IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

STANLEY BRYANT, LEROY WHEELER, AND DONALD FRANKLIN SMITH,

Defendants and Appellants.

S049596

CAPITAL CASE

Los Angeles County Superior Court No. A711739
The Honorable Charles E. Horan, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an amended information filed by the Los Angeles County District Attorney, appellant Stanley Bryant, appellant Leroy Wheeler, appellant Donald Smith, and codefendant Jon Settle[1/] were charged with the August 28, 1988, murders of Chemise English, Loretha Anderson, Andre Armstrong, and James Brown (counts 1-4; Pen. Code, §§ 187, subd. (a), 1192.7, subd. (c)(1))[2/] and the willful, deliberate, and premeditated attempted murder of Carlos English (count 5; §§ 664/187, subd. (a)). The multiple-murder special circumstance was alleged as to the four murder counts (§ 190.2, subd. (a)(3)). (1 Supp. CT 832-835.) Appellants were arraigned, pleaded not guilty, and denied the special circumstance allegation. (CT 1837, 5721-5722, 5734-5735; see RT 6156-6159.)

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1. Codefendant Settle is not a party to this appeal. The jury was unable to reach a verdict as to him. The trial court found the jury hopelessly deadlocked and declared a mistrial as to all counts against codefendant Settle. (CT 15571.)

2. Unless otherwise indicated, all further statutory references are to the Penal Code.

Trial was by jury. (CT 14429, 14535.) The jury found appellants Bryant and Wheeler guilty of four counts of first degree murder and one count of premeditated attempted murder. The jury found appellant Smith guilty of two counts of first degree murder, two counts of second degree murder, and one count of attempted murder (finding the premeditation allegation on the attempted murder charge to be not true). As to each appellant, the jury found the multiple-murder special-circumstance allegation to be true. (CT 15248-15249, 15260-15277, 15280-15281, 15403-15424.) At the conclusion of the penalty phase, as to appellants Bryant and Wheeler, the jury fixed the penalty at death on all four murder convictions. As to appellant Smith, the jury fixed the penalty at death on the two first degree murder convictions. (CT 15252-15259, 15789-15794, 15851-15859.)

The trial court denied each appellant's automatic motion for reduction of sentence, pursuant to section 190.4, subdivision (e). In accordance with the jury verdicts, the court sentenced appellants Bryant and Wheeler to death on counts 1 through 4 and to a stayed term of life in state prison on count 5. The court sentenced appellant Smith to death on counts 3 and 4 and to a stayed term of 39 years to life in state prison on counts 1, 2, and 5. (CT 16128-16139, 16218-16226, 16230-16231, 16235-16254.)

These appeals are automatic following the judgments of death. (§ 1239.)

STATEMENT OF FACTS

During the 1980s, appellant Bryant operated a notorious drug sales organization in the northeast San Fernando Valley, which included the areas of Pacoima and Lake View Terrace. The organization, commonly called the "Bryant Family" or "Bryant Organization," consisted of over 150 employees and grossed as much as $1,600,000 during a three-month period. In addition to terrorizing the northeast section of the San Fernando Valley, the Bryant

Organization was involved with "hit men," murders, and bribing witnesses to prevent prosecution.

Andre Armstrong, a "hit man," was hired by appellant Bryant and his brother Jeff Bryant in 1982 to murder Kenneth Gentry, a dissatisfied customer of the Bryant Organization. Armstrong had been promised by the Bryants that any witnesses to the Gentry murder would be "taken care of" and that there was no need to worry about prosecution. Armstrong performed his part of the bargain by murdering Gentry in broad daylight in front of several witnesses. Appellant Bryant and his brother Jeff Bryant, who were in the immediate area both before and after the murder, were arrested along with Armstrong for Gentry's murder. The Bryants paid off and threatened the witnesses as to their involvement in the Gentry murder. However, the Bryants failed to "take care of" the witnesses as to Armstrong. The case against the Bryants was dismissed, and Armstrong was convicted of murder and sentenced to state prison. Armstrong was not happy for "taking the fall" for the Bryants. Following his release from prison in July 1988, Armstrong came to Los Angeles to "squeeze" appellant Bryant to get what he had coming to him -- a part of appellant Bryant's drug organization. Appellant Bryant thought differently.

On the afternoon of August 28, 1988, Andre Armstrong and James Brown were executed by members of the Bryant Organization -- appellants Bryant, Wheeler, and Smith -- while trapped inside an electronically-controlled cage surrounding the front door of the premises at 11442 Wheeler Street, a long-time fortified Bryant drug and "count house." Armstrong and Brown had been lured to the Wheeler Street house by appellant Bryant on the pretext of picking up some money due Armstrong. Appellant Bryant believed Armstrong was seeking revenge and attempting to take over his drug organization for having previously been set up by appellant Bryant and his brother Jeff Bryant for "taking the fall" for the Gentry murder. After appellant Bryant exited the

Wheeler Street house, Armstrong and Brown were let into the electronically-controlled cage through the exterior steel-grated door. After the exterior door closed and locked, the interior steel-grated, electronically-controlled door was opened from inside the house. At that time, appellants Wheeler and Smith opened fire with shotguns and handguns on the two helpless victims trapped inside the cage.

Armstrong, who was in front of Brown and closest to the interior door, was struck with two fatal 12-gauge shotgun wounds: one to the center of the chest fired at a distance of less than four feet and another to the right side of the head. The wound to Armstrong's head was a contact wound fired at a distance such that "the muzzle of the shotgun was so close that the smoke actually deposited on the bone structure." Brown, apparently realizing what was about to occur once the interior door opened, turned in an effort to get out of the cage through the exterior door. He was struck with two non-fatal shotgun wounds: one in the back and another to the right side of his head just above the ear. This second blast forcibly removed a portion or the right side of his skull. The force of the shotgun blasts to Brown were such that he was thrown through the locked exterior metal door out onto the front porch. Thereafter, Brown suffered two fatal gunshot wounds: one to the center of his chest which "partially exploded" his heart and another to the anterior abdominal wall below the right rib cage. "Muzzle stamping" was around the entrance of each of the fatal gunshot wounds.

Immediately after the execution of Armstrong and Brown, appellant Wheeler ran out of the house and proceeded to Armstrong's red Toyota parked in front of the house. Loretha Anderson, Brown's girlfriend, and her two babies, Chemise and Carlos, were waiting inside the car. Appellant Wheeler opened fire on the car with a shotgun and handgun and executed Anderson and 28-month-old Chemise. Anderson suffered at least two, and possibly three,

shotgun wounds, as well as four handgun wounds. Baby Chemise died from a near-contact gunshot wound to the back of the head with "a large caliber handgun" as she "cowered away" from the shooter. Incredibly, 18-month-old Carlos survived the attack, apparently by being buried under the bodies of his mother and sister.

The prosecution's case relied, in part, on the testimony of James "Jay" Williams, a relatively new employee of the Bryant Organization who was inside the Wheeler Street premises on the afternoon of August 28, 1988.

FACTS PRESENTED AT THE GUILT PHASE

I. THE PROSECUTION'S CASE-IN-CHIEF

A. Andre Armstrong, A "Hit Man" Hired By Appellant Bryant, Shoots Reynard Goldman And Murders Kenneth Gentry

Andre Armstrong, a "hit man," was hired by appellant Bryant in 1982 to take care of some unfinished business involving the Bryant Organization. On the morning of April 23, 1982, Armstrong shot Reynard Goldman several times as Goldman left his mother's house. The shooting was the result of Goldman's failure to pay a $50 debt owed Jeff Bryant for the purchase of cocaine.

A little over a month later, on the afternoon of May 27, 1982, Armstrong murdered Kenneth Gentry in the parking lot of a Pierce Street apartment complex while Gentry worked on his car. The murder occurred after Gentry and his friends vandalized Roscoe "Ross" Bryant's van in retaliation for Jeff Bryant's refusal to refund $150 which Gentry and his friends had paid Ross Bryant for the purchase of "bunk dope."

1. Andre Armstrong Shoots Reynard Goldman

Reynard Goldman started using cocaine in his early twenties while he worked at Lockheed. John Allen, Goldman's carpool partner who also worked at Lockheed, introduced him to coworker Jeff Bryant. Thereafter, Goldman purchased between $200 and $500 of cocaine every weekend from Jeff Bryant at a house on Louvre Street in Pacoima. The transactions were conducted in a reinforced caged area, which surrounded the front door of the house. Jeff Bryant eventually moved out of the house and relocated in the Hansen Hills area. Goldman's friend, Stanley Laneer, lived across the street from the house on Louvre Street. (RT 9243-9250.)

When Goldman stopped using cocaine in the summer of 1981, he owed Jeff Bryant $50 for a past purchase of narcotics. The debt remained unpaid for eight or nine months. One day, while at Laneer's house, Goldman was approached by Jeff Bryant, who inquired about the $50 debt. Goldman said he would bring the money over to Jeff Bryant's house on the next pay day, which was the following Thursday. Goldman went to Jeff Bryant's Hansen Hills house the following Thursday, but no one was home. About one or two weeks later, Goldman saw Jeff Bryant, and they engaged in an argument over the $50. Jeff Bryant told Goldman he had better pay the $50 "or you better get yourself a gun or something's going to happen to you." In return, Goldman told Jeff Bryant that he had better get a gun because Jeff Bryant was not going to do anything to him. (RT 9250-9253, 9291-9293.) Thereafter, appellant Bryant approached John Allen, Goldman's carpool partner, and told him that, if Goldman did not pay the $50, his brother Jeff "was gonna get violent." (RT 9337-9341.)[3/]

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3. Allen was impeached with a prior inconsistent statement to the police. (See RT 9227-9233, 9337-9340.) Before he testified at trial, Allen informed one of the deputy district attorneys prosecuting the instant case that

On April 23, 1982, about a week after the conversation in which the threats were exchanged between Goldman and Jeff Bryant, Goldman left his mother's house at approximately 6:00 or 6:30 a.m. when he saw Andre Armstrong (see Peo. Exhs. 67, 68), a person he did not know, sitting on the curb in the front yard reading the newspaper and smoking marijuana. Goldman said, "What's happening?" Armstrong looked up and nodded. As Goldman turned to get into his car, Armstrong fired five or six shots at him. Two shots passed Goldman's head, another hit his arm, and a fourth struck him in the hand as he lay on the ground. When he turned while lying on the ground, Goldman saw Armstrong pointing a gun at him and firing. Goldman survived the attack. (RT 9253-9260, 9285-9286.)

Goldman resumed his drug use following the shooting. Although he did not buy narcotics directly from Jeff Bryant, Goldman frequented Neighborhood Billiards, an establishment operated by the Bryant Organization as a "front" for the drug operation, where he was given directions as to where he could purchase narcotics (i.e., a particular house or motel room, etc.). (RT 9266-9270, 9302.)

2. Andre Armstrong Murders Kenneth Gentry

On May 22, 1982, Winifred Fisher, Michael Flowers, and Kenneth Gentry purchased one-eighth of an ounce of cocaine from Ross Bryant at a house on Louvre Street in Pacoima. After the purchase, the trio returned to the Louvre Street house and demanded the return of their $150 because the cocaine they had purchased was "bunk dope." Ross Bryant said he would have to consult with his brother Jeff Bryant about a return of the $150. That evening, the trio encountered Jeff Bryant at his house. Jeff Bryant told the men to "fuck

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he (Allen) would not relate to the jury what he had told the police "because he liked living." (See RT 9330-9333, 9347-9348.)

off" or "fuck out" because "the dope wasn't shit." Thereafter, at approximately 11:15 p.m., the trio proceeded to the home of Ross Bryant. There, the men forced entry into Ross Bryant's van and tore out the dashboard. During the "fuck[ing] up [of Ross Bryant's] van," appellant Bryant drove by the location and yelled at the trio. Fisher, Flowers, and Gentry fled the area. (RT 8640-8645, 8860-8863, 8873-8874, 9180.)[4/]

Sofinia Newsom, Gentry's stepsister, lived in an apartment in Building 6 of the Pierce Street Apartments at 12601 Pierce Street in Pacoima. Gentry "hung around" the Pierce Street apartment complex, because he was a "running buddy" of Flowers and Fisher. After Gentry told Newsom about the bad drug deal and the vandalizing of Ross Bryant's van, she saw appellant Bryant on the stairs near her apartment. Appellant Bryant, whom Newsom had never before seen at the apartment building, "asked us [Newsom was with her sister and a friend] was Ken Gentry around." Newsom said, "No." (RT 9147-9150, 9167-9171, 9177-9180.)

Thereafter, on May 27, 1982, at approximately 3:45 p.m., Gentry and Benny Ward (hereinafter referred to as "Benny") were in Benny's car on Pierce Street across from the apartment building located between Glenoaks and Borden in Pacoima. Benny was on the floorboard working on a wire to the stereo. Gentry, who was seated in the front passenger seat, said, "There goes those niggers that I got a beef with. I ain't got my shit but I'd get down with

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4. The facts surrounding this incident were established through statements Winifred Fisher, who was dead at the time of trial, made to the police prior to his death (RT 8640-8645) and the prior inconsistent statements of Michael Flowers (RT 8860-8863, 8873-8874; see RT 8830-8840, 8844, 8846, 8847; Peo. Exh. 5 [statement of Michael Flowers]). At trial, Flowers maintained Fisher's death had no impact on his trial testimony, in which he denied making statements to the police or being involved in the "trashing" of Ross Bryant's van. Flowers acknowledged, however, that, although he had heard of appellant Bryant, he did not know him. Flowers also did not recognize any of the defendants at trial. (RT 8827-8830, 8840, 8844, 8846, 8847, 8850.)

them." Benny looked up from the floorboard and saw a brown Cadillac traveling westbound on Pierce Street toward Glenoaks. Gentry responded, "There's a guy in there by the name of Stanley." (RT 8789-8791, 8923-8931, 8936-8940, 8983-8987, 8990-8991, 8996-8997, 9001-9006, 9009-9010, 9148; 3 Supp. CT 10619-10620; Peo. Exhs. 58 [report of interview with Benny Ward], 59 [tape recording], 216 [transcript].)

Forty-five minutes later, at approximately 4:30 p.m., Detective Thomas Kirk of the Los Angeles Police Department responded to a parking lot between Buildings 5 and 6 of the Pierce Street Apartments, a large two-story apartment complex. Gentry was covered with a yellow blanket lying on the asphalt surface of the parking lot near a red Cougar. (RT 8786-8792; see Peo. Exhs. 52-54 [photos].)

Detective Kirk recovered a spent .45 caliber casing from a semi-automatic handgun on the asphalt approximately 10 feet from Gentry's body. The casing bore a "W" on the bottom, indicating the manufacturer was Winchester. Detective Kirk also recovered a copper jacket from an expended projectile from very close to Gentry's foot. Gentry suffered bullet wounds to his head, torso, and upper chest. (RT 8794-8804.) A neighbor recovered three expended .45 caliber shell casings, similar to the one Detective Kirk recovered, at the crime scene and turned the evidence over to the police. (RT 8801-8804, 8809-8813, 8869-8871.)

There were several witnesses to Gentry's murder, including Sofinia Newsom, Rhonda Miller, Barron Ward, and Benny Ward.

Sofinia Newsom, who, as mentioned earlier, lived in Building 6 of the apartment complex, looked out her window at approximately 4:30 p.m. and saw Gentry working on his Cougar in the parking lot. She also saw a Cadillac driven by appellant Bryant, followed closely by a brown or burnt-orange colored Volkswagen (see Peo. Exh. 66), slowly pass the entryway of the

parking lot on Pierce Street. As the two cars passed the entryway, appellant Bryant nodded his head in the direction of the parking lot where Gentry was working on the Cougar. The two cars passed the entryway of the parking lot, but, very shortly thereafter, the Volkswagen came back down Pierce Street in the opposite direction and turned into the parking lot. Newsom then heard approximately nine gunshots. According to Newsom, it sounded like "a lot of popping back to back," and it was a "constant" shooting without any time in between the shots. She grabbed her daughters and locked the door of her apartment. When she looked out her window, Newsom saw the Volkswagen backing out of the parking lot onto Pierce Street. Newsom ran to the parking lot and saw Gentry, who was dead, lying on the ground. After the police arrived, Newsom saw appellant Bryant and Jeff Bryant in a Cadillac traveling down Pierce Street past the Pierce Street apartments toward Borden Street. (RT 9156-9167, 9173-9174, 9183, 9199-9202.)

At approximately 4:30 p.m., Rhonda Miller, a friend of Gentry's who lived in an apartment at the Pierce Street apartment complex, heard numerous gunshots from the parking lot where earlier in the day she had seen Gentry working on his car. When she looked out her kitchen window, Miller saw Gentry on the ground in the parking lot and a man, whom she subsequently identified from photographs (see Peo. Exh. 63) as Andre Armstrong, standing by the open driver's door of a Volkswagen which was getting ready to leave the area. Miller wrote down on a piece of paper (see Peo. Exh. 65) the license plate number of the Volkswagen. (RT 9065-9073, 9090-9094.)

Benny Ward was with Gentry in the parking lot at the time of the shooting. While bending down to pick up a battery in the trunk of Gentry's Cougar, Benny heard "a hell of gunfire" from the front of the car. Benny ducked down and saw Gentry laying on the ground near the front of the Cougar. He also saw the bottom of a copper or brown-colored Volkswagen

parked perpendicular to the Cougar such that the passenger side of the Volkswagen was next to the front of the Cougar. The Volkswagen exited the parking lot and proceeded down Pierce Street. Benny saw Jeff Bryant at the crime scene following the shooting.[5] (RT 8932-8936, 8995, 8998-8999.)

Barron Ward (hereinafter referred to as "Barron"), Benny's brother, was also in the parking lot with Gentry during the shooting. Gentry was working under the hood of his Cougar, which was backed into a parking space. Barron, who was standing with Gentry, saw a tan or brown-colored Volkswagen turn into the parking lot from Pierce Street. The Volkswagen stopped near Gentry's Cougar. Barron motioned to the driver of the Volkswagen, "Do you want some marijuana?" The driver answered in the affirmative, and, as Barron was walking toward the passenger window of the Volkswagen, the driver of the Volkswagen pulled out a gun and pointed it at Barron, who was between the driver and Gentry's Cougar. Barron ran to the apartment building and then heard shots fired. (RT 9009-9019.)

Approximately two minutes after the shooting, Barron saw Jeff Bryant drive by the apartment building on Pierce Street in a Borougham and appellant Bryant drive by the apartment building in a brown Cadillac. Jeff Bryant and appellant Bryant stopped at the intersection of Borden and Pierce Streets. They talked with one another, and then drove off in different directions. (RT 9039-9042; Peo. Exh. 60 [notes of interview with Barron].)[6]

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5. At trial, Benny denied this fact, as well as any knowledge of the Bryant Family other than what he had read in the newspapers. He claimed not to recognize any of the defendants at trial. As noted by Benny: "There is no reason for me to be threatened. I don't have nothing to do with this. I don't understand." (RT 8932-8936, 8945-8951.)

6. The facts in this paragraph were established through Barron's prior inconsistent statements to the police. (See RT 9020-9029, 9039-9043.) In another interview, Barron related that, minutes after the shooting, he saw Jeff Bryant drive by the crime scene in a Cadillac. However, when shown

On May 27, 1982, at approximately 10:40 p.m., appellant Bryant was interviewed at the Foothill Police Station. Appellant Bryant stated he owned Neighborhood Billiards[7/] located at 13179 Van Nuys Boulevard and that his girlfriend was Tannis Babineaux. (RT 9341-9343.)

Following Gentry's murder, G.T. Fisher, the brother of Winifred Fisher (one of the individuals who was with Gentry when Ross Bryant's van was vandalized), received a telephone call from Jeff Bryant asking for G.T.'s older brother Johnny.[8/] Two days later, G.T., Johnny Fisher, Winifred Fisher, and a couple of other Fisher brothers went to Neighborhood Billiards and confronted appellant Bryant. The Fisher brothers told appellant Bryant that, if there was any attempt to hurt Winifred, the Fisher family would retaliate. Appellant Bryant said he would have to talk with his brother Jeff but that Gentry "had to be dealt with" for vandalizing Ross Bryant's van because, otherwise, others would do the same. (RT 8902-8904; Peo. Exh. 56 [G.T.'s statement to police].)[9/]

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photographs, Barron selected appellant Bryant's photograph as the driver of the Cadillac. (RT 9045-9049, 9052.)

7. Title to Neighborhood Billiards was in the name of Jeff Bryant from June 11, 1984, through August 5, 1991. (Peo. Exh. 116; RT 10640-10641, 10645, 11717.)

8. At trial, G.T. Fisher was impeached with a prior inconsistent statement to the effect that, prior to the shooting in the parking lot, appellant Bryant drove by the crime scene with Andre Armstrong and, with his finger, pointed out Gentry in the parking lot. (RT 9369-9371.)

9. The facts in this paragraph were established through G.T.'s prior inconsistent statements to the police. (See RT 8883-8887, 8902-8907; Peo. Exh. 56; Peo. Exh. 216 at 3 Supp. CT 10581-10600.) Prior to testifying at trial, G.T. told one of the prosecutors, "I don't want to be involved in this case." When a tape (Peo. Exh. 57) of the conversation with the prosecutor was played for the jury, G.T. denied it was his voice on the tape. The parties stipulated that it was G.T.'s voice on the tape recording. At trial, G.T.

3. Andre Armstrong, Appellant Bryant, And Jeff Bryant Are Arrested For The Goldman Assault And The Gentry Murder

On June 15, 1982, following a surveillance of the residence of Wilbur Babineaux at 11673 Kimset Street in Lake View Terrace, Andre Armstrong (Peo. Exh. 68) was arrested for the assault on Goldman and the murder of Gentry. During the surveillance, police officers observed appellant Bryant on a motorcycle near the residence, as well as in a car leaving the residence. Armstrong was arrested after he left the residence on a motorcycle. Armstrong had $13 and a driver's license in the name of "Robert Louis Flournoy" on his person at the time of his arrest. (RT 9324-9335.)

In an effort to locate the stolen Volkswagen which had been used in the Gentry murder, police officers proceeded to an apartment building at 9010 Cedros in Panorama City, where they found a burnt-orange-colored Volkswagen (see Peo. Exh. 71) with a removed ignition parked in the far back corner of the parking lot. The officers also searched a Cadillac (see Peo. Exh. 71), which Armstrong had apparently been living in, parked at the location. A shaving kit on the floorboard of the Cadillac contained live, laded, brass, Winchester Western .45 A.C.P. ammunition. The live rounds were copper-jacketed and the "same caliber, same brand, and the shell casing was made out of the same material" as the .45 caliber Winchester shell casings found at the Gentry murder scene. The shell casings in the Cadillac and the one partial casing found by Gentry's foot in the parking lot were both copper clad or copper jackets. A driver's license in the name of Andre Armstrong was also found in the shaving kit. (RT 8813-8816, 9356-9359, 9364.) Also found in the

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maintained he had no knowledge of the Bryant Family or any narcotic organization operated by appellant Bryant and Jeff Bryant. (RT 8883-8889, 8906-8907, 8954, 8957-8963, 8972-8973.)

Cadillac was a box of Winchester Western .38 Smith and Wesson rounds in lead-nickel-plated casings. (RT 9357.)

Appellant Bryant and Jeff Bryant were arrested on June 18, 1982, for their participation in the assault on Goldman and the murder of Gentry. (RT 9144-9145.)

4. Witnesses Are Threatened And Offered Money Not To Testify Against The Bryants

On July 6, 1982 -- approximately two weeks before the preliminary hearing for appellant Bryant, Jeff Bryant, and Andre Armstrong -- Alvin Brown, the boyfriend of Rhonda Miller, was bailed out of jail by Florence Bryant, the mother of appellant Bryant, even though Mrs. Bryant had no personal knowledge of Brown. Mrs. Bryant used the property at 13031 Louvre Street in Pacoima as collateral for the bond. Brown had been in jail for beating his girlfriend, Rhonda Miller (who was a witness to the Gentry murder). (RT 9144-9146, 9099-9104.)

Thereafter, Rolo or Rochelle (see Peo. Exh. 65), the girlfriend of Jeff Bryant, and Tannis Babineaux (see Peo. Exh. 64), the girlfriend or wife of appellant Bryant, arrived at Miller's apartment. Rolo handed Miller an envelope containing $1,000 and said, "Here. This is from my boyfriend." Miller, who knew who the women were but who had never been introduced to them, initially declined their offer. However, when Brown, whom Miller believed was in custody, unexpectedly arrived at her apartment, he berated her for not taking the money. Miller eventually took the money, because she feared Brown would beat her again. Miller testified at the preliminary hearing but lied when she testified Armstrong was not the man by the Volkswagen during the Gentry murder. Miller was not a witness at Armstrong's trial. (RT 9093-9105, 9128-9134, 9141-9143; see RT 9263.)

Rochelle Bryant also visited Goldman prior to the preliminary hearing and offered him $500 not to testify. John Allen, Goldman's friend, told Goldman to take the money and not get involved in the case because Goldman might get hurt. Goldman declined the money and testified at the preliminary hearing. (RT 9261-9270, 9299-9300, 9306-9308; see RT 9237-9239.)[10/]

5. Andre Armstrong Takes The Fall For The Bryants

Armstrong, Jeff Bryant, and appellant Bryant each attended the preliminary hearing as defendants in the Goldman/Gentry matters. However, the case against appellant Bryant and Jeff Bryant was dismissed. Armstrong was held to answer and was the only defendant to go to trial on the charges arising from the Goldman and Gentry incidents. (RT 8808-8813, 9295-9296, 9336-9337.)

On May 23, 1983, after a jury trial, Armstrong was convicted of the first degree murder of Gentry and assault with a deadly weapon on Goldman. (RT 9398.) On June 20, 1983, as a result of those convictions, Armstrong was sentenced to state prison for 28 years and 8 months. (RT 9399.) Armstrong was received at the state prison in Chino on July 1, 1983, and thereafter transferred to the state prison in Folsom on August 15, 1983. (RT 9400.)

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10. Goldman relocated prior to testifying at trial. However, the day before he testified, Goldman received a visit from Kenny Reaux, a person who he had not seen in several years, who, like Goldman, was under subpoena to testify. Reaux told Goldman that he (Reaux) was "a stone killer myself" and that he (Reaux) had nothing to say in court against the Bryants. When Goldman told Reaux that he was just going to testify as to what he had already testified to, Reaux told him that he (Goldman) was "lucky" "because he [Goldman] was suppose to be a dead man." Shortly thereafter, Johnny Fisher and another man arrived at Goldman's residence. Although Johnny Fisher did not threaten Goldman, he told Goldman that people were watching him. The second man, however, threatened that Goldman "was gonna get f'd up for what you're doing." When Goldman inquired, the man responded, "Nothing else be said." (RT 9261-9270, 9299-9300, 9306-9308; see RT 9237-9239.)

Armstrong's convictions were reversed on appeal, and, on retrial, Armstrong pleaded guilty on April 24, 1987, to the voluntary manslaughter of Gentry and assault with a deadly weapon on Goldman for which he received a prison sentence of nine years. (RT 9401-9402.) Armstrong remained in prison until his release in St. Louis on July 21, 1988. (RT 9403-9404; see Peo. Exh. 73 [Armstrong's prison packet].)

B. While Armstrong Is In Prison

1. Armstrong Talks

On July 6, 1983, Gentry's father, Charles Gentry, was murdered at his North Hollywood home. Approximately two weeks later on July 23, Detective Russell Lyons and his partner interviewed Armstrong, who was in custody at Chino, "to explore the fact that the two murders [Gentry and his father] may have been connected." Although Armstrong did not provide any useful information regarding the murder of Charles Gentry, he did provide information regarding his participation, as well as the roles of appellant Bryant and Jeff Bryant, in the murder of Kenneth Gentry. (RT 9405-9409, 9412-9414.)

The interview, unbeknownst to Armstrong, was partially tape recorded (Peo. Exh. 74). Armstrong related the following: the Bryants hired him and paid him $2,000 for the Goldman shooting and $15,000 for the Gentry shooting; appellant Bryant gave him the $15,000 in the form of 750 $20 bills; the Bryants agreed to take care of his wife and children while he was in prison; the Bryants provided his wife money to move to Southern California; he considered the Bryants "lightweights" and that anyone could take from the Bryants what they had accumulated; and he intended to "squeeze" the Bryants by letting them know they (the Bryants) should save some of their wealth for when Armstrong got out of prison. (See Peo. Exh. 74 [tape recording]; Peo.

Exh. 216 [transcript] at 3 Supp. CT 10505-10506, 10512-10513, 10518-10519; see also RT 9414-9415, 9417-9418, 9435.)

2. Armstrong "Squeezes" Appellant Bryant; Appellant Bryant Reciprocates By Providing For Armstrong And His Friends

Prison records (see Peo. Exh. 75) revealed appellant Bryant sent Armstrong money in prison on several occasions: $500 on October 4, 1983; $150 on January 31, 1984; $100 on August 17, 1984; $50 on December 7, 1984; $100 on January 8, 1985; $50 on March 5, 1985; and $100 on July 5, 1985. Prison records of money received by inmates terminated at the end of 1985 because of a computer change. (RT 9481-9487.) Prison records also revealed that appellant Smith and appellant Bryant were approved correspondents for Armstrong. (RT 9488.)

Appellant Bryant asked Francine Smith to write to Armstrong in prison. Ms. Smith did so, even though she did not know Armstrong. Ms. Smith also visited Armstrong once or twice while he was in local custody. Although Ms. Smith did not know why he was in jail, Armstrong told her that, after he got out of jail, appellant Bryant would take care of him with money, a car, and a place to stay. Appellant Bryant gave Ms. Smith $300 to make a trip to Folsom to visit Armstrong while he was in prison, but she used the money to purchase narcotics. Ms. Smith also sent Armstrong money while he was at Folsom. (RT 9446-9456, 9462-9464, 9487; see RT 9466-9471.)[11/]

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11. In the latter part of 1986, Ms. Smith used an altered $10 bill as if it was a $100 bill in an attempt to purchase narcotics at a house on Louvre Street. However, before she could get out of the enclosed cage surrounding the front door, someone spit on her and reprimanded her that she should not try that again. At a Christmas party in 1986, Ms. Smith, with appellant Bryant standing nearby in a parking lot, was beaten in the head and neck by an unknown person with a billy-club-type object (two sticks with a chain in the middle) commonly referred to as a "nunchukas." About one or two weeks later, appellant Bryant told Ms. Smith that she was lucky to be alive and words to the effect of "That

Mona Scott met Armstrong while visiting her boyfriend in custody. During 1988, Scott corresponded with Armstrong and talked with him on the telephone. Armstrong told Scott not to worry about her substantial telephone bill, because he had a friend "that owed him." Armstrong made arrangements for Scott to pick up money from appellant Bryant at his Judd Street residence. Scott proceeded to appellant Bryant's residence and met appellant Bryant. He gave her a brown paper bag containing $400. The money in the bag contained a lot of $1 bills, which were stacked in neat piles with a rubberband around each pile. Sometime prior to Mother's Day in 1988, Armstrong and Scott made arrangements for Scott to travel to Folsom for a visit. Armstrong told her to calculate the cost for the trip and appellant Bryant would pay for it. Appellant Bryant came to Scott's house and handed her a brown paper bag containing approximately $2,500 for the trip, telephone bill, and money to post to Armstrong's prison account. Once again, the money in the bag contained mostly $1 bills, which were in stacks with rubberbands around them. (RT 9492-9504.)

In February 1988, prior to Armstrong's release from prison, Angela Armstrong, Armstrong's sister who lived in St. Louis, received $2,100 from appellant Bryant. Armstrong had told his sister that she would be receiving the money to pay her telephone bill for the calls between her and Armstrong while he was in prison. (RT 9402-9404, 10451-10455, 10531-10533; Peo. Exh. 109.)

James Brown and Armstrong became friends in prison. After he escaped from custody in late 1987 and while awaiting Armstrong's release from prison in the summer of 1988, Brown, with the assistance of appellant Bryant, set up a small-time drug operation in Northern California in the early part of 1988. (RT 9404-9408, 11568-11574.)

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if [appellant Bryant] didn't know [her] so well, [she] would be dead now." (RT 9446-9456.)

Appellant Bryant sent substantial sums of money to Brown and Brown's family members and friends. Valerie Wilbon, a former girlfriend of Brown, received $500 on March 6, 1988, from appellant Bryant, a person she did not know. She also received a letter from Armstrong, another person she did not know, while he was in prison. (RT 10457-10467, 10499-10507; Peo. Exh. 109.) Shirley Owens, who resided in St. Louis, received in March 1988, four wire transfers of money from appellant Bryant, a person she did not know, totaling $2,200. When Owens received the wire transfers, Brown and his girlfriend were living at Owens's house. (RT 10459-10462, 11497-11507; Peo. Exh. 109.)

After he arrived in Northern California in March 1988, Brown received Western Union wire transfers of money from appellant Bryant on March 15 ($200), March 25 ($2,000), March 31 ($1,000), and June 22 ($1,500). Brown also received a wire transfer of $800 from Antonio Johnson on August 3, 1988. (RT 10462-10467, 11598-11603; Peo. Exh. 109.)

3. The Bryant Narcotic Distribution Operation Flourishes In The San Fernando Valley

During the 1980s, while Armstrong sat in prison taking the fall for Jeff Bryant and appellant Bryant, the narcotic distribution operation of the Bryant Family or the Bryant Organization, controlled and operated by appellant Bryant, dominated the northeast section of the San Fernando Valley.

a. The 1984-1985 Investigation Of Bryant "Rock Houses"

In 1984 and 1985, there was an extensive undercover operation in the northeast San Fernando Valley of "rock houses" active in the Pacoima/Lake View Terrace area. The houses, which served as narcotic distribution points, were operated and controlled by the Bryant Family or the Bryant Organization. The term "Family" in the Lake View Terrace area of Pacoima, in terms of

narcotic distribution, referred to the Bryant Family. (RT 9536-9538, 9636-9637, 9663-9667, 9705-9706.)

During the investigation, a series of search warrants were executed on the "rock houses" or the "Bryant houses." There were two unique characteristics of the Bryant "rock houses": (1) each was extremely well fortified (i.e., an electronically-controlled steel cage surrounded the front door so that a person desiring entrance into the house was "trapped" in the cage until such time the person inside the house opened the inner steel door after the outer steel door had closed and locked); and (2) each had crock pots, which contained very hot or almost boiling oil for the purpose of destroying the narcotics and other evidence present inside the location. Following the execution of the search warrants, appellant Bryant, who operated the Bryant Organization, and other individuals were convicted of various narcotic offenses. Specifically, appellant Bryant pleaded guilty to conspiracy to sell or transport cocaine. (RT 9536-9538, 9636-9637, 9654-9657, 9663-9666, 9702-9703, 9705-9707, 9730-9732.)

Below is a summary of the various search warrants executed during the investigation.

(i) The June 27, 1984, Search Warrants

On June 27, 1984, Los Angeles County Deputy Sheriff Gheral Taylor, assigned to the Narcotics Bureau, conducted undercover operations of "rock houses" and assisted in the preparation of search warrants for various locations, including 13031 Louvre Street, 10743 De Haven (the residence of Jeff Bryant), and 10731 De Haven (the residence of Eli Bryant, who was a deputy sheriff assigned to the Custody Division at the Men's Central Jail). The search warrant authorized the search of the vehicle driven by Jeff Bryant. And, when Jeff Bryant's vehicle was searched, it was occupied by Jeff Bryant and his wife Rochelle. A ring of 12 keys was found on Jeff Bryant. One of the keys fit the

lock on the iron-grate door at 13031 Louvre Street. The search warrant did not involve appellant Bryant's person, residence, or vehicle. (RT 9587-9590, 9600.)

The property located at 13031 Louvre Street was a fortified "rock house" which was owned by Florence Bryant and Jeff Bryant. Police officers ultimately gained entry into the location by using a specially built crowbar and sledge hammer and prying the steel doors loose from the steel cage framework mounted to the front of the house. All the windows and doors of the premises were barred. Danny Miles was found inside the house. No keys were found at the location. Miles was locked in the house with no way out. (RT 9588-9591, 9594, 9597.)

The following items were recovered from inside the premises at 13031 Louvre: a plastic baggie containing eight smaller plastic baggies, each containing "an eight track" (one-eighth of an ounce) of a white crystalline substance resembling cocaine; a slow cooker containing almost boiling oil and approximately 75 individual bindles in the bathtub; two or three other slow cookers containing hot oil in the kitchen area; a loaded shotgun (.00 buck) with a cut-down barrel "positioned directly in front of the front door"; and a police scanner tuned to the West Valley LAPD frequencies. No clothes and only a couple pieces of furniture were found in the premises. The kitchen was bare of utensils, and the refrigerator was empty. Paperwork bearing the name of Jeff Bryant was found during the search. (RT 9591-9595.)

When the search warrant was executed at 10743 De Haven (Jeff Bryant's residence), police officers found a plate which contained a small amount of a white substance resembling cocaine and $6,500 cash. During the search at 10731 De Haven (Eli Bryant's residence located next to Jeff Bryant's residence), $20,000 was found in a bedroom safe. (RT 9594-9596, 9598-9599,

9638-9640.)[12/]

The same day the search warrants were executed, a locksmith was summoned to 13031 Louvre Street to repair the electric strike on the outer steel door of the caged area surrounding the front door which had been damaged during the execution of the search warrant. The electric device releases the lock on the door from the inside of the premises. The call for the locksmith was placed by a person named "Bryant." The locksmith also re-keyed 12 locks at the premises. (RT 9683-9687; Peo. Exh. 83.)

(ii) The January 22, 1985, Search Warrant

On January 22, 1985, Los Angeles Police Officer Ernest Guzman, assigned to the Narcotics Division, participated in the execution of a search warrant for the premises at 11442 Wheeler Street -- a single family residence with barred windows and a steel cage surrounding the front door. (This is the location where the instant quadruple homicide occurred over three and one-half years later on August 28, 1988.) The cage had a steel-grated exterior door which was electronically controlled from inside the residence. There was also an interior steel-grated door, with a slot in it to allow items to be passed through it into the house. Entry into the premises was effectuated by SWAT. (RT 9983-9987.)

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12. Title to the De Haven property was held by Jeff Bryant and Rochelle Bryant, husband and wife as joint tenants, from February 9, 1983, through December 16, 1985 (they had received the property from appellant Bryant, Ross Bryant, and Florence Bryant as "a wedding gift deed"). On December 16, 1985, Jeff and Rochelle Bryant quitclaimed the property to Florence Bryant as a gift. She, in turn, on September 4, 1986, gifted her son Eli Bryant the property, and together they took title as joint tenants. On May 12, 1992, the property was gifted from Florence Bryant and Eli Bryant to Jeff Bryant who, in turn, sold the property to Andreas Sahanaja on the same date. (Peo. Exh. 116; RT 10640-10641, 10646-10650.)

A person by the name of Terry Evans was found inside the house. The following items were found at the location: 46 bindles of white powder resembling cocaine inside the toilet bowl; a carton of battery acid, used for the destruction of evidence, next to the toilet bowl; a 12-gauge sawed-off shotgun in the living room; and $300. The house was void of clothing and household items and contained little furniture. (RT 9983-9988.)

(iii) The February 6, 1985, Search Warrant

On February 6, 1985, Detective James Dumelle of the Narcotic Group of the Los Angeles Police Department participated in the execution of a search warrant for the premises at 13037 Louvre Street. The residence was a fortified "rock house" with barred doors and windows, a steel door over the front door, and an electronically-controlled steel cage surrounding the front door. The doors of the residence were covered with iron and black-out mesh. SWAT and a battering ram were used to effectuate entry into the premises by knocking down a portion of a wall. Inside the house, the room where narcotics were kept was sealed off and secured with a solid-core heavy door with double-cylinder deadbolt locks. (RT 9628-9631, 9641-9644.)

The following evidence of "rocking equipment" (equipment used to convert powder cocaine into rock cocaine) was found inside the premises: a glass vial, baking soda, a knife, 151 rum, and a "torch" -- a long piece of copper wire with cotton on the end. (RT 9644-9645.) Also found at the location were "pay and owes" (recordings of narcotic transactions) and a grant deed in the name of Jeff Bryant. (RT 9646, 9662.) Within minutes of the execution of the search warrant, Antonio Johnson arrived at the location and proclaimed the residence, as well as the car in the driveway, belonged to him. (RT 9647.)

(iv) The March 5, 1985, Search Warrant

On March 5, 1985, Detective Charles Uribe, assigned to the Narcotic Division of the Los Angeles Police Department, participated in the execution of a search warrant for the premises at 13031 Louvre Street -- the same premises which had been searched pursuant to a search warrant on June 27, 1984. Immediately before the execution of the search warrant, an undercover purchase of narcotics with the use of "dusted" money took place in the electronically-controlled steel cage surrounding the front door of the premises. There was a rectangular opening in which to pass items back and forth through the steel-barred front door inside the caged area. Entry into the premises was effectuated after SWAT pulled the cage off the front door and the bars off the windows. Kenny Reaux, who was alone inside the residence and who had powder on his hands from the "dusted" money, was arrested. Found inside the residence were "pay and owes" and about one to one-and-one-half pounds of cocaine. The cocaine was covered with hot oil and found on the floor next to a spilled crock pot. No items were found inside the premises which would be normally found in a residence. (RT 9550-9563.)

Following the execution of the search warrant, Antonio Johnson contacted a carpenter to do some repair work on the house. While there, the carpenter was asked to do some repair work on the other Louvre Street house (13037 Louvre Street), since the police had raided it by that time. The carpenter performed the work and strengthened the fortification of the two houses. While doing the repair work, Antonio Johnson introduced the carpenter to appellant Bryant. At appellant Bryant's request, the carpenter barricaded the bedroom doors at 13031 Louvre Street so they were closed off from the rest of the house. (RT 9676-9679.)

Detective Dumelle returned to 13031 Louvre Street about one week after the execution of the March 5 search warrant and noticed a unique repair to the

house: the bedroom doors were boarded up with 5/8" thick plywood reinforced with plywood or a 2' x 4' bracing, which was screwed into the wall with lug bolts. There was, according to Detective Dumelle, "no way" for someone using the house as a home to enter the bedrooms. The front window was also boarded, but the plywood was held in place by a 2'x 4' hinged like a shutter so that the shutters could be opened and the steel cage surrounding the front door would be visible from inside the house. (RT 9657-9660.)

(v) The March 22, 1985, Search Warrant

On March 22, 1985, Detective Dumelle participated in the execution of a search warrant for the premises at 11442 Wheeler Street (see Peo. Exh. 82 [photo]) -- the same premises which had been searched pursuant to a search warrant on January 22, 1985. (Again, this is the location where the quadruple homicide occurred over three years later on August 28, 1988.) Before the execution of the search warrant, several undercover purchases had been made at the location, including one that very day when an undercover officer passed $100 through the opening in the inner steel front door in exchange for cocaine. Entry into the premises was effectuated by SWAT and a battering ram, which was used to remove the front door of the steel cage "with great difficulty." The bedroom doors inside the location were covered with iron grates. There were cylinder bolt locks with black mesh on the inside of the bedroom doors. Plywood covered the interior bedroom windows, while there were bars on the outside of the windows. The sliding glass door at the location was covered with a steel grate. (RT 9647-9657, 9660.)[13/]

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13. Following the execution of the search warrant at 11442 Wheeler Street on March 22, a locksmith did repair work at the location. Appellant Bryant paid for the repairs. (RT 9687-9689; Peo. Exh. 83.)

The following items were found inside the premises: a couple of tipped over, slow-cooking crock pots containing oil; one crock pot in the living room containing cocaine in the oil; a second spilled crock pot of warm oil on the carpet in the dining area; shotgun shells and a one-gallon bottle of Wesson Oil on the living room floor; and a notebook with "pay and owes." The house was sparsely furnished -- a chair in the living room, a bed or cot in the bedroom, no toilet articles in the bathroom, a few staples in the kitchen, and no clothes in the closets. There was "nothing to indicate anybody had been there for any length of time." Kenny Reaux -- the individual who was arrested inside 13031 Louvre Street when the search warrant was executed on March 5, 1985 -- was found inside the premises and, once again, arrested. (RT 9647-9657, 9660.)

Reaux, who worked at Neighborhood Billiards as a pool attendant for approximately six months prior to his initial arrest on March 5 at 13031 Louvre Street, acknowledged at trial that, on March 5, he was selling crack cocaine from the premises at 13031 Louvre Street. Reaux, however, maintained it was "his" operation and that he knew nothing about "family dope" or the Bryant Organization. Reaux also acknowledged at trial that he was arrested 17 days later on March 22, 1985, inside the Wheeler Street residence selling crack cocaine ("I am a crack seller") but again maintained it was "his" operation and that appellant Bryant and Jeff Bryant had nothing to do with it. (RT 9602-9608, 9610-9615, 9620.) Reaux maintained that no one, other than himself, worked at the Louvre and Wheeler Street houses when the search warrants were executed in March 1985. Reaux claimed he purchased the cocaine from "whoever had it" and denied ever purchasing narcotics from appellant Bryant or Jeff Bryant. (RT 9609-9610, 9614-9621.)

Reaux, however, was impeached with prior inconsistent statements he made to Detective Dumelle following his second arrest on March 22. At that time, Reaux related the following: because he needed extra money, Reaux

permitted appellant Bryant to recruit him while he was working at Neighborhood Billiards to work an eight-hour shift at 11442 Wheeler Street for $200; appellant Bryant drove Reaux to the Wheeler Street house on the afternoon of March 22, at approximately 2:30 p.m., in appellant Bryant's white Audi; and appellant Bryant told Reaux there was no cocaine in the house and that Reaux's job was just to watch the house. Reaux concluded the interview with Detective Dumelle by stating that he did not want to talk about the matter any further "because the Bryants would have him killed." (RT 9631-9632, 9702; see RT 9705-9707.)[14/]

(vi) The April 18, 1985, Search Warrants

On April 18, 1985, Detective Dumelle participated in the execution of a search warrant for the premises at 10743 De Haven (Jeff Bryant's residence). During the search, tax records and payment books for the houses at 13031 and 13037 Louvre Street and 11442 Wheeler Street were recovered. Also found at the residence was a one-half kilogram of a cutting agent material for narcotics. (RT 9637-9640.)

Simultaneously, Detective Uribe participated in the execution of a search warrant for the premises of appellant Bryant at 12719 Judd Street. The following items were recovered: a calendar with Roman numeral writing on it which appeared to be the same calendar Detective Uribe saw during the search of 13031 Louvre Street on March 5, 1985; a piece of paper containing Kenny Reaux's name, booking number, and a notation of Health and Safety Code

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14. While in custody, Reaux related in an interview that he was in custody for narcotic-related offenses because he was operating a "rock house" for Jeff Bryant and appellant Bryant. Reaux stated that, while in custody, he received money from the Bryant Family and that his bills and family were being taken care of by the Bryant Family. When asked if he would assist the police with information regarding the murder of Gentry's father, Reaux said "that the Bryants were family, and he would not rat on them." (RT 9717-9720.)

section 11352; nine one-gallon Wesson Oil containers (eight of the nine containers were full of oil, while the nine containers found at the Louvre Street location were mostly empty); a locksmith receipt (see Peo. Exh. 80) for repair work completed at 13031 Louvre Street; and a GTE bill for Pam Carson, a document from Michelle Muldrew, and a Los Angeles Health Department violation notice addressed to Tony Johnson for the residence at 11442 Wheeler Street. (RT 9539-9542, 9545-9550.)

(vii) Neighborhood Billiards

Detective Dumelle also conducted an undercover surveillance of Neighborhood Billiards on Van Nuys Boulevard around March of 1985. There was not a lot of traffic in and out of the pool hall, and Detective Dumelle noted that it "[d]idn't appear to me that they were making their money in the pool hall by shooting pool." Detective Dumelle explained that there was "[j]ust a lot of hanging around in there, but not a lot of people." Detective Dumelle entered Neighborhood Billiards on March 18, 1985, and observed appellant Bryant behind the counter. Appellant Bryant was cited for not having paid for a permit to operate a pool hall in Los Angeles County. Detective Dumelle observed that it is "uncommon" for a pool hall to operate as a business with an unlisted telephone number. (RT 9661-9662.)

(viii) Convictions As A Result Of The Search Warrants

The trial court took judicial notice of the following: case A810867 filed in superior court in 1985 charged Jeff Bryant and appellant Bryant with narcotic offenses and that, at the end of the case, Jeff Bryant pleaded guilty to operating a house where narcotics were sold (11442 Wheeler Street) and selling or transporting cocaine, and appellant Bryant pleaded guilty to conspiracy to sell or transport cocaine. The trial court also took judicial notice of the words

uttered by appellant Bryant during his plea of guilty on February 7, 1986, namely, that on March 5, 1985, he conspired with Kenny Reaux and others to possess cocaine for sale, and, in pursuit of the conspiracy, committed the following overt acts: (1) recruited Reaux to work in a "rock house" operated by Jeff Bryant and appellant Bryant; (2) prior to March 22, 1985, appellant Bryant told Reaux he would receive $200 for working an eight-hour shift selling cocaine at 11442 Wheeler Street; and (3) Reaux had in his possession 137 grams of cocaine on March 22, 1985, at 11442 Wheeler Street while working for appellant Bryant and that Reaux attempted to destroy the cocaine by putting it in a crock pot containing hot cooking oil. (RT 9730-9732.)

b. Undeterred, The Bryant Narcotic Distribution Operation Continues "Full Speed Ahead" From 1986 Through 1988

Undeterred by the searches, arrests, and convictions, the Bryant Organization continued "full speed ahead" with its narcotic distribution operation after 1986. Respondent will summarize the testimony of several witnesses (employees and customers of the Bryant operation) to demonstrate the depth and breadth of the activities of the Bryant Organization.

(i) James "Jay" Williams

One of the main prosecution witnesses during the trial was James "Jay" Williams, a member of the Bryant Organization who was inside 11442 Wheeler Street on the day of the murders. He described what occurred inside the Wheeler Street residence between codefendant Settle and appellants Bryant, Wheeler, and Smith while Armstrong and Brown prepared to come over to the Wheeler Street house on the pretext of picking up money to clean an apartment at 7654 Laurel Canyon. That testimony will be discussed in detail later in this Statement of Facts. Here, however, respondent will summarize Williams's

activities and involvement with the Bryant Organization prior to the quadruple murder at 11442 Wheeler Street on August 28, 1988.

a) Williams Joins The Family And Works At Neighborhood Billiards

Nineteen-year-old James "Jay" Williams, a small-time street seller of rock cocaine, joined "The Family" on April 1, 1988 (just five months before the instant murders), after his life-long friend Lamont Gillon, who worked at Neighborhood Billiards (see Peo. Exh. 121), called him and told him to come to the pool hall because they were looking for another person to hire. Williams went to the pool hall that day and was immediately hired by Nash Newbill, the operator of the pool hall. Williams started work that very day. (RT 12110-12112, 12115-12120.) There were two work shifts at Neighborhood Billiards -- 6:00 a.m. to 4:00 p.m. and 4:00 p.m. to 2:00 a.m. The workers at the pool hall -- Williams, Lamont Gillon, and Anthony Shelby -- worked 14 days followed by 7 days off. Each was paid $233 per week every Tuesday by Nash Newbill. (RT 12129-12130.)

Williams's job at Neighborhood Billiards was to "direct drug addicts to a spot where they could pick up their drugs" and to make the pool hall "look business like." If an individual walked into the pool hall and asked where narcotics could be purchased, the person was told, "It's a pool hall. That's it. Shoot pool. Play video games." However, if an individual asked "Where is it at?" or "Who got it?" the individual was directed to a location where narcotics could be purchased (i.e., Filmore Park, Hansen Dam, Louvre Street, Poor Boys, Desmond, Chivers, etc.). The locations of where narcotics could be purchased occasionally changed during Williams's work shift. Various individuals who worked for the Bryant Family -- Derrico, Greg, Binky, Nizam -- called the pool hall or stopped by the pool hall to advise Williams, or whoever was working,

that the location where narcotics could be purchased had been changed or moved. (RT 12120-12130.)

Appellant Bryant, the "boss," did "whatever he wanted" in the Organization. Williams believed appellant Wheeler ("Slim") was the nephew of appellant Bryant, because appellant Wheeler referred to appellant Bryant as "Uncle Stan." (RT 12110-12112, 12116-12117.)

b) Williams Gets Promoted To Work At The "Count House" At 11442 Wheeler Street

After working at Neighborhood Billiards for a couple of months, Nash Newbill promoted Williams and Lamont Gillon to work at the "count house" at 11442 Wheeler Street. Even though the house was located in a residential area, the house, unlike the other houses in the area, had bars on the doors and windows and an electronically-controlled metal cage surrounding the front door. There were two buzzers inside the house (one next to the front door and one in the kitchen) to control the outer steel door of the cage surrounding the front door, as well as the metal interior door. Also, unlike the other houses in the area, the house on Wheeler Street had a swimming pool (even though it was always empty). Williams worked the 7:00 a.m. to 3:00 p.m. shift. Other individuals who worked at Wheeler Street were Lamont Gillon, appellant Wheeler, and Anthony Arceneaux. Appellant Wheeler worked the 11:00 p.m. to 7:00 a.m. shift, and Gillon worked from 3:00 p.m. to 11:00 p.m. Arceneaux "floated" and worked the shift when one of the others was off. One of the four workers was always at the Wheeler Street house. Their job was to count money received for the purchase of narcotics. As Williams explained, "We received money. We would count it. Straighten it up and hook up drug deals." (RT 12130-12142, 12224-12227, 12279-12281.)

Williams and the others who worked at Wheeler Street were paid $500 each Tuesday. Other employees or members of "The Family" stopped by Wheeler Street to pick up their pay. The payroll was kept in the safe in the bedroom. Each person received a stack of money secured with a rubberband with his name on it. Those individuals who were involved in the "narcotic end" of the Bryant Organization, as distinguished from those like Williams who were involved in the "money end" of the Bryant Organization, received $1,000 per week in salary. Appellant Smith was paid $1,000 per week. Williams, who did not know appellant Smith's last name, had no idea what appellant Smith did for the Bryant Organization. (RT 12230-12235.)

Inside the Wheeler Street location (see Peo. Exh. 34) were the following items: a roll top desk in a back bedroom; an adding machine; a money counting machine; counterfeit bills to ensure the money counting machine was accurate; a safe in one of the bedrooms; preprinted confirmation sheets (see Peo. Exh. 95) used to record the specifics of a narcotic transaction; a list of the Family members' beeper numbers (see Peo. Exh. 39A-30) on the wall in the kitchen next to the telephone; and the 90-minute schedule on the wall above the work table in the living room. (RT 12145-12147, 12157-12158, 12161, 12213-12223, 12252-12253, 12262-12266, 12298; see Peo. Exh. 40 [photo].)

The Wheeler Street location was also used for the sale of "large quantities" of cocaine.[15/] The smallest amount of narcotics sold from the

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15. Title to the Wheeler Street property was held by Jeff Bryant from September 7, 1983, until December 15, 1987, when he transferred title to Nash Newbill. On April 6, 1989, Newbill quitclaimed title (for consideration) to Edgar Garrido. (Peo. Exh. 116; RT 10640-10641, 10650-10652, 11726.) The gas service to the location was in the name of: Kowanda Evans, employed by Neighborhood Billiards, from September 7, 1983, through March 2, 1984; Pamela L. Carson from March 2, 1984, through November 20, 1984; and Michelle Muldrew, an employee of Neighborhood Billiards, from November 9, 1984, through March 26, 1985. (Peo. Exh. 118; RT 10625-10627.)

Wheeler Street location was nine ounces of cocaine ("a quarter key") for $4,500.[16] The buyer at Wheeler Street, if recognized, was let into the electronically-controlled cage around the front door of the house and eventually into the house. Williams took the money from the buyer and counted it in front of him,[17] found out what the buyer wanted to buy and the location where the buyer wanted the narcotics delivered, called a telephone number he had been instructed to memorize when he first started working at Wheeler Street, and "set up" the delivery of narcotics to the desired location. Following the delivery of the narcotics to the buyer, the person Williams had called to set up the delivery would call him back and advise him the transfer was completed. Williams then entered the specifics of the transaction on a preprinted form or confirmation sheet (Peo. Exh. 39A-37). (RT 12149-12155, 12158-12160; see RT 12155-12157, 12212-12213.)

Approximately two to three weeks prior to August 28, 1988, Williams attended a meeting at the pool hall with several other members of the Bryant Organization. Appellant Bryant conducted the meeting and was "telling everybody what to do." The purpose of the meeting was to discuss the "changing of our operation." Williams explained that "we were going to shut down the pool hall [Neighborhood Billiards] and not use it the way we were using it before. We were going to change the system." Appellant Bryant told the group the change was necessary because "the police were close to catching on to what we were doing" at the pool hall. Appellant Bryant told the group the change in the procedure was that now a customer would pay the money for the

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16. Eighteen ounces of cocaine was referred to as "a half key," and 36 ounces was referred to as "a key." (RT 12158-12160.)

17. Williams was instructed how to count the money: take all the wrinkles out of the bills, straighten the bills, face the bills in the same direction, separate the bills in denominations, and place the bills in stacks of 50 except for $1 bills which were placed in stacks of 25. (RT 12147-12149.)

purchase of narcotics at one house, receive a slip of paper with numbers on it, and take the slip of paper to another house where he would turn in the paper and receive the drugs he paid for at the first house. To implement the change, appellant Bryant instructed that the pool hall would stay open 24 hours a day with members of the Bryant Organization working 90-minute shifts at the pool hall "to let the customers know about the changes that were going to take place." Appellant Bryant wanted Neighborhood Billiards open around the clock so all the customers "found out that [the pool hall] was closing down and he was going to operate a new way." Those present at the meeting placed their initials on the schedule (see Peo. Exh. 114) next to the 90-minute shift he was going to work at the pool hall. (RT 12243-12252, 12290-12292.)

After Williams worked at the Wheeler Street house for about one month, appellant Bryant gave Williams a .45 caliber revolver with a silver emblem of a horse (Peo. Exh. 152) and instructed him to be armed with it whenever he answered the door. Appellant Bryant told Williams that they kept a lot of money in the house and should not take it for granted that someone might try to take the money. During the work shift, the .45 caliber revolver was left on the work table in the living room. (RT 12235-12239.)

(ii) George Smith

George Smith (hereinafter referred to as "George") worked for the Bryant Family selling narcotics in the Filmore Park area.[18/] Eddie Barber, a Bryant Family member, introduced George to appellant Bryant in the summer of 1986. George agreed to sell narcotics at Filmore Park for appellant Bryant and the Bryant Organization. Appellant Bryant assured George that "nobody

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18. George did not want to testify. His mother had recently suffered a stroke which George believed was caused by his involvement in this case. George was impeached with prior inconsistent statements he made to the police. (RT 10821-10822, 10836-10837.)

would fuck with [him] while he sold" the narcotics and that, if he got arrested, "[the Bryant Organization] could get him an attorney." Appellant Bryant also assured George that, if he "crossed" appellant Bryant or the Bryant Family, "[George] would be in bad shape." Bryant Family members Eddie Barber, Binky, Blaylock, Darrell Blaylock, and Nash Newbill delivered the narcotics to George for resale on the street. George received an unattractive company car or "bucket car" to avoid police attention. Appellant Bryant told George that he and his brother Jeff "would circle Filmore Park to keep the competition away" and that he had hired some Inglewood and Los Angeles "hoodlums" to do the enforcing and "rob and take the drugs from [George's] competitors." When George talked with appellant Bryant, appellant Bryant had a .45 caliber automatic and a long barrel .44 Magnum revolver in his waistband, shoulder holster, briefcase, or console of his car. (RT 11212-11217; see RT 10801-10806.)

When George paid for the narcotics he purchased from the Bryant Family, he stacked the money in piles of 100 with all the bills facing the same way and then placed a rubberband around the stack. Near the end of October 1986, after he increased the amount of cocaine he was selling at Filmore Park to four ounces a week, George moved into an apartment at the apartment building at 7654 Laurel Canyon (see Peo. Exh. 126). (RT 10801-10810, 10834.)

On February 14, 1987, George was arrested in apartment 309 of the Laurel Canyon apartment building after the police found a pound of rock cocaine in his apartment (#303). Appellant Bryant got George an attorney and George "beat the case but he owed the Family money [for the attorney] so he had to work it off, approximately $9,000." As noted by George, he "beat" the case, and the case against him was eventually dismissed "because he had an attorney that was hired by the [Bryant] Family." Following George's release

from custody, he worked at the Bryant "rock house" at 11442 Wheeler Street (the location of the murders in this case) until April 1988, when his debt was paid. After paying off the debt, George worked at Neighborhood Billiards directing buyers of narcotics to "rock houses" or "poor houses" where they could rent a house in the neighborhood for $100-$200 per day and sell narcotics. (RT 10811-10812, 10833-10835, 10865-10868, 11217-11219, 11253-11255, 11728.)

George knew appellant Wheeler from appellant Wheeler's selling narcotics at the Teresa apartments. Appellant Wheeler was treated "like a brother" by appellant Bryant. Appellant Wheeler, who drove a white Audi with 18 ounces of cocaine in the trunk, and who carried a four-inch blue steel .357 Magnum revolver with rubber grips and an "oozie," was given gold-rimmed glasses and several gold chains by appellant Bryant. George also related that appellant Wheeler wore "lots of gold" jewelry (see Peo. Exhs. 116, 127, 128 [photos]). George noted that, in 1988, as compared to the time of trial, appellant Wheeler was thinner and had shorter hair. (RT 10791-10795, 10797-10798, 10871-10872, 11219-11220, 11253-11255.)

George knew codefendant Settle (the defendant the jury was unable to reach a verdict on) from elementary school. Codefendant Settle worked for the Bryant Family and was, according to George, "a big dope connection with the Family. He would sell not ounces but kilos of cocaine for the Family." George purchased narcotics from codefendant Settle on three occasions. (RT 10800, 10816-10818, 11220-11221, 11255.)

Antonio Johnson worked at Neighborhood Billiards, and his primary function was "if a member of the Family was arrested, he would bail them out." Johnson also sold narcotics from a house on Louvre Street. In 1985, the police used the battering ram on the Louvre Street house occupied by Johnson and did not find any narcotics, but, according to George, there was $200,000 in cash

and 10 kilograms of cocaine in the house next door, which was occupied by Nash Newbill. (RT 10816-10819, 11221-11222.)

George also related the following: appellant Bryant was in charge of running the street narcotic operation for the Bryant Family in 1988 at the time of the quadruple murder on Wheeler Street; the overall head of the Bryant Organization for the "non-street" operation was Jeff Bryant, who was in custody at the time of the instant murders; and that, when Jeff Bryant was in custody in 1988, "[appellant] Stan Bryant let the power go to his head and any time somebody in the Family would screw up or mess up that [appellant Bryant] would deal with it by saying, 'Oh, well. We'll have to kill them.'" (RT 11222-11223.)

(iii) Laurence Walton

Laurence Walton, a member of the Bryant Family who was impeached with prior inconsistent statements he gave the police, operated one of the roving sales locations (i.e., Filmore Park, Hansen Dam, Adelphia Street, etc.).[19/] When he moved the roving location he was operating, Walton called Neighborhood Billiards and reported the new location. Walton also called Neighborhood Billiards when he needed to "reup" (obtain a new supply of narcotics) because his supply of narcotics was low. After such a call, either Anthony Johnson or Frank Settle met him at a location and "fronted" him additional narcotics. Walton, in turn, gave the money received from the sale of the narcotics to the

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19. Walton explained at trial: "I don't want to be up here. I want to get on with my life" and "This is part of my past. I don't want anything to do with this" case. When asked if he would tell the truth as he did to the police in his prior statements, Walton responded, ". . . No. I won't say anything." Walton also maintained at trial, "I didn't work for the Family. I worked for myself." (RT 10539-10540, 10545-10554; see RT 10681-10683; see also Peo. Exh. 120 [tape of interview with district attorney investigator morning of Walton's testimony]; see Peo. Exh. 216 at 3 Supp. CT 10468-10472 [Walton expressing fear of testifying at trial during interview with Detective Lambert].)

Bryant Family. (RT 10691-10692.)

At other times, Walton worked at the Fenton Street "rock house" for which he received $1,000 per week. As will be discussed in more detail later, on September 25, 1988, about one month after the instant murders, Walton was arrested inside the Fenton residence for taking money from customers and giving them post-its (see Peo. Exh. 89) with seven digits indicating the amount of money paid and narcotics purchased, which the customer, in turn, took to the Adelphia house and received the narcotics paid for at Fenton. Walton counted and stacked the money received from customers at Fenton "like a bank." (RT 10546-10566, 10696.) At other times, at the direction of Anthony Johnson or William Settle, Walton made large deliveries of narcotics (one-quarter of a kilogram to a full kilogram) in a "company car" to various individuals, including Billy Fields. (RT 10583-10588.)

While Walton worked for the Bryant Family, the narcotic distribution operation was operated by appellant Bryant, the "boss." The term "Family," according to Walton, referred to the Bryant brothers and the Settle brothers. Walton also related that the term "Family," as used in the Lake View Terrace/Pacoima area, included "all those people or anybody that was involved in the narcotic or rock cocaine distribution in that area." (RT 10689-10691, 10696-10697, 10713-10715.) Walton identified several individuals, including, but not limited to, appellant Smith, appellant Wheeler, and codefendant Settle, as being members of the Bryant Organization. (RT 10540-10544; see Peo. Exh. 113.)

Walton, like Jay Williams, was present at the meeting at Neighborhood Billiards conducted by appellant Bryant in which appellant Bryant explained the Bryant Organization was changing its narcotic distribution operation to the new distribution procedure of using the "rock houses" on Fenton Street and Adelphia Street (pay at one and receive the narcotics at the other). In order to

communicate the new system, appellant Bryant devised a 90-minute schedule (see Peo. Exh. 39A-20) in which various members of the Family would work 90-minute shifts at Neighborhood Billiards (see Peo. Exh. 121) on a 24-hour basis in order to explain the new procedure to all their customers. The individuals present at the meeting placed their initials next to a particular shift. Those present at the meeting included, in addition to appellant Bryant and Walton, appellant Smith, William Blaylock, Darrell Blaylock, appellant Wheeler, Nash Newbill, Anthony Johnson, Delvanina Butler, and others. (RT 10604, 10689-10690, 10693-10696.)[20/]

(iv) Alonzo Douglas Smith

Near the end of 1986, Alonzo Douglas Smith (hereinafter referred to as "Alonzo") wanted to set up his own drug operation. "Da Da," an associate, made arrangements for Alonzo to meet appellant Bryant. Appellant Bryant went to Alonzo's house and sold him narcotics, which Alonzo, in turn, sold to others. Alonzo returned to jail after this purchase of narcotics from appellant Bryant. (RT 10883-10889.)

After he got out of jail, Alonzo lived in apartment 309 of the apartment building at 7654 Laurel Canyon. Around March of 1988, Alonzo received nine ounces of cocaine from Andrew Settle, on behalf of appellant Bryant, for delivery to "Tommy Hull's people" in St. Louis.[21/] Alonzo placed the narcotics

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20. Walton identified his telephone number and initials on the beeper list (see Peo. Exh. 115) recovered from the Adelphia house. Walton also identified Jay Williams as "Jay Baby" and "Baby Huey." According to Walton, Williams was a jokester who was "big [not skinny] and goofy." (RT 10582-10588.)

21. As will be discussed in more detail later, "Tommy Hull" was the alias used by Armstrong's prison buddy James Brown when, with the assistance of appellant Bryant, Brown set up a small-time drug operation in Northern California following his escape from custody in St. Louis.

in a cracker box and proceeded by way of train to St. Louis. "Tommy" (James Brown) had made arrangements for Alonzo to be picked up at the train station in St. Louis. Before departing the train station, however, Alonzo placed all but one-quarter of an ounce of the cocaine in a locker. Alonzo was thereafter taken to an abandoned apartment building where the buyers of the cocaine "rocked" it up and then pulled out a gun and robbed him of the cocaine and money on his person. (RT 10891-10895.)

Alonzo, who had no money and who knew nobody in St. Louis, called appellant Bryant and told him he had "been jacked" of his money and the one-quarter ounce of cocaine. Appellant Bryant told Alonzo not to worry and that he would have someone meet him at the pay telephone he was calling from. Shortly thereafter, "Mike" showed up at the pay telephone and said appellant Bryant had sent him. Mike took Alonzo to the Western Union office, where Alonzo picked up a $500 wire transfer (see Peo. Exh. 109) from appellant Bryant. Mike also made arrangements for Alonzo to sell the balance of the cocaine he had at a "smoke house," where the buyer of the cocaine uses the narcotics in a room at the "smoke house." After selling the cocaine, Alonzo sent the money to appellant Bryant and then flew back to Los Angeles. (RT 10456-10457, 10895-10901, 10987.)[22/]

(v) Ladell Player

Ladell Player was a regular and frequent purchaser of large amounts of rock cocaine (nine ounces or more) from the Bryant Organization. The rock cocaine was shaped in little moon-shaped cookies and packaged in one-half

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22. Alonzo was concerned about his safety in testifying before the jury because "I went against everything I stand for" and "I opened my mouth and that's a sentence to death." Alonzo explained that inmates pass around in jail transcripts of trial testimony and "that's the last thing you want to have written down next to your name" that you are a "snitch." (RT 10986-10987, 10992.)

ounce baggies (18 one-half ounce baggies for a 9-ounce purchase). Player purchased the narcotics from appellant Bryant because "there wasn't many people I knew that I could get it from." Player and appellant Bryant initially agreed Player would pay $4,200 for nine ounces of cocaine, but, after a couple of weeks, appellant Bryant raised the price to $4,500. Player paid the higher price "because in those days Jeff [Bryant] or Stan [Bryant] would kill you if you went somewhere else" to purchase narcotics. Player dropped off the money for the narcotics at the Wheeler Street house where the money was counted in his presence, usually by Antonio Johnson or appellant Wheeler. The delivery of the cocaine was made to Player's house, usually by Darrell Blaylock. (RT 10234-10243, 10247-10250, 10315-10320, 10334-10339; Bryant's Exh. 6 [10-page transcript of plea in federal court].)[23/]

Player did not want to testify in this case. As he noted, it was "not nice to testify against anyone" and "a man is fighting . . . he has a lot at stake." When served with a subpoena, Player attempted to flee the police rather than testify in this case. Brent McCleave, a law enforcement officer from another state, testified police officers had to physically place a police vehicle in front of Player's fleeing vehicle in order to get him to stop. Player was then flown to California by law enforcement officials and remained in custody until the completion of his testimony. Before being transported to California to testify, Player said that he had family members in California and would never testify against the Bryants or what he knew about their activities. Player, who was on federal probation, told authorities he was fearful of testifying in the instant case.

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23. In 1990 and 1991, after the murders in this case but before the trial, Player, who was still purchasing narcotics from the Bryant Organization and others, got involved in the distribution of narcotics to Minnesota. Player agreed to cooperate with the DEA and pleaded guilty to the federal offense of trafficking narcotics interstate. (See RT 10244-10248, 10253-10254, 10268-10286, 10305-10310, 10321-10327, 10333-10334, 10345-10350, 10352; Bryant's Exh. 6.)

(RT 10258-10267, 10484-10495; Peo. Exh. 216 at 3 Supp. CT 10546-10570.)

(vi) Haywood Kemp

Haywood Kemp, a "real close friend" of Player, was a seller of large quantities of cocaine. He purchased narcotics from Player and Billy Fields and then resold those narcotics in the midwest. In August of 1988, Kemp lived in Canoga Park and contacted Fields to purchase a kilogram of powder cocaine. Codefendant Settle arrived at Fields's apartment with the cocaine, and Kemp arrived with the $14,500 for the narcotics. The exchange took place through Fields. (RT 10054-10058, 10061-10065.)

(vii) William Anthony ("Amp") Johnson

On November 28, 1994, William Anthony Johnson was interviewed by Detective Lambert. Unbeknownst to Johnson, the interview was tape recorded. During the interview, Johnson expressed concerned about testifying as a witness. (See RT 10215-10222; Peo. Exh. 106; Peo. Exh. 216 at 3 Supp. CT 10601-10617.)

At trial, Johnson admitted he sold drugs during the 1987-1988 years but maintained none of the money he obtained from selling narcotics went to the Bryant Family, appellant Bryant, or Jeff Bryant. (RT 9990-9998.) Johnson asked his parole officer to put him in jail until the instant case was completed, because he did not want to be called as a witness about something he was not involved with. Johnson was concerned about his family if he was called in "this drama" "as a witness in something that I'm not involved in." Johnson also acknowledged that "when you tell people to come to court when they are needed, a whole bunch of people aren't going to be around any more." (RT 10002-10005.)

(viii) The Keith Curry Incident

Keith Curry, a seller of narcotics, did not realize when he started dating Tannis Bryant that she was the wife of appellant Bryant. He found out later that the relationship between Tannis and appellant Bryant was "unstable" and that Tannis was thinking of leaving appellant Bryant. In 1986, Tannis moved out from the home she shared with appellant Bryant and maintained an apartment at 6754 Claiborne in North Hollywood. Curry, who lived with his mother, spent three or four nights a week at Tannis's apartment. On the evening of March 15, 1986, Curry spent the night with Tannis after parking his Porsche in the parking spot where Tannis usually parked her car. The next morning, when Curry was leaving the apartment, he got into his Porsche, backed out of the parking spot, and drove forward four to six feet when the Porsche exploded. Curry was injured as a result of the explosion and was taken to the emergency room. (RT 11315-11320, 11326-11328, 13080-13083.) A bomb expert opined that a bomb had been placed in the Porsche with a triggering device designed to activate once the car moved forward. (RT 11788-11790.)

Prior to the car explosion, Pierre Marshall, a friend of Curry's who was serving a 30-year prison term at the time of trial, had warned Curry about maintaining a relationship with Tannis. Curry, according to Marshall, had been bragging about sleeping with Tannis, and Marshall told him to be careful and to "cool it." Curry disagreed, telling Marshall he was going to marry Tannis. After the car explosion, Marshall talked again with Curry, who at that time was "on crutches and looking kind of bad." Marshall told Curry that Tannis was "nothing to be going through these problems." (RT 11748-11750, 11776-11780.)

In April 1986, shortly after the car bombing, Tannis went to Mrs. Liz, a beauty salon, and engaged in a conversation with Gwendolyn Derby, another customer, and with "Andrea," a woman who worked at the salon. Tannis, who

seemed agitated, told the women that her ex-husband had placed a pipe bomb underneath the car of her current boyfriend and that her ex-husband "would do it again . . . until [Curry] was dead." (RT 13095-13099, 13110-13111; see RT 13083-13085.)

The following year, on September 28, 1987, Curry was shot in the neck by appellant Smith. That evening, at approximately 9:05 p.m., Curry, who by this time had married Tannis, was seated in the front seat of his car as he left the house of Tannis's mother when the car behind him starting flashing its headlights. Curry, who was concerned, pulled over but then realized the driver of the other car was appellant Smith, Curry's brother-in-law, who he thought was "a friend." After engaging in some "small talk," appellant Smith fired two shots at Curry. One shot entered Curry's neck and went through his spine. The other shot entered the back of Curry's arm. Curry, who had been warned by various individuals to stop seeing Tannis, was "totally surprised" when appellant Smith shot him in the neck. Curry was hospitalized for six months as a result of the shooting. Curry was also paralyzed and confined to a wheelchair as a result of the shooting. Sometime thereafter, Curry and Tannis separated. (RT 11320-11326, 11353-11354, 13655-13657.)

Pierre Marshall had a meeting with appellant Bryant at a Burger King. Marshall, who was armed and aware of what had occurred to Curry, was accompanied to the meeting by two carloads of his friends (seven people) "for security purposes." The meeting, according to Marshall, was for two reasons: (1) the "word was on the street that there was a hit on him" for having a relationship with Rolo, Jeff Bryant's wife, a couple of years earlier; and (2) Marshall's cousin, Derrik Johnson, owed the Bryant Organization money for one-half of a kilogram of cocaine. When Marshall walked into the Burger King (his friends waited outside), appellant Bryant, who was sitting at a table, started mimicking Curry by holding his hands in a deformed fashion around his

head and laughingly saying, "remember that nigger that got paralyzed?" (RT 11748-11757, 11780-11784, 11791-11793, 11804-11805.)

(ix) The Arrest Of Appellant Smith

Appellant Smith was arrested within five hours of the shooting incident involving Keith Curry. At approximately 2:00 a.m. on September 29, 1987, California Highway Patrol Officer Charles Lofton and his partner James Vandemark were on patrol on the 101 Freeway when they observed a Renault weaving and exceeding the speed limit. The officers activated their red lights and the Renault, in response to the red lights, exited the freeway at Tampa and pulled over to the right shoulder. The officers got out of their patrol car and took a couple of steps toward the Renault. The driver of the Renault turned around, looked at the officers, and then took off on Tampa. A 45-minute high-speed chase, which was joined in by units of the LAPD including a helicopter, followed. During the chase, the driver of the Renault, appellant Smith, exceeded the speed limit by traveling at speeds up to 85 miles per hour, drove on the wrong side of the street, ran through stop lights and stop signs, busted through three security gates in an apartment complex, and made a U-turn across a 40-foot dirt center area on the freeway. At one point, appellant Smith held his hand in a cupped position up to his nose and jerked his head back slightly. Also during the chase, various papers, as well as plastic bags and white powder, were thrown out the driver's window by appellant Smith. The chase ended when a police car rammed into the left rear side of the Renault and the Renault spun out of control and came to a stop. (RT 10106-10114, 10121, 10123-10126.)

Appellant Smith, who was under the influence of cocaine (powdery substance observed in his left nostril) and "very cooperative," was arrested. A pair of sweatpants, which matched the sweatshirt appellant Smith was wearing, was rolled up on the right front seat of the Renault. Inside the sweatpants was

a .357 Magnum handgun (AAU5662) which contained one expended bullet casing but no live rounds. Found between the right front seat and front passenger door was a large clear plastic bag containing 18 smaller plastic bags each of which contained an equal quantity of rock cocaine. The total weight of the cocaine was 271 grams or about one-quarter of a kilogram. (RT 10106-10114, 10117-10121, 13655-13657.)

Appellant Smith was bailed out of jail on October 18, 1987, for the attempted murder of Keith Curry. Bert Potter Bail Bonds posted a $200,000 bond to bail appellant Smith out of jail. The following properties were put up as security for the posting of the bond: (1) 11673 Kismet in Lake View Terrace, owned by Wilbert and Dessie Babineaux; (2) 13574 Corcoran Street owned by James Settle and codefendant Settle; (3) 11516 Vanport owned by James Settle and codefendant Settle; (4) 12932 Eustace in Pacoima owned by Eulisee Clayton; and (5) 9117 Castlewood owned by Clarence and Anne Victorian. (RT 11400-11405, 11417-11418.) Codefendant Settle signed the indemnity agreement, as well as the trust deed and note securing the bail bond, for appellant Smith's release. (RT 13024-13027.)

(x) Codefendant Settle And The Vanport House

Following the 1982 murder of Kenneth Gentry, Rhonda Miller's life went downhill: her addiction to drugs got worse, and she was evicted from her house and lived on the street selling drugs. She ended up at a house at 11516 Vanport, which was being used for drug sales.[24/] Although Miller was involved in cooking and cleaning ("my free way of getting drugs") rather than the

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24. On November 30, 1984, codefendant Settle deeded the Vanport property to himself and James Settle, Jr. On March 22, 1989, codefendant Settle quitclaimed his interest to James Settle, Jr. as a gift. (Peo. Exh. 161; RT 10640-10641, 10661-10664, 11724.)

narcotic sales, she observed stealing among the people living at the house. Miller called the telephone number of "Johnnie," which she saw on the counter in the kitchen, and told him about the stealing. Codefendant Settle immediately arrived at the Vanport house. (RT 9105-9117, 10661-10662, 11403-11405, 11410-11417.)

Una Distad related the following through prior inconsistent statements to the police:[25/] She met Boris Curtis (Mickey) as a teenager while using drugs on the street and traded sex for drugs with him. Distad went to the house on Vanport several times with Mickey, where he purchased drugs. Distad met codefendant Settle at the Vanport house, and Mickey told her to sleep with codefendant Settle and she would get all the drugs she needed. Distad lived with codefendant Settle for several months at a house on Corcoran Street. (RT 9768-9770.)

Distad explained how drugs were purchased at the Vanport house: a buyer passed money through a mail slot of an exterior-barred, wire-meshed door, and drugs were passed through the mail slot to the buyer. Distad received cocaine from codefendant Settle approximately 200 times while she was seeing him. She also made approximately 20 deliveries of oil cans or tennis ball cans filled with cocaine to the Vanport house. Distad was given the cans by codefendant Settle, and she received between $1,000 and $1,500 for each delivery. The money she received from codefendant Settle was in bundles wrapped with rubberbands. When Distad engaged in sex with codefendant Settle, he placed a gun on the floor next to the bed. (RT 9770-9773.)

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25. Distad expressed concerns for herself and her children if she testified against codefendant Settle: "You don't have to go back to the community. I live there. I have to go back there. I've got kids. You can have anybody killed for 600 bucks." As she told Detective Vojtecky following her trial testimony, "I'm sorry Jim. I was an asshole but you guys can prosecute him without me. You don't need me." (RT 9767-9768.)

Reynard Goldman, the victim of the 1982 assault with a deadly weapon, was at the Vanport house shortly before the quadruple murder. Goldman, who had previously purchased narcotics from the Vanport house, overheard codefendant Settle tell another individual words to the effect that Andre Armstrong "wasn't really going to be around too much longer." (RT 9276-9280.)

(xi) The February 11, 1988, Search Warrant

On February 11, 1988, a search warrant was executed at rooms 287 and 288 at the Best Western Motel on Sepulveda Boulevard in conjunction with the activities of codefendant Settle. Una Distad and codefendant Settle were in room 287. William Settle was in room 288, and the following items were recovered from his briefcase which tended to connect him (William Settle) to the Bryant Organization: financial records of the narcotic distribution operation and $2,297, which was rubberbanded by denomination. (RT 9866-9869.) The following items used in the manufacturing of rock cocaine were recovered from Distad's car: a digital scale; two 600-milliliter beakers; and Ziploc baggies for one-half ounce quantities of cocaine. No contraband was found in codefendant Settle's vehicle. (RT 9869-9871, 9932-9933.)

The documents (Peo. Exh. 161) recovered from the briefcase of William Settle were "narcotic recordings, financial and inventory records of narcotic trafficking." The documents included an adding machine tape numbered 1 through 24 with a total of $346,992. This figure, according to Detective Lambert, represented the total amount of financial gain for the first 24 days of January 1988. (RT 12011-12013.)

Appellant Bryant's initials ("SB") appeared on some financial records found in the briefcase. Appellant Bryant's initials appeared at inventory counts at distribution locations, for withdrawal of one eight-ball quantity or eight-ounce quantity from the inventory, and at midshift inventory count at a

location for narcotics distribution. According to Detective Lambert, "In terms of reading all those documents, [appellant Bryant's initials] appearing in midshift locations verifying particular quantities of narcotics" is indicative of a person in a supervisory role in the Bryant Organization. (RT 12020-12028.)

The records also reflect three work shifts for the individuals at the distribution locations. The initials of the individual operating the shift are marked on the schedule. Detective Lambert noted that the time of the work shifts corresponded to the work shifts of the police department so as to minimize police activity on the streets when the Organization changed its shifts. (RT 12022-12024.)

Also included in the documents were notes from a meeting which "appear to give instructions to personnel that are working at various cocaine sales locations." A page of the notes is entitled "Meeting Notes." The notes indicate "No Calls," meaning no personal calls from the locations used to distribute narcotics. The reference to "not dropped off" meant employees were not to be dropped off at the drug sales locations except by company personnel. The notes also indicated that "If can't make it, must give one hour and one half notice." Below that is the notation: "No excuses accepted (death is an only reason)." Detective Lambert explained that the reference meant "no excuses will be accepted for these instructions. And they're saying death is the only reason for exceptions to these instructions." (RT 12013-12015, 12018-12021.)

In the January-February 1988 time-frame, unlike later in the year, the Bryant Organization had three basic distribution quantities: the one gram amount of rock cocaine; an eight-ounce (or "eight ball" amount), which is approximately three and one-half grams; and the one-half ounce quantity. A post-it found in William Settle's briefcase contained a telephone number (609-3270) with three other numbers (a 50 with a dash, and 0-0), indicating the pager number for Eddie Barber and that Barber was "involved in other

transactions of 50 small or 50-G baggies, 08 balls or eight-ounce quantities and zero one-half-ounce quantities." (RT 12013-12014.)

4. Armstrong's Prison Buddy, James Brown, With The Assistance Of Appellant Bryant, Sets Up A Small-Time Drug Operation In Marina, California, Using The Alias "Tommy Hull"

After escaping from custody in St. Louis in late 1987, James Brown, a childhood friend who had reunited with Armstrong while in prison, traveled to Marina, California, in early 1988 and, with the assistance of appellant Bryant and the Bryant Organization, set up a small-time drug operation while using the alias "Tommy Hull." Brown obtained the narcotics he sold in Northern California from the Bryant Family in Southern California. (RT 9404-9408.)

Valerie Mitchell met Brown as "Tommy Hull" (see Peo. Exh. 76) in March of 1988. They occasionally dated. While Brown lived on Carmel Street, Mitchell realized he was "doing narcotics" and selling cocaine. Brown provided Mitchell a list of names, addresses, and telephone numbers of people she should contact if he was arrested. Brown wrote the following names and telephone numbers in Mitchell's telephone book (see Peo. Exh. 145): "Tommy" and the number (818) 765-4144; "Drew" and the number (818) 909-8761; and the words "Stan" and "Los Angeles" below the number for "Drew." (RT 11366-11374.)

Rodney Wiley, a maintenance man at the Six Pence Inn in Marina, met Brown as "Tommy Hull" while Brown resided at the hotel. Wiley, who was aware Brown was selling cocaine and did not drive a car, drove Brown around the area in his girlfriend's (Lavonne Cowles) red Escort. In March of 1988, Wiley drove Brown to a courthouse in Monterey because supposedly Brown's cousin got a traffic ticket for speeding. The court hearing actually involved

Alonzo Smith (see Peo. Exh. 117) for "fleeing from the police."[26] A couple of times, Wiley drove Brown to the local Western Union office and saw Brown come out of the office with an envelope. Brown asked Wiley "quite a few times" to drive him to Los Angeles, but Wiley refused. Brown paid Wiley for his driving services in either cash or cocaine. (RT 11379-11383, 11429-11433, 11437-11439, 11561-11563.)

Albert Owens, a soldier at Fort Ord, met Brown as "Tommy Hull" in the early part of 1988 at the apartment of Mack Taylor, a friend who was also in the Army. Owens, who was aware Brown was selling cocaine, agreed to drive Brown to Los Angeles in Owens's van. Before they departed for Los Angeles, Brown placed a telephone call, in the presence of Owens, and said words to the effect, "Stan, we're on our way down now and we should be there in 'X' amount of time, six, six and a half hours or so." Thereafter, Owens drove Brown to an apartment building at 7654 Laurel Canyon Boulevard (see Peo. Exh. 126). Brown and Owens proceeded to an apartment on the first floor where a woman let them inside. Brown used the telephone and paged "Stan." Shortly thereafter, Brown received a call back and said, "Okay, Stan, we're down here now." (RT 11463-11471, 11561-11563.)

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26. Alonzo Smith received from Andrew Settle in March 1988 "about a half bird" or 10 ounces of rock cocaine packaged in one gram Ziploc baggies for delivery to "Tommy" in Northern California. On March 14, 1988, while in Northern California, Alonzo made an illegal U-turn while traveling to a 7-Eleven. The police followed Alonzo after the U-turn. Alonzo threw the narcotics out of his car while the police chased after him. The police eventually "rammed" Alonzo's car to end the chase. There were no narcotics in Alonzo's car when the police eventually stopped him. Alonzo told Brown where he threw the narcotics out of the car. Brown recovered the narcotics. Following his arrest, Alonzo telephoned appellant Bryant, but there was nothing appellant Bryant could do to get Alonzo out of jail because Alonzo had a "parole hold" placed on him. Appellant Bryant did, however, at the request of Alonzo, wire transfer money (see Peo. Exh. 109) to an ex-wife. (RT 10448-10451, 10464-10465, 10902-10911.)

Approximately 30 minutes later, Andrew Settle (see Peo. Exhs. 117, 151) arrived at the apartment, removed a Ziploc baggie containing nine ounces of powder cocaine from his pants, and handed it to Brown. Brown, in return, gave Andrew Settle envelopes containing $4,500. Andrew Settle immediately left the apartment. Brown and Owens left for Northern California about 30 to 45 minutes later. Brown gave Owens cocaine as payment for driving him to Los Angeles. (RT 11471-11475, 11561-11563.)

Thereafter, Owens made three more trips in his van to Los Angeles with Brown. The trips occurred at one-and-one-half to two-week intervals. Each of the trips followed the procedure described in the preceding paragraphs, including the amount of cocaine received, the packaging of the cocaine, the amount paid for the cocaine, and Andrew Settle delivering the cocaine to the apartment on Laurel Canyon. On the last trip to Los Angeles with Brown, Owens's van broke down, and they took a bus back to Northern California. (RT 11475-11479.)

After the four trips to Los Angeles with Brown, Owens made some trips alone at Brown's request. The first of these trips occurred around the first week of May 1988 and about one and one-half to two weeks following the last trip with Brown. Owens drove Mack Taylor's Volvo for this trip. Just before departing for Los Angeles, Brown, in the presence of Owens, made a telephone call from his apartment on Carmel Avenue (see Peo. Exh. 144) and said, "Stan, I'm sending Owens down to pick up the package by himself" and "He'll drop the money off and he'll give you a call once he gets down there letting you know he is in the area." Brown gave Owens two envelopes containing a total of $4,500 and "Stan's" beeper number (see Peo. Exh. 145). Brown instructed Owens to call "Stan" when he got to Los Angeles and let him know he was there so the delivery of the cocaine could be made. (RT 11479-11483.)

Owens drove to the apartment building on Laurel Canyon, but the woman was not in the apartment. Owens went to the pay telephone across the street from the apartment building and paged "Stan." When Owens received a call back, he said, "This is Owens here. Tommy [Hull/Brown] sent me down here, and he told me to give you a call, Stan, when I came down here." The person who had returned the page told Owens, "Okay, where are you at?" After Owens explained where he was located and described the car he was diving, the other person said, "Well, okay, I have someone there" and that Owens should be on the lookout for a red Volkswagen with a white convertible top. Andrew Settle arrived in the parking lot where the telephone booth was located within 30 minutes in a red Volkswagen with a white convertible top (see Peo. Exh. 151). The exchange of the cocaine from Andrew Settle, which was packaged in a Ziploc baggie, and the money from Owens took place in the parking lot. (RT 11509-11514.) Owens made about three more similar trips to Los Angeles on his own. The trips occurred at one-and-one-half-week intervals. (RT 11515-11518.)

Andrew Greer became friends with both Armstrong (Peo. Exh. 68) and Brown (Peo. Exh. 76) while the trio was in prison in St. Louis.[27] Greer was released from prison near the end of 1987. Sometime in April or May of 1988, Greer heard from Brown, who related that he had relocated to Northern California and was using the alias "Tommy Hull." Brown told Greer, "I want you to come join me." Greer understood he was going to Marina "to transport drugs." Brown sent Greer a bus ticket, and Greer arrived in Salinas in May or June of 1988. Owens picked up Greer at the bus station. Brown had told Owens that Greer was his brother from East St. Louis. Owens took Greer back

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27. When Greer talked with the police following the murders, he told them the truth, but he used the fake name of Andrew Wiley "because I didn't want [Detective Vojtecky] to know who I was." (RT 11640-11641.) Greer was given immunity to testify in this case. (RT 11677-11679.)

to the Carmel Street apartment where Brown was living with Owens. (RT 11518-11521, 11568-11581, 11677-11679.)

Near the end of June 1988, Brown asked Greer to accompany Owens on a trip to North Hollywood in order to purchase some cocaine. Owens and Greer made the trip in Mack Taylor's Volvo. The same procedure was followed as in the other trips: Brown telephoned "Stan" from his apartment and then briefed Owens and Greer as to how they were to take the money to North Hollywood, call "Stan" and let him know they were in town, get the cocaine, and then immediately return to Northern California. After Brown gave the men the envelopes of money to purchase the cocaine, they drove to North Hollywood, they proceeded to the shopping center at the corner of Laurel Canyon and Saticoy, Greer paged "Stan" from the public telephone, Greer received a call back five to ten minutes later, Andrew Settle arrived shortly thereafter in the parking lot driving a red Volkswagen, Greer took the envelopes of the money out of the glove compartment of the Volvo and gave them to Andrew Settle who, in return, gave the men the cocaine, and then Owens and Greer drove back to the Carmel Street apartment in Northern California and gave the cocaine to Brown. (RT 11518-11523, 11581-11585.)

At the request of Brown, Owens and Greer made a second trip to North Hollywood in Taylor's Volvo. This time, however, in addition to the money for the purchase of cocaine, Brown gave the men two guns: a Colt MK4 Series 70, government model .45 caliber automatic handgun (Peo. Exh. 152) and a Winchester rifle. Brown told Owens and Greer, "make sure Stan gets" the guns. Owens and Greer proceeded to North Hollywood, but the cocaine was not ready when they got there. The men obtained a motel room, and the cocaine was delivered to them later that evening. (RT 11524-11525, 11589-11592, 11596-11598.)

Brown moved out of the apartment on Carmel Street to 1049 Del Monte Avenue in Salinas (see Peo. Exh. 147) in August of 1988, because it was "getting hot" on Carmel Street with the "Police starting to know that we were distributing drugs at that point." Lavonne Cowles, Wiley's girlfriend, and Brown signed the lease for the apartment in Salinas. Wiley permitted Brown to use his name and identification in executing the lease. Cowles explained that she signed the lease with Brown, who was using Wiley's name, "just so we could get the apartment when he left." However, Brown lived at the Salinas apartment with Loretha Anderson (see Peo. Exh. 77) and her two young children, Chemise and Carlos (see Peo. Exhs. 78, 79). (RT 11383-11391, 11433-11435, 11525-11528, 11561-11563, 11604-11605; see Peo. Exhs. 146 [lease], 147 [photo].)

C. Armstrong Gets Out Of Prison

1. Armstrong Is Released From Prison In St. Louis

Andre Armstrong was paroled from the California state prison at Folsom into the custody of officials in St. Louis on June 16, 1988. He was transported to St. Louis and then released from custody in St. Louis on July 21, 1988. (RT 9403-9404; Peo. Exh. 73 [Armstrong's prison packet].)

2. Armstrong Leaves St. Louis For California To Get "Some Money Coming To Him"

Armstrong stayed with his sister, Deborah Armstrong (Marshall), in St. Louis for a couple of weeks following his release from prison. While there, Armstrong made several telephone calls to Los Angeles. Ms. Armstrong received from Antonio Johnson, a person who she did not know, two Western Union wire transfers totaling $1,500 (one for $1,000 on July 22, 1988, and another for $500 on July 30, 1988). Ms. Armstrong gave the money to Armstrong. (RT 10465-10466, 10471-10478; Peo. Exh. 109.) Before leaving

for California, Armstrong told his mother, Delores Brown, he was going to Los Angeles because "he had some money coming to him." (RT 10510-10515.)

3. Armstrong Does Not Like What He Sees In Marina, California

When Armstrong arrived in Marina, California, in August 1988, he did not like what he saw. Armstrong was "very upset" at Brown's narcotic operation, because Armstrong "had an understanding" that Brown would wait for Armstrong to get out of prison before commencing the project. Armstrong told Owens that Brown was "going about the thing all wrong dealing on a small level" when "they should have been dealing in bulk." Armstrong said Brown had "fucked up a lot of money" and that they had "to do something different." Armstrong did not like the area Brown's operation covered and thought they should go to Los Angeles and set up the operation there "on their own without having to listen to [appellant Bryant]" because Armstrong did not want to be under "Stan's" control. Armstrong told Greer that appellant Bryant owed him some money for "a hit" and that Armstrong "was going to get [his money]." Armstrong said he was tired of being "nickel and dimed" by appellant Bryant. (RT 11530-11531, 11607-10611, 16675.)

While in Northern California, Armstrong had a couple of conversations with his mother in St. Louis. Armstrong told his mother that there were some people in Los Angeles that "owed him a lot of money" and that, once he collected the money, he was going to pay for the family house and give it to her. (RT 10510-10515, 10722-10725.)

4. Armstrong Leaves For Los Angeles To Get The Money Owed Him By Appellant Bryant

Armstrong eventually left Marina for Los Angeles near the end of August. Several days before he left, Tannis Bryant (Peo. Exh. 153), appellant Bryant's ex-wife, stayed with Armstrong at the apartment on Del Monte.

Armstrong did not try to conceal his relationship with Tannis. A couple of days after Armstrong left Marina for Los Angeles in a Jeep with Tannis, Brown and the others made the move to Southern California. Arrangements had been made through appellant Bryant for the group to stay at the apartment building at 7654 Laurel Canyon Boulevard. On August 26, 1988, Brown moved out of the Del Monte apartment and moved to Los Angeles: Greer and Elaine Webb made the trip in a U-Haul truck (Peo. Exh. 149), while Brown, Loretha Anderson, Chemise English, and Carlos English made the trip in a red Toyota Camry (Peo. Exh. 26). (RT 11461-11462, 11608-11616.)

The group arrived in North Hollywood in the early morning hours of Saturday (August 27) and proceeded to Tannis's apartment at 9010 Tobias (see Peo. Exh. 154). Armstrong told the group to get a motel room. The group proceeded to a nearby motel and rented a room. Greer, however, spent the evening with a female friend on Van Owen Street. (RT 11611-11617.) Later that morning, Greer picked up Brown, Loretha Anderson, and the children (Chemise and Carlos) and proceeded to the apartment building at 7654 Laurel Canyon to look at their apartment. Thereafter, the group proceeded to Neighborhood Billiards (Peo. Exh. 121) "to try to catch up with Stan" since the apartment they were suppose to live in was dirty and needed to be cleaned. Armstrong wanted appellant Bryant to pay for the cleaning of the apartment. There was a gun on the counter in the pool hall. (RT 11616-11623, 11679-11681.)

The next day, Sunday (August 28), Armstrong, Brown, and Greer stopped by the house of Monica Scott Walker, a girlfriend of Armstrong, and visited for approximately 15 or 20 minutes. Armstrong "sounded anxious and frustrated" and talked about how appellant Bryant "owed him" for being a "fall guy." (RT 9508-9520, 9531, 11623-11626.)

Armstrong, Brown, and Greer then proceeded to Tannis's (whom Brown referred to as a "black widow") apartment on Tobias. Everyone smoked "weed" at Tannis's apartment and then Armstrong paged appellant Bryant and left Tannis's telephone number as the call back number. Approximately 15 minutes later, appellant Bryant called Tannis's apartment and had a conversation with Armstrong. After he got off the telephone, Armstrong said they were to meet appellant Bryant at approximately 4:00 to 4:30 p.m. to pick up $500 so the apartment at the Laurel Canyon apartment building could be cleaned. Armstrong told Tannis to get the pistol "in case the dude started tripping over it." Tannis went into the back room, retrieved a pistol, and placed it in her purse. When the group left Tannis's apartment, Armstrong told Greer to ride with Tannis in the Jeep. Greer refused, because he thought Armstrong should ride with Tannis since "that's who's fucking her, not me." (RT 11623-11631.)

The group proceeded to the home of Tannis's aunt in Tannis's Jeep and the red Toyota Camry. When they left the aunt's house, Armstrong told Tannis to follow them in the Jeep. Armstrong, Brown, and Greer drove off in the Toyota Camry. Tannis, however, did not follow the Toyota; rather, she turned around and went back inside her aunt's house. Greer was concerned that Tannis, the only one in the group who had a weapon, was not following them as planned. Although Greer was assured by Armstrong that "everything's cool," Greer insisted on being taken back to the apartment on Laurel Canyon. After calling Greer a "scared motherfucker," they dropped him off at the Laurel Canyon apartment building. At that point, Anderson said she and the two children were hungry and wanted to get something to eat. Anderson and her two children got into the back seat of the red Toyota Camry, with Armstrong and Brown in the front seat. The Camry drove off at approximately 4:30 p.m. They were "going to meet Stan [at 11442 Wheeler Street] to get the money" so

they could clean the apartment. (RT 11632-11637, 11679-11681.)

D. A Bloody Massacre At 11442 Wheeler Street On A Sunny Sunday Afternoon

At approximately 5:00 p.m. on August 28, 1988, a Sunday, the red Toyota Camry containing Armstrong, Brown, Anderson, and her two children, Carlos and Chemise, arrived at 11442 Wheeler Street. The Toyota was parked in front of the residence. Anderson and her two young children remained in the back seat of the Toyota, while Armstrong and Brown walked up to the front door of the house to get the $500 from appellant Bryant. While trapped inside the electronically-controlled caged area surrounding the front door of the house, Armstrong and Brown were brutally gunned down by two gunmen (appellants Wheeler and Smith) from inside the house. One of the gunmen (appellant Wheeler) then ran down to the parked Toyota Camry and opened fire on Anderson and her children. Remarkably, Carlos survived the onslaught. Everyone else -- Armstrong, Brown, Anderson, and Chemise -- was murdered.

1. James "Jay" Williams

On the morning of August 28, 1988, appellant Wheeler picked up Williams at Neighborhood Billiards in appellant Wheeler's white Audi (Peo. Exhs. 131, 139), which had a car phone, and drove him to 11442 Wheeler Street. It was unusual for Williams to be picked up in anything other than a "company car," a car used by employees to arrive and leave work locations. But it was Williams's understanding the company car (see Peo. Exh. 163) "was not running at the time." When appellant Wheeler arrived at the Wheeler Street location, he opened the garage door with the garage door opener and let Williams into the garage. Williams walked through the house to make sure no one was there and everything was in order. Williams watched television, waiting for a customer to show up and make a purchase. At approximately

2:00 p.m., Williams received a telephone call from appellant Bryant who told him, "I'm here. Open the door." Williams opened the garage door and let appellant Bryant, who was driving his blue Hyundai (Peo. Exh. 158), pull inside. Williams closed the garage door once appellant Bryant parked his Hyundai inside the garage. (RT 12177-12182, 12283-12288.)

Appellant Bryant entered the house carrying a leather briefcase and engaged in "small talk" with Williams before picking up the .45 caliber revolver (Peo. Exh. 152) and the portable telephone from the table in the living room and going into the back bedroom where the safe was located. Williams continued to watch television. The telephone rang, but Williams did not remember how many times or whether he answered it. (RT 12282, 12284-12289.) At some point, appellant Bryant exited the back bedroom, walked into the living room, and told Williams to page Anthony Arceneaux ("Ant Man"), the person who was to relieve Williams at 3:00 p.m., and tell him not to come in that day. Williams did so. Appellant Bryant removed the money, the adding machine, and the money counting machine (see Peo. Exh. 92) from the house into the garage where his Hyundai was parked. When appellant Bryant returned from the garage, he was carrying a military duffle bag which appeared to be heavy. Appellant Bryant took the duffle bag to the back of the house. (RT 12241-12243, 12289-12296.)

Thereafter, although not expected by Williams, appellant Wheeler, who was not carrying anything, arrived at the house and went into the back bedroom with appellant Bryant. Appellant Smith then arrived at the house and he, like appellant Wheeler, joined appellant Bryant in the back bedroom. Appellant Bryant, on more than one occasion, came out of the back bedroom into the living room and said, "Where's Johnny. He's late." Codefendant Settle eventually arrived at the house and joined appellants Bryant, Smith, and Wheeler in the back bedroom. (RT 12292-12304.)

Approximately one hour after appellant Bryant arrived, Williams heard a loud gunshot from the rear of the house. Appellant Bryant walked into the living room from the back of the house and asked Williams, "Was it loud?" and "Do you think the neighbors heard it?" Appellant Bryant returned to the back of the house. Later, while Williams was sitting at the work table in the living room, codefendant Settle came out from the back of the house. Codefendant Settle, who was behind Williams, cocked a shotgun. Williams, startled, turned around and saw codefendant Settle "kneeling down on the floor with a shotgun in his hand." Codefendant Settle was "just kind of smiling" as he chambered a shotgun round. They did not speak to each other. Codefendant Settle got up and went to the back of the house. Williams did not inquire as to what was going on because he "just figured it wasn't none of my business at the time." (RT 12304-12307.)

Thereafter, while Williams was sitting at the work table in the living room, all three appellants -- Bryant, Wheeler, and Smith -- came out from the back of the house together. Appellant Wheeler, armed with a pistol, looked at appellant Bryant and said, "Are you going to tell Jay?" Appellant Bryant then told Williams the following: he expected some men to come by to see him; Williams was to stand in the kitchen by the window where the buzzer for the electronically-controlled door of the cage on the front door was located; when the men arrived and walked toward the house, Williams was to holler that the visitors had arrived; somebody else would let the men into the house; Williams was to wait for appellant Bryant's order to let him out of the house and then Williams was to push the buzzer and not release it until appellant Bryant "was all the way out of the house"; Williams was then to exit the house through the garage, walk down the driveway to a parked green car with a key in the ignition, and back the green car into the garage; after moving the green car into the garage, Williams was to walk down the driveway, make a left turn, and

walk to a bus stop where he was supposed to catch a bus to the pool hall; and, while walking to the bus stop, Williams was suppose "to look around the neighborhood and see who was watching, who was looking at what was going on." (RT 12307-12321.) Appellant Bryant then told appellant Wheeler, "You go to the 7-11." (RT 12324-12326.)

Williams grew up in the neighborhood and knew that no one would have any difficulty recognizing him. (RT 12307-12321.) Williams realized at this point that something was going to happen that he "want[ed] no part of" but believed it was "too late to back out for something I didn't ask to be part of in the first place. It just didn't seem like a very safe thing to do." Williams, who was the only one not armed, "didn't think I would make it out of there." (RT 12321-12324, 12326-12328.)

The others -- codefendant Settle and appellants Bryant, Wheeler, and Smith -- did not seem excited. Appellants Wheeler and Smith put on "heavy" "like workman's gloves." No one gave Williams any gloves to wear. (RT 12319, 12329.)

While sitting in the kitchen looking out the window, Williams saw some people arrive at the house. However, before he could yell out that the people had arrived, somebody else yelled out, "They're here." Williams, as instructed, stayed at the kitchen window and observed two men (Armstrong and Brown) walk through the front gate and toward the front door. Williams, who did not recognize either of the men and who could not see the driveway near the garage or the front entryway from his vantage point at the kitchen window, heard the other buzzer activated to open the outer steel door, someone entering the caged area, and casual conversation like "What's happening?" and "How you doing?" At that point, appellant Bryant said, "I have to go get some groceries" (even though they never had groceries in the house). Appellant Bryant hollered to Williams, "All right, Jay. Let me out." Williams, as instructed, pushed the

buzzer, saw the outer steel door of the cage open, and appellant Bryant walk out of the house. After appellant Bryant was "all the way out of the house," Williams released the buzzer and the exterior door closed. (RT 12330-12336.)

As Williams, who could not see the entryway from his location, walked out of the kitchen/dining room area toward the garage, he heard a gunshot and then a scream of a man in agony. Williams then heard two more gunshots as he was "leaving out the house." Williams walked passed appellant Bryant's blue Hyundai in the garage and down the driveway to the gate at the sidewalk. There, Williams encountered appellant Wheeler, who was holding a shotgun and "moving pretty fast." Williams got into "an old green car" with the key in the ignition and, as instructed, backed the car into the garage. As he started to back the green car into the garage, Williams heard appellant Wheeler hollering. Williams heard appellant Wheeler yell the words "bitch" and "car." Williams then heard glass breaking and screaming. After Williams backed the green car into the garage, he got out of the car and was standing next to appellant Bryant and the blue Hyundai. Appellant Bryant said, "All right, Jay," which Williams understood to mean, "Goodbye. See you later." (RT 12336-12345.)

Williams walked down the driveway, and, when he reached the street, he saw appellant Wheeler driving the red car (Toyota Camry) in which the two male visitors had arrived. Appellant Wheeler stopped the red car in front of the driveway and "looked at [Williams] and just looked at [Williams]." Appellant Wheeler then drove off down the street. Williams, as instructed, walked down the street in the opposite direction, "watching" and "looking around" the neighborhood as the neighbors watched him walk down the street. (RT 12345-12350; see RT 12141-12142.)

Williams walked to the bus stop. When he got near the intersection of Wheeler and Fenton, Williams saw appellant Wheeler driving the red car. Appellant Wheeler pulled over at the corner and looked at Williams and then

drove off. While walking down Fenton towards Kagel Canyon, appellant Bryant passed Williams in the blue Hyundai. While walking up Kagel Canyon toward Eldridge, Williams saw the green car he had backed into the garage. Codefendant Settle and appellant Smith were inside the green car, which was traveling in the direction of the foothills. (RT 12351-12358; see Peo. Exh. 165 [photo].)

Williams took the bus to Neighborhood Billiards, where he met Anthony Arceneaux ("Ant Man"). While at the pool hall, appellant Bryant called and asked Williams whether he noticed anybody looking around the neighborhood as he walked down the street. Williams said "yes" and told appellant Bryant who he noticed. Appellant Bryant then told Williams "not to go over there [Wheeler Street] anymore ever, ever again and he told me -- I believe he said that I had been described. He told me not to go over there and not to send anybody over there and not to talk about what just happened." (RT 12364-12369.)

2. The Neighbors

Several neighbors around 11442 Wheeler Street heard the gunshots on the afternoon of August 28, 1988.

a. Lucila Esteban

Lucila Esteban lived at 11433 Wheeler Street. She was "very new" to the area, having recently moved from Glendale. At approximately 5:00 p.m., Esteban proceeded to her kitchen and drank a glass of water because "it was a hot day." While looking out her window, which faced Wheeler Street, Esteban saw "very clearly" a new, small red Toyota (see Peo. Exh. 26) proceeding "very slow" down Wheeler Street "looking for a number on a house." The Toyota eventually stopped and parked at the property line separating 11442 Wheeler (see Peo. Exh. 23), which is surrounded by a link-chain fence, and the house

next to 11442. Although she did not see anyone exit the Toyota, "a few seconds later," Esteban observed a "considerably tall and slender" Black male in his twenties with short hair exit 11442 Wheeler Street and run down the driveway toward the parked Toyota. The man, who was holding a two-foot carbine-type rifle in his hands, was wearing white cotton gloves and "some kind of either khaki color or Navy or military green type of green." (RT 8434-8446, 8454, 8464-8468.)

When the man got to the sidewalk near the curb, he "immediately started shooting" "real quickly" into the rear passenger seat of the red Toyota Camry. After the man fired several times, he ran around to the driver's side, tried to open the driver's door but could not because it was locked, and then shot out the driver's window. The shooter pulled up the lock on the driver's door, entered the Toyota, and drove off. Esteban did not see anyone other than the shooter in the driveway of 11442 Wheeler Street. (RT 8438-8439, 8444-8446, 8484-8489.)

"Almost immediately" after the Toyota drove away, a white or beige El Camino with a burgundy top (see Peo. Exh. 25) drove up and "stopped almost where the [Toyota]" had been parked. A heavy Black man, whom Esteban did not recognize, got out of the El Camino, went up to the house at 11442 Wheeler Street, immediately returned to the El Camino with some packages under his arm, placed the packages inside the car, and drove off. Thereafter, Esteban observed "a bluish/greenish faded color of an older car coming out of the garage" of 11442 Wheeler Street. Esteban noticed the driver of the green car was Black. (RT 8444-8451, 8473-8474, 8485-8487, 8494-8496.)

Esteban rushed to the front of her residence, where her 14-year-old daughter and some teenage neighborhood girls, including Rosa, had been playing. The girls were bunched up outside the locked front door. The girls

were crying and "were frightened of being shot." While waiting for the police to arrive, Esteban and the girls stayed away from the windows of the residence and "protected ourselves." Esteban did not call 911 or contact the police about the shooting. (RT 8441-8443, 8451-8453, 8494-8496.)

Esteban saw three individuals that evening: the shooter, the man in the El Camino, and the driver of the older green car exiting the garage. (RT 8476-8482, 8484-8485.) Esteban did not make an in-court identification of the shooter: "I don't recognize nobody like him. Probably a lot younger. I don't see nobody like him." (RT 8467, 8475.)

b. Manuel Contreras

At approximately 5:00 p.m., Manuel Contreras was visiting his sister, who lived across from 11442 Wheeler Street, when he heard noises like a shotgun being fired. Contreras walked out of the house and along a wall to the end of the garage before "peeking" around the corner onto Wheeler Street. Contreras saw a tall, thin, Black male in his twenties, holding a three-foot shotgun in his right hand standing on the driver's side of a red Toyota (see Peo. Exh. 26). The man was shooting into the Toyota.[28/] Contreras did not see anyone else standing near the Toyota. Contreras moved very slowly back into his sister's house and told his wife to call the police. (RT 8500-8509A, 8512, 8519-8520; Peo. Exh. 27 [tape of 911 call].)

Contreras proceeded to a bedroom in his sister's house where he could see a portion of 11442 Wheeler Street from the window. As the Toyota was leaving the area, Contreras saw a Black male exit 11442 Wheeler Street and get into a white El Camino and drive off in the same direction as the Toyota. Contreras then observed a green car pull out of the garage, headlights first.

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28. Contreras initially indicated he did not see the man shooting into the Toyota. (RT 8503.) But he later identified photographs of the Toyota as the "car that the man was shooting into across the street." (RT 8519-8520.)

There were four people in the green car: two individuals in the back seat leaning together or holding each other, and two individuals in the front seat. The two individuals in the back seat were not moving or talking, and it was an "unusual" position in which they were leaning. Contreras could not tell if the two individuals in the back seat were alive. (RT 8505-8509A, 8512-8515.)

c. Jennifer Daniel

At approximately 5:00 p.m., Jennifer Daniel was sitting on her front porch at the corner of Wheeler and Glamis Streets reading the newspaper while her two children played on the front lawn. After hearing a series of three "muffled" gunshots from inside the house at 11442 Wheeler Street (see Peo. Exh. 23), Daniel dropped her newspaper, grabbed her children, put them in the house, told them to stay inside, and shut the door. Within a minute, Daniel heard another series of shots ("maybe three") from outside 11442 Wheeler Street. Daniel looked toward 11442 Wheeler Street and noticed a red Toyota (see Peo. Exh. 76) traveling toward her house and a late model, dark blue Hyundai (see Peo. Exh. 158), similar to appellant Bryant's Hyundai, pulling out backwards from the driveway. Daniel decided to focus on the red Toyota, since it was approaching her house. (RT 11846-11856, 11869.)

Daniel ran from her porch to the fence of her yard so she could write down the license plate number of the Toyota as it passed her house. As the Toyota passed Daniel's house, the driver, who was the only person Daniel saw in the car, looked "right at" her and tried to duck down behind the steering wheel. Daniel, however, got a "good look" at the driver, whom she described as a Black male between 18 and 30 years of age, skinny (he was not overweight), with very short hair, and wearing off-white or tan gloves on both hands. As the Toyota passed Daniel's house, the driver "looked right at me and started to duck and speed up and I looked at him." Daniel identified

appellant Wheeler as the driver of the Toyota.[29] Daniel called 911 and related what she saw, including three digits/letters of the license plate number on the Toyota (2, F, and P). (RT 11853-11865, 11868, 11875-11876, 11892-11893, 11922, 11932-11935, 11939-11943, 11951-11952; Peo. Exh. 27 [tape of 911 call]; Peo. Exh. 216 at 3 Supp. CT 10576-10577.)[30]

3. The Discovery Of The Red Toyota Camry

On August 28, 1988, at approximately 5:00 p.m., Dwayne Brown was in the backyard of his residence at 11311 Osborne, located directly across the alley from a 7-Eleven (see Peo. Exh. 49), "hanging out" with his cousin Philip Boozer and Kim Brown. The next-door neighbor entered the backyard through the alley and asked if the group knew whose car was parked in her driveway. Dwayne Brown indicated he did not know but that he would "check the car out." Dwayne Brown walked over to the neighbor's house and noticed the red

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29. Prior to trial, Daniel selected appellant Wheeler's photograph (Peo. Exh. 113, number 2) in 1995 -- seven years after the murders -- as the driver of the red Toyota. At trial, Daniel testified she was "positive" of her selection of appellant Wheeler's photograph (see Peo. Exhs. 113, 160) as the driver of the red Toyota. However, when asked if she saw the driver of the red Toyota in the courtroom, Daniel pointed out appellant Bryant. But, even after her "identification" of appellant Bryant, Daniel continually repeated that the driver of the red Toyota was the person depicted in photograph number 2 of People's Exhibit 113 -- appellant Wheeler. (See RT 11853-11865, 11875-11876, 11884, 11892-11893, 11922, 11939-11943, 11949-11952, 11959, 13711-13712; see RT 10539-10544, 11865-11868, 12173-12177.)

30. After the police arrived at the scene, Daniel gave them a list (Peo. Exh. 159) of activities she had observed at the "drug house" at 11442 Wheeler Street since April. The list included license plate numbers and descriptions of cars frequenting the premises (including appellant Wheeler's brown Audi), as well as the dates of the activities she observed. Daniel compiled the list "because I didn't want a drug house in our neighborhood." After she turned the list over to the police, a young boy by the name of "Keithy" pointed out Daniel to Provine McCloria. Keithy pointed to Daniel and told McCloria, "She's the one." (RT 11869-11874, 11928-11931.)

Toyota Camry (Peo. Exh. 29). There was shattered car window glass on the floor of the front seat of the car. Two children (Carlos and Chemise) were seat-belted into the back seat, and a woman (Loretha Anderson) covered with blood was on the floor of the back seat. The baby boy (Carlos) was seat-belted in on the passenger seat next to the passenger window, which had been shattered. When the boy moved, Kim Brown released his seat belt and removed him from the car. When the seat belt was released on the young girl, who was seat-belted in on the driver's side of the back seat, Dwayne Brown noticed a hole in her neck and said, "Leave her alone. She's dead." (RT 8566-8577, 8734-8737; Peo. Exh. 27 [tape of 911 call].)

4. The Police Arrive At The Crime Scene

On August 28, 1988, at approximately 5:10 p.m., Lynn Bless, a uniformed patrol officer with the Los Angeles Police Department, responded to a "shots fired" call at 11442 Wheeler Street. Officer Bless and her partner, Officer Carol Posner, were the first police officers to arrive at the crime scene. Neighbors who had gathered at 11437 Wheeler Street informed Officer Bless that there had been "a lot of shooting" at 11442 Wheeler Street. They related that a male Black exited the residence at 11442 Wheeler Street, approached a red compact car parked at the curb, fired a round into the back seat, walked around the red car, got into the driver's seat, and drove off. (RT 8532-8535.)

After talking with neighbors, Officer Bless approached the residence at 11442 Wheeler Street (see Peo. Exh. 28) and observed the following: "quite a bit" of shattered vehicle glass in the gutter at the curb where the red Toyota had been parked (see Peo. Exh. 23); a closed garage door; a closed inner front door; a large pool of blood on the front porch leading to the exterior steel grated-type front door of the residence (see Peo. Exh. 23); a "large chunk" of scalp with hair in the alcove just on the other side of the open exterior steel grated-type door; a couple of large bullet holes in the steel grate of the exterior front door,

just above where the scalp lay on the ground; and hair in the bullet holes in the steel grated door. (RT 8534-8541.)

Officer Bless then proceeded to the location where the red Toyota Camry was found -- approximately .7 of a mile from the Wheeler Street crime scene. When the police arrived, they observed the red Toyota Camry with the right rear passenger window blown out. There were two dead victims -- an adult Black female (Anderson) and a younger Black female child (Chemise) -- in the back seat of the Camry covered with shattered glass (see Peo. Exh. 29).[31/] The adult female (Anderson) was facing down on the floorboard on the left rear side of the car with her legs extended across the passenger seat. She "took an extremely bad hit" with two rounds in her hip and her right side. An infant (Carlos), covered in blood, was being held by a woman at the location. The infant was taken to the hospital. (RT 8541-8550, 8606-8609.)

The Toyota was impounded. The following items were recovered from the Toyota: a 12-gauge shotgun cardboard wadding from the rear floorboard; three mushroomed and deformed expended copper jacketed .38 or .357 caliber rounds from the rear floorboard and rear seat area; and two .00 shotgun buck pellets from the seat. (RT 8674-8681; Peo. Exhs. 39A-45 through 49 [items recovered from Toyota].)

James Vojtecky, a homicide detective with the Los Angeles Police Department, responded to the Wheeler Street crime scene and observed the following: a closed garage door; a large pile of shattered glass fragments in the gutter on the street; windows and doors of the house covered with iron bars and mesh so that there were only two ways to get out of the house in an emergency -- through the front door or the garage; a "sallyport" -- an enclosed

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31. A criminalist analyzed a piece of glass recovered from the front of 11442 Wheeler Street and a piece of glass recovered from inside the red Toyota where the bodies of Anderson and Chemise were found. She opined the two glass items could have come from the same source. (RT 12005-12007.)

patio about four feet square -- around the front door of the residence with stucco walls and a metal door with metal grating on both sides of the metal door; a bent strike plate on the metal door of the sallyport; a broken return spring on top of the metal door; a broken slide pin lash locking mechanism on the metal door; a large pool of blood in the area of the outer metal door of the sallyport; drag marks from the pool of blood into the sallyport area and across a small piece of carpet onto a red carpet; a piece of scalp with long hair attached to it laying in the sallyport; two holes in the metal grating of the interior part of the exterior door in the sallyport, approximately two inches apart, six feet off the ground, with hair in them similar to the hair in the piece of scalp on the floor of the sallyport; drag marks across the dining room and kitchen; a couple of coins on the dining room floor and in the garage; blood splattering on three of the walls and two large pools of blood in the immediate carpeted area near the front door; bloody shoe prints and drag marks in the garage; a partially legible bloody shoe print (see Peo. Exh. 44) in the center of the garage; additional partial shoe prints with overlapping shoe prints and bloody drag marks at the kitchen entry door from the garage; an open safe, which was empty, on the closet floor of one of the bedrooms; a hole of a large caliber bullet which passed through the shower door in one of the bedrooms; no towels, washcloths, or cosmetics in the bathroom; no clothing in the closets; a refrigerator which was "fairly empty" and "a few dishes in the house but no food stuff in the cabinets in the kitchen"; and an empty swimming pool. Detective Vojtecky determined that the drag marks indicated movement away from the pool of blood in front of the house, into the house through the sallyport, through the house, and into the garage. (RT 8537, 8597-8606, 8611-8613, 8652-8655, 8665-8670, 8681-8687, 8755, 13593-13594; see Peo. Exhs. 33-35, 37-38 [crime scene photos].)

