device would be viewed in the courtroom. (19 RT 2796.)

The jury retired for deliberations on June 24, 2009. Early into deliberations, the jurors made an oral request to the bailiff to view People's Exhibits 65 and 65a. The minutes indicate that the exhibits "were not received into evidence on the Rices case but were presented to both juries during the overlapping evidence with the Miller case. The Court directs the bailiff to inform the jurors of this fact. Jurors continue with deliberations." Subsequently, the jury asked for a copy of all the stipulations that had been entered. The court called counsel and by agreement, the jury was given court's exhibits 26-44. Later that afternoon, the jury arrived at its verdict. (6 CT 1251.)

The issue concerning the jury's request was revisited during record correction. During record correction, the court ordered that the clerk's transcript reflect the following, "The following People's exhibits are not submitted to the jury room as they were not received in this trial: Numbers 49 through 62; Number 64 and 64A never identified; Number 65 through 66a." (22 RT 2870.) The court also provided a settled statement regarding the jury's request for those exhibits, which added that the court did not contact counsel for the People or appellant to notify them of the note or the court's communication. (39 CT 8831.)

B. The Court's Ex Parte Response to the Jury's Request for Exhibits 65 and 65a was in Error

The Sixth Amendment right to the assistance of counsel applies to all critical stages of a criminal proceeding in which the substantial rights of a defendant are at stake. (*Mempa v. Rhay* (1967) 389 U.S. 128, 134 [88 S.Ct. 254, 19 L.Ed.2d 336]; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1002.) This Court has acknowledged that not every communication between the judge and the jury constitutes a critical stage of a trial. (*People*

v. Clark, *supra*, 52 Cal.4th at p. 987.) Indeed the court may properly engage in ex parte communication with the jury pertaining to, "scheduling, administrative purposes, or emergencies that do not deal with substantive matters…." (*Ibid.*) However, this Court has found on multiple occasions that the court must notify counsel upon responding to jury requests to see trial exhibits during deliberations. Such a request has been considered a critical stage of the trial where the right to counsel applies. (Pen. Code, § 1138; *People v. Price* (1991) 1 Cal.4th 324, 414; *People v. Hogan* (1982) 31 Cal.3d 815, 848.) Thus, the court erred when it did not notify counsel of the jury's request.

Appellant also has a federal and state right to be present at all critical stages of trial. (*Rushen v. Spain* (1983) 464 U.S. 114, 117 [104 S.Ct. 453, 78 L.Ed.2d 287]; *People v. Mendoza*, *supra*, 62 Cal.4th at p. 898.) Ex parte communications with jurors outside of open court and the defendant's presence violates a defendant's right to be present. (*People v. Clark*, *supra*, 52 Cal.4th at p. 987; *People v. Hawthorne* (1992) 4 Cal.4th 43, 69.) Although the court may have erred in responding to the jury's inquiry outside the presence of counsel and appellant, as will be discussed below, any error was harmless beyond a reasonable doubt.

C. Any Error in Responding to the Jury's Request to Produce Exhibits that Had Not Been Received into Evidence Was Harmless

It is well-settled that a violation of the right to counsel or personal presence is subject to the harmless beyond a reasonable doubt standard set forth in *Chapman v. California*, *supra*, 386 U.S. at p. 36. This standard applies to situations where the trial court engages in ex parte communication with jurors. (E.g. *Rushen v. Spain*, *supra*, 464 U.S. at p. 118; *People v. Clark*, *supra*, 52 Cal.4th at p. 988; *People v. Wright* (1990) 52 Cal.3d 367, 402.) Any error will typically be harmless when the court

does not discuss any fact in controversy or legal principle connected to the case. (*Rushen v. Spain, supra*, 464 U.S. at p. 121.)

In spite of the settled body of authority clearly setting forth the standard for prejudice in this precise situation, appellant nevertheless urges the Court to presume prejudice on the deprivation of counsel claim under *United States v. Cronic* (1984) 466 U.S. 648 [104 S.Ct. 2039, 80 L.Ed.2d 657], a case addressing ineffective assistance of counsel. (AOB 204-209.) There, the Supreme Court stated,

> "[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.' [Citation.] The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.... [I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated."

(*United States v. Cronic, supra*, 466 U.S. at pp. 656 to 657, fns.omitted.) The Supreme Court set forth three situations where a breakdown of the adversarial process constitutes per se reversible error. (*Id.* at p. 659.) Those instances are: (1) where there had been a "complete denial of counsel," (2) where "counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing," and (3) where counsel was called upon to render assistance under circumstances where competent counsel very likely could not. (*Id.* at pp. 659–662.)

The *Cronic* exception to the general rule requiring a showing of prejudice in ineffective assistance of counsel cases is extremely narrow. (See *Florida v. Nixon* (2004) 543 U.S. 175, 190 [125 S.Ct. 551, 160 L.Ed.2d 565.) Indeed, its narrowness is illustrated by *Cronic* itself when the High Court reversed a ruling by the Court of Appeal that had presumed the existence of prejudice arising from the inadequate performance of an inexperienced, underprepared attorney in a complex mail fraud trial.

(*United States v. Cronic*, *supra*, 466 U.S. at pp. 662, 666.) Cases decided after *Cronic* likewise show that its application is narrow. (E.g. *Javor v. United States* (9th Cir.1984) 724 F.2d 831, 833 [counsel fell asleep during trial]; *Green v. Arn* (6th Cir.1987) 809 F.2d 1257, 1263 [counsel failed to appear for cross-examination of a key witness]; *United States v. Swanson* (9th Cir.1991) 943 F.2d 1070, 1073 [counsel urged the jury to find his client guilty].)

This case simply does not fall within the limited exception set forth by *Cronic* as it did not involve a total breakdown of the adversarial process. The circumstances surrounding the court's denial of the jury's request for an unadmitted exhibit, did not "demonstrate that counsel failed to function in any meaningful sense as the Government's adversary." (*United States v. Cronic*, *supra*, 466 U.S. at p. 666.) The presumption of prejudice set forth in *Cronic* is "reserved for situations in which counsel has entirely failed to function as the client's advocate." (*Florida v. Nixon*, *supra*, 543 U.S. at p. 189.) This case simply is not of the type and character magnitude reserved for the *Cronic* exception.

Contrary to appellant's argument, the decision in *People v. Bradford* (2007) 154 Cal.App.4th 1390, offers no support for using the *Cronic* exception here. (AOB 207.) In that case, the judge engaged in six unreported interactions with the jury during deliberations, several of which were done without input of counsel and occurred within the confines of the jury room. (*Id.* at pp. 1400-1410.) The appellate court found that the unreported ex parte communications between the judge and the jury in the jury room while the jury was deliberating and unaccompanied by counsel were "highly improper" and implicated Bradford's right to counsel at a critical stage of the trial. (*Id.* at pp. 1411-1413.)

The court ultimately reversed, finding the error was prejudicial under *Chapman*. In addressing Bradford's argument that the court's actions

defied a harmless-error analysis, the court in passing cited to *Cronic*, noting that there was some authority that suggested that the deprivation of counsel at a critical sage of the proceedings was cause for automatic reversal. (*People v. Bradford*, *supra*, 154 Cal.App.4th at p. 1417.) The court declined to find that *Cronic* applied because it was clear that reversal was required under *Chapman*. (*Ibid.*) Thus, in a situation where the ex parte contact was far more egregious in both character and frequency than seen here, the court declined to make a finding that *Cronic* applied. The decision in *Bradford* does nothing to suggest that prejudice should be presumed in this case.

In any event, using the proper standard of prejudice under *Chapman*, any error was harmless beyond a reasonable doubt. To begin with, as discussed above, the exhibit had not been received into evidence in the Rices case, thus the court's answer to the jury was not incorrect. Appellant nevertheless engages in multiple assumptions in an attempt to show that the exhibits would have been given to the jury had counsel been contacted. He assumes that counsel would have asked for them to be provided, that the prosecution would have agreed, and that the court would have permitted exhibits that had previously not been admitted to be given to the jury. (AOB 210.) It is not likely appellant's counsel would have wanted the letter before the jury because it contained gang references, and appellant's gang membership was a fact he sought to remove from the jury's consideration. Nevertheless, even assuming all these circumstances would have been met had the court consulted with counsel, a finding of prejudice is still not supported.

To begin with, a fair examination of the actual exhibits in question demonstrates that any error was harmless beyond a reasonable doubt. As the Court will see, the exhibits contain little useful information, are barely comprehendible, and mostly refer to matters unrelated to the underlying

case. (Exhibits 65, 65a.) The letter could be construed in different ways, neither of which was particularly helpful to the prosecution nor the defense. It would seem that the prosecution was attempting to show that Miller was not in fact scared of appellant and held him in high regard which could undercut his duress defense. However, the letter could likewise be interpreted to show that Miller was in fact afraid of appellant, and after implicating him, sought to smooth things over by seeming remorseful and loyal. The exhibits added little evidentiary value for or against either party. Thus, even assuming the exhibits would have made their way into the jury room had the court consulted counsel, no different result would have occurred.

