IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| **THE PEOPLE OF THE STATE OF CALIFORNIA,**<br>Plaintiff and Respondent,<br>v.<br>**GREGORY O. TATE,**<br>Defendant and Appellant. | S031641<br>**CAPITAL CASE** |

Alameda County Superior Court No. 93308
Honorable Alfred A. Delucchi, Judge

# RESPONDENT'S BRIEF



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## STATEMENT OF THE CASE

By information filed August 3, 1988, the Alameda County District Attorney charged appellant with one count of murder in violation of Penal Code section 187. The information next charged a burglary-murder special circumstance within the meaning of Penal Code section 190.2, subdivision (a)(17), and a robbery-murder special circumstance within the meaning of Penal Code section 190.2, subdivision (a)(17). (1CT 194-195.) The information lastly alleged that appellant personally used a deadly and dangerous weapon, a knife, within the meaning of Penal Code section 12022, subdivision (b), during the commission of the murder. (1CT 194-195.)

At arraignment on August 4, 1988, appellant pleaded not guilty, and denied the special circumstances and the personal-use allegation. (1CT 198; 8/4/88 RT 1-2.)

The parties completed jury selection on December 1, 1992. (3CT 631.) On December 2, 1992, testimony in the guilt phase began. (3CT 635-636.) The prosecution rested its guilt phase case-in-chief on December 10, 1992 (3CT 654), and the defense rested its guilt phase case on December 15, 1992 (3CT 658). The jury commenced deliberations on December 22, 1992. (1CT 240.) On December 28, 1992, the jury rendered its verdicts, finding appellant guilty

of first degree murder and finding true both special circumstance allegations, as well as the personal-use allegation. (3CT 702–705; 34RT 4639-4655.)

The penalty phase commenced on January 7, 1993, with pretrial motions. (3CT 786.) The jury returned its verdict on February 5, 1993, fixing appellant's punishment at death. (5CT 1102.)

On March 5, 1993, the trial court denied appellant's motions for new trial (Pen. Code, § 1181) and to modify the verdict (Pen. Code, § 190.4, subd. (e)). (5CT 1115-1125.) The court thereafter imposed the death judgment on the count one murder conviction. The court additionally imposed a one-year determinate term on the affirmative Penal Code section 12022, subdivision (b) finding that appellant used a knife during the murder. The court ordered that determinate term to run concurrently with the death judgment. (5CT 1125-1134.)

On March 11, 1993, the trial court ordered the judgment corrected by striking the personal-use finding for sentencing purposes. (5CT 1134-1137.) This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

## STATEMENT OF FACTS

The facts are presented as this Court must view them—in the light most favorable to the judgments. (*People v. Johnson* (1980) 26 Cal.3d 557, 575-579.) Hence, not only are all inferences and intendments drawn in the prosecution's favor, but all conflicts and ambiguities are presumed resolved in the prosecution's favor as well. (*Ibid.*)

### The Prosecution's Guilt Phase Case-in-chief

The prosecution presented overwhelming evidence that appellant committed a first degree murder of Sarah LaChapelle on the evening of April 18, 1988. He personally used a deadly and dangerous weapon during the

commission of the murder, and committed the murder while engaged in the commission of robbery and burglary.

**The Discovery Of The Body Of The Victim**

On Monday, April 18, 1988, at approximately 8:00 p.m., Tanya DeLaHoussaye visited Sarah LaChapelle at LaChapelle's home at 9938 Hesket Road in Oakland. (25RT 3391, 3393, 3397-3398.) DeLaHoussaye was the girlfriend of LaChapelle's son, Anthony, and arrived at 9938 Hesket to retrieve the phone book she had left there the previous evening. (25RT 3392, 3425.) DeLaHoussaye stayed for about five minutes. (25RT 3393.) LaChapelle was wearing a gown, and told DeLaHoussaye that she had a cold and planned to lie down. (25RT 3393-3394.) LaChapelle's burgundy Oldsmobile was parked in her driveway. (25RT 3394.)

On Tuesday, April 19, 1988, Anthony LaChapelle went to his mother's house at 11:00 a.m., and observed that her Oldsmobile Cutlass was not in the driveway. (25RT 3397-3398.) Although the screen door to the front door was closed, the front door itself was open. (25RT 3398-3399.) Anthony went inside and found his mother dead on the living room floor, dressed in a gown. (25RT 3399, 3402.)[1/] A butcher knife and a barbecue fork were impaled into her body. (25RT 3429-3430.) Anthony also saw that his mother's ring finger had been cut off and was lying nearby. (25RT 3420.) The living room was in disarray, as items had been thrown around, and a chair turned over. (25RT 2420, 3419-3420.)

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1. For ease of reference this factual outline will sometimes refer to persons by their first names. This is done to distinguish them from others with the same surname. This is done only to avoid confusion and to assist the reader; no disrespect for the individuals so named is intended from such usage. (See *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 248, fn. 1.)

Anthony placed a call to 911 and observed a hole in the back door. He went outside and waited for the police to arrive. (25RT 3399-3400.)

**The Police Find Appellant Driving The Victim's Car**

On April 19, 1988, at approximately 6:00 p.m., Oakland Police Officer Kevin Sullivan and his partner Alex Boyovich were on patrol in a semi-marked unit on Kingsland Avenue when they spotted a burgundy Oldsmobile Cutlass. Because Boyovich recognized the Cutlass as being on a "stolen vehicle" list the officers initiated a traffic stop. (26RT 3586-3587, 3593.) The Cutlass was Sarah LaChapelle's. Appellant was driving. (26RT 3587-3588.)

Appellant initially resisted being handcuffed, but the officers subsequently placed him in the police car. (26RT 3589.) Once in the car appellant stated, "I'll tell you where I got the car from, a guy named Fred Bush." (26RT 3589.) The officers asked appellant no questions. (26RT 3589-3591.) Sergeant Ramon Paniagua, who had already been named the lead investigator in the LaChapelle homicide, soon arrived. (30RT 3968-3969.) Appellant was transported to police headquarters while other officers began processing the Cutlass for evidence. (26RT 3506-3507, 3522, 3589-3591; 30RT 2973.) Officer Sullivan observed a small meat-carving knife on the floor of the Cutlass and Officer Thomas Viglienzone recovered five fingerprints from the car. He recovered three from the right front window; one from the left front door; and one from the left front door frame that supported the window. (26RT 3509, 3592.)

Viglienzone also seized a pair of red pants from the rear floor of the Oldsmobile. (28RT 3729.) Officers additionally found a radio-television and a VCR in the car, each of which had been taken from LaChapelle's home. (25RT 3403-3405; 28RT 3729-3730.)

After processing the vehicle Viglienzone went to 9938 Hesket Avenue to assist other officers in collecting evidence there. (26RT 3615.)

**The Crime Scene Investigation**

Harriet Davis, a crime scene technician for the Oakland Police Department, arrived at 9938 Hesket Road in Oakland to fingerprint the scene. (25RT 3436-3437.) Davis also took 92 photographs of LaChapelle and collected a blouse from a bed that appeared to have blood on it. (25RT 3443, 3447.) Some of the photographs showed the following: a bloody footprint in the back hallway by the den, a knife block that had two of the three knives missing, a bloody paper towel in the trash, a bloody Lucky's bag, and blood splatter on a wall. (25RT 3459-3463.) Davis also photographed a bloody footprint (as opposed to a shoe print), on the carpet in the living room, and LaChapelle's purse with the contents strewn around near her head. (25RT 3466.)

Oakland Police Officer Dale Burnell also came to 9938 Hesket Road to help collect evidence and preserve the scene on April 19, 1988. (27RT 3614.) Burnell made diagrams of the house, and dusted the interior of the house, including the doors, for fingerprints. (27RT 3615, 3619.) He asked Viglienzone to print the floor tiles which had impressions of both a shoe and a foot on them. (27RT 3675-3676.) Viglienzone complied and took photos of shoe prints and footprints. (26RT 3516, 3522-3523.)

**Appellant Talks To The Police**

Meanwhile, back at the Homicide Section of the Oakland Police Department, appellant sat in an interview room. His shoes were sitting outside the interview room and had blood on them. (30RT 3975.) His jacket was on Sergeant Paniagua's desk. (30RT 3976.)

At 9:25 p.m. on April 19, 1988, Paniagua entered the interview room and read appellant his *Miranda* rights. (30RT 3982-3983.) Paniagua told appellant he was under arrest for car theft. (30RT 3989.) Appellant responded that he understood his rights and wished to talk. (30RT 3984.) Paniagua asked appellant about the blood on the sleeve of his sweater and appellant replied that the blood was from a nose bleed he had suffered. (30RT 3990.) He also initially stated that he lived at his grandmother's home, and then said he was staying at his girlfriend's house on Yuba Street. (30RT 3990-3991, 3994.) Appellant identified his girlfriend as Lisa Henry. (30RT 3994.)

Appellant told Paniagua that he had been to his grandmother's house the day before, April 18, at around 2:00 to 3:00 p.m. (30RT 3992-3993.) Appellant said that he had slept at his girlfriend's house on the night of April 18. (30RT 3994.) He stated that he had taken the bus from Hegenberger and had arrived at Lisa's house at 8:00 p.m. (30RT 3995.) He stated that Lisa's brother, Germaine, her little sister Mickie, and her father Reggie were there. (30RT 3995.)

Appellant told Paniagua that he had gotten up on April 19 at 10:00 a.m. (30RT 3995.) He went to 55th Avenue and Foothill and met up with Fred Bush. (30RT 3996.) Appellant said that Bush had the burgundy Oldsmobile Cutlass. (30RT 3996.) Bush owed appellant $500 and was trying to sell a VCR and a small television. (30RT 3996.) Appellant gave Bush two rocks of cocaine worth $20 each. (30RT 3996-3997.) In return, Bush gave appellant the television, the VCR, and the use of the burgundy car until 11:00 p.m., so that appellant could take Lisa to a drive-in movie. (30RT 3997.) Appellant felt that this was a fair trade, and that it would "break him even" with Bush. (30RT 3998.)

When Paniagua asked appellant why Bush owed him $500, appellant replied that during a fight he had engaged in with Bush he was arrested, and

that after he was taken to jail either Bush or Bush's mother took his jacket, which contained $500 worth of cocaine. (30RT 3997-3998.)

Paniauga had already obtained a photograph of Fred Bush and determined that Bush was in custody at the county jail. (30RT 3982.) Bush had been taken into custody on April 7, 1988 (and would remain in custody until July 18, 1988). (30RT 4038-4062.) Paniagua showed appellant the picture of Bush, which appellant positively identified. (30RT 4008.)

Appellant told the officers that he had planned to keep the television and VCR Bush had given him. (People's Exhs. 73, 74; 30RT 4002-4003.) When the officers asked appellant if he knew Sarah LaChapelle, he replied that he knew her son "Skeet." (*Ibid.*) Appellant said he knew where Sarah LaChapelle lived and said that she drove a green car. (*Ibid.*) When the officers asked appellant if he had been at LaChapelle's house the previous evening, he asked "for what?" (*Ibid.*) Appellant said that he had never been inside LaChapelle's house and said that she "stays by" his grandmother's house, about "six to seven" homes away. (*Ibid.*) Appellant admitted having some alcohol the previous evening (Cisco and beer) but denied ingesting any narcotics. (*Ibid.*)

At this point appellant was given a restroom break and was also provided with water. Paniagua offered him food, but appellant declined. (30RT 4009.) After a break, the interview resumed with appellant declining coffee and another use of the restroom. (30RT 4011.)

Paniagua asked appellant if anything had happened at his grandmother's house on April 18 and appellant said no. (30RT 4011-4012.) Appellant asked for more water. (30RT 4012.) Appellant told Paniagua that he had gone to his grandmother's house on April 18 because he wanted money from his mother for a bus ticket. Appellant additionally said that he asked his mother for money, "but she didn't give it to him." (30RT 4012.) Appellant also said that he had been looking for his gun, which is why he went into his grandmother's

room. (30RT 4012.) Appellant denied taking anything from the house. (30RT 4012.) Paniagua already knew that two phone calls had been made to 911 from 9919 Hesket in Oakland on April 18, 1988, at 7:04 p.m. and 9:25 p.m., respectively. (30RT 3991–3992, 4012–4013, 4046.)[2/]

Paniagua then confronted appellant with the fact that two calls had been made to police on April 18 from 9919 Hesket. (30RT 4013.) Appellant responded, "What if I did go back? But I didn't." (30RT 4013.) Appellant said that when something went wrong in the family household he got blamed for it. (30RT 4011.) He indicated that his family did not like him. (30RT 4011.)

Paniagua told appellant he was lying. (30RT 4013.) Appellant, "almost like talking to himself," said, "Going to jail for the rest of your life, man." (30RT 4013.)

At 12:05 a.m., on what was now April 20, 1988, appellant asked for water and it was provided. (30RT 4013.) (A few minutes earlier appellant had taken off his sweater, stating that it was too hot in the interview room. (30RT 4012.)) Appellant then became depressed and, appearing as if he was going to cry, said that ever since he was little "they" would put him in hot water and beat him up, which is why "they" thought he was crazy. (30RT 4013-4014.) Appellant referred to his stepfather and the hot water, stating, "I'm going to kill his ass." (30RT 4014.) Appellant asked for and was given coffee at 1:25 a.m. (30RT 4014.)

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2. Appellant's grandmother, Lurlean Jackson, indeed lived at 9919 Hesket Road in Oakland in April 1988. (27RT 3680; 28RT 3734.) Also living there were appellant's mother Rosia, his brother DeWayne, his aunt Mamie Jackson and her daughter Sparkle, and two nieces and a nephew of Mamie Jackson. (28RT 3731, 3734-3735.) According to Mamie, appellant "lived with us, but he wasn't there at that time." (28RT 3735.)

Appellant regained his composure, and maintained that he had not gone back to the family home on Hesket Road on April 18. (30RT 4014.) Paniagua again told appellant that the fact that his family had called the police on the 18th indicated he was lying. Appellant continued to maintain that he was not lying. (30RT 4014.) At 1:40 a.m., Paniagua and Sergeant Medsker took a break. (30RT 4014.)

At 1:50 a.m., the interview resumed and Paniagua confronted appellant with the evidence that he had been found driving the victim's car, that the car had a television and VCR stolen from the victim's house in it, and that he had bloodstains on his clothing and shoes. (30RT 4015.) Paniagua also told appellant that Fred Bush could not have given him the Oldsmobile because Bush had been in jail "at the time of this incident." (30RT 4015.) Appellant responded by shrugging his shoulders "like he didn't care, like it's no big deal." (30RT 4016.) Paniagua told appellant to tell the truth and appellant responded, "Well, what's in it for me." (30RT 4016.) Paniagua told appellant that the police wanted the truth and that there would be no deals at all. (30RT 4016.)

At 3:12 a.m., Paniagua advised appellant that he was under arrest for the murder of Sarah LaChapelle. (30RT 4016.) Paniagua took appellant's sweater at about 3:13 a.m., and gave appellant a blanket. (30RT 3977-3978.) There was a bloodstain on the sleeve of the sweater. (30RT 3978.) Paniagua took appellant's blue sweat pants from him at 4:10 a.m. (30RT 3978.) Paniagua gave appellant's tennis shoes, sweater, and sweat pants to Officer Burnell. (27RT 3648-3650, 3677; 30RT 3978.)

### Further Evidence Regarding The Events Of April 18 Through April 20, 1988, Including Testimony From Appellant's Girlfriend Lisa Henry And His Aunt Mamie Jackson

In April 1988 Lisa Henry had been appellant's girlfriend for two years and she was three months pregnant with his child. (27RT 3679, 3695.) Lisa

lived at 5320 Yuba Avenue in Oakland with her father and 16-year-old brother, Germaine. (27RT 3679, 3687, 3779.) Appellant had been staying at the Henry home since his discharge from the hospital at the end of March, but he was not there every night. (27RT 3683, 28RT 3777.) Appellant had been in the hospital for approximately ten days, after being shot. (28RT 3777.) Appellant did not stay at the Henry home on either of the evenings of April 17 or April 18, 1988. (27RT 3683-3684.)

Lisa recalled appellant coming to her house on Monday evening, April 18, 1988, at about 8:00 p.m., but he did not stay. (28RT 3788.) Appellant was wearing acid-washed jeans and a red jacket. (28RT 3826.) Lisa recalled her father telling appellant to change his clothes because they were muddy. However, appellant and the elder Henry left together without appellant changing his pants. (28RT 3787-3788, 3825.) Lisa recalled her father coming back that evening, but not appellant. (28RT 3788-3789.)

Mamie Jackson testified that she saw appellant in the late afternoon or early evening of April 18, 1988. (28RT 3731-3732, 3734, 3735.) Appellant arrived at 9919 Hesket to see his mother, who was in one of the bedrooms. (28RT 3736.) Appellant was wearing a red leather suit. (28RT 3736.) On appellant's arrival Jackson went to a neighbor's house because, as she would tell police, when appellant came home everyone left because he was violent. (28RT 3737-3738.) Jackson stayed at the neighbor's home for 20 to 30 minutes. (28RT 3737.) When she returned home she discovered her mother's bedroom ransacked and assumed money had been taken. (28RT 3746-3747.) In any event, Jackson did not see appellant again on April 18. (28RT 3739.)

On the morning of April 19, 1988, Jackson received a telephone call from Sylvester LaChapelle asking her if she would check and see if Sarah LaChapelle's car was parked at her (Sarah's) house. (28RT 3732.) Sarah LaChapelle's home was across the street and three doors down from Jackson's

residence. Jackson went outside, checked for the car, and told Sylvester that the car was not there. (28RT 3732-3733.)

Also on the morning of April 19, 1988, Lisa Henry saw appellant again. (27RT 3684.) Germaine had let appellant into the house while Lisa slept. (27RT 3684-3685, 3687.) When Lisa woke up at 8:00 a.m., she saw appellant in the living room. (27RT 3686, 3688.) He was wearing acid-washed blue jeans and a red jacket. (27RT 3686, 28RT 3826.) The red jacket had a matching pair of pants, and Lisa had seen appellant wear jeans under the red leather pants in the past. (27RT 3695.)

Lisa did the laundry at approximately 9:00 a.m. and washed appellant's pants, socks, and jeans. (27RT 3689.) Lisa's brother Germaine wore the red leather jacket and matching pants to school that day. (27RT 3690, 3794.)[3/] After doing the laundry, Lisa found a Chase Manhattan Bank credit card in a paper bag, with the name "Sarah" on it. (27RT 3712-3713.) That morning, appellant gave Lisa a watch and a necklace. (27RT 3693.) Appellant did not tell Lisa where he got the items, and she did not ask him. (27RT 3694.) Appellant also gave her a diamond wedding ring, and a diamond engagement ring. (27RT 3700-3701.) Appellant did not tell her where he got the rings. (27RT 3702.) Lisa assumed he got them from "dealing" on the streets, which was what he did. (27RT 3702.)

Later that day, appellant drove Lisa and her friend Yolanda to the store in the burgundy Cutlass. (27RT 3697.) Then appellant and Lisa drove around

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3. In April 1988 Germaine Henry was 15 years old and living with his sister, Lisa, and his father, Reginald, on Yuba Street in Oakland. (28RT 3829-3230.) Germaine told the police that appellant had come to his house on April 19, 1988, at 7:47 a.m., with a red jogging suit in a pillowcase. (28RT 3831.) Germaine wore the red jogging outfit to school that day (he had worn it in the past as well). (28RT 3834.) Germaine recalled wiping off the jogging suit with a wet rag because it was dirty. (28RT 3836.)

in the car. (27RT 3704.) Lisa asked appellant where he had obtained the car, but he did not answer. (27RT 3704.)

At about 6:00 p.m. appellant dropped Lisa off at her house after asking for the rings back, which she gave him. (27RT 3718-3719.) She did not see appellant again that day. (27RT 3722.) Germaine arrived home at around 6:00 p.m. and took off the red pants and jacket. (28RT 3840-3841.)

At 7:40 a.m. on the following morning, April 20, 1988, Oakland Police Sergeants Medsker, Paniagua and Lacer served a search warrant at the Henry home at 5320 Yuba Avenue. (27RT 3722; 28RT 3845; 30RT 3971-3972.) Medsker took a statement from Germaine, and the officers seized the necklace and watch appellant had given Lisa; a two-dollar nickel paper wrapper; and the Chase Manhattan Bank Visa card with the name "Sarah" on it. (27RT 3722; 28RT 3799, 3845; 30RT 3972.) The officers told Lisa that the search concerned appellant and they asked her specifically for "the rings." (28RT 3798-3799.) Lisa said she did not have the rings. (28RT 3799.) The officers asked Lisa to accompany them to the Oakland Police Department and she did so. (28RT 3753, 3800; 30RT 3973.)

On arrival at the Homicide Section the officers placed Lisa in an interview room to talk to her. Appellant was in another interview room. (28RT 3753-3754, 3801, 3851-3852.) The officers told Lisa that this "was a murder case, that a woman had been murdered." (28RT 3803-3803.) The officers mentioned the name "Fred" to Lisa. (28RT 3803.) The officers asked Lisa if appellant had given her some rings and she said yes. (28RT 3801.) She also said appellant had taken the rings back. (28RT 3801.) During the interview either Lisa asked to see appellant or the officers told her she could see him. (28RT 3754, 3758, 3802, 3852.) In either case, Lisa went into appellant's interview room to talk with him. (28RT 3754-3755, 3804, 3852-3853.)

Lisa found appellant sitting by himself with only a pair of briefs on. (28RT 3756, 3804.) She noticed a blanket in the room and that appellant was bleeding from what appeared to be a cut on one of his wrists. (28RT 3757, 3804-3805.) Lisa asked appellant if he had a cut on his wrist and he may or may not have answered. (28RT 3805, 3807.) Lisa also asked appellant about "Fred" ("I asked did he do it, did he have something to do with it") but appellant did not answer. (28RT 3758, 3808-3809.) Lisa stayed in the room with appellant for five minutes. (28RT 3759, 3853.)

Appellant then requested to use the restroom. (28RT 3853.) When Medsker and Officer Thiem took appellant there he proceeded to slam his fists into the mirror. (28RT 3854.) When Thiem and Medsker handcuffed appellant Medsker noticed that appellant's left wrist was bleeding. (28RT 3854.) Medsker and Thiem took appellant back to his interview room and when Medsker noticed the blanket on the floor he picked it up and shook it out, and a piece of broken glass ashtray fell out. (28RT 3854.)

Medsker and Paniagua then commenced a second interview with Lisa Henry. (28RT 3762, 3854-3855; People's Exhs. 62, 64; 28RT 3855-3864; 29RT 3877-3879; 34RT 4454-4459.) During this interview Lisa told the officers that she and appellant had just discussed what "had occurred" and that appellant had told her he was "there" but "didn't do it." (28RT 3764.) Lisa also told the officers that appellant had said "Fred did it" and that he (appellant) "tried to stop Fred." (28RT 3765, 3809.) Lisa advised appellant that he should say who else had been involved "so maybe he wouldn't have to stay in so long." (People's Exhs. 62, 64.) Appellant replied that he was going to have to stay in jail anyway. (*Ibid.*)[4/]

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4. Lisa Henry testified that on reflection, appellant did not tell her anything during their five minutes together, and that she told police what she did because that is what "she believed" had happened and because she thought it would help appellant. (28RT 3765, 3810.) Lisa testified that when she talked

Subsequently on April 20, 1988, appellant was transported to the hospital for treatment on his injured wrist and to have blood drawn. (30RT 4019, 4050.) Paniagua personally observed the blood draw. (30RT 4050.) Medsker searched LaChapelle's Oldsmobile again, looking for the missing rings, but didn't find them. (29RT 3879-3880.)

**Serological Evidence**

Criminologist Charles Alan Keel of the Oakland Police Department qualified as an expert in forensic serology. (29RT 3898-3899, 3902.) Keel examined appellant's red leather pants and found human blood on them. (29RT 3905, 3911.) He obtained blood from the homicide victim, Sarah LaChapelle, as well as blood from appellant. (29RT 3905.) LaChapelle was blood type B. (29RT 3906.) Appellant had type O blood. (29RT 3906.) Because the red pants had type B blood on them appellant was excluded as the source of this blood and LaChapelle was included as a source. (29RT 3907.) The blood stains on the pants included smeared "transfer-type" stains and "spatter" stains, which Keel described as blood in flight. (29RT 3907-3908.)

Keel found bloodstains on the inside lining of the red leather jacket he examined. (29RT 3937–3938.) Keel also examined appellant's tennis shoes and not only found blood on the top of them, but on the inside tongues as well. (29RT 3939.) Keel made a print of one of the shoes and it fit over the floor tile that had been removed from the victim's house. (29RT 3941.)

Keel found a bloodstain on one of the sleeves of appellant's sweater, toward the cuff. (27RT 3648–3650, 3677.) This stain was comprised of type B blood. (29RT 3915.) Thus, while appellant was excluded as a source of that

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to appellant she did all the talking and thus she was the one who said "Fred did it." (28RT 3766.) At the time of trial Lisa was married to someone else. (28RT 3780.)

blood all of the of the other genetic markers from it were consistent with LaChapelle. (29RT 3915-3916.) Genetic markers are substances in a person's body fluids, which are inherited from one's parents and remain constant during one's lifetime. (29RT 3917.) One genetic marker system focuses on Esterase-D (protein.) (29RT 3918-3919.) This marker takes different forms for different people. (29RT 3919.) LaChapelle was type 2-1. (29RT 3920.) The evidence on the sweater was also type 2-1. (29RT 3920.) Combining that genetic marker with the ABO evidence is a way to further narrow the potential population of the source of the blood. (29RT 3920.) When Keel then examined five other markers, he obtained the same results. (29RT 3921.)

**The Autopsy**

On April 20, 1988, Dr. Thomas Wayne Rogers performed the autopsy on Sarah LaChapelle's body. (26RT 3528-3529.) She had a knife impaled in her backside, and a barbeque fork impaled in the right side of her neck. (26RT 3529, 3536.) Dr. Rogers removed these weapons and turned them over to the Oakland Police Department. (25RT 3429–3430; 26RT 3529.)

A wound is called a "stab wound" where the weapon penetrates the victim's body to a deeper distance than the length of the opening the weapon makes on the surface of the body. (26RT 3530.) LaChapelle had multiple stab wounds on the left and right sides of her back and on her left buttocks area, and also on the left side of her neck. (26RT 3532.) Some of the stab wounds were inflicted by a different knife than the one found in LaChapelle's back. (26RT 3565.) LaChapelle also had incised wounds on her left shoulder, right index finger, and right thumb. (26RT 3530.) (An "incised wound" is the opposite of a stab wound. (26RT 3532.)) LaChapelle suffered a total of 24 stab or incised wounds. (26RT 3532.) LaChapelle also had multiple puncture wounds in her back and face, including one that penetrated her eye, which caused oozing from

the retina. (26RT 3533-3534.) In all, LaChapelle had 28 puncture wounds. (26RT 3535.) Puncture wounds are generally caused by something sharp and small entering the body. (26RT 3532.)

Dr. Rogers opined that Sarah LaChapelle was alive when all of the stabbing and puncture wounds were perpetrated on her, including the wound to her eye, and the ones caused by the barbeque fork and the knives. (26RT 3536-3538.)