Detective Vojtecky recovered the following items from inside 11442 Wheeler Street: shotgun fragments from the wrought-iron sallyport door frame (Peo. Exh. 39A-4); shotgun fragments or bullet fragments from the garage (Peo. Exhs. 39A-4B, 5, and 33); two 12-gauge .00 Buck Magnum expended shell casings along the west wall in the entryway (Peo. Exh. 39A-10); expended 12-gauge .00 Buck Magnum expended shell casings in the center of the entryway against the eastern most wall laying on the carpet (Peo. Exh. 39A-11) and just south of the entryway (Peo. Exh. 39A-12); live 12-gauge .00 Buck Magnum shells in the living room between the sofa and the couch (Peo. Exh. 39A-9) and on top of the stove in the kitchen (Peo. Exh. 39A-21); four expended .00 Buck shotgun pellets from the linen closet in the hallway just east of the bathroom (Peo. Exh. 39A-18); a 12-gauge .00 Buck Magnum expended shotgun shell casing (Peo. Exh. 39A-40) and an expended .45 caliber shell casing (Peo. Exh. 39A-40) from the trash can in the kitchen; a "90-minute schedule" (Peo. Exh. 39A-20) affixed to the living room wall; papers (Peo. Exh. 39A-22), a calculator (Peo. Exh. 39A-28), and an address book page with the name "Tommy" and a telephone number laying together with a piece of "junk" mail addressed to Jeff Bryant (Peo. Exh. 39A-38) from the work table in the living room; miscellaneous papers (Peo. Exh. 39A-24) from the coffee table in the bedroom with the safe; a personal folder (Peo. Exh. 39A-25) with identification and the address of Anthony Arceneaux from the center drawer of the roll top desk in the bedroom; two counterfeit bills in the desk; miscellaneous papers, telephone bills, gas bills, and "junk" mail (Peo. Exh. 39A-27) from the kitchen drawer in the vicinity of the trash can; miscellaneous papers and post-its (Peo. Exh. 39A-39); a "beeper list" (Peo. Exh. 39A-30) with the telephone numbers and/or pager numbers for various initials, partial names, and full names which was affixed to the kitchen wall; a partially smoked Kool cigarette (see Peo. Exh. 40) adjacent to a pool of blood in the entryway; a set of keys

(Peo. Exh. 48A) in the interior deadbolt lock of the front door; and three key rings (Peo. Exh. 48B) containing several keys hanging on a hook on the oven in the kitchen near where the live shotgun round was found. (RT 8618-8635, 8655-8664, 8691-8697, 8734-8737, 8754-8755, 10757-10759, 11742; see RT 8698-8711, discussing Peo. Exhs. 41-45 [photos of interior of Wheeler Street residence]; see also Peo. Exh. 32 [a mock house (scale representation) of residence].)

The blood found on the step of the front door was consistent with Brown's blood. A piece of hair found was from Brown's scalp. The blood trail from the front doorway through the house was consistent with the blood of Armstrong and Brown. The blood splattering in the residence, as well as the blood in the doorway, was consistent with Armstrong's blood. Saliva samples from the partially smoked Kool cigarette were consistent with Armstrong's blood. (RT 13584-13588.)

E. The Discovery Of The Decomposed Bodies Of Armstrong And Brown In Lopez Canyon

On the afternoon of September 1, 1988, the bodies of Armstrong and Brown were found in Lopez Canyon (see Peo. Exh. 49), located approximately 4.7 to 4.9 miles from 11442 Wheeler Street. The bodies were decomposed and lying near a bush under a packing cloak. Based on the length and texture of the hair, Brown's scalp appeared consistent with the piece of scalp recovered at 11442 Wheeler Street. The following property was recovered from Armstrong's body: a prison identification card and an address book with the names and addresses of various individuals connected to the instant case, including the 11442 Wheeler Street address and telephone number with the name of appellant Bryant. The following property was recovered from Brown's body: an address book with a missing page; a piece of paper from an address book containing the address and telephone number of 11442 Wheeler Street;

and a card containing the same information as the page from the address book. (RT 8712-8715, 8734-8735, 8738-8753; see Peo. Exhs. 46-47, 50-51 [photos].)

The address book (Peo. Exh. 111) recovered from Armstrong's body contained the names, addresses, and telephone numbers for various individuals, including appellant Bryant on Judd Street, Ross Bryant, Wilbur Babineaux, and appellant Smith. The address book also contained three telephone numbers for 11442 Wheeler Street and a telephone number for Neighborhood Billiards. Also included in the address book were telephone numbers for Angela Armstrong in East St. Louis, Debra Armstrong and Delores Brown in St. Louis, Bangie Armstrong, Mona Scott, Valerie Wilbon, Francine Smith, Valerie Smith Field, and Tannis Curry. (RT 10729-10738.)

F. The Autopsies

Dr. James Ribe, a forensic pathologist employed by the Los Angeles County Department of the Coroner, performed the autopsies on the four victims. (RT 8278-8286.)

1. Andre Armstrong

At the time of the autopsy, Armstrong's body was in a moderate state of decomposition (see Peo. Exh. 12), with an extremely powerful odor of putrefaction. Armstrong's body revealed a severe discoloration of the skin, partial liquefaction of the fatty tissues, partial destruction of the eyeballs, distortion of the facial features, early changes toward mummification of portions of the skin, extensive slippage of the epidermis, gas formation within the body, and extensive activity of both large and small maggots on the body. A large area of the abdominal wall was missing, which could have been caused by a gunshot-type injury. (RT 8336-8339.)

Armstrong suffered two fatal shotgun wounds. One was a 12-gauge shotgun wound in the center of the chest which exited in the right lower back. Two of the shotgun pellets went through the heart. Nine buckshot pellets were recovered from Armstrong's chest. A piece of shotgun wadding was also recovered. No stippling was present on Armstrong's chest. The muzzle of the shotgun was held less than four feet from Armstrong's body at the time of the shot. (RT 8348-8350.)

The second fatal shotgun wound was to the right side of Armstrong's head, above and slightly behind the ear. The wound caused extensive fracturing. A number of deformed buckshot pellets and numerous pellet fragment shadows were present within the cranium and upper neck area. Two cardboard shotgun wads were recovered from the head. The hole caused by the gunshot measured two inches vertically and three and one-half inches horizontally. Given one bullet hole, the size of the hole, and the presence of soot on the bone, Dr. Ribe opined that the wound was a contact wound or near-contact wound: "one where the muzzle of the shotgun was so close that the smoke actually deposited on the bone surface." According to Dr. Ribe, the muzzle of the shotgun was zero to 12 inches from Armstrong's head when it was fired. (RT 8343-8350; see Peo. Exhs. 13, 14 [diagrams depicting wounds on Armstrong's body].)

2. James Brown

James Brown suffered two non-fatal shotgun wounds and two gunshot wounds, one of which was fatal.

One shotgun wound entered Brown's back in the area of his rib cage. The blast made 11 holes in Brown's back. Three buckshot pellets attributable to this wound were recovered from Brown's chest. The shot was fired across the back, right to left, and upward toward the head. The shot was fired from a distance of more than four feet. The wound was not fatal. (RT 8350-8354,

8429.)

Another shotgun blast was to the right side of Brown's head just above the ear. The blast created a large four by five inch avulsion (tearing away by force) defect of the scalp where the scalp was forcibly removed or blown away from the right side of Brown's head. All the tissue was stripped away from Brown's head, including the actual coating of the bone. The blast likely rendered Brown unconscious and was probably fired at close, but an unknown, range. It was a potentially fatal wound but not the cause of death according to Dr. Ribe. (RT 8354-8357, 8429; see Peo. Exhs. 15-18 [autopsy photos and diagrams].)

Dr. Ribe examined the specimen of the scalp with hair on it recovered from Wheeler Street with the hair still on Brown's head and opined there were "significant similarities" between the two. According to Dr. Ribe, "I can say with medical certainty that the scalp specimen is in every way consistent with having been traumatically removed in the right side of [Brown's] head by virtue of a shotgun blast." (RT 8366-8368.)

There were two gunshot wounds on Brown's body. One was a fatal gunshot wound to the center of the chest. This wound had a "muzzle stamp" around the entrance wound (meaning the gun was placed firmly against the chest and fired). The direction of the shot was front to back and right to left. Brown's heart "partially exploded" as a result of this gunshot. The front side of Brown's head had a three-inch defect which was caused by the explosive action of the bullet and gases upon the blood inside the heart. The second gunshot wound was located in Brown's right anterior abdominal wall below the right rib cage. There was evidence "strongly suggestive" of "muzzle stamping" on this wound also. A handgun caused both wounds, but Dr. Ribe made no determination of the caliber of the weapon. (RT 8368-8372, 8429.)

3. Loretha Anderson

The cause of Loretha Anderson's death was multiple shotgun wounds. Anderson suffered at least two, and possibly three, shotgun wounds, as well as four handgun wounds. Other injuries suffered by Anderson included abrasions of the skin on the right arm, right side of the face, right forearm, and the lateral aspect of the right arm, which were caused by the explosive impact against the skin of multiple pellets, and puncture wounds in the abdomen and hip area caused by deformed and fragmented buckshot pellets which passed through an intermediate target (i.e., the car window). (RT 8301-8306.)

One fatal shotgun blast entered Anderson's body in the right side of the abdomen and the right upper thigh. An intermediate target (i.e. the right rear window of the Camry) was between the muzzle of the shotgun and Anderson when the shot was fired. Anderson also suffered a second fatal, close-range shotgun blast from a 12-gauge shotgun (the cardboard wad found in the wound was consistent with either a base wad or powder from a Winchester 12-gauge shotgun shell). The muzzle of the shotgun was held less than four feet from Anderson's body when it was fired. (RT 8306-8324.)

Anderson also suffered four gunshot wounds. One handgun wound was in the area of the abdomen. The bullet went into the left hip through the abdomen into the lower part of the lung. Stippling was present on the abdomen. The gun was held less than 18 inches from Anderson's body when it was fired. The wound was fatal. The projectile (see Peo. Exh. 9) was recovered from Anderson's body. (RT 8324-8326.) Another gunshot wound was in the middle of the abdomen. The bullet traveled in the same direction as the other gunshot wound, but this one failed to penetrate the chest wall and only went through the soft tissues of the anterior chest wall ending up in the upper lateral part of the left breast near the armpit. This wound was not fatal. A projectile (see Peo. Exh. 9) from this wound was recovered in the anterior left

upper chest wall. (RT 8329-8334; see Peo. Exh. 10 [autopsy diagram].) The last two gunshot wounds were through-and-through wounds in the shoulder. These were non-fatal wounds. (RT 8328-8329.)

The two projectiles recovered from Anderson's chest were hollow point, wad cutter or semi-wad cutter handgun bullets of a large caliber. (RT 8295, 8332-8334.) Also recovered from Anderson's body were 21 .00 buckshot pellets or fragments of pellets. (RT 8301-8304.)

4. Chemise English

Chemise English died from a gunshot wound in the posterior base of the neck close to the middle of the spine. The bullet struck the vertebral column (backbone of the neck) and the left collar bone before initially exiting the body. The bullet reentered the body under the side of the chin and re-exited the body on the left cheek. The wound caused extensive bleeding and caused death "over a period of minutes, maximum." "Stippling" surrounded the initial entrance wound. The bullet was "a large caliber handgun round." Four fragments of the bullet were recovered from Chemise's shoulder. The projectile, according to Dr. Ribe, was probably a wad cutter or semi-wad cutter (basically a flat-nose bullet). (RT 8286-8290, 8294-8301, 8405-8406; see Peo. Exh. 5 [autopsy photo].)

Dr. Ribe noted that, at the time of the shot, Chemise was basically "cowering away" from the shooter. She was "tightly hunched over, or in a balled up position with her head way down next to her left shoulder, as in the position of attempting to hide from . . . or get away from" "the weapon that was extended toward her." The stippling on Chemise's clothing and on her skin where the bullet entered her neck indicated to Dr. Ribe that the gun which fired the fatal bullet was held 12 inches or less from her body when the shot was fired. (RT 8290-8295, 8299-8301, 8405-8406.)

Anthony Paul, a firearms examiner under contract with the Los Angeles Police Department, offered a somewhat more precise explanation of the wound on Chemise. According to Paul, the shot was fired at an angle so as to create an asymmetrical entrance wound. The wound was consistent with Chemise seated in the car and the shooter standing to her right while she cowered away from the gun. The stippling around the wound was consistent with the gun being held at an angle. Based on the stippling and the fact Chemise was wearing a T-shirt, Paul estimated the gun was held "somewhere between six and eight inches" from her neck when it was fired. Paul's opinion was consistent with Chemise seated in the middle of the back seat of a car and a person reaching in through the window, holding a gun six to eight inches from her neck as she cowered away from the gun when the trigger was pulled. Paul opined that a bullet from a .357 Magnum was consistent with the bullet which traversed Chemise's back, went through her spine, broke her spine, exited her shoulder, entered into her face, broke her jaw, exited her face, and traveled on through and through. (RT 13141-13145.)

5. Toxicology Tests

Toxicology tests revealed the following: negative as to Chemise; negative as to Anderson except for a blood alcohol level of .03; negative as to Armstrong for drugs but he did have a blood alcohol level of .11, which could have been caused by decomposition of the body; and negative as to Brown for drugs but he did have a .12 blood alcohol level, which, like Armstrong, could have been caused by the decomposition. Because of the state of decomposition of the bodies, the blood alcohol level of Brown and/or Armstrong is not indicative that either was drinking alcohol prior to death. (RT 8374-8377, 8405-8406.)

G. Significant Events Following The Murders

1. Appellants Wheeler And Bryant Visit Jeff Bryant In Prison The Day After The Quadruple Homicide

On August 29, 1988, the day after the murders, appellants Bryant and Wheeler visited Jeff Bryant at the Donovan State Prison in San Diego County. Neither appellant had completed the necessary paperwork to receive prior approval for the visit. After filling out the necessary forms, both appellants were permitted to visit Jeff Bryant. Appellant Bryant, however, was subsequently notified by letter (Peo. Exh. 167) on September 2, 1988, by prison officials that he was disapproved for any further visits because he falsified information on the forms he filled out on August 29. (RT 12824-12836, 12838; Peo. Exh. 166 [visiting records].) Appellant Wheeler visited Jeff Bryant in prison again on September 22, 1988. (RT 12839.)

2. Jay Williams Is Told To Leave Town

Around midnight a couple of days after the quadruple homicide, William Settle arrived at Jay Williams's apartment. William Settle told Williams the following: (Williams) had been identified at the crime scene on Wheeler Street; "it wasn't a bright idea for [Williams] to stay around the neighborhood"; appellant Bryant wanted Williams to leave town and take a six-month vacation; the Organization would take care of his expenses; and if Williams "needed anything just call them and they would send it to [Williams]." Arrangements were made where Williams could have his back pay of $2,000 picked up before he left town. After receiving the $2,000, Williams took a plane to Pennsylvania. (RT 12364-12371.)

After he ran out of money in Pennsylvania, Williams called Lamont Gillon and obtained a telephone number to straighten out his money situation. Williams called the number several times and talked with various individuals

in the Bryant Organization. As a result of the calls, William Settle made arrangements for Williams to receive a $500 Western Union wire transfer. Because Williams did not have any identification, William Settle made arrangements for Williams to pick up the money at the Western Union office with the use of the code word "red." (RT 12371-12373.)

3. "We Had Some Problems, But We Took Care Of Them"

During a videotaped interview between Ladell Player and Deputy District Attorney Kevin McCormick, Player related the following: A couple days after the quadruple homicide at Wheeler Street, Player and Billy Fields saw appellant Bryant in a San Fernando courtroom. Appellant Bryant was there for a case involving his ex-wife Tannis. Player and Fields were in the courtroom for a case involving Fields. Player told appellant Bryant that he had stopped by the Wheeler Street house after the murders, saw the yellow police tape around the house, and realized something had happened. Appellant Bryant responded, "Yeah, we had some problems, but we took care of them." (See Peo. Exh. 110; RT 10262-10266, 10486-10495.)

4. The Trade In Of Appellant Bryant's Hyundai

On September 3, 1988, less than one week after the quadruple homicide, Antonio Johnson, appellant Bryant, and appellant Wheeler proceeded to North Hollywood Toyota where they purchased a new, four-door, red or burgundy Toyota Corolla in exchange for a 1988 blue Hyundai (see Peo. Exh. 158) and $5,000. The Hyundai had only 14,705 miles on it and was "in very good condition." The $5,000 cash was brought to the dealership in a brown paper bag. The transaction was conducted and executed by Antonio Johnson. Following the transaction, the finance manager of the dealership purchased the Hyundai. (RT 12845-12855, 12862-12869; Peo. Exh. 100 [purchase contract for Corolla].)

On October 18, 1988, criminalist William Lewellen of the Scientific Investigative Division of the Los Angeles Police Department, examined the Hyundai for the presence or absence of blood. After conducting a luminal test and a phenolpthalein test, Lewellen determined there was blood present on the floorboard of the driver's side of the front seat between the foot pedals and the driver's seat. Although the two tests performed are tests to determine the presumptive presence of blood, Lewellen explained, "I have never encountered a situation that was not blood that reacted positively to these two tests." (RT 12878-12883.)

5. The Arrest Of Appellant Wheeler

On September 25, 1988, Detective Robert Saurman of the Los Angeles Police Department, assigned to the Foothill Division of the Gang Unit, was interviewing a witness in an unrelated case when appellant Wheeler's name (i.e., "Slimm") came up during the conversation. The witness, Myra James, provided Detective Saurman the pager number for appellant Wheeler. Detective Saurman paged "Slimm" and left a call-back telephone number for an outside line at the police station. "Slimm" returned the call and agreed to come to the police station for an interview. (RT 11012-11017, 11048.) Appellant Wheeler was approximately 6'1" to 6'2" tall and weighed 160 to 170 pounds. (See RT 8243-8247, 8249; Peo. Exhs. 1, 2.)

During the interview, Detective Saurman attempted to ascertain where appellant Wheeler lived. Appellant Wheeler related that his girlfriend, Tavia Givens, lived somewhere on LaSalle but that he did not live with her. Thereafter, the police determined where Givens lived, and the police proceeded to her residence at 13950 Foothill Boulevard, apartment 202. Givens answered the door and gave the officers permission to search her apartment. The officers found the following inside the apartment: male clothing; a loaded .357 Magnum chrome revolver in the hall closet; ammunition; $1,000 in Givens's purse (fifty

$20 bills); a pager (Peo. Exh. 132) bearing the telephone number Detective Saurman had called earlier to page "Slimm"; a black notebook (Peo. Exh. 130) bearing the name "Slim" and containing writing indicating "Slim" owned the notebook and lived at the apartment; a 1988 calendar book with the name "$limm" written on it (Peo. Exh. 130) on the nightstand which contained negative film strips and a photo album (Peo. Exh. 131); another notebook (Peo. Exh. 132) with writing on the pages reflecting "fairly standard pay and owe list"; a yellow note pad and telephone records from Pac Tel cellular and GTE (Peo. Exh. 133); and two sections of the Daily News newspaper (Peo. Exh. 129) containing articles about the quadruple homicide at Wheeler Street laying on the floor next to the nightstand in the bedroom. The first section was from the August 29 edition of the newspaper where the article about the instant case was on the first page. The second section was from the August 30 edition of the newspaper where the article appeared on page three. (RT 11021-11033, 11045-11046.)

After finding the above items, Detective Saurman returned to the police station and asked appellant Wheeler for permission to search the apartment. Appellant Wheeler responded with words to the effect of "Go ahead and search. I want you to . . . there's nothing there." Detective Saurman returned to the apartment and continued the search. The following items were recovered: a male jacket and $7,650 in cash. The money was found in a brown paper bag located in a vent hole above the water heater in an alcove next to the kitchen. The money was "bundled in small denominations" and wrapped with a rubberband. The bills in the bag were flat as opposed to folded or wrinkled. The money in the paper bag consisted of one $50 bill, three $100 bills, fifty-four $20 bills, twenty-four $10 bills, and three $5 bills. (RT 11035-11038, 11045-11048.)

The photo album (Peo. Exh. 131) contained photographs of various Bryant Family members, including Laurence Walton, Antonio Johnson, Chris King, Danny Hall, Sharif Malik, Eddie Barber, Jackie and James Mason, Gregory Thomas, Keith Chatters, and Wilbert Lankins. (RT 12008-12011.) The negative strip found in the calendar book, when developed, depicted appellant Wheeler in a number of the photographs, including one in which he was wearing a cardboard crown and a very large gold chain and had several $100 bills spread out in front of him. (RT 10574, 10870-10872, 11188-11191, 12261; Peo. Exh. 116.) The calendar book also contained the names and telephone numbers of various Bryant Family members and addresses of various Bryant Family locations. (See RT 11193-12111.)

On the evening of September 25, 1988, Detective Eric Lindquist and his partner, Detective St. John, responded to 1935 La Salle, apartment 4. Evelyn Trimble, the grandmother of appellant Wheeler, answered the door and gave her consent to a search of the apartment. Numerous items (Peo. Exh. 137) were found on the floor of the bedroom, including: several documents relating to a 1984 white Audi, license 1 KEP 159; a bank statement in the name of appellant Wheeler bearing the address of 1935 La Salle; and literature about cellular telephones. Trimble told the officers that appellant Wheeler only periodically came by the apartment to pick up his mail. (RT 11062-11071.)

When appellant Wheeler went to the police station on the evening on September 25 to be interviewed, the interview, unbeknownst to him, was tape recorded. Following the interview, appellant Wheeler was placed in a room with Tavia Givens and their conversation, unbeknownst to them, was tape recorded. During the interview, appellant Wheeler claimed he lived with his grandmother (Trimble) and denied he knew anything about "the Family" or what occurred at 11442 Wheeler Street on August 28, 1988. (Peo. Exh. 200 [tape]; Peo. Exh. 216 at 3 Supp. CT 10621-10660; see RT 13535-13551.)

6. The Search Of Appellant Wheeler's Audi

On September 27, 1988, at approximately 9:30 a.m., after obtaining appellant Wheeler's consent, Police Officer Michael Oppelt searched a 1984 white Audi (Peo. Exh. 139), license 1 KEP 159, at a police tow garage. There were two bullet holes in the car, and the holes were made when bullets were fired from the inside of the car. A car telephone and a telephone base or mounting jacket were also inside the car. Officer Oppelt found the following items in the glove compartment: an empty prescription bottle bearing the name of appellant Wheeler; a pager receipt from a pager company in the name of Keith Chatters; and a DMV invoice for the premises at 13590 Foothill Boulevard, apartment 202, for the period of April 13 through June 11, 1988. (RT 11125-11131.) The mobile telephone number for the telephone in the Audi was (213) 760-5365 and was in the name of Tavia Givens. (RT 11134, 11138-11140; see Peo. Exh. 142 [application for telephone].)

7. The Execution Of The Search Warrants On September 29, 1988

A series of search warrants were executed on various residences during the early morning hours of September 29, 1988. Each residence will be discussed separately.

a. 11236 Adelphia

The premises at 11236 Adelphia Street was a fortified "rock house." The exterior windows and doors were secured with wrought iron. A metal caged area or sallyport, similar to the one at 11442 Wheeler Street, formed a secure closed area around the front door. Entry into the premises was effectuated by the use of a battering ram and SWAT officers pulling the bars

off the windows. (RT 9783-9793; see Peo. Exh. 87 [photos].)[32/]

The following items (see Peo. Exh. 88) were inside the location: a metal pot containing oil in the kitchen; an O'Haus triple beam scale in the kitchen; a slip of paper with telephone numbers in the kitchen; and five rounds of ammunition in a cup on a shelf in the closet. Also found inside the premises were the following (see Peo. Exh. 89): narcotics on the living room floor along with pays and owes, financial records, and inventory control figures; a crumpled-up piece of paper which contained inventory control figures; a plastic bag containing 36 smaller Ziploc bags each containing one gram of rock cocaine; a larger Ziploc bag containing seven bags each containing half an ounce of rock cocaine; a page of a notebook containing inventory control figures; and post-its with numbers. The only money found inside the premises was a crumpled-up $5 bill, which contained a little over one gram of cocaine, found on top of the television. (RT 9780-9782, 9794-9797; see Peo. Exhs. 88, 89 [photos].)

b. 11649 Fenton

The premises at 11649 Fenton was a fortified "rock house" with bars over the windows and doors, as well as a metal caged area around the front door. (See Peo. Exh. 84 [photo].) Entry into the premises was effectuated by SWAT, while other equipment (i.e., a battering ram) was used to take off the steel and metal bars obstructing the windows and doors of the house. (RT

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32. On April 3, 1988, Eddie Barber received title to the Adelphia property from Otis and Sara Evans, husband and wife. Barber transferred title on May 3, 1988, to Olivia Vargas. (Peo. Exh. 161; RT 10640-10641, 10656-10657, 11721.) Anthony Arceneaux subscribed for the gas service at the location from May 12, 1988, through December 6, 1989. (Peo. Exh. 118; RT 10634.)

9694-9698.)[33] Laurence Walton, who was inside the house, was arrested. (RT 9699, 9831-9832.)

The following items were found on a table in the living room: several telephones; $1,407 cash; a box of rubberbands; small pieces of notebook paper containing markings; and a calculator. (See Peo. Exh. 86.) A .38 caliber revolver was found in the closet next to the front door where the caged area was located. (RT 9698-9700.)

Detective David Lambert, an expert on the Bryant Family, described the Bryant Family as a narcotic-distribution organization located in the northeast section of the San Fernando Valley which distributed rock cocaine. Detective Lambert opined that there was a relationship between the books and financial records found at the Adelphia location and the recordings and accounting kept at the Fenton location. Detective Lambert described the detailed record and inventory keeping procedure and the interrelationship of the documents found at the locations. Detective Lambert explained that a buyer of narcotics paid for the purchase at the Fenton location and received a post-it with writing on it. Since the narcotics were stored at the Adelphia location, the buyer took the post-it to the Adelphia location where, after presenting the post-it, he received the narcotics he had paid for at Fenton. (RT 9797-9805.)

Detective Lambert explained that the Fenton location was referred to as a "slip house" -- a location which did not store large quantities of drugs but only took in money, and then periodically, for safety purposes, the money would be picked up and taken to a more secure location referred to as a "count house." Large amounts of money were not kept at a "slip house," but rather were kept at the "count house." The house at 11442 Wheeler Street was the "count

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33. Eddie Barber, an employee of Neighborhood Billiards, was the subscriber of the gas service from May 25, 1988, through February 9, 1989. (Peo. Exh. 118; RT 10635.)

house" at the time of the murders on August 28, 1988, for the various "slip houses" in the Bryant Organization. Detective Lambert explained that the daily tally and accounting sheets were found at the Wheeler Street house -- which detailed the quantities of cash, including the breakdown of the ones, fives, tens, twenties, fifties, and hundreds, and who brought the cash -- because it received all the money from the "slip houses." Detective Lambert explained: "It's almost like banking procedure except they're not using a bank. They're billing money to a location at the end of a shift, much like one might do a night drop . . . if you owned a business." (RT 9823-9824.)

c. 13037 Louvre Street

Antonio Johnson was inside the location when the search warrant was executed at 13037 Louvre Street. The following items were found inside the premises: papers bearing the name of Antonio Johnson; a photograph (Peo. Exh. 123) from the bedroom depicting Antonio Johnson holding a number of bills and currency; a Toyota new vehicle sales delivery survey (Peo. Exh. 124) in the name of Antonio Johnson from the top of the dresser in the bedroom; pink slips in the name of Antonio Johnson for three different vehicles from a safe in the master bedroom; and the keys for the vehicles from the living room. (RT 10766-10771.)[34/]

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34. Title to the property at 13037 Louvre Street was held by Jeff Bryant from October 14, 1983, until March 24, 1989, when he transferred the property to Javier Vasquez and Celia Valle, husband and wife, and Jose Ramirez, a single man, and Eva Valle, a single woman, as joint tenants. (Peo. Exh. 161; RT 10640-10641, 10655-10656, 11715-11716.) Antonio Johnson, an employee of Neighborhood Billiards, subscribed for the gas service at the location between July 9, 1984, through March 29, 1985, and from December 8, 1987, through January 1, 1989. (Peo. Exh. 118; RT 10631-10632.)

d. 13031 Louvre Street

Nash Newbill was inside the location at 13031 Louvre Street when the search warrant was executed. The following items were found inside the premises: utility bills from DWP and Southern California Gas Company addressed to Newbill at 13031 Louvre Street; a Western Union money order receipt for money Newbill sent to Thelma Newbill; a preliminary lien notice addressed to Nash Newbill at 13031 Louvre Street for failure to pay rent at a storage location; a driver's license in the name of Nash Newbill (on the back of the driver's license is an address notification changing Newbill's address to 13031 Louvre Street); and keys from atop the furniture in an interior bedroom. A ring of keys was also recovered from a Toyota pickup truck parked in the driveway. (RT 10774-10780.)[35/]

e. 12483 Ralston -- Codefendant Settle's Residence

Entry into the premises at 12483 Ralston was effectuated by SWAT after dispersing gas throughout the house. No one was inside the premises when the search warrant was executed. The following items were recovered: a walkie talkie; a tap trapper (Peo. Exh. 172); miscellaneous papers (Peo. Exhs. 173, 175) bearing codefendant Settle's name; photographs, letters, and receipts in the name of codefendant Settle bearing an address of 12518 Filmore Street; and

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35. Title to the property at 13031 Louvre Street was held by Jeff Bryant and Florence Bryant as joint tenants from July 24, 1980, until December 16, 1985, when Jeff Bryant gifted and quitclaimed his interest to Florence Bryant. On March 10, 1989, the property was sold to Israel and Tomasa Castillo. (Peo. Exh. 116; RT 10640-10641, 10652-10655, 11715-11716.) The gas service at the location was in the name of Florence Bryant from July 1979, through April 4, 1983, at which time it was transferred to Wilene F. Haywood. The gas service was in the name of Nash Newbill, an employee of Neighborhood Billiards, from January 1, 1988, through March 14, 1989. (Peo. Exh. 118; RT 10628-10630.)

gold jewelry (Peo. Exh. 174). (RT 12946-12954.) A gun was found in the safe in the garage. (RT 12956-12966.)[36/]

f. 12719 Judd Street -- Appellant Bryant's Residence

On September 29, 1988, a search warrant was executed at appellant Bryant's residence at 12719 Judd Street. Appellant Bryant was inside the residence when the search warrant was executed, and he was arrested. (RT 12908-12910, 12912, 12933-12934.)[37/]

The following items were found inside the residence: $719 cash; 50 live rounds of .380 caliber ammunition in the master bedroom; 40 live rounds of .45 caliber ammunition in the bedroom; 450 live rounds of nine millimeter ammunition in the master bedroom; 50 live rounds of .25 caliber ammunition; 22 miscellaneous keys (see Peo. Exh. 169) from the master bedroom; a black briefcase (see Peo. Exhs. 167 and 170); and a .45 caliber Colt automatic (see Peo. Exh. 152) with five live rounds in the magazine (Peo. Exh. 168). The .45 caliber automatic pistol was found three to five feet from the front door and was loaded. Several of the keys found at appellant Bryant's residence were to the premises at 11442 Wheeler Street. (RT 12909-12917, 12926-12928, 12933-

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36. On March 10, 1987, Hana Settle, wife of grantee, quitclaimed the Ralston property to John L. Settle as his sole and separate property. On July 22, 1988, John L. Settle quitclaimed and gifted the property to Norma Ramirez, who on August 1, 1988, quitclaimed and gifted the property to Jon Preston Settle, who on March 17, 1989, gifted and quitclaimed the property to James Settle, Jr. (Peo. Exh. 161; RT 10640-10641, 10665-10669, 11710.) Gas company records revealed the subscriber for the gas service at the Ralston location was Una Distad from July 11, 1988, until August 29, 1988, when the service was placed in the name of codefendant Settle. (Peo. Exh. 118; RT 10637.)

37. Title to the Judd Street property was in the name of appellant Bryant from April 27, 1983, through February 24, 1989. (Peo. Exh. 116; RT 10640-10641, 10645.)

12934, 13553-13554.)

Appellant Bryant's black briefcase contained the following documents and papers:

-- A piece of paper with the St. Louis telephone numbers for Delores Brown and Deborah Armstrong. (RT 13366-13367.)

-- A quitclaim deed for the property at 11442 Wheeler Street, which was recorded on December 15, 1987, transferring ownership from Jeff Bryant, Jr. to Mark Newbill. (RT 13367-13368.)

-- An envelope from Pac Bell addressed to Andrew Settle at 7654 Laurel Canyon, apartment 109, North Hollywood. (RT 13368-13369.)

-- Calling cards for (818) 765-4144 in the name of Andrew Settle. (RT 13369-13370.)

-- A receipt in the name of Andrew Settle at 11313 Oxnard Street, apartment 313, for a lock repair to a vehicle. (RT 13370.)

-- A notice of a court appearance bearing appellant Bryant's name for August 30, 1988, at 8:30 a.m. in Division 130 in San Fernando. (RT 13371-13372.)

-- A receipt for an Airdyne exercise machine dated April 2, 1988, in the name of appellant Bryant with an address of 12719 Judd and a telephone number 897-0172 (which was a telephone in the name of Tannis Bryant). (RT 13372-13373.)

-- A notice dated September 2, 1988, from Donovan Correctional facility to appellant Bryant denying his request to visit Jeff Bryant at the prison. (RT 13373.)

-- An application for auto insurance in the name of appellant Bryant bearing the Judd Street address and listing his occupation as manager of Family Billiards. (RT 13373.)

-- A slip of paper containing numerous telephone numbers, including one for "Tommy," which corresponds to "Tommy Hull's" address in Marina, California. (RT 13374-13375.)

-- A piece of paper containing telephone numbers, including one number (609-5258) which was also on the "beeper list" found at 11442 Wheeler Street with initials "FRK" next to it. (RT 13375.)

-- A slip of paper containing "a cryptic code for narcotics transactions." (RT 13375-13378.)

-- Pages of narcotic recordings for inventory control, such as who is selling what and who will receive certain amounts of narcotics. The documents reflect narcotic distribution to sales representatives for the period of March 28 through May 1, 1988. Another page in the documents contains the daily total gross receipts for the narcotic distribution business. The amounts vary from $7,750 to $109,789 per day. (RT 13378-13382.)

-- An adding machine tape with numerical figures and initials. The amounts on the adding machine tape correspond to numerical figures in the documents recovered from the Carl Street residence which evidenced narcotic sales by the Bryant Organization. (See Peo. Exh. 93 [records of sales activity for a three-month period recovered from Carl Street]; RT 13395-13398.)

-- A paper showing the shift schedules and the initials of individuals working the shift. (RT 13398.)

-- A "nameless phone book," containing no names but only telephone numbers of various individuals and locations involved in the instant case. (RT 13999-13405.)

-- A document regarding the proposed court policy related to proceedings under Penal Code section 1275, which is the mechanism for the court to

hold a hearing to insure money put up for bail is not stolen or narcotic-related. (RT 13405-13408.)

g. 13574 Corcoran

People Exhibit 171 contains the collection of documents (two binders) recovered from 13574 Corcoran on September 29, 1988, during the service of the search warrant. (RT 12924-12944.)[38/]

8. Jay Williams Is Arrested In Pennsylvania

On October 5, 1988, at the request of Detective Vojtecky, Detective Richard E. Curtis and other police officials in Harrisburg, Pennsylvania, who had no knowledge of the facts underlying the quadruple homicide on Wheeler Street, arrested Jay Williams at his grandmother's house. Williams, who was approximately 6'4" tall and approximately 300 pounds (see Peo. Exh. 3),[39/] was told he was placed under arrest for the homicides in Los Angeles.[40/] Williams agreed to talk with the Pennsylvania authorities because "I knew I didn't kill nobody" and "I wanted to let them know that they had the wrong man."

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38. Title to the Corcoran property was held by William Settle from July 2, 1987, until August 11, 1988, when he gifted and quitclaimed the property to Lillis V. Settle. (Peo. Exh. 161; RT 10640-10641, 10664-10665, 11710-11711.)

39. As noted by Detective Harris, Williams "was big, he was big." (RT 12808.)

40. The teletypes sent out following the murders never described Anderson's and Chemise's shooter as large or heavy set. When Detective Vojtecky issued a warrant for Williams's arrest, he used the physical description for Williams from a juvenile arrest record one year before the murders. (See Peo. Exh. 117.) That description described Williams as considerably lighter than he appeared at the time of his arrest. Williams had undergone a substantial weight gain (over 100 pounds) from the time of the juvenile arrest until the time of the instant arrest. (RT 8238-8243, 8254-8257, 10615, 10698-10710.)

Detective Curtis, who interviewed Williams, "didn't have any knowledge. None at all" about the murders on Wheeler Street in California. Williams realized, however, it was possible he had been identified as the shooter because he looked, even though he was heavier, similar to appellant Wheeler. (RT 8246-8250, 12373-12375, 12393-12398, 12412-12414, 12452, 12775-12780, 12791, 12807-12808; Peo. Exh. 3.)

Williams related the following to Detective Curtis: appellant Bryant, appellant Wheeler ("Slimm"), "Don," and codefendant Settle were involved in the August 28, 1988, murders; appellant Bryant was the "boss" of the Organization responsible for the murders; appellant Wheeler ran out of the Wheeler Street house with a shotgun and fired into a red car, breaking the car windows, where a woman and her daughter were shot; and appellant Wheeler did not shoot the boy in the red car. (RT 12780-12782.)

The next day, at the request of Detective Vojtecky, Detective Curtis, who still did not have any knowledge of the facts of the instant case, conducted a tape-recorded interview of Williams. Williams related the following: on April 1, 1988, he went to work at the pool hall under the direction of Nash Newbill; he worked for a Black Guerrilla Family, a large drug organization; he told customers at the pool hall where the drugs were being sold "because every eight hours they [the Organization] would change houses" where the drugs were sold; the Organization gave individuals four or five grams of cocaine in exchange for the use of their house for eight hours and "every eight hours they would switch houses" where the drugs were sold; appellant Bryant was "the chief" of the Organization; the individuals were murdered at the Wheeler Street house on August 28, 1988, at approximately 5:00 p.m., after appellant Bryant ("the chief"), appellant Wheeler, "Don" [appellant Smith],[41] and codefendant Settle

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41. Williams did not know appellant Smith's last name at the time of the interview. (RT 12714-12718.)

arrived; the instructions he received were given to him by appellant Bryant; what he could observe from his vantage point by the kitchen window; appellant Wheeler screamed "Get the fuck out of the car, bitch" as Williams backed the green car into the garage; and he received $2,000 in back pay and another $500 when he got to Harrisburg. When asked if he would testify in a California court and talk with California authorities about what he had related to Detective Curtis, Williams responded, "Yeah, I suppose I'd have to be protected." (RT 12714-12716, 12782-12783, 12808-12812, 12814-12816.)

9. The October 14, 1988, Search Of 11943 Carl Street

On October 14, 1988, a search warrant was executed at 11943 Carl Street.[42/] The premises at Carl Street (see Peo. Exhs. 90-92), like many of the other locations searched, was a "fortified residence in terms of narcotic distribution," with metal bars over the windows and doors and a metal cage surrounding the front door.[43/] SWAT was used to effectuate entry into the premises. Inside the premises, there was a wrought-iron door between the kitchen/dining area and the garage. No one lived at the residence, and it was "sparingly furnished." (RT 9810-9816, 9828, 9835.) The residence was owned by James Settle, Jr., the father of codefendant Settle. (RT 9835, 9922-9925, 10177, 10182, 10186-10187.) Officer Lambert opined that the Carl Street residence had become the new "count house" for the Bryant Organization. (RT 10138-10139, 10173.)

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42. The search of Carl Street did not take place on September 29, 1988, when the collective search warrants were executed at the other locations, because the police did not know about the Carl Street location until they interviewed Williams on October 7, 1988. (RT 13554-13557.)

43. Gas company records reveal the subscriber for the gas service at the location was James Flagg from July 20, 1987, through November 11, 1988. (Peo. Exh. 118; RT 10636.)

The following items were found inside the premises: paperwork in the closet; large Ziploc baggies containing cocaine in the kitchen cabinet; smaller Ziploc baggies used to package cocaine in a cabinet; three empty boxes of baking soda containing Ziploc baggies; an adding machine with tape, a money counter, and slips of paper on a fold-up table in a bedroom; a safe in the closet of a bedroom; and cartons of 600 milliliter Pyrex beakers in the closet of another bedroom. (RT 9831-9834.) Detective Lambert explained that the evidence recovered at Carl Street was indicative of the premises being used in the past for a "rocking" manufacturing procedure (making rock cocaine out of powder). Detective Lambert also noted that the type of narcotics found at the Adelphia location were manufactured in the type of beakers found at Carl Street. (RT 9836-9837.)

Also found in the closet were the financial records (Peo. Exh. 93; see Peo. Exh. 98) of the day-by-day accounting of monies received by the Bryant Organization from the distribution and sale of rock cocaine for the period of June 1, 1988, through August 27, 1988. The records reflect that the income for the three-month period exceeded $1,600,000. According to Detective Lambert, it was significant the records stopped on August 27 -- the day before the quadruple homicide at 11442 Wheeler Street (the "count house" for the Organization). (RT 9816-9820, 9931-9932, 10138-10141, 10161-10167, 11721-11723; see Peo. Exhs. 104, 105.)

Slips of paper (Peo. Exh. 94) with writing, like post-its with notations reflecting narcotic transactions similar to the ones recovered at the Fenton and Adelphia locations, were recovered from the garbage can. The initials on the post-its referred to the individual doing business with the Bryant Organization (i.e., Ladell Player). The notation "R and up" meant a "re-up" or replacing the drugs at the sales location was necessary. A notation for "big house," meant a house where the major amounts of narcotics are located, such as a distribution

location. The documents also reflected the initials of various individuals in the Organization and any draw of money they may have taken. The documents also tracked the "company cars" given to workers. (RT 9820-9822, 9826-9829, 10158-10161; see Peo. Exh. 103.)

Found on the upper shelf of the hallway closet were the following items: a vehicle contract for the purchase of a 1988 Toyota Corolla on September 3, 1988; the documents relating to the trade-in of a 1988 Hyundai; and a receipt from a stationary store dated August 22, 1988, in the name of "Stan" for post-its and rubberbands. (RT 9840-9846, 10143-10146; Peo. Exh. 100.)

Records (Peo. Exh. 100) were also found at the location which included bail receipts obtained by Antonio Johnson for the following family members: Vincent Williams (assault), Daron McConnell (sales of narcotics), Ken Derrico (possession of rock cocaine), Tommy Davis (robbery), Jackie Macon (receiving stolen property), Arlesa Hamilton (sale of narcotics), Donnie Brown (possession of narcotic), and Tyson Jackson (sale of narcotics). (RT 10146-10155.) Utility bills for other residences (i.e., Wheeler Street) and numerous parking ticket notices for vehicles in the names of members of the Bryant Organization were found in the bedroom. Seven blank Western Union money gram applications were found at the location. (RT 10140-10143, 10156-10158; Peo. Exhs. 99, 102.)

Also found on the premises were the following: telephone bills for the Fenton location in the name of Eddie Barber; gas bills for the 11442 Wheeler Street location in the name of Leonard Cooper; a disconnection notice from GTE for the Wheeler Street location in the name of William Settle; a "dealer's ledger" (Peo. Exh. 95) (identical to the one found at the Wheeler Street location) containing initials of individuals connected to the Bryant Organization; a driver's license for Antonio Johnson; a utility bill for 11442 Wheeler Street in the name of Leonard Cooper; a paper containing the word

"Leroy" and the telephone number 734-8574; an automobile repair receipt for a Granada in the name of "Tony"; an automobile repair estimate for a Mercury Monarch in an abbreviated name for Antonio Johnson; and a piece of paper with "900" crossed off and "15,000," a line and then "12,500" with the following writing: "Bond has to be worked over 11 days. April 26, 1988. Pick out. A dollar sign $ on William Thomas Blaylock." Blaylock, a family member, had a nickname of "Binky." (RT 9840-9846, 10146-10155; Peo. Exh. 101.)

10. Anthony Arceneaux

On March 19, 1989, Detective Vojtecky was returning to the Foothill Police Station with partner Bill Coy and Jay Williams. As they drove by an apartment complex just east of Laurel Canyon, Williams asked, "Aren't you guys still looking for Arceneaux?" Arceneaux (Peo. Exh. 122) was a suspect in the case and a fugitive with an outstanding arrest warrant. Williams then said, "That's him standing right back there on the street. You just passed him." Detective Coy made a U-turn, and Arceneaux ran into the apartment complex over a wrought-iron fence after the officers made eye contact with him. Arceneaux was eventually apprehended inside the apartment complex. (RT 10738-10745.)

11. "Yeah, [Tommy] Had To Go"

In 1992, while they were both in county jail, Alonzo Smith had a conversation with appellant Bryant about the fact "Tommy" (Brown/Hull) was dead and that Alonzo had not trusted Tommy because "Tommy scammed." During the conversation, appellant Bryant told Alonzo words to the effect of "yeah, he [Tommy] had to go." (RT 10911-10914, 10916-10917.)

H. Fingerprint Evidence

Frederick Banuelos, a forensic print specialist for the Scientific Investigative Division of the Los Angeles Police Department, who is responsible for the identification and comparison of fingerprints (see RT 13258-13261), proffered the following opinions as to prints found at 11442 Wheeler Street: appellant Bryant's right index fingerprint and middle right ring fingerprint were found on the portable telephone found on the coffee table in the living room; appellant Bryant's left palm print was found on the outside door jam to the rear bathroom; appellant Bryant's right index fingerprint was found on the page of the address book bearing the name "Tommy" (Peo. Exh. 51; RT 13266-13274, 13306-13308); Jay Williams's right thumb print and right palm print were found on the heater closet door in the hallway (RT 13275-13278, 13307-13308); appellant Wheeler's left palm print, left ring fingerprint, and left index fingerprint were found on the hallway closet (RT 13278-13280, 13307-13308); William Settle's left thumb print was found on the outside of the rear bathroom door (RT 13280-13281, 13307-13308); Antonio Johnson's left palm print was found on the outside of the heater door (RT 13282-13283); and fingerprints from Anthony Arceneaux, Antonio Johnson, and Nash Newbill were found on papers recovered from the residence (RT 13283-13287).

Banuelos also proffered the following opinions regarding the prints obtained from the items recovered from 11943 Carl Street: Anthony Arceneaux's left middle fingerprint and left middle ring fingerprint were found on the safe (RT 13287-13288); Antonio Johnson's fingerprints and palm prints were found on the vehicle sales contract (Peo. Exh. 100) where the Hyundai was traded in for the new Toyota Corolla (RT 13292-13294); and the fingerprints of several individuals, including Antonio Johnson, Nash Newbill,

Anthony Arceneaux, Lamont Gillon, and William Settle were found on the Organization's financial records (see Peo. Exhs. 93, 98).

It was stipulated that Andre Armstrong's fingerprints were found on the driver's side of the red Toyota Camry and James Brown's fingerprints were found on the passenger side window of the red Toyota Camry. (RT 13310-13311.)

I. Ballistics

Anthony Paul, a firearms examiner under contract with the Los Angeles Police Department, examined some of the evidence in this case and reached the following conclusions regarding the bullets and shell casings found at 11442 Wheeler Street: the live 12-gauge shotgun round (Peo. Exh. 39A-9) found near the couch in the living room was a Federal 2 3/4" Magnum .00 buckshot shell containing 12 pellets of buck lead which could have been cycled, but not fired, through a shotgun (RT 13157-13162, 13192); the two expended 12-gauge shotgun shell casings or cartridges (Peo. Exh. 39A-10A, 10B) found on the left side of the entrance way were fired from the same pump-action shotgun; the single shot shell expended 12-gauge cartridge casing (Peo. Exh. 39A-11) found against the back wall in the center of the entrance way and the 12-gauge cartridge casing (Peo. Exh. 39A-12) found in the hallway to the right of the entrance way were each fired from a second, pump-action shotgun (a different shotgun than the one which discharged People's Exhibit 39A-10A and 10B); the shotgun casings in People's Exhibit 39A-10B and People's Exhibit 39A-11 were each cycled through a third shotgun, meaning "they were worked through the action of a third shotgun" but not fired from that shotgun; the expended shotgun shell casing (Peo. Exh. 39A-40) recovered from the trash can was fired from a fourth shotgun; and the .45 caliber shell casing (Peo. Exh. 39A-40) found in the trash can with the 12-gauge shotgun shell was fired from the Colt .45 caliber automatic revolver (Peo. Exh. 152) found during the search of

appellant Bryant's residence "to the exclusion of all other" weapons. (RT 13162-13166, 13170-13172, 13175-13177, 13196-13197, 13219-13223.)

Paul also compared the two projectiles (Peo. Exh. 9) recovered from the body of Loretha Anderson with the three projectiles (Peo. Exh. 39A-47 through 49) recovered from the red Toyota Camry and determined that "the caliber is the same, .38, .357" for each and that "the lands and grooves are the same and that microscopic analysis has revealed that they were all fired through the same gun or from the same firearm." (RT 13174, 13192-13193.) Paul noted that, although the compared bullets were typical of, and consistent with, a Colt manufactured weapon, they were not fired from the Colt .45 caliber automatic weapon depicted in People's Exhibit 152 because "that is a different caliber gun all together." (RT 13192-13195.)

The clip of the gun in People's Exhibit 152 contained five rounds of .45 caliber cartridges commonly referred to as jacketed hollow point bullets. The .45 cartridge casing (Peo. Exh. 39A-40) found in the trash can at Wheeler Street, as well as the five rounds in the clip of People's Exhibit 152, were manufactured by the Federal Cartridge Company. (RT 13172-13173.)

J. Telephone Records

The prosecution introduced a considerable amount of evidence relating to the telephone records of several individuals connected with the instant case. (See Peo. Exhs. 138 [GTE records], 142 [Pac Tell Cellular records], 143 [Pacific Bell records]; see also RT 11079, 11086-11118, 11134-11140, 11143-11145, 11171-11184.) In summary, the telephone records reveal the following:

Between January and August 27, 1988, 105 telephone calls were placed from the telephone at appellant Smith's residence on 11100 Strathern Street, apartment 8, to the telephone in the name of Tannis Bryant at appellant Bryant's residence on Judd Street. The last call was placed at 7:16 p.m. on August 27, the day before the murders. Tannis was not living at appellant

Bryant's residence during this period of time. (RT 13455-13458.)

Between January and September of 1988, 134 telephone calls were placed from the two telephones in appellant Bryant's Judd Street residence to the telephone at appellant Smith's residence. The last call in August was placed at 8:52 p.m. on August 27, the night before the murders. The first call in September was placed on September 12. (RT 13458-13460.)[44/]

Following Andre Armstrong's release from prison in July 1988, 30 telephone calls were placed from the telephone at appellant Smith's residence to appellant Bryant's residence, and 24 telephone calls were placed from appellant Bryant's residence to appellant Smith's residence. (RT 13460.)

Following the murders on August 28, 1988, the first telephone call from appellant Bryant's Judd Street residence on the telephone in appellant Bryant's name was on September 9, 1988, at 1:19 a.m. to a telephone subscribed to by Andrew Settle at 11313 Oxnard Street, apartment 313 (a "safe house," where the telephone and utilities records were kept in the name of Andrew Settle but he lived at 11300 Foothill Boulevard, unit 2). (RT 13462-13464.) The last call prior to the murders on the telephone in Tannis's name at appellant Bryant's residence was on August 28, 1988, at 10:41 a.m. to Fratt, Texas. The first call on Tannis's line following the murders was on September 9, 1988, at approximately 1:51 a.m. (approximately 30 minutes following the call on appellant Bryant's line), to a telephone subscribed to by Andrew Settle at 11311 Oxnard, apartment 313. (RT 13464.)

Between January and August 28, 1988, approximately 69 telephone calls were placed from appellant Smith's residence to the residence at 11442 Wheeler Street. The last call was placed on August 28, 1988, at 12:44 a.m.

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44. Following the quadruple homicide, appellant Bryant moved into the "safe house" on Oxnard Street for approximately nine days before returning to his Judd Street residence.

(when appellant Wheeler was working at Wheeler Street). Approximately 107 calls were placed from the Wheeler Street residence to appellant Smith's residence during the same period of time. The last call was placed on August 27, 1988, at 8:39 p.m. (RT 13466-13469.)

Between January and September 1988, approximately 11 telephone calls were placed from appellant Smith's residence to the residence at 11943 Carl Street (the "count house"). The last call in August was on August 27 at 3:34 p.m. Five of the 11 calls were made in September, four of which were made on September 3. (RT 13469-13471.) Approximately 77 telephone calls were placed from Carl Street to appellant Smith's residence between May and August of 1988. The last call prior to the murders was placed to appellant Smith's residence on August 25 at 11:49 a.m. The last recorded telephone call from the residence at Carl Street to any telephone occurred on September 29, 1988 (the date numerous search warrants were executed on various locations, other than Carl Street, in this case). (RT 13471-13474.)

Numerous telephone calls were placed from appellant Wheeler's car or cellular telephone (which was in the name of his girlfriend Tavia Givens). (See RT 11134-11145.) For example, in July 1988, the following calls were made from appellant Wheeler's telephone: eight calls to Tannis's telephone at appellant Bryant's residence; three calls to appellant Bryant's beeper; 33 calls to the Wheeler Street residence; four calls to the two telephones at Neighborhood Billiards; and 13 calls to various "family" members, including Darrell Blaylock, Antonio Johnson, and "M.B." (RT 13474-13476.) In August 1988, the following calls were made from appellant Wheeler's telephone: five calls to Tannis's telephone at appellant Bryant's residence; two calls to appellant Bryant's beeper; 10 calls to the Wheeler Street residence; six calls to Neighborhood Billiards; and five calls to miscellaneous "family" members, including Blaylock and Antonio Johnson. The last call in August to the

Wheeler Street residence was on August 28 at 3:05 p.m. -- less than two hours before the murders. (RT 13476-13477.) In September 1988, the following calls were made from appellant Wheeler's telephone: four calls to Neighborhood Billiards on September 1 (the date the bodies of Armstrong and Brown were found at Lopez Canyon); one call to appellant Bryant's beeper number on September 8 at 2:46 a.m.; and 17 calls to various "family" members, including William Settle, Blaylock, and Antonio Johnson. (RT 13477-13480.)

Five weeks before the murders, on July 21, 1988, Andre Armstrong was released from prison in St Louis. At 11:20 a.m., a three-minute telephone call was made from appellant Bryant's residence to Delores Brown, Armstrong's mother. At 11:22 a.m., a telephone call was placed from appellant Bryant's residence to appellant Smith's residence. Both calls were made on Tannis's line at appellant Bryant's residence. At 2:21 p.m., a telephone call was placed from appellant Bryant's residence on Tannis's line to Delores Brown, and at 2:48 p.m. another call was placed to Delores Brown. At 2:49 p.m., an 11-minute telephone call was placed from Tannis's line at appellant Bryant's residence to Armstrong's sister Deborah Armstrong in St. Louis; at 6:26 p.m., a one-minute call was placed from the Wheeler Street house to Deborah Armstrong's house; and at 7:43 p.m., a seven-minute call was placed from Tannis's line at appellant Bryant's residence to Deborah Armstrong's house. (RT 13480-13481, 13484-13486.)

The next day, July 22, 1988, Deborah Armstrong picked up a Western Union money order from Antonio Johnson for $1,000. (RT 13486.) On July 23, 1988, at 9:46 p.m., a collect call was made from Vangie Armstrong's (Armstrong's sister) residence in St. Louis to appellant Smith's residence. At 4:43 p.m., a six-minute collect call was made from Deborah Armstrong to appellant Smith. (RT 13487-13488.)

On August 1, 1988, a one-minute telephone call was made from appellant Smith's residence to the home of Andre Armstrong's mother in St. Louis. On August 3, three calls (6 minutes, 17 minutes, and 45 minutes) were placed from appellant Smith's residence to the residence at 1049 Del Monte in Salinas (where Brown, Armstrong, and Greer resided). Also, on August 3, Brown received an $800 Western Union money order from Antonio Johnson. (RT 13488-13489.) On August 11, two telephone calls (one at 12:16 p.m. for three minutes and another at 12:59 p.m. for 14 minutes) were placed from appellant Smith's residence to the Del Monte residence in Salinas. (RT 13489.)

Telephone calls on August 26, 1988, reflect the following: a call at 9:24 a.m. from Tannis's line at appellant Bryant's residence to appellant Smith's residence; a call at 6:26 p.m. from appellant Smith's residence to appellant Bryant's residence; and calls at 9:17 p.m. and 9:59 p.m. from the residence on Wheeler Street to appellant Smith's residence. (RT 13490.)

Telephone calls on August 27, 1988, reflect the following: calls at 6:57 a.m., 10:38 a.m., and 7:16 p.m. from appellant Bryant's residence to appellant Smith's residence; and a call at 8:39 p.m. from the Wheeler Street residence to appellant Smith. (RT 13491.) On August 28, 1988, a call was placed at 12:44 a.m. from appellant Smith's residence to the Wheeler Street residence. (RT 13491-13492.)

From 5:55 p.m. on August 28, 1988, through the next 16 hours, approximately 90 telephone calls were made from the telephone registered to Andrew Settle at 11313 Oxnard Street, apartment 313 (the "safe house"), where appellant Bryant moved into after the murders. These calls included: six calls to Wilbert Babineaux's (appellant Smith's father-in-law) residence on Kismet; nine calls to Neighborhood Billiards; six calls to apartment 202 at 13850 Foothill Boulevard (the residence of appellant Wheeler and Tavia Givens); two calls to 12843 Ralston (the residence of codefendant Settle); one call to the

Fenton Street house (the "slip house"); two calls to the house on Carl Street; two calls to the house on Adelphia Street; four calls to "T.J." (Tony Johnson); five calls to "Will"; and three calls to 13037 Louvre. (RT 13492-13498.)

On September 25, 1988, at approximately 9:00 p.m., Detective Saurman called a number on the pager list for the initials "S.L." The call was returned from the residence of Tavia Givens's mother at approximately 9:00 p.m. At 9:07 p.m., three minutes after the conclusion of the return call, two calls were placed from the telephone at Tavia Givens's mother's residence to appellant Bryant's beeper number. At 9:08 p.m., a three-minute call was placed from the residence of Givens's mother to the residence on Carl Street. (RT 13498-13500.) The telephone records of appellant Wheeler's grandmother reflected no calls made to Detective Saurman on September 25, 1988, at approximately 9:00 p.m. In fact, her telephone records revealed a 27-minute call, which commenced at 8:51 p.m., to an unrelated number in the San Fernando Valley. (RT 13500-13502.)

K. Handwriting Evidence

Appellants Bryant and Wheeler each refused to provide a handwriting exemplar for comparison with documents in this case. (RT 13023.)

Bruce Greenwood, a forensic document examiner employed by the Los Angeles County District Attorney's Office, examined various documents and reached the following conclusions: (1) the person who wrote "Slimm" in appellant Wheeler's address book is the same person who wrote "Slimm" on recovered post-it receipts; (2) the person who wrote "Slimm" on the 90-minute schedule is the same "Slimm" referred to in appellant Wheeler's address book and the post-its; (3) the person who signed appellant Bryant's driver's license is the same person whose handwriting appears on money order transfers to Alonzo Smith and Brown; and (4) paperwork recovered from the body of Brown bore the handwriting of the same person whose handwriting appeared

on the two money order transfers to Alonzo Smith and Brown. (RT 13024-13041.)

II. DEFENSE EVIDENCE

A. Appellant Smith

Appellant Smith did not present a defense. (RT 13910-13911.)

B. Codefendant Settle

Through various friends and family members, as well as his own testimony, codefendant Settle established the following: he lived on Ralston Street and used his house to work as a car mechanic where he purchased, repaired, and resold used cars; he was usually home on the weekends so he could receive telephone calls from prospective buyers; he did not sell cocaine; he leased the house on Vanport in June 1988 to his brother William Settle for $100 per day for the use and sale of narcotics; and he did not personally use the Vanport house to sell cocaine. (RT 14614-14615, 14628-14635, 14680-14681, 14685, 14698-14699, 14701-14704, 14714, 14725, 14771-14772, 14811-14812; see also RT 14609-14610, 15532-15538, 15592-15594, 15597-15598.)

Codefendant Settle also testified on his own behalf and denied any involvement in the murders. Codefendant Settle maintained he never worked for the Bryants, had never been to the Wheeler Street house, and did not know who ran "The Family." (RT 15552-15553, 15614-15615, 15623-15624, 15641-15642, 15726-15727.)

Codefendant Settle maintained that he worked on cars at his house on Ralston Street. He sold four to six cars a month and was always at home on the weekends. Codefendant Settle denied having any involvement in the sale of narcotics. (RT 15537-15539, 15619, 15641-15642.)

On August 28, 1988, at approximately 3:00 or 3:15 p.m., while at his Ralston Street home, codefendant Settle received a telephone call from appellant Bryant who asked if he (codefendant Settle) could do a brake job on a red Toyota, license number 245AYC (see Peo. Exh. 163), which was a "company" car. Appellant Bryant also inquired of codefendant Settle as to what type of old, big cars he had available and, sight unseen, agreed to purchase for $900 a green 1970 Pontiac Bonneville (which codefendant Settle had acquired three weeks earlier from Goodwill Motors). Approximately 15 minutes later, Frank Settle, codefendant Settle's brother who was involved in drug activity with appellant Bryant, arrived at codefendant Settle's home with the red Toyota. Frank Settle took the green 1970 Pontiac and left the Toyota. Codefendant Settle fixed the brakes on the Toyota in about an hour. Shortly thereafter, Frank Settle and appellant Wheeler arrived at codefendant Settle's house in a red Jeep. Appellant Wheeler was driving. Frank Settle and appellant Wheeler picked up the red Toyota and gave codefendant Settle $1,000 ($900 for the Pontiac and $100 for the brake job). Frank Settle left driving the red Toyota. (RT 15537-15541, 15544, 15552-15559, 15562, 15569-15570, 15588-15589, 15600-15602, 15614-15617, 15624-15628, 15730-15731.)

Codefendant Settle had never been to the house on Wheeler Street. His brother Frank, who was involved in narcotic activity with appellant Bryant, owned the house on Carl Street. Frank told codefendant Settle that the old green Pontiac he (codefendant Settle) had sold appellant Bryant was the one used in the murders. Frank also told codefendant Settle that his (Frank's) role was to remove the machines from Wheeler Street to Carl Street during the day of August 28, 1988, before the murders were committed later that afternoon. (RT 15544, 15572-15583, 15691-15692, 15714.)

Codefendant Settle acknowledged he used to live at the home of his brother William Settle on Corcoran Street while William Settle rented codefendant Settle's house on Vanport for $100 per day to sell drugs. Codefendant Settle eventually moved out of the house on Corcoran Street in 1986 and moved into the house on Ralston Street. Codefendant Settle explained that William Settle was the bookkeeper of the Bryant Organization. Codefendant Settle knew that William Settle was involved in "illegal stuff," but he did not know the extent of it. (RT 14609-14610, 15532-15538, 15592-15594, 15597-15598; see RT 14627-14629.)

Codefendant Settle also presented several witnesses to substantiate his defense and the nature of his relationship with his brother William Settle. (See RT 14527-15541, 14572-14578, 14585-14587, 14611-14617, 14626-14635, 14680-14683, 14723-14739, 14809-14814.)

C. Appellant Wheeler

Appellant Wheeler, who was 19 years old at the time of the murders, testified on his own behalf and denied any involvement in the murders. (See RT 13912.)

Appellant Wheeler maintained he was only in the Pacoima/Lake View Terrace area for a brief period of time while in junior high school and living with his mother's sister. From the summer of 1983 through the summer of 1984, appellant Wheeler lived with his grandmother in South Central, Los Angeles. Upon his release from custody in November 1987, appellant Wheeler returned to live with his grandmother. Appellant Wheeler denied selling drugs from the Teresa apartments in 1986. He claimed he was never in the Pacoima area from October 1985 through November 1987. (RT 13912-13917.)

After appellant Wheeler's mother died in February 1988, appellant Wheeler worked for the segment of the Bryant drug organization operated by Eddie Barber. Appellant Wheeler had met Barber through a friend who purchased drugs from Barber. Barber took appellant Wheeler "under his wing." Appellant Wheeler did not work for appellant Bryant, Jeff Bryant, and/or Jay Williams; rather, he worked as a member of Barber's "crew." Appellant Wheeler described the drug operation as follows: "this [drug] organization was set up, it was like one big circle with a whole bunch of little bitty circles inside of it." Jeff Bryant controlled the "big circle," while Barber and others, including Williams ("Jay Baby"), operated "little circles" within the drug organization. (RT 13915-13922, 13924-13925, 14111-14114.)

Barber provided appellant Wheeler an apartment on Foothill Boulevard in Sylmar. Appellant Wheeler sold drugs with Barber and made "quite a bit of money." Appellant Wheeler made about $8,000 per month and saved $75,000 by the time of his arrest in September 1988. Appellant Wheeler credited his success in dealing narcotics to "hard work." (RT 13927-13931, 14011-14012, 14017, 14294-14296.)

Eventually, in late May or early June 1988, appellant Wheeler, at the direction of Barber, commenced work at the Wheeler Street house as a money counter. The Wheeler Street house was operated by "Jay Baby" (Williams), who was the "boss" of the house and also the "enforcer" of the Organization who "would enforce the law of the organization." As noted by appellant Wheeler, "Like if somebody needed to be dealt with, [Williams] would deal with it. If someone was to get fired, [Williams] would fire you, and if [Williams] fires you, you're not coming back." The Wheeler Street operation was Williams's "whole set up." Williams, who "was all business," showed appellant Wheeler how to count the money and what to do in case the police

raided the house.[45] Appellant Wheeler worked the 11:00 p.m. to 7:00 a.m. shift and made $500 a week. Williams, who was paid $1,500 a week, worked the 7:00 a.m. to 3:00 p.m. shift, because it was the busiest shift and because it was Williams's operation. Appellant Wheeler took the job for $500 a week, because "it was constant money" and sometimes he did not make any money from selling drugs. (RT 13927-13937, 13984-13987, 14240-14241, 14301-14302.)

On the evening of August 27, 1988, appellant Wheeler arrived at the Wheeler Street house to commence his shift at 11:00 p.m. At the conclusion of his shift at 7:00 a.m. on August 28, appellant Wheeler drove a company car (see Peo. Exh. 163 [license number 245AYC]) to the pool hall, picked up "Jay Baby" (Williams) who was going to work the 7:00 a.m. to 3:00 p.m. shift, and was then dropped off by Williams at appellant Wheeler's Foothill Boulevard apartment. Williams returned to the Wheeler Street house. Appellant Wheeler drove his Audi back to the pool hall so he could work his 90-minute shift from 9:00 to 10:30 a.m. Thereafter, appellant Wheeler left the pool hall, returned to his Foothill Boulevard apartment, picked up his girlfriend Tavia, and proceeded with her in his Audi to her mother's home on LaSalle so they could spend the day with their families (appellant Wheeler's mother's home was next door to the home of Tavia's mother). Shortly after 3:00 p.m., appellant Wheeler received a page from the Wheeler Street house. When he returned the call, "Jay Baby" (Williams) told him *not* to come to work that evening. Later, at approximately 10:45 p.m., appellant Wheeler received another page from Williams. When appellant Wheeler returned the call, Williams again told him to make sure he did not come to work that evening. (RT 13933-13935,

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45. Appellant Wheeler maintained that Williams's mother used to sell narcotics and that Williams, who had his own employees, negotiated his way into the Bryant Organization. (RT 13932-13933, 13986.)

13941-13945, 13954-13955, 14244-14250.)

The next morning, appellant Wheeler, unaware of the murders which had occurred the previous day at the Wheeler Street house, traveled to San Diego to visit Jeff Bryant, who was incarcerated in Donovan State Prison. Appellant Wheeler, on occasion, acted as a messenger for Barber and took Jeff Bryant messages. The purpose of this visit was to discuss various aspects of the operation with Jeff Bryant. While at the prison, appellant Wheeler heard about the murders for the first time from appellant Bryant, whom he did not expect to see at the prison. Appellant Bryant said he had heard on the news that there had been a shooting at the Wheeler Street house. Appellant Bryant asked appellant Wheeler if he knew anything about it, and appellant Wheeler said, "no." When he returned to Los Angeles, appellant Wheeler obtained newspaper articles about the shooting and kept the articles for "no particular reason, but I had told Jay Baby [Williams] that I was going to send it to him." (RT 13937-13939, 13958-13960, 13997-14000, 14026-14028.)

Thereafter, appellant Wheeler went on a one-week vacation. Upon his return, he started work at the Carl Street house for $1,000 per week. In the absence of Williams, the operation at Carl Street was "lackadaisical" and "we basically could do what we wanted to do" because Williams, the "enforcer," was not present. Occasionally, Williams called appellant Wheeler at the Carl Street house. Williams never complained about being misidentified. (RT 13961-13965, 14296-14297.)

On September 25, 1988, while at Tavia's house, appellant Wheeler received a page. When he returned the page, appellant Wheeler spoke to Police Officer Bob Saurman, who asked if appellant Wheeler would come to the police station. Appellant Wheeler agreed. Appellant Wheeler paged appellant Bryant and asked him to arrange for bail. Tavia drove appellant Wheeler to the police station, and appellant Wheeler gave the police permission to search his

apartment because he had nothing to hide. Appellant Wheeler also told Tavia to tell the police whatever she knew, because appellant Wheeler had nothing to hide: "Because I did not commit these murders and I don't have anything to hide and I want you guys to know the truth." After he was arrested, appellant Wheeler contacted Eddie Barber and asked him to arrange for an attorney. (RT 13922-13924, 13943-13945, 13968-13969, 13973-13974.)[46]

Appellant Wheeler denied any involvement in the murders. He explained that, had he committed the murders, he would not have gone to see Jeff Bryant in prison on August 29 because that would have jeopardized Jeff Bryant who liked to keep "buffers" between himself and the Organization. Appellant Wheeler explained that, had he been involved in the murders and then visited Jeff Bryant the next day, "I probably wouldn't be living today. That means that would have jeopardized Jeff by going to see him." Appellant Wheeler took the one-week vacation following the August 28 incident because there was no reason for him to change his normal behavior because he did nothing wrong. As noted by appellant Wheeler, if he had been involved in the murders, he "wouldn't be sitting here right now because I would have fled like Jay Baby [Williams], I would have left the country." (RT 13960-13963, 13973-13974, 14021, 14301-14302.)

The first time appellant Wheeler saw codefendant Settle relative to this case was in the courtroom. Appellant Wheeler knew some of codefendant Settle's brothers, including William Settle who used to come to the Wheeler Street house, count money, and act "like the accountant." Appellant Wheeler explained that William Settle had a lot of power in the Organization because "he had a lot of control over the money, over the money situation." After Williams left, William Settle paid the employees. (RT 13937-13941, 14296-

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46. At the time of his arrest, appellant Wheeler was 6 feet, 2 inches tall and weighed approximately 185 pounds. (RT 13973.)

14297.)

Tavia Wheeler also testified on appellant Wheeler's behalf. On the evening of September 25, 1988, unaware of the murders, Tavia drove appellant Wheeler to the police station in her Jeep. Appellant Wheeler told Tavia there was some money ($7,000) in the apartment, but he did not say where the money was located. After dropping off appellant Wheeler at the police station, Tavia returned to the Foothill Boulevard apartment and looked for the money but could not find it. Several hours later, the police arrived and stated appellant Wheeler had consented to the search of the apartment. Although the police did not find the money they were looking for, they did find $1,000 in Tavia's purse. At the police station, appellant Wheeler asked Tavia if the police had found the money ($7,000) and she responded, "No." Later, the police searched the apartment again and found the money. (RT 14336-14340, 14344-14346, 14360-14364.) Tavia did not know why she asked appellant Wheeler at the police station if she still had to move. (RT 14371-14372.)

While in custody, various visitors, including Jeff Bryant, gave appellant Wheeler small amounts of money for incidentals. According to appellant Wheeler, Jeff Bryant would not have visited him if he (appellant Wheeler) was involved in the murders because such a visit would have jeopardized Jeff Bryant. (RT 14290-14291.)

Appellant Wheeler also explained that the photograph depicting him with a crown on his head with money was the $2,500 that members of his "crew" had given him on his 19th birthday. (RT 13925-13926, 14009, 14126-14127.)

D. Appellant Bryant

Appellant Bryant testified on his own behalf and denied any involvement in the August 28, 1988, murders. Appellant Bryant maintained he was not at the Wheeler Street house on August 28, 1988. The last time he was

at the Wheeler Street house was the previous day on August 27, and all he did was count money. Appellant Bryant denied making any arrangements to meet Armstrong on August 28 at 4:00 p.m. at the Wheeler Street house. Appellant Bryant claimed he first heard about the murders on the Channel 7 Eyewitness News at 11:00 p.m. on August 28. Appellant Bryant maintained that he spent most of the day of August 28 at his home. He may have gone to his mother's house and his girlfriend's house to water her plants, since she was out of town, but he was not at the Wheeler Street house on August 28. However, appellant Bryant acknowledged he was at the Wheeler Street house *every* day from January 1, 1988 through August 27, 1988. (RT 15165-15167, 15169-15171, 15180-15182, 15205-15207, 15222-15223, 15321, 15331, 15350, 15450-15452, 15459-15460, 15489-15490.)

Appellant Bryant, who was involved in narcotic activity from 1982 through 1988, worked for his brother Jeff Bryant, who ran the narcotic distribution organization. Nobody worked for appellant Bryant. When Jeff Bryant was arrested in September 1985, the Organization was in debt so William Settle took control of the operation in September 1985 through August 1988. Appellant Bryant explained that, from 1986 through 1988, William Settle was paying him about $1,500 per week for the use of the pool hall so William Settle could sell narcotics. In August 1988, William Settle, according to appellant Bryant, ran the Wheeler Street house as a narcotic house, as well as the pool hall, and that everything centered around the Wheeler Street house. (RT 15165-15176, 15179, 15219-15223, 15226-15228, 15263-15266, 15291, 15322-15325, 15352-15354.)

Appellant Bryant denied he had anything to do with the murder of Kenneth Gentry or the attempted murder of Keith Curry. (RT 15161-15165, 15261.) Appellant Bryant denied any knowledge of "a family." (RT 15169-15171.)

III. REBUTTAL EVIDENCE

On August 28, 1988, the day of the murders, Michelle Kelly, the girlfriend of Jeff Bryant, resided at Jeff Bryant's residence at 13239 Desmond Street in Pacoima. She did not receive any telephone calls following the murders and had no explanation for why various telephone calls were, in fact, placed to the Desmond residence following the murders. (RT 15873, 15875-15877, 15879-15881, 15896-15904.)

When Detective Vojtecky first interviewed Williams in Pennsylvania, appellants Bryant and Wheeler were already under arrest for the murders. Williams related the following during the first interview: he did not have a telephone in his residence at the time of the murders; he wanted protection from appellant Bryant, not William Settle; he assumed two dead bodies were put in the trunk of the green car parked in the garage; he thought appellant Wheeler arrived at the Wheeler Street residence "possibly" between 2:30 and 3:00 p.m. on the afternoon of the murders; he believed the shots he heard from the back of the Wheeler Street residence prior to the murders came from a .45 caliber revolver; and the name "James Flagg" was a "strawman name" used by the Bryant Organization. (RT 15757-15760, 15766-15768, 15771-15772, 15779-15781, 15921.) Detective Vojtecky also testified to the following: evidence was found in the back bedroom of the Wheeler Street residence of a .12 gauge shotgun having been fired, not a .45 caliber handgun; Williams had "nothing of great value" in his possession or anything to indicate he was "running a dope operation from the Wheeler Street house" at the time he relocated; and appellant Bryant refused to provide a handwriting sample on May 14, 1991. (RT 15768-15771, 15921.)

Detective Vojtecky also testified that, on August 6, 1991, he and Deputy District Attorney Janice Maurizi interviewed codefendant Settle following his arrest by Detective Hughley. An audiotape (Peo. Exh. 217) of a portion of the

interview was played for the jury. During the interview, codefendant Settle refused to provide the address of his current residence or any of his residences during the last 15 years. Codefendant Settle denied he ever sold or used narcotics. (RT 16052-16054, 16110-16111.) David Harris, a narcotic user, testified that, on April 27, 1987, he purchased narcotics from codefendant Settle at 11516 Vanport. (RT 16042-16047.)

Detective Walter Hampton interviewed Renard Tillman on June 30, 1992, at the Foothill Police Station. Tillman related he used to live with codefendant Settle and that Settle purchased narcotics from the Bryant Organization. He identified photographs of Eddie Barber and appellant Wheeler from a photo album of 170 photos as individuals involved in "dealing dope" for the Bryants and indicated that appellant Wheeler had "heavy involvement" with the Bryants. Tillman also stated that Jeff Bryant was running the narcotic organization at the time of the interview (June 30, 1992) "because Stan [appellant Bryant] was in jail." (RT 15805-15808, 15813-15816.)

Detective Robert Saurman testified that, on September 26, 1988, he interviewed Tavia Givens at the Foothill Police Station. Givens described appellant Wheeler's activities for the previous day (Sunday, September 25) as follows: when Givens awoke at 10:00 a.m., appellant Wheeler was getting dressed inside their apartment at 13950 Foothill Boulevard; shortly thereafter, appellant Wheeler left the apartment and returned approximately one hour later and engaged in a conversation with Givens; appellant Wheeler then left the apartment again for approximately one hour and returned to the apartment; Givens left appellant Wheeler inside the apartment at approximately 12:30 p.m.; and Givens called the apartment at approximately 5:30 or 5:40 p.m. and spoke with appellant Wheeler who asked Givens to pick him up at approximately 8:30 p.m. at his mother's house in downtown Los Angeles where he was going to

drop off his car. (RT 15957-15959.)

Detective Saurman also testified that a .357 caliber Magnum handgun was recovered from the Foothill Boulevard apartment. Givens stated that appellant Wheeler had the .357 handgun for "about two months." Givens also stated appellant Wheeler owned a second handgun, but it was not recovered. The money recovered from the Foothill Boulevard apartment was found in a hole in the ceiling adjacent to the water heater vent. (RT 15959-15961.)

FACTS PRESENTED AT THE PENALTY PHASE

I. PROSECUTION EVIDENCE

A. Aggravating Evidence Presented Against Appellant Bryant

1. Appellant Bryant Hires David Hodnett To Kill Clarence Johnson

Appellant Bryant hired David Hodnett to kill Clarence Johnson. Hodnett received $3,500, as well as $16,000 while in prison, for "the hit" from appellant Bryant. The shooting took place on the evening of March 19, 1985, in the dirt parking lot on the east side of Neighborhood Billiards after Johnson climbed into appellant Bryant's pickup truck. Two weapons were used in the shooting, and a total of 11 shots were fired at Johnson. A bullet-ridden Johnson drove the pickup truck to the Foothill Police Station. (RT 17663-17677, 17682-17683; see RT 17618-17628.)

At approximately 10:30 p.m. that evening, Los Angeles Police Officer Robert A. Sorrentino was sitting at the front desk at the Foothill Police Station when he heard, for "about a minute," the honking of a car horn from the street. After Officer Sorrentino walked outside, he saw an older blue pickup truck parked on the wrong side of the street at an angle with the back of the pickup truck blocking the traffic lane. Officer Sorrentino also heard a "real weak

voice" from inside the pickup truck state, "Help me. Help me. I've been shot." Officer Sorrentino approached the pickup truck and noticed a bullet hole in the driver's door and a "gouge" towards the front of the door by the hinge area. The glass on the driver's side of the pickup truck "had been blown out" and the driver, Clarence Johnson, had "glass fragments all over his lap." Johnson suffered six bullet wounds: two in the left upper arm, one in the left calf, one in the lower left back, and two in the upper right back. Johnson was transported by paramedics to the hospital for treatment. Johnson did not die as a result of the shooting. (RT 17653-17658, 17661, 17675-17676.)

Although there was an "arrangement" where Hodnett would identify Jeff Bryant and appellant Bryant during his testimony at the preliminary hearing as the individuals who hired him to kill Johnson, Hodnett abruptly changed his mind during the hearing and pleaded guilty. Hodnett told Detective Vojtecky that he just got out of prison and would rather return to prison than "jeopardize his life or his family's life." Hodnett related that he would never testify against the Bryants because, if he did, "he would be a dead man." Hodnett explained that, if he testified against the Bryants, "he would either be killed or any member of his family would be killed if they couldn't get at him." After learning that Alonzo Smith testified in the instant case, Hodnett said, "If you see Doug [Alonzo Smith], you tell him because of my love for his family and for him I will not kill him. Would you also tell him if you don't lock him down in prison and secure him, you tell him to carry two knives because he's a dead man. And tell him never to approach me on the street when he gets out. We don't know each other anymore." (RT 17678-17682, 17685-17686.)

2. Appellant Bryant Hires Walter Compton To Kill Sofinia Newsom

Near the end of November 1983, appellant Bryant hired Walter Compton, a former high school friend and drug associate, to kill Sofinia

Newsom, an eyewitness to the Kenneth Gentry murder, in exchange for $10,000. Appellant Bryant told Compton that Gentry had been killed because Gentry was upset about some drugs Gentry had purchased. Appellant Bryant, after telling Compton who had killed Gentry, asked Compton to kill Newsom "because she was running off at the mouth with the police about the Gentry murder." After the meeting with appellant Bryant, Compton met Jeff Bryant at the pool hall. Jeff Bryant gave Compton a nine millimeter revolver to kill Newsom. Jeff Bryant also showed Compton a stolen car parked on Weidner Street near Newsom's apartment which Compton could use as a "getaway" car following the murder. (RT 17584-17591, 17594-17595.)

Over the next several days, Compton watched Newsom "for what would be a good chance where I might be able to kill her." After a couple of days, Compton followed Newsom to the Pierce Street apartments but "had a change of heart" about killing her. Compton was "really scared" and realized he could go to jail. He was also "afraid that maybe if I did [the killing], they would probably kill me." Compton approached a police car in the parking lot of the Pierce Street apartments and showed the police officer the nine millimeter revolver. Compton was arrested. Compton turned himself over to the police, rather than committing the murder, because "it'd be the most wise sort of thing. It's one way of getting out of it." (RT 17591-17595, 17602-17603.)

B. Aggravating Evidence Presented Against Appellant Wheeler

1. Attempted Robbery Of Chris Castillo

It was stipulated that the time appellant Wheeler spent in a juvenile custodial setting from March 14, 1985, through October 27, 1987, was the result of an attempted robbery of Chris Castillo. (RT 17299.)

2. Appellant Wheeler Attacks Inmate Brock

On January 7, 1987, appellant Wheeler, while attending a computer science class at the El Paseo De Robles Juvenile Custody Facility, picked up a chair with four metal legs, approached inmate Kingsley Brock, who was sitting with his back to appellant Wheeler, and, without provocation, "swung the chair" in a manner which "could have caused serious injury" to Brock. After appellant Wheeler swung the chair at Brock, the two wards "mostly wrestled. They were both on the floor. They were grappling with each other." (RT 17306-17314, 17319; see RT 17250-17256.)

3. Appellant Wheeler Assaults Brian Brown With A Deadly Weapon

On September 24, 1988, at approximately 10:45 p.m., following a football game at Kennedy High School, appellant Wheeler committed an assault with a deadly weapon on Brian Brown outside a Tommy's Burgers. Appellant Wheeler and Brown got into a verbal disagreement. Appellant Wheeler told Brown, "You don't know who I am" and Brown responded, "I don't give a . . . ." At that point, appellant Wheeler pulled out a gun, waved the gun around, pointed it at Brown's head for three or four seconds, and then jumped into his Audi and left the area. (RT 17384-17392, 17397-17400.)

4. Appellant Wheeler Pleads Guilty To Possessing A Weapon In Jail

On June 1, 1989, at approximately 6:20 p.m., Deputy Sheriff Gregg Hopping, assigned to the county jail, conducted a random search of appellant Wheeler, who was a "trustee," after appellant Wheeler had entered the row to sweep the floor. Deputy Hopping found a "shank" secreted in appellant Wheeler's crotch area between two pairs of underwear. The shank was a metal object approximately four inches in length sharpened to a point at one end and

wrapped with a piece of tape at the other end. The shank was the type of weapon which could have inflicted serious injury on another inmate or deputy. (RT 17366-17369.) Appellant Wheeler pleaded guilty to possessing a weapon in jail as a result of this incident. (RT 17295-17296, 17299-17300.)

5. Appellant Wheeler Attacks Inmate Turner

On November 4, 1989, at approximately 10:50 p.m., appellant Wheeler attacked inmate Keith Turner on 2500-A Row of the county jail after Turner attempted to change the station on the television without first seeking appellant Wheeler's permission. Appellant Wheeler got angry and struck Turner several times in the head and kicked him several times on the body. Even though Turner fell to the ground in a fetal position and placed his hands over his face and head, appellant Wheeler continued to hit him. After deputy sheriffs broke up the fight, Turner was escorted to a medical facility for treatment, and appellant Wheeler was transported to a disciplinary module. While the inmates were being transported, appellant Wheeler broke free of the deputies holding him and began hitting Turner again in the head and body. (RT 17369-17372, 17379-17381.)

6. Appellant Wheeler Attacks Inmate Contreras

On March 13, 1991, at approximately 9:00 p.m., appellant Wheeler, a "trustee" who had a "store" (items for sale), asked inmate Andre Contreras how much Contreras would charge him for pastries Contreras possessed. Contreras responded, " For you, $2.50." Appellant Wheeler got mad and told Contreras "he would deal with it later." Contreras went to his cell. Thereafter, appellant Wheeler, armed with a broom and another inmate arrived at Contreras's cell. While Contreras was standing outside the cell waiting to enter, appellant Wheeler came towards him with the broom and engaged in a fight with him. (RT 17404-17414, 17421-17422.)

7. Appellant Wheeler Attacks Inmate Wright

On October 10, 1991, at approximately 8:50 p.m., appellant Wheeler attacked inmate Richard Wright following a "jailhouse argument" "over nothing." During the argument, appellant Wheeler made comments about Wright's mother. Wright told appellant Wheeler that his mother was dead and that he should "drop it." The next day, appellant Wheeler told Wright "he was gonna rip my face off" for talking back to him. Appellant Wheeler hit Wright as Wright was leaning against the outside of his cell. Even though Wright fell to the ground and placed his hands over his eyes, appellant Wheeler continued to hit and kick Wright several times in the head with his foot. Appellant Wheeler pulled down Wright's pants and told him he was going to "fuck [him] in [the] ass." Wright "screamed [his] head off" and guards responded to his cell. Wright was found huddled in the corner of his cell with his pants pulled down to his thighs. Wright was bleeding and had bruises and scratches on his body. (RT 17322-17333, 17345-17347.)

8. Appellant Wheeler Attacks Inmate Smith

On February 15, 1992, at approximately 10:20 p.m., appellant Wheeler attacked inmate Tyrone Smith with a deadly weapon. Smith was locked in his cell as a result of a lock-down. Appellant Wheeler, a trustee who was not subject to the lockdown, was on the row outside Smith's cell playing cards with Smith. Appellant Wheeler became angry during the game because he was losing. Appellant Wheeler ripped up the score sheet, tossed it out onto the tier, and walked away after exchanging words with Smith. Appellant Wheeler returned shortly thereafter with a big plastic bucket of bleach and water. Appellant Wheeler threw the water and bleach into Smith's cell. Smith then threw "some piss" on appellant Wheeler and "spit a loogie on him." Appellant Wheeler then walked to the end of the row and talked with the guards about

cleaning up the mess in Smith's cell. About 10 minutes later, the door to Smith's cell "popped open," and appellant Wheeler was standing there with a mop. Wheeler dropped the mop and said "something about he was going to kill me." Appellant Wheeler started fighting with Smith. (RT 17212-17222, 17224-17225, 17289-17290.)

When Deputy Sheriff Erik Lewis responded to Smith's cell, he saw appellant Wheeler and Smith in the open door of Smith's cell. The two inmates "appeared to be fighting, rolling on the ground, one on top of the other." Deputy Lewis yelled at the inmates to stop fighting, but they did not. When Deputy Lewis pulled appellant Wheeler off Smith, he realized appellant Wheeler was stabbing Smith with a shank or knife (see Peo. Exh. 218). Appellant Wheeler followed Smith as Smith crawled out of the cell. Appellant Wheeler collided with Deputy James Johnson in the row and took a "swipe" at him with the shank. The shank hit and cut the inside of Deputy Johnson's right forearm. Deputy Lewis then struck appellant Wheeler in the back of his head with a flashlight. Appellant Wheeler turned toward Deputy Lewis, who was in a position such that he could not exit the row without going by appellant Wheeler. Appellant Wheeler took a "defensive posture" in the middle of the row. Deputies yelled at appellant Wheeler to put down the shank, but he refused. Appellant Wheeler told Deputy Lewis "Go by, deputy." Appellant Wheeler and Deputy Lewis were in a "standoff" for about five minutes. Appellant Wheeler eventually put down the shank after a deputy arrived at the scene with a taser gun. After appellant Wheeler was handcuffed, he tried to dispose of a blood-stained latex glove from his right hand. (RT 17222-17223, 17262-17265, 17267-17268, 17275-17280, 17290-17292, 17296-17297.)

Smith was stabbed in the area of the rib cage, several times in the upper arm, and "something went through my lung and half inch from my heart." Smith spent approximately 18 hours in the emergency room for treatment of his

injuries. He was also hospitalized for approximately two weeks as a result of the attack. Appellant Wheeler was not injured during the incident. (RT 17223-17224, 17239-17241, 17272.)

C. Aggravating Evidence Presented Against Appellant Smith

1. Appellant Smith's 1982 Burglary Conviction Of The Lubell Residence

On July 30, 1982, at approximately noon, Roselyn Lubell, age 60, left her home at 8735 Cedros Avenue, Panorama City. The premises were locked when she left. When Lubell returned to her house at around 5:20 p.m, she and her mother were dropped off in front of the residence by Hazel Cohen, Lubell's daughter. While Cohen went to park the car, Lubell and her mother entered the premises. Lubell noticed the door, which had been closed when she left, was ajar. After placing her pocketbook on the dining room table, Lubell noticed her bedroom door was closed. As she went to open the bedroom door, the door swung open, and she saw a man. The next thing Lubell recalled was being seated on the couch in her living room "and there was a lot of people in the house and my head was bleeding profusely and I didn't know what had happened." (RT 17500-17503, 17573-17576.)

Meanwhile, as Cohen approached her mother's condominium after parking the car, she saw appellant Smith standing in the door. Appellant Smith mumbled something and ran out of the condominium. Cohen entered the premises and found her mother and grandmother on the living room floor. Lubell had "an open gash on her forehead" and was bleeding. The police and paramedics were called. Lubell sustained a cut on the forehead which required 20 stitches and bruises on her upper and lower body. (RT 17504, 17573-17578, 17581.)

Appellant Smith, who had Lubell's jewelry (Peo. Exh. 2) in his pocket, was apprehended by civilians and arrested by the police one block from Lubell's condominium. (RT 17504-17505, 17509, 17576-17580.) Appellant Smith was convicted of the burglary of the Lubell residence on January 19, 1983, and sentenced to state prison. (See Peo. Exh. 219; RT 17302.)

2. Appellant Smith's Other Prior Convictions

The prosecution introduced documentary evidence relating to appellant Smith's conviction of assault with intent to inflict great bodily injury on 23-year-old Darla Faile on December 16, 1982, at approximately midnight as she sat inside her apartment at 8936 Cedros Avenue (see Peo. Exh. 219), as well as appellant Smith's convictions for the 1987 attempted murder of Keith Curry and transportation and sale of cocaine (see Peo. Exh. 220). Appellant Smith was sentenced to state prison for the prior convictions. (See RT 17302, 17509-17510.)

3. In-Custody Conduct

a. Appellant Smith Is Found In Possession Of A Shank

On June 5, 1991, at approximately 3:30 p.m., appellant Smith was found in possession of a shank while in custody. Deputy Sheriff Mark Moffett was working in the Housing Unit of the jail when he searched appellant Smith's property to make sure he did not possess an item which could be used to injure another inmate or deputy. Deputy Moffett found in appellant Smith's property a seven-inch, jail-made knife: two plastic cups independently melted down and sharpened at one point with a sock wrapped around the end opposite of the point. (RT 17527-17532.)

b. Appellant Smith Attacks Inmate Holiday

On October 16, 1991, appellant Smith and inmate Edward Furnass attacked and beat inmate Holiday. When deputies arrived at the scene, Furnass was behind Holiday holding him in a "full nelson" or some other type of wrestling hold so that he could not move while appellant Smith punched him above the neck and in the upper torso area. Holiday was non-responsive during the attack. Appellant Smith continued to hit Holiday in the face with his fists, even after the deputies told him to stop. After additional deputies arrived on the scene, appellant Smith and Furnass stopped hitting Holiday. Although neither appellant Smith nor Furnass suffered any injuries, Holiday suffered a severely bloodied nose and three bleeding round puncture wounds on his back about one-half inch deep. There was blood on Holiday's shirt. (RT 17452-17458, 17461-17462, 17471.)

A subsequent search of the surrounding area produced two metal rods or "jail-made" shanks from the commode, which was about six to eight feet from where the fight took place. One metal rod was approximately 13-14 inches in length and the other was approximately nine inches in length. Both rods were sharpened at one end and had a cloth wrapped around the other end. (RT 17458-17461, 17479-17482.)

c. Appellant Smith Is Found In Possession Of Another Shank

On July 9, 1993, at approximately 3:00 p.m., appellant Smith was found in possession of another shank when Deputy Sheriff James Johnson conducted a random search of appellant Smith's bed and found underneath the mattress a compact disc which had two sharp edges on it. Although one edge was sharper than the other end, both edges had scratches. The compact disc "was in a half moon sort of shape. One of the edges had scratches on it, it appeared as though someone had sharpened one of the edges although both edges were sharp." The

modified compact disc was the type of instrument which could "very easily" cause substantial or serious injury to other inmates or deputies. (RT 17490-17493.)

II. DEFENSE EVIDENCE

A. Mitigating Evidence Presented By Appellant Bryant

Appellant Bryant presented two former golf partners, a family-child therapist, an ex-mother-in-law, a sister, and his mother who maintained his life should be spared because he was a "good person" who cared for others, especially his daughter Eneeka.

Wanda Proctor, appellant Bryant's sister, related that appellant Bryant is "very close" to his daughter, Eneeka. Prior to his incarceration, appellant Bryant was a "hands on" father who "did a lot of activities" and "spent a lot of time" with Eneeka. Appellant Bryant participated in Eneeka's activities and was a "stabilizing" force in her life. Following his incarceration, appellant Bryant "talks to [Eneeka] as much as he possibly can" and she, in turn, confides in appellant Bryant "about everything," including her day-to-day problems. Appellant Bryant is "protective" of Eneeka and kept from her (and asked other family members to keep from her) the fact he was incarcerated on a death penalty case. (RT 18018-18023.)

Proctor is also "very close" to appellant Bryant and has shared "the word of God" with him during her telephone calls to him in jail. Appellant Bryant, according to Proctor, has made "spiritual progress" since his arrest. Proctor described appellant Bryant as a "good person" who "doesn't deserve to die. He has a daughter to continue to raise who wants to be with him. He has his brothers and sister and his mom. And he doesn't deserve to die. . . ." (RT 18023-18028.)

Dessie Babineaux, appellant Bryant's former mother-in-law and Eneeka's grandmother, related that, prior to appellant Bryant's arrest, Eneeka was his "whole life. . . . They went out to eat together, and they did normal things that dad and daughter would do," including going to movies and amusement parks. During appellant Bryant's divorce, he was "devastated" when he was not allowed to see Eneeka. Babineaux opined that appellant Bryant will stay in close contact with Eneeka "even if he is in prison for the rest of his life." (RT 18040-18046.)

During his divorce, appellant Bryant, concerned over his daughter's well being and stability as a result of the divorce, took Eneeka to see a family-child therapist. Therapist Suzanne Bogeberg related that appellant Bryant impressed her and he seemed to be a "very caring and loving father, and just a very warm and really nice person." (RT 18009-18011.)

Donald Key met appellant Bryant at Hansen Dam Golf Course and played golf with him. He described appellant Bryant as "a good person," "a true friend," and "really not that type of person that he has been convicted of." Key related that appellant Bryant was "always a nice person to be around" and was a person who was "willing to help out [other people] anyway he could." (RT 18060-18065.)

Roy Player, another of appellant Bryant's golf partners, recounted some of the good deeds appellant Bryant conducted over the years in the neighborhood (i.e., collecting money for burials of individuals who could not afford a burial, collecting money for uniforms for the Little League, etc.). Player described appellant Bryant as a "good person" who will help others while he is in jail: "I know that if he go to jail, when he goes to jail, he's gonna help somebody there. He's just that type. He's gonna help somebody. I -- that's the only thing I've ever know him to do is help people. He helps peoples. He's helped me." Player also noted that he had seen appellant Bryant

interact with Eneeka and that the two of them communicated "really good" and that there was "a good understanding between the two of them." (RT 17992-17999.)

B. Mitigating Evidence Presented By Appellant Wheeler

Appellant Wheeler presented several family members who described his violent and chaotic upbringing as a child, a youth counselor who worked with appellant Wheeler while he was in custody at a juvenile facility, and a clinical psychologist who provided a psychological assessment of appellant Wheeler.

Appellant Wheeler's mother and father married when they were teenagers and separated when appellant Wheeler was two years old. Appellant Wheeler's father left the relationship because he was "very violent" toward his wife and "beat her all the time." Although appellant Wheeler's father maintained some contact with his son over the next four years, he severed all contact when appellant Wheeler was six years old telling him, "Don't call me, I'll call you." (RT 17720-17721, 17803-17806, 17813.)

Following the separation, appellant Wheeler lived with his mother who had "difficulty coping" with life. They moved frequently because of appellant Wheeler's mother's inability to pay the rent. Because of the frequent moves, the children attended many different schools and "really had a hard time." Appellant Wheeler mother's use of drugs and "wanting to party all the time" adversely impacted her ability to raise the children. Frequently, family members came to her assistance and took care of the children until appellant Wheeler's mother could reestablish herself. (RT 17717-17720, 17725, 17734-17735, 17771-17774, 17784-17786.)

Appellant Wheeler's mother was also the type of person who needed a man in the house. Several men were in and out of appellant Wheeler's mother's life. One man, Charles Luster, maintained a live-in relationship with appellant Wheeler's mother from 1977 to 1983. Luster was a gambler and a "hustler"

who engaged in illegal activities. He also was abusive to appellant Wheeler and frequently beat him, including with blows to the head. The beatings, according to appellant Wheeler's brother, were "a constant thing" where Luster "beat us until pretty much [until] he tired." Luster also provided appellant Wheeler negative messages from his lifestyle. (RT 17736-17738, 17744-17746, 17752, 17769-17771, 17784-17787, 17793.)

Priscilla Gray, an aunt, related that, when appellant Wheeler stayed with her as a child, he interacted "very well" with other children and expressed an interest in a drama class. (RT 17718-17720.) Mamie Trimble, an aunt, described appellant Wheeler as "very, very smart" and "very industrious" and "really, really ambitious." (RT 17731-17732.) Forrest Wheeler, appellant Wheeler's brother, noted that appellant Wheeler always encouraged him to "do something with his life" and that "he has always been there for me if I needed him." (RT 17788-17890.) Numerous family members, including appellant Wheeler's father and Luster, testified appellant Wheeler should be spared the death penalty. (RT 17726, 17738, 17749-17751, 17761, 17766-17768, 17776-17778, 17807-17808.)

Adrienne Davis, a clinical psychologist with a specialty in forensic psychology and psychological testing, conducted an evaluation of appellant Wheeler for the penalty phase of the trial. She described her evaluation of appellant Wheeler as follows:

> [Appellant] Wheeler is a young man who started off under very difficult circumstances with, you know, a mom who had difficulties raising him early on, who was abandoned by his father at a point in which he had already started to bond with him, who experienced a lot of difficulties in the family domestically with domestic violence, with child abuse and stability.

A young man that during his early years had experienced a lot of what we consider the mental health risk factors for having difficulty later on in his later years.

As a result, during his adolescent years and as an adult ended up, I believe, being an angry person, a person who was very needy for attention, for nurturing, for being on the fast track in terms of getting the kinds of material that he wanted and needed.

I think he ended up being a young man who wanted to -- was really kind of desperate for aligning himself with men, adult males, who he felt liked him, protected him, looked after him and took care of him. And that's what he found when he was in his teenage years.

He found a family essentially. And, as I indicated, I think those early years predisposed him to having values that weren't quite right and were inappropriate, that led him down a path where he was involved in criminal behavior that had the potential for things becoming violent.

(RT 17872-17873.)

As for the fights and altercations appellant Wheeler engaged in while in jail or custody, Davis explained that "it wasn't unusual or uncommon incident" given the jail environment which is "a very intense volatile, potentially volatile, environment where there are a lot of men frustrated, scared, anxious and things happen." (RT 17847.)

Bernard Lavender, a youth counselor at El Paso De La Robles School, met appellant Wheeler in 1987 when appellant Wheeler was attending the San Simeon Cottage (a college program) at the juvenile facility. Appellant Wheeler performed his tasks "very well" and "was a determined kid to . . . do well." Lavender noted that appellant Wheeler's involvement in some altercations was the result of appellant Wheeler's lack of gang affiliation. Lavender explained that the violence appellant Wheeler engaged in early on in his incarceration

lessened over time and appellant Wheeler became a less violent person. (RT 17697-17706, 17715-17716.)

C. Mitigating Evidence Presented By Appellant Smith

Appellant Smith provided the testimony of his sister to describe his upbringing as a child and a clinical psychologist who provided neurocognitive and psychological assessments of appellant Smith.

Donnette Smith, appellant Smith's older sister, described her and her brother's upbringing as children. Neither Ms. Smith nor appellant Smith resided with their parents until appellant Smith was four years old and Ms. Smith was six years old. Up until that time, Ms. Smith resided with her paternal grandparents, and appellant Smith resided with his maternal grandparents. Ms. Smith and appellant Smith did not have any contact with their parents and "very little" contact with each other while they resided with the grandparents. They integrated into their mother and father's household when appellant Smith was four years old. Appellant Smith's father, who was in the military and frequently out of the house, had "little or no" relationship with appellant Smith. When appellant Smith's father was present, he frequently "tortured" appellant Smith by beating him with an extension cord or the buckle end of a belt. The beatings took place "more than once a week" and usually in the garage while appellant Smith was naked or partially clothed. On occasion, appellant Smith hung from a pole in the garage with his hands tied while his father beat him. Other times, appellant Smith would be beaten after he pulled down his pants and placed his head between his knees. During one of the beatings, the belt buckle "snaked around [appellant Smith's] waist and cut his penis." (RT 18312-18323.)

Neither parent demonstrated any affection toward appellant Smith or Ms. Smith. Appellant's mother did nothing to stop the violence. When the parents separated, appellant Smith, age 8, and Ms. Smith, age 10, returned to live with

their grandmothers. Ms. Smith never lived with appellant Smith after the parents separated. Ms. Smith had no positive recollections of life with her mother and father. The most profound recollection she had was of her fathering "torturing" appellant Smith and molesting her, which, her father told her "was our little secret." (RT 18331-18332.)

Donald Hoagland, a clinical psychologist, performed a neurocognitive and psychological assessment of appellant Smith. The neurocognitive evaluation of appellant Smith

> determined that he is of subnormal intelligence, that he is dyslexic, that he had A.D.H.D. [Attention Deficit Hyper-Activity Disorder] and still has the intentional deficit component of it and he has deficits in a variety of aspects of cognitive functioning including auditory memory, auditory discrimination and visual processing speed . . . .

(RT 18149-18150.) Hoagland described appellant Smith's psychological assessment as follows:

> The M.M.P.I., the long questionnaire in the Rorschach inkblot test, shows that he has a chronic very serious mental disorder. Although he was not actively psychotic when I evaluated him, he does have the potential to be psychotic under adverse conditions. Testing also identified him as chronically depressed and anxious and as having a seriously impaired self-image and being very socially and emotionally withdrawn and detached. It also suggested that there are still some other characteristics of A.D.H.D., impulsivity, the irrationality to getting quickly angry and also suggestions that his pattern of psychopathology also comes from family backgrounds that are particularly adverse.

(RT 18155-18156.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED APPELLANTS' TWO RECUSAL MOTIONS BECAUSE THE LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE DID NOT HAVE A DISQUALIFYING CONFLICT OF INTEREST IN PROSECUTING THIS CASE

Two motions to recuse the Los Angeles County District Attorney's Office (DA's Office) were filed in this case. The first recusal motion was based upon the allegation that the DA's Office had been "infiltrated" by members of the Bryant Family, a group to which appellants belonged. (RT 4281; CT 11263-11281.) This motion was denied in December 1992. (RT 4480-4481.)

About two weeks later, a second recusal motion was filed, alleging that unrelated prosecutorial misconduct -- the delay in providing the defense with the unredacted notes of Deputy District Attorney (DDA) Eduards Abele regarding a witness interview -- warranted recusal of the DA's Office. (1 Supp. CT 754-768.) This recusal motion was granted in January 1993. (RT 4816-4820.) An appeal from the trial court's ruling was taken by the Attorney General's Office, and, on March 4, 1994, the Court of Appeal in *People v. Bryant* (B074364), reversed the order of recusal in an unpublished opinion. (CT 3090-3121.) Thereafter, on June 16, 1994, this Court denied appellants' petitions for review. (S039252; CT 13470.)

Appellant Bryant now claims the record demonstrates that the DA's Office abandoned its role as an impartial prosecutor and establishes the existence of a conflict of interest that affected the ability of the prosecutor -- from the line deputies up through the District Attorney himself -- to act impartially in prosecuting this case. Appellant Bryant argues that his prosecution by the DA's Office denied him a fair trial, due process of law, and

the rights to present a defense, to be present at his capital trial, to confrontation, to the effective assistance of counsel, and to a reliable judgment of death in violation of the Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments to the United States Constitution and the parallel provisions of the California Constitution. (BAOB 81-120.) Appellants Wheeler and Smith join in this claim. (WAOB 435; SAOB 451.)

Respondent submits the trial court did not abuse its discretion as a matter of law in denying the first recusal motion and that the doctrine of law of the case precludes review of the trial court's ruling on the second recusal motion. And, because there was no error, appellants' constitutional rights were not violated. Finally, even if there is a doubt about the propriety of the actions of one or more members of the DA's Office, recusal of the *entire* office was an unnecessary extraordinary measure.

A. Relevant Proceedings

1. The First Recusal Motion

Appellants' trial was set for October 5, 1992. (RT 4105.) On that date, the trial court granted a defense motion to sever a narcotics conspiracy count (count 7) from the homicide prosecution. (RT 4250; CT 4817-4835, 11224-11225.)

The People sought review of the severance order by petition for writ of mandate to the Court of Appeal. (CT 11219-11252.) One of the supporting documents in the writ petition, Appendix Q, was a "Summary of Likely Trial Testimony." In this document, DDA Janice Maurizi, the lead prosecutor at the time, stated: "They [members of the Bryant Family] coordinated their work schedules to coincide with LAPD change of watch and had (and continue to have) people inside most of the major organizations including LAPD, LADA, Franchise Tax Board, Department of Motor Vehicles, Pacific Telephone, etc.;

allegedly all the way up to congressmen and judges." (CT 11278; see RT 4290.)

A few days later, on October 11, 1992, the Los Angeles Times reported on and quoted DDA Maurizi's statement, labeling it an allegation of "infiltration" by the Bryant Family. The Los Angeles Times reported that Sandi Gibbons, the Spokesperson for the DA's Office, confirmed accounts that prosecutors and support staff at the DA's Office were being investigated on the matter. The Los Angeles Times also reported that then-District Attorney Ira Reiner (DA Reiner) said his office was *not* investigating possible confidential leaks. (CT 11280-11281.)

Two days later, on October 13, 1992, appellant Wheeler filed a motion to recuse the DA's Office from prosecuting the instant case, and appellant Bryant joined in the motion. The motion alleged that, based on the conflicting statements of Spokesperson Gibbons and DA Reiner, it was evident DA Reiner had no interest in investigating possible confidential leaks involving prosecutors and support staff who were accused of collaborating with the Bryant Family. Accordingly, the motion argued, there was a conflict of interest that prejudiced the DA's Office against the defendants and impaired the prosecutor's ability to impartially perform his function. The motion also alleged that no discovery relevant to the infiltration had been provided to the defense. (CT 11263-11281; see RT 4281.) Appellant Bryant also claimed the allegation of infiltration was made in order to taint the pool of prospective jurors on the eve of jury selection. (CT 11898-11967.)

The trial court held extensive hearings on the recusal motion. On November 2, 1992, the court heard from the parties. DDA Maurizi related that the Internal Affairs Unit of the DA's Office had, in fact, been pursuing the allegation of infiltration. She explained that DA Reiner would not necessarily have known about such "low-level investigations," because the investigations

could involve only low-level employees with access to computers. DDA Maurizi noted, as an example, that the warrants which charged codefendant Settle had been removed from law enforcement computers and had to be re-entered four times. She explained that this was something that could have been done by a low-level employee but could have compromised the integrity of the prosecution. (RT 4315-4317.) DDA Maurizi explained that the People's position was that the status of both the past and current investigations were irrelevant to discovery. And, in furtherance of the privilege asserted by Lieutenant Alan Tomich of the DA's Bureau of Investigation and pursuant to Evidence Code section 1040, the inquiry whether such investigations were relevant to the recusal motion should be made by the court in camera. (RT 4317-4318; see CT 11346-11347.)

DDA Maurizi related that the DA's Office had provided the court, that morning, with a notebook containing the discovery previously provided by the prosecution to the defense. She explained that this material supported the allegation of infiltration and was the basis of her statement in the writ petition. (RT 4318-4319.) DDA Maurizi highlighted some of the items in the notebook. She pointed to a Los Angeles Times article, reporting that the police had said there was evidence of a Bryant Family agent at the Department of Motor Vehicles and that the Bryant Family had informants in other agencies, such as the DA's Office. (RT 4319.) DDA Maurizi pointed to a statement made by Cindy Armstrong; in the context of Ms. Armstrong's description of her fear of the Bryant Family, she talked about Linda Bryant who worked at the DA's Office. (RT 4320.) DDA Maurizi also pointed to a statement made by George Smith; he described numerous "insiders," said the Bryant Family had police officers and prosecutors working for them, and said it was common knowledge that two Los Angeles Police Department police officers would not confiscate Bryant "dope" and would only "take the money." (RT 4320-4321.) DDA

Maurizi informed the court that, in the interest of simplifying the case and based on other considerations, the People would not offer any evidence of infiltration at trial. (RT 4323.)

The defense disputed that it had been provided all the discovery on the infiltration allegation. The defense pointed to a declaration submitted by the People and prepared by Richard Hecht, the Director of the Bureau of Branch and Area Operations for the DA's Office. In his declaration, Director Hecht stated DDA Maurizi had told him that a confidential informant had implicated an employee of the DA's Office (in terms of the employee's dealings with the Bryant Family), that the employee was currently employed by the DA's Office, and that there was an ongoing investigation as to that employee. The defense said that it did not have any of the material from such an investigation. (RT 4328-4329; see CT 11343-11344.)

DDA Maurizi responded that, as to the ongoing investigation (and the confidential informant who led to the investigation), the People had not disclosed that informant, did not intend to use that informant, and never intended to use that informant. Also, nothing in the informant's statement was *Brady* material.[47] (RT 4329-4330.) DDA Maurizi reiterated that, to the extent the court needed the information to evaluate the recusal motion, Director Hecht and Lieutenant Tomich were available to give the court the information in camera. (RT 4330.)

DDA Maurizi added that two former employees of the DA's Office had been terminated for some time as a result of their connections to the Bryant Family and had been prosecuted by the Attorney General's Office. One former employee had pleaded guilty to being an accessory after the fact and disseminating confidential information. The second employee had been diverted on drug charges. DDA Maurizi explained there was nothing in the

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47. *Brady v. Maryland* (1963) 373 U.S. 83.

files pertaining to those matters which was relevant to the prosecution of this case. (RT 4330.) DDA Maurizi further argued that the DA's Office could not be a victim of the defendants' operatives and, at the same time, be hiding those operatives from the defendants. She argued the defendants were in a far better position than the DA's Office to know the extent to which these employees had information. (RT 4330-4331.)

At the close of this hearing, the court stated it intended to review the notebook provided by the People. The court also said it could not make an evaluation of what was privileged without reviewing some information in camera. (RT 4333.)

Over the next few days, the court held in-camera hearings. The court heard from Director Hecht. The court was also provided with three folders of information on investigations conducted by the DA's Office. The files showed some individuals had already been investigated (and those investigations had concluded) and there were other ongoing investigations. (RT 4343; see RT 4339(1)-4339(44) [sealed].)

On November 10, 1992, the court held another hearing on the recusal motion. The court stated it had to decide whether to release to the defense the information disclosed to the court in camera and whether the material was germane to the issue of recusal. (RT 4343.) The court, thereafter, heard testimony from DA Reiner, Spokesperson Gibbons, and Detective James Vojtecky, the lead investigator in the case. DA Reiner testified that, for several years, there had been a *continuing inquiry* by the DA's Office on the Bryant Family infiltration into the DA's Office. DA Reiner, however, explained that a *formal investigation* had not been opened by that office until about October 20, 1992 (about 10 days *after* the Los Angeles Times article had appeared). DA Reiner explained there had been some past investigations relating to the case that had been concluded. (RT 4363-4373.)

Spokesperson Gibbons testified that she told the Los Angeles Times that there were investigations being conducted by the DA's Office, based on the information in the writ petition filed in the Court of Appeal and based on her knowledge of the DA's Office. (RT 4374-4388.)

Detective Vojtecky testified that he interviewed an informant on September 15, 1992. He did his own investigation and then set up a meeting with the DA's Bureau of Investigation and the informant on October 20, 1992. (RT 4388-4402.)

The trial court conducted several more in-camera hearings, which were held on November 16, November 20, November 24 (two sessions), December 14, and December 16, 1992. (RT 4413(1)-4413(10), 4415(1)-4415(18), 4420(1)-4420(19), 4434(1)-4434(58) [sealed].)

On December 17, 1992, the trial court denied the recusal motion. The court noted the investigation conducted by the DA's Office had been completed. The court found there was nothing in the in-camera proceedings to substantiate the allegation of infiltration. As for the corollary discovery claim, the court found the informants at issue were non-exonerating and a privilege attached to some of them. (RT 4438, 4480-4481.) None of the defendants sought review of the denial of the recusal motion. (See CT 3096.)

2. The Second Recusal Motion

On December 22, 1992, DDA Harry Sondheim requested the trial court to hold an in-camera hearing on a discovery issue. The subject matter of the discovery issue was the unredacted notes of a deputy district attorney regarding an interview of a prosecution witness. DDA Sondheim asked the court to review the notes and rule on whether the DA's Office could rely on the work-product doctrine pursuant to section 1054.6. The court asked if this matter would have any impact on the recently denied recusal motion. DDA Sondheim said he did not believe it would have such an impact. After hearing

from the parties, the court denied the request to review the notes. Counsel for appellant Wheeler served the prosecution with a subpoena duces tecum asking for the production of the notes. (RT 4545-4560.)

The same day, the DA's Office mailed to defense counsel a copy of the unredacted notes of DDA Abele of the January 1991 interview of witness Rosa Hernandez.[48] The unredacted notes had not been previously provided to the defense, although a redacted version of the notes had. The DA's Office also mailed to the defense a transcript of a December 16, 1992, recorded interview of DDA Abele conducted by an investigator for the DA's Office, concerning DDA Abele's notes. (1 Supp. CT 756, 769-803; see RT 4696-4697.) The notes and the transcript of the interview reflect that DDA Abele was formerly a member of the prosecution team in this case and he participated in an interview of witness Rosa Hernandez on January 28, 1991. Also present at the interview were DDA Maurizi and Detective Vojtecky. DDA Abele was concerned that DDA Maurizi and Detective Vojtecky had used what he believed to be improper techniques in an effort to influence Hernandez's testimony regarding the number of assailants she saw on the afternoon of the murders, as well as the number and descriptions of the weapons she saw. Shortly after the interview with Hernandez, DDA Abele prepared four pages of notes, consisting of factual recitations of Hernandez's statements and DDA Abele's conclusions about the propriety of the interview. (1 Supp. CT 769-803.)

On December 24, 1992, defense counsel received a letter from Gil Garcetti, the newly elected District Attorney, informing them that DDA Maurizi had been removed as lead prosecutor in the case because of the possibility she would be called as a witness at trial. (1 Supp. CT 681, 756-757.)

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48. Rosa Hernandez was an eyewitness to the shootings of Anderson and her children. (See CT 3094.)

Appellant Bryant filed a "Motion For Reconsideration Of Recusal Motion (New Facts And Changed Circumstances)." The motion was based on the delay in production of the unredacted version of DDA Abele's notes, on the need to call both DDA Abele and DDA Maurizi as witnesses regarding the Hernandez interview, and the handling of the conflict between the deputies within the DA's Office. (See 1 Supp. CT 242-243, 754-768.) Other then-defendants (e.g., Andrew Settle, Antonio Johnson) alleged the prosecution had tampered with witness Hernandez, suppressed evidence, and engaged in a "coverup." (See 1 Supp. CT 653-720, 805-815.) The remaining defendants joined in these claims. (CT 3098, 3100.)

On January 22, 1993, the trial court held a hearing on this recusal motion. (RT 4646-4825.) DDA Shellie Samuels testified that DDA Abele told her about the problems he had with a witness interview but DDA Abele did not claim that anyone in the DA's Office was "covering up" his allegations. DDA Abele repeatedly told DDA Samuels that he was dissatisfied with his limited responsibilities in the case. (RT 4657-4673.)

Director Hecht testified that he had a meeting with DDA Maurizi and Detective Vojtecky on February 1, 1991 (a few days after the Hernandez interview). (RT 4686-4688.) DDA Maurizi told him that the Professional Responsibility Unit of the DA's Office had advised her to delete work product from DDA Abele's original notes before providing the notes to the defense. DDA Maurizi said she had redacted the notes with DDA Abele's assistance and then had provided the defense with the redacted version of the notes. (RT 4696-4697.)

Detective Vojtecky told Director Hecht that DDA Abele had prepared the notes because he had been "paid off." Director Hecht did not believe this allegation and thought Detective Vojtecky was angry. Detective Vojtecky said he did not trust DDA Abele. (RT 4679-4681.) Detective Vojtecky also

expressed concern about the security of the case file and the witnesses because warrants had been deleted from the computer system several times. (RT 4682-4683.) Director Hecht's notes indicated DDA Maurizi said that Hernandez was the only witness who placed a gun in appellant Bryant's hand. (RT 4682, 4699.)

Director Hecht also testified that Chief Deputy Greg Thompson removed DDA Abele from the case. (RT 4685.) Director Hecht explained that he did not personally meet with DDA Abele, because he believed DDA Abele would be called as a defense witness and he did not want to place himself in a position of being accused of tampering with a defense witness. (RT 4689-4690, 4709.)

DDA Abele testified that he had been a part of the prosecution team and developed ethical concerns as a result of the Hernandez interview. (RT 4726, 4729-4730.) DDA Abele said that, during the interview, Detective Vojtecky and DDA Maurizi discouraged Hernandez from reviewing her preliminary hearing testimony. (RT 4743-4744, 4764.) Also, Detective Vojtecky directed Hernandez in identifying the guns involved in the crimes. Initially, Hernandez said she saw two guns and that the man she saw standing next to the red car at the crime scene was the same man she saw coming out of the Wheeler Street residence. But, DDA Abele maintained, DDA Maurizi persisted in questioning Hernandez, and Hernandez eventually expressed uncertainty about a third gun. When she did so, Detective Vojtecky produced a photo display of several guns and asked Hernandez to select the gun carried by the person standing next to the red car. Hernandez selected a gun. Then, Detective Vojtecky asked Hernandez to pick the gun that the person coming out of the Wheeler residence was carrying, and Detective Vojtecky covered the photo that Hernandez had just selected, thus eliminating the possibility of that option. Hernandez hesitated. Detective Vojtecky suggested a .45 caliber gun, and Hernandez selected it. (RT 4743-4747.) DDA Abele explained this led to the inference that Hernandez

saw two people, not one, at the crime scene, and the significance of the change in her statement was that it made appellant Bryant a gunman. (RT 4762, 4764.)

DDA Abele testified that, on the day of the Hernandez interview, he prepared notes about the interview. (RT 4742.) Later, at the direction of the Professional Responsibility Unit of the DA's Office, DDA Abele talked to DDA Maurizi, but she declined to ask Detective Vojtecky to document the interview. (RT 4747.) The Professional Responsibility Unit suggested that DDA Abele contact a supervisor. DDA Abele contacted Thomas Trapp, the Assistant Director of Branch and Area Operations, and asked if he should prepare a memo on what had happened. DDA Trapp appeared unhappy about the idea of a memo, and DDA Abele did not prepare one. (RT 4748-4750, 4752.) DDA Abele testified that, together with DDA Maurizi, he redacted his notes so that they would be provided to the defense. (RT 4775-4776.)