When the contents of the exhibits are balanced against the substantial case in aggravation against appellant, any error must be deemed harmless. As discussed previously, in Argument X, the circumstances of the offense were senseless and violent. Having accomplished the robbery, appellant elected to take the lives of two young people who cooperated during the offense. Appellant also engaged in a substantial amount of violent conduct both before and after he committed these crimes, including having admitted to the attempted murder of a peace officer while in custody, along with a slew of armed robberies. (15 RT 2197-2201, 2208-2210, 2234-2235, 2238-2244, 2266-2267, 2293-2295, 2307-2310.)

In light of the negligible value of the exhibits weighed against the substantial evidence supporting the jury's death judgment, any impermissible ex parte contact the court had with the jury in declining to provide them with the exhibits in question was harmless beyond a reasonable doubt.

Finally, appellant argues that the court's ex parte communication violated the reliability requirements of the 8th Amendment. (AOB 213-216.) As discussed previously, the Eighth Amendment's reliability

requirement is met when the prosecution discharges its burden of proof pursuant to the rules of evidence and within the guidelines of the death-penalty statute, the death verdict is rendered under proper instructions and procedures, and the trier of the penalty has duly considered relevant mitigating evidence. (*People v. Jenkins*, *supra*, 22 Cal.4th 900, 1044.) The court's minor and only ex parte communication with the jury does not call into question the reliability of the death judgment under the circumstances. Appellant's claim should be rejected.

XIII. THE PROSECUTOR DID NOT ERR IN RELYING ON APPELLANT'S JUVENILE ADJUDICATIONS AND CRIMINAL CONDUCT

Appellant contends that his Eighth Amendment rights were violated when the prosecution relied upon juvenile criminal conduct as part of its case in aggravation. In doing so, appellant urges this Court to reconsider well-established authority and create a new rule of law that would prohibit the use of juvenile criminal conduct as evidence of aggravation. (AOB 217-231.) The authority appellant cites to support his argument simply does not support a new rule of law which would prohibit a jury from considering criminal acts committed by juveniles as part of the prosecution's case in aggravation.

Appellant was born on August 21, 1981, and thus turned 18 years old the same date in 1999. (6 CT 1337.) The prosecution presented evidence of felony convictions and prior juvenile criminal conduct during its case in aggravation. First, appellant committed the armed carjacking against Paul Hillard on March 7, 1999. He was prosecuted as an adult and suffered an adult felony conviction based on that conduct. (15 RT 2208-2210, 2215-2219, 2307.) The prosecution also presented one instance of criminal conduct that occurred when appellant was a juvenile, when he committed a robbery of a Taco Bell in February of 1999. (15 RT 2197-2200.)

To begin with, appellant has forfeited this claim by failing to object below. The failure to object to the admission of juvenile misconduct as evidence of aggravation forfeits the claim in a capital case. (*People v. Rundle*, *supra*, 43 Cal.4th at p. 185, overruled on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421.)

Notwithstanding his forfeiture, appellant does not and cannot dispute that felony convictions suffered as a juvenile or unadjudicated criminal acts committed when he was a juvenile are admissible aggravating circumstances under Penal Code section 190.3, factors (b) and (c). (AOB 217-218; *People v. Taylor* (2010) 48 Cal.4th 574, 652-653 [juvenile criminal activity involving force or violence is admissible under factor (b)]; *People v. Williams* (2010) 49 Cal.4th 405, 462 [felony conviction suffered when tried as an adult is admissible under factor (c)].)

Nevertheless, appellant contends that admission of these convictions violated the Eighth Amendment. (AOB 219-229.) He relies on three Supreme Court cases: *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1]; *Graham v. Florida* (2010) 560 U.S. 48 [130 S.Ct. 2011, 176 L.Ed.2d 825]; and *Miller v. Alabama* (2012) __ U.S. __ [132 S.Ct. 2455, 183 L.Ed.2d 407]. These cases do not support appellant's argument.

In *Roper*, the Supreme Court held that the Eighth Amendment barred execution of a defendant who was under 18 when he committed the capital crime. (*Roper v. Simmons*, *supra*, 543 U.S. at pp. 555-556, 578.) *Graham* held that the Eighth Amendment prohibits a sentence of life without parole (LWOP) for a juvenile offender's non-homicide crime. (*Graham v. Florida*, *supra*, 560 U.S. at pp. 52-53, 82.) Finally, *Miller* held that the Eighth Amendment precludes a mandatory LWOP sentence for a defendant convicted of a murder committed before he turned 18. (*Miller v. Alabama*, *supra*, 132 S.Ct. at p. 2460.)

Roper, *Graham*, and *Miller* were solely concerned with the penalty imposed on an offender for a juvenile crime. This case, however, involves appellant's penalty for a murder he committed as an adult. Enhancing an adult defendant's sentence based on his juvenile crimes is not an additional penalty for his juvenile crimes, it represents a stiffened penalty for his adult crime. (*People v. Bivert* (2011) 52 Cal.4th 96, 122.) Thus, appellant's reliance on *Roper*, *Graham*, and *Miller* is misplaced because they say nothing about the propriety of permitting a capital jury, trying an adult, to consider evidence of offenses committed when the defendant was a juvenile and can not be reasonably interpreted to lead to such an extended holding. (*Id.* at pp. 122-123; *People v. Bramit* (2009) 46 Cal.4th 1221, 1239.)

Moreover, "an Eighth Amendment analysis will often hinge upon whether there is a national consensus in this country against a particular punishment." (*People v. Bramit*, *supra*, 46 Cal.4th at p. 1239.) Here, appellant's challenges the admissibility of evidence, not the imposition of punishment. (*Ibid*; *People v. Bivert* , *supra*, 52 Cal.4th at p. 123 [rejecting defendant's argument that *Roper* articulated a "rule in which no prior juvenile conduct is admissible in the penalty phase of a capital trial"]; *People v. Lee* (2011) 51 Cal.4th 620, 648-649 [holding that *Roper* does not compel exclusion of juvenile criminal activity]; *People v. Taylor*, supra, 48 Cal.4th at pp. 653-654 [same].)

In sum, this Court has held that juvenile criminal activity is admissible as an aggravating circumstance in capital cases. There is no support for appellant's contention that *Roper*, *Graham*, and *Miller* created a bar on the consideration of juvenile crimes when deciding the appropriate penalty for an adult murderer.

Even if the evidence should have been excluded, any error was harmless. When evidence has been improperly admitted under Penal Code section 190.3, subdivisions (b) and/or (c), "the error may be harmless when

the evidence is trivial in comparison with the other properly admitted evidence in aggravation." (*People v. Williams*, *supra*, 49 Cal.4th at p. 461.) The question is whether, in light of the properly admitted evidence of appellant's criminal history and the circumstances of the crimes in this case, there is a reasonable possibility that the jury's penalty verdict was affected by the inadmissible evidence. (*People v. Burton* (1989) 48 Cal.3d 843, 864.) This standard is "essentially the same as the harmless beyond a reasonable doubt standard of *Chapman v. California*." (*People v. Lewis*, *supra*, 43 Cal.4th at p. 527, internal quotation marks omitted.)

Here, the Taco Bell robbery and the carjacking were not the most significant features of the prosecution's case in aggravation, alone or in combination. They paled in comparison to the appalling nature of the executions of two defenseless, young people, along with the attempted murder of the sheriff's deputy, the assaults in custody, and the violent, armed bank robberies appellant committed. Moreover, the prosecutor did not unduly focus on that particular evidence during closing argument. The prosecutor merely commented that appellant robbed Hillard and stole his car and robbed a Taco Bell. (15 RT 2748-2749.) That discussion amounted to only six lines of reporter's transcript. Given the properly admitted evidence of defendant's substantial criminal history and the circumstances of the instant offenses, there simply is no reasonable possibility the jury's penalty verdict was affected by the evidence of appellant's juvenile criminal conduct and his one conviction for carjacking.

XIV. The Trial Court Properly Permitted the Prosecution to Argue That Appellant Would Continue to Present a Danger While in Prison Because the Argument Was a Fair Comment on the Evidence

Appellant contends that the trial court violated state law when it permitted the prosecutor to argue future dangerousness to the jury, which is

not a statutory factor in aggravation. By doing so, appellant extrapolates that his Eighth Amendment right to a reliable jury determination was violated. (AOB 217-231.) Appellant is incorrect. The trial court properly overruled the defense objection because such an argument is a fair comment on the evidence and could also be used to rebut the suggestion that appellant would not pose a danger in prison.

During closing argument, the prosecutor highlighted appellant's violent conduct while in custody, after having killed Heather and Firas. Specifically, the prosecution discussed the beating of Darnell Moore while appellant was in custody. (19 RT 2749-2751.) He also noted that appellant attempted to intimidate a witness during the preliminary hearing. (19 RT 2751.) The prosecution further argued that appellant attempted to murder the deputy while in jail without any provocation. (19 RT 2751-5752.) Not three days later, deputies discovered appellant with a metal shank secreted in the waistband of his clothing. (19 RT 5752.) The day after that, he made a statement that it was "cool" to dip a piece of metal in "piss and shit" and stab a cop with it. (19 RT 5752.) The prosecution then stated, "Do not think for one moment that his interaction with staff in a prison setting is going to change. Do not think for one moment that his interaction with other prisoners is going to change." At that point, defense counsel objected on "dangerousness, relevancy." The court overruled the objection, stating, "Overruled based on the evidence. You can argue that." (19 RT 2753.)