The wounds inflicted on LaChapelle damaged her ribs, voice box, pericardial sac, heart, connective tissue and muscle of her right hand, torso, neck, back, right jugular vein, right chest cavity, right lung, the back bone of her vertebral column, left kidney, abdominal cavity, and left buttock area. (26RT 3538-3539.)

LaChapelle also suffered multiple blunt force injuries to her head, face, arms, hands and torso. (26RT 3539-3543.) Her ring finger had been detached from her hand and had been cut off through the bone, close to the knuckle. (26RT 3543.) In addition to her severed fourth finger LaChapelle also had damage to her third and fifth fingers which may have occurred at the same time the ring finger was severed. (26RT 3545.) LaChapelle also had blunt injuries to her arms and hands, which were consistent with her fighting an attacker. (26RT 3581.)

LaChapelle's upper jaw was fractured and she had teeth knocked out. (26RT 3552.) She had a telephone cord wrapped around her left wrist, right wrist, and torso. (26RT 3555–3556.) Lastly, the front part of LaChapelle's gown was torn about ten inches. (26RT 3556.)

**The Defense Guilt Phase Case-in-chief**

The defense theory was simple—appellant did not do it. He testified to that effect, and the defense relied on forensic evidence as well—the absence of

appellant's fingerprints at the crime scene. The defense further argued that if appellant was involved at all he committed nothing but burglary or possession of stolen property.

**The Fingerprint Evidence**

Curtis Sato worked in the Crime Laboratory of the Oakland Police Department. He worked with fingerprints, including making fingerprint comparisons and identifications. (31RT 4069-4070.) Sato had testified as an expert 40 times in Oakland Municipal and Alameda County Superior Courts. (31RT 4069-4070.) Sato examined latent lift cards identified as having originated from the crime scene at 9938 Hekset on April 18-19, 1988. (31RT 4071.) He was asked by the defense to compare the prints on the cards taken by technicians Davis and Burnell and compare them against several people. (31RT 4073.)

Sato stated that the quality of the lift from the east door frame of the front bedroom was poor. (31RT 4074.) The lift from the left corner of the front bedroom's exterior east door was of sufficient quality for identification, however, although the prints lifted from the jewelry box in that bedroom were not, just like the prints lifted from a coin can and a box found in that bedroom, and the prints lifted from a rear interior door. (31RT 4074-4075, 4077-4078, 4080-4081.) Sato compared the one identifiable print against eight people (appellant, Anthony LaChapelle, Sarah LaChapelle, Tanya DeLaHoussaye, Tuana Williams, Evelyn LaChapelle, Ronald LaChapelle, and Reginald Henry) and found no match. (31RT 4075-4077, 4112.)

Sato testified that he additionally examined two identifiable fingerprints lifted from the telephone in the living room, and compared them against the same eight people identified above. (31RT 4075, 4078-4079.) One of the prints belonged to Anthony LaChapelle but Sato found no match for the other.

(31RT 4079-4080, 4107-4110, 4113.)

In short, none of the prints the police lifted from the crime scene on April 18 and 19, 1988, that were of sufficient quality for comparison and identification purposes, belonged to appellant. (31RT 4077-4078, 4080-4081.)

Sato next examined three fingerprint cards the police had lifted from victim LaChapelle's car. (31RT 4081, 4084-4085.) Two of those cards had prints too poor for comparison purposes but the third one contained prints that could be examined and identified. None of those prints belonged to appellant. (31RT 4080-4082, 4084-4086, 4090-4093.) Sato also learned that none of the prints matched any of the prints on file in the state's Automated Latent Print System, which contained prints of all persons "booked" (arrested and fingerprinted) in California. (31RT 4086-4087, 4089, 4110-4111.)

Although Sato examined all of the foregoing prints several years after the police had lifted them and placed them on cards, Sato explained that the passage of time had no effect as the prints were covered with tape on the cards. (31RT 4087-4088, 4112.)

In March 1992 both the defense and prosecution asked Sato to examine several items for fingerprints. He examined six knives, a steam iron, a plastic grocery bag, two bottles of pills, and a wallet which included credit and identification cards. These were items seized from 9938 Hesket Road after the homicide in April 1988. (31RT 4082-4083, 4107.) Sato was unable to develop any identifiable latent prints from them. (31RT 4082-4084, 4087-4088, 4097-4107.)

Sato also dusted the barbeque fork that had been found in LaChapelle's neck for fingerprints but found none. (31RT 4083, 4094-4096.) As for the knife that had been found in LaChapelle's body, it appeared to Sato that it had been previously dusted for fingerprints. (31RT 4096.) As for a black-handled butcher knife that had been found in LaChapelle's house near a window, Sato

could not develop any prints from it either. (31RT 4099.) Factors that make it difficult to obtain useable fingerprints are heat, wind, humidity, dust, and sunlight, all of which affect how long a print will remain on a surface. (31RT 4083, 4091, 4096-4097.) Other factors that impact the existence of fingerprints are the hands that handle an item, as they may be wet, dry, dirty, or wearing gloves. (31RT 4083, 4089, 4097.)

Criminalist Keel examined the brown serrated knife found in the victim's burgundy Oldsmobile on April 19, 1988. (31RT 4116-4119.) Keel examined the knife for blood on August 14, 1992 and found none, although it was possible that pizza was on the knife. (31RT 4118.)

**Appellant's Testimony**

On April 18, 1988, appellant was unemployed and living with Lisa Henry at her father's house at 5320 Yuba Avenue in Oakland. (31RT 4120, 5120.) Appellant was not sure whether he spent the night there on Sunday, April 17, 1988. (31RT 4121.)

On Monday, April 18, 1988, appellant went to his grandmother's house at 9919 Hesket Road in Oakland to visit his mother. (31RT 4121-4122.) Appellant did not have a car and wanted his mother to buy him a bus ticket to Seattle. (31RT 4124.) Appellant also wanted to obtain a gun as he had been shot the previous month and learned from an acquaintance that "the guy was going to get him again." (31RT 4123-4125.)

Appellant took two buses to get to his grandmother's house and arrived sometime in the afternoon between 4:00 and 5:00 p.m., walking in from the corner of 98th Avenue and Empire Road. (31RT 3128, 4125-4126; 32RT 4279.) Appellant was wearing a red leather Adidas sweat suit and white Fila tennis shoes. (31RT 4130.) In addition, appellant was wearing a pair of acid-

washed pants under the leather sweat pants and had a sweater on under the leather sweat jacket. (31RT 3136, 4135.)

When appellant arrived at the house, his mother was indeed there, as was his grandmother, his ex-girlfriend Trina, a cousin named Carla, and a lady named Joanne. (31RT 4131.) Appellant could not recall if his Aunt Mamie was there, but he did not see her. (31RT 4131.) Appellant was angry with his family that day because they had taken out life insurance on him and had not come to the hospital to visit him after he had been shot. (32RT 4275.)

Appellant talked to his mother alone in a bedroom. (31RT 4131.) Appellant told his mother about having been shot, because he had not seen her since that time. (31RT 4131.) Appellant asked his mother to buy him a ticket to Seattle because either he would get shot or he would have to shoot somebody. (31RT 4132.) His mother did not have enough money to give him. (31RT 4132.)

Appellant knew there were guns in the house because his deceased grandfather had kept several. (31RT 4132.) Appellant may have told his mother that he needed a gun but in any event he went into his grandmother's room to get one. (31RT 4133.) Appellant did not have permission to be in his grandmother's bedroom so he shut the door while opening drawers, looking for a gun. (31RT 4133.) Appellant located a .38-caliber revolver under the bed, which he put under his belt, in his pants. (31RT 4134-4135, 32RT 4278.) Appellant did not ransack his grandmother's bedroom. He just looked in the drawers and under the bed. (32RT 4275.) Appellant also took a police scanner from his grandmother's room, which she had left on. (31RT 4136.) Appellant heard his name broadcast over the scanner. (31RT 4137.) He thus knew that someone had placed a call to the police about him, and he left the house through the back door. (31RT 4137.) Appellant was at the house for approximately 40 minutes. (31RT 4136.)

Over the police scanner appellant heard that police were being dispatched to his grandmother's house. (32RT 4279.) He knew he had done something wrong when he took the gun. (32RT 4280.) Appellant thought that the police might arrive and, because he was on probation for being in possession of a gun on three prior occasions, he hid the gun on a shelf in his old clubhouse, which was on the side of the garage. (31RT 4138.) Appellant then jumped back over the fence, carrying the scanner. (31RT 4138, 4142.)

Appellant crossed the street and walked through the park toward Empire Road, and then walked along a creek to Hegenberger Road, listening to the police scanner along the way. (31RT 4140.) Appellant had mud on his shoes and pants from walking in the mud. (31RT 4143.) Appellant got on a bus on Hegenberger Road and went to Lisa Henry's house. (31RT 4143-4144.)

When appellant arrived at Lisa's house he washed the mud off his pants with a hose. (31RT 4145.) He went into the house and took off his shoes and socks, put on new socks and then put on a pair of blue Fila tennis shoes that belonged to Germaine. (31RT 4147-4148.) Appellant spoke with Lisa's father, Reginald, for about 30 minutes, and then asked him for a ride to Seminary Avenue. (31RT 4149.) Appellant had hidden some drugs in that area so that he could sell them later, but when he and Reginald got there appellant could not find the drugs. (31RT 4149.)

Appellant and Reginald proceeded to a liquor store at Seminary and Foothill and bought some beer. (31RT 4153.) Appellant had approximately $15 to $20 on him at the time. (31RT 4143.) Appellant and Reginald sat in the parking lot for about an hour, talking and drinking a 40-ounce beer. (31RT 4154.) They then drove back to the Henry house and Reginald dropped appellant off. (31RT 4155.) Appellant did not go into the house because he and Lisa had been arguing about him being with other women. (31RT 4155.)

Appellant next walked to a store at Cole Avenue and Foothill Boulevard and bought some strong wine called "Cisco." (31RT 4156.) From there he walked to "Roshan and Judo's" apartment on Elizabeth Street. (31RT 4157.) There were a lot of people there, appellant testified, because crack cocaine was sold from this house. (31RT 4158, 4160.) Appellant decided to take the bus back to Hesket Road and get the gun. (31RT 4160.) Appellant was unsure of the time. (32RT 4279.) When he arrived at his grandmother's house he went into the clubhouse, retrieved the gun, and stayed for about 15 minutes, finishing the wine. (31RT 4162, 4165.) During this second trip to his family's home appellant did not go inside. (32RT 4275, 4279.)

Appellant then walked toward the front of the house. (31RT 4166.) He planned to go back to Empire Road and take the bus again. (31RT 4167.) However appellant then observed two men coming out of Sarah LaChapelle's house carrying things. (31RT 4168-4170.) One man had a box and the other had a pillowcase. (31RT 4172.) When they saw appellant, the man with the pillowcase dropped it and started to run. (31RT 4173.) Appellant had seen the men before. (31RT 4176.) They were both African-American and appellant testified that the "tall man" had a light complexion. (31RT 4179.)

Appellant looked in the pillowcase and saw a VCR and a television inside. (31RT 4184-4185.) Appellant also saw that the door to the LaChapelle house was open. (31RT 4184.) Appellant went up to the house, and looked through the screen, but he could not see anyone inside. (31RT 4187.) Appellant then entered the house and saw Sarah LaChapelle with a knife in her back. He also saw blood everywhere. (31RT 4188.) Appellant tried to see if LaChapelle was breathing, but when he heard a noise from the back and reached for his gun, he dropped it by her body. (31RT 4189.) Because the shoes appellant was wearing were two sizes too small for him one of them fell off. (31RT 4190.)

Appellant saw that the back door had been kicked in and he decided to leave. (31RT 4191.) He got a towel from the sink to wipe blood off the gun. (31RT 4191.) Although appellant had known LaChapelle as a neighbor for 21 years, he did not call the police when he saw that she had been killed. (31RT 4300.) Nor did appellant tell his mother or grandmother that LaChapelle was dead. (31RT 4301.) Appellant picked up LaChapelle's car keys and also picked up the television and other items and got into her car and drove off. (31RT 4191, 4193.)

Appellant drove to Maxwell Park in Oakland and took off his socks and threw them away because they had blood on them. (31RT 4194; 32RT 4295.) After driving around, he parked the car and fell asleep. (31RT 4196.) When appellant awoke, he drove to Lisa Henry's house and pulled off his red pants, which he put into the pillowcase that also contained the television and VCR. (31RT 4197; 32RT 4316.) At approximately 8:00 a.m., on April 19, 1988, appellant carried the pillowcase and its contents into Lisa's home. (31RT 4198.)

Appellant took a beer from the refrigerator and Germaine asked appellant if he could wear the red suit to school. (31RT 4200.) Appellant had the pillowcase in the closet; he retrieved the pants from it and gave them to Germaine. (31RT 4200, 4203.) The pillowcase remained in the closet and the gun was under the bed. (32RT 4219.) Appellant took a shower and put on sweat pants. (31RT 4203; 32RT 4219.) Appellant then took the VCR and television out of the pillowcase, along with a chain, a watch, rings, and a little brown bag. (32RT 4220.) Appellant gave the rings to Lisa and then went to sleep on the floor. (32RT 4221, 4223-4224.)

Later on that day, appellant put the gun in his coat pocket and went to a market called the "White House." (32RT 4226.) He bought hot links, a pizza, beer and strong wine. (32RT 4222.) After he returned, he took Lisa and

her friend, Yolanda, to the store. (32RT 4228.) They dropped some medicine off at Yolanda's mother's house and they returned to the Henry house. (32RT 4229-4230.)

Appellant placed the television and VCR into the trunk of LaChapelle's burgundy Oldsmobile, intending to sell them, and went to Seminary Avenue and Elizabeth Street where people were drinking and selling drugs. (32RT 4231.) Appellant and a friend, Arnold Haney, prepared a pizza back at the Henry house and then took the pizza and visited friends on Rawson Avenue. (32RT 4235.) When appellant returned back to the Henry house, Germaine was there so appellant took back his red leather pants. (32RT 4238.)

Appellant then took Lisa to the market, and they got into an argument. Lisa threw the rings in the car. (32RT 4239-4240.) Appellant put the rings in the ashtray and drove off. (32RT 4241.) Appellant spotted a friend, Rommell Jones, at Kingsland Avenue and Madera Avenue and, while they were talking, the police pulled up. (32RT 4241-4243.) Appellant told Officer Sullivan that he got the car from "Fred Bush," although this was not true. (32RT 4249.) Appellant had fought with Fred Bush in the past and appellant had spent 90 days in jail as a result. (32RT 4249.)

On arrival at the police station appellant recognized that the officers were placing him in the Homicide Section because he had been there in the past, when a friend had been shot. (32RT 4252.) Appellant had also been there to pick up his property after he was released from the hospital. (32RT 4252.) The police took appellant's shoes from him. (32RT 4306.)

When Sergeant Paniagua and Sergeant Medsker came into the room, they read appellant "his rights," and told him that he did not have to speak to them. (32RT 4255.) Appellant testified that he did not know why he elected to talk to them. (32RT 4255.) The officers did not tell appellant that he was a suspect in a murder, but asked him where he had obtained the car, and he

repeated that he got it from Fred Bush. (32RT 4256.) Appellant did not tell them otherwise because he did not like Medsker and did not think it would "help." (32RT 4256.) When appellant told the police that Bush gave him the car, he did not know that he was going to be charged with homicide. (32RT 4283.) Appellant also lied to the officers when he told them that Bush had given him the VCR and television in exchange for two rocks of cocaine. (32RT 4313.) When officers asked appellant if he had gone inside LaChapelle's house, he said "no." (32RT 4293-4294.)

Appellant's clothes were subsequently taken from him. He was left wearing shorts and received a blanket at about 5:00 or 6:00 a.m. (32RT 4258.) Appellant hit the bathroom mirror because he "got mad" and did not like Medsker; he also did not want to talk but wanted to go to sleep. (32RT 4259, 4262.) Appellant tried to cut his wrist using an ashtray he had broken by throwing it against the wall. (32RT 4260.) He wanted to get out of the interrogation room. (32RT 4261.)

Appellant testified that he could not recall if Lisa asked him some questions when she visited him. (32RT 4264.) Appellant testified that he did not kill LaChapelle and was not there when she was killed. (32RT 4266.) He continued to maintain that he had observed some people coming out of her house. (32RT 4266.)[5/]

**The Prosecution's Penalty Phase Case-in-chief**

As evidence in aggravation, the prosecution relied on the circumstances of the charged crime and special circumstances (Pen. Code, § 190.3, subd. (a)),

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5. In the prosecution's guilt phase rebuttal case Officer Viglienzone testified that he did not find any evidence of blood in victim LaChapelle's Oldsmobile. (32RT 4218-4219.)

and the evidence of the following prior violent conduct by appellant (Pen. Code, § 190.3, subd. (b)).

**Appellant's Prior Assault On Althea Edwards And Clifford Parker**

Althea Edwards was driving Clifford Parker in Parker's car on March 7, 1986, at 7:40 p.m., heading on Edes Avenue toward 98th Avenue in Oakland. (35RT 4766.) At that point a truck making a left turn into the intersection hit them. (35RT 4767, 4771.) Parker exited to examine the damage and he asked the driver of the truck to get out of the truck and look and see what he had done to Parker's car. (35RT 4768, 4777.) The man driving the truck was holding two guns. (35RT 4768.) Edwards honked the horn and told Parker that the man had a gun. (35RT 4768.) Parker immediately got back into his car and drove them away. (35RT 4768.) The truck followed them however, and the driver started shooting at them. (35RT 4768.) As Parker drove on Edes Avenue the truck followed and the driver eventually rammed his truck into the back of Parker's car. (35RT 4768, 4782.) At one point they were going about 70 miles per hour. (35RT 4769.) The truck's driver fired three shots but did not hit Edwards or Parker or the car. (35RT 4770.) Edwards was afraid for her life. (35RT 4785.)

Parker and Edwards got away and drove to Hegenberger Road and Edes Avenue where they located a police officer and reported the incident. (35RT 4770.)

Oakland Police Officer Gonzalez broadcast the report of a hit-and-run and shots fired in the vicinity of 98th and Edes Avenue, involving a green pickup truck, license number 3A10685. (35RT 4796-4698.) At approximately 8:00 p.m., Officer Gregorich of the California Highway Patrol, who was in the area of 66th Avenue and Hegenberger Road in Oakland having dinner,

responded to a radio call of an accident involving property damage at 66th Avenue and Coliseum Way. (35RT 4786.) On arrival Gregorich saw an Oakland police officer and two vehicles, including a pickup truck. (35RT 4787.) Gregorich was instructed to look for a black male wearing a red or orange jacket with blue jeans and white tennis shoes. (35RT 4788.) Gregorich then saw the suspect running from the Hyatt Hotel parking lot southbound across Hegenberger on to the ramp to Highway 880. (35RT 4788.) The man ran in back of a multistory building on the corner and was out of sight. (35RT 4788.) Gregorich then saw him jump over a fence off of Hegenberger Road. (35RT 4789.) Gregorich drove into the residential area to see if he could see the suspect again. (35RT 4789.) When Gregorich then saw the suspect at Cairo Avenue and Coral Road the officer ordered him to stop. (35RT 4789.) When a second CHP officer pulled up they ordered the suspect to the ground, with guns drawn. (35RT 4789.) The suspect refused and looked at the officers and reached into his waistband a few times. (35RT 4789-4790.) Eventually, however, the suspect went down to his knees and then fully on to the ground. (35RT 4790.) This man was appellant. (35RT 4791-4792.) Appellant had two loaded handguns in his waistband. (35RT 4790-4791.) One was a revolver with one live round in the chamber "and four empty rounds," and the other was a semiautomatic pistol with an empty magazine and one live round in the chamber. (35RT 4791.)

The CHP officers turned appellant over to officers from the Oakland Police Department. (35RT 4790.) OPD officers then showed appellant to Parker and Edwards for identification purposes. They positively identified him as their assailant. (35RT 4771, 4800.)

**Appellant's Prior Assault On Marlena Bush**

Marlena Bush lived at 272 Sextus Road, off of Hegenberger, in

Oakland. (35RT 4803-4804.) On February 2, 1988, she observed appellant outside of her home involved in a confrontation with her brother Fred Bush. (35RT 4810.) Marlena's mother told appellant to leave, and appellant said that he would "get" them. (35RT 4811, 4814.) Nine days later, on February 11, 1988, Marlena walked to a convenience store located about five minutes from her home. (35RT 4804.) Appellant approached her inside the store and asked if she was Fred Bush's sister, to which she replied, "yes." (35RT 4805.) Appellant then hit her in the face with the back of his hand. (35RT 4806, 4817.)

Appellant then grabbed Marlena in a choke hold and took her outside of the store and told her to call her brother. (35RT 4806.) Appellant stated that if she did not call her brother, he would use his gun, which he showed her was in his pants. (35RT 4807.) Marlena was scared and shaking and called her home and spoke with her brother Fred. (35RT 4807.) Appellant then took over the phone and talked to Fred. (35RT 4808, 4818.) Marlena was subsequently picked up by a Curtis Brooks, who took her home. (35RT 4808, 4820.) When Marlena arrived home, Fred was gone. (35RT 4821.)

After appellant's assault upon her, Marlena went to stay in Alabama for one month. (35RT 4822-4823.) Marlena admitted that she had told police that her brother had taken money and rock cocaine from appellant. (35RT 4823-4824.)

**Appellant's Prior Assault On Officer James Gordon**

On September 29, 1987, Officer James Gordon of the Oakland Police Department was patrolling the area of 98th Avenue in his police car. (35RT 4826.) At one point, Gordon observed a green Plymouth Duster sedan traveling on Hesket Road, with expired registration tags, veering off the road. (35RT 4826, 4832.) Gordon thought the driver was under the influence so he initiated

a stop on the vehicle. (35RT 4826, 4833.) After Gordon activated his patrol lights the Duster continued 400 feet and pulled into the driveway of 9919 Hesket. (35RT 4827.) The driver exited and proceeded to the front of the car while the passenger got out and stood at the car. (35RT 4828.) Next, the driver took off running toward a parked RV but returned within seconds. (35RT 4828-4829.) The driver was appellant and he appeared to have discarded something from under his coat. (35RT 4829.)

Gordon escorted appellant to the police car but appellant pushed him away and stood in the middle of the street. (35RT 4829-4830.) When Gordon attempted to grab appellant he (appellant) hit Gordon in the shoulder with his right fist. (35RT 4830.) Appellant then backed away, laughed, and challenged Gordon to a fight in the street. (35RT 4830.) Appellant started rushing Gordon, forcing Gordon to strike appellant with his short-handled baton. (35RT 4830.) After a struggle in the street, Gordon got hold of one of appellant's hands and placed it behind his back. (35RT 4830.) Gordon radioed for assistance. (35RT 4831.) Appellant was eventually handcuffed and arrested. (35RT 4831.)

**Victim Impact Evidence**

Sarah LaChapelle's son Anthony had two children, Anthony Jr., age eleven, and Evelyn, age seven. (36RT 4870.) His grandmother's death affected young Anthony very hard, and he would break down and cry at the mention of her name. (36RT 4870.) Evelyn suffered as well. (36RT 4871-4872.)

Anthony LaChapelle Sr. dreamt about his mother often, yet tried not to think about her during the day. (36RT 4871.) He started drinking heavily after her death and could not face his friends. (36RT 4871.) Anthony's friends would tell him that he should kill appellant and Anthony thought that as well. (36RT 4871.) Anthony moved to Los Angeles and continued to drink and

eventually committed a drunk driving offense that resulted in jail time. (36RT 4871.) While Anthony was in jail, his father passed away. (36RT 4871-4872.)

After Anthony's father died, he inherited the family construction business, but could not run it alone. (36RT 4872-4873.) At the time of trial he was employed driving a forklift. (36RT 4873.)

**The Defense Penalty Phase Case-in-chief**

Appellant's defense counsel presented an exhaustive case in mitigation, including evidence of appellant's troubled family, childhood, and school years. The defense presented mental health evidence as well.

**Appellant's Childhood As Recalled By His Mother Rose**

Appellant's mother Rosia (Rose) met his father, Gregory Tate, Sr. (Big Gregory) in high school and formed a close relationship with him during her senior year. (36RT 4876, 4880-4881.) Rose described Big Gregory as outgoing and at that time, she "thought he was a nice person." (36RT 4881.) Rose had hoped that after high school she would go to college, study to become a teacher, and eventually get married. (36RT 4881-4882.) Rose was unhappy when she learned she was pregnant because she was brought up to believe that intercourse should take place after "you're married." (36RT 4882-4883.) When Rose told Big Gregory about the pregnancy he was happy. (36RT 4884-4885.) He wanted to get married and he bought Rose a ring, but she did not want to get married. (36RT 4885-4886.) Rose did not have a job at the time and although Big Gregory was working in a department store restaurant, they could not provide for a child. (36RT 4886.) The relationship ended when Rose was four months pregnant. (36RT 4892.) Big Gregory began seeing other women and Rose had nothing to do with him until after appellant was born. (36RT 4893.)

At one point before appellant's birth, Rose tried to abort the fetus herself by taking quinine and "powdered mustard," as abortions were illegal at the time. (36RT 4883-4884, 4920, 4922.) However, by the time appellant was born, she felt ready to be a parent. (36RT 4884-4885.)

Appellant was born on April 13, 1967, and Big Gregory came to see him and Rose in the hospital. (36RT 4893.) Rose and appellant initially lived with her parents, Chester and Lurlean Jackson, her brother Chester Jackson, Jr., and sisters Annette, Evelyn, Mamie, Chesterlene, and Brenda Jackson, at 9919 Hesket Road in Oakland. (36RT 4887, 4889-4892.) In 1968 Rose moved with appellant to 81st Avenue in an attempt to be independent, and to be near her job at Sunshine Biscuits. (36RT 4888, 4897, 4899.) Rose's job involved different shifts and, while at work, her mother and sisters took care of appellant. (36RT 4894-4895.)

During this time Big Gregory bought Rose a baby bed and he would come by and check to see if she and appellant needed anything. He also sometimes took them to visit his mother. (36RT 4895-4896.) Big Gregory would occasionally stay a few nights at the 81st Avenue address, but there remained good times and bad times between he and Rose and they would argue and fight. (36RT 4896-4897, 4900.) During their fights, Big Gregory would hit Rose and during one such fight he cut up her mattress, furniture and other belongings. (36RT 4904-4905.) Big Gregory used drugs at the time, possibly speed, and Rose observed his arm bleeding from injections and she saw the syringe. (37RT 4966-4967.) Rose had known since her pregnancy that Big Gregory used drugs. (37RT 4967.) Although not certain of the exact dates, Rose believed this "on-and-off-again" aspect of her relationship with Big Gregory continued for approximately six months. (36RT 4900-4903.) Rose also lived on 81st Avenue for about six months, then moved back home. (36RT 4898.)

When appellant was born he was diagnosed with a heart murmur, which eventually went away. (37RT 5036.) Rose took appellant to the pediatrician 16 times during his first year of life (whenever he would cough or his nose would run) and many times when he was two years old as well. (37RT 5036.)