DDA Abele believed DDA Maurizi was "obsessed" with the case, in light of the prosecution of certain counts he believed should not have been charged. (RT 4713.) DDA Abele denied creating the concerns about the Hernandez interview in order to be removed from the case. (RT 4756.) He understood from a statement made by the Assistant District Attorney that his career was not jeopardized by this incident. (RT 4790.)

In opposition to the recusal motion, the Attorney General's Office filed, and successfully moved to admit into evidence, the declarations of six deputy or assistant district attorneys detailing their roles in the discovery of DDA Abele's notes and the manner in which the conflict between DDA Abele and DDA Maurizi was handled within the DA's Office. (1 Supp. CT 234-484; see RT 4800.) One declaration was from Assistant District Attorney Frank Sundstedt (ADA Sundstedt). In his declaration, ADA Sundstedt explained that, shortly after assuming the role of Assistant on December 7, 1992, he requested a management staff meeting in order to review the status of this case. One of

his concerns was that DDA Abele was listed as a defense witness. Pursuant to his request, several meetings were held. During the course of those meetings, ADA Sundstedt learned DDA Abele had made notes of his impressions of the Hernandez interview and had indicated a desire to speak to management supervisors about the case. ADA Sundstedt decided to send an investigator to speak to DDA Abele. The interview was conducted on December 16, 1992 (the day before the trial court ruled on the first recusal motion). That same day, ADA Sundstedt learned for the first time from the tape recording of the interview that only a redacted version of the notes had been given to the defense. Although ADA Sundstedt determined it might be necessary to turn over the previously redacted portions of DDA Abele's notes, as well as DDA Abele's tape-recorded statement, he decided (along with some others) that it would be inappropriate to disclose the material that day. The issue was considered sufficiently distinct from the issues before the trial court on the then-pending (first) recusal motion. The next day, DDA Sondheim was directed to write a letter to the trial court, asking for an in-camera hearing. When the court denied the request for such a hearing, the DA's Office decided to provided all of DDA Abele's notes, and the transcript of his interview, to the defense. (1 Supp. CT 458-459.)

During the course of the hearing on this recusal motion, counsel for Detective Vojtecky filed a declaration prepared by Detective Vojtecky. (See 1 Supp. CT 570-581.) Although the trial court had the document marked for purposes of identification, the court did not admit the document into evidence. (RT 4733-4735, 4800-4801.)

At the conclusion of the hearing, the trial court granted the second recusal motion. (RT 4816-4821.) The court stated:

> The conflict is so obvious to this court that I can't even articulate all the things that are wrong with this case. When we first talked about the

in-camera hearings, we talked about what was germane to me, what I needed to know to grant or deny the recusal motion.

. . . [T]he basic question I asked again was, "Is there anything else? Is there anything else that you could tell me that would have an impact on the outcome of my decision?"

And obviously there was because at the time one of the directors of that organization wanted me to have another in-camera hearing. And I knew with 39 years of experience and instincts that there sure as hell was something else they had.

Little did I know that that would be a conflict between two of their attorneys, either vying for the same position or whatever it was. They both have their impressions of how the interview was handled.

It was so extreme that one [deputy] district attorney . . . felt enough about it to go to [DDA] Trapp and other people and talk about it. And he felt it was so important he went to his ethics group and didn't get much help from them either.

Then they sat on it and they looked at it, talked about it; and then two years later again they come up with that information that does have an impact on these defendants for a fair trial. . . .

. . .

But when you show an intentional, deliberate holding back of evidence, that is the conflict. There is no question that [DDA] Maurizi, [Director] Hecht and [DDA] Trapp, whoever was involved, knew that that was discoverable; and that is the problem. And it must have been a tough decision for them.

. . .

But when the State is asking for the life of some of these defendants -- this is a death penalty case. . . . [T]his requires the maximum protection of [] rights. . . .

Most of you in this court are officers of this court. They sat on that information when asked repeatedly by this court for that information, "Do they have it all? Would it affect it? Would it have an impact on this case? Would it affect their rights to a just trial, to a speedy trial?"

It did, and it does have another impact now because the court grants recusal. . . .

(RT 4816-4819; see also RT 4830.)

The Attorney General's Office appealed, and, on March 4, 1994, the Court of Appeal in *People v. Bryant* (B074364), reversed the grant of recusal. (CT 3091-3121.) The Court of Appeal found it was clear the Attorney General's Office had appealed only from the January 1993 order of recusal. The Court of Appeal further found that, in making its recusal order, the trial court had not relied upon the issue of "infiltration" raised in the first recusal motion and the only basis for the order of recusal was the fact the prosecution had not immediately produced DDA Abele's unredacted notes and the subsequent actions of the DA's Office in handling the ensuing controversy. (CT 3118.) The Court of Appeal addressed numerous contentions under the following subject headings: witness tampering, work product, coverup, office personnel as witnesses, personal stake in outcome, taint of the office, totality of the circumstances, section 1054, and Code of Civil Procedure section 128, subdivision (a)(5). In so doing, the Court of Appeal found the trial court abused its discretion in granting the second recusal motion. (CT 3091-3121.) On June 16, 1994, this Court denied appellants' petitions for review. (S039252; CT 13470.)

B. The DA's Office Did Not Have A Disqualifying Conflict Of Interest In Prosecuting This Case; Appellants' Constitutional Rights Were Not Violated

Section 1424, subdivision (a)(1), provides that a motion to recuse a district attorney "may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." A conflict, within the meaning of section 1424, exists whenever the circumstances of a case evidence a reasonable probability that the district attorney's office may not exercise its discretionary function in an evenhanded manner. (*People v. Conner* (1983) 34 Cal.3d 141, 148; *Millsap v. Superior Court* (1999) 70 Cal.App.4th 196, 200.) The conflict is disabling only when it is so grave as to render it unlikely that the defendant will receive fair treatment during all portions of the criminal proceedings. (*Millsap v. Superior Court, supra*, at p. 200.) Thus, the test for recusal is a two-part test: (1) there must be a conflict of interest; and (2) the conflict must be so severe as to disqualify the district attorney from acting. (*Ibid.*; *People v. Eubanks* (1996) 14 Cal.4th 580, 594.)

"[R]ecusal of an entire prosecutorial office is a serious step, imposing a substantial burden on the People, and the Legislature and courts may reasonably insist upon a showing that such a step is necessary to assure a fair trial." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1156.) Recusal of an entire prosecutorial office is a disfavored remedy that should not be applied unless justified by a substantial reason related to the proper administration of justice. (*Millsap v. Superior Court, supra*, 70 Cal.App.4th at pp. 200-201; *People v. Merritt* (1993) 19 Cal.App.4th 1573, 1578-1579; *People v. Hernandez* (1991) 235 Cal.App.3d 674, 679-680.)

On appeal, the reviewing court reviews the trial court's factual determinations on the recusal motion under the substantial evidence test. (*People v. Eubanks, supra,* 14 Cal.4th at p. 595; *People v. Hamilton, supra,* 48

Cal.3d at p. 1155.) Once the pertinent factual issues are settled, the reviewing court determines whether the trial court abused its discretion in ruling on the motion. (*People v. Eubanks, supra,* at p. 595; *People v. Hamilton* (1988) 46 Cal.3d 123, 140.)

1. The Trial Court Did Not Abuse Its Discretion In Denying The First Recusal Motion

Initially, it must be noted, appellant Smith did not join in the first recusal motion. (See RT 4281.) Any claim as to the trial court's ruling on that motion is, thus, waived as to him. (See *People v. Zapien* (1993) 4 Cal.4th 929, 966.) In any event, there was no error.

As stated earlier, the first recusal motion alleged that, based of the conflicting statements of Spokesperson Gibbons and DA Reiner, it was evident DA Reiner had no interest in investigating possible confidential leaks involving prosecutors. The motion also alleged that discovery relevant to the infiltration allegation had not been provided to the defense. (CT 11263-11281; see RT 4281.) The trial court denied the first recusal motion. The court found there was nothing in the in-camera proceedings to substantiate the allegation of infiltration. And, on the discovery issue, the court found the informants in question were non-exonerating and a privilege attached to some of them. (RT 4480-4481.) The trial court did not abuse its discretion as a matter of law based on the record before it.

The declarations of Director Hecht and Lieutenant Tomich demonstrate the DA's Office was committed to investigating persons within its ranks who were alleged to have ties to the Bryant Family. (See CT 11343-11347.) In fact, two employees had been referred to the Attorney General's Office for prosecution. (RT 4330-4331.)

It is true DA Reiner stated to the Los Angeles Times that his office was not investigating the possibility of confidential leaks. (CT 11280-11281.) But, as DA Reiner explained to the trial court, for several years, there had been a *continuing inquiry* by his office regarding the allegation of infiltration by the Bryant Family into the DA's Office. DA Reiner explained, however, that a *formal investigation* had not been opened by his office until after the Los Angeles Times article appeared. DA Reiner also explained that there had been some past investigations relating to the case that had been concluded. (RT 4363-4373.)

Under these facts, there is nothing in the record to support the allegation that the DA's Office was shielding its own members from prosecution, while pursuing convictions against appellants. And nothing about DA Reiner's statement to the Los Angeles Times or his subsequent testimony at the hearing on the first recusal motion demonstrates that DA Reiner was personally involved in this case. Further, neither DA Reiner's statement nor his testimony could reasonably be interpreted as an abandonment of his responsibilities as the District Attorney.

As to the discovery issue, as DDA Maurizi informed the trial court, she had provided the defense with the material that was the basis of her statement in the writ petition, supporting the allegation of infiltration. (RT 4318-4319.) DDA Maurizi also informed the court that, in the interest of simplifying the case and based on other considerations, the People would *not* offer any evidence of infiltration at trial. (RT 4323.) As for discovery on the internal investigations conducted by the DA's Office, DDA Maurizi argued that the status of both the past and current investigations were irrelevant to discovery and, moreover, privileged. She argued that, pursuant to Evidence Code section 1040, the inquiry whether such investigations were relevant to the recusal motion should be made by the court in camera. (RT 4317-4318; see CT 11346-

11347.) After holding several such in-camera hearings, the trial court found the informants in question were non-exonerating and a privilege attached to some of them. (RT 4480-4481.) Respondent submits a review of the sealed proceedings by this Court will support the trial court's findings. (See BAOB 119-120.)

Appellants contend that recusal was warranted because the People tried the case in the press or tried to taint the jury pool. (BAOB 111, 113.) There is only one portion of the record which arguably could be a basis for this claim -- a sentence taken from the writ petition filed by the DA's Office which stated that members of the Bryant Family: "coordinated their work schedules to coincide with LAPD change of watch and had (and continue to have) people inside most of the major organizations including LAPD, LADA, Franchise Tax Board, Department of Motor Vehicles, Pacific Telephone, etc.; allegedly all the way up to congressmen and judges." (CT 11278; see RT 4290.) Significantly, this single sentence was made in an approximately three-inch thick writ petition filed in the Court of Appeal. (RT 4289, 4315.) But, even assuming that this one sentence was inappropriately "made" to the press, this Court has found that even an erroneous newspaper article does not necessitate recusal to maintain public confidence. (*People v. Hamilton, supra,* 46 Cal.3d at p. 141.) In *Hamilton*, the Assistant District Attorney in Fresno was reported in the newspaper to have been on a "hit list" found on the defendant. (*Id.* at pp. 133, 141.) This Court stated: "[e]ven under the [outdated] *Greer* standard, the newspaper report would not compel recusal. . . . [I]t is not necessary to take such a drastic step as recusal of an entire prosecutorial office in order to compensate for an erroneous newspaper report." (*Id.* at p. 141.) The same result should be reached here.

In sum, there was no abuse of discretion in the denial of the first recusal motion.

2. Review Of The Propriety Of The Trial Court's Ruling On The Second Recusal Motion Is Barred By The Doctrine Of Law Of The Case; In Any Event, The Court Of Appeal Properly Reversed The Order Recusing The Entire Los Angeles County DA's Office From Prosecuting This Case

As for the second recusal motion, the doctrine of law of the case bars review of the propriety of the trial court's ruling. In any event, the Court of Appeal correctly reversed the order of the trial court recusing the entire DA's Office.

a. Law Of The Case

The doctrine of law of the case provides that, when a reviewing court in an interlocutory appeal states a principle or rule of law that is necessary to the reviewing court's decision, that principle or rule of law must be applied in subsequent proceedings. (*People v. Stanley* (1995) 10 Cal.4th 764, 786.) The doctrine of law of the case applies in criminal matters; it also applies in this Court, even if the prior appeal was decided in the Court of Appeal. (*Ibid.*) The primary rationale for the doctrine is to promote judicial economy. (*Ibid.*) However,

> the doctrine will not be adhered to where its application will result in an unjust decision, e.g., where there has been a "manifest misapplication of existing principles resulting in substantial injustice" [citation], or the controlling rules of law have been altered or clarified by a decision intervening between the first and second appellate determinations [citation].

(*Id.* at p. 787.)

The doctrine of law of the case barred reconsideration of an issue in *People v. Martinez* (2003) 31 Cal.4th 673. In *Martinez*, a capital case, the defendant had succeeded in having a special circumstance allegation dismissed by the trial court on the ground that the defendant's Texas murder conviction

did not qualify because it did not require the same elements as first or second degree murder in California. (*Id.* at pp. 678, 680-681.) The Court of Appeal subsequently reversed the trial court, this Court unanimously denied a petition for review, and the special circumstance allegation was reinstated. (*Ibid.*) On automatic appeal from his death judgment, the defendant reasserted his contention that the special circumstance should be dismissed. (*Id.* at p. 681.) After determining that the Court of Appeal had not misapplied existing law, and after finding that no intervening decisions had clarified the law since the Court of Appeal's decision, this Court applied the doctrine of law of the case to bar reconsideration of the special circumstance issue. (*Id.* at pp. 683-688.)

Here too, prior to trial, the People appealed the order of the trial court recusing the DA's Office. In an unpublished opinion filed on March 4, 1994, the Court of Appeal reversed the order of the trial court. (CT 3091-3121.) Appellants filed petitions for review in this Court, which were denied on June 16, 1994. (CT 13470.) Appellants now make the same claims on the second recusal motion as were disposed of by the Court of Appeal. As set forth more fully below, the Court of Appeal did not misapply existing law. And, as in *Martinez*, there has been no change in the law of recusal since the Court of Appeal's opinion. Accordingly, consideration of the propriety of the trial court's ruling on the second recusal motion is barred by the doctrine of law of the case.

b. The Delayed Discovery Of DDA Abele's Notes Did Not Warrant Recusal Of The Entire DA's Office

The delayed discovery of DDA Abele's notes was not a sufficient basis for recusal of the entire DA's Office. (See BAOB 110-111.) Within three days of the Hernandez interview, DDA Maurizi and DDA Abele redacted some passages from DDA Abele's original interview notes, and DDA Maurizi provided the redacted version of the notes to appellants. (RT 4696-4697;

1 Supp. CT 472.) As the Court of Appeal found -- and as appellants do not dispute -- all but one sentence which was redacted consisted of opinions, impressions, and conclusions reached by DDA Abele and, therefore, within the work-product doctrine of section 1054.6. In other words, the delayed discovery consisted of only one sentence in DDA Abele's original notes. (See CT 3107.)

Also, well before the start of trial, appellants received a copy of DDA Abele's original notes. Appellants do not explain how the delay deprived them of the right to a fair trial. As the Court of Appeal recognized (see CT 3108), a similar issue was considered and rejected in *People v. Merritt, supra,* 19 Cal.4th 1573. In *Merritt*, an investigator with the DA's Office had engaged in several improprieties, including withholding possible exculpatory statements from both the prosecution and defense. (*Id.* at p. 1579.) The trial court ordered recusal of the entire office. (*Ibid.*) The *Merritt* court reversed, finding no basis for recusal in the delayed discovery, because the material had been produced in time for preparation of the defense. (*Ibid.*) The *Merritt* court relied on settled rules of discovery requiring the defendant to show that a continuance cannot cure the harm of late disclosure. (*Ibid.*, citing *People v. Pinholster* (1992) 1 Cal.4th 865, 941.) As in *Merritt*, here, too, there is no basis for recusal in the delayed discovery of the one sentence in DDA Abele's notes which was improperly redacted.

Appellants claim DDA Maurizi and Detective Vojtecky acted improperly in interviewing Rosa Hernandez. (BAOB 111.) But, as the Court of Appeal correctly recognized, the trial court made no such finding. The trial court focused, instead, on the discovery of DDA Abele's notes and the subsequent handling of the issue by the DA's Office. (RT 4816-4819; see CT 3104.)

c. There Was No "Coverup" By High-Ranking Officials At The DA's Office

Appellants argue that, bent on obtaining convictions, high-ranking officials at the DA's Office engaged in a "coverup" by withholding DDA Abele's observations of witness tampering from the defense and silencing DDA Abele's efforts to document his concerns about the prosecution of the case. (BAOB 115-116.) The record reflects the opposite: as the Court of Appeal recognized, appellants were provided with all the relevant information related to DDA Abele's interview notes and with complete and detailed accounts of the actions taken by the DA's Office following DDA Abele's report of his concerns about the Hernandez interview. (CT 3112.) None of that material supports the allegation that the DA's Office engaged in a "coverup."

More specifically, in opposition to the second recusal motion, the Attorney General's Office filed in the trial court the declarations of six deputy or assistant district attorneys detailing their roles in the discovery of DDA Abele's notes and the manner in which the conflict between DDA Abele and DDA Maurizi was handled by the DA's Office. (1 Supp. CT 441-473, 482-483.) At the hearing on the recusal motion, appellants called DDA Samuels, Director Hecht, and DDA Abele as witnesses. (RT 4656, 4674, 4726.) Additional declarations were admitted as exhibits, including those prepared by DDA Samuels, DDA Abele, and DDA Patricia Ryan. (RT 4659, 4727, 4792, 4796, 4800; 1 Supp. CT 488-491, 507-520, 566-569 [Def. Exhs. 1-2, 7-8; Peo. Exh. F].) Copies of handwritten notes prepared by members of the Professional Responsibility Unit at the DA's Office regarding their conversations with DDA Abele and DDA Maurizi and others in January 1991 were admitted into evidence. (RT 4795-4796, 4800; 1 Supp. CT 553-564 [Peo. Exhs. B-E].) Also, the transcript of the December 1992 interview of DDA Abele by an investigator with the DA's Office was admitted. (RT 4758, 4792, 4800; 1 Supp. CT 521-

552 [Def. Exh. 9].) In sum, appellants received all relevant information related to DDA Abele's interview notes and the handling of DDA Abele's concerns by the DA's Office. (See CT 3112.)

And the information does not support the allegation of a "coverup." Far from hiding misconduct or engaging in misconduct, all members of the DA's Office attempted to take the most appropriate measures during the investigation and the prosecution of this case. The evidence admitted at the recusal hearing demonstrates that personnel at the DA's Office discussed the matter of DDA Abele's notes and his concerns openly, reported it to appropriate persons, and acted carefully and properly in consulting ethics experts. In fact, it was ADA Sundstedt's ethical re-evaluation of this controversy which brought the entire matter to appellants' attention. (1 Supp. CT 458-459.)

It is true that the trial court made the finding that "[t]here is no question that [DDA] Maurizi, [Director] Hecht and [DDA] Trapp, whoever was involved, knew that [the unredacted version of DDA Abele's notes] was discoverable; and that is the problem." (RT 4818.) However, this finding by the trial court is not supported by the record. A review of the record reveals it was uncontroverted that Director Hecht and DDA Trapp were entirely uninvolved in the determination as to what portion of DDA Abele's notes would be redacted and what was discoverable. Instead, DDA Maurizi, together with DDA Abele, after discussions with their Professional Responsibility Unit, made a good-faith judgment call that the redacted portions of DDA Abele's notes were protected by the work-product rule. (RT 4697, 4717-4719.)

Contrary to appellants' allegations (BAOB 111, 115-116), the evidence adduced at the recusal hearing does not show that DDA Abele was silenced or discouraged from reporting his concerns. DDA Samuels testified that, although DDA Abele told her about the problems he had with a witness interview, he did not tell her that members of the DA's Office were "covering up" his allegations

or discouraging him from making them public. (RT 4660-4662; 1 Supp. CT 490.) DDA Abele, in fact, was interviewed about his concerns by an investigator with the DA's Office at the direction of ADA Sundstedt. (1 Supp. CT 458-459, 769-799.) Director Hecht explained that he did not personally meet with DDA Abele, because he believed DDA Abele would be called as a defense witness and he did not want to place himself in a position of being accused of tampering with a defense witness. (RT 4689-4690, 4709.) Further, although appellants note that DDA Abele was not promoted subsequent to the Hernandez interview (BAOB 117), there is no evidence in the record that the lack of a promotion was due to DDA Abele's conduct in this case. And DDA Abele testified that he understood from a comment made by ADA Sundstedt that his (DDA Abele's) career was not jeopardized because of this incident. (RT 4790.)

Moreover, any suggestion that members of the DA's Office withheld the information of DDA Abele's notes, pending the determination of the first recusal motion, has no merit. (See BAOB 93-94.) The issue of whether members of the Bryant Family had "infiltrated" the DA's Office, litigated in the first recusal motion, was sufficiently distinct from the issue of DDA Abele's notes to make the decision of the DA's Office to withhold them, until seeking guidance from the trial court, reasonable. Also, appellants suffered no prejudice because the material was ultimately disclosed.

Finally, there is no merit to the collateral claim that recusal was warranted because high-ranking officials were deeply involved in the prosecution of this case and had a personal stake in its outcome. (BAOB 116-117.) As the Court of Appeal found, because only one sentence in DDA Abele's notes was improperly redacted and the original notes were provided to the defense in ample time to prepare for trial, there was no evidence of wrongdoing which would provide the requisite personal stake suggested by

appellants. (See CT 3116.) Also, the premise would require recusal of a prosecutor's entire office any time the management of that office made a pretrial decision in a case and then had an interest in seeing that decision ratified or vindicated. As noted by the Court of Appeal, such a policy is beyond the limits set by section 1424 and not the law in California. (See CT 3116-3117.)

As the Court of Appeal recognized, *People v. Zapien, supra*, 4 Cal.4th 929, a capital case where the defendant sought to recuse the Santa Barbara District Attorney, is analogous. (See CT 3111-3112.) In *Zapien*, the trial prosecutor and his investigating officer discovered a trial strategy tape-recording belonging to defense counsel. (*Id.* at pp. 961-962.) The prosecutor directed the officer to listen to the tape and to report back to him, but the officer threw away the tape instead. (*Ibid.*) About three weeks later, the officer told the Chief of Police about the tape, and the Chief, in turn, informed the DA's Office. (*Ibid.*) When the Santa Barbara District Attorney, Thomas Sneddon, was confronted with his deputy's misconduct, he took a number of steps to deal with the problem. Sneddon assumed the role of trial prosecutor, demoted the assigned deputy, instructed the Assistant District Attorney to inform defense counsel about the problem, had all relevant parties interviewed, and disclosed the interview notes to the defense. (*Id.* at pp. 961-962, 968-970.) Sneddon's actions were determined to be entirely appropriate. (*Id.* at pp. 968-971.) The same is true of the actions of the supervisors and managers at the DA's Office in this case.

3. Appellant's Constitutional Rights Were Not Violated

Appellants argue that their prosecution by the DA's Office denied them a fair trial, due process of law, and the rights to present a defense, to be present at a capital trial, to confrontation, to the effective assistance of counsel, and to a reliable judgment of death. (BAOB 81-120.) The point fails, because, as

explained above, the denial of the first motion and the reversal of the grant of the second motion were not erroneous. (See, e.g., *People v. Cole* (2004) 33 Cal.4th 1158, 1193, fn. 5, 1197, fn. 7, 1210, fn. 13.)

C. Recusal Of The Entire DA's Office Was An Inappropriate Remedy

If any doubt exists about the propriety of the actions of one or more members of the DA's Office, recusal of the entire office was an unnecessary extraordinary measure. Only cases with exceptional circumstances -- not present in this case -- warrant recusal of an entire prosecutorial office.

The lead case on point is *People v. Conner, supra,* 34 Cal.3d 141, and its exceptional facts warranted recusal of the entire Santa Clara DA's Office. Trial prosecutor Braughton was prosecuting Conner. During the trial, Braughton saw Conner holding a gun and standing over a deputy sheriff, who was shot and stabbed. Conner swung the gun toward Braughton. The gun fired, but Braughton was not hit. (*Id.* at pp. 144-145.) Braughton discussed the incident with 10 of the 25 deputies in his office and with the media. (*Ibid.*) Conner moved to disqualify the entire DA's Office, and the trial court granted the motion as to the new charges. (*Id.* at pp. 145-146.)

This Court affirmed, finding the relevant factors to be: (1) the size of the DA's Office; (2) Braughton's communication of the threat to his coworkers; (3) the seriousness of the threat; and (4) the impact of witnessing the injuries of the sheriff's deputy. (*People v. Conner, supra,* 34 Cal.3d at p. 148.) The Court found Braughton's experience was "harrowing," "dramatic," and "gripping," and the threat to him serious. Braughton also saw the injuries inflicted on the sheriff's deputy. Then, Braughton's coworkers learned about the incident through "pervasive" conversations and media coverage, and, because there were only 25 deputies in the office, "there [was] a commendable comraderie" among the deputies. (*Ibid.*) From these exceptional circumstances, the Court concluded that recusal of the entire DA's Office was warranted. (*Id.* at

pp. 148-149.)

Another exceptional case where recusal of an entire prosecutorial office was warranted is *People v. Choi* (2000) 80 Cal.App.4th 476, 481. And its exceptional facts were that *the* District Attorney of San Francisco County, Terence Hallinan, was unable to sever his emotional ties to the case. Hallinan's close friend, Natali, was shot to death, and, minutes later and one mile away, Tran was shot to death. (*Id.* at p. 478.) The defendants indicted for Tran's murder moved to recuse the DA's Office, based on Hallinan's friendship with Natali and his statements to the press that the murders were connected. The trial court denied the motion, relying on the declaration of the prosecutor who was assigned to the case that he was not reporting to Hallinan. (*Ibid.*) But, soon thereafter, Hallinan caused a mistrial in Tran's case when he told the press that the same people were involved in the two shootings, a statement that contradicted the court's express instruction to the jury. (*Id.* at p. 479.) Later, Hallinan again was quoted in the press regarding his feelings about the case. A gag order was entered. (*Id.* at p. 481.) While a second recusal motion was pending, Hallinan approached the court ex parte with a proposed "letter to the editor" about the case. (*Id.* at pp. 479-480.) The trial court found Hallinan's emotional involvement prevented him from exercising the discretionary functions of his office in an evenhanded manner. (*Id.* at pp. 481-482.)

The Court of Appeal agreed. (*People v. Choi, supra,* 80 Cal.App.4th at p. 482.) The court noted that it was difficult to gauge the effect of Hallinan's personal loss, and of his belief that the two shootings were connected, on the deputies in his office. The court recognized that deputies serve at the will of the district attorney and that potential bias might result from the fact that deputies are hired, evaluated, and promoted by the district attorney. (*Id.* at pp. 482-483, citing *People v. Lepe* (1985) 164 Cal.App.3d 685, 689.) The court noted that the deputy who was prosecuting the Tran case was aware of Hallinan's

proposed letter. Thus, the "ethical wall" in the DA's Office had not prevented Hallinan from communicating about the case with others in his office. Given these exceptional circumstances, the court found that the trial court did not abuse its discretion in recusing the entire DA's Office. (*People v. Choi, supra,* at p. 483.)

Conner and *Choi,* however, are the exceptional cases. And the bar they set is high: to warrant recusal of an entire prosecutorial office, there must be a conflict capable of permeating the entire staff of prosecutors to such an extent that no deputy could prosecute the case fairly. Most cases where there is a conflict of interest do not reach the high threshold required for the recusal of an entire prosecutorial office.

In *Hernandez*, for example, recusal of the entire Los Angeles DA's Office was found to be unwarranted. A criminal case was pending in which Braverman was the defendant and Hernandez was the victim. (*People v. Hernandez, supra,* 235 Cal.App.3d at p. 677.) During the trial, Hernandez stabbed Braverman, and the DA's Office filed a case against Hernandez. Hernandez moved to recuse the DA's Office on the ground that the office had received information from him as a witness in the Braverman prosecution. The trial court granted the recusal motion as to the entire DA's Office. (*Ibid.*)

The Court of Appeal disagreed and modified the recusal order to provide for disqualification only of certain deputies. (*People v. Hernandez, supra,* 235 Cal.App.3d at p. 677.) The court noted that, even where a prosecutor had formerly represented a defendant, recusal of only that prosecutor was warranted; only where the defendant's former lawyer occupied a *supervisory* position has it been necessary to recuse the entire DA's Office. (*Ibid.*) The court noted there was no evidence whether information obtained from Hernandez had permeated or would permeate the entire DA's Office -- only speculation. (*Id.* at p. 680.) "[T]he problems of insulating the case against

Hernandez from the case against Braverman are not insurmountable -- not in a prosecuting agency comprised of some 900 attorneys." (*Ibid.*) The court suggested a wall be created, by assigning the Hernandez case to deputies unacquainted with the Braverman case and by ordering the deputies on the two separate cases not to communicate about the cases. (*Ibid.*)

The same was true in *Merritt*. As noted previously, Merritt moved to recuse the entire Los Angeles DA's Office based on the alleged misconduct of an investigator with the DA's Office. (*People v. Merritt, supra,* 19 Cal.App.4th at p. 1576.) Despite the fact that the DA's Office insulated the investigator from the case, the trial court granted the recusal motion as to the entire DA's Office. (*Ibid.*) The Court of Appeal disagreed and tailored the order of recusal to apply only to the investigator and any others who had participated in or approved of his activities. (*Id.* at pp. 1581-1582; see also *People v. Clark* (1993) 5 Cal.4th 950, 1000 [this Court recognized the sufficiency of ethical walls within prosecutorial offices].)

The facts of the instant case did not evidence exceptional circumstances warranting recusal of the entire Los Angeles DA's Office. The District Attorneys at the time of the two recusal motions, Ira Reiner and Gil Garcetti, were not shown to be actively involved in this case. Although DA Reiner answered a single press inquiry about investigations related to this case and gave limited testimony about his one comment to the press, he was not shown to be an active participant in the decision-making and prosecution of the instant case.

Also, the fact high-ranking members of the DA's Office were involved in some pretrial decisions in this case did not warrant office-wide recusal. Appellants reliance on *Younger v. Superior Court* (1978) 77 Cal.App.3d 892, in this regard, is misplaced. (See BAOB 116-117.) In *Younger*, it was the special nature of the relationship between the prosecutor and the defendant, not

just that the prosecutor held an administrative position, that made recusal appropriate in that case. In any event, as appellants acknowledge (BAOB 116), *Younger* was decided before section 1424 was enacted and specifically relies upon the outdated appearance-of-impropriety standard for recusal.

In terms of the number of persons at the DA's Office connected to the controversies about "infiltration" and DDA Abele's notes, the number represented only a small fraction of a very large office. By appellants' count, 18 persons from the DA's Office were involved. (BAOB 118, citing 6 Supp. CT 3149.) Initially, this count is inaccurate. One person is listed twice and was retired. (6 Supp. CT 3149; see RT 4625.) But even considering appellants' best count, that number represented about two percent of the DA's Office. In any event, there is no authority for the proposition that the mere number of persons involved in a case, in the context of an office with 900 deputies (see *People v. Hernandez, supra,* 235 Cal.App.3d at p. 681 [the *Hernandez* court estimates there were about 900 deputies at the Los Angeles County DA's Office in 1991], demonstrates an office-wide recusal is the appropriate remedy.

Finally, contrary to appellants' contention (see BAOB 118), there was no evidence presented that any purported conflict had somehow spread and infected the entire staff of over 900 deputies to such an extent that no prosecutor could afford the defendants a fair trial. And, even if it is assumed that DDA Maurizi or other members of the DA's Office committed some misconduct, DDA Maurizi and DDA Abele were removed from the case. No more curative measure was needed.

In summary, recusal of the Los Angeles County DA's Office was unwarranted in this case. Accordingly, there was no violation of appellants' constitutional rights. And, even if there is a doubt about the propriety of the

actions of one or more members of the DA's Office, recusal of the entire office was an unnecessary extraordinary measure. Instead, the measures taken by the DA's Office were sufficient to ensure appellants a fair trial.

II.

THE TRIAL COURT ACTED WELL WITHIN ITS AUTHORITY AND ITS DISCRETION IN DENYING APPELLANT BRYANT'S MOTION TO RECUSE DETECTIVE VOJTECKY

As set forth in Argument I, two motions to recuse the Los Angeles County DA's Office were filed in this case. On March 4, 1994, the Court of Appeal reversed the trial court's order granting the second recusal motion in *People v. Bryant* (B074364). (CT 3091-3121.)

Several months later, but still before the start of trial, appellant Bryant filed another recusal motion. This time, appellant Bryant moved to (1) recuse Detective Vojtecky, the lead investigating officer, (2) compel a psychiatric examination of Detective Vojtecky, and (3) preclude Detective Vojtecky from being armed while in the courtroom. (CT 13798-14000.) The motion was predominantly based upon the allegation of witness tampering arising from Detective Vojtecky's January 1991 interview of witness Rosa Hernandez -- the allegation litigated in the second motion to recuse the DA's Office. (CT 13804-13832.) Appellant Bryant also submitted additional allegations in support of his motion, which included the following: Detective Vojtecky had tried to intimidate DDA Abele by displaying his guns during DDA Abele's testimony at the hearing on the second recusal motion; Detective Vojtecky had hired an attorney and filed a declaration during the second recusal motion; and Detective Vojtecky had withheld discovery and misrepresented to the trial court that all discovery had been provided to the defense. (CT 13804-13832.)

The trial court held a hearing on appellant Bryant's motion. (RT 6113-6126.) Appellant Bryant submitted the matter on the written motion but cited as additional support for his motion Detective Vojtecky's involvement in the change of appellant Bryant's housing in county jail to a less desirable location. (RT 6114.) The People opposed the motion, arguing that the recusal statute

(i.e., section 1424) and case law did not contemplate recusal of an investigator not employed by the DA's Office. (RT 6119.) Appellant Bryant countered that the People were estopped from making this argument because, during the prior recusal hearings, the Attorney General's Office had asked that Detective Vojtecky be recused. (RT 6120.)

In response to the estoppel argument, the trial court stated that the record showed the Attorney General's Office had suggested the recusal of Detective Vojtecky only as an *alternative*, less drastic measure to recusing the entire 900-deputy DA's Office. (RT 6120-6121.) The court stated it would assume it had the authority to remove a prosecutor or an investigator from a case, if it determined the defendant could not otherwise receive a fair trial. However, the court found such measures were unwarranted in this case. (RT 6122.)

More specifically, the trial court noted that the origin of the second motion to recuse the DA's Office was the January 1991 interview of witness Rosa Hernandez by DDA Maurizi and Detective Vojtecky. As a result of that recusal motion, the DA's Office had removed DDA Maurizi from the case, and the trial court had conducted extensive hearings on the motion. And, although the trial court had found a sufficient basis to recuse the entire DA's Office, the Court of Appeal had disagreed. (RT 6121-6122.)

As far as the new motion calling for Detective Vojtecky's recusal, the trial court recognized it was again based upon Detective Vojtecky's conduct during the Hernandez interview, as well as some other "unusual" behavior attributable to a number of things that had occurred in the case (e.g., accusations by the defense that Detective Vojtecky had engaged in criminal conduct). The court concluded there was nothing in the record to indicate Detective Vojtecky's conduct was likely to preclude any defendant from receiving a fair trial. (RT 6122, 6124.) The court found any unusual behavior by Detective Vojtecky would harm the prosecution, not the defense, and Detective

Vojtecky's presence in the courtroom would not be tantamount to a stamp of approval of the case. (RT 6123-6125.) The court, therefore, denied the motion to recuse Detective Vojtecky, to order a psychiatric examination of him, and to preclude him from being armed while in the courtroom. (RT 6123.)

Appellant Bryant now argues that the trial court erred in denying his motion to recuse Detective Vojtecky and violated his rights under the Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments to the United States Constitution and the parallel provisions of the California Constitution. (BAOB 121-130.) He also contends that the People are estopped from opposing his argument, in light of the request for Detective Vojtecky's recusal made by the Attorney General's Office at the hearing on the second recusal motion. (BAOB 128-130.) Although appellants Wheeler and Smith did not join in the motion to recuse Detective Vojtecky in the trial court, they join in this claim of error on appeal. (WAOB 435; SAOB 451.)

Initially, this issue is waived as to appellants Wheeler and Smith, because they did not join in the motion in the trial court. (See *People v. Zapien, supra,* 4 Cal.4th at p. 966.) As to appellant Bryant, the claim of error has no merit. First, the trial court did not abuse its discretion in ruling that recusal of Detective Vojtecky was unwarranted. Second, respondent is not now estopped from opposing appellant Bryant's claim, because the record makes clear the Attorney General's Office suggested the recusal of Detective Vojtecky at the second motion to recuse the entire DA's Office only as an alternative, less drastic remedy to recusing the entire 900-deputy DA's Office.

A. The Trial Court Did Not Abuse Its Discretion In Denying Appellant Bryant's Motion To Recuse Detective Vojtecky

Even before the enactment of section 1424, this Court recognized in *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, the judicial power to recuse the district attorney as prosecutor. Under section 1424, a defendant may

successfully move to disqualify a district attorney when the evidence shows a conflict of interest that would render it unlikely the defendant would receive a fair trial. Although, by its terms, section 1424 refers to a "fair trial," this Court has recognized that prosecutorial impartiality extends to all portions of the proceedings -- from the investigation and gathering of evidence relating to criminal offenses, through the crucial decisions of whom to charge and what charges to bring, to the numerous choices a prosecutor makes at trial. (*People v. Eubanks, supra,* 14 Cal.4th at pp. 589, 593.) And a trial court's ruling on a recusal motion is reviewed on appeal for abuse of discretion. (*Id.* at p. 595.)

In *People v. Merritt, supra*, 19 Cal.App.4th 1573, the trial court granted the defendant's motion to recuse the entire Los Angeles County DA's Office based on the alleged misconduct of a single district attorney investigator. (*Id.* at p. 1576.) The Court of Appeal disagreed with such a broad order and thus modified the recusal order of the trial court to apply only to the investigator, as well as to any others who had participated in or approved of his activities. (*Id.* at pp. 1581-1582.)

Under these principles and case law, even assuming the trial court's authority to disqualify a member of the prosecution team extended to Detective Vojtecky, who was a Los Angeles police officer "on loan" to the DA's Office (see RT 2896, 4136, 8251-8252), the trial court properly denied the motion to recuse Detective Vojtecky. The basis of appellant Bryant's motion to recuse Detective Vojtecky was the same as that for the second motion to recuse the entire DA's Office -- the January 1991 interview of witness Rosa Hernandez. As set forth in Argument I, the Court of Appeal did not find that the facts surrounding the Hernandez interview warranted the recusal of the entire DA's Office. (See CT 3091-3121.) Additionally, even though the Court of Appeal was well aware of *Merritt* and had the record of the extensive hearings on the second recusal motion before it (including DDA Abele's allegations regarding

Detective Vojtecky's conduct at the Hernandez interview), the Court of Appeal did not tailor the recusal order to apply to Detective Vojtecky. (CT 3108.)

Instead, the Court of Appeal correctly noted that the trial court had made no finding of witness tampering, or any other finding of misconduct, by Detective Vojtecky. (See CT 3104; compare *People v. Merritt, supra,* 19 Cal.App.4th at p. 1577 [the trial court finds that DA investigator engaged in "sexual impropriety" towards a material witness, withheld statements from both the prosecution and the defense, and was guilty of the appearance of "gross misconduct"].) The Court of Appeal also noted that appellants would have the opportunity to explore the conduct of the Hernandez interview, if it became an issue at trial. (CT 3104.)

On remand from the Court of Appeal, the trial court correctly recognized that appellant Bryant had pointed to nothing which showed that Detective Vojtecky's alleged conduct was likely to preclude any defendant from receiving a fair trial. (RT 6122.) The trial court also properly found that appellant Bryant had not adequately explained how Detective Vojtecky's mere presence in the courtroom would bolster the People's case. (RT 6125.) The trial court's decision to permit Detective Vojtecky to remain in the courtroom during the trial was well within the court's broad discretion. (*People v. White* (1950) 100 Cal.App.2d 836, 838; see *People v. Griffin* (2004) 33 Cal.4th 536, 574; see BAOB 127.) Appellant Bryant does not now articulate how he met his burden in the trial court and showed that, absent Detective Vojtecky's recusal, it was unlikely appellant Bryant would receive a fair trial.

Under these circumstances, the trial court did not abuse its discretion as a matter of law in denying the motion to recuse Detective Vojtecky. And, because there was no error, appellant Bryant's constitutional rights were not violated. (See, e.g., *People v. Cole, supra,* 33 Cal.4th at p. 1193, fn. 5.)

B. Respondent Is Not Estopped From Opposing Appellant Bryant's Claim Of Error On Appeal

During the hearing on the second recusal motion, the Attorney General's Office suggested the recusal of Detective Vojtecky as an alternative, less drastic remedy to recusing the entire 900-deputy DA's Office. (RT 4740, 6120-6121.) The trial court ordered the recusal of the entire DA's Office, and the Court of Appeal reversed the trial court's order in its entirety. (CT 3091-3121.) On remand, appellant Bryant filed a motion to recuse Detective Vojtecky. The People opposed the motion. (RT 6119.) Appellant Bryant now contends that the People took inconsistent positions on the issue of recusal as to Detective Vojtecky and that the doctrine of judicial estoppel precludes respondent from opposing his claim of error on appeal. (BAOB 128-130.)

The doctrine of judicial estoppel precludes a party from gaining an advantage by taking one position and then seeking a second advantage by taking an incompatible position. (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986.) The doctrine's goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. (*Ibid.*) The doctrine applies when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. (*Id.* at pp. 986-987.) Application of the doctrine is discretionary. (*Id.* at p. 986.)

The doctrine does not apply, and should not apply, here. First, the People were not "successful" in obtaining the limited recusal of Detective Vojtecky at the close of the second motion to recuse the entire DA's Office (factor 3). Instead, the trial court ordered the recusal of the entire DA's Office. (RT 4816-4821.)

Second, the positions taken by the People were not "totally inconsistent" (factor 4). The crux of the People's position was always the same throughout the various recusal motions -- that no recusal of a member of the prosecution team was warranted. However, the People submitted that, to the extent that the trial court was going to make an order of recusal based on the second motion to recuse the entire DA's Office, the order should apply to Detective Vojtecky only, instead of the entire DA's Office. (RT 4740, 6120-6121.) The goals of the doctrine of estoppel -- maintaining the integrity of the judicial system and protecting parties from opponents' unfair strategies -- are advanced, not thwarted, by recognizing that a party may offer a compromising alternative to a motion, without being a proponent of that position.

Moreover, the People never conceded that Detective Vojtecky's conduct *during the Hernandez interview* warranted his recusal. To the contrary, the Attorney General's representative stated it appeared Detective Vojtecky was impartial because he disagreed with the new District Attorney administration's (Gil Garcetti's) recommendation on case dismissals. (RT 4740.) This was not a concession of the alleged conflict of interest which was the basis of the motion to recuse Detective Vojtecky (i.e., Detective Vojtecky's techniques during the January 1991 interview of Rosa Hernandez). Also, the fact Detective Vojtecky may have been a driving force in the prosecution team (see RT 4740) was not a "conflict" under section 1424, in light of the fact Detective Vojtecky was the lead investigator in the case. Accordingly, the People never took the position that, in light of Detective Vojtecky's conduct during the Hernandez interview or its aftermath, Detective Vojtecky had a disabling conflict of interest.

In light of the foregoing, respondent is not estopped from opposing the instant claim.

III.

THE TRIAL COURT PROPERLY DENIED ALL MOTIONS FOR SEVERANCE

Appellants contend the trial court abused its discretion in denying their motions to sever their cases from codefendant Settle's case. Each appellant also contends the trial court abused its discretion in denying his motion to sever his case from his two co-appellants' cases. Appellants argue these errors violated their constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the parallel provisions of the California Constitution. (BAOB 131-156; WAOB 100-151; SAOB 100-150.) Respondent submits there was no abuse of discretion in the denials of severance, and appellants' claims of constitutional error likewise must fail.

A. Relevant Proceedings

On June 24, 1994, the trial court re-joined codefendant Settle's case with appellants' cases. Previously, the trial court had severed codefendant Settle's case from appellants' cases in order to give codefendant Settle's counsel -- then a new attorney on the case -- sufficient time to prepare for trial. However, given the passage of time with the litigation of the recusal issue on appeal (see Arg. I), the trial court re-joined codefendant Settle's case with appellants' cases. This way, the four capitally-charged defendants (i.e., appellants Bryant, Wheeler, and Smith, and codefendant Settle) would be tried together, and the cases of the remaining non-capital defendants (i.e., Antonio Johnson, Nash Newbill, Lamont Gillon, and Andrew Settle) would trail the capital trial. (CT 13472; RT 4936, 4947, 4950-4951.) Several months after the joinder, on November 10, 1994, the trial court granted codefendant Settle's motion to represent himself. (CT 13744; RT 6071-6088.)

On December 12, 1994, appellant Bryant filed a motion to sever his case from that of codefendant Settle, appellant Smith, and appellant Wheeler, alleging violations of his state and federal constitutional rights in the absence of severance. (CT 14084-14136.) With regard to codefendant Settle, appellant Bryant argued that codefendant Settle was unfamiliar with the law and permissible courtroom behavior, was uncaring about what the law required of him with respect to conforming his conduct to standards which did not jeopardize the constitutional rights of his codefendants, and had stated his intent to act as a "second government prosecutor" if counsel for appellant Bryant displeased him. (CT 14098-14099.) Appellant Bryant argued that, at trial, codefendant Settle might ask a witness a question implicating himself and appellant Bryant. If this happened, appellant Bryant would be deprived of his right to confront and cross-examine the non-testifying codefendant, would not be able to unring the bell, and would be deprived of the effective assistance of counsel -- since counsel would not focus on protecting appellant Bryant's rights but, instead, would focus on not angering codefendant Settle who could sabotage the case. (CT 14109-14110.)

In support of his motion to sever his case from appellant Smith's case, appellant Bryant argued that counsel for appellant Smith had demonstrated a willingness to "sabotage" appellant Bryant's case. Appellant Bryant stated that counsel for appellant Smith had unexpectedly asked for a reversal of the trial court's recusal order during oral argument in the Court of Appeal and also had not responded to invitations for joint meetings of defense counsel. (CT 14110-14115.) As for appellant Wheeler, appellant Bryant argued that, since appellant Wheeler had allegedly confessed that he had shot two-year-old Chemise and her mother, appellant Bryant would be prejudiced if he were tried with a child killer. (CT 14115-14116.)

A few days later, on December 21, 1994, the trial court addressed appellant Bryant's severance motion. The court said it had read and considered the motion. Counsel for appellant Bryant reiterated the arguments he had presented in his written motion. (RT 6128-6130.) Focusing on codefendant Settle, counsel for appellant Bryant noted that there was a recent article in the Daily Journal quoting codefendant Settle as saying that his codefendants were guilty but he was not. Counsel for appellant Bryant said he was concerned codefendant Settle would take the same position at trial and referred to codefendant Settle as a "ticking time bomb." (RT 6138.)

The trial court said it could not envision how codefendant Settle would present a defense that the other defendants were guilty but he was not. The court observed that codefendant Settle's position was that he was not at the crime scene and did not know about the homicides. Thus, his defense was not one that was susceptible of implicating appellants. (RT 6139-6141.) The court also noted that the problem presented to the court had nothing to do with codefendant Settle's pro per status and that the same issue could be presented to the court if codefendant Settle had been represented by counsel. (RT 6147.) The court asked codefendant Settle for his input on the severance motion. Codefendant Settle stated that he did not "do it [the murders]," that his defense was "antagonistic," and that he intended to assign responsibility for the crimes. (RT 6143-6144.) In response, appellants Wheeler and Smith joined in appellant Bryant's motion to sever their cases from codefendant Settle's case. (RT 6144.)

The People argued that there was no indication at that point in the case that appellant Bryant's defense was inconsistent with codefendant Settle's defense. The People argued that, whether codefendant Settle could present a defense exculpating himself and implicating his codefendants was something unknown and would not be known until there were hearings to see what the witnesses would testify. (RT 6145.) The trial court stated that codefendant

Settle had not done anything to give the court the slightest hint that he was going to do what appellants suggested. (RT 6149.) The court, thereafter, denied appellant Bryant's motion to sever his case from appellant Wheeler's and appellant Smith's cases and took under submission the motion to sever appellants' cases from codefendant Settle's case. (RT 6151.)

On January 18, 1995, the next court date, the trial court denied the motion to sever appellants' cases from codefendant Settle's case. The court explained that the California Constitution, statutory law, and case law recognized society's interest in joint trials. The court stated that joint trials served the interest of justice by enabling a more accurate assessment of relative culpability. Also, under section 1098, joint trials were the rule and separate trials were the exception. The court concluded that, under this authority, the need for a joint trial was clear in this case. (RT 6192-6193.)

Focusing on the factors warranting a joint trial, the trial court explained the basis for its ruling: the case was complex and the trial would be lengthy, ranging from three to six months; the case originally had a two-year trial estimate, which was one of the reasons the prior trial judge had severed many counts and defendants; it had taken over five years to bring the case to trial; there were several hundred potential witnesses; the charges were serious, and they involved several counts of murder and allegations of narcotics and (at the time) other conspiracies, ranging over a wide geographic area and spanning many years, and the four defendants faced the death penalty; there were security problems inherent in the case, and the security problems made it likely the jury would be an anonymous panel that might be sequestered during a part of the trial; and the security problems required additional bailiffs and other security personnel to be used during the trial. The court summarized that these were some of the factors, among others, that overwhelmingly supported a joint trial. (RT 6193-6196.)

The trial court observed that the sole ground urged by appellants for severance was the fear that codefendant Settle might defend his case in a way that was detrimental to the others. The court stated it was confident codefendant Settle would abide, and had abided, by the court's instructions to him. The court found that, at that point in time, the allegations that there would be inconsistent defenses and that codefendant Settle may choose a course of action detrimental to his codefendants were just that -- allegations not borne out by any concrete evidence presented to the court. Accordingly, the court denied the motion to sever appellants' cases from codefendant Settle's case. (RT 6195-6196.)

A few days later, on January 24, 1995, codefendant Settle moved for severance. The trial court denied the motion. The court then heard codefendant Settle's motion to be held in federal custody. Codefendant Settle stated that, throughout the history of the case, witnesses had been intimidated or killed and he believed appellants were involved in those efforts. Codefendant Settle stated that he had received a threat and, if he was not placed in federal custody, it would affect his right to testify. Codefendant Settle explained that he intended to testify and his trial testimony would not be favorable to appellants. The trial court denied codefendant Settle's motion to be held in federal custody. (RT 6335-6343.)

Following this exchange, appellant Bryant argued that codefendant Settle was making vague allegations of future crimes of violence and, if the allegations were untrue, appellant Bryant was entitled to know because this supported his earlier assertion that codefendant Settle was willing to fabricate evidence to convict appellant Bryant. Appellant Wheeler asked that codefendant Settle's case be severed from his, arguing that codefendant Settle was likely to make allegations of future crimes before the jury. The trial court implicitly denied the motion, stating that the fact codefendant Settle was

representing himself did not mean he could do what he wanted to do before the jury. The court noted that codefendant Settle understood that, if he did not comply with the court's rules, he would not represent himself. (RT 6379-6381.)

On February 9, 1995, codefendant Settle made a motion to reconsider his motion for severance and/or federal protection. Codefendant Settle indicated his trial testimony could be damaging to his codefendants. The trial court denied the motion, stating that separate trials would not solve the problems of the alleged threats against codefendant Settle. Appellants Bryant and Wheeler indicated they wished to join in codefendant Settle's motion. The court instructed counsel for appellants Bryant and Wheeler to read codefendant Settle's motion before joining in it because they might not agree with the entire motion. The court also directed counsel to make written motions and said it would not entertain "motions from the hip." (RT 7834-7838.)

The case proceeded to trial. During the defense case, codefendant Settle called Floyd Tillman as a witness. On cross-examination, the prosecution asked Tillman about prior statements he had made to the police which were inconsistent with Tillman's trial testimony. (RT 14670-14675.) During a sidebar conference, appellant Bryant moved for a mistrial based on "the impossibility of being in trial with the pro per," arguing that the prosecution's cross-examination of Tillman was directed against appellant Bryant. Appellant Bryant argued that, had codefendant Settle been represented by counsel, counsel would not have called Tillman as a witness. The trial court denied the motion. (RT 14675-14676.)

Appellant Bryant renewed his motion to sever his case from codefendant Settle's case during codefendant Settle's cross-examination of appellant Bryant. Counsel for appellant Bryant argued: "The 10 minutes [of cross-examination of appellant Bryant] by [codefendant] Settle yesterday I think did more than anything that I have even seen in 28 years to destroy on nonissues." Counsel

explained: "[Codefendant Settle's] questions about the Toyota and his questions about Will Settle and the truck and the 7-Eleven were totally destructive of the presentation of [appellant Bryant's] defense. . . ." (RT 15471.) Appellant Wheeler joined in this motion; appellant Smith did not. The trial court denied the motion. (RT 15471-15472.)

Later that same day, during codefendant Settle's testimony, appellants renewed their motions to sever their cases from codefendant Settle's case. The court, once again, denied the motion. (RT 15543.)

Finally, appellant Bryant renewed his motion to sever his case from codefendant Settle's case, based primarily upon codefendant Settle's guilt phase closing argument. Appellant Bryant argued that codefendant Settle had displayed a disregard for the trial court's admonition to restrict argument to the evidence. Appellants Wheeler and Smith joined in this motion. Appellant Wheeler also moved for a mistrial, based on the fact that codefendant Settle had testified last. Appellant Smith joined in the motion. The trial court denied the motions. (RT 16634-16635.)

B. The Applicable Law

Under section 1098, "[w]hen two or more defendants are jointly charged . . . they must be tried jointly, unless the court order[s] separate trials." Thus, under section 1098, a trial court must order a joint trial as the "rule" and may order separate trials as an "exception." (*People v. Cleveland* (2004) 32 Cal.4th 704, 726; *People v. Alvarez* (1996) 14 Cal.4th 155, 190.) "Joint trials are favored because they promote economy and efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." (*People v. Coffman* (2004) 34 Cal.4th 1, 40, internal quotation marks omitted.) A "classic case" for joint trial is presented when defendants are charged with common crimes involving common events and victims. (*People v. Cleveland, supra,* at p. 726.)

In light of this legislative preference for joinder, separate trials are usually ordered only in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony. (*People v. Box* (2000) 23 Cal.4th 1153, 1195, internal quotation marks omitted; *People v. Cleveland, supra,* 32 Cal.4th at p. 726.) However, antagonistic defenses alone do not compel severance. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1286.)

In *Coffman*, this Court set forth the applicable law regarding severance and conflicting defenses:

> In [*People v. Hardy* (1992) 2 Cal.4th 86, 168], we said: Although there was some evidence before the trial court that defendants would present different and possibly conflicting defenses, a joint trial under such conditions is not necessarily unfair. [Citation.] Although several California decisions have stated that the existence of conflicting defenses may compel severance of codefendants' trials, *none has found an abuse of discretion or reversed a conviction on this basis*. [Citation.] If the fact of conflicting or antagonistic defenses *alone* required separate trials, it would negate the legislative preference for joint trials and separate trials would appear to be mandatory in almost every case. We went on to observe that although it appears no California case has discussed at length what constitutes an antagonistic defense, the federal courts have almost uniformly construed that doctrine very narrowly. Thus, [a]ntagonistic defenses do not *per se* require severance, even if the defendants are hostile or attempt to cast the blame on each other. [Citation.] Rather, to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that

> [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict *alone* demonstrates that both are guilty. [Citation.] When, however, there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance. [Citation.]

(*People v. Coffman, supra,* 34 Cal.4th at pp. 41-42, internal quotation marks omitted, emphasis in original.)

A trial court's ruling on a severance motion is reviewed for abuse of discretion on the basis of the facts known to the court at the time of the ruling. (*People v. Box, supra,* 23 Cal.4th at p. 1195; *People v. Alvarez, supra,* 14 Cal.4th at p. 189.) Even if a trial court abuses its discretion in failing to grant severance, reversal is required only upon a showing that, to a reasonable probability, the defendant would have received a more favorable result in a separate trial. (*People v. Coffman, supra,* 34 Cal.4th at p. 41.) Also, the reviewing court may reverse a conviction where, because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law. (*People v. Cleveland, supra*, 32 Cal.4th at p. 726.)

C. The Trial Court Properly Denied Appellants' Motions To Sever Their Cases From Codefendant Settle's Case

1. The Initial Motion

The trial court properly denied appellants' pretrial motion to sever their cases from codefendant Settle's case, because this was a "classic case" for joint trial. Appellants and codefendant Settle were each charged with having committed the same crimes involving the same events and victims: the August 28, 1988, murders of Andre Armstrong, James Brown, Loretha Anderson, and Chemise English and the attempted murder of Carlos English. Appellants and codefendant Settle were also each charged as a capital defendant. Because the charges against appellants and codefendant Settle were identical, there was no

danger of jury confusion and no danger of prejudicial association. There was also no suggestion that, if tried separately from codefendant Settle, any appellant would have provided exonerating testimony. And there was no issue of extrajudicial statements in which codefendant Settle implicated appellants.

Moreover, there was no indication appellants and codefendant Settle had conflicting defenses. As the trial court observed, codefendant Settle's defense was that he was not at the crime scene and did not know about the murders. Thus, regardless of codefendant Settle's assertion that his defense was "antagonistic" and that he would be "assigning responsibility" for the crimes, his defense that he did not "do it" and was not present during the murders was not one that was susceptible of implicating appellants. (RT 6139-6141, 6144.) There were simply no facts before the trial court that appellants and codefendant Settle had antagonistic, let alone irreconcilable, defenses. And codefendant Settle's use of the buzz word "antagonistic" was insufficient to warrant severance. As the trial court recognized, the allegations that there would be inconsistent defenses and that codefendant Settle might choose a course of action detrimental to appellants were just that -- allegations not borne out by any concrete evidence presented to the trial court. (RT 6195-6196.)

Even if this Court concludes that the trial court abused its discretion in denying severance, compelling independent evidence of each appellant's guilt leads to the inescapable conclusion that appellants have not demonstrated a reasonable probability of a more favorable outcome had severance been granted, as is required for reversal. (*People v. Coffman, supra,* 34 Cal.4th at p. 43.) The prosecution had overwhelming independent evidence of each appellant's guilt, and it was not any purported conflict with codefendant Settle's case alone that demonstrated each appellant's guilt. (*Ibid.* [no abuse of discretion and no reasonable probability of a more favorable outcome had severance been granted in light of the prosecution's independent evidence of

guilt, where one defendant (Coffman) described her relationship with the other defendant (Marlow), his threats and violence towards her, other murders in which he had forced her to participate, and his kidnapping, robbery, probable sexual assault, and burial of the victim].) Specifically, as set forth in the Statement of Facts, James Williams described each appellant's participation in the August 28, 1988, quadruple murder. Also, as detailed in Argument XI, compelling other evidence corroborated Williams's testimony and convincingly established each appellant's guilt. Accordingly, since there was persuasive and compelling independent evidence of each appellant's guilt, apart from anything codefendant Settle had to say, appellants suffered no prejudice from the denial of severance. For the same reasons, appellants' claims that the joint trial deprived them of their constitutional rights likewise must fail.

2. The Renewed Motions

Following the initial motion to sever, appellants renewed their motion to sever their cases from codefendant Settle's case several times during the course of the case. But no circumstances developed which required the trial court to grant severance.

a. Codefendant Settle's Motion To Be Held In Federal Custody

Appellant Wheeler first renewed his motion to sever his case from codefendant Settle's case during the pretrial litigation of codefendant Settle's motion to be held in federal custody. Codefendant Settle told the trial court that witnesses had been intimidated or killed during the course of the case and he believed appellants were involved in those efforts. He added that he had personally received a threat and feared testifying without being held in federal custody, because his trial testimony would not be favorable to appellants. (RT 6336, 6339, 6342-6343.) Appellant Bryant argued that codefendant Settle was

making vague allegations of future crimes of violence and, if untrue, the allegations supported his earlier assertion that codefendant Settle was willing to fabricate evidence to convict appellant Bryant. Appellant Bryant, however, did not renew his severance motion. Appellant Wheeler renewed his severance motion and argued that codefendant Settle was likely to make allegations of future crimes before the jury. (RT 6379-6381.)

Because appellant Bryant did not renew his severance motion, he may not complain that the trial court should have granted severance at this juncture in the case. (*People v. Ervin* (2000) 22 Cal.4th 48, 68 ["If further developments occur during trial that a defendant believes justify severance, he must renew his motion to sever. Defendant made no renewed motion in this case. Accordingly, he may not raise the point on appeal."].) In any event, there was no "further development" in the case which justified severance. There were no facts before the trial court that codefendant Settle was making false allegations of a threat and no indication that codefendant Settle would improperly inform the jury about the threat. And, because appellants Bryant and Wheeler focused their arguments on codefendant Settle's allegedly unpredictable courtroom behavior, it was proper for the trial court to focus on those concerns in ruling on the renewed severance motion. (See BAOB 140.)

Moreover, codefendant Settle's assertion that his trial testimony would not be favorable to appellants -- like his earlier allegations during the initial motion -- did not warrant severance. (*People v. Hardy* (1992) 2 Cal.4th 86, 168 ["'[A]ntagonistic defenses do not *per se* require severance, even if the defendants are hostile or attempt to cast the blame on each other.'"].) Contrary to appellant Bryant's claim (see BAOB 141), codefendant Settle did not state that he would testify that appellant Bryant was guilty of the murders. The trial court properly denied the renewed motion.

b. Codefendant Settle's Renewed Motion To Be Held In Federal Custody

As for the pretrial hearing during which appellants Bryant and Wheeler indicated they wished to join in codefendant Settle's motion for reconsideration of his motion for severance and/or federal protection, the trial court did not permit appellants Bryant and Wheeler to join in the motion, apparently because such a joinder would have been contrary to their interests. Additionally, the trial court stated it would not entertain "motions from the hip." (RT 7834-7838.) Accordingly, this did not constitute a renewed motion for severance.

c. Codefendant Settle's Opening Statement And Conduct During The People's Case

Although appellant Smith argues that codefendant Settle's opening statement and conduct with prosecution witness Una Distad required severance (see SAOB 103, 109, 113, 119-120), none of the appellants renewed the severance motion on those grounds at trial. Appellant Smith, therefore, may not complain that the trial court should have granted severance on these grounds. (*People v. Ervin, supra,* 22 Cal.4th at p. 68.)

d. Evidence Admitted Against Codefendant Settle Only

Appellant Wheeler suggests he was prejudiced by association with codefendant Settle, since the People presented three items of evidence admissible against codefendant Settle only. (WAOB 112-115.) However, appellant Wheeler did not renew the severance motion on this basis at trial. He, therefore, may not complain on appeal that the trial court should have granted severance on this ground. (*People v. Ervin, supra,* 22 Cal.4th at p. 68.)

In any event, the three items of evidence admitted exclusively against codefendant Settle[49] did not implicate appellants. And, as appellant Wheeler acknowledges (WAOB 112-115), the trial court gave limiting instructions on the evidence both during the trial and at the close of the case. Presumably, the jury followed these instructions. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 139 [jurors are presumed to understand and follow instructions]; see also *People v. Ervin, supra,* 22 Cal.4th at p. 69 [court finds no error in joint trial where defendant claims the introduction of evidence admissible against some but not all codefendants warranted severance, stating: "The record . . . fails to show that the jurors in this joint trial were unable or unwilling to assess independently the respective culpability of each codefendant or were confused by the limiting instructions."].)

e. Codefendant Settle's Witness, Floyd Tillman

Appellant Bryant made a motion for mistrial during the prosecution's cross-examination of codefendant Settle's witness, Floyd Tillman. On direct examination, Tillman testified that he and William Settle rented a house on Vanport from codefendant Settle in order to sell cocaine. Tillman testified that codefendant Settle had nothing to do with the drug sales and that he did not know codefendant Settle as someone who sold drugs. (RT 14627-14629, 14635.) On cross-examination, the prosecution asked Tillman about prior statements he had made to the police which were inconsistent with his trial testimony. Specifically, the prosecutor asked Tillman whether he had previously told the police that codefendant Settle used to buy cocaine from the Bryant Organization. (RT 15670-15675.)

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49. The three items of evidence are: (1) codefendant Settle's statement, shortly before the murders, that Armstrong would not be around much longer; (2) codefendant Settle's interview with Detective Hughley; and (3) codefendant Settle's interview with Detective Vojtecky. (See WAOB 112-115.)

Appellant Bryant moved for a mistrial based on "the impossibility of being in trial with the pro per," arguing that the prosecution's cross-examination of Tillman was directed against appellant Bryant. The trial court denied the motion. The court noted that codefendant Settle had elicited from Tillman that only Tillman and William Settle (not codefendant Settle and not the Bryant Family) sold cocaine from the Vanport house. The court stated that, because Tillman had given statements to the police that were inconsistent with his testimony, the prosecution was entitled to examine him about his prior statements. (RT 14675-14676.) The trial court did not abuse its discretion. (See *People v. Cleveland, supra,* 32 Cal.4th at p. 728 ["Some defendants will sometimes cross-examine witnesses differently from another defendant, and may thus elicit testimony on redirect examination that another defendant would not elicit, but such differences in trial tactics do not mandate severance."].)

f. Codefendant Settle's Cross-Examination Of Appellant Bryant

Next, appellant Bryant renewed his motion to sever his case from codefendant Settle's case during codefendant Settle's cross-examination of appellant Bryant. Appellant Wheeler joined in the motion. (RT 15471-15472.)

On direct examination, appellant Bryant testified that he became involved in the sale of narcotics in February 1982 and remained involved until 1988 (including in August 1988, the month of the murders). (RT 15158, 15165.) He testified that he was not at the Wheeler Street residence on August 28, 1988, had nothing to do with the murders, and first learned about the murders on the evening news. (RT 15164-15167.)

On cross-examination by the People, appellant Bryant testified in relevant part that, in 1982, his brother Jeff Bryant ran the group of people selling drugs, and appellant Bryant assisted Jeff Bryant because he needed money to raise his newborn. Jeff Bryant paid appellant Bryant $500 per week.

(RT 15176, 15179, 15191-15192, 15267-15268.) In October 1985, William Settle approached appellant Bryant and told him that he had money to invest. Appellant Bryant had previously told William Settle that he assisted his brother Jeff in selling drugs and that it was profitable. In November 1985, because the business was in debt and things "got worse," William Settle took over the drug selling group. (RT 15174-15175.) Appellant Bryant negotiated the transfer of the group to William Settle. (RT 15319.) Appellant Bryant continued to be involved in the distribution of narcotics, and William Settle paid appellant Bryant $1,500 per week and used the pool hall. (RT 15170-15171.) In 1988, William Settle was providing most of the drugs being sold in the neighborhood, and he was running the Wheeler Street residence as a part of the drug operation. (RT 15170, 15222.)

On cross-examination by codefendant Settle, appellant Bryant repeated that William Settle took over the drug sales in late 1985. Appellant Bryant also testified that William Settle worked for Budweiser until 1987. (RT 15456-15457.) Codefendant Settle asked appellant Bryant, "So after [William Settle] got off of work from stacking cases of beer in the 7-11's, he then ran the Bryant Organization?" (RT 15457.) Appellant Bryant responded, "Like I said, I never considered it an organization. He wanted to invest some money and that is what he did. He basically, like I said, he had a lot of free time. He was always in the streets." (RT 15457.) Codefendant Settle showed appellant Bryant a photograph of a Toyota (Peo. Exh. 163; "the company car") and asked if he recognized it. Appellant Bryant responded that he had seen the car at the Wheeler Street residence. On further questioning, appellant Bryant testified that he did not know whether the Toyota needed brake repairs on August 28, 1988, and did not recall telephoning (but may have telephoned) codefendant Settle on August 28 about the brakes. (RT 15457-15461.) Appellant Bryant also testified that he did not use Frank Settle as a "go between" for drug deliveries

but that William Settle may have. (RT 15461-15462.)

Appellant Bryant contends that this examination demonstrates that codefendant Settle served, in effect, as a second prosecutor, bringing out in cross-examination testimony detrimental to appellant Bryant. (BAOB 142-143.) Appellant Bryant, however, fails to explain how codefendant Settle's questions about the Toyota, Frank Settle, and a telephone call on August 28 were detrimental to, or irreconcilable with, his defense. Appellant Bryant admitted to distributing narcotics on direct examination. So, any testimony connecting him to drug sales (i.e., his connection to the "company car" or Frank Settle) was not detrimental to, or irreconcilable with, his defense. If anything, codefendant Settle's examination was, as apparently described by the trial court, "some bizarre tangent." (RT 15502.)

As for the question about William Settle working for Budweiser and simultaneously running the drug organization, this was cross-examination that the People could have undertaken. "The mere fact that a damaging cross-examination that the prosecution could have undertaken was performed instead by [codefendant] did not compromise any of the defendant's constitutional or statutory rights." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1208.) Appellant Bryant does not identify any evidence elicited by codefendant Settle that would have been inadmissible at a separate trial. Thus, the trial court properly denied the renewed motion for severance.

g. Codefendant Settle's Testimony

Appellants renewed their motion to sever their cases from codefendant Settle's case during codefendant Settle's testimony. (RT 15543.) Codefendant Settle testified that, on August 28, 1988, he was at home when he received a telephone call from appellant Bryant, who asked if he (codefendant Settle) could do a brake job on a Toyota. Codefendant Settle agreed. Appellant Bryant also inquired if codefendant Settle had cars for sale. Codefendant Settle

read appellant Bryant a list, and appellant Bryant agreed to purchase for $900 a 1970 Pontiac Bonneville. Thereafter, Frank Settle arrived at codefendant Settle's house in the Toyota, left the Toyota for repair work, and drove off in the Pontiac. Codefendant Settle fixed the brakes on the Toyota in one hour. Later, Frank Settle and appellant Wheeler arrived in a jeep, paid codefendant Settle, and picked up the Toyota. Codefendant Settle testified that he had never been at the Wheeler Street residence. He denied the statement attributed to him by Reynard Goldman (i.e., that codefendant Settle said, shortly before the murders, that Andre Armstrong "wasn't really going to be around too much longer"). He testified that his brother William Settle was involved in the sale of narcotics. (RT 15531-15541.)

At this point in codefendant Settle's testimony, appellants renewed their motion for severance. Appellant Bryant argues on appeal that codefendant Settle's testimony was "extremely antagonistic" to his defense. (BAOB 144.) But codefendant Settle did not blame, point the finger at, or implicate any appellant in the murders. He did not place any appellant at the Wheeler Street residence during, or near the time of, the murders. He did not even place any appellant in a leadership position in the drug organization. Codefendant Settle's testimony -- that he was not at the Wheeler Street residence on August 28, 1988, but was, instead, at home working on cars -- was not irreconcilable with any appellant's defense.

Specifically, appellant Bryant testified that he may have called codefendant Settle on August 28 about the Toyota's brakes. (RT 15460-15461.) So, there was no irreconcilable conflict between appellant Bryant's and codefendant Settle's case. Appellant Smith did not present a defense. So, there was no irreconcilable conflict between appellant Smith's and codefendant Settle's case. And, appellant Wheeler's defense did not preclude him from having picked up the Toyota, as testified to by codefendant Settle. So, there

was no irreconcilable conflict between appellant Wheeler's and codefendant Settle's case.

Contrary to appellant Bryant's assertion, codefendant Settle did not "secure[]" appellant Bryant's, or any other appellant's, conviction. (BAOB 146.) The prosecution did. Finally, the fact codefendant Settle may have perjured himself, as argued by appellant Smith (see SAOB 110-113) is a red-herring; the point is that codefendant Settle's testimony, truthful or not, was not irreconcilable with appellants' defenses. Thus, the trial court properly denied the renewed severance motion.

h. Codefendant Settle's Guilt Phase Closing Argument

Finally, appellants renewed their motion to sever their cases from codefendant Settle's case after codefendant Settle's guilt phase closing argument. (RT 16634-16635.)

Codefendant Settle began his guilt phase closing argument as follows:

> It's clear that the Bryant Organization strikes again, and it's Stanley Bryant calling the shots on August 28, 1988. . . . It was Stanley Bryant, Donald Smith, and Leroy Wheeler and James Franklin Williams [] present when Stanley Bryant was giving instructions on what he wanted them to do. Neither Jon Settle or Frank Settle was present.

(RT 16592.) Codefendant Settle continued his argument, explaining how the evidence presented at trial showed that appellants were culpable, and he was not. (See RT 16592-16633.) During a recess, the trial court noted that, at some points in his argument, codefendant Settle lapsed into statements that were not in evidence but most of the statements did not pertain to appellants. The trial court instructed codefendant Settle to limit his argument to the evidence and reasonable inferences to be drawn from the evidence. (See RT 16626-16627.) At the close of codefendant Settle's argument, appellants moved for severance, arguing that codefendant Settle displayed a disregard for the trial court's

admonition to restrict argument to the evidence. Appellant Wheeler also moved for a mistrial, based on the fact that codefendant Settle had testified last. The trial court denied both motions. (RT 16634-16635.)

Appellants do not explain how codefendant Settle's argument resulted in an unfair trial. "'[A]ntagonistic defenses do not *per se* require severance, even if the defendants are hostile or attempt to cast the blame on each other.'" (*People v. Hardy, supra,* 2 Cal.4th at p. 168.) Further, the trial court instructed the jurors that they should decide the case based on the evidence presented at trial and that the attorneys' comments, including those of codefendant Settle other than during his testimony, did not constitute evidence. (CT 15456, 15459 [CALJIC Nos. 1.00, 1.02]; see also RT 16633 [the trial court instructs the jurors during codefendant Settle's closing argument that they were not hearing evidence, only argument].) Presumably, the jury followed these instructions and decided the case on the evidence. (See *People v. Yeoman, supra,* 31 Cal.4th at p. 139; *Zafiro v. United States* (1993) 506 U.S. 534, 541 [any possibility of prejudice resulting from mutually antagonistic defenses was cured by jury instructions].)

Additionally, appellant Smith now argues that codefendant Settle insinuated during closing argument that appellant Smith was guilty because he did not testify and further that codefendant Settle asked the jury to draw an adverse inference from the fact appellants were represented by counsel. (SAOB 113-117.) No motion for severance was made on these grounds in the trial court. Appellant Smith, therefore, cannot be heard to complain that severance should have been granted on these grounds. (*People v. Ervin, supra,* 22 Cal.4th at p. 68.)

In any event, codefendant Settle did not insinuate that appellant Smith was guilty because he did not testify; rather, codefendant Settle merely suggested his (codefendant Settle's) own credibility was strong because he

subjected himself to cross-examination. (See RT 16593 ["I believe in the justice system, and -- and that I will get up there and answer all the questions of any of these attorneys. . . ."]; *People v. Hardy, supra,* 2 Cal.4th at pp. 157-160.) Also, a fair reading of the record demonstrates that codefendant Settle did not ask the jury to draw any adverse inference from the fact appellants were represented by counsel. (See RT 16592-16593 [". . .I'm here representing myself because . . . I feel that [is] the best way to get to the truth through the defendant."].)

Further, appellant Wheeler -- who based his mistrial motion on the fact codefendant Settle testified last -- provides no explanation why the order of the defenses warranted severance. First, appellant Wheeler had already agreed that codefendant Settle could present his defense *after* appellant Wheeler presented his defense. (RT 13910.) Second, contrary to appellant Wheeler's claim that codefendant Settle was permitted to testify only after repeatedly assuring the court that he did not intend to testify (WAOB 139), the record is replete with representations from codefendant Settle that he always desired to testify on his own behalf. (See Arg. XXIII.) Prior to jury selection (RT 6341-6342), after the alternate jurors were sworn (RT 7831), during codefendant Settle's opening statement (RT 8158), prior to the close of the prosecution's case (RT 13754-13755), and during codefendant Settle's defense (RT 14774), codefendant Settle repeatedly indicated his desire to testify on his own behalf. It was only after consulting with advisory counsel that codefendant Settle indicated he did not desire to testify at that time. Significantly, however, codefendant Settle inquired of the trial court, and received its assurance, that he would be permitted to testify on his own behalf if one of the codefendants testified and "raises issues that after I have rested would make me want to testify." (RT 14786-14788.) Third, there was no prospect the jury would accord codefendant Settle's testimony any greater emphasis than any of the other defendants. His

testimony did not place any of the other defendants at the crime scene or directly implicate any of them in the murders. Also, codefendant Settle's testimony was cross-examined by the parties and refuted by Frank Settle in appellant Wheeler's surrebuttal. Thus, it is highly unlikely the jury would have accorded the testimony of codefendant Settle any undue emphasis. Accordingly, the order in which the defenses were presented did not warrant severance.

The trial court properly denied the renewed motions for severance and mistrial.

i. There Was No Reasonable Probability Appellants Would Have Received A More Favorable Result Had The Renewed Motions For Severance Been Granted; There Was No Due Process Violation

As with the initial pretrial motion to sever, even if this Court concludes that the trial court abused its discretion in denying severance when the motion was renewed, appellants have not demonstrated a reasonable probability of a more favorable outcome had severance been granted. (*People v. Coffman, supra,* 34 Cal.4th at p. 43.) The prosecution presented compelling independent evidence of each appellant's guilt, and it was not a purported conflict with codefendant Settle's case alone that demonstrated each appellant's guilt. For the same reasons, appellants' claims of constitutional error as to the renewed motions must fail as well.

D. The Trial Court Properly Denied Severance Of Appellants' Cases From Each Other

Each appellant points to several grounds which he contends warranted severance of appellants' cases. As an initial point, with one exception, it appears that appellants failed at trial to renew their motion to sever their cases from one another on all of these grounds (or at least, on appeal, to point to the

renewed motions). Accordingly, to the extent appellants failed to renew the severance motion in the trial court on the grounds addressed below, they should not be heard on these grounds on appeal. (*People v. Ervin, supra,* 22 Cal.4th at p. 68.) In any event, none of the grounds cited by appellants reveals that the trial court abused its discretion in denying severance or denied appellants their constitutional rights.

1. The Relative Strength Of The Cases Against Appellants

Appellant Wheeler argues he was prejudiced by association with appellants Bryant and Smith, since he was only a "short term bit player" in the Bryant Organization. (WAOB 125-131, 140-149.) However, as set forth in detail in the Statement of Facts, the evidence showed appellant Wheeler took an active and integral role in the commission of the quadruple murder. Most significantly, James Williams placed appellant Wheeler at the crime scene with a shotgun and heard him holler "bitch" and "car" shortly before hearing glass breaking and people screaming. (RT 12336-12345; see also Arg. XI [outlining evidence corroborating Williams's testimony].) The prosecution's evidence -- including the neighbors who witnessed the shooting -- established appellant Wheeler was the gunman in all four murders and the attempted murder. Simply stated, this was "not a situation in which a marginally involved defendant might have suffered prejudice from joinder with a codefendant who participated much more actively." (*People v. Coffman, supra,* 34 Cal.4th at p. 44.)

Appellant Smith claims he was prejudiced by his association with appellants Bryant and Wheeler, because the People's case against him was far weaker than the cases against appellants Bryant and Wheeler. (SAOB 147-150.) This is incorrect. In light of James Williams's testimony, the attack on Keith Curry, and the highly incriminating telephone records, the case against appellant Smith was as strong as the cases against appellants Bryant and Wheeler. This was not "a situation in which a strong case against one

defendant was joined with a weak case against a codefendant." (*People v. Coffman, supra,* 34 Cal.4th at p. 44.)

2. The People's Evidence

Appellant Wheeler argues he was prejudiced by association with appellants Bryant and Smith, because the People presented seven items of evidence admissible against appellants Bryant and Smith only. (WAOB 115-118, 135-139; see also SAOB 144.) Appellant Wheeler does not suggest that he renewed the severance motion as to six of these items. As for the seventh -- the evidence regarding Keith Curry -- appellant Wheeler argued at trial that the evidence warranted severance. (See CT 16124-16127.) In any event, the seven items of evidence[50/] did not refer to, or implicate, appellant Wheeler. And, as appellant Wheeler acknowledges (WAOB 115-118), the trial court gave limiting instructions on all of this evidence both during the trial and at the close of the case. The jury presumably followed these instructions. (See *People v. Yeoman, supra,* 31 Cal.4th at p. 139; see also *People v. Ervin, supra,* 22 Cal.4th at p. 69.) Given the trial court's carefully tailored instructions and the prosecution's independent evidence of guilt, there was no abuse in the denial of severance and, for the same reasons, no denial of appellant Wheeler's constitutional rights. (*People v. Coffman, supra,* 34 Cal.4th at p. 44.)

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50. These items of evidence are: (1) three statements by Ladell Player about appellant Bryant (that appellant Bryant had said that he had "taken care of" a problem at the Wheeler Street residence, that Player believed testifying against appellant Bryant was like testifying against John Gotti, and Player's statement that appellant Bryant would shake a person's hand and then have the person killed); (2) Alonzo Smith's statement that appellant Bryant had said that James Brown "had to go"; (3) Alonzo Smith's statement that, if he crossed appellant Bryant, he would be in bad shape; (4) the bombing of Curry's Porsche; and (5) appellant Smith shooting Curry. (See WAOB 115-118.)

Appellant Smith argues that he was prejudiced by association with appellant Bryant, because the evidence of the Keith Curry attacks was not admissible against him (appellant Smith). Appellant Smith claims that, because Gwendolyn Derby's testimony about Tannis's statement at the beauty salon (i.e., that appellant Bryant admitted to Tannis that he was responsible for the bombing of Curry's Porsche and said he would do it again until Curry was dead) was admissible as to appellant Bryant only, the predicate facts for the admission of Curry's testimony (i.e., that appellant Bryant knew about Curry's relationship with Tannis and was unhappy about it) were established as to appellant Bryant only, and not appellant Smith. Therefore, appellant Smith argues, Curry's testimony was not admissible as to him. (SAOB 131-132.) Appellant Smith provides no authority for his proposition. In any event, Pierre Marshall's testimony was also circumstantial evidence that appellant Bryant knew and was unhappy about Curry's relationship with Tannis. (RT 11259-11260.) Marshall's testimony was not limited to any defendant. Thus, the evidence of the Curry attacks was admissible against appellant Smith, and he was not prejudiced by any evidence admissible against appellant Bryant only.

Appellants Wheeler and Smith contend they were prejudiced by their association with appellant Bryant, because the jury heard about the dangerous nature of the Bryant Organization. (WAOB 133-135; SAOB 133-135.) However, even if appellant Wheeler and appellant Smith had been tried separately, evidence of their involvement in the Bryant Organization would have been admissible at their separate trials to show, among other things, their motive for the murders. Notably, appellant Smith acknowledges that evidence of the scope of the Bryant Organization would have been admissible against him at a separate trial. (SAOB 133.) And any evidence of witnesses being intimidated (WAOB 134; SAOB 145) was relevant to the credibility of the witnesses, who were also witnesses against appellants Wheeler and Smith.

Thus, the fact witnesses had been intimidated would have been introduced at separate trials. Finally, again, given the prosecution's independent evidence of guilt of each appellant, there was no abuse of discretion and no denial of appellants' constitutional rights in the joint trial. (*People v. Coffman, supra,* 34 Cal.4th at p. 44.)

Appellant Bryant argues his case should have been severed from appellant Smith's case because appellant Bryant was precluded at a joint trial from showing that appellant Smith had a motive independent of appellant Bryant for shooting Keith Curry. (BAOB 151-152.) Although appellant Bryant suggests otherwise, the record does not reflect that a severance motion was renewed on this basis. (See RT 10951.) In any event, just as it was in appellant Bryant's interest to show that appellant Smith had an independent motive for shooting Curry, it was also in appellant Smith's interest, since such an independent motive would have distanced appellant Smith from the quadruple murder. So, appellants Bryant and Smith did not have conflicting interests at trial. Also, appellant Smith offered to prove that he shot Curry because he (appellant Smith) was upset with Curry, but Curry denied the claim. (RT 11161-11162.) The result would have been no different had appellant Bryant offered that independent motive for the Curry shooting at a separate trial.

3. The Defenses

Appellant Bryant argues his case should have been severed from appellant Wheeler's case because, in essence, appellant Bryant suggested during his testimony that William Settle was responsible for the murders (by testifying that William Settle ran the Wheeler Street residence) while appellant Wheeler suggested during his testimony that James Williams was responsible for the murders (by testifying that Williams ran the Wheeler Street residence). (BAOB 151.) As stated earlier, "'[A]ntagonistic defenses do not *per se* require

severance, even if the defendants are hostile or attempt to cast the blame on each other.'" (*People v. Hardy, supra,* 2 Cal.4th at p. 168.) Here, appellants Bryant and Wheeler did not cast blame for the murders on each other. Both denied being at the Wheeler Street residence during, or near the time of, the shootings. Neither did -- or could have -- identified anyone as being responsible for the murders. Accordingly, the fact the testimony of each appellant may have suggested someone else was responsible for the murders can hardly be categorized as a conflict.

Similarly, although appellant Wheeler contends that his defense was inconsistent with appellant Bryant's defense since appellant Bryant denied there was an "organization" (WAOB 131), appellant Bryant admitted that "there were people in the area selling drugs" and he helped William Settle take over "the group" in late 1985. (RT 15174-15176, 15319.) So, this matter of semantics can hardly be categorized as an irreconcilable conflict. Likewise, although appellant Smith contends he was prejudiced in the joint trial because appellants Bryant and Wheeler committed perjury (SAOB 136-138), the point is that, regardless of whether appellants Bryant and Wheeler testified truthfully, their testimony did not present any irreconcilable conflict with appellant Smith's defense.

Finally, appellants have not demonstrated a reasonable probability of a more favorable outcome had severance been granted. The prosecution presented compelling and persuasive independent evidence of appellants' guilt, and it was not any purported conflict among appellants' cases alone that demonstrated guilt. (*People v. Coffman, supra,* 34 Cal.4th at p. 43.)

4. Rebuttal Evidence

Appellant Smith claims he was prejudiced by the joint trial because, even though he presented no defense, "extensive" rebuttal evidence triggered by his codefendants' cases was admitted against him. (SAOB 141-142.)

Appellant Smith does not indicate what "extensive" evidence in rebuttal was harmful to his case or even applied to him. This claim does not support severance.

5. Security And The Conduct Of The Parties

Appellant Wheeler contends he was prejudiced by association with appellants Bryant and Smith, since the joint trial created the need for multiple security measures and created an "aura of guilt." (WAOB 132.) Similarly, appellant Smith contends he was prejudiced by association with appellants Bryant and Wheeler, since he would not have been required to wear a stun belt at a separate trial. (SAOB 140-141.) Appellant Wheeler's and appellant Smith's arguments incorrectly assume that no security measures would have been taken had they be tried separately. In addition to being charged capitally for four murders, appellant Wheeler had two arrests while in custody, one for an attack on another inmate that was being charged as an attempted murder and one for an attack on a deputy that was being charged as an assault with a deadly weapon. And appellant Smith was serving a sentence for the attempted murder of witness Keith Curry at the time of the trial. (RT 6347-6349.) Since at least some (if not all) of the security measures would have been taken even if appellants Wheeler and Smith had been tried separately, their claims of being under the "aura of guilt" are in actuality challenges to the security measures themselves, as opposed to arguments in support of severance. Those claims are addressed in Argument XXIV of the Respondent's Brief.

Appellant Smith contends that the improper behavior of appellants Bryant and Wheeler and their counsel (e.g., laughing or making noises at trial) prejudiced him. (SAOB 135.) Given the prosecution's compelling independent evidence of guilt of each appellant, there was no abuse of discretion and no denial of appellant Smith's constitutional rights in the joint trial. (*People v. Coffman, supra,* 34 Cal.4th at p. 44.)

6. The Penalty Phase

Appellant Smith claims he was prejudiced by the joint penalty phase, because CALJIC No. 8.85 informed the jurors to consider the evidence which had been presented exclusively against appellants Bryant and Wheeler at the guilt phase against appellant Smith at the penalty phase. (SAOB 142-143; see CT 15820-15821 [CALJIC No. 8.85 informed the jurors that, in determining the penalty to be imposed on each appellant, they "shall consider all of the evidence which has been received during any part of the trial of this case. . . ."].) Appellant Smith's claim is not a reasonable reading of CALJIC No. 8.85. Since the evidence admitted exclusively against appellants Bryant and Wheeler was not "received" against appellant Smith at the guilt phase, the jurors would not have considered that evidence against appellant Smith at the penalty phase.

Appellant Bryant argues that his case should have been severed from appellant Wheeler's and appellant Smith's cases, because appellants Wheeler and Smith presented "more powerful" and "more compelling" mitigating evidence at the penalty phase -- that they had been abused as children and had had difficult childhoods -- while appellant Bryant merely presented evidence that his family cared for him and wanted him to live. (BAOB 152-156.) The problem with appellant Bryant's claim is that appellants Wheeler and Smith, like appellant Bryant, were also sentenced to death. Thus, appellant Bryant's defense at the penalty phase was hardly coupled with two "more powerful" and "more compelling" penalty phase defenses, which diminished the force of appellant Bryant's defense. Moreover, there is nothing in the record to suggest the jurors failed to assess independently the appropriateness of the death penalty for appellant Bryant or engaged in improper comparative evaluations of appellants. The jurors were told to "decide separately the question of the penalty as to each of the defendants. . . ." (CT 15847.) Under these

circumstances, there was no error and no constitutional violation in the denial of severance. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1174.)

In sum, the trial court did not abuse its discretion in denying all of the severance motions presented in this case. And appellants' claims of constitutional error likewise must fail.

IV.

THE TRIAL COURT PROPERLY DENIED APPELLANT BRYANT'S SUPPRESSION MOTIONS

Appellant Bryant filed two motions to suppress evidence in the trial court. First, appellant Bryant challenged the warrantless search of the Wheeler Street premises on the day of the murders on the ground there was no exception to the warrant requirement justifying the search. Second, appellant Bryant challenged a search about a month later of his Judd Street residence on the ground the affidavit in support of the search warrant failed to establish probable cause for the search. (CT 10437-10450.) The trial court denied both motions. The court found that, because he did not establish a reasonable expectation of privacy in the premises within the meaning of the Fourth Amendment, appellant Bryant lacked "standing" to challenge the warrantless search of the Wheeler Street premises. The court further found that, although appellant Bryant had "standing" as to the Judd Street premises and could challenge that search, the search warrant was constitutionally sufficient. (RT 4175-4186.)

On appeal, appellant Bryant maintains the trial court erred in finding he lacked "standing" to challenge the warrantless search of the Wheeler Street premises, especially since the trial court precluded him from calling James Williams as a witness at the suppression hearing in an effort to establish appellant Bryant's expectation of privacy in the premises. Appellant Bryant also maintains the trial court erred in denying the motion to suppress evidence regarding the Judd Street premises, because the warrant was issued without probable cause, was based on stale information, and was unconstitutionally overbroad. (BAOB 316-343.) Appellants Wheeler and Smith join in these claims. (WAOB 435; SAOB 451.) Respondent submits the trial court properly denied both suppression motions.

A. Relevant Proceedings

Prior to trial, appellant Bryant filed two motions to suppress evidence pursuant to section 1538.5. One motion sought to suppress evidence seized as a result of the warrantless search of the Wheeler Street crime scene[51] on the ground that the exigent circumstances exception to the Fourth Amendment warrant requirement did not apply. (CT 10441-10460.) The other motion sought to suppress evidence seized pursuant to a search warrant executed at appellant Bryant's house on Judd Street on the primary ground the warrant was not supported by probable cause, particularly that the location and items to be seized were not sufficiently connected to the murders. (CT 10461-10521.) Appellant Bryant also orally moved to have evidence from the Judd Street address suppressed on the ground that language in the warrant (i.e., "any articles of personal property tending to establish the identity of the persons who have dominion and control over the premises") was overbroad. (RT 4175-4181.)

Appellant Bryant also filed a motion to compel the production of James Williams as a witness at the suppression hearing in an effort to demonstrate appellant Bryant's reasonable expectation of privacy in the Wheeler Street premises. According to appellant Bryant, testimony from Williams that appellant Bryant was "in charge" of the Wheeler Street "count house" and was present in the house just before the murders would establish appellant Bryant's reasonable expectation of privacy in the premises. Further, appellant Bryant contended that the prosecution could not admit evidence at trial that appellant Bryant's property was found at both locations yet deny that appellant Bryant had a reasonable expectation of privacy in the areas searched for purposes of the Fourth Amendment. (CT 10437-10440; RT 4119-4120.)

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51. It was stipulated that there was no warrant issued prior to the seizure of property at Wheeler Street. (RT 4125.)

In opposition, the prosecution argued that Williams had already provided testimony that the Wheeler Street premises was used as a "count house" for the drug operation, that nobody lived in the house, that appellant Bryant gained entry into the premises only by calling ahead and being let in, and that Williams worked at the house as a "money counter" for the Bryant Organization. The prosecutor also noted that appellant Bryant was not listed on the deed as the owner of the house and could testify on his own behalf as to his control over the Wheeler Street house. Thus, the prosecution argued, Williams could add nothing that would demonstrate a reasonable expectation of privacy in the premises by appellant Bryant. (CT 10558-10559; RT 4117-4118, 4122.)

For purposes of appellant Bryant's motion regarding Williams, the prosecutor offered to stipulate that Williams would testify to the facts he had previously testified to, but the prosecutor refused to stipulate that those facts would establish that appellant Bryant had a reasonable expectation of privacy in the Wheeler Street premises. (RT 4120.) The trial court denied appellant Bryant's motion to compel Williams to testify at the suppression hearing. (RT 4124.)

Thereafter, appellant Bryant attempted to support his suppression motions by having Detective Vojtecky testify regarding his statement in the warrant affidavit that the Judd Street house was appellant Bryant's residence. The trial court ruled that Detective Vojtecky's testimony on this point was inadmissible, because it was based entirely on hearsay. (CT 10519; RT 4126-4132, 4139.) Thereafter, appellant Bryant testified that, as of September 29, 1988, he was living at the Judd Street address, paid rent there, and kept personal possessions there. Appellant Bryant did not testify he resided in, or had control over, the Wheeler Street premises. (RT 4158-4174.)

The trial court denied both suppression motions. As to Wheeler Street, the trial court found that appellant Bryant had no "standing" to challenge the search and seizure. As to the Judd Street search, although appellant Bryant was found to have "standing," the motion was denied. (RT 4181-4186.)

B. The Trial Court Properly Denied Appellant Bryant's Motion Challenging The Warrantless Search Of The Wheeler Street Premises Because Appellant Bryant Failed To Establish That He Had A Reasonable Expectation Of Privacy In The Premises

The trial court denied appellant Bryant's motion to suppress the evidence seized during the warrantless search of the Wheeler Street premises, because appellant Bryant failed to establish "standing" (i.e., that he had a reasonable expectation of privacy in the premises). (RT 4185-4186.) Appellant Bryant raises several contentions regarding the trial court's finding: (1) the prosecution "conceded" appellant Bryant had standing to challenge the warrantless search of the Wheeler Street premises; (2) the prosecution was "estopped" from contesting appellant Bryant's lack of standing as to the Wheeler Street premises; (3) the trial court improperly denied his motion to compel James Williams to testify in an effort to establish appellant Bryant's reasonable expectation of privacy in the Wheeler Street premises; and (4) the trial court unconstitutionally precluded him from carrying his burden of proof regarding his reasonable expectation of privacy in the Wheeler Street premises by applying evidentiary standards in an uneven and arbitrary manner. (BAOB 316-328.) Respondent submits appellant Bryant's contentions are without merit and the trial court properly found appellant Bryant failed to establish "standing" (i.e., a reasonable expectation of privacy) as to the Wheeler Street premises.

1. The Prosecutor Did Not Concede Appellant Bryant Had "Standing" To Challenge The Warrantless Search Of The Wheeler Street Premises

Relying on page 10559 of the Clerk's Transcript, appellant Bryant maintains the prosecution "conceded appellant's [Bryant] standing to challenge the warrantless search and seizure of evidence from the Wheeler [Street] house." And, since the prosecution conceded standing, appellant Bryant reasons, "the trial court erred in precluding appellant [Bryant] from challenging the legality of the warrantless search and seizure of evidence from the Wheeler [Street] house." (BAOB 323.) The page relied upon by appellant Bryant is to a page from the prosecution's opposition to appellant Bryant's "Motion To Compel Production Of Witness And Suppress Evidence." The prosecution did not concede on that page of the Clerk's Transcript appellant Bryant's standing to challenge the warrantless search of the Wheeler Street premises. Rather, the prosecution posed a hypothetical in which appellant Bryant could "arguably" establish his standing but, in the next two sentences, demonstrated why that "arguable" position would not be recognized as valid.

Appellant Bryant contends the prosecutor conceded standing at the suppression hearing by offering to stipulate to the facts that Williams had testified to in the past. (BAOB 321-323.) Although the prosecutor offered to stipulate that, if called as a witness, Williams would testify to certain facts, the prosecutor unequivocally stated that she would not stipulate that those facts established standing such that appellant Bryant could challenge the search of the Wheeler Street crime scene. (RT 4120.) Thus, appellant Bryant's contention that the prosecutor conceded standing fails.

2. The Prosecution Was Not Estopped From Contesting Appellant Bryant's Lack Of Standing As To The Wheeler Street Premises

Appellant Bryant contends the prosecutor was estopped from denying that appellant Bryant had a reasonable expectation of privacy in the Wheeler Street premises, given that the prosecution intended to prove that appellant Bryant possessed the items seized from the premises. (BAOB 324-329.) Appellant Bryant relies on *United States v. Issacs* (9th Cir. 1983) 708 F.2d 1365, 1367-1368 and *People v. Dees* (1990) 221 Cal.App.3d 588, 596, for the proposition that "where circumstances of a particular case make possession and denial of an expectation of privacy inconsistent . . . the government cannot have it both ways." (BAOB 322-323.) Respondent submits appellant Bryant's claim is without merit and his reliance on *Issacs* and *Dees* is misplaced.

In *United States v. Salvucci* (1980) 448 U.S. 83, 88-89, the United States Supreme Court overturned its holding in *Jones v. United States* (1960) 362 U.S. 257, that persons charged with crimes of possession had "automatic standing" to challenge the legality of the search in favor of a rule that persons charged with crimes of possession must establish their own individual expectation of privacy in the place searched. The rationale of *Jones* was that, with crimes of possession, a defendant's admission of ownership was self-incriminatory and also the Government should not be allowed to take advantage of the contradictory positions that the defendant possessed the items for purposes of the charged crime, while simultaneously arguing that the defendant did not possess the items for purposes of the defendant's Fourth Amendment challenge. (*Salvucci, supra*, at pp. 84-88.) *Salvucci* found that the rationale of *Jones* had been eroded by the holding in *Simmons v. United States* (1968) 390 U.S. 377, that a defendant's testimony in a motion to suppress could not be used against him at trial and by developments in the principle of Fourth Amendment "standing" such that "a prosecutor may, with legal consistency and legitimacy,

assert that a defendant charged with possession of a seized item did not have a privacy interest violated in the course of the search and seizure." (*Salvucci, supra*, at pp. 88-89.)

In *Issacs*, the Secret Service found an incriminating journal inside a locked safe while executing a search warrant at the defendant's apartment. The defendant denied owning the journal or knowing it was in the safe. When the defendant sought to challenge the seizure of the journal, the Government argued that the defendant did not have a reasonable expectation of privacy in something that he denied knowing existed. The Ninth Circuit Court of Appeals found that, pursuant to *Salvucci*, the Government could not "argue possession but deny expectation of privacy where the circumstances of the case make such positions necessarily inconsistent." (*United States v. Issacs, supra,* 708 F.2d at pp. 1367-1368.) In *Issacs*, the Government did not dispute, nor could it, that the defendant had a legitimate expectation of privacy in the safe itself, such that it followed that the defendant's denial of ownership of the contents of the safe could not defeat that legitimate expectation of privacy. (*Id.* at p. 1368.) *Issacs* gave four examples where it would not be contradictory for the Government to contend that a defendant had no expectation of privacy, while simultaneously arguing ownership of items seized: (1) a defendant owned drugs that he put in his girlfriend's purse; (2) checks found in another person's apartment belonged to the defendant; (3) evidence seized from a room where the defendant's only connection was "mere presence"; and (4) a defendant once possessed an item but abandoned it. (*Ibid.*)

In *Dees*, the Court of Appeal applied *Issacs* to reach a similar result. (*People v. Dees, supra,* 221 Cal.App.3d at p. 588.) There, a police officer responding to a disturbance saw a car parked on the street. The defendant, who was 150 feet from the car, responded "yes" when asked if the car belonged to him. Seeing that the defendant was under the influence, the police searched the

car and found scales and methamphetamine. (*Id.* at pp. 590-591.) At the preliminary hearing, the defendant presented evidence that he did not own the car, whereas the only evidence presented by the prosecution that the defendant did own the car was the defendant's admission at the scene. (*Id.* at p. 592.) The defendant submitted a motion to suppress, based on the preliminary hearing transcript. In opposition, the prosecutor argued that the defendant did not have "standing" to challenge the search given his denial of ownership of the car at the preliminary hearing. (*Id.* at pp. 592, 597.) The Court of Appeal held that the prosecution's evidence that the trial court would have to accept as true for purposes of holding the defendant to answer to the charges (i.e., that he admitted possessing the car containing the drugs) could not be denied by the prosecution for purposes of proving that the defendant had no reasonable expectation of privacy in the car. (*Id.* at p. 597.)

In the instant case, there is no contradiction like that in *Issacs* and *Dees*. What *Issacs* and *Dees* have in common is that the prosecution's evidence presented prior to the suppression motion established the defendant's expectation of privacy in the place searched. However, the defendants themselves contradicted the evidence. Thus, in *Issacs*, the prosecution had established that the safe was in the defendant's apartment, yet the defendant denied the contents were his. And, in *Dees*, the prosecution's evidence established the defendant's admission that he owned the car, but the defendant presented evidence at the preliminary hearing that he did not.

Here, at no time did the prosecutor present evidence establishing that appellant Bryant had a reasonable expectation of privacy in the Wheeler Street premises. To the contrary, the prosecutor's position was consistent -- appellant Bryant had no reasonable expectation of privacy in the Wheeler Street premises since it was used as a "count house" for the drug operation, no one lived in the house, appellant Bryant was not on the deed for the house, and appellant Bryant

gained entry into the house only by calling ahead and being let in. (CT 10558-10559; RT 4117-4118, 4122.) Thus, there was nothing inconsistent about the prosecution in this case arguing that a defendant (i.e., appellant Bryant) owned items found in a place where he had no reasonable expectation of privacy. (*United States v. Issacs, supra,* 708 F.2d at p. 1368.) Under the facts of the instant case, the prosecution was not "estopped" from arguing that appellant Bryant had no reasonable expectation of privacy in the Wheeler Street premises.

3. The Motion To Compel The Production Of James Williams Was Properly Denied Because Williams Could Not Establish A Reasonable Expectation Of Privacy In The Wheeler Street Premises For Appellant Bryant

Appellant Bryant maintains his standing would have been established through the testimony of James Williams. Williams's testimony, argues appellant Bryant, would have established appellant Bryant's "subjective expectation of privacy in the Wheeler [Street] house: he was legitimately on the premises; he took precautions to maintain the privacy and security of the premises; he determined who was permitted on the premises; he employed people at the house; and he operated the payroll out of that house. All of these factors demonstrate appellant [Bryant's] subjective expectation of privacy there." (BAOB 332.) Thus, appellant Bryant contends, the trial court erred in denying his motion to compel the production of Williams, since Williams could have established appellant Bryant's reasonable expectation of privacy in the Wheeler Street premises. (BAOB 316-335.) Respondent submits appellant Bryant is mistaken.

That Williams could not establish a reasonable expectation of privacy in the Wheeler Street premises for appellant Bryant was succinctly explained by the prosecutor in her written opposition to appellant Bryant's motion to compel production of Williams:

It is clear from the record, particularly the preliminary hearing transcript, that witness Williams would testify, if called, that no one lived in the [Wheeler Street] subject house, that [appellant] Stan Bryant had to call ahead and be let into the house, that he (Williams) worked there as a money counter for the Bryant Family drug organization under the direction of [appellant] Stanley Bryant and others and that he (Williams) was present at that location on August 28, 1988 when [appellant] Stan Bryant and others killed four people and injured another. The property itself had been quit-claim deeded to defendant Nash Newbill from uncharged co-conspirator Jeff Bryant, the brother of [appellant] Stan Bryant, at the time of the search in question. Others including most of the co-defendants and all persons listed on Items 20 and 30 of the property report DR #88-1626658 also worked at the location and could presumably testify to the same facts regarding their employment. [Appellant] Stan Bryant, himself could testify that he operated a drug sales count house and participated in the murder of four people at that house therefore arguably establishing his "standing" as operating a business out of the location and therefore possessing a legitimate expectation of privacy. Although it is unlikely that a competent court would find a legitimate expectation of privacy in an illicit [drug and murder] business location, the People would gladly stipulate to those underlying facts. The *Katz* standard defining a person's right to privacy is based on a two-fold requirement that the defendant exhibited an actual expectation of privacy and that this expectation was reasonable from the viewpoint of society. (*Rakas v. Illinois* (1978) 439 U.S. 128, 1319.) *Certainly society does not sanction the use of another person's property to sell drugs and kill people for purposes of establishing an expectation of privacy.*

(CT 10558-10559, emphasis added.)

During oral argument on the motion, the prosecutor elaborated further as to why Williams could not establish a reasonable expectation of privacy for appellant Bryant in the Wheeler Street premises:

> Counsel cites, number one, no authority for the proposition that an immunized, protected witness be brought in under these circumstances to establish standing. But, more important than that, counsel cites no factual basis whatsoever, no offer of proof as to in what way possible that the immunized witness, who has testified at six preliminary hearings and one grand jury hearing, testified in essence that he was an employee of the organization, employed to count money, employed by [appellant] Stanley Bryant to operate the cash house for the drug organization, was present at the time that [appellant] Stanley Bryant ordered and participated in the murder of four persons.
>
> Among other things, the case of *Rakas*, being the landmark case, cited in my moving papers, says that the expectation of privacy has to be not only something legitimate but it has to be reasonable and it has to be an expectation of privacy that society is willing to accept.
>
> And I don't understand how counsel can say that a witness who would come in and testify that he was counting money for the drug organization operating out of the house, was present at the house on an occasion when [appellant] Stanley Bryant was there picking up drug receipts, was there ordering and orchestrating murders, how that could possibly help counsel or [appellant Bryant] to establish this both reasonable and legitimate expectation of privacy.
>
> I think that it is a ruse to take this witness out of protective custody to subject him to further cross-examination for possible impeachment purposes.

(RT 4117-4118.)

Respondent agrees with the prosecutor's reasoning: given Williams's prior testimony in this case, it was inconceivable Williams could have established a reasonable expectation of privacy for appellant Bryant in the Wheeler Street premises.

4. The Trial Court Did Not Unconstitutionally Preclude Appellant Bryant From Carrying His Burden Of Proof Regarding His Reasonable Expectation Of Privacy In The Wheeler Street Premises

Appellant Bryant also maintains the trial court unconstitutionally precluded him from carrying his burden of proof in attempting to establish his reasonable expectation of privacy in the Wheeler Street premises. (BAOB 325.) The trial court, reasons appellant Bryant, applied evidentiary standards in an arbitrary and uneven manner which precluded him from attempting to establish his standing through the testimony of James Williams and Detective Vojtecky. Thus, as explained by appellant Bryant, "[he] was left with no witness [on the standing issue] but himself" and "the law simply does [not] allow a trial court to control the presentation of defense evidence [on the standing issue] in this manner." (BAOB 328.) The issue regarding the propriety of permitting the defense to compel the production of James Williams on the standing issue was discussed in the previous section of this Argument and need not be repeated here. Suffice it to say, the trial court properly denied appellant Bryant's motion to compel Williams to testify for the reasons previously stated.

The trial court also properly precluded Detective Vojtecky from testifying as to appellant Bryant's reasonable expectation of privacy in the Wheeler Street premises, because Detective Vojtecky had no personal knowledge as to who was residing at the location. Detective Vojtecky testified that the information he possessed was obtained from what others had told him.

(RT 4128.) Thus, the trial court precluded Detective Vojtecky from offering such testimony, since it constituted inadmissible hearsay. (RT 4129-4131, 4133, 4139, 4143.) The trial court's ruling was proper, because standing must be established by competent, admissible evidence, not inadmissible hearsay. (Evid. Code, § 300; see *Jauregi v. Superior Court* (1999) 72 Cal.App.4th 931, 939-941.)

5. Appellant Bryant Failed To Establish A Subjective Or Objective Reasonable Expectation Of Privacy In The Wheeler Street Premises

Appellant Bryant contends his motion to suppress evidence as to the Wheeler Street premises should have been granted, because he had an expectation of privacy in the premises. (BAOB 329-337.) Appellant Bryant is incorrect.

California applies federal Fourth Amendment standards in deciding what remedy may be available following a claim of unlawful search or seizure. (*Bowens v. Superior Court* (1991) 1 Cal.4th 36, 47; *In re Lance W.* (1985) 37 Cal.3d 873, 886-887.)

> [I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."

(*People v. Ayala* (2000) 23 Cal.4th 225, 254-255, quoting *Minnesota v. Carter* (1998) 525 U.S. 83, 88.) "In other words, the defendant must show that he or she had a subjective expectation of privacy that was objectively reasonable." (*People v. Ayala, supra*, at p. 255.)

Among the factors to be considered in determining whether a defendant has demonstrated a reasonable expectation of privacy include: whether the defendant has a property or possessory interest in the thing seized or the place searched; whether he has the right to exclude others from that place; whether he has exhibited a subjective expectation that the place would remain free from governmental invasion; whether he took normal precautions to maintain his privacy; and whether he was legitimately on the premises. (*People v. Thompson* (1996) 43 Cal.App.4th 1265, 1269-1270; see also *People v. McPeters* (1992) 2 Cal.4th 1148, 1172.)

Appellant Bryant attempts to characterize the Wheeler Street premises as a "private residence" such that the search was presumptively unreasonable pursuant to *Payton v. New York* (1980) 445 U.S. 573, 586 [warrantless search and seizure inside a home is presumptively unreasonable] and *Coolidge v. New Hampshire* (1971) 403 U.S. 443, 474-475, 477-478 [same]. However, appellant Bryant's argument overlooks the overwhelming evidence that the Wheeler Street premises was not a residence at all nor even the private office of appellant Bryant.

Instead, the evidence, including that provided by Williams at the preliminary hearings, showed that the Wheeler Street premises was a "count house" (where money was counted) and where Bryant Organization employees were paid. No one slept at the Wheeler Street premises, and there is no evidence that appellant Bryant had a possessory interest in the premises. Significantly, when appellant Bryant visited the Wheeler Street premises, he had to be buzzed in like everyone else, and he always brought a briefcase with him. Further, there is no evidence that appellant Bryant exercised a right to exclude persons from the house, given that he was almost never at the house and at most authorized Williams to use force against anyone who threatened the drug operation. These facts establish that, far from being a private place that

appellant Bryant controlled where he expected to be free from government intrusion, the Wheeler Street premises was nothing more than a drug sales location where appellant Bryant came to collect cash. Thus, appellant Bryant did not, and could not, even if his request to compel Williams had been granted, establish that he had a reasonable expectation of privacy in the Wheeler Street premises for purposes of the Fourth Amendment. (See BAOB 331-332.)

Appellant Bryant relies on *United States v. Vega* (5th Cir. 2000) 221 F.3d 789, 797, citing *Minnesota v. Carter, supra,* 525 U.S. at page 110 (disn. opn. of Ginsberg, J.), for the proposition that a person does not forfeit his or her Fourth Amendment rights by using property that he or she has a reasonable expectation of privacy in for illegal purposes. (BAOB 330.) In *Vega*, the court found that the defendant had not forfeited his Fourth Amendment rights by possessing marijuana in a home when there was no question that the defendant lawfully possessed or controlled the property by virtue of being the lessee of the house and by not inviting strangers to the house. (*Vega, supra*, at pp. 794-796.)

In the instant case, the nature of the illegal activities at the Wheeler Street premises, which involved people coming and going when appellant Bryant was not present, is part of the totality of the circumstances which demonstrates that appellant Bryant had no reasonable expectation of privacy there. An expectation of privacy in commercial premises is less than the expectation of privacy in a person's home. (*Minnesota v. Carter, supra,* 525 U.S. at pp. 90-91, citing *New York v. Burger* (1987) 482 U.S. 691, 700.)

In *Carter*, the Supreme Court found that two drug dealers who did not live at a home and were merely using it to package cocaine, had no legitimate expectation of privacy for purposes of the Fourth Amendment. (*Minnesota v. Carter, supra*, 525 U.S. at pp. 85-86, 91.) Here, the Wheeler Street premises was used as a retail outlet for drug sales such that numerous employees of the Bryant Organization, as well as their customers, were in and out of the house

on a daily basis. Thus, absent some ownership nexus as in *Vega*, the illegality of the drug sales activity demonstrates that, as in *Carter*, appellant Bryant did not have a reasonable expectation of privacy in the Wheeler Street premises. Accordingly, the trial court properly denied appellant Bryant's motion to suppress evidence seized during the warrantless search of the Wheeler Street premises because appellant Bryant did not, and could not on the facts of this case, establish a reasonable expectation of privacy in the premises.

C. The Trial Court Properly Denied Appellant Bryant's Motion To Suppress Evidence Seized From His Judd Street Residence Pursuant To A Search Warrant

During the early morning hours of September 29, 1988, a series of search warrants were executed on various residences involved in the instant case. One of the places searched pursuant to a search warrant was appellant Bryant's residence at 12719 Judd Street.

Appellant Bryant contends the trial court improperly denied his motion to suppress evidence seized from his Judd Street residence on the following three grounds: First, the affidavit in support of the search warrant failed to establish probable cause. He maintains "there were no facts alleged in the affidavit that gave rise to the inference that the evidence sought was probably located in appellant [Bryant's] home." (BAOB 337-338.) Second, the information in the affidavit was too "stale" to provide the requisite probable cause. He argues that "the one month gap between the homicides and the issuance of the search warrant rendered the information [in the affidavit] too 'stale' to supply the requisite probable cause." (BAOB 339-340.) Third, the search warrant was unconstitutionally overbroad since it authorized the search for "[a]ny articles or personal property tending to establish the identity of persons who have dominion and control over the premises." This broad language, maintains appellant Bryant, authorized the "seizure of virtually any

document" inside the residence. (BAOB 341-342.) Respondent submits the trial court properly denied appellant Bryant's motion to suppress the evidence seized from his Judd Street residence.

1. The Affidavit In Support Of The Search Warrant Established Probable Cause For The Search Of Appellant Bryant's Judd Street Residence

The search warrant and the affidavit in support of the search warrant were attached as exhibits to appellant Bryant's motion to suppress evidence. The affidavit in support of the search warrant was prepared by Detective James Vojtecky. (See CT 10480-10521.)

a. Summary Of The Affidavit

In order to examine the basis upon which the magistrate below issued the warrant authorizing the search of appellant Bryant's residence at 12719 Judd Street, an account of the more salient features of the affidavit submitted in support of the search warrant, and relating to appellant Bryant's connection to the multiple homicides then under investigation, is required. In reviewing the affidavit, it is evident the magistrate had the following before him:

In 1982, Jeff Bryant, appellant Bryant, John (Roscoe) Bryant, and Andre Armstrong were arrested for the execution-style murder of Kenneth Gentry and the attempted murder of Reynard Goldman. Although murder and attempted murder charges were filed against Jeff Bryant, appellant Bryant, and Andre Armstrong, Armstrong was the only suspect convicted. He was sentenced to prison for 27 years to life. (CT 10497.)

On June 23, 1983, Armstrong had a taped conversation with Detectives Harley and Lyons, during which he admitted appellant Bryant paid him $15,000 to murder Kenneth Gentry, $2,000 to shoot and cripple Reynard Goldman, and additional monies to murder intended victims "Foots" Fisher and Michael Flowers. Armstrong was arrested before he could commit the additional

murders. Armstrong went on to state that the Bryants "were now his." He considered the Bryants "light weights" who could be "squeezed" for money because "he had two things on them": he could implicate them in the murder for hire of Kenneth Gentry, and he could have them killed at any time. On January 18, 1988, Armstrong was paroled from prison. (CT 10497-10498.)

Following his release from prison, Armstrong told a citizen informant that he (Armstrong) was a "hit man" in the Black Guerilla Family. He stated that he had performed a contract killing for appellant Bryant, for which he was paid $200,000. On at least two occasions, the citizen informant overheard Armstrong "order" monies totaling $7,000 from appellant Bryant. After the telephone conversations, Armstrong picked up the money at a local Western Union office. (CT 10510.)

Information obtained from the same citizen informant disclosed that another individual, James Brown, was "running drugs" for appellant Bryant from the Panorama City area to the Monterey area, where he sold them at Fort Ord. On August 26, 1988, the citizen informant assisted James Brown, Loretha Anderson, and her two children move from the Monterey Bay area to Los Angeles. (CT 10510-10511.)

On August 27, 1988, the citizen informant accompanied Brown, Anderson, and the children to a pool hall in Pacoima known as "Neighborhood Pool." Armstrong and Brown were there trying to get $500 from appellant Bryant for move-in expenses. While there, the citizen informant observed numerous guns on the counter and pool tables. They did not find appellant Bryant. (CT 10511.)

The following day, Sunday, August 28, 1988, the citizen informant and James Brown went to an address where they met a girl named Tannis. Armstrong had spent the night with her. Tannis was supposed to be appellant Bryant's "old lady," even though Armstrong had been having sex with her for

some time. That day, Armstrong made several telephone calls from Tannis's apartment, trying to contact appellant Bryant. When appellant Bryant returned a call, Armstrong told him that he wanted $500. He also told appellant Bryant he was going to need some more money the next week, because he wanted to buy a motorcycle. (CT 10511-10512.)

After the telephone conversation, Armstrong told the citizen informant and Brown that they were going to meet with appellant Bryant at 4:00 p.m. Armstrong then asked Tannis if she had a gun, because he did not trust appellant Bryant. He knew appellant Bryant would pat him down for weapons before letting him in. Tannis produced a .38 caliber revolver, and Armstrong told her to put it in her purse. Just in case appellant Bryant tried something, she was to follow them, let them go in first, and then enter a few minutes later with the gun. (CT 10512.)

They left at approximately 3:45 p.m. Armstrong then dropped the citizen informant off and picked up Anderson and her children. That was the last time the citizen informant saw them alive. Armstrong, Brown, Anderson, and Chemise were murdered later that day at 11442 Wheeler Avenue in Lake View Terrace. (CT 10512.)

The subsequent homicide investigation disclosed that, at approximately 5:00 p.m. on the afternoon of August 28, 1988, neighbors heard three to four muffled gunshots coming from the residence at 11442 Wheeler Avenue. Shortly thereafter, a male suspect ran out of the residence armed with a shotgun and a handgun. He approached a red Toyota Camry, license #2FHP266, which was parked in front of the location, and fired at the occupants with both weapons. Victims Anderson, Chemise, and Carlos were sitting in the rear seat. After shooting the occupants, the suspect entered the Camry and drove off. (CT 10486-10487.)

While the shooting occurred, two additional suspects were observed loading unknown objects into the back seat of an older sedan, turquoise in color with gray primer spots, which was parked in the open garage of the residence. As the turquoise sedan left the scene, witnesses observed an object in the rear of the vehicle covered with a blanket or sheet. (CT 10487.)

A short time later, the Toyota Camry was located nearby in the alley near 11311 Osborne Place, Lake View Terrace, with the bodies of Anderson and Chemise. Carlos, who survived, was also located. (CT 10488.)

Further investigation at 11442 Wheeler Avenue disclosed that all exterior windows and doors of the house were secured with iron bars. The front door had two iron gates. The first gate permitted entry onto the porch and was electronically controlled from inside the residence. The second door controlled access into the house. Numerous overlapping bloody shoe prints were observed between the two metal doors. Two bullet holes with matted hair were observed in the metal grating of the first door. A large piece of bloody scalp with hair attached was found on the ground between the metal doors. Expended 12-gauge 00 buck shotgun shells were observed in the hallway and living room. At the entrance of the residence, two large pools of blood were observed on the carpet. A blood trail led from the pools through a living room, a dining room, and into the garage. There, additional bloody shoe prints were observed in the center of the garage, where the trail ended. From this evidence, the affiant concluded that additional victim(s) might have been critically wounded and transported from the scene. (CT 10488-10489.)

Very little furniture was observed in the residence. An open safe and possible work schedules were found, along with mail addressed to various individuals at 11442 Wheeler Avenue. Investigators recognized many of the names as those of known drug dealers and possible members of a prison gang known as the Black Guerilla Family, who are also associated with the Bryant

Organization. (CT 10489-10490.)

Four days later, on September 1, 1988, the badly decomposed bodies of Armstrong and Brown were discovered in a remote area of Lopez Canyon. Armstrong had suffered shotgun wounds to the right side of the skull, leaving a large gaping hole, and to the center of the chest. Examination of Brown disclosed a shotgun wound to the right side of the skull. The size and location of the wound, coupled with Brown's hair style, indicated that the scalp specimen recovered at the Wheeler Avenue crime scene matched. Two additional possible gunshot wounds were observed in Brown's chest and right side. (CT 10494-10496.)