The prosecution then went on to argue,

> "Someone's son, someone's daughter works in our prisons. They are exposed to the people who are alive and kept alive in our prisons. They are and will be exposed to Jean Pierre Rices. To think that all of a sudden you come back and say, 'Oh, well, Maybe LWOP is okay,' I suggest to you, ladies and gentlemen, that it's not for a lot of reasons. And based upon this

defendant's violent criminal behavior, both before, during, and after this crime, he is a danger for those people." (19 RT 2753.)

The law on this issue is well-settled. The prosecution is not permitted to present expert testimony that a defendant will pose a danger in the future should he not be put to death. (*People v. Murtishaw* (1981) 29 Cal.3d 733, 773-775.) The decision in *Murtishaw* was limited to state law grounds, as the United States Supreme Court has found that consideration of a defendant's future dangerousness is "an essential element" in determining what punishment to impose. (*Jurek v. Texas* (1976) 428 U.S. 262, 275 [49 L.Ed.2d 929, 96 S.Ct. 2950].)

In spite of the state law limitation in presenting extrinsic evidence of a defendant's future dangerousness in the capital context, the prosecution is nevertheless entitled to argue a defendant's future dangerousness when based on evidence of the defendant's conduct rather than expert opinion. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 446; *People v. Cunningham* (2001) 25 Cal.4th 926, 1022.) This Court has repeatedly rejected arguments attacking a prosecution's ability to argue future dangerousness based on jailhouse altercations. (E.g. *People v. Tully* (2012) 54 Cal.4th 952, 1054.) Indeed, this Court has also specifically declined to find that future dangerousness cannot be argued because it is not listed as an aggravating factor and has declined to reconsider the issue since its initial holding in *People v. Davenport* (1985) 41 Cal.3d 247, 288. (*People v. Thomas* (2011) 52 Cal.4th 336, 364; *People v. Michaels* (2002) 28 Cal.4th 486, 540.) Thus, appellant has no reasonable grounds upon which to base his argument that the Court should reconsider such well-established precedent.

Even assuming that the prosecutor could not have argued future dangerousness in support of the death penalty, it had another proper basis

upon which to make the argument. Future dangerousness may also be argued when

> "aimed at persuading the jury not to accord significant weight to the defense argument, proffered in mitigation, that the defendant had been (and presumably, would continue to be) a model prisoner."

(*People v. Garceau* (1993) 6 Cal.4th 140, 205, overruled on other grounds in *People v. Yeoman, supra*, 31 Cal.4th 93 at pp. 117-118.) The prosecutor's argument could have properly served as a response to the defense evidence regarding appellant's prior good behavior in prison. Daniel Vasquez, a correctional consultant, testified that during appellant's prison term, he only participated in one assault, which was later found to be an instance of mutual combat. (18 RT 2611.) Vasquez also noted that during appellant's prison term, he committed no assaults against staff. (18 RT 2615.) Thus, the argument was proper on this point as well and the court properly sustained the objection on that basis.

Simply put, the trial court had no basis upon which to sustain appellant's objection. Under the state of the law at the time the trial was held, and currently, the trial court properly overruled the defense objection. "Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction." (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.) Consequently, the trial court committed no error when it overruled appellant's objection.

Finally, assuming the trial court should have disregarded well-established authority and sustained the objection, any error was harmless even under the more stringent standard of *Chapman.* In assessing the prejudicial impact of a prosecutor's comments during closing argument, a reviewing court will consider the length of the statement in addition to the other evidence presented to the jury. (See *People v. Coffman, supra*, 34

Cal.4th at p. 94.) The prosecutor's comments regarding appellant's future dangerousness were fleeting and only amounted to 13 lines of argument within the prosecutor's approximately 21-page argument. (19 RT 2744-2758, 2777-2784.) And as discussed previously, the factors in aggravation presented against appellant were substantial and compelling. Even had the jury not heard the few lines regarding appellant's future dangerousness, they could not have ignored appellant's violent behavior both before, during, and after the offenses. Indeed, it would have been difficult for the jury not to conclude on its own that appellant posed a danger to correctional staff after he brutally attacked the deputy with a razor while awaiting charges and admitted to attempting to murder him. (15 RT 2308-2309, 2320-2324.) Even after having done so, appellant possessed a weapon in jail soon thereafter. (16 RT 2378-2379.) The issue of future dangerousness was virtually inescapable in light of appellant's behavior in custody. Consequently, any error was harmless beyond a reasonable doubt.

XV. The Trial Court Properly Excluded Evidence of the Impact Appellant's Execution Would Have on His Family Because Appellant Did Not Lay Adequate Foundation

Appellant contends that his Eighth Amendment rights were violated when the court precluded counsel from asking family members about the impact appellant's execution would have on them. (AOB 240-265.) Appellant is incorrect. Neither federal constitutional nor state statutory authority requires that evidence that is irrelevant to appellant's character or background be admitted. Here, appellant failed to lay the proper foundation for the introduction of the evidence, therefore, the trial court properly excluded it. Finally, any error was harmless in light of the minimal relevance of the evidence balanced against the strength of the prosecution's case.

A. Facts Relating to the Trial Court's Ruling

During the defense case in mitigation, counsel asked appellant's aunt what she believed the appropriate penalty to be and whether he should get the death penalty. (17 RT 2470.) The prosecutor objected and the court sustained the objection. (17 RT 2470.) The court later explained its ruling to counsel,

> "...As to the objection, I believe we may be in a generally relevant area. Ms. Wright has indicated she loves Mr. Rices, and I will allow you to inquire as to her thoughts about what impact certain penalties might have on her due to that degree of love. But just offering opinion as to what penalty, I'm going to sustain that objection. It has to be linked, somehow, to a circumstantial tidbit of evidence regarding Mr. Rices and his character before I would allow that type of question." (17 RT 2471-2472.)

When court resumed, counsel had no further questions for Ms. Wright. (17 RT 2498.)

Counsel called appellant's grandfather, but did not ask him any questions about penalty or the effect on him. (17 RT 2500-2508.) Likewise, counsel posed no inquiry to Charles Rices, appellant's uncle, or Benjamin Hazard, appellant's grand-uncle, on that topic. (17 RT 2514-2520.) During counsel's examination of Gloria Brooks, appellant's grandmother, he asked, "Ma'am, do you have an opinion about what the impact would be on Jean Pierre's family if he was to be executed?" The prosecution objected and the court sustained the objection and asked to meet with counsel at side bar. (17 RT 2538.)

The court told counsel that impact was not relevant. Counsel argued that the court had previously indicated that the impact could be considered if it reflected some positive quality. Counsel offered to rephrase the question to seek her opinion on whether an LWOP sentence would have a positive impact on herself and appellant's son. (17 RT 2538.) The court

responded by stating there were a number of cases finding the impact of execution on the defendant's family was not relevant or a mitigating factor in the case. The court attempted to clarify, "If somehow it might indirectly bear on his character, that's one thing, but this question doesn't get to that." It further explained,

> "His character, obviously, he's got positive characteristics, go for it. But right now, you're just saying what impact would this have on the family. That's not relevant to a character trait of Mr. Rices."

Counsel further argued that the impact was indirect evidence of character. The court reiterated that any question on the impact of execution on the family was not relevant. (17 RT 2539.) Counsel then went on to ask Brooks about appellant's relationship with his son. (17 RT 2540.) The remainder of the witnesses were not members of appellant's family.

The issue arose again during a conference on jury instructions in reference to CALCRIM No. 763, the instruction containing aggravating and mitigating factors. The parties discussed the following bracketed portion of the instruction,

> "[Although you may consider sympathy or compassion for the defendant, you may not let sympathy for the defendant's family influence your decision.][However, you may consider evidence about the impact the defendant's execution would have on (his/her) family if that evidence demonstrates some positive quality of the defendant's background or character.]]"

The prosecution requested the first part of the bracketed instruction, but objected to the latter. (18 RT 2693.) It did not believe there had been any evidence that demonstrated some positive quality in the defendant's background or character to justify the instruction. The court agreed. Counsel argued that Charlene Wright, appellant's aunt, cried in front of the jury and the nonverbal aspect of her testimony was indirect evidence that appellant's background and character had positive qualities. (18 RT 2693-

2694.) The court deferred ruling until the next day because it wanted to read *People v. Ochoa* (1998) 19 Cal.4th 353, before making its final ruling. (18 RT 2694.)

The following day, the court indicated that it had read the decision in *Ochoa* and reviewed the testimony of Northrop and Wright. It noted there were objections at the conclusion of those witnesses' examinations, which were sustained. Counsel had not revisited the issue within the context that the court provided for proper examination. Based on those considerations, the court sustained the People's objection to the last sentence of the bracketed portion of the instruction. (19 RT 2719.)

B. The Trial Court Properly Refused to Admit Evidence Pertaining to the Impact of Execution on Appellant's Family and Instruct on It.