On October 7, 1968, as Rose walked to a bus stop, Big Gregory and a woman named Pat Davis pulled up in a car. Davis accused Rose of saying something about Davis's mother, and then hit Rose. (36RT 4924.) During the fight Rose "cut" Davis with "something" and Big Gregory jumped out of the car and beat Rose. (36RT 4926-4927.) In addition, Rose cut her finger and subsequently spent four weeks in the hospital after the cut became infected. (36RT 4926-4927.) When Rose attempted to report the incident to police, she was told that she could not because it had been alleged that Rose had tried to kill Davis. (36RT 4926.) Big Gregory married Davis in 1969, before being sent to Vietnam. (36RT 4924, 4927.)

In 1970 Rose became involved with Wayne Carter. (36RT 4928.) Rose had known Carter since elementary school and they attended the same church. (36RT 4928.) Rose and Carter were married in August 1970 when appellant was three years old. They live on Ney Street in Oakland for approximately one year and in 1972 they moved to Greenly Drive. (36RT 4928, 4930, 4931, 4945.) Rose continued to work at Sunshine Biscuits before eventually gaining employment with the phone company. (36RT 4935.) While Rose worked, either her mother or Carter would take care of appellant. (36RT 4935.) At first, Carter was kind, but subsequently he too became violent and abusive. (36RT 4928.) Carter continually accused Rose of maintaining a relationship with Big Gregory and Rose perceived Carter's jealousy as a sickness. (36RT 4928-4929.) Because of that jealousy he would beat Rose. (36RT 4929.) He was abusive in other ways as well. For example, he would take the keys and lock

the house and not let Rose leave or use the phone. (36RT 4929.) In 1973, their son, DeWayne, was born. (36RT 4931.)

After DeWayne was born Carter continued to abuse Rose, including not letting her touch the baby at times. (36RT 4929.) During those times Rose would often just stay in her room until Carter's mood changed. (37RT 4973.) After one argument, Rose saw Carter pretending to give appellant some "reds"(a narcotic) in order to "get back" at her. (36RT 4929-4930; 37RT 5039-5040.) Rose also recalled one Easter when she did not want to be in a photograph with Carter at his mother's house, and he beat her in the front seat of the car when they drove home. (36RT 4932.) Appellant was in the backseat at that time. (36RT 4933.) When they arrived home, Carter chased Rose down the street and continued to beat her. (36RT 4933.) During the five years Rose was with Carter, he remained threatening and assaultive toward her. (36T 4932.)

During that period of time Rose did not think that Carter was abusive toward appellant, although she did recall an incident when Carter was giving appellant (who was five at the time) a bath, and he let the water get too hot, causing appellant to cry out. (36RT 4934.) Rose thought Carter simply did not know any better and had failed to test the water. (36RT 4934.) She also recalled times when she wanted to take appellant to the store with her but Carter insisted that appellant stay with him. (36RT 4936.) At the time she thought it would be good for appellant to spend time with Carter. (36RT 4936.) On one occasion, however, when appellant was seven, appellant broke his collarbone and Rose believed it had occurred during a beating from Carter. (36RT 4936-4937.) Appellant never said anything to Rose about Carter and she felt appellant did not want her to "find out" in order to keep Carter from abusing her more. (36RT 4937-4938.)

When Rose had married Carter she did not know he was using drugs, but she eventually learned that he snorted cocaine. (37RT 4969.) Although Rose did not know if Carter was selling drugs, she recalled appellant telling her that Carter would put "balloons" of something in his pocket while they were in the car. (36RT 4939.) Subsequently, Rose found out that Carter was involved in criminal drug activity and, in approximately 1975, Carter was sent to federal prison for bank robbery. (36RT 4938-4940.) While Carter was incarcerated Rose would occasionally write to him and he would periodically send her money as he received Veteran's Administration benefits. (36RT 4940.) While Carter was in prison appellant would spend much of his non-school hours at his grandparents' house on Hesket. (36RT 4949.) Appellant and his brother were often cared for by their aunt, Evelyn Jackson, but she died in a car accident in 1976. (36RT 4951.)

Appellant's father, Big Gregory, came back into Rose's life for about six months before Carter got out of prison. (36RT 4899-4902; 37RT 4989.) During this time, Big Gregory used heroin and hit Rose on many occasions, once beating Rose so severely he broke her nose and left her with lacerations and bruises on her face. (36RT 4922, 37RT 4990-4991.)

It was in 1979 that Carter was released from prison and although he and Rose tried to make the marriage work, Rose believed that she did fit into Carter's "new" lifestyle. (37RT 4970-4971, 4992.) Carter first lived in a halfway house and later in the year Rose reluctantly allowed him to move back in with her on Greenly Drive. (37RT 4980-4981.) The abuse continued, however. Rose recalled an incident when Carter and his friend Lonnie Cooper were at the house and Carter hit her and then threatened her with a hammer. (37RT 4973.) Rose ran to a neighbor's house to call the police and she slipped and broke her elbow and crushed her kneecap. (37RT 4974-4975.) Her sister Mamie stayed with her for a few days while she was recuperating and Carter hit

DeWayne, who was four or five years old at the time. (37RT 4979.) Carter was trying to find out who Rose had dated while he was in prison. (37RT 4979.) Appellant jumped out of the window and called the police. (37RT 4979.) The officers took Rose and her two sons to her parents' house. (37RT 4980.)

During this period of time Rose recalled Carter spanking appellant for being suspended from school. (37RT 4994.) She also recalled a time when she attended a funeral and afterward she found appellant with a swollen face and a black eye. (36RT 4937.) When she tried to talk to appellant, Carter drove off with him. (37RT 4994.) Rose recalled a problem with appellant wetting his bed. (37RT 4985.) Carter would deal with this by spanking him or not allowing him to play outside. (37RT 4985.) The bed wetting did not go away until appellant was in the sixth or seventh grade. (37RT 4987.) She later learned that appellant had a small bladder and a friend told her that the proper way to deal with it was to tell him it was okay. (37RT 4987-4988.) Rose believed that appellant hated Wayne Carter. (37RT 4993.)

In 1980 Carter returned to prison. (37RT 4982.) In approximately 1981, Rose filed for divorce and sold the house on Greenly at Carter's insistence. (37RT 4984.)

On August 10, 1982, appellant's cousin Clifton Spencer died. (36RT 4949.) Spencer was at another cousin's home when someone broke in and stabbed him through the back. (36RT 4953.) Appellant had been close to Spencer and thereafter appellant carried Spencer's obituary around in his wallet. (36RT 4954.)

In 1983 Rose was living on Best Avenue in Oakland. (37RT 4999.) Appellant continued to spend a lot of time at his grandparents' house on Hesket Road. (37RT 4999.) Rose's father Chester was retired. (37RT 4999.)

On December 24, 1983, Willie Reed, a teenage neighbor, died in a fire

in Rose's backyard. (37RT 5030.) Reed's death occurred this way: He would often stay in Rose's backyard in a shed where a heater stood next to a lounge chair. (36RT 4947.) One time, as Reed was slept, the heater fell over, causing a fire in which he died. (36RT 4947.) Appellant was not around during this time because he was living in a "boy's camp," which Rose also described as "jail." (37RT 5030, 5047.) When Rose learned from the firefighters that there was a dead child in the shed, she was afraid it was appellant and called "the jail" to make sure that appellant was still there. When she spoke with him she told him about Reed's death. (37RT 5047.) Rose was not sure whether appellant was in jail for burglary and thought it might have been for a probation violation. (37RT 5048.) Reed's death was traumatic for Rose and for appellant as Reed was his close friend. (36RT 4947.) Reed's death was doubly traumatic for appellant because another friend, Antoine, had been killed in a drive-by shooting, dying in appellant's arms. (36RT 4948, 4955.) Appellant did not sleep well after this incident. (36RT 4955.) Appellant often talked about the friends in his life who had died. (36RT 4955-4956.)

In 1983, after Reed's death, Rose moved back into her parents' house at her father's request. (36RT 4946, 5047.) Because of the "smell" from Reed's death, Rose experienced mental "changes," could not eat, and began seeing a doctor. (36RT 4948.) Rose's father died in 1984, after a stroke, a few months after she had moved back in with him and her mother. (36RT 4948, 4960.) After Chester Sr.'s death the family "fell apart." (37RT 5002.) Appellant had been close to his grandfather and was so traumatized by the death he refused to attend the funeral. (36RT 4958.) Chester had been a positive person who required everyone in the household to do something constructive with their lives. (37RT 5003.) Chester had also been a community leader, who took kids camping, had a neighborhood park built from property given to them by PG & E, and who had also developed a lunch program for kids in the

summer. (36RT 4959.) Appellant had looked up to his grandfather and missed him. (36RT 4960.)

After Chester Sr.'s death, Brenda developed a drug problem and had five children. Rose's mother had custody of some of them. (37RT 5003.) Mamie Spencer and her daughter Carla both had drug problems and lived in the area of Hesket Road. (37RT 5004.) There was tension between family members and this would explode in the form of anger and physical fights. (37RT 5004.) Appellant became involved in some of these fights. During this time he and Rose did not have a good relationship. (37RT 5004.)

In 1984, when appellant was 17 years old, he attempted to hang himself in the backyard. (37RT 5031, 5068.) It was raining and Rose ran outside and tried to remove the rope or wire from his neck while Lurlean called 911. (37RT 5031.) When the police came appellant got into an altercation with them. Rose was told that the officers believed appellant might be trying to make them kill him. (37RT 5032.) Appellant eventually ran from them. (37RT 5032.)

Rose was aware of a problem between appellant and his cousin Carla in October 1985, but did not know whether it was then, or January of 1986, that appellant struck Carla. (37RT 5071-5072.) Rose did not know if appellant struck his aunt Mamie in 1985, and as to the question of whether appellant struck his aunt Brenda in 1985, Rose's answer was "yes or no." (37RT 5071-5072.) Rose did know that in 1986 appellant took his grandmother's truck and "wrecked it." (37RT 5072.) She did not know if appellant struck Trina Berry in September 1987. (37RT 5072.)

Rose recalled a time when she told appellant that she did not like how his life was going. Appellant replied that his life was the way it was because of how he had been brought up. (37RT 5005.) Rose criticized appellant for being involved in a life of crime and selling drugs. (37RT 5005.) She also criticized him for walking off jobs that she had been able to obtain for him

through people she knew. (37RT 5005.) They were arguing in the kitchen when she told him and Germaine (who was there too) to get out. (37RT 5006.) Appellant grabbed a knife out of her hand, slapped her, then left. (37RT 5006.) Rose went across the street and called the police. (37RT 5075.) When she went outside, she saw that all four of her tires had been slashed. (37RT 5007.) Rose did not recall the date of this incident.

**Appellant's Educational And Juvenile Commitment History As Recalled By Rose**

In 1971, when appellant was four, Rose enrolled him in kindergarten, reporting his birth date as 1966 instead of 1967. (37RT 5007-5008.) She felt he was ready for school at the time. (37RT 5008.) Appellant changed schools in first grade from a school near his grandmother's (Dag Hammarskjold) to a school closer to where he lived (Howard Elementary). (37RT 5010.) At that time, Rose worked at the same school and felt that the teachers expected her to deal with some of the problems appellant was having in his classroom. (37RT 5010.) Appellant was easily distracted. (37RT 5011.) Because appellant was smaller than other kids, he tended to act aggressively with them. (37RT 5011-5012.) In addition, appellant was tested and Rose believed he was found to have dyslexia. (37RT 5012.) Rose recalled a recommendation that appellant be placed in an educationally handicapped program due to learning disabilities and in the third grade, he was transferred to a school with smaller class sizes (Toler Heights). (37RT 5011, 5013.) Rose recalled that appellant was teased by neighborhood kids both on Greenly (where he was picked up) and on Hesket (where he was dropped off) because he being transported in a "special bus." (37RT 5014.) To alleviate these problems Rose eliminated the bus and would pick appellant up from school and take him to work with her at a beauty salon. (37RT 5015.)

In 1975, when appellant was in the fourth grade, he was transferred back to Howard School as Toler Heights only went up to the third grade. He was partially mainstreamed into regular classes at this time, which bothered him. (37RT 5016-5017, 5019-5020.) Appellant eventually had to repeat the fourth grade. (37RT 5019.) That did not bother appellant as he should have been in the fourth grade at that time anyway. (37RT 5019.)

On the one hand, between the fourth and sixth grades things seemed to get better for appellant. (37RT 5020.) Rose was working at appellant's school at the time and if appellant had a problem in class, she would have him do his work in her class. (37RT 5020.) If there were problems, she restricted him from watching television or from going over to his grandparents' house. (37RT 5020.) She would also make him eat his dinner at the beauty salon where she worked, which he disliked. (37RT 5021.)

On the other hand, when appellant was still in the fourth grade Rose took him to the juvenile authorities to see if someone could talk to him before he got into trouble. (37RT 5021.) Appellant's school had suggested that Rose look into a residential school in Oakland for appellant, Lincoln School. (37RT 5021.) Appellant was tested and evaluated, but Lincoln denied his application because the school already had a student with a problem similar to appellant's and there was no room for a second student with the same problem. (37RT 5021-5022.) Also at about this same time, Rose tried taking appellant to a counselor, but he would not answer any of the counselor's questions, with the exception of whether he disliked his mother, to which he replied "no." (37RT 5022–5023.) The counselor told Rose that he was usually able to "break through" to a child but that he was unable to do so with appellant. (37RT 5023.)

Appellant remained at Howard School for the sixth grade, but he was placed on a half-day schedule due to problems he was having there. (37RT

5024, 5041.)

Appellant attended King Estates Junior High for seventh grade. (37RT 5024.) Appellant attended one special education class along with regular classes. (37RT 5025, 5041.) However at one point one of appellant's friends brought a pellet gun to school and appellant was expelled and placed on home instruction for the remainder of that school year. (37RT 5025.) Rose could not recall whether appellant was suspended on February 27, 1979, for fighting in class and causing and threatening physical injury. (37RT 5054.)

In the eighth grade appellant returned to school and attended one special education class along with regular classes. (37RT 5025.) Rose could not recall whether appellant was suspended on October 25, 1979, for starting a fight. (37RT 5053.)

Rose moved when appellant was in the ninth grade, and appellant's grades improved when he transferred to Frick Junior High. (37RT 5027, 5041.) Rose was also involved in a live-in relationship with an individual named Levi Warner at this time and he had a good relationship with appellant. (37RT 5028.) Rose could not recall whether on March 2, 1981, appellant was suspended from school for fighting, and could not recall whether on May 19, 1981, appellant was suspended for possession of marijuana and alcohol. (37RT 5055.) Rose additionally could not recall whether on October 8, 1981, appellant was suspended for making threats and for causing physical injury. (37RT 5055.) She lastly could not recall whether appellant was suspended on November 5, 1981, for lack of respect to his teachers. (37RT 5056.)

In the tenth grade, appellant joined a gymnastics team that met on Saturdays at Skyline High School. (37RT 5029.) Appellant was the youngest person accepted on this team and he was also the only African-American on the team. (4957.) However, on December 3, 1981, appellant injured his foot and could no longer participate on the team. (37RT 5040, 5044.)

Rose did recall appellant being placed in "Los Cerros," a juvenile facility, on one occasion, but she did not remember what the placement was for. (37RT 5068.) Rose did not recall attending court with appellant on an accusation that he had hit a store owner with a rock, although he was acquitted of those charges. (37RT 5061-5062.) Rose did not attend court with appellant when he was accused of burglarizing a railroad car in 1981, but she believed that her parents did. (37RT 5060.) Rose recalled that she had appellant arrested in 1983 for staying with her parents and refusing to come home. (37RT 5061.) She did this not because she wanted to "get rid of him," but because she wanted to put some "fear" into him. (37RT 5081.) Rose did not recall if appellant was arrested for burglarizing an Oakland business on December 21, 1983, three days before Reed died in the fire. (37RT 5062–5063.) Rose did not know whether appellant burglarized the home of "Square" Johnson in February of 1984, but she did talk to Johnson about someone having done "something" to him but he did not know who it was. (37RT 5064.) Rose did recall appellant leaving Los Cerros on February 2, 1984. (37RT 5068–5069.) Rose did not recall if appellant escaped from a juvenile facility on August 15, 1984. (37RT 5069-5070.) Rose did visit appellant when he was in juvenile hall between November 1984 and February 1985. (37RT 5070.)

At one point, when appellant was a teenager, Rose took him to a psychiatrist. (37RT 5050, 5068.) She had also been supportive of efforts by a probation officer named Lowe, who had tried to assist appellant. (37RT 5051.)

Rose had known Sarah LaChapelle for a long time, even before appellant was born, and knew LaChapelle to be a lovely woman and a very special lady. (37RT 5035.)

Rose loved appellant. (37RT 5032, 5034, 5053.)

**Zelma Richard**

Zelma Richard, appellant's paternal grandmother, testified on appellant's behalf. (38 RT 5125.) She recalled that Big Gregory initially did well in school, but dropped out in the 11th or 12th grade and went to work. (38RT 5126-5127.) Richard recalled Rose and Big Gregory fighting, but she never saw it. (38RT 5129, 5131.) Big Gregory would fight if provoked. (38RT 5130.) When Rose became angry, she would interfere with appellant seeing his father. (38RT 5132.)

Big Gregory married Pat Davis in 1969, before he went into the military. (38RT 5133-5134.) When he returned from the service, he was addicted to heroin. (38RT 5135.) Richard recalled a visit from appellant when he was between four and six years old and he was angry and would not speak to anyone. (38RT 5136.) She recalled appellant kicking his uncle Terrell at one point. (38RT 5138.) After that, Big Gregory took appellant home. (38RT 5138.)

Richard did not get the impression that Rose held appellant accountable for his conduct. (38RT 5139.) She recalled one meeting with appellant, both grandmothers, and appellant's mother at a location in Oakland. (38RT 5140-5141.) Appellant had been in trouble for riding a moped without a license. Richard asked Rose why would she buy appellant a moped if he was not old enough to have a license. (38RT 5141.)

Richard recalled being asked to come to appellant's high school because he was in trouble and the authorities were afraid he might get shot, and because Rose had been uncooperative. (38RT 5147.) A school official asked Richard if appellant could live with her and she said, "sure." (38RT 5147.) However appellant did not move in with her at that time. (38RT 5147.)

When appellant was 17, he asked Richard if he could live with her. She said yes, but told him he would have to work or go to school. (38RT 5144.)

Appellant worked, but only stayed for one week. (38RT 5144-5145.) Richard recalled appellant wanting to stay with her a second time and she thereafter enrolled him in trade school in Union City, but he did not attend. (38RT 5146.)

Richard believed appellant to be generally helpful and respectful. (38RT 5145.) She also described him as smart. (38RT 5145.)

**Big Gregory**

Big Gregory dropped out of school in the 12th grade because he did not "feel" like going. What he did do was hang out with his friends in the neighborhood. (38RT 5160.) In 1966 he was in a relationship with Rose, and she became pregnant. (38RT 5160.) When Rose first told Big Gregory that she was pregnant, he did not have any plans. (38RT 5163.) They talked about marriage, but also argued a lot. (38RT 5163-5164.) They lived together for a few months and argued and fought with each other. (38RT 5165.) Big Gregory recalled Rose once telling him that appellant was not his son. (38RT 5166.) Big Gregory admitted hitting Rose. (38RT 5166.)

As noted, Big Gregory married Patricia Davis in December 1969. He used marijuana on a daily basis at that time. (38RT 5167.) He also used alcohol and felt that it "triggered his temper." (38RT 5167.) Shortly after his marriage to Davis, Big Gregory entered the military and was sent to Vietnam. (38RT 5168.) When he came back, he was addicted to heroin—an addiction that lasted for 25 years. (38RT 5168-5169.) He committed crimes to finance his habit. (38RT 5171.)

Big Gregory recalled an incident where Rose came up behind his wife, Davis, and stabbed her in the back. (38RT 5172.) Big Gregory slapped Rose in response. (38RT 5173.) Big Gregory would see appellant when Rose would bring him to his grandmother's house. (38RT 5174.) Big Gregory felt that Rose was overprotective of appellant. (38RT 5175.) He felt that Rose would

bribe appellant to encourage good behavior. He believed she should have used other corrective measures. (38RT 5192-5193.) At any rate, Rose did not want Big Gregory telling her how to handle appellant. (38RT 5175.)

Big Gregory and Rose resumed their relationship in 1978 and lived together for about six months. (38RT 5177.) They would fight and he recalled once taking her to the hospital after a fight. (38RT 5178.)

When appellant was approximately 17 years old, he came to stay with Big Gregory, who was then living in Seattle. (38RT 5188.) Big Gregory eventually learned that appellant had escaped from a juvenile camp in Alameda County. (38RT 5189.) For his part Big Gregory was in Seattle to avoid being arrested for a parole violation. (38RT 5192.) Appellant subsequently decided to go back home. (38RT 5191.)

**Friends Of The Family And Acquaintances**

Norman Cooper's brother Lonnie had been incarcerated with Wayne Carter, appellant's stepfather. (38RT 5088.) Cooper worked as a Juvenile Hall Institution Supervisor for the Alameda County Probation Department. (38RT 5091.) He met Wayne Carter in approximately 1981, and, on one occasion, while at the Carter house for a barbecue, saw Rose and Wayne Carter arguing. (38RT 5092, 5107.) Cooper described them as aggressive toward each other. (38RT 5094.) Cooper also knew Rose to be an overprotective parent. (38RT 5104.) For example, she tried to keep appellant out of jail when he was involved in a burglary. (38RT 5108.) Cooper thought of appellant as a burglar and a "sneaky kid," based on the impression he got from Rose and Wayne Carter. (38RT 5105-5106.)

Sherrill Rogers was a friend of Rose. (38RT 5197-5198.) She was aware of the fights between Rose and Big Gregory and also saw injuries on Rose. (38RT 5198.) Rogers also knew Rose when she was married to Wayne

Carter and Rogers knew they fought too. (38RT 5198.) Rogers knew that Carter was verbally and physically abusive to Rose. (38RT 5199.) She also knew Carter dealt drugs. (38RT 5202.)

In 1976 Michael Cholerton worked with the Family Crisis Intervention Unit of Alameda County. (38RT 5110.) This unit dealt with kids who were runaways or out of control, and worked to try to divert them from the juvenile justice system. (38RT 5110-5111.) Families would voluntarily participate. (38RT 5111.)

Cholerton met with appellant, Rose and DeWayne on February 23, 1976. (38RT 5113.) Rose had called the unit with a complaint regarding appellant. (38RT 5113.) Appellant was described as disobedient and "stealing things." (38RT 5113.) Appellant had stolen gum and a toy car from a store. (38RT 5114.) Rose wanted him in a residential school. (38RT 5113.) Rose told Cholerton that appellant was involved in fights at school and left home or school without permission. (38RT 5114.) Cholerton felt family counseling would be appropriate. (38RT 5115.) However, he sensed that Rose was rejecting appellant as she did not want family counseling, but wanted another placement for appellant (38RT 5115.) During the subsequent interview, appellant seemed withdrawn and would not talk. (38RT 5118.) Cholerton did not follow-up because he did not deal with residential treatment, although he may have referred Rose to one Linda Goodman, who worked in this area. (38RT 5116.) Cholerton would not know the outcome of any such contact. (38RT 5122.)

Arthur Simpson, one of appellant's uncles, by marriage (to Mamie), spent two years in prison and, on his release, started "hanging out" on 98th Avenue and Edes Avenue in Oakland with appellant. (40RT 5413–5414.) Appellant sought recognition and would hang around with people older than him, which included Simpson. (40RT 5415.) Simpson and appellant remained

close until 1988, when Simpson was arrested for murder. (40RT 5417.)

Simpson, a Pelican Bay State Prison inmate at the time of trial, believed it would be difficult, but not impossible, to escape from a maximum security prison. (40RT 5418–5419.) Simpson believed appellant was prone to verbal outbursts. (40RT 5420.)

Darryl Cooper had been friends with appellant since childhood. (40RT 5426.) Cooper lived on Hesket Road in Oakland, and appellant spent a lot of time at his grandmother's house there. (40RT 5427.) He recalled that in the fourth grade he and appellant would drink beer daily. (40RT 5430.) To make money they would steal boxes of cereal off of trains and gamble. (40RT 5430.) They also stole clothes and tennis shoes. (40RT 5433.) Appellant was known to have a temper and fight with people. (40RT 5434.) Cooper described appellant as an alcoholic and also stated that appellant "smoked weed" in the fourth grade. (40RT 5435–5436.) Cooper and appellant lost track of each other around ninth grade. (40RT 5435–5436.) Cooper felt appellant was affected by his grandfather's death as well as the deaths of Antoine Martin and Willie Reed. (40RT 5440.) Appellant had an "I don't care" attitude. (40RT 5440.) At the time of trial Cooper was in custody at Corcoran State Prison for violating his parole from a conviction for robbery. (40RT 5442.) On one occasion, Cooper had described appellant as violent. (40RT 5452–5453.)

Eric Cato knew appellant growing up near appellant's grandmother's house. (40RT 5467.) They raised pigeons at Cato's house and hung out in the park, drinking and smoking, as early as age six. (40RT 5470.) Older people would buy the beer for them and they would buy the weed. (40RT 5473.) They would steal pigeons and break into a shack or a boxcar. (40RT 5477.) Cato also recalled that he and appellant would shoot cans. (40RT 5479.) Cato described himself as an influence in appellant's life. (40RT 5478.) At the time of trial Cato was in prison for kidnaping and robbery. (40RT 5481.)

**Appellant's Educational Background As Related By Others**

Ellen O'Shea testified that in April 1975 she taught special education classes at Toler Heights School in Oakland. (39RT 5216.) Appellant was in her class, which included children who had learning problems that were either neurologically or emotionally connected. These children were not mentally retarded. (39RT 5217.) Other children were there because they had behavior problems, including aggressiveness. (39RT 5219.) O'Shea attempted to provide them with positive reinforcement. (39RT 5220.)

In appellant's April 1975 evaluation, O'Shea recommended that he remain in her classroom. (39RT 5222.) She noted that appellant was doing well with his aggressiveness issues. (39RT 5222.) O'Shea knew appellant to be emotionally disturbed and aggressive. (39RT 5235.) She did not recall dyslexia being his problem. (39RT 5237.)

At the time of trial Dr. Dietra Teichman worked in private practice as a clinical psychologist, licensed in Illinois. (39RT 5240.) In February 1975 Dr. Teichman was a student working on her master's degree at California State University in Hayward and she conducted a psychological evaluation of appellant. (39RT 5240.) She worked at Toler Heights School under the supervision of a school psychologist and was expected to test ten children. (39RT 5240.) Appellant was in the third grade at the time and was eight years, ten months old. (39RT 5241.) Dr. Teichman's evaluation consisted of observing students in the classroom, on the playground, interviews with the teacher and parents, as well as conducting a battery of tests. (39RT 5241.)

At the time Dr. Teichman noted from appellant's records that he had had learning problems at his first school and that Rose believed he had a negative attitude because his teacher had a negative attitude toward him. (39RT 5242-5243.) Dr. Teichman knew from these records that after his first school appellant had transferred to Howard School, where he was placed in a regular

classroom. However, at the end of that second grade year he was only reading at a first grade level. (39RT 5244.) At that time appellant was tested for educational handicaps. (39RT 5245.)