Aside from the physical evidence of the homicides, information received from Detectives Dunn and Lambert of Valley Narcotics Division disclosed that Jeff Bryant and appellant Bryant operated an organization known as "The Family" -- a group involved in the sales of cocaine. They used and operated a pool hall called "The Neighborhood Billiards" as "a front" for their drug cartel, and appellant Bryant operated the organization while Jeff was in prison. Los Angeles County Tax Assessor records disclosed that, in 1985, Jeff Bryant personally owned seven homes in the Lake View Terrace and Pacoima areas. Three of the locations, including 11442 Wheeler Avenue, were verified "rock cocaine houses." (CT 10501-10503.) Twice in 1985, LAPD/SWAT officers gained forced entry into 11442 Wheeler Avenue. Among the evidence they recovered were 42 grams and 137 grams of cocaine, respectively. (CT 10499.)

On September 14, 1988, Los Angeles County Tax Assessor files verified that Jeff Bryant was still the current owner of 11442 Wheeler Avenue. (CT 10500.)

In 1985, the affiant conducted an investigation into the attempted murder of Clarence Johnson that occurred in a dirt lot next to "Neighborhood Billiards." Johnson had been employed by Jeff Bryant and appellant Bryant to

operate one of the rock cocaine houses. He came up "short" in the nightly receipts and had "smoked some of the merchandise." Consequently, Jeff Bryant and appellant Bryant hired a paroled murderer, David Hodnett, to kill Johnson. During an interview, Hodnett admitted that Jeff Bryant and appellant Bryant had offered him $3,500 to kill Johnson. (CT 10504.)

On September 20, 1988, the affiant learned the following from an untested informant. Following the initial raids by police on the Wheeler Avenue address in 1985, the house was shut down. It reopened approximately one year later (September 1987) and was no longer a "rock house." Instead, it became a "money house" where persons wanting cocaine would come to pay and then be directed to a second location to pick up the drugs. Monies made at other locations were also brought to this house. The employees worked 12-hour shifts and were paid on commission. Every Tuesday was payday. Appellant Bryant would come by and pay them based on the quantity of drugs sold. The informant named a number of people as employees at the residence, including Tony Johnson, William Settle, and Nash Newbill. (CT 10513-10514.)

It is noted that a review of mail seized during the initial crime scene investigation on August 29, 1988, at 11442 Wheeler disclosed that some of the items were addressed to Nash Newbill and William Settle. (CT 10500-10501.)

Approximately one week after the murders, the untested informant spoke with appellant Bryant. Appellant Bryant told the informant that, approximately one week before the murders, he (appellant Bryant) had received a telephone call "from one (1) of his people up north." He was told "that there would be some guys coming down to move on him and take down his money house." Appellant Bryant told the informant, "They got two of them but one got away." Appellant Bryant gave a physical description of this third person that fit the description of the citizen informant previously mentioned in the affidavit.

Appellant Bryant told the informant to keep an eye out for this man. If the informant saw him, she/he was supposed to tell Tony Johnson. Appellant Bryant indicated he had a couple of people looking for this man and "that they would take care of him." (CT 10514.)

Finally, appellant Bryant had a lengthy criminal record involving sales of narcotics and a murder arrest. He resides at 12719 Judd Street in Pacoima. (CT 10515.)

b. Legal Analysis

A magistrate's probable cause determination is entitled to great deference on appeal. (*People v. McDaniels* (1994) 21 Cal.App.4th 1560, 1564, citing *Illinois v. Gates* (1983) 462 U.S. 213, 236.) In determining whether an affidavit is sufficient to support the issuance of a search warrant, a reviewing court "should not conduct a de novo review of the evidence." (*People v. McDaniels, supra*, at p. 1564.) Instead, the magistrate's probable cause determination should only be disturbed on appeal when "the affidavit fails as a matter of law to set forth sufficient competent evidence to support the magistrate's finding of probable cause." (*Ibid.*, citing *People v. Leyba* (1981) 29 Cal.3d 591, 596-597.) "[D]oubtful or marginal cases should be resolved in favor of upholding the warrant." (*People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1784, citing *United States v. Ventresca* (1965) 380 U.S. 102; *People v. Superior Court (Corona)* (1981) 30 Cal.3d 193, 207.)

Probable cause to search exists when all of the circumstances set forth in a warrant affidavit establish "there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates, supra*, 462 U.S. at p. 238.) Under the *Gates* totality-of-the-circumstances analysis, an informant's reliability and basis of knowledge are relevant factors, but they are not considered independently. Thus, a weakness in one factor can be compensated for by the strength in the other. (*Id.* at p. 233.)

Under the totality of the circumstances presented in the affidavit, it was reasonable for the magistrate to conclude that appellant Bryant was involved in the quadruple homicide on Wheeler Street and that evidence relating to those crimes could be found in appellant Bryant's residence. The reasonable common-sense conclusions which can be drawn from the contents of the affidavit are as follows:

(1) In 1982, appellant Bryant and his brother Jeff Bryant paid Andre Armstrong to murder Kenneth Gentry and to shoot Reynard Goldman.

(2) While all three were arrested, only Armstrong was convicted and sentenced to prison.

(3) While in prison, Armstrong stated his intention to extort money from Jeff Bryant and appellant Bryant.

(4) Armstrong was paroled on January 18, 1988.

(5) Armstrong demanded money from appellant Bryant on several occasions, including moments before his death.

(6) James Brown, another murder victim, "ran drugs" for appellant Bryant to the Monterey Bay area.

(7) On August 26, 1988, Brown and additional murder victims Loretha Anderson and Chemise English moved to the Los Angeles area where they met Armstrong.

(8) Armstrong was staying with a girl named Tannis, who was supposed to be appellant Bryant's "old lady."

(9) On August 28, 1988, the day of the murders, Brown and a citizen informant met Armstrong at Tannis's apartment.

(10) From there, Armstrong placed several telephone calls and spoke to appellant Bryant. Armstrong asked for $500 and stated he would need additional money the following week. Armstrong arranged to meet appellant Bryant at 4:00 p.m. that day.

(11) Because Armstrong did not trust appellant Bryant, he asked Tannis to conceal a .38 caliber revolver in her purse and to follow behind them when they entered to meet appellant Bryant.

(12) En route to meet appellant Bryant, Armstrong dropped off the informant and picked up Anderson and her children.

(13) Shortly after they arrived at 11442 Wheeler Street, Armstrong and Brown were murdered as they entered the residence by unknown assailants using multiple shotgun/gunshot blasts to the head and chest. Anderson and Chemise were also gunned down execution style as they waited in the rear seat of the car.

(14) Immediately after the shootings, two suspects loaded the bodies of Armstrong and Brown into the rear of a sedan parked in the garage. They covered them and drove off, eventually dumping them in Lopez Canyon.

(15) The assailant, who shot the occupants of the car, drove off and dumped the car and bodies nearby.

(16) Jeff Bryant and appellant Bryant ran an organization known as the "Family," which is involved in the sales of cocaine.

(17) 11442 Wheeler Street is owned by Jeff Bryant and was formerly used by the organization as a "rock cocaine house" (i.e., a house from which cocaine is sold). 11442 Wheeler Street was currently used as a "money house" only (i.e., where payment for drugs is received).

(18) Appellant Bryant operated the organization while his brother was in prison and paid the employees at 11442 Wheeler Street every Tuesday; payment was based on the quantity of drugs sold.

(19) Appellant Bryant knew in advance that persons were coming to the "money house" to make a "move" on him and admitted that "they got" two of them but one got away.

(20) Appellant Bryant and his brother Jeff had twice previously contracted murders for hire.

Considering the totality of the circumstances presented, it was reasonable for the magistrate reviewing the affidavit to conclude that, on August 28, 1988, appellant Bryant participated in the murders, or had others commit the murders of Andre Armstrong, James Brown, Loretha Anderson, and Chemise English as they arrived at 11442 Wheeler Street to meet with him. Accordingly, the magistrate had a substantial basis for concluding that probable cause existed.

Having reasonably concluded that appellant Bryant was responsible in whole, or in part, for the multiple murders at 11442 Wheeler Street, the magistrate, without more, had a sufficient legal basis for issuing the warrant authorizing a search of appellant Bryant's residence.

Affidavits must be interpreted in a common-sense fashion, rather than a hyper-technical one. Reasonable and logical inferences may be drawn, and the magistrate may consider matters of common knowledge concerning human behavior. (*People v. Superior Court* (1972) 6 Cal.3d 704; *United States v. Ventresca, supra,* 380 U.S. 102.) *People v. Miller* (1978) 85 Cal.App.3d 194, 204, states "a number of California cases have recognized that from the nature of the crimes and the items sought, a magistrate can reasonably conclude that a suspect's residence is a logical place to look for specific incriminating items." In *Miller*, police received and corroborated information that the suspect had committed a series of burglaries and robberies and a kidnap for ransom. Based upon this information and corroboration, a search warrant was obtained for the suspect's residence and for his two automobiles authorizing a search for various specifically described fruits, instrumentalities, and evidence of the crimes. The Court of Appeal held the warrant valid, stating:

> The connection between the items to be seized and the place to be searched need not rest on direct observation. It may be inferred from the

type of crime involved, the nature of the items and the normal inferences as to where a criminal might likely hide incriminating evidence.

(*Id.* at p. 201.)

Similarly, in *People v. Superior Court (Brown)* (1975) 49 Cal.App.3d 160, a magistrate issued a warrant for a suspect's residence for items taken 31 days earlier in a burglary. The facts connecting the suspect with the burglary were that he had been seen in the vicinity of the burgled premises and his fingerprints were found at the point of entry. The Court of Appeal upheld the warrant for the stolen property.

> . . . the nexus between the items to be seized and the place to be searched rested not on direct observation, as in the normal search-and-seizure case, but on the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment and normal inferences as to where a criminal would be likely to hide stolen property.

(*Id.* at p. 167.)

The affidavit in the instant case contains 35 pages of factual allegations. The allegations describe in detail the murders of Armstrong, Brown, Anderson, and Chemise and considerable circumstantial evidence pointing to appellant Bryant's guilt, including motive, association to the victims and murder scene, and subsequent admissions. The affidavit concludes by describing the act appellant Bryant is believed to have committed, i.e., ordering the murder of Armstrong and, further, the murders of Brown, Anderson, and Chemise and the attempted murder of Carlos to eliminate witnesses. The affiant reasonably inferred therefrom that a search of the residences and vehicles of those people directly associated to the Wheeler Street address, as well as those persons known to be directly involved in "The Family" operation, would result in the seizure of physical evidence that would lead to the identification of suspect(s) involved. (CT 10515-10516.)

The affidavit, thereafter, specifies the items sought and explains why it is believed they will be found at the residences and vehicles to be searched. In particular the affidavit states:

> Based on the foregoing, your affiant knows that guns have a high value and are difficult to obtain, particularly by ex-convicts and parolees. Suspect(s) tend to retain these weapons, ammunition, holsters and cleaning equipment. In addition to the firearms described, your affiant also expects to find and wishes to seize miscellaneous gun pieces, ammunition, gun cleaning items, holsters ammunition belts, original box packaging, targets, expended pieces of lead, photographs of firearms and paperwork showing the purchases, storage, disposition, or dominion and control over guns, ammunition, and other above items.

(CT 10516.)

The affidavit continues:

> It is your affiant's opinion that whether or not the firearms sought are themselves recovered, the above related items would tend to show that the firearms existed and had once been located in a place to which the suspect(s) had access, and that these items would tend to connect the suspect(s) with the weapons sought in the shooting of the four (4) murder victims.
>
> Additionally, blood is extremely difficult to remove completely and analyzation under laboratory conditions may disclose trace evidence months after the assault. Therefore, your affiant feels that clothing worn by the suspect(s) described in the assault may reveal forensic evidence linking the suspect(s) to the murders. This evidence would include both cloth and hair fibers.

Based on your affiant's observations of bloody tennis shoe prints at the shooting scene and shoe prints and tire tracks at the recovery location of the bodies of Andre Armstrong and James Brown, your affiant seeks to seize and compare footwear and vehicles with similar tire pattern for further analysis. It is your affiant's belief that these items would tend to connect the suspect(s) to both the crime scene and the body dump location leading to further identification of suspect(s).

It is also your affiant's experience and training that suspect(s) involved in violent assaults tend to continue their association, as in the case of Armstrong with Jeff and [appellant] Bryant following the murder of Kenneth Gentry. They maintain contact for self preservation and to avoid detection. Therefore, your affiant wishes to search for and seize letters, notes, telephone books, bills and photographs that may lead to the identity to the suspects described in the initial police reports.

(CT 10518-10519.)

Nothing further was required to justify the issuance of a warrant authorizing a search of appellant Bryant's Judd Street residence.

2. The Information In The Affidavit Was Not Too "Stale" As To Preclude Its Reliability

Appellant Bryant's contention that the information in the affidavit supporting the issuance of the warrant was "stale" and therefore unreliable is also without merit. The time reference of the affiant's observations, which are set forth as constituting probable cause, is essential to the validity of a search warrant. (*Srgo v. United States* (1932) 287 U.S. 206, 210-211.) Information that is remote in time may be stale and unworthy of weight in a magistrate's consideration of an affidavit supporting an application for a search warrant. (*Alexander v. Superior Court* (1973) 9 Cal.3d 387, 393.) However, if there are special circumstances that would justify a person of ordinary prudence to

conclude that the alleged illegal activity had persisted from the time of the stale information to the present, then the passage of time has not deprived the old information of all value. (*Ibid.*) In other words, an affidavit in support of a search warrant must provide probable cause to believe the material to be seized is still on the premises to be searched when the warrant is sought. (*People v. Mesa* (1975) 14 Cal.3d 466, 470.)

"[T]here is . . . no arbitrary time limit on how old the information contained in an affidavit may be." (*Unites States v. Guinn* (5th Cir. 1972) 454 F.2d 29, 36.) "Probable cause is not determined by merely counting the number of days between the time of the facts relied upon and the warrant's issuance." (*United States v. Brinklow* (10th Cir. 1977) 560 F.2d 1003, 1005.) Instead, "[t]he question of the staleness of probable cause depends more on the nature of the unlawful activity alleged in the affidavit than the dates and times specified therein." (*United States v. Harris* (3d Cir. 1973) 482 F.2d 1115, 1119; accord, *United States v. Steeves* (8th Cir. 1975) 525 F.2d 33, 35 [information not stale after 87 days].) In other words, "the question of staleness depends on the facts of each case." (*People v. Gibson* (2001) 90 Cal.App.4th 371, 380-381 [warrant issued six months after last police surveillance of location].)

Where an ongoing criminal enterprise, as opposed to a single criminal episode, is involved, a longer lapse of time will not be improper or affect the validity of a warrant. "Circumstances such as prior extended observations, or a setting strongly suggestive of continuing illegal traffic in contraband, have caused a delay of as much as seven weeks to be held sufficient to indicate present probable cause." (*Hemler v. Superior Court* (1975) 44 Cal.App.3d 430, 434, citations omitted; see *People v. Mesa, supra*, 14 Cal.3d at p. 470.)

In the instant case, the magistrate was presented with ample evidence of a continuing criminal enterprise. (See *People v. Gibson, supra,* 90 Cal.App.4th at p. 381.) The search warrant was part of a lengthy investigation into multiple murders carried out on behalf of an ongoing criminal narcotics sales organization. There was probable cause to believe: appellant Bryant committed the murders; the murders were connected to the Bryant Organization; and appellant Bryant would possess clothing or documents connecting him to the murders and/or other suspects. Unlike cases involving crimes of possession, the warrant affidavit in this case was not deficient for having been sworn 30 days after the murders.

3. The Search Warrant Was Not Unconstitutionally Overbroad

The search warrant for appellant Bryant's Judd Street residence authorized the seizure of "[a]ny articles of personal property tending to establish the identity of persons who have dominion and control over the premises. . . ." (CT 10485.) Relying on this Court's opinion in *People v. Frank* (1985) 38 Cal.3d 711, 722-723 (BAOB 341), appellant Bryant contends the foregoing language is unconstitutionally overbroad since "it failed to place a meaningful restriction on the things to be seized" and permitted "the seizure of virtually any document." (BAOB 341, 342.) This contention is without merit.

The identical argument challenging similar language was raised and rejected in *People v. Rodgers* (1986) 187 Cal.App.3d 1001, 1004-1007. As noted in *Rogers, Frank* did not hold that a description of "Evidence tending to establish the identities of the occupants, users or owners of the residence, including, but not limited to utility bills or receipts, envelopes, traffic tickets, insurance papers or vehicle registration" was unconstitutionally overbroad but, instead, found the warrant as a whole lacked probable cause. Moreover, even if incorrect in its interpretation of the *Frank* holding, the *Rodgers* court went on to note that the holding in *Frank* was premised on the California Constitution,

not the Fourth Amendment to the United States Constitution. And, following the passage of Proposition 8, exclusion of evidence as the product of an illegal search is only compelled to the extent necessary to enforce the United States Constitution, such that the precedential value of *Frank* is questionable. (*Id.* at p. 1006.) *Rodgers* ultimately held that, in light of the above, a description in a warrant like that challenged by appellant Bryant was not unconstitutionally overbroad. (*Id.* at pp. 1007-1008.) Thus, appellant Bryant's overbreadth argument fails.

It must also be noted that the federal courts have repeatedly upheld closely related warrant clauses against challenges for overbreadth. (See *People v. Rodgers, supra*, 187 Cal.App.3d at pp. 1007-1009.) For example, in *United States v. Alexander* (9th Cir. 1985) 761 F.2d 1294, 1301, the Ninth Circuit rejected a contention, identical to that made by appellant Bryant, that the phrase, "items or articles of personal property tending to show identity of persons in ownership, dominion or control of said premises. . . ." rendered a warrant void because it was overbroad. The court noted that the United States Supreme Court has held that warrants were to be "read in a common-sense fashion" and that the challenged language had been upheld in multiple cases in the Ninth Circuit. (*Id.* at pp. 1301-1302.)

Appellant Bryant's claim must fail.

V.

THE PROCEDURE UTILIZED BY THE TRIAL COURT IN CONDUCTING THE DEATH QUALIFICATION VOIR DIRE WAS REASONABLE AND THEREFORE PROPER

Appellant Bryant contends the trial court's failure to conduct individual sequestered death qualification voir dire, and its unreasonable and unequal application of California law governing juror voir dire, violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as his statutory right under Code of Civil Procedure section 223 to individual voir dire where group voir dire is not practicable. (BAOB 451-459.) Specifically, appellant Bryant maintains: (1) a voir dire procedure that does not allow individual sequestered voir dire on death qualifying issues violates a capital defendant's constitutional rights to due process, trial by an impartial jury, effective assistance of counsel, and a reliable sentencing determination (BAOB 452-454); (2) the trial court erred in denying appellants' request for individual sequestered voir dire (BAOB 454-458); and (3) the trial court's unreasonable and unequal application of the law governing juror voir dire violated Code of Civil Procedure 223 and thus requires reversal of the death sentences (BAOB 458-460). Appellants Smith and Wheeler join in the claim. (SAOB 451; WAOB 435.) Respondent submits appellants' claim must fail for two reasons: (1) appellants failed to preserve the issue below by renewing their request in a timely manner and obtaining a ruling from the trial court on the motion for individual sequestered death qualification voir dire; and (2) in any event, following the passage of Proposition 115, the *Hovey*[52] individual sequestered voir dire is no longer required and the procedure utilized by the trial court in conducting the death qualification voir dire in this case was entirely reasonable and therefore proper.

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52. *Hovey v. Superior Court* (1980) 28 Cal.3d 1.

A. Relevant Proceedings

On September 23, 1992, appellant Smith filed a 14-page written motion for "attorney conducted, sequestered individual voir dire." (CT 2799-2812.) The motion argued, in part, that, because of the extensive pretrial publicity and the nature of the death-qualification process in the instant four-defendant capital murder trial, "a court conducted, nonsequestered jury selection procedure is neither required by Proposition 115 nor adequate to select a fair and impartial jury in this case." (CT 2802-2803.) Instead, the motion maintained, "sequestered individual voir dire is necessary to identify those prospective jurors who cannot serve as fair and impartial jurors because of their exposure to prejudicial pretrial publicity without tainting the entire jury pool" and such a voir dire procedure "will also minimize the potentially prejudicial effect arising out of the procedure used in California to identify death-qualified jurors in the context of this four-defendant capital murder case." (CT 2803.)

Over two years later, on January 19, 1995, during a discussion regarding the jury questionnaire and voir dire procedures, the trial court indicated it would conduct the voir dire and "when I am done asking the questions of the first twelve, I will invite all counsel to submit any additional questions they may have or we will do it in chambers or approach the bench. Anything else you want me to ask I will consider doing it." (RT 6294.) At this point, counsel for appellant Smith asked the trial court to "take a look at" the motion filed in 1992 regarding sequestered voir dire. Counsel for appellant Smith stated, "I have a feeling I know which way the court is leaning, but if we can get a ruling." The trial court responded, "I will be glad to." (RT 6294.)

On January 25, 1995, following hardship excusals and instructions to one of the groups of prospective jurors regarding the filling out of the jury questionnaire (RT 6523-6574), the following appears in the record regarding the voir dire procedure to be utilized by the trial court:

MR. MCCORMICK [the prosecutor]: Is your process going to be that you are going to *Hovey* the group first to find out which jurors we actually need to go into voir dire?

THE COURT: No. No. I am going to put them in the box and commence voir dire.

Your *Hovey* questions will be to some degree dealt with by the court but they are also on your questionnaire.

MR. MCCORMICK: I understand.

THE COURT: Let me also suggest this. That if -- it is up to all of you, but if there are folks that you want to stipulate off based on the questionnaire answers, that will save me the time of asking ridiculous questions.

If somebody is obviously out of here for some reason, maybe you can agree.

If you can agree ahead of time on how many, give me the list and I will send them home.

Likewise, I would appreciate this. Although I cannot demand it, but I would appreciate this. If somebody knows for a fact that there is going to be a peremptory challenge as to some particular juror, if you could let me know.

Somehow we can work something out so that I don't again go through the length.

Everybody knows that somebody is going to get kicked or you know for a fact and you will exercise a challenge on that person, then I see very little need to go through the next 10 minutes or so of repetitive voir dire.

If you would keep that in mind, I would appreciate it.

Likewise, we need to have the defense decide how you wish to handle these challenges as joint challenges and things of that nature.

If -- I mean it is preferable to me, although not to you folks, if you could simply pool your challenges and make them joint challenges if you think you can get along and do that. That worked pretty well when we did that before when everybody cooperates.

Obviously nobody can force you to do that, but if you wish to consider that, I would be glad to have you consider that.

MR. NOVOTNEY [counsel for appellant Smith]: Could we have an opportunity to huddle? I don't think we need an extended period of time.

Along the lines that you were talking about Hovey and selecting the actual twelve in the box, I am not saying anything right now that rises to an objection because I want to look at *Witherspoon/Morgan*,[53] but my impression was that the appropriate way of selecting the panel was to go through an initial qualification process in terms of removing automatic lifers and automatic death people; and from that pool, which would be a legal eligible pool, then draw the twelve people subjected to, of course, the general voir dire rules.

I am wondering if we don't do that process if we may be drawing someone for general voir dire from what would be otherwise an illegal, unqualified pool.

I want to take a look at *Witherspoon/Morgan* again, but I want to -- that was my impression of the procedure as far as selecting qualified jurors.

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53. *Witherspoon v. Illinois* (1968) 391 U.S. 510; *Morgan v. Illinois* (1992) 504 U.S. 719.

THE COURT: *To my knowledge there is no authority, statutory or otherwise, that suggests that is [the] only way to do things.*

I think what is important is that once you have completed whatever voir dire process you use, whether it is sequestered, non-sequestered, questionnaires, non-questionnaires, then you have people that are legally qualified to serve.

There is no procedure set forth that I know of that suggests that we have to do it in the way that you indicated.

Likewise, we are moving away further and further from those sorts of restrictions with even Prop. 115 to those sorts of issues.

And everybody does it their own way, you know. But, no, my inclination is to simply -- don't forget you have 100 questions answered by these people and the court has invited as to the obvious people that will be challenged for trial that counsel simply don't make me voir dire them if you can.

Other than those sorts of things, my inclination is to put twelve people in the box and inquire of them and make sure they are fit to serve in all respects.

MR. NOVOTNEY: The only other questions I have then, assuming we are going to get into that process on Tuesday --

THE COURT: We will.

MR. NOVOTNEY: Are you inviting written questions from counsel?

THE COURT: I don't know if I need written ones. I would doubt that there will be that many.

We put together, again, 100 questions or thereabouts or something like 100 questions in the questionnaire.

I would prefer -- and I think this will work and I am not trying to mislead you -- but it you listen to the court's voir dire, then I will invite counsel to the bench or in chambers and have you give me suggestions.

I will not prevent you from asking for additional things, but I prefer that you wait and see what sort of voir dire is done and how in depth it gets.

It will not be that short unfortunately, or fortunately.

MR. GREGORY [co-counsel for appellant Smith]: Again, I have not done a case in here with your Honor and we do want to rule Tuesday morning, if you would, on some of the motions that we have, but I am confused how many will we or the court voir dire before --

THE COURT: Twelve.

MR. GREGORY: And you will ask us for our challenges for cause and you will ask us for peremptories.

THE COURT: Right.

MR. GREGORY: And only if we need more do more jurors come up and then you will voir dire how many more?

THE COURT: One more.

It will be like any other standard jury trial. Twelve people in the box at all times. And then we will call their name and the person would be spoken to.

MR. GREGORY: If we getting to -- let's say Mr. McCormick has an idea that 10 or 12 are automatic lifers --

THE COURT: Of the whole bunch?

MR. GREGORY: Yes. And we have 10 or 12 that we think are automatic death, for want of a better phrase, what if we want you to ask a couple of questions to resolve that so that we don't have to go through the whole voir dire? You might be able to eliminate those.

Is that something that you will do or not?

THE COURT: That is not something that I will do ahead of time, but I will do it if and when they are called to the jury box.

If they say we don't need the voir dire, just the following, I will do that. That is my inclination.

MR. GREGORY: My fear is that it will go so fast that we will not be able to handle it as customarily as we would.

THE COURT: I don't think it will go that fast.

MR. GREGORY: Would you think this might take four or five days or less?

THE COURT: In view of the number of peremptory challenges, it would take four days or so. That would not surprise me.

MR. GREGORY: You would anticipate opening statements a week from Monday or Tuesday?

THE COURT: Again, a lot of that stuff is up to you folks.

That sounds possible. I don't know what you folks are going to do. I don't know.

MR. GREGORY: And out of -- when do we come up to you in terms of our challenges for cause, *Witherspoon* challenge? After the People are voir dired or one at a time?

THE COURT: After the twelve.

MR. GREGORY: Then we huddle with you and you make the decisions.

THE COURT: If somebody has a challenge for cause after the first twelve people, you can make it at side bar and I will rule on that.

If it is sustained, we will put another person in there and start again.

MR. GREGORY: Sounds complicated.

THE COURT: Very simple. Pretend this is a regular jury trial. That is what it is. It is with additional questions being asked on death. That is all it is.

(RT 6576-6583, emphasis added.)

On January 31, 1995, following hardship excusals and prior to voir dire of the first 12 jurors, the following appears in the record:

THE COURT: All right. On the record outside of the jury's presence.

Let's see, Mr. Novotney, you wish to address the issue of sequestered voir dire; is that right?

MR. NOVOTNEY: Yes. Actually, I will defer to Mr. Gregory.

THE COURT: All right. Mr. Gregory, I will hear you.

MR. GREGORY: I think it bears my signature. But I tried to come up with a procedure that I thought might be expeditious from the court's point of view and society's point of view, and also protect the rights of my client. And I think the other defendants may want to join in this. But my proposal was to have the court have 12 jurors in at a time, do the death qualification of those persons and allow the attorneys three minutes per juror. I gave a number of points and authorities, and it really embodies some of the considerations. We have the *Hovey* decision, and I wanted the court to consider my request, and I will submit on that basis.

THE COURT: Any other counsel wish to join or be heard on that issue?

MR. MCKINNEY: No, we will join.

DEFENDANT JON SETTLE: Join on that.

MR. HARRIS: Join.

THE COURT: People?

MR. MCCORMICK: I submit it.

THE COURT: That request will be denied.

(RT 6626-6627.)

B. The Procedure Utilized By The Trial Court In Conducting The Death Qualification Voir Dire Was Reasonable And Proper

The claim raised on appeal is that the trial court erred in failing to grant appellant Smith's motion for "individual sequestered [death qualification] voir dire." (BAOB 451-459; SAOB 451; WAOB 435.) Although appellant Smith raised this issue in his written motion in 1992 and asked the trial court for a ruling on the motion on January 19, 1995 (CT 2799-2812; RT 6294), it appears appellant Smith abandoned the motion on January 25, 1995, when the trial court was explaining the procedures it was going to utilize to conduct voir dire. At that time, rather than pursue the portion of the 1992 motion regarding individual sequestered death qualification voir dire, appellant Smith, in response to the trial court's indication of how it would conduct voir dire, stated,

> I am not saying anything right now that rises to an objection because I want to look at *Witherspoon/Morgan*, but my impression was that the appropriate way of selecting the panel was to go through an initial qualification process in terms of removing automatic lifers and automatic death people; and from that pool, which would be a legal eligible pool, then draw the twelve people subjected to, of course, the general voir dire rules.

(RT 6578-6579.) Thereafter, on January 31, 1995, prior to the voir dire of the first 12 jurors, appellant Smith, once again, rather than raise the issue of individual sequestered voir dire and obtain a ruling on his motion, argued the trial court should conduct death qualification of 12 jurors at a time and then permit the attorneys three minutes each per juror. (RT 6626.) Appellants now erroneously maintain that the trial court's ruling denying appellant Smith's

request on January 31 was a denial of the 1992 motion, and, more particularly, of the request for individual sequestered death qualification voir dire. (BAOB 451-459.) But a fair reading of the record, as summarized above, does not support appellants' claim. Thus, appellants must be deemed to have abandoned the portion of the 1992 motion raising the issue of individual sequestered death qualification voir dire by failing to renew the motion and obtain a ruling from the trial court.

In any event, assuming arguendo appellants preserved the issue, it is nonetheless without merit. Code of Civil Procedure section 223 provides that, in a criminal case, a trial court has discretion in the manner it conducts voir dire of prospective jurors. It further provides, however, that in all such cases including death penalty cases, the trial court must conduct the voir dire of any prospective jurors, where practicable, in the presence of other prospective jurors. In doing so, it abrogated the holding of *Hovey v. Superior Court, supra*, 28 Cal.3d 1, which required in capital cases that voir dire of each prospective juror regarding views on the death penalty be done individually and in sequestration. (*People v. Waidla* (2000) 22 Cal.4th 690, 713.)

An appellate court applies the abuse-of-discretion standard of review to a trial court's granting or denial of a motion on the conduct of jury voir dire. (*People v. Navarette* (2003) 30 Cal.4th 458, 490.) A trial court abuses its discretion when its ruling falls outside the bounds of reason. (*People v. Waidla, supra*, 22 Cal.4th at p. 714.)

Here, the trial court's manner and procedure of conducting the voir dire was entirely reasonable. It appears the trial court was well aware of the *Hovey* procedure and that the procedure was abrogated by Proposition 115. (See RT 6576-6579.) The trial court was fully aware that there were numerous ways of conducting voir dire (i.e., individual, group, sequestered, non-sequestered, questionnaires, non-questionnaires, etc.) and that what was important,

regardless of the procedure employed, was that the voir dire produced a group of jurors "that are legally qualified to serve." (RT 6579.) As can be seen from the portion of the record quoted above, the trial court did not believe that individual sequestered death qualification voir dire was necessary in order to produce such a jury. Rather, given the fact the prospective jurors had answered over 100 questions in writing and under oath, many of them pertaining to the prospective jurors' views and attitudes toward the death penalty, the trial court believed the most efficient manner to select a jury was "to put twelve people in the box and inquire of them and make sure they are fit to serve in all respects." (RT 6580.) Given the facts of this case, the procedure utilized by the trial court in conducting the death qualification voir dire was entirely reasonable. It cannot be said the trial court abused its discretion as a matter of law. Appellants' claim must, therefore, be rejected.

VI.

THE TRIAL COURT PROPERLY EXCUSED THREE PROSPECTIVE JURORS FOR CAUSE

Relying primarily on *Witherspoon v. Illinois, supra*, 391 U.S. 510 and *Wainwright v. Witt* (1985) 469 U.S. 412, appellants Bryant and Smith contend the trial court improperly excused for cause Prospective Juror Nos. 52 and 56 because the record reflects those two jurors, despite their feelings about the death penalty, would follow the law and impose the death penalty if warranted by the evidence. (BAOB 461-484; SAOB 294-301.) Appellant Wheeler joins in the claim. (WAOB 435.) Appellant Bryant additionally claims the trial court improperly excused for cause Alternate Prospective Juror No. 204 for the same reason. (BAOB 461, 484-486.) Appellants Wheeler and Smith join in the claim. (WAOB 435; SAOB 451.) Respondent will demonstrate below that appellants' claims are without merit since the record contains substantial evidence supporting each of the three for-cause excusals.

A. The Applicable Law

In *Wainwright v. Witt, supra,* 469 U.S. at page 424, the United States Supreme Court held:

> the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether 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."

(See *People v. Williams* (1997) 16 Cal.4th 635, 667; *People v. Crittenden* (1994) 9 Cal.4th 83, 120-121; *People v. Mincey* (1992) 2 Cal.4th 408, 456.) The critical question in each challenge is "whether the juror's view about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror*." (*People v. Bradford* (1997) 15 Cal.4th

1229, 1318-1319, emphasis original.)

If a prospective juror provides conflicting or equivocal answers to questions concerning his or her impartiality, the trial court's determination as to that person's true state of mind, which may include an evaluation of the juror's demeanor, is binding on the appellate court. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 975; *People v. Bradford, supra*, 15 Cal.4th at p. 1319; *People v. Mayfield* (1997) 14 Cal.4th 668, 727; see also *Wainwright v. Witt, supra*, 469 U.S. at pp. 425-426.) A prospective juror who has expressed an unwillingness to impose the death penalty may properly be excused for cause. (*People v. Jenkins* (2000) 22 Cal.4th 900, 986-987.) Furthermore, the trial court's decision to excuse for cause a prospective juror must be upheld if supported by substantial evidence. (*People v. Holt* (1997) 15 Cal.4th 619, 651.)

People v. Heard (2003) 31 Cal.4th 946, a case cited and relied upon by appellants (see SAOB 296-297, 300; BAOB 467-468), is distinguishable from the instant case. In *Heard*, this Court found reversible error from the dismissal of a prospective juror on *Witt* grounds, holding there was no substantial evidence supporting the trial court's determination that the juror's views on capital punishment would prevent or substantially impair the performance of his duties. The prospective juror in *Heard* unequivocally indicated "that he would not vote 'automatically'" for life without parole or death. (*Id.* at pp. 964-965.) The prospective juror also "indicated he was prepared to follow the law and had no predisposition one way or the other as to imposition of the death penalty." (*Id.* at p. 967.) Here, as will be demonstrated below, the three excused jurors not only gave equivocal and conflicting answers on their ability to impose the death penalty, but made statements indicating that they could not, in good conscience, vote for death. Unlike the situation in *Heard*, there was substantial evidence in the instant case that the three excused jurors' views on capital

punishment would prevent or substantially impair the performance of their duties, and thus the trial court properly excused each of them for cause.

Moreover, the trial court was not required under *Heard* to ask the three prospective jurors additional questions to clear up any uncertainty regarding the prospective jurors' views on capital punishment and whether they were qualified to sit as a juror under the *Witt* standard. In *Heard,* this Court stated the trial court was not required, but instead, "was *free*, of course, to follow up with additional questions [of the prospective juror]" where the "trial court remained uncertain as to whether [the prospective juror's] views concerning the death penalty would impair his ability to follow the law or to otherwise perform his duties as a juror. . . ." (*People v. Heard, supra*, 31 Cal.4th at p. 965, emphasis added.) Here, however, as demonstrated below, each of the three prospective jurors was extensively questioned during voir dire about his or her views on the death penalty, and no additional questions were required or necessary since there was no uncertainty regarding their views under the *Witt* standard, or the reasons the trial court excused each, at the time the challenge for cause was granted.

B. Analysis

1. Prospective Juror No. 52

Prospective Juror No. 52, a 58-year-old male, acknowledged in his jury questionnaire that he understood that, if the trial reached the penalty phase, the only choices were either the death penalty or, in his view, the more severe punishment of life in prison without the possibility of parole. (1 Supp. CT 6666, 6669.) Although his views on the death penalty had not changed in the last 10 years (1 Supp. CT 6669), Prospective Juror No. 52 answered each of the following questions on the jury questionnaire with a question mark ("?"): what are your general feelings about the death penalty (1 Supp. CT 6666); do you

feel the death penalty is used too often or too seldom (1 Supp. CT 6667); are your views on the death penalty based on religious conviction (1 Supp. CT 6667); do you feel California should have a death penalty (1 Supp. CT 6667); regardless of your views on the death penalty, would you as a juror, be able to vote for the death penalty on another person if you believed, after hearing all the evidence, that the penalty was appropriate (1 Supp. CT 6667); what do you see as the purpose of the death penalty (1 Supp. CT 6668); when you first learned this case was a murder case what was your reaction (1 Supp. CT 6664); would your religious preference or beliefs make it difficult or impossible to sit in judgment of another person (1 Supp. CT 6661); would your religious preference or beliefs cause you not to want to sit in judgment of another person (1 Supp. CT 6662); in your opinion, what are the most important causes of crime (1 Supp. CT 6662); do you believe the problem of crime has become more serious in recent years (1 Supp. CT 6662); what, in your opinion, could or should be done about the crime problem (1 Supp. CT 6662); how do you feel about plea bargains (1 Supp. CT 6663); how do you feel about the practice in which the prosecution may decide not to prosecute one person in exchange for testimony against another person (1 Supp. CT 6663); do you believe the criminal laws relating to narcotics or drugs of any type are too lenient (1 Supp. CT 6655); and how much of a problem do you think racism and racial discrimination are today in the United States (1 Supp. CT 6663).

Prospective Juror No. 52 answered each of the following questions on his jury questionnaire with "Don't know": if you found a defendant guilty of first degree murder would you automatically, in every case, find the special circumstance of multiple murder true, regardless of the evidence, in order to be able to consider the death penalty (1 Supp. CT 6668); if the trial reached the penalty phase would you automatically, in every case, regardless of the evidence, vote for the death penalty (1 Supp. CT 6668); if the trial reached the

penalty phase would you automatically, in every case, regardless of the evidence, vote for life imprisonment without the possibility of parole (1 Supp. CT 6668); and do you have any conscientious objections to the death penalty which you believe might impair your ability to be fair and impartial in a case in which the prosecution is seeking the death penalty (1 Supp. CT 6669).

Prospective Juror No. 52 answered "no" to each of the following questions on the questionnaire: would you automatically, in every case, refuse to vote to find a defendant guilty, regardless of the evidence, to avoid the issue of the death penalty (1 Supp. CT 6668); and if you found the defendant guilty of first degree murder would you automatically, in every case, refuse to find the special circumstance true, regardless of the evidence, to avoid the issue of the death penalty (1 Supp. CT 6668).

During voir dire, Prospective Juror No. 52 indicated that he was "very opposed to the death penalty" and that he had been "studying" whether his views on the death penalty would "substantially affect" his ability to choose between the penalties of death and life in imprisonment without the possibility of parole, because the death penalty was a "problem"' for him in this case and "I would be lying to you if I said that it didn't bother my conscious about the death penalty." (RT 7017-7018.) Prospective Juror No. 52 indicated he "could follow the law" and be a "fair judge" in this case but "couldn't say [following the law] would not be against [his] conscious." (RT 7018, 7019.) Prospective Juror No. 52 stated he could vote for the death penalty "if [he] had to" but would rather not since he preferred to remain "neutral" when judging another individual. (RT 7019.) He also indicated that his guilt phase verdict would not be affected to avoid a penalty phase. (RT 7020.)

Prospective Juror No. 52 changed the following "don't know" answers from the jury questionnaire to "no" answers during voir dire: if you found the defendant guilty of first degree murder, would you automatically find the

special circumstance true in order to be able to consider penalty (RT 7020); if the trial reached a penalty phase, would you automatically vote for the death penalty (RT 7020-7021); and if there is a penalty phase, will you automatically vote for life in prison without the possibility of parole (RT 7021).

After Prospective Juror No. 52 indicated he was "sure" he could vote for death or life in prison without the possibility of parole in this case because "you have to go by the evidence" (RT 7021), the following appears in the record:

> THE COURT: I agree.
>
> My question is this. You say that you have some conscientious problem and your conscious would hurt you if you had to vote for death.
>
> Nobody will make you vote any way in this case. The law will guide you and the evidence should guide you.
>
> Notwithstanding the fact that you have a conscientious objection for this, could you in fact be a fair judge of the penalty and vote for death if you felt it was appropriate given our facts or could you not?
>
> PROSPECTIVE JUROR NO. 52: *No. I don't think so.*
>
> THE COURT: You don't believe you could do that?
>
> PROSPECTIVE JUROR NO. 52: *No.*
>
> THE COURT: All right. No. 65 asks you whether you have any religious beliefs or preference that would make it difficult to sit in judgment on a case like this. You put a question mark.
>
> Would you answer that one for me?
>
> PROSPECTIVE JUROR NO. 52: As I say, I have been studying about it lately and from what I learn, this is where it comes into play.
>
> Now 10 years ago I would have no quarrel with that, but since I have learned in the past few years, I can't honestly say that.

(RT 7021-7022, emphasis added.) Thereafter, the trial court sustained the prosecution's challenge for cause to Prospective Juror No. 52. As noted by the

trial court, the "challenge is sustained based on the total of his answers including the quite clear one he gave about two minutes ago." (RT 7024.)

There is substantial evidence in the record to support the trial court's excusal of Prospective Juror No. 52 for cause. Although Prospective Juror No. 52 indicated during voir dire that "he could follow the law" and be a 'fair judge" and even vote for the death penalty "if he had to," the record is clear that this prospective juror's very strong opposition to the death penalty was based not only on his personal views but on some kind of religious studying and enlightenment during the last 10 years. He acknowledged that he preferred to remain 'neutral" when judging another person and that voting for the death penalty was a "problem" for him since it would be contrary to his conscious and apparent religious beliefs.

When specifically asked whether "notwithstanding the fact that you have a conscientious objection [to the death penalty], could you in fact be a fair judge of the penalty and vote for death if you felt it appropriate given the facts or could you not," Prospective Juror No. 52 responded, "No. I don't think so." This objection to imposition of the death penalty was based, according to Prospective Juror No. 52, on his religious studying over the last 10 years. In other words, Prospective Juror No. 52, by his own acknowledgment, could not be a fair juror and vote for the penalty of death even if he believed it was the appropriate penalty on the facts of this case because of his religious beliefs. Such views, respondent submits, are sufficient and ample evidence to support the trial court's excusal for cause of this prospective juror since his views concerning capital punishment were based on his religious beliefs and thus would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*People v. Cunningham, supra*, 25 Cal.4th at p. 982; *People v. Millwee* (1998) 18 Cal.4th 96, 146-147.)

Finally, to the extent there may have been conflict or contradiction in the prospective juror's voir dire answers, the trial court resolved those differences adversely to appellants by granting the challenge. And the trial court's determination as to the prospective juror's true state of mind, if supported by substantial evidence, as is the case here, is binding on the appellate court. (See *People v. Bradford, supra*, 15 Cal.4th at p. 1329; *People v. Carpenter* (1997) 15 Cal.4th 312, 357.)

2. Prospective Juror No. 56

Prospective Juror No. 56, a 50-year-old female, stated in her jury questionnaire that "I don't believe in the death penalty" (1 Supp. CT 6737) and "I believe in life in prison without parole" (1 Supp. CT 6734). She indicated in the questionnaire that her views regarding the death penalty were based on her religious convictions since "no one has the right to take a life." (1 Supp. CT 6735.) Prospective Juror No. 56 stated in the questionnaire that her religious preference or beliefs would make it difficult or impossible to sit in judgment of another person "if death [penalty] was involved." (1 Supp. CT 6729.) And she "would not want to be a juror on a death penalty case" because of her religious preference and beliefs. (1 Supp. CT 6730.)

Prospective Juror No. 56 answered "No" on the questionnaire to the question of whether she would as a juror, be able to vote for the death penalty on another person if she believed, after hearing all the evidence, that the death penalty was appropriate. (1 Supp. CT 6735.) She indicated that, if the trial reached the penalty phase, she would automatically, in every case, regardless of the evidence, vote for life in prison without the possibility of parole. (1 Supp. CT 6736.) Prospective Juror No. 56 also stated in the questionnaire that she believed that life imprisonment without the possibility of parole is a more severe punishment than the death penalty. (1 Supp. CT 6737.) When she first heard that the instant case was a murder case, her reaction was, "Oh no."

(1 Supp. CT 6732.)

Prospective Juror No. 56 also "strongly disagreed" on the questionnaire with the statement that anyone who intentionally kills more than one person without legal justification and not in self defense, should automatically receive the death penalty. (1 Supp. CT 6736.) Prospective Juror No. 56 stated in the questionnaire that the purpose of the death penalty was "to stop murder -- you take a life, you loss [sic] yours." (1 Supp. CT 6736.) Finally, she stated in the questionnaire that her views on the death penalty have not changed in the last 10 years. (1 Supp. CT 6737.)

During voir dire, Prospective Juror No. 56 indicated she did not want to be on a death penalty case because "I wouldn't want to be on a case where he [sic] was deciding whether they're guilty or not guilty about the death penalty." She also reaffirmed that her views on the death penalty were based on her religious preference or beliefs. When asked if her religious views prevented her from returning a death verdict regardless of the evidence, Prospective Juror No. 56 responded, "If it was required under the law, I could do it, but it's something I would not want to do." (RT 6745.) When asked if her beliefs substantially impaired her ability to be a fair juror in a death penalty case, Prospective Juror No. 56 stated, "I don't think I would be able to be fair because I remember he had a [sic] 18-month old baby." (RT 6746.) In response to the trial court's question of whether she could serve fairly or whether she had made up her mind one way or the other about the death penalty or was biased because a child was involved, the prospective juror stated, "Okay, I could be fair." The trial court stated, "Well, I don't know that you've convinced me. Did I coerce you into it?" (RT 6747.) She then indicated she could return a verdict of death as to all defendants, even in a case involving a child, "depending on the evidence." (RT 6747-6748.)

Prospective Juror No. 56 also stated during voir dire that she had previously served as a juror in a single-defendant murder case which involved a special circumstance but did not involve the death penalty. (RT 6748-6749.) When asked to explain her jury questionnaire answer that she believed in life imprisonment in response to the question about her feelings on the death penalty, Prospective Juror No. 56 explained, "Well, you just -- because believe that when you take someone's life and you're -- it's not going to bring the person they killed back to life; so I just don't believe in the death penalty." (RT 6749.) Prospective Juror No. 56 then told the trial court that she would be able to decide the penalty in this case "based on the facts" without regard to her religious beliefs: "It's something I can do because it's my civic duty to do; but it's not something I would be overjoyed in doing." (RT 6750.) Prospective Juror No. 56 also stated that the trial court's "little speech this morning about weighing the good and the bad and that evidence that comes in before that" changed her jury questionnaire answer that she would always vote for life imprisonment without parole regardless of the evidence. (RT 6750-6751.) And she did not think her religious feelings would influence the manner in which she judged the penalty in this case. (RT 6751.)

The trial court upheld the prosecution's for-cause challenge to Prospective Juror No. 56, stating:

> I concur with the quote you read, no doubt about it, that's the law. You are not entitled, either side, not entitled to people that view the death penalty as they would like them to view it. But the issue is this: Given the totality of her answer[s], is there really a reasonable likelihood she could choose conscientiously between the penalties based on the evidence and so forth. The answer is clearly no, in the court's opinion.

I don't believe it is a close credibility call at all. I don't believe the woman is trying to mislead the court, but when you look at the terms in which she answered, and in the questionnaire she said she could never impose that penalty. She is dead set on religious grounds and that nobody has got a right to that power, over and over and over, eight or nine or ten times in the questionnaire. For some reason yesterday she had this awakening that the court is not convinced is reflective of her true feelings, frankly. So, yes, the court feels that her ability would be substantially impaired to be a juror *** not on the guilt phase, but the penalty phase of the trial [for] the reasons stated in her questionnaire. That challenge will be allowed.

(RT 6837.)

Here, substantial evidence was presented in the questionnaire and voir dire to support the trial court's ruling excusing Prospective Juror No. 56 for cause. Prospective Juror No. 56 had strongly held religious beliefs which prevented her from imposing the death penalty regardless of the evidence. Prospective Juror No. 56 repeatedly stated in her jury questionnaire that she did not believe in the death penalty and that her views on the death penalty were based on her religious convictions that "no one has the right to take a life." Prospective Juror No. 56 also stated that her religious beliefs would make it difficult or impossible to sit in judgment of another person if the death penalty was involved. She answered "No" to the question of whether she would be able to vote for the death penalty on another person if she believed, after hearing all the evidence, that the death penalty was appropriate. Indeed, Prospective Juror No. 56 stated in the questionnaire that, if the trial reached the penalty phase, she would automatically, in every case, regardless of the evidence, vote for life in prison without the possibility of parole rather than the death penalty. During voir dire, Prospective Juror No. 56 reaffirmed that her

views on the death penalty were based on her religious beliefs. Such views, respondent submits, are sufficient and ample evidence to support the trial court's excusal for cause of this prospective juror since her views on capital punishment were based on religious beliefs and thus would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." (*People v. Cunningham, supra*, 25 Cal.4th at p. 982; *People v. Millwee, supra*, 18 Cal.4th at pp. 146-147.)

It is true that Prospective Juror No. 56 contradicted some of the jury questionnaire answers during voir dire and indicated that, notwithstanding her strongly held religious beliefs, she could return a death verdict "depending on the evidence" and if it was "required under the law." However, based on the totality of her answers in the questionnaire and voir dire, the trial court was persuaded that those answers were not reflective of her true feelings and state of mind. To the extent this prospective juror gave conflicting answers, the trial court resolved those differences adversely to appellants by granting the challenge. The trial court's determination as to the prospective juror's true state of mind, if supported by substantial evidence, as is the case here, is binding on the appellate court. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1114-1115 [while some answers showed willingness to follow the law and the court's instruction, other answers furnished substantial evidence of prospective juror's inability to consider the death penalty]; see also *People v. Bradford, supra*, 15 Cal. 4th at p. 1329.)

3. Prospective Juror No. 204

When Prospective Juror No. 204, a 66-year-old female, was asked on the jury questionnaire about her general feelings about the death penalty, she responded, "I am against it because I wasn't put here so another person dies. Each has their own responsibility." She did not believe California should have a death penalty because it "seems to have little import on person doing the

crime." She stated that her views on the death penalty were not based on a religious conviction. (1 Supp. CT 4288-4289.) Her first reaction when she heard the instant case was a murder case was "I'd rather not be involved." (1 Supp. CT 4286.) Prospective Juror No. 204 did not know whether the death penalty is used too often or too seldom because she could not "say we had less serious crime when we didn't have capital punishment." (1 Supp. CT 4289.) The purpose of the death penalty, according to Prospective Juror No. 204, is "another person less on the planet." (1 Supp. CT 4290.) She also believed that life without possibility of parole is a more severe punishment than the death penalty. (1 Supp. CT 4291.) Her views on the death penalty had not changed in the last 10 years. (1 Supp. CT 4291.)

Prospective Juror No. 204 was voir dired as a potential alternate juror. (See RT 7388.) Although Prospective Juror No. 204 did not have any objections to serving as an alternate juror, she did have considerable reservations about serving as an actual juror, because the case involved the death penalty and because of her own long-held (a number of years) personal philosophy against the death penalty. (RT 7388-7389.) Although Prospective Juror No. 204 indicated that it would be "very difficult" to render a death verdict, she "would try" to be a fair juror and could, if she "had to" (i.e., "if the facts were there"), return a death verdict. Thereafter, she contradicted that answer after the trial court explained the penalty phase process and the weighing of aggravating and mitigating evidence. When asked if she could envision herself rendering a death verdict if the aggravating evidence substantially outweighed the mitigating evidence, Prospective Juror No. 204 responded, "Not really." Prospective Juror No. 204 acknowledged that a person who could only render one verdict at a penalty phase would not be a fair and impartial juror. (RT 7390-7392.)

After further questioning, Prospective Juror No. 204 indicated that she could be a fair juror on the death penalty issue although she "would find it very difficult to find somebody guilty." (RT 7392.) In attempting to ascertain what Prospective Juror No. 204 meant by "difficult" the following appears in the record:

THE COURT: I don't know what that means. I have trouble dealing with that. I would find it difficult. Difficult in the same way that it is tough to get up and go to work in the morning --

PROSPECTIVE JUROR NO. 204: Oh, no.

THE COURT: -- or you are tired?

PROSPECTIVE JUROR NO. 204: Oh, no. A man killing another man.

THE COURT: You would find that difficult?

PROSPECTIVE JUROR NO. 204: Yes.

THE COURT: As if you were literally pulling the trigger on somebody?

PROSPECTIVE JUROR NO. 204: Absolutely.

THE COURT: Could you imagine yourself doing that under any circumstance?

PROSPECTIVE JUROR NO. 204: What, pulling a trigger?

THE COURT: Yes.

PROSPECTIVE JUROR NO. 204: No, I could not.

THE COURT: You kind of equate serving on a penalty case with that sort of situation?

PROSPECTIVE JUROR NO. 204: Yes.

THE COURT: Okay, just one or two more.

If you equate the two situations as being indistinguishable or at least very similar killing, somebody, actually shooting them yourself and

voting for the death penalty, you have indicated you could never personally take a life. And stop me if I'm wrong at any time, okay. You say you could not personally shoot anyone or take anybody's life, and then earlier on you said that you think you could impose the judgment of death in a death penalty case. Now, is that -- am I right so far or not?

PROSPECTIVE JUROR NO. 204: That's correct. Which would be hearing facts, I would hope, and it would be determined how much I should go into the case.

(RT 7392-7394.) After additional questioning regarding whether the guilt phase vote could be a problem if it, in turn, produced a penalty phase (see RT 7394-7395), the following appears in the record:

THE COURT: You have to simply call that like you see it, guilty or not guilty. Do you understand that?

PROSPECTIVE JUROR NO. 204: Yes.

THE COURT: Do you believe that your penalty [sic] phase vote, whether it's guilty or not guilty, would be influenced in your mind by the fact that there may be a penalty phase if you vote a way?

PROSPECTIVE JUROR NO. 204: No.

THE COURT: Okay. So the guilt phase, no problem, I take it?

PROSPECTIVE JUROR NO. 204: No.

THE COURT: All right. If we get into a penalty phase, you understand what the choices are?

PROSPECTIVE JUROR NO. 204: Yes.

THE COURT: And the basic rules under which we operate, the aggravation and mitigation; is that correct?

PROSPECTIVE JUROR NO. 204: Yes.

THE COURT: *Now, let me ask you once again, do you think you could actually in this particular case come out here and look somebody*

in the eye, a defendant, say -- I'm sorry. Evidence to the death sentence here, that's what the evidence and the law came up with. That's what you came up with?

PROSPECTIVE JUROR NO. 204: *No.*

THE COURT: *Do you have any doubt about that?*

PROSPECTIVE JUROR NO. 204: *Only that I would have to think about what I wanted to say.*

THE COURT: Okay. Well, I'm just trying to see if that is a tentative answer because some of your answers have seemed to be a little bit tentative and they have changed. You say you could do that?

PROSPECTIVE JUROR NO. 204: *No, could not.*

THE COURT: *Any doubt in your mind about it?*

PROSPECTIVE JUROR NO. 204: *No, there is no doubt.*

THE COURT: Anything else you want to say 'cause I don't want to mischaracterize what you have been telling me?

PROSPECTIVE JUROR NO. 204: No.

THE COURT: Do you have any information on that point you care to offer me?

PROSPECTIVE JUROR NO. 204: No.

(RT 7395-7396, emphasis added.)

Here, substantial evidence was presented in the jury questionnaire and voir dire to support the trial court's ruling excusing Prospective Juror No. 204 for cause. (RT 7398.) In her jury questionnaire, Prospective Juror No. 204 clearly indicated her opposition to the death penalty when she stated she was against capital punishment and "wasn't put here [on earth] so another person dies." She also responded in the questionnaire that the purpose of the death penalty was "another person less on the planet." Prospective Juror No. 204 also stated that life without the possibility of parole was a more severe punishment

than the death penalty. Although her views regarding the death penalty were not based on religious beliefs or preference, Prospective Juror No. 204's views against the death penalty were firmly held.

Prospective Juror No. 204's opposition to the death penalty was reaffirmed during voir dire when she indicated she did not want to sit as an actual juror on the case because of her personal philosophy against the death penalty. On more than one occasion during voir dire, Prospective Juror No. 204 clearly responded to the trial court's questions with answers which indicated she could not return a death verdict even if the aggravating evidence outweighed the mitigating evidence. Such views, respondent submits, are sufficient and ample evidence to support the trial court's excusal for cause of this prospective juror since her views concerning capital punishment would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." (*People v. Cunningham, supra*, 25 Cal.4th at p. 982; *People v. Millwee, supra*, 18 Cal.4th at pp. 146-147.)

Finally, to the extent there may have been conflict or contradiction in the prospective juror's voir dire answers, the trial court resolved those differences adversely to appellants by granting the challenge. And, as mentioned above, the trial court's determination as to the prospective juror's true state of mind, if supported by substantial evidence, as is the case here, is binding on the appellate court. (See *People v. Bradford, supra*, 15 Cal.4th at p. 1329; *People v. Carpenter, supra,* 15 Cal.4th at p. 357.)

VII.

THE TRIAL COURT DID NOT APPLY A MORE LENIENT DEATH-QUALIFICATION STANDARD TO PROSECUTION CHALLENGES TO PROSPECTIVE JURORS

Appellant Bryant contends the trial court violated his Sixth, Eighth, and Fourteenth Amendments rights, and committed reversible error, by applying a more lenient death-qualification standard to prosecution than defense challenges to prospective jurors. He maintains the trial court utilized a double standard in evaluating and ruling upon defense and prosecution challenges for cause. The gist of appellant Bryant's argument appears to be that the trial court used a double standard because it accepted the voir dire answers of "pro-death" Prospective Juror Nos. 80 and 82 that they could follow the law and consider both penalties of life without possibility of parole and death before returning a penalty as reflective of their true state of mind regarding the death penalty, even though they each indicated a strong preference for the death penalty in the answers on their jury questionnaires, while the trial court did not accept the voir dire answers of "pro-life" Prospective Juror Nos. 52, 56, and 204 that they could follow the law and consider both life without possibility of parole and death before returning a penalty verdict as reflective of their true state of mind given their very strong views against the death penalty as expressed in their answers on the jury questionnaires. Because the trial court accepted the jury questionnaire answers of Prospective Juror Nos. 52 and 56, and refused to accept their voir dire answers, as reflective of their true state of mind regarding whether they could return a death penalty verdict in this case, and, on the other hand, accepted the voir dire answers, rather than the jury questionnaire answers, of Prospective Juror Nos. 80 and 82 as reflective of their true state of mind regarding whether they could return a death penalty verdict in this case, appellant Bryant maintains the trial court utilized a "peculiar and uneven

application of the *Witt* standard." (BAOB 487-493.) Appellants Smith and Wheeler join in the claim. (SAOB 451; WAOB 435.) Respondent disagrees.

The trial court utilized an extensive jury questionnaire, as well as voir dire, in evaluating and determining the particular juror's true state of mind regarding whether the juror was death-qualified and could return a death penalty verdict in this case. The fact the trial court accepted the jury questionnaire answers, rather than the voir dire answers, of some prospective jurors (i.e., Prospective Juror Nos. 52 and 56), while accepting the voir dire answers, rather than the jury questionnaire answers, of other prospective jurors (i.e., Prospective Juror Nos. 80 and 82) does not mean the *Witt* standard was applied unevenly or resulted in a double standard. To the contrary, the purpose of the *Witt* standard is for the trial court to determine based on the totality of the circumstances (i.e., answers in jury questionnaire and voir dire answers) whether the particular juror's views concerning capital punishment would "prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath." (*Wainwright v. Witt, supra*, 469 U.S. at p. 424.) That is exactly what the trial court did in this case.

For example, Prospective Juror No. 82 expressed a strong preference for the death penalty in his jury questionnaire answers. (1 Supp. CT 3065-3068.) However, in voir dire, after the trial court explained the death penalty process, Prospective Juror No. 82 stated he could follow the law and consider both life without the possibility of parole and death before returning a penalty verdict in this case. (RT 6733-6737, 6820.) Appellants challenged Prospective Juror No. 82 for cause and argued he should be removed just like Prospective Juror No. 56 was removed because his voir answers were contradicted by the answers he provided in the jury questionnaire. (RT 6852-6854.) The trial court aptly noted:

THE COURT: Challenge is disallowed.

Given the sum total of the responses of the juror and not what was written in the questionnaire or said in open court but the sum total of responses, demeanor, appearance, et cetera, of the juror while answering questions, and the court tries to make a judgment as to whether a juror could or could not go forward and be a juror that could be fair to the defense and prosecution in a guilt and penalty phase, as to that juror the challenge is disallowed.

If you listen to the explanation offered, they seem quite rational and didn't anywhere on that form did not seem to indicate that his mind was locked in stone or philosophical or religious reasons or anything else unlike juror no. [56].

So the attempt to equate the two seems not convincing. That challenge will be disallowed.

(RT 6854-6855.)

The trial court considered and evaluated both the jury questionnaire answers and the voir dire answers of each prospective juror in ruling on the *Witt* challenges. The fact the trial court accepted voir dire answers of some prospective jurors while rejecting the voir dire answers of others as to their true state of mind regarding their ability to impose the death penalty in this case does not mean the *Witt* standard was applied unevenly or resulted in a double standard. The trial court did exactly what it was suppose to do: make a factual finding based on the totality of the circumstances. Appellants' claim must, therefore, be rejected.

VIII.

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN ADMITTING VARIOUS HEARSAY STATEMENTS

Appellants contend the trial court committed prejudicial error in admitting various hearsay statements. Relying on *Crawford v. Washington* (2004) 541 U.S. 36, appellants contend the trial court committed prejudicial error in admitting the tape-recorded interview of Andre Armstrong conducted by the police while Armstrong was in custody. (BAOB 274-282; WAOB 248-255; SAOB 191-203.) Appellants Bryant and Smith additionally maintain the trial court committed prejudicial error in admitting the following hearsay statements: (1) statements made by Winifred Fisher during the police investigation of the Kenneth Gentry murder (BAOB 283-285; SAOB 205-206); (2) statements made by Kenneth Gentry to Benny Ward (BAOB 285-290; SAOB 203-205); and (3) a portion of the tape-recorded statement of William Anthony "Amp" Johnson (BAOB 233-237, 245-246, 290-292; SAOB 214-217). Appellant Smith additionally claims the trial court committed prejudicial error in admitting the following evidence: (1) statements made by Kenneth Gentry to Sofinia Newsom (SAOB 206-207); (2) written materials relating to drug transactions found at various locations (SAOB 208-212); (3) statements made by Karen Flowers relating the telephone number for Andre Armstrong (SAOB 212-213); and (4) records from Western Union reflecting various money transfers (SAOB 207-208). Appellants claim the admission of the foregoing evidence constituted prejudicial inadmissible hearsay in violation of state evidentiary rules and also deprived them of their right of confrontation under the state and federal Constitutions, as well as their rights to due process and a reliable penalty determination in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. (BAOB 274-277, 292-293; SAOB 191, 217-220.) Appellant Smith joins in the claims raised by

appellant Bryant (SAOB 451), and appellant Wheeler joins in the claims raised by appellants Bryant and Smith (WAOB 435). Respondent submits appellants' claims are without merit.

A. Appellants Waived Several Of The Foregoing Issues By Not Raising Them At Trial

Unless otherwise indicated, all of appellants' federal constitutional claims have been waived by the failure to preserve the issue with a timely and specific objection on that ground in the trial court. (See *People v. Vera* (1997) 15 Cal.4th 269, 272.)

Moreover, many of the issues raised by appellants have been waived under state law. Appellate review is not available for questions relating to the admissibility of evidence without a *specific* and *timely* objection in the trial *on the ground urged on appeal.* (Evid. Code, § 353, subd. (a) [finding shall not be set aside by reason of erroneous admission of evidence unless, inter alia, there appears on record an objection that was timely and specifically made]; *People v. Rowland* (1992) 4 Cal.4th 238, 275; *People v. Raley* (1992) 2 Cal.4th 870, 892; *People v. Szeto* (1981) 29 Cal.3d 20, 32 [waiver of hearsay objection resulted from failure to raise objection at trial].)

Although appellant Smith candidly acknowledges that "the defense did not raise any objections to some [of the challenged] evidence at trial," he attempts to overcome this obstacle by maintaining that an objection is not necessary where "an important federal constitutional right is sought to be preserved." (SAOB 193.) However, the cases cited by appellant Smith -- *People v. Matteson* (1964) 61 Cal.2d 466 and *People v. Hinds* (1984) 154 Cal.App.3d 222 -- are of no assistance to him since both cases involved a challenge to the voluntariness of a confession or admissions made by the defendant. (See *People v. Underwood* (1964) 61 Cal.2d 113, 120, 126 [the introduction of an involuntary confession or admission requires reversal of a

judgment of conviction despite the defendant's failure to object to its introduction "because special policy considerations preclude the use of involuntary statements"].) None of the challenged evidence in this case involves a confession or admission of any appellant. Thus, appellants were required to raise a timely and specific objection in the trial court in order to preserve the issue for appellate review.

1. Kenneth Gentry's Statement To Sofinia Newsom

Appellant Smith contends the trial court erred in allowing Newsom to relate Gentry's statement "about the bad drug deal and ripping off Roscoe Bryant's van" since the statement was not against his interest under Evidence Code section 1230. (SAOB 206-207.) This issue has been waived since no timely and specific objection on this ground was presented in the trial court.

At trial, Sofinia Newsom, the stepsister of murder victim Kenneth Gentry, testified that she lived in Building 6 of the Pierce Street apartments and that Gentry "hung around" the apartment building because he was a "running buddy" of Michael Flowers and Winifred Fisher. Prior to his death, Gentry told Newsom about "his involvement in a bad dope deal and his subsequent vandalizing of a van owned by John Roscoe Bryant." After Gentry related this information to Newsom, but prior to Gentry's death, Newsom saw appellant Bryant on the stairs near her apartment at the Pierce Street apartment building. Appellant Bryant, whom Newsom had never before seen at the apartment building, "asked us [Newsom was with her sister and a friend] was Ken Gentry around." Newsom responded, "No." (RT 9147-9150, 9167-9168, 9170-9170A, 9177-9180.)

The only objection presented below to Newsom's testimony was raised by appellant Bryant, not appellant Smith, who *conceded* the statement was against Gentry's penal interest but took exception to any reference in Gentry's statement that he was joined by Winifred Fisher and Michael Flowers in

participating in a "bad cocaine" deal with Ross Bryant. As noted by appellant Bryant's trial counsel, "[The statement] is not a declaration against penal interest to anybody *except Ken Gentry*, first of all, so any reference to Michael Flowers or Foots should be deleted." (RT 9168-9170, emphasis added.) The trial court agreed, and the references to Fisher and Flowers were not mentioned in Newsom's testimony. (RT 9167-9168, 9170-9170A, 9177-9180.) Thus, the issue raised by appellant Smith has been waived since he failed to preserve it with a timely and specific objection below on the ground he now urges on appeal.

In any event, even assuming a timely objection below on the ground raised on appeal, respondent agrees with appellant Bryant that the statement was, in fact, against Gentry's penal interest. (See RT 9168-9170.) The statement obviously subjected Gentry, who was unavailable at trial since he was dead, to criminal responsibility for participating in a narcotics transaction and vandalizing Ross Bryant's van. Thus, Gentry's statement qualified as a declaration against penal interest under Evidence Code section 1230. (See *People v. Lawley* (2002) 27 Cal.4th 102, 153; *People v. Duarte* (2000) 24 Cal.4th 603, 610-611; *People v. Lucas* (1995) 12 Cal.4th 415, 462.)

Moreover, it must be noted that the *timing* of the statement was highly relevant to the prosecution's case. Newsom saw appellant Bryant at the Pierce Street apartment building *after* Gentry made the statement about the "bad dope deal" but prior to Gentry's death. The sighting of appellant Bryant at the apartment building, as well as appellant Bryant's inquiry as to the whereabouts of Gentry, *after* Gentry made the statement to Newsom, but prior to Gentry's death, was highly relevant, circumstantial evidence as to appellant Bryant's involvement in Gentry's murder.

Finally, assuming arguendo, Gentry's statement to Newsom was improperly admitted, such error must be deemed harmless since the reference to the bad drug deal and "ripping off" Ross Bryant's van was independently established through the prior inconsistent statements of Michael Flowers (see RT 8860-8863, 8873-8874; see also RT 8830-8840, 8844, 8846-8847; Peo. Exh. 5 [statement of Michael Flowers]), as well as statements Winifred Fisher made to the police prior to his death (see RT 8640-8648). (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

2. Written Materials Relating To Drug Transactions Found At Various Locations

Written materials relating to drug transactions were found and recovered at various locations (i.e., the Carl Street house, the Fenton house, the Wheeler Street house, etc.). These materials, which are summarized in detail in the Statement of Facts of this brief, included, but were not limited to, papers containing records of drug sales, adding machine receipts, tally sheets of drug sales, a notebook containing financial records, day-by-day accountings of money received and by whom, and drug sale records from June 1, 1988, to August 27, 1988, reflecting sales in excess of $1,600,000. (See RT 9816-9819, 9842-9843, 9958, 10158-10163, 12916-12917, 12943.) Appellant Smith contends the trial court erred in allowing the introduction of these materials since they constituted hearsay and did not fall within any exception to the hearsay rule. Specifically, appellant Smith maintains the materials did not qualify as business records under Evidence Code section 1271 since none of the necessary foundational requirements for that hearsay exception were established. (SAOB 208-212.)

This claim has been waived since the record does not contain a timely and specific objection to the evidence in the trial court. Neither appellant Smith's Opening Brief (see SAOB 208-212) nor the pages of the Reporter's Transcript cited in appellant Smith's Opening Brief (see RT 9816-9819, 9842-9843, 9958, 10158-10163, 12916-12917, 12943) contain a timely and specific objection on the ground raised on appeal. As mentioned previously, appellate review is not available for questions relating to the admissibility of evidence without a specific and timely objection in the trial court on the ground urged on appeal. (Evid. Code, § 353, subd. (a); *People v. Rowland, supra,* 4 Cal.4th at p. 275; *People v. Raley, supra,* 2 Cal.4th at p. 892.) The issue has been waived.

3. Western Union Records

Appellant Smith contends the trial court improperly admitted People's Exhibit 109, an exhibit authenticated by Jennifer Dalton, an Associate Compliance Officer and Custodian of Records for Western Union Financial Services. This exhibit summarized the various wire transfers of money involved in this case. (See RT 10437-10445, 10448-10467; Peo. Exh. 109.) Appellant Smith never objected to the admission of this exhibit or Dalton's testimony on the ground he now urges on appeal. Neither appellant Smith's Opening Brief (see SAOB 207-208) nor the pages of the Reporter's Transcript cited in his opening brief (see RT 10437, 10438, 10442-10445) reference a timely and specific objection to the exhibit or the testimony of Dalton on the ground appellant Smith now urges on appeal. (See RT 10436-10467.) This issue has been waived. (Evid. Code, § 353, subd. (a); *People v. Rowland, supra*, 4 Cal.4th at p. 275; *People v. Raley, supra*, 2 Cal.4th at p. 892.)

4. The Statement Of Winifred Fisher

Appellants Bryant and Smith contend the trial court committed prejudicial error in admitting statements made by Winifred Fisher, who was

dead at the time of trial, during the police investigation of the Kenneth Gentry murder. (BAOB 283-285; SAOB 205-206.) Respondent disagrees.

Detective David Stachowiski testified at trial that, on May 22, 1982, as part of the Gentry homicide investigation, he interviewed Winifred Fisher at the Foothill Police Station. Fisher told Detective Stachowiski the following: Fisher, Michael Flowers, and Kenneth Gentry had purchased some "bunk" dope from a man named "Bryant"; the trio attempted to get their money back from Bryant but were unsuccessful; in retaliation, the threesome stole and vandalized ("fucked up") Ross Bryant's van; and they were seen vandalizing the van, and "Bryant" and his friends were upset about it. (RT 8640-8648.)

Prior to Detective Stachowiski relating the contents of his conversation with Fisher, counsel for appellant Smith, Mr. Novotney, objected on hearsay grounds because "no foundation" had been established. The trial court inquired of the prosecution, and the prosecutor stated, "I will ask a question to lay the foundation." The prosecutor asked the witness if Fisher was dead, and Detective Stachowiski responded that he was dead. The trial court then asked Mr. Novotney if that was a sufficient foundation "or do you wish more?" Mr. Novotney responded, "No." (RT 8641-8642.)

Any objection presented below to the testimony of Detective Stachowiski relating the statement of Fisher was withdrawn once the prosecutor established Fisher was dead at the time of trial, and Mr. Novotney effectively stated nothing more was required for the admission of Fisher's statement. Thus, the claim raised by appellant Smith on appeal -- that an insufficient foundation was established for any hearsay exception (SAOB 205-206) -- was clearly waived since Mr. Novotney withdrew his objection to the foundational requirements once it was established Fisher was dead.

Moreover, appellants' claim that admission of Fisher's statement violated their Sixth Amendment right to confrontation and the principles contained in *Crawford* (SAOB 206; BAOB 283-284) since Fisher's statement constituted "testimonial evidence" (SAOB 206; BAOB 283-284) is likewise waived for failure to object on Sixth Amendment grounds in the trial court. A claim based on a purported violation of the Confrontation Clause must be timely asserted at trial or it is waived on appeal. (Evid. Code, § 353, subd. (a); *People v. Burgener* (2003) 29 Cal.4th 833, 869; *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1118.) The objection below was predicated solely on state law hearsay grounds, not federal constitutional grounds. Thus, appellants' claim of a confrontation violation under the Sixth Amendment or a violation of *Crawford* is waived on appeal.

Assuming arguendo appellants preserved a confrontation claim under the Sixth Amendment and assuming further that Fisher's statement to Detective Stachowiski constituted "testimonial evidence" under *Crawford* since the statement was made during a police investigation and Fisher was dead at the time of trial and thus unavailable for cross-examination, any error in admitting Fisher's statement was harmless under the beyond-a-reasonable-doubt standard of prejudice (*People v. Roldan* (2005) 35 Cal.4th 646, 714, fn. 26; *Chapman v. California, supra,* 386 U.S. at p. 24) or the reasonable-probability standard of prejudice (*People v. Watson, supra,* 46 Cal.2d at p. 836). The contents of Fisher's statement regarding the purchase of "bunk dope" and the vandalizing of Ross Bryant's van was corroborated by Gentry's statements to Sofinia Newsom (see RT 9167-9168, 9170-9170A), as well as the prior inconsistent statements of Michael Flowers (RT 8860-8863, 8873-8874; see RT 8830-8840, 8844, 8846, 8847; Peo. Exh. 5 [statement of Michael Flowers]). Both Newsom and Flowers testified at trial and were available for cross-examination. Thus, any error in admitting Fisher's statement was harmless beyond a reasonable

doubt. (See *People v. Roldan, supra*, at p. 714, fn. 26.)

5. Karen Flowers' Statement To The Police Regarding The Telephone Number Of Andre Armstrong

Notwithstanding the fact appellant Smith stipulated to the matter, he nevertheless contends that Karen Flowers' statement to Detective Tucker that 893-7912 was Armstrong's telephone number constituted inadmissible hearsay on two levels: (1) Flowers telling the police that 893-7912 was Armstrong's telephone number did not qualify under the past recollection recorded exception to the hearsay rule; and (2) a third party's statement relating to Flowers that 893-7912 was Armstrong's telephone number. (SAOB 212-213.) Should this Court address the claims notwithstanding the stipulation, respondent submits appellant Smith expressly waived any hearsay objection to Flowers telling the police the telephone number she had for Armstrong. As to the second issue, respondent submits Flowers was not relating a hearsay conversation in which some third party related to her a telephone number for Armstrong. Rather, she was relating the telephone number she used to contact Armstrong.

a. Relevant Proceedings

Karen Flowers was called as a defense witness by appellant Bryant. (RT 15022.) Flowers testified that, in 1982, she dated both Kenneth Gentry and Andre Armstrong. Although she did not visit Gentry while he was in custody, Flowers dated Gentry before he went into custody and after release from custody. While Gentry was in custody, Flowers dated Armstrong. Flowers terminated her relationship with Armstrong about two months before Gentry was released from custody. Armstrong was upset about the breakup. Gentry was murdered approximately four or five months after he was released from custody. (RT 15024-15030, 15035.)

On cross-examination, Flowers related, without objection, that, in 1982, prior to Gentry's release from custody, Armstrong told her he was living on Cedros. (RT 15036.) When the prosecutor inquired, "Do you have a phone number for him at Cedros where you could contact Andre Armstrong," Flowers responded, "Yes." (RT 15036.) Flowers could not, however, recall the telephone number during her testimony. Flowers did, however, provide the telephone number to the police when she was interviewed. (RT 15037-15038.) Appellant Smith's objection was upheld to the following question asked by the prosecutor: "From your knowledge do you know that the number of 893-7912 to be the home phone number of [appellant] Don Smith back at that time?" The trial court upheld the objection, because the question assumed 893-7912 to be the telephone number that Flowers provided the police. (RT 15037-15038.)

After the trial court overruled appellant Smith's objections to the telephone number Karen Flowers provided the police (i.e., improper rebuttal, improper hearsay, and Evidence Code section 352 [see RT 15998-16005]), the following stipulations were entered into by the parties: (1) on November 10, 1981, and July 30, 1982, appellant Smith provided his address as 9010 Cedros and his telephone number as 818-893-7912; and (2) on June 14, 1982, when Flowers was interviewed by Detective Tucker, she provided Detective Tucker the number of 893-7912 as the telephone number where she could get in touch with Armstrong. (RT 16011-16012.)

b. Legal Analysis

Appellant Smith contends the evidence of the telephone number (893-7912) involved two levels of inadmissible hearsay: (1) the statement of a third party telling Flowers that 893-7912 was Armstrong's telephone number; and (2) Flowers telling Detective Tucker that 893-7912 was Armstrong's telephone number. (SAOB 212-213.) There are several flaws in appellant Smith's claim.

Preliminarily, Flowers never testified as to the telephone number and thus she did not relate any inadmissible hearsay. She testified she could not recall the number but that she did give the number to the police. Thereafter, appellant Smith *stipulated* that 893-7912 was the telephone number Flowers provided the police. As such, appellant Smith's claim is patently without merit.

In any event, even if appellant Smith's objections were preserved prior to the entry of the stipulations, his contention still fails. Significantly, appellant Smith expressly waived any hearsay objection to Flowers relating the telephone number to Detective Tucker when he advised the trial court: "I would agree under past recollection recorded, Detective Tucker could come in and say perhaps the foundation has been laid but this is what Ms. Flowers told me because she did not recall what the [telephone] number was." (RT 15998.) As such, this claim has been waived on appeal. (Evid. Code § 353, subd. (a).)

And, finally, appellant Smith's claim that evidence of the telephone number involves the out-of-court statement of some third party relating the telephone number to Flowers is a red-herring. The record does not support this claim. Flowers was asked, "Did you have a phone number for him at Cedros where you could contact Andre Armstrong?" (RT 15036.) She was not asked to relate any hearsay conversation in which a third party related to her a telephone number for Armstrong. As such, this claim must be rejected.

B. Kenneth Gentry's Statement To Benny Ward

Appellants Bryant and Smith contend the trial court erred in admitting the prior statements of Benny Ward regarding the events which occurred 45 minutes prior to the Gentry murder. Appellants maintain the trial court improperly admitted the statements under Evidence Code section 1240 since the statements did not constitute "spontaneous declarations" or "excited utterances" by Gentry. (SAOB 203-205; BAOB 287-290.) Appellant Bryant additionally maintains the trial court erred in admitting the statements as prior inconsistent

statements under Evidence Code section 1235 since Ward's prior statements were not inconsistent with his trial testimony. (BAOB 285-287.) Respondent submits appellants' contentions are without merit.

1. Relevant Proceedings

Benny Ward was with Kenneth Gentry prior to and at the time of Gentry's murder. At trial, Benny Ward related the circumstances surrounding the shooting of Gentry. (RT 8931-8938.) Ward, however, maintained that, 45 minutes before the shooting, he was standing with Gentry in the parking lot and that Ward's car was parked on Pierce Street in front of the apartment building. Ward denied that, 45 minutes before the shooting, he and Gentry were working on Ward's car parked on Pierce Street. (RT 8924-8926.) Ward repeatedly testified he did not recall Gentry making a statement to him while they were standing in the parking lot 45 minutes prior to the murder and further did not recall a Cadillac passing by on Pierce Street at the time of Gentry's statement. Ward explained he did not have a recollection of those events because "it has been like 13 years" since the incident. (RT 8926-8928.) Although Ward did not recall the events 45 minutes prior to the murder, he was able to recall in considerable detail the circumstances of the actual shooting of Gentry. (RT 8931-8938.)

Detective David Alfred testified that, on May 28, 1982, the day following the murder of Kenneth Gentry, he interviewed Benny Ward at the Foothill Police Station. Ward related the following: at approximately 3:45 p.m. on May 27, 1982 (approximately 45 minutes before Gentry's murder), Ward's car was parked on Pierce Street across from the apartment building; Ward was lying on the floorboard fixing a wire to the stereo; Gentry, who was seated in the right front passenger seat, said, "There goes those niggers that I got a beef with. I ain't got my shit but I'd get down with them"; Ward looked up and saw a brown Cadillac traveling westbound on Pierce Street toward Glenoaks; and

Gentry then said, "There is a guy in there by the name of Stanley." (RT 8983-8991; see Peo. Exh. 58 [report of interview].)

Detective Thomas Kirk testified that, on August 10, 1992, over 10 years following the Gentry murder, he conducted a follow-up, tape-recorded interview of Benny Ward at the Foothill Police Station. Ward reaffirmed the contents of the written report of the 1982 interview with Detective Alfred. (RT 9002-9006.)

At trial, Ward denied he told the detectives during the 1992 interview that he and Gentry were in his car parked on Pierce Street 45 minutes before the shooting or that Gentry made any statement to him at that time. Ward maintained that, in the 1992 interview, the detectives read the 1982 report to him and that he told them he did not recall making any statements in 1982 regarding an incident 45 minutes prior to the Gentry murder. (RT 8938-8940.)

2. Legal Analysis

a. Prior Inconsistent Statement

The law regarding the admission of prior inconsistent statements was summarized by this Court in *People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220:

> A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770. The "fundamental requirement" of section 1235 is that the statement in fact be *inconsistent* with the witness's trial testimony. [Citation.] Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.] However, courts do not apply this rule mechanically. "Inconsistency in effect, rather than contradiction in

express terms, is the test for admitting a witness' prior statement [citation], and the same principle governs the case of the forgetful witness." When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. As long as there is a reasonable basis in the record for concluding that the witness's "I don't remember" statements are evasive and untruthful, admission of his or her prior statements is proper. [Citation.]

Here, the record contains substantial evidence supporting the trial court's conclusion that Ward's statements were properly admitted as prior inconsistent statements under Evidence Code section 1235. As noted by the trial court, even though the incident occurred 13 years earlier, Ward's repeated "I don't recall" answers during his testimony to "fairly crucial matters" that he was interviewed on in 1982 and again 10 years later in 1992 -- just three years before his trial testimony -- with "fairly precise" answers did "not strike the court as being legitimate." (RT 8977.) The trial court concluded that there was evidence that Ward was being "evasive" in his recollection of the events and thus the trial court decided to instruct the jury pursuant to CALJIC No. 2.13 ("If you disbelieve a witness' testimony that he no longer remembers a certain event, that testimony is inconsistent with a prior statement or statements by him describing that event."). Thus, the trial court left if for the jury to decide whether Ward was being evasive in his "I don't recall" answers. (RT 8977-8978.) The record amply supports the trial court's ruling.

b. Spontaneous Statement

Evidence Code section 1240 states:

Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

In *People v. Poggi* (1988) 45 Cal.3d 306, 318, this Court stated:

> To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it. [Citations.]

Whether a statement satisfies the foregoing requirements of the spontaneous declaration exception is largely a question of fact within the discretion of the trial court, whose finding will not be disturbed unless the facts on which it relied are not supported by a preponderance of the evidence. (*People v. Poggi, supra,* 45 Cal.3d at pp. 318-319.) Neither the lapse of time between the event and the declarations nor the fact the declarations were elicited by questioning deprives the statements of spontaneity if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance. (*Id.* at pp. 319-320.)

The record supports the trial court's ruling that Gentry's statement qualified as a spontaneous statement under Evidence Code section 1240. Gentry was not on good terms with the Bryants. Gentry had been involved in the "bunk dope" transaction and also involved in vandalizing Ross Bryant's van. Gentry knew appellant Bryant saw him "fuck[ing] up" the van. When appellant Bryant drove by in the Cadillac, Gentry was startled and frightened to such a degree that he immediately made the statement, "There goes those niggers I got a beef with. I ain't got my shit but [if I did] I'd get down with

them." The statement was unreflective and not in response to any questioning. Reasonably construed, Gentry's statement, "I ain't got my shit but [if I did] I'd get down with them," meant, as noted by the trial court, he was not armed and did not have a gun with him at the time but wished he did have a gun so he could engage appellant Bryant. (RT 8980-8981.) Thus, the event of seeing appellant Bryant drive by was a sufficiently startling and frightening event to Gentry that he proclaimed he wished he was armed so he could "get down" with appellant Bryant. The trial court properly admitted Gentry's statement as a spontaneous statement under Evidence Code section 1240.

C. William "Amp" Johnson's Statements During A Taped Interview

Appellants Bryant and Smith contend the trial court improperly admitted portions of the edited version of the tape-recorded interview of William "Amp" Johnson. (BAOB 233-237, 245-246, 290-292; SAOB 214-217.) Respondent disagrees.

1. Relevant Proceedings

William Anthony ("Amp") Johnson, a member of the Bryant Organization, testified on direct examination at trial that, although he purchased drugs from the Bryant Organization and sold the drugs during the 1987-1988 years, none of the money he obtained from selling narcotics went to the Bryant Family, appellant Bryant, or Jeff Bryant. (RT 9990-9998.) Johnson admitted he had asked his parole officer to place him in jail until the instant case was completed because he did not want to be a witness about something he was not involved with. Johnson was concerned about his family if he was called in "this drama" "as a witness in something that I'm not involved in." Johnson acknowledged that "when you tell people to come to court when they are needed, a whole bunch of people aren't going to be around any more." (RT 10002-10005.)

Johnson denied any knowledge of the workings of the Bryant Organization or their selling of narcotics. (See RT 9990-10006.) Although Johnson acknowledged working for the Bryant Organization, he maintained he did not know several individuals including, but not limited to, codefendant Settle, appellant Smith, appellant Wheeler, or Jeff Bryant. (RT 10009-10011.) Johnson also testified he was not fearful of testifying in this case and that there was no pressure or threats being exerted on himself or others in the community not to testify in this case. (RT 9997, 10000, 10001.)

On cross-examination, counsel for appellant Bryant, without objection from any of the other defendants, questioned Johnson extensively about whether he made certain statements during a November 28, 1994, interview with Detective Lambert. Unbeknownst to Johnson, the interview was tape recorded. (See RT 10013-10014, 10082-10088, 10091, 10215-10222; Peo. Exh. 106; Peo. Exh. 216 at 3 Supp. CT 10601-10617.) Specifically, in response to a question by counsel for appellant Bryant, Johnson denied he told the interviewers "that they had arrested the right people but let them go after a few months." (RT 10014.) Later in his cross-examination, counsel for appellant Bryant returned to the subject of whether in Johnson's view the police had the right individuals in custody. Johnson specifically denied he told the interviewers that, when the murders first occurred, "Ya all picked his ass up and had him locked up for about four or five months and let him go." (RT 10088.)

Thereafter, the prosecutor edited the tape recording of the interview and introduced into evidence a tape recording of only those "portions [of the interview] which are inconsistent to what [Johnson] testified to here now [in trial]. . . ." (See Peo. Exh. 106.) The edited portion of the tape recording was approximately 15 minutes in length. (RT 10017-10019, 10220, 10221; see RT 10202-10213.)

2. Legal Analysis

Appellant Smith contends the following portion of the edited tape recording and transcript should not have been admitted into evidence:

Q So far as you are pointing at either Stan or Don or Leroy or --

A I don't know Leroy.

Q You don't know Slim?

A I didn't know Slim, Leroy or whoever that is. I have been hearing that name.

Q But the other people as far as Don and -- you're not going to point the finger at anybody sitting in court. Let's put it that way; right?

A I can't do that. That's what I'm --

Q You just can't?

A Because seeing when I was at Pelican Bay, they can reach out and touch me.

(See Peo. Exhs. 106, 216; see also RT 10042.)

Appellant Smith maintains that it was error to admit the foregoing because Johnson's answers implied appellant Smith was involved in the murders when there is no indication Johnson knew or had personal knowledge of appellant Smith. (SAOB 214-217.) As explained by appellant Smith's trial counsel: "The problem is that my client's name, Don, is only mentioned in the context of a question. Of course, the answer is so broad that it makes it sound by implication that yes, Don was involved but I am not going to point the finger at him and I am not sure that is what this witness would be saying. I am not really sure this witness has any first hand information concerning [appellant] Smith." (RT 10042-10043.) The prosecution argued that, reasonably construed, the challenged passage constituted an adoptive admission on the part of Johnson since he acknowledged he did not know appellant Wheeler and, while he did know appellant Bryant and appellant Smith, he was "not going to

point the finger at [them while they were] sitting in court." (RT 10042-10044.) The trial court overruled appellant Smith's objection noting, "I think it is an ambiguity and nothing more in his answer." The trial court ruled that any ambiguity in Johnson's answers could be clarified by counsel on cross-examination. (RT 10045.)

The trial court's ruling was correct. As aptly noted by the trial court, Johnson's answers to the questions could be interpreted in one of two ways: (1) "I don't know any Mr. Smith" or (2) I'm not going to tell you whether I know Mr. Smith or not but if I do I am not going to say so." (RT 10045.) Given the ambiguous nature of Johnson's answers, which can be construed that he knew appellant Smith but was not going to acknowledge it out of fear of "fingering" appellant Smith in court, coupled with Johnson's earlier answer during direct examination that he did not know appellant Smith (RT 10011), it was proper for the trial court to allow the statements to be admitted and for counsel to clarify the matter on cross-examination.

Appellants Bryant and Smith also maintain that the portion of the edited interview which contained a prior statement of Johnson regarding his belief in appellants' guilt was inadmissible hearsay. Specifically, appellants maintain that Johnson's statement during the interview that the prosecution did not have the "wrong people" in custody constituted inadmissible hearsay. (BAOB 290-292; SAOB 214-217.) Both the prosecution and the trial court agreed that Johnson's statement on a clean slate might be inadmissible because of an inadequate foundation as well as hearsay. But the problem in the instant case was that counsel for appellant Bryant, without objection, cross-examined Johnson on two separate occasions regarding this matter and left the impression with the jury that he had told the police the wrong people were in custody. The trial court considered various alternatives as to how to deal with the situation (i.e., allow the tape recording with a limiting instruction, admit the challenged

portion of the tape recording as to appellant Bryant only since he was the one who made issue of the statement during his cross-examination of Johnson, a stipulation from appellant Bryant that Johnson never opined the police had the wrong people in custody, etc.). After listening to suggestions of defense counsel, the trial court noted that "the positions of the defendants on this point are not four-squared together." Thus, the trial court resolved the issue by admitting the tape to be played for the jury with a limiting instruction that the inconsistency could not be considered by the jury for the truth of the matter asserted but could only be considered by the jury "as it bears on [Johnson's] state of mind and his willingness therefore to testify and i.e. his credibility." (RT 10202-10211.) Appellants, however, specifically requested the trial court not to give such a limiting instruction as it might "highlight" that matter for the jury. No limiting instruction was therefore given. (RT 10212-10218.)

The trial court's ruling was correct. It is true, as noted by appellants, that Johnson's opinion as to whether the police had the correct people in custody would normally be considered inadmissible since it was an "opinion of [Johnson's] without foundation" and most likely hearsay. And the trial court seemed to agree. The trial court noted that, had appellant Bryant not gone into the matter on cross-examination and left the jury with a misleading impression as to what Johnson stated, it would have ordered the tape recording to be edited by striking the challenged portion. (RT 10208.) But, once appellant Bryant, without objection from any of the other defendants, left the erroneous impression before the jury, the prosecution was entitled to clarify the matter for the jury. Surely, appellants should not be entitled to present the jury with misleading information and then claim foul when the prosecutor attempts to clarify the matter. It was, after all, counsel for appellant Bryant who, without objection, broached the subject with Johnson during cross-examination and left the misleading impression with the jury that Johnson never made any such

statement. Again, appellants should not be permitted to initiate an inquiry into an area which leaves an erroneous impression before the jury and then claim foul when the prosecutor attempts to clarify the matter. On the facts of this case, the trial court's ruling was correct.

Finally, appellant Bryant maintains the prosecution "sought to introduce the *entirety* of Johnson's tape-recorded statement to police as a prior inconsistent statement. . . ." (BAOB 234-235, emphasis added.) Although appellant Bryant acknowledges at pages 290-292 of his opening brief that only a portion of Johnson's tape-recorded interview with the police was introduced into evidence by the prosecution, he, for some inexplicable reason, maintains at pages 234-235 of his opening brief that the "entirety" of Johnson's statement was introduced by the prosecution "as a prior inconsistent statement." This is simply incorrect. As noted above, Johnson's tape-recorded statement to the police was substantially edited by the prosecutor so that only about 15 minutes of the interview -- those portions of the interview which were specifically inconsistent with Johnson's trial testimony -- was introduced into evidence. (See Peo. Exh. 106; RT 10017-10019, 10188-10197, 10202-10213, 10220, 10221.)

Appellant Bryant also maintains that none of the statements contained in the edited portion of the tape-recorded interview were, in fact, inconsistent with his trial testimony that "in 1987 he sold narcotics for appellant [Bryant] and Jeff Bryant." (BAOB 245.) This specific issue was not raised in the trial court. The issues litigated below regarding the admissibility of the edited portion of Johnson's statement were twofold: (1) the portion of the tape recording where Johnson stated that the prosecution did not have the "wrong people" in custody for the instant murders constituted inadmissible hearsay without an adequate foundation; and (2) the portion of the tape recording which contained Johnson's statement regarding his belief in appellants' guilt

constituted inadmissible hearsay. (See RT 10017-10019, 10042-10045, 10188-10197, 10202-10213, 10220, 10221.) Those two issues, which are analyzed above, were the only issues preserved by appellant Bryant.

Other than the two issues analyzed above, appellant Bryant fails to indicate where in the record he objected to any other statement in the edited portion of the tape recording on the specific grounds (1) that any particular statement(s) in the edited tape recording was not inconsistent with Johnson's trial testimony; and/or (2) that any particular statement(s) violated the provisions of Evidence Code section 1101. Appellant Bryant also fails to indicate where in the record he obtained a ruling from the trial court on either issue. (See BAOB 233-237, 245-246, 290-292.) Respondent has also reviewed the applicable portions of the record (RT 10017-10019, 10042-10045, 10188-10197, 10202-10213) and, other than the two specific issues raised below and analyzed above, is unable to locate an objection and/or ruling that any particular statement in the edited portion of the tape recording is not inconsistent with Johnson's trial testimony and/or violated the provisions of Evidence Code section 1101. Since appellant Bryant failed to specifically object and litigate below the precise issues he now raises on appeal (i.e., that the statements in the edited portion of the tape recording were not, in fact, inconsistent with Johnson's trial testimony and violated the provisions of Evidence Code section 1101), and/or obtain a ruling from the trial court on those issues, he is precluded from raising those issues for the first time on appeal. (Evid. Code, § 353, subd. (a); *People v. Rowland, supra*, 4 Cal.4th at p. 275; *People v. Raley, supra*, 2 Cal.4th at p. 892.)

In any event, even assuming arguendo the trial court erred in any aspect in admitting the edited portion of the tape-recorded statement, it is not reasonably probable the jury would have reached a different verdict absent the error. The evidence of appellants' guilt was truly overwhelming, and Johnson

was not a particularly persuasive witness. As noted by the trial court, ". . . I don't think [the jury] will make much of [the inconsistency] anyway given what they saw of the witness." (RT 10212.)

D. The Taped Interview Of Andre Armstrong

Relying on *Crawford*, appellants contend the trial court committed prejudicial error in admitting the in-custody, tape-recorded police interview of Andre Armstrong regarding the Kenneth Gentry murder. They maintain they were denied their Sixth Amendment constitutional right of confrontation since Armstrong's statements during the interview constituted "testimonial" statements or evidence within the meaning of *Crawford*. (WAOB 248-255; BAOB 274-282; SAOB 191-203, 217-221.) Assuming arguendo appellants preserved the issue for appellate review with a timely and specific objection below on the grounds of a Sixth Amendment violation (see CT 14505-14534; RT 7970-7980), and assuming further that Armstrong's statements constituted "testimonial" statements within the meaning of *Crawford*, appellants' claim still fails since, given the considerable other evidence presented in this case, they are unable to establish prejudice from the admission of Armstrong's statements. (See *People v. Roldan, supra,* 35 Cal.4th at p. 714, fn. 26 [applying *Chapman* beyond-a-reasonable-doubt standard to the erroneous admission of hearsay statements under *Crawford*].)

Armstrong was interviewed while in prison. During the interview, Armstrong related the following: the Bryants hired him and paid him $2,000 for the Goldman shooting and $15,000 for the Gentry shooting; appellant Bryant gave him the $15,000 in the form of 750 $20 bills; the Bryants agreed to "take care of" the witnesses after Armstrong's arrest for the Gentry homicide but failed to do so; the Bryants also agreed to provide for Armstrong's wife and children while he was in prison ("They have to. 'Cause I, see I'm holdin' threats on them, you know."); the Bryants provided Armstrong's wife money

to move to Southern California; he considered the Bryants "lightweights" and that anyone could take from the Bryants what they had accumulated; and he intended to "squeeze" the Bryants by letting them know that they (the Bryants) should save some of their wealth for when he (Armstrong) got out of prison. (See Peo. Exh. 74 [tape recording]; Peo. Exh. 216 [transcript] at 3 Supp. CT 10505-10506, 10512-10513, 10518-10519; see also RT 9414-9415, 9417-9418, 9435.)

Appellants' main claim is that, without Armstrong's taped statements, there was no evidence of a motive for the murders -- a matter which appellants claim was critical to the prosecution's case. (WAOB 248-255; BAOB 274-282; SAOB 191-203, 217-221.) As explained by appellant Wheeler, "Without the fruit of Armstrong's interrogation, the prosecution had no evidence that the Organization had any motive to kill Armstrong or Armstrong's companions thereby eviscerating the prosecution's theory for the principal motive for the homicides charged in the instant case." And, appellant Wheeler continues, "Armstrong's interrogation provided the prosecution with the only evidence that it had that Armstrong held any ill feelings or animosity toward [appellant] Stanley Bryant or that he felt Bryant was vulnerable game to any pressure Armstrong might apply." (WAOB 253.) Respondent will demonstrate below that, quite apart from Armstrong's taped statements, the prosecution presented overwhelming evidence of Armstrong's belief that he was "owed" money by the Bryant Organization for the "hit" on Gentry, that Armstrong intended to make good on that obligation when he got out of prison by "squeezing" the Bryant Organization for a "piece of the business," and that appellant Bryant eliminated Armstrong when he attempted to achieve his goal.

Preliminarily, however, appellant Bryant raises a point in his opening brief which can be readily disposed of. He maintains that, without Armstrong's taped statements, there was no evidence of appellant Bryant's involvement in

the shooting of Goldman or the murder of Gentry. (BAOB 280.) This claim is without merit. Quite apart from Armstrong's statements, the record reveals the following compelling evidence regarding appellant Bryant's involvement in the incidents: Armstrong was the shooter in both the Goldman incident and the Gentry murder; appellant Bryant and the Bryant Organization had a motive to commit each of those offenses since both Goldman and Gentry had disagreements over narcotic transactions with the Organization; appellant Bryant was arrested and charged with the Gentry murder but released after individuals associated with appellant Bryant threatened and bribed witnesses not to testify against him at the preliminary hearing (i.e., Rhonda Miller, Reynard Goldman, etc.); appellant Bryant was at the Pierce Street apartments looking for Gentry after Ross Bryant's van was vandalized but before Gentry was murdered; appellant Bryant was seen in the vicinity of the crime scene immediately before Gentry's murder pointing out Gentry in the parking lot to Andre Armstrong; appellant Bryant was seen in the vicinity of the crime immediately after Gentry's murder with his brother Jeff Bryant; and, significantly, two days after Gentry's murder, appellant Bryant told the Fisher brothers that Gentry "had to be dealt with" for vandalizing Ross Bryant's van because, otherwise, other individuals might engage in the same type of activity against the Bryants. Thus, in view of the considerable other evidence connecting appellant Bryant to the Gentry murder and the Goldman shooting, it can be said with confidence that the admission of Armstrong's statements implicating appellant Bryant in the incidents was harmless beyond a reasonable doubt. (See *People v. Roldan, supra*, 35 Cal.4th at p. 714, fn. 26.)

Appellants' claim that, apart from Armstrong's taped statement, there was no evidence of the motive for the instant murders is likewise unavailing. Indeed, the record contains overwhelming evidence that Armstrong believed he was "owed" by appellant Bryant for taking the "fall" for the "hit" on Gentry and

that he intended to collect on his debt once released from prison. For example, the record supports the conclusion that, while in prison, Armstrong "squeezed" appellant Bryant for taking the "fall" for the Gentry murder and that, in turn, appellant Bryant and his associates reciprocated by sending substantial sums of money to Armstrong (see RT 9481-9488), Armstrong's relatives (i.e., Angela Armstrong, Deborah Armstrong), and Armstrong's friends (i.e., Mona Scott, James Brown). Many of these transfers of money are detailed in People's Exhibit 109 (the Western Union summary of various wire transfers of money). (See RT 10437-10445, 10448-10467.)

The record also supports the conclusion that appellant Bryant was "squeezed" by Armstrong since appellant Bryant and his associates sent substantial sums of money to Brown (Armstrong's longtime friend and prison buddy) and Brown's friends (i.e., Valerie Wilbon, Shirley Owens). Significantly, when Brown was released from prison before Armstrong's release, appellant Bryant financed Brown's drug operation in Northern California. (See RT 10462-10467, 11598-11603; Peo. Exh. 109.)

Appellant Bryant, who was a correspondent for Armstrong in prison, also arranged for individuals who did not know Armstrong to visit him while in prison (i.e., Francine Smith). (RT 9488.)

Significantly, Armstrong told various individuals that appellant Bryant "owed" him for a "hit" and would take care of him with money, a car, and a place to stay once he was released from prison (i.e., Francine Smith, Mona Scott, Angela Armstrong, Valerie Mitchell, Delores Brown, Andrew Greer, etc.). For example, Armstrong told Francine Smith that appellant Bryant would take care of him following his release from prison with money, a car, and a place to stay. (RT 9446-9456, 9462-9464, 9487.) Armstrong told Mona Scott not to worry about the substantial telephone bill she accrued while Armstrong was in prison because he had a friend "that owed him." (RT 9494-9497.) After

his release from prison and just before departing St. Louis for California, Armstrong told his mother, Delores Brown, he was going to Los Angeles because "he had some money coming to him." (RT 10510-10515.) When he arrived in Northern California, Armstrong, who was extremely disappointed with the small-time drug operation Brown had set up with appellant Bryant's assistance, told Brown that they should go to Los Angeles and set up their own drug operation "without having to listen to [appellant Bryant]" because Armstrong did not want to be under appellant Bryant's control. Armstrong told Andrew Greer that appellant Bryant "owed" him some money for "a hit" and that Armstrong "was going to get [his money]." Armstrong told Greer he was tired of being "nickel and dimed" by appellant Bryant. (RT 11530-11531, 11607-10611, 16675.)

When Armstrong arrived in Los Angeles on August 28, 1988, the day of the murders, he told Monica Walker, a girlfriend, that appellant Bryant "owed him" for being a "fall guy." (RT 9508-9520, 9531, 11623-11626.) And, just before leaving for the Wheeler Street house on the day of the murders, Armstrong told Tannis to get a pistol "in case the dude [appellant Bryant] started tripping over it [giving Armstrong money]." (RT 11623-11631.)

Appellant Bryant also made damning statements acknowledging he had to eliminate Armstrong and Brown. A couple of days after the quadruple homicide, appellant Bryant told Ladell Player, "We had some problems, but we took care of them." (RT 10262-10266, 10486-10495.) And, notably, in 1992, when discussing "Tommy's" (James Brown) murder, appellant Bryant told Alonzo Smith, "Yeah, he [Brown] had to go." (RT 10911-10914, 10916-10917.) These statements take on tremendous significance especially when viewed with how the Bryant Organization dealt with individuals perceived as a threat or an encumbrance to their operation (i.e., Gentry, Goldman, Curry, etc.).

Respondent submits that, in view of the foregoing evidence, any error in admitting the taped statement of Armstrong regarding the motive for the murders was harmless beyond a reasonable doubt. (See *People v. Roldan, supra*, 35 Cal.4th at p. 714, fn. 26.) Although Armstrong's taped statement was important evidence to the prosecution regarding the motives for the instant murders, it can readily be seen from the evidence summarized above that Armstrong's words were "nothing more than icing on a very rich cake." (*People v. McDaniels* (1980) 107 Cal. App.3d 898, 905.)

IX.

DETECTIVE DUMELLE'S OPINION ON REDIRECT EXAMINATION THAT JEFF BRYANT WOULD LEAVE APPELLANT BRYANT IN CHARGE OF THE DRUG OPERATION WHILE JEFF BRYANT WAS IN PRISON WAS PROPERLY ADMITTED; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant Bryant, joined by appellants Smith and Wheeler, contends the trial court erred by permitting Detective James Dumelle to testify on redirect examination to his opinion that Jeff Bryant would leave appellant Bryant in charge of the drug operation while Jeff Bryant was in prison. Specifically, appellant Bryant contends that Detective Dumelle's opinion was improper lay opinion and did not qualify as expert opinion, because the testimony amounted to an opinion regarding the subjective beliefs of Jeff Bryant as to appellant Bryant's competence to run the drug operation. (BAOB 294-299; WAOB 435; SAOB 451.) Respondent submits the evidence was properly admitted and, assuming error, such error must be deemed non-prejudicial on this record.

A. Relevant Proceedings

Detective James Dumelle testified for the prosecution. He was a supervisor in the Narcotics Unit of the Los Angeles Police Department. At the time of trial, he had been a police officer for 25 years with 15 years of experience in narcotics. He had taken numerous courses in narcotics and narcotics distribution, taught narcotics enforcement, and was an expert in narcotics, undercover operations, and narcotics distribution systems for the California Narcotics Officers Association. (RT 9628-9630.)

In late 1984, Detective Dumelle was involved in narcotics suppression in the northeast San Fernando Valley, including an investigation of the Bryant Family. Detective Dumelle took part in serving the search warrants at the home of Jeff Bryant (10743 DeHaven) and the fortified "rock houses" on Louvre

Street and Wheeler Street. (RT 9635-9660.) Detective Dumelle interviewed Kenny Reaux, who was arrested inside the Wheeler Street premises. According to Reaux, appellant Bryant hired him to work in the house for $200 a day, drove him there, told him what he would be doing, and locked him inside the house. Reaux would not say anything else to Detective Dumelle out of fear that Jeff Bryant would have him killed. (RT 9631-9633, 9702.) Detective Dumelle had also conducted surveillance of Neighborhood Billiards, including citing appellant Bryant for running the pool hall without a license. (RT 9660-9662.)

During cross-examination, appellant Bryant elicited from Detective Dumelle his opinion that, during the investigation of the Bryant Family, Jeff Bryant controlled the Organization, even though he was in prison. (RT 9702-9703.) On redirect examination, the following occurred:

> [THE PROSECUTOR:] You indicated no matter whether Jeff Bryant is in prison or not, it is you belief, your opinion, that he would still be in control of the Organization; correct?
>
> [DETECTIVE DUMELLE:] Yes.
>
> [THE PROSECUTOR:] If one has control of an organization from the confines of the prison does he have to have people on the outside of the prison?
>
> [DETECTIVE DUMELLE:] I would think so.
>
> [THE PROSECUTOR:] Based upon your understanding of the people running the organization, what's your opinion as to who he would leave in charge of this?
>
> MS. GULARTIE: Objection, lack of foundation, improper opinion.
>
> THE COURT: Objection overruled.
>
> Go ahead.
>
> [DETECTIVE DUMELLE:] [Appellant] Bryant.

(RT 9707.)

B. Legal Analysis

1. Detective Dumelle's Opinion On Redirect Examination Was Proper Since Appellant Bryant Brought Up The Subject On Cross-Examination

Because appellant Bryant asked Detective Dumelle on cross-examination who controlled the Bryant Organization while Jeff Bryant was in prison, the prosecutor was entitled on redirect examination to further examine Detective Dumelle on the subject. Thus, it was proper for the prosecutor to inquire about Detective Dumelle's opinion as to who Jeff Bryant would leave in charge of running the Organization on the street while he was in prison. (See Evid. Code, § 356; *People v. Sakarias* (2000) 22 Cal.4th 596, 644.) Appellants' claim must be rejected.

2. Detective Dumelle's Opinion Was Proper Lay Opinion Or Expert Opinion

All witnesses, with the exception of expert witnesses, are limited to testifying about matters within their personal knowledge. (Evid. Code, § 702.) A lay witness can testify to an opinion that is rationally based on his or her perception and helpful to a clear understanding of his or her testimony. (Evid. Code, § 800.) In contrast, an expert witness must have "special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720.) In addition, an expert witness may testify only in the form of an opinion if the opinion is related to a subject that is sufficiently beyond common experience and is based on matters reasonably relied on by experts. (Evid. Code, § 801.) A trial court has considerable latitude in determining the qualifications of an expert, and its ruling will be affirmed absent an abuse of discretion. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1207.) A trial court also has wide discretion to admit or exclude expert testimony, and an appellate court will not interfere with the

exercise of that discretion unless it is clearly abused. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.)

Expert testimony is admissible even though it encompasses the ultimate issue in the case. On the other hand, expert testimony is inadmissible if it consists of inferences and conclusions that can be drawn as easily and intelligently by the trier of fact as by the witness. (*People v. Valdez, supra,* 58 Cal.App.4th at p. 506.) Evidence Code section 801, subdivision (a), requires only that the subject of the expert testimony be sufficiently beyond the jury's experience that the testimony would "assist" the trier of fact. Exclusion is required only if the expert's opinion would add "nothing at all to the jury's common fund of information. . . ." (*People v. Stoll* (1989) 49 Cal.3d 1136, 1154.)

Here, Detective Dumelle's opinion was properly admitted as either lay opinion or expert opinion. Detective Dumelle had personally participated in investigating the Bryant Organization and had been personally involved in the investigation and the searches of locations such as Neighborhood Billiards, Jeff Bryant's house, and the fortified "rock houses" at Wheeler Street and Louvre Street. Because appellant Bryant elicited from Detective Dumelle that Jeff Bryant was controlling the Bryant Organization from inside prison, it was necessary to an understanding of his testimony that Detective Dumelle explain who was running the operation on the street. Under these circumstances, it cannot be said that Detective Dumelle's testimony lacked a rational basis or that it failed to clarify his testimony. Thus, Detective Dumelle's testimony was properly admitted as lay opinion. (See *People v. Lucero* (1998) 64 Cal.App.4th 1107, 1110-1111 [police officer testimony regarding whether soles of a defendant's shoes matched shoe prints found at a crime scene was admissible as lay opinion].)

Moreover, Detective Dumelle's testimony was properly admitted as expert testimony. Appellant Bryant does not contest that Detective Dumelle was an expert in the field of narcotics sales and narcotics investigation. Further, Detective Dumelle had specific expertise regarding the Bryant Organization, given his participation in the investigation and evidence gathering.

In *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1227-1228, the defendants contended that the trial court had abused its discretion by admitting the expert opinion of an investigating officer regarding, among other things, the roles of the defendants in a Columbian drug sales ring. The Court of Appeal found that no abuse of discretion occurred because an opinion regarding the roles of the defendants in a drug sales ring was beyond the common experience of the jurors. (*Id.* at pp. 1228-1229.) Here, although the prosecutor's question was phrased in terms of who Jeff Bryant would leave in charge, the import of the question was the identity of the person running the operation on the street given Jeff Bryant's incarceration. Thus, as in *Harvey*, Detective Dumelle could properly give an expert opinion as to who was in charge of the street operation of the Bryant Organization, because the operation of a drug sales ring such as the Bryant Organization (an organization with over 150 employees and gross narcotics sales in excess of $1,600,000 in a three-month period) was beyond the jurors' common experience, and Detective Dumelle's opinion was based on a matter relied on by experts.

Appellant Bryant relies on *People v. Killebrew* (2003) 103 Cal.App.4th 644 (BAOB 296-298) for the proposition that an expert's opinion "that a specific individual had specific knowledge or possessed a specific intent" is improper opinion testimony. Specifically, appellant Bryant characterizes Detective Dumelle's testimony as concerning whether "Jeff Bryant believed appellant [Bryant] was the person to whom [sic] he believed most qualified to run the business while Jeff was in prison." (See BAOB 298.) *Killebrew* is

distinguishable and inapplicable.

In *Killebrew*, a gang expert testified for the prosecution regarding the major gangs of Bakersfield, the criminal activities of the Eastside Boys Crips, that 12 people, including the defendants, were members of the Eastside Boys Crips, and that the Eastside Boys Crips would expect retaliation from another gang in connection with a shooting incident that had occurred. The expert went on to testify that, when one gang member in a car possesses a gun, all other gang members in the car will know about it and will have constructive possession of the gun. (*People v. Killebrew, supra,* 103 Cal.App.4th at p. 652.) *Killebrew* held that the portion of the expert's opinion concerning the specific knowledge and intent of the gang members in the car was inadmissible, because it amounted to an improper opinion of how the case should be decided and was not the type of general testimony regarding the customs or expectations of gang members that would have been helpful to the jury. (*Id.* at p. 658.)

Here, unlike *Killebrew*, Detective Dumelle did not express an opinion regarding the thoughts or intentions of Jeff Bryant. Instead, the prosecutor's question simply sought to establish who was in charge of the day-to-day operations of the Bryant Organization while Jeff Bryant was in prison. Moreover, unlike *Killebrew*, where the expert's opinion was based on general opinions regarding gang members, Detective Dumelle had a specific factual basis for his opinion given his interview of Reaux, the evidence he gathered when the warrants were executed, and his participation in the investigation of the Bryant Organization. Thus, *Killebrew* is of no assistance to appellant Bryant.

3. Harmless Error

Assuming arguendo it was error to admit Detective Dumelle's opinion, any error was harmless. Error in admitting opinion testimony is harmless if it is not reasonably probable the defendant would have achieved a more favorable

result absent the error. (See *People v. Melton* (1988) 44 Cal.3d 713, 745.) In *Melton*, this Court found any error harmless when the opinion testimony was brief and there was otherwise strong evidence of the defendant's guilt. (*Ibid.*)

Here, Detective Dumelle's opinion was a small part of his overall testimony and a very small part of the prosecution's case. Even without Detective Dumelle's opinion, the evidence overwhelmingly demonstrated that appellant Bryant was running the day-to-day operations of the Bryant Organization while Jeff Bryant was in prison. Significantly, George Smith told Detective Hernandez that appellant Bryant was in charge of running "the operations on the street" for the Bryant Family in 1988 while Jeff Bryant was in jail. (RT 11222.) As noted by Detective Hernandez:

> George Smith indicated that with his brother Jeff in jail that [appellant] Stan Bryant let the power go to his head and any time somebody in the Family would screw up or mess up that he would deal with it by saying "Oh, well. We'll have to kill them."

(RT 11223.)

Moreover, the evidence gathered prior to Jeff Bryant's convictions for operating a narcotics house and selling or transporting cocaine, as well as appellant Bryant's conviction for conspiracy to distribute narcotics, showed that appellant Bryant was intimately connected to the operation of the Organization. Appellant Bryant recruited workers such as Kenny Reaux and George Smith to sell cocaine. He took care of the employees when they got into trouble with the law. Appellant Bryant repaired and fortified the Louvre Street and Wheeler Street "rock houses." Appellant Bryant operated the Neighborhood Billiards "front" business. (RT 9539-9542, 9545-9550, 9631-9632, 9661-9662, 9676-9679, 9705-9707, 9730-9732, 10811-10812, 10833-10835, 10865-10868, 11212-11219, 11253-11255.) Appellant Bryant was identified as the "boss" while Jeff Bryant was in prison by eyewitnesses James Williams, George Smith,

and Laurence Walton. (RT 10689-10697, 10713-10715, 11222-11223, 12110-12112, 12116-12117, 12244-12452, 12290-12292.) Appellant Bryant's initials were on numerous drug inventory sheets from different locations, indicating a supervisory role in the operation. (RT 12020-12028.) Not surprisingly, after the drug organization paperwork was seized, appellant Bryant evidenced his consciousness of guilt by refusing to provide a handwriting exemplar. (See CT 15472 [jury instructed it could consider refusal to provide handwriting exemplar for proof of consciousness of guilt].)

Further, there was overwhelming evidence of each appellant's guilt for the murders, regardless of whether appellant Bryant was specifically "in charge" of the day-to-day operations of the Bryant Organization while Jeff Bryant was in prison. In sum, in light of the overwhelming evidence from multiple sources that appellant Bryant was, in fact, running the Bryant Organization while Jeff Bryant was in prison and the overwhelming evidence of appellants' guilt, admitting Detective Dumelle's opinion that Jeff Bryant would leave appellant Bryant in charge of the operation was utterly harmless.

X.

THE TRIAL COURT PROPERLY ADMITTED AND PROPERLY INSTRUCTED THE JURY ON THE EVIDENCE OF APPELLANT BRYANT'S AND APPELLANT SMITH'S PRIOR ACTS

Appellants Bryant and Smith challenge the trial court's rulings on the admissibility of the evidence of prior acts, including: the bribe of Rhonda Miller; the beating of Francine Smith; the investigations of the Bryant "rock houses" resulting in appellant Bryant's conviction for conspiracy to distribute narcotics; the testimony and statements of William Johnson, Laurence Walton, and Ladell Player; the attacks on Keith Curry; and the high-speed police chase involving appellant Smith. (BAOB 211-258; SAOB 151-174.) Appellant Bryant also claims he was denied a full and fair hearing on the admissibility of the evidence of his prior acts. (BAOB 377-382.) Additionally, appellants Bryant and Smith argue that the trial court committed numerous errors in instructing the jury on the prior acts. (BAOB 253-254, 382-391; SAOB 175-190.) Further, appellants Bryant and Smith contend these errors were prejudicial and violated their state and federal constitutional rights. (BAOB 211-258, 377-391; SAOB 151-190.) Appellants Smith and Wheeler join in all claims made by appellant Bryant. (SAOB 451; WAOB 435.)

Respondent submits the trial court committed no error in its rulings on the admissibility of the evidence of appellant Bryant's and appellant Smith's prior acts. The trial court also afforded appellant Bryant a full and fair hearing on the admissibility of the evidence of his prior acts. Additionally, the trial court committed no instructional error with regard to the evidence. And, because there was no state law error, appellant Bryant's and appellant Smith's constitutional rights were not violated.

A. The Bribe Of Rhonda Miller

Appellant Bryant contends the evidence relating to the bribe of Rhonda Miller should have been excluded as irrelevant and, if relevant, more prejudicial than probative under Evidence Code section 352. (BAOB 219-221.) Respondent submits the evidence relating to the bribe of Rhonda Miller was both relevant and not unduly prejudicial.

1. Relevant Facts

On the afternoon of May 27, 1982, Andre Armstrong shot and killed Kenneth Gentry in the parking lot of the Pierce Street apartment complex while Gentry worked on his car. Rhonda Miller, a friend of Gentry's who lived at the apartment building, heard the gunshots. When she looked out her window, Miller saw Gentry lying on the ground and Armstrong standing in the open driver's door of a Volkswagen which was getting ready to leave the area. Miller wrote down the license plate number of the Volkswagen. (RT 9065-9073, 9090-9094.) Two days later, Miller identified Armstrong in a photograph as the person she saw standing by the Volkswagen. (RT 9090-9094.) Armstrong was arrested for the Gentry murder on June 15, 1982 (see RT 9327-9332), and appellant Bryant and Jeff Bryant were arrested for the Gentry murder on June 18, 1982 (see RT 9144-9145).

On July 6, 1982, about two weeks before the preliminary hearing on the Gentry murder, Tannis Babineaux (the girlfriend or wife of appellant Bryant) and Rochelle or Rolo (the girlfriend of Jeff Bryant) arrived at Miller's apartment and offered Miller money in exchange for her not identifying Armstrong as the shooter at the preliminary hearing. Rolo handed Miller an envelope containing $1,000 and said, "Here. This is from my boyfriend." Miller, who recognized the women but who had never been introduced to them, initially declined their offer. However, when Alvin Brown, Miller's boyfriend,

unexpectedly arrived at the apartment, he berated her for not taking the money. Brown had been in custody for beating Miller until that very morning when he was, unbeknownst to Miller, bailed out of custody by Florence Bryant, the mother of appellant Bryant, using the property at 13031 Louvre Street as collateral for the bail. Mrs. Bryant and Brown did not know each other. Miller eventually took the money from Tannis and Rolo, because she believed Brown would beat her again if she refused. Miller later attended the preliminary hearing and lied when she testified Armstrong was *not* the man standing by the Volkswagen during the Gentry murder. Miller did not testify as a witness at Armstrong's trial. (RT 9093-9105, 9128-9134, 9141-9146; see RT 9263.)