Appellant argues at length that statutory construction requires that a defendant be permitted to admit evidence of the impact his execution would have on his family without regard to his character as "any matter relevant... to mitigation and the sentence" under Penal Code section 190.3.[14] (AOB 243-252.) This very argument has been rejected by this Court on numerous occasions. The issue was first addressed in *People v. Ochoa*, *supra*, 19 Cal.4th at 454. The Court considered the language of Penal Code section 190.3 and concluded,

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[14] The relevant portion of Penal Code section 190.3 states, "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition."

"In this context, what is ultimately relevant is a defendant's background and character-not the distress of his or her family. A defendant may offer evidence that he or she is loved by family members or others, and that these individuals want him or her to live. But this evidence is relevant because it constitutes indirect evidence of the defendant's character. The jury must decide whether the defendant deserves to die, not whether the defendant's family deserves to suffer the pain of having a family member executed." (*Id.* at p. 456.)

The Court illustrated how such evidence should be considered.

"[A] jury may take into account testimony from the defendant's mother that she loves her son if it believes that he must possess redeeming qualities to have earned his mother's love. But the jury may not spare the defendant's life because the jury feels sorry for the defendant's mother, or believes that the impact of execution would be devastating to other members of defendant's family."

(*People v. Ochoa, supra,* 19 Cal.4th at 456.)

The Court summed up the issue by stating,

"we hold that sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation, but that family members may offer testimony on the impact of an execution if by doing so they illuminate some positive quality of the defendant's background or character." (*Ibid.*)

Since this Court's decision in *Ochoa*, it has repeatedly declined to revisit arguments that rely on statutory construction as a basis for the introduction of such evidence. (E.g. *People v. Williams* (2013) 56 Cal.4th 165, 197-198; *People v. Gonzales* (2012) 54 Cal.4th 1234, 1292; *People v. Bennett* (2009) 45 Cal.4th 577, 602.) Those decisions are based on solid reasoning. Although statutorily Penal Code section 190.3 does not expressly limit evidence of the impact of execution on a defendant's family, this Court has noted it does not have bearing on the individualized nature of

the penalty decision.[15] (*People v. Bemore* (2000) 22 Cal.4th 809, 856.) That conclusion is based upon the wording of the statute which limits the evidence to *relevant* evidence, which the impact on the defendant's family is not when it does not relate to his character. Indeed, to permit the jury to take into account the impact of execution without regard for a defendant's character, would permit them to return a verdict of life without the possibility of parole solely to spare the defendant's family emotion distress. (*People v. Smithey* (1999) 20 Cal.4th 936, 1000.) Appellant has provided no compelling reason for the Court to reconsider this issue on statutory grounds.

The trial court acted well-within this well-established framework. The trial court properly sustained the objection to appellant's aunt asking what she believed the appropriate penalty to be. (17 RT 2470.) The court explained to counsel that her feelings on execution had to be linked to some character trait which justified his aunt's love. (17 RT 2471-2472.) Counsel elected not to ask any further questions. (17 RT 2498.) Nor did counsel seek to admit execution impact evidence with appellant's grandfather, uncle, or grand-uncle. (17 RT 2500-2508, 2514-2520.) Counsel then asked appellant's grandmother her opinion about the impact the execution would have on appellant's family. (17 RT 2538.) The court reminded counsel that he would have to find a way to have the impact relevant to appellant's character. (17 RT 2538-2539.) Counsel still did not attempt to lay the

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[15] Appellant's argument that such evidence should be considered in light of the matters considered for granting probation under Penal Code sections 1203 and 1170, subdivision (b) and California Rules of Court, rule 414(AOB 245-246) has also been squarely rejected by this Court. (*People v. Bennett*, *supra*, 45 Cal.4th at p. 602 [the rules governing probation are different than section 190.3].)

foundation. (17 RT 2540.) Under the circumstances, the trial court properly limited the admission of execution impact evidence under *Ochoa*.

Appellant further argues, relying on *Payne v. Tennessee* (1991) 501 U.S. 808, [111 S.Ct. 2597, 115 L.Ed.2d 720], that execution-impact evidence is admissible because the impact of a defendant's execution on his family is essential for the jury to understand the defendant's uniqueness as a human being. (AOB 253-259.) The decision in *Payne* does not support this position.

In *Payne*, the United States Supreme Court overruled prior authority to hold that the prosecutor could introduce victim impact evidence to balance the scales in a capital trial. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 811, 822, 829.) The Court found such evidence is relevant to show the harm done by the defendant in committing his crime, in other words, a circumstance or effect of his conduct. (*Id.* at p. 827.) The Court also emphasized that the state has a legitimate interest in showing the jury that the victim was a unique individual. (*Id.* at p. 825.) In doing so, the High Court did not implicitly hold that the defendant was entitled to offer a wider range of evidence than previously permitted. Rather, the Court noted that there were no limits on the relevant mitigating evidence a capital defendant may introduce concerning "his *own* circumstances." (*Id.* at p. 822, emphasis added.)

The rationale behind permitting the prosecution to present victim impact evidence simply does translate to the admissibility of execution-impact evidence. This Court has repeatedly rejected claims that *Payne* compels a different finding. (E.g. *People v. Bennett*, *supra*, 45 Cal.4th at p. 602; *People v. Bemore*, *supra*, 22 Cal.4th at p. 856.) Contrary to appellant's argument, he is able to present evidence of his uniqueness as an individual by presenting evidence of his character and background. The

effect of a defendant's execution simply does not bear on him at all and only bears on his family, an irrelevant consideration.

Appellant's argument that limiting his ability to present execution-impact evidence violates the Eight Amendment is also without basis. (AOB 258-259.) The Eighth Amendment requires only that state law permit the jury to "consider all relevant mitigating evidence," such as

> "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

(*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110, 117 [102 S.Ct. 869, 71 L.Ed.2d 1], citations omitted.) California law complies with that mandate. Under California law, a death penalty jury is to consider

> "any matter relevant to . . . mitigation . . . including, but not limited to, . . . the defendant's character, background, history, mental condition and physical condition." (Pen. Code, § 190.3.)

Because pure sympathy for the defendant's family is not independently relevant to lessen a defendant's punishment, execution-impact evidence is not constitutionally mandated.

C. Any Error in Excluding the Evidence and Failing to Instruct the Jury was Harmless

Even if there had been error in limiting how the jury could consider evidence of the impact of a death verdict on appellant's family, reversal is not required where "the state proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*People v. Smith*, *supra*, 35 Cal.4th at p. 368, quoting *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Bennett*, *supra*, 45 Cal.4th at p. 605.) Appellant argues that the error requires a new penalty phase without respect to prejudice because the jury was precluded from considering mitigating evidence. (AOB 260-263.) This Court has explicitly rejected this

argument many times. (E.g. *People v. Roldan* (2005) 35 Cal.4th 646, 739; *People v. Brown* (2003) 31 Cal.4th 518, 577.)

Here, the trial court did not limit the evidence that appellant could offer in mitigation concerning his character and background. Moreover, the jury heard evidence of the affection appellant's family felt for him. Appellant's father testified that he loved his son. While he felt he should be punished, he should not get the death penalty. (17 RT 2457-2458.) His aunt, Cheryl Wright, testified that she loved appellant and felt guilty for not having done more. She was apparently was moved to tears during her testimony. (17 RT 2470, 18 RT 2693-2694.) His grandmother told the jury that appellant loved his son and seemed to have an emotional reaction to the circumstances in which appellant found himself. (17 RT 2540.)

Aside from the evidence of his family's feelings about him, the jury heard extensive evidence regarding his mother's issues, the circumstances of his abandonment, her subsequent death, his behavioral difficulties since that time, and how the system failed to address his problems. (E.g. 17 RT 2431-2441, 2468-2470, 2505-2506, 2567, 18 RT 2663-2664.) Had the execution-impact evidence been allowed and an instruction provided, it still would not have been able to overcome the prosecution's case in aggravation, including the heinous facts surrounding the instant offense and appellant's penchant for violence before and after the crimes. (15 RT 2197-2201, 2208-2210, 2234-2235, 2238-2244, 2266-2267, 2293-2295, 2307-2310.) The jury could also consider that although appellant faced difficult circumstances, his grandparents made tremendous efforts to provide him with a solid and loving upbringing after his mother abandoned him, so he was not without love and support throughout his childhood. (17 RT 2504, 2511.) Under the circumstances, any error in excluding evidence of the impact of an execution on appellant's family and not providing an instruction on such was harmless beyond a reasonable doubt.

XVI. THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE JURY THAT MILLER'S TESTIMONY OR OUT-OF-COURT STATEMENTS REQUIRED INDEPENDENT SUPPORTING EVIDENCE

Appellant contends that the trial court should have instructed the jury that Miller's testimony and out-of-court statements required corroboration because he was an accomplice. He claims the court had a sua sponte duty to do so, and if not, counsel was ineffective for failing to ensure that the jury was properly instructed. According to appellant, the error was prejudicial and requires a new penalty phase trial because it rendered the death verdict and sentence unreliable under the federal constitution. (AOB 266-294.)

To begin with, appellant has forfeited this argument for failing to object to the instructions as given. The forfeiture did not constitute ineffective assistance of counsel because no instruction on corroboration was necessary in light of the fact Miller testified about a crime of which appellant had already been convicted. Even assuming the court should have given an instruction on corroboration, any error was harmless because Miller's testimony and statements were adequately corroborated and any error did not impact appellant's right to a reliable jury verdict under the Eighth Amendment or any other constitutional provision.