In the third grade, when Dr. Teichman met appellant, he was in O'Shea's class. (39RT 5245.) Rose told Dr. Teichman that appellant would fight with other children and hold grudges. (39RT 5246.) Rose described appellant as resembling his father and also described appellant as being "evil," which she said to Dr. Teichman while appellant was present. (39RT 5246.) Rose also stated that she wanted appellant to stand up for himself when playing with other children and that she would "whip him" to make him angry enough to fight. (39RT 5248.)

Dr. Teichman observed appellant on the playground and he was involved in one fight per day. (39RT 5249.) She found that he could also be cooperative and charming when he had limits set on him. (39RT 5250.) She understood appellant's birthday to be in 1966, and if she had known he had really been born in 1967, she would have expected him to function at a lower level, due to the maturation process. (39RT 5253.) Dr. Teichman thought appellant was severely handicapped by an emotional problem. (39RT 5254.) In her 1975 report she deemed him of at least average intelligence. (39RT 5255.) She recommended that the school authorities place him with a teacher who could be firm, in a supportive way. (39RT 5256.)

On appellant's IQ test, he had a full scale IQ of 96, which is average. (39RT 5258.) If Dr. Teichman had known appellant was only eight at the time of the test, rather than nine, his IQ would have been higher. (39RT 5259.)

Dr. Teichman described appellant as the type of child that would take "offense at almost anything." (39RT 5265.) Appellant tried hard to attract attention, including by fighting. (39RT 5265.)

Barbara Hanson was employed in 1974 as an Educational Psychologist with the Oakland public schools. (39RT 5272, 5287.) In 1973 Hanson prepared appellant's Individual Education Plan (IEP). (39RT 5272, 5274.) She had observed appellant to be extremely aggressive with other children and performing below grade level. (39RT 5273.) She had recommended that appellant go into the special education program. (39RT 5273.) Appellant's IEP implied that he had emotional problems and recommended a self-contained classroom. (39RT 5274-5275.) A second evaluation of appellant was conducted in May 1976. (39RT 5278.) At that time appellant was in the fourth grade and in a class for educationally handicapped students for two hours per day. (39RT 5278.) He was reading at a 2.3 grade level and was at a 4.2 grade level for math. (39RT 5278.) His teacher noted that he had improved. (39RT 5279.) The 1976 report noted that appellant could do excellent work when he knew "the routine," and recommended that he remain in the educationally-handicapped program for two hours per day. (39RT 5280.)

In 1977 appellant repeated the fourth grade, again spending two hours per day in a class for educationally handicapped students. At this time his reading tested at a 3.1 grade level and his math at 4.7. (39RT 5283-5284.)

Connie Peoples was appellant's teacher in 1975-1976. (39RT 5344.) Appellant was not a problem for her. (39RT 5345, 5351.) Her classroom rules were defined and appellant sat close to her desk, so she could maintain control. (39RT 5345.) Peoples's thought that Rose was caring, but did not always see the "full picture" of what was best for appellant. (39RT 5345.) Peoples's felt that Rose believed the school was responsible for appellant's problems. (39RT 5346.) Peoples's noticed that appellant only smiled when someone else was being hurt or disciplined. (39RT 5348.) She did not suspect that appellant had been an abused child. (39RT 5348.) She did perceive appellant as a bully, and he was older than most students in the class. (39RT 5349.)

In 1979 Dolores Cober was appellant's seventh grade counselor at King Estates Junior High. (39RT 5353–5354.) Cober reviewed appellant's school records, which indicated that he had been involved in three fights and suspended after each fight. (39RT 5356.) Appellant received a fourth suspension after obtaining a pellet gun from another student. He was placed on home instruction for the remainder of the year. (39RT 5356–5358.) Appellant also received all failing grades. (39RT 5358.) At appellant's parents' request, he was placed in special education classes for eighth grade. (39RT 5359.) In the ninth grade, fall semester, appellant received the following grades: Two B's, two C's, and one D. (39RT 5361.) In the spring semester he earned three B's, one C, one D, and an F in physical education. (39RT 5362.)

Margaret McCullum taught appellant seventh grade physical education and eighth grade United States History. (39RT 5370.) Appellant was not a "high-achiever" but he did not present a daily problem in the class, which was structured and well-managed. (39RT 5370.) She vaguely recalled that appellant was also receiving special education classes the time, but her class was not a special education class. (39RT 5372.)

Nancy Downey was a school psychologist for the Oakland Unified School District and that was also her job in 1980. (39RT 5380.) She examined appellant's IEP. (39RT 5381.) At the time, appellant was receiving home instruction. (39RT 5382.) Appellant was recommended for educationally handicapped classes, which was a "catch-all" and included students with emotional problems. (39RT 5383.) She recalled that appellant was in the office frequently. (39RT 5388.) His IEP discussed visual motor integration and reading disabilities, and that he was overactive with impulse control problems. (39RT 5389.)

Lee Mouton was a dean of students at Fremont High School. (39RT 5396.) She handled discipline and recalled appellant receiving a suspension for

fighting in class. (39RT 5397.) Appellant's mother was upset about it and threatened to kick Mouton's "ass." (39RT 5398.) Rose did not believe appellant was involved in the incident. (39RT 5398.) She later accepted that fact after coming to the school. (39RT 5399.)(38RT 5191.)

**Appellant's Involvement With The Juvenile Justice System**

Charles Sims, an Alameda County Probation Department Officer, was so employed in 1983-84. (39RT 5301.) At that time he was assigned to the juvenile division in the intake investigation unit. (39RT 5302.) He recalled appellant as a juvenile. (39RT 5302.) Appellant's first contact with the juvenile justice system occurred on November 18, 1983. (39RT 5303.) Appellant was arrested for battery, which was subsequently deemed mutual combat by the district attorney. (39RT 5303.) Appellant was released from juvenile hall on November 21, 1983, to his stepfather Wayne Carter. (39RT 5306.) Appellant's next contact was December 1, 1983, when he was referred by Rose for incorrigibility. (39RT 5304.) Because his prior case was closed, appellant should have been referred to a non-secure shelter, and not juvenile hall. (39RT 5305.) When appellant was then referred to a shelter, he ultimately refused to stay there. (39RT 5306-5307.)

On December 5, 1983, appellant was arrested for burglary. (39RT 5308.) The case was referred to the district attorney's office but no petition was filed. (39RT 5309.) Appellant was released to his mother two days later. (39RT 5309.) Appellant was next arrested on December 21, 1983, for burglary of a business. (39RT 5310.) Although appellant denied his involvement to investigators, keys and a flashlight belonging to the business owner (and that had been in his desk) were found in appellant's possession. Appellant was also wearing gloves. (39RT 5335-5336.)

At the time of the detention hearing on the burglary charge (December 27, 1983), appellant was 16 years and 8 months old. (39RT 5311-5312.) Appellant was released to the custody of his mother on January 5, 1984, on home supervision. On January 27, 1984, appellant was formally released to Rose after being declared a ward of the court. (39RT 5316, 5318-5319.)

On February 15, 1984, appellant was arrested on another burglary charge and he was committed to the Los Cerros County Camp on March 19, 1984. (39RT 5319-5320.) On or about April 2, 1984, appellant walked away from Los Cerros, and he turned himself in on April 24, 1984. (39RT 5316-5317, 5321.) Appellant was returned to Los Cerros, but he walked away again on August 15, 1984. He surrendered again on November 8, 1984. (39RT 5323.) Rose felt that appellant needed professional counseling, after he attempted to hang himself on the night of November 7, 1984. (39RT 5324.) Rose noted that appellant was depressed over the deaths of friends and relatives. (39RT 5324–5325.) Appellant was observed on a camera and referred for psychiatric treatment, which was standard procedure (although this was not reflected in the file). (39RT 5326.)

**Dr. Daniel Sonkin**

Dr. Daniel Sonkin, Ph.D, worked as a licensed marriage and family counselor in private practice in Sausalito. (41RT 5511.) He also had a forensic consultation practice, which he described as the inteface between mental health and the courts. (41RT 5511.) Dr. Sonkin did not examine appellant, nor have a diagnosis of him, and was not rendering an opinion about appellant. (41RT 5543.)

In 1975, Dr. Sonkin was employed by the San Francisco District Attorney's Family Violence Project and was asked to set up an offender-and-education program. (41RT 5514.) He worked with men who battered and

developed his practice working with adult men who were abused as children. (41RT 5516.)

Although Dr. Sonkin was not a clinical psychologist and not licensed to practice psychology in California, he treated problems by virtue of his marriage, family and child counselor license. (41RT 5530.) Dr. Sonkin deemed himself to specialize in the area of child abuse.[6] (41RT 5539.)

Dr. Sonkin defined child abuse as an act of omission by a parent against a child that is developmentally inappropriate and damaging to the child. (41RT 5547.) He defined physical abuse as corporal punishment, that damages the child. (41RT 5548.) Spanking does not qualify as abuse, Dr. Sonkin opined, but it is an act of violence that can lead to physical abuse. (41RT 5548.) Other types of abuse are sexual abuse and neglect. (41RT 5553–5554.)

Dr. Sonkin testified that psychological maltreatment can fall into several categories, including rejection of a child, treating or communicating with a child differently from others, or wishing that the child had not been born. (41RT 5554.) And terrorizing a child additionally qualifies as a form of psychological maltreatment (e.g., threats). (41RT 5554.)

Dr. Sonkin stated that bed-wetting by older children may be a symptom of child abuse, but that it may also be caused by a physiological problem. (41RT 5563.) Fist fighting by young children could also be a symptom of child abuse. (41RT 5563.) Dr. Sonkin noted that some of the long-term effects of child abuse are cognitive defects, an inability to think through situations, impulsive behavior, difficulty concentrating, and not doing well in school. (41RT 5567–5568.) Also, he continued, child abuse can cause behavioral effects such as alcohol and drug abuse, "acting out" behavior, aggressiveness,

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6. The trial court determined Dr. Sonkin to be qualified in the field of family relationships and in the effect of child abuse on the family dynamics. (41RT 5546.)

sexual "acting out," and running away from home in the early years. (41RT 5568.) A frequent reaction to childhood abuse is depression, and suicide is not uncommon. (41RT 5571.)

Therapy involves trying to find other ways of dealing with stress, conflict, and emotion, rather than acting impulsively. (41RT 5577.) Often, people who are abused as children act very immature as adults, including having temper tantrums. (41RT 5579.) In the 1970's and 1980's many professionals did not identify child abuse and the treatment may not have been effective. (41RT 5586.)

A conduct disorder is a diagnosis that might be made about a person who breaks the law before 18. (41RT 5586.) There is a correlation between somebody diagnosed as having conduct disorder and severe child abuse. (41RT 5600.) Conduct disorders occur more often in abused children. (41RT 5600.) It may be easier to control a child's behavior in a small classroom, rather than a large one. (41RT 5602.)

## ARGUMENT

## I.

## THE TRIAL COURT DID NOT COMMIT PREJUDICIAL *CASH* ERROR DURING VOIR DIRE

Appellant contends that the trial court improperly restricted his death-qualification voir dire in a way that "created the risk that a juror may have been empaneled who was inclined to vote for the death penalty because of the aggravating evidence presented in this case as a general fact or circumstance, regardless of the strength of the mitigating circumstances." (AOB 73.) Appellant claims this case "is squarely on 'all fours'" with *People v. Cash* (2002) 28 Cal.4th 703, "where this Court reversed the penalty judgment for the identical error in restricting death-qualification voir dire." (AOB 91.) Appellant contends that the *Cash* error deprived him of his state and federal constitutional rights to due process, a fair trial, an impartial jury, and a reliable determination of guilt and penalty, and he of course wants the same reversal of the death judgment that occurred in *Cash*, as his remedy. (AOB 71-92.)

Appellant is entitled to no such remedy. No *Cash* error occurred, and any such error did not prejudice him under the circumstances of this case.

### A. The Factual And Procedural Background Is Detailed

On September 1, 1992, defense counsel filed a brief with the trial court requesting a so-called "*Fields*" question for jury voir dire. (2CT 503-505; *People v. Fields* (1983) 35 Cal.3d 329.) More specifically, counsel proposed that the court read a script to the prospective jurors, beginning with these admonitions:

> The following is a summary of the accusations which is being used *only* to make voir dire more meaningful. This summary does not indicate that evidence will be presented in this case which will actually prove beyond a reasonable doubt and to a moral certainty that the

accusations are true. This summary is being used only to make jury-selection questioning about *possible* penalty trial matters more meaningful. You are instructed not to draw any inferences from this summary as to Mr. Tate's guilt or innocence. Mr. Tate's plea of not guilty is an absolute denial of all the allegations. The ultimate question of guilt or innocence must be made exclusively based on the actual evidence presented at trial, not any speculative inferences made from the summary of the District Attorney's accusations.

(2CT 504; original emphasis.)

Defense counsel requested that the script then pose the following detailed question to the jury:

> If the evidence were to prove beyond a reasonable doubt and to a moral certainty that
>
> 1. someone kicked in the back door and entered the residence of Sarah LaChapelle with the intent to commit a burglary or robbery, and
>
> 2. that someone murdered Sarah LaChapelle during the course of that burglary or robbery, and
>
> 3. Sarah LaChapelle died as a result of multiple stabbing, multiple blunt instrument blows to the head and neck, multiple puncture wounds, and
>
> 4. Sarah LaChapelle's ring finger was severed and her wedding rings were taken; and
>
> 5. Victim's adult son discovered her body,
>
> Would you necessarily impose either the death penalty or life without the possibility of parole in the above fact situation if it was proved to you beyond a reasonable doubt and to a moral certainty that the accused defendant committed those acts?

(2CT 503-505.)

At the first hearing on voir dire issues the trial court initially stated that although the defense's proposed *Fields* question was lengthy, it was probably "a fair one." (1RT 199.) The court suggested this alternative, however:

> THE COURT: I think this can be phrased to essentially show that the evidence in this case is likely to show that someone kicked in the back door, entered the residence of Sarah LaChapelle, and I can add with the intent to commit a burglary or robbery, and that during the

course of this burglary or robbery, someone murdered Sarah LaChapelle as a result of -- murdered LaChapelle, she died of multiple stabbing, multiple blunt instrument blows to the head and neck, and multiple puncture wounds; and during the course of this -- this event the evidence is going to show that Miss [*sic*] LaChapelle's ring finger was severed and her wedding rings were taken. Now if the evidence in this case shows that these are the facts, would both these penalties be open to you?

(1RT 199-200.)

The prosecutor stated that this question seemed "too inclusive." (1RT 200.) He specifically objected on the ground the question asked the jury to "prejudge the evidence that is going to come out in this trial." (1RT 201.)

The court then presented another alternative:

THE COURT: Just off the top of my head, the evidence in this case is going to show that the residence of Mrs. LaChapelle was burglarized; and during the course of the burglary someone murdered Mrs. LaChapelle by multiple stab wounds, multiple blunt instrument blows to the head and neck; and that also during the course of this incident Mrs. LaChapelle's ring finger was severed and her wedding rings were taken.

(1RT 201.)

The prosecutor again objected, asserting that "the multiple stabbing, the multiple puncture wounds, the multiple blunt injuries, the cutting of the finger, the son finding her, the kicking of the door. These are facts that are not to be presumed by a prospective juror in making a decision whether a capital decision can be made." (1RT 202.)

The court told defense counsel that any detailed questions to the prospective jurors in this area could lead to problems if some of the facts offered in the questions were thereafter not elicited at the trial. (1RT 204.) Defense counsel responded that they didn't see that as a problem in this case ("I think this material is dealing with the facts that are really fairly uncontroverted" (1RT 204)), and the court took the matter under submission. (1RT 205.)

At a later hearing the trial court noted that it had reviewed a *Fields* question submitted by the prosecutor that was modeled after something the court had used in a previous capital case. (1RT 224–225.) The prosecutor summarized as follows:

> [THE PROSECUTOR]: So the first paragraph is, assume the evidence is going to show such and such.
>
> Then he delivers that statement of the assumption of the evidence, and then he says, now the question is, if that's what happened in this case, would both of those penalties be open to you, Mr. or Mrs., or have we pushed you too far one way or the other.
>
> That's the Court's question that I know he's asked in at least half a dozen cases.

(1RT 225.) The court stated, "yes, that's basically what I ask" (1RT 225), and then proposed the following *Fields* question:

> THE COURT: The evidence in this case is likely to show that the victim's house was unlawfully entered, that she was robbed and burglarized, and that during the course of the crimes the victim was stabbed and bludgeoned to death, period. That's it.

(1RT 227.)

The court stated, "What we have here, I'm leaving off a finger was severed, because this raises an issue with the jury. And then we are going to be inviting questions, and that will all come out in the evidence." (1RT 228.) The court continued: "All I'm asking -- All I want to find out is if this is what the evidence shows happened in this case, that a woman was robbed, burglarized, and stabbed and bludgeoned to death in her own home, would both penalties still be open. That's all I want to know." (1RT 228.) In reply defense counsel argued that the trial court's proposed *Fields* question eliminated "the most serious piece of aggravating evidence -- the severed finger and would cause a prospective juror to automatically choose the death penalty without giving any consideration to the mitigating evidence." (1RT 228-229.) The trial court disagreed, and ultimately noted defense counsel's objection to, and the

prosecutor's approval of, the court's proposed *Fields* question. (1RT 230-231.)

At a subsequent hearing, however, the court, after further research, stated that it had reconsidered the *Fields* question and determined that death qualification voir dire "should focus on jurors attitudes toward the death penalty in the abstract and should not be used to seek a prejudgment of the facts to be presented at trial." (1RT 246.) The court based it ruling on the holding of the United States Supreme Court in *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776]. (1RT 246-248.) The court expressed concern that the points or question proposed by defense counsel violated the holding in *Witherspoon* because that question went into great detail about the facts of the case. (1RT 246.) The court concluded that it would not permit a hypothetical that sought to present detailed specifics of the case in isolation because it "indoctrinates the juror" or attempts to get the "juror to vote in a specific way." (1RT256.) The court then proposed that it read something similar to the following to the prospective jurors:

> THE COURT: . . . if the defendant in this case is found guilty of murder of the first degree and the jury further finds that the second -- that the special circumstances alleged are true that they are going to be aware, that this was a murder committed during the commission of a burglary and/or a murder committed during the commission of a robbery with the use of a deadly weapon, would both penalties still be open with respect to their selection of the possible penalties in this case.

(1RT 246-247.)

Regarding the voir dire it would permit counsel to engage in with the prospective jurors in this area, the court stated:

> THE COURT: I would permit -- Because it's going to be read to them from the information, I would permit counsel to voir dire the jury on the felony-murder rule. I would permit the Court -- I would permit the attorneys to voir dire on the fact that the victim in this case was a woman. I would also let the --- I would let the attorneys voir dire on the fact that a knife was used, because that is going to be read with respect to the charges.

But with respect to the specific details of this offense, the fact that her -- she was bludgeoned to death, the fact that her fingers were cut off, the fact that she was nude from the waist down, all of those specific little details about the case I think is condemned under *Witherspoon*.

And I'm mindful of the fact that *Wainwright versus Witt* has arguably modified *Witherspoon* to some extent, which I think gives the Court a little latitude with respect to making a judgement as to whether or not the jurors are qualified, death qualified in this case.

(1RT 247-248.)

Noting defense counsels' objections and belief that fact-specific questions are appropriate in voir dire (1RT 252), the court issued its final ruling:

I'm going to read the Information to this jury, and we are -- I'm going to tell you what you can voir dire on. I'm going to tell them that he is charged with murder the murder of Sarah LaChapelle, obviously a female; I'm going to read the first and second special circumstance; I'm going to read the use clause. And I'm going to ask the jury, if the defendant in this case is found guilty of murder of the first degree and the jury further found the first and second special circumstances are true, plus the use of a deadly weapon as alleged, would both penalties still be open.

I'm going to permit counsel to voir dire on the fact this is a murder, I'm going to permit defense counsel to voir dire on the fact that the victim was a woman, and I'm going to let defense counsel voir dire on the fact that a knife was used because those are included in the Information

. . . . . .

THE COURT: But we are not -- [defense counsel], so you know, I'm not going to let you get into the fact that the evidence in this case is likely to show that Mrs. LaChapelle was bludgeoned to death, that she was stabbed 15 times, the evidence in this case is likely to show that when she was found by her son that she was nude from the waist down and a finger was severed. Those are all specifics of the case. I think getting into the detail to that extent and to that degree would violate *Witherspoon*, and apparently it would violate all other caveats in the cases we have been citing.

(1RT 252-253.)

## B. *Cash* And The Applicable Law

In *People v. Cash, supra*, 28 Cal.4th 703, this Court set forth certain of the general principles governing jury selection in capital cases:

> Prospective jurors may be excused for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as jurors. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].) "The real question is '"' whether the jurors views 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. Ochoa* (2001) 26 Cal.4th 398, 431 . . . quoting *People v. Bradford* (1997) 15 Cal.4th 1229, 1318 . . . quoting in turn *People v. Hill* (1992) 3 Cal.4th 959, 1003 . . . .) Because the qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty (*Morgan v. Illinois* (1992) 504 U.S. 719, 726-728 [112 S.Ct. 2222, 2228-2229, 119 L.Ed.2d 492]), it is equally true that the "real question" is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror.

(*People v. Cash, supra*, 28 Cal.4th at pp. 719-720.)

The *Cash* court "affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 47; citing *People v. Cash, supra*, 28 Cal.4th at pp. 720-721.)

> Our decisions have explained that death-qualification must avoid two extremes. One the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. In deciding where to strike the balance in a particular case, trial courts have considerable discretion.

(*People v. Cash, supra*, 28 Cal.4th at pp. 721-722; citations omitted.)

This Court found error in *Cash* because "the trial court's ruling prohibited defendant's trial attorney from inquiring during voir dire whether prospective jurors would automatically vote for the death penalty if the defendant had previously committed another murder. Because in this case defendant's guilt of a prior murder (specifically, the prior murders of his grandparents) was a general fact or circumstance that was present in the case *and that could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances*, the defense should have been permitted to probe the prospective jurors' attitudes as to that fact or circumstance. In prohibiting voir dire on a prior murder, *a fact likely to be of great significance to prospective jurors*, the trial court erred." (*People v. Cash, supra*, 28 Cal.4th at p. 721, emphasis added.)

### C. No *Cash* Error Occurred

Several reasons make clear that the trial court did not commit *Cash* error in the present case.

First, although a capital defendant's prior murder is a fact or circumstance that, when present in a case, could cause a juror to invariably vote for the death penalty, none of the five facts or circumstances appellant wanted to discuss with the prospective jurors here was a fact likely to be of great significance to the jurors. Specifically, that (1) someone kicked in the back door and entered the residence of victim LaChapelle with the intent to commit a burglary or robbery, (2) that someone murdered her during the course of that burglary or robbery, (3) that she died as a result of multiple stabbing, multiple blunt instrument blows to the head and neck, and multiple puncture wounds, (4) that her ring finger was severed and her wedding rings taken, and (5) that her adult son discovered her body, do not, either singly or cumulatively, rise to such

a level that a juror would invariably vote for the death penalty regardless of the strength of the mitigating circumstances. Not only is a prior murder not present here, but appellant's proffered facts do not involve sensational sex crimes, child victims, or torture. (*People v. Roldan* (2005) 35 Cal.4th 646, 694; citing *People v. Cash, supra*, 28 Cal.4th at p. 721.) It is a very unfortunate fact of life that the majority of the circumstances present in our case and appellant's proposed *Fields* question involved facts that are almost routine in capital cases, albeit heinous and cold-blooded.

Second, even post-*Cash* a defendant has no right to ask questions in voir dire that invite the prospective jurors to prejudge the penalty issue based on a summary of the aggravating or mitigating evidence, or seek to educate the jury as to the facts of the case. (*People v. Burgener* (2003) 29 Cal.4th 833, 865.) Appellant's *Fields* question certainly sought to educate the venirepersons as to the facts of the case, even if it arguably did not ask them to prejudge that evidence. And the People submit that the trial court could have reasonably concluded that while the admonition contained in appellant's proposed *Fields* question sufficiently cautioned the prospective jurors to refrain from prejudging guilt, it did not sufficiently warn them against prejudging penalty.

Third, notwithstanding the trial court's ruling on appellant's proffered *Fields* question, the prospective jurors were ultimately given many of the facts and circumstances appellant wanted them to know, and they were then asked whether, if those facts were proved true, they could remain open to imposition of both possible penalties in this case. The typical death-qualification voir dire included the following question from the trial court:

> Let's pretend that the jury in this case finds Mr. Tate guilty of murder of the first degree and that the jury finds that this murder was committed when Mr. Tate broke into the victim's residence, that he robbed her, and the victim will turn out to be a woman, and that he stabbed her to death with the use of a knife and killed her in her own residence. Let's assume that's what happened in this case.

In your mind, would both of [the] penalties still be open?

(See e.g., 13RT 2056.)

That inquiry adequately covered three of the five subjects appellant wanted covered by his *Fields* question, and defense counsel were able to pursue similar questions on voir dire. The following are illustrative:

> Q. Well, is there any particular kind of crime that would automatically give you the death penalty, for instance, a murder when you have certain things happen, multiple murders or, as you indicated, deliberation, premeditation? Is there anything that you in your own mind would automatically give death to because of the type of murder it was?

(2RT 311.)

> Q. Is there any kind of a case itself where the crime itself would be enough for you to automatically vote death without taking into consideration anything else about the defendant, but that the crime itself is so bad in your mind that the death penalty should automatically be imposed?

(2RT 338-339)

> Q. The Court asked you, if you were serving as a juror in the penalty trial in a case where you found that the person had committed a murder of a woman in the course of a robbery or burglary with a knife. The Court asked you that question, and you delayed for a long time before you said that both penalties would be open to you. [¶] And my question to you is: [¶] What was it about that question or that issue that made you feel a need to take some time before you gave an answer? Was it something about that question that troubled you? What are your feelings? What are you thinking about?

(3RT 436-437.)

> Q. And what is your feeling about the -- the element of the death being -- you know, the deceased being a woman and the knife being used?

(3RT 438.)

> Q. One of the district attorney's last questions was, if you sat as a juror and had come to the conclusion in the guilt phase that the defendant committed a burglary and in the course of that burglary or robbery killed this woman with a knife that you would vote for the death penalty? [¶] Is that a fair statement of your position?

(3RT 502.)

Q. But if we were to get to the penalty phase, penalty trial, and you were to sit as a juror, that means that the jury had concluded that my client, Gregory, had committed a murder, had killed a woman, stabbed her to death in the course of a robbery or a burglary, unjustified killing of an innocent woman. Do you think in that situation that you really could have an open mind about the possibility of imposing the alternative to death, which would be life without the possibility of parole?

(6RT 826.)

Q. The Judge said that -- And he said hypothetically, because you have to evaluate the evidence in a case. But assuming that a jury concluded that the defendant was a murderer, that he killed a woman in the course of robbing her or burglarizing her home, stabbed her to death -- which are pretty brutal circumstances -- would you still be able to keep an open mind and consider all the other stuff which we often refer to as mitigation evidence -- childhood, abuse, education, mental state, all those other possibly mitigating factors?

(7RT 1067-1068.)