2. Legal Analysis

Evidence Code section 210 defines "relevant evidence" as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Miller's testimony regarding the bribe was relevant on at least two grounds. First, the evidence regarding the bribe was circumstantial evidence supporting the inference that members of the Bryant Organization had an interest in the outcome of the preliminary hearing. Given that neither Tannis nor Rolo knew Miller, and Mrs. Bryant did not know Brown, the jury could reasonably infer from the evidence that individuals other than Armstrong were involved in the Gentry murder and they, in turn, directed the women to do their "dirty work." (See RT 9082.) Second, the evidence regarding the bribe was highly relevant on the issue of why Miller changed her story and refused to identify Armstrong at the preliminary hearing after identifying him from a photograph. Thus, the evidence was highly relevant.

The trial court also did not abuse its discretion under Evidence Code section 352 in admitting the evidence. The evidence was highly probative for the reasons stated above. Moreover, there is nothing to suggest the evidence tended to evoke an emotional bias against appellant Bryant without regard to

its relevance on material issues. (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) Indeed, that the evidence did not create the danger of "undue prejudice" under Evidence Code section 352 can be seen from the foregoing: the evidence did not directly implicate appellant Bryant in making the bribe to Miller or in obtaining the release of Brown; there was other evidence presented regarding the bribing of other witnesses (i.e., Reynard Goldman); and there was overwhelming evidence implicating appellant Bryant in the Gentry murder including the testimony of several witnesses placing him near the crime scene both before and after the murder (i.e., Sofinia Newsom, Barron Ward, Benny Ward, etc.) and appellant Bryant's very damning statement to G.T. Fisher following Gentry's murder that Gentry "had to be dealt with" for vandalizing Ross Bryant's van. Thus, it cannot be said the trial court abused its discretion as a matter of law under Evidence Code section 352 by exercising its discretion in an arbitrary, capricious, or patently absurd manner in admitting the evidence. (See *People v. Cox* (2003) 30 Cal.4th 916, 955; *People v. Coddington* (2000) 23 Cal.4th 529, 619, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.)

Finally, because there was no error in the admission of the evidence of the bribe, the claims of constitutional error fail as well. (*People v. Cole, supra,* 33 Cal.4th at p. 1195, fn. 6.) And, in light of the overwhelming strength of the People's case, the vicious and brutal nature of the charged quadruple murder which included the shooting of two small children, and the instruction given to the jury on the use of evidence relating to the Gentry murder, there is no reasonable probability a result more favorable to appellant Bryant would have been reached, absent the admission of the evidence. (*Id.* at p. 1195, citing *People v. Watson, supra*, 46 Cal.2d at p. 836.)

B. The Beating Of Francine Smith

Appellant Bryant contends the portion of Francine Smith's testimony relating to her severe beating with "nunchukas" by a person she did not know while appellant Bryant stood nearby and watched, after she had misappropriated $300 given to her by appellant Bryant for a trip to see Armstrong in prison and her unsuccessful attempt to pass a $10 bill as a $100 bill at the Louvre Street house for the purchase of narcotics, should have been excluded as irrelevant and, if relevant, more prejudicial than probative under Evidence Code section 352. Appellant Bryant also contends the evidence of the beating was improperly admitted as a prior act under Evidence Code section 1101. (BAOB 221-223.) Respondent submits the Evidence Code section 1101 claim has been waived by appellant Bryant's failure to raise a timely and specific objection on that ground in the trial court. Also, the evidence regarding the beating was both relevant and not unduly prejudicial under Evidence Code section 352.

1. Relevant Facts

At the request of appellant Bryant, Francine Smith visited and wrote letters to Andre Armstrong, even though she did not know him, while Armstrong was in prison. On one occasion, appellant Bryant gave Ms. Smith $300 to make a trip to Folsom to visit Armstrong, but Ms. Smith used the money to buy narcotics instead. (RT 9446-9456, 9462-9464, 9487.) On another occasion in the latter part of 1986, Ms. Smith used an altered $10 bill as if it were a $100 bill in an attempt to buy narcotics at a house on Louvre Street operated by the Bryants. However, before she could get out of the enclosed cage area surrounding the front door of the location, someone at the location spit on her, reprimanded her, and told her not to try that again. At a Christmas party in 1986, Ms. Smith, with appellant Bryant standing nearby in

a parking lot, was beaten about the head and neck by an unknown person with a billy-club-type object (two sticks with a chain in the middle) commonly referred to as a "nunchukas." About one or two weeks later, appellant Bryant told Ms. Smith in referring to the beating that she was lucky to be alive and words to the effect of "That if [appellant Bryant] didn't know [her] so well, [she] would be dead now." (RT 9446-9456.)

2. Legal Analysis

Appellant Bryant's claim that the evidence of the beating was improperly admitted under Evidence Code section 1101 has been waived by his failure to preserve the issue with a timely and specific objection on that ground in the trial court. It is the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal. (Evid. Code, § 353, subd. (a); *People v. Raley, supra*, 2 Cal.4th at p. 892.) Neither the applicable portions of the Reporter's Transcript (see RT 9420-9424) nor Appellant Bryant's Opening Brief (see BAOB 221-223) reflect an objection in the trial court on the ground of Evidence Code section 1101. Thus, appellant Bryant has waived his claim under Evidence Code section 1101.

The evidence of the beating of Ms. Smith was relevant to the issue of retaliation. The prosecution's theory of the case was, in part, that Armstrong was eliminated because he wanted to "squeeze" appellant Bryant out of a piece of his drug operation in return for taking the "fall" for the Gentry murder. The beating of Ms. Smith was circumstantial evidence that appellant Bryant and his associates retaliated against individuals who threatened the operation of the drug organization. As aptly noted by the trial court, the evidence of the beating of Ms. Smith tended "to show [appellant Bryant's] involvement and interest [in] the financing of these various narcotic houses and, perhaps, his willingness to use violence to make sure things run as they were suppose to run and that

people don't rip them off and things of that nature, all of which are issues in the case." (RT 9424.) As mentioned, Armstrong wanted a piece of appellant Bryant's drug operation. Appellant Bryant was not about to be "ripped off" by Armstrong. Thus, the evidence of the Francine Smith beating tended to support the prosecution's theory of the motive for the Armstrong murder.

Moreover, the trial court did not abuse its discretion under Evidence Code section 352 in admitting the evidence. As conceded by appellant Bryant (BAOB 222), apart from the beating of Francine Smith, there was considerable evidence of motive before the jury. Moreover, there was considerable evidence of retaliation by appellant Bryant and his associates regarding other incidents where individuals crossed the line with appellant Bryant and his associates (i.e., Reynard Goldman, Kenneth Gentry, Keith Curry, etc.). Thus, there was no danger that the admission of the evidence of the beating of Francine Smith would cause "undue prejudice" to appellant Bryant. Respondent, therefore, submits it cannot be said that the trial court abused its discretion as a matter of law under Evidence Code section 352 by exercising its discretion in an arbitrary, capricious, or patently absurd manner in admitting the evidence. (*People v. Cox, supra*, 30 Cal.4th at p. 955; *People v. Coddington, supra*, 23 Cal.4th at p. 619.)

Finally, because there was no error in the admission of the evidence of the beating, the claims of constitutional error fail as well. (*People v. Cole, supra,* 33 Cal.4th at p. 1195, fn. 6.) And, in light of the overwhelming strength of the People's case, there is no reasonable probability a result more favorable to appellant Bryant would have been reached, absent the admission of the evidence of the Francine Smith beating. (*Id.* at p. 1195.)

C. Evidence Relating To The 1984-1985 Investigation Of The Bryant "Rock Houses" And Appellant Bryant's 1986 Conviction For Conspiracy To Distribute Narcotics

Appellant Bryant contends the evidence relating to the Bryant Family "drug operations" and narcotic sales in the mid-1980s, as well his 1986 conviction for conspiracy to distribute narcotics as a result of that investigation, was irrelevant and prejudicial and should have been excluded by the trial court. (BAOB 223-233.) This contention is without merit.

1. Relevant Facts

In 1984 and 1985, there was an extensive undercover operation in the San Fernando Valley of "the Bryant Family rock houses" active in the Pacoima/Lake View Terrace area. The evidence surrounding this investigation, as well as the evidence recovered during the investigation, is summarized in considerable detail in the Statement of Facts portion of Respondent's Brief, and respondent hereby incorporates it by reference for purposes of this discussion.

Suffice it to say here that, during the investigation, a series of search warrants were executed on the "rock houses" operated by the Bryant Family. The searches included the premises at 13031 Louvre Street, 13037 Louvre Street, 10743 De Haven, 10731 De Haven, 11442 Wheeler Street, and 12719 Judd Street. Evidence was presented as to what was recovered during the investigation and the execution of the search warrants. Evidence was also presented regarding various narcotic transactions occurring at some of these premises. Kenny Reaux, an employee of the Bryant Organization, was arrested inside the premises at 13031 Louvre Street during a search on March 5, 1985, and arrested again 17 days later inside the premises at 11442 Wheeler Street during a search on March 22, 1985. (See RT 9550-9555, 9611-9614, 9620.) Reaux testified and acknowledged he was selling drugs from the premises at 13031 Louvre Street on March 5, 1985, but maintained it was "his" operation

and that he knew nothing about "family dope" or the Bryant Organization. Reaux also acknowledged he was arrested 17 days later on March 22, 1985, inside the premises at 11442 Wheeler Street selling crack cocaine, but again maintained it was "his" operation and that appellant Bryant and Jeff Bryant had nothing to do with the operation. (RT 9602-9615, 9620.)

As a result of the investigation into the Bryant "rock houses," appellant Bryant and Jeff Bryant entered pleas of guilty to various offenses. The trial court took judicial notice of the following: case A810867 filed in superior court in 1985 charged Jeff Bryant and appellant Bryant with narcotic offenses and that at the end of the case Jeff Bryant pleaded guilty to operating a house where narcotics were sold (11442 Wheeler Street) and selling or transporting cocaine, and that appellant Bryant pleaded guilty to conspiracy to sell or transport cocaine. The trial court also took judicial notice of the words uttered by appellant Bryant during his plea of guilty on February 7, 1986, namely, that on March 5, 1985, he conspired with Kenny Reaux and others to possess cocaine for sale and, in pursuit of the conspiracy, committed the following overt acts: (1) recruited Reaux to work in a "rock house" operated by Jeff Bryant and appellant Bryant; (2) prior to March 22, 1985, appellant Bryant told Reaux he would receive $200 for working an eight-hour shift selling cocaine at 11442 Wheeler Street; and (3) Reaux had in his possession 137 grams of cocaine on March 22, 1985, at 11442 Wheeler Street while working for appellant Bryant and that Reaux attempted to destroy the cocaine by putting it in a crock pot containing hot cooking oil. (RT 9730-9732.)

The trial court, thereafter, instructed the jury on the limited purpose for which the evidence could be considered:

> Now, let me give a limiting instruction as to the purpose or purposes to which you may put that in evidence.

First of all, evidence is not offered and may not be considered by you as evidence that [appellant Bryant] is a person of bad character or a person apt to or reason to commit any crimes of the type alleged in this case. However, that evidence may be considered by you on the following issues:

(a) On the issue of whether there existed an organization of the type alleged and described by the prosecution in this case and if so its membership; and, if so, its scope and its activities.

And further, that evidence may be considered by you as it may tend to contradict any of the testimony of Mr. Reaux. In other words, it may go to the credibility of Mr. Reaux who you heard, I believe, yesterday morning in the case.

Does everybody understand the limiting instruction the court has just offered?

(The jurors nod in the affirmative.)

THE COURT: Very good.

(RT 9732-9733.)

2. Legal Analysis

It appears appellant Bryant objected to the introduction of his 1986 conviction (not, though, the admissions in his plea) on the grounds of relevancy and more prejudicial than probative under Evidence Code section 352. (See RT 9721-9723.) But the record does not support the conclusion that appellant Bryant presented a timely and specific objection to the evidence relating to the Bryant Family narcotic operation and sales in the mid-1980s on the grounds it was inadmissible under Evidence Code sections 210, 352, and 1101. (See BAOB 223-224, 231-233.) Thus, any claims as to this evidence are waived since appellant Bryant never posed a specific and timely objection to the evidence on these grounds in the trial court.

Appellant Bryant refers this Court to pages 9533 through 9535 of the Reporter's Transcript and asserts he preserved the issue regarding the admissibility of the evidence relating to the narcotic investigation and narcotic sales operation in the mid-1980s. (See BAOB 223.) However, a review of this portion of the record does not support appellant Bryant's claim:

THE COURT: All right. We are at side bar.

MR. MCCORMICK: We are hitting a transition area in this part of the trial.

What my request would be is to have Dave Lambert sit as my investigating officer and Mr. Vojtecky can be excluded for this portion.

We are going into the dope operation at this point and Detective Lambert is the one with the familiarity of the dope area and Vojtecky knows nothing about it.

THE COURT: Any objection?

MR. GREGORY: No objection, your Honor.

But I do wish to be heard briefly.

THE COURT: I will hear you.

MR. GREGORY: But not on this issue.

THE COURT: What do you want to be heard on?

MR. GREGORY: On the drug stuff.

There is a point at which we believe there is a relevancy on 352 problems in terms of the consumption of time.

I believe Uribe and Dumelle are going to talk about incidents in '84 or '85, certain rock houses and so on and so forth that may have some relevance.

I don't know how long Mr. McCormick will go into that but it is going away from the motive to kill Armstrong into maybe matters relating to a drug conspiracy or something of that nature which has been

severed out.

I understand that it may have some relevance, but I want the court to be cognizant.

Maybe we can go through it.

MS. GULARTIE: Join.

DEFENDANT SETTLE: Join.

MS. BAIRD: Join.

THE COURT: Fair enough.

MR. MCCORMICK: All right.

THE COURT: Your request is granted.

Lambert?

MR. MCCORMICK: Yes.

So -- I only intend to go on those houses that are relevant to this.

13031 Louvre, 13037 Louvre, 11442 Wheeler and the Adelphia, Fenton and Judd Street houses which are subject to search warrants for the dope operation.

THE COURT: All right.

MR. GREGORY: So Vojtecky will be out?

THE COURT: Yes.

(RT 9533-9535.)

Respondent submits the foregoing does not reflect an objection on any basis to the challenged evidence. There is absolutely no reference to Evidence Code section 1101. Defense counsel acknowledged the relevancy of the evidence but was concerned that *at some point in the future*, depending on how long the prosecution presented evidence on the issue, there *could* be a "352 problem in terms of consumption of time." Thus, rather than reflecting a specific and timely objection on the ground the probative value was substantially outweighed by the danger of undue prejudice, the transcript

merely reveals that defense counsel wanted to alert the court that at some undetermined time in the future there might be an Evidence Code section 352 issue regarding the *undue consumption of time* with the presentation of the evidence. Appellant Bryant fails to indicate where in the record he subsequently made a timely and specific objection to the evidence on any of the grounds he now urges on appeal.

Appellant Bryant's claim that appellants renewed the Evidence Code section 352 objection "at one point during the presentation of this evidence" is not supported by the record. (BAOB 224, fn. 93.) Appellant Bryant refers to page 10536 of the Reporter's Transcript in support of his assertion that all counsel "renewed" their Evidence Code section 352 objection. But page 10536 of the Reporter's Transcript refers to a specific defense objection under Evidence Code section 352 to witness Laurence Walton, an employee of the Bryant Organization (see RT 10534-10536), not to the evidence appellant Bryant challenges in this argument.

Finally, the record does not support appellant Bryant's assertion that at page 9533 of the Reporter's Transcript the trial court denied appellants' motion to exclude the evidence "without comment." (BAOB 223-224.) Indeed, pages 9533 through 9535 of the Reporter's Transcript do not reflect any ruling by the trial court on any motion presented by any appellant to exclude the challenged evidence. What the record does reflect is the trial court's comment "fair enough" to the suggestion by defense counsel that at some point "maybe we can go through [the evidence]." (RT 9534.) The suggestion by defense counsel and the comment of the trial court did not, respondent submits, constitute a specific and timely objection to the evidence on the grounds raised on appeal. The issue has been waived. (Evid. Code, § 353, subd. (a); *People v. Raley, supra,* 2 Cal.4th at p. 892.)

In any event, appellant Bryant's challenges to the admissibility of the evidence are without merit. The evidence regarding the narcotic investigation and the massive narcotic operation conducted by the Bryant Family in the mid-1980s was highly relevant regarding the motive for the instant homicides. The prosecution's theory was that Armstrong, a "hit man," was hired by appellant Bryant and Jeff Bryant in 1982 to murder Kenneth Gentry, a dissatisfied customer of the Bryant Organization. Armstrong had been promised that any witnesses to the Gentry murder would be "taken care of" and that there was no need to worry about prosecution. Armstrong performed his part of the bargain by murdering Gentry in broad daylight in front of several witnesses. Appellant Bryant and Jeff Bryant, who were in the immediate area both before and after the murder, were arrested with Armstrong for Gentry's murder. The Bryants paid off and threatened the witnesses as to their involvement in the Gentry murder. However, the Bryants failed to "take care of" the witnesses against Armstrong. The case against the Bryants was dismissed, and Armstrong was convicted of murder and sentenced to state prison. While Armstrong sat in prison, the Bryant Organization flourished. When Armstrong was released from prison on July 21, 1988, he proceeded to Los Angeles to "squeeze" appellant Bryant to get what he believed he had coming to him for his services in the Gentry murder and his taking the "fall" for the Bryants while they remained free and prospered from their drug operation -- a part of appellant Bryant's drug organization. Appellant Bryant thought differently. Thus, the evidence regarding the narcotic investigation and the massive narcotic operation conducted by the Bryant Family in the mid-1980s -- while Armstrong sat in prison for the Bryants -- was highly relevant on the issue of motive.

Appellant Bryant seems to acknowledge that the challenged evidence was relevant to the issue of motive but maintains the prosecution did not present any evidence that appellant Bryant knew of Armstrong's threats and demands for a part of the narcotic operation. (See BAOB 231.) However, as respondent demonstrated in Argument VIII, the prosecution presented -- apart from Armstrong's taped interview in prison -- considerable and compelling evidence (i.e., paying off Armstrong, Armstrong's relatives, and Armstrong's friends while Armstrong sat in prison) that appellant Bryant was fully aware of the threat Armstrong presented to the narcotic operation controlled by the Bryant Family.

Moreover, appellant Bryant's 1986 conviction for conspiracy to distribute narcotics was highly relevant to the issues in the case -- even though appellant Bryant had not yet testified -- since it (1) constituted circumstantial evidence that appellant Bryant and Jeff Bryant were involved in a drug operation in the mid-1980s while Armstrong was in prison, (2) explained and placed in context appellant Bryant's admissions during his plea, and (3) impeached the testimony of Reaux.

Appellant Bryant also maintains that the evidence relating to the drug operation prior to and including his conviction in 1986 was "irrelevant to the proceedings since appellant [Bryant] admitted selling drugs for his brother Jeff during that period of time." (BAOB 231.) Of course, the fact appellant Bryant admitted his involvement in the narcotic operation during his testimony in the defense portion of the case does not negate the relevancy of the evidence which was presented during the prosecution's case.

Further, appellant Bryant's claim that the introduction of his prior conviction constituted improper evidence of his bad character (see BAOB 232-233) must be rejected because the trial court specifically instructed the jury that the evidence could *not* be considered as evidence that appellant Bryant was

"a person of bad character or a person apt to or reason to commit any crimes of the type alleged in this case." (RT 9732-9733.) Indeed, the trial court instructed the jury that the evidence could be considered on the issues of impeachment of Reaux and "whether there existed an organization of the type alleged and described by the prosecution in this case and if so its membership; and, if so, its scope and its activities." (RT 9733.) Appellant Bryant's claim must, therefore, be rejected.

Finally, because there was no error in the admission of this evidence, the claims of constitutional error fail as well. (*People v. Cole, supra,* 33 Cal.4th at p. 1195, fn. 6.) And, in light of the overwhelming strength of the People's case and the instruction given to the jury on the use of the evidence of the investigation of the Bryant "rock houses" and appellant Bryant's resulting conviction, there is no reasonable probability a result more favorable to appellant Bryant would have been reached, absent the admission of the evidence. (*Id.* at p. 1195.)

D. The Testimony And Statements Of William Anthony Johnson, Laurence Walton, And Ladell Player

Appellant Bryant claims the trial court erred in admitting the testimony and statements of William Anthony Johnson, Laurence Walton, and Ladell Player. (BAOB 233-244.) Appellant Bryant's challenges to the admission of the evidence relating to William Johnson are addressed in Argument VIII. As for the admission of the evidence relating to Laurence Walton and Ladell Player, appellant Bryant's claims have no merit.

1. Laurence Walton

Appellant Bryant contends the trial court erred under Evidence Code sections 352 and 1101 in admitting the testimony and prior inconsistent statements of Laurence Walton. (BAOB 237-241, 245-246.) Respondent

submits appellant Bryant's claim under Evidence Code section 1101 has been waived because of the failure to preserve the issue with a timely and specific objection on that ground in the trial court. Respondent further submits the trial court did not abuse its discretion under Evidence Code section 352 in admitting the challenged evidence.

Laurence Walton, an employee of the Bryant Family, operated one of the "roving" sales locations (i.e., Filmore Park, Hansen Dam, Adelphia Street, etc.) for the narcotic distribution organization controlled by appellant Bryant. He gave the money he received from the sale of narcotics at the roving locations to the Bryant Family. (RT 10691-10692.) Walton also worked at the Fenton Street "rock house" for which he was paid $1,000 per week by the Bryant Family. He was arrested inside the Fenton Street "rock house" on September 25, 1988, during the execution of a search warrant. (RT 10583-10588.) Walton identified appellant Bryant as the "boss" of the Bryant Family narcotic distribution operation and appellant Smith, appellant Wheeler, and codefendant Settle as members of the Bryant Organization. (RT 10540-10544, 10689-10691, 10696-10697, 10713-10715; see Peo. Exh. 113.)

Appellant Bryant's claim the testimony and prior inconsistent statements of Walton were improperly admitted under Evidence Code section 1101 has been waived. Appellant Bryant fails to indicate where in the record he raised a timely and specific objection to the testimony of Walton on the ground it violated Evidence Code section 1101. (See BAOB 237-241, 245-246.) As mentioned previously, it is the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal. (Evid. Code, § 353, subd. (a); *People v. Raley, supra*, 2 Cal.4th at p. 892.) Thus, this claim has been waived by appellant Bryant's failure to adequately preserve the issue below.

The record does, however, support the raising on appeal of appellant Bryant's Evidence Code section 352 claim regarding Walton's testimony and his prior inconsistent statements. (See RT 10535, 10675.) Unfortunately for appellant Bryant, though, the Evidence Code section 352 claim must fail as it does not appear the trial court abused its discretion in admitting the evidence.

The issue of whether the Bryant Family operated and controlled a narcotic distribution organization was a highly disputed issue in the case. The prosecution, of course, maintained that the Bryant Family was a notorious drug sales operation in the northeast section of the San Fernando Valley. Appellant Bryant maintained in his opening statement that "the only Bryant family in Los Angeles" was a traditional family consisting of the Bryant parents -- Mrs. Bryant and Jeff Bryant Sr. -- and their children -- Eli Bryant, appellant Bryant, Jeff Bryant, Roscoe "Ross" Bryant, Wanda Bryant, and Sheila Bryant. Appellant Bryant maintained in his opening statement that the "Bryant Family" was *not* a narcotic distribution organization as maintained by the prosecution. (See RT 8214-8215.)

Although the trial court was willing to accept a stipulation in lieu of Walton's testimony regarding the existence of the Bryant Family and its role in narcotic trafficking, the parties refused the offer. (See RT 10536-10537.) Since Walton played a role in the Bryant Family by operating a "roving" sales location and worked inside the Fenton Street "rock house," his testimony was highly probative on the contested issue of the existence of the Bryant Family and Bryant Organization. Moreover, Walton identified appellant Bryant as the "boss" of the operation and appellant Wheeler, appellant Smith, and codefendant Settle as members of the Bryant Family. Given the extremely high probative value of Walton's testimony on a very important and disputed issue in the case, it cannot be said as a matter of law that the trial court abused its discretion under Evidence Code section 352 in admitting his testimony and

prior inconsistent statements. (See *People v. Cox, supra*, 30 Cal.4th at p. 955; *People v. Coddington, supra*, 23 Cal.4th at p. 619.)

And it must also be noted that, contrary to appellant Bryant's suggestion that the jury would consider the evidence as an indication appellants "were bad guys and had a very bad organization and they were out doing bad things" (RT 10535; BAOB 238), there is nothing in the record to support such a claim. Indeed, appellant Bryant points to nothing specific in the record to suggest the evidence tended to evoke an emotional bias against any appellant without regard to its relevance on material issues. (See *People v. Kipp, supra*, 26 Cal.4th at p. 1121.) Thus, appellant Bryant's claim must be rejected.

Appellant Bryant also contends the trial court abused its discretion under Evidence Code section 352 in admitting Walton's prior inconsistent statement that he was reluctant and fearful of testifying in this case. (BAOB 246.) However, this claim must be rejected because Walton could not recall during his testimony if he had previously said he was fearful of testifying against appellant Bryant. Thus, it was proper for the prosecution to present through the testimony of District Attorney Investigator Steven Johnson a taped interview with Walton which took place immediately prior to Walton's testimony in which he maintained that, if called as a witness, he would lie out of fear of testifying against appellant Bryant. As aptly noted by the trial court:

> What I see going on are witnesses coming in, for whatever reason, do not want to testify. It is open to interpretation as to some of these people why they don't wish to.
>
> So I don't see the matter as being one that the People have a good deal of choice about.
>
> They call witnesses who take the oath and then lie their heads off like that young man [Walton] did this morning.

No question about that. I don't think anybody in the courtroom would be shocked that I say that. That was my impression.

And it is certainly relevant if at 8:30 a.m. this morning he indicates that if he is called he is going to lie.

. . . .

The court notes that the sum and substance of these five pages [transcript of the taped interview] is not that [Walton] says anything about the defendants here. It is just indicating that he is fearful which he did deny. He said he didn't remember if he was fearful was the way he phrased it. At 8:30 a.m. [Walton] remembered he was fearful; further, his stated purpose to get up on the witness stand and fabricate if forced to testify.

And so the court feels it is quite relevant and we will hear it.

(RT 10677-10679.) Respondent agrees with the reasoning and ruling of the trial court.

Finally, because there was no error in the admission of this evidence, the claims of constitutional error fail as well. (*People v. Cole, supra,* 33 Cal.4th at p. 1195, fn. 6.) And, in light of the overwhelming strength of the People's case, there is no reasonable probability a result more favorable to appellant Bryant would have been reached, absent the admission of the evidence. (*Id.* at p. 1195.)

2. Ladell Player

Appellant Bryant contends the trial court erred under Evidence Code sections 352 and 1101 in admitting the testimony and prior inconsistent statements of Ladell Player. (BAOB 241-246.) Again, appellant Bryant fails to indicate where in the record he raised a timely and specific objection under Evidence Code section 1101 to either Player's testimony or his inconsistent statements. Thus, the section 1101 issue has been waived. Respondent submits

the trial court did not abuse its discretion under section 352 in admitting Player's prior inconsistent statements indicating his reluctance to testify against appellant Bryant.

Ladell Player was a regular and frequent purchaser of large amounts of rock cocaine from the Bryant Organization. He purchased the narcotics from appellant Bryant because "there wasn't many people I knew that I could get it from." Player did not want to testify in the instant case. As he explained, it was "not nice to testify against anyone" and "a man is fighting . . . he has a lot at stake." When served with a subpoena, Player attempted to flee the police rather than testify in this case. Indeed, police officers had to physically place a police vehicle in front of Player's fleeing vehicle in order to get him to stop. Before being transported to California to testify, Player said he had family members in California and that he would never testify against the Bryants or what he knew of their activities. Player told the authorities that he would rather go to the electric chair than testify in the instant case since testifying against appellant Bryant was like testifying against John Gotti. (RT 10243, 10247-10250, 10258-10267, 10315-10320, 10334-10339, 10484-10486, 10494-10495.)

Appellant Bryant acknowledges that "while parts of the testimony and out-of-court statements of Lawrence [sic] Walton and Ladell Player [were] relevant to the instant case and arguably more probative than prejudicial," he takes exception to Player's out-of-court statements in which he expressed concern about the prosecution's discovery obligations to appellant Bryant and Player's reference that testifying against appellant Bryant was like testifying against John Gotti. (See BAOB 246.) Appellant Bryant argues that these statements were "not relevant to any material fact in issue, [were] more prejudicial than probative given the fact that the reasons for the witnesses's reluctance to testify had already been explained." (BAOB 246.) Respondent submits, however, that these statements were highly probative on Player's

reluctance to testify against appellant Bryant. As noted by the trial court regarding Player's reference to the prosecution's discovery obligations:

> . . . The court feels that there is relevance to the statement.
>
> Whether it is true or not true, it is certainly explaining -- might explain some of the witness' reluctance to comment.
>
> It is a fair inference that in the absence of any court order or otherwise, a defendant at least has the right to view most discovery documents and whether he did or did not, I mean the defendant -- you represent him. He does not represent you.

(RT 10427.) Respondent agrees with the trial court that the statements were relevant and highly probative as to Player's reluctance to testify against appellant Bryant. It cannot be said the trial court abused its discretion as a matter of law in admitting the statements. (See *People v. Cox, supra*, 30 Cal.4th at p. 955; *People v. Coddington, supra*, 23 Cal.4th at p. 619.)

Finally, because there was no error in the admission of this evidence, the claims of constitutional error fail as well. (*People v. Cole, supra,* 33 Cal.4th at p. 1195, fn. 6.) And, even assuming the trial court erred in admitting the evidence, any such error must be deemed non-prejudicial given the overwhelming evidence of appellant Bryant's guilt and the numerous witnesses who expressed fear and a reluctance to testify against appellants. Also, as correctly noted by appellant Bryant (see BAOB 246), the jury already knew the reasons for Player's reluctance to testify and therefore the challenged statements could not possibly have prejudiced appellant Bryant or any of the other appellants since the statements did not effectively tell the jury anything it did not already know about Player (i.e., that he was reluctant and fearful of testifying against appellant Bryant).

E. The Attacks On Keith Curry

Appellant Bryant contends the evidence relating to the two attacks on Keith Curry -- one involving the pipe-bomb attack of Curry's Porsche and the other involving appellant Smith shooting and paralyzing Curry -- was improperly admitted to show motive, identity, and intent. (BAOB 246-254.) Appellant Smith argues the evidence had foundational problems and was improperly admitted to show identity, intent, common scheme, and the relationship between appellants Bryant and Smith. Appellant Smith also argues the error violated Evidence Code sections 210, 352, and 1101. (SAOB 152-155, 163-168.) Respondent submits the trial court acted well within its discretion in admitting the evidence of the Curry attacks.

1. Relevant Facts

During the People's case-in-chief, the trial court held an Evidence Code section 402 hearing on the admissibility of testimony from Keith Curry, a "medium level" drug dealer in Pacoima who married Tannis Bryant after her divorce from appellant Bryant. (RT 10935-10936, 10944.) Curry testified at the 402 hearing and described three attacks on him which occurred *after* he commenced a romantic relationship with Tannis.

Curry met Tannis in 1984 but did not learn until several months later that she was married to appellant Bryant, whom Curry had never met. Tannis eventually separated from appellant Bryant and got her own apartment in North Hollywood, where Curry was a frequent visitor. One morning in 1985, after an overnight stay at Tannis's apartment, Curry got into his Porsche which was parked in Tannis's parking spot. After he drove a short distance, the Porsche exploded. Curry was injured. (RT 11263-11270, 11275.)

Three or four months later, Curry was arrested for possession of narcotics for sale. He served about one year in prison for the offense and was released in August 1987. One month after his release, Curry -- who was now married to Tannis -- was driving down the street and noticed a car behind him flashing its lights. Curry pulled over and saw that it was his brother-in-law, appellant Smith, in the other car. Curry and appellant Smith had a cordial relationship with each other. Appellant Smith engaged in small talk with Curry and then, for no apparent reason, appellant Smith shot Curry twice, including once in the neck. Curry was paralyzed as a result of the shooting. Curry told the police that appellant Smith had shot him. (RT 11269-11276.)

Six to seven months later, after a significant period of hospitalization, Curry was trying to recover at his sister's home. After a visit from Tannis, someone entered Curry's sister's house through a window and shot Curry. Curry was injured once again (having his eye blown out of its socket). At the time of this attack, Curry was scheduled to testify in court the next day at appellant Smith's preliminary hearing. After this third attack, Curry stopped seeing Tannis. He was not shot at or blown up again. (RT 11273-11277; see RT 10937.)

In support of the admissibility of Curry's testimony, the People proffered several other pieces of evidence. The People stated that Andrew Greer would testify that, like Curry, Andre Armstrong was having a sexual relationship with Tannis and appellant Bryant knew about the relationship. (RT 11157.) Also, Pierre Marshall, who had dated Jeff Bryant's wife to appellant Bryant's chagrin, would testify that appellant Bryant told him about the Curry shooting by mocking Curry's paralysis. (RT 11259-11260.) Additionally, Gwendolyn Derby would testify that Tannis said appellant Bryant admitted to her that he was responsible for the bombing of Curry's Porsche and that he would do it again until Curry was dead. (RT 11287.)

The People argued that Curry's testimony was admissible because it identified appellant Smith's role in the Bryant Organization as a person whom appellant Bryant trusted to carry out his "hits." Curry and appellant Smith were brother-in-laws and had a cordial relationship. There was no reason for appellant Smith to shoot Curry other than because of his unique role in the Bryant Organization. (RT 10937-10938.) In other words, the Curry evidence was not character evidence, because its purpose was to establish the relationship between the defendants and to identify appellant Smith's role in the Bryant Organization. The People also argued that the evidence was admissible to show common scheme -- that everyone who had a sexual relationship with Tannis was shot. (RT 11160.)

Appellant Smith objected to the admission of Curry's testimony. First, appellant Smith argued that the evidence was irrelevant; because it had no tendency to prove his complicity in the charged crimes and was not evidence of motive for the quadruple homicide. Second, appellant Smith objected on the grounds of Evidence Code section 352, explaining that there was other, less prejudicial, evidence linking him to the Bryant Organization and that the introduction of Curry's testimony would be time consuming. Third, appellant Smith argued that Curry's testimony was inadmissible under Evidence Code section 1101, because it was being offered to show that appellant Smith had a propensity to shoot people. Also, appellant Smith maintained, the evidence was being offered to show identity without the Curry attacks having a high degree of similarity with the instant crimes. (RT 10939-10941, 11150-11151, 11154-11155, 11281-11282.) Fourth, appellant Smith argued that the admission of Curry's testimony would deny him the right to a fair trial. (RT 11292.) Finally, appellant Smith noted that the DA's Office had previously indicated that it did not believe appellant Smith was involved in the third attack (the eye socket shooting). (RT 10941-10942.) Appellants Bryant and Wheeler joined in

appellant Smith's objections. (RT 10948-10949, 11286, 11290.)

The trial court admitted the evidence of the first two attacks on Curry (the bombing of the Porsche and the attack which paralyzed Curry) but excluded the evidence of the third attack (the eye socket shooting). The court found the admissible evidence highly relevant because it tended to prove a fact that was greatly in dispute -- whether appellant Smith would use deadly force for appellant Bryant. The evidence showed appellant Smith was willing to do appellant Bryant's bidding. The court reasoned that the evidence was different from other evidence connecting appellant Smith to the Bryant Organization, because it showed appellant Smith was not just selling drugs at the pool hall -- he was taking additional steps, such as killing on appellant Bryant's behalf. Appellant Smith had no reason to shoot Curry since they were related and on friendly terms with each other. The fact there was no apparent explanation for appellant Smith's actions strongly suggested he shot Curry at the request of a person who had the motive for it -- appellant Bryant. Thus, the Curry evidence was highly relevant and probative because it showed that the relationship between appellants Bryant and Smith was such that, at appellant Bryant's request, appellant Smith would commit violent acts out of loyalty or as a part of his job in the Bryant Organization. As for appellant Bryant, the evidence was relevant and probative as to his culpability because it showed appellant Bryant had previously hired appellant Smith to do his "dirty work." The court found the probative value of the evidence was not substantially outweighed by its potential for prejudice. (RT 11292-11299.)

Moreover, the court found the evidence admissible under Evidence Code section 1101. The evidence was not being offered to show propensity for violence. Instead, the evidence focused on appellant Smith's relationship with appellant Bryant and showed what appellant Smith would do when asked by appellant Bryant. The evidence identified appellant Smith as a triggerman and

appellant Bryant as a person who hired appellant Smith to do his "dirty work." And the prior attacks on Curry had "glaring" similarities to the charged crimes. In both sets of offenses: appellants Bryant and Smith acted in concert; appellant Smith was on friendly terms with the victims and was used to lull or get close to the victims; and Tannis had a central involvement. (RT 11156, 11295-11298.)

Prior to Curry's trial testimony, the trial court instructed the jury that it could consider Curry's testimony only as to appellants Bryant and Smith and not as to appellant Wheeler. The court instructed the jury that it could consider Curry's testimony on the following limited issues: the intent and motive for the charged crimes; the identity of the person who committed the charged crimes; and the tendency of the evidence to prove the relationship between appellants Bryant and Smith. The court further instructed the jury that it could *not* consider Curry's testimony on the issue of propensity for violence on the part of any defendant. (RT 11313-11314.)

2. Legal Analysis

The trial court acted well within its broad discretion in finding Curry's testimony admissible to prove motive, identity, the relationship between appellants Bryant and Smith, and intent. (*People v. Harrison* (2005) 35 Cal.4th 208, 230 [this Court reviews for abuse of discretion a trial court's ruling on relevance and admission of evidence under Evidence Code sections 1101 and 352].)

Beginning with *motive*, appellant Bryant acknowledges that the trial court correctly recognized that Curry's testimony was relevant on the issue of motive -- that appellant Bryant wanted to have his ex-wife's lovers (first Curry, then Armstrong) killed. However, appellant Bryant argues that the predicate facts to the admission of the evidence -- that appellant Bryant knew about Curry's relationship with Tannis and was upset about it -- were admitted in

violation of the marital privilege. (BAOB 252.) Appellant Bryant is mistaken.

As set forth in Argument XII, the marital privilege did not apply to the remarks made by Tannis at the beauty salon and testified to by Gwendolyn Derby -- that appellant Bryant admitted to Tannis that he was responsible for the bombing of Curry's Porsche and that he would do it again until Curry was dead. (RT 13095-13099, 13110-13111.) Moreover, even assuming arguendo Derby's testimony was inadmissible because of the marital privilege, there was other evidence that appellant Bryant made threatening remarks to Pierre Marshall (for Marshall's relationship with Jeff Bryant's wife, Rolo) that referenced what had happened to Curry. (RT 11791-11793.) This was circumstantial evidence that appellant Bryant knew and was unhappy about Curry's relationship with Tannis. Thus, admissible evidence clearly showed that appellant Bryant was aware of and unhappy about Curry's relationship with Tannis. Accordingly, the trial court did not abuse its discretion in admitting Curry's testimony on the issue of motive.

Appellant Smith argues that, because Derby's testimony about Tannis's statement at the beauty salon was admissible as to appellant Bryant only, the predicate facts for the admission of Curry's testimony (i.e., that appellant Bryant knew about Curry's relationship with Tannis and was unhappy about it) were established as to appellant Bryant only, and not as to appellant Smith. Therefore, appellant Smith argues, Curry's testimony was inadmissible as to him. (SAOB 163.) Appellant Smith provides no authority for his proposition. In any event, Pierre Marshall's statement was also circumstantial evidence that appellant Bryant knew and was unhappy about Curry's relationship with Tannis. Marshall's testimony was not limited to any defendant.

Appellant Bryant also argues that there was no evidence that he was aware of the relationship between Armstrong and Tannis, making Curry's testimony inadmissible on the issue of motive. (BAOB 252.) But the

testimony of Andrew Greer was circumstantial evidence that appellant Bryant was aware of the relationship between Tannis and Armstrong. Greer testified that Armstrong and Tannis had a sexual relationship, which they did not try to conceal. (RT 11605-11607.) Greer also testified that, when Armstrong was at Tannis's apartment, he used her telephone to page appellant Bryant -- a call which appellant Bryant returned. (RT 11629-11631.) A reasonable inference from this evidence was that appellant Bryant was aware of Armstrong's relationship with Tannis. Accordingly, Curry's testimony was properly admitted to prove motive.

Turning next to the issue of *identity* (and the closely-related issue of the relationship between appellants Bryant and Smith), appellants Bryant and Smith contend that the trial court erroneously instructed the jury that it could consider Curry's testimony on the issue of the identity of the perpetrators of the quadruple homicide. (BAOB 252-253; SAOB 165-167.) Appellant Bryant adds that the instruction was contrary to the prosecution's purpose for offering the evidence and contrary to the trial court's own ruling regarding the permissible use of the evidence. (BAOB 252-253.) Appellants Bryant and Smith are wrong on all fronts.

The trial court properly found -- and correctly instructed the jury -- that Curry's testimony was relevant to prove identity. As the trial court explained, the evidence identified appellant Smith as the hired gun or triggerman. At the same time, the evidence identified appellant Bryant as the person who hired or used appellant Smith to do the killing or "dirty work" for him. (RT 11292-11299.)

And appellant Smith's shooting of Curry shared distinctive common marks with the instant crimes sufficient to raise an inference of identity. (*People v. Roldan, supra,* 35 Cal.4th at p. 705; *People v. Medina* (1995) 11 Cal.4th 694, 748.) For identity to be established, the uncharged misconduct and

the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. (*People v. Roldan, supra,* at p. 706.) Here, in both sets of offenses: appellants Bryant and Smith acted in concert; appellant Smith was on friendly terms with the victims (Curry and Armstrong) and was used to lull or get close to them; and Tannis had a central involvement -- appellant Bryant victimized those who were his ex-wife's lovers, a distinct group. (RT 11295-11298.) In light of the high degree of distinctiveness and unusual nature of these shared characteristics, the trial court did not abuse its discretion in ruling that Curry's testimony could support an inference that the same person hired appellant Smith to commit the instant crimes -- appellant Bryant.

Moreover, it is true that the People argued that Curry's testimony showed common scheme or plan. (See BAOB 252-253.) But the People also argued that the evidence identified appellant Smith as a shooter and appellant Bryant as the one who used him as such. (RT 10937, 11286.) Thus, Curry's testimony was properly admitted to prove identity.

Turning to the issue of *intent* (BAOB 253-254; SAOB 166-167), by pleading not guilty, appellants Bryant and Smith placed their intent/mental state directly in issue, and it was part of the prosecution's burden to prove intent. (*People v. Roldan, supra,* 35 Cal.4th at pp. 706-707; *People v. Ewolt* (1994) 7 Cal.4th 380, 400, fn. 4.) Accordingly, the trial court properly instructed the jury that it could consider Curry's testimony on the issue of intent.

Appellant Smith argues that the trial court improperly admitted Curry's testimony to show *common scheme or plan.* (See SAOB 165-166.) But it does not appear the trial court ruled that the evidence was admissible for that purpose. (RT 11292-11299.) Also, the trial court did not instruct the jury that Curry's testimony was admissible as evidence of a common scheme or plan. (RT 11313-11314.)

In sum, the trial court acted well within its discretion in admitting the evidence of the Curry attacks. And, because there was no error in the admission of the evidence, the claims of constitutional error fail as well. (*People v. Cole, supra,* 33 Cal.4th at p. 1195, fn. 6.) Finally, in light of the overwhelming strength of the People's case and the instruction given to the jury on the use the evidence of the Curry attacks, there is no reasonable probability a result more favorable to appellants Bryant and Smith would have been reached, absent the admission of the evidence. (*Id.* at p. 1195.)

F. The High-Speed Police Chase Involving Appellant Smith

Appellant Smith contends the trial court erred in admitting the evidence of the 1987 high-speed chase, during which the CHP pursued and ultimately arrested appellant Smith and found him to be in possession of a sellable amount of rock cocaine and a handgun. (SAOB 155-156, 168-171.) Respondent submits the trial court did not abuse its discretion in admitting the evidence.

1. Relevant Facts

At trial, appellant Smith challenged the admission of the evidence of the high-speed chase, during which the CHP pursued and ultimately arrested appellant Smith. Defense counsel noted that, following his arrest, appellant Smith was found to possess 271 grams (i.e., a quarter of a kilogram) of rock cocaine in 18 individually wrapped baggies. Counsel said, "I think we may hear that this drug was in a form that is somewhat peculiar as we have heard testimony to cocaine that is packaged in a certain form of half wafers and half ounce quantities of rock that is related to the so-called 'Family.'" (RT 10034-10035.) Counsel added, "Now I don't know if that is the case or not" and "I assume we may hear testimony that one of the CHP officers who recovered it looked at it and will tell us what it looked like." (RT 10035.)

Appellant Smith argued that the evidence of the narcotics arguably showed his participation in the Bryant Organization but was irrelevant to the charged homicides. In this regard, he argued the drug evidence was inadmissible propensity evidence under Evidence Code section 1101. Also, appellant Smith objected to the admission of the evidence of the handgun on the grounds of relevance and Evidence Code section 352. (RT 10033-10036.)

The prosecutor responded that the CHP had recovered "18 one half ounce bindles [] in a larger bag similar to the evidence that [Detective] Lambert has testified about as a Bryant pattern of dealing narcotics." (RT 10036.) Detective Lambert had previously testified that the Bryant Organization packaged rock cocaine in half-ounce quantities and that a quarter of a kilogram of rock cocaine would be packaged in a larger bag containing 18 half-ounce smaller baggies. (RT 9960-9962.)

The trial court overruled appellant Smith's objections. The court found that, based on appellant Smith's possession of a sellable amount of rock cocaine -- packaged in a distinctive manner that Detective Lambert had testified was common to the Bryant Organization -- the evidence of appellant Smith's drug possession was relevant to both motive and identity and was, therefore, admissible. The court found the evidence had relevance to show appellant Smith's membership in the Bryant Organization and tended to show appellant Smith's motive for committing the charged offenses -- to protect his on-going narcotics activity. The evidence also identified appellant Smith as one of the perpetrators of the homicides. The court reasoned that, if a member of the Bryant Organization was shown to be in good standing, that evidence tended to show that the person was more likely to commit the charged crimes. The court also found that the high-speed chase was relevant, because it showed appellant Smith knowingly possessed the drugs. Also, appellant Smith's possession of the handgun was relevant (aside from its connection to the Curry

shooting), because it tended to show appellant Smith was willing to arm himself to protect the narcotics. Finally, the court found the fact there was an expended round in the gun was irrelevant. (RT 10038-10040.)

Thereafter, CHP Sergeant Charles Lofton testified that, on the day of appellant Smith's arrest in 1987, appellant Smith possessed 271 grams (a quarter of a kilogram) of rock cocaine. The cocaine was packaged in a large bag containing 18 smaller baggies of approximately equal amounts (i.e., half ounces) of rock cocaine. (RT 10113-10114, 10119-10120.)

At the close of the case, appellant Smith made a motion for mistrial or, in the alternative, a motion to strike the evidence relating to the high-speed chase, primarily because the prosecution had not shown that the cocaine found in appellant Smith's possession was cookie-shaped. (RT 14458-14460.) The court denied the motions. The court found that, notwithstanding the absence of evidence of cookie-shaped cocaine, the testimony about the quantity of narcotics that appellant Smith possessed was consistent with prior testimony on the amount dealt with by the Bryant Organization (as testified to by Detective Lambert). Also, the totality of the evidence in the case showed that appellant Smith was not a solo drug dealer, and there was sufficient evidence tying the 1987 high-speed chase to the greater facts of the case. (RT 14460.)

2. Legal Analysis

Appellant Smith now argues that, because the People did not show that the cocaine found in his possession following the high-speed chase was cookie-shaped, the evidence suffered from foundational deficiencies and was improperly admitted. (SAOB 168-170.) Appellant Smith is mistaken. Sergeant Lofton's testimony about the size and the packaging of the cocaine found in appellant Smith's possession provided the necessary foundation for the proper admission of the evidence. Detective Lambert had testified that the Bryant Organization packaged rock cocaine in half-ounce quantities and that a

quarter of a kilogram of rock cocaine would be packaged in a larger bag containing 18 half-ounce smaller baggies. (RT 9960-9962.) This distinctive packaging was a perfect match with the cocaine found in appellant Smith's possession following the high-speed chase. (RT 10113-10114, 10119-10120.)

Although there may not have been evidence that *only* the Bryant Organization sold drugs in this manner (see SAOB 168-169), the packaging was undeniably distinct. And, as the trial court recognized, under the totality of the circumstances, there was sufficient evidence tying this incident to other facts in the case (e.g., evidence regarding appellant Smith's activities, such as picking up his pay checks at the Wheeler address; see RT 12230-12235). Accordingly, the evidence did not suffer from foundational deficiencies.

Also, contrary to appellant Smith's contention (see SAOB 170), the fact appellant Smith possessed a gun during the pursuit was relevant. The evidence showed the extent appellant Smith was willing to go to protect the interests of the Bryant Organization. In other words, the evidence tended to show appellant Smith was willing to kill in order to protect the interests of the Bryant Organization -- an issue that was certainly in dispute during the trial.

Appellant Smith argues the fact there was a police chase added nothing to the relevance of the evidence of the cocaine possession. (SAOB 170-171.) Appellant Smith is mistaken. The police chase (like appellant Smith's possession of a gun during the pursuit) was relevant to show the extent appellant Smith was willing to go to protect the Bryant Organization. Moreover, appellant Smith fails to explain how he was harmed by the admission of the evidence of the police chase. For example, there was no evidence that appellant Smith caused physical injury to anyone during the chase. Also, although appellant Smith argues that the chase was the result of his having just shot Curry (as opposed to the concern over being caught with drugs), the fact remains that appellant Smith tried to dispose of drugs, not his

gun, during the chase. This supports the trial court's analysis that the chase was relevant to show appellant Smith knew he illegally possessed drugs.

In sum, there was no error in the admission of the evidence of the high-speed police chase involving appellant Smith. Accordingly, the claims of constitutional error fail as well. (*People v. Cole, supra,* 33 Cal.4th at p. 1195, fn. 6.) Finally, in light of the overwhelming strength of the People's case, which was *uncontradicted* as to appellant Smith because he did not present a defense, there is no reasonable probability a result more favorable to appellant Smith would have been reached, absent the admission of the evidence. (*Id.* at p. 1195.)

G. Appellant Bryant Received A Full And Fair Hearing On The Admissibility Of The Evidence Regarding His Prior Acts

Appellant Bryant contends the trial court erred in denying his motion for an evidentiary hearing on the admissibility of the evidence regarding his prior acts. (BAOB 377-382.) The claim has no merit.

Initially, the record suggests appellant Bryant failed to secure a ruling on his motion for an evidentiary hearing. Appellant Bryant points to a document in the Clerk's Transcript entitled "Demand for Preliminary and Evidentiary Hearings," which was set to be heard in the trial court on October 5, 1992, several years before the start of the trial. (BAOB 378; CT 11079-11086.) Appellant Bryant states that the trial court denied this motion, but he does not identify the portion of the record where the trial court did so. Instead, appellant Bryant states that he is unable to locate the portion of the record where the trial court denied his motion and suggests that the relevant record "*might* have been produced had the trial court and the instant court granted [his] requests to augment and settle the record." (BAOB 378, emphasis added.) Appellant Bryant also points to a statement by trial counsel towards the close of the case, where counsel refers to this motion, and appellant Bryant states that "trial

counsel mentions a denial of this motion." (BAOB 378, fn. 114.)

The Reporter's Transcript of the October 5, 1992, proceedings reveals that appellant Bryant's motion for an evidentiary hearing was not litigated that day. (See RT 4219.) Also, it appears appellant Bryant did not secure a ruling on his motion on a later date. And, at the close of the case, defense counsel did not mention a denial of the motion for an evidentiary hearing; instead, she noted only that such a motion had been filed. (RT 18338-18339.) Thus, contrary to appellant Bryant's suggestion, the record on appeal is not deficient. Rather, the record suggests that appellant Bryant did not secure a ruling on his motion. And, because appellant Bryant has not identified a ruling by the trial court on his motion, there is no ruling for this Court to review on appeal.

In any event, appellant Bryant has failed to show that he was denied a full and fair opportunity to litigate the admissibility of the evidence he complains about on appeal. The record reveals appellant Bryant was allowed to litigate his objections to the admission of the evidence as to his prior acts and to assist the trial court in fashioning limiting instructions on the evidence. (See, e.g., RT 10935-10950, 11150-11161, 11259-11299 [trial court conducts three hearings on the admissibility of the three attacks on Keith Curry, including one where the court hears testimony from Curry]; RT 9217-9222, 9226 [court hears defense objections to the admissibility of the Reynard Goldman shooting, the defense request for a limiting instruction on the evidence, and the defense objections to the admissibility of the threats made against Goldman during the trial]; RT 8724-8732, 8786-8787 [court hears defense objections to the admissibility of the crime scene photographs of the Kenneth Gentry murder and the defense request for a limiting instruction on the evidence]; RT 9420-9425 [court hears defense objections to the admissibility of the attack on Francine Smith]; RT 9063-9064, 9075-9084 [court hears defense objections to the admissibility of the bribe of Rhonda Miller]; see also RT 10034-10040, 14458-

14460 [court hears defense objections to the admissibility of the high-speed chase involving appellant Smith and hears a motion to strike at the close of the case regarding the evidence].) Appellant Bryant has failed to show he was thwarted in any way in his efforts to challenge the admission of the evidence as to his prior acts, such as by being denied a request to examine additional witnesses outside the presence of the jury.

Appellant Bryant points to some of these hearings -- specifically, the hearings on the Gentry shooting, the Goldman shooting, and the Curry shooting/bombing -- as examples of how he was denied full and fair hearings. (BAOB 380-381.) But appellant Bryant's examples do not support his claim.

For example, appellant Bryant argues that the trial court "blindly" accepted the People's proffer that Armstrong's threats to collect on the Gentry and Goldman shootings were communicated to appellant Bryant, without giving appellant Bryant the opportunity to challenge the proffer. As a result, appellant Bryant claims, the People were able to obtain admission of the evidence and later failed to prove the proffer. (BAOB 380-381.) The record does not support this claim. The People presented considerable evidence that Armstrong's sentiment about being "owed" was communicated to the Bryant Organization. Reynard Goldman testified that he overheard a conversation between codefendant Settle and another person about how Armstrong was making demands against the Bryant Organization. (RT 9276-9278; see RT 8728 [the trial court notes that the prosecution's theory was that Armstrong felt he was owed something, that Armstrong returned to California to act on that sentiment, and that the sentiment was made known to at least one of the defendants -- who then acted with the others to kill Armstrong].) Moreover, the prosecution presented compelling evidence (i.e., paying off Armstrong, Armstrong's relatives, and Armstrong's friends while Armstrong sat in prison) that appellant Bryant was fully aware of the threat Armstrong presented to the

narcotic operation conducted by the Bryant Family. Thus, appellant Bryant has failed to show that the hearings he received on the Gentry and Goldman shootings were inadequate in any respect.

Next, appellant Bryant argues that the trial court accepted the People's proffer that appellant Bryant directed people to threaten Goldman prior to his testimony, without giving appellant Bryant the opportunity to challenge the proffer. (BAOB 380-381.) Again, the record does not support appellant Bryant's claim. Appellant Bryant has not pointed to, nor has respondent been able to locate, any representation by the People at trial that they would show that the threats to Goldman were at appellant Bryant's behest. Instead, the record reveals that counsel for appellant Bryant expressed concern about the People's proof on the source of the threats against Goldman. The trial court responded that the fact Goldman had been threatened was relevant to his credibility, regardless of whether the threats came from appellant Bryant himself. (RT 9217-9222.) And, consistent with its ruling, the trial court instructed the jury that evidence of threats against a witness could be considered only on the issues of the credibility of the witness or the willingness of the witness to testify, and not for any other purpose. (RT 10233.) Thus, appellant Bryant has failed to show that the hearing regarding the threats against Goldman was inadequate in any respect.

Turning to the Curry attacks, the evidence was admitted, in part, on the issue of motive -- that appellant Bryant wanted to have his ex-wife's lovers (first Curry, then Armstrong) killed. Appellant Bryant argues that, had he been granted a hearing, he would have been able to establish that the People could not show the prerequisite to the admission of the evidence -- that appellant Bryant knew about Armstrong's relationship with Tannis -- and thus the Curry evidence would have been excluded. (BAOB 380-381.) But appellant Bryant was, in fact, afforded a hearing on the Curry evidence. The trial court heard

testimony from Curry outside the jury's presence and heard arguments from the parties. The People said that they would prove through witness Andrew Greer that Armstrong -- like Curry before him -- was having a sexual relationship with Tannis and that appellant Bryant knew about the relationship. (RT 11157.) Following the hearing, as proffered by the People, Greer testified before the jury that Armstrong and Tannis had a sexual relationship, which they did not try to conceal. (RT 11605-11607.) Greer also testified that, when Armstrong was at Tannis's apartment, he used her telephone to page appellant Bryant -- a call that appellant Bryant personally returned. (RT 11629-11631.) A reasonable inference from Greer's testimony was that appellant Bryant knew about Armstrong's relationship with Tannis. Thus, appellant Bryant has failed to show that the hearing he received on the Curry evidence was inadequate in any respect.

For these reasons, appellant Bryant's claim must fail.

H. The Trial Court Properly Instructed The Jury Regarding The Challenged Evidence

Appellants Bryant and Smith contend the trial court committed numerous instructional errors with regard to the evidence of their prior acts, in violation of their state and federal constitutional rights. Appellant Bryant contends: (1) the trial court erred in denying his request for a modified CALJIC No. 2.50 instruction, requiring the jury to find preliminary facts before considering the evidence of his prior acts; (2) as given, CALJIC No. 2.50 improperly allowed the jury to consider the evidence of prior acts for improper purposes; (3) as given, CALJIC Nos. 2.50 and 2.50.1 unconstitutionally lessened the prosecution's burden of proof; and (4) the trial court erred in admitting the evidence of prior acts on the issue of intent, because the crime scene left no doubt about the intent of the shooters. Appellant Smith contends: (1) as given, CALJIC No. 2.50 improperly allowed the jury to consider the

evidence of prior acts for improper purposes; (2) the instructions failed to limit the jury's consideration of the evidence of prior acts to the defendant who committed the specific prior act; and (3) the trial court failed to instruct the jury sua sponte on certain evidence of prior acts. (BAOB 253-254, 377-391; SAOB 175-190.) None of these claims have merit.

1. The Trial Court Properly Denied Appellant Bryant's Request To Instruct The Jury To Find Certain Preliminary Facts Before Considering The Evidence Of The Prior Acts

During the conference on jury instructions, appellant Bryant requested that a modified version of CALJIC No. 2.50 (Evidence Of Other Crimes) be given, requiring the jury to find preliminary facts before considering the evidence of the prior acts. Appellant Bryant argued that, since he disputed that he committed the uncharged acts, the jury should be instructed to first find that he committed the acts, before drawing inferences from the commission of the acts. (RT 16325.) The trial court asked counsel for appellant Bryant: "Doesn't [CALJIC No.] 2.50.1 deal with that?" (RT 16325.) Counsel for appellant Bryant responded: "You're correct." (RT 16325.) Counsel for appellant Bryant, however, requested that the court give the requested modification, requiring the jury to find specific preliminary facts as to several of the uncharged acts (see CT 14995-14996), which the court denied. (RT 16332-16334.) The court, thereafter, instructed the jury with CALJIC No. 2.50.1, in relevant part, as follows:

> Within the meaning of the preceding instruction [CALJIC No. 2.50], such other crime or crimes purportedly committed by a defendant or defendants must be proved by a preponderance of the evidence. You must not consider such evidence for any purpose unless you are satisfied that a particular defendant committed such other crime or crimes.

(RT 16395; CT 15490.)

Appellant Bryant now contends the trial court erred in denying his request for a modified CALJIC No. 2.50 instruction. (BAOB 382-384.) The claim has no merit.

First, as the trial court and trial counsel for appellant Bryant recognized, CALJIC No. 2.50.1 served the same purpose as appellant Bryant's proposed modification. CALJIC No. 2.50.1 informed the jurors that they were not to consider the other crimes evidence for any purpose unless they were first satisfied that a particular defendant had committed such other crime or crimes. (RT 16395; CT 15490.) Also, CALJIC No. 2.50 itself informed the jurors that they had to believe the evidence regarding the other crimes before they could consider the evidence for any purpose. (See RT 16393-16395; CT 15488-15489.) In light of the instructions given, there is no reasonable possibility the jury misunderstood its obligation to find that appellant Bryant committed or was involved in the uncharged acts before drawing inferences from the evidence. (*People v. Harrison, supra,* 35 Cal.4th at p. 253 ["'[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'"].)

Second, as the trial court recognized, appellant Bryant's proposed modification was flawed. For example, appellant Bryant suggested that the trial court instruct the jury that it could consider the Gentry shooting only if it found that appellant Bryant requested, instigated, or hired Armstrong to kill Gentry. (CT 14995.) However, this instruction was deficient, because the evidence of the Gentry shooting was still relevant if the other head of the Bryant Organization, Jeff Bryant, had hired Armstrong to shoot Gentry. Under such circumstances, the Gentry shooting would still be relevant to show the connection between Armstrong or Gentry and one or more of the defendants and on the issues of motive, premeditation, and intent. (RT 8786-8787, 16332-16334.) The trial court was not required to instruct the jury with appellant

Bryant's flawed modification.

In sum, there was no instructional error. And because there was no instructional error, appellant Bryant's claims of constitutional error fail as well. (*People v. Cole, supra,* 33 Cal.4th at p. 1210, fn. 13.) Finally, even assuming the trial court erred in not giving appellant Bryant's proposed modification, the People's case was overwhelming even apart from the challenged evidence of prior acts, and it is not reasonably probable a result more favorable to appellant Bryant would have been reached absent the alleged instructional error. (See *People v. San Nicolas* (2004) 34 Cal.4th 614, 669, citing *People v. Watson, supra,* 46 Cal.2d at pp. 836-837.)

2. The Trial Court Properly Instructed The Jury With A Modified Version Of CALJIC No. 2.50

During the conference on jury instructions, the parties discussed how the trial court would instruct the jury regarding the evidence of appellant Bryant's and appellant Smith's prior acts. In the end, the parties agreed that the trial court would instruct the jury with a modified version of CALJIC No. 2.50. Appellant Smith specifically requested that instruction. (RT 16319-16334.) Thereafter, the court instructed the jury as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial.
>
> Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes.
>
> Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:
>
> A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show

the existence of the intent which is a necessary element of the crime charged or the identity of the person who committed the crime, if any, of which the defendant is accused;

The existence of the intent which is a necessary element of the crime charged;

The identity of the person who committed the crime, if any, of which the defendant is accused;

A motive for the commission of the crime charged;

The defendant had knowledge of the nature of the thing found in his possession;

The defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged;

That the crime charged is a part of a larger continuing plan or scheme -- plan or scheme, period.

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

You are not permitted to consider such evidence for any other purpose.

However, prior criminal conduct resulting in a felony conviction may also be considered on the issue of the credibility of the person suffering the conviction.

(RT 16393-16395, emphasis added; CT 15488-15489.)

Appellants Bryant and Smith now argue the trial court erred in not matching each prior act with each issue to be proved (e.g., motive, intent, identity). (BAOB 384-388; SAOB 175-190.) The claim has no merit.

First, during the conference on jury instructions, counsel for appellant Bryant said, in relevant part: "I have no problem with [CALJIC No.] 2.50 as the

court has just modified it." (RT 16332.) Appellant Bryant did not request that CALJIC No. 2.50 be modified so that all of the prior acts were matched with the issues to be proved. (CT 14991-14997.) Appellant Smith requested that the trial court instruct the jury with CALJIC No. 2.50. And he, too, did not request that the instruction be modified so that all of the prior acts were matched with the issues to be proved. (RT 16324.) Accordingly, appellant Bryant waived his claim of error on appeal. (*People v. Wilson* (2005) 36 Cal.4th 309, 327; *People v. Rodrigues, supra,* 8 Cal.4th at pp. 1191-1192.) And any error as to appellant Smith was invited. (*People v. Medina, supra,* 11 Cal.4th at p. 763.)

Second, as appellant Bryant implicitly acknowledges, there is no case law supporting the contention that the trial court was required to match the prior acts with the issues to be proved. (See BAOB 388.) Indeed, *People v. Linkenaugher* (1995) 32 Cal.App.4th 1603, 1614-1615, holds the exact opposite.

Third, it was to appellant Bryant's and appellant Smith's advantage for the trial court not to list -- and not to highlight -- all of the prior acts for the jury and then to couple the evidence with the issues to be proved. This is so, because the list of prior acts was long. For example, there was evidence relating to the killing of Kenneth Gentry, the shooting of Reynard Goldman, the bombing of Keith Curry, the shooting of Keith Curry, the bribery of the witnesses to the Gentry killing, the narcotics arrests and conviction of appellants Bryant and Smith, the assault on Francine Smith, and narcotics activities involving each appellant. (See RT 16319-16321.) To avoid an emphasis on this lengthy list, it was to appellant Bryant's and appellant Smith's advantage for the trial court to address the jury in the more general language of CALJIC No. 2.50 as follows: "Evidence has been introduced. . . ." (CT 15488; *People v. Wilson, supra,* 36 Cal.4th at p. 327 ["Delineating the other crimes might have caused the jury to focus on the crimes, and a defendant may want

to avoid any such focus."].)

Fourth, the instructions as a whole informed the jury of the limited purposes of the evidence of the prior acts. (*People v. Harrison, supra,* 35 Cal.4th at p. 253.) And it would have been repetitive to modify CALJIC No. 2.50 to match the prior act evidence with each issue to be proved. More specifically, at the close of the case, the trial court instructed the jury with CALJIC No. 2.09 (Evidence Limited As To Purpose) as follows:

> Certain evidence was admitted for a limited purpose.
>
> At the time this evidence was admitted you were admonished that *it could not be considered by you for any purpose other than the limited purpose for which it was admitted.*
>
> *Do not consider such evidence for any purpose except the limited purpose for which it was admitted.*

(RT 16387, emphasis added; CT 15475.) CALJIC Nos. 2.50 and 2.09, together with the instructions given by the trial court during the course of the trial, informed the jury about the limited purposes for which it might consider each prior act. (*People v. Carter* (2005) 36 Cal.4th 1114, 1151; see, e.g., RT 8786-8787 [trial court instructs the jury that the evidence relating to the Gentry murder was admitted for the limited purpose of demonstrating the connection between Armstrong or Gentry and one or more of the defendants and on the issues of motive, premeditation, and intent]; RT 9226 [trial court instructs the jury that the testimony regarding the Goldman shooting was not offered to prove disposition but rather on how the evidence might bear on the issues of intent and motive]; RT 9732-9733 [trial court instructs the jury that the evidence of appellant Bryant's prior convictions could not be considered as evidence of his bad character or disposition but rather was limited to the issues of whether there existed an organization of the type alleged or described by the prosecution and, if so, its membership, scope, and activities]; RT 11313-11314

[trial court instructs the jury on the limited purpose of Keith Curry's testimony]; RT 13086 [trial court instructs the jury on the limited purpose of Tannis Curry's and Gwendolyn Derby's testimony]; see also RT 10215-10218 [trial court instructs the jury regarding the tape-recorded interview of William Johnson]; RT 10487-10488 [trial court instructs the jury on Ladell Player's interview].)

Additionally, the trial court instructed the jury with CALJIC No. 17.31, in relevant part, as follows: "Whether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist. Do no conclude that because an instruction has been given that I am expressing an opinion as to the facts." (RT 16420; CT 15538.) Thus, viewed as a whole, the instructions adequately advised the jury how to consider the evidence of the prior acts. (*People v. Harrison, supra,* 35 Cal.4th at p. 253.)

Fifth, with the agreement of the parties, the trial court deleted from CALJIC No. 2.50 inapplicable references, such as to a conspiracy and sexual conduct. (RT 16326-16327.) Accordingly, CALJIC No. 2.50 itself properly enumerated the limited purposes for which the evidence of the prior acts could be considered. (*People v. San Nicolas, supra,* 34 Cal.4th at p. 668.)

In sum, there was no instructional error. And because there was no instructional error, appellant Bryant's and appellant Smith's claims of constitutional error fail as well. (*People v. Cole, supra,* 33 Cal.4th at p. 1210, fn. 13.) Finally, even assuming the trial court erred in not matching each prior act with the issues to be proved, the People's case was overwhelming even apart from the evidence of the prior acts, and it is not reasonably probable a result more favorable to appellant Bryant or appellant Smith would have been reached absent the alleged instructional error. (*People v. San Nicolas, supra,* 34 Cal.4th at p. 669.)

3. Standard CALJIC Nos. 2.50 And 2.50.1 Did Not Unconstitutionally Lessen The Prosecution's Burden Of Proof

Appellant Bryant argues that, as given, standard CALJIC Nos. 2.50 (Evidence Of Other Crimes) and 2.50.1 (Evidence Of Other Crimes By The Defendant Proved By A Preponderance Of The Evidence) unconstitutionally lessened the prosecution's burden of proof. (BAOB 388-390.) As appellant Bryant recognizes (see BAOB 390, citing *People v. Carpenter, supra,* 15 Cal.4th at pp. 380-382), this Court has rejected such constitutional challenges to these instructions. (*People v. Carter, supra,* 36 Cal.4th at p. 1188; *People v. Medina, supra,* 11 Cal.4th at pp. 762-764.) Appellant Bryant provides no basis for this Court to reconsider its prior decisions upholding the validity of these standard jury instructions. In any event, even assuming the trial court erred in giving these instructions, the People's case was overwhelming even apart from the evidence of the prior acts and it is not reasonably probable a result more favorable to appellant Bryant would have been reached absent the alleged instructional error. (*People v. San Nicolas, supra,* 34 Cal.4th at p. 669.)

4. The Evidence Of Prior Acts Was Admissible On The Issue Of Intent

Appellant Bryant argues that the trial court erred in admitting the evidence of the prior acts on the issue of intent, because the crime scene left no doubt about the intent of the shooters. (BAOB 253-254.) Respondent submits the trial court did not abuse its discretion in admitting the evidence of the prior acts on the issue of intent.

As this Court noted in *Ewolt*, for the purpose of deciding the admissibility of other crimes evidence, a defendant's plea of not guilty puts the elements of the crime in issue, unless the defendant has taken some action to narrow the prosecution's burden of proof. (*People v. Ewolt, supra,* 7 Cal.4th

at p. 400, fn. 4, citing *People v. Daniels* (1991) 52 Cal.3d 815, 857-858.) "'The prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense.'" (*People v. Ewolt, supra,* at p. 400, fn. 4, quoting *Estelle v. McGuire* (1991) 502 U.S. 62, 69.)

Here, by pleading not guilty, appellant Bryant placed his intent directly in issue. Appellant Bryant has not shown that he took any action to narrow the prosecution's burden of proof. In fact, appellant Bryant did not concede that this was a first degree murder case when effectively invited to do so by the trial court. (See RT 8728-8729.) Thus, it remained a part of the prosecution's burden throughout the trial to prove appellant Bryant's intent. Accordingly, the trial court properly instructed the jury that it could consider evidence of certain prior acts on the issue of intent.

In sum, there was no instructional error. And because there was no instructional error, the claims of constitutional error fail as well. (*People v. Cole, supra,* 33 Cal.4th at p. 1210, fn. 13.) Finally, even assuming the trial court erred in instructing the jury that certain prior acts might be considered on the issue of intent, there was no prejudice because the People's case was overwhelming particularly on the issue of intent, and it is not reasonably probable a result more favorable to appellant Bryant would have been reached absent the alleged instructional error. (*People v. San Nicolas, supra,* 34 Cal.4th at p. 669.)

5. The Trial Court Had No Duty To Instruct The Jury On Prior Acts Where No Such Request Was Made And No Duty To Identify The Defendants Alleged To Be Involved In The Prior Acts

Appellant Smith argues that the trial court failed to instruct the jury sua sponte on some prior acts -- such as the operation of the drug houses by the Bryant Organization and the beating of Francine Smith. He also argues that the

instructions given by the trial court during the course of the trial failed to limit the jury's consideration of the evidence of the prior acts to the defendant who committed the specific act. (SAOB 183-188.) The claims have no merit.

Addressing the first of the claims, as appellant Smith recognizes, he failed to request that limiting instructions be given on certain prior acts, and the trial court had no duty to give such instructions sua sponte. (*People v. Padilla* (1995) 11 Cal.4th 891, 950, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800 [the trial court is under no duty to instruct sua sponte on the limited admissibility of evidence of past criminal conduct]; *People v. Morris* (1991) 53 Cal.3d 152, 214, overruled on another point in *People v. Stansbury* (1995) 9 Cal.4th 824.) And because there was no instructional error, the claims of constitutional error fail as well. (*People v. Cole, supra,* 33 Cal.4th at p. 1210, fn. 13.) Moreover, in view of the abundant evidence of guilt of the quadruple homicide, appellant Smith fails to show how the jury's knowledge that he participated in the sale of cocaine and that some unknown person beat Francine Smith could have prejudiced his defense (which was non-existent since he did not present one) or made any difference in the verdicts rendered. (*People v. Morris, supra*, at p. 214.)

Appellant Smith also contends that the instructions given during the course of the trial failed to limit the jury's consideration of the evidence of the prior acts to the defendant who committed the specific act. (SAOB 183-186.) For example, on the Gentry killing, the trial court instructed the jury that the evidence could be used, if believed, only for the limited purpose of supporting the People's theory that there was a connection between Armstrong or Gentry and one or more of the defendants and on the issues of motive, premeditation, and intent. (RT 8786-8787.) Appellant Smith argues that the trial court had a duty to modify this instruction so that it referred to appellant Bryant only, since appellant Bryant was the only defendant alleged to be involved in the Gentry

killing. (SAOB 183-186.) But if the trial court had no duty to give limiting instructions sua sponte on evidence of prior acts (*People v. Morris, supra*, 53 Cal.3d at p. 214), then, a fortiori, it had no duty to modify the limiting instructions given, absent a request from appellant Smith. And, here, appellant Smith made no such request at trial. Moreover, again, in view of the abundant and *uncontradicted* evidence of appellant Smith's guilt of the quadruple homicide, appellant Smith fails to show how the fact the limiting instruction on the Gentry killing (or any other prior act) did not exclusively refer to appellant Bryant could have prejudiced appellant Smith or made any difference in the verdicts rendered. (*Ibid.*) It is unlikely that such modifications would have altered the verdicts because the trial court would have only been instructing the jury on the obvious -- to not consider a prior act not alleged as to a defendant against the defendant.

Appellant Smith also argues that the jury "was expressly told" that it could consider the bombing of Curry's Porsche for any purpose against appellant Smith. (SAOB 180-182; see also SAOB 164.) This is inaccurate. The trial court instructed the jury that it could consider Curry's testimony on the following limited issues: the intent and motive for the charged crimes; the identity of the person who committed the charged crimes; and the tendency of the evidence to prove the relationship between appellants Bryant and Smith. The court further instructed the jury that it could not consider Curry's testimony on the issue of propensity for violence on the part of any defendant. (RT 11313-11314.) Even if the trial court should have instructed the jury that the bombing of Curry's Porsche (as distinguished from appellant Smith's shooting of Curry) was admissible against appellant Bryant only, appellant Smith failed to request such a limiting instruction at trial, and the trial court had no duty to sua sponte instruct the jury as appellant Smith now contends. (*People v. Morris, supra*, 53 Cal.3d at p. 214.)

In any event, nothing in Curry's testimony about the bombing of the Porsche implicated appellant Smith -- instructing the jury not to consider the bombing of the Porsche against appellant Smith would have been tantamount to instructing the jury on the obvious. And, even if Curry's testimony about the bombing of the Porsche somehow implicated appellant Smith, the evidence was hardly as damaging as the evidence that appellant Smith, after engaging in friendly conversation with Curry, shot him twice and paralyzed him for life. Moreover, in light of the overwhelming evidence of guilt of the quadruple homicide and appellant Smith's lack of a defense, appellant Smith cannot show prejudice. (*People v. Morris, supra*, 53 Cal.3d at p. 214.)

In sum, the trial court committed no error in its rulings on the admissibility of the evidence of appellant Bryant's and appellant Smith's prior acts, afforded appellant Bryant a full and fair hearing on the admissibility of the evidence of his prior acts, and committed no instructional error with regard to the evidence. And, because there was no state law error, appellant Bryant's and appellant Smith's constitutional rights were not violated.

XI.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO ACCOMPLICE LIABILITY; AND, IN ANY EVENT, WILLIAMS'S TESTIMONY WAS ADEQUATELY CORROBORATED AS TO EACH APPELLANT

Appellants raise several inter-related claims of error concerning or related to the instructions on the law of accomplices given in this case. They argue that the instructional errors violated their rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the California Constitution, and state statutory law.

Specifically, appellants each argue that the trial court prejudicially erred by denying their requests to instruct the jury that James Williams was an accomplice as a matter of law. Appellants also argue that there was insufficient evidence corroborating Williams's testimony. (BAOB 344-376; WAOB 170-208; SAOB 45-80.)

Appellant Smith raises several additional claims of instructional error. He argues that the trial court erred in instructing the jury that the evidence needed to corroborate accomplice testimony "is sufficient if it tends to connect the defendant with the crime even though it is slight and entitled, when standing alone, to little consideration." (SAOB 92-94.) Next, appellant Smith argues that standard jury instructions CALJIC Nos. 3.00 and 3.10, when read together, improperly suggested that Williams had to be "equally guilty" before he was found to be an accomplice. (SAOB 88-91.) Also, appellant Smith argues the trial court should have instructed the jury that Tannis Curry was an accomplice as a matter of law and should have modified CALJIC No. 2.11.5 (Unjoined Perpetrators Of Same Crime) to ensure the jury would not apply the instruction to Tannis. (SAOB 72-80, 95-99.) Appellant Wheeler joins in these claims. (WAOB 435.)

Finally, appellants each contend that the trial court prejudicially erred when it denied appellant Smith's request to order the jury to reconsider its verdicts against him because it was clear the jury had not understood the accomplice instructions. (BAOB 356-360, 375; WAOB 183-187, 206-207, 260-267; SAOB 81-87.)

Respondent submits, first, that the trial court properly denied the requests to instruct the jury that James Williams was an accomplice as a matter of law -- and, instead, decided the jury should make the determination as to Williams's accomplice status -- because the evidence did not permit the "clear and undisputed" inference that Williams was an accomplice as a matter of law. In any event, there was sufficient corroborating evidence of Williams's testimony as to each appellant. Second, the trial court properly instructed the jury on what constituted sufficient corroboration of accomplice testimony. Third, the trial court properly instructed the jury with CALJIC Nos. 3.00 and 3.10. Fourth, the trial court had no duty to instruct the jury that Tannis Curry was an accomplice as a matter of law and properly did not exclude her from the applicability of CALJIC No. 2.11.5. Finally, the trial court properly rejected appellant Smith's request to order the jury to reconsider its verdicts.

A. The Trial Court Properly Denied The Requests To Instruct The Jury That James Williams Was An Accomplice As A Matter Of Law; In Any Event, There Was Sufficient Corroborating Evidence Of Williams's Testimony As To Each Appellant

1. Relevant Proceedings

Following the presentation of the prosecution's case-in-chief, appellant Smith moved for a judgment of acquittal (§ 1118.1) based upon section 1111, which provides that a conviction cannot be based upon the testimony of an accomplice unless that testimony is corroborated by other evidence tending to connect the defendant to the crime. Appellant Smith argued the evidence

showed James Williams was an accomplice to the murders and that his testimony inculpating appellant Smith was not corroborated by other evidence. The People responded, first, that Williams was not an accomplice because he never indicated sufficient knowledge as to what the four defendants were going to do on the afternoon of the murders and, second, that the question of whether Williams was an accomplice was a question of fact which should be submitted to the jury. (RT 14450-14453.)

The trial court stated it could not find Williams to be an accomplice as a matter of law, because the evidence did not support the sole inference that Williams knew there would be a murder. The court explained:

> . . . There is a dispute in the evidence, and there is circumstantial evidence from which the jury could find him to be an accomplice, or they could find him to be an innocent dupe who does not quite know what's going on. He -- according to him, he knows that there are guns, he does not know the people that are coming over, or what is going to happen, but he knows it could be dangerous. He knows [appellant] Bryant is to leave and his [Williams's] job is to buzz him out and then get on back to the pool hall after he brings the car in. Does that add up to he must have known there would be a murder and, therefore, must have aided and abetted in one or more murders and shared that intent to kill and so forth? No, that does not necessarily dictate that result.
>
> The jury may well find that he is not to be believed and that he knew from the beginning what was going to happen in this situation, and he was part and parcel of planning to kill some people that were coming in. . . . But they may believe him. . . . If they believe everything he said, I would submit he is not an accomplice at least as a matter of law.

(RT 14455-14456.) The court, thereafter, denied appellant Smith's motion for acquittal. (RT 14458.) The court later denied a similar motion made by

appellant Wheeler. The court also denied an 1118.1 motion made, but not argued, by appellant Bryant. (RT 16154-16157.)

During the discussion on jury instructions, the trial court denied the request by each appellant that the court instruct the jury that Williams was an accomplice as a matter of law (i.e., with CALJIC No. 3.16). The court reiterated that it believed the evidence was disputed as to when Williams knew about the murders and, therefore, found it was a factual question for the jury to determine whether Williams was an accomplice. (RT 16208-16209.) The court, thereafter, instructed the jury on the law of accomplices as follows:

> An accomplice is a person who is or was subject to prosecution for the identical offense charged against the defendant on trial by reason of aiding and abetting.
>
> A defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense.
>
> Testimony of an accomplice includes any out-of-court statement purportedly made by an accomplice received for the purpose of proving that what the accomplice stated was true.
>
> 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 not such independent evidence which tends to connect defendant with the commission of the crime, the testimony of the accomplice is not corroborated.

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

The required corroboration of the testimony of an accomplice may not be supplied by the testimony of any or all of his accomplices, but must come from other evidence.

Evidence to corroborate an accomplice may be direct or circumstantial. It is sufficient if it tends to connect the defendant with the crime even though it is slight and entitled, when standing alone, to little consideration.

Corroborative evidence does not need to establish the precise facts testified to by the accomplice. It is sufficient if it tends to connect the defendant with the commission of the offense.

A defendant's own testimony and inferences therefrom may be sufficient corroboration of an accomplice as to that defendant only.

Likewise, false or misleading statements to authorities regarding the charged offenses may constitute corroborative evidence or as part of the circumstances supporting a finding of corroboration as to the defendant making the false or misleading statement.

Merely assenting to or aiding or assisting in the commission of a crime without knowledge of the unlawful purpose of the perpetrator and

without the intent or purpose of committing, encouraging or facilitating the commission of the crime is not criminal. Thus a person who assents to, or aids, or assists in the commission of a crime without such knowledge and without such intent or purpose is not an accomplice in the commission of such crime.

The testimony of an accomplice insofar as it tends to incriminate any defendant ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with care and caution and in the light of all the evidence in the case.

You must determine whether any witness was an accomplice as I have defined the term.

The defendant has the burden of proving by a preponderance of the evidence that such witness was an accomplice in the crimes charged against the defendant.

You should consider all of the evidence bearing upon this issue, regardless of who produced it.

(RT 16406-16409; CT 15510-15517 [CALJIC Nos. 3.10, 3.11, 3.12, 3.13, 3.13a, 3.14, 3.18, 3.19].)

2. The Evidence Did Not Permit The "Clear And Undisputed" Inference That Williams Was An Accomplice

Section 1111 defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." In order to be chargeable with the identical offense, the witness must be considered a principal under section 31. (*People v. Horton* (1995) 11 Cal.4th 1068, 1113; *People v. Fauber* (1992) 2 Cal.4th 792, 833.) Section 31 defines principals to include "[a]ll persons concerned in the commission of a crime . . . whether they directly commit the

act constituting the offense, or aid and abet in its commission. . . ." (*People v. Horton, supra,* at pp. 1113-1114; *People v. Fauber, supra,* at p. 833.) To be liable as an aider and abettor, the person must act both with knowledge of the perpetrator's criminal purpose and the intent of encouraging or facilitating commission of the offense. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271, fn. 19.) An aider and abettor is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets. (*Id.* at p. 1271, fn. 20.)

However, an accessory is not an accomplice. (*People v. Fauber, supra,* 2 Cal.4th at p. 834.) An accessory is defined as "[e]very person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment. . . ." (§ 32.)

Significant to the issue of whether there was instructional error in this case:

> "Whether a person is an accomplice within the meaning of section 1111 presents a factual question for the jury 'unless the evidence permits only a single inference.' [Citation.] Thus, a court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are 'clear and undisputed.'"

(*People v. Brown* (2003) 31 Cal.4th 518, 556-557, quoting *People v. Williams, supra,* 16 Cal.4th at p. 679; *People v. Hayes, supra,* 21 Cal.4th at p. 1271 ["whether a witness is an accomplice is a question of fact for the jury in all cases unless 'there is no dispute as to either the facts or the inferences to be drawn therefrom'"]; *People v. Fauber, supra,* 2 Cal.4th at p. 834.) The burden is on the defendant to prove by a preponderance of the evidence that a witness is an accomplice. (*People v. Fauber, supra,* at p. 834, citing *People v. Tewksbury* (1976) 15 Cal.3d 953, 963.)

Here, as the trial court recognized, Williams's testimony did not permit the "clear and undisputed" inference that he was an accomplice as a matter of law. Williams, the junior-most member of the Bryant Organization, testified that, on the day of the murders, he arrived the "same way as always" for his regular shift at the Wheeler Street residence. Like any other day, he watched television, waiting for a customer to arrive. Appellants and codefendant Settle each arrived at the house and went to a back room, while Williams remained alone in the living room. No one said anything to Williams about what was going to happen that day. (RT 12130-12133, 12284-12304, 12717.)

While sitting in the living room, Williams heard what he believed to be a loud gunshot in the back of the house. Appellant Bryant came out from the back and asked Williams, "Was it loud?" and "Do you think the neighbors heard it?" Sometime later, Williams was startled by the sound of a shotgun being cocked behind him. He turned around and saw codefendant Settle with a shotgun in his hand. (RT 12304-12307.) Williams did not ask what was going on because he "just figured it wasn't none of [his] business." (RT 12307.)

Later, however, appellants came out from the back of the house together, and appellant Wheeler asked appellant Bryant, "Are you going to tell Jay [Williams]?" Appellant Bryant then told Williams that he was expecting company. He instructed Williams how the company would be permitted to enter the house and how appellant Bryant would exit the house. Appellant Bryant also instructed Williams to back up a green car into the garage, walk to the bus stop, "look around the neighborhood and see who was watching" along the way, and go to the pool hall. (RT 12307-12321.)

It was at this point, Williams testified, that he knew "something" was going to happen, although he "wasn't exactly sure" what. Williams, however, "wish[ed] [he] wasn't there." Williams "knew [he] didn't want no part of it"

but believed he "was in too deep" and "it was too late to back out for something that [he] didn't ask to be part of in the first place. It just didn't seem like a very safe thing to do." (RT 12321-12324.) Williams "didn't think [he] would make it out of there." Appellants Bryant and Wheeler and codefendant Settle were armed; Williams was not. (RT 12303, 12311, 12326-12328.)

This testimony from Williams supported the inference that he had no knowledge of appellants' intent to kill. The jury was, of course, free to disbelieve the testimony. But, as the trial court correctly found, it was sufficient evidence to support the inference that Williams was not an accomplice as a matter of law. (See, e.g., *People v. Hayes, supra,* 21 Cal.4th at pp. 1271-1272 [in finding that a witness was not an accomplice as a matter of law (and, instead, leaving the question to the jury), the trial court properly considered whether the jury might find that the witness's denial that she knew of the defendant's intent to kill was credible].)

Further, other evidence bolstered Williams's credibility and supported the inference that he was not an accomplice. Williams testified that he heard a gunshot in the back of the house shortly before the killings. (RT 12304; see also RT 14913 [testimony of DA Investigator Duncan, recounting January 1993 interview of Williams].) However, Detective Vojtecky testified that a *shotgun* had been discharged in the back bathroom of the Wheeler Street residence. (RT 8624-8625.) This discrepancy suggested Williams was not privy to the planning of the killings, because he would have otherwise known that a shotgun -- not a handgun -- had been fired in the back of the house.

Similarly, Detective Vojtecky testified that, when he first spoke to Williams, Williams said he believed the victims' bodies were put in the trunk of the green car. (RT 15766-15768.) However, Manuel Contreras, who watched the green car flee the crime scene, saw two people in the back seat. The two people were leaning against each other and motionless, and Contreras

could not tell if they were alive. (RT 8510A, 8513.) Contreras's testimony suggested that the bodies of Armstrong and Brown were in the back seat, not in the trunk as Williams believed. Williams's lack of knowledge of how the bodies would be transported suggested he was not privy to the planning of the killings.

And, had Williams been an accomplice, he certainly would not have agreed to walk down Wheeler Street, in broad daylight, looking to see if any neighbors were paying attention to gunfire, shotgun blasts, or screams of agony. In other words, if Williams knew about appellants' intent to kill and intended on assisting them in their plot, he surely would not have placed himself in the position of being identified by witnesses. Instead, the inference to be drawn is that, as the newest member of the Bryant Organization, Williams was not trusted with the plot to kill but was used and set up to be identified as a possible killer leaving the crime scene. As the trial court recognized, there was evidence supporting the inference that Williams was "an innocent dupe." (RT 14455.)

Appellants argue that Williams's belief that it was "too late to back out" did not relieve Williams of criminal liability for the four murders because Williams did not have available to him the defense of duress. (BAOB 367-368; WAOB 196-197; SAOB 55.) This argument assumes Williams was referring to a murder when he said it was "too late to back out." But Williams did not mention a murder. Instead, he testified that, even after appellant Bryant's instructions, he "wasn't exactly sure" what was going to happen. (RT 12321-12322.) And Williams had no reason to suspect the murders, because nothing of the sort had occurred at the Wheeler Street residence in the four months that Williams had worked for the Bryant Organization.

Also, Williams was not the one who "buzzed in" Armstrong and Brown. (RT 12333; see SAOB 57.) And he did not assume that bodies would be placed in the green car when appellant Bryant instructed him to move the car. (See

BAOB 367; WAOB 195.) Rather, it was only after the crimes that Williams assumed he had been asked to move the car so that bodies could be placed in the trunk. (RT 15766-15768.) So, even when Williams followed appellant Bryant's instructions and buzzed the door to the Wheeler Street residence to let appellant Bryant out, he was not an accomplice to the murders, because he did not know that appellants had the intent to kill. If, arguably, Williams knew about appellants' intent once he heard gunfire and screams, he was, at most, an accessory to the murders after that point. (§ 32.)

Appellants argue that Williams's statement during an interview with the DA's Office revealed Williams knew about appellants' intent to kill prior to the murders. (See BAOB 349-350, fn. 107; WAOB 176-177, fn. 62; SAOB 55.) This is incorrect. First, the prior statement revealed that Williams believed appellant Bryant owned the Wheeler Street residence and that appellant Bryant would not allow a murder to occur there because appellant Bryant would be connected to the murder. (See BAOB 346-347; WAOB 173-174; RT 14930-14931.) Second, DA Investigator Duncan testified that he had incorrectly reported that Williams had said during the interview that he (Williams) knew someone was going to die prior to the murders. (RT 14918-14919.) Third, a revised report prepared by Investigator Duncan revealed that Williams said during the interview that he (Williams) had no idea appellants were going to kill anyone. (RT 14923.) Thus, Williams's prior statement was consistent with his trial testimony, which supported the inference that Williams was not an accomplice.

Appellants also argue that Williams was an accomplice as a matter of law because he was "a principal in the target offense of drug[] sales" and that this made him liable for murder under the natural and probable consequences doctrine. (BAOB 366; WAOB 194-195; SAOB 59-60.) They are mistaken. It is true Williams was a member of the Bryant Organization, a notorious drug

sales organization. It is also true that, on the day of the murders, Williams was on duty at the Wheeler Street residence, which was the "count house." However, there is nothing in the record to indicate that Williams participated in a drug sale at the Wheeler Street residence on the day of the murders. There is also nothing in the record to indicate that Armstrong and Brown went to the Wheeler Street residence to buy drugs, to dispute a drug sale, or the like. Instead, the record shows that Armstrong went to the Wheeler Street residence accompanied by the others in order to pick up money he believed was owed to him so that he could have an apartment cleaned. (RT 11616-11637, 11679-11681.) There was simply no narcotics activity involving Williams on August 28, 1988, the natural and probable consequence of which might arguably be a murder.

Along the same lines, appellant Smith argues that, because Williams was liable to prosecution for second degree felony murder (based on his participation in drug sales) and because appellant Smith was convicted of two second degree murders, Williams was an accomplice. (SAOB 60.) The problem, again, is that Williams was not selling drugs to Armstrong, and Williams was, therefore, not liable to prosecution for second degree felony murder. Nor was appellant Smith convicted under a felony-murder theory.

Next, appellant Smith argues that Williams was an accomplice because he was liable to prosecution for some other crimes originally charged against appellant Smith but later "fortuitously" severed (i.e., charges of operating a narcotics ring and conspiracy to avoid prosecution/conceal a crime). (SAOB 57-59.) Initially, the severance of the charges was not "fortuitous"; it was at the request of the defense. (See RT 4250.) In any event, appellant Smith incorrectly assumes Williams could not simultaneously be an accomplice to drug charges but not be an accomplice to murder charges. To be an accomplice, one must be liable to prosecution for "the identical offense."

(§ 1111.) Williams was not liable to prosecution for "the identical offense," i.e., murder.

Finally, appellant Smith repeatedly contends that the trial court incorrectly stated during a discussion *outside* the jury's presence that an accomplice was one who was "guilty," i.e., convicted, of the same crime as the defendant on trial. (See, e.g., SAOB 47, 52, 55, 60.) The trial court did not misunderstand the law. It merely used the word "guilty" as a short-hand reference to "liable to prosecution," during a discussion outside the presence of the jury. And, as appellants Bryant and Wheeler recognize (see BAOB 367; WAOB 196; but see SAOB 55), the fact Williams was a named defendant early in the case is not dispositive to the analysis of whether he was an accomplice as a matter of law. (*People v. Gordon* (1973) 10 Cal.3d 460, 467, overruled on another point in *People v. Ward* (2005) 36 Cal.4th 186.)

In sum, the trial court properly left to the jury to decide whether Williams was an accomplice. Moreover, absent an error in the application of state law, appellants' constitutional claims also fail.

3. Williams's Testimony Was Adequately Corroborated

Even if Williams was an accomplice, his testimony is adequately corroborated as to each appellant. Section 1111 provides:

> A conviction cannot be had upon the testimony of an accomplice unless it 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.

Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. (*People v. Brown, supra,* 31 Cal.4th at p. 556; *People v. Hayes, supra,* 21 Cal.4th at p. 1271.) The evidence is sufficient if it *tends* to connect the

defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth. (*People v. Brown, supra,* at p. 556.)

The standard of review on appeal is a deferential one:

> Unless a reviewing court determines that the corroborating evidence should not have been admitted or that it could not reasonably *tend* to connect a defendant with the commission of a crime, the finding of the trier of fact on the issue of corroboration may not be disturbed on appeal.

(*People v. Perry* (1972) 7 Cal.3d 756, 774, emphasis original, footnote omitted; see *People v. McDermott* (2002) 28 Cal.4th 946, 986.)

Further, in making this determination, because "an appellate court must view the evidence in a light most favorable to the verdict [citation]," the reviewing court "must uphold the trial court's disposition if, on the basis of the evidence presented, the jury's determination is reasonable." (*People v. Perry, supra,* 7 Cal.3d at p. 774.)

a. Appellant Bryant

Beginning with appellant Bryant, the evidence corroborating Williams's testimony included -- but is not limited to -- the following:

(1) During a videotaped interview, Ladell Player said that, when he bumped into appellant Bryant a few days after the murders, he told appellant Bryant that he had stopped by the Wheeler Street residence after the murders, saw the yellow police tape around the house, and realized something had happened. Appellant Bryant responded, "Yeah, we had some problems, but we took care of them." (RT 10262-10266, 10486-10495; Peo. Exh. 110.)

(2) Alonzo Smith said that, while both he and appellant Bryant were in county jail in 1992, Alonzo talked with appellant Bryant about the fact "Tommy" (Brown/Hull) was dead and that Alonzo had not trusted Tommy because "Tommy scammed." Appellant Bryant said words to the effect of

"yeah, he [Tommy] had to go." (RT 10911-10917.)

(3) Jennifer Daniel, who lived on Wheeler Street, testified that she heard the shots coming from the Wheeler Street residence on the day of the murders. She looked towards the house and saw a dark blue Hyundai, similar to appellant Bryant's Hyundai, pulling backwards in the driveway. (RT 11846-11856, 11869.)

(4) A car salesman and a finance manager from North Hollywood Toyota testified that, less than one week after the murders, appellants Bryant and Wheeler and Antonio Johnson traded in appellant Bryant's Hyundai. (RT 12289-12290, 12845-12855, 12862-12869.)

(5) A criminalist examined the Hyundai and found blood on the floorboard of the front driver's side. (RT 12878-12883.)

(6) Appellant Bryant refused to provide samples of his handwriting at his preliminary hearing. (RT 13023.)

(7) A forensic document examiner testified that the person who signed appellant Bryant's driver's license was the same person whose handwriting appeared on the money order transfers to Alonzo Smith and Tommy Hull (i.e., James Brown). Also, paperwork recovered from the body of James Brown bore the handwriting of the same person whose handwriting appeared on the money order transfer to Alonzo Smith and a piece of paper found in appellant Bryant's briefcase. (RT 13036-13041.)

(8) A firearms examiner testified that the .45 caliber shell casing (Peo. Exh. 39A-40) recovered at the crime scene (from the trash at the Wheeler Street residence) was fired from the Colt .45 caliber automatic revolver (Peo. Exh. 152) found at appellant Bryant's residence "to the exclusion of all other" weapons. (RT 12913-12916, 13170-13172.)

(9) A forensic print specialist testified that appellant Bryant's fingerprints were found at the Wheeler Street residence, including on the telephone in the living room, on the door jam to the rear bathroom, and on the page of the address book bearing the name "Tommy." (RT 13266-13274, 13306-13308.)

(10) As summarized in the Statement of Facts, there were numerous telephone calls between appellants in the periods before and after the murders. For example, from 5:55 p.m. on the day of the murders through the next 16 hours, about 90 telephone calls were made from the telephone at the "safe house" that appellant Bryant moved into after the murders. (RT 13492-13498.)

(11) Finally, appellant Bryant's modus operandi of handling people who were contrary to the Bryant Organization (e.g., Goldman, Gentry, Curry) was consistent with the quadruple murder. (RT 9157-9165, 9253-9260, 9285-9286, 9337-9341, 11320-11326, 13095-13099, 13110-13111.)

The foregoing evidence *tends* to connect appellant Bryant to the crimes apart from Williams's testimony. Appellant Bryant does not acknowledge some of this evidence. (See BAOB 373.) Also, his analysis of the issue is nothing more than a "divide and conquer" approach, in which he offers non-incriminatory explanations for much of the corroborative evidence. (See BAOB 373.) But, as this Court stated in *Perry*, "it is the jury's function to determine which of several possible reasons actually explains [the conduct of the defendant]." (*People v. Perry, supra,* 7 Cal.3d at p. 772.) Appellant Bryant's drawing favorable inferences or conclusions from the corroborative evidence does not alter the rule that "an appellate court must view the evidence in the light most favorable to the verdict [citation]." (*Id.* at p. 774.)

Thus, in light appellant Bryant's damning statements to Ladell Player and Alonzo Smith, the incriminating evidence linking appellant Bryant's Hyundai and gun to the crime scene, the handwriting evidence, the fingerprint

evidence, the telephone records, and appellant Bryant's past actions against people contrary to the Bryant Organization, there was ample evidence corroborating Williams's testimony which *tended* to connect appellant Bryant to the crimes.

b. Appellant Wheeler

Turning to appellant Wheeler, the evidence corroborating Williams's testimony included -- but is not limited to -- the following:

(1) On the day of the murders, three neighbors -- Lucila Esteban, Manuel Contreras, and Jennifer Daniel -- saw a Black male fitting appellant Wheeler's description shoot into and/or drive off in the red Toyota containing Anderson, Chemise, and Carlos. (RT 8243-8249, 8434-8446, 8454, 8464-8468, 8484-8489, 8500-8509A, 8512, 8519-8520, 11853-11865, 11868, 11875-11876, 11892-11893, 11922, 11932-11935, 11939-11943, 11951-11952.) Also, prior to trial, Daniel selected appellant Wheeler's photograph (Peo. Exh. 113, number 2) in 1995 -- seven years after the murders -- as the driver of the red Toyota. At trial, Daniel testified she was "positive" of her selection of appellant Wheeler's photograph (see Peo. Exhs. 113, 160) as the driver of the Toyota. However, when asked if she saw the driver of the Toyota in the courtroom, Daniel pointed out appellant Bryant. But, even after her "identification" of appellant Bryant, Daniel continually repeated that the driver of the Toyota was the person depicted in photograph number 2 of People's Exhibit 113 -- appellant Wheeler. (See RT 11853-11865, 11875-11876, 11884, 11892-11893, 11922, 11939-11943, 11949-11952, 11959, 13711-13712; see RT 10539-10544, 11865-11868, 12173-12177.)

(2) An officer at the Donovan State Prison testified that, on the day after the murders, appellants Wheeler and Bryant visited Jeff Bryant, without having received prior approval for the visit. (RT 12824-12836.)

(3) After the murders, appellant Wheeler participated in trading in appellant Bryant's blood-stained Hyundai for a new car. (RT 12289-12290, 12845-12855, 12862-12869, 12878-12883.)

(4) During a search of appellant Wheeler's apartment, police recovered a .357 Magnum, the same type of gun used to kill Chemise. (RT 11017-11020, 11219-11220, 13141-13145.)

(5) During the search of appellant Wheeler's apartment, the police also recovered two newspaper articles about the murders from appellant Wheeler's bedroom. (RT 11017-11027.)

(6) A forensic print specialist testified that appellant Wheeler's fingerprints and palm print were found on the hallway closet at the Wheeler Street residence. (RT 13278-13280, 13307-13308.)

(7) Appellant Wheeler refused to provide samples of his handwriting at his preliminary hearing. (RT 13023.)

(8) A forensic document examiner testified that the person who wrote "Slimm" in appellant Wheeler's address book was the same person who wrote "Slimm" on post-it receipts and a 90-minute schedule recovered during the searches of the drug houses. (RT 13029-13036.)

(9) Finally, the telephone records reveal that, in August 1988, numerous telephone calls were made from appellant Wheeler's cellular phone to appellant Bryant's residence, appellant Bryant's beeper, the Wheeler Street residence, and Neighborhood Billiards. The last call in August to the Wheeler Street residence was on August 28 at 3:05 p.m. -- less than two hours before the murders. (RT 13476-13477.) Also, in the hours after the murders, there were several calls from the Oxnard Street address (where appellant Bryant was staying) to appellant Wheeler's apartment. (RT 13492-13498.) And, on September 25, 1988, Detective Saurman called a number on the pager list for the initials "S.L." The call was returned from the residence of the mother of appellant Wheeler's

girlfriend. Three minutes after the conclusion of the return call, two calls were placed from the residence to appellant Bryant's pager number. (RT 13498-13500.)

In light of the foregoing, especially Daniel's identification, the recovery of the .357 Magnum and the newspaper articles, and the telephone records, there was ample evidence corroborating Williams's testimony which *tended* to connect appellant Wheeler to the crimes.

c. Appellant Smith

Finally, although it appears the trial court believed there was insufficient corroborating evidence as to appellant Smith (see RT 14457-14458), respondent respectfully disagrees. The evidence corroborating Williams's testimony as to appellant Smith included -- but is not limited to -- the following:

Appellant Smith's involvement in the shooting of Keith Curry was circumstantial evidence that he was involved in the instant murders. One morning in 1986, after Curry had spent a night with Tannis, his Porsche exploded while he was in it. Tannis told someone at a beauty salon that her ex-husband, appellant Bryant, had placed a pipe bomb underneath Curry's car and "would do it again . . . until [Curry] was dead." (RT 13095-13111.) The following year, appellant Bryant used appellant Smith to do his bidding. Curry was seated in the front seat of his car as he left the house of Tannis's mother when he noticed the car behind him flashing its headlights. Curry pulled over and saw that the driver of the other car was appellant Smith, Curry's brother-in-law, who he thought was "a friend." After engaging in some "small talk," appellant Smith fired two shots at Curry. One shot entered Curry's neck and went through his spine. Curry was paralyzed. (RT 11320-11326, 11353-11354, 13655-13657.)

Appellant Bryant used appellant Smith to harm his ex-wife's new husband, Curry. It was a reasonable inference that appellant Bryant again used appellant Smith to harm his ex-wife's new lover, Andre Armstrong. In the Curry shooting, Curry recognized appellant Smith as a friend, and appellant Smith engaged in "small talk" with Curry before shooting him in the neck and paralyzing him. Here, too, appellant Smith lulled Armstrong into a sense of safety through the numerous telephone calls to Armstrong and his family members after Armstrong's release from prison, and there was some "small talk" with Armstrong and Brown before the two were shot and killed while trapped inside the cage on Wheeler Street. The evidence of the Curry shooting *tended* to connect appellant Smith to the quadruple homicide.

Next, the telephone records substantiate Williams's claim that there was a concerted effort on the part of appellants to kill Armstrong. As such, the telephone records demonstrated Williams's credibility as a witness and *tended* to connect appellant Smith to the charged crimes. (See *People v. Bunyard* (1988) 45 Cal.3d 1189, 1208, fn. 9; see also *People v. McDermott, supra,* 28 Cal.4th at p. 986.)

This Court has expressly indicated that telephone records can serve as adequate corroboration of accomplice testimony. (*People v. Bunyard, supra,* 45 Cal.3d at p. 1208, fn. 9; *People v. Heishman* (1988) 45 Cal.3d 147, 164-165.) In *Bunyard*, this Court upheld the defendant's conviction for the murder of his pregnant wife and her unborn child, based primarily on the testimony of Popham, the accomplice who carried out the murders at the defendant's request. The corroboration was the testimony of Randy Johnson, whom the defendant had unsuccessfully solicited to carry out the murders. (*People v. Bunyard, supra,* at p. 1206.)

Addressing the other corroborating evidence in the case, this Court explained:

> Since we find that Johnson's testimony was sufficient to corroborate accomplice Popham, we do not need to assess the other *evidence in the case which substantiated Popham's credibility*. Nevertheless, we note that there were many other corroborative factors besides Johnson's testimony which demonstrated Popham's credibility as a witness and tended to connect defendant to the charged crime: . . . (2) *telephone records showed a call was placed from the house where [accomplice] Popham was staying two days after the murder to the defendant's home, as [accomplice] Popham testified.* . . .

(*People v. Bunyard, supra*, 45 Cal.3d at p. 1208, fn. 9, emphasis added.)

This Court also approved the use of telephone records as corroboration of accomplice testimony in *Heishman*. Heishman was convicted of a November 1 first degree murder of Nancy Lugassy, a woman who was taking nursing classes at Vista College in Berkeley, part of the Peralta Community College District. Two accomplices -- Gentry and Miller -- provided the eyewitness testimony regarding the plot to kill and the actual killing of Lugassy, by Heishman. Telephone records showed calls between October 24 and 30 to the Peralta colleges from Heishman's, Gentry's, and Miller's telephone numbers, calls through November 1 from Heishman to Gentry and to Miller, and calls between Miller and Gentry. (*People v. Heishman, supra,* 45 Cal.3d at pp. 156-161.)

In discussing the lack of prejudice from an erroneous jury instruction on accomplice testimony, this Court stated, in part:

> . . . there were telephone company records of calls on October 24, 1979, from defendant to three Peralta campuses, as well as calls from him to Gentry and Miller and calls from Gentry, and from Miller, to the Peralta

campuses. This evidence satisfied the rule, on which the jury was correctly instructed, that accomplice testimony must be corroborated by evidence, which, if believed by itself, tends to connect the defendant with the offense charged, and that such evidence need not establish every element of the offense or corroborate all facts testified to by the accomplice. (CALJIC No. 3.12; see § 1111; *People v. Szeto* (1981) 29 Cal.3d 20, 26-27 [] [plur. opn.], 43 [dis. opn.].)

(*People v. Heishman, supra,* 45 Cal.3d at pp. 164-165.)

Thus, in *Bunyard*, "a call" from accomplice Popham to Bunyard's home two days after the murder, as Popham testified, was sufficient corroboration of the accomplice's testimony. In *Heishman*, calls to the Peralta campus from Heishman and from each of the accomplices, coupled with calls between Heishman and the accomplices, were sufficient corroboration to demonstrate a lack of prejudice from an erroneous jury instruction on accomplice testimony. Given *Bunyard* and *Heishman*, it follows that the number, timing, length, and interrelationship of the calls between appellants in this case is sufficient corroboration of Williams's testimony inculpating appellant Smith (as well as appellants Bryant and Wheeler).

A review of the telephone records in this case demonstrates respondent's point that there was an intricate relationship between the crime partners at the time of the murders. Between January and August 27, 1988, 105 telephone calls were placed from appellant Smith's residence to appellant Bryant's residence on Judd Street. The last call was placed at 7:16 p.m. on August 27, the day before the murders. Between January and September of 1988, 134 telephone calls were placed from appellant Bryant's residence to appellant Smith's residence. The last call in August was placed at 8:52 p.m. on August 27, the night before the murders. (RT 13455-13460.)

Between January and August 28, 1988, approximately 69 telephone calls were placed from appellant Smith's residence to the Wheeler Street residence. The last call was placed on August 28, 1988, at 12:44 a.m. (the time appellant Wheeler was working at Wheeler Street). Approximately 107 telephone calls were placed from the Wheeler Street residence to appellant Smith's residence during the same period of time. The last call was placed on August 27, 1988, at 8:39 p.m. (RT 13466-13469.) Between January and September 1988, approximately 11 telephone calls were placed from appellant Smith's residence to the Carl Street "count house." (RT 13469-13471.) Approximately 77 telephone calls were placed from Carl Street to appellant Smith's residence between May and August of 1988. (RT 13471-13474.)

Following Andre Armstrong's release from prison in July 1988, 30 telephone calls were placed from appellant Smith's residence to appellant Bryant's residence, and 24 telephone calls were placed from appellant Bryant's residence to appellant Smith's residence. (RT 13460.)

Five weeks before the murders, on July 21, 1988, Andre Armstrong was released from prison in St. Louis. A flurry of telephone calls occurred that day. At 11:20 a.m., a three-minute call was made from appellant Bryant's residence to Delores Brown, Armstrong's mother. Two minutes later, a telephone call was placed from appellant Bryant's residence to appellant Smith's residence. At 2:21 p.m. and 2:48 p.m., two more telephone calls were placed from appellant Bryant's residence to Delores Brown. At 2:49 p.m., an 11-minute call was placed from appellant Bryant's residence to Armstrong's sister, Deborah Armstrong in St. Louis. At 6:26 p.m., a one-minute telephone call was placed from the Wheeler Street residence to Deborah Armstrong. At 7:43 p.m., a seven-minute call was placed from appellant Bryant's residence to Deborah Armstrong. (RT 13480-13484.) The next day, July 22, Deborah Armstrong picked up a Western Union money order from Antonio Johnson for $1,000.

(RT 13486.)

On July 23, at 9:46 p.m., a collect telephone call was made from Vangie Armstrong's (Armstrong's sister's) residence in St. Louis to appellant Smith's residence. At 4:43 p.m., a six-minute collect telephone call was made from Deborah Armstrong to appellant Smith. (RT 13487-13488.)

On August 1, 1988, a one-minute telephone call was made from appellant Smith's residence to Armstrong's mother's house. On August 3, three calls (6 minutes, 17 minutes, and 45 minutes) were placed from appellant Smith's residence to the residence at 1049 Del Monte in Salinas (where James Brown, Andre Armstrong, and Andrew Greer resided). Also, on August 3, James Brown received an $800 Western Union money order from Antonio Johnson. (RT 13488-13489.) On August 11, two calls (one at 12:16 p.m. for three minutes and another at 12:59 p.m. for 14 minutes) were placed from appellant Smith's residence to the Del Monte residence in Salinas. (RT 13489.)

Telephone calls on August 26, 1988 -- two days before the murders -- reflect the following: a call at 9:24 a.m. from appellant Bryant's residence to appellant Smith's residence; a call at 6:26 p.m. from appellant Smith's residence to appellant Bryant's residence; and calls at 9:17 p.m. and 9:59 p.m. from the Wheeler Street residence to appellant Smith's residence. (RT 13490.)

Telephone calls on August 27, 1988, -- one day before the murders -- reflect the following: calls at 6:57 a.m., 10:38 a.m., and 7:16 p.m. from appellant Bryant's residence to appellant Smith's residence; and a call at 8:39 p.m. from the Wheeler Street residence to appellant Smith. (RT 13491.)

On August 28, 1988 -- the day of the murders -- a call was placed at 12:44 a.m. from appellant Smith's residence to the Wheeler Street residence. (RT 13491-13492.)

From 5:55 p.m. on August 28, 1988, through the next 16 hours, approximately 90 telephone calls were made from the "safe house" where appellant Bryant was staying. These calls included six calls to Wilbert Babineaux's residence, six calls to appellant Wheeler's residence, and calls to several other drug houses and "family" members. (RT 13492-13498.)

The foregoing review of the telephone records reveals numerous calls between appellants over a considerable period of time leading up to the murders. The number, timing, length, and interrelationship of the calls further reveals an intricate and involved relationship among the trio of appellants. Simply stated, the telephone records independently and convincingly *tended* to connect appellant Smith, as well as appellants Bryant and Wheeler, to the murders. (See *People* v. *Bunyard*, *supra*, 45 Cal.3d at p. 1208, fn. 9.)

d. Substantial Evidence Supports Appellants' Convictions

In light of Williams's testimony, together with the corroborating evidence outlined above, substantial evidence supports the convictions of each appellant. (BAOB 375-376; WAOB 207-208; SAOB 75-80.)

B. The Trial Court Properly Instructed The Jury On What Constituted Sufficient Corroboration Of Accomplice Testimony

Without objection, the trial court instructed the jury with what it designated as "CALJIC No. 3.13a" as follows: "Evidence to corroborate an accomplice . . . is sufficient if it tends to connect the defendant with the crime even though it is slight and entitled, when standing alone, to little consideration." (RT 16408; CT 15514.) Appellant Smith now argues that the trial court erred in giving this instruction because the instruction allowed the jury to convict appellant Smith on a standard lower than the beyond-a-reasonable-doubt standard required for criminal convictions. (SAOB 92-94.)

Initially, there was no objection to this instruction in the court below. (RT 16313-16316.) Accordingly, the claim of error is waived. (See *People v. Rodrigues, supra,* 8 Cal.4th at pp. 1191-1192.)

In any event, the claim has no merit. The instruction was a correct statement of the law. (*People v. Williams, supra,* 16 Cal.4th at p. 681.) It supplemented CALJIC No. 3.12, a standard jury instruction, which informed the jury as follows: "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." (RT 16407; CT 15512, emphasis added.) CALJIC No. 3.13a, in turn, informed the jurors that "any remaining evidence" included evidence which was slight -- as long as it tended to connect the defendant to the crime. (RT 16408; CT 15514.)

Appellant Smith cites some federal cases from the Fifth Circuit which hold that it is error for a trial court to instruct a jury that, when a conspiracy has been established by competent proof, only slight evidence is necessary to connect a person with the conspiracy. (SAOB 92-93.) These federal cases find error because, although the instruction correctly describes the standard a court should use on appeal to determine whether the evidence against a particular defendant supports submission of his case to the jury, the instruction would confuse the jury on the beyond-a-reasonable-doubt standard. (See, e.g., *United States v. Gray* (5th Cir. 1980) 626 F.2d 494, 500.) Appellant Smith argues that here, too, the "slight" language in CALJIC No. 3.13a confused the jury on the beyond-a-reasonable-doubt standard. (SAOB 92-94.)

The argument must fail for several reasons. First, decisions of federal Courts of Appeal are not binding on this Court. (*People v. Seaton* (2001) 26 Cal.4th 598, 653.) Second, the federal cases do not address the accomplice

instruction at issue here. Third, unlike the instructions at issue in the federal cases, the instruction here (that evidence of corroboration may be slight) is more than the standard a court uses on appeal to evaluate the sufficiency of corroborative evidence -- it is also the standard a juror employs to determine whether he or she can find a defendant guilty based on an accomplice's testimony. Fourth, the instruction at issue here could not have convinced a juror that the charges against a defendant need not be proved beyond a reasonable doubt because, unlike the instructions on the law of conspiracy in the federal cases, the instruction here related to a "collateral factual issue[] having no direct bearing on any link in the chain of proof of any element" of the charged crimes. (See *People v. Frye* (1998) 18 Cal.4th 894, 967-968 ["We are aware of no decision, and defendant cites none, supporting the proposition that section 1111 establishes an issue bearing on the substantive guilt or innocence of the defendant or otherwise constitutes an element of a criminal offense."].) Accordingly, appellant Smith's claim of instructional error must fail.

Because the claim of instructional error fails, appellant Smith's claims of constitutional error fail as well. Finally, because the trial court instructed the jury with CALJIC No. 2.90 (RT 16401; CT 15502), any error was harmless.

C. The Trial Court Properly Instructed The Jury With CALJIC Nos. 3.00 And 3.10

Without objection, the trial court instructed the jury with standard CALJIC No. 3.00 as follows:

> The persons concerned in the commission or attempted commission of a crime who are regarded by law as principals in the crime thus committed or attempted and equally guilty thereof include:
>
> 1. Those who directly and actively commit or attempt to commit the act constituting the crime, or
>
> 2. Those who aid and abet the commission of the crime.

(RT 16404; CT 15507.)

Without objection, the trial court also instructed the jury with standard CALJIC No. 3.10 as follows:

> An accomplice is a person who is or was subject to prosecution for the identical offense charged against the defendant on trial by reason of aiding and abetting.

(RT 16406; CT 15510.) Appellant Smith now argues that CALJIC Nos. 3.00 and 3.10, when read together, improperly suggested Williams had to be "equally guilty" before he was found to be an accomplice. (SAOB 88-91.)

First, appellants neither objected to nor requested modifications of these standard instructions in the court below. (See RT 16188-16189.) Accordingly, the claim of instructional error is waived. (*People v. Lawley, supra*, 27 Cal.4th at pp. 160-161; see *People v. Rodrigues, supra,* 8 Cal.4th at pp. 1191-1192.)

Second, the claim has no merit. Appellant Smith argues that the jury may have believed Williams was guilty of second degree felony murder based on a narcotics sale. But, appellant Smith maintains, because the trial court instructed the jury pursuant to CALJIC No. 3.00 that an aider and abettor was "equally guilty," the jury may have concluded that Williams could not be considered an accomplice (because he was not guilty of first degree murder). Therefore, he argues, CALJIC Nos. 3.00 and 3.10 removed from the jury's consideration the question of whether Williams was an accomplice. (SAOB 88-91.)

This argument has several fatal flaws. Initially, as explained earlier, the jury could not have found Williams liable to prosecution for second degree felony murder because there was no evidence that Williams sold drugs to anyone at the Wheeler Street residence on August 28, 1988.

Next, even assuming arguendo that the jury could have made such a finding, appellant Smith has lost sight of the plain meaning of CALJIC No. 3.00, which states that direct perpetrators and aiders and abettors are "equally guilty." The plain meaning of these words is that direct perpetrators and aiders and abettors are subject to the same criminal liability -- not that they are ultimately convicted of the same offense. For example, this Court has explained that an aider and abettor "*is guilty* not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets." (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5, emphasis added.) The word "guilty" in this context is synonymous with "liable to prosecution."

Moreover, the Use Notes to CALJIC No. 3.10, which defines accomplices, specifically refers to CALJIC No. 3.00 for guidance on aiding and abetting. And the trial court in this case also instructed the jury with CALJIC No. 3.01, which defined aiding and abetting. (RT 16404-16405; CT 15508.)

Contrary to appellant Smith's assertion (see SAOB 89), *People v. Woods* (1992) 8 Cal.App.4th 1570 does not hold that the "equally guilty" language of CALJIC No. 3.00 is misleading and inaccurate. And *Woods* is not helpful to appellant Smith, because it addresses whether an aider and abettor may be found guilty of a lesser-included offense to that ultimately committed by the perpetrator under the natural and probable consequences doctrine. Appellant Smith's theory that the jury may have found Williams committed a second degree felony murder does not follow because second degree felony murder was not a lesser-included offense to the charges in this case. (See SAOB 90.)

In sum, the trial court committed no instructional error with CALJIC Nos. 3.00 and 3.10. Because there was no instructional error, appellant Smith's constitutional claims also fail.

Finally, even if there was instructional error, it was certainly harmless because, as explained above, Williams was not liable to prosecution for second degree felony murder.

D. The Trial Court Properly Instructed The Jury With Regard To Tannis Curry

Appellant Smith argues that the trial court should have instructed the jury that Tannis Curry was an accomplice as a matter of law. (SAOB 72-75.) Appellant Smith also argues that the trial court erred in not excluding Tannis from the applicability of CALJIC No. 2.11.5. (SAOB 95-99.) Both claims have no merit.

First, in addition to the instructions already given to the jury, the trial court had no sua sponte duty to instruct the jury that Tannis was an accomplice as a matter of law. (*People v. Sanders* (1995) 11 Cal.4th 475, 534.) In any event, the instruction was unwarranted because the evidence did not support the "clear and undisputed inference" that Tannis was an accomplice. (*People v. Brown, supra,* 31 Cal.4th at pp. 556-557.) Appellant Smith points out that Tannis did not follow Armstrong and the others to the Wheeler Street residence as planned. He argues that this evidence supported the inference that Tannis was a "lure" and a part of the murder plot. (SAOB 72, 95.) However, this evidence supported another inference: that Tannis simply did not want to accompany her lover (Armstrong) to meet with her ex-husband (appellant Bryant), particularly in light of the latter's reaction to Tannis's other lovers (e.g., Keith Curry). Accordingly, the trial court had no duty to instruct the jury that Tannis was an accomplice as a matter of law.