A. Facts Relating to the Instruction in Question

As discussed previously, Miller testified on his own behalf in front of the Rices jury. As is relevant to the issue here, the prosecutor impeached Miller with his prior statement to detectives on several points. Specifically, at trial, Miller testified that he recalled telling detectives that Heather and Firas begged for their lives, but he lied to detectives on that point to seem more credible. (19 RT 1958-1961.)

During the conference on jury instructions, the instructions at issue, CALCRIM 301 [single witness's testimony] and 335 [accomplice testimony], were only briefly mentioned. The court compiled a packet of proposed instructions for the parties. (18 RT 2685.) After having reviewed the court's packet, the parties noted that CALCRIM No. 335 was not included, and the court agreed to add the instruction. (18 RT 2687.) The court indicated it would provide a copy for the parties to review the following morning. (18 RT 2712.) CALCRIM No. 301 had been included in the packet. (18 RT 2690.)

The following day, the court followed up with the parties on the CALCRIM No. 335 instruction. It noted,

> "CALCRIM 335, which is a standard accomplice instruction, simply doesn't fit because it talks about jurors finding someone guilty of a crime. I looked at the case, I think it's *People v. Box*,[16] that requires the court even sua sponte – and thank you, counsel for reminding me - - that it's necessary to give accomplice testimony. But it emphasizes that the essence should be that accomplice testimony be weighed with caution.
>
> Mr. Chambers, the balance of 335 talks about in order to find someone guilty based upon an accomplice's testimony, there has to be corroboration. Corroboration can be slight. There has to be independent evidence of the crime. This instruction does not include that, but I believe it goes to the heart of why I should instruct regarding Mr. Miller's testimony." (19 RT 2720-2721.)

At that point, counsel stated, "We would ask that the court give that instruction." The court then generally asked counsel if he had any issues he would like to address as to the instructions as a whole, to which counsel responded, "No, your honor." (19 RT 2721.)

The court instructed the jury with CALCRIM No. 301. That instruction stated,

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[16] *People v. Box* (2000) 23 Cal.4th 1153, 1208-1209

"Except for the testimony of Anthony Miller, which requires supporting evidence, the testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." (19 RT 2730-2731.)

The court instructed the jury with its modified version of CALCRIM No. 335.[17] That instruction stated,

"The defendant, Anthony Miller, was a witness in the trial. Mr. Miller is an accomplice to the crimes of murder committed by Jean Pierre Rices. Because he is an accomplice, any statement or

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[17] The full text of CALCRIM No. 335 is as follows, "If the crime[s] of <insert charged crime[s]> (was/were) committed, then <insert name[s] of witness[es]> (was/were) [an] accomplice[s] to (that/those) crime[s].

You may not convict the defendant of <insert crime[s]> based on the (statement/ [or] testimony) of an accomplice alone. You may use the (statement/ [or] testimony) of an accomplice to convict the defendant only if:

1. The accomplice's (statement/ [or] testimony) is supported by other evidence that you believe;

2. That supporting evidence is independent of the accomplice's (statement/ [or] testimony);

AND

3. That supporting evidence tends to connect the defendant to the commission of the crime[s].

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the witness testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime

[The evidence needed to support the (statement/ [or] testimony) of one accomplice cannot be provided by the (statement/ [or] testimony) of another accomplice.]

Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ [or] testimony) the weight you think it deserves after examining it with care and caution and in the light of all the other evidence."

> testimony of Mr. Miller that tends to incriminate the defendant, Jean Pierre Rices, should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that statement or testimony the weight you think it deserves after examining it with care and caution in light of all the other evidence." (19 RT 2731.)

B. The Argument is Forfeited

At the conference on jury instructions, the court provided the instructions to the parties and informed them of the modifications it made to CALCRIM No. 335. Appellant did not request that CALCRIM No. 301 be modified to include a reference to Miller's out-of-court statements. Nor did appellant offer a clear opposition to the court's modification of CALCRIM No. 335 excluding the portion regarding corroboration. A party may not complain that an instruction is legally correct yet too general or incomplete without having requested clarifying or amplifying language below. (*People v. Lucas* (2014) 60 Cal.4th 153, 290; *People v. Sanders* (1995) 11 Cal.4th 475, 533.) Consequently, the issue should be deemed forfeited and not considered on appeal.

Appellant attempts to overcome his forfeiture by asserting that counsel was ineffective for failing to object to the modification of CALCRIM No. 335 excluding the corroboration requirement and failing to request modification of CALCRIM No. 301 to include a reference to appellant's out-of-court statements. (AOB 290-293.) As set forth previously, the defense has the burden to show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and that he suffered prejudice as a result. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) Appellant cannot meet his burden, because as discussed in the context of the merits of the claim, the trial court had no obligation to provide the instructions on corroboration, and even assuming error, appellant cannot demonstrate prejudice.

C. An Instruction on Accomplice Corroboration Is Not Required When an Accomplice Testifies At the Penalty Phase About a Crime That Has Already Been Adjudicated

A reviewing court will assess a claim of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) Penal Code section 1111 prohibits a defendant from being convicted on the uncorroborated testimony of an accomplice. Such testimony must be corroborated by

> "such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

Under some circumstances, which will be discussed in further detail below, this section is applicable at the penalty phase of a capital trial. (*People v. Nelson* (2011) 51 Cal.4th 198, 217; *People v. McDermott* (2002) 28 Cal.4th 946, 1000.)

At the onset, it is helpful to note that there are two main components to the accomplice instruction contained in CALCRIM No. 335, an instruction that was seemingly drafted to be used in trials determining guilt, not penalty. The first part requires that an accomplice's statement or testimony be supported be independent evidence. The trial court did not offer that portion of the instruction here. The second warns the jury to view accomplice statements and testimony with caution and to give the testimony the proper weight after examining it with care and caution. The trial court instructed with that latter portion. CALCRIM No. 335 combined several prior instructions, CALJIC No. 3.11[18] [testimony of accomplice or

[18] CALJIC No. 3.11 states, "You cannot find a defendant guilty based upon [the testimony of an accomplice] [or] [the testimony by a codefendant that incriminates the defendant] unless that testimony is (continued...)

codefendant must be corroborated], CALJIC No. 3.12[19] [sufficiency of evidence of accomplice corroboration] and CALJIC 3.18[20] [testimony of accomplice or codefendant to be viewed with care and caution], which are the instructions most frequently referenced in capital cases dealing with this issue.

With that background in mind, contrary to appellant's argument, the trial court did not have a sua sponte obligation to instruct the jury that

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(...continued)
corroborated by other evidence which tends to connect [the] [that] defendant with the commission of the offense.

Testimony [of an accomplice] [or] [by a codefendant] includes any out-of-court statement purportedly made by [an accomplice] [or] [a codefendant] received for the purpose of proving that what the [accomplice] [or] [the codefendant] stated out-of-court was true.]"

[19] CALJIC No. 3.12 states, "To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the crime which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the crime charged.

However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crime charged, or that it corroborate every fact to which the accomplice testifies.

In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime.

If there is no independent evidence which tends to connect defendant with the commission of the crime, the testimony of the accomplice is not corroborated.

If there is independent evidence which you believe, then the testimony of the accomplice is corroborated."

[20] CALJIC No. 3.17 states, "To the extent that [an accomplice] [or] [a codefendant] gives testimony that tends to incriminate [the] [a] [another] defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in this case."

Miller's testimony must be supported by independent evidence. When an accomplice testifies at a penalty phase, the trial court must instruct that the witness' testimony must be viewed with distrust. (*People v. Mincey* (1992) 2 Cal.4th 408, 461.) If the evidence adduced from the accomplice pertains to unadjudicated prior criminal conduct, the court should also instruct the jury that the accomplice testimony must be corroborated. (E.g. *People v. Hernandez* (2003) 30 Cal.4th 835, 874; *People v. Easley* (1988) 46 Cal.3d 712, 733-734; *People v. Varnum* (1967) 66 Cal.2d 808, 814-815.) However, no instruction pertaining to corroboration is required when penalty phase accomplice testimony relates to an offense of which the defendant has already been convicted. (*People v. Carter*, *supra*, 30 Cal.4th at p. 1223; *People v. Williams* (1997) 16 Cal.4th 153, 276.) That principle was illustrated in *People v. Moore* (2011) 51 Cal.4th 1104. There, the Court found that the trial court did not err when it did not instruct the jury that the penalty phase testimony of an accomplice regarding the details of a murder required corroboration. It reasoned that no such instruction was necessary because the defendant had already been convicted of that crime. (*Id.* at p. 1143-1144.) Here, appellant pled guilty to the underlying crimes and allegations pertaining to the robbery and murders to which Miller testified. (4 CT 716-718.) Because appellant had already been convicted of that offense, no corroboration instruction was necessary because it did not pertain to unadjudicated criminal conduct. Accordingly, the trial court did not err when it modified CALCRIM No. 335 to exclude the corroboration portion of the instruction.