Q. As the Judge told you, we're talking hypothetically here. But if a jury decided that a killing had taken place, unjustified, no excuse for it whatsoever -- we are not talking about self-defense, insanity, anything like that -- unjustified killing of a woman in her own home while she was burglarized or robbed, she was stabbed to death, do you think you can really keep an open mind in the penalty trial and consider all those factors the Court mentioned like his history, his family, you know, child abuse, things of that nature? [¶] Do you think you could keep an open mind even though the jury has concluded he's responsible for this killing?

(10RT 1560.)

Q. Now, are both penalties still open to you, either life without the possibility of parole or the death penalty, if you were to find beyond a reasonable doubt, to a moral certainty that the person was guilty of the crime the Judge told you about, breaking into a house, robbing a woman who was home alone, stabbing that woman to death? If you were to convict the person of those things, would both punishments still be open to you if there were no defenses to that crime?

(18RT 2936.)

In short, an exhaustive review of the voir dire reveals that defense counsel had ample opportunity to ascertain the views of prospective jurors on the felony-murder and knife-use circumstances of this case.[7] His claim that he was "categorically precluded from exploring, in general voir dire, the prospective juror's attitudes about the aggravating circumstances of the victim's demise" (AOB 91), is not correct.

It is correct that during the voir dire in this case the court did not ask about, and did not permit defense counsel to ask about, the one fact appellant calls "the signature feature" of his case, "that the victim's finger had been severed in the course of the felony murder in order to steal her wedding rings." (AOB 88, citing 1RT 228-229.)[8] We continue to maintain, however, that this fact is not the sort of horrible or sensational circumstance that could cause a juror to invariably vote for death, regardless of the strength of the mitigating circumstances. (*People v. Cash, supra*, 28 Cal.4th at p. 721.) There is no suggestion from the evidence that appellant severed LaChapelle's finger when she was alive or that he did it to torture her. It would appear that his action had a practical—although admittedly callous purpose—to gain possession of the victim's rings.

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7. We have quoted above just a small sampling of the relevant questions asked by defense counsel. (See also 3RT 506; 4RT 524, 546, 595, 610, 612, 630; 5RT 674, 687-688, 725-726, 735, 736, 761; 6RT 806, 829, 838–839, 888; 7RT 998-999, 1002-1004, 1010-1011, 1054; 8RT 1132-1133, 1167-1168, 1234; 9RT 1291-1293, 1295, 1317, 1326-1327, 1357-1358, 1409-1410; 11RT 1728–1729, 1731, 1830; 13RT 1975-1976, 2016-2017, 2022, 2138; 15RT 2423-2425, 2464, 2498; 17RT 2832; 18RT 2966-2966, 2868-2971, 2996; 20RT 3067-3068.)

8. In his motion for new trial, in urging relief from the trial court's denial of his proffered *Fields* question, appellant focused only on the severed finger and that victim LaChapelle suffered multiple wounds. (5CT 1115-1116.)

In sum, contrary to appellant's claim, the trial court did not impermissibly restrict voir dire.

### D. Any *Cash* Error Did Not Prejudice Appellant

Assuming, for the sake of argument, that the trial court improperly restricted voir dire, appellant is not due the reversal of the penalty judgment he requests. (AOB 90-92.)

In *People v. Cash, supra*, this Court stated that errors in restricting death-qualification voir dire do not invariably require reversal of a judgment of death. (38 Cal.4th at p. 722; citing *People v. Cunningham* (2001) 25 Cal.4th 926, 974.) "In particular, we have suggested that such error may be deemed harmless if the defense was permitted 'to use the general voir dire to explore further the prospective jurors' responses to the facts and circumstances of the case' or if the record otherwise establishes that none of the jurors had a view of about the circumstances of the case that would disqualify that juror." (*Ibid.*) As we have already demonstrated, defense counsel did use the general voir dire to explore the prospective jurors feelings regarding many of the aggravating facts of the case.

Finally, as in *People v. Coffman and Marlow, supra*, 34 Cal.4th at page 47, appellant failed to express dissatisfaction with the jury on the ground that he was precluded from inquiring into a juror's ability to determine penalty. (24RT 3352.) "Any error, therefore, was nonprejudicial." (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 47; see also *People v. Burgener, supra*, 29 Cal.4th at p. 866.)

Appellant's first contention fails.

## II.

## THE TRIAL COURT DID NOT ERR IN EXCUSING PROSPECTIVE JUROR ROBERT W. JR. ON UNDUE HARDSHIP GROUNDS

Appellant contends that the trial court's hardship excusal of prospective juror Robert W. Jr. did not comply with the applicable statutes and rules of court and is not supported by the record. (AOB 93-101.) Appellant concurrently contends that the error infringed on his state and federal constitutional rights to an impartial jury, arbitrarily deprived him of a state-created liberty interest guaranteed by the Due Process Clause, and violated his Eighth Amendment right to a reliable sentencing determination in a capital case. (AOB 93, 97, 101-102.) Appellant lastly contends that the error is "structural" and requires a per se reversal of both the guilt and death judgment against him. (AOB 93, 101-107.)

All of appellant's claims in this regard are without merit.

### A. Factual Background And The Trial Court's Ruling

Jury selection took several days and required three panels of potential jurors before a panel was seated and sworn. During voir dire of the second panel, when prospective juror Robert W. Jr. indicated he was a full-time student at California State University in Hayward and taking 17 units, the trial court asked him if he had any problem sitting on a jury for a trial that could take one to two months. (8RT 1142-1143.) Robert W. replied, "It depends on the time schedule." (8RT 1143.) When Robert W. was questioned about his own schedule and any interference the trial might have with his December and January finals, he stated, "Most likely it would probably be a burden." (8RT 1144.)

The trial court advised defense counsel that it was aware that they potentially wanted Robert W., an African-American male, on the jury. (8RT 1144-1145.) However, the court also confirmed, "I'm not here to have kids flunk out of school by taking two months sitting here as a juror when we have lots of other jurors." (8RT 1145.) On this basis, the court excused prospective juror Robert W. Jr. (8RT 1145; 2CT 536.)

### B. Applicable Law

While a criminal defendant has a constitutional right to a trial by jury drawn from a representative cross section of the community, the right to a randomly selected jury is purely statutory. (*People v. Visciotti* (1992) 2 Cal.4th 1, 37 & fn. 11; Code of Civ. Proc., §§ 191, 198, 222.)

A trial court has authority to excuse a person from jury service for undue personal hardship. (Code Civ. Proc., § 204, subd. (b).) Exercise of that authority is reviewed for abuse of discretion. (See Code Civ. Proc., § 204, subd. (b); *People v. Lucas* (1995) 12 Cal.4th 415, 488, citing *People v. Mickey* (1991) 54 Cal.3d 612, 665.) A trial court abuses its discretion when it rules beyond the bounds of reason, all the circumstances before it considered. (*People v. Gimenez* (1975) 14 Cal.3d 68, 72.)

### C. The Trial Court Did Not Abuse Its Discretion In Excusing Robert W. Jr.

The entirety of appellant's objection below to the excusal of Robert W. Jr. on full-time student hardship grounds was that Robert W. did not and was not requesting that he be excused. (8RT 1192-1195.) Appellant reiterates that position in this Court, asserting that Code of Civil Procedure sections 204 and 218, as well as former rule 860 of the California Rules of Court (current rule 2.1008) expressly support his position. (AOB 97-99.) Appellant protests that

the "entire issue" of Robert W.'s "excusal was initiated by the trial court in what was likely a well-intentioned, but inappropriately personal and paternalistic, effort to shepherd a young African-American student through his college years without the distraction of serving as a juror in a capital case." (AOB 99.)

We submit that both the record and the law support the trial court's decision to excuse Robert W. Although Robert W. did not first initiate a request that he be excused for hardship, he did state in response to the court's questions that the trial would likely interfere with his school schedule. (8RT 1144.) That circumstance clearly renders the excusal reasonable. Unless Robert W. intended to withdraw from school, one can anticipate that at some point he would raise the problem of having a class or assignment that conflicted with the trial. Certainly appellant would raise an objection if, at a later date, he felt that Robert W. desired to bring the jury deliberations to a speedy end in order to preserve his position in college.

It is also important to note that court had an opportunity to view Robert W.'s demeanor when asked about this issue. (*People v. Beeler* (1995) 9 Cal.4th 953, 989 [recognizing the importance of the trial court's observation of a prospective juror's demeanor in reviewing decisions].) Moreover, the court excused other students because it did not want to see anyone drop out of school due to jury duty. (2RT 349-350; 7RT 1048-1049.) Thus, the record does not demonstrate that the court singled out Robert W. from the rest of the full-time students. No abuse of discretion appears.

Next, in arguing that the trial court's discharge of Robert W. "did not comply with applicable statute and rule," appellant seemingly contends that a "student hardship" is not authorized by law. (AOB 97-101.)

> Indeed, none of the seven grounds set forth in subdivision (d) of rule 860, justifying the granting of an excusal, was addressed by either the trial court or by prospective juror W[]. It would seem that of the

> cognizable grounds constituting undue hardship enumerated in rule 860, the financial impact of jury service is most analagous to the "student hardship" that so concerned the trial court. Yet for financial hardship to constitute proper ground for excusal, the financial burden must be extreme. Surely, if W[] viewed the likely impact of serving on a jury as "extreme," one might have expected him to promptly request an excusal or deferment of jury service, rather than endure lengthy death-qualification voir dire.

(AOB 101, fn. omitted.)

This claim is forfeited. At no point at trial did appellant make the argument that the trial court would err in excusing Robert W. on "student hardship" grounds because such grounds are not authorized by law. It is well settled that appellant's may not proffer theories of error for the first time on appeal. (*People v. Thomas* (1992) 2 Cal.4th 489, 519-520.)[9/]

The bottom line here is that this Court has repeatedly rejected any claim that a trial court's policy of freely excusing prospective jurors for hardship deprives a defendant of his right to a fair and impartial jury. (*People v. Howard* (1992) 1 Cal.4th 1132, 1160 [defendant cannot demonstrate systematic exclusion based upon the even-handed application of a neutral criterion, such as hardship].) In short, read fairly and as a whole, the record demonstrates that the trial court excused Robert W. Jr. for hardship and not to unfairly remove him from serving in a capital case, as appellant suggests. Again, the court granted similar excusals on the same basis. (2RT 349-350; 7RT 1048-1049.)

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9. We do not understand appellant's invocation of the state and federal Constitutions to be a proffer of theories of error he did not make below—i.e.—an invocation of facts or standards different from those he asked the trial court to apply. (*People v. Avila* (2006) 38 Cal.4th 491, 527, fn. 22; *People v. Partida* (2005) 37 Cal.4th 428, 437-438.) Instead we read appellant's invocation of the state and federal Constitutions (AOB 93, 97, 101-102) to be an assertion "that the trial court's error, insofar as it was wrong for the reasons actually presented to that court, had the additional legal consequence of violating the [state and] federal Constitution." (*People v. Avila, supra*, 38 Cal.4th at p. 527, fn. 22.)

The court used its practical experience and made a pragmatic evaluation regarding Robert W. It did not rule unreasonably.

### D. Any Error Did Not Prejudice Appellant

Assuming, for the sake of argument, that the trial court abused its discretion in excusing prospective juror Robert W. Jr. on the basis of school hardship, appellant is not due the per se reversal of the guilt and death judgments he requests. In *People v. Mickey, supra*, 54 Cal.3d at pages 666-667, this Court held that any error in excusing a juror for hardship is not prejudicial per se, and that no actual prejudice can result. Defendants have " right to jurors who are qualified and competent, not to any particular juror." (*People v. Holt* (1997) 15 Cal.4th 619, 656.) We see no reason for this Court to grant appellant's request (AOB 103) and reconsider *Mickey* and *Holt*.

Appellant's second assignment of error fails.

## III.

## THE TRIAL COURT DID NOT PREJUDICIALLY ERR IN GRANTING THE PROSECUTOR'S FOR-CAUSE CHALLENGE TO PROSPECTIVE JUROR ALEAN S.-P.

Appellant contends third that he is due a reversal of both the guilt and penalty judgments against him because the trial court prejudicially violated various of his constitutional and statutory rights by erroneously granting the prosecutor's for-cause challenge to prospective juror Alean S.-P. (AOB 108-137.) The prosecutor challenged Ms. S.-P. because he believed she had misrepresented her educational credentials. (13RT 2089-2090.) Appellant complains that the trial court conducted an inadequate inquiry in response to the prosecutor's accusations in that it failed to summon Ms. S.-P. to court to examine her under oath regarding those allegations. (AOB 128-134.)

Appellant concurrently claims that extra-record materials prove Ms. S.-P. told the truth regarding her educational credentials and he asks this Court to take judicial notice of those materials. (AOB 114-115, fn. 43.) Appellant next asserts that the trial court ultimately excused Ms. S.-P. because it found, under *Wainwright v. Witt, supra*, 469 U.S. 412, that her views on the death penalty were such that she would be unable to conscientiously consider both sentencing alternatives in this case, and that this finding is not supported by the record. (AOB 108, 124-127.) Appellant correctly notes that a trial court's error in sustaining a prosecutor's challenge to a juror for cause under *Witt* compels a per se reversal of the death judgment (AOB 134-135), and he wants this rule extended to the guilt judgment as well (AOB 135-137).

Appellant is due no reversal whatsoever because the trial court did not err in excusing Ms. S.-P. for cause. And because the issue here is whether the trial court erred on the record before it, for this Court to take judicial notice of materials not before the trial court in reviewing the correctness of its ruling would be inappropriate. The trial court reasonably concluded on the record before it that Ms. S.-P. had committed misconduct, and it further reasonably found that her misconduct left it with doubt that she had the necessary qualifications to serve as a capital-case juror. The court was not obligated to place Ms. S.-P. under oath and give her the opportunity to address the misconduct charge. While the court did invoke *Wainwright v. Witt*, in context the court's citation was not a finding by it that it was excusing Ms. S.-P.'s *solely* because of her views on the death penalty. Accordingly, any error here is not reversible per se. Indeed if the trial court erred in excusing Ms. S.-P. for cause, any error did not prejudice appellant.

### A. The Factual And Procedural Background Is Detailed

On October 6, 1992, the parties conducted individual and sequestered

voir dire (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80-81) of prospective juror Alean S.-P. (10RT 1569-1603.) At the conclusion of that voir dire, neither the prosecutor nor defense counsel voiced any objection to her qualifications to sit as a juror in appellant's case, and the court ordered her to return to court on December 1, 1992, for the exercise of peremptory challenges, making the following observation:

> THE COURT: Based upon your answers, you've qualified yourself to serve on a capital jury. Okay? Not everybody makes it all the way through but you have.

(10RT 1602.)

On October 27, 1992, however, the prosecutor made a for-cause challenge to Ms. S.-P., on the ground that she had misrepresented her educational credentials:

> [THE PROSECUTOR]: Well, Ms. S[]-P[] told our bailiff to call -- for him and for us to call her "doctor."
>
> She stated in her questionnaire that she had attained a doctorate in education, and I had a funny feeling about that so I called the University of San Francisco and found that she has lied to us. She is not a doctor in education.
>
> [DEFENSE COUNSEL]: Is she getting her doctorate degree now?
>
> [THE PROSECUTOR]: She has not submitted her dissertation yet.
>
> [DEFENSE COUNSEL]: So she is in their Ph.D. program?
>
> [THE PROSECUTOR]: She is in the program.

(13RT 2090.)

The court stated that it remembered Ms. S.-P., and that its recollection was that she had stated "she had her doctorate degree." (13RT 2090.) Defense counsel complained that they were at a disadvantage because the prosecutor had not given them prior notice of this for-cause challenge, and because they did not have immediate access to Ms. S.-P.'s questionnaire. (13RT 2091.) The court stated it would take the matter under submission, and as it then examined Ms.

S.-P.'s questionnaire, the prosecutor represented that he had called an administrative aide at the University of San Francisco ("USF"), who reviewed Ms. S.-P.'s file and told the prosecutor that while Ms. S.-P. was a candidate for a doctorate, she was not yet a Ph.D. (13RT 2091.) The court noted that question number 15 of Ms. S.-P.'s questionnaire reflected that she had indeed written down that she had received a doctorate in education in 1992. (13RT 2092; see also 18CT 4685.) The prosecutor declared that the basis of his challenge to Ms. S.-P. was "perjury." (13RT 2092.) The trial court responded this way:

> THE COURT: Well, it's not a question of perjury. It's a question of her credibility in the way she answered her other questions. If she purports to be something she isn't, how can we lend any credence to the way she answered her other questions? That's the problem.
>
> I'll take it under submission, and you guys can go get your questionnaire and take a look at it.

(13RT 2092.)

Subsequently, after attending to *Hovey* voir dire of other prospective jurors, and defense counsel's examination of Ms. S.-P.'s questionnaire, the parties returned to the issue of the prosecutor's for-cause challenge, with defense counsel opening the discussion:

> [DEFENSE COUNSEL]: I am concerned about a number of things. First, Ms. [S]-P[] is apparently the only person we're aware of that Mr. Landswick [the prosecutor] has personally looked into the background of.
>
> THE COURT: I wouldn't take that as gospel.
>
> [DEFENSE COUNSEL]: I would not take it as gospel, either. That's the only person that I'm aware of at this time.
>
> What I'm also aware of, that Ms. S[]-P[] is an African-American woman with a high education. Whether, in fact, she has her doctorate at this time or whether, in fact, she is going to get it in 1992 or some other time is information developed by Mr. Landswick over the telephone.

Should the court be entertaining a cause of action challenge, I don't believe the Penal Code allows for a cause challenge under these circumstances. But should the court be interested in entertaining that, I think the only appropriate thing to do would be to call Ms. S[]-P[] back and question her about her answer on the questionnaire. For all I know, she has a Ph.D. somewhere else or she read that as being she would be getting her Ph.D. in 1992. But I don't think that a telephone conversation in which somebody on the telephone says she is in the doctorate program should be sufficient to challenge her.

But, in addition, I don't think the Penal Code allows for that as a challenge for cause.

(13RT 2148-2149.)

The trial court responded as follows:

THE COURT: Well, I think the Penal Code allows the Court to take into consideration the veracity of the particular juror if the Court's of the opinion that there may be some question about the credibility of that particular juror and it's brought into question. I think the Court has a right to -- to weigh and assess that credibility, number one.

Number two, Mr. Landswick is an officer of the court, and I don't think I have any reason to disbelieve his representations. I have no reason to disbelieve the lady or the person from the University of San Francisco who told Mr. Landswick that this lady had not been awarded her Ph.D. degree. What would her reason for deceiving Mr. Landswick be, I'd like to know?

. . . . . .

Also, I don't think there could be -- You're talking about a lady with a high education. How could she be possibly confused as to what university she was attending or whether or not she has been awarded a doctorate degree?

She hasn't been awarded a doctorate degree, according to Mr. Landswick, according to what's been told to him by the University of San Francisco.

She told the bailiff to refer to her as doctor. We referred to her as doctor. She is not a doctor. She is in a program. She hasn't been awarded a Ph.D. so she is holding out to be something she isn't.

She could have said I'm in the Ph.D. program, I haven't received my program now -- my Ph.D. but I'm in the doctorate program at the

University of San Francisco, and I would be getting my degree sometime this year.

She didn't say that. She said she had a Ph.D.

(13RT 2149-2150.)

One of the two defense counsel stated that she, "under no circumstances in any fashion," disbelieved the prosecutor. "I'm sure that he has represented exactly what's happened over the telephone." (13RT 2150.) But counsel argued that the woman on the phone could have been mistaken and further argued that such a person should not be believed over Ms. S.-P. (13RT 2150-2151.) Counsel noted that Ms. S.-P. had answered a questionnaire under penalty of perjury, while the woman from USF with whom the prosecutor had spoken on the phone had not. (13RT 2150.) Counsel again urged the court to bring Ms. S.-P. back into court to help resolve the conflict. (13RT 2150-2151.)

When the court again wondered what motive the USF representative would have had to lie, defense counsel again stated that the representative might have made a mistake. (13RT 2151.) The prosecutor discounted that as a possibility, explaining that because he had been "curious" about Ms. S.-P.'s dissertation in international multi-cultural education (and desired to read it to help him determine whether or not to eventually peremptorily challenge Ms. S.-P.) he had called the USF library "before the 20th of October" and spoke with a librarian who informed him that the dissertation was neither "on file" nor catalogued. (13RT 2151-2152.) The prosecutor asked the librarian if the librarian could search for the dissertation, and she agreed to do so. (13RT 2152.) According to the prosecutor, the librarian "spent several days looking for the dissertation," and called the prosecutor back on "the 20th of October" to tell him that Ms. S.-P. had not presented a dissertation. (13RT 2152.) It was then, on the librarian's suggestion, that the prosecutor, on October 21, 1992, called the administrative offices at USF to learn whether the absence of a dissertation from Ms. S.-P. meant she had no doctorate. He then, the prosecutor

continued, had the conversation with the administrative aide he had recounted for the court and defense counsel previously. (13RT 2152-2153.) The prosecutor added that the administrative aide he had spoken with "pulled" Ms. S.-P.'s file and informed him that there was no dissertation on file, that Ms. S.-P. had not finished her dissertation, and had not received a doctorate degree. (13RT 2152-2153.)

The trial court stated that in its view this meant Ms. S.-P. had "misrepresented her credentials here." (13RT 2153.) The prosecutor emphasized that, during her oral voir dire, Ms. S.-P. had not only asked the bailiff to address her as "doctor," but had neglected to correct the court each of the 26 times the court addressed her as "doctor." (13RT 2154.)

Defense counsel reiterated their request that the court refrain from ruling on the prosecutor's challenge unless and until Ms. S.-P. was afforded an opportunity, as a matter of due process, to respond to the prosecutor's information, especially since that information amounted to an impugning of Ms. S.-P.'s character. (13RT 2155-2156.) The court rejected that request, believing that Ms. S.-P. could not have been confused and noting that she never corrected the court whenever it addressed her as "doctor." (13RT 2155-2156.)

> Now, the problem with what's happened here is she's been caught misrepresenting her credentials pure and simple. That's pretty good, solid evidence that's been represented to the Court by Mr. Landswick, and I'll accept his representation.
>
> She's telling us that she is something she isn't. This casts some question on her veracity in my mind. How can you believe her answers to her other questions? She is playing games with the Court.

(13 RT 2156-2157.)

The court asked defense counsel to explain why Ms. S.-P. had written down on her questionnaire that she had a doctorate if that wasn't true. (13 RT 2157.) Counsel responded that it was apparently not uncommon for people to "pad" their resumes with unearned credentials to help themselves garner

employment. (13RT 2157.) Perhaps that is what Ms. S.-P. did here, continued defense counsel, and now Ms. S.-P. felt "compelled to maintain a certain consistency." (13RT 2157.) The court stated that if that were the case there would exist even more reason to question Ms. S.-P.'s credibility and character. (13RT 2157-2158.) Counsel responded that if Ms. S.-P. did in fact pad her credentials that did not necessarily mean her answers to questions regarding her "attitudes and opinions" were not true. (13RT 2158.) When the prosecutor repeated his position that Ms. S.-P. had committed perjury, the court stated:

> She has not been forthright with us in telling us what her credentials are. Maybe that's one little white lie, and how many others are there in that particular questionnaire. Now she's been caught in perpetrating -- I'm not going to say a fraud, but a misconception on this court and on everybody in this courtroom.
>
> How can you trust the rest of her answers? How do I know?

(13RT 2158.)

Defense counsel attempted to answer that question by once again requesting that the court permit Ms. S.-P. to return to court to respond to the prosecutor's representations. (13RT 2158.) The court denied the request:

> THE COURT: I'm not going to bring her back. It doesn't serve any useful purpose, number one, because she's already written down her answers.
>
> And, number two, it might be very embarrassing for this lady to come down here and be called on the fact that she misrepresented her credentials. I mean, I don't want to put her through this embarrassment.
>
> There is no question in my mind, based upon the representations from the University of San Francisco, from the people who are running the program, that she doesn't have a Ph.D. degree or doctor of education.
>
> So what am I going to bring her down and ask her for, did you lie to us, Ms. [S]-P[], and why did you do it? This isn't an inquisition.
>
> I'm going to grant the challenge for cause because, based upon her representation and her answers, the court has some questions about the veracity of the rest of her answers, because apparently she has not been

forthcoming with the court in answering these questions truthfully. (13RT 2159.)

Defense counsel made clear that the basis of their objection to the court's ruling included their belief that there did not exist a "cause basis" to grant the prosecutor's challenge to Ms. S.-P., and that the prosecutor had not brought the challenge in a timely fashion. (13RT 2161.) The court repeated its ruling as follows: "If she's telling us she's something that she isn't, I have some questions about the -- the -- the honesty of her answers." (13RT 2160.)

The following day, the court explained its ruling, noting that the record might give the impression that its excusal of Ms. S.-P. was premised on Code of Civil Procedure section 229. (14RT 2163.) That statutory provision contains the exhaustive list of causes that will support a challenge to a juror for implied bias. The court ruled that its discharge of Ms. S.-P. was premised on *Wainwright v. Witt, supra*, 469 U.S. 412.

> THE COURT: Before you bring him in, in reviewing yesterday's dailies with respect to the basis for the disqualification of Mrs. [S]-P[], I should say that that's based on *Wainwright vs. Witt*, because the impression is that it's under 229 CCP, and that's not correct.
>
> [DEFENSE COUNSEL]: I don't understand. She certainly qualified as a death qualified juror in what she said.
>
> THE COURT: It's a *Wainwright vs. Witt* challenge. That is the basis for the challenge as far as I'm concerned."

(14RT 2163.)

**B. No Error Occurred In The Discharge**

Appellant seemingly concedes that the prosecutor had a right to make a for-cause challenge to prospective juror Alean S.-P. at the time he did, given his belief that she had misrepresented her educational credentials during voir dire. Nor is appellant contending that the law did not authorize the trial court's inquiry into the matter and ultimate discharge of Ms. S.-P.

Appellant's concessions are appropriate. This Court has made clear: "A juror who conceals relevant facts or gives false answers during the voir dire examination . . . undermines the jury selection process and commits misconduct." (*In re Hitchings* (1993) 6 Cal.4th 97, 111; citations omitted.)

> Without truthful answers on voir dire, the unquestioned right to challenge a prospective juror for cause is rendered nugatory. Just as a trial court's improper *restriction* of voir dire can undermine a party's ability to determine whether a prospective juror falls within one of the statutory categories permitting a challenge for cause (see *People v. Wright* (1990) 52 Cal.3d 367, 419 [276 Cal.Rptr. 731, 802 P.2d 221]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1083-1084 [259 Cal.Rptr. 630, 774 P.2d 659]), a prospective juror's *false answers* on voir dire can also prevent the parties from intelligently exercising their statutory right to challenge a prospective juror for cause.
>
> Such false answers or concealment on voir dire also eviscerate a party's statutory right to exercise a peremptory challenge and remove a prospective juror the party believes cannot be fair and impartial. We have recognized that "the peremptory challenge is a critical safeguard of the right to a fair trial before an impartial jury." (*People v. Williams* (1981) 29 Cal.3d 392, 405 [174 Cal.Rptr. 317, 628 P.2d 869].) As explained by the Court of Appeal, "[j]uror concealment, regardless whether intentional, to questions bearing a substantial likelihood of uncovering a strong potential of juror bias, undermines the peremptory challenge process just as effectively as improper judicial restrictions upon the exercise of voir dire by trial counsel seeking knowledge to intelligently exercise peremptory challenges." (*People v. Diaz*[] [(1984)] 152 Cal.App.3d [926,] 932; see also [*People v.*] *Blackwell*[] [(1987)] 191 Cal.App.3d [925,] 931.)