Second, without objection, the trial court instructed the jury with a modified version of CALJIC No. 2.11.5 as follows:

> There has been evidence in this case indicating that a person other than defendant was or may have been involved in the crime for which

the defendant is on trial.

There may be many reasons why such person is not here on trial. Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he or she has been or will be prosecuted. Your duty is to decide whether the People have proved the guilt of the defendants on trial.

The second paragraph of this instruction does not apply to the testimony or prior statements of James Williams.

(RT 16387-16388; CT 15477.)

Appellants did not request that this instruction be further modified to refer to Tannis Curry. (RT 16234-16236.) Accordingly, the claim of instructional error is waived on appeal. (*People v. Sanders, supra,* 11 Cal.4th at p. 533.)

Moreover, the claim has no merit. CALJIC No. 2.11.5 should not be given when a non-prosecuted *participant* testifies, because the jury is entitled to consider the lack of prosecution in assessing the witness's credibility. (*People v. Williams* (1997) 16 Cal.4th 153, 226.) Here, there was nothing in the record to suggest Tannis was a participant in the murders. There was no evidence that she was aware of appellants' intent to kill, intended to assist appellants in the killings, or that she was or may have been involved in the murders in any way. Accordingly, there was no reason to modify CALJIC No. 2.11.5 to ensure the jury would not apply the instruction to Tannis. Furthermore, because there was no instructional error, appellant Smith's constitutional claims fail as well.

Appellant Smith also fails to demonstrate he was prejudiced by the use of CALJIC No. 2.11.5 as given. Even if the jury believed Tannis was a participant in the murders and that CALJIC No. 2.11.5 applied to her, "it was not without compass in determining [her] credibility." (*People v. Williams,*

supra, 16 Cal.4th at p. 227.) The jury was instructed with CALJIC No. 2.20 on evaluating the credibility of witnesses generally, including the existence or nonexistence of a bias, interest, or other motive for testimony -- including any immunity from prosecution. (*People v. Lawley, supra,* 27 Cal.4th at pp. 162-163; *People v. Williams, supra,* at p. 227; see RT 16389-16390; CT 15480.) Also, if the trial court had modified CALJIC No. 2.11.5 to ensure the jury would not apply the instruction to Tannis, it is unlikely the jury would have reached a different verdict because Tannis was not "the mainstay of the prosecution's case." (*People v. Williams, supra,* at p. 227.) Therefore, the trial court's unmodified use of CALJIC No. 2.11.5 as to Tannis did not prejudice appellant Smith. (*People v. Cox* (1991) 53 Cal.3d 618, 668, citing *People v. Watson, supra,* 46 Cal.2d at p. 836.)

E. The Trial Court Properly Rejected Appellant Smith's Request To Order The Jury To Reconsider Its Guilt Verdicts

Appellants contend the trial court prejudicially erred by rejecting appellant Smith's request pursuant to section 1161 that the trial court order the jury to reconsider its guilt verdicts. Appellants contend the jury's questions and interaction with the court after it had reached verdicts as to all defendants except codefendant Settle demonstrated the jurors misunderstood the law regarding Williams's status as an accomplice and further misunderstood the reasonable-doubt standard. (BAOB 356-360, 375; WAOB 183-187, 206-207; SAOB 81-87.)

Appellants Bryant and Wheeler waived this claim by not objecting or joining appellant Smith's request. Further, the trial court did not abuse its discretion by rejecting appellant Smith's request, because the jury's questions were limited to consideration of codefendant Settle's guilt by one juror.

1. Relevant Proceedings

The jury reached verdicts as to appellant Bryant on May 17, May 24, and May 25, 1995, appellant Wheeler on May 26, 1995, and appellant Smith between May 30 and June 2, 1995. The jury was polled, and the verdicts were recorded on June 8, 1995. (CT 15403-15424.)

The jury resumed deliberations on June 12, 1995. That morning, the jurors sent out a note stating that they were deadlocked as to all five counts against codefendant Settle. (RT 17086; CT 15443.) The jury foreman was questioned and stated that deliberations began to focus on codefendant Settle on June 2, 1995, after verdicts as to appellants had been reached. The jury took three or four ballots as to each count against codefendant Settle and reached a point where the balloting was 11 to 1. (RT 17088-17094.)

The court asked the jury, "Is there anything that you think of . . . that might assist the jury at arriving at a unanimous decision?" (RT 17094.) Juror No. 261 asked for "some clarity in the difference between reasonable doubt and possible doubt," the jury foreman thought "possibly a clarification" on the meaning of "accomplice," and Juror No. 412 thought "possibly the full aspect of the corroboration of an accomplice and what that entails." (RT 17094-17095.) The court asked the jurors to write down any specific questions they had that might help them reach a verdict as to codefendant Settle. (RT 17095-17096.)

The jurors sent out notes asking the following questions: (1) "Please clarify page 23 of jurors instructions, in regards to inconsistent or consistent of a testimony" (CT 15438; see RT 17100); (2) "If more than one witness has made inconsistent statements, how do we weigh their 'credibility' and 'truth of facts' between them?" (CT 15439; see RT 17101); (3) "If one is charged with the same crime but not brought to trial is he automatically an accomplice? Can there be aiding and abetting after the crime was committed?" (CT 15440; see

RT 17101); (4) "We would like to have some clarification as to doubt. Reasonable -- Possible -- Imagined -- pg. 47 -- 2nd paragraph. * maybe an example of each???" (CT 15442; see RT 17101); and (5) "Page 56 of the instructions says, quote, 'A defendant cannot be found guilty based upon the testimony of an accomplice unless corroborated by other evidence.' Doesn't this constitute reasonable doubt if there is not corroboration of same in your mind? If you have reasonable doubt, you are required to vote not guilty. Is that the law?" (CT 15441; see RT 17102).

Prior to the jury being given further instructions, counsel for appellant Smith made a motion pursuant to section 1161 for the trial court to instruct the jury to reconsider its verdicts regarding appellant Smith. The court denied the motion. (RT 17105e.)

During the discussions about how to respond to the jury's questions, the trial court said it would tell the jury that aiding and abetting was determined as of the commission of the crime, not by what happened later, that persons could be principals even if not charged with a crime, and that a person could be charged with a crime and not be an accomplice. (RT 17105h.) The court noted that, although technically a person could not be an aider and abettor after the commission of a crime, actions taken after the crime could be consistent with being an aider and abettor. A person could theoretically aid and abet a crime by agreeing before the crime was committed to help afterward. (RT 17105i, 17105k-17105l.) The court thought that the jury might either be asking about whether Williams was an aider and abettor by driving the car after the murders, or might be wondering about whether codefendant Settle's actions of driving the car with bodies in it after the murders made him an aider and abettor. (RT 17105-17105a, 17105j-17105k.)

As to the fourth question, the court indicated it would not give examples of "reasonable doubt" but would refer back to CALJIC No. 2.90. As to the fifth question, the court indicated the answer would be that guilt could not be based on uncorroborated accomplice testimony if a juror found a witness was an accomplice, and that if a juror had reasonable doubt, he was to vote not guilty. (RT 17105a-17105b, 17105l-17105n.)

In the trial court's response to the jury, the court answered the jury's third question by stating that a person who was charged with a crime was not automatically an accomplice, and that whether a person is an accomplice is determined by looking at the circumstances of the crime. As to whether there can be aiding and abetting after a crime was committed, the trial court gave an example for the jury that the aider and abettor would have to know about the crime prior to the crime being committed and agree in advance to aid after the fact. In contrast, a person is not an aider and abettor if he agrees to help after the crime has already been committed. (RT 17105s-17105u.)

As to question four, regarding reasonable doubt, the trial court referred the jurors to CALJIC No. 2.90 and further noted reasonable doubt is not "based on mere, purely, and totally speculation, bias, emotion, a desire to favor one side over the other for whatever reason, whim, caprice, fantasy, i.e., not based upon rationality and reason." (RT 17105w.)

As to question five, the trial court told the jury that, if it determined "that a person is an accomplice, then that person's testimony requires some corroboration," in other words, the jury could not convict based upon uncorroborated accomplice testimony standing alone. The court clarified this rule was a separate concept from "reasonable doubt." Finally, the court reiterated that CALJIC No. 2.90 states that if a juror has a reasonable doubt that a person is guilty of a crime, he must vote not guilty. (RT 17105x-17105y.)

Juror No. 113 asked whether the court was "still []saying" that it was up to the jury to determine whether someone was "an accomplice or an accessory?" and stated "that was part of the problem we were having." The trial court clarified that the jury had not been instructed on the law of being an accessory and it was up to the jury to determine if someone was an accomplice. (RT 17105y-17105aa.) In response to a question from Juror No. 412, the trial court stated that Juror No. 412 was correct that a juror must vote not guilty if he found no corroboration to an accomplice's testimony. (RT 17105aa.) In response to a question from Juror No. 261, the court clarified that the jury need not unanimously agree on whether someone was an accomplice but must unanimously agree on guilt beyond a reasonable doubt. (RT 17105aa-17105bb.)

Appellant Smith renewed his section 1161 motion on the ground that the jury "at the time of the rendering, or perhaps now does not understand the law of accomplice" including "this notion of corroboration" and that appellant Smith's defense was based on "the law of accomplice." (RT 17105bb-17105dd.) The trial court denied the motion and stated:

> I don't see a misunderstanding. What I see is the fact as to Mr. Settle, one defendant, one juror is apparently having problems with the issue of whether there is sufficient corroboration, assuming Mr. Settle [sic] is an accomplice. And that in no way exists with any verdict re[garding] your client's case, and does not evidence a confusion as to the law regarding accomplices whatsoever as to render a verdict against your client mildly suspect. So your motion will be denied.

(RT 17105cc-17105dd.)

2. The Trial Court Properly Denied Appellant Smith's Motion Pursuant To Section 1161

Initially, appellants Bryant and Wheeler have waived this claim, because they did not object on any ground, did not request that the trial court order the jury to reconsider its verdicts pursuant to section 1161, and did not join in the request made by appellant Smith. (RT 17104, 17105e, 17105bb-17105cc; see *People v. Gayle* (1927) 202 Cal. 159, 163 [waiver by defendant's failure to raise former section 1161]; *People v. Bratis* (1977) 73 Cal.App.3d 751, 762 [same].) Notably, appellant Bryant was not present during these proceedings, having waived his presence and that of his counsel. (RT 17085, 17100.)

Moreover, the claim is without merit. Section 1161, provides, in relevant part:

> When there is a verdict of conviction, in which it appears to the Court that the jury have mistaken the law, the Court may explain the reason for that opinion and direct the jury to reconsider their verdict, and if, after the reconsideration, they return the same verdict, it must be entered. . .

The trial court is empowered to direct the jury to reconsider its verdict under section 1161 prior to the discharge of the jury. (*People v. Fields* (1996) 13 Cal.4th 289, 310.)

Section 1161 provides that the trial court "may" direct the jury to reconsider its verdict. Given the discretionary nature of the trial court's power, the abuse-of-discretion standard should apply to claims that the trial court erred by not ordering the jury to reconsider its verdict. (See *People v. Griffin, supra,* 33 Cal.4th at p. 587 [abuse-of-discretion standard applies to trial court's rulings on admissibility of evidence]; *People v. Silva* (2001) 25 Cal.4th 345, 367 [abuse-of-discretion standard applies to motion to relieve counsel]; *People v. Waidla, supra,* 22 Cal.4th at pp. 745-746 [abuse-of-discretion standard applies to decision to instruct a deliberating jury]; *People v. Hill, supra,* 17 Cal.4th at

p. 841 [abuse-of-discretion standard applies to decision to shackle a defendant].) An abuse of discretion occurs only if the trial court's ruling falls "outside the bounds of reason." (*People v. Waidla, supra,* at p. 714.)

Cases in which section 1161 applies involve situations where the jury's verdict itself demonstrates the jury may have mistaken the law. For example, in *Fields*, this Court noted that section 1161 should be used where the jury's verdict demonstrated that it misunderstood that it had to acquit the defendant of the greater offense before reaching verdicts on lesser-included offenses. (*People v. Fields, supra,* 13 Cal.4th at pp. 310-311.) In *People v. Bonillas* (1989) 48 Cal.3d 757, 769, the Court noted that section 1161 applied where the jury found the defendant guilty of murder "as charged" but had not fixed the degree of the crime as instructed. The Court catalogued numerous examples demonstrating that section 1161 applied to situations where the verdict itself was irregular or demonstrated that the jury had misunderstood the law. (*Id.* at pp. 769-770.)

Further, appellants Smith and Wheeler interpret section 1161 in such a way that it would permit reopening deliberations upon a finding that the jurors' *reasons* for voting guilty were incorrect. However, this interpretation conflicts with other settled law. A statement by a juror giving the reasons for his own vote, or that reports statements by another juror regarding the reasons for the other juror's vote, is inadmissible under Evidence Code section 1150 for purposes of impeaching the verdict. (Evid. Code, § 1150 ["No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."]; *People v. Lewis* (2001) 26 Cal.4th 334, 388-389; *People v. Hedgecock* (1990) 51 Cal.3d 395, 419.)

Applying these principles, no abuse of discretion occurred in this case. There was nothing in the *verdicts* as to appellants that would indicate the jurors had misunderstood or misapplied the law. (See *People v. Bonillas, supra,* 48 Cal.3d at p. 769.) Instead, appellants impermissibly speculate that the jurors' reasoning in reaching verdicts as to them was incorrect. (See Evid. Code, § 1150; *People v. Lewis, supra,* 26 Cal.4th at pp. 388-389.) Thus, section 1161 did not apply, and no abuse of discretion occurred.

Moreover, contrary to appellants' contention (SAOB 84-86; WAOB 264-266; BAOB 356-360, 375), there was nothing demonstrating the jury had misapplied or misunderstood the instructions regarding accomplices or the reasonable-doubt standard as they related to the evidence and charges against appellants. The jury's questions were asked in the context of attempting to break a deadlock over codefendant Settle's guilt after the jury was specifically asked to write down questions that might help it resolve the issue of codefendant Settle's guilt. Contrary to appellant Wheeler's contention that "four jurors (247, 113, 412, 261) were 'having problems'" (WAOB 264), the record shows the jury at no time was deadlocked 8 to 4. Instead, by the time the questions were sent to the court, the jury was deadlocked 11 to 1, having taken three to four ballots. (RT 17089-17094.) Thus, the trial court was correct that the jury's questions were aimed at assisting one remaining juror in the deliberations regarding codefendant Settle.

As the trial court stated, it appeared one juror believed Williams was an accomplice and was having problems with the issue of whether there was sufficient corroboration as to codefendant Settle's guilt. (RT 17105cc-17105dd.) Compared to appellants, there was less evidence offered regarding codefendant Settle's connection to the Bryant Organization and his movements at the exact moment of the shootings. And, compared to appellants, the corroborating evidence regarding codefendant Settle's participation in the

crimes focused more on his driving away in the green car after the murders. Further, there was nothing in the jury's inquiries indicating that the jury had any problems understanding or applying the law to the facts elicited regarding appellants.

Moreover, in the context of a jury deadlock as to the sole remaining defendant, the jury's questions regarding "reasonable doubt" were not indicative of a general misunderstanding of the reasonable-doubt standard but, instead, demonstrate that one juror had doubt about the guilt of codefendant Settle. Obviously, a juror who harbored doubt about the guilt of codefendant Settle would want reassurance that he was properly performing his duty such that he might ask for a further explanation of the term "reasonable doubt."

In light of the above, the trial court did not abuse its discretion in denying appellant Smith's motion pursuant to section 1161. Moreover, absent an error in the application of state law, appellants' constitutional claims also fail.

XII.

THE TRIAL COURT PROPERLY REJECTED APPELLANT BRYANT'S CLAIM OF MARITAL PRIVILEGE

Appellant Bryant contends the trial court erred in rejecting his claim of marital privilege regarding a statement he made to Tannis Curry while still married to her that he (appellant Bryant) was responsible for the pipe-bomb attack of Keith Curry's car and that he would do it again until Curry was dead. (BAOB 259-273.) Appellants Smith and Wheeler join in this claim. (SAOB 451; WAOB 435.) Respondent submits the trial court properly rejected appellant Bryant's claim of privilege, because the statement was not made "in confidence" within the meaning of Evidence Code section 980.

A. Relevant Proceedings

1. Trial Testimony

Tannis Curry, appellant Bryant's ex-wife, testified she moved out of appellant Bryant's Judd Street residence in November 1985. Within two months, Tannis took up residence in an apartment on Clybourn Street. While living on Clybourn, Tannis was having an "intimate relationship" with Keith Curry (i.e., living or spending evenings and nights together). After spending the evening with Tannis on March 14, 1986, Curry got into his car outside the apartment building and the car "blew up." Tannis took Curry to the hospital. (RT 13080-13082.)

Tannis denied she contacted appellant Bryant about the incident and further denied that appellant Bryant told her that "he put a pipe bomb under Curry's car and that he would do it again until Curry was dead." Tannis also denied that, shortly after the pipe-bomb incident, while having her hair done at Mrs. Liz Beauty Salon, she told Andrea (an employee of the salon) and Gwendolyn Derby (another customer) that she (Tannis) had contacted appellant

Bryant about Curry's car blowing up and appellant Bryant told her "he did the bombing and would do it again until Curry was dead." (RT 13083-13085.)

Gwendolyn Derby testified that, in early April 1986, while having her hair done at Mrs. Liz Beauty Salon, she had an "unusual" conversation with Tannis. Tannis, who was "upset" and "agitated," told her and Andrea that she (Tannis) had talked with "her ex" about the pipe-bomb incident on Curry's car and that "her ex" admitted he "had placed a pipe bomb underneath her current boyfriend's car" and that he would do it again "until he [the boyfriend] was dead." Derby, who was married to an arson investigator for the Los Angeles City Fire Department, was "startled" by the comment. (RT 13095-13098.)

2. Proceedings Held Outside The Presence Of The Jury Prior To The Trial Testimony

Prior to the above trial testimony, there were several hearings held outside the presence of the jury regarding appellant Bryant's claim of marital privilege as to the statement he made to Tannis. (See RT 11821-11842, 11961-11999, 12972-13006, 13051-13076.)

Tannis testified she married appellant Bryant in Las Vegas 1982 or 1983. She filed for divorce in "about 1986," and she thought she was actually divorced from appellant Bryant in 1986 or 1987. (RT 13055-13058.) Although she remembered filing for divorce, Tannis did not recall the length of the divorce proceedings. And, although she remembered moving out of appellant Bryant's Judd Street address and moving into an apartment on Clybourn, Tannis did not recall when she and appellant Bryant stopped living together. (RT 13059-13060.)

Tannis related that the pipe-bomb attack on Keith Curry's car occurred on the morning of March 15, 1986, after she and Curry, with whom she had been having an "intimate relationship," had spent the night together in her Clybourn Street apartment. Tannis denied she contacted appellant Bryant about

the pipe-bomb incident or that appellant Bryant told her that he put the pipe bomb under Curry's car and would do it again until Curry was dead. And, although Tannis recalled going to the Mrs. Liz Beauty Salon in April 1986, she did not remember telling Andrea (the person who did her hair) or Gwendolyn Derby (another customer whom Tannis said she did not know) that, shortly after the pipe-bomb incident, appellant Bryant told her that he had blown up Curry's car and would do it again until Curry was dead. (RT 13058-13060.)

Tannis described her relationship with appellant Bryant in 1986 at the time of the pipe-bomb incident as "friends." As explained by Tannis, "We were friends because of my daughter." Tannis denied she "share[d] this confidence" about the pipe-bomb incident with appellant Bryant. (RT 13060-13061.)

Records from the file regarding the dissolution of the marriage between appellant Bryant and Tannis revealed the following: (1) Tannis filed for divorce, and appellant Bryant "was served with process on the case" on September 29, 1983 (see RT 13067-13068); (2) the marriage was officially dissolved on May 13, 1986 (see RT 12973); and (3) Notice of Entry of Judgment regarding the dissolution of marriage was entered on September 2, 1986 (see RT 12973, 13067-13068).

3. The Trial Court's Ruling

The trial court rejected appellant Bryant's claim of marital privilege. It found that, although appellant Bryant and Tannis were married at the time of the challenged statement, under the facts of this case, the statement was not made "in confidence" within the meaning of Evidence Code section 980. (See RT 13067-10375.)[54/]

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54. Appellant Bryant's claim that the trial court predicated its ruling on dicta from *People v. Johnson* (1991) 233 Cal.App.3d 425 (BAOB 267-268) is incorrect. The trial court based its ruling on Evidence Code section 980 and the facts of the instant case, which demonstrate that appellant Bryant's statement

B. Legal Analysis

1. Appellant Bryant's Statement To Tannis Was Not Made "In Confidence" Within The Meaning Of Evidence Code Section 980

Evidence Code section 980 provides, in relevant part:

> a spouse . . . whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife.

For a communication to be made "in confidence" for purposes of Evidence Code section 980, the parties must intend nondisclosure and the facts must show that the parties had a reasonable expectation of privacy in the confidentiality of the communication. (See *People v. Cleveland, supra*, 32 Cal.4th at p. 744; *People v. Mickey* (1991) 54 Cal.3d 612, 654.) Both factors must be shown before invocation of the marital privilege will be honored. (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 221.) As this Court noted in *Cleveland*: "'While a communication between a husband and wife is presumed to be confidential, if the facts show that the communication was not intended to be kept in confidence, the communication is not privileged.'" (*People v. Cleveland, supra,* at p. 744.)

That is exactly what occurred in the instant case. Appellant Bryant's statement to Tannis was not a communication which was intended to be kept in confidence. Indeed, the exact opposite appears to be the case. The record supports the conclusion that appellant Bryant had no expectation of privacy in his statement and further his conduct demonstrated that he did not intend

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to Tannis was not made "in confidence" within the meaning of the statute. (RT 13067-13075.)

nondisclosure.

The following facts support the conclusion that appellant Bryant's statement to Tannis (i.e., that he was responsible for placing the pipe bomb underneath Keith Curry's car and would do it again until Curry was dead) was not made "in confidence": (1) appellant Bryant and Tannis had been involved in a protracted dissolution proceeding which was coming to an end after nearly three years; (2) appellant Bryant and Tannis were not living together as husband and wife and, according to Tannis, were "friends" only because of Tannis's daughter; (3) Tannis had commenced an intimate, live-in relationship with Keith Curry, who she eventually married; (4) appellant Bryant's statement was a "message-type" statement, which appellant Bryant intended Tannis to convey to Curry (in other words, it is simply unreasonable for a nearly ex-husband to expect that his statement that he would continue to pipe bomb the car of his estranged wife's live-in boyfriend and future husband until he was dead would be kept confidential and not related to the person at risk); (5) "it was no secret around the neighborhood what had happened to Mr. Curry and what the source of Mr. Keith Curry's problems were" (RT 13069); (6) appellant Bryant acknowledged to Pierre Marshall his responsibility and involvement in the crippling of Keith Curry as he mimicked the actions of a paraplegic; and (7) Tannis related the statement to others at the beauty salon.

Given the totality of the foregoing facts, the trial court quite properly rejected the claim of marital privilege, finding that appellant Bryant's statement to Tannis was not made "in confidence." As aptly explained by the trial court, "It sort of stretches the imagination that [the] statement . . . was something that [appellant Bryant] hoped for [Tannis] to keep a secret or expected would remain confidential." (RT 13069.) The trial court explained, "I am all for marital bliss. But one would not be able to expect any spouse in any marriage to keep [appellant Bryant's statement] secret, a plan to kill somebody. That

would . . . enable [Tannis's] boyfriend to then be killed. The statute specifically excepts statements like that from any claim of privilege." And, finally, the trial court noted, "I can't believe that the statute wants to take into consideration that type of behavior where a man is trying to kill the new boyfriend of his wife and then brags about it to her and says 'not only did I do it, but I will continue to do it until this guy is in his grave.'" (RT 13071.)

Moreover, appellant Bryant's contention that the trial court's rejection of his claim of marital privilege provided the factual predicate for the admission of other evidence relating to the attacks on Keith Curry (BAOB 269-272) is without merit. The trial court never ruled that admission of evidence that appellant Bryant had threatened Pierre Marshall by referring to the attack on Curry was contingent on eliciting evidence regarding appellant Bryant's statement to Tannis about the pipe-bomb attack of Curry's car. Appellant Bryant's threats to Marshall, which referenced another attack on Curry ("Remember how that nigger got paralyzed"), was an admission of appellant Bryant's involvement in that Curry attack, given that one of the purposes of appellant Bryant's meeting with Marshall was to discuss Marshall's relationship with Rolo, the wife of Jeff Bryant.

2. Harmless Error

Assuming arguendo the trial court erroneously rejected appellant Bryant's claim of marital privilege, any such error on the facts of this case was certainly non-prejudicial. Significantly, the jury was already aware from the testimony of Pierre Marshall that appellant Bryant claimed responsibility for the crippling of Keith Curry as he (appellant Bryant) mimicked the actions of paraplegic Curry and said "Remember how that nigger got paralyzed." Additionally, appellant Bryant's statement to Tannis really did not tell the jury anything it did not already know about appellant Bryant, namely, that appellant Bryant was a dangerous and violent individual who would maim, beat, or kill

any individual who crossed his path (i.e., Kenneth Gentry, Reynard Goldman, Francine Smith). Also, that the prosecution had already succeeded in connecting appellant Bryant to the attack on Curry was evidenced by the trial court's inquiry as to whether it was "absolutely imperative" to elicit Tannis's testimony on the point. (See RT 12976-12977.)

Furthermore, the evidence of appellant Bryant's guilt was truly overwhelming, quite apart from his statement to Tannis taking responsibility for the pipe-bomb attack of Keith Curry's car. The pipe-bomb attack on Curry's car, although serious, pales in comparison to the other evidence presented detailing a cold-blooded quadruple homicide, which included the murder of a cowering baby and the attempted murder of another baby. In sum, even if appellant Bryant's marital privilege claim had been upheld as to his statement to Tannis, it is simply inconceivable on the facts of this case that the jury would have reached any different verdict as to appellant Bryant under either the *Watson* or *Chapman* standards of prejudice. (*People v. Watson, supra*, 46 Cal.2d at p. 836; *Chapman v. California, supra*, 386 U.S. at p. 24.)

XIII.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING INTO EVIDENCE THE PHOTOGRAPHS OF THE FOUR VICTIMS

Appellants contend the trial court abused its discretion as a matter of law under Evidence Code section 352 by admitting into evidence photographs of the four murder victims. Appellants argue the error violated their rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and comparable provisions of the California Constitution. (BAOB 300-311; SAOB 236-246; WAOB 435.) Respondent submits the trial court properly exercised its discretion in admitting the photographs, and, in any event, any error was harmless.

A. Relevant Proceedings

Appellants objected to the prosecutor showing photographs of victims Loretha Anderson and baby Chemise during opening statement on the ground the photographs were inflammatory and prejudicial. The trial court overruled the objections. (RT 8078-8079.)

Prior to the medical examiner's testimony, appellants agreed to stipulate to the identity of the bodies of victims Armstrong and Brown. (RT 8260-8261.) Appellants noted that some photographs the prosecution intended to use depicted portions of scalp and hair recovered at the crime scene. They offered to stipulate that the scalp and hair belonged to Brown. (RT 8265-8266.) As to the photographs of Brown's decomposed body, which depicted various handgun or shotgun wounds, appellants noted that the body may have been eaten by animals and that "we're not contesting either the number [of gunshot/shotgun wounds] or where those wounds were sustained." (RT 8267.)

The prosecutor argued that the photographs were necessary to illustrate the medical examiner's testimony and the prosecution's theory about where and how each victim was killed. In particular, the photographs of Brown's body were necessary to illustrate the medical examiner's testimony regarding the trajectory and angle of the bullets for purposes of illustrating that Brown had been wounded with two shotgun blasts in the entryway of the Wheeler Street residence, survived, and then was fatally shot with a handgun in a car. The photographs illustrated that, despite the decomposition, Brown suffered multiple shotgun wounds and two close-range handgun wounds. (RT 8267-8271.)

Appellant Smith also objected to a photograph of baby Chemise's body. The prosecution argued that the photograph was necessary to explain that, given her body position, one bullet could cause two sets of entry and exit wounds and that her position of being seat-belted in the car when she was shot at close range demonstrated the deliberateness of her murder. Appellant Smith objected to photographs of Anderson's body in which her face and breast were visible, arguing the photographs were repetitive and inflammatory. (RT 8271-8274.)

The trial court overruled the objections to the photographs with the exception of a photograph of baby Chemise's spinal column and a repetitive photograph of Anderson. The court found the photographs were relevant to illustrate the medical examiner's testimony and had probative value. The court further noted that the potential for prejudice had been reduced by voir dire and could be further reduced by appropriately admonishing the jury prior to the medical examiner's (Dr. Ribe's) testimony. (RT 8275.)

Thereafter, prior to Dr. Ribe's testimony, the trial court admonished the jury as follows:

> You are going to be allowed during the testimony of Dr. Ribe to view some photographs that he is going to describe for you, photographs of

the four decedents in this case. The photographs are not given to you with the idea of inflaming you or trying to affect you emotionally, but because the court feels there is some relevance to the photographs that is not outweighed by any potentially damaging effect by your seeing the photographs. I want you to keep in mind that they are simply evidence like every other piece of evidence in this case.

(RT 8277.)

During Detective Vojtecky's testimony, appellants objected to other photographs depicting the bodies of Armstrong and Brown as they were found in Lopez Canyon (Peo. Exhs. 46, 47) on the ground they were cumulative and unduly inflammatory. The court sustained an objection to a photograph that showed "a skeletal grimace" (Peo. Exh. 47a) but overruled objections as to the remaining photographs. (RT 8716-8717, 8720.)

At the close of the People's case-in-chief, the prosecution moved to have all exhibits admitted into evidence. (RT 13681, 13688.) The parties agreed that objections to the exhibits would be deemed to have been made by all defendants. (RT 13796.) The trial court overruled a relevance objection to the admission of X-rays of baby Chemise (Peo. Exh. 4) that were used in conjunction with Dr. Ribe's testimony. (RT 13795-13796.) A relevance objection was made to the admission of photographs of baby Chemise's wounds (Peo. Exh. 5). The court overruled the objection, because the evidence illustrated the medical examiner's testimony regarding how Chemise was bent over when she was shot. Appellants argued that two photographs of Chemise's head (Peo. Exhs. 5a, 5b) would have a prejudicial effect. The court overruled the objection because, although a child's death "is going to have a certain impact," there was no blood depicted and the photographs were "far from the most graphic photographs the court has seen." (RT 13796-13798.)

Appellants objected to the autopsy photographs of Armstrong and Brown (Peo. Exh. 8) if certain photographs taken at Lopez Canyon (Peo. Exh. 29) were not excluded. The court sustained the objections as to some of the photographs (Peo. Exhs. 29f, 29j) that were cumulative. (RT 13798-13801.)

Appellants objected to photographs of Armstrong (Peo. Exh.12) on the ground they were prejudicial because they depicted decomposition and were cumulative. The court ruled that, with the exception of one cumulative photograph (Peo. Exh. 12c), the photographs were admissible, particularly where some mistakes had been made in an earlier autopsy and the missing abdomen made it difficult to determine the exact injuries causing death. (RT 13802-13804.)

Appellants objected to photographs depicting Brown (Peo. Exh. 16), with the exception of two photographs depicting "muzzle stamping" (Peo. Exh. 16i, 16e). (RT 13804-13805.) The court impliedly overruled the objection. (RT 13859.)

Appellants objected to an X-ray and a photograph of a piece of scalp found at the Wheeler Street residence (Peo. Exhs. 19a, 19b) and to photographs of the scalp piece being matched to Brown's head (Peo. Exhs. 19c, 19d). The court sustained the objections to two of the photographs (Peo. Exhs. 19c, 19d). (RT 13805-13806.)

The trial court overruled the defense objection to photographs depicting Brown and Armstrong as they were found in Lopez Canyon (Peo. Exh. 46). Appellants also objected to close-up photographs of Brown and Armstrong in Lopez Canyon (Peo. Exh. 47) with some exceptions (Peo. Exhs. 47d, 47i, 47h). The court overruled most of the objections and permitted photographs depicting the clothing, shoes, watch, and tattoo on Armstrong (Peo. Exhs. 47b, 47c, 47f, 47g, 47h, 47i) and a photograph depicting Brown's scalp wound (Peo. Exh. 47e). The court noted that the parties had not stipulated to the identity of the

bodies found in Lopez Canyon and, therefore, did not change its ruling that the probative value of the photograph was not substantially outweighed by the prejudicial effect. (RT 13809-13813.)

B. The Trial Court Did Not Abuse Its Discretion

Initially, to the extent appellants failed to object in the trial court to the admissibility of the photographs (or X-rays) of the four murder victims on the ground of Evidence Code section 352 (see, e.g., RT 13795-13796 [appellants raise relevance objection to X-ray of baby Chemise but do not raise an objection under Evidence Code section 352]), their claims of error are waived on appeal. (Evid. Code, § 353, subd. (a); *People v. Raley, supra*, 2 Cal.4th at p. 892.) In any event, the trial court did not abuse its discretion under Evidence Code section 352.

When an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh the probative value of the evidence against the dangers of undue prejudice, confusion of issues, and undue consumption of time. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) The "prejudice" referred to in Evidence Code section 352 refers to evidence "which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) "Prejudicial" is not synonymous with "damaging." (*Ibid.*) Evidence Code section 352 is not intended to avoid the "prejudice or damage to a defense that naturally flows from relevant, highly probative evidence," but instead is intended to prevent "prejudging" a person or cause on the basis of extraneous factors. (*People v. Zapien, supra,* 4 Cal.4th at p. 958.)

A finding as to the admissibility of evidence is left to the sound discretion of the trial court and will not be disturbed on appeal unless it constitutes a manifest abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 371.) Appellate courts rarely find an abuse of discretion under Evidence

Code section 352. (*People v. Ramos* (1982) 30 Cal.3d 553, 598, fn. 22, reversed on other grounds in *California v. Ramos* (1983) 463 U.S. 992.)

Appellants contend the photographs of the victims were not sufficiently probative to justify their admission to illustrate the nature of the wounds or to prove the prosecution's theory that all of the victims were intentionally and deliberately executed. In particular, appellants contend the photographs were inadmissible, because appellants were not contesting that the shootings were deliberate and because intent to kill was proven by the infliction of multiple injuries. (See BAOB 307-308; SAOB 244.) Appellants are incorrect.

The parties to a criminal proceeding are not required to rely solely on oral testimony when presenting their case. (*People v. Pride* (1992) 3 Cal.4th 195, 243.) Physical evidence, such as photographs, may be introduced to substantiate oral testimony. (*People v. Price* (1991) 1 Cal.4th 324, 433-435.) "Generally, photographs that show the manner in which a victim was wounded are relevant to the determination of malice, aggravation and penalty." (*People v. Wader* (1993) 5 Cal.4th 610, 655; see also *People v. Farnam* (2002) 28 Cal.4th 107, 186.) Prosecutors are not obliged to prove their case with evidence solely from live witnesses, and the jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case. (*People v. Gurule* (2002) 28 Cal.4th 557, 624; *People v. Scheid* (1997) 16 Cal.4th 1, 16.) Phrased another way, "[e]vidence does not become irrelevant simply because other evidence may establish the same point." (*People v. Smithey* (1999) 20 Cal.4th 936, 973; see also *People v. Box, supra*, 23 Cal.4th at p. 1199 ["the prosecution was not obligated to accept antiseptic stipulations in lieu of photographic evidence'"]; *People v. Weaver* (2001) 26 Cal.4th 876, 933 ["The state is not required to prove its case shorn of photographic evidence merely because the defendant agrees with a witness or stipulates to a fact" and "[T]he jury was entitled to see the physical details of

the crime scene and the injuries the defendant inflicted on his victim[]."].)

Here, the prosecution's theory was that all of the victims had, in essence, been executed -- that Brown, Armstrong, and Anderson had all been wounded by shotgun blasts, after which they were fatally wounded with closer-range shotgun or handgun wounds, and that baby Chemise was killed while seat-belted in a car cowering away from the shooter when a shot was fired from less than a foot away. Although unpleasant, the state of decomposition of Armstrong and Brown, and the missing section of Armstrong's abdomen, factored into the medical examiner's opinions regarding which of the several wounds suffered by each victim were fatal and inflicted at close-range. Similarly, the medical examiner was required to explain how Chemise could receive multiple entry and exit wounds from one bullet based on her position of being bent over and cowering away from her killer when she was shot. The medical examiner also needed to explain how some of the wounds on Anderson were consistent with shotgun blasts fired through window glass, whereas other wounds were direct. In light of the above, the trial court did not abuse its discretion when it determined that the photographs were highly probative in illustrating the medical examiner's testimony.

Similarly, the photographs of Brown and Armstrong as they were found in Lopez Canyon were highly probative, because they depicted the victims wearing the clothes they were last seen wearing on the day of the murders. Further, photographs of Brown's scalp wound and photographs of Brown and Armstrong being found together were highly probative in establishing the link with the murder scene on Wheeler Street. As noted by the trial court, the parties had not stipulated that the bodies found in Lopez Canyon were those of Brown and Armstrong. Accordingly, the trial court did not abuse its discretion in admitting the photographs of Brown and Armstrong's bodies as they were discovered in Lopez Canyon.

Appellants contend the trial court abused its discretion by admitting photographs of Brown's scalp found at the Wheeler Street residence, because the prosecutor had argued their admissibility to rebut a theoretical self-defense claim that was never actually made by appellants. (BAOB 307; SAOB 243.) Appellants also contend the trial court abused its discretion, because the prosecutor argued that photographs of Brown were relevant to prove that he had been shot in the doorway with shotguns and was later killed by handgun shots in a car. (SAOB 243.) As to these contentions, only one photograph of the scalp piece at Wheeler Street was actually admitted, along with an X-ray. Two photographs showing the scalp piece being matched to Brown were excluded. (See RT 13805-13806.) Regardless of whether the prosecutor was incorrect by stating that Brown was shot with a handgun in a car, the photographs were still highly probative to illustrate the medical examiner's testimony. Similarly, the one photograph of a scalp piece found at the Wheeler Street entrance was probative to illustrate how Brown had been wounded there and to link the body in Lopez Canyon to the Wheeler Street murder scene.

Appellants further contend that the photographs were unduly prejudicial. Without specifying which photographs they are referring to, appellants contend that the photographs were inherently prejudicial absent some mitigation like the bodies being cleaned up or displayed in a clinical setting (BAOB 308; SAOB 244-245) or because the oral testimony was more important than the photographs illustrating it (BAOB 309). Appellants are incorrect.

This Court often has observed, "victim photographs and other graphic items of evidence in murder cases always are disturbing. [Citation.] [Citations.]" (*People v. Smithey*, *supra*, 20 Cal.4th at p. 974.) As this Court has recognized, "'[M]urder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant.'" (*People v. Pierce* (1979) 24 Cal.3d 199, 211; see also *People v. Riel* (2000) 22 Cal.4th 1153,

1194.)

Here, there was nothing inherently prejudicial about the prosecutor illustrating the testimony of Dr. Ribe and Detective Vojtecky with relevant photographs of what they observed. Moreover, numerous photographs of which appellants now complain were taken in the "clinical setting" of the medical examiner's office. For example, the autopsy photographs of baby Chemise's head were not bloody. Similarly, the autopsy photographs of Brown, Armstrong, and Anderson were "clinical," given that they displayed the victims' wounds without the addition of more graphic autopsy procedures. Significantly, the trial court excluded a photograph of baby Chemise's removed spinal column.

As to the decomposition of the bodies of Brown and Armstrong, appellants appear to argue that decomposition renders the photographs per se inadmissible. However, the effect on a human corpse of four days of exposure to the elements is hardly the type of evidence that "uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Karis, supra,* 46 Cal.3d at p. 638.) This is particularly true where the trial court excluded photographs depicting a "skeletal grimace" caused by decomposition and, instead, limited the evidence to the wounds at issue in the trial.

In sum, in light of the testimony, including that of the investigating officer and the medical examiner detailing the condition of the crime scene and the victims, "the photographs were not so gruesome as to have impermissibly swayed the jury." (*People v. Smithey, supra,* 20 Cal.4th at p. 974.) Thus, the trial court properly found the probative value of the photographs was not substantially outweighed by their potentially prejudicial effect and did not abuse its discretion as a matter of law under Evidence Code section 352 in admitting them into evidence. (See *People v. Taylor, supra*, 26 Cal.4th at pp. 1168-

1169.) Because no abuse of discretion occurred, appellants' constitutional claims also fail. (*People v. Cole, supra,* 33 Cal.4th at p. 1198, fn. 10.)

C. Any Error Was Harmless

Even assuming arguendo the trial court abused its discretion in admitting the photographs, the admission of the photographs was harmless under *People v. Watson, supra*, 46 Cal.2d at p. 836. (See *People v. Scheid, supra*, 16 Cal.4th at p. 21.) Prior to Dr. Ribe's testimony, the trial court noted that any potential for undue prejudice had been reduced by voir dire. Moreover, the jury was expressly instructed that the photographs were not "given to you with the idea of inflaming you or trying to affect you emotionally." (RT 8275, 8277.) All of the photographs served to *illustrate* testimony that the jury was otherwise presented. Thus, the photographs were no more inflammatory than the descriptions provided by the witnesses. Given that appellants do not challenge the substance of the testimony of Dr. Ribe and Detective Vojtecky, it is not reasonably probable the jury would have reached a different result had some or all of the photographs not been introduced.

Contrary to appellant Smith's argument (SAOB 246), the trial court *excluded* a photograph showing a "skeletal grimace" (RT 8720). Similarly, although appellants Smith and Bryant refer to all photographs of Brown and Armstrong as depicting "maggot-infested" bodies (BAOB 310; SAOB 246), the record suggests that only one photograph of Brown's scalp wound (Peo. Exh. 47e) depicted maggots. (RT 13810-13813.) Thus, the photographs the jury viewed were not so extreme that a different result was reasonably probable had the photographs not been admitted.

Finally, in light of the overwhelming evidence in this case, particularly the testimony of James Williams and all of the evidence which corroborated his testimony (see Arg. XI), any error in the admission of the photographs was harmless as to all appellants.

XIV.

IT DOES NOT APPEAR THE TRIAL COURT ASKED APPELLANT BRYANT A QUESTION DURING CROSS-EXAMINATION; AND, EVEN ASSUMING IT DID, THE ISSUE HAS BEEN WAIVED BY APPELLANT BRYANT'S FAILURE TO OBJECT TO THE QUESTION

Relying on an obvious typographical error in the Reporter's Transcript, appellant Bryant maintains his state and federal constitutional rights were violated because the trial court improperly asked him a question during cross-examination which demonstrated the trial court was partial and disbelieved his testimony. (BAOB 312-315.) Appellants Wheeler and Smith join in this claim. (WAOB 435; SAOB 451.) Respondent submits the question to which appellant Bryant refers was asked by the prosecutor, not the trial court, even though the record indicates the question was asked by the trial court.

Respondent quotes at length from the prosecution's recross-examination of appellant Bryant so that the issue can be properly evaluated by this Court:

BY MR. MCCORMICK:

Q A number of times when I asked you questions, you said that that happened seven or eight years ago, and you just couldn't remember the answer; correct?

A The answer to what?

Q A lot of my questions, you can't remember because so much time had passed that you just had no idea?

A If I couldn't remember certain things, I said that.

Q Is there some particular reason you remember that you purchased a car on [sic] January of 1983, that you had an accident in January of 1987, that you remember the date that you bought a house, you remember the date John bought a house, you remember the date Ely bought a house, you remember the date that Jeff bought a house, you

remember the date that a pool hall was purchased, yet when I asked you questions you can't remember any of the details?

MR. JONES: Your Honor, I --

THE WITNESS: Did you ask me --

MR. JONES: I object as compound.

THE COURT: Overruled.

Go ahead.

THE WITNESS: Did you [sic] me any of those questions?

Q BY MR. MCCORMICK: Are you having selective memory problems?

A Absolutely not.

THE COURT: And you aren't selectively answering questions you choose to answer because you figure they're safe questions to answer?

A I'm answering the questions to the best of my ability *when you ask me and the other attorneys [ask me].*

Q You said that you weren't around during that time frame Leroy was talking about. What did you mean by that?

A Well, I didn't see a lot of the people. I made a point not to be around.

Q Why?

A Because it wasn't necessary. Why should I be around? If people were breaking the law, I want to be around as less as possible.

Q They were breaking the law at the Wheeler house, right?

A Yes.

Q So you went there every day to be away from it?

A No. I had to be there to be -- if I wasn't there, I wasn't going to get any money. So that's why I was there, but I was there as less as possible is what I am trying to say.

Q You weren't running things, were you?

A No, I wasn't.

Q And Jeff didn't want people sending him letters?

A No, he didn't.

Q So you were his filtering system?

A People would send me letters to try and get in touch with him.

Q So you were filtering information from other inmates and friends of Jeff into the system, into the prison system for Jeff?

A No, I wasn't filtering information in.

Q Well, people would send their information to Jeff through you; correct?

A They would try and get in touch with Jeff through me.

Q And if people wanted to send some information from prison to prison, they would contact you collect, and you could pass the information on to Jeff; right?

A Yeah, I passed information onto Jeff.

Q William Settle wasn't the filter for Jeff, was he, you were?

A William Settle had nothing to do with Jeff. Jeff had nothing to do with William Settle.

Q And Leroy Wheeler, he was another person who was the filtering system passing information to the jail to Jeff; correct?

A From his testimony, yes. I know nothing about that.

Q Why isn't Jeff visiting Leroy while Leroy is in prison?

MR. MCKINNEY: Objection, calls for speculation.

THE COURT: Overruled.

Go ahead.

THE WITNESS: I don't recall. He has never given me a reason. I guess they're friends.

Q BY MR. MCCORMICK: Jeff is giving you money?

A Yes, he's giving me money.

(RT 15491-15494, emphasis added.)

Appellant Bryant maintains the italicized question was asked by the trial court. However, given the answer to the question (". . . you . . . and the other attorneys"), it is rather obvious the court reporter erred in indicating the trial court was asking the question rather than the prosecutor. The trial court, of course, is not an attorney, and thus it is readily apparent from the answer that the question was asked by the prosecutor, not the trial court.

Should any doubt remain as to who asked the challenged question, one need only consider the entirety of the quoted record above to realize the court reporter erred in typing "The Court" rather than "Mr. McCormick [the prosecutor]" when the question was asked. To construe the record otherwise means the trial court was responsible for asking appellant Bryant 14 uninterrupted questions on cross-examination (see RT 15492-15493) -- even though appellant Bryant complains only about one -- before overruling an objection to its own question, at which point the questioning was resumed by prosecutor McCormick (see RT 15492-15494). Such an interpretation of the record, respondent submits, especially coupled with the fact appellant Bryant does not even contend the trial court asked appellant Bryant 14 uninterrupted questions on cross-examination covering three pages of Reporter's Transcript, is simply illogical. Respondent submits the question attributed to the trial court was due to court reporter error.

In any event, assuming, without conceding, the question appellant Bryant attributes to the trial court was, in fact, asked by the trial court, the issue has been waived, because appellant Bryant failed to object to the question in the trial court. Appellant Bryant did not object to the trial court's question on any ground, let alone on the ground that his federal and state constitutional rights

to due process would be violated. (See RT 1529.) Thus, this contention has been waived. (See *People v. Harris* (2005) 37 Cal.4th 310, 350 [the defendant "did not object to the trial court's questioning, thus making the claim not cognizable on appeal"]; *People v. Williams, supra*, 16 Cal.4th at p. 652; *People v. Hines* (1997) 15 Cal.4th 997, 1041 ["Defendant has not preserved the issue for appeal because he made no objection to any of the trial court's allegedly improper actions"].)

In any event, should this Court reach the merits, it must be assumed the jurors followed the trial court's instruction that

> I have not intended . . . by any questions that I may have asked . . . to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness. If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusions.

(CT 15537.) Finally, given the overwhelming strength of the prosecution's case and the weakness of appellant Bryant's defense, it is not reasonably probable the jury would have reached a different verdict had the trial court refrained from purportedly asking the challenged question. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

XV.

BY FAILING TO OBJECT IN THE TRIAL COURT, APPELLANTS HAVE WAIVED ANY CLAIM RELATED TO A JUROR ASSISTED DURING THE PROCEEDINGS BY A LISTENING DEVICE (I.E., A HEADSET) PROVIDED BY THE TRIAL COURT; IN ANY EVENT, APPELLANTS' CLAIMS ARE BASED ON SPECULATION RATHER THAN THE RECORD

Even though he did not object in the trial court, appellant Smith nonetheless maintains for the first time on appeal that it was improper for Juror No. 412 to sit as a juror since he was assisted during the proceedings by a listening device (i.e., a headset) provided by the trial court. Appellant Smith, joined by appellant Wheeler, speculates that the juror may not have heard all of the evidence and thus was not qualified to participate equally with the other jurors. Appellants also speculate that the juror's apparent ability to "lip read" created a possible danger the juror received information that other jurors did not. The juror's participation in the proceedings, maintain appellants, prejudicially violated their rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (SAOB 263-272; WAOB 435.) Unfortunately for appellants, they never objected on any basis whatsoever in the trial court and thus there is no trial court ruling for this Court to review. Stated differently, appellants have waived the claim by failing to raise the issue in a timely manner in the trial court. And, assuming arguendo the claim is properly before this Court, it must be rejected, because it is based on speculation, not the record.

A. Relevant Proceedings

Juror No. 412 was sworn as an alternate juror. (CT 14535; RT 7944-7947, 7949.)[55/] Immediately thereafter, the following exchange occurred:

PROSPECTIVE JUROR NO. 412: When court begins, do you use a microphone?

THE COURT: Well, I will, if you want me to. Do you have any hearing difficulty?

PROSPECTIVE JUROR NO. 412: Slightly. I have a little trouble understanding.

THE COURT: We will get one. I will get one turned on. We will have a device we can get for you, if you want, that you actually wear a little headset, microphone stands up over here and picks up everybody's voice and transmits directly to you. Would you like me to try and get that down and try it out?

PROSPECTIVE JUROR NO. 412: Well, I see a microphone here for the witnesses, and I guess they use that.

THE COURT: They do. Do me a favor, this goes for everybody, if you do not hear something during the trial, if you don't hear a question or answer that somebody has said, don't sit and try to figure it out. Raise your hand just like you did now, and we will have it read back or repeat it. It is better to nip it in the bud than trying to figure it out at the end of the case.

(RT 7947-7948.)

During the direct examination of Lucila Esteban, there was a discussion regarding whether the jurors could see the exhibits. The court mentioned that the hearing device for the juror who needed it was on its way. (RT 8473.)

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55. On February 21, 1995, Alternate Juror No. 412 replaced Juror No. 196 on the jury panel. (CT 14644.)

During Esteban's cross-examination, the trial court stopped the proceedings to set up the hearing device. The court made the following remarks to the juror:

> What you will find when you use this -- we will get hooked up right now. It is a headset; it's got volume control on it. When you are done, when you get your break, turn the volume all the way down; otherwise there will be a noise that comes through it. [¶] You will notice when anybody steps between this device and your headphone, there will be a little bit of static. It will cut out temporarily. And as soon as they get out of the line of sight, it will come back on.

(RT 8478-8479.)

Later, during the trial court's admonition to the jury regarding the use of transcripts in conjunction with a tape recording, there was a problem with the listening device. The juror interrupted the court to state that he had not heard part of what the court had said, that he could read lips, and that "You have to start all over again." The problem with the listening device was fixed. (RT 8510-8511.)

Before the testimony of Jennifer Dalton, when she was stating her name, there was a problem with the listening device. The juror said, "I read the lips. I got it." The trial court moved the listening device to the proper position, and the juror confirmed that he could hear through the headphones. (RT 10436-10437.)

During the penalty phase, prior to the presentation of a witness for appellant Bryant, the trial court told the juror that the battery for the headset had been recharged. The juror responded, "It was making funny noises, I guess, when the battery gets down." (RT 18059.)

B. Legal Analysis

1. Waiver

Appellants Smith and Wheeler did not object when the juror indicated after being sworn that he would like assistance hearing, did not object to the provision of the listening device or the timing of its arrival, did not object or seek any admonition when the juror indicated he could "lip read," did not raise any concern when the listening device needed to be fixed, moved, or recharged, and did not make any constitutional objection at any time to the participation of the juror in the proceedings. (See RT 7947-7948, 8473, 8478-8479, 8510-8511, 10436-10437, 18059.) Having failed to object on any ground or request any further admonitions, appellants have waived this claim. (See *People v. Ramos* (2004) 34 Cal.4th 494, 515 [claim of inadequate voir dire before dismissal of juror for cause waived where defendant did not object]; *People v. Turner* (2004) 34 Cal.4th 406, 437 [claim of inadequate response to juror question waived by failure to object]; *People v. Holloway* (2004) 33 Cal.4th 96, 126 [claim that trial court conducted inadequate inquiry into juror bias was waived by failure to object or seek further inquiry].)

2. Merits

Assuming, without conceding, the issue is properly before this Court, it should be summarily rejected since it is based on idle speculation, rather than the record. For example, appellant Smith speculates that, because of the juror's ability to "lip read," "it is *possible* that this juror received 'evidence,' arguments, and instructions different from the other jurors." (SAOB 263, 270, emphasis added.) Appellant Smith points to nothing in the record to support the conclusion the juror did, in fact, receive matters different than the other jurors. Appellant Smith also speculates that, because of the difficulties with the hearing device, the juror *may* not have heard all the evidence and thus was not

qualified to participate equally with the other jurors. (SAOB 263, 270.) Again, appellant Smith fails to support this claim with citations to the record. There is nothing in the record to support the conclusion this juror received "different" information than the other jurors. Finally, appellant Smith maintains, again without a shred of record support, that "it is *likely* this juror received less, additional, *and* different information from that received from the other jurors." (SAOB 271, first emphasis added, second emphasis original.) Respondent submits that "possibilities," "likelihoods," and "speculations" are insufficient to support claims raised on appeal. The claim should be summarily rejected on the merits.

XVI.

THERE WAS NO PROSECUTORIAL MISCONDUCT, PREJUDICIAL OR OTHERWISE, DURING THE GUILT PHASE OF THE TRIAL

Appellants Wheeler and Smith contend the prosecutor committed prejudicial misconduct during numerous instances at the guilt phase of the trial and violated their constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (WAOB 238-248; SAOB 221-235.) Most of the claims of misconduct are waived, and all of them have no merit. Moreover, even assuming misconduct, there was no prejudice in light of the insignificant nature of the misconduct, the trial court's instructions, and the overwhelming strength of the People's evidence.

A. The Prosecutor Did Not Assert False Facts In Closing Argument

Appellant Wheeler contends the prosecutor committed prejudicial misconduct in closing argument by asserting facts he knew or should have known were false. (WAOB 238-248.) The claim has no merit, because the prosecutor did nothing more than comment upon the state of the evidence.

During the People's case, Ladell Player, an employee of the Bryant Organization, testified that he met appellant Wheeler around 1986 and that he and appellant Wheeler sold narcotics in the Terra Bella apartments. (RT 10253, 10308.) In this own defense, appellant Wheeler testified that he was in custody outside of Los Angeles in 1986 and was not selling drugs at the Terra Bella apartments. (RT 13914-13916.)

In closing argument, the prosecutor referred to appellant Wheeler's testimony and stated: "Well, that is a fine defense, but nonetheless, he went to juvenile camp, and the juvenile camp had him in and out of custody." (RT 16481.) Defense counsel objected that the argument misstated the evidence. The court ruled: "There is no evidence. Jury is admonished to disregard." (RT

16481-16482.) The prosecutor continued:

> There is no evidence, no records to show when [appellant] Wheeler was in custody and when he was not. And if it was true he was in custody that entire time, how easy to show that. If there is any truth at all to that, how easy to show that. Oh, just take [appellant] Leroy Wheeler's word for it. [Appellant] Leroy Wheeler, the man lied to the police with every word he said, and lied to you a number of times. But take my word for that. Yeah, right.

(RT 16482.)

During appellant Wheeler's closing argument, defense counsel argued the case against his client was prosecuted in bad faith. (RT 16647.) Counsel pointed to the prosecutor's argument that the defense had not proven, with documentary evidence, that Player could not have met appellant Wheeler in 1986. Counsel argued that appellant Wheeler's juvenile records -- which the People had provided to the defense -- showed that appellant Wheeler was in custody in 1986. Following an objection by the prosecutor, counsel for appellant Wheeler acknowledged at a sidebar discussion that no evidence was presented that the People had provided the defense with appellant Wheeler's juvenile records. The court, thereafter, instructed the jury to disregard defense counsel's statement. (RT 16656-16658.)

The following day, outside the jury's presence, counsel for appellant Wheeler requested a mistrial, "a statement to the jurors" that appellant Wheeler was in custody in 1986, or permission to place appellant Wheeler's juvenile records into evidence. Counsel explained the juvenile records were not previously offered into evidence because they contained information which the jurors did not need and because the defense had not expected the prosecution to argue as it had. (RT 16691-16692.)

The trial court denied the motion. The court explained it had already instructed the jury that neither side was required to produce all documentary evidence or items suggested by the evidence. Also, during the presentation of evidence, the court had urged the parties to reach a stipulation on the subject of appellant Wheeler's incarceration, but the parties had not. Finally, the defense had presented the unrefuted testimony of appellant Wheeler that he was incarcerated in 1986. The defense could, therefore, argue to the jurors that the People had failed to refute appellant Wheeler's testimony, that the People incarcerate individuals, and, if they wanted records, they should have offered the records into evidence. (RT 16694-16695.)

A prosecutor's behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Hill, supra,* 17 Cal.4th at p. 819, citing *People v. Gionis* (1995) 9 Cal.4th 1196, 1214 and *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Hill, supra*, at p. 810, citing *People v. Espinoza*, *supra*, at p. 820.)

Argument is "traditionally vigorous and therefore accorded wide latitude." (*People v. Fierro* (1991) 1 Cal.4th 173, 212.) A prosecutor may comment upon the state of the evidence, including the failure of the defendant to introduce material evidence or to call witnesses. (*People v. Brown, supra*, 31 Cal.4th at p. 554; *People v. Boyette* (2003) 29 Cal.4th 381, 434; *People v. Mincey, supra,* 2 Cal.4th at p. 446.)

Here, the prosecutor did just that. The prosecutor argued that the defense had presented no documentary evidence to show when appellant Wheeler was in custody and when he was not. (RT 16482.) Read in context,

the prosecutor merely made the permissible argument, and did no more than emphasize, appellant Wheeler's failure to present material evidence. (*People v. Brown, supra,* 31 Cal.4th at p. 554.) Contrary to appellant Wheeler's suggestion (WAOB 244-245), the prosecutor did not argue that no documentary proof *existed* which revealed appellant Wheeler's history of incarceration. Rather, the prosecutor merely argued that the defense had failed *to present* such documentary evidence in its case. (See RT 16482.) There was no misconduct.

B. The Prosecutor Did Not Appeal To The Passions And Prejudices Of The Jurors

Appellant Smith contends the prosecutor improperly appealed to the passions and prejudices of the jurors in closing argument by describing the horrific nature of the Bryant Organization and referring to Armstrong's views about children. (SAOB 221-225.) These claims are waived. Moreover, the claims are without merit, because the prosecutor did nothing more than comment on facts in evidence.

Without objection, the prosecutor argued that the Bryant Organization had been a growing drug organization for over a decade and had used means, such as building fortified houses with cages, to prevent the police from seizing evidence. The prosecutor also argued that the Bryant Organization functioned by intimidating, threatening, and paying off witnesses, as well as by beating, blowing up, and killing people. (RT 16430N-16430T, 16475-16476, 16490-16491.)

The prosecutor also noted that, although Armstrong was a "hit man" for the Bryant Organization, he was a victim in this case. The prosecutor recounted Mona Scott's testimony that Armstrong loved children. (Compare RT 16430-O to RT 9513-9514.) The prosecutor also recounted Armstrong's statement to the investigating officers on the Gentry case that he (Armstrong) would never kill

children. (Compare RT 16430-O to Peo. Exh. 74 (see CT 14344-14345).) The prosecutor called this case a "horrible case" and described the acts committed by appellants as "evil." (RT 16430N.)

Initially, appellant Smith has waived his claim of misconduct. A defendant cannot complain on appeal of misconduct by a prosecutor at trial unless in a timely fashion, and on the same ground, he made an assignment of misconduct and requested the jury be admonished to disregard the impropriety. (*People v. Hill, supra,* 17 Cal.4th at p. 820; *People v. Sanchez* (1995) 12 Cal.4th 1, 66.) Here, because appellant Smith failed to object on the ground of prosecutorial misconduct in the court below and because he denied the trial court an opportunity to correct any error which allegedly occurred, appellant Smith has waived his claims of error on appeal.

Moreover, there was no misconduct. Appellant Smith claims the prosecutor's references to the nature of the Bryant Organization, as well as to the evidence regarding Armstrong's views on children, were intended to appeal to the jury's passions and prejudices. (SAOB 222-225.) The claim is without merit, because the comments were based on facts in evidence. (*People v. Panah* (2005) 35 Cal.4th 395, 463.) "The prosecutor cannot be faulted for misconduct because he referred to [facts in evidence] nor was he required to discuss his view of the case in clinical or detached detail." (*Ibid.*) Appellant Smith does not contend that the trial court improperly admitted the evidence of the nature of the Bryant Organization. For this reason, appellant Smith's citations to cases that discuss the propriety of the *admission* of gang evidence (see SAOB 225) are inapposite.

Additionally, there was nothing improper about the prosecutor's characterization of the case as "horrible" and the actions of appellants as "evil." And a fair view of the record supports the descriptions of the Bryant Organization as a threat to the community. "Prosecutors 'are allowed a wide

range of descriptive comment and the use of epithets which are reasonably warranted by the evidence' [citation], as long as the comments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury [citation]." (*People v. Farnam, supra,* 28 Cal.4th at p. 168.) In light of the record, the comments here were neither deceptive nor reprehensible, and they did not they deny appellant Smith a fair trial.

C. The Prosecutor Did Not Commit Misconduct In Attempting To Define "Accomplice" For The Jury

Appellant Smith argues the prosecutor tried to mislead the jury about the meaning of "accomplice." (SAOB 231-232.) The claim was not raised in the court below and is, therefore, waived on appeal. (*People v. Hill, supra,* 17 Cal.4th at p. 820.) Moreover, it has no merit.

In closing argument, the prosecutor argued that James Williams was not an accomplice because "he has to be subject to prosecution for exactly the same crimes, meaning he has to be guilty of these crimes." (RT 16505.) Following an objection that the prosecutor had misstated the law, the trial court instructed the jurors: "Well, he has to be shown to be an accomplice by the evidence, I think within, the confines of the court." (RT 16505.) Thus, any confusion caused by the prosecutor's brief attempt to explain the meaning of "accomplice" was cured by the trial court's prompt explanation to the jury. (RT 16505.) And the trial court later further instructed the jury that an "accomplice" was a person who was subject to prosecution for the identical offense charged against the defendants on trial. (CT 15510.) A fair reading of the record simply does not support the assertion that the prosecutor attempted to deceive the jury. Thus, there was no prejudicial misconduct resulting in a due process violation.

D. The Prosecutor Did Not Make Misrepresentations To The Trial Court

Appellant Smith argues that, during discussions held outside the jury's presence, the prosecutor made several misrepresentations to the trial court in order to persuade the court that various items of evidence were admissible. (SAOB 225-231.) This claim of misconduct was not made in the court below and is, therefore, waived on appeal. (*People v. Hill, supra,* 17 Cal.4th at p. 820.) Moreover, for the reasons discussed below, the claim has no merit.

1. Appellant Smith's 1987 Arrest

Appellant Smith argues that the prosecutor committed misconduct during the hearing on the admissibility of his 1987 arrest. (SAOB 225-227.) There was no misconduct.

Detective Lambert testified that the Bryant Organization packaged rock cocaine in half-ounce quantities and that a quarter of a kilogram of rock cocaine would be packaged in a larger bag containing 18 half-ounce smaller baggies. (RT 9960-9962.) During a hearing outside the jury's presence, defense counsel noted that, following appellant Smith's arrest in 1987, appellant Smith was found to possesses, among other things, 271 grams (i.e., a quarter of a kilogram) of rock cocaine in 18 individually wrapped baggies. Counsel said, "I think we may hear that this drug was in a form that is somewhat peculiar as we have heard testimony to cocaine that is packaged in a certain form of half wafers and half ounce quantities of rock that is related to the so-called 'Family.'" (RT 10034-10035.) Counsel added, "Now I don't know if that is the case or not" and "I assume we may hear testimony that one of the CHP officers who recovered it looked at it and will tell us what it looked like." (RT 10035.) In response, the prosecutor explained the CHP had recovered "18 one half ounce bindles [] in a larger bag similar to the evidence that [Detective] Lambert has testified about as a Bryant pattern of dealing narcotics." (RT

10036.) The trial court ruled that, based on appellant Smith's possession of a sellable amount of rock cocaine -- packaged in a manner that Detective Lambert had testified was common to the Bryant Organization -- the evidence of appellant Smith's narcotics dealing in 1987 was relevant to both motive and identity and was, therefore, admissible. (RT 10039-10040.)

Thereafter, consistent with the prosecutor's representation, CHP Sergeant Charles Lofton testified that, on the day of appellant Smith's arrest in 1987, appellant Smith possessed 271 grams (a quarter of a kilogram) of rock cocaine. The cocaine was packaged in a large bag containing 18 smaller baggies of approximately equal amounts (i.e., half ounces) of rock cocaine. (RT 10113-10114, 10119-10120.) The prosecutor did not deceive the court and did nothing to deny appellant Smith a fair trial. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819.) If defense counsel wanted to know if the half-ounce quantities of rock cocaine also resembled "half wafers," he had the opportunity to cross-examine Sergeant Lofton on that point. There was no misconduct.

2. Armstrong's Demands Of The Bryant Organization

Appellant Smith argues the prosecutor falsely informed the trial court that there was evidence that the Bryant Organization was aware of Armstrong's belief that the Bryant Organization "owed" him for the time he served in prison on the Gentry murder. (SAOB 227.) The claim has no merit. Although not from the sources indicated by the prosecutor prior to opening statements (see RT 7974-7978), the prosecution presented considerable testimony that Armstrong was making demands of the Bryant Organization. This evidence is summarized in Argument VIII(D) of this brief. Suffice it to say here that Reynard Goldman testified that he heard someone talking to codefendant Settle about the fact that Armstrong was making demands of the Bryant Organization. (RT 9276-9279.) Although Settle's response to this individual was limited to the case against codefendant Settle, the evidence of Armstrong's demands was

not. (RT 9281-9283.) There was no misconduct.

3. Photographs Of James Brown's Shotgun And Gunshot Wounds

Appellant Smith argues the prosecutor secured the admission of some of the photographs of James Brown's body by falsely arguing to the court that Brown was killed by a gunshot wound when he was transported away from the Wheeler Street residence. (SAOB 228-229.) There was no misconduct. The coroner testified that Brown suffered two *shotgun* blasts, neither of which was the cause of death. One shotgun blast was to Brown's back, fired from several feet away. The other was to the right side of his head, probably fired at close range, which tore away a part of his scalp and likely rendered him unconscious. (RT 8350-8357.) A large chunk of scalp with hair was recovered from the open exterior steel grated-type door at the Wheeler Street residence. (RT 8534-8541.) The coroner examined the specimen of the scalp with hair on it recovered from Wheeler Street with the hair still on Brown's head and opined there were "significant similarities" between the two. (RT 8366-8368.) The coroner further testified that Brown suffered two *gunshot* wounds. One of the gunshot wounds was to the center of Brown's chest and was the cause of his death. This wound had a "muzzle stamp," meaning a handgun was firmly placed against Brown's chest when fired. (RT 8369-8370.) The other gunshot wound was located in the abdominal wall, and there was some evidence of muzzle stamping on this wound as well. (RT 8372.)

In light of the evidence of the muzzle stamping (produced by the direct placement of a handgun to Brown's body), it was a fair comment on the evidence for the prosecutor to suggest that Brown was killed by a gunshot wound during his transportation away from the Wheeler Street residence (as opposed to the shotgun blasts in the iron cage at the Wheeler Street residence). The prosecutor did not deceive the court in arguing that the photographs of

Brown's wounds showed what happened to Brown both in the entrance way of the Wheeler Street residence and then during his transportation away from the residence.

4. Armstrong's 1983 Interview

Appellant Smith claims the prosecutor improperly argued (presumably to the jury) that Armstrong's 1983 statement to the police was true -- that Armstrong had worked with children and would not kill children even if he were paid two million dollars. (SAOB 228-229.) There was no misconduct. The prosecutor recounted Armstrong's police interview, the tape recording of which was played for the jury at trial. (RT 9417; see CT 14344-14345.) The prosecutor did not argue Armstrong's statements were true -- he argued only that Armstrong had admitted being a "hit man" but denied being willing to kill children. (RT 16430-O.)

E. There Was No Prejudicial Misconduct

Even where prosecutorial misconduct has been committed, reversal is not required unless the misconduct subjects the defendant to prejudice. (*People v. Warren* (1988) 45 Cal.3d 471, 480.) Prosecutorial misconduct is cause for a reversal only when it is reasonably probable that a result more favorable to the defendant would have occurred had the prosecutor refrained from the comment attacked by the defendant. (*People v. Milner* (1988) 45 Cal.3d 227, 245.) Whether there exists a reasonable probability of prejudice is determined by a review of the prejudicial nature of the misconduct and the weight of the evidence adduced at trial. (*People v. Parsons* (1984) 156 Cal.App.3d 1165, 1171.)

Here, appellants Wheeler and Smith suffered no prejudice as a result of the prosecutor's remarks in closing argument. The trial court instructed the jurors that statements of counsel are not evidence (CT 15459 [CALJIC No.

1.02]), that neither side was required to produce all documents mentioned or suggested by the evidence (CT 15476 [CALJIC No. 2.11]), and that the jurors should not be influenced by sympathy and passion (CT 15456-15457 [CALJIC No. 1.00]). The court also instructed the jurors on the law of accomplices. (CT 15510 [CALJIC No. 3.10].)

In addition, the challenged statements were made following the conclusion of a lengthy trial in which much evidence was introduced, and there is little likelihood the jurors were affected by the prosecutor's relatively brief and insignificant remarks in an otherwise lengthy argument. When viewed in context, the statements at issue were hardly so inflammatory as to distract the jurors from a thorough and reasoned evaluation of the evidence. (See *People v. Hawthorne* (1992) 4 Cal.4th 43, 61.) Moreover, overwhelming evidence was introduced as to each appellant's guilt. Any possible misconduct was, therefore, harmless. (See *People v. Hardy, supra,* 2 Cal.4th at pp. 172-173 [prosecutor "many times" pushed the limits of proper advocacy and occasionally crossed that line, but any misconduct could not have contributed to the verdict and was harmless in light of the overwhelming evidence of the defendants' guilt].)

XVII.

BECAUSE APPELLANT SMITH WAS A PROPERLY JOINED DEFENDANT WITH HIS CODEFENDANTS, HE WAS NOT ENTITLED TO AN INSTRUCTION THAT THE JURY WAS LIMITED TO THE EVIDENCE PRESENTED BY THE PROSECUTION DURING ITS CASE-IN-CHIEF IN DETERMINING HIS GUILT EVEN THOUGH HE DID NOT PRESENT AN AFFIRMATIVE DEFENSE

Near the end of the prosecution's case-in-chief, appellant Smith advised the trial court he would not be presenting an affirmative defense and thus asked the trial court to instruct the jury that it was limited to the evidence thus far presented by the prosecution in determining his guilt. (See RT 13890-13898.) Since appellant Smith's "defense" was that the prosecution failed to sustain its burden of proving appellant Smith guilty beyond a reasonable doubt, he requested from the trial court "an order to the jury that evidence from this stage forward [i.e., any defense evidence presented by the codefendants and any rebuttal evidence presented by the prosecution] would not be admissible against [appellant] Smith, but would be relevant and admissible only against the three co-defendants." (RT 13892.) Appellant Smith now claims, without citation of any controlling authority, the trial court erred in refusing his request for the instruction. (SAOB 282-288.) Appellant Wheeler joins in the claim. (WAOB 435.) Respondent submits that, because appellant Smith was a properly joined defendant with three codefendants, the trial court properly denied the request. (See RT 13890-13898.)

In Argument III, respondent discussed in considerable detail the reasons why it was proper to jointly try appellant Smith with codefendant Settle and appellants Wheeler and Bryant. Respondent will not repeat that discussion here. Suffice it to say, however, that section 1098 expresses a strong legislative

preference for joint trials[56] and that a "classic case" for a joint trial is when, as here, the defendants are charged with common crimes involving common events and victims. (See *People v. Cleveland, supra*, 32 Cal.4th at p. 726.)

> In light of this legislative preference for joinder, separate trials are usually ordered only in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.

(*People v. Box, supra*, 23 Cal.4th at p. 1195, internal quotation marks omitted.) Antagonistic defenses alone do not warrant severance, "even if the defendants are hostile or attempt to cast the blame on each other." (*People v. Hardy, supra*, 2 Cal.4th at p. 168.) And, "in order to obtain a severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." (*Id.* at p. 168.)

Because appellant Smith was a properly joined defendant and his request for a severance was properly denied (see Arg. III), he was not entitled to the type of instruction he requested below. The problem with appellant Smith's claim is that it fails to appreciate the difference between a single trial and a joint trial. Had appellant Smith been tried by himself and he rested without presenting a defense, then surely he might be entitled to the type of requested instruction holding the prosecution to the evidence it presented during its case-in-chief in determining his guilt. But that is not what happened here -- appellant Smith was in a joint trial with three codefendants. As aptly explained by the trial court:

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56. "Joint trials are favored because they promote economy and efficiency and serve the interest of justice by avoiding the scandal and inequity of inconsistent verdicts." (*People v. Coffman, supra*, 34 Cal.4th at p. 40, internal quotation marks omitted.)

THE COURT: No question, had there been only one jury, had you had a second trial, you would be right; *but that is like saying if a rhino had wings, he could fly. That is not where you are at. You are in a joint trial*, and my understanding of trial -- and, again, you don't have any case because I think you are not going to find any because there aren't any. That absent some reason to cut somebody out completely, *the jury will have the duty of evaluating each defendant's culpability or lack thereof individually based on a totality of the evidence received in the case*, absent only the evidence that the court has specifically for some reason limited to one defendant.

So, you may rest or not rest; that is your decision, but *your request that none of this evidence apply, none of the evidence we are about to hear apply to your client will be denied* absent a stipulation between the parties, if that is the case. If you want to work out something with the prosecution to that effect, then you certainly have the right to do so, I believe, to stipulate that certain evidence cannot touch your client. Absent that, the court will not make that order, *it is just not the law*.

(RT 13895-13896, emphasis added.)

Moreover, the trial court recognized that if the law were as appellant Smith maintained, then there would never be a need for severance of joined defendants:

THE COURT: I would say one more thing before I move on. The fact of that the appellate courts have recognized as a possible grounds for severance from conflicting defenses, I think answers a lot of your points. *In other words, there would be absolutely no need [for severance] if that were the law as you believe that to be, or as you believe that should be, to wit, that each defendant can choose which*

defense evidence applies to him. That would certainly not be the problem with conflicting defenses. For example, if a -- I think your only recourse is in arguing to make it clear what you are relying on and what you are not. If the defendant -- again, let's take [appellant] Wheeler here, and he got up and said I wasn't at Wheeler Street during the homicides, I was at home and not only that, [appellant] Smith was with me. And that might come off very well for the defense or very badly, depending on how believable [appellant] Wheeler was. *You would not be precluded from arguing to the jury, you should believe [appellant] Wheeler when he says my client was with him.* That argues for reasonable doubt. You might want to argue that was ridiculous, we are not relying on that defense, we are actually relying on weaknesses in the People's case. That is one of the down sides from the defense's point of view, of a joint trial.

(RT 13897-13898, emphasis added.)

In sum, appellant Smith's claim, which is not supported by any controlling authority, should be rejected, because he was a properly joined defendant in a multi-defendant case.[57/]

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57. Appellant Smith complains about certain evidence introduced after he rested which he claims was prejudicial. In Argument VIII(A)(5) of this brief, respondent discusses appellant Smith's legal challenges to Karen Flowers's statement to the police regarding the telephone number of Andre Armstrong. Also, respondent submits that, apart from the evidence about the telephone number Armstrong shared with appellant Smith, the case against appellant Smith was overwhelming.

XVIII.

THIS COURT HAS EXPRESSLY UPHELD THE STANDARD CALJIC JURY INSTRUCTIONS WHICH APPELLANTS CLAIM UNDERMINED OR DILUTED THE REQUIREMENT THAT APPELLANTS BE PROVED GUILTY BEYOND A REASONABLE DOUBT

Appellant Bryant, joined by appellants Smith and Wheeler, contends that numerous standard CALJIC jury instructions -- 1.00, 2.01, 2.02, 2.21.1, 2.21.2, 2.22, 2.27, 2.50, 2.50.1, 2.51, and 8.20 -- violated their rights to due process and a reliable death penalty determination by undermining the requirement that the prosecution prove guilt by proof beyond a reasonable doubt. (BAOB 392-410; SAOB 451; WAOB 435; CT 15456-15457, 15466-15467, 15482-15484, 15487-15490, 15492, 15524-15525.)[58/] Unfortunately for appellants, they have invited any possible error and/or waived this contention by requesting the instructions about which they now complain and/or by failing to object. More significantly, however, this Court has rejected the identical contentions raised by appellants, and appellants have not demonstrated any need for this Court to revisit its prior holdings.

Initially, any error was waived and/or invited as to all instructions except CALJIC No. 2.21.2, to which appellant Bryant requested a modification. (CT 14989-14990.) As to the other instructions, appellant Bryant *requested* that standard CALJIC Nos. 2.01, 2.02, 2.21.1, 2.22, 2.27, 2.50.1, 2.51, and 8.20 be given, and no objection was made by any party to these instructions. (CT 14974-14975.) As for CALJIC No. 2.50, appellant Bryant *requested* that the pattern instruction be given, along with a modification, unrelated to the instant claim. (CT 14991-14997.) It does not appear any appellant objected to

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58. Respondent has addressed issues relating to CALJIC Nos. 2.50 and 2.50.1 in Argument X(H) of this brief and issues relating to CALJIC No. 2.51 in Argument XX of this brief.

CALJIC No. 1.00.

Having requested all of the jury instructions with the exception of CALJIC Nos. 2.21.2 and 1.00, and not having raised the objections and/or the suggested modifications that appellant Bryant now contends should apply to the instructions, any error was invited and/or waived. (See *People v. Medina, supra,* 11 Cal.4th at p. 763 [invited error barred raising challenge to CALJIC No. 2.50.1 where defendant requested instruction].)

More significantly, however, as appellant Bryant candidly acknowledges (BAOB 405-406), the instructions about which he now complains have been held to be proper by this Court. Specifically, in *People v. Crew* (2003) 31 Cal.4th 822, 847-848 and *People v. Nakahara* (2003) 30 Cal.4th 705, 713-715, this Court rejected challenges, identical to the ones made here by appellant Bryant, to CALJIC Nos. 1.00, 2.01, 2.02, 2.21.2,[59] 2.22, 2.51, and 8.20. Contrary to appellant Bryant's contention (BAOB 406-407), this Court did not uphold the instructions solely on the basis that they were "saved" by giving CALJIC No. 2.90 but, instead, determined that there was no reasonable likelihood the jury misapplied the instructions in a way that would affect the burden of proof. (*People v. Crew, supra*, at pp. 847-848; *People v. Nakahara, supra*, at pp. 713-715.)

This Court has also rejected identical contentions like those made by appellant Bryant as to CALJIC Nos. 2.27, 2.50, and 2.50.1. As to CALJIC No. 2.27, appellant Bryant contends that it "was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts." (BAOB 403.) While appellant Bryant cites *People v. Turner* (1990) 50 Cal.3d 668, 697, for his observation that CALJIC No. 2.27 could be

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59. Although appellant Bryant also challenges CALJIC No. 2.21.1, his challenge to the instruction is nothing more than a challenge to CALJIC No. 2.21.2. (See BAOB 401.)

"improved" to "have a more neutral effect as between prosecution and defense," appellant Bryant fails to acknowledge that *Turner* held that CALJIC No. 2.27 does not mislead the jury when given with other instructions on the burden of proof. (*Ibid.*) *Turner* held: "We cannot imagine that the generalized reference to 'proof' of 'facts' in CALJIC No. 2.27 would be construed by a reasonable jury to undermine" the "much-stressed" principles regarding the burden of proof. (*Ibid.*) *Turner* was reaffirmed by this Court in *People v. Montiel* (1993) 5 Cal.4th 877, 941. *Turner* is thus dispositive, and appellant Bryant fails to demonstrate that it was incorrectly decided.

As to CALJIC Nos. 2.50 and 2.50.1, it is well-established that prior crimes or acts that are admitted into evidence for purposes of Evidence Code section 1101, subdivision (b), are subject to proof by a preponderance of the evidence. (See *People v. Carpenter, supra,* 15 Cal.4th at pp. 381-382.) In *Medina,* this Court held that CALJIC No. 2.50.1 correctly stated the law because "evidentiary facts" tending to establish the elements of a crime were subject to the preponderance of the evidence standard, whereas the "ultimate facts" or elements of the crime needed to be proved beyond a reasonable doubt. (*People v. Medina, supra,* 11 Cal.4th at pp. 763-764.) Thus, CALJIC Nos. 2.50 and 2.50.1 correctly state the law.

In sum, appellant Bryant cannot demonstrate that the jury was improperly instructed regarding the presumption of innocence and the meaning of reasonable doubt. And there is no need for this Court to revisit its prior decisions upholding the challenged instructions.

XIX.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON EFFORTS TO SUPPRESS EVIDENCE AND CONSCIOUSNESS OF GUILT

Appellant Bryant contends that instructions regarding evidence of consciousness of guilt prejudicially violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the parallel provisions of the California Constitution. Specifically, appellant Bryant contends that instructing the jury with CALJIC Nos. 2.05, 2.06, and 2.52, as well as a special instruction regarding refusal to submit a handwriting exemplar, were unfairly argumentative in favor of the prosecution and permitted the jury to draw an irrational permissive inference of consciousness of guilt. (BAOB 411-421.) Appellants Wheeler and Smith join in this claim. (WAOB 435; SAOB 451.) As discussed below, appellant Bryant waived and/or invited any error by failing to object and by requesting and/or drafting the majority of the instructions that he now claims are erroneous. Moreover, this Court has repeatedly rejected the identical claims as to the consciousness of guilt instructions.

A. Relevant Proceedings

Appellant Bryant requested the trial court instruct the jury with CALJIC No. 2.06 and further requested additional language referring to efforts to suppress evidence made by someone other than the defendant. The versions of CALJIC Nos. 2.05 (Efforts By Other Than Defendant To Suppress Evidence) and 2.06 (Efforts To Suppress Evidence)[60] that were given to the jury included

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60. The jury was instructed with CALJIC No. 2.05 as follows:

If you find that an effort to procure false or fabricated evidence was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt unless you also find that the

the language requested by appellant Bryant relating to efforts by other people to suppress evidence. The trial court, however, refused appellant Bryant's request to modify CALJIC No. 2.06 with the additional language: "You may not consider the defendant's suppression of evidence for any purpose unless you first determine that the suppression of evidence demonstrates a consciousness of guilt *as to the charged offenses*." The trial court noted, in part, that, under the facts presented at trial, the jury would not conclude that actions taken by appellant Bryant prior to the instant homicides (e.g., the bribery of witnesses to the Gentry murder) could be evidence of consciousness of guilt regarding the instant homicides. The only possible exception was the evidence that, *after* the homicides, appellant Bryant refused to give a handwriting exemplar, which could relate to both the homicides and drug sales. (CT 14974, 14983-14987; RT 16224-16225, 16252-16256.)

> defendant authorized such effort. If you find defendant authorized that effort, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(CT 15470.)

The jury was instructed with CALJIC No. 2.06 as follows:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by the intimidation of a witness, by an offer to compensate a witness, by destroying evidence or by concealing evidence, such attempt may be considered by you as to that defendant as a circumstance tending to show consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.
>
> If you find that such attempt was not made by the defendant, but by someone for the defendant's benefit, you may not consider such effort as tending to show the defendant's consciousness of guilt unless you find also that the defendant authorized such effort.

(CT 15471.)

Appellant Bryant's trial counsel drafted the following special instruction, which was adopted by the trial court, regarding handwriting exemplars:

> If you find that before this trial any defendant willfully failed and refused to provide handwriting exemplars, then as to that defendant you may consider such failure as a circumstance tending to prove his consciousness of guilt as to the fact that his handwriting appears on some or all of the documents admitted into evidence.

The trial court rejected the prosecutor's request to make the special instruction more specific such that it would inform the jury that it could infer consciousness of guilt regarding the charged murders. (CT 15472; RT 16256, 16316-16320.)

Codefendant Settle requested a special instruction regarding flight as consciousness of guilt, because he had testified to his motives for fleeing. The trial court suggested CALJIC No. 2.52 be given instead. Neither appellant Bryant's trial counsel, nor any other trial counsel, objected and, to the contrary, appellant Bryant's trial counsel suggested that CALJIC No. 2.52, be modified, such that the version ultimately given to the jury read:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of his guilt or innocence. Whether or not evidence of flight shows a consciousness of guilt, and the significance to be attached to such a circumstance, are matters for your determination.

(CT 15493; RT 16347-16350.)

B. Legal Analysis

Initially, appellant Bryant invited and/or waived all alleged errors by requesting the instructions, drafting the special instruction, and otherwise failing to make timely and specific objections. (See *People v. Valdez* (2004) 32 Cal.4th 73, 137 [failure to object to CALJIC No. 2.06 waived contention on appeal]; *People v. Farnam, supra,* 28 Cal.4th at p. 165 [failure to object that an instruction was an impermissible "pinpoint" instruction and/or violated the Sixth and Eighth Amendments waived claim on appeal]; *People v. Cooper* (1991) 53 Cal.3d 771, 831 [generally, invited error precludes the reversal of a criminal conviction where the record shows defense counsel's inducement of error was deliberate and motivated by a tactical decision].)

In any event, appellant Bryant's claims fail on the merits. Appellant Bryant characterizes CALJIC Nos. 2.05, 2.06, and 2.52, as well as the special instruction regarding handwriting exemplars, as "misleading, unsupported by the evidence" and "improper pinpoint instructions," which "unfairly highlighted evidence favorable to the prosecution" and allowed the jury to improperly infer his guilt for the instant offenses from conduct related to other offenses. (See BAOB 411-420.) This Court has repeatedly rejected similar claims. (See *People v. San Nicolas, supra,* 34 Cal.4th at pp. 666-667 [consciousness of guilt instructions proper regarding post-crime statements, even when defendant had confessed]; *People v. Coffman, supra,* 34 Cal.4th at pp. 102-103 [CALJIC Nos. 2.04 (Attempt To Dissuade A Witness) and 2.06 proper, even though not specific as to which counts they applied, because they do not direct the jury to infer guilt of all crimes charged]; *People v. Holloway, supra,* 33 Cal.4th at p. 142 [consciousness of guilt instructions neither argumentative nor fundamentally unfair]; *People v. Crew, supra,* 31 Cal.4th at pp. 848-849 [CALJIC Nos. 2.05 and 2.52 are not impermissible "pinpoint" instructions]; *People v. Yeoman, supra,* 31 Cal.4th at pp. 131-132; *People v. Boyette, supra,*

29 Cal.4th at p. 438 [CALJIC Nos. 2.03, 2.06, and 2.52 did not improperly endorse prosecution's theory or lessen its burden of proof in capital murder prosecution and were not improper pinpoint instructions]; *People v. Jackson, supra,* 13 Cal.4th at pp. 1223-1224.)

Consciousness of guilt instructions are proper, because:

> "[t]he instructions advise the jury to determine what significance, if any, should be given to evidence of consciousness of guilt, and caution that such evidence is not sufficient to establish guilt, thereby clearly implying that the evidence is not the equivalent of a confession and is to be evaluated with reason and common sense. The instructions do not address the defendant's mental state at the time of the offense and do not direct or compel the drawing of impermissible inferences in regard thereto."

(*People v. San Nicolas, supra*, 34 Cal.4th at pp. 666-667, quoting *People v. Crandell* (1988) 46 Cal.3d 833, 871.) In other words, "'[t]he cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory.'" (*People v. Holloway, supra,* 33 Cal.4th at p. 142, quoting *People v. Jackson, supra,* 13 Cal.4th at p. 1224.)

In *Yeoman*, this Court rejected appellant Bryant's argument (BAOB 418-420) that the consciousness of guilt instructions violate due process by creating a permissive inference that is not justified by reason and common sense in light of the facts proven to the jury. (*People v. Yeoman, supra,* 31 Cal.4th at pp. 131-132, citing *Francis v. Franklin* (1985) 471 U.S. 307, 314-315.) In *Yeoman*, this Court concluded that evidence that a defendant expressed a desire to remove his fingerprints from a murder victim's car after confessing to murdering the driver was a reasonable and common sense inference of consciousness of guilt. (*People v. Yeoman, supra*, at pp. 131-132.)

Here, as noted by the trial court, there was no possibility that the jury would infer that actions taken *before* the charged murders demonstrated consciousness of guilt as to the murders but, instead, related solely to consciousness of guilt for the prior incidents like the murder of Gentry or the attacks on Curry. As to the charged murders, reason and common sense supported an inference that appellant Bryant's post-crime conduct of refusing to provide a handwriting exemplar demonstrated consciousness of guilt for the murders. Thus, the instructions were proper.

Moreover, the flight instruction (CALJIC No. 2.52) was requested by codefendant Settle to assist him in arguing that his actions after the murders were motivated by fear, rather than consciousness of guilt. In contrast, appellant Bryant's contention that the prosecutor applied CALJIC No. 2.52 to argue that appellant Bryant "fled" to a "safe house" (BAOB 412, fn. 123) is not supported by the record. Instead, the prosecutor argued that, contrary to appellant Bryant's testimony in which he denied any connection to the drug organization, he was at the "safe house" owned by the Bryant Organization in the days after the murders and was involved in numerous telephone calls made from there to others involved in the crimes. In other words, the prosecutor did not argue that appellant Bryant's presence at the "safe house" demonstrated flight as consciousness of guilt; rather, he explained to the jury that the telephone records connected to appellant Bryant and the "safe house" demonstrated that he was in charge and had ordered the murders. (See RT 16430p-16430q, 16530, 16833-16838.) Thus, appellant Bryant's contentions regarding CALJIC No. 2.52 fail, because the instruction was inapplicable to the evidence and arguments at trial regarding his guilt.

This Court has also upheld consciousness of guilt instructions similar to the special instruction given regarding the refusal to submit a handwriting exemplar. In *People v. Cash* (2003) 28 Cal.4th 703, 740, the jury was

instructed with a modified version of CALJIC No. 2.06 that made specific reference to the defendant's in-court gesture of simulating a gun and pointing it at a witness. The instruction was held not to be argumentative where the jury was otherwise instructed that the defendant's conduct was "not sufficient in itself to prove guilt" and the weight and significance of the evidence was for the jury to determine. (*Ibid.*)

In *People v. Farnam, supra,* 28 Cal.4th at pages 164-165, this Court rejected the contentions that a modification of CALJIC No. 2.06 that made specific reference to the defendant's failure to provide hair and blood samples allowed a permissive inference that was not supported by the evidence and that such an instruction was an improper pinpoint instruction that favored the prosecution. *Farnam* found that, while the refusal to submit a sample could support an inference of consciousness of guilt, the fact that other inferences could be drawn from the evidence did not render the instruction improper but, instead, raised issues that could be argued to the jury. (*Id.* at p. 164.)

Here, the special instruction regarding handwriting exemplars instructed the jurors that they "may" consider the willful failure to provide a handwriting exemplar as a "circumstance tending to prove his consciousness of guilt as to the fact that his handwriting appears on some or all of the documents admitted into evidence." (CT 15472.) This instruction, when read with CALJIC No. 2.06, cannot be considered argumentative when the instruction does not direct a particular conclusion and informs the jurors that attempts to conceal evidence are not sufficient by themselves to prove guilt. (See *People v. Farnam, supra,* 28 Cal.4th at p. 165.) Thus, like in *Cash* and *Farnam*, the special instruction in this case was proper.

Finally, any error in the giving of the instructions was harmless under the *Watson* standard of prejudice. (See *People v. San Nicolas, supra*, 34 Cal.4th at p. 667.) The evidence of appellant Bryant's guilt was overwhelming. And,

as noted by appellant Bryant (BAOB 414), the jury would still have been instructed regarding circumstantial evidence pursuant to CALJIC Nos. 2.00, 2.01, and 2.02, such that the prosecutor could still have argued that the refusal to provide handwriting exemplars, the attempts to procure false testimony, and the acts of intimidation were circumstantial evidence of appellant Bryant's guilt *without* the benefit of the cautionary language in CALJIC Nos. 2.05, 2.06, and 2.52, that such evidence is not sufficient by itself to prove guilt. (See *People v. Holloway, supra,* 33 Cal.4th at p. 142 [even without consciousness of guilt instructions, jury would draw the same inference and prosecutor could argue guilt based on willful falsehood or suppression of evidence].) Similarly, the special instruction regarding the refusal to give a handwriting exemplar was beneficial to appellant Bryant, because it permitted the jury to draw an inference that he did not want to connect himself to the drug dealing evidence that would be introduced at trial, not just as consciousness of guilt of murder. In sum, any error in giving the instructions was harmless.

XX.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON MOTIVE WITH CALJIC NO. 2.51

Appellants Wheeler and Smith contend the trial court improperly instructed on motive with CALJIC No. 2.51 because this instruction: (1) impermissibly allowed the jury to find them guilty based solely upon motive; and (2) placed the burden on them to show absence of motive to prove innocence. They argue that giving CALJIC No. 2.51 therefore violated their constitutional rights to a jury trial, due process, and a reliable verdict in a capital case, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (WAOB 255-260; SAOB 278-281.) Respondent disagrees, as appellants Wheeler and Smith waived any error by failing to request clarifying language for this instruction. Moreover, this Court has repeatedly rejected the same claim on the merits, holding that CALJIC No. 2.51 neither impermissibly permits motive to suffice as guilt nor inappropriately places a burden on a defendant to prove innocence.

During discussion on jury instructions, the trial court announced its intention to give CALJIC No. 2.51 on motive. (RT 16188.) No appellant objected on any ground to this instruction at this time, nor during the entire discussion on the proposed jury instructions, nor during the giving of CALJIC No. 2.51. (RT 16188-16372, 16396.)

The trial court instructed the jury on motive with CALJIC No. 2.51, as follows:

> Motive is not an element of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to

which you find it to be entitled.

(RT 16396; see CT 15492.)

Initially, the contention that CALJIC No. 2.51 was misleading and constitutionally defective is waived. If appellants Wheeler and Smith "believed the instruction was unclear, [they] had the obligation to request clarifying language." (*People v. Rodrigues, supra,* 8 Cal.4th at pp. 1191-1192.)

Moreover, the claim lacks merit. This Court has repeatedly rejected the same challenges to CALJIC No. 2.51. (*People v. Crew, supra,* 31 Cal.4th at p. 848; *People v. Prieto* (2003) 30 Cal.4th 226, 254; *People v. Snow* (2003) 30 Cal.4th 43, 57.) "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson* (1992) 3 Cal.4th 926, 943.)

In *People v. Snow,* the defendant argued CALJIC No. 2.51 suggested to the jury that proof of motive alone could establish guilt as the instruction did not further caution the jury that proof of motive alone was insufficient to establish guilt. (*People v. Snow, supra*, 30 Cal.4th at p. 97.) This Court disagreed, noting:

> If the challenged instruction somehow suggested that motive alone *was* sufficient to establish guilt, defendant's point might have merit. But in fact the instruction tells the jury that motive is not an element of the crime charged (murder) and need not be shown, which leaves little conceptual room for the idea that motive could establish *all* the elements of the murder. When CALJIC No. 2.51 is taken together with the instruction on the concurrence of act and specific intent (CALJIC No. 3.3.1) and the instruction outlining the elements of murder and requiring each of them to be proved in order to prove the crime (CALJIC No. 8.10), there is no reasonable likelihood (*People v. Frye, supra*, 18 Cal.4th at p. 958) it would be read as suggesting that proof of motive

alone may establish guilt of murder.

(*Ibid.*)

Soon after *Snow*, in *People v. Prieto*, this Court rejected the contention that the phrase "tend to establish innocence" in CALJIC No. 2.51 led the jury to believe that the defendant had to establish his innocence. (*People v. Prieto, supra,* 30 Cal.4th at p. 254.) This Court reasoned,

> "CALJIC No. 2.51 [does] not concern the standard of proof . . . but merely one circumstance in the proof puzzle -- motive." [Citation.] "The instruction merely uses innocence as a direction signal or compass. It does not tell the jurors they must find innocence, nor does it lighten the prosecution's burden of proof, upon which the jury received full and complete instructions." [Citation.] Thus, no reasonable juror would misconstrue CALJIC No. 2.51 as "a standard of proof instruction apart from the reasonable doubt standard set forth clearly in CALJIC No. 2.90." [Citation.] Accordingly, the instruction did not violate defendant's right to due process.

(*Ibid*; accord, *People v. Crew, supra,* 31 Cal.4th at p. 848.)

Here, there is no reasonable likelihood the jury read CALJIC No. 2.51 as suggesting that proof of motive alone was sufficient to establish guilt of the first degree, special circumstance murders. First, the instruction told the jury that motive was not an element of the crimes charged, "which leaves little conceptual room for the idea that motive could establish all the elements" of the charged crimes. (*People v. Snow, supra*, 30 Cal.4th at p. 43.) Second, the instructions regarding murder and attempted murder outlined their elements and advised the jury every single element had to be proved. (CT 15522, 15530-15532.) Third, CALJIC No. 3.31 (Concurrence Of Act And Specific Intent) instructed the jury that, for murder and attempted murder, there had to be a concurrence of the act with a specific intent. (CT 15518.) Finally, the jury was

instructed on reasonable doubt with CALJIC No. 2.90 (CT 15502), so there is no reasonable likelihood the jury would construe CALJIC No. 2.51 as a burden of proof instruction. In light of this, there is no reasonable likelihood the jury read CALJIC No. 2.51 as appellants Wheeler and Smith suggest.

Not acknowledging this Court's prior resolution of these issues, appellants Wheeler and Smith argue that CALJIC No. 2.51 was "startlingly anomalous" in context because the court, in instructing the jury on other categories of evidence, admonished it that these categories were insufficient to establish guilt. (WAOB 257-258, citing CALJIC No. 2.05 (Efforts Other Than By Defendant To Fabricate Evidence), CALJIC No. 2.06 (Efforts To Suppress Evidence), and CALJIC No. 2.52 (Flight After Crime); SAOB 279-280, also citing CALJIC No. 2.03 (Consciousness Of Guilt -- Falsehood); see CT 15469-15471, 15493.) As persuasively explained by one Court of Appeal, however, CALJIC No. 2.51 is justifiably worded differently than the other referenced instructions:

> The motive instruction is similar to the referenced instructions in that it gives the jury guidance as to the significance of particular evidence. But the motive instructions differs from the others because it is given for the additional purpose of clarifying that motive is not an element of a crime. "Motive describes the reason a person chooses to commit a crime." [Citation.] It is not synonymous with intent. Although in law we recognize this distinction, in common usage the terms are often used interchangeably. CALJIC No. 2.51 points out that motive (unlike intent) need not be proved. Considering that the instruction is different in this way from the instructions to which defendant refers, there is nothing particularly startling or anomalous about the fact that it is phrased differently than the others.

(*People v. Petznick* (2003) 114 Cal.App.4th 663, 685.)

Thus, appellants Wheeler and Smith offer no good reason to revisit this Court's recent rejections of their claims in *Crew, Snow,* and *Prieto.*

XXI.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY PURSUANT TO CALJIC NO. 2.13

The trial court instructed the jury pursuant to CALJIC No. 2.13 as follows:

> Evidence that on some former occasion, a witness made a statement or statements that were inconsistent or consistent with his or her testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on such former occasion.
>
> If you disbelieve a witness' testimony that he or she no longer remembers a certain event, such testimony is inconsistent with a prior statement or statements by him or her describing that event.

(RT 16388, 18421-18422; CT 15478, 15810.)

Appellant Bryant, joined by appellants Wheeler and Smith, contends CALJIC No. 2.13 unfairly favored the prosecution, because it informed the jurors that they could consider prior inconsistent statements for their "truth," but not their "falsity." Appellant Bryant also maintains CALJIC No. 2.13 "strongly implied" that the prior inconsistent statements were, in fact, factual. Thus, in view of the number of prosecution witnesses who were impeached with prior inconsistent statements, appellant Bryant reasons, CALJIC No. 2.13 "unfairly affected the jury's evaluation of the prosecution witnesses' credibility" and thus "unfairly strengthened the prosecution's case against appellant [Bryant]." (BAOB 422.) As explained by appellant Bryant, CALJIC No. 2.13 "violated the Due Process Clause of the Fourteenth Amendment and California case law by impermissibly tilting the balance in favor of the prosecution with respect to the jury's evaluation of the credibility -- or lack thereof -- of many of its witnesses." (BAOB 422-428; SAOB 451; WAOB 435.) Respondent submits

this claim is without merit for two reasons: (1) appellants waived the claim by failing to raise it in the trial court; and (2) CALJIC No. 2.13 is a content-neutral instruction which does not favor either the prosecution or defense.

A. Waiver

Appellant Bryant did not object to CALJIC No. 2.13 being given, especially on the constitutional grounds he now raises. In particular, appellant Bryant did not request any clarifying or limiting language to CALJIC No. 2.13 regarding the phrases "truth" and "the facts," but rather sought only an addition to the instruction that would have instructed the jury that, prior to considering a prior consistent statement, the jury needed to determine that the statement was made prior to any bias or motive to fabricate arose. Appellant Bryant specifically represented to the trial court that he was *not* seeking to change the language of CALJIC No. 2.13, only to supplement it, as discussed above. Appellants Smith and Wheeler did not join appellant Bryant's request and did not otherwise object to CALJIC No. 2.13. (See CT 14970-14974, 14987; RT 16237, 16239, 16256-16262.) Thus, this contention has been waived. (See *People v. Guttierez* (2002) 28 Cal.4th 1083, 1134 [contention that CALJIC No. 2.13 was improper was waived where no limiting instruction was requested].) And, to the extent appellant Bryant affirmatively approved of using the language of CALJIC No. 2.13 without modification, any error was invited. (See *People v. Cooper, supra,* 53 Cal.3d at p. 831.)

B. Merits

Significantly, CALJIC No. 2.13 is a content-neutral instruction in that it applies to *any* witness -- prosecution or defense -- who is impeached with a prior statement. CALJIC No. 2.13 cannot be characterized as "one-sided" or somehow more favorable to the prosecution. Nothing in the instruction commanded the jurors to apply it solely to the prosecution's evidence. The

instruction refers to "a witness" without regard to whether the witness testified for the prosecution or defense. Moreover, the instruction states that the jurors *may* consider the evidence to test a witness's credibility or for its truth. Thus, there is nothing on the face of the instruction that commands the jurors to favor the prosecution or to find the prior statements to be true.

Appellant Bryant cites numerous examples of how the *evidence* favored the prosecution if the jury resolved credibility determinations against appellant Bryant and/or relied on prior statements of forgetful or evasive witnesses for their truth. (BAOB 424-426.) But what appellant Bryant fails to show is that there is anything in *the instruction* -- CALJIC No. 2.13 -- that unfairly favors the prosecution. Again, CALJIC No. 2.13 is a content-neutral instruction.

CALJIC No. 2.13 sets forth for the jurors the principles expressed in Evidence Code sections 780, 1235, and 1236 (i.e., that prior consistent or inconsistent statements may be considered to determine the truthfulness of testimony or for the truth of the matter asserted in the out-of-court statement). Notably, for prior statements to be admissible for their truth, the person who made the prior inconsistent statement must be given an opportunity to explain or deny the statements. (See Evid. Code, §§ 770, 1235.)

Given that CALJIC No. 2.13 explains to the jury the exception to the hearsay rule that prior inconsistent statements may be considered for their "truth" (see Evid. Code, §§ 1200, 1235), appellant Bryant's contention that CALJIC No. 2.13 is erroneous because it does not refer to "falsity" is illogical. (See BAOB 426.) CALJIC No. 2.13 on its face gives jurors the option of rejecting the prior statements (i.e., finding them false) and further instructs the jury that it can consider the prior statements for purposes of "testing the credibility" (i.e., the truth or falsity) of the witness. In addition, the jurors were instructed with CALJIC No. 2.20 that they could consider the "existence or nonexistence of a bias, interest or motive," as well as prior consistent or

inconsistent statements in determining the credibility (i.e., the truth or falsity of the testimony) of the witnesses. (CT 15480.) Thus, CALJIC No. 2.13 did not unfairly privilege the prosecution by not referring to the "falsity" of prior statements.

Not surprisingly, respondent has not found any authority holding that CALJIC No. 2.13 is an improper statement of law or that it unfairly favors the prosecution. This is so, respondent submits, because the instruction is neutral and equally applicable to both the prosecution and defense. Indeed, there are cases in which defendants contend the trial court erred by *not* giving CALJIC No. 2.13 sua sponte. (See *People v. Griffin* (1988) 46 Cal.3d 1011, 1026; *People v. Snead* (1993) 20 Cal.App.4th 1088, 1097.)

Appellant Bryant's reliance on *Wardius v. Oregon* (1973) 412 U.S. 470 is misplaced. (BAOB 423.) In *Wardius*, the United States Supreme Court held that an Oregon statute that prevented a defendant from introducing alibi evidence unless the prosecution was notified prior to trial violated due process, because Oregon did not provide defendants with reciprocal discovery regarding the prosecution evidence that could rebut the alibi defense. (*Id.* at pp. 473-475.) The United States Supreme Court found it to be fundamentally unfair to force a defendant to divulge the details of his or her defense while subjecting the defendant to the surprise of the prosecution's rebuttal evidence. (*Id.* at pp. 475-476.) Appellant Bryant seizes on language from *Wardius* that, "[a]lthough the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, . . . it does speak to the balance of forces between the accused and the accuser." (*Id.* at p. 475.) In essence, appellant Bryant contends that CALJIC No. 2.13, like the non-reciprocal discovery statute at issue in *Wardius*, was so advantageous to the prosecution that it was fundamentally unfair. Appellant Bryant is incorrect, because *Wardius* has no application to the instant contention.

The discussion in *Wardius* was limited to reciprocal discovery obligations in the context of a statute that completely barred a defendant from presenting an alibi defense if he or she failed to comply. Thus, on its face, *Wardius* concerned a rule that went to the very heart of a fair trial (i.e., the ability of the defendant to present a defense without unfair surprise). In contrast, CALJIC No. 2.13 does not prevent defendants from presenting a defense and is equally applicable to both the prosecution and defense. Obviously, defendants, as well as prosecutors, present evidence in the form of prior inconsistent or consistent statements and often argue to the jury that it is the prior statement that is accurate. Thus, *Wardius* is inapplicable, given that CALJIC No. 2.13 is, on its face, equally applicable and beneficial to both the prosecution and defense.

Appellant Bryant's reliance on *People v. Moore* (1954) 43 Cal.2d 517, 526-529, is likewise misplaced. In *Moore*, the Court considered whether a jury instruction on manslaughter, that made specific reference to the facts of the case and instructed the jury as to what would *not* be a justifiable use of force, was error because the instruction stated the law from the viewpoint of the prosecution. (*Ibid.*) The fact-specific instruction in *Moore* has no applicability to the neutral wording of CALJIC No. 2.13. Thus, appellant Bryant's claim must fail.

XXII.

THE TRIAL COURT PROPERLY SUBSTITUTED A JUROR AFTER VERDICTS HAD BEEN REACHED ON COUNTS 3 AND 4 AS TO APPELLANT BRYANT

Appellant Bryant, joined by appellants Wheeler and Smith, contends the trial court committed reversible error in substituting a juror after verdicts had been reached on counts 3 and 4 as to appellant Bryant. (BAOB 429-450; SAOB 451; WAOB 435.) Appellant Bryant argues "the trial court's erroneous rulings during guilt phase deliberations relating to the discharge of [Juror No. 77] and the taking of a partial verdict [on counts 3 and 4] requires reversal of appellant's convictions and sentence." As explained by appellant Bryant:

> The trial court erroneously allowed a juror it knew was suffering a disabling medical condition to deliberate and reach a partial verdict against appellant. The court also erred when it then recorded the partial verdict taken from the jury before the deliberative process was complete and thereafter substituted the disabled juror with an alternate juror. The court further erred when it failed to instruct the newly constituted panel to begin deliberations anew as to all counts.

(BAOB 429.) All of appellant Bryant's contentions are without merit.

A. Relevant Proceedings

The jury commenced deliberations on May 11, 1995. (CT 15206.) Six days later, before the jury had returned any verdicts, the trial court advised counsel that it had received the following note from Juror No. 77:

> Your Honor, on yesterday, I kept my appointment to see my doctor. She advised me to take a couple of days off and stay off my feet. She says I have two things wrong: first, my blood pressure was very high, 184 over 120. And I have a very severe case of arthritis. She says if my knees don't respond to the medication, I will have to go to have a knee

replacement. She wants me to keep my feet elevated the whole time. (RT 16895.) After conferring with counsel, the trial court decided to question Juror No. 77 to "find out the true nature of the problem." (RT 16906.) The following thereafter appears in the record:

THE COURT: How are you doing today?

JUROR NO. 77: I thought I was doing good.

THE COURT: We have been joined by Juror No. 77. The balance of the jurors are absent.

All right. Sir, I got your note, and I read it to the parties here. And, basically, it says that you went to the doctor, what, yesterday afternoon?

JUROR NO. 77: Six o'clock.

THE COURT: Okay, 6:00.

And your doctor told you you needed to take a couple of days off and elevate your leg --

JUROR NO. 77: Yes.

THE COURT: -- Basically; right?

Did she tell you, I mean, to stay home in bed or --

JUROR NO. 77: Mostly.

THE COURT: Yes?

JUROR NO. 77: And if the medication didn't do what they want it to do within the next six to eight weeks, I would probably have to have a knee replacement.

THE COURT: That's a rough thing to go through. They work. There is a judge in the building who is thinking about getting one, as a matter of fact. It is a real painful process, but once you get through it, it can make you as good as new. I hope you don't have to do it, but it really will work.

Did she tell you specifically how long -- she said a couple of days off. What does that mean, do you know?

JUROR NO. 77: Well, she told me to stay off my legs until after Friday. And I'm supposed to give her a call back to let her know how we are doing.

THE COURT: *So you are basically asking what, to be excused starting now for the rest of the week?*

JUROR NO. 77: *Yes.*

THE COURT: *Is there any guarantee that you will be back with us if we do that?*

JUROR NO. 77: *No.*

THE COURT: There isn't.

Let me ask this, again, just for the sake of the record. Is there any other problems that --

JUROR NO. 77: Yes. She also said that my blood pressure was completely up. It usually runs 180 over 90. Yesterday it was a 180 over 120. She said the 180 is okay; the 120 was far out of line.

THE COURT: The bottom one.

How long has the blood pressure been a problem? Is that just now --

JUROR NO. 77: No.

THE COURT: That's been a problem?

JUROR NO. 77: That's been a problem.

THE COURT: And you are taking something for that?

JUROR NO. 77: Yes, every day.

THE COURT: Is there anything else going on, in other words, is there any reason that you are having problems and need to get away from this case for a while?

JUROR NO. 77: No.

THE COURT: Or just the physical stuff?

JUROR NO. 77: That's it.

THE COURT: *No problems with the deliberation or what have you that causes you to want to be excused?*

JUROR NO. 77: *No.*

THE COURT: Well, I am going to speak to the parties, and I will let you know what we are going to do. The problem is the following: Obviously, we hate to take a break in the middle of the deliberations, you know, right at the end of the thing when everybody is talking. It if looks like we are going to have to replace a juror, sometimes it is better to do it sooner than later. The reason is this, you probably remember this from the voir dire, that if we replace a trial juror with an alternate juror during the deliberations, the jury has to be instructed to start all over again. So, the further we go into this deliberations, and then if somebody is excused, it is a lot of time we've lost because they're brought back in, and we have to tell them here is your alternate, and now we have to start all over. So I will have to give it serious thought.

What about you, do you have any feelings about what you want me to do other than give you the days off? You know your physical condition better than I do.

JUROR NO. 77: *Well, I do need the days off.*

THE COURT: *Do you think you will make it back, or you don't know?*

JUROR NO. 77: *I don't know.*

THE COURT: Is it hurting you pretty bad, in your leg?

JUROR NO. 77: After a full day it does.

THE COURT: It does.

Even sitting most of the day?

JUROR NO. 77: Yeah. Yeah, it does.

THE COURT: You've got to get it up in the air. Well, sorry to hear that.

How long have you had the knee problem?

JUROR NO. 77: I've had it now for about eight or nine years.

THE COURT: Did you hurt it, or just start getting --

JUROR NO. 77: Well, the thing is sometimes it goes and comes. But it seems to be progressively getting worse.

THE COURT: Okay. Let me see, is there anything else that anybody wishes to ask or have the court ask at this point?

MR. JONES: No, you Honor.

MS. HARRIS: No.

MR. NOVOTNEY: (Shakes head.)

THE COURT: Do me a favor, No. 77; go on back in the jury room and resume your deliberations. I will get back with you shortly and let you know what is going to happen.

JUROR NO. 77: All right.

THE COURT: Thank you.

(RT 16906-16910, emphasis added.)

Thereafter, outside the presence of Juror No. 77, the prosecutor commented that "if the court is inclined to excuse [Juror No. 77], I think there should be some inquiry as to find out whether they have reached verdicts. . . ." Appellant Bryant objected to excusing Juror No. 77 if partial verdicts were to be accepted by the court. The trial court ruled there was "good cause" to excuse Juror No. 77 in light of his medical condition and the uncertainty of his ability to return to deliberations. (RT 16910-16913.) The trial court indicated that, at the time it excused Juror No. 77, it would inquire as to whether the jury had

reached any verdicts. Appellant Bryant objected that any verdicts should be sealed and that deliberations should begin anew. (RT 16914-16916.)

When the jurors were assembled, the trial court informed them that Juror No. 77 would be excused from jury service for a severe medical problem. However, before excusing Juror No. 77, the trial court inquired of the jury foreman, "whether as to any of the counts or defendants, have there been *final verdicts* reached?" The foreman replied, "*yes*." The foreman advised the court that verdict forms as to two counts for one defendant had been filled out, but the foreman erroneously told the court that the jurors had not fixed the degree on those counts. Juror No. 77 was not excused at that time but rather was directed to return to the jury room with the other jurors and "sort of stand by for a couple of minutes" while the court conferred with counsel. (RT 16914-16919, emphasis added.)

Outside the presence of the jurors, the trial court and the parties discussed what to do if the verdicts had been filled out without fixing the degree. The trial court ruled that, to protect the record and given the possibility that the jurors may have been confused and actually reached "not guilty" verdicts, it would examine all jury forms *before* excusing Juror No. 77 and receiving partial verdicts. (RT 16917-16925.)

Thereafter, upon examination of the forms and questioning of the jury foreman, it was determined that the jurors had, in fact, reached guilty verdicts, including the fixing of degree, as to counts 3 and 4 against appellant Bryant. The jury foreman explained that these two verdict forms had been filled out *before* the trial court spoke to the jurors about excusing Juror No. 77 and he had been mistaken when he told the trial court that the jury had not fixed the degree as to those two counts. The jury foreman explained that, when he previously spoke to the trial court, he was thinking of the jury's current deliberations, not the forms that had already been filled out. Appellant Bryant objected to taking

the verdicts as interfering with the continuous deliberation process, as a denial of due process, and because Juror No. 77 did not give his "full attention" to the verdicts in counts 3 and 4 given his medical condition and his desire to be excused. Appellant Bryant requested that an alternate be seated and deliberations begin anew and also objected to excusing Juror No. 77 on the ground that there was not good cause to excuse him. (RT 16926-16933, 16938-16940, 16946.)

The trial court ruled that it would accept the verdicts on counts 3 and 4 as to appellant Bryant. In particular, the record shows that the verdicts had been reached *before* any discussion with the jurors about Juror No. 77, such that excusing him could not have impacted those verdicts. In particular, the trial court noted, "I don't know of any case or statute that stands for the proposition that a defendant in a multiple count case is entitled to have all verdicts on all counts rendered by the same 12 jurors" and "I know of no authority that suggests that the other defendants are entitled to somehow have a jury verdict rendered in their case by the same exact jury that rendered a [verdict in a] codefendant's case." The trial court also noted that, contrary to appellant Bryant's arguments, Juror No. 77 had not asked to be excused and had not been "begging off" deliberations but had only asked for the rest of the week off because of his medical condition. (RT 16940-16944, 16947.)

Appellant Bryant agreed with the trial court's suggested modifications to a jury admonition to the newly constituted jury to add the phrases "and tentative conclusions reached" and "as to the remaining counts" such that the admonition would read: "You must therefore set aside and disregard all past deliberations [and tentative conclusions reached] and begin deliberating anew [as to the remaining counts]." (RT 16947-16948.)

Prior to taking the two verdicts, the jury foreman confirmed that the verdicts were not "tentative" but were "*final*" and had been reached *prior* to the jurors being called into the courtroom to discuss Juror No. 77. The verdicts were received by the trial court, and appellant Bryant was found guilty of the first degree murders of Armstrong and Brown (counts 3 and 4). The jury was polled and all jurors, including Juror No. 77, answered in the affirmative that those were their verdicts. (RT 16952-16956.) Thereafter, Juror No. 77 was excused, alternate Juror No. 247 was chosen at random to replace him, and the newly-constituted jury was admonished as follows:

> Ladies and Gentlemen of the jury, one of your numbers has been excused for legal cause and replaced with an alternate juror. You must not consider that fact for any purpose. The People and the defendants have the right to a verdict reached only after the full participation of the 12 jurors who returned the verdicts. This right may be assured only if you begin your deliberations again from the beginning. *You must, therefore, set aside and disregard all past deliberations and tentative conclusions and begin deliberating anew as to the remaining charges.* This means that each remaining original juror must set aside and disregard the earlier deliberations as if they had not taken place. You will now retire to begin anew your deliberations in accordance with all the instructions previously given.

(CT 15548; RT 16957-16958, emphasis added.) The jurors indicated that they understood the instruction. (RT 16958.) The same admonition was repeated five days later when another juror was replaced with an alternate juror. (RT 16970.)

B. Legal Analysis

1. The Trial Court Properly Substituted A Juror After The Verdicts On Counts 3 And 4 Had Been Reached As To Appellant Bryant

Appellant Bryant contends that taking the verdicts on counts 3 and 4 prior to the substitution of an alternate juror for Juror No. 77 requires reversal as to all counts, the multiple-murder special-circumstance finding, and the penalty determination. According to appellant Bryant, it was error for the trial court to substitute an alternate juror for Juror No. 77 after the original jury had reached a partial verdict on counts 3 and 4 and thereafter to instruct the newly-constituted jury to "begin deliberating anew as to the remaining charges." Appellant Bryant maintains the trial court should not have accepted the verdicts on counts 3 and 4 and also should have instructed the newly-constituted jury to commence its deliberations anew "as to all counts." (BAOB 441-449.) Appellant Bryant is mistaken.

Section 1089 authorizes a trial court to dismiss a juror "at any time," whether before or after the final submission of the cause to the jury, if the juror dies or becomes ill or upon a showing of good cause is found unable to perform his or her duty. In *People v. Collins* (1976) 17 Cal.3d 687, 690-694, this Court made it clear that the substitution of an alternate juror for an original juror after the submission of the case to the jury is constitutional both under the United States and California Constitutions so long as the reconstituted jury is instructed to start its deliberations anew.

Collins is not limited to the substitution of an alternate juror at a time after submission of the case to the jury but before the jury has rendered a partial verdict. And there is no persuasive reason to impose such a limitation. The unambiguous wording of section 1089 authorizes a trial court to substitute an alternate for a regular juror "at any time, whether before or after the final

submission of the case to the jury. . . ." Presumably the Legislature meant what it said when it included the phrase "at any time" in the statute. (*People v. Thomas* (1990) 218 Cal.App.3d 1477, 1487.)

In *Collins,* this Court removed any constitutional impediment to the substitution of an alternate juror for an original juror by requiring the trial court to instruct the reconstituted jury to set aside its past deliberations and begin deliberating anew. Such a procedure, which was followed in the instant case, also minimizes any possibility of prejudice where the substitution occurs after the jury renders a partial verdict. (*People v. Thomas, supra*, 218 Cal.App.3d at p. 1487.)

Although the issue of whether it is proper for the trial court to permit juror substitution following the return of a partial verdict during the guilt phase was raised in *People v. Fudge* (1994) 7 Cal.4th 1075, 1100-1101, this Court declined to address the merits of the issue, because it agreed with respondent "that defendant waived this issue for appeal by failing to object to the juror substitution, or to otherwise move for a mistrial on this ground." (*Id.* at p. 1100.) However, two Court of Appeal cases -- *People v. Thomas, supra*, 218 Cal.App.3d 1477 and *People v. Aikens* (1988) 207 Cal.App.3d 209 -- have addressed the issue and held, consistent with the language of section 1089 and *Collins*, that it is proper for the trial court to permit juror substitution following the return of a partial verdict.