The same rationale applies to appellant's related argument that the trial court had a duty to instruct the jury that corroboration was necessary for Miller's pre-trial statements to detectives. When out-of-court statements made by an accomplice are admitted during the penalty phase of a trial, an instruction on corroboration is not necessary if his statements

relate to an offense of which the defendant has already been convicted. (*People v. Carter*, *supra*, 30 Cal.4th at p. 1222-1223.) Consequently, the court did not err when it instructed the jury to view Miller's testimony and statements with caution without a requirement for corroboration, as his testimony only related to crimes that appellant had pled guilty to.

In spite of the well-established authority demonstrating that the court had no basis upon which to provide an instruction on accomplice corroboration, appellant nevertheless argues that this case presents an exception to the rule because Miller's testimony presented certain facts in aggravation that went beyond the fact that the crime was committed. (AOB 280-285) Appellant is incorrect.

In *People v. Easley*, *supra*, 46 Cal.3d at pp. 733-734, the Court rejected the defense's argument that an accomplice corroboration instruction was necessary at the penalty phase because the jury was concerned with the degree of his culpability. It found that any accomplice testimony related solely to murders of which the defendant had already been convicted, thus the instructions were unnecessary. (*Id.* at p. 734.) The Court in *People v. Carter*, *supra*, 30 Cal.4th at pp. 1222-1223, likewise rejected the defense argument that the corroboration instruction was necessary because the guilty verdict did not encompass the extent of the defendant's culpability as an aider or abettor or actual killer.

Appellant attempts to contrast these two cases with the situation here to no avail. No exception to those cases has been carved out for accomplice testimony which provides details regarding the circumstances of the crimes. Generally such details are not susceptible to corroboration and his argument runs contrary to the framework of Penal Code section 1111, which only requires slight corroboration tying the defendant to the crime and does not require supporting evidence for precise facts. (*People v. Manibusan*, *supra*, 58 Cal.4th at p. 95.) Moreover, the decisions in *Easley* and *Carter*

did not contemplate an accomplice mechanically testifying to the bare fact that the defendant committed a crime. Rather, an accomplice will typically testify as to the nature of the defendant's involvement in the crime, a circumstance that does not require a corroboration instruction. (*People v. Williams*, *supra*, 16 Cal.4th at p. 276.) Appellant's attempt to distinguish cases not requiring the corroboration instruction is without sound basis.

Because appellant pled guilty to the underlying charges and allegations, the court had no duty to provide the jury with instructions requiring that his testimony or out-of-court statements be supported by independent evidence.

D. Any Error In Failing To Instruct The Jury That Miller's Testimony and Out-of-Court Statements Required Independent Support Was Harmless

Even assuming the trial court should have provided instructions regarding corroboration sua sponte, any error was harmless. To begin with, any error regarding instructions on accomplice corroboration is one of state law and will be reviewed for prejudice under the *Watson* standard, i.e., whether it is reasonably probable a result more favorable to the defendant would have been reached absent the error. (*People v. Gonzales* (2011) 52 Cal.4th 254, 304; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Had the instructions on corroboration been given, the jury would have been informed that the required supporting evidence of testimony or statements "may be slight" and "does not need to support every fact mentioned by the accomplice in the statement or about which the witness testified." (CALCRIM No. 335.) The supporting evidence need not establish the precise facts to which the accomplice has testified. (*People v. Manibusan* (2013) 58 Cal.4th 40, 95.) The evidence need only tend to connect the defendant to the crime in a manner that satisfies the jury that the accomplice is telling the truth. (*Ibid.*) In fact, the defendant's own

statements may furnish adequate corroboration for the testimony of an accomplice. (*People v. Williams* (1997) 16 Cal.4th 635, 680.)

In light of the requirements of the instruction, the jury would have found adequate independent support for Miller's testimony had they been instructed as appellant suggests. First and foremost, appellant pled guilty to the underlying offenses with a personal use of a firearm, thus conclusively connecting him to the robbery and murders. (15 RT 2308.) The jury saw the surveillance video of what occurred that night and photo stills taken from the video. They also heard testimony from Detective Hoefer directing their attention to certain parts of the video. (11 RT 1632-1649.) The parties had also stipulated that Debbie Mays would have testified that appellant told her that he and Miller robbed a liquor store where he shot two clerks and saw the female victim's leg kick up. According to the stipulation, appellant later admitted that photos contained on a flyer circulating about the Granada Liquor Store robbery was of him and Miller. (15 RT 2265.) The parties also stipulated that had Dwayne Hooks testified he would have stated that appellant told him that he shot and killed two people at the Granada Liquor Store. Appellant specified that the female victim's leg moved in the air after he shot her. (15 RT 2263.) The detail regarding Heather's legs was important because it was not known to the general public. (15 RT 2362.) These facts provided sufficient corroboration for Miller's testimony.

Appellant's argument that prejudice was established because there was no corroboration of the victims' last words is to no avail. (AOB 272.) To begin with, seeing that appellant murdered Heather and Firas leaving only Miller and himself as witnesses to the pleas for their lives, there could be no such corroboration. Moreover, legally, there was no requirement to make any such showing. As noted previously, there is no requirement that the corroborating evidence establish the precise facts to which an

accomplice testifies. (*People v. Pedroza* (2014) 231 Cal.App.4th 635, 651, quoting *People v. Manibusan, supra*, 58 Cal.4th at p. 95.) The independent evidence amply connected appellant to the crime, which was all that was required.

It should also be noted that the jury was instructed to some degree that Miller's statement should be supported. The jury was told in the context of CALCRIM No. 301 that,

> "*Except for the testimony of Anthony Miller, which requires supporting evidence*, the testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." (19 RT 2730-2731, emphasis added.)

Although it was not explained further, the jury was told that they could not rely on Miller's testimony alone to prove any fact, rather his testimony needed supporting evidence. The jury was instructed that his testimony must be viewed with caution, thus the jury knew to scrutinize his testimony.

Finally, as discussed throughout Respondent's brief in issues pertaining to Miller, even if the jury might have found that his prior statements or testimony was not sufficiently corroborated to be credited, there is no reasonable likelihood it would have returned anything other than a death verdict. The underlying facts of the crime constituted a senseless and cold-blooded murder. Those facts, in conjunction with appellant's violent offenses before and after the crime, including the attempted murder of a sheriff's deputy while in custody awaiting trial, provided overwhelming support for the death judgment, even without consideration of Miller's testimony and statements. There is simply no reasonable likelihood appellant would have obtained a more favorable result had the jury been instructed as he proposed.

E. Any Failure to Instruct The Jury That Miller's Testimony and Out-of-Court Statements Required Corroboration Did Not Violate Appellant's Right to a Reliable Penalty Determination

Appellant claims that the alleged error violated a host of his federal constitutional rights, including his due process rights and his right to a reliable penalty determination. (AOB 271-272, 285-287.) This Court has found no constitutional violation when the court fails to instruct not only on accomplice corroboration, but even without the cautionary instruction. (E.g. *People v. Letner* (2010) 50 Cal.4th 99, 207; *People v. Box*, *supra*, 23 Cal.4th at pp. 1208-1209.) No federal constitutional error occurred here.

XVII. The Trial Court Did Not Abuse Its Discretion When It Denied Appellant's Motion for a New Trial

Appellant argues that the trial court should have granted his motion for a new trial on the grounds that the trial court should have granted his motions for mistrial when evidence of appellant's gang membership and post-crime bragging was referenced. (AOB 295-312.) Because the two instances were fleeting in nature and the court promptly admonished the jury to disregard the testimony, the court did not abuse its discretion in denying the motions for mistrial and the subsequent motion for a new trial because appellant's right to a fair trial was not irreparably damaged.

A. Facts Related to the Motion for New Trial Based on the Court's Failure to Declare a Mistrial Following a Reference to Gang Evidence

Prior to trial, appellant filed a motion to exclude gang evidence under Evidence Code section 352, arguing that any gang affiliation had no bearing on the crimes. (3 CT 701-705.) While addressing pre-trial motions, counsel indicated that he did not anticipate that the prosecution was going to present any affirmative gang evidence but wanted to bring the potential issue to the court's attention. (4 RT 608-609.) The prosecution

confirmed that it did not intend to elicit any gang evidence. However, appellant's gang affiliation might be referenced in other contexts, like a jail letter. (4 RT 609.) The court then asked counsel whether it was satisfied that any tangential references to gang affiliation would be subject to trial objections, but that the People were not going to attempt to elicit gang evidence independently. Counsel for Miller agreed, but the record was silent from counsel for appellant. (4 RT 610.)

Later, counsel for Miller asked the court for clarification on the gang issue. The court explained that it had not granted the defense motion to exclude all gang evidence but,

> "There was a basic agreement that that was not an issue in contention any longer based on the People's representation that there was no intent at this time to present such evidence at the penalty phase." (4 RT 638.)

After more confusion was expressed by counsel for the defendants, the judge stated that any gang evidence presented by the People must comply with notice requirements. The court noted that the Evidence Code section 352 issue would continue to be before the court, but it could not rule on the issue because no gang evidence was before it. (4 RT 639-640.)