(*In re Hitchings, supra*, 6 Cal.4th at pp. 111-112, original emphasis.)

In short, where the parties have examined the venirepersons concerning their qualifications, and the venirepersons do not answer truly, it is manifest that the parties are deprived of their right of challenge for cause, and deceived into foregoing their right of peremptory challenge. (*Id.* at p. 112.)

> "The prosecution, the defense and the trial court rely on the voir dire responses in making their respective decisions, and if potential jurors do not respond candidly the jury selection process is rendered meaningless. Falsehood, or deliberate concealment or nondisclosure of facts and

attitudes deprives both sides of the right to select an unbiased jury and erodes the basic integrity of the jury trial process."

(*In re Hitchings, supra*, 6 Cal.4th at p. 112, quoting *People v. Blackwell, supra*, 191 Cal.App.3d at p. 929.)

Here, whether Ms. S.-P. committed misconduct by misrepresenting her educational credentials was clearly a factual question for the trial court, and substantial evidence supports the trial court's determination that she did. The prosecutor set forth in detail what he had learned from *two* USF employees regarding Ms. S.-P.'s status there—that she had not earned the Ph.D. she had been claiming she earned—and trial courts may certainly accept as true representations given them by officers of the court. Even one of appellant's defense counsel stated that she had no reason not to accept the prosecutor's recitations as true. (13RT 2151.) The court determined that the two USF employees who spoke with the prosecutor would have had no reason to be untruthful. (13RT 2149, 2151.) The court also recalled Ms. S.-P.'s voir dire (13RT 2090), and reviewed her questionnaire (13RT 2191.) The court's ruling that Ms. S.-P. had misrepresented her credentials was peculiarly within the court's province, given that it could measure tones of voice, levels of confidence, and other valuable information that simply cannot be captured by a cold record. The court's determination that "we can't trust her" deserves deference.

Appellant responds with multiple arguments. First, he asserts that the trial court erred in not doing what he urged it to do below—allow Ms. S.-P. the opportunity to respond to the prosecutor's information regarding her credentials. (AOB 128-134.) In summary, appellant believes "the trial court's treatment of the matter . . . was wholly inadequate to constitute a reliable determination of the facts." (AOB 134.)

The People disagree. How the trial court handled the inquiry into the allegation of misconduct was a matter for its discretion, and the court did not

abuse that discretion in not re-opening the voir dire of Ms. S.-P. in order to address the prosecutor's assertions about her. As the trial court reasonably concluded, it would not have served a useful purpose to bring back Ms. S.-P. because she had "already written down her answers" and because the court did not want to expose her to possible embarrassment. (13RT 2159.) "This isn't an inquisition." (13RT 2159.) Appellant obviously feels differently, and other courts might have reasonably recalled Ms. S.-P. for further questioning. However, where "the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge." (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.)

Appellant next contends that there currently exists evidence that shows prospective juror Alean S.-P. was in fact a doctor at the time of jury selection in October 1992 (having earned her doctorate in May 1992), and thus either the prosecutor lied to the trial court, or relied on incorrect information given to him by the USF personnel he spoke with. (AOB 114-115, fn. 43.) Specifically, appellant cites to several exhibits appended to a Petition for a Writ of Habeas Corpus pending before this Court in another case (*In re Robert Young*, S115318), and asks this Court to take judicial notice of those exhibits.

> These documents demonstrate that [Alean S.-P.] had in fact presented her doctoral dissertation and was awarded the degree of Doctor of Education from the School of Education at the University of San Francisco on May 21, 1992, some five months before Mr. Landswick made his contrary representations to the trial court. Appellant requests that this Court take judicial notice of the fact of the pendency of Claim One in *In re Young, supra*, and of the lodging of Exhibits 127, 148, and 153 in support of that claim. (Evid. Code, §§ 452, subd. (d); 459.)

(AOB 115, fn. 43.)

The People oppose appellant's request for judicial notice. On appeal, the propriety of a trial court ruling is judged on the record before the trial court at

the time of the ruling at issue. (See generally, *People v. Hardy* (1992) 2 Cal.4th 86, 167.) Put differently, the general rule is that appellate courts should not grant judicial notice requests where, on examination of the entire record, it appears that the material at issue was not presented to and considered by the trial court in the first instance. (*People v. Preslie* (1977) 70 Cal.App.3d 486, 493.) Such a rule prevents the unfairness that flows from allowing one side to press a theory on appeal that the party did not raise in the trial court. Appellant can, of course, present this Court with the *Young* documents in his own Petition for Writ of Habeas Corpus; a proceeding in which parties are permitted to go outside the record.

Finally, appellant contends that the record does not support the excusal of Alean S.-P. for cause under *Wainwright v. Witt* because Ms. S.-P.'s questionnaire, and the oral answers she gave to questions asked her in voir dire, show that she was not substantially impaired in performing her duties as a juror in a capital case. (AOB 108, 124-127.) This argument also fails.

As discussed previously, under *Wainwright v. Witt, supra*, 469 U.S. 412, 424, and decisions of this Court, counsel in a capital case may challenge a prospective juror for cause based on the prospective juror's views regarding capital punishment if those views would "prevent or substantially impair" the performance of a juror's duties as defined by the trial court's instructions and the juror's oath. (*People v. Cunningham, supra*, 25 Cal.4th at p. 975.)

> A prospective juror is properly excused if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. In addition, [o]n appeal, we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous.

(*Ibid.*, citations and internal quotation marks omitted.)

It is true that the trial court invoked *Wainwright v. Witt* as the basis for his discharge of prospective juror Alean S.-P. (14RT 2163.) But appellant's attack on the court's ruling—his assertion that Ms.S.-P.'s questionnaire and voir dire answers do not show a potential juror who could not conscientiously consider both death and LWOP as possible punishments in this case—is both off-base and too narrow. It is the former because Ms. S.-P.'s answers regarding her views on the death penalty are of no moment given that the court repeatedly concluded that it did not believe them given the evidence of her mis-representation of her educational credentials. If that finding is reasonable, and we have established that it is, then it is no less binding on appeal than if Ms. S.-P. had given conflicting answers concerning her views on the death penalty. Appellant's focus is also too narrow here because context shows that notwithstanding its citation to *Wainwright v. Witt*, the court no longer believed anything Ms. S.-P. had told the parties, not just her views on the death penalty. "If she purports to be something she isn't, how can we lend any credence to the way she answered her other questions? That's the problem." (13RT 2092.) "She's telling us that she is something she isn't. This casts some question on her veracity in my mind. How can you believe her answers to her other questions? She is playing games with the Court." (13RT 2157.) "Now she's been caught in perpetrating -- I'm not going to say a fraud, but a misconception on this court and on everybody in this courtroom. [¶] How can you trust the rest of her answers? How do I know?" (13RT 2158.) "I'm going to grant the challenge for cause because, based upon her representation and her answers, the court has some questions about the veracity of the rest of her answers, because apparently she has not been forthcoming with the court in answering these questions truthfully." (13RT 2159.) The court clearly believed that Ms. S.-P. was substantially impaired in a universal sense, not just in a death-penalty sense.

When a trial court is faced with a prospective juror it does not believe on any of the matters put before him or her in a written questionnaire and at oral voir dire, the court can legitimately excuse the person for cause. Such a situation is tantamount to one where the prospective juror has displayed an "incapacity" that "satisfies the court that the person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party." (Code Civ. Proc., § 228, subd. (b).) Again, this was purely a discretionary call for the trial court, and it did not abuse that discretion.

### C. Any Error In The Discharge Was Harmless

With the exception of an erroneous exclusion of a prospective juror based on his or her views on the death penalty, an erroneous ruling on a "for cause" challenge is not automatically reversible but is subject to harmless-error analysis. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1247, overruled on another ground in *People v. Edwards* (1991) 54 Cal.3d 787, 835.) The question is whether the defendant's right to a fair and impartial jury was affected by the error. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965; *People v. Mickey, supra,* 54 Cal. 3d at p. 682.) The reason an erroneous exclusion of a prospective juror based on his or her views on the death penalty is treated differently is because the *Witt* standard is rooted in the constitutional right to an impartial jury (*Wainwright v. Witt, supra*, 469 U.S. at p. 416), and because the impartiality of the adjudicator goes to the very integrity of the legal system. The High Court has recognized that some constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error." (*Chapman v. California* (1967) 386 U.S. 18, 23 [87 S.Ct. 824, 17 L.Ed.2d 705].) The right to an impartial adjudicator, be it judge or jury, is such a right. (*Id.* at p. 23, fn. 8.) As the High Court stated in *Witherspoon v. Illinois, supra*, 391 U.S. 510,

a capital defendant's constitutional right not to be sentenced by a "tribunal organized to return a verdict of death" surely equates with a criminal defendant's right not to have his culpability determined by a "tribunal 'organized to convict.'" (*Id.* at p. 521; quoting *Fay v. New York* (1947) 332 U.S. 261, 294 [67 S.Ct. 1613, 91 L.Ed. 243].)

That's not this case. The excusal of Alean S.-P. was not about "impartiality." As previously demonstrated, what occurred here was not a discharge of a prospective juror solely on *Wainwright v. Witt* grounds, and appellant is wrong in contending otherwise. (AOB 108, 124-127.) Accordingly, appellant is not due the per se reversal he so vigorously requests if the trial court erred in excusing Alean S.-P. for cause. (AOB 134-137.) Again, *the trial court determined that it could not trust any of the answers Ms. S.-P. provided on her questionnaire and in voir dire*, not just her statements regarding the death penalty. Simply put, any error in the excusal of Ms. S.-P. is not tantamount to the formation of a tribunal "organized to convict" or "organized to return a verdict of death." Indeed, any error was clearly harmless as it did not affect appellant's right to a fair and impartial jury.

First, if the trial court erred, and Ms. S.-P. gave sincere and credible answers on her questionnaire and orally, she was a juror who could have imposed the death penalty. (10RT 1570.) Furthermore, as noted previously, party has no statutory or constitutional right to any particular juror. (*People v. Holt, supra*, 15 Cal.4th at p. 656.) And here, one can reasonably conclude that even if the trial court had not excused Ms. S.-P., the prosecutor would have peremptorily challenged her, given his doubt as to accuracy of the information she provided. A peremptorily challenge by the prosecutor would have been no less likely even if the court had asked Ms. S.-P. to return for further questioning about her credentials because notwithstanding any possible embarrassment for her, the prosecutor would have believed she would be angry with him for

raising the issue and would not have felt comfortable keeping her on the jury.

The trial court did not prejudicially err in granting the prosecutor's for-cause challenge to prospective juror Alean S.-P.

## IV.

## THE TRIAL COURT PROPERLY EXCUSED FIVE PROSPECTIVE JURORS FOR CAUSE

Relying primarily on *Witherspoon v. Illinois, supra*, 391 U.S. 510, and *Wainwright v. Witt, supra,* 469 U.S. 412, appellant contends that the trial court improperly excused, for cause, prospective jurors Barbara E., Alvin D., Paul M., Maria R., and Roberta F., alleging that the record did not "support the trial court's rulings." (AOB 138-225.) According to appellant, the trial court's "actions in excusing qualified prospective jurors violated appellant's rights to an impartial jury, a fair and reliable capital sentencing hearing, and due process under the Sixth, Eighth, Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution." (AOB 138.) Appellant wants the per se reversal of the death judgment that is required when a trial court erroneously excuses a prospective juror under *Wainwright v. Witt.* (AOB 225.)

Appellant's claims of error are without merit as the record contains substantial evidence supporting each of the court's for-cause rulings. Each of the five prospective jurors at issue was extensively questioned during voir dire about his or her views on the death penalty, and no additional questions were required or necessary under the law. Nor did the court leave any uncertainty regarding the reasons behind its rulings.

"The applicable law is settled. The trial court may excuse for cause a prospective juror whose views on the death penalty would prevent or substantially impair the performance of that juror's duties" in accordance with

the court's instructions and the juror's oath. (*People v. Smith* (2003) 30 Cal.4th 581, 601; *Wainwright v. Witt, supra*, 469 U.S. at p. 424.)

"The standard of review of the court's ruling regarding the prospective juror's views on the death penalty is essentially the same as the standard regarding other claims of bias. If the prospective juror's statements are conflicting or equivocal, the court's determination of the actual state of mind is binding. If the statements are consistent, the court's ruling will be upheld if supported by substantial evidence." (*People v. Schmeck* (2005) 37 Cal.4th 240, 261; *People v. Cunningham, supra*, 25 Cal.4th at p. 975; *People v. Bradford, supra*, 15 Cal.4th 1229, 1319; *People v. Mayfield* (1997) 14 Cal.4th 668, 727; see also *Wainwright v. Witt, supra*, 469 U.S. at pp. 425-426.)

### A. The Trial Court Properly Excused Prospective Juror Barbara E. For Cause

In her September 10, 1992 juror questionnaire, Barbara E. set forth that she was 60 years old and worked four days per week as a secretary with the Alameda Unified School District. (12CT 2704-2706.)[10/] In the section entitled "Attitudes Regarding The Death Penalty," Barbara E. indicated that she had "no feelings" about the death penalty (12CT 2719), and felt that it was a "just punishment for very severe crimes" (12CT 2720).

During voir dire, Barbara E. stated, in response to the very first question asked her, that after giving it "considerable thought," she could not vote to execute another human being. (9RT 1339.) She supplied as the reason that she did not have "a strong enough sense of [her]self." (9RT 1339.) The court posed some additional questions:

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10. The stipulated questionnaire contained 80 questions. A sample questionnaire is found at 2CT 399-418.

THE COURT: ---- Ms. E[], do you have it in you to vote to execute another human being? That's the issue.

MS. E[]: No.

THE COURT: Okay.

MS. E[]: No.

(9RT 1340.)

After further questioning, Barbara E. indicated that she did not "believe" she had any feelings about either the death penalty or life without the possibility of parole that might prevent her from making a choice between those two possible penalties in this case if she was in fact selected as a trial juror. (9RT 1345.) However, as to additional questions, Barbara E. responded as follows:

THE COURT: All right. Let's take it a step further, Ms. E[]. Let's assume that the jury in this case finds Mr. Tate guilty of murder of the first degree, the jury further finds that this murder was committed while Mr. Tate was burglarizing a residence and robbing the victim, and let's assume that the jury finds that the victim in this case was, in fact, a woman who is named in this information and that she was stabbed to death with a knife in her own home.

Okay?

MS. E[]: (Nods head.)

THE COURT: Let's assume that's what happened.

Would both of those penalties still be open to you?

MS. E[]: I don't feel that the death penalty would be open to me in that situation.

THE COURT: All right. You think that that's a case where you'd always vote for life without the possibility of parole?

MS. E[]: That would be my inclination.

THE COURT: All right.

MS. E[]: That would be my gut feeling.

THE COURT: Okay.

MS. E[]: At this point.

THE COURT: All right.

Challenge?

(9RT 1345-1346.)

After Prospective Juror Barbara E. indicated she "guess[ed]" she could vote for death or life in prison (9RT 1347-1349) and that both penalties were open to her (9RT 1348), the court asked her an additional question:

> THE COURT: Ms. E[], let's assume for a minute you were selected as a juror in this case, and let's say you were in the penalty phase. And let's say you and the other 12 jurors -- Based upon what you heard and the aggravating and mitigating circumstances, you came to the conclusion that Mr. Tate should die for what he did. Let's assume that's what happened.
>
> And you were the foreperson, and you had a verdict up there that says, "We, the jury in the above-entitled action, fix the penalty at death." And there's a space for your signature.
>
> Could you put your name down there, [Ms.] E[], bring that down to me, give that verdict to me, knowing that you're going to start him on his way to the gas chamber, or lethal injection, as the case may be? Could you do that?
>
> That's all we need do. Not will you, but could you?
>
> MS. E[]: Going with my gut feelings that are being stirred up by this--
>
> THE COURT: That's the point of the question.
>
> MS. E[]: -- and by what your question was there, I would say no.
>
> THE COURT: Okay. Fair enough.

(9RT 1356-1357.)

Thereafter, the trial court sustained the prosecution's challenge for-cause challenge to Barbara E.[11/] As noted by the trial court, "This is a judgment

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11. Appellant argues that the prosecutor's language directly requesting a challenge is not found in the record. (AOB 154). Respondent maintains that from a thorough reading of this portion of the record, it is evident that this was the court's understanding and the prosecutor's intent. (9RT 1338-1362.)

decision I have to make, so I'm going to state for the record that based upon the inconsistent answers of the potential juror, the long pauses before she answered, I feel -- and based upon her answers and observing the juror, I think this is a *Wainwright versus Witt* bonafide challenge . . . " (9RT 1361.)

There exists substantial evidence in the record to support the trial court's excusal of Barbara E. for cause. At one point she acknowledged that she did not have "that strong a sense of [her]self" to vote for the death penalty. (9RT 1339.) At another point, when specifically asked whether she had "it in [her] to vote to execute another human being," Barbara E. replied "no." (9RT 1340.) Although she later said she did "not believe" she had any feelings about either the death penalty or life without the possibility of parole that might preclude her from making a choice between them, she additionally stated, on a recitation of the charges in this case, that the death penalty would not be an option for her. (9RT 1346.) The record is thus clear that this prospective juror had an opposition to the death penalty that would have substantially impaired her ability to perform her duties as a juror.

Appellant cites *People v. Heard* (2003) 31 Cal.4th 946, 968, for the proposition that "in spite of invoking E[]'s demeanor during voir dire," the trial court's determination of bias is "not entitled to deference" because the trial court provided "nothing of substance" to which this Court can defer. (AOB 161.) *Heard* is distinguishable, however. There, this Court found reversible error from the dismissal of a prospective juror on *Witherspoon v. Witt* grounds because it found that there existed 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. (*Id.* at p. 964.) 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 the record demonstrates, Barbara E. not only gave equivocal and conflicting answers on her ability to impose the death penalty, but made other statements indicating that she could not, in good conscience, vote for death. (9RT 1339, 1356-1357.) Unlike *Heard*, here there exists substantial evidence that Barbara E.'s views on capital punishment would prevent or substantially impair the performance of her duties. The trial court properly excused her for cause. There is "substance" to which this Court can defer.

In short, to the extent there existed a conflict or contradiction in the prospective juror's voir dire answers, and appellant acknowledges that existence (AOB 157), the trial court resolved those differences adversely to appellant, of course, by granting the challenge. (*People v. Ayala* (2000) 24 Cal.4th 200, 275 [because the potential juror's answers were "inconsistent, but included testimony that she did not think herself capable of imposing the death penalty, we are bound by the trial court's determination that her candid self-assessment showed a substantially impaired ability to carry out her duty as a juror"]; *People v. Harrison* (2005) 35 Cal.4th 208, 227-228 [court properly excused juror who said that "maybe" she could not impose the death penalty and later said it would be "very, very difficult" but that she could "probably do it"].) Again, the trial court's determination as to Barbara E.'s true state of mind is supported by substantial evidence and thus is binding on this Court. (See *People v. Bradford, supra*, 15 Cal.4th at p. 1319-1321; *People v. Carpenter* (1997) 15 Cal.4th 312, 357.)

Appellant additionally contends that accepting a trial court's ruling on a prospective juror's true state of mind as binding violates his Eighth and Fourteenth Amendment rights to meaningful appellate review. (AOB 164-167, 180-181.) Specifically, appellant argues that this Court's appellate-review

practice of giving binding deference to a trial court's determination of a prospective juror's true state of mind when the prospective juror gives conflicting or ambiguous statements violates *Gray v. Mississippi* (1987) 481 U.S. 648 [107 S.Ct. 2045, 95 L.Ed.2d 622]. (AOB 164-165.) Respondent disagrees. A similar, if not identical argument was raised by the defendant and rejected by this Court in *People v. Schmeck*, *supra*, 37 Cal.4th 240, 263. This Court should reject appellant's argument for the same reasons it rejected the claim in *Schmeck* and *People v. Moon* (2005) 37 Cal.4th 1.

Specifically, *Gray v. Mississippi, supra,* is inapposite for two reasons. First, the issue in that case was not the standard for excusing a juror for cause, but whether the erroneous excusal of a juror for cause was subject to a harmless-error test. (481 U.S. 648 at p. 660.) Second, *Gray* posed a unique situation not present here. In *Gray*, the trial court denied several of the prosecutor's challenges for cause, leading the prosecutor to excuse those jurors by exercising peremptory challenges, eventually exhausting all of his allotted peremptory challenges. (*Id.* at p. 653.) The court, apparently arriving at the belated realization it had erroneously denied some of the prosecutor's for-cause challenges, thereafter excused a juror for cause who did not meet the standards for excusal under *Wainwright v. Witt, supra*, 469 U.S. 412. (481 U.S. at pp. 655, 657.) "Due to the trial judge's apparent ulterior motives in that case, deference to his decision obviously was not appropriate. Nothing in Gray suggests the high court intended to cast aside its view that 'deference must be paid to the trial judge who sees and hears the juror.' (*Wainwright v. Witt, supra*, at p. 426.)" (*People v. Moon, supra*, 37 Cal.4th at pp. 14–15.)

Here, the trial court had no ulterior motive in excusing Barbara E. Unlike the excused juror in *Gray*, Barbara E. indicated that she could not impose the death penalty. (9RT 1339-1340.)

## B. The Trial Court Properly Excused Prospective Juror Alvin D. For Cause

Prospective juror Alvin D., a 68-year-old African-American and a retired postal clerk, answered three of the six questions in the "Attitudes Regarding the Death Penalty" section of his jury questionnaire. (16CT 3979-3996.) In response to the question of whether his religious views would affect his service as a juror, Alvin D. responded "Yes," and then added that it was "difficult to say" how it would affect his service. (16CT 3986.) Next, when asked about his feelings about the punishment of life imprisonment without the possibility of parole, Alvin D. replied, "Cannot answer without hearing or knowing nature of case." (16CT 3995.) As to the third and final questionnaire inquiry that Alvin D. answered in this area, he stated that he was "not sure" how he would vote if California should have the issue of the death penalty on the ballot in the upcoming election. (16CT 3995.)

During voir dire, the trial court asked prospective juror Alvin D. if, in the abstract, he could ever vote to execute another human being. (14RT 2371.) Alvin D. replied that he did not know, and that he would have to engage in deep introspection to fully answer that question. (14RT 2371.) Alvin D. volunteered that the question brought to mind the fact that his daughter had been killed in an automobile accident and that the responsible party received only a very lenient sentence after extremely prolonged legal proceedings. (14RT 2371–2371.) Alvin D. felt that he had been "shabbily treated" by the criminal justice system. (14RT 2372.) When the trial court asked Alvin D. if he thought this personal experience might affect his ability to be impartial in this case, he ambiguously responded, "I -- I don't know if I can do that, Your Honor." (14RT 2372.)

Defense counsel asked Alvin D. if he was implying that because of some "negative experiences" with the criminal justice system, he would be inclined

to vote for the "worst penalty," in this case, "the death penalty." (14RT 2374.) Alvin D. responded "No," and that, to the contrary, he would "be inclined to vote for life without possibility of parole." (14RT 2374.) When asked by defense why that would be, Alvin D. replied, "Well, when I look at this young man, I look at my son, also. I have a son 35 years old, very quiet, very unassuming. He doesn't make a lot of noise. That sometimes tells me that if he was pushed into a corner where he cannot retreat any further, he may do something that he would regret." (14RT 2374.)

Alvin D. clarified that the reason he "allud[ed]" to his son was based on "someone acting to determine whether he should live or die." (14RT 2376.) The court asked Alvin D. if that would "affect his ability to be objective with respect to deciding" between the two possible penalties in a capital case, and Alvin D. replied, "Well, at the moment, yes." Defense counsel then posed what the court referred to as "leading questions," and Alvin D. agreed he could follow the judge's instructions. (14RT 2377.) Alvin D. then wavered and agreed that the influence of his son was leading him to wonder "whether or not [he] could consider the death penalty" at all. (14RT 2377.)

After consideration, the trial court upheld the prosecution's for-cause challenge (14RT 2378) to prospective juror Alvin D., ruling:

> I think this is a case of *Wainwright versus Witt*, notwithstanding his last answer that was a result of a bunch of leading questions by defense counsel.
>
> The Court observed the juror's demeanor, the Court observed the way the juror answered these questions from the very beginning with respect to the system, and I'm not satisfied that he would be the type of juror that will pass under *Wainwright versus Witt*.
>
> So for that reason, over the defense's vigorous objection, I'm excusing Mr. D[].

(14RT 2379.)

The trial court did not err in excusing prospective juror Alvin D. for cause. As the foregoing discussion established, substantial evidence is present

in the questionnaire and voir dire to support the trial court's ruling. Alvin D. stated that his religious views would affect his services as a juror. (16CT 3986.) He also asserted that he did not know if he could "ever vote" to execute another human being. (14RT 2371.) Alvin D. acknowledged that he was emotionally influenced by his daughter's death in a car accident and believed the experience might affect his ability to be impartial in this case. (14RT 2372.) Alvin D. further stated that he might well be inclined not to consider the death penalty because looking at appellant caused him to think of his own son and the possibility that someone could be given the decision whether he (the son) should live or die. (14RT 2377.) With those thoughts in mind Alvin D. told the court his ability to be objective would be impacted. (14RT 2376.)

As noted earlier, to the extent this prospective juror gave conflicting answers the trial court resolved those differences adversely to appellant by granting the challenge. And, because the trial court's determination as to Alvin D.'s true state of mind is supported by substantial evidence, it is binding on this Court. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1114-1115 [while some answers showed a willingness on the part of the prospective juror to follow the law and the court's instruction, other answers furnished substantial evidence of the prospective juror's inability to consider the death penalty]; see also *People v. Bradford, supra*, 15 Cal. 4th at p. 1319-21.)

### C. The Trial Court Properly Excused Prospective Juror Paul M. For Cause

Prospective Juror Paul M. was 48 years old. (20CT 5093.) In his juror questionnaire, regarding his feelings about the death penalty, Paul M. stated that he had to "think about it more" and that he had no "significant" feelings "at the moment." (20CT 5108.) He also had no feelings about LWOP and was "not

sure" how he would vote should the issue of the death penalty appear on the ballot in an upcoming election. (20CT 5109.)

During voir dire, Paul M. stated that he could vote to execute another human being in "an appropriate case." (16RT 2786.) After additional questioning, and an explanation of mitigating and aggravating circumstances, Paul M. stated, "it would be something that I would do with reluctance, but it is something which I would do." (16RT 2787-2790.) After the trial court posed a hypothetical based on the allegations in this case (16RT 2791), it asked Paul M., "Now if that's what happened, in your mind are both of these penalties still open to you, or have you eliminated one of these penalties?" Paul M. replied that the two options were open to him, and he confirmed that he would be open to the aggravating and mitigating arguments. (16RT 2793-2794.) He also stated that he could follow the court's instructions with respect to the "weighing process." (16RT 2794-2795.)