In *Aikens*, which is particularly instructive, a majority of the court concluded that it was not error for a trial court to substitute a juror after a partial verdict had been returned and to allow the reconstituted jury to reach a final verdict on the remaining charge. (*People v. Aikens, supra,* 207 Cal.App.3d at pp. 211-212.) In so holding, the *Aikens* court observed:

> In exercising its discretion concerning juror substitution, the trial court should give paramount consideration to the constitutional rights of

the accused, but weight should also be given to the state's interest and the consequence which might flow therefrom if a mistrial is granted causing the prolongation of criminal proceedings. For example, suppose after a lengthy-two-year trial a jury arrived at a verdict on a particular count and then a juror became disabled, leaving the other multiple counts not yet decided. Must there be an "automatic" mistrial, even though qualified alternate jurors are available? We think not, for the following reasons:

The traumatic effect on victims who must be ground through the trial process all over again may be profound;

The expense which might accrue to the state as well as to the accused could be considerable;

Public confidence in the justice system could be eroded; and

The maxim of "justice delayed equals justice denied" would certainly have a relevant application in such an instance. If resolution and punishment following a proper conviction are so remote from the crime, then the intended effect of deterrence would be diluted.

(*Id.* at p. 214.)

People v. Thomas, supra, 218 Cal.App.3d at pages 1482-1489 reached a similar result. In *Thomas*, the jury reached verdicts on some, but not all, counts prior to two jurors being excused for good cause. One of the jurors had become ill during deliberations, and another juror would suffer economic hardship if he continued to deliberate. (*Id.* at pp. 1483-1484.) *Thomas* held that it was not error to receive the partial verdicts before dismissing the two jurors. (*Id.* at p. 1485.) Specifically, *Thomas* found that the unanimous verdict of 12 otherwise competent jurors as to some of the charges was consistent with the defendant's right to a fair trial by an impartial jury, because: (1) the jury trial right did not entitle the defendant to a jury of any particular persons; (2) the

defendant could not demonstrate harm where the alternates had taken the same oath and heard the same evidence as the jurors; (3) *Collins* was not limited to pre-verdict substitutions and that any such limitation would be inconsistent with the language of section 1089 that substitution of an alternate may occur "at any time"; (4) admonishing the jury pursuant to *Collins* to begin deliberations anew after the substitution of the alternate eliminated any possible harm to the defendant; and (5) as set forth in *Aikens*, the trial court should "give paramount consideration to the rights of the accused balanced against the state's interest in promoting the efficient administration of justice." (*Id.* at pp. 1485-1488.)

Further, it is well-established that a capital defendant's right to a unanimous jury verdict is not violated by the substitution of an alternate juror prior to the penalty phase and that substitution of an alternate juror for purposes of the penalty phase does not require a retrial of the guilt phase evidence or reweighing of the guilt phase evidence. (See *People v. Cunningham, supra*, 25 Cal.4th at p. 1030 [an alternate juror who is substituted onto the panel for purposes of the penalty phase need not be instructed to disregard prior deliberations]; *People v. Fields* (1983) 35 Cal.3d 329, 351, fn. 9 [excusal of juror for good cause and substitution of an alternate at the penalty phase does not require a retrial of the guilt phase].) In *People v. Cain* (1995) 10 Cal.4th 1, 65-66, this Court approved a jury instruction that instructed an alternate juror, who was substituted in before the penalty phase, to accept the jury's verdicts in the guilt phase, and that all penalty phase jurors should begin deliberations anew on guilt phase evidence only to the extent relevant to deliberating the "lingering doubt" mitigating circumstance. *Cain* noted that *Thomas* and *Aikens* were consistent with its decision that the instruction did not violate the defendant's right to a jury trial or juror unanimity. (*Id.* at p. 67.) Respondent agrees with the holdings in *Cain*, *Aikens*, and *Thomas* and submits it was proper for the trial court to permit juror substitution following the return of the partial

verdicts on counts 3 and 4 and thereafter instructing the newly-constituted jury, in accordance with *Collins*, to begin its deliberations anew as to the remaining charges.

Appellant Bryant's reliance on *State v. Corsaro* (1987) 107 N.J. 339, 526 A.2d 1046 (BAOB 444-448) is misplaced. In *Corsaro* the New Jersey Supreme Court ruled that replacing a juror with an alternate juror after the return of a partial verdict in a criminal prosecution and thereafter permitting continued deliberations in order to reach final verdicts on the remaining counts was error requiring reversal of the convictions on the counts on which verdicts were reached after the substitution. However, as pointed out in *People v. Aikens, supra*, 207 Cal.App.3d at page 213,

> [A] careful reading of *Corsaro* leaves one with a distinct impression that the decision is superficial, unpersuasive and too mechanistic. The opinion failed to reveal that the court weighed important conflicting interests and addressed the realities of jury dynamics. Instead, a "formulistic" approach is taken by that court.

Respondent agrees with the observations in *Aikens* regarding *Corsaro*.

Finally, it must be noted that the appellate courts have rejected the notion that, pursuant to section 1164, the trial court *must* take a partial verdict by polling the jury and recording it as soon as the jury announces agreement, even if the jury has not agreed as to other counts. (*People v. Hernandez* (1985) 163 Cal.App.3d 645, 657-658.) *Hernandez* noted that, while that was one option available under section 1164, section 1164 also permitted the trial court to send the jury back to deliberate further until it reached a verdict on the remaining count. (*Ibid.*)

Here, consistent with *Collins*, the newly-constituted jury was properly instructed. Appellant Bryant argues that the trial court was required to instruct the jury "to begin deliberations anew" as to all counts and that it was error to

instruct the jury to begin deliberations anew "as to the remaining counts." (BAOB 448-449.) As discussed above, it is well established that a verdict may be returned as to some counts but not others prior to substitution of an alternate juror, such that there is no need to instruct the newly-constituted jury to begin deliberations anew as to all counts. (See *People v. Thomas, supra*, 218 Cal.App.3d at pp. 1485-1488; *People v. Aikens, supra*, 207 Cal.App.3d at pp. 211-214.)

Appellant Bryant's claim fails.

2. The Verdicts On Counts 3 And 4 As To Appellant Bryant Were Unanimous Verdicts Even Though Juror No. 77 Was Thereafter Excused

Appellant Bryant contends he "was deprived of his right to a unanimous verdict by 12 jurors on counts 3 and 4 because one of the jurors [Juror No. 77] who rendered that verdict suffered from a disabling medical condition for which the trial court found good cause for excusal." Appellant Bryant concedes there was "good cause" to excuse Juror No. 77 but maintains "the juror should have been excused immediately" rather than returning to the deliberations before eventually being excused. (BAOB 437-440.) The claim is without merit.

The record is unclear whether the jurors reached verdicts on counts 3 and 4 as to appellant Bryant before or after the trial court spoke to Juror No. 77 about his note to the court. This is so, because, after the trial court spoke to Juror No. 77, the court sent the juror back to the jury room with instructions to resume deliberations. (RT 16910.) Also, the verdict forms were dated that very day, May 17, 1995, with no indication of the time the verdicts were reached. (CT 15276-15277; RT 16953-16954.)

The record does indicate, however, that, once the trial court decided to excuse the juror for cause, the trial court immediately reassembled the jurors and indicated it was going to excuse Juror No. 77 for cause. Before doing so, however, the trial court accepted the partial verdicts on counts 3 and 4 after the jury foreman had represented to the court that those verdicts were "final" and had been reached by the jury *prior* to the time the court had discussed the issue of Juror No. 77's excusal with the jury. (RT 16926-16927.) Thus, as the trial court noted, the excusal of Juror No. 77 had no impact on the verdicts on counts 3 and 4. (RT 16941 [the trial court stated: "I can't imagine any colloquy involving [Juror No.] 77 or his impending possible dismissal could have contributed [to the verdicts on counts 3 and 4 as to appellant Bryant]"].)

Assuming, without conceding, Juror No. 77 participated in deliberations on counts 3 and 4 as to appellant Bryant after the trial court spoke to the juror about his note, appellant Bryant was still not denied a unanimous verdict on either count, because the main concern of the trial court was the uncertainty of whether Juror No. 77 would return to jury service after keeping his knee elevated for a couple of days. The concern with Juror No. 77 was not an immediate disabling medical condition which prevented him from deliberating at that very moment, as appellant Bryant maintains, but rather a situation which could leave the jury hanging in limbo awaiting Juror No. 77's uncertain return. (See *People v. Thomas, supra*, 218 Cal.App.3d at p. 1485; see RT 16911-16912, 16940, 16943-16944.) Appellant Bryant's claim must be rejected.

3. The Trial Court Did Not Accept The Verdicts On Counts 3 And 4 As To Appellant Bryant Before The Deliberative Process Was Complete

Appellant Bryant maintains the trial court interfered with the jury's deliberative process on counts 3 and 4 and erred in taking the verdicts on those counts "before the jury informed the court that final verdicts had been reached."

(BAOB 436.) As explained by appellant Bryant,

> it is appellant's contention that the trial court's decision to take verdicts from the jury prior to the jury notifying the court that it had unanimously reached its own conclusion regarding the finality of the verdicts constitutes an interference with the deliberative process and [appellant's] right to have the jury render an ultimate finding of guilt.

(BAOB 434-435.)

According to appellant Bryant, the phrase "receivable by the court" as used in section 1164[61] requires as a prerequisite that the jury foreman inform the court that the jurors have reached a unanimous verdict. Thus, according to appellant Bryant, trial courts may never ask juries if they have reached a "final" verdict absent a process whereby jurors were polled about whether they understood what "final" meant. Appellant Bryant's interpretation of section 1164 is illogical in a case where a juror is excused during deliberations and is unsupported by any authority.

The validity of the verdict is unaffected if the trial court asks the jury for its verdict and takes the verdict orally. For example, in *People v. Galuppo* (1947) 81 Cal.App.2d 843, 850-851, a defendant contended that "no legal

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61. Section 1164 provides:

> (a) When the verdict given is receivable by the court, the clerk shall record it in full upon the minutes, and if requested by any party shall read it to the jury, and inquire of them whether it is their verdict. If any juror disagrees, the fact shall be entered upon the minutes and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury shall, subject to subdivision (b), be discharged from the case.
>
> (b) No jury shall be discharged until the court has verified on the record that the jury has either reached a verdict or has formally declared its inability to reach a verdict on all issues before it, including, but not limited to, the degree of the crime or crimes charged, and the truth of any alleged prior conviction whether in the same proceeding or in a bifurcated proceeding.

verdict was rendered or recorded" where the jury returned with a written verdict of robbery on which the jury had not fixed the degree of the crime. The trial court asked if a verdict had been reached as to degree, the foreman said "first degree," and then the jury was polled by a raise of hands as to whether that was its verdict. The Court of Appeal rejected the contention that the trial court was under an obligation to send the jury back to the deliberation room to determine the degree of the crime and found no prejudice had occurred. (*Ibid.*)

Moreover, appellant Bryant's interpretation of section 1164 to require a separate preliminary finding that a verdict is "final" before it is read by the trial court is inconsistent with California's procedure for taking a verdict. As the Court of Appeal explained in *People v. Green* (1995) 31 Cal.App.4th 1001, 1009-1010, the jury's verdict is never "complete" until after the jury has been orally polled and all jurors have answered in the affirmative pursuant to the procedures set forth in sections 1163 and 1164. Phrased another way, it is the oral declaration of the jurors endorsing a verdict that constitutes the true "return" of the verdict prior to recording it. (*People v. Mestas* (1967) 253 Cal.App.2d 780, 786.)

Here, the jurors had completely filled out the verdict forms as to counts 3 and 4 as to appellant Bryant before being told that Juror No. 77 would be excused from further jury service. (RT 16926-16933, 16938-16940.) Prior to polling the jury, the jury foreman again confirmed for the trial court that the verdicts on counts 3 and 4 were "final," and, when polled, all 12 jurors, including Juror No. 77, affirmed their verdicts. (RT 16950-16956.) Thus, by polling the jurors, it was established that the verdict was legally "final" for purposes of sections 1163 and 1164 and that the deliberative process of the jurors was complete.

Appellant Bryant further contends that polling the jury as to its verdicts on counts 3 and 4 was flawed, because, weeks later, the jurors expressed some confusion about the concept of when a verdict is "final." (BAOB 436.) The record demonstrates otherwise.

On July 7, 1995, the jury foreman sent the following written question to the trial court: "Can you change your vote regarding a decision prior to a verdict being read." (CT 15393.) The prosecutor and appellant Bryant's counsel agreed that the answer was "yes," and appellant Bryant's counsel expressed concern that the jury might be referring to the verdicts previously rendered on counts 3 and 4 as to appellant Bryant. The trial court stated that it would ask the jurors what they meant in order to determine if they were referring to the jurors' on-going voting process or previously rendered verdicts. (RT 17040-17042.) When the jurors were questioned, it was revealed that Juror No. 261, who had been substituted onto the jury *after* the verdicts on counts 3 and 4 as to appellant Bryant had been rendered, wanted to know whether a juror could change his or her vote in juror polling prior to a verdict being read. The jurors were told the answer was "yes," that a verdict was not accepted until delivered in open court and affirmed by the jurors, and that, if the jurors wanted to change a verdict form that they had already filled out, they could do so. (RT 17042-17044.)

The verdicts as to appellant Bryant on counts 1, 2, and 5, and the special circumstance finding were reached on May 24 and 25, 1995, two weeks prior to the juror's question. (See CT 15409-15412.) Respondent submits no error occurred regarding appellant Bryant's verdicts, considering that the juror question regarding when a verdict was "final" came from a juror who had *not* deliberated on counts 3 and 4 and, in any event, came weeks after the jurors had voted on appellant Bryant's guilt as to counts 1, 2, and 5.

Finally, even assuming arguendo appellant Bryant is correct that trial courts may never ask juries if they have reached a "final" verdict absent a process whereby jurors were polled about whether they understood what "final" meant (BAOB 435), the trial court in this case effectively fulfilled that task. The gist of appellant Bryant's complaint is that the trial court did not ascertain whether the verdicts on counts 3 and 4 as to appellant Bryant were "final" or merely "preliminary vote[s] that [were] open to more discussion." (See BAOB 435.) But, on three occasions, the jury made it clear that it had not merely cast preliminary votes on counts 3 and 4 as to appellant Bryant that were open to more discussion.

Specifically, when the trial court first informed the jury that Juror No. 77 would be excused, it asked the jury foreman if any verdict had been reached. The jury foreman indicated that one or more verdicts had been reached on one defendant. The trial court then asked the foreman, "Well, what I'd like you to do in that case, or -- *are these tentative decisions or final verdicts filled out?*" The foreman indicated the latter. (RT 16918, emphasis added.) No other juror indicated otherwise. Later, after the trial court reviewed the verdict forms, it again asked the foreman, "Are these [the verdicts on counts 3 and 4 as to appellant Bryant], in fact, verdicts that have been arrived at?" The foreman responded, "Yes, they are." The court then asked, "*Ten[t]ative, or final?*" The foreman responded, "They are final." The court asked, "Any doubt about that?" The foreman responded, "None." (RT 16926.) Again, no other juror indicated otherwise. Lastly, before taking the two verdict, the court asked the foreman for the third time whether the verdicts were "tentative" or "final." Once again, the foreman indicate that the verdicts were final, and no other juror indicated otherwise. (RT 16952-16953.) The jury thus made it clear that it had not merely cast tentative or preliminary votes on counts 3 and 4 as to appellant Bryant. Accordingly, appellant Bryant's claim is belied by the record.

XXIII.

THE TRIAL COURT PROPERLY CONTROLLED THE ORDER OF THE PROCEEDINGS AND DID NOT ABUSE ITS DISCRETION IN PERMITTING CODEFENDANT SETTLE TO TESTIFY ON HIS OWN BEHALF AFTER HE HAD RESTED HIS DEFENSE

Throughout the proceedings, codefendant Settle repeatedly indicated he was going to testify on his own behalf. Near the end of the prosecution's case, the defendants agreed, amongst themselves, they would present their defenses in the following order: appellant Smith, appellant Wheeler, codefendant Settle, and appellant Bryant. Near the end of the presentation of his defense, the trial court asked codefendant Settle if he had made a final decision about testifying on his own behalf. Although codefendant Settle initially reiterated his intention to testify, he asked for, and received, time to consult with advisory counsel, Mr. Leonard. Following consultation with Mr. Leonard, codefendant Settle stated he would *not* testify on his own behalf but inquired of the trial court if he could change his mind and testify on his own behalf if a codefendant testifies and "raises issues." The trial court assured codefendant Settle that, if he changed his mind, he would be permitted to testify on his own behalf as long as argument had not yet commenced.

Thereafter, appellant Bryant commenced his defense. Near the end of appellant Bryant's testimony (and prior to appellant Bryant resting his defense), the trial court inquired of the other defendants as to whether any of them had any additional defense evidence to present and whether codefendant Settle had decided if he was going to testify. Appellants Smith and Wheeler stated they had no further evidence to present. At that point, codefendant Settle indicated he would testify. After appellant Bryant rested, codefendant Settle presented his testimony to the jury. Thereafter, the prosecution presented rebuttal evidence. Appellant Wheeler presented surrebuttal witness Frank Settle,

codefendant Settle's brother, who contradicted and repudiated the testimony of codefendant Settle. Following codefendant Settle's guilt phase argument, appellants renewed their motion to sever codefendant Settle's case from their cases and moved for a mistrial on the ground codefendant Settle prejudiced their defenses by testifying after appellants had rested. The trial court denied the motion.

Under the guise of the trial court's alleged failure to control the order of the proceedings, appellants Wheeler and Bryant contend the trial court committed prejudicial error in permitting codefendant Settle to testify on his own behalf because, they argue, codefendant Settle's testimony prejudiced their cases. Specifically, appellant Wheeler maintains the trial court erred in permitting codefendant Settle to testify on his own behalf, after all of the defendants, including himself, had rested their cases, after repeatedly assuring the court that he did not intend to testify. Appellant Wheeler argues that the trial court should have controlled codefendant Settle's "manipulation" and "gamesmanship" and prevented him from testifying on his own behalf after he had rested his case. This purported failure to control the proceedings, argues appellant Wheeler, resulted in a denial of a fair trial and due process of law in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. (WAOB 151-169.) Appellant Bryant raises a similar claim and argues the trial court erred in allowing codefendant Settle "to manipulate the order of evidence to appellant [Bryant's] detriment." Codefendant Settle's "subterfuge," argues appellant Bryant, "was calculated to obstruct justice in this case while tipping the scales of justice against his codefendants." (BAOB 157-174.)[62/] Appellant Smith joins in this claim. (SAOB 451.)

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62. Appellant Bryant also contends the trial court failed to protect appellant Bryant's constitutional rights in failing to give appropriate admonishments to the jury after codefendant Settle made comments in opening statement and closing argument allegedly prejudicial to appellant Bryant. (See

Respondent submits that, although appellants have cloaked their claim as one involving the trial court's alleged failure to control the proceedings, the real essence of their claim is that neither appellant Wheeler nor appellant Bryant wanted to be tried jointly with codefendant Settle such that codefendant Settle was able to testify on his own behalf and provide the jury a defense which, according to appellants Wheeler and Bryant, contradicted their defenses and therefore prejudiced their cases. In Argument III, respondent addressed the claims raised by appellants as to the propriety of the trial court's refusal to sever their cases from codefendant Settle's case. Respondent will not repeat those arguments here. Rather, this argument assumes codefendant Settle was a properly joined defendant in the case and the trial court properly denied all of appellants' motions for severance, including the renewed motion made subsequent to codefendant Settle's testimony. Thus, respondent will limit this response to whether the trial court abused its discretion as a matter of law in failing to control the order of the proceedings by permitting codefendant Settle, a pro per defendant in a capital prosecution, to testify on his own behalf, even though he had rested his case but while defense evidence was still being presented to the jury. As will be explained below, the trial court did not abuse its discretion in permitting codefendant Settle to testify on his own behalf.

A. Relevant Proceedings

Prior to jury selection, codefendant Settle informed the court and the codefendants that he "intended" to testify on his own behalf and "my testimony is not going to be favorable toward the defendants. . . ." (RT 6341-6342.)

BAOB 163-164.) However, appellant Bryant neither objected to, nor sought an admonition for, the comments made by codefendant Settle in opening statement and/or closing argument. (See RT 8157-8158, 16592-16593.) Thus, appellant Bryant has waived this issue, and it is not necessary for this Court to address the merits of the claim. (See *People v. McDermott, supra,* 28 Cal.4th at pp. 1001-1004.)

After the alternate jurors were sworn, codefendant Settle stated he would testify in the instant case and "base the entire part of my case on my testimony." (RT 7835.) During codefendant Settle's opening statement, he stated he would give up his right to remain silent in this case and take the witness stand on his own behalf "and answer any of the questions that any of those attorneys would like to ask regarding my life." (RT 8158.)

Near the close of the prosecution's case-in-chief, the trial court asked the defendants for an estimate of the length of their defenses. Codefendant Settle indicated it would depend "on the length of the People's cross-examination of myself." The trial court stated, "I will not ask you whether you are or are not testifying. Just how long you think it will take for you to put on your defense. You have the right to testify. You have the right not to. You will decide that for yourself." (RT 13435.) At the end of that court session, there was a discussion regarding the order the defendants would present their defenses. Codefendant Settle stated he did not want to go first or second, but third was "okay." The prosecutor said he would meet with the other defense counsel and work out an arrangement. (RT 13438-13439.)

The next day, prior to the close of the prosecution's case, codefendant Settle stated in discussing his witness list that he would testify as a witness in his defense. The court advised codefendant Settle that "you can make that decision *at any point*." (RT 13754-13755, emphasis added.)

Following the conclusion of the prosecution's case, and immediately prior to the commencement of the defense case, the trial court informed the jury that the defendants had agreed to the following order of presentation of their defenses: appellant Smith, appellant Wheeler, codefendant Settle, and appellant Bryant. (RT 13910.) Appellant Smith rested without presenting any defense. (RT 13910-13911.) Appellant Wheeler presented his defense and testified on his own behalf. (RT 13911-14377.)

Codefendant Settle presented his defense without initially testifying on his own behalf. (RT 14526-14847.) The day before codefendant Settle concluded his defense, the trial court asked him, "Have you decided whether you intend to offer your testimony in the case?" (RT 14774.) The following appears in the record:

DEFENDANT SETTLE: Yes, I am.

THE COURT: And you understand that you have the absolute right --

DEFENDANT SETTLE: Not to.

THE COURT: -- Not to. You understand that?

DEFENDANT SETTLE: Yes.

THE COURT: Do you understand that this is strictly a tactical choice on your part if you do testify.

Obviously you will be cross-examined by the prosecution and any defense counsel that wishes to examine you.

DEFENDANT SETTLE: Yes.

THE COURT: Do you understand that your testimony may help you but also devastate your case?

Do you understand that?

DEFENDANT SETTLE: Yes.

THE COURT: All right. You still want to testify?

DEFENDANT SETTLE: What I would like to do is to see what Mr. Leonard [advisory counsel] thinks.

THE COURT: All right. That is a good idea.

MR. JONES: What was the last part?

THE COURT: He wants to see what Leonard thinks.

MR. JONES: Okay.

THE COURT: All right.

(RT 14774-14775.) Later in the day, after consulting with Mr. Leonard, codefendant Settle indicated he would *not* testify on his own behalf. The following appears in the record:

THE COURT: . . . All right. Mr. Settle, now on the other issue we discussed at the bench, have you had a chance to consult with Mr. Leonard?

DEFENDANT JON SETTLE: Yes.

THE COURT: What have you decided?

DEFENDANT JON SETTLE: I decided that I will not testify.

THE COURT: You have decided you will not?

DEFENDANT JON SETTLE: Yes.

THE COURT: That you don't want to?

DEFENDANT JON SETTLE: Yes.

THE COURT: Please understand, I want to be truthful with you. I don't have a position on this, it is your case.

DEFENDANT JON SETTLE: Right.

THE COURT: You are the one who has the absolute right to testify or not to testify. And I don't want any hint to exist on this record that I have given you a wink and a nod as to what I think you ought to do. I don't know what you ought to do. I am watching the case from my point of view, not your point of view.

DEFENDANT JON SETTLE: Right.

THE COURT: And you are going to have to make that choice as objectively as you can given what you can offer, and what the down side will be.

Do you have any questions you want to ask me or Mr. Leonard or anybody else about anything procedural that may come up?

DEFENDANT JON SETTLE: Yes.

THE COURT: Go ahead.

DEFENDANT JON SETTLE: *Should the co-defendant testify and raise issues that after I have rested that would make me want to testify?*

THE COURT: *I would let you.*

DEFENDANT JON SETTLE: All right.

THE COURT: *I think it would be error for a court to refuse a defendant's request to testify, basically at any point in the case.* I don't think I could do that.

DEFENDANT JON SETTLE: Okay.

THE COURT: *Unless the case had been argued to the jury.* You know what I am saying? *While we are still taking testimony, if you change your mind and decided you had to get up there, yeah, I would.*

DEFENDANT JON SETTLE: Okay. In that case, --

THE COURT: But I'd kind of like you to do this -- again, I have told you the truth, but what I would like you to do is if you know for sure that you are going to, let's do it now.

DEFENDANT JON SETTLE: At this point, I'm not. And I just have one more witness, my wife.

(RT 14786-14788, emphasis added.) At the end of the day, counsel for appellant Bryant expressed his concern about codefendant Settle possibly changing his mind and testifying after appellant Bryant presented his defense. The following appears in the record:

MR. JONES: Also, your Honor, two short things: I am concerned about Mr. Settle and his statement earlier that he might testify later. We had agreed upon a rotation, so to speak, and the only concern I have was that we not go in front of Mr. Settle.

THE COURT: Well, there is only so much I can do, and I gave him an honest answer to this question, and I think he is being honest with

me. Has been throughout most of the trial. He has indicated that his intention is not to testify in the case.

Am I correct on that?

DEFENDANT JON SETTLE: Yes.

THE COURT: And he was inquiring if somebody got up and dumped on him or said something about him that he disagreed with would he be allowed to rebut that, and I gave him, again, the honest answer, the only answer I could, that I would allow. I cannot prevent, no more than I could if Mr. Wheeler changed his mind and decided now he -- or Mr. Smith changed his mind. It was an agreement, but *if he does change his mind, I have to let him testify.*

(RT 14804-14805, emphasis added.) The next day, codefendant Settle rested without testifying on his own behalf. (RT 14847.)

Thereafter, appellant Bryant presented his defense and testified on his own behalf. (See RT 14849, 14856-15507.) Near the end of appellant Bryant's testimony and the resting of his defense, the trial court inquired of appellants Smith and Wheeler as to whether they had any additional evidence to present and whether codefendant Settle had decided to testify on his own behalf. The following appears in the record:

THE COURT: Okay. The jury is absent.

We are closing in on the end of this. It looks to me like tomorrow morning. I don't imagine there will be a whole lot more examination of the witness.

Mr. McKinney [counsel for appellant Wheeler], anything going on from your end?

MR. MCKINNEY: No, your Honor.

THE COURT: Mr. Smith?

MR. GREGORY: We rested.

THE COURT: All right. Mr. Settle.

DEFENDANT SETTLE: That's just about it.

THE COURT: I don't mean in terms of your examination. *Have you decided if you are going to testify?*

DEFENDANT SETTLE: *Yes, I am.*

THE COURT: All right. That will be tomorrow.

Get ready.

DEFENDANT SETTLE: All right.

THE COURT: All right.

(RT 15463, emphasis added.)

The next day, prior to concluding his testimony, appellant Bryant objected to codefendant Settle being given the opportunity to testify since it was contrary to the "agreement" regarding the order the defendants would present their defenses. The following appears in the record:

MR. JONES: We would also ask the court to preclude any additional cross-examination because Mr. Settle is incompetent and, perhaps -- well, incompetent. And secondly, my understanding is that he plans to testify, which is contrary to the original agreement with respect to sequence. And he has maneuvered a situation where he is coming up last, and I object to that.

THE COURT: All right. Well, in terms of precluding further cross -- because you feel he is incompetent -- the court will not do that. I don't feel he is conducting his defense in an incompetent manner at all. I think his questioning of most of the witnesses has been, at times, quite effective given what he wants to do in the case, or what he apparently wants to do.

In terms of his desire to testify, I am assuming that it is still his desire today. It has changed a couple of times.

DEFENDANT JON SETTLE: Yes, I --

THE COURT: You still want to testify.

I don't believe, as I indicated, trying to be honest with the defendant. I don't believe the court has the authority to preclude a defendant from testifying in the guilt phase, notwithstanding he made that decision after he has passed the first time around and rested. And later he was waiting in the wing to see what [appellant] Bryant did and what he testified to. Perhaps, that is what was going on. Perhaps, he made the decision to testify whether [appellant] Bryant did or not. I don't know. But for sure he has the constitutional right to testify as all defendants do, and I am not going to preclude him from testifying in the case.

(RT 15472-15473.) Thereafter, appellant Bryant resumed his testimony (RT 15487-15501) and rested (RT 15507).

Codefendant Settle then testified on his own behalf. (RT 15530-15754.) The testimony of codefendant Settle is summarized at length in the Statement of Facts. Suffice it to say here that he testified to the following: he denied any involvement in the murders; he was a car mechanic who worked on cars at his Ralston Street residence; on August 28, 1988, at approximately 3:00 or 3:15 p.m., he received a telephone call at home from appellant Bryant who inquired whether he (codefendant Settle) could do a brake job on a red Toyota, a "company car"; appellant Bryant also inquired as to what type of old, big cars codefendant Settle had available for sale and, sight unseen, appellant Bryant agreed to purchase a green 1970 Pontiac Bonneville for $900; approximately 15 minutes after the telephone call, Frank Settle, the brother of codefendant Settle who was involved in drug activity with appellant Bryant, arrived at codefendant Settle's Ralston Street home with the red Toyota; Frank Settle took the green 1970 Pontiac Bonneville and left the Toyota; about one hour later, Frank Settle and appellant Wheeler arrived at codefendant Settle's Ralston

Street house in a red Jeep; and they picked up the red Toyota and left with appellant Wheeler driving the Jeep and Frank Settle driving the red Toyota. (RT 15537-15541, 15544, 15552-15559, 15562, 15569-15570, 15588-15589, 15600-15602, 15614-15617, 15624-15628, 15730-15731.) Codefendant Settle also testified that Frank Settle told him that the old green Pontiac he (codefendant Settle) sold appellant Bryant was the car used in the murders. (RT 15572-15573.)

Codefendant Settle was cross-examined by appellant Bryant (see RT 15552-15585), appellant Wheeler (RT 15585-15591, 15728-15730), and the prosecution (RT 15592-15612, 15614-15728, 15730-15731, 15751-15754). Although given the opportunity, appellant Smith did not cross-examine codefendant Settle. (RT 15591.)

Appellant Wheeler called Frank Settle as a surrebuttal witness. Frank Settle rebutted the testimony of codefendant Settle. Specifically, Frank Settle testified to the following: he did not know appellant Wheeler; he was not in the company of appellant Wheeler on August 28, 1988; he had never been to the Wheeler Street house; he did not go to codefendant Settle's house on August 28; he did not drive a red Toyota to codefendant Settle's house on that date to have the brakes fixed; he did not pick up a 1970 green Bonneville from codefendant Settle's house on that date; and he was never in a red Jeep with appellant Wheeler. (RT 15841-15843.)

Following codefendant Settle's guilt phase argument, appellants renewed their motion to sever their cases from the case of codefendant Settle and moved for a mistrial because codefendant Settle was permitted to prejudice their defenses by testifying after they had rested their cases. The trial court denied the motions. (RT 16634-16635.)

B. Analysis

The order of proof in a trial rests largely within the sound discretion of the trial court, and the exercise thereof will not be disturbed on appeal in the absence of palpable abuse. (Evid. Code, § 320; Pen. Code, §§ 1093, 1094; *People v. Cuevas* (1971) 16 Cal.App.3d 245, 250.) It is equally well established that a trial court has broad discretion to order a case reopened, including the defense case, and allow the introduction of additional evidence. (See *People v. Cuccia* (2002) 97 Cal.App.4th 785, 792; *People v. Goss* (1992) 7 Cal.App.4th 702, 706.) In *People v. Funes* (1994) 23 Cal.App.4th 1506, 1520, the court listed the factors to be considered in evaluating whether the trial court abuses its discretion in ruling on a request to reopen the case and present additional evidence: "(1) the stage the proceedings had reached when the motion was made; (2) the defendant's diligence (or lack thereof) in presenting the new evidence; (3) the prospect that the jury would accord the new evidence undue emphasis; and (4) the significance of the evidence." Applying these factors to the instant case, it is clear the trial court did not abuse its discretion as a matter of law in permitting codefendant Settle to reopen his case to present his testimony to the jury.

First, a criminal defendant who testifies on his own behalf in his defense is exercising a "constitutional right of fundamental dimension." (*Rock v. Arkansas* (1987) 483 U.S. 44, 51; see *People v. Vargas* (1987) 195 Cal.App.3d 1385, 1394.) This is particularly so, respondent submits, where the defendant is representing himself in a capital prosecution and his testimony plays a significant role in his defense, as was the case here. After the alternate jurors were sworn, codefendant Settle stated on the record that he would testify on his own behalf and "base the *entire* part of my case on my testimony." (RT 7835, emphasis added.) Thus, the testimony of codefendant Settle was highly significant to his defense and involved his fundamental constitutional right to

testify on his own behalf.

Second, codefendant Settle made his request to present his testimony during *the defense portion of the proceedings*. The request was made after codefendant Settle had initially rested his case but prior to the conclusion of appellant Bryant's defense. Thus, when codefendant Settle made his request to testify on his own behalf, the case had not progressed to the prosecution's rebuttal case, closing argument, and/or deliberations.

Third, codefendant Settle was extremely diligent in letting it be known that he would, in fact, testify on his own behalf during his defense. Contrary to appellant Wheeler's claim that codefendant Settle was permitted to testify only "after repeatedly assuring the court that he did not intend to testify" (WAOB 152), the record is replete with representations from codefendant Settle that he always desired to testify on his own behalf. Prior to jury selection (RT 6341-6342), after the alternate jurors were sworn (RT 7831), during codefendant Settle's opening statement (RT 8158), prior to the close of the prosecution's case (RT 13754-13755), and during codefendant Settle's defense (RT 14774), codefendant Settle repeatedly indicated his desire to testify on his own behalf. It was only after consulting with Mr. Leonard, advisory counsel, that codefendant Settle indicated he did not desire to testify at that time. Significantly, however, codefendant Settle inquired of the trial court, and received its assurance, that he would be permitted to testify on his own behalf if one of the codefendants testified and "raises issues that after I have rested would make me want to testify." (RT 14786-14788.) Thus, it cannot be seriously maintained that codefendant Settle was not diligent in letting it be known that he intended to testify.

Fourth, there was no prospect the jury would accord codefendant Settle's testimony any greater emphasis than any of the other defendants. His testimony did not place any of the other defendants at the crime scene or directly implicate

any of them in the murders. To the extent his testimony contradicted portions of the defense evidence presented by appellants Wheeler and Bryant (i.e., appellant Bryant making the telephone call to codefendant Settle regarding the car on August 28 and appellant Wheeler showing up at codefendant Settle's house on August 28 to pick up the car), it must be remembered that codefendant Settle's testimony was cross-examined by the parties and refuted by Frank Settle in surrebuttal. Thus, it is simply not likely the jury would have accorded the testimony of codefendant Settle any undue emphasis.

In sum, applying the applicable factors to the instant case, it is clear the trial court did not abuse its discretion as a matter of law in permitting codefendant Settle to reopen his case and testify on his own behalf.

Finally, it must be noted that appellants' claim that the trial court failed to realize it had discretion and power to prevent codefendant Settle from testifying (WAOB 168-169; BAOB 173-174) is refuted by the record. It is true the trial court stated at one point that "it had no authority to preclude a defendant from testifying in the guilt phase" (RT 15473), but that comment, respondent submits, must be read in conjunction with the trial court's comments that it could not preclude codefendant Settle from reopening his case. For example, the trial court indicated that, had argument to the jury commenced, it would not have permitted codefendant Settle to reopen his case and present his testimony, but "[w]hile we are still taking testimony, if you change your mind and decided you had to get up [on the witness stand], yeah, I would [permit you to do it]." (RT 14786.) The trial court's comments, reasonably construed, support the obvious: it would have been a palpable abuse of the discretion on the part of the trial court if it had refused to let codefendant Settle, a pro per defendant facing the death penalty who had repeatedly expressed his desire to testify, exercise his constitutional right to testify on his

own behalf, when the request was made during the defense portion of the case while defense testimony was still being received.

Appellants' claim must be rejected.

XXIV.

THE SECURITY MEASURES EMPLOYED AT TRIAL, INCLUDING THE USE OF THE REACT BELTS, WERE PROPER; IN ANY EVENT, ANY ERROR WAS HARMLESS ON THE FACTS OF THIS CASE

Appellants contend the security measures employed at trial violated their rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (BAOB 175-210; WAOB 209-238, 435; SAOB 247-262, 451.) Specifically, appellants contend there was no "manifest need" to outfit each of them with a REACT belt during trial. (BAOB 181-201; SAOB 250-262, 451; WAOB 228-238, 435.) Further, appellants contend the following conditions prejudicially undercut the presumption of innocence and deprived them of their rights to an impartial jury, a fair trial, due process, and a reliable death judgment: use of additional bailiffs; a possible additional metal detector at the entrance to the courtroom; voir dire of prospective jurors regarding witnesses who were granted immunity; withholding of juror names; restrictions on juror movement including being fed inside the courthouse; and the trial court's statements to the jurors regarding the security arrangements. (BAOB 202-210; WAOB 219-227, 234-238; SAOB 451.) Appellants' contentions are without merit, and, in any event, any error was harmless on the facts of this case.

A. Relevant Proceedings

1. The REACT Belt

Prior to jury selection, the trial court stated its preliminary intention that, during trial, each defendant would either be shackled with waist and leg shackles (with curtains around the tables in the courtroom blocking the shackles from the jury's view) or be given the opportunity to wear a REACT belt underneath his clothing. The trial court stated that the REACT belt was less

restrictive in terms of freedom of movement, caused no lasting harm, and immobilized the wearer only when activated. The court noted that it would consider a leg brace for pro per codefendant Settle, who needed a free hand to write. (RT 6200-6207, 6297-6298.)

Appellant Bryant filed a written objection to shackling or the use of the REACT belt, arguing that such physical restraints would deny him his state and federal constitutional rights to due process and a fair trial. (CT 14280-14285.) During the hearing on the issue, appellant Bryant noted that the REACT belt could deliver 50,000 volts to the wearer when activated. Appellants stated that they did *not* want to wear an electronic device if the trial court required some type of restraint. Codefendant Settle objected to any restraint absent a showing of need but chose the REACT belt if the trial court was going to require a restraint. (RT 6344-6347.)

The trial court explained the criteria for activating the REACT belt as follows:

> THE COURT: I will tell you now. Things such as follows: attempted escapes, a sudden or hostile movement toward other individuals involved in the case, like attacking another lawyer or defendants. Tampering with the belt, failure to comply with repeated demands or requests by the court. Threats to other individuals, things of that nature. Not just simply for the heck of it.
>
> DEFENDANT JON SETTLE: So if I -- What if I itch or scratch?
>
> THE COURT: You will be in good shape, nothing's going to happen. Again, this is -- I'm not trying to be cute with you, but this is simply to ensure the safety of everybody in the courtroom including you. And no one is going to set this thing off, and I don't expect it [to be activated] during the entire course of the trial.

(RT 6347.)

The prosecutor argued restraints were necessary because of the circumstances of the crime itself. Further, the prosecutor argued that each appellant was a member of a sophisticated criminal organization which existed in the county jail system (i.e., the Black Guerilla Family) and also had ties to the Crips and the Bloods gangs because of their narcotics transaction activity. As to appellant Wheeler, the prosecutor noted appellant Wheeler had two charges pending while in custody: an attempted murder on another inmate and an assault with a deadly weapon on a deputy. As to appellant Bryant, the prosecutor argued that it appeared appellant Bryant continued to be engaged in illicit activity in the county jail, given his possession of "excessive amounts of razor blades, hundred packages of cookies, excessive candy bars and amounts of money" for which he had received "a number of incident cards." As to appellant Smith, the prosecutor argued that, at the time of trial, appellant Smith was serving a sentence for the attempted murder of witness Keith Curry. (RT 6347-6349.)

Counsel for appellant Bryant indicated that appellant Bryant, who was in shackles, was "enduring a great deal of physical pain" and did not think he could tolerate shackles for eight hours a day during the trial. Appellant Bryant chose the REACT belt over shackles if the trial court was going to order a restraint. Appellants Smith and Wheeler also chose the REACT belt over shackles. (RT 6373-6375.)

The trial court ordered the use of the REACT belt on each appellant at trial for the following reasons: appellant Wheeler had committed violent acts while in county jail; appellant Smith had tried to kill witness Curry; the ill-will between codefendant Settle and appellants[63]; the nature and facts of this

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63. In making his motion to be held in federal custody, codefendant Settle stated that, throughout the history of the case, witnesses had been intimidated or killed and he believed appellants were involved in those efforts. Codefendant Settle stated that he had received a threat and, if he was not placed

multiple-murder case, including the potential death sentence; and for the same reasons the court had ordered an anonymous jury (i.e., for a number of years, appellants were involved in a widespread and powerful criminal organization involved in a wide range of criminal activity, including crimes of violence; that other members of the organization were not in custody; and there were allegations "even by one of the defendants of ties with various individuals involved in the case with prison gangs and other gangs"). The court found the use of the REACT belt would have no effect on appellants' rights to a fair trial, because the belts would not be seen by the jury, would not restrict the movement of appellants, and would not be activated by the deputies who were trained to use them other than for courtroom safety. (RT 6374-6377; see also RT 6360, 6363-6364.)

When appellant Bryant testified during his defense at trial, he walked to the witness stand and was sworn. At the beginning of questioning, appellant Bryant's trial counsel told him that he could lean back if he would be more comfortable. Appellant Bryant responded, "This is about as far as I can lean back anyway." There is nothing in the record demonstrating the jurors observed the REACT belt at this or any other time or that the REACT belt was responsible in any manner whatsoever for his inability to lean back further. (See RT 15157-15158.)

At the close of the case, in ruling on appellant Bryant's and appellant Wheeler's motions for a new trial, the trial court noted that the only way a juror could have seen the REACT belts during the many months of trial was if a defendant made "some motion forward or walks through the courtroom to take the witness stand." The court stated that, even if the jurors did see a "lump in the rear portion of the clothing" of appellants, it was "never identified to the jury as stun belts or any other security device." (RT 18789-18790.)

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in federal custody, it would affect his right to testify. (RT 6335-6343.)

2. Additional Bailiffs

Prior to jury selection, the trial court stated additional bailiffs would likely be used. (RT 6194-6195, 6202.) When the bailiffs were sworn to take charge of the deliberating jurors and alternates, there were up to nine bailiffs present in the courtroom. (RT 16865, 18594-18595.) Appellant Wheeler's trial counsel stated in argument on a motion for new trial that there were "anywhere from six to seven deputies at all times during the course of this trial." (RT 18782.) The trial court responded, "there were several deputies in the court, no question about it, at all times, some uniformed but many out of uniform" and it was "probably noticeable" that there were more than the usual amount of bailiffs. (RT 18788.)

Prior to deliberations, appellant Bryant requested a pinpoint jury instruction regarding the presence of additional bailiffs in the courtroom. (CT 14977.) Appellant Bryant approved of, and appellants Smith and Wheeler did not object to, the trial court's modification of appellant Bryant's instruction. The jury was, thereafter, instructed that the "security measures taken in relation to this, or any, trial are not evidence and cannot be considered or discussed by the jury in determining any issue in this case." (CT 15464; RT 16221, 16250.)

3. Anonymous Jury

The trial court made a preliminary ruling to use an anonymous jury. The court noted it was aware of the need to balance the feelings of the jurors with the rights of the parties to select a jury and not have a jury that was convinced in advance that a dangerous individual was involved. (RT 6207-6216.) Appellants objected to juror anonymity on the ground it was not authorized by state law and would otherwise deprive them of their constitutional rights. The court denied the motion, because: appellants were involved in a widespread, violent criminal organization with members who were not currently in custody;

prospective jurors would be hesitant to serve on a case like the instant case if their personal information was available; an anonymous jury would assure that the verdicts were not reached out of fear of any participant in the trial; for the safety of the jurors, given appellant Smith's conviction of attempting to kill Curry; and there was little potential for prejudice. (CT 14286-14290; RT 6358-6364.)

4. Metal Detector

Prior to trial, the trial court told the parties to be prepared to argue regarding the installation of a metal detector at the door of the courtroom. (RT 6296.) The record, however, does not reflect that a metal detector was installed at the door to the courtroom. To the contrary, the record suggests otherwise. (See CT 15888; RT 18782.)

5. Immunized Witnesses

Without objection, the jury questionnaire included a question about how jurors felt about immunized witnesses. Based on their responses, several prospective jurors, only four of whom eventually served as jurors or alternates (Juror Nos. 73, 113, 261, and 377), were questioned about how they felt about immunity and were reminded it was just one factor in determining witness credibility. (RT 6662-6663, 6688, 6722, 6738-6739, 6743, 6764-6765, 6799, 6810-6811, 6826, 6908, 6921, 7013, 7058, 7081, 7089, 7131-7132, 7267-7268, 7503-7504, 7566-7567, 7614, 7622, 7646-7647, 7721, 7737-7738, 7911, 7929-7930.) Only Prospective Juror No. 4 (who did not serve) thought that a grant of immunity could be harmful to the person granted immunity. The court explained that the job of jurors was not to base credibility determinations on that type of factor and to not base decisions on their like or dislike of the policy of granting immunity. (RT 6810-6811.)

During the voir dire of prospective alternate jurors, the trial court asked Prospective Juror No. 217 about the response that he or she did not think that a grant of immunity in exchange for testimony was "fair." The following exchange occurred:

> THE COURT: How about if there was somebody that was -- I am not talking about this case but hypothetically. What if there was somebody who was so bad and so dangerous that nobody could testify against him unless they got something in return for it?
>
> Do you think that might be an appropriate time to give somebody immunity to get them into court?
>
> PROSPECTIVE ALTERNATE JUROR NO. 217: Yes.

(RT 7596-7597.) Prospective Juror No. 217 was then given another hypothetical of immunity being given to one of two people, such as a couple involved in the death of their baby, and was further questioned about whether he or she could make a fair credibility determination of a witness who had been granted immunity. (RT 7598-7599.)

Appellants challenged Prospective Juror No. 217 for cause and moved to discharge the entire panel on the ground the trial court had questioned the juror about immunity being granted for cases involving "somebody so bad" that no one would testify and for immunity being granted to obtain testimony that would otherwise not be available. The court denied the challenge and the motion, because the court's questions were hypotheticals and unrelated to the facts of this case. (RT 7605-7607.)

6. The Trial Court's Discussion With The Jury Regarding Security Measures

After the jurors and alternates were sworn, the trial court spoke to them outside the presence of appellants and the attorneys. The court explained to the jurors that, for a variety of reasons (i.e., their privacy from the press and others

in a long and potentially "high profile" case; to avoid the jurors coming into contact with witnesses; and to avoid the difficulty of getting 24 jurors into and out of a crowded building), the court was going to take the following actions: jurors would meet at a central parking area and be escorted into and out of the courthouse by sheriff's deputies; the jurors would not be allowed to wander the halls of the courthouse and would take their breaks in a separate jury room; and snacks and meals would be provided to the jurors at county expense. The jurors were told that they were not allowed to let the court's security arrangements, or the reasons for them, affect their verdicts at any phase of the case and were not to speculate about the reasons for the procedures. The jurors were told not to talk about the case with anybody or to talk about the court's arrangements. (RT 8057-8064.)

Two weeks later, outside the presence of appellants and all counsel, the trial court addressed the jurors once again:

> [T]he arrangements that we have to get you to court in the morning and to keep you in the building during the day and to provide lunches and so forth, those are being done for your benefit and at considerable expense.

(RT 9567.) The court reminded the jurors not to speculate about why the court was doing this and said it was necessary for the reasons previously indicated. The court asked the jurors whether there were any problems. (RT 9568, 9572-9573.)

Juror No. 247 said the arrangements were "very accommodating" and it was "going overboard." (RT 9568-9569.) The court reminded the jurors that: whether "we are going overboard" or were "too accommodating" was not their concern; the jurors' feelings about the accommodations should not affect their verdicts; and, if they had a problem or concern, they could bring it to the court's attention. The court stated:

> I understand this is a long case. It is uncomfortable to be here in the criminal courts building. But believe me when I tell you that it would be a lot worse if we were not doing this. [¶] Okay? It would be a lot harder on you in terms of getting here and all that you would have to do to fight the public elevators and things of that nature.

(RT 9569.)

Juror No. 412 asked if the jurors were restricted to the break room because he or she wanted to get cough drops at lunch time. The trial court responded that a bailiff could get what the juror needed or escort him or her to the snack bar. Juror No. 261 was concerned because the jurors were not being searched, to which the court responded that there was no need. (RT 9570-9571.)

During deliberations, the bailiffs brought to the trial court's attention their concern that Juror No. 247 had, among other things, been speaking on the telephone in the jury break room about the manner in which the jurors were brought to court. (RT 16976.) The court spoke to Juror No. 247, who stated that he had made telephone calls to the office responsible for juror compensation regarding a legal bill he had incurred because of his service. In that conversation, he described the schedule of deliberations and his unavailability to speak on the telephone but did not describe the route the jurors took to get to court. There was nothing in the trial court's questioning or the responses of Juror No. 247 that demonstrated Juror No. 247 was somehow influenced in his deliberations by the security arrangements or the trial court's discussion with him. (RT 16995-17005.)

The trial court assembled all of the jurors and explained that what had just occurred with Juror No. 247 did not concern the other jurors as it was a matter "to do with the problem of scheduling another case a long time back, and we resolved that." (RT 17006.) The court also said:

> From time to time things may occur up in the assembly room where you eat . . . that may not please you. I can guarantee that some of the security arrangements and just the hours and things might not please all of you, and for that the court does offer the humblest and most sincere apologies to each and every one of you, but try to keep your minds focused on what is first and foremost, that is the facts and the law. The other things are tangential and peripheral and . . . will fade into oblivion.

(RT 17006.)

7. Other Security Measures

The counsel tables in the courtroom were arranged to accommodate a four-defendant trial. Appellants did not object to the arrangement. (RT 6299, 6307, 16867.)

In statements to prospective jurors, the trial court stated, without objection, that it did not intend to sequester the jury and, if it did, it would do so only during deliberations. The court told the prospective jurors that use of juror numbers was to protect their privacy and the jurors should not be fearful of serving either because an anonymous jury was being used or because the case was being tried on the ninth floor of the Criminal Courts Building. The court explained that the ninth floor of the courthouse was used for longer cases. The court also told the jurors:

> we have metal detectors in front of this building for a reason and that is to assure the safety of everybody . . . so that you can go about your duties in this case and render a fair verdict whether it is one that favors the prosecution or the defense. We want it to be a verdict reached based on the evidence and logic and rationale [*sic*] and the law, not concerns that people have fear for their safety.

(RT 6651-6654.)

B. The Trial Court Did Not Abuse Its Discretion By Ordering The Use Of The REACT Belts

Appellants argue the trial court violated their rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by ordering each of them to wear a REACT belt during trial. Appellants' claim fails, because the trial court's order was entirely justified on the facts of this case.

A defendant may not be physically restrained while in the jury's presence without a showing of "manifest need." (*People v. Duran* (1976) 16 Cal.3d 282, 290-291.) This Court recently held the requirements of *Duran* apply to a trial court's decision to compel a defendant to wear a stun belt at trial. (*People v. Mar* (2002) 28 Cal.4th 1201, 1219-1220.) *Mar* found a showing of "manifest need" is required based on the possible adverse psychological effects the belt may have on the defendant's demeanor and his or her ability to focus on court proceedings, confer with his or her attorney, or otherwise assist in the defense at trial. (*Ibid.*)

A "manifest need" exists upon a showing of unruliness, an announced intention to escape, and nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained. (*People v. Hill, supra,* 17 Cal.4th at p. 841; *People v. Cox, supra,* 53 Cal.3d at p. 651; *People v. Duran, supra,* 16 Cal.3d at p. 292, fn. 11.) No formal hearing is required to fulfill the requirements of *Duran*, but the need for the restraints must appear as a matter of record. (*People v. Cox, supra,* at pp. 649-652; *People v. Duran, supra,* at p. 291.)

A defendant's prior violent criminal record or the nature of his current case cannot alone justify physical restraints. (*People v. Cunningham, supra*, 25 Cal.4th at p. 986; *People v. Hawkins* (1995) 10 Cal.4th 920, 944, overruled on another point in *People v. Blakeley* (2000) 23 Cal.4th 82.) Courts have

generally read *Duran* as requiring a defendant to make specific threats of violence, escape from court or have a history of escape, engage in violent conduct while in custody, or demonstrate unruly conduct in court before restraints are justified. (*People v. Jackson, supra,* 13 Cal.4th at p. 1215; *People v. Sheldon* (1989) 48 Cal.3d 935, 945-946.) However, a showing of "manifest need" does not have to be based on the conduct of the defendant at the time of trial nor does it require a previous attempt by the defendant to disrupt courtroom proceedings or to escape from custody. (*Small v. Superior Court* (2000) 79 Cal.App.4th 1000, 1016, citing *People v. Livaditis* (1992) 2 Cal.4th 759, 774 and *People v. Hawkins, supra,* 10 Cal.4th at p. 944.)

The decision to order physical restraints is committed to the trial court's discretion, which must be exercised on a case-by-case basis. (*People v. Mar, supra,* 28 Cal.4th at p. 1218; *People v. Hamilton* (1985) 41 Cal.3d 408, 423.) The court's exercise of discretion will not be reversed on appeal absent manifest abuse. (*People v. Pride, supra*, 3 Cal.4th at p. 231; *People v. Cox, supra,* 53 Cal.3d at p. 651; *People v. Duran, supra,* 16 Cal.3d at p. 293, fn. 12.)

Here, the trial court did not abuse its discretion as a matter of law in ordering each appellant to wear a REACT belt. As to appellant Smith, he contends there were no factors justifying the use of the REACT belt other than that this was a violent crime and that he was being tried with appellants Wheeler and Bryant. According to appellant Smith, the facts of the crime are insufficient to justify the use of the REACT belt. Moreover, he claims, the fact that codefendant Settle had reported a threat from the Bryant Family and that appellant Wheeler had been violent in custody did not apply to him. (SAOB 254-256.)

Appellant Smith fails to appreciate the seriousness of his violent attack on witness Curry, for which he had been convicted of attempted murder. Evidence was going to be introduced in the instant trial that appellant Bryant

was responsible for the pipe-bomb attack on Curry and that, like Armstrong, Curry had just left Tannis's mother's house before being shot by appellant Smith. When viewed against the allegations of the present case (i.e., that appellant Smith participated in the murders at the behest of appellant Bryant) there is an undeniable inference that appellant Smith committed violent acts on behalf of the Bryant Organization and was thus a danger in the courtroom.

Similarly, appellant Bryant contends that appellant Wheeler's record of violence in the county jail should not have been held against him. (BAOB 190.) Appellant Bryant further contends that codefendant Settle's allegations of threats made against him by "sympathizers and/or members" of the Bryant Organization and "associated gang member[s]" because of codefendant Settle's expected testimony were too vague to justify physical restraints. (BAOB 190-191.) As discussed above, it was anticipated that the evidence at trial would show (and it did) that appellant Bryant had been responsible for the pipe-bomb attack on witness Curry and that appellant Bryant was running the Bryant Organization while Jeff Bryant was in prison. In addition, the evidence would show (and it did) that Armstrong had carried out the Gentry "hit" for appellant Bryant and appellant Bryant had evaded prosecution by the use of physical threats and bribes against several witnesses.

Also, appellant Bryant's possession of excessive amounts of contraband in the county jail demonstrated he was still exerting influence as the head of the Bryant Organization. In light of the evidence that appellant Bryant had harmed people in the past, avoided prosecution, and engaged in illicit activity while in custody, including possession of an excessive amount of *razor blades*, the trial court did not abuse its discretion by finding a "manifest need" for physical restraints.

Appellant Smith further contends that all defendants should have been subjected to the same lesser level of restraint as that afforded to codefendant Settle, who was representing himself. (SAOB 255.) The record reveals that, although the trial court contemplated that codefendant Settle might be allowed to wear a leg brace and have one hand free, codefendant Settle chose the REACT belt, because it afforded him the most freedom to conduct his pro per defense. Thus, codefendant Settle was not ultimately subjected to any lesser level of restraint than appellants.

Appellant Smith contends there was nothing in the four years of trial preparation that would justify the use of the REACT belt. (SAOB 255.) Similarly, appellant Bryant contends that "in the more than six years his case had been pending," he had not caused any courtroom disruptions, had no escape attempts, and had no disciplinary record in the county jail. (BAOB 188.) Based on the trial court's comments, it appears the trial court was concerned for the safety of the jurors and witnesses at the time of trial. There was evidence from which the trial court could conclude that appellant Bryant directed violent acts against those who crossed him and that appellant Smith carried out such acts. Thus, the behavior of appellants Bryant and Smith during the pretrial proceedings that were conducted without witnesses or jurors was overridden by their potential danger during the actual trial that carried a potential death sentence.

As to appellant Wheeler, he appears to acknowledge that the trial court did not abuse its discretion by ordering physical restraints, given his record of assaulting a sheriff's deputy in the county jail and attempting to murder an inmate there. Instead, appellant Wheeler contends that he was deprived of due process, because, over the course of five months of trial, he was subject to the "threat" that the REACT belt would be activated either on purpose or accidentally. (WAOB 228-234.) Appellant Wheeler, like all of the appellants

and codefendant Settle, was given the choice of physical restraints or the REACT belt. Appellant Wheeler chose the REACT belt and at no time expressed discomfort or inability to assist in his defense because of the "threat" of accidental or purposeful activation. The trial court provided assurances that the REACT belt would be used only to prevent harm to others in the courtroom. At no time did appellant Wheeler express any fear or apprehension of the device or ask to have alternative physical restraints used.

Similarly, appellants Bryant and Smith did not indicate they had any fear that the belt would inhibit their ability to concentrate or assist in their defenses or that it would affect their demeanor while testifying. There is nothing in the record to indicate the REACT belt had any effect on any appellants' presentation of his defense. Notably, codefendant Settle, who, like appellants, chose to wear the REACT belt instead of shackles, represented himself and succeeded in obtaining a hung jury. Thus, it cannot be said the REACT belt prevented appellants from participating in their defenses or otherwise violated their rights to a fair trial. In sum, the trial court did not abuse its discretion by ordering each appellant to wear a REACT belt or shackles.

Appellants' reliance on *Dyas v. Poole* (9th Cir. 2002) 309 F.3d 586, 588, amended and superceded by *Dyas v. Poole* (9th Cir. 2003) 317 F.3d 934 (SAOB 253), is misplaced. In *Dyas*, a juror and a prospective juror saw the defendant in leg shackles in the courtroom. Another juror saw the defendant outside the courtroom in shackles. Moreover, the evidence against the defendant (who was being charged with murder) was not that she directly committed the murder, but rather that she stopped someone from going into a room where a murder was occurring. It was under these circumstances the Ninth Circuit found visible shackling to be prejudicial. (*Dyas v. Poole, supra,* 317 F.3d at pp. 937-938.) Here, there is no evidence in the record that any juror observed the REACT belt on any appellant at any time.

Gonzalez v. Pliler (9th Cir. 2003) 341 F.3d 897, 899-902 (WAOB 214, 220, 228, 232, 234; BAOB 182, 185-187, 197) is also inapplicable. There, a REACT belt was placed on a defendant without the trial court's knowledge, and the trial court accepted the bailiff's representation that the belt was needed because the defendant had shown "a little attitude." (*Id.* at pp. 900-902.) Unlike *Gonzales*, in the instant case, the decision to physically restrain appellants was made by the trial court based on the totality of circumstances and following considerable discussion and argument.

Finally, appellant Bryant contends that, even if the trial court did not prejudicially abuse its discretion by ordering use of the REACT belts, appellants had a due process right to the "least restrictive alternative." (BAOB 198-201.) Similarly, appellant Smith contends that less-restrictive measures, such as contempt of court, threatening to admonish the jury to appellants' detriment, or the presence of additional bailiffs, could have been used. (SAOB 256.) To the extent appellants contend that they have a separate constitutional right to the "least restrictive alternative" of restraint, they are mistaken. Rather, whether the trial court considered less restrictive means is part of the analysis of whether a defendant's constitutional rights were violated by the use of physical restraints. (*People v. Mar, supra,* 28 Cal.4th at p. 1226.) Here, the trial court gave considerable weight to appellants' perspectives in determining whether the traditional security measures -- such as the leg and waist shackles -- or the stun belt constituted the less intrusive or restrictive alternative. (*Id.* at p. 1228.)

C. Other Security Measures Were Proper And Did Not Violate Appellants' Constitutional Rights

Appellants contend that the other security measures used by the trial court had the same negative impact on the presumption of innocence and the impartiality of the jury as would a requirement that appellants wear visible

shackles. Specifically, appellants identify the following conditions as suggesting to the jury that appellants were dangerous and violent individuals: use of up to nine bailiffs; use of a possible metal detector at the courtroom entrance; keeping the jury from roaming around in the courthouse or going outside at lunch; withholding of juror names; voir dire of one prospective juror in the presence of others regarding granting immunity to witnesses; the trial court's statements to the jurors regarding the security arrangements; Detective Vojtecky's testimony that he took varying routes between the courthouse and the police station because of his security concerns; testimony and prosecution argument that some prosecution witnesses were afraid to testify; and discussing with a juror during deliberations whether the juror was discussing "security" arrangements on the telephone in the jury room. (BAOB 202-210; WAOB 219-227.) Appellants' claims are without merit.

Appellant Bryant relies on *Gibson v. Superior Court* (1982) 135 Cal.App.3d 774, 779-780, for the following propositions: (1) security measures "create a courtroom environment that distinguishes the defendant's trial from those of others, that suggests to the juror that these defendants are dangerous and violent people requiring extraordinary measures, and possibly deters some people from attending"; and (2) "security at the scale employed at appellant's trial created the same negative impact on the presumption of innocence and impartiality of the jury as would the requirement that appellants wear shackles visible to the jury." (See BAOB 207.) *Gibson* does not support either assertion. Notably, appellant Bryant is citing to the portion of *Gibson* in which the Court of Appeal summarized the *defendant's contentions*. *Gibson* does not hold that security precautions have the same impact on the jury as visible shackles, only that defendants are entitled to a hearing that does not rely solely on *in camera* confidential materials prior to security measures being implemented. Thus, *Gibson* is inapplicable to the instant case.

Similar to *Gibson*, the other authorities relied on by appellants such as *Illinois v. Allen* (1970) 397 U.S. 337, 343, *Rhoden v. Rowland* (9th Cir. 1999) 172 F.3d 633, 637, *Dyas v. Poole, supra,* 309 F.3d at page 588, and *Spain v. Rushen* (9th Cir. 1989) 883 F.2d 712, 721-722 (BAOB 207, 210; SAOB 252-254), are inapplicable to the type of courtroom security measures complained of by appellants, because the cited cases concern visible shackling.

This Court has held that, unlike the use of physical restraints which require a showing of "manifest need," other security measures used in the courtroom rest within the sound discretion of the trial court. (*People v. Jenkins, supra,* 22 Cal.4th at pp. 995-996.) *Jenkins* noted that the United States Supreme Court has made the same distinction by holding that visible shackling and requiring prisoners to appear in prison garb are inherently prejudicial, whereas other security measures such as the presence of additional uniformed, armed bailiffs are not inherently prejudicial because of the wider range of inferences that may be drawn. (*Id.* at p. 996, citing *Holbrook v. Flynn* (1986) 475 U.S. 560, 567-569.) Further, "security measures that are not inherently prejudicial need not be justified by compelling evidence of imminent threats to the security of the courts." (*People v. Jenkins, supra*, at p. 997, citing *Holbrook, supra,* at pp. 568-569; *People v. Duran, supra,* 16 Cal.3d at p. 291, fn. 8.)

Here, the trial court did not abuse its discretion in ordering additional security measures and such security measures, in conjunction with other events, testimony, and argument, did not deprive appellants of a fair trial. First, as to an additional metal detector, appellant Bryant concedes, as he must, that the record is at best unclear as to whether an additional metal detector was installed at the courtroom entrance. (See BAOB 203.) Since the record does not affirmatively support the claim, it should be summarily rejected. However, even assuming there was an additional metal detector, no error occurred. As

this Court held in *Jenkins*, "the use of a metal detector does not identify the defendant as a person apart or as worthy of fear and suspicion" and that, even if the jury was aware of it, the more likely implication was that it was a routine security measure or had been installed to keep order among the spectators. (*People v. Jenkins, supra,* 22 Cal.4th at p. 997.) Here, even assuming a metal detector had been installed outside the courtroom door, the jury was likely unaware of it considering that it was not waiting around in the hallway before or after proceedings.

Next, the trial court did not abuse its discretion by having additional bailiffs present. Again, the record does not affirmatively support the number of bailiffs in the courtroom throughout the trial. However, assuming that six or seven bailiffs were present during most of the trial (see RT 18782), the record does not demonstrate that there were six or seven bailiffs in uniform. And, even if there were, it would hardly seem unreasonable given this was a four-defendant, quadruple homicide case where the death penalty was sought against each of the four defendants.

In *Holbrook*, the United States Supreme Court found no due process violation in a five-defendant trial where four armed and uniformed state troopers sat directly behind the defendants as a supplement to the six courtroom bailiffs. (*Holbrook v. Flynn, supra,* 475 U.S. at pp. 564-565, 571-572.) The record in *Holbrook* established that normally a minimum of two bailiffs per defendant would have been used and that, due to a shortage of bailiffs, only six had been available. (*Ibid.*)

Similarly, in *Jenkins*, this Court found that, during a two-defendant trial, the presence of three bailiffs in addition to the three or four that would normally be the minimum present for a two-defendant trial, was not inherently prejudicial and did not result in a violation of due process. (*People v. Jenkins, supra,* 22 Cal.4th at pp. 998-999.) Here, there were four incarcerated capital

defendants being tried jointly, such that six to seven bailiffs would hardly seem excessive. This is particularly true, where, as noted in *Jenkins*, three bailiffs are usually the minimum for a two-defendant trial. (*Id.* at p. 998.) Moreover, as in *Jenkins*, the fact some of the bailiffs in the instant case were not visible to the jury (i.e., were dressed in plain clothes) also demonstrates no abuse of discretion or violation of due process occurred. (See *ibid.*)

The reasoning of *Jenkins* and *Holbrook* applies to other security precautions that appellants contend violated their rights to due process. The use of an anonymous jury and keeping the jurors out of the public hallways and elevators at the courthouse, like additional bailiffs or a courtroom metal detector, are different from visible shackles or jail clothing, because there are inferences other than appellants' guilt which may be drawn. For example, given the trial court's instructions that the jurors were not to discuss the case with anyone, juror anonymity and keeping the jurors from contact with the public at the courthouse could be seen as serving this function rather than protecting them from appellants. Similarly, juror anonymity implies a need to shield the jurors from the press. In addition, the arrangements for escorting the jurors to the courtroom and keeping them together also served the function of minimizing the burden of keeping track of 24 jurors and making sure that they timely returned to court following breaks. Like the metal detector and additional bailiffs at issue in *Jenkins*, the additional security measures in appellants' trial were neither an abuse of discretion nor a violation of appellants' constitutional rights.

Appellants also suggest that the way the tables in the courtroom were arranged was yet another security measure. (See BAOB 203; WAOB 210.) This contention has no merit. The record shows appellants did not object to having multiple tables and that the arrangement was necessary to accommodate four defendants, not for security purposes. Obviously, the jury would

understand that the courtroom was not in its typical condition, because, given the number of defendants and lawyers involved, the case was not typical. No error occurred.

Appellants further contend the cumulative impact of the above measures, combined with the voir dire, witness testimony, and prosecutor's argument, prejudicially violated their due process rights. As discussed above, no abuse of discretion or constitutional violation arose from any of the security measures employed. Further, the record shows the trial court's voir dire of the jurors was not arbitrary or intended to brand appellants as dangerous. Rather, it focused on jurors who in their questionnaires had expressed an opinion regarding the use of immunized witnesses. In the one instance the trial court gave an example of a fearful witness being granted immunity, the court could not have been any clearer that it was positing a hypothetical that was unrelated to this case. Thus, nothing about the voir dire suggested any opinion about appellants' dangerousness or guilt.

Further, the witnesses who did testify under a grant of immunity did so to avoid prosecution for their own actions, not because they were afraid of appellants. For example, Andrew Greer was involved in victim Brown's drug trade, George Smith worked for the Bryant Organization, Tannis Curry was with Armstrong just prior to his murder, and James Williams was present at the time of the murders. Thus, the implication from the immunized witnesses was not that they had been granted immunity because they were afraid of appellants but because they were avoiding their own potential criminal liability.

To the extent appellants rely on a juror asking why the jurors were not being searched (BAOB 205, citing RT 9570-9571; WAOB 213), their contention fails. Obviously, a juror wondering why other *jurors* were not subject to security screening does not demonstrate a fear of *appellants* or a perception that appellants were dangerous or guilty. Similarly, the fact that

during deliberations a juror was questioned about whether he was talking on the telephone about the route the jurors took to court (see BAOB 209; SAOB 249-250) does not demonstrate prejudicial error occurred. Juror No. 247 did not contact the court with any concerns about security. Instead, the bailiffs overheard the juror talking on the telephone in the jury break room. As it turned out, Juror No. 247 was not concerned with security but, instead, had been trying to get the juror coordinator to help him get compensated for an expense he had incurred by serving as a juror. (See RT 16995-17005.)

Moreover, at no time did the trial court make comments to the jury that would have the same type of impact on the jurors as visible shackles. To the contrary, the trial court took great pains to point out to the jury that any measure employed at trial should not be considered by it and that its duty was to render verdicts that were fair "whether it is one that favors the prosecution or the defense." At no time were the jurors told the security measures were being employed to protect them from appellants but, instead, were told that the measures were being employed to protect their privacy, to keep them from talking about the case to others, and for the jurors' and the trial court's convenience in assembling them. (See RT 6651-6654, 8057-8065, 9568-9569, 9572-9573, 17006.)

As for Detective Vojtecky's trial testimony that he took varying routes between the courthouse and the police station because of his security concerns, appellants have waived any contention of error, given that the only objection by appellant Bryant to the testimony was "relevance."[64/] Moreover, in context, Detective Vojtecky's testimony was not elicited to prove appellants' dangerousness but, instead, was elicited to rebut cross-examination by appellant

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64. The trial court sustained an Evidence Code section 352 objection and ordered stricken Detective Vojtecky's answer that he varied his route because he was aware of a contract on his life. (See RT 10755-10757.)

Bryant in which he attempted to impeach Detective Vojtecky's veracity by questioning the route he traveled between the courthouse and the police station. (See RT 10755-10757.) Thus, Detective Vojtecky's testimony on redirect examination about events outside the courthouse does not demonstrate that the otherwise proper courthouse security measures prejudicially impacted the jury.

Finally, although there was testimony and prosecution argument that some prosecution witnesses were afraid to testify (see BAOB 209), there is nothing in the record that could have suggested to the jurors that any of the security measures were used because of the witnesses' fears.

In sum, pursuant to *Jenkins* and *Holbrook*, the security measures, either individually or together, were not an inherently prejudicial suggestion of guilt such as visible shackles or jail clothing. Moreover, even when considered with the trial court's statements to the jurors and the evidence and argument at trial, no inherently prejudicial atmosphere was created. The trial court did not abuse its discretion, and appellants' constitutional rights were not violated. (See *People v. Jenkins, supra,* 22 Cal.4th at pp. 995-997.)

D. Any Error Was Harmless

Appellants contend the use of a REACT belt and/or a combination of the other security measures and courtroom events was the *de facto* equivalent of having them appear in visible restraints and prejudicially violated their constitutional rights. Notably, in *Mar*, this Court declined to decide whether, in determining if the use of a stun belt was prejudicial, the *Watson* or *Chapman* standard of harmless error applied. (*People v. Mar, supra,* 28 Cal.4th at p. 1225, fn. 7.)[65/] Given that the REACT belts were not visible to the jury and the

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65. Contrary to appellants' contention (BAOB 193-195; SAOB 258-260; WAOB 234), *Riggins v. Nevada* (1992) 504 U.S. 127 does not hold that the erroneous forced administration of an anti-psychotic drug to a defendant during trial is structural error. Although the Court recognized that

other errors complained of fell within the discretion of the trial court, respondent submits the *Watson* standard of harmless error should apply. In any event, any error in this case was harmless under either standard.

In *Mar*, this Court found the trial court's order that the defendant wear a stun belt was prejudicial, because: (1) the evidence in the case was close; (2) the defendant's demeanor while testifying was crucial because the case turned on the jury's determination of the credibility of the witnesses; and (3) there was an indication in the record that the stun belt might have had some effect on the defendant's demeanor while testifying. (*People v. Mar, supra,* 28 Cal.4th at pp. 1224-1225.) The instant case is distinguishable from *Mar*.

Here, there was compelling evidence of appellants' guilt, and the evidence was not at all close. Moreover, the jurors quickly determined appellant Bryant's guilt as to all counts. The length of deliberations as to appellants Wheeler and Smith can be explained, in part, by the need to begin deliberations anew upon the replacement of jurors.

Further, appellant Smith's defense did not hinge on his credibility, because he did not testify. (RT 13910-13911.) As to appellants Bryant and Wheeler, unlike the defendant in *Mar*, they never expressed to the court that the REACT belt in any way interfered with their testimony. (See *People v. Mar, supra,* 28 Cal.4th at pp. 1224-1225 [defendant, who was on trial for injuring a law enforcement officer, specifically said he feared that the law enforcement officer who controlled the stun belt might "push the button"].) Moreover, appellant Bryant's and appellant Wheeler's minimization of their involvement in the Bryant Organization and their denials of being at the crime scene were overwhelmingly refuted by the prosecution's case. Also, codefendant Settle,

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the precise consequences of forcing anti-psychotic medication upon Riggins could not be shown from the trial transcript, the Court appears to have engaged in a harmless error analysis, finding the error prejudicial. (*Id.* at pp. 137-138.)

who represented himself while wearing the REACT belt, obtained a hung jury. Thus, given codefendant Settle's performance and no evidence in the record that appellants' defenses were in any way impaired, it can confidently be said that the use of the REACT belt was non-prejudicial.

Finally, the security arrangements other than the REACT belt and the other events in the trial were also non-prejudicial. At all times, the trial court admonished the jurors not to consider the courtroom arrangements in reaching their verdicts, the juror questions did not indicate that the jurors were afraid of appellants, and the evidence presented by the prosecution fairly portrayed the Bryant Organization. In sum, any error was harmless under either the *Watson* or *Chapman* standard.

XXV.

THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF SIX UNADJUDICATED OFFENSES AT THE PENALTY PHASE AGAINST APPELLANT WHEELER

Appellant Wheeler argues that the admission at the penalty phase of six unadjudicated crimes -- his 1987 attack on inmate Brock, his 1988 assault on Brian Brown, his 1989 attack on inmate Turner, his 1991 attack on inmate Contreras, his 1991 attack on inmate Wright, and his 1992 attack on inmate Smith -- violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution because, in essence, it was unfair to have the same jury that found him guilty of murder pass on the truth of the unadjudicated criminal activity. (WAOB 273-279.) Appellant Smith joins in this claim. (SAOB 451.)

First, this claim of error is waived, because appellant Wheeler does not appear to have objected on this ground at trial. (*People v. Catlin, supra,* 26 Cal.4th at p.172, citing *People v. McPeters, supra,* 2 Cal.4th at p. 1188.) In any event, this Court has previously rejected this identical claim (*People v. Young* (2005) 34 Cal.4th 1149, 1207-1208; *People v. Williams, supra,* 16 Cal.4th at p. 236) and should do so again here since appellant Wheeler has not provided any reason for this Court to depart from its prior rulings.

XXVI.

THE INTRODUCTION OF, AND INSTRUCTION ON, EVIDENCE AT THE PENALTY PHASE THAT APPELLANT SMITH TWICE POSSESSED A SHANK WHILE IN CUSTODY WAS PROPER

Appellant Smith maintains the introduction of, and instruction on, evidence at the penalty phase that he twice possessed a shank while in custody deprived him of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as the corresponding sections of the California Constitution. Specifically, appellant Smith claims that possession of a shank is not a crime involving the use or attempted use of force or violence or the express or implied threat to use force or violence under factor (b) of section 190.3. (SAOB 349-352.) He also maintains that CALJIC No. 8.87 erroneously instructed the jury in several respects. (SAOB 352-356.) Appellant Wheeler joins in the claims. (WAOB 451.) Respondent submits the claims are without merit.

A. Relevant Proceedings

1. The Evidence

The prosecution introduced evidence at the penalty phase under factor (b) of section 190.3 (implied threat of force or violence) that on two occasions appellant Smith was found in possession of a shank while in custody.

The first incident occurred on June 5, 1991, when Deputy Sheriff Mark Moffett was working in the Housing Unit of the jail and he searched appellant Smith's property to make sure he did not possess an item which could be used to injure another inmate. Deputy Moffett found in appellant Smith's property a seven-inch, jail-made knife: two plastic cups independently melted down and sharpened at one point with a sock wrapped around the end opposite the point. (RT 17527-17529, 17531-17532.)

The second incident occurred over two years later on July 9, 1993, when Deputy Sheriff James Johnson conducted a random search of appellant Smith's bed and found underneath the mattress a compact disc which had two sharp edges on it. Although one edge was sharper than the other, both edges had scratches. The compact disc "was in a half moon sort of shape. One of the edges had scratches on it, it appeared as though someone had sharpened one of the edges although both edges were sharp." The modified compact disc was the type of instrument which could "very easily" cause substantial or serious injury to other inmates or deputies. (RT 17490-17493.)

2. The Jury Instruction

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

> Evidence has been introduced for the purpose of showing that the [appellant] Donald Smith has committed the following criminal acts:
>
> . . . .
>
> 4. Possession of weapon in County jail (melted plastic cup)(6/5/91)
>
> . . . .
>
> 6. Possession of weapon in County jail (altered compact disc)(7/9/93)
>
> which involved the express or implied use of force or violence or the threat of force or violence. Before a juror may consider any of such criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the [appellant] Donald Smith did in fact commit such criminal acts. A juror may not consider any evidence of any other criminal acts as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not

convinced, that juror must not consider that evidence for any purpose. (CT 15830-15831.)

B. Analysis

1. The Evidence Appellant Smith Twice Possessed A Shank While In Custody Was Properly Admitted At The Penalty Phase As Evidence Of An Implied Threat Of Force Or Violence Under Factor (b) Of Section 190.3

Although appellant Smith cites this Court's holding in *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589, and concedes that this Court has held that a defendant's knowing possession of a potentially dangerous weapon while in custody is admissible as an implied threat of force or violence under factor (b) of section 190.3, he nonetheless urges this Court to "reconsider its previous decisions or distinguish this case from situations that have involved actual threats or the possession of a weapon on a defendant's person." (SAOB 349-350.) Respondent submits such reconsideration is not necessary.

In *People v. Tuilaepa, supra*, 4 Cal.4th at pages 588-589, the defendant challenged the deputy's testimony describing several unauthorized items found on his person and in his cell, arguing that mere possession of even a deadly weapon did not involve the threat of violence. This Court rejected the argument, stating: "It is settled that a defendant's knowing possession of a potentially dangerous weapon in custody is admissible under factor (b)." (*Id.* at p. 589.) Even more recently, in *People v. Gutierrez, supra*, 28 Cal.4th at page 1153, this Court held that the defendant's possession of razors for use as deadly weapons was validly considered as evidence in aggravation under factor (b) of section 190.3.

Appellant Smith argues that this Court should reconsider its previous decisions or distinguish this case from those situations that have involved actual threats or the possession of a weapon on a defendant's person. But this Court

should reject appellant Smith's invitation, because it has very recently rejected the requirement of actual threats. (*People v. Martinez, supra,* 31 Cal.4th at p. 697; *People v. Tuilaepa, supra*, 4 Cal.4th at p. 589.) And this Court has never required the possession of a weapon on a defendant's person. (See SAOB 352.) In *Tuilaepa,* the defendant had unauthorized items both on his person and in his cell. (*People v. Tuilaepa, supra*, at pp. 580, 588-589.) Moreover, requiring the possession of a weapon on a defendant's person would be legally incorrect. An inmate violates section 4574 by actually *or* constructively possessing deadly weapons. (See *People v. Prieto, supra*, 30 Cal.4th at p. 269.) Here, because the shank was found inside appellant Smith's property and underneath his mattress, he constructively possessed the shanks. The trier of fact was free to consider any "innocent explanation" for appellant Smith's possession of the item, but such inferences did not render the evidence inadmissible per se. (*People v. Tuilaepa, supra*, at p. 589.)

Appellant Smith's claim must be rejected because he offers no legitimate or persuasive reason for reconsidering this Court's decisions. (See *People v. Nakahara, supra*, 30 Cal.4th at pp. 719-720.)

2. The Trial Court Properly Instructed The Jury With CALJIC No. 8.87

Appellant Smith makes several claims regarding the propriety of CALJIC No. 8.87. Appellant Smith claims the instruction erroneously directed the jury that his acts were crimes involving the express or implied use of force or violence or the threat of force or violence. Specifically, as to CALJIC No. 8.87, appellant Smith argues the instruction created a "mandatory presumption" that the criminal activity involved force or violence. He also argues that the instruction improperly escalated the seriousness of the incident by defining the incident as an actual, express threat or implied use of force or violence. (SAOB 352-356.) Unfortunately for appellant Smith, this Court has

recently considered and rejected each of his claims regarding CALJIC No. 8.87 in *People v. Nakahara, supra,* 30 Cal.4th at p. 720:

> Defendant also complains that the court took the issue of implied threat out of the jury's hands, and created an improper "mandatory presumption" by instructing that evidence had been introduced that the shank incident "involv[ed] the implied use of force or violence or the threat of force or violence." As defendant observes, this instruction left it to the jurors to decide only whether, beyond a reasonable doubt, the incident in fact occurred.
>
> We recently held that CALJIC No. 8.87 is not invalid for failing to submit to the jury the issue whether the defendant's acts involved the use, attempted use, or threat of force or violence. (*People v. Ochoa* (2001) 26 Cal.4th 398, 453 [].) The question whether the acts occurred is certainly a factual matter for the jury, but the *characterization* of those acts as involving an express or implied use of force or violence, or the threat thereof, would be a legal matter properly decided by the court.
>
> Contrary to defendant's argument, the instruction given here did not advise the jury that defendant's conduct amounted to an *actual or express* threat of violence, and no danger existed the jury would assume that an actual threat was made in this case. As the evidence made clear, defendant's illegal conduct amount to *possessing* a shank in his cell, conduct that is properly deemed an *implied* threat of violence. (See *People v. Smithey, supra*, 20 Cal.4th at p. 1002.)
>
> As noted, the court's instruction left it to the jury to decide whether, beyond a reasonable doubt, defendant possessed a shank in his cell.

[Emphasis original.] Respondent thus submits appellants' claims must be rejected.

XXVII.

THE TRIAL COURT DID NOT ERR IN ALLOWING THE PENALTY JURY TO CONSIDER IMPROPER AGGRAVATING CIRCUMSTANCES AS TO APPELLANT BRYANT SINCE THE ACCOMPLICE TESTIMONY OF DAVID HODNETT AND WALTER COMPTON WAS SUFFICIENTLY CORROBORATED; ASSUMING ARGUENDO THE TRIAL COURT ERRED, ANY SUCH ERROR WAS NON-PREJUDICIAL ON THE FACTS OF THIS CASE; AND THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN ORALLY INSTRUCTING THE JURY BECAUSE THE WRITTEN INSTRUCTIONS WERE AVAILABLE TO THE JURY DURING DELIBERATIONS

Appellant Bryant contends the trial court committed several statutory and constitutional errors at the penalty phase in admitting and instructing upon evidence in aggravation against him. Specifically, appellant Bryant first contends the aggravating evidence admitted under factor (b) that he solicited Walter Compton to kill Sofinia Newsom, and David Hodnett to shoot Clarence Johnson should have been stricken by the trial court since the prosecution failed to present sufficient evidence to corroborate the testimony of accomplices Compton and Hodnett. This error was compounded, argues appellant Bryant, by the trial court's incorrect instruction to the jury on the need for corroboration of the accomplice testimony before such evidence could be considered by the jury. (BAOB 494-499.)

Appellant Bryant next contends the trial court's instruction to the jury pursuant to CALJIC No. 8.77 "essentially directed [the jury] to find such evidence constituted a crime." (BAOB 499-502.) Finally, appellant Bryant contends the trial court erroneously instructed the jury that it could consider the facts and circumstances underlying appellant Bryant's non-violent conviction as factor (b) evidence rather than factor (c) evidence. (BAOB 503-504.) Appellants Wheeler and Smith join in this claim. (WAOB 435; SAOB 451.)

Respondent submits the trial court did not err in admitting the accomplice testimony of either Compton or Hodnett and, to the extent the trial court did err in this regard, any such error must be deemed non-prejudicial on the facts of this case since it is not reasonably possible the penalty jury would have arrived at a different penalty verdict as to appellant Bryant absent the testimony of either Compton or Hodnett. Finally, respondent submits the instructional issues raised by appellant Bryant are without merit.

A. The Accomplice Testimony Of Compton And Hodnett Was Sufficiently Corroborated By Other Evidence

1. The Accomplice Testimony Presented At The Penalty Phase Against Appellant Bryant

At the penalty phase, the prosecution presented aggravating evidence against Bryant which showed: (1) appellant Bryant hired David Hodnett to kill Clarence Johnson; and (2) appellant Bryant solicited and hired Walter Compton to kill Sofinia Newsom. Below is a reiteration of the relevant facts as to each incident.

a. Appellant Bryant Hires David Hodnett To Kill Clarence Johnson

Appellant Bryant hired David Hodnett to kill Clarence Johnson. Hodnett received $3,500, as well as $16,000 while in prison, for "the hit" from appellant Bryant. The shooting took place on the evening of March 19, 1985, in the dirt parking lot on the east side of Neighborhood Billiards after Johnson climbed into appellant Bryant's pickup truck. Two weapons were used in the shooting, and a total of 11 shots were fired at Johnson. A bullet-ridden Johnson drove the pickup truck to the Foothill Police Station. (RT 17663-17677, 17682-17683; see RT 17618-17628.)

At approximately 10:30 p.m. that evening, Los Angeles Police Officer Robert A. Sorrentino was sitting at the front desk at the Foothill Police Station when he heard, for "about a minute," the honking of a car horn from the street. After Office Sorrentino walked outside, he saw an older blue pickup truck parked on the wrong side of the street at an angle with the back of the pickup truck blocking the traffic lane. Officer Sorrentino also heard a "real weak voice" from inside the pickup truck state, "Help me. Help me. I've been shot." Officer Sorrentino approached the pickup truck and noticed a bullet hole in the driver's door and a "gouge" towards the front of the door by the hinge area. The glass on the driver's side of the pickup truck "had been blown out" and the driver, Clarence Johnson, had "glass fragments all over his lap." Johnson suffered six bullet wounds: two in the left upper arm, one in the left calf, one in the lower left back, and two in the upper right back. Johnson was transported by paramedics to the hospital for treatment. Johnson did not die as a result of the shooting. (RT 17653-17658, 17661, 17675-17676.)

Although there was an "arrangement" where Hodnett would identify Jeff Bryant and appellant Bryant during his testimony at the preliminary hearing as the individuals who hired him to kill Johnson, Hodnett abruptly changed his mind during the hearing and pleaded guilty. Hodnett told Detective Vojtecky that he just got out of prison and would rather return to prison than "jeopardize his life or his family's life." Hodnett related that he would never testify against the Bryants in court because, if he did, "he would be a dead man." Hodnett explained that, if he testified against the Bryants, "he would either be killed or any member of his family would be killed if they couldn't get at him." After learning that Alonzo Smith testified in the instant case, Hodnett said,

> If you see Doug [Alonzo Smith], you tell him because of my love for his family and for him I will not kill him. Would you also tell him if you don't lock him down in prison and secure him, you tell him to carry two

knives because he's a dead man. And tell him never to approach me on the street when he gets out. We don't know each other anymore.

(RT 17678-17682, 17685-17686.)

b. Appellant Bryant Solicits And Hires Walter Compton To Kill Sofinia Newsom

Near the end of November 1983, appellant Bryant hired Walter Compton, a former high school friend and drug associate, to kill Sofinia Newsom, an eyewitness to the Kenneth Gentry murder, in exchange for $10,000. Appellant Bryant told Compton that Gentry had been killed because Gentry was upset about some drugs Gentry had purchased. Appellant Bryant, after telling Compton who had killed Gentry, asked Compton to kill Newsom "because she was running off at the mouth with the police about the Gentry murder." After the meeting with appellant Bryant, Compton met Jeff Bryant at the pool hall. Jeff Bryant gave Compton a nine millimeter revolver to kill Newsom. Jeff Bryant also showed Compton a stolen car parked near Newsom's apartment which Compton could use as a "getaway" car following the murder. (RT 17584-17591, 17594-17595.)

Over the next several days, Compton watched Newsom "for what would be a good chance where I might be able to kill her." After a couple of days, Compton followed Newsom to the Pierce Street apartments but "had a change of heart" about killing her. Compton was "really scared" and realized he could go to jail. He was also "afraid that maybe if I did [the killing], they would probably kill me." Compton approached a police car in the parking lot of the Pierce Street apartments and showed the police officer the nine millimeter revolver. Compton was arrested. Compton turned himself over to the police, rather than committing the murder, because "it'd be the most wise sort of thing. It's one way of getting out of it." (RT 17591-17595, 17602-17603.)

2. The Accomplice Testimony Of Compton And Hodnett Was Sufficiently Corroborated By Other Evidence

The accomplice corroboration rule applies to both the guilt and penalty phases of a death penalty case. (See *People v. Mincey, supra,* 2 Cal.4th at p. 461; *People v. Miranda* (1987) 44 Cal.3d 57, 100; see also *People v. McDermott, supra,* 28 Cal.4th at p. 1000.) Thus, where, as here, the prosecution introduces evidence of the defendant's unadjudicated prior criminal conduct, the jury should be instructed at the penalty phase that an accomplice's testimony must be corroborated. (*People v. Mincey, supra*, at p. 461; *People v. Easley* (1988) 46 Cal.3d 712, 734.) Here, the jury was so instructed. (CT 15834; RT 18436-18437.)

Accomplice corroboration may be established entirely by circumstantial evidence, and such evidence "'may be slight and entitled to little consideration when standing alone.'" (*People v. Rodrigues, supra,* 8 Cal.4th at p. 1128, quoting *People v. Zapien, supra,* 4 Cal.4th at p. 982.) While corroborating evidence "'must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime,'" it is *not* necessary that the corroborative evidence "'be sufficient in itself to establish every element of the offense charged.'" (*People v. Zapien, supra*, at p. 982.) Accordingly, the prosecution need only "produce independent evidence which, without aid or assistance from the testimony of the accomplice, *tends* to connect the defendant with the crime charged." (*People v. Perry, supra*, 7 Cal.3d at p. 769, emphasis added; see *People v. Rodrigues, supra*, at p. 1128.) And, "unless a reviewing court determines that the corroborating evidence should not have been admitted or that it could not reasonably *tend* to connect a defendant with the commission of the crime, the finding of the trier of fact on the issue of corroboration may not be disturbed on appeal." (*People v. Perry, supra*, at p. 774, emphasis original, footnote omitted.) Finally, in making this determination, because "an

appellate court must view the evidence in a light most favorable to the verdict [citation]," the reviewing court "must uphold the trial court's disposition if, on the basis of the evidence presented, the jury's determination is reasonable." (*Ibid.*)

Here, the prosecution presented substantial independent corroborative evidence which *tended* to connect appellant Bryant to the attempted murder of Clarence Johnson such that the jury could reasonably conclude accomplice Hodnett was telling the truth when he implicated appellant Bryant in the incident. Significantly, while in prison, Hodnett received $16,000 from appellant Bryant. Appellant Bryant argues that the payment of money "may very well [be] evidence that appellant [Bryant] was involved in paying off Hodnett after the fact, but it does not establish that it was appellant [Bryant] who solicited the crime." (BAOB 497.) That, of course, is an argument which could have been directed to the jury. Given appellant Bryant's history of "paying off" "hit men," the jury could reasonably infer appellant Bryant was satisfying his debt to Hodnett for "the hit" on Johnson. The payment of the money, standing alone, respondent submits, is sufficient independent corroborative evidence which *tends* to connect appellant Bryant to the attempted murder of Johnson.

There is, however, additional independent corroborative evidence which *tends* to connect appellant Bryant to the attempted murder of Johnson. The shooting took place in the parking lot on the east side of Neighborhood Billiards after Johnson climbed into appellant Bryant's pickup truck. Officer Sorrentino confirmed the shooting of Johnson actually took place by his observations of Johnson inside the pickup truck outside the Foothill Police Station. And, finally, Hodnett, like so many other witnesses who ran afoul of appellant Bryant, refused to testify against appellant Bryant at trial because of his fear that, if he did, "he would either be killed or any member of his family

would be killed if they [the Bryant Organization] couldn't get at him." (RT 17684.)

In sum, the combination of the corroborative evidence, especially the payment of money to Hodnett while in prison and Hodnett's refusal to testify at trial against appellant Bryant, reasonably *tends* to connect appellant Bryant with the attempted murder of Johnson such that the jury could reasonably conclude Hodnett was telling the truth when he implicated appellant Bryant in the Johnson incident.

The prosecution also presented substantial independent corroborative evidence which *tended* to connect appellant Bryant to the solicitation and hiring of Walter Compton to kill Sofinia Newsom such that the jury could reasonably conclude accomplice Compton was telling the truth when he implicated appellant Bryant in the incident. Appellant Bryant did not want the prosecution of the Kenneth Gentry murder to proceed. He bribed witnesses to insure they would not testify in the Gentry prosecution. Ladell Player related that, if appellant Bryant had a problem with someone, appellant Bryant would smile, shake their hand, and then have them killed. Appellant Bryant assured Andre Armstrong that he and his Organization would "take care of" the witnesses to the Gentry murder. But Newsom was one of those witnesses appellant Bryant could not buy. She testified in the Gentry murder case by identifying appellant Bryant as the person who acknowledged Gentry to Armstrong as they passed by the apartment building immediately before Gentry was executed. And, as to the Newsom attempted murder, Jeff Bryant gave Compton a gun for the murder and a stolen "getaway car" to use after the murder. In sum, the combination of this corroborative evidence reasonably *tends* to connect appellant Bryant with the solicitation and attempted murder of Sofinia Newsom such that the jury could reasonably conclude accomplice Compton was telling the truth when he implicated appellant Bryant in the Newsom incident.

3. Any Error In The Admission Of The Accomplice Testimony Was Non-Prejudicial On The Facts Of This Case

Assuming arguendo insufficient evidence was presented to corroborate the testimony of accomplices Hodnett and/or Compton, respondent submits the introduction of the evidence regarding the Johnson and/or Newsom incidents was utterly harmless since it is not reasonably possible the penalty jury would have returned a verdict of life without the possibility of parole absent the evidence. (See *People v. Brown* (1988) 46 Cal.3d 432, 446-447; *People v. Jackson, supra*, 13 Cal.4th at p. 1232.) The fact appellant Bryant wanted to eliminate individuals who crossed his path or who testified against him was nothing new to the penalty jury. The record is replete with testimony where appellant Bryant sought to deal with such individuals in a violent manner. The more significant incidents include, but are not limited to, the brutal executions of the four helpless victims in the instant case (Armstrong, Brown, Anderson, and Chemise), the murder of Kenneth Gentry, the shooting of Reynard Goldman, the *two* attempted murders of Keith Curry (i.e., a bombing and a shooting), and the assault of Francine Smith with nunchukas. Thus, in assessing appellant Bryant's character, the Johnson and/or Newsom incidents did not tell the penalty jury anything it did not already know about appellant Bryant, namely, that he was an extremely violent person who would "take out" anyone who got in his way. In short, the Johnson and/or Newsom incidents added nothing to the penalty jury's assessment of appellant Bryant's character.

Moreover, the Johnson and/or Newsom incidents did not play a significant role in the prosecutor's closing argument. Indeed, the prosecutor relied mainly on the circumstances of the crime as the primary aggravating evidence against appellant Bryant. (See RT 18459-18466, 18476, 18494.) And, the mitigating evidence presented by appellant Bryant -- two former golfing buddies, a family-child therapist, an ex-mother-in-law, a sister, and his

mother -- paled in comparison to the horrendous nature of the circumstances surrounding the *four* executions in the instant case. Given the nature of the Johnson and Newsom incidents as it related to appellant Bryant's character, the lack of significant reliance on such evidence by the prosecutor in his closing argument, and the overwhelming aggravating evidence presented against appellant Bryant in the nature of the circumstances of the charged crimes, as well as the other violent crimes introduced against appellant Bryant, it is not reasonably possible the penalty jury would have returned a verdict of life without the possibility of parole absent the testimony regarding the Johnson and/or Newsom incidents.

B. The Jury Was Properly Instructed At The Penalty Phase

Appellant Bryant raises three jury instruction issues. First, appellant Bryant contends that CALJIC No. 8.77 erroneously directed the jury that appellant Bryant committed prior criminal acts without deciding if such acts violated factor (b). As explained by appellant Bryant, CALJIC No. 8.77 "improperly decided against appellant [Bryant] the issue of whether or not his threats violated a penal statute under factor (b), and thereby deprived him a jury determination of whether the threat evidence was properly considered as aggravation." (BAOB 499-502.) As fully explained in Argument XXVI of Respondent's Brief, in *People v. Nakahara, supra,* 30 Cal.4th at page 720, this Court upheld CALJIC No. 8.77 from attacks similar to those raised by appellant Bryant. Respondent incorporates by reference its discussion of CALJIC No. 8.77 from Argument XXVI. Appellant Bryant's claim must, therefore, be rejected.

Second, appellant Bryant contends the trial court erred in instructing the jury on the accomplice instruction. It appears there may have been a slight misreading of the written instruction to the jury. The Clerk's Transcript indicates the jury was instructed, in part, as follows:

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 *alleged. If there is not such independent evidence tending to connect defendant with the commission of the crime*, the testimony of the accomplice is not corroborated. If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.

(CT 15834, emphasis added.) The Reporter's Transcript, however, fails to contain the italicized portion of the above-quoted instruction. (See RT 18436-18437.) Appellant Bryant contends the missing portion of the instruction from the oral reading of the instruction was prejudicial error. (BAOB 498-499.) For the reasons discussed below, this contention is without merit.

Finally, appellant Bryant contends the trial court improperly instructed the jury that it could consider under factor (c) the facts and circumstances of a non-violent drug offense as an aggravating factor rather than just the fact of the conviction. (BAOB 503-504.) Factor (c) of section 190.3 permits the penalty jury to consider as a circumstance in aggravation "the presence or absence or any prior felony conviction," while factor (b) permits the penalty jury to consider as a factor in aggravation "the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express threat to use force or violence."

The Clerk's Transcript contains the correct instruction as to factors (b) and (c):

In determining which penalty is to be imposed on each defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the

following factors, if applicable:

. . . .

(b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.

(CT 15820.)

However, in reading the instruction to the jury, it appears the trial court re-read a first portion of the factor (b) instruction instead of the factor (c) portion:

(c) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings.

(RT 18426.)

The second and third instructional issues raised by appellant Bryant are without merit, because the jury was provided the written copies of the instructions during its deliberations. (See CT 15842.) Both of the alleged errors raised by appellant Bryant have to do with an apparent misreading of the written instructions to the jury. In other words, the written instructions are correct and proper but conflict with the incorrect oral reading of a portion of those instructions to the jury. Unfortunately for appellant Bryant, the law is clear that "as long as the court provides the jury with the written instructions to take into the deliberation room, they govern in any conflict with those delivered orally." (*People v. Osband* (1996) 13 Cal.4th 622, 717.) It is presumed the jury was guided by the written instructions. (*People v. Davis* (1995) 10 Cal.4th 463,

542.) Thus, if the jury is given the written instruction for its consideration during deliberations, as is the case here, no prejudicial error occurs from deviations in the oral instructions. (*People v. Osband, supra*, at p. 717; *People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1113.)

Appellant Bryant offers no record-based reason to deviate from the presumption in this case. And, more significantly, appellant Bryant offers no record-based reason (i.e., prosecutor's argument) that the jury erroneously applied either the accomplice instruction or the factor (c) instruction as he maintains. Appellant Bryant has failed to demonstrate that there is any reasonable likelihood the jury misapplied either instruction in this case. Thus, his claim must be rejected. (See *People v. Clair* (1992) 2 Cal.4th 629, 688.)

XXVIII.

THE TRIAL COURT PROPERLY REFUSED APPELLANT SMITH'S REQUESTED INSTRUCTIONS ON LINGERING DOUBT

Appellant Smith contends the trial court's refusal to give his requested instructions on lingering doubt deprived him of his rights to due process of law and a reliable penalty determination in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (SAOB 342-348.) Appellant Wheeler joins in the claim. (WAOB 451.) Respondent submits the trial court properly refused to give the requested instructions on lingering doubt.

A. Relevant Proceedings

1. The Requested Instructions

Appellant Bryant submitted to the trial court a packet of proposed penalty phase jury instructions. (See CT 15628-15665.) Proposed penalty phase jury instruction No. 9, entitled "Lingering Doubt As to Guilt," contained two instructions:

> 1. The adjudication of guilt is not infallible and any lingering doubt you entertain on the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that at some time in the future, facts may come to light which have not yet been discovered; and
>
> 2. It may be considered as a factor in mitigation if you have a lingering doubt as to the guilt of the defendant.

(CT 15650.) Appellant Smith joined in the request for an instruction on lingering doubt. (RT 17971.)

2. The Trial Court's Ruling

Prior to the trial court's ruling on the request for a lingering doubt instruction, appellant Smith argued in support of the request: "We all know [lingering doubt is] an appropriate factor to argue, but the problem is giving it any weight. How [does the jury] know it is appropriate for them to consider?" (RT 18298.)

The trial court refused the requested instructions on lingering doubt:

> THE COURT: I will put it this way.
>
> The [lingering doubt] concept is one that the cases say can be argued by counsel. That is without objection. The cases also say the court is under no duty to instruct on it and the reason is clear, because it is simply something that is in the statute, was decided by a court to be appropriate in a given case but not appropriate to the degree that they have told us to instruct on.
>
> So that tells us a bit as to what is going on.
>
> It invites the relitigation as to a guilt phase and speculation about things that are -- that the jury has resolved.
>
> So that is the reason I am not big on that.

(RT 18299.)

3. Appellant Smith's Argument To The Jury

Although counsel for appellant Smith advised the penalty jury that "that was your verdict and I accept them, Mr. Gregory [co-counsel for appellant Smith] accepts it and hopefully my client [appellant Smith] accepts it and we move forward" (RT 18569-18570), he actually argued lingering doubt at the outset of his argument when he told the penalty jury the following:

> Before I start though, I have to tell you when you returned your guilt phase verdicts and you found [appellant] Smith guilty of two counts of

first degree murder of the two men that were inside the house and then the two counts of second degree murder for what occurred in the car and one count of second degree attempted murder, I was somewhat puzzled and somewhat disappointed. And I will be brief and I will tell you why.

The reason I will tell you why is maybe that is something that will enter into your penalty phase deliberations and maybe it won't.

I wasn't in the jury room so I don't know what happened back there. I don't know if you concluded that [appellant] Smith shot someone or merely aided and abetted.

I don't know if you went through the California law on accomplice and decided that Mr. Williams was not an accomplice and, therefore, there was no corroboration of [appellant] Smith's participation in those August 28th, 1988 events or whether Mr. Williams was an accomplice and there was corroboration, or I should say if he was an accomplice then corroboration was required.

Because, as you know, California law says that you're not allowed to convict someone solely on the uncorroborated testimony of an accomplice.

Then towards the tail end of your deliberation, there were questions asked. And once again, I was not back there with you so I don't know the genesis of these questions. But it started to bring up fears that I had that maybe the accomplice rule was considered to be discretionary.

You could apply it or not apply it as you saw fit or maybe you had gone through all the steps and decided whatever was appropriate in terms of returning your verdicts against [appellant] Don Smith.

But nonetheless I was somewhat disappointed but that was your verdict and I accept them, Mr. Gregory accepts it and hopefully my client accepts it and we move forward.

But I mention this just in case some of you may have had some wrong impressions about the accomplice rule and *there may be some lingering doubt* as to did we really apply that rule properly.

California law says that *you can use that lingering doubt now in your penalty phase deliberations.*

But enough said on that.

(RT 18568-18570, emphasis added.)

B. Analysis

Appellant Smith's claim that the trial court erred in refusing to give the requested instructions on lingering doubt has been squarely rejected by this Court in numerous cases. For example, in *People v. Earp* (1999) 20 Cal.4th 826, 903-904, this Court stated:

> There is no constitutional entitlement to instructions on lingering doubt. (*Franklin v. Lynaugh* (1988) 487 U.S. 164, 173-174 []; *People v. Frye, supra*, 18 Cal.4th 894, 1027; *People v. Johnson, supra*, 3 Cal.4th 1183, 1252.) "This is not to say that the jury's consideration of any such doubt is improper; the defendant may urge his possible innocence to the jury as a factor in mitigation." (*People v. Johnson, supra*, at p. 1252.) Instructions directing the jury to consider the circumstances of the crime (§ 190.3, factor (a)) and any other circumstance that extenuates the gravity of the crime (*id.*, factor (k)) necessarily encompass the concept of lingering doubt, and thus render any special instruction on the concept unnecessary. (*People v. Frye, supra*, at p. 1027; *People v. Hines, supra*, 15 Cal.4th 997, 1068.) Here, the question of "lingering doubt" was properly put before the penalty phase jury when defense counsel argued that jurors should consider whether they "were absolutely certain" that defendant killed 18-month-old Amanda. There was no error.

Here, the penalty jury was instructed to consider the circumstances of the crime under factor (a) of section 190.3 and any other circumstance that extenuates the gravity of the crime under factor (k) of section 190.3. (CT 15820, 15821.) And, significantly, the question of "lingering doubt" was squarely placed before the jury in appellant Smith's argument. Thus, there was no error and appellant Smith's claim must be rejected. (*People v. Earp, supra*, 20 Cal.4th at pp. 903-904; see *People v. Staten* (2000) 24 Cal.4th 434, 464.)

Finally, it must be noted that appellant Smith's request that this Court "reconsider" *Franklin v. Lynaugh* (1988) 487 U.S. 164, a case in which the United States Supreme Court held there is no constitutional entitlement to instructions on lingering doubt at a penalty phase, misses the mark. *Franklin* was decided by the United States Supreme Court, not this Court. (See SAOB 348.)

XXIX.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY DURING THE PENALTY PHASE

On several bases, appellants claim the trial court unconstitutionally instructed the jury during the penalty phase. (WAOB 279-319, 435; SAOB 358-416, 451; BAOB 505-534, 571-585, 602-605.) This Court has previously rejected these same arguments in other capital cases, and appellants "offer[] no convincing reasons for reconsidering those rulings." (*People v. Johnson* (1993) 6 Cal.4th 1, 51.) As a result, this Court should again reject appellants' arguments that the penalty phase instructions were unconstitutional.

A. CALJIC No. 8.88 Is Constitutional

The trial court instructed the jury pursuant to CALJIC No. 8.88.[66] (CT

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66. CALJIC No. 8.88 provides:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without the possibility of parole, shall be imposed on each of the defendants.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of the aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign

15846-15847; RT 18443-18444.) Appellants contend CALJIC No. 8.88 was constitutionally deficient and violated their Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution because the instruction: (1) failed to inform the jurors that, if they determined that mitigation outweighed aggravation, they were required to impose a sentence of life without the possibility of parole (SAOB 371-375; BAOB 580-584; WAOB 292-293); (2) failed to inform the jurors that they had discretion to impose life without the possibility of parole even in the absence of mitigating evidence (SAOB 375-376); (3) used the "so substantial" standard for comparing mitigating and aggravating circumstances (SAOB 376-378; BAOB 574-577; WAOB 293-295); (4) failed to convey to the jury that the central decision at the penalty phase is the determination of the appropriate punishment (SAOB 378-

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> whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.
>
> In this case you must decide separately the question of the penalty as to each of the defendants. If you cannot agree upon the penalty to be inflicted on all defendants, but do agree on the penalty as to one or more of them, you must render a verdict as to the one or more on which you do agree.
>
> You shall now retire and select one of your number to act as the foreperson, who will preside over your deliberations. In order to make a determination as to penalty, all twelve jurors must agree.
>
> Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.

(RT 18444-18445; CT 15846-15847.)

379; BAOB 577-579); (5) failed to specify the appropriate burdens of proof (SAOB 379-392); (6) failed to require jury unanimity in the determination of aggravating factors (SAOB 392-405); (7) failed to require written findings on the aggravating factors supporting the death verdict (SAOB 405-408); (8) failed to instruct on the presumption of life (SAOB 408-409; BAOB 571-572); (9) failed to inform the jurors that appellants did not have to persuade them the death penalty was inappropriate (BAOB 584-585); and (10) failed to adequately define the terms "aggravating" and "mitigating" (WAOB 295-298). This Court has repeatedly rejected each of the above claims. (See *People v. Levont* (2004) 32 Cal.4th 1107, 1134-1135; *People v. Cleveland, supra,* 32 Cal.4th at p. 765; *People v. Crew, supra,* 31 Cal.4th at p. 858; *People v. Boyette, supra,* 29 Cal.4th at pp. 464-466; *People v. Farnam, supra,* 28 Cal.4th at p. 192; *People v. Hughes* (2002) 27 Cal.4th 287, 405; *People v. Hawkins, supra,* 10 Cal.4th at p. 965; *People v. Marshall* (1990) 50 Cal.3d 907, 936-937.)

Many of the issues raised by appellants were rejected by this Court in *People v. Boyette, supra*, 29 Cal.4th at pages 464-465, when this Court stated:

> Defendant next claims CALJIC No. 8.88 is unconstitutional for a variety of reasons. He admits we have rejected all these claims in prior cases and asserts he is raising them in this court to exhaust his state remedies to permit him to renew these claims in federal court. We agree none of the claims has merit and that no reason appears to reconsider our past decisions. We list defendant's claims here to ensure a future court will consider them fully exhausted:
>
> — . . . .
>
> — The instruction's use of the phrase "so substantial" is vague and violates the Eighth Amendment to the United States Constitution.
>
> — The instruction's use of the term "warrants" is so overbroad it misleads the jury to believe it may impose the death penalty even when

it concludes it is not the appropriate penalty.

— The instruction fails to specify that the prosecution has the burden of persuasion.

— The instruction fails to require the jury to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating ones and that death is the appropriate penalty.

— The instruction fails to require that the jury unanimously find which aggravating circumstances are true.

— The instruction fails to require a statement of reasons supporting the death verdict.

Likewise in *People v. Hughes, supra*, 27 Cal.4th at page 405, this Court stated:

> Defendant also asserts that CALJIC No. 8.88 given here, is constitutionally inadequate to "channel the jury's discretion and provide a non-arbitrary, non-capricious sentencing decision" by informing the jury, consistently with section 190.3, that if, in weighing the factors in aggravation and mitigation, the jury finds that the former do not outweigh the latter, the jury must return a verdict of life imprisonment. We rejected a similar challenge in *People v. Duncan* (1991) 53 Cal.3d 955, 978 [281 Cal.Rptr. 273, 810 P.2d 131], and do so here as well.

And, in *People v. Farnam, supra*, 28 Cal.4th at page 192, this Court stated the following regarding CALJIC No. 8.88:

> The capital sentencing scheme is not unconstitutional insofar as it does not require the jury to render a statement of reasons or to make unanimous written findings on the aggravating factors supporting its verdict. There is no constitutional requirement that the jury, in order to return a verdict of death, must unanimously find that aggravating factors outweigh the mitigating factors beyond a reasonable doubt or that death

is the appropriate remedy beyond a reasonable doubt. Defendant's arguments fail to convince us to revisit any of these holdings.

Finally, in *People v. Taylor, supra,* 26 Cal.4th at page 1181, this Court observed:

> Defendant faults the sentencing instructions (CALJIC No. 8.88) for failing to direct the jury to impose a life imprisonment without parole sentence if it concluded the mitigating circumstances outweighed the aggravating ones. We have repeatedly rejected the claim in light of other language in this instruction, allowing a death verdict only if aggravating circumstances outweighed mitigating ones.
>
> Defendant also faults CALJIC No. 8.88 for calling on the jury to impose death if they find "substantial" aggravating factors, implicitly compelling a death verdict if aggravating circumstances outweighed mitigating ones. Defendant observes that under our case law, the jury may reject a death sentence even if mitigating circumstances do not outweigh aggravating ones. Our reading of the instruction discloses no compulsion on the jury to impose death under such circumstances. Instead, the instruction simply explains that no death verdict is appropriate unless substantial aggravating circumstances exist which outweigh the mitigating ones. This instruction was proper under our case law.
>
> Defendant also argues CALJIC No. 8.88 was deficient for failing expressly to inform the jurors they could vote against the death penalty even if they believed the aggravating circumstances outweighed the mitigating ones. We have rejected the argument in past cases.

Appellants also complain that certain requested instructions on how the jury should weigh the aggravating and mitigating evidence were improperly refused by the trial court. Specifically, appellants claim the trial court erred

when it refused to instruct the jury: (1) that the absence of a mitigating factor could not be considered to be an aggravating factor and that the aggravating factors are limited to those specified in the instructions; (2) with a special instruction on the scope and proof of mitigation (see CT 15636-15637); (3) that sympathy alone was sufficient to reject death as the penalty (see CT 15638-15639); (4) it could return a verdict of life imprisonment with the possibility of parole even if it failed to specifically find the presence of any mitigating factors (see CT 15640-15641); and (5) aggravating factors are limited to those enumerated and that appellants' background may be considered only in mitigation. (BAOB 506-517, 525-526.) The trial court properly refused to give these instructions since the jury was instructed with CALJIC No. 8.88, and, as mentioned previously, CALJIC No. 8.88 accurately describes the weighing process for aggravating and mitigating factors. There was no need to replace CALJIC No. 8.88 with appellants' proposed instructions. (See *People v. Smith* (2003) 30 Cal.4th 581, 638 [CALJIC No. 8.88 "provided adequate guidance on how to consider the aggravating and mitigating factors"]; *People v. Gutierrez, supra*, 28 Cal.4th at p. 1161 ["CALJIC No. 8.88 properly describes the weighing process"]; *People v. Gurule, supra*, 28 Cal.4th at p. 662 [CALJIC No. 8.88 "adequately informs the jury of its role in weighing the circumstances of the case"]; see *People v. Anderson* (2001) 25 Cal.4th 543, 598-600 [CALJIC Nos. 8.85 and 8.88 "adequately explain the jury's sentencing responsibilities and are not impermissibly vague"].) Appellants' claim, therefore, has no merit.[67/]

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67. Appellants' contention that the trial court erred in failing to grant the request to strike the non-unanimity provision of CALJIC No. 8.87 (BAOB 523-525) is also without merit. (*People v. Nakahara, supra,* 30 Cal.4th at pp. 719-720.)

Even though appellants acknowledge this Court has repeatedly rejected the claims they raise, they nonetheless argue this Court's prior decisions should be reconsidered. Because this Court has repeatedly declined such an invitation, it should do so here. (*People v. Boyette, supra*, 29 Cal.4th at p. 464 ["We agree none of the claims has merit and that no reason appears to reconsider our past decisions."]; *People v. Taylor, supra*, 26 Cal.4th at p. 1183 ["Once again, as defendant acknowledges, we have repeatedly rejected similar arguments, and we see no compelling reason to reconsider them here."].)

B. CALJIC No. 8.85 Is Constitutional

The trial court instructed the jury pursuant to CALJIC No. 8.85[68], the

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68. CALJIC No. 8.85 provides:

In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

(b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

standard instruction describing the aggravating and mitigating circumstances listed in section 190.3. (CT 15820-15821; RT 18426-18427.) Appellants contend the instruction violated their rights under the Eighth and Fourteenth Amendments to the United States Constitution in the following respects: (1) the trial court's failure to instruct the jury that statutory mitigating factors were relevant solely as potential mitigators precluded a fair, reliable, and evenhanded administration of capital punishments (SAOB 358-360; BAOB 604-605); (2) the trial court's failure to delete inapplicable statutory mitigating factors (specifically, subdivisions (d) through (j)) precluded a fair and reliable capital sentencing determination (SAOB 360-365; BAOB 506-510, 602-604); (3) the trial court's failure to instruct the jury that it could not consider aggravating factors not enumerated in the statute violated appellants' right to a fair and reliable penalty capital-sentencing determination (SAOB 365-367); and (4) the use of restrictive adjectives in the list of potential mitigating factors impermissibly acted as a barrier to consideration of mitigation by appellants'

> (g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.
>
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.
>
> (i) The age of the defendant at the time of the crime.
>
> (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(RT 18426-18427; CT 15820-15821.)

jury (SAOB 367-369; BAOB 605). Appellants' claims are without merit. (See, e.g., *People v. Hughes, supra,* 27 Cal.4th at pp. 404-405.)

This Court rejected claims (1) and (2) in *People v. Farnam, supra,* 28 Cal.4th at pages 191-192:

> Contrary to defendant's assertions, the trial court had no obligation to advise the jury which statutory factors are relevant solely as mitigating circumstances and which are relevant solely as aggravating circumstances. Moreover, it was proper for the court to instruct the jury in the language of CALJIC No. 8.85 without deleting certain factors that were inapplicable to defendant's case.
>
> In short, CALJIC No. 8.85 is not unconstitutionally vague and does not allow the penalty process to proceed arbitrarily or capriciously.

This Court has repeatedly held that the trial court is not required to edit the standard CALJIC instructions by deleting the aggravating and mitigating factors which might be inapplicable under the facts of the case. (*People v. Osband, supra,* 13 Cal.4th at p. 704; *People v. Ghent* (1987) 43 Cal.3d 739, 776-777.) It thus follows the trial court properly refused to give appellants' requested instruction. (CT 15644-15645.)

This Court has also specifically rejected claim (3) when it held in *People v. Rodriguez* (1986) 42 Cal.3d 730, 777, 778-779, that the death penalty statute is not unconstitutional for failing to "exclude nonstatutory, unspecified aggravating factors as a basis for the death penalty." (See *People v. Earp, supra,* 20 Cal.4th at p. 899.)

And this Court has repeatedly rejected claim (4) raised by appellants in holding that adjectives used in conjunction with mitigating factors do not act as unconstitutional barriers to consideration of mitigating evidence. As noted in *People v. Anderson, supra,* 25 Cal.4th at page 601:

> Use in the sentencing factors of the phrases "*extreme* mental or emotional disturbance" (§ 190.3, factor (d), italics added) and "*extreme* duress or . . . *substantial* domination of another" (*id.*, factor (g), italics added) does not inhibit the consideration of mitigating evidence or make the factors impermissibly vague.

(See also *People v. Arias* (1996) 13 Cal.4th 92, 188-189 [the words "extreme" and "substantial" as set forth in the death penalty statute have common sense meanings which are not impermissibly vague].)

Appellants have not presented any new or legitimate reasons for this Court to revisit its holdings on any of the claims. Because this Court has repeatedly declined such invitations in the past, it should do so again here.

C. Life Without The Possibility Of Parole

Appellants Wheeler and Smith contend the trial court erred in refusing to instruct the jury as follows as to the meaning of life imprisonment without the possibility of parole:

> You are instructed that life without the possibility of parole means exactly what it says: the defendant will be imprisoned for the rest of his life.
>
> You are instructed that the death penalty means exactly what it says: That the defendant will be executed.
>
> For you to conclude otherwise would be to rely on conjecture and speculation and would be a violation of your oath as trial jurors.

(CT 15759; WAOB 309-316; SAOB 410-416.)

Respondent submits the trial court properly refused to give the instruction since it is legally incorrect. A person sentenced to life imprisonment without the possibility of parole can still, under certain circumstances, be released from prison. And, of course, simply because a person is sentenced to death does not mean that "he will be executed." A Governor can always grant

clemency to a person under a death judgment.

It is well established that a trial court should not instruct the jury with legally incorrect instructions. This Court has held the failure to give an instruction similar to that requested by appellants was not error. (*People v. Memro* (1995) 11 Cal.4th 786, 886-887 [rejecting an error predicated on trial court's failure to instruct "sentence of life imprisonment without possibility of parole means just that"].) In *People v. Carpenter* (1999) 21 Cal.4th 1016, 1063, this Court upheld a trial court's decision rejecting a proffered defense instruction which stated life without the possibility of parole means "the defendant will be confined in prison until he dies, without the possibility of parole or release." Similarly, in *People v. Sakarias, supra,* 22 Cal.4th at page 641, this Court held the trial court properly refused to instruct the jury that "life without the possibility of parole means that defendant will never have a parole hearing and will never be released from prison." (See also *People v. Navarette, supra,* 30 Cal.4th at p. 521.)

Appellants Wheeler and Smith seem to concede the point that the proffered instruction was properly refused because it was legally incorrect when they assert that "even if there is some flaw in the wording of the instruction that would render it incorrect, the court still had a sua sponte duty to instruct on the true meaning of the sentence." (WAOB 410.) The trial court instructed the jury pursuant to CALJIC No. 8.84 as follows:

> The defendants in this case have been found guilty of murder of the first degree. The multiple murder special circumstance had been specially found to be true.
>
> It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstance alleged in this case has been specially found to be

true.

> Under the law of this state, you must now determine which of said penalties shall be imposed on each defendant as to each count of first degree murder. Thus, there are four penalty decisions for you to make as to [appellant] Bryant and [appellant] Wheeler, and two decisions as to [appellant] Smith.