The issue of appellant's gang affiliation arose during Miller's testimony. Miller testified that he was scared of appellant in part due to his reputation. (13 RT 1928.) On cross-examination, the prosecutor asked Miller to explain what he meant by appellant's reputation. Miller answered, "Well, as far as streets go, street ethics and being a gang member, he has a very high status." Counsel objected and moved to strike. (13 RT 1939.) The court then admonished the jury,

> "Ladies and gentlemen, this is an awkward situation. We have two juries, and I indicated we are here for overlapping evidence. As to what Mr. Miller has testified, this is something that can only be considered as evidence by his jury. Our yellow jury, Mr. Rice's jury, you are to disregard that reference to 'gang' and

you are to treat it as though you never heard it." (13 RT 1939-1940.)

Later, out of the presence of the jury, appellant moved for a mistrial based upon the gang reference. The court invited counsel to make a record later, but denied the motion without prejudice at that time. (13 RT 1945.) Counsel renewed the motion for a mistrial later, and added that the prosecutor brought up a gang reference a second time. The court could not recall the prosecution having done so. It declined to make a ruling until the transcript had been examined. (13 RT 1990-1991.)

The issue was not revisited until appellant filed a motion for new trial based on this, and other grounds. (6 CT 1296, 1310-1313.) The court tentatively denied the motion on the grounds that the reference was "very fleeting" and in light of the "substantial evidence of Mr. Rices' pattern of violent behavior." (20 RT 2808.) After hearing argument from counsel, the court denied the motion on this ground with no further comment. (20 RT 2813.)

B. Facts Related to the Motion for New Trial Based on the Court's Failure to Declare a Mistrial Following A Reference to Appellant Bragging About the Crime

The defense filed a motion to exclude evidence of lack of remorse based on statements appellant made to witnesses in the weeks and months following the crime. (3 CT 496-498.) The People opposed and specified that it sought to elicit comments made by appellant to witnesses, which included mimicking the physical reaction of Heather's body after he shot her while laughing and showing pride in what he had done. (3 CT 615-616.)

During motions in limine, the court expressed concern about the elapsed time between the crime and appellant's statements, as they were not made very shortly after the crime. (4 RT 607.) Counsel argued that the

statements at issue occurred four to six months after the crime and could not constitute a circumstance of the crime. (4 RT 656.) The prosecutor argued that the statements were admissions that appellant committed the crime, and since the statements included appellant's observation of the victim's movements, they were a circumstance of the crime. (4 RT 656-657.) The prosecutor also argued that the evidence tended to enhance the credibility of prosecution witness, Dwayne Hooks, who knew facts about the crime that were not public record. (4 RT 657-658.) The court felt it was difficult to rule at that point not knowing if lingering doubt would be an issue or if the evidence pertained to credibility. (4 RT 458-459.) On the issue of remorse, the prosecutor argued that the statements showed the attitude appellant held at the time of the crime. (4 RT 660-661.) The court was doubtful that the statements made months later could be introduced for that purpose. (4 RT 662.) The court ultimately ruled that the statements could not come in to show a lack of remorse because they were too remote, although there might be other relevant reasons for the statements to be admitted. It reserved ruling on those issues until the penalty phase. (4 RT 665-666.)

Hooks did not testify at trial. Rather, the parties entered into a stipulation whereby they agreed that, had Hooks testified, he would have admitted to committing a bank robbery with appellant. He also would have testified that he saw appellant at a baby shower in the summer of 2006, where appellant admitted he shot and killed two people at the Granada liquor store. Appellant said when he shot the female, her legs shot up in the air. Miller was there and nodded in assent. (15 RT 2262-2263.)

Appellant's statement to Hooks was briefly addressed during Detective Hoefer's testimony regarding Heather's activity on the surveillance tape after being shot, namely that her feet had moved. (15 RT

2362.) The following exchange ensued on direct examination by the prosecutor:

> "Q: Is that information that you as the lead homicide investigator had disseminated to anyone other than law enforcement officers working the case?
>
> A: We didn't even inform most law enforcement officers in the case. It was – that information was held on the highest tier of investigators, my lead investigators.
>
> Q: And that was information that you then later heard from other people, such as Dwayne Hooks?
>
> A: Yes. We eventually received information from witnesses who stated Mr. Rices bragged about- -"

At that point, the prosecutor interrupted the witness and counsel for appellant moved to strike the answer. The court then instructed the prosecutor to lead the witness. It explained to the jury, "There's certain things that I've excluded in terms of his description of what other people have said because it's technically hearsay." The court struck the word "bragged" where the prosecutor had cut the witness off and ordered the jury to disregard it. (15 RT 2362.)

Once the jury had been excused, counsel made a motion for a mistrial based upon the testimony that appellant had bragged. Counsel argued that Detective Hoefer had been there for most of the trial and should have been aware that any evidence of bragging should not have come before the Rices jury. (15 RT 2366.) The prosecutor argued that the detective's statement was accidental and he interrupted the witness immediately. The prosecutor had not anticipated that the detective would make such a reference and apologized to the court. Nevertheless, the reference did not rise to the level of necessitating a mistrial. The prosecutor noted that appellant, in his opening statement, made comments regarding appellant's remorse, which might render the evidence admissible in any event. The prosecutor also

pointed out that the jury was told to disregard the statement. (15 RT 2367.) Counsel countered that the defense had entered into stipulations to avoid this type of testimony and the inadvertence did not overcome the need for a mistrial. (15 RT 2368.)

The court believed that the mistake was based on inadvertence and recalled another instance where it had admonished the jury when a question was posed about why Miller was contacted. In light of the unintentional nature of the error and its belief that the jury would follow its instruction to disregard it, the comment did not justify a mistrial. (15 RT 2368-2369.)

Appellant included this issue in his motion for new trial. (6 CT 1313-1316.) The court tentatively denied the motion referring to the reference as "fleeting" and unintentional. The court also found that the evidence had "very limited prejudicial impact" "considering the scope of the evidence presented at the penalty phase…." (20 RT 2808.) After hearing brief arguments from both sides, the court added that it had promptly admonished the jury to disregard the evidence. The court found the reference did not create a prejudicial impact that resulted in an unfair trial. (20 RT 2813.)

C. Standard of Review

A trial court's denial of a motion for new trial is reviewed deferentially for an abuse of discretion. (*People v. Coffman*, *supra*, 34 Cal.4th at p. 127.) The trial court's ruling will not be disturbed on appeal "unless a manifest and unmistakable abuse of discretion clearly appears." (*People v. Davis* (1995) 10 Cal.4th 463, 524.)

The issues raised in appellant's motion for a new trial pertained to the court's denial of his two motions for mistrials. A motion for mistrial should be granted "only when a party's chances of receiving a fair trial have been irreparably damaged." (*People v. Clark*, *supra*, 52 Cal.4th at p. 990.) That occurs only if the resulting prejudice from the error is not

susceptible of being cured by admonition or instruction. (*People v. Lucero* (2000) 23 Cal.4th 692, 713–714.) Whether a particular incident is so prejudicial that it warrants a mistrial "requires a nuanced, fact-based analysis," which is best performed by the trial court. (*People v. Chatman* (2006) 38 Cal.4th 344, 370.) A trial court's denial of a mistrial will not be disturbed "unless the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.) No such showing as been made here, therefore the trial court did not abuse its discretion in denying the motion for new trial on that basis.

D. The Trial Court Did Not Abuse Its Discretion When It Denied Appellant's Motion for New Trial

On both occasions, the jury was admonished that it should not consider the evidence. The admonitions were promptly given after any improper reference. The admonitions were clear yet did not belabor the point to place any undue attention to the error. It is presumed that the jury followed the court's admonition to disregard evidence. (*People v. Pearson* (2013) 56 Cal.4th 393, 434-435; *People v. Duncan* (1960) 53 Cal.2d 803, 818.) Also, the two instances were very fleeting and in the context of the entire penalty phase, were not remarkable. (See *People v. Hinton* (2006) 37 Cal.4th 839, 868 [when impermissible references are made a trial, a mistrial is often not warranted if those references are fleeting in nature].)

With respect to Miller's mention of gangs, it should be noted that Miller's testimony regarding appellant's gang membership was not necessarily inadmissible. Miller was merely explaining why he feared appellant. The trial court had previously noted that there might be some instances where appellant's gang ties might be admissible (4 RT 610, 639-640) and it would seem this would fall within one of those occasions.

Thus, because the evidence was offered to explain Miller's state of mind, it was likely admissible and thus did not render the trial unfair.

Even if the jury could not consider such evidence, it must be noted that appellant presented evidence that appellant was a member of a gang through his own expert. Dr. Mingawa testified that appellant had associated with gang members and had been exposed to the gang culture at a very early age. He testified that appellant became a gang member at about 14 or 15 years old which hindered his development because they approved of violence. (18 RT 2654-2656.) Because appellant introduced gang evidence as part of his case in mitigation, the trial court's finding that any passing reference was not prejudicial must be upheld.

Any evidence that appellant bragged about the crime was also admissible and thus could not have been prejudicial. Here, the detective was not testifying as to appellant's lack of remorse. Rather, he merely sought to explain that appellant had disseminated specific information about the crime that was not available to the public. (15 RT 2362.)