During the prosecutor's questions, Paul M. raised the issue of rehabilitation. (16RT 2798.) The court responded:

> THE COURT: Mr. M[], I want to disabuse you of that notion.
>
> Some people think we are talking about rehabilitation here. Because of the draconian nature of these two penalties, the death penalty or life without parole, we are not talking about rehabilitating anybody. This is the end result, period. So we are not trying to -- Nobody will be arguing to you about rehabilitating the defendant because we are only talking about which is the appropriate penalty. That's it.
>
> You see what I'm saying?
>
> MR. M[]: Somewhere in the course of 48 years, I've acquired the notion that the court system in the United States is set up in order to administer rehabilitation in part.
>
> THE COURT: That's correct.
>
> MR. M[]: If not largely.
>
> THE COURT: Except that in this case, since it's a capital case and we only give you two options, either the death penalty or life without

parole, we're talking about the ultimate sanctions that our society can provide, either the death penalty or you spend the rest of your life in prison.

So nobody is talking here about rehabilitating anybody. We are talking about penalties pure and simple, because he's never going to get out. There is no reason to prepare him to get back into society.

You see what I'm saying?

There is no -- There is no reason to teach him a trade, to teach him to be a printer, unless he is going to be printing books in prison for the rest of his life.

You see what I'm saying?

Does that make any difference to you?

MR. M[]: I think I understand it.

(16RT 2798–2800.)

When asked by the prosecutor to explain and elaborate on previous answers, including those in his juror questionnaire, Paul M. stated that his feelings on the death penalty were "ambivalent." (16RT 2802.) He stated that he found himself in an "unfortunate situation" by having to comply with the law, because "by law, in the state of California, capital punishment exists." (16RT 2802.) He stated, "I must comply with that." (16RT 2802.) Paul M. indicated that if he came to the conclusion that the death penalty was warranted, he could select it. (16RT 2803.)

The prosecutor asked Paul M. if, after sitting through voir dire for 30 minutes, he had thought further about the death penalty issue. (16RT 2811.) Paul M. replied that he could think about it "many times and never reach a permanent sort of conclusion." (16RT 2811.) Paul M. stated, "How shall I say? This whole thing is a social dilemma." (16RT 2812.) Yet Paul M. confirmed that if he became the foreman that he could "sign the verdict" imposing the penalty of death. (16RT 2812.)

During defense counsel's voir dire of Paul M. (16RT 2812), he (Paul M.) posed some questions:

MR. M[]: May I ask a question, please?

THE COURT: Certainly.

MR. M[]: The option of imprisonment for life, that is an option?

THE COURT: Correct.

MR. M[]: Is it guaranteed that it would be?

[THE PROSECUTOR]: You must assume that.

MR. M[]: It would be for life?

THE COURT: Absolutely.

[THE PROSECUTOR]: You must assume that for the ---

THE COURT: Mr. [Prosecutor], can I answer his questions? He is directing them to me.

The answer is "absolutely." He doesn't get out ever again.

MR. M[]: I may be wasting the court's time.

THE COURT: Well, tell us if you are.

MR. M[]: I -- Perhaps that is the case.

THE COURT: It's getting contentious in here, as you can see.

MR. M[]: It is perhaps the case that I'm wasting the Court's time. There are matters on which people cannot decide. This may be one of them. I can feel the whole thing is -- It's if there is the option of life in prison without the possibility of release that is perhaps insurmountably the way to go.

THE COURT: All right. And are you telling me --

MR. M[]: In which case I'm afraid I may be wasting the Court's time.

THE COURT: All right. Then I'm not trying to put words in your mouth, Mr. M[], but then I have to make a judgment decision here because of the gravity of this case, whether I excuse you or not.

Are you telling us in so many words that if you're satisfied that this man would spend the rest of his life in prison that the death penalty would not be an option for you in this case?

MR. M[]: I am saying that I'm very confused.

THE COURT: Okay. And would you have some difficulty in making this decision?

MR. M[]: I sure would.

THE COURT: All right.

(16RT 2815-2817.)

The prosecutor challenged Paul M. for cause and defense counsel objected. (16RT 2817.) The court granted the challenge, stating "I'm satisfied this is a *Wainwright versus Witt* failure." (16RT 2817.) The court continued, "And it was like pulling teeth through the whole voir dire, and I'm satisfied under *Wainwright versus Witt* he is not qualified." (16RT 2818.)

Contrary to appellant's claim (AOB 182-195), the trial court did not err in excusing prospective juror Paul M. for cause. Substantial evidence supports the ruling.

As previously noted, a prospective juror may be excluded for cause if the juror's views on capital punishment would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath. (*People v. Stewart* (2004) 33 Cal.4th 425, 440-441.) If a juror's statements are equivocal, ambiguous, or conflicting, the trial court's determination of the juror's state of mind is binding on appeal. (*Id.* at p. 441; *People v. Jones* (2003) 29 Cal.4th 1229, 1247.)

In this case, it is true that Paul M. initially maintained that in an appropriate case he could consider the death penalty, weigh the mitigating and aggravating factors, and reluctantly impose the death penalty. (16RT 2802.) However, as time passed, it became evident that his true state of mind was that he could not consider the death penalty at all and would not impose it. This became most apparent when he advised the trial judge that he was "wasting the Court's time." (16RT 2816.) Paul M. also admitted that if there was the option of "life in prison without the possibility of parole," then that would probably be

"insurmountably the way to go." (16RT 2816.) Again, although Paul M. initially stated that he could impose the death penalty, upon further questioning he acknowledged that he was not certain about that. (16RT 2816-2817.)

Given Paul M.'s vacillations and contradictions, the trial court's conclusion as to his true state of mind—that he was unfit to serve as a juror—must be upheld since it is supported by substantial evidence. (*People v. Griffin* (2004) 33 Cal.4th 536, 558-561 [although at some point, each prospective juror "may have stated or implied that she would perform her duties as a juror," this did not prevent the trial court from finding, on the entire record, that each nevertheless held views that substantially impaired her ability to serve]; *People v. Welch* (1999) 20 Cal.4th 701, 747 [court permissibly excused juror who said he did not know whether he could ever see himself feeling that death was the appropriate sentence].)

Appellant seemingly concedes that Paul M.'s statements regarding his views on the death penalty were contradictory or equivocal. (AOB 197.) Under this Court's precedents the trial court did not err in granting the prosecutor's for-cause challenge to Paul M.

We next address appellant's claim that the trial court foreclosed additional questioning of prospective juror Paul M.

The record reflects that when the prosecutor lodged his for-cause challenge to Paul M. defense counsel stated, "I'd like to object. I'd like to go ahead and ask a few more questions." (16RT 2817.) The following then occurred:

THE COURT: No more questions.

[Defense Counsel]: No more questions?

THE COURT: I'm satisfied this is a *Wainwright v. Witt* failure.

(16RT 2817.)

Appellant claims that the trial court erred in "restricting" his voir dire of Paul M. (AOB 196-198.) Appellant complains that his counsel "succeeded in asking but two questions" of Paul M. before the court "took over," and also complains that the court "completely shut off" defense counsel from attempting to "rehabilitate" Paul M. and "demonstrating that he was qualified." (AOB 196-198.) Appellant concludes that the trial court's conduct at the voir dire of Paul M. "intolerably distorted the death-qualification process and thereby prejudicially violated appellant's Sixth, Eighth, and Fourteenth Amendment rights." (AOB 197-198.)

The record does not reflect appellant ever objecting on the ground that the trial court "took over" the defense voir dire of Paul M. (16RT 2812-2817), and it is unclear whether the objection appellant did make (16RT 2817), was a specific objection that he was being improperly prevented from attempting to rehabilitate Paul M. In any event, assuming, without conceding, that the claims are preserved for appeal, they are meritless.

As appellant concedes, this Court has stated that a trial court has discretion to limit rehabilitation voir dire. (AOB 196, citing *People v. Mattson* (1990) 50 Cal.3d 826, 895.) Here, the trial court reasonably ended the voir dire of Paul M. when it did because any further questioning of him would have been futile. Indeed, Paul M.'s statements to the trial court that he was "wasting the court's time" (16RT 2816), and that if given the option of choosing life without the possibility of parole, this would "insurmountably" be the way he would "go" (16RT 2816), seemed to directly and categorically answer any question concerning whether he was willing to weigh aggravating and mitigating factors or otherwise perform his duties as a juror in this case. Appellant forgets that the court had Paul M. before it and could judge his credibility and demeanor and other factors not evident from the cold record ("it was like pulling teeth throughout the whole voir dire" (16RT 2818)) and could reasonably determine

Paul M.'s true state of mind.[12/]

### D. The Trial Court Properly Excused Prospective Juror Maria R. For Cause

In her questionnaire, Maria R. stated she was a 29-year-old Quality Control Specialist who was married and had three children. (14CT 3331–3332.) In the death penalty qualification portion of the questionnaire, in pertinent part, Maria R. stated that she did not support the death penalty (14CT 3346–3347.)

During voir dire, Maria R. reiterated that she was "against" the death penalty. (6RT 845.) After being given a definition of the term "execute," Maria R. stated that she could not vote to execute someone. (6RT 846.) Subsequently, although Maria R. again indicated she was opposed to the death penalty and stated she was not "really sure" she could ever vote for the death penalty, she replied that she "guessed" it would "depend on what the person did." (6RT 846.) Maria R. also acknowledged that she was "confused." (6RT 846.)

The trial court asked Maria R., "Could you vote to have somebody go to the gas chamber to be executed? Could you do something like that?" (6RT 846.) Maria R. responded, "no." (6RT 846.) Maria R. then vacillated as she contemplated someone like Charlie Manson, and "guessed" that she could vote to execute Manson. (6RT 846-847.) When confronted with the fact that this case was not about Charlie Manson, she confirmed that she was "opposed to the death penalty." (6RT 847.) When questioned, then, how she could vote to execute Charlie Manson if she was opposed to the death penalty, Maria R.

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12. None of the United States Supreme Court cases cited by appellant hold or suggest that the federal Constitution guarantees defendants the right to ask "rehabilitative" questions of prospective jurors without the trial court having discretion to intervene.

replied only that she "guessed" she could. (6RT 847-848.)

Realizing that Maria R. was giving conflicting and confusing responses, the trial court attempted to definitively determine her position on the death penalty. The court reminded Maria R. that she had put in her questionnaire that she was "opposed to the death penalty," and she confirmed this was accurate. (6RT 849.) The court then explained to Maria R. that given her response it was the court's understanding that she "could not vote to execute anybody." (6RT 849.) Maria R. confirmed that. (6RT 849.) When asked to explain her conflicting responses, Maria R. replied that she could not explain them, but that it was her belief that she did not "think anybody should be executed to the death penalty." (6RT 849.)

Defense counsel followed up with some additional questions. (6RT 850–851.) Counsel asked Maria R. if there were "some crimes" and "some murders" where she could vote for the death penalty. (6RT 851.) Counsel posed the hypothetical that a jury "convicted a man of breaking into a woman's house" and "robbing a woman," and "stabbing that woman to death," and asked Maria R. if she could consider both life without the possibility of parole and the death penalty under those circumstances. Maria R. responded that she would only consider LWOP. (6RT 851-852.) Maria R. subsequently confirmed that the death penalty would not be an option under counsel's hypothetical. (6RT 853.)

The trial court concluded:

> [Defense counsel], this is a failure under *Wainwright versus Witt.* In looking at the potential juror, listening to her responses, I am satisfied that she's a *Wainwright versus Witt* failure."

(6RT 853.)

The trial court therefore dismissed Maria R. for cause on the prosecutor's motion. (6RT 853.)

The court did not err. To again reiterate the law, a prospective juror may be excused for cause if the juror's views on capital punishment would prevent or substantially impair the performance of the juror's duties as defined by the court's instructions and the juror's oath. (*People v. Stewart, supra*, 33 Cal.4th at pp. 440-441.) If a juror's statements are equivocal, ambiguous, or conflicting, the trial court's determination of the juror's state of mind is binding on appeal. (*Id.* at p. 441; *People v. Jones, supra*, 29 Cal.4th at p. 1247.) Here, although prospective juror Maria R. indicated that she could vote to impose the death penalty on the likes of a Charlie Manson, she clearly had considerable reservations about the death penalty. Indeed Maria R. contradicted even her Manson answer when she told the court that she could not vote to execute another human being. (6RT 846.) Moreover, when the factual circumstances of this case were presented to her as a hypothetical, Maria R. stated she could only vote for LWOP. (6RT 851–852.)

Here, the trial court properly excused Maria R. based on her views regarding the death penalty. Given Maria R.'s vacillations and contradictions, the trial court's conclusion on her true state of mind—that she was unfit to serve as a juror—is binding and due affirmance because it is supported by substantial evidence. (*People v. Harrison, supra*, 35 Cal.4th at pp. 227-228; *People v. Griffin, supra,* 33 Cal.4th 536 at pp. 558-561; *People v. Ayala, supra*, 24 Cal.4th at p. 275.)

### E. The Trial Court Properly Excused Prospective Juror Roberta F. For Cause

In her October 5, 1992 questionnaire, Roberta F. stated she was a 56-year-old divorced woman who was employed full-time as a clerk for Tharco. (18CT 4575.)

In the death penalty qualification section of the questionnaire, Roberta F. did not answer the first four questions. (18CT 4588-4589.) As to the fifth question, Roberta F. responded that she did not belong to an organization that was either for or against the death penalty. (18CT 4589.) As to the sixth question, Roberta F. was "not sure" how she would vote if the issue of whether California should have a death penalty were to appear on the next ballot. (18CT 4589.)

During voir dire Roberta F. indicated that she "honestly" did "not know" if she could vote to execute another human being. (12RT 1916.) The court posed some additional questions:

> THE COURT: Mrs. F[], if you were selected as a trial juror in this case, we would be calling upon you to make a decision between two possible penalties, either the death penalty or life without the possibility of parole. And if you were selected as a juror, the district attorney here, if we got to the penalty phase, would be spending two or three weeks trying to persuade you to execute Mr. Tate.
>
> If you felt that that was the appropriate penalty in this case, could you ever vote to execute-- Could you vote for the death penalty in this case if you felt it was the appropriate penalty?
>
> MS. F[]: That I can't honestly answer because I don't know whether I could or not.

(12RT 1916.)

The trial court next asked Roberta F. what else she might need to know in order to make that decision, and Roberta F. replied, "I don't know." (12RT 1916-1917.) Subsequently, Roberta F. stated that she had "misunderstood the previous question" and stated she "could make a decision between one or the other." (12RT 1917-1918.) The court followed up again with a question, asking, "Now let me ask you this. If you felt that the death penalty was the appropriate penalty in this case, could you vote for the death penalty?" (12RT 1918.) Roberta F. responded, "That's the question that I do not know . . . down deep whether I can." (12RT 1918.)

Roberta F. then stated that after she heard the evidence, and if she felt that the death penalty was an appropriate penalty, then she "thought" she could vote for it. (12RT 1919.) After more explanation regarding the two penalties, Roberta F. stated that she thought that she could pick either penalty. (12RT 1921-1924.) Roberta F. confirmed that both penalties would be open to her after the court set forth the charges against appellant in this case. (12RT 1924.)

The prosecutor then proceeded to conduct his voir dire of Roberta F. (12RT 1927.) Roberta F. explained that she did not answer the pertinent questions on the juror questionnaire because she was "not sure of the answer," and "had to get through [her] mind what [she] thought." (12RT 1927.) She stated that she concluded that she thought that she could work with the two penalties. (12RT 1927.) The prosecutor asked, " [O]kay. If -- if you're capable of selecting either the death penalty or life without the possibility of parole, you must feel that the death penalty accomplishes something. Do you feel that way, that we should have the death penalty?" (12RT 1913.) Roberta F. did not answer the question. When the judge asked her to answer, she stated: "I'm trying to, Your Honor. And it's difficult. I don't know. I've -- I really don't." (12RT 1931.)

When Roberta F. was asked by the trial court if this was a bit too much for her, she responded, "It's a little mind boggling yes." (12RT 1932.) When Roberta F. was asked if she was ". . . up to sitting as a juror in a case like this" because there were "going to be hard choices to make here," she replied, "I don't know whether I could do it to be honest." (12RT 1932.) Once again Roberta F. was asked if she thought she could decide between the two possible penalties in this case, and she replied, "I think I could do it if I knew the circumstances and everything that goes with it." (12RT 1932.) Roberta F. was asked, "If you could pick the death penalty in this case as a possible penalty, in your mind what do you think the death penalty accomplishes by executing

somebody? Or what -- what do we get? What good does society get out of that?" Roberta F. replied, "Really nothing." (12RT 1933.) Roberta F. indicated that she believed LWOP to be a more severe penalty than death because "that person would have to sit and think about what he has done." (12RT 1933-1934.)

The trial court posed this scenario to Roberta F.: that she was selected foreperson, and that she and "the other eleven jurors in this case decided that for what Mr. Tate did, he should be executed." The verdict form set the penalty at death, the court continued; he asked Roberta F. whether she could place her name on it. Roberta F. responded, "no." (12RT 1934-1936.)

The prosecutor requested a challenge for cause. (12RT 1935.) Defense counsel requested and received permission to ask further questions, and inquired of Roberta F., "are you telling us that when push came to shove, you would not be able to vote for the death penalty regardless of whether you thought it was warranted or not?" Roberta F. answered, "Yes." (12RT 1935-1936.) To a follow-up question she replied that if it was "warranted," she could vote for the death penalty. (12RT 1935-1936.) When the court questioned Roberta F. about those two inconsistent responses, she stated, "Oh, yeah I just told -- No, I couldn't" and " . . . yes, I could." (12RT 1936.) Roberta F. reiterated that she did not think that as the foreperson, she could sign the verdict form. (12RT 1936.)

Outside of the prospective juror's presence, the court made the following determination:

> First of all, after every question there was a long, long pause while she groped for an answer. She gave inconsistent answers to the questions. She seemed totally confused by the process. She would say one thing to defense counsel, one thing to the Judge, another thing to the district attorney.
>
> I'm of the opinion in examining her demeanor as she sat there in the jury box answering these questions that she would be unable to

effectively deliberate in this case and to be a contributor to the deliberative process. I think she is totally confused, and I don't think she could make up her mind one way or the other.

And so based on *Wainwright versus Witt* and for the reasons stated, I've decided not to belabor the point. I've given her plenty of time to make the position clear, and from the get go in this voir dire process she's been inconsistent. So I don't know where she stands.

(12RT 1937-1938.)

Defense counsel objected on the ground that the trial court had not given them an opportunity to ask enough questions. (12RT 1938.) The court overruled the objection. (12RT 1939.) The court confirmed that it was satisfied that under the law Roberta F. was "not a competent juror to sit in this kind of case." (12RT 1939.) The court reiterated that it was not on the basis of one question that it was making its ruling. It then stated the following:

It was the way she answered all the questions, and it was the way she comported herself in response to the questions. And number two, I'm not blind nor am I deaf. And I can say for the record as the Judge trying this case that in response to the questions posed by me, in response to the questions posed by the district attorney, and in response to the questions that I asked her in return, there were long, long pauses where she was attempting to grasp for an idea in order to respond to our questions.

(12RT 1940.)

The court continued,

And having her - - it's a total waste of time. She doesn't know what she wants to do or what she can do. She is totally inconsistent. She is confused. She thinks long, long periods of time before she answers questions. She tells me one thing. She tells the PD something else. She goes back and forth. It's like chasing your tail. I'm not even sure she knows what she stands for.

(12RT 1941.)

In contending that the trial court erred by excusing prospective juror Roberta F. for cause, appellant contends that the voir dire was faulty and confusing and that Roberta F. expressed no opposition to the death penalty.

(AOB 215-216.) Not so. The record contains substantial evidence supporting the trial court's conclusion that Roberta F.'s views on capital punishment would prevent or substantially impair the performance of her duties as a juror. In other words, the court's excusal was proper.

Roberta F.'s responses were unclear and confusing. She maintained, on the one hand, that she could not, or did not know, if she could impose the death penalty. (12RT 1916-1918, 1932.) At the same time, she also asserted that she could impose the death penalty. (12RT 1918-1919, 1924-1928.) However, Roberta F. was clear that if the responsibility fell to her as the jury foreperson to sign her name to a death verdict she could not do it. (12RT 1935-1936.) We once again repeat that where a prospective juror's statements are equivocal, ambiguous, or conflicting, the trial court's determination of the person's true state of mind is binding on appeal. (*People v. Harrison, supra*, 35 Cal.4th at p. 227; *People v. Stewart, supra*, 33 Cal.4th at p. 441; *People v. Jones, supra*, 29 Cal.4th at p. 1247.) In this case, the trial court resolved the conflict and determined Roberta F. could not personally impose the death penalty. Put differently, given Roberta F.'s vacillations and self-contradictions, as well as her apparent moral opposition to the death penalty, the trial court's conclusion that she was unfit as a juror must be upheld since it is supported by substantial evidence. (*People v. Harrison, supra*, 35 Cal.4th at p. 227; *People v. Stewart, supra*, 33 Cal.4th at p. 441; *People v. Jones, supra*, 29 Cal.4th at p. 1247.)

Appellant argues that this Court's decision in *People v. Stewart, supra,* 33 Cal.4th 425, indicates that the trial court erred in dismissing Roberta F. (AOB 220.) However, *Stewart* does not assist appellant. In *Stewart*, the trial court granted the prosecutor's challenges for cause against certain potential jurors based solely on their responses on the jury questionnaire. (*People v. Stewart, supra*, 33 Cal.4th at pp. 444-445.) This Court held that the trial court erred in excluding the prospective jurors based solely on their questionnaire

responses. (*Id.* at pp. 445, 451-452.) In so holding, this Court noted that the responses on the jury questionnaires did not give the trial court sufficient information to ascertain whether the potential jurors' views would prevent or substantially impair the performance of their duties. (*Id.* at pp. 445-449.) Although the questionnaire responses preliminarily indicated that each potential juror might be challenged for cause, this could not be ascertained without any follow-up questioning; during this examination, the trial court could have further explained the role of jurors and probed whether each of the potential jurors could impose the death penalty. (*Id.* at p. 449.)

In the case at bar, the trial court did allow Roberta F. to be extensively questioned by counsel and posed some questions itself. (12RT 1915-1937.) During this questioning, Roberta F. gave statements indicating she could not fulfill her role as a juror in this case because she did not know if she could personally vote for the death penalty and could not sign a verdict form which imposed the death penalty. (12RT 1935–1936.) As the *Stewart* court noted, the trial court's determination that a prospective juror's views would substantially impair his or her performance as a juror in the case is entitled to deference. (*People v. Stewart, supra*, 33 Cal. 4th at p. 451.) That is the case here, as we have demonstrated with respect to Roberta F. and the other four prospective jurors at issue. Appellant's claims that the trial court erred in excusing those jurors and thus violated various of his state and federal constitutional rights fails in all regards.

## V.

## THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT AT EITHER THE GUILT OR PENALTY PHASE AND DID NOT OTHERWISE DEPRIVE APPELLANT OF DUE PROCESS OR FAIR GUILT AND PENALTY TRIALS

Appellant contends that the prosecutor committed misconduct in numerous ways and on several occasions at the guilt phase. (AOB 226, 228-252.) Appellant additionally argues that with respect to the prosecutor's misconduct, he (the prosecutor), "outdid himself at the penalty phase." (AOB 226, 257-272.) Appellant not only claims that the prosecutor violated state law and the federal constitution in very specific ways, but, generally speaking, appellant asserts, the prosecutor engaged in conduct so egregious that it infected the trial with such unfairness as to constitute a denial of due process. (AOB 226-228, 230, 239, 240-248, 252, 270.) Appellant lastly asserts that he was prejudiced by the misconduct, considered "either singly or in combination with one another and the other errors which occurred in this case," under any standard of harmless-error review, and therefore reversal of both the guilt and penalty judgments is required. (AOB 226, 228, 252-256, 272-275.)

Appellant is wrong. First, many of appellant's claims are not cognizable on appeal. Second, the record does not support many of appellant's claims that the prosecutor engaged in misconduct. Appellant's specifics often take the prosecutor's statements and arguments out of context or mischaracterize them. Third, even if appellant could demonstrate that the prosecutor committed misconduct in the manner alleged, he has failed to establish prejudice. Hence, any such misconduct was harmless.

The law in this area is well settled. A prosecutor has a duty to not only seek conviction, but to seek justice as well. Although prosecutors may strike hard blows at the defense, they must strike fair blows, not foul ones. (*Berger*

*v. United States* (1935) 295 U.S. 78, 88 [55 S.Ct. 629, 79 L.Ed. 1314].) "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." (*Brady v. Maryland* (1963) 373 U.S. 83, 87 [83 S.Ct. 1194, 10 L.Ed.2d 215].)

Prosecutors commit state-law misconduct when they engage in deceptive or reprehensible attempts to persuade either the court or the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) Prosecutors commit misconduct which violates the federal Constitution when they not only violate specific constitutional guarantees offered defendants, but also when they engage in a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [94 S.Ct. 1868, 40 L.Ed. 431]; *People v. Padilla* (1995) 11 Cal.4th 891, 939.)

Prosecutorial misconduct under state law at the guilt phase is cause for reversal only when it is reasonably probable that a result more favorable to the defendant would have occurred had the prosecutor not committed the misconduct. (*People v. Barnett, supra,* 17 Cal.4th at p. 1133; *People v. Bolton* (1979) 23 Cal.3d 208, 214; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Misconduct at the guilt phase that infringes on a defendant's constitutional rights mandates reversal unless the reviewing court determines beyond a reasonable doubt that the misconduct did not affect the jury's verdict. (*Chapman v. California, supra*, 386 U.S. 18, 23-24.) Misconduct at the penalty phase is cause for reversal unless there is no reasonable possibility that the jury would have reached a more favorable penalty verdict for the defendant absent the misconduct. (*People v. Sandoval* (1992) 4 Cal.4th 155, 194; citing *People v. Brown* (1988) 46 Cal.3d 432, 448-449.) This "reasonable possibility" test is the same for penalty-phase misconduct which violates state law and penalty-

phase misconduct which infringes on federal Constitution. (*People v. Ashmus, supra*, 54 Cal.3d 932, 990 ["*Brown's* 'reasonable possibility' standard and *Chapman's* 'reasonable doubt' test . . . are the same in substance and effect."].)

Few principles of appellate review are more well established than the one which declares that, except in extraordinary circumstances, allegations of prosecutorial misconduct are cognizable on appeal only if at the time of trial defense counsel made a timely and specific objection to the prosecutor's alleged misconduct and requested an admonition regarding it. (*People v. Frye* (1998) 18 Cal.4th 894, 969-970; *People v. Montiel* (1993) 5 Cal.4th 877, 914-915.) There is no exception to the waiver rule for capital cases. (*People v. Clair* (1992) 2 Cal.4th 629, 662.) Nor is there any "close case" exception to the waiver rule. (*People v. Cain* (1995) 10 Cal.4th 1, 48.)