(CT 15801.) No additional instruction on the meaning of life imprisonment without the possibility of parole was necessary.

This Court has repeatedly rejected appellants' claim that an additional instruction was necessary. As noted in *People v. Ochoa* (1998) 19 Cal.4th 353, 457:

> We have previously rejected the point, and do so again: "When a term is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request. [Citation.] In this case, the term 'confinement in the state prison for life without possibility of parole' was used in the common and nontechnical sense that the plain meaning of the words convey. Accordingly, the court was not required to give an instruction as to its meaning sua sponte."

(See *People v. Holt, supra,* 15 Cal.4th at pp. 688-689; *People v. Padilla, supra*, 11 Cal.4th at p. 971; see also *People v. Sakarias, supra,* 22 Cal.4th at p. 641; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1271; *People v. Jones* (1997) 15 Cal.4th 119, 189-190; *People v. Memro, supra,* 11 Cal.4th at pp. 886-887.)

Moreover, appellants' reliance on three United States Supreme Court decisions involving South Carolina death sentences (*Kelly v. South Carolina* (2002) 534 U.S. 246, 250; *Shafer v. South Carolina* (2001) 532 U.S. 36, 44-45; and *Simmons v. South Carolina* (1994) 512 U.S. 154, 158-160) is misplaced.

(See WAOB 411-416.) Although appellants acknowledge that this Court rejected the "Simmons argument" in *People v. Arias, supra,* 13 Cal.4th at pages 172-173 (see also *People v. Smithey, supra*, 20 Cal.4th at pp. 1009-1010), he maintains the rejection of the "Simmons argument" was "erroneous." (WAOB 413.) Respondent disagrees because "[e]very California penalty jury is specifically instructed that it must choose between two possible sentences, death or 'confinement in [the] state prison for a term of life *without [the] possibility* of parole.'" (*People v. Arias, supra*, 13 Cal.4th at p. 173.)

Indeed, this Court has considered and rejected the due process arguments based on *Kelly*, *Shafer*, and *Simmons*. As noted by this Court in *People v. Snow, supra,* 30 Cal.4th at pp. 123-124:

> Three United States Supreme Court decisions stemming from death sentences imposed under South Carolina law are readily distinguishable, in that the juries in those cases were told that the alternative to a death sentence was one of "life imprisonment" without instruction that a capital defendant given such a sentence would not be eligible for parole. Here, the jury was told that the alternative to death was life imprisonment "without possibility of parole," and that that phrase should be understood in its ordinary sense. Those instructions were sufficient to inform the jury that defendant would not be eligible for parole.

And, in *People v. Prieto, supra,* 30 Cal.4th at page 270, this Court stated:

> Citing *Simmons v. South Carolina* (1994) 512 U.S. 154 [] (plur. opn. of Blackmun, J.) (*Simmons*), defendant contends CALJIC No. 8.84 does not adequately inform the jury that "life without possibility of parole" means confinement for life without the possibility of parole. (See also *Kelly v. South Carolina* (2002) 534 U.S. 246, 248 [] ["when 'a capital defendant's future dangerousness is at issue, and the only sentencing

alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant "to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel"""]; *Ramdass v. Angelone* (2000) 530 U.S. 156, 165 [] (plur. opn. of Kennedy, J.) [same].) Since *Simmons*, we have, however, held that CALJIC No. 8.84 adequately informs the jury "of the defendant's ineligibility for parole." (*People v. Smithey, supra*, 20 Cal.4th at p. 1009.)

Although defendant acknowledges our post-*Simmons* decisions upholding CALJIC No. 8.84, he contends *Shafer v. South Carolina* (2001) 532 U.S. 36 [], casts doubt over these decisions. Contrary to defendant's contention, *Shafer* is distinguishable. In *Shafer*, the United States Supreme Court concluded that the instruction that "'life imprisonment means until the death of the defendant'" did not satisfy *Simmons* because the instruction did not clearly eliminate the possibility of parole and because many jurors may not know "'whether a life sentence carries with it the possibility of parole.'" (*Shafer*, at p. 52 [].) The court also found the instruction ambiguous because the judge also instructed the jury that "'[p]arole eligibility or ineligibility is not for your consideration.'" (*Id.* at p. 53 [].) The latter instruction "did nothing to ensure that the jury was not misled and may well have been taken to mean 'that parole *was* available but that the jury, for some unstated reason, should be blind to this fact.'" (*Ibid.*, quoting *Simmons, supra*, 512 U.S. at p. 170 [] (plur. opn. of Blackmun, J.).)

By contrast, CALJIC No. 8.84 does not suffer from the same deficiencies. Unlike the jury in *Shafer*, "the jury [in this case] expressly [was] informed of the defendant's ineligibility for parole by the instruction that it must choose between death or 'confinement in the

state prison for life without the possibility of parole.'" (*People v. Smithey, supra*, 20 Cal.4th at p. 1009.) The term "'life without the possibility of parole'" is clear and unambiguous and does not require "a sua sponte definitional instruction."

Appellants have not presented any new argument or authority which this Court has not already considered and rejected on this issue. Therefore, appellants' contention should be rejected, and there is no need to revisit established authority.

D. Other Instructional Issues

Appellants contend the trial court unconstitutionally instructed the jury that *sympathy for his family could not be considered* as a factor in mitigation. (WAOB 281-290; BAOB 527-533.) As appellants rightly acknowledge, however (WAOB 281), this Court has rejected the constitutional claim that sympathy for a defendant's family can be considered as a factor in mitigation during the penalty phase. (*People v. Bemore* (2000) 22 Cal.4th 809, 855-856; *People v. Ochoa, supra,* 19 Cal.4th at p. 456; *People v. Sanders, supra*, 11 Cal.4th at pp. 544-546.) In rejecting this claim, this Court has reasoned, "Sympathy for defendant's loved ones, as such, and their reaction to a death verdict, as such, do not relate to either the circumstances of the capital crime or the character and background of the accused." (*People v. Bemore, supra,* at p. 856; see also *People v. Ochoa, supra,* at p. 456 ["what is ultimately relevant is a defendant's background and character -- not the distress of his or her family"].)

Appellants also contend that the trial court erred by denying from the jury's consideration an instruction that no mitigation is necessary to reject a sentence of death. (WAOB 298-302.) Appellants correctly concede, however (WAOB 299-300; BAOB 516), this Court has rejected this contention, stating that such an instruction would have been duplicative of other instructions and

that the standard instructions would not lead any reasonable juror to presume death was required just because there were no mitigating circumstances. (*People v. Jones* (1998) 17 Cal.4th 279, 314; see also *People v. Anderson, supra,* 25 Cal.4th at p. 600.)

In a similar vein, appellants contend that the trial court wrongly refused the defense request to instruct the jury that a single mitigating factor may outweigh multiple aggravating factors because the trial court's instructions impermissibly conveyed to the jury that multiple factors in mitigation were required to avoid a death verdict. (WAOB 302-308.) But, again, this Court has rejected such a contention, finding that this proposed defense instruction was duplicative of other instructions and argumentative. (*People v. Earp, supra*, 20 Cal.4th at p. 902; *People v. Jones, supra*, 17 Cal.4th at p. 314.)

Appellants next contend that the trial court improperly refused to allow the jury to consider as mitigation that his accomplice received a more lenient sentence. (WAOB 308-309.) As they once again acknowledge, however (WAOB 308, fn. 100), this Court has rejected this claim, holding such information to be irrelevant to the jury's penalty determination. (*People v. Cain, supra*, 10 Cal.4th at p. 63; *People v. Gallego* (1990) 52 Cal.3d 115, 201; *People v. Dyer* (1988) 45 Cal.3d 26, 69-71.)

Lastly, appellants contend that the trial court improperly refused to allow the jury to consider that it must *presume the elected sentence would be carried* out. (WAOB 309-316.) As appellants concede (WAOB 310, fn. 101), this contention, too, has been rejected by this Court because it would be incorrect to instruct the jury that a defendant's penalty necessarily will be carried out. (*People v. Earp, supra,* 20 Cal.4th at p. 903; *People v. Hines, supra*, 15 Cal.4th at p. 1069.)

Appellants' contention that the trial court erred in refusing to instruct on lingering doubt (BAOB 517-522) is likewise without merit for the reasons stated in Argument XXVIII. A defendant is not constitutionally entitled to an instruction at the penalty phase to reconsider the issue of guilt as a basis for mitigation. (*Franklin v. Lynaugh, supra*, 487 U.S. at pp. 172-176; *People v. Staten, supra,* 24 Cal.4th at p. 464.) Moreover, the refusal to give a lingering doubt instruction, even if required, was clearly not prejudicial in the instant case. (*People v. Fauber, supra,* 2 Cal.4th at p. 864.)

Since there were no errors, appellants' argument that the alleged errors were prejudicial (WAOB 316-319; BAOB 533-534) must fail. Moreover, given the overwhelming evidence supporting the jury's death determination, it is not reasonably possible that appellants would have received a more favorable penalty verdict absent these alleged instructional errors. (*People v. Jackson, supra,* 13 Cal.4th at p. 1232.) For the same reasons, any federal constitutional error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

XXX.

BY FAILING TO INTERPOSE A SPECIFIC OBJECTION IN THE TRIAL COURT ON THE GROUND NOW RAISED ON APPEAL, APPELLANT SMITH WAIVED HIS CLAIM THE PROSECUTOR COMMITTED MISCONDUCT DURING PENALTY PHASE ARGUMENT

Appellant Smith contends the prosecutor committed prejudicial misconduct during argument when he referred to the testimony of Donald Hoagland, a psychologist who testified on behalf of appellant Smith at the penalty phase, as a "convoluted cockamamie theory that is a bunch of psycho babble." Appellant Smith maintains that the attack on Hoagland's testimony and the references to factor (k) evidence as not being as significant as factor (d) and/or factor (h) evidence was an improper disparagement of the mitigating evidence which resulted in a violation of his rights under the Eighth and Fourteenth Amendments to the United States Constitution. (SAOB 337-341.) Appellant Wheeler joins in the claim. (WAOB 451.) Respondent submits appellant Smith is foreclosed from seeking appellate review of this claim since he failed to interpose a specific objection in the trial court on the same ground he now raises on appeal. In any event, when the record is read in context, it is inconceivable appellant Smith was prejudiced by the prosecutor's comments.

A. Relevant Proceedings

1. Hoagland's Testimony

Appellant Smith presented the testimony of Donald Hoagland, a clinical psychologist, as part of his mitigating evidence at the penalty phase. Hoagland performed a neurocognitive and psychological evaluation of appellant Smith between October 1992 and March 1993. (RT 18131-18135.)

The neurocognitive evaluation of appellant Smith

> determined that he is of subnormal intelligence, that he is dyslexic, that he had A.D.H.D. [Attention Deficit Hyper-Activity Disorder] and still has the intentional deficit component of it and he has deficits in a variety of aspects of cognitive functioning including auditory memory, auditory discrimination and visual processing speed. . . .

(RT 18149-18150.) Hoagland described appellant Smith's psychological assessment as follows:

> The M.M.P.I., the long questionnaire in the Rorschach inkblot test, shows that he has a chronic very serious mental disorder. Although he was not actively psychotic when I evaluated him, he does have the potential to be psychotic under adverse conditions. Testing also identified him as chronically depressed and anxious and as having a seriously impaired self-image and being very socially and emotionally withdrawn and detached. It also suggested that there are still some other characteristics of A.D.H.D., impulsivity, the irrationality to getting quickly angry and also suggestions that his pattern of psychopathology also come from family backgrounds that are particularly adverse.

(RT 18155-18156.)

Hoagland did *not* present any testimony regarding the circumstances of the instant crimes. Although he interviewed appellant Smith for his evaluations, Hoagland did not discuss with appellant Smith his state of mind and/or thought process while he committed the charged crimes. (See RT 18191.) Indeed, as a tactical matter, the defense entered into a stipulation with the prosecutor that the testimony of Hoagland was offered and limited to a consideration by the jury as "sympathy" evidence under factor (k) (any other circumstance that extenuates the gravity of the crime). (RT 18191-18194.)

2. The Prosecutor's Argument To The Jury

The following argument by the prosecutor appears in the record:

In terms of mitigation, Dr. Hoagland is not interested in providing you anything but deception and misleading testimony.

Let's look at his first and third grade records and come up with some excuse and not talk to anybody that has known of him or knows him since third grade.

And let's *come up with some convoluted cockamamie theory that is a bunch of psycho babble as to why [appellant] Donald Smith committed these acts and don't ask him about that.*

MR. NOVOTNEY [Counsel for appellant Smith]: I will ask to strike that. *He offered no opinion as counsel just stated.*

THE COURT: Objection will be overruled.

Go ahead.

MR. MCCORMICK: *What you recall Dr. Hoagland said specifically and the stipulation that you received was this evidence was being offered for K factor only.* And you can understand why that is significant because it's not being offered for the D factor. It's not being offered for the H factor.

Those mitigating factors might have some importance because if one of these defendants was mentally unstable or he was not culpable or responsible for his conduct, if he was mentally retarded, seriously mentally retarded or had some mental impairment that caused his judgment to be screwed up on a daily basis, not because of moral values but because of some severe legitimate problem, you would want to know that.

As a juror you would have the right to know that and you would have the right to assign some weight to how significant that would be.

And if somebody truly had a severe mental disease or defect, I would guess that would be entitled to some serious consideration by you.

But a psychologist coming here and admitting that he is limiting this evidence and testimony as to sympathy [under factor (k)] for the defendant is somewhat revealing of what is going on.

(RT 18487-18488, emphasis added.)

B. Analysis

A defendant generally cannot complain on appeal of alleged misconduct by a prosecutor during argument at trial unless in a timely fashion -- *and on the same ground* -- the defendant made an assignment of misconduct and requested the jury to disregard the impropriety. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072, overruled on another point in *People v. Hill, supra*, 17 Cal.4th 80; see *People v. Samayoa* (1997) 15 Cal.4th 795, 841.) This Court has repeatedly held that the rule requiring an objection and request for an admonishment to preserve a claim of prosecutorial misconduct applies to capital cases. (*People v. Jones, supra*, 15 Cal.4th at p. 181; *People v. Noguera* (1992) 4 Cal.4th 599, 638-639.) And an objection is required even for alleged prosecutorial misconduct occurring during penalty phase argument. (See *People v. Garceau* (1993) 6 Cal.4th 140, 205-206.)

There are, however, exceptions to the general rule. As this Court noted in *Hill*:

A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if "'an admonition would not have cured the harm caused by the misconduct'" [Citations.] Finally, the absence of a request for a curative admonition does not forfeit the issue on appeal if "the court immediately overrules an objection to alleged

prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request."

(*People v. Hill, supra*, 17 Cal.4th at pp. 820-821.)

Here, appellant Smith has waived the issue he raises on appeal, because he never objected on those specific grounds in the trial court. Appellant Smith did *not* object below to the use of the words "convoluted cockamamie theory" or "bunch of psycho babble" used to describe the theory described in Hoagland's testimony. Appellant Smith did *not* object below on the ground the prosecutor's argument, insofar as it pertained to Hoagland's testimony, disparaged the defense mitigating evidence in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Appellant Smith did *not* object below that the prosecutor disparaged the mitigating factor (k) evidence by arguing it was not as important as factor (d) and/or factor (h) evidence. (See RT 18487-18488.) And, significantly, appellant Smith fails to even attempt to demonstrate in his opening brief that he did interpose a *specific* objection in the trial court and/or that any of the exceptions to the general rule requiring a specific objection apply to his case. (See SAOB 337-342.) Thus, appellant Smith is precluded from raising this issue for the first time on appeal. (See *People v. McDermott, supra,* 28 Cal.4th at p. 1001; *People v. Berryman, supra*, 6 Cal.4th at p. 1072.)

What appellant Smith did object to in the trial court, and what appellant Smith does *not* raise on appeal (see SAOB 337-342), was the prosecutor's reference as to Hoagland's theory "as to why [appellant] Smith committed these acts and don't ask him about it." (RT 18487.) Appellant Smith objected on the ground Hoagland "offered no opinion" as to why appellant Smith committed the acts "as counsel just stated." (RT 18487.) If appellant Smith had raised this issue on appeal, respondent might have to acknowledge that the prosecutor conceivably misstated the evidence, in part, when he referred to Hoagland's

testimony as indicating a theory "as to why [appellant] Smith committed these acts." Of course, Hoagland's testimony was limited to a consideration of sympathy under factor (k) and thus he offered no opinion or theory in his testimony as to why appellant Smith committed the charged acts. But even counsel for appellant Smith below stated in his objection that the prosecutor "just stated" Hoagland did *not* offer such an opinion (i.e., "and don't ask him about it"). And, in any event, any minor misstatement by the prosecutor in this regard was corrected by the prosecutor himself when he immediately informed the jury following the objection: "What you recall Hoagland said specifically and the stipulation that you received was *this evidence was being offered for K factor only*." (RT 18487, emphasis added.) Thus, the jury was never misled that Hoagland offered an opinion as to why appellant Smith committed the charged crimes. Hoagland's testimony was at all times limited to a consideration by the jury as "sympathy" evidence under factor (k).

XXXI.

THE TRIAL COURT DID NOT IMPROPERLY COERCE A DEATH VERDICT AFTER THE JURY HAD TWICE DECLARED ITSELF DEADLOCKED AS TO APPELLANT SMITH; AND THE SUBSEQUENT REPLACEMENT OF JUROR NO. 113, A JUROR FOR WHOM IT WAS AGREED A MONTH EARLIER (PRIOR TO THE COMMENCEMENT OF THE PENALTY PHASE) SHOULD BE EXCUSED FROM JURY SERVICE ON A DATE CERTAIN BECAUSE OF A PREPAID VACATION, WITH AN ALTERNATE JUROR WAS PROPER

Appellant Smith contends that "under the unusual facts of this case" the trial court improperly coerced a death verdict by its instruction to the jury to continue its deliberations after the jury had twice declared itself deadlocked as to reaching a unanimous penalty verdict on appellant Smith. Appellant Smith also maintains the trial court subsequently erred the next day when, rather than declare a mistrial, it substituted an alternate juror for Juror No. 113, a juror for whom it was agreed a month earlier, prior to the commencement of the penalty phase, should be excused for cause from jury service on a date certain because of a prepaid vacation. Appellant Smith argues that, at the point of the substitution, "it was no longer practicable for the jury to begin its penalty deliberations anew." (SAOB 302; see SAOB 302-331.) Appellant Wheeler joins in this claim. (WAOB 435.) Respondent disagrees.

A. Relevant Proceedings

1. June 21, 1995: Prior To The Commencement Of The Penalty Phase

On June 21, 1995, prior to the commencement of the penalty phase, Juror No. 113 informed the court and counsel that he had a prepaid one-week vacation planned to start on July 21. The trial court stated it thought the matter would be concluded by that time, but "we are not going to keep anybody out of

a paid vacation." It was agreed Juror No. 113 would be excused if penalty verdicts were not reached by his departure date. (RT 17190.)

2. The Penalty Jury Commences Deliberations On July 6, 1995

The penalty jury commenced its deliberations on the afternoon of July 6, 1995. (See RT 18595.) However, on the morning of July 6, prior to closing arguments and the trial court's instructions, Juror No. 86 sent a note to the court stating she would be unable to continue as a juror after July 7 (Friday) because of a family medical problem:

> I will be unable to continue as a juror after July 7, 1995. My father is quite ill with asbestosis, which requires that he be on oxygen 24 hours a day. He is scheduled for an angioplasty on his leg to improve circulation on July 10th, and my mother is unable to care for him, and it requires my assistance.
>
> My parents are 88 years old and are finding it difficult to fend for themselves. . . .

(RT 18406.) The trial court initially thought Juror No. 86 should be excused prior to the commencement of penalty phase deliberations because it was unlikely the jury would resolve the case prior to the end of the next day: "I doubt very much that there will be any possibility of any resolution as to anybody by tomorrow afternoon." (RT 18407.) Although appellant Wheeler agreed with the trial court that Juror No. 86 should be excused at that time, appellants Bryant and Smith believed Juror No. 86 should be permitted to deliberate until the end of the following day and be excused at that time. (RT 18407-18409.) After hearing the arguments of counsel, as well as questioning Juror No. 86, the trial court agreed with appellants Bryant and Smith that Juror No. 86 should be permitted to deliberate until the end of the following day (Friday) and, if necessary, be replaced with an alternate juror on Monday morning (July 10). (RT 18407-18414.) The trial court advised counsel that "I

am going to nonetheless explain to the jury that [Juror No. 86] will be leaving and that [the jury] need not rush to any verdict simply because of [the departure of Juror No. 86] because we do have alternates left, if necessary. All right?" Counsel for appellant Smith responded, "That's fine, judge." (RT 18414.)

The trial court advised the jury that Juror No. 86 had to be excused at the end of the deliberations the following day because of a family medical emergency and then added the following:

> THE COURT: . . . So here is what we're going to do, just listen carefully and you will understand. I am going to instruct you. You will hear arguments, and the deliberations will begin if not late afternoon, then, certainly very early tomorrow morning. If by chance -- and I say by chance because it is a long case, and I don't know how long the deliberations will be -- if by chance as to any defendant or defendants final verdicts are reached, we will take those verdicts tomorrow whenever they come in. If there are not any verdicts, then all we will do is Monday morning we will get together with the alternate pool here and select an alternate juror, and we are going to release No. 86. In other words, No. 86 will not be with us past tomorrow and [sic] the close of business. And that's just the way that's going to have to be.
>
> Okay. Now, I want to tell you this: Don't -- because I am raising the possibility that some verdict may be reached, and the court may take those tomorrow. That does not mean you should rush to get a decision because we're going to seat an alternate later on. Don't do that, that would be inappropriate. Take the route you would take. If it is fast, so be it; if slow, so be it. We are just interested, all sides, in getting your reasoned decision after full consideration of all the evidence and the law. . . .

(RT 18416-18417.)

Thereafter, the trial court instructed the jury (RT 18417-18448), counsel presented closing arguments to the jury (see RT 18449-18589), the jurors were sworn (RT 18595), and the jury commenced its deliberations.

3. The Penalty Jury Deliberates On July 7 Without Reaching Any Verdicts

The penalty jury deliberated on July 7 (Friday) without reaching any verdicts. (See RT 18599, 18600, 18601.)

4. On July 10, The Trial Court Replaces Juror No. 86 With Alternate Juror No. 220, And The Penalty Jury Commences Its Deliberations Anew; The Trial Court Refuses To Excuse Juror No. 113

On July 10 (Monday), prior to selecting an alternate juror to replace Juror No. 86, the trial court indicated that late Friday afternoon (July 7) it had received a note from Juror No. 113, the juror who had to leave jury service on July 21 because of a prepaid vacation (RT 17190), stating he could not serve for the rest of the penalty deliberations because he could "no longer put up with certain jurors' inability to understand the evidence or law or their deliberate prolonging of the deliberations for whatever personal reasons they have . . . they don't want to go back to work and are in love with your free food." (RT 18601-18602, 18604.) Appellants Bryant and Wheeler believed that, based on the contents of the note, Juror No. 113 should be excused since he could no longer deliberate. Appellant Smith advised the trial court he was "not taking a position" on whether Juror No. 113 should be excused at that time. The prosecution did not believe there was an adequate basis to excuse Juror No. 113. (RT 18602-18603.)

The trial court questioned Juror No. 113 about the note. Juror No. 113 indicated that he was so "frustrated" and "angry" with the deliberations that "it's really beginning to affect me." (RT 18607-18608.) He thought he was

being "jerked around" by other jurors who were wasting time and "I'm not willing to go through it anymore." (RT 18608-18609.) As explained by Juror No. 113, "When people will -- seemingly take an opposite point of view just to take an opposite point of view, there's no valid reason behind it. Just to do it. It's almost like to get attention and that's really aggravating." (RT 18609.) Juror No. 113 also advised the trial court that "I do rise to the bait. And my being there means that they're going to continually bait me." (RT 18611.) Juror No. 113 also stated that he thought one juror was not taking the matter seriously and treated the deliberations "like a joke or a game or something of this sort, I don't want to be a part of it." (RT 18615-18616.)

After questioning Juror No. 113, appellants Bryant and Wheeler asked the court to excuse him because of his inability to deliberate. (See RT 18618-18620.) Appellant Smith, however, asked the trial court not to excuse Juror No. 113 since it "sounds to me like it's normal frustration that is arising from 12 people getting together to discuss matters in this deliberation." (RT 18620.) The trial court agreed with appellant Smith's view and did not excuse Juror No. 113. The trial court then asked Juror No. 113 to "give us one more shot and attempt to stay involved in these deliberations." Juror No. 113 agreed. (RT 18622-18623.) Thereafter, Juror No. 86 was replaced by Alternate Juror No. 220. (RT 18624-18625.) The trial court admonished the newly-constituted jury as follows:

> Ladies and gentlemen of the jury:
>
> One of your number [Juror No. 86] has been excused for legal cause and replaced with an alternate juror. You must not consider this fact for any purpose.
>
> The People and the defendants have the right to a verdict reached only after full participation of the twelve jurors who return the verdict. This right may be assured only if you begin your deliberations again

from the beginning.

You must therefore set aside and disregard all past deliberations and begin deliberating anew. This means that each remaining original juror must set aside and disregard the earlier deliberation as if they had not taken place.

You will soon retire and begin anew your deliberations in accordance with all the instructions previously given. . . . .

(RT 18625-18626.) After some additional comments asking the jurors to set aside their frustrations and to "*deliberate and resolve the matter if you can*," the trial court told the jurors to "begin your deliberations on this phase of the trial." (RT 18626-18627, emphasis added.)

The trial court refused a request of appellant Bryant that the newly-constituted jury be instructed "not to change their mind simply to reach a verdict," noting, "I don't see a need for that." (RT 18630.)

The jury deliberated for the rest of the day without reaching any verdicts. (See RT 18631, 18632.)

5. The Penalty Jury Deliberates From July 11 Through July 13 Without Reaching Any Verdicts

The penalty jury deliberated on July 11 (Tuesday), 12 (Wednesday), and 13 (Thursday) without reaching any verdicts. (See RT 18633-18670.)

6. The Penalty Jury Returns Verdicts As To Appellant Wheeler On The Afternoon Of July 14 And Requests To Be Released For The Rest Of The Day

On the afternoon of July 14 (Friday), the jury returned verdicts as to appellant Wheeler. (See RT 18671-18677.) At the request of the jury, the jury was excused for the rest of the afternoon and ordered to return on Monday morning (July 17) at 9:00 a.m. to resume deliberations. (RT 18677, 18679.)

Before excusing the jury, the trial court inquired as to the status of Juror No. 113 and when he would have to depart from jury service due to a prepaid vacation. Juror No. 113 indicated he could deliberate through Wednesday (July 19) because he was "flying out on Thursday [July 20]." (RT 18679.)

7. The Jury Deliberates On July 17 Without Reaching Any Verdicts

The penalty jury deliberated on July 17 (Monday) without reaching any verdicts. (RT 18682, 18683.)

8. The Penalty Jury Indicates On July 18 That It Has Reached An Impasse As To A Unanimous Verdict On Appellant Smith; The Trial Court Questions The Jurors And Thereafter Asks That They Continue Their Penalty Deliberations As To Appellant Smith

On the afternoon of July 18 (Tuesday), the trial court informed counsel that it had received a note from the jury late that morning indicating it was at an "impasse" as to appellant Smith. (RT 18684.) Appellant Smith asked the trial court to inquire of the jury if it was, in fact, deadlocked as to him and, if so, appellant Smith would ask for a mistrial. (RT 18684-18685.) The prosecution maintained that whether a mistrial should be declared as to appellant Smith depended on "whether there is movement, whether [the jurors] think there is anything that might assist them." (RT 18685.) Appellant Smith asked the trial court to ask the jurors about the note "with respect to if they are at an impasse and [whether] further deliberations would not be fruitful, and if there is anything the court can do to help with that impasse. Then we know where we stand." (RT 18687.) Appellant Smith also asked the court to inquire of the jury whether the impasse is "in the nature of permanence versus temporary. . . ." (RT 18688.) The trial court agreed to make the inquiry but noted that, if the jury indicated it was deadlocked, it was "quite unlikely" the trial court would declare a mistrial given the jury did not deliberate Friday afternoon after

returning verdicts as to appellant Wheeler and it had deliberated only a day and a half since then. (RT 18688.) As noted by the trial court,

> I don't know what went on before [the reaching of the verdicts as to appellant] Wheeler, maybe they are bouncing around, maybe they looked at [appellant] Smith last week, I don't know; but given the length of this trial and number of witnesses and so forth, the court is not in any great hurry to mistry this penalty phase. We will see.

(RT 18688-18689.)

The jury returned to the courtroom and the following occurred:

THE COURT: . . . .

"We, the jury have come to an impasse as to a unanimous verdict on one defendant, all counts. It is not possible for us to render a unanimous verdict."

Let's see, which defendant is that, Mr. Foreman?

THE FOREPERSON: [Appellant] Smith.

THE COURT: [Appellant] Smith. When you say all counts, there are only -- there are two counts?

THE FOREPERSON: That's correct.

THE COURT: You mean on both those counts?

THE FOREPERSON: Yes, sir.

THE COURT: Have there been formal balloting, voting as to Mr. Smith's --

THE FOREPERSON: Yes, sir.

THE COURT: -- two counts?

Can you tell me roughly how many ballots have been taken as to [appellant] Smith.

THE FOREPERSON: I'd say at least eight.

THE COURT: About eight, okay. And do you have -- has there been any change from the first throughout the process?

THE FOREPERSON: Yes.

THE COURT: And do you have in mind or handy the various numerical splits on these eight ballots or thereabouts?

THE FOREPERSON: I believe *we've gone from six [to] six through just about every number to eleven to one.*

THE COURT: Start out at six six?

THE FOREPERSON: Yes.

THE COURT: And the last ballot stood eleven to one?

THE FOREPERSON: Yes.

THE COURT: There has been some fairly substantial movement then, it would appear. Is that a fair statement?

THE FOREPERSON: Yes.

THE COURT: You don't need to answer that, I can make that assessment myself. There has been some movement.

When did the balloting as to [appellant] Smith commence? In other words, when was the first ballot, if you remember?

THE FOREPERSON: Last week.

THE COURT: Do you remember when, roughly? You don't have to give me a specific date or time, but close as you can remember the date.

Maybe if anybody remembers it.

THE FOREPERSON: The very first ballot on [appellant] Don Smith was taken on Friday, when the case was given to us.

THE COURT: Friday when you got the case?

THE FOREPERSON: Yes. And we lost a juror.

THE COURT: Right.

THE FOREPERSON: And --

THE COURT: Okay. Well, yeah --

THE FOREPERSON: As to this jury.

THE COURT: As constituted, right.

THE FOREPERSON: We -- Monday.

THE COURT: Which Monday, yesterday or a week --

THE FOREPERSON: No, a week from this Monday.

JUROR NO. 261: The 10th, July 10th.

THE COURT: All right. That was the first ballot, that stood six to six. *Again, I am not interested, again, at all which way these things were leaning,* six [to] six that's clear. But as to later on, when it got off -- *I don't want you to tell me which way, life in prison or the death penalty.* In terms of the two counts, were the votes the same as to the two counts?

THE FOREPERSON: Yes.

THE COURT: There was no difference at all as to --

THE FOREPERSON: None.

THE COURT: Okay. I understand that.

And were the -- again, I don't want to direct you in any way as to how you are to deliberate or what order, but there was a period of time when, apparently, the focus shifted to [appellant] Wheeler and verdicts were rendered last Friday, and I accepted those verdicts last Friday as to [appellant] Wheeler. Was the balloting as to [appellant] Smith going on throughout the Wheeler deliberations, as well, or did you sort of split this up and focus person by person?

THE FOREPERSON: We split it up person by person. And when we reached a point of exasperation, we would move on to a different subject and let that aside.

THE COURT: Okay. So at some period of time last week, the focus moved toward [appellant] Wheeler?

THE FOREPERSON: Yes.

THE COURT: And there was deliberation. And once that concluded -- and I know we were off Friday afternoon, you folks. We let you go after those verdicts were returned. Did you then resume yesterday with [appellant] Smith?

THE FOREPERSON: Yes.

THE COURT: Okay. And have been deliberating with [appellant] Smith all day yesterday and this morning, am I correct on that?

THE FOREPERSON: Yes.

THE COURT: How many ballots were taken today, if any?

THE FOREPERSON: At least four.

THE COURT: Same, eleven to one?

THE FOREPERSON: The last two.

THE COURT: The last two were eleven to one.

What about the first two?

THE FOREPERSON: Was eight, two, and two.

THE COURT: Oh, eight, two, and two. It doesn't seem possible. Is there a third possible verdict that I have forgotten about?

SEAT NO. 7 JUROR: Undecided.

THE FOREPERSON: Undecided. Since there were all tentative ballots, there was. . . .

THE COURT: Let me ask this: From the six to six --

THE FOREPERSON: There was a ten two in that interim. Ten two and then eleven one.

THE COURT: Eight two and two, ten two, and then a couple of eleven one, correct; is that right?

THE FOREPERSON: Yes.

THE COURT: What, if anything, additional do you believe that the court could do in assisting the jury?

THE FOREPERSON: Nothing.

THE COURT: Well, is there any clarification of the law, for example, or any portion of the law that applies that you think the court can assist with?

THE FOREPERSON: No questions raised; so I can't read people's minds, but I don't believe so. If anybody has anything to say.

THE COURT: I'm not asking you to read anybody's mind. I know that you can't do that, but certainly you are the foreman and have been present during all these deliberations, and in your opinion as a foreman and as a juror on this case, *do you think that there is a need for any clarification in anyone's mind as to the law that applies in the case?*

THE FOREPERSON: Not that I can think of.

THE COURT: *Is there anything other than that you think the court might be able to do to assist in resolving this matter?*

JUROR NO. 435: *I've heard from somewhere a clear definition of the sympathy factor.*

THE COURT: When you say that, *you mean discussion about factor K?*

JUROR NO. 435: *That's correct.*

THE COURT: The last one?

JUROR NO. 435: Yes.

THE COURT: Anything else you think might be of assistance? Rather than have you determine from the box, why don't you folks do this: I would like you to return to the jury room to discuss that matter, that matter being is there anything that the court might be able to do to

assist the jury in resolving this matter as to [appellant] Smith.

We're going to move away from you folks in a few minutes and start back up with another jury. But I will have all counsel remain, okay, to answer to that question. And the answer may simply be no, there is nothing we can think of. But if there is anything, I would like you folks to have an opportunity to mull that question over and then return with an answer to it as shortly as you can so we can keep counsel here and be able to give you an answer, whatever it might be. All right?

(RT 18689-18695, emphasis added.)

During the recess, the jury "buzzed" the clerk to inform the trial court there was nothing that could be done to assist it in reaching a verdict as to appellant Smith. (RT 18696.) Thereafter, the jury returned to the courtroom. In response to questioning from the trial court, the foreperson of the jury indicated the following: the weighing process as discussed in the instructions was understood by the jury; no verdicts had been reached as to appellant Bryant on any count; and there was nothing else to add regarding the jury's impasse as to appellant Smith. (RT 18700-18701.) The trial court then instructed the jury as follows:

THE COURT: All right. The court is going to ask you to do the following.

I want you to continue your deliberations on the remaining matters including [appellant] Smith.

You may be quite right and it may be that you do not arrive at a verdict as to [appellant] Smith as you seem to feel in your note.

The court is not convinced that that is the case given the fact that there has been a verdict rendered as to one defendant, given the fact that there has been a change from six to six right up to *eleven to one.*

That may be where it ends or it may go back. That tells me that there is a *potential* that the jury may resolve this matter regardless of what you feel now.

I may be wrong. I may be right.

I will ask you to continue your deliberations in any order that you want.

Again, I am not suggesting who you deliberate on or what count or anything like that. You will have to do that for yourselves. But the court is not going to at this point declare a mistrial as to the penalty phase as to any defendant based on what we have talked about right here.

So you will need to continue your deliberations.

We are going to see you tomorrow.

As you know, we have a juror [No. 113] who will be out of here tomorrow. That will be his last day.

I will have everybody present here tomorrow afternoon before you folks leave and we will speak again and we will handle the matter at that time, if it's still necessary, or seating an alternate juror and so forth.

If there are, again, I am not suggesting that you rush. *I am suggesting that you don't rush [in your deliberations].* If there are verdicts that you arrive at as to any counts or any defendant or anything, we will accept those tomorrow afternoon even if they are not complete verdicts.

Do you understand?

PROSPECTIVE JUROR NO. 49: Yes, sir.

THE COURT: So we will see you folks --

Unless there is a question between now and then. If so, send it out and we will try to round everybody up and deal with it.

If not, we will see you before you go home tomorrow afternoon.

Any questions?

JUROR NO. 247: *Yes.*

THE COURT: Yes, sir.

247.

JUROR NO. 247: Well, I feel that I understand the weighing process, the questions that are asked in the weighing process, the factor K as is included in the instructions. But I would be interested in hearing if you had any edification on the instructions or I would be interested in hearing anything more that you might have to say about it.

I feel that I do understand it, but I suppose there is a possibility that I don't.

THE COURT: All right. There are a lot of instructions that I just don't want to shoot from the hip and start trying to reword those.

If there is a specific point of law or a specific process that is of interest, I will do my best to answer the question.

But it's going to have to be put in writing and narrow it down for me to do that.

I don't want to reinvent the wheel as we indicated last time. But I will try to do anything that I can to assist.

It's been a long trial. I know everybody is tired. I will need a specific question. And if so, I will give you an answer.

JUROR NO. 247: Okay.

THE COURT: All right.

Yes, sir.

JUROR NO. 435: You mentioned continuing deliberations.

Does that mean we must continue deliberating on the person, [appellant] Smith, or can we change over?

THE COURT: You can change over. But the court is not declaring a mistrial as to [appellant] Smith. There will have to be deliberations by this jury on [appellant] Smith's matter.

The order in which you deliberate these counts, defendants and issues is up to you.

I have indicated that.

You can deliberate in any order that you want. But the case is still alive as to [appellant] Smith.

That is what I am saying.

Yes, ma'am.

JUROR NO. 21: What do you mean by mistrial? Do you mean that the guilt verdicts won't stand?

THE COURT: Again, I am not going to get into that.

If you have a question on that, I will be glad to answer it.

When I say a mistrial, I mean declaring that the jury is unable to arrive at a verdict, a mistrial as to penalty phase. And I'm not going to go into any answer now as to what that means or what that entails.

I am just saying that we are status quo. The deliberations go on.

JUROR NO. 261: It does not to have do with anything as far as conviction of the guilt phase.

THE COURT: Let me see counsel.

(RT 18701-18705, emphasis added.)

During the conference with counsel, appellant Smith objected to continuing deliberations on the penalty phase and asked for a mistrial. The trial court indicated that "given the length of this trial, given the great movement in their votes, the court does not feel it's appropriate at this point to grant that

motion." (RT 18709.) After conferring with counsel, the trial court advised the jury:

> THE COURT: All right. Ma'am, the court will answer your question this way.
>
> That the verdicts that have been received by the court heretofore, the jury has been polled and those verdicts have been recorded.
>
> Those verdicts will not be influenced by what takes place from this point forward.
>
> But I do not want you to take that as a signal by the court that work is done on this case because your work is not done on this case until the court concludes that the work is done.
>
> This is one trial we need to concentrate on.
>
> Okay?
>
> Does that answer your question?
>
> JUROR NO. 261: Pretty much.
>
> THE COURT: Don't speculate about things other than what the court has told you.
>
> You are clear of my answer to you.
>
> JUROR NO. 261: Yes.

(RT 18709-18710.) Thereafter, the jury resumed deliberations without reaching any verdicts. (See RT 18710.)

9. On July 19, The Trial Court Replaces Juror No. 113 With Alternate Juror No. 433 And Instructs The Jury To Commence Its Penalty Deliberations Anew

On the afternoon of July 19, the trial court took up the matter of excusing Juror No. 113, the juror who was leaving on a prepaid vacation on July 20. (RT 18713.) When the trial court inquired of counsel whether anyone wished to be heard on the issue of replacing Juror No. 113, appellant Smith

responded, "*No, not on that issue.*" (RT 18713, emphasis added.) The trial court indicated that, before it excused Juror No. 113, it would inquire of the jurors whether they had reached verdicts as to any defendant. If the answer was "yes," the trial court would accept those verdicts. If the answer was "no," the trial court would inquire if the jury was still at an impasse as to appellant Smith. Counsel for appellant Smith indicated that if the jury was "at the same impasse that they indicated yesterday on two separate occasions" then he would request the trial court to declare a mistrial. (RT 18714.)

The trial court also advised counsel that it was considering "changing [the jury's] hours a bit to get them here earlier and perhaps keep them an extra half hour on each end and maybe cut that hour-and-a-half lunch to about an hour so that while they are here they will be, hopefully, more focused on their duties as opposed to other things. And I think that that is something the court is going to do." (RT 18717-18718.) When asked if counsel wished to be heard on the issue, appellant Smith remained silent and posed no objection to the procedure. (See RT 18717-18718.) In response to appellant Bryant's concern, the trial court stated,

> Well, the problem is this: in terms of imposing on the jury, the longer they are attending to other things during the day, the more the possibility that we seat additional alternate jurors, and the process begins anew, and all jurors are thereby put out. You have people here that at some point need to get back to their lives.

(RT 18718-18719.) The court noted that the case was in its sixth month. (RT 18719.)

After the jury returned to the courtroom, the foreperson, in response to questions from the trial court, indicated the following: the jury had not arrived at any verdicts since the previous day; and, although *there had been further deliberations as to appellant Smith*, there had not been any further votes as to

appellant Smith. (RT 18719.) Outside the presence of the jury, appellant Smith asked the trial court to make further inquiry of the jury as to whether "they think further deliberations would be helpful. If not, we want the court to declare a mistrial" as to appellant Smith because "if you take a juror off a jury [Juror No. 113] where they say they are deadlocked and put another juror on, it seems like we're changing the makeup to that jury, and it seems like a dangerous road to go down." (RT 18720.) Appellant Smith reiterated he had no objection to replacing Juror No. 113 but asked the trial court to inquire of the jury whether further deliberations "would be fruitful." (RT 18722, 18723.)

The jury returned to the courtroom and the following occurred:

THE COURT: Back on the record in open court.

Ladies and gentlemen, just one or two more questions before we go to the next step today. You say there were deliberations as to [appellant] Smith, Mr. Foreman; is that right?

MR. FOREPERSON: That's correct.

THE COURT: Was some portion of the day, also, taken out for deliberating as to [appellant] Bryant?

MR. FOREPERSON: Yes.

THE COURT: And I don't want to know any numbers, but were there votes taken as to [appellant] Bryant?

MR. FOREPERSON: Yes, sir.

THE COURT: That took some of the day.

As to [appellant] Smith, again, I am not trying to push you folks at all. There are certain things I need to know for the record before we move to the next step here, and that is your estimation as to [appellant] Smith, if you can tell me, and perhaps you don't know an answer to this question, and if you don't, just tell me that. But insofar as you can recall, have things changed as to [appellant] Smith since you sent a note

out to me yesterday relative to [appellant] Smith?

MR. FOREPERSON: *I think there has been some change, some dialogue has opened up, yes.*

THE COURT: All right. But no further ballots today?

MR. FOREPERSON: No, sir.

THE COURT: Okay. I just needed the record clear as to certain things at various times in the trial.

All right. The court is prepared to move forward. If anyone wishes to make a record, you may do so.

MR. GREGORY: No.

Mr. MCCORMICK: No, sir.

THE COURT: All right. Just to be one thousand percent sure, you don't have any verdicts filled out to hand to the court now?

MR. FOREPERSON: None at this time.

THE COURT: All right. Number 113, your time has arrived.

(RT 18723-18725.) Thereafter, the trial court replaced Juror No. 113 with Alternate Juror No. 433. (RT 18725-18727.) The trial court then advised the jury as follows:

THE COURT: . . .

Ladies and gentlemen of the jury, one of your number has been excused for legal cause and replaced with an alternate juror. You must not consider this fact for any purpose. The People and the defendants have a right to a verdict reached only after full participation of the 12 jurors who returned the verdict. This right may be assured only if you begin your deliberations again from the beginning. You must, therefore, set aside and disregard all past deliberations and tentative conclusions and deliberate anew as to the remaining matters. This means that each remaining original juror must set aside and disregard the earlier

deliberations as if they had not taken place.

When you return tomorrow, you will retire to begin your deliberations anew in accordance with all instructions previously given. Everybody clear on that?

(The jurors nod collectively in the affirmative.)

THE COURT: Okay. I have other news for you. That is the following: The court believes that it is necessary, we have a lot of jurors who obviously need to get on with their business. This case will take as long as it takes in order for it *either to be resolved or for the court to feel that it cannot be resolved.* All right? But within those parameters, we need to make use of our time wisely. In that regard, the court is going to do two things: I want you to focus, to begin your deliberations at 8:30 in the morning. This is not to punish you, but so we can get as much time in as we can on this case while we have you folks here during the day. 8:30.

We are going to take an hour for lunch and deliberate until 4:30, okay? I know it is tough, but we're going to do it that way, and I believe that it may assist in one way or another getting this thing concluded. *At some point in this case, your service will end at some point, either with verdicts or with the court declaring there will not be verdicts as to various matters however that works its way out, it works its way out;* but that end will come sooner whichever way it is, if we stick to these hours.

(RT 18727-18728, emphasis added.) The newly-constituted jury was excused until the next day at which time it would commence its deliberations "anew." (See RT 18729-18730.)

10. The Penalty Jury Deliberates On July 20 Without Reaching Any Verdicts

The penalty jury deliberated on July 20 (Thursday) without reaching any verdicts. (RT 18732-18732-1.)

11. On July 24, The Penalty Jury Returns Verdicts As To Appellant Bryant And Appellant Smith

The jury returned verdicts as to appellant Bryant on July 24 (Monday). (See RT 18747-18751.) After returning the verdicts, the trial court took up the matter regarding a question pertaining to appellant Smith. The question presented by the jury was as follows: "Is it appropriate in the eyes of the law to put a different value on one person's life than another in as far as weighing the crime?" (RT 18752.) After conferring with counsel, the trial court answered the question as follows: "In each of the two decisions you have been asked to make as to [appellant] Smith, counts 3 and 4, you may consider and give whatever weight you deem appropriate to the various personal characteristics of the five victims." (RT 18759.) The jury resumed its deliberations (RT 18759) and, thereafter, returned verdicts as to appellant Smith (see RT 18760-18764).

B. Legal Analysis

1. The Denial Of Appellant Smith's Motion For A Mistrial On July 18 And The Subsequent Instructions To The Jury To Continue Its Deliberations Were Entirely Proper

The contention that the trial court's instructions improperly coerced a death verdict on July 18 after the jury twice declared itself deadlocked as to reaching a unanimous penalty verdict on appellant Smith is a red-herring. The instructions the trial court gave on July 18, which appellant Smith maintains coerced penalty verdicts as to appellants Smith and Bryant, did *not* result in any penalty verdict as to any appellant and, therefore, cannot under any scenario be

considered coercive. The next day, July 19, Juror No. 113 was excused without any additional penalty verdicts being reached. At that time, the penalty jury commenced its deliberations "anew from the beginning." The jury was specifically instructed that it "must, therefore, set aside and disregard all past deliberations and tentative conclusions and deliberate anew as to the remaining matters. This means that each remaining original juror must set aside and disregard the earlier deliberations as if they had not taken place." (RT 18727-18728.) Given the instructions on July 19 to commence "deliberations anew from the beginning," the instructions given on July 18 cannot possibly be considered to have, in any manner whatsoever, influenced or coerced the newly-constituted jury in reaching penalty verdicts as to appellants Smith or Bryant. Again, the claim raised by appellant Smith is a red-herring.

In any event, respondent will demonstrate below that the trial court properly denied appellant Smith's mistrial motion on July 18 and, thereafter, did not coerce the jury in its subsequent instructions to continue its deliberations. This issue, respondent submits, requires an analysis of two matters: (1) did the trial court properly deny appellant Smith's motion for a mistrial on July 18 because of the jury's inability to reach a penalty verdict as to appellant Smith; and (2) did the trial court's subsequent instructions to the jury to continue its deliberations improperly coerce the jury into returning penalty verdicts. Respondent submits the answer to the first question is "Yes," and the answer to the second question is "No."

a. Appellant Smith's July 18 Motion For A Mistrial

Section 1140 provides:

> Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may

deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.

"The court may ask jurors to continue deliberating where, in the exercise of its discretion, it finds a 'reasonable probability' of agreement." (*People v. Pride, supra*, 3 Cal.4th at p. 265; *People v. Sandoval* (1992) 4 Cal.4th 155, 195; § 1140.) "The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.'" (*People v. Breaux* (1991) 1 Cal.4th 281, 319, quoting *People v. Carter* (1968) 68 Cal.2d 810, 817.) The question of coercion is necessarily dependent on the facts and circumstances of each case. (*People v. Breaux, supra*, at p. 319.)

Here, the trial court did not abuse its discretion on July 18 when it denied appellant Smith's motion for a mistrial and asked the jurors to continue their penalty deliberations as to appellant Smith. The facts which support the trial court's exercise of discretion are the following: (1) the trial was extremely lengthy and was then in its sixth month; (2) over 150 witnesses testified during the trial; (3) there had been significant progress in the votes taken on appellant Smith commencing a week earlier at 6-6 and ending on July 18 at 11-1 after eight votes; (4) four votes taken on July 18 demonstrated significant progress that very day as the votes went from 8-2-2 (two undecided) to 10-2 to 11-1 on two occasions; (5) the jury had deliberated for only one and one-half days since it returned verdicts as to appellant Wheeler; and (6) the jury had not yet reached a penalty verdict as to appellant Bryant. These facts certainly support the trial court's exercise of discretion on July 18 when it denied appellant Smith's motion for a mistrial and asked the jurors to continue their deliberations.

And, significantly, that the trial court was correct in its assessment that the jury should continue to deliberate as to appellant Smith is clearly demonstrated by the questions the jurors asked *immediately after* they were

instructed to continue deliberations (i.e., a question by Juror No. 247 about the weighing process; a question by Juror No. 435 about whether the jurors had to continue deliberating on appellant Smith or if they could change over to another defendant; and a question by Juror No. 21 about what the trial court meant when it referred to a mistrial).

The trial court did not abuse its discretion in denying appellant Smith's July 18 motion for a mistrial.

b. The Trial Court's Instructions To The Jury Were Entirely Proper And Not Coercive In Any Manner Whatsoever

In *Allen v. United States* (1893) 157 U.S. 675, the United States Supreme Court approved a charge which encouraged the minority jurors to reexamine their views in light of the views expressed by the majority.[69] In *People v. Gainer, supra,* 19 Cal.3d 835, this Court specifically disproved of two elements of the typical "*Allen* charge." First, this Court found "the discriminatory admonition directed to minority jurors to rethink their position in light of the majority's views" was improper in that, by counseling minority jurors to consider the majority view, whatever it might be, the instruction encouraged jurors to abandon a focus on the evidence as the basis of their verdict. (*Id.* at p. 848.) Second, this Court took issue with the direction that the

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69. As this Court explained:

> In the *Allen* opinion this concept is expressed in the following passage: "if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority."

(*People v. Gainer* (1977) 19 Cal.3d 835, 845.)

jury "should consider that the case must at some time be decided." (*Id.* at p. 845.) This Court also noted that "[a] third common feature of the *Allen*-type instructions is a reference to the expense and inconvenience of a retrial. While such language was absent from the charge in this case, it is equally irrelevant to the issue of defendant's guilt or innocence, and hence similarly impermissible." (*Id.* at p. 852.)

None of the vices condemned by this Court in *Gainer* are present in the instant case. First, the instruction did *not* contain a discriminatory admonition directed to the minority juror to rethink his or her position in light of the views of the majority. The trial court instructed the jurors to continue deliberations as to appellant Smith and "you may be quite right and it may be that you do not arrive at a verdict as to [appellant] Smith as you seem to feel in your note." The trial court told the jurors that, given a verdict had been returned as to one defendant and there had been movement from 6-6 to 11-1 as to appellant Smith, there was "a potential" the matter could be resolved. But the court advised the jurors, "I may be wrong" and the case could well end up as a mistrial. These comments, respondent submits, can hardly qualify as a discriminatory admonition to the minority juror to rethink his or her position in light of the views of the majority.

Appellant Smith's claim the instruction was defective because it did not affirmatively contain an admonition to the minority juror *not* to abandon his or her views merely to reach a verdict (SAOB 312, 314, 315) is not required by *Gainer*. The vice of the *Gainer*-type instruction is where the jury is affirmatively instructed that the minority juror should rethink his or her views in the light of the views of the majority. As noted above, the instruction here did not contain any of the flaws of a *Gainer* instruction.

Second, the instruction did *not* inform the jury that the case must at some time be decided. To the contrary, the trial court instructed the jury, "You may be quite right and it may be that you do not arrive at a verdict as to [appellant] Smith as you seem to feel in your note" and that a vote of 11-1 "may be where it ends or it may go back."

And, third, the instruction did *not* make reference to the expense and inconvenience of a retrial. Again, to the contrary, after conferring with counsel, the trial court responded to a juror's question about the meaning of a mistrial as to the penalty phase by advising the jury that such a mistrial would have no effect on the guilt verdicts which had already been recorded and "those [guilt] verdicts will not be influenced by what takes place from this point forward." There was absolutely no reference, direct or indirect, as to the possibility of a penalty phase retrial should a mistrial be declared.

Although appellant Smith acknowledges that it must be "clear from the record" (see SAOB 310) that an instruction is coercive, he attempts to dance around the *Gainer* requirements by stating that the *Gainer* flaws "are mirrored to *some* extent in this case" by the "*tenor* of the court's comments" and what "was *implicit* in the court's praise of the jurors' progress from six to six to eleven to one." (SAOB 316, emphasis added.) However, as mentioned above, the flaws this Court found in the *Gainer* instruction are simply not present here, and the "tenor" of the court's comments was for the jury to take its time and try, if possible, to reach a verdict and, if it could not, so be it. There was simply no coercion in the instruction.

Finally, appellant Smith takes exception to the trial court's inquiry into the numerical division of the jury as to the votes regarding appellant Smith and on the court's comment "praising" the progress the jury made from going from a 6-6 vote to an 11-1 vote. (SAOB 309-321.) The trial court, however, did not "praise" the progress of the jury in going from a 6-6 vote to an 11-1 vote. The

court merely stated there was a "potential" for a resolution of the matter given the change in votes from 6-6 to 11-1.

And, in any event, unfortunately for appellant Smith, the law in California does not support his view regarding the trial court's inquiry into the numerical division of the votes. Although appellant Smith may find some support for his view in the federal arena (see *Brasfield v. United States* (1926) 272 U.S. 448, 449-450), established California law does not support such a view as long as the court's inquiry is neutral and causes no coercion (see *People v. Rodriguez, supra*, 42 Cal.3d at p. 776; *People v. Carter, supra*, 68 Cal.3d at p. 815). As this Court noted in *Rodriguez, supra*, 42 Cal.3d at page 776 and footnote 14, the federal rule prohibiting an inquiry into the numerical division of a jury has been held to be a matter of federal criminal procedure and, therefore, not required to be followed by the states, whereas in California "a neutral inquiry into numerical division, properly used, is an important tool in ascertaining the probability of agreement." Here, the trial court's inquiry into the numerical division was at all times neutral (i.e., the court specifically advised the jury not to indicate which way it was leaning -- life without the possibility of parole or death) and was helpful in assessing "the probability of agreement." The inquiry into the numerical division of the jury's votes did not cause any coercion of the jury.

The trial court's instructions to continue deliberations were not coercive.

2. The Trial Court Did Not Abuse Its Discretion In Denying Appellant's Smith Motion For A Mistrial On July 19 And Thereafter Replacing Juror No. 113 With An Alternate Juror

Appellant Smith contends the trial court should have declared a mistrial on July 19 rather replace Juror No. 113, the juror who had to leave jury service because of a prepaid vacation, because it was "impossible" for the newly-constituted jury to commence deliberations "anew" after nine days of

deliberations. Appellant Smith does *not* dispute the fact that there was "good cause" to excuse and replace Juror No. 113 given his pre-paid vacation, nor could he given the instant record and his repeated concurrences throughout the proceedings that "good cause" existed to excuse Juror No. 113 because of his pre-paid vacation. Rather, he argues that, given the length of the deliberations and the two occasions the jury declared an impasse as to appellant Smith on a vote of 11-1, coupled with the fact the jury had already reached guilty verdicts as to appellant Wheeler, it was simply "not feasible for the jury to return to square one and pretend none of this 'progress' or 'movement' [from 6-6 to 11-1] ha[d] happened." Thus, appellant Smith reasons, that under these "unusual facts," the trial court should have declared a mistrial as to appellant Smith rather than excusing and replacing Juror No. 113 with an alternate juror and instructing the jury to commence its deliberations "anew." (SAOB 321-327.) Respondent disagrees and will demonstrate below: (1) the trial court did not abuse its discretion in denying appellant Smith's July 19 motion for a mistrial; and (2) appellant Smith has not offered any record-based reason in an attempt to rebut the presumption that the jurors could follow the trial court's instruction and commence their deliberations "anew" following the replacement of Juror No. 113.

a. Appellant Smith's July 19 Motion For A Mistrial

On July 19, the day following the jury's indication it had reached an impasse as to appellant Smith, Juror No. 113, as previously determined, was scheduled to end his jury service due to a pre-paid vacation. Before the excusal took place, the trial court inquired of the jury and was advised that it had not yet arrived at any verdicts since the previous day, and, although it had conducted further deliberations as to appellant Smith, it had not taken any further votes on appellant Smith. Outside the jury's presence, counsel for appellant Smith asked the trial court to make a further inquiry of the jury as to whether "they think

further deliberations would be helpful. If not, we want the court to declare a mistrial" as to appellant Smith. (RT 18720.) When the jury returned to the courtroom, the foreperson responded to the trial court's question as to whether there had been any change as to appellant Smith since yesterday with the following: "*I think there has been some change, some dialogue has opened up, yes.*" (RT 18724, emphasis added.) The trial court indicated it was prepared to move forward with the replacement of Juror No. 113 but asked counsel if he wished "to make a record" at that point. Appellant Smith responded, "No." (RT 18724.) The trial court proceeded with the selection of an alternate juror for Juror No. 113. (See RT 18725-19727.)

Given this record, it appears appellant Smith abandoned his motion for a mistrial on July 19. The motion was predicated on "whether [the jurors] think further deliberations would be helpful." When the trial court inquired, the foreperson indicated that "there had been some change, some dialogue has opened up" as to appellant Smith -- an obvious declaration that further deliberations would be beneficial. When the trial court inquired of appellant Smith whether he wished to make a record, counsel responded, "No." Such a record, respondent submits, clearly indicates appellant Smith withdrew the motion for a mistrial since the jury had experienced "change" and "a dialogue" had "opened up" as to appellant Smith. Thus, he cannot be heard to complain on appeal about a motion he effectively abandoned.

In any event, assuming arguendo the issue is preserved, the record supports the trial court's implicit denial of the mistrial motion. If it was proper for the trial court to deny the mistrial motion on July 18, which it clearly was, then it was equally proper to deny the mistrial motion the next day. Indeed, there was a far greater reason to deny the mistrial motion on July 19: The only thing which had changed from the previous day was that there had "been some change, some dialogue [had] opened up" between the jurors as to appellant

Smith. This fact obviously supports the trial court's denial of appellant Smith's mistrial motion.

b. The Replacement Of Juror No. 113

Appellant Smith maintains that replacing Juror No. 113 and instructing the jury to commence "deliberations anew was not a viable option under the facts of this case." Appellant Smith *speculates* that, given the past deliberations and verdict as to appellant Wheeler, the jury would be unable to realistically start deliberations "anew." He surmises that "a likely momentum for the death penalty had evolved" (SAOB 325) and "past deliberations could not be set aside" (SAOB 327) because the "jurors' views had already been shaped by each other" (SAOB 324). Appellant Smith suggests that the existing 11 jurors would be "hard pressed to truly begin deliberations anew" (SAOB 327) with a "Johnny-come-lately, purporting to be an equal partner." (SAOB 327.) Appellant Smith surmises that "a likely momentum for the death penalty had evolved, a momentum in which the new juror has not played a part" and "[u]nder the best of circumstances, the new juror would have a hard time resisting the tide" (SAOB 325) because he "was under profound pressure to go along with the majority, the side praised by the judge as having made progress" (SAOB 328). Thus, appellant Smith concludes, it was simply was not feasible for this jury to commence deliberations anew. (SAOB 321-328.) The problem with appellant Smith's argument, respondent submits, is that it is based entirely on surmise and speculation as to what appellant Smith thinks might have happened in the jury room when the jury commenced its deliberations "anew." This, of course, is not the law on which to evaluate appellant Smith's claim.

Unfortunately for appellant Smith, the law is clear that on appeal it is presumed that jurors follow the court's instructions and directions. (See *People v. Maury* (2003) 30 Cal.4th 342, 439-440; *People v. Waidla, supra,* 22 Cal.4th at p. 725.) The presumption that the jurors in this case understood and followed

the court's instructions to commence deliberations "anew" is not rebutted by anything except appellant Smith's speculation. Appellant Smith presents not one record-based reason to believe the jurors did not follow the court's instruction to commence deliberations anew. His claim must, therefore, be rejected.

Finally, it should be noted that appellant Smith appears to argue that the trial court's instruction to the jury following the replacement of Juror No. 113 "coerced" a death verdict by extending the hours of deliberation: starting at 8:30 a.m, one hour for lunch, and stopping at 4:30 p.m. Appellant Smith also takes exception to the trial court's comment to the jury that "this case will take as long as it takes in order for it *either to be resolved or for the court to feel that it cannot be resolved.*" (RT 18727, emphasis added.) Appellant Smith argues the comments were "inherently coercive" since the trial court "threatened to keep the jury for an undermined amount of time." (SAOB 319-320.) This contention is without merit for two reasons. First, appellant Smith did not object below when the trial court suggested the hours of deliberations be extended so the jury could "wisely" use its time and do its work and *either* resolve the matter with verdicts or an impasse. (See RT 18717-18718.) Second, the instructions on July 19 after the replacement of Juror No. 113 did not, in any manner whatsoever, contain the vices of the *Gainer* instruction. The fact the trial court, without objection from appellant Smith, wanted the jury to be efficient and use its time "wisely" does not translate into a coercive instruction. Moreover, the trial court was always quite clear with the jury that it was not necessary for it to reach verdicts: *"either"* resolve the matter with verdicts *or* indicate to the court that the matter cannot be resolved. That is, respondent submits, the antithesis of a coercive instruction to reach a verdict.

Appellant Smith's claim must be rejected.

XXXII.

THE TRIAL COURT PROPERLY DENIED APPELLANT SMITH'S MOTION TO MODIFY THE DEATH VERDICT PURSUANT TO SECTION 190.4, SUBDIVISION (E)

Appellant Smith contends the trial court erroneously denied his motion to modify the jury's death verdict under section 190.4, subdivision (e), because its findings were contrary to the law and to the evidence. Specifically, appellant Smith contends the trial court erred by refusing to consider and rejecting "out of hand" the entirety of the mitigating evidence he presented because it was the type of mitigating evidence "commonly presented in capital cases." Such a "cursory dismissal of legitimate factors in mitigation," reasons appellant Smith, was a "patent violation" of the Eighth Amendment and precluded the trial court from conducting the type of review required by section 190.4, subdivision (e). Appellant Smith next contends the aggravating factors relied upon by the trial court were not supported by the record. (SAOB 332-336.) Appellant Wheeler joins in the claim. (WAOB 451.) Respondent submits appellant Smith's claims are without merit, and the trial court properly denied his motion for modification of the verdict under section 190.4, subdivision (e).

Subdivision (e) of section 190.4 provides:

> In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section [1181]. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

Accordingly, pursuant to section 190.4, in ruling on an application for modification of a verdict imposing the death penalty, the trial court must independently reweigh the evidence of aggravating and mitigating circumstances and then determine whether, in its independent judgment, the weight of the evidence supports the jury's verdict. (*People v. Ochoa, supra,* 19 Cal.4th at p. 461.) On appeal, the trial court's ruling is subject to de novo review; however, this Court simply reviews the trial court's determination after independently considering the record and does not make a de novo determination of penalty. (*Ibid.*)

In denying the modification motion, the trial court complied with the requirements of section 190.4, subdivision (e). The trial court stated that it "independently reviewed the evidence in this case in relation to the aggravating and mitigating" factors detailed in section 190.3. (RT 18824.) The trial court specifically reviewed the testimony of "all witnesses" presented by both the People and the defense at both the guilt and penalty phases and "assessed the credibility" of those witnesses, determining the probative force of the testimony and the weight to accord such evidence. (RT 18824.) The court expressly found that the jury's findings and verdict were "warranted to be consistent with the law and the evidence presented" and noted "the jury was correct, I believe, absolutely in their verdict, legally, morally and in any other way. . . ." (RT 18820, 18825.) After expressly weighing the aggravating and mitigating factors on the record, and concluding the aggravating factors not just "substantially," but "hugely" and "greatly" outweighed the mitigating factors, the trial court denied the motion. (RT 18816-18820, 18824-18825.)

Appellant Smith's first complaint, that the trial court did not consider and rejected "out of hand" the mitigating evidence he presented (SAOB 332-336), is belied by the record. At the penalty phase, appellant Smith provided the testimony of his sister to describe an abusive upbringing as a child

and a clinical psychologist who provided neurocognitive and psychological assessments of appellant Smith. The trial court consider and discussed at length both pieces of mitigating evidence before denying appellant Smith's motion. For example, in referring to the testimony of appellant Smith's sister, the trial court stated, "I have reread [her] testimony in full." (RT 18818.) And, significantly, the trial court stated the following regarding the testimony of the clinical psychologist and how the mitigating evidence stacked up against the aggravating evidence:

> Additionally, [appellant] Smith offered the testimony of a psychologist who offered the opinion that [appellant] Smith suffered from dyslexia and/or hyperactivity and/or poor impulse control.
>
> The court notes, without trying to sound harsh or out of step, that these terms have become obligatory to a large degree in these cases and everyone, or surprisingly a large number of individuals, before the court seem to have brought out or produce that type of explanation in mitigation for a partial excuse.
>
> That is not to say that [appellant] Smith did not have problems in school. Those problems after listening to the testimony of the psychologist were caused by [appellant] Smith.
>
> You can simply and certainly label behavior in any way one wants and affix a psychological label to it and try to change it into some sort of a disease syndrome and treat it that way.
>
> Even assuming the court does that, it suspends disbelief to a large degree and fully credits that testimony. It in no way excuses, mitigates or lessens [appellant Smith's] responsibility for his actions.
>
> [Appellant Smith] is not unintelligent. His I.Q. scores -- he took three I.Q. scores when he was a kid, one above average, two below.
>
> He got a college scholarship for athletics. And while I am not

unmindful of the fact that one need not be at the top of his class to find himself in that position, certainly those authorities after looking at [appellant] Smith's background felt he could succeed in college.

He could have. He was succeeding until he got thrown out for a criminal conviction for burglary.

MR. MCCORMICK: Burglary. Correct.

MR. NOVOTNEY: I don't believe that is accurate.

THE COURT: All right. Well, he was in college. Let's put it that way. He left for whatever reason.

It further -- and it is important for the record, as we went through the testimony of the psychologist of the record -- the testimony of the psychologist that testimony was not offered for the way of mitigating or explaining conduct but was, therefore, sympathy only and that was a tactical choice and I think a very good one made by the defense.

But now what we need to ask is well, is that sympathetic factor or those sympathetic factors about [appellant] Smith sufficient to sparing this penalty that the jury has returned when coupled to things that he points in his home life.

The answer is *absolutely not.*

The manner of these crimes, heinous nature of these crimes, and the other crimes committed by [appellant Smith] outweigh hugely, not just substantially, but hugely any attempt that [appellant] Smith has made to explain or mitigate his actions or to even gender [sic] sympathy in the fact finder or the court.

And the jury was correct, I believe, absolutely in their verdict, legally, morally and in any other way and I adopt it without hesitation. (RT 18818-18820, emphasis added.)

Later in the proceedings, the trial court stated:

> Additionally and pursuant to Penal Code section 190.3 and 190.4(e), I considered whether or not there was any mitigating evidence. I have considered the entire record. I find that the aggravating factors are so substantial in comparison with the mitigating circumstances that the appropriate penalty is death. Additionally, there are no other circumstances about the defendant which extenuate the gravity of the crime.

(RT 18825.)

As can be seen from the foregoing, the trial court discussed and considered at length the entirety of the mitigating evidence presented by appellant Smith. The record shows the trial court carefully considered and weighed the mitigating evidence against the aggravating evidence presented and concluded the mitigating factors were "hugely" and "greatly" outweighed by the aggravating factors. There is absolutely no indication in the record that the trial court rejected the mitigating evidence "out of hand" (SAOB 334) or "deemed an entire category of unworthy of consideration" (SAOB 334) or engaged in a "cursory dismissal" (SAOB 332) of the mitigating evidence presented by appellant Smith. Indeed, as mentioned, the record demonstrates the exact opposite. As such, appellant Smith's claim must be rejected. (See *People v. Osband, supra,* 13 Cal.4th at p. 727.)

Likewise, appellant Smith's claim that the aggravating factors relied upon by the trial court are unsupported by the record is without merit. Appellant Smith first takes exception to the trial court's comment that appellant Smith "was a long-standing and respected member" of the Bryant Organization. (SAOB 332-333; see RT 18816.) The record, however, overwhelmingly supports the trial court's comment. Prison records revealed that appellants Smith and Bryant were listed as correspondents for Armstrong while Armstrong was in prison. Also, Armstrong, while in prison, gave Karen Flowers the

telephone number of appellant Smith. Significantly, appellant Smith was convicted of the attempted murder of Keith Curry (whom appellant Bryant was angry at for his involvement with Tannis) and the transportation and sale of cocaine. James Williams testified appellant Smith frequently picked up money at the Wheeler Street house and was paid $1,000 per week, indicating appellant Smith was involved in the "narcotic end" of the Bryant Organization. And, perhaps most significantly, the fact appellant Smith was entrusted by appellant Bryant to be one of the executioners on the afternoon of August 28, 1988, as well as the telephone records introduced at trial revealing the numerous telephone calls placed from and to appellant Smith's home telephone, demonstrates rather conclusively that appellant Smith was "a long-standing and respected member" of the Bryant Organization.

Appellant Smith's claim that the trial court improperly relied on the "horrible" nature of the murders of Loretha Anderson and baby Chemise as an aggravating factor because his liability for those murders was "vicarious" and his personal culpability was "less than the actual shooter" misses the mark. (See SAOB 334.) Appellant Smith was convicted of the murders of both Anderson and baby Chemise (as well as Armstrong and Brown) and was thus responsible for those two murders. Whether appellant Smith was the actual gunman who personally fired the bullets into Anderson and baby Chemise does not negate the "horrible" and brutal nature of those two murders. Anderson suffered multiple shotgun and gunshot wounds fired at close range as she tried to protect her daughter. Baby Chemise died from a gunshot wound in the posterior base of the neck as she "cowered away" from the shooter. As aptly noted by the trial court, "the murder of a mother and child who were helpless, unarmed, unaware sitting in a car, were horrible." (RT 18817.) Appellant Smith's claim must be rejected.

Finally, the record supports the trial court's reliance on appellant Smith's possession of shanks while in custody and the burglary of the Lubell residence as aggravating factors. The evidence as to both aggravating factors is uncontradicted. And, contrary to appellant Smith's claim, it is not necessary to actually use a shank to be liable for the possession of the shank while in custody. Additionally, appellant Smith was convicted of the Lubell burglary, which involved an elderly victim being pushed to the floor and receiving "an open gash on her forehead" which bled -- hardly a situation in which it can be said that appellant Smith's culpability was "mitigated" because he was "surprised" by the victim's return to the property during the burglary. (See SAOB 334.) Since the record supports appellant Smith's involvement in these incidents (indeed, the evidence is uncontradicted as to these incidents), the trial court did not err in relying on them as aggravating factors.

Appellant Smith's claims must, therefore, be rejected. The trial court properly denied appellant Smith's motion for modification of the verdict pursuant to section 190.4, subdivision (e).

XXXIII.

THE ABSENCE OF APPELLANTS FROM VARIOUS PRETRIAL AND TRIAL PROCEEDINGS DID NOT VIOLATE THEIR CONSTITUTIONAL OR STATUTORY RIGHTS; AND, IN ANY EVENT, APPELLANTS WERE NOT PREJUDICED BY THEIR ABSENCE

Appellant Bryant claims the trial court erred in failing to have him present at several pretrial and trial proceedings and that the error violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, parallel provisions of the California Constitution, and state statutory and decisional law. (BAOB 617-635.) Appellants Wheeler and Smith join in this claim. (WAOB 435; SAOB 451.) As set forth below, respondent submits there was no right on the part of appellants to be personally present at the proceedings from which they were absent. Moreover, appellants were not prejudiced by their absence.

A. Relevant Proceedings

Appellants were tried in the Los Angeles County Superior Court but were absent from the courtroom during certain pretrial and trial proceedings. The first of the pretrial proceedings was a hearing held in the municipal court on November 22, 1988. The hearing was held in the absence of appellants Bryant and Wheeler, and it does not appear that appellant Smith was a named defendant in the case at the time. (See CT 3446-3447.) The hearing was limited to a discussion about some discovery matters. Detective Vojtecky testified at the hearing. (CT 3449-3467.)

Another pretrial proceeding from which appellants were absent occurred on October 1, 1992, a date not previously calendared for hearing. Appellant Bryant's counsel waived appellant Bryant's presence, and a hearing was held regarding the prosecution's compliance with appellant Bryant's subpoenas served on Detective Vojtecky and the DA's Office. Detective Vojtecky

testified at the hearing. Appellants Wheeler and Smith and their counsel were not present at this hearing. (RT 4197, 4199-4218; CT 11115.)

Other pretrial proceedings from which appellants were absent involved the first motion to recuse the DA's Office, which stemmed from the allegation that the DA's Office had been "infiltrated" by members of the Bryant Family. (RT 4281; see Arg. I.) In late 1992, the trial court held extensive hearings on this motion, including some ex-parte, in-camera hearings held at the request of the prosecution, which claimed a privilege under Evidence Code section 1040. At these hearings, the court heard from Director Hecht from the DA's Office and was provided with three files on investigations conducted by the DA's Office on three of its own employees. (RT 4343; see RT 4339(1)-4339(44), 4413(1)-4413(10), 4415(1)-4415(18), 4420(1)-4420(19), 4434(1)-4434(58) [sealed].) The record does not reflect that appellants expressly objected to their absence, or the absence of their counsel, from these proceedings, and appellant Smith did not even join in the first recusal motion. In the end, the trial court found there was nothing in the ex-parte, in-camera proceedings to substantiate the allegation of infiltration, found the informants leading to the investigations were non-exonerating and a privilege attached to some of them, and denied the first recusal motion. (RT 4480-4481.)

Appellants subsequently brought a second recusal motion, which was granted by the trial court but reversed on appeal. The case against appellants, thereafter, proceeded in the trial court with the DA's Office representing the People. (See Arg. I.) On July 29, 1994, the parties (including appellants) appeared in court, specifically in Department 102 before Judge J.D. Smith, and continued the case to November 2, 1994, setting that day as day 0 of 30. (RT 4972.) Shortly thereafter, however, Judge Smith recused himself from the case. As a result, on August 23, 1994, counsel for appellants appeared in Department 100, without their clients, for the sole purpose of having the case

transferred from Department 102 (Judge Smith's courtroom) to another courtroom. Appellants were in custody in the holding cells at the courthouse, and counsel for appellants did not object to their absence during this brief transfer proceeding. (RT 4999-5005.) The case was transferred to Department 108, and appellants were present in that courtroom before Judge Charles Horan on their next court date. (RT 5010.)

The case proceeded to trial. On the day before opening statements, the trial court indicated it would hold an Evidence Code section 402 hearing that afternoon on codefendant Settle's motion to exclude statements he made at the time of his arrest. The statements were potentially admissible as to codefendant Settle only. Appellants and their counsel expressly requested to be excluded from the afternoon hearing. The court, thereafter, held the hearing in their absence and found codefendant Settle's statements admissible. (RT 7990-7991, 8010-8053.)

Also on the day before opening statements, in the presence of the parties, the trial court said it would be taking some security measures with the jury, as it had previously indicated. The court explained that, although the jury would not be sequestered, it would be in the sheriff's custody while at the courthouse. The jury would be escorted to the courthouse, would not be required to wait in line to enter the courthouse, would be escorted to the courtroom via a specific route, and would eat meals inside the courthouse at county expense. The court stated it had to explain these measures to the jury, that it would do so on the record, but that it would not allow the prosecution or the defense to be present when it did so. (RT 7980-7981.) The court said it would explain to the jury that the special transportation and accommodations were being implemented because there was difficulty gaining access to the building and navigating the halls due to other cases such as the case against O.J. Simpson, which was being tried down the hall. Also, the court would explain that it did not want to risk

a mistrial because a juror spoke to a member of the press or mingled in the hallway with one of the 200 witnesses in this case. The court invited further admonition suggestions from the defense. (RT 7982.)

Appellants Bryant and Wheeler objected to being excluded from the proceeding where the court would address the jury, but the court found counsel would be placed in an awkward position if present and it would not be beneficial to have any party aware of the manner in which the jury was transported to court. Also, the court rejected appellant Bryant's suggestion and found it would hurt the defense to be present only when the court explained the necessity of the measures but to be asked to leave the courtroom before the court described the jury's travel route. The court further noted the security measures were occasioned, in part, by activities alleged against appellants. (RT 7984-7985.) The court assured the parties that it would address the jury in a neutral manner. It added that the alternative was to allow the sheriff to handle the matter, but the defense would then have no record of what was said to the jury. (RT 7984-7986.) Accordingly, the next day and during the early part of the People's case, the court addressed the jury, outside the presence of all of the parties, on the issues of transportation and accommodations. (RT 8057-8072, 9567-9581.)

At the close of the guilt phase, the jury rendered its verdicts as to appellants. (See RT 17047, 17070-17076.) Afterwards, counsel for appellant Bryant orally and telephonically waived his and appellant Bryant's presence for proceedings related to the jury's deliberations as to codefendant Settle. (RT 17083, 17085, 17105C.) During these proceedings, the court invited written questions from the jury about the areas of the law that would assist in deliberations, and the jury submitted some questions. (RT 17095-17096, 17100-17105B.) The court discussed the questions with the parties who were present (the prosecution, codefendant Settle, and counsel for appellants Wheeler

and Smith) and then addressed the jury. In the course of these proceedings, the court found that, although the jury asked for some clarification on the law of accomplices, the jury was not confused about that area of the law as it applied to appellants. (RT 17105C-17105DD.)

Finally, during the penalty phase, appellant Bryant orally waived his presence for a hearing where his counsel argued, and the court ruled upon, a few unresolved portions of appellant Bryant's motion in limine regarding some of the prosecution's evidence in aggravation. (RT 17547-17561; CT 15604.)

B. There Was No Right On The Part Of Appellants To Be Personally Present At The Proceedings From Which They Were Absent, And, In Any Event, Appellants Were Not Prejudiced By Their Absence

On appeal, this Court applies the de novo standard of review to the trial court's exclusion of a criminal defendant from pretrial and trial proceedings, "either in whole or in part, 'insofar as the trial court's decision entails a measurement of the facts against the law.'" (*People v. Cole, supra,* 33 Cal.4th at p. 1230, quoting *People v. Waidla, supra,* 22 Cal.4th at p. 741.)

Under the Sixth Amendment's Confrontation Clause, a criminal defendant does not have a right to be personally present at a particular proceeding unless his appearance is necessary to prevent interference with his opportunity for effective cross-examination. (*People v. Cole, supra,* 33 Cal.4th at p. 1230, citing *Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745, fn. 17.) Under the Fourteenth Amendment's Due Process Clause, a criminal defendant does not have a right to be personally present at a particular proceeding unless he finds himself at a stage that is critical to the outcome and his presence would contribute to the fairness of the procedure. (*People v. Cole, supra*, at p. 1231, citing *Kentucky v. Stincer, supra,* at p. 745 and *United States v. Gagnon* (1985) 470 U.S. 522, 526.) A defendant has a due process right to be present at a proceeding "'whenever his presence has a relation, reasonably substantial, to

the fulness of his opportunity to defend against the charge. . . . [The] presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.'" (*United States v. Gagnon, supra*, at p. 526, quoting *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-106, 108.)

Similarly, under article I, section 15 of the California Constitution, "'a criminal defendant does not have a right to be personally present "either in chambers or at bench discussions that occur outside of the jury's presence on questions of law or other matters as to which [his] presence does not bear a ""reasonably substantial relation to the fullness of his opportunity to defend against the charge."""" [Citations.]'" (*People v. Cole, supra,* 33 Cal.4th at p. 1231, citing *People v. Waidla, supra,* 22 Cal.4th at p. 742.) And, under sections 977 and 1043, a criminal defendant does not have a right to be personally present, even in the absence of a written waiver, where he does not have such a right under the California Constitution. (*People v. Cole, supra,* at p. 1231, citing *People v. Waidla, supra*, at p. 742 and *People v. Bradford, supra,* 15 Cal.4th at p. 1357.)

In *Gagnon*, the United States Supreme Court held that the presence of four defendants and their attorneys during an in-camera discussion between a judge, juror, and another attorney was not required to ensure "fundamental fairness or a 'reasonably substantial . . . opportunity to defend against the charge.'" (*United States v. Gagnon, supra,* 470 U.S. at p. 527.) This was so, because the encounter between the judge, the juror, and Gagnon's lawyer was a short interlude in a complex trial and was not the type of event which every defendant has a right personally to attend under the Fifth Amendment. (*Ibid.*) The Court noted that the defendants could have done nothing had they been at the conference and would have gained nothing by attending. (*Ibid.*)

In *Stincer*, there was no constitutional violation for a defendant to have been excluded from a competency hearing concerning two witnesses because the defendant gave no indication that his presence "would have been useful in ensuring a more reliable determination as to whether the witnesses were competent to testify." (*Kentucky v. Stincer, supra,* 482 U.S. at p. 747.) More specifically, the Court noted that the defendant had presented no evidence that his relationship with the two witnesses (both children), or his knowledge of facts regarding their background, could have assisted either counsel or the judge in asking questions that would have resulted in a more assured determination of competency. (*Ibid.*)

Here, too, appellants have failed to demonstrate that their presence at the various proceedings at issue was necessary for an opportunity for effective cross-examination or would have contributed to the fairness of the proceedings. (See *People v. Cole, supra,* 33 Cal.4th at p. 1231.) Beginning with the discovery hearing in the municipal court and the hearing regarding the prosecution's compliance with appellant Bryant's subpoenas, the proceedings involved the actions of the prosecution, i.e., the prosecution's compliance with discovery and subpoenas. There was nothing appellants could contribute if they were present at these proceedings. The proceedings were "short interlude[s] in a complex trial" and not the "sort of event[s] which every defendant has a right personally to attend." (*United States v. Gagnon, supra,* 470 U.S. at p. 527.) Significantly, appellants do not identify any question or issue that they would have brought to their counsels' or the court's attention had they been present at these hearings.

Appellants also had nothing to gain had they been present for the purely ministerial proceeding in which their case was transferred to Judge Horan's courtroom. The proceeding did not affect their ability to defend against the charges. (See *People v. Hines, supra*, 15 Cal.4th at p. 1039 [no right of

personal presence where case merely "trailed" due to unavailability of a courtroom].)

As for the Evidence Code section 402 hearing on codefendant Settle's statements, appellants and their counsel expressly requested to be excluded from this proceeding. (RT 7990-7991.) Moreover, codefendant Settle's statements were admissible as to codefendant Settle only. Accordingly, the hearing had nothing to do with appellants' opportunity to defend against the charges. Appellants do not articulate any benefit to their presence at this hearing. (*People v. Holt, supra,* 15 Cal.4th at p. 707, fn. 29 [no right of personal presence for in-chambers discussions on the use of an out-of-court statement by defendant to a jailer].)

Similarly, appellant Bryant points to no benefit to his or his counsel's presence at the proceedings where the court invited and received questions from the jury during deliberations. The jury had already rendered its verdicts as to appellants. The proceedings, which involved the jury's deliberations as to codefendant Settle only, were not "critical to the outcome" for appellants. (*Kentucky v. Stincer, supra,* 482 U.S. at p. 745.) Also, the discussion involved purely legal issues, i.e., elaborations on jury instructions. Thus, the presence of appellants during these proceedings would have been useless. (*Snyder v. Massachusetts, supra,* 291 U.S. at p. 106; *People v. Waidla, supra,* 22 Cal.4th at pp. 742-743.) Also, to the extent appellant Bryant is suggesting that, had his counsel been present, counsel could have challenged the verdicts against appellants on the ground that the jury was confused on the law of accomplices as to appellants (see BAOB 626), that challenge was made by counsel for appellant Smith and rejected by the court. (RT 17105E, 17105BB-17105CC.) Therefore, appellants' absence from these proceedings did not impede their ability to defend against the charges.

As for the hearing where appellant Bryant's counsel argued, and the court ruled upon, a few unresolved portions of appellant Bryant's motion in limine, appellant Bryant waived his presence at this hearing. (RT 17549.) Also, appellant Bryant does not explain how his personal presence would have enhanced his position at the hearing. (*People v. Holt, supra,* 15 Cal.4th at p. 707, fn. 29 [no right of personal presence for conference on in-limine motions].) The benefit of appellant Bryant's presence at this hearing would have been nothing more than a "mere shadow." (*Snyder v. Massachusetts, supra,* 291 U.S. at pp. 106-107.)

As for the two brief discussions the court had with the jury regarding transportation and accommodations, appellant Bryant argues that, if he (or his counsel) had been present, he "would have heard the court's voice, seen [the court's] actions, and measured the jurors' reaction" and thereafter "made objections relevant to appellant[] [Bryant's] right to a fair trial by an impartial jury." (BAOB 625.) The claim is pure speculation. (*People v. Cole, supra*, 33 Cal.4th at p. 1232.) Also, the United States Supreme Court has made it clear that due process principles do not entitle a defendant to appear at every encounter between judge and jurors. (*United States v. Gagnon, supra,* 470 U.S. at pp. 526-527.) Here, appellants had nothing to gain from being present because the court addressed the jurors about matters outside the trial proceedings: how the jurors would arrive at and leave the courthouse and the courtroom, where they would eat and take their breaks, and the reasons for these measures (e.g., the difficulty in navigating to and within the courthouse due to the high-profile case against O.J. Simpson). Stated differently, the proceedings simply had nothing to do with appellants' ability to defend against the charges. (*Ibid.*) Additionally, the presence of the defense and the prosecution at the proceedings would have been counterproductive. The measures were occasioned, in part, by activities alleged against appellants. (RT

7984-7985.) Having all of the parties aware of the jury's route to and from the courtroom would have defeated the purpose of the security measures.

Finally, the trial court conducted ex-parte, in-camera proceedings during the first recusal motion in order to review the internal investigations conducted by the DA's Office against three of its employees and to determine what discovery was available to the defense to argue the recusal motion. (RT 4343.) Appellant Bryant argues that his presence at these proceedings was necessary because he could have informed the court of his questions, concerns, and observations, and could have contradicted allegations that he was involved in or responsible for obtaining confidential information from employees of the DA's Office. (BAOB 624.) It is not necessary, respondent submits, to address this concern because, in the end, once the investigations were completed, the trial found that there was nothing in these proceedings to substantiate the allegation of infiltration. (RT 4480-4481; see *People v. Holt, supra,* 15 Cal.4th at p. 707 [no error where defendant prevailed in the matters discussed at some of the in-chambers proceedings at which he was not present].) Therefore, appellants' presence at the proceedings would not have benefitted them.

Finally, even assuming arguendo appellants had a right to be present at some or all of these proceedings, they suffered no prejudice by their absence. (See *Chapman v. California, supra,* 386 U.S. at p. 87; see also *Arizona v. Fulminante* (1991) 499 U.S. 279, 307-308, citing with approval *Rushen v. Spain* (1983) 464 U.S. 114, 117-118 & fn. 2 in support of the proposition that the denial of a defendant's right to be present during criminal proceedings can be trial, not structural, error.) Even if appellants had been present at the proceedings regarding the prosecution's compliance with discovery and subpoenas, the prosecution's explanation of its actions would have been no different. As for the transfer proceeding, all appellants could have accomplished if present was to object to the transfer to Judge Horan's

courtroom, which they do not now contend was warranted. As for the proceedings pertaining to codefendant Settle only, appellants' presence would have been meaningless because the hearings involved factual and legal issues as to codefendant Settle only. Next, because appellant Bryant does not even argue that the trial court erred in its rulings on his motion in limine, appellants' absence from this proceeding was harmless. Similarly, appellants have made no claim of juror or judicial bias based on the court's discussions with the jurors about transportation and accommodations. Last, because the trial court found no evidence of "infiltration" by the Bryant Family, appellants were not prejudiced by their absence from the ex-parte, in-camera proceedings on the first recusal motion.

In sum, appellants had no right to be personally present at any of the proceedings set forth above. Moreover, they suffered no prejudice by their absence.

XXXIV.

THE TRIAL COURT'S STATEMENT TO THE JURORS REGARDING THE COST OF THE TRIAL DID NOT DEPRIVE APPELLANTS OF THEIR CONSTITUTIONAL RIGHTS

Appellants Bryant and Smith, joined by appellant Wheeler, contend that the trial court's statements to the jury regarding the cost of the trial had the effect of putting pressure on the jury to convict them, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (BAOB 611-616; SAOB 273-278; WAOB 435.) As discussed below, the trial court's statements had no impact on the jurors' ability to reach a fair and impartial verdict; moreover, any error was harmless.

A. Relevant Proceedings

Before opening statements, during a discussion with the jurors outside the presence of the parties regarding the courthouse security arrangements, the trial court explained to the jurors that they would not be sequestered because sequestering the jury was difficult and expensive. (RT 8058-8059.) The trial court also made the following remarks about how the jurors needed to follow the court's instructions to avoid a mistrial:

> We are going to start this case with a nonsequestered jury, and I believe we will finish it with a nonsequestered jury, especially if you folks follow my suggestions. You saw how much care went into selecting you people. It was a hard, long, boring, process; and we simply cannot afford to have trials blow up because the jury cannot follow the court's instructions. I mean it, this is one thing we cannot have happen. I can put up with a lot, but that I would not put up with, and if anybody sees fit to not follow the court orders, that juror is going to have a problem. It costs a lot of money to run this courtroom. I won't bore you with the

details, only to say it is astronomical. That means we must have everybody on the same wavelength, not speaking about the case, not doing anything for no good reason that would result in a mistrial.

(RT 8059.)

Early in the People's case-in-chief, in another statement to the jurors made outside the presence of the parties, the trial court stated, "the arrangements that we have to get you to court in the morning and to keep you in the building during the day and to provide lunches and so forth, those are being done for your benefit and at considerable expense." (RT 9567.) In response to a question from a juror who thought the trial court was "going overboard" with juror comfort arrangements, the trial court responded:

This is being done because the court thinks it is appropriate. That is about all I will say at this point in time. [] And whether you think we are going overboard with the accommodations or being too accommodating, you are entitled to your opinion. But I don't want those opinions to in any way influence the manner in which this case is decided. . . .

(RT 9569.)

During the People's case-in-chief, after testimony that the Bryant Organization hired attorneys for their associates who were arrested, the trial court gave the following admonition to the jurors, at the request of appellants:

Ladies and Gentlemen, you heard some testimony in this case about family attorneys, things of that nature, two or three times. I don't remember what witnesses but let me assure you as follows: [¶] That none of the defense attorneys in this case have been retained by the defendants in this case. These attorneys are on our approved, very elite death penalty list and they are the ones that the court calls upon and appoints to handle cases wherein a potential penalty is death. [¶] These

people, whether there are or are not family attorneys, these lawyers are not among that group. [¶] Does everybody understand that? [¶] I don't want you to get any misapprehension about these lawyers here.

(RT 11355-11356; see RT 10875-10877.) The next morning, when one of the jurors asked the court to repeat its statement about the attorneys, the court repeated its statement. (RT 11363-11365.)

B. Legal Analysis

As an initial matter, any contention of error related to the trial court's statement to the jurors that appellants' counsel were court appointed is waived. Appellants requested that the trial court inform the jurors that their attorneys were court appointed. (RT 10875-10877.)

In any event, the trial court did not err in making any of the challenged statements to the jury. Significantly, the statements to the jurors were not made as jury instructions during deliberations. Respondent has addressed the propriety of the statements the trial court made to the jury during deliberations in Argument XXXI. Here, the challenged comments were made pretrial and at a very early stage of the lengthy trial proceedings in this case.

The authority appellants rely on to challenge the trial court's statements is misplaced. Appellants rely on *People v. Gainer, supra,* 19 Cal.3d at page 852, footnote 16 (BAOB 612; SAOB 274), for its statement that:

A third common feature of *Allen*-type instructions is a reference to the expense and inconvenience of a retrial. While such language was absent from the charge in this case, it is equally irrelevant to the issue of defendant's guilt or innocence, and hence similarly impermissible.

In *Gainer*, the Court was considering the propriety of an *Allen* charge to a *deadlocked jury* that asked minority jurors to reconsider their votes in light of the majority and to consider that the "case must at some time be decided." (*Id.* at pp. 851-852.) *Gainer* concluded that an implicit reference to an inevitable

retrial was improper, given that not all jury deadlocks resulted in retrial but, instead, often resulted in charges being dropped. (*Ibid.*) Here, the statements were not made to a deadlocked jury during deliberations.

Similarly, appellants' reliance on *People v. Barraza* (1979) 23 Cal.3d 675, 685 (BAOB 612; SAOB 274), is misplaced. In *Barraza*, a *deadlocked jury* was instructed that "If you fail to agree on a verdict, this case will be tried before another jury." (*Id.* at p. 683.) The heightened prejudice noted by *Barraza* was in the context of giving such an instruction to a deadlocked jury. In other words, in the context of an instruction to a deadlocked jury, reminding holdout jurors of the expense of a retrial has a coercive effect on their verdict. (*Id.* at p. 685.) Again, the statements at issue here were not made to a deadlocked jury during deliberations.

People v. Andrews (1990) 49 Cal.3d 200, 220-221, is directly on point and demonstrates that no error occurred in the instant case. In *Andrews*, during jury selection, the trial court, in the context of exhorting the jurors to obey the court's admonitions not to discuss the case with others or attempt to obtain information outside the courtroom, stated that it cost between $3,000 and $4,000 a day to run the courtroom and "you can imagine what it costs to have this case retried." (*Id.* at p. 220 & fn. 16.) *Andrews* rejected the contention that *Gainer* and *Barraza* apply to facts where the trial court's remarks in no way suggested that the jury should convicted the defendant to avoid a costly retrial. (See *id.* at p. 221.) The same is true in the instant case.

Here, the trial court's remarks were not made in the context of trying to move a deadlocked jury toward a verdict. To the contrary, the trial court's comments were made pretrial and at a very early stage of the trial proceedings. And the trial court was merely explaining to the jurors why they were not sequestered and the arrangements made for this unique and lengthy trial. Notably, the trial court made it expressly clear to the jurors that what the trial

court wanted was for the jurors to follow its instructions and that the jurors were not to consider their feelings about the juror arrangements in rendering verdicts. Similarly, the trial court's remarks regarding the appointment of appellants' counsel were directed solely to minimizing any possible prejudice to appellants that might occur if the jurors were left with the impression that appellants were all being represented by "Bryant Family" lawyers. In context, as in *Andrews*, the trial court's comments about the cost of the trial had the impact of focusing the jurors on having an error-free and fair trial and did not impermissibly suggest to the jury that it should convict appellants. (*People v. Andrews, supra*, 49 Cal.3d at pp. 220-221.)

Finally, in light of the overwhelming evidence of appellants' guilt, any error must be deemed non-prejudicial.

XXXV.

APPELLANTS' CHALLENGES TO THE 1978 DEATH PENALTY SENTENCING SCHEME LACK MERIT

Appellants allege numerous aspects of the 1978 death penalty sentencing scheme violate the United States Constitution. (WAOB 319-409, 435; SAOB 378-405, 417-442, 451; BAOB 535-572, 587-602, 604-610, 636-640.) But, as appellants readily acknowledge (WAOB 319; SAOB 417), many of these claims have been raised and rejected in prior capital appeals before this Court. Because appellants fail to raise anything new or significant which would cause this Court to depart from its earlier holdings, their claims should be rejected. Moreover, it is entirely proper to reject appellants' complaints by case citation, without additional legal analysis. (E.g., *People v. Welch* (1999) 20 Cal.4th 701, 771-772; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256.)

A. The Special Circumstances In Section 190.2 Are Not Overbroad And Perform The Narrowing Function

Appellants Smith and Wheeler contend the failure of California's death penalty law to meaningfully distinguish those murders in which the death penalty is imposed from those in which it is not is in violation of the Eighth and Fourteenth Amendments and requires reversal of the death judgment. Specifically, appellants argue their death sentences are invalid because section 190.2 is impermissibly broad and fails adequately to narrow the class of persons eligible for the death penalty. (SAOB 418-421; WAOB 321-326, 333-335.)

The United States Supreme Court has found that California's requirement of a special-circumstance finding adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53.) Likewise, this Court has repeatedly rejected, and continues to reject, the claim raised by appellants that California's death penalty law contains so many special circumstances that it fails to perform the narrowing

function required under the Eighth Amendment or that the statutory categories have been construed in an unduly expansive manner. (*People v. Crew, supra,* 31 Cal.4th at p. 860; *accord People v. Pollack* (2004) 32 Cal.4th 1153, 1196; *People v. Bolden* (2002) 29 Cal.4th 515, 566; see also *People v. Burgener, supra,* 29 Cal.4th at p. 884 ["Section 190.2, despite the number of special circumstances it includes, adequately performs its constitutionally required narrowing function."]; *People v. Kraft* (2000) 23 Cal.4th 978, 1078 ["The scope of prosecutorial discretion whether to seek the death penalty in a given case does not render the law constitutionally invalid."].) Appellants' claim must be rejected.

B. Section 190.3, Factor (A), Is Not Impermissibly Overbroad

Section 190.3, factor (a), allows the trier of fact, in determining penalty, to take into account:

> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

Appellants contend the death penalty is invalid because section 190.3, factor (a), as applied allows arbitrary and capricious imposition of death in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (WAOB 327-333; SAOB 422-428; BAOB 587-594.) Specifically, appellants contend factor (a) has been applied in a "wanton and freakish" manner that almost all features of every murder have been found to be "aggravating" within the meaning of the statute. (SAOB 422; WAOB 327.) The issue is without merit.

The United States Supreme Court has specifically addressed the issue of whether section 190.3, factor (a), is constitutionally vague or improper. In *Tuilaepa v. California* (1994) 512 U.S. 967, the Supreme Court stated:

> We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

(*Id.* at p. 976.)

This Court has been presented with ample opportunity to revisit the issue raised by appellants since the holding in *Tuilaepa*. However, this Court has consistently rejected the claim and followed the ruling by the Supreme Court. (See, e.g., *People v. Brown* (2004) 33 Cal.4th 382, 401; *People v. Jenkins, supra,* 22 Cal.4th at pp. 1050-1053.) There is no need for this Court to revisit the issue.

C. Application Of California's Death Penalty Statute Does Not Result In Arbitrary And Capricious Sentencing

Appellants also contend California's death penalty statute contains no safeguards to avoid arbitrary and capricious sentencing and therefore violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. They raise numerous sub-claims in support of this claim. All of these claims are without merit.

1. The United States Constitution Does Not Compel The Imposition Of A Beyond-A-Reasonable-Doubt Standard Of Proof, In Connection With The Penalty Phase; The Penalty Jury Does Not Need To Agree Unanimously As To Any Particular Aggravating Factor

Appellants assert their death sentences violate the Eighth and Fourteenth Amendments for the following reasons: (1) because their death sentences were not premised on findings beyond a reasonable doubt by a unanimous jury that

one or more aggravating factors existed and that these factors outweighed mitigating factors, appellants' constitutional right to a jury determination beyond a reasonable doubt of all facts essential to the imposition of the death penalty was violated; (2) the penalty jury was not instructed that it could impose a death sentence only if it was persuaded beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors and that death was the appropriate penalty; (3) even if proof beyond a reasonable doubt was not constitutionally required for finding (a) that an aggravating factor exists, (b) that the aggravating factors outweigh the mitigating factors, and (c) that death is the appropriate sentence, then proof by a preponderance of the evidence is constitutionally compelled as to each such finding; (4) some burden of proof is required at the penalty phase in order to establish a tie-breaking rule and ensure even-handedness; and (5) even if a burden of proof is not constitutionally required, the trial court erred in failing to instruct the jury to that effect. (WAOB 336-362; SAOB 378-405; BAOB 539-572.) Appellants' contentions are without merit, because this Court has previously rejected them.

Unlike the determination of guilt, the sentencing function is inherently moral and normative, not functional, and thus not susceptible to *any* burden-of-proof qualification. (*People v. Burgener, supra,* 29 Cal.4th at pp. 884-885; *People v. Anderson, supra*, 25 Cal.4th at p. 601; *People v. Welch, supra,* 20 Cal.4th at p. 767.) This Court has repeatedly rejected claims identical to appellants' regarding a burden of proof at the penalty phase (*People v. Sapp* (2003) 31 Cal.4th 240, 316-317; see also *People v. Welch*, *supra*, at pp. 767-768; *People v. Dennis* (1998) 17 Cal.4th 468, 552; *People v. Holt, supra,* 15 Cal.4th at pp. 683-684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"]), and, because appellants do not offer any valid reason to vary from those past decisions, should do so again here. Moreover, California death penalty law does not

violate the Sixth, Eighth, and Fourteenth Amendments by failing to require unanimous jury agreement on any particular aggravating factor. Neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors. (*People v. Fairbank, supra,* 16 Cal.4th at p. 1255; *People v. Osband, supra*, 13 Cal.4th at p. 710.)

Appellants argue, however, that this Court's decisions are invalid in light of *Ring v. Arizona* (2002) 536 U.S. 584 and *Apprendi v. New Jersey* (2000) 530 U.S. 466. (WAOB 337-348; SAOB 382-392.) This Court has considered and rejected appellants' argument by finding that neither *Ring* nor *Apprendi* affect California's death penalty law. (*People v. Martinez, supra,* 31 Cal.4th at p. 700; *People v. Cox, supra,* 30 Cal.4th at pp. 971-972; *People v. Prieto, supra,* 30 Cal.4th at pp. 262-263, 271-272.) The same is true as to *Blakely v. Washington* (2004) 542 U.S. 296. (*People v. Morisson* (2004) 34 Cal.4th 698.)

2. The Jury Was Not Constitutionally Required To Provide Written Findings On The Aggravating Factors It Relied Upon

Appellants maintain California law violates the Sixth, Eighth, and Fourteenth Amendments by failing to require that the jury base any death sentence on written findings regarding aggravating factors. (SAOB 405-408; WAOB 362-367; BAOB 605-608.) This Court has held, and should continue to so hold, that the jury need not make written findings disclosing the reasons for its penalty determination. (*People v. Hughes, supra,* 27 Cal.4th at p. 405; *People v. Welch*, *supra*, 20 Cal.4th at p. 772.) The above decisions are consistent with the United States Supreme Court's pronouncement that the federal Constitution "does not require that a jury specify the aggravating factors that permit the imposition of capital punishment." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746, 750.)

3. Intercase Proportionality Review Is Not Required By The Federal Or State Constitutions

Appellants contend the failure of California's death penalty statute to require intercase proportionality review violates their Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (WAOB 367-371; SAOB 430-433; BAOB 535-539.) Appellants' point is not well taken. Intercase proportionate review is not constitutionally required in California (*Pulley v. Harris, supra,* 465 U.S. at pp. 51-54; *People v. Wright* (1990) 52 Cal.3d 367), and this Court has consistently declined to undertake it (*People v. Brown, supra,* 33 Cal.4th at p. 402; *People v. Lenard* (2004) 32 Cal.4th 1107, 1131).

4. Section 190.3, Factor (B), Properly Allows Consideration Of Unadjudicated Violent Criminal Activity And Is Not Impermissibly Vague

Section 190.3, factor (b), allows the trier of fact, in determining penalty, to take into account:

> (b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(CT 15820-15821 [CALJIC No. 8.85].)

Appellants' claim that consideration of unadjudicated criminal activity at the penalty phase violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, thereby rendering the death sentence unreliable (WAOB 372-373; BAOB 594-602), must be rejected because section 190.3, factor (b), has been held by this Court to be constitutional. Introduction of evidence under factor (b) does not offend the state or federal Constitutions. (*People v. Kipp, supra,* 26 Cal.4th at p. 1138; *People v. Cunningham, supra*, 25 Cal.4th at p. 1042.)

This Court has "long held that a jury may consider such evidence in aggravation if it finds beyond a reasonable doubt that the defendant did in fact commit such criminal acts." (*People v. Samayoa, supra*, 15 Cal.4th at p. 863.) Factor (b) is also not impermissibly vague. Both the United States Supreme Court and this Court have rejected this contention. (*Tuilaepa v. California, supra*, 512 U.S. at p. 976; *People v. Lewis* (2001) 25 Cal.4th 610, 677.) The Supreme Court stated:

> Factor (b) is phrased in conventional and understandable terms and rests in large part on a determination whether certain events occurred, thus asking the jury to consider matters of historical fact.

(*Tuilaepa v. California, supra*, at p. 976.) The Court concluded: "Factor (b) is not vague." (*Ibid.*) And neither *Ring v. Arizona, supra*, 536 U.S. 584 nor *Apprendi v. New Jersey, supra,* 530 U.S. 446 affect these holdings because *Ring* and *Apprendi* "have no application to the penalty phase procedures of this state." (*People v. Martinez, supra*, 31 Cal.4th at p. 700; *People v. Cox, supra*, 30 Cal.4th at pp. 971-972.)

5. Adjectives Used In Conjunction With Mitigating Factors Did Not Act As Unconstitutional Barriers To Consideration Of Mitigation

Appellants Wheeler and Smith contend the inclusion in potential mitigating factors of such descriptions as "substantial" in factor (g) and "extreme" in factors (d) and (g) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (WAOB 373-374; BAOB 605.) Appellants' contention is without merit.

This Court has previously held that the words "extreme" and "substantial" as set forth in the death penalty statute have common sense meanings which are not impermissibly vague. (*People v. Brown, supra,* 33 Cal.4th at p. 402; *People v. Jones, supra,* 15 Cal.4th at p. 190.)

Significantly, the trial court instructed the jury pursuant to factor (k):

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

(CT 15821.) As this Court has noted:

> the catch-all language of section 190.3 factor (k), calls the sentencer's attention to "[a]ny other circumstance which extenuates the gravity of the crime," and therefore allows consideration of any mental or emotional condition, even if it not "extreme." Similarly, factor (k) allows consideration of duress that is less than "extreme" and domination that is less than "substantial."

(*People v. Arias, supra*, 13 Cal.4th at p. 189, citations omitted.)

Thus, appellants' claim that the jury was inhibited from considering mitigating factors should be rejected.

6. The Trial Court Did Not Err In Refusing To Label The Aggravating And Mitigating Factors

Appellants argue the trial court erred in failing to label the factors as aggravating and/or mitigating, thus precluding a fair, reliable, and evenhanded administration of the capital sanction. (WAOB 374-376; BAOB 604-605.) They are wrong.

Sentencing factors are not unconstitutional simply because they do not specify which are aggravating and which are mitigating. (*People v. Brown, supra*, 33 Cal.4th at p. 402; *People v. Crew, supra*, 31 Cal.4th at p. 860.) As

this Court has stated, "the trial court's failure to label the statutory sentencing factors as either aggravating or mitigating [i]s not error." (*People v. Williams, supra,* 16 Cal.4th at p. 669.)

In addition, the United States Supreme Court has held that "[a] capital sentencer . . . need not be instructed how to weigh any particular fact in the capital sentencing decision." (*Tuilaepa v. California, supra,* 512 U.S. at p. 979.) Thus, the trial court is not constitutionally required to instruct the jury that certain sentencing factors are relevant only in mitigation. (*People v. Kraft, supra,* 23 Cal.4th at pp. 1078-1079.) Accordingly, "[a]lthough [labeling the factors] would be a correct statement of law [citation], a specific instruction to that effect is not required, at least not until the court or parties make an improper or contrary suggestion." (*People v. Livaditis, supra,* 2 Cal.4th at p. 784; see also *People v. Carpenter, supra,* 15 Cal.4th at p. 420 [although some factors may be only aggravating or mitigating, because it is self-evident, the trial court need not identify which is which]; *People v. Samayoa, supra,* 15 Cal.4th at p. 862 ["[t]he jury need not be instructed as to which sentencing factors are aggravating and which are mitigating"].) Under this well-established authority, the trial court properly instructed the jury.

D. The Death Penalty Law Does Not Violate The Equal Protection Clause Of The Federal Constitution By Denying Procedural Safeguards To Capital Defendants Which Are Afforded To Non-Capital Defendants

Appellants claim that the absence of intercase proportionality review at trial or on appeal violates their rights to equal protection of the law under the Fourteenth Amendment to the United States Constitution. Appellants maintain it is unfair to afford non-capital inmates such review under former section 1170, subdivision (f), of the Determinate Sentencing Law, but not to allow such review to capital defendants. Appellants acknowledge that this Court rejected this claim in *People v. Allen* (1986) 42 Cal.3d 1222, but they nevertheless urge

a re-examination of the issue since the reason undergirding *Allen* was "necessarily flawed." (WAOB 376-387; SAOB 433-439; BAOB 608-610.)

But this Court has consistently rejected the claim that equal protection requires that capital defendants be provided with the same sentence review afforded felons under the determinate sentencing law. (*People v. Cox, supra,* 30 Cal.4th at p. 970; *People v. Lewis, supra,* 26 Cal.4th at p. 395; *People v. Anderson, supra,* 25 Cal.4th at p. 602.) As aptly noted by this Court in *People v. Cox, supra*, 53 Cal.3d at page 691:

> . . . [I]n *People v. Allen, supra*, 42 Cal.3d 1222, we rejected "the notion that equal protection principles mandate that the 'disparate sentencing' procedure of section 1170, subdivision (f) must be extended to capital cases." (*Id.*, at pp. 1287-1288.) Section 1170, subdivision (f), is intended to promote the uniform-sentence goals of the Determinate Sentencing Act and sets forth a process for implementing that goal by which the Board of Prison Terms reviews comparable cases to determine if different punishments are being imposed for substantially similar criminal conduct. (42 Cal.3d at p. 1286.) "*[P]ersons convicted under the death penalty are manifestly not similarly situated to persons convicted under the Determinate Sentencing Act and accordingly cannot assert a meritorious claim to the 'benefits' of the act under the equal protection clause [citations].*" (*People v. Williams, supra*, 45 Cal.3d at p. 1330, emphasis added.)

Thus, appellants' equal protection claim must be rejected since they are not similarly situated to defendants sentenced under the Determinate Sentencing Law.

E. International Law

Appellants assert California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency and violates the Eighth and Fourteenth Amendments. (WAOB 387-409; SAOB 428-430, 440-442; BAOB 636-640.) This claim was specifically rejected in *People v. Ghent, supra*, 43 Cal.3d at pages 778-779 (discussing the 1977 death penalty statute). Moreover, the use of the death penalty in California does not violate international norms where, as here, the sentence of death is rendered in accordance with state and federal constitutional and statutory requirements. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 511; see *People v. Bolden, supra,* 29 Cal.4th at p. 567.) Appellants do not provide sufficient reasoning to revisit the issue here, and thus, it should be rejected.

XXXVI.

APPELLANTS RECEIVED A FAIR TRIAL

Appellants contend the cumulative effect of the guilt phase errors requires reversal of the guilt judgment and that the cumulative effect of the guilt and penalty phase errors requires reversal of the penalty. (WAOB 267-273, 409-435; SAOB 289-293, 443-451; BAOB 641-643.) Respondent disagrees. As set forth above, several of appellants' claims were waived from failure to object below. Moreover, there were no multiple errors to accumulate. Whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (*People v. Burgener, supra*, 29 Cal.4th at p. 884; *People v. Seaton, supra,* 26 Cal.4th at pp. 675, 691-692.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Box, supra,* 23 Cal.4th at pp. 1214, 1219.) The record shows each appellant received a fair trial. This Court should, therefore, reject appellants' claim of cumulative error.

XXXVII.

A REVERSAL AS TO ANY INDIVIDUAL COUNT DOES NOT WARRANT A PENALTY PHASE RETRIAL

Appellant Bryant, joined by appellants Wheeler and Smith, contends that "[i]f this Court sets aside the convictions on any of the counts or the findings on any of the special circumstances, the entire matter must be remanded for a new sentencing determination." A reversal of any of the charges or allegations, argues appellant Bryant, "would significantly alter the landscape the jury was considering when making its determination to assess death." Failure to conduct a new penalty phase under such circumstances, reasons appellant Bryant, would violate the Eighth Amendment to the United States Constitution, as well as article I, section 17 of the California Constitution. (BAOB 644-645; WAOB 435; SAOB 451.) The claim is without merit.

First, appellants have not demonstrated in the instant appeal that there is any basis for this Court to set aside any conviction on any count or to reverse the true finding on the multiple-murder special circumstance. Indeed, appellants do not even challenge the multiple-murder special circumstance in their opening briefs. Thus, the simple answer to appellants' claim is that it is moot on this record.

Second, contrary to appellants' claim, assuming arguendo this Court reverses a count on one of the convictions, any such reversal would, given the overwhelming evidence presented at the penalty phase as to each appellant, not warrant reversal of the penalty determination. Appellants do not seem to dispute this fact but, on the contrary, maintain that a harmless-error analysis at the penalty phase is inappropriate. They are wrong. A determination of an invalid conviction or special circumstance is not prejudicial per se, but subject to harmless-error analysis. (*Clemons v. Mississippi, supra,* 494 U.S. at pp. 745-750; *Zant v. Stephens* (1983) 462 U.S. 862, 890-891 [fact that one aggravating

factor may be found invalid does not mean a death penalty may not stand where there are other valid aggravating factors]; *People v. Hillhouse, supra,* 27 Cal.4th at p. 512 [invalid conviction for kidnaping for robbery, felony-murder theory, and felony-murder special circumstance did not require reversal of penalty]; *People v. Roberts* (1992) 2 Cal.4th 271, 327 [appellate court examines whether there is a reasonable possibility that the jury would have recommended a sentence of life without the possibility of parole]; *People v. Mickey, supra,* 54 Cal.3d at p. 703 [subject to harmless-error analysis].)

Moreover, a retrial of the penalty phase is not precluded under the United States Supreme Court decisions in *Ring v. Arizona, supra*, 536 U.S. 584 and *Apprendi v. New Jersey, supra*, 530 U.S. 466, as appellants maintain. This Court has held that "[*Apprendi* and *Ring*] have no application to the penalty phase procedures of this state" (*People v. Prieto, supra,* 30 Cal.4th at pp. 262-264, 271-272, 275; *People v. Nakahara, supra,* 30 Cal.4th at pp. 721-722) and "*Ring* does not apply to California penalty phase proceedings" (*People v. Prieto, supra,* at pp. 262-263.)[70/]

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70. *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849, does not stand for the proposition that reversal as to any count or special circumstance finding results in an automatic penalty phase retrial. (See BAOB 644.) Instead, *Silva* involved a determination that trial counsel's ineffective performance was prejudicial where counsel had not investigated and presented mitigating evidence of family history and substance abuse at the penalty phase, the jury had asked questions about life without parole, three of four special circumstances found by the jury were subsequently invalidated by this Court, and an accomplice who was also convicted of two murders was sentenced to life without parole. (*Id.* at pp. 847-850.)

XXXVIII.

APPELLANT BRYANT'S SPECULATION IS INSUFFICIENT TO MEET HIS BURDEN OF DEMONSTRATING THAT THE RECORD ON APPEAL IS INADEQUATE

Appellant Bryant contends he has been denied the right to a complete and accurate appellate record in violation of his rights under the state and federal Constitutions. (BAOB 646-655.) Appellants Wheeler and Smith join in this claim. (WAOB 435; SAOB 451.) The claim is without merit.

"A criminal defendant is entitled under the Eighth and Fourteenth Amendments to an appellate record that is adequate to permit meaningful review." (*People v. Young, supra*, 34 Cal.4th at p. 1170.) The burden is on the defendant to demonstrate that the appellate record is inadequate to permit meaningful review. (*Ibid*; *People v. Heard, supra,* 31 Cal.4th at p. 970.) "'The record on appeal is inadequate, however, only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal.'" (*People v. Heard, supra,* at p. 970.) "Inconsequential inaccuracies or omissions are insufficient to demonstrate prejudice." (*People v. Young, supra,* at p. 1170.) And speculation is an insufficient basis to support a claim the appellate record is inadequate to permit meaningful review. (*Ibid.*)

For example, in *Young,* the defendant contended that the appellate record was inadequate, because transcripts of the following were not in the record: the defendant's arraignment; a portion of the jury selection proceedings; a conference between the trial court and counsel in which a prospective juror was excused by stipulation; conferences during which other jurors were excused by stipulation; a bench conference held prior to a prosecution witness's testimony; conferences regarding jury instructions, penalty phase scheduling, and the readback of testimony; and a conversation between the trial court and the jury foreperson. The defendant argued that he had met his burden of showing that

the missing material was prejudicial, because legal discussions or examples of ineffective assistance of counsel *may* have occurred. This Court rejected the defendant's claim as "nothing more than speculation, which is insufficient." (*People v. Young, supra,* 34 Cal.4th at p. 1170.)

The same is true in this case. Appellant Bryant contends the trial court: (1) improperly denied his requests to settle the record involving the physical gestures of witnesses while testifying; and (2) improperly precluded him from attempting to settle the record with regard to (a) hearings that should have been transcribed and included in the record on appeal (including "off the record" discussions between counsel and the trial court), and (b) various charts and other visual aids used by counsel in opening statements and argument. Appellant Bryant also contends the record is missing sealed records and requested settlement items without which he cannot fully argue the merits of his claims of error. As to this last contention, appellant Bryant specifically refers to: the sealed proceedings conducted during the first recusal motion (see Arg. I); a transcript of an alleged hearing/ruling by the trial court on appellant Bryant's request for an evidentiary hearing on evidence of prior crimes (see Arg. X(G)); and preliminary hearing transcripts of other defendants originally charged in this case which might bolster appellant Bryant's argument that he had a reasonable expectation of privacy to challenge the August 1988 search of the Wheeler Street house (see Arg. IV). (BAOB 644-650; see Arg. X(G) [where respondent argues that, contrary to appellant Bryant's contention that the record on appeal is deficient as to the hearing/ruling on the admissibility of prior acts, it appears appellant Bryant failed to secure a ruling on his motion].)

As in *Young*, the essence of appellant Bryant's argument is that, by merely showing that the missing material *may* have contained matters that demonstrate error or reflect a constitutional violation, he has satisfied his burden of establishing prejudice. Along the same lines, appellant Bryant argues

that the mere fact that the record was not corrected and/or augmented as he requested demonstrates that this Court cannot conduct a meaningful review and that "it is impossible to determine how many other issues could have been raised on appellant[] [Bryant's] behalf." (BAOB 650-651, 654.) As in *Young*, appellant Bryant's speculative contention must be rejected. For the same reasons, appellant Bryant's contention that he was improperly denied the opportunity to correct the record on appeal (BAOB 650) must fail.

Respondent submits that the appellate record in the instant case is adequate for this Court to reach the merits of appellants' claims and, accordingly, appellants were not prejudiced by the omission of portions of the record. And, for this reason, the constitutional claims must fail. (*People v. Young, supra,* 34 Cal.4th at p. 1170.)

Further, appellant Bryant's contention that an incomplete trial record is "tantamount to a 'structural defect'" (BAOB 653) is without merit. This Court has recognized that failure to report all trial proceedings, even when required by statute, is *not* structural error. (*People v. Cummings, supra,* 4 Cal.4th at p. 1333, fn. 70.) As discussed above, because appellant Bryant cannot meet his burden of showing he was prejudiced by any omission from the record, reversal is not warranted. (See *ibid.*)

Finally, appellant Bryant argues that the trial court erred by not sealing the section 987.2 records that were erroneously included in the Clerk's Transcript. (BAOB 651.) Appellant Bryant cites no authority that the failure to seal a document during the record-correction process mandates reversal of the judgment. *Osband v. Woodford* (9th Cir. 2002) 290 F.3d 1036, 1042 demonstrates that, even if attorney work-product (such as attorney files and psychological examinations) are made available to the prosecution for purposes of post-conviction proceedings, a defendant's trial rights may be protected by issuing a protective order barring the prosecution from using the information

at retrial. Thus, any error in failing to seal the invoices of appointed defense counsel does not mandate reversal of the convictions. Moreover, any error was harmless, because appellant Bryant cannot show that the failure to seal the invoices had any impact on the result at trial. (See *Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Watson, supra,* 46 Cal.2d at p. 836.) Reversal is not warranted.

CONCLUSION

Accordingly, respondent respectfully requests that the judgments be affirmed.

Dated: January 4, 2006

Respectfully submitted,

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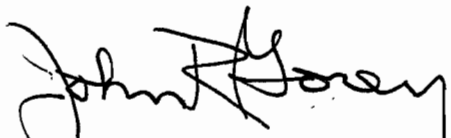

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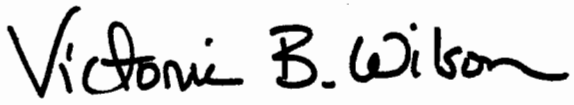

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 188,827 words.

Dated: January 4, 2006

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Stanley Bryant, Leroy Wheeler, and Donald F. Smith** No.: **S049596**

I declare:

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

On JAN 05 2006, I served the attached **RESPONDENT'S BRIEF (Capital Case)** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on JAN 05 2006, at Los Angeles, California.

M.I. Rangel
Declarant

Signature

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