Even assuming no mention should have been made, the trial court did not abuse its discretion when it denied the motion for mistrial. This case bears some similarity to *People v. Bolden* (2002) 29 Cal.4th 515. There, a police officer inadvertently referenced a parole office when asked about the circumstances of the defendant's arrest. As soon as the officer mentioned the parole office, the prosecutor immediately interrupted and asked a different question. (*Id.* at p. 554.) The defense later moved for a mistrial on the grounds that the jury could infer that the defendant had served a prison term for a prior felony conviction. (*Id.* at p. 554-555.) The court denied the motion, noting that the "very brief reference" was unlikely to make a lasting impression on the jury. (*Id.* at p. 555.)

This Court affirmed the trial court's ruling. It found,

> "[A]lthough the witness referred briefly to a parole office in connection with obtaining defendant's address, the witness's answer was nonresponsive and the prosecutor interrupted before the answer was completed. It is doubtful that any reasonable juror would infer from the fleeting reference to a parole office that defendant had served a prison term for a prior felony conviction. The incident was not significant in the context of the entire guilt trial….." (*Id.* at p. 555.)

The same conclusion should be reached here. The reference was fleeting and not responsive to the prosecutor's question, and the prosecutor interrupted right away. (15 RT 2362.) Also, like *Bolden*, the detective did not directly testify that appellant lacked remorse. Rather, he used the word "bragged" which was not an explicit reference to the excluded evidence. Moreover, this case presents an even smaller chance of prejudice than *Bolden* because here the court struck the answer and admonished the jury to disregard it. (15 RT 2362.)

When either or both instances are considered, the trial court did not abuse its discretion when it denied appellant's motion for a new trial because the fleeting references to any potential inadmissible evidence did not irreparably damage appellant's chances of receiving a fair trial.

XVIII. APPELLANT IS NOT ENTITLED TO A NEW SENTENCING HEARING BECAUSE THE COURT DID NOT CONSIDER CONFIDENTIAL INFORMATION IN RENDERING ITS DECISION

Appellant argues that he is entitled to a new hearing to modify the sentence pursuant to Penal Code section 190.4 because the court possessed information not provided to the defense, specifically, the transcript of the free talk with Miller. (AOB 313-317.) The record affirmatively shows that the court did not consider any improper information during the sentencing hearing. No new hearing is warranted.

Penal Code section 190.4, subdivision (e), requires the court to

> "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and...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. The judge shall state on the record the reasons for his findings."

Here, the trial court indicated that it considered the arguments by counsel and the evidence presented at trial. "I have considered only the evidence presented to the jury." It likewise indicated that it had reweighed the evidence before it received the presentence report from the probation officer and "[had] not considered information contained in any presentence report." (20 RT 2814.) Throughout its analysis affirming the jury's decision of the death sentence, it made no reference to Miller's free talk, or any reference to Miller at all. It found that the evidence supported the jury's verdict. (20 RT 2818.)

Although the court may have had access to Miller's interview, which at the time of sentencing the defense did not, it was clear that the court was careful to limit its consideration to only matters that were statutorily permitted. In addition to the clarity of the record, this Court should presume that the trial court did not rely upon a document it was not permitted to consider. (Evid. Code, § 664; *People v. Martinez* (2000) 22 Cal.4th 106, 125 [it is presumed that the trial judge regularly performs his official duties].) None of appellant's rights were violated during the hearing.

Appellant relies on *Gardner v. Florida* (1977) 430 U.S. 349 [97 S.Ct. 1197, 51 L.Ed.2d 393] to support his argument that his due process rights were violated at the sentencing hearing. (AOB 315-316.) That case is distinguishable on numerous and significant grounds. In that case, the jury

found the defendant guilty of the underlying charges and returned an advisory verdict recommending that the court impose a life sentence, having found that the mitigating circumstances outweighed the aggravating circumstances. (*Id.* at p. 352-353.) The court ordered a presentence investigation report, which the court relied upon as part of its decision to disregard the jury's recommendation and impose a death sentence. (*Id.* at p. 353.)

As it turned out, the report upon which the court relied contained a confidential portion which was not disclosed to the parties. (*Gardner v. Florida*, *supra*, 430 U.S. at p. 353-354.) During the sentencing hearing, the trial court did not reveal the substance of the confidential information contained in the report that it might have considered, so counsel had no opportunity to challenge the accuracy of the information, a circumstance that the High Court found raised due process implications. (*Id.* at p. 356.) The Court also expressed concern that the confidential report was not a part of the record on appeal. (*Id.* at p. 361.) The Court ultimately concluded that the defendant was denied due process when his "death sentence was imposed, at least in part, on the basis of information he had no opportunity to deny or explain." (*Id.* at p. 362.)

Gardner presents a wholly different set of circumstances than the case here. There, the court actually relied on confidential information not provided to either of the parties. There was no such reliance here. Indeed the record here unequivocally demonstrates that the trial court took pains to rely upon only the arguments of the parties and the evidence presented at trial. Also, in *Gardner*, the report containing the confidential information was not part of the record on appeal, so it was unknown what the judge actually relied upon and gave no opportunity for the defendant to deny or explain the content during the sentencing hearing or on appeal. That was not the case here. Miller testified consistently with the free talk and the

transcript of Miller's interview has been made available to both parties. Under these circumstances, appellant is not entitled to a new hearing.

XIX. Appellant's Constitutional Challenges Should Be Rejected

Appellant acknowledges that the constitutional challenges he raises have been rejected by this Court, but wishes to preserve them for the future and request that the Court reconsider its decisions on those issues. (AOB 318-319.) Respondent likewise seeks to preserve its opposition to appellant's arguments.

Appellant first argues that the consideration of appellant's age should not be an aggravating factor for the jury to consider because it is unconstitutionally vague under the Eighth Amendment. (AOB 319.) This argument has no merit. (*Tuliaepa v. California* (1994) 512 U.S. 967, 977 [114 S.Ct. 2630, 129 L.Ed.2d 750]; *People v. Crittenden* (1994) 9 Cal.4th 83, 156.)

Appellant maintains that California's sentencing scheme fails to meaningfully distinguish between those defendants who are sentenced to death and those who are not, in violation of the Eighth Amendment. (AOB 319.) Respondent interprets this argument to assert that the law fails perform the narrowing function as required by the Eighth Amendment. That being the case, this argument has also been repeatedly rejected. (*People v. Myles* (2012) 53 Cal.4th 1181, 1224-1225.)

Appellant claims that his constitutional rights were violated under *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct 2428, 153 L.Ed.2d 556], because the jury was not required to unanimously agree that appellant had committed prior acts involving force or violence. (AOB 319.) This Court has found to the contrary on numerous occasions. (E.g. *People v. Johnson* (2016) 62 Cal.4th 600, 656.)

Appellant challenges the portion of Penal Code section 190.3 that permits a jury to sentence a defendant to death based upon the circumstances of the crime because it is applied in an unconstitutionally arbitrary and capricious manner. (AOB 319.) This argument is without merit. (*Tuliaepa v. California*, *supra*, 512 U.S. at pp. 987-988; *People v. Brown* (2004) 33 Cal.4th 382, 401.)

Appellant asserts that his constitutional rights were violated because the jury was not instructed that it must find that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt. (AOB 320.) This argument has been repeatedly rejected. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 521.)

Appellant argues that CALCRIM No. 763 is constitutionally flawed because it does not delete inapplicable sentencing factors, failed to delineate between aggravating and mitigating factors, contained vague and ill-defined factors, limited the mitigating factors by using terms such as "extreme" or "substantial," and neglected to specify the burden of proof. (AOB 320.) These arguments have all been soundly rejected. (*People v. Dykes* (2009) 46 Cal.4th 731, 814; *People v. Schmeck* (2005) 37 Cal.4th 240, 305.)

Appellant claims that the death penalty violates international law. (AOB 320.) His claim is contrary to well-established authority to the contrary. (E.g., *People v. Taylor* (2010) 48 Cal.4th 574, 661.)

CONCLUSION

Respondent respectfully requests that the Court affirm the death judgment.

Dated: August 3, 2016

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
MICHAEL MURPHY
Deputy Attorney General

ALANA COHEN BUTLER
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and **48,082** contains words.

Dated: August 3, 2016

KAMALA D. HARRIS
Attorney General of California

ALANA COHEN BUTLER
Deputy Attorney General
Attorneys for Respondent

CERTIFICATE OF SERVICE

Case Name: **People v. Rices** No. **S175851**

I hereby certify that on August 4, 2016, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

RESPONDENT'S BRIEF

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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.

I further certify that some of the participants in the case are not registered CM/ECF users. On August 4, 2016, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Cliff Gardner
Attorney at Law
1448 San Pablo Avenue
Berkeley, CA 94702

Attorney for Appellant Jean Pierre Rices
(Two Copies)

CAP - SF
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3647

Clerk of the Court
For: The Honorable Lantz Lewis
San Diego County Superior Court
250 East Main Street
El Cajon, CA 92020

Appellate Division
San Diego County District Attorney's Office
P.O. Box X-1011
San Diego, CA 92112

Mark A. Chambers
Law Office of Mark A. Chambers
345 West Ninth Avenue, Suite 200
Escondido, CA 92025

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 4, 2016, at San Diego, California.

B. Romero
Declarant

Signature

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