### A. The Prosecutor Did Not Commit Prejudicial Misconduct At The Guilt Phase

As noted, appellant contends that the prosecutor committed a variety of acts of misconduct during the guilt phase, including during opening statement (commenting on appellant's invocation of his Fourth Amendment rights), during his direct examination of appellant's aunt, Mamie Jackson (character assassination of appellant), during his cross-examination of appellant (*Doyle* error), and during closing argument (disparaging defense counsel and exploiting the *Doyle* error). (AOB 228, 234, 240.) Many of these allegations of prejudicial misconduct are forfeited and all are without merit.

#### 1. The Prosecutor Did Not Commit Prejudicial Misconduct During Opening Statement

Appellant claims that the following portion of the prosecutor's opening statement was an improper comment on appellant's exercise of his Fourth

Amendment rights:

> After the denial by the defendant, a request was made for the defendant to consent to the search of the place he was staying at, meaning Lisa Henry's house. He denied such consent.
>
> [Defense Counsel]: Objection. I believe that's prosecutorial error.
>
> THE COURT: The jury can disregard that.
>
> [Defense Counsel]: Are you going to assign prosecutorial misconduct?
>
> THE COURT: No, I'm not going to assign prosecutorial misconduct. I'm going to ask the jury to disregard that.

(24RT 3378.)

Notwithstanding the trial court's "disregard that" admonition, it correctly overruled the misconduct objection. When a claim of prosecutorial misconduct focuses on comments made by the prosecutor before the jury, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Berryman* (1993) 6 Cal.4th 1043, 1072, overruled on other grounds in *People v. Hill, supra*, 17 Cal.4th at p. 823, fn.1.) Here, there is no reasonable likelihood the jury would have understood the challenged remark as a comment on appellant's invocation of a Fourth Amendment right. The only purpose of an opening statement by counsel is "to apprise the jury in a general way of what is expected to be proved" (*People v. Pantages* (1931) 212 Cal. 237, 244), and thus the jury would have viewed the "he denied consent to search" comment by the prosecutor as simply an attempt to set forth what his evidence would later show. Accordingly, the prosecutor did not commit federal constitutional misconduct. Nor did he commit state-law misconduct because the remark at issue was not a deceptive or reprehensible attempt to persuade. (*People v. Berryman, supra,* 6 Cal.4th at p. 1072.)

In any event, appellant suffered no prejudice from any misconduct. This Court has stated that "prosecutorial misconduct in an opening statement is not

grounds for reversal of the judgment on appeal unless the misconduct was prejudicial or the conduct of the prosecutor so egregious as to deny the defendant a fair trial." (*People v. Wrest* (1992) 3 Cal.4th 1088, 1109; citation and internal quotation marks omitted.) That is not this case. The prosecutor's "he denied consent to search" remark was not only fleeting, but the trial court immediately instructed the jury to disregard it. (24 RT 3378.) And, this Court presumes that jurors follow the instructions given them. (*People v. Jones* (1997) 15 Cal.4th 119, 168; *People v. Wash* (1993) 6 Cal.4th 215, 263.)

Nevertheless, relying on certain language from *People v. Bolton, supra,* 23 Cal.3d at p. 208, appellant argues that he was entitled to more than a "disregard that" admonition here. (AOB 231.) Appellant's reliance is misplaced. *Bolton* is distinguishable. There, during closing argument, the prosecutor improperly suggested that the defendant had a history of prior convictions and propensity for wrongful acts that, but for the rules of evidence, the prosecutor could prove to the jury. (*People v. Bolton, supra*, 23 Cal.3d at pp. 212-215.) Defense counsel objected, and the trial court admonished the jurors not to consider the prosecutor's comments. (*Id.* at pp. 214-215.) In a footnote this Court cautioned:

> But when the defense counsel requests cautionary instructions, the trial judge certainly must give them if he agrees misconduct has occurred. He should aim to make a statement to the jury that will counteract fully whatever prejudice to the defendant resulted from the prosecutor's remarks.

(*People v. Bolton, supra*, 23 Cal.3d at p. 216, fn. 5.)

The prosecutor's statement here is in no way comparable to the criminal-history insinuation made in *Bolton*. It is also interesting to note that even in *Bolton* this Court held the misconduct harmless. (*People v. Bolton, supra*, 23 Cal.3d at p. 215.)

It is also important to note that in addition to the "disregard that" admonition here the trial court also ultimately instructed the jury that the

prosecutor's opening statement was not evidence. (34RT 4416; 3CT 712.) Again, appellant suffered no conceivable prejudice from any misconduct.

### 2. The Prosecutor Did Not Prejudicially Assassinate Appellant's Character During Direct Examination Of Mamie Jackson

Appellant next contends that the prosecutor engaged in a campaign of "character assassination" by repeatedly and improperly eliciting evidence that appellant was regarded as violent and feared by his own family, and that he had kicked in his aunt's door on three occasions. (AOB 234-240.) Contrary to appellant's contention, no such misconduct occurred during the direct examination of appellant's aunt, Mamie Jackson.

Specifically, Jackson testified that, with respect to April 18, 1988, appellant "lived with us, but he wasn't there at the time." (28RT 3735.) Jackson could not recall the exact time appellant came to house that day ("early evening, late afternoon"), but did recall that when he entered the house he was wearing a red leather suit and went into a bedroom to see his mother. (28RT 3735-3736.) Jackson then testified that she did not know how long appellant remained in the house because she "wasn't timing anything. He was just there." (28RT 3736.) Jackson just "continued to do what [she] was doing." (28RT 3736-3737.) The following colloquy then occurred:

> Q. Did you tell the police back in April 19th of 1988 that when Greg entered the house that everybody in the house ran out because Greg is very violent?
>
> [Defense Counsel]: Objection, Your Honor. That's speculation, it's prejudicial, and that's --
>
> THE COURT: No. She said she can't remember, so he's refreshing her memory.
>
> [Defense Counsel]: Well, that is not the way to refresh her recollection. It's to allow her to read the --

THE COURT: He can ask her if that refreshes her recollection that that's what she told the police.

Is that what you told the police -- Mrs. Spencer, Ms. Jackson?

THE WITNESS: I can't remember what I said now.

[THE PROSECUTOR]: Okay. And did you -- did you look over this statement that I gave to you this morning?

A. I looked it over, yes.

. . . . . .

[THE PROSECUTOR]: As a matter of fact, Mr. Tate has kicked in the door to your house --

[Defense Counsel]: Objection, Your Honor. Objection, Your Honor.

[THE PROSECUTOR]: Q. -- on three occasions?

THE COURT: What is the basis for your objection? If you'll give me a reason.

[Defense Counsel]: Irrelevant. It's irrelevant.

THE COURT: Okay. Sustained.

[Defense Counsel]: Thank you. Move to strike, admonish the jury.

THE COURT: The jury may be admonished to disregard the question.

All right. Let's keep it in the ballpark, Mr. [prosecutor].

(28RT 3737-3738.)

It is not misconduct to ask a question that the trial court determines is irrelevant. It is misconduct, however, to elicit evidence in violation of a pretrial court order and that is what appellant claims the prosecutor did in the foregoing exchange. Appellant argues that the prosecutor's examination was "in direct violation of an in limine order" prohibiting the introduction of evidence of violent acts committed by appellant against members of his family. In summary, appellant contends that the prosecutor improperly introduced "evidence of appellant's bad character," which mandates reversal. (AOB 237.)

First, this claim is forfeited. Appellant lodged a relevancy objection below—not a "court order violation" objection. (28RT 3738.) "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—*and on the same ground*—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841; emphasis added.)

Second, appellant is wrong regarding the "in limine order." The "hearing" appellant discusses followed a motion filed by the prosecutor with respect to the evidence he was going to seek to introduce at the penalty phase in aggravation under Penal Code section 190.3, factor (b) ("The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.") The trial court examined a list of 16 allegedly violent acts committed by appellant. (1RT 205-208.) The only reference to Mamie Jackson was, "Number six, 10-27-85, threats and assault on Carla Spencer, who apparently was his cousin, and Mamie Jackson, which from the police report as far as I can tell is unrelated to the defendant."[13] (1RT 206.) Of the 16 acts listed the court ruled which ones it was inclined to allow as aggravating evidence and generally eliminated the incidents appellant allegedly committed against members of his own family. (1RT 208-209.) The court determined that it was not "enthusiastic about members of the defendant's family running down here and testifying to acts of violence that were perpetrated again them in the hopes that their relative will be executed. So you know, I would be really surprised if that, in fact, happens." (1RT 155.) The court made no further ruling and certainly made no "ruling" that the prosecutor could not ask Jackson

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13. The prosecutor clarified for the court that Mamie Jackson is "the defendant's aunt." (1RT 206.)

during the guilt phase whether she recalled telling the police she was afraid of appellant and that appellant had kicked down her door in the past.

Finally, absolutely no prejudice could have accrued to appellant at the guilt phase from any misconduct here. Although appellant contends the prosecutor's question was prejudicial because it suggested that appellant was "prone to kick in doors" and "steal from elderly women," respondent disagrees. In his own testimony appellant impugned his character. He testified that on April 18, 1988, he entered his grandmother's bedroom and not only stole a gun but stole his grandmother's police scanner. (31RT 4134-4137, 32RT 4275, 4278.) Appellant also testified that later that evening he entered Sarah LaChapelle's home and stole her keys, her personal property, and her car. (31RT 4191, 4300-4301.)

It is inconceivable that the jury's verdict of guilt and its true findings on the special circumstance and personal-use allegations had anything to do with the prosecutor asking appellant's aunt if appellant had kicked in the door to her house on three occasions in the past. The question went unanswered, and the court sustained appellant's objection to it and instructed the jury to disregard the question. The jury not only subsequently learned that the statements of counsel were not evidence, but that where "an objection was sustained to a question, do not guess what the answer might have been. Do not speculate as to the reason for the objection. Do not assume to be true any insinuation suggested by a question asked a witness." (34RT 4587.) To repeat, this Court presumes that the jury follows the instructions given it. (*People v. Jones, supra*, 15 Cal.4th at p. 168; *People v. Wash, supra*, 6 Cal.4th at p. 263.)[14/]

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14. Throughout this brief, feeling obliged to defend the judgments on all available grounds, the People have addressed the merits of otherwise forfeited claims. This Court has no obligation to address the merits of waived claims, however, and should instead reject assignments of error on procedural "failure to object" grounds identified by the People throughout this case,

### 3. The Prosecutor Did Not Commit Prejudicial *Doyle* Error During Cross-examination Of Appellant

In *Doyle v. Ohio* (1976) 426 U.S. 610, 619 [96 S,Ct. 2240, 49 L.Ed.2d 91], the United States Supreme Court held that the prosecution's use, for impeachment purposes, of a defendant's post-arrest silence after receiving *Miranda* warnings, violates the Due Process Clause of the Fourteenth Amendment.

Appellant contends that the prosecutor transgressed *Doyle* during his cross-examination of appellant. (AOB 240-247.) The claim is forfeited and without merit.

During appellant's testimony he stated, for the first time, that on the night of April 18, 1988, he observed two African-American males coming out of the LaChapelle residence, one carrying a pillowcase and one carrying a box. (31RT 4168-4170, 4172, 4179.) Appellant testified that when the men saw him, the one carrying the pillowcase dropped it and then they both started to

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thereby upholding California's timely and specific contemporaneous objection rule (see generally Evid. Code, § 353), and its corollary principle that defendants may not change the theories behind their trial objections on appeal (see generally *People v. Thomas, supra*, 2 Cal.4th at pp. 519-520). For purposes of federal habeas corpus review (which is only available for persons in custody in violation of the Constitution or laws or treaties of the United States (28 U.S.C. § 2254, subd. (a)), a failure to properly object to or raise a federal constitutional issue at the state trial ordinarily constitutes a procedural default, foreclosing collateral review of the waived claim. (*Wainwright v. Sykes* (1977) 433 U.S. 72, 86-87 [97 S.Ct. 2497, 53 L.Ed.2d 594].) However, when a state appellate court reaches the merits of an issue despite the lack of a sufficient objection at trial without also or alternatively "plainly stating" that it is invoking the waiver doctrine, its failure to vindicate state procedure justifies federal review on the merits. (*Harris v. Reed* (1989) 489 U.S. 255, 262-264, fn. 10 [109 S.Ct. 1038, 103 L.Ed.2d 308].) Since the federal procedural default rule protects the state's interest in the finality of its judgments, a federal court does no offense to state procedure by refusing to enforce a state procedural rule ignored by the state court. In such a case, the federal court simply accepts the state court's subordination of the state's interest in finality.

run. (31RT 4173.) It was then, appellant continued, that he entered the LaChapelle house, found Sarah LaChapelle's murdered body, proceeded to step around it, and stole some of her property and her car. (31RT 4187-4191, 4193.)

During direct examination defense counsel asked appellant why he had not given police the same account of events he had just given the jury. (32RT 4256.) Appellant first replied that he didn't know why, then added, "the other lawyer I had, he told me don't talk to nobody, period, about it." (32RT 4257.)

During cross-examination defense counsel objected to the prosecutor questioning appellant about whether his former attorney had taken notes when appellant told him what had happened on the evening he had gone to Sarah LaChapelle's house. (32RT 4268.) The court overruled the "attorney-client confidential communication" objection, stating that the prosecutor was simply asking if the former attorney had taken notes, and that appellant "brought this up himself." (32RT 4268.)

Subsequently, the prosecutor asked appellant, "When did you tell Mr. Chaffee [appellant's former attorney] that you saw two men coming out of Mrs. LaChapelle's house?" (34 RT 4284.) The trial court sustained defense counsel's "attorney-client confidentiality" objection, and when the prosecutor protested that this was again something appellant had brought up, the trial court disagreed. (34RT 4284.) "That's going beyond. That's going beyond what he said Chaffee told him. [¶] It's also assuming a fact not in evidence." (32RT 4284.)

Later, the following exchange occurred between the prosecutor and appellant:

> Q. Okay. And did you make any effort to call the police and tell them that Mrs. LaChapelle was murdered?
>
> A. No.
>
> Q. Did you make any effort to call the police and tell them that you saw two men coming out of her home?

A. No.

Q. As a matter of fact, you never told that to anyone until this jury heard it for the first time?

A. Heard what? What part?

Q. The whole thing.

[Defense Counsel]: Your Honor, I object. There's attorney -client privilege that's involved here.

THE COURT: Sustained.

THE WITNESS: So answer that question?

THE COURT: All right. The objection is sustained.

(32RT 4300.)

Preliminarily, appellant's argument that the prosecutor committed *Doyle* error in the above three exchanges is forfeited because appellant made no such objection then. (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.) Moreover, the claim fails. This isn't *Doyle*. There, the defendant immediately invoked his right to remain silent and did not make any post-arrest statements to the police. (*Doyle v. Ohio, supra*, 426 U.S. at p. 619.) *Doyle* prohibits questioning defendants on their post-arrest silence; it does not prohibit cross-examination concerning post-arrest statements, including omissions in such statements (*Anderson v. Charles* (1980) 447 U.S. 404, 409 [100 S.Ct. 2180, 65 L.Ed.2d 222]), which is what the prosecutor was attempting to inquire about here. The prosecutor was not attempting to draw adverse inferences *from appellant's discussions with his former counsel.*

Again, here appellant made voluntary statements to officers after voluntarily waiving his *Miranda* rights. (30RT 3982-3984, 3990-3992, 3994-3998, 4011-4016; 32RT 4293-4294.) A prosecutor does not commit misconduct in questioning a defendant on cross-examination about testimony that differs from what the defendant told the police. A reasonable juror would not have understood the prosecutor's challenged inquiries here as attempts to

comment on an exercise of the right to remain silent invoked by appellant. (*People v. Samayoa, supra*, 15 Cal.4th at p. 841.) Nor would the jury have seen the questions as deceptive or reprehensible attempts to persuade: "Mr. Tate, when your other lawyer told you not to tell anybody about what you had seen the night that you went over to Mrs. LaChapelle's, had he made notes of what you had said to him?" (34RT 4268.) "When did you tell Mr. Chaffee [appellant's former attorney] that you saw two men coming out of Mrs. LaChapelle's house?" (34 RT 4284.) "As a matter of fact, you never told that to anyone until this jury heard it for the first time?" (34RT 4300.) Prosecutors are "permitted wide scope in the cross-examination of a criminal defendant who elects to take the stand" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1147) and that's what the prosecutor was doing here.

At any rate, even if the two sustained "attorney-client communication" objections can somehow be construed as *Doyle*-error prosecutorial misconduct, the misconduct was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) It was appellant who introduced the "fact" that his attorney had told him not to talk about the case with anyone, and it is inconceivable that the jury's verdict of guilt and its true findings on the special circumstance and personal-use allegations had anything to do with the prosecutor asking appellant questions that only arguably inquired of other things appellant and Chaffee may have talked about. As we will elaborate on *post*, the evidence against appellant was otherwise overwhelming.

### 4. The Prosecutor Did Not Commit Misconduct By Exploiting *Doyle* Error During Rebuttal Summation

In an argument related to his prior one, appellant contends that the prosecutor somehow "exploited" the *Doyle* errors he committed while cross-examining appellant during rebuttal summation by "insinuating " that appellant

had "colluded with defense counsel to fabricate a defense." (AOB 240-247.) Appellant points to several different portions of the prosecutor's argument (AOB 243, citing 34RT 4549, 4551, 4552, 4555, 4567, 4575), and claims "the prosecutor's refrain that defense counsel herself created a 'phantom killer'" was nothing other "than a frontal attack on the ethics of defense counsel" and "serious misconduct" (AOB 247). Not so. Moreover, the claim is forfeited.

Context reveals that the prosecutor did nothing other than what is permitted: Exercise his right to fully state his views as to what the evidence showed and to urge the conclusions he deemed proper. (*People v. Panah* (2005) 35 Cal.4th 395, 463.) To explain, defense counsel argued that the evidence showed that appellant was not LaChapelle's killer because if he was the actual killer he would have had more blood on his clothes. Counsel also pointed out that the fingerprint evidence showed an unidentified person had been in the house. Counsel admitted that appellant had been in the house, and admitted that if appellant had entered the house with the actual killer he could be found guilty of felony murder, but argued that the special circumstances could not be found true if appellant had entered with the actual killer because there existed no evidence appellant had intended to kill. Counsel nevertheless urged that there existed a reasonable doubt appellant had entered the house with the actual killer. Counsel argued that while appellant had lied to police he did not lie to the jury, and that therefore, while it was true that appellant had committed a burglary or possessed stolen property, he was innocent of the murder charge and the special circumstance and personal-use allegations. (34RT 4498-4549.) The prosecutor began his rebuttal as follows:

> Ladies and gentlemen, the interesting thing about [defense counsel's] preparation for her argument over this weekend was that she created a phantom killer. In so doing, she created her defendant a liar, because in order to accept the actual killer versus the aiding and abetting killer, the defendant has had to have committed perjury in his testimony when he said he didn't enter the house until after he saw the other two

people leaving.

As I stated to you before, the only evidence in this case of aiding and abetting is the testimony in the transcript and the tape of Lisa Henry when Gregory Tate told her that Fred did it and he tried to stop Fred.

With [defense counsel's] argument today, it was very empty and shallow because she created the defendant into the house with her argument but not being the killer.

We know that the defendant was in the house because the defendant said so in his testimony.

The next question is when?

And the answer is: At the beginning until the end.

. . . . . .

It's not uncommon not to find a fingerprint in a murder scene.

You would expect to find fingerprints on a VCR and on a TV, but you did not find the defendant's fingerprints there, either, while Germaine said he saw those things handled, and the defendant testified that he handled them. And he -- In his statement, he said he took them into the house, Lisa's house.

There was no phantom killer. You don't work backwards. You work forward.

. . . . . .

Now, [defense counsel] says this was awful and gruesome and there was total carnage to Mrs. LaChapelle. But she doesn't reveal to you what happened to Mrs. LaChapelle, and she doesn't reveal to you how the defendant killed her. She wants you to start guessing about a phantom killer and the defendant was simply helping because he didn't have enough blood on his clothes.

There is no evidence of a phantom killer here, none whatsoever. It's a rather elementary thinking what [defense counsel] tried to do today.

(34RT 4549-4552.)

The prosecutor mentioned the "phantom killer" three more times in his rebuttal summation:

This is a classic premeditation murder. It so happens to coincide, to occur at the same time that a robbery and a burglary are occurring. And

that's why I explained to you on Thursday that the two theories of murder merge.

But to say that this was frenzied killing and to show some sympathy for Mrs. LaChapelle by saying it was total carnage and it was gruesome is trying to ask you, even though there is a phantom killer, if you find Tate guilty of murder, it's not premeditated. It's second degree.

(34 RT 4555.)

This thing about the phantom killer again I submit to you is preposterous because even under the defendant's theory of this defense, it doesn't work because, as you say -- as I say, the defendant said he wasn't there. So how can you find Mr. Tate guilty of aiding and abetting a murder when he wasn't there?

You see?

It doesn't work.

Mr. Tate is the only person that went into that home. He's the only person that came out alive.

(34RT 4567.)

So it is a case of credibility. And it's over because the defendant did not get the car from Fred Bush. He did not give him two rocks of cocaine in exchange for the VCR and the TV and the use of the rented car until 11:00 o'clock so he can take his girlfriend to the movie. That didn't happen. It's over.

The charade is over. He cannot fool you, either, like he didn't fool the police. It's over. It's first degree murder. It's murder during the course of a burglary. It's murder during the course of a robbery. There is no phantom killer.

(34RT 4575.)

Preliminarily, we note that defense counsel did not object to any of these "phantom killer" comments or request an admonition. Accordingly, the issue is not cognizable on appeal. (*People v. Sapp* (2003) 31 Cal.4th 240, 279; *People v. Earp* (1999) 20 Cal.4th 826, 858.)[15/]

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15. "Perhaps defense counsel's failure to object reflected [their] own perception that the prosecutor was . . . not voicing a personal attack. In any event, we do not believe that the more questionable of the prosecutor's

Furthermore, no reasonable juror would have understood the prosecutor's comments as suggesting that defense counsel was "involved in" or "colluded with" appellant in creating a "phantom killer." (*People v. Samayoa, supra*, 15 Cal.4th at p. 841.) There was no "exploitation" of attorney-client discussions or attacks on ethics. The jury would have understood that the prosecutor's remarks were (1) a fair response to the defense argument that appellant was not the actual killer and (2) the prosecutor's belief that the evidence failed to support defense counsel's argument. There was no misconduct. (*People v. Frye, supra*, 18 Cal.4th at p. 978 [prosecutor's remarks that defense counsel was "irresponsible" for making a third party claim and that defense counsel's challenge to a witnesses's testimony was "ludicrous" and a "smoke screen" were focused on the evidence adduced at trial and did not constitute misconduct].) The prosecutor was arguing that appellant lied at trial and that defense counsel' s summation was essentially a corroboration of that conclusion because it was an argument inconsistent with appellant's testimony. The prosecution's comments were at times confusing and inartful, but as both this Court and the United States Supreme Court have cautioned, "Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion and not of evidence, . . . like all closing arguments of counsel, are seldom carefully constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." (*Donnelly v. DeChristoforo, supra,* 416 U.S. at pp. 646-647; accord, *People v.*

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statements were so egregious as to deprive defendant of a fair trial." (*People v. Thomas, supra*, 2 Cal.4th at p. 530.)

*Frye, supra*, 18 Cal.4th at p. 970.)

### 5. The Prosecutor Did Not Permeate The Guilt Phase With Other, Gratuitous Acts Of Misconduct

Appellant next contends that the prosecutor committed prejudicial misconduct during both the direct and cross-examination of appellant by making demeaning facial and verbal gestures. (AOB 248-250.) At one point the court told the jury the following:

> THE COURT: All right. Ladies and Gentlemen of the Jury, the subject matter of this side bar conference is that defense counsel is concerned about Mr. Landswick's reaction to some of this testimony.
>
> I want to admonish you that you're not to take into consideration any facial expressions of Mr. Landswick as the defendant is testifying in this case. You're going to have to draw your own conclusions as to the veracity of the defendant's testimony and not rely on Mr. Landswick's reaction to this testimony. So if Mr. Landswick smiles or whatever he does, grimaces, I want you to disregard any looks on his face and just rely on your own common sense with respect to evaluating the testimony of this defendant and whatever jury instructions I give in this regard.

(32RT 4254.)

This admonition does not establish misconduct, i.e., that the jury had been aware of the prosecutor's facial expressions and construed them negatively to the defense. Most likely the jury understood the prosecutor as engaging in a type of advocacy. Moreover, because we know jurors follow the instructions given them, no prejudice could have accrued to the defense from the prosecutor's facial expressions. (*People v. Jones, supra*, 15 Cal.4th at p. 168; *People v. Wash, supra*, 6 Cal.4th at p. 263.) As the trial court told the jury, "I want you to disregard any looks on his face and just rely on your own common sense with respect to evaluating the testimony of this defendant and whatever jury instructions I give in this regard." (32RT 4254.) Because the jury also knew the statements of counsel were not evidence (34RT 4587), it would have

known the facial expressions of counsel were not evidence either.

This same conclusion applies to the following exchange that appellant asserts shows prosecutorial misconduct:

> [Defense Counsel]: Objection to his attitude, Your Honor.
>
> THE COURT: Well, I can't --
>
> [THE PROSECUTOR]: My attitude is my attitude.
>
> THE COURT: I will just caution the jury that if Mr. Landswick laughs when he is asking questions to disregard it.

(32RT 4291-4292.)

Finally, appellant's assigns misconduct to the prosecutor for engaging in what appellant calls "gratuitous" and "self-aggrandizing" misconduct. (AOB 250-252.) Specifically, as set forth by appellant, when the trial court "proposed a schedule which had the potential of interfering with the prosecutor's scheduled Christmas vacation in Paris," defense counsel "objected to having the matter addressed in front of the jury," and the prosecutor "then made a seemingly noble gesture, 'I'll tell you what I'm going to do. I'm going to cancel my flight.'" (AOB 250-251, footnotes omitted; quoting 32RT 4325-4327.) "The trial court told the prosecutor that it was not necessary to do so, and scheduled arguments to begin on a Thursday afternoon." (AOB 251, footnote omitted.)

> The clear message that the prosecutor was sending to the jurors was that he was so committed to the justice of his cause, and such a noble and selfless person, that he was prepared to sacrifice a Christmas vacation to Europe. Moreover, the trial court's response, made in the presence of the jurors, that it was not necessary for the prosecutor to cancel his vacation plans, sent a subtle message to the jurors that lengthy deliberations would impact the 'selfless' prosecutor's vacation plans during the Christmas holidays.

(AOB 251-252.)

There are two problems with this argument. One, appellant did not make it below or request an admonition. Hence, the "self-aggrandizing"

prosecutorial misconduct claim is forfeited. (*People v. Sapp, supra*, 31 Cal.4th at p. 279; *People v. Earp, supra,* 20 Cal.4th at p. 858.) Second, there is no reasonable likelihood the jurors would have understood the exchange the way appellant is now spinning it. Nor would the jury have understood the exchange as a deceptive or reprehensible attempt by the prosecutor to persuade. Appellant's reasoning is too tenuous and tangential to be taken seriously.

### 6. Any Prosecutorial Misconduct At The Guilt Phase Did Not Cumulatively Prejudice Appellant

Appellant concludes his guilt-phase prosecutorial-misconduct argument by asserting that the cumulative effect of the prosecutor's misdeeds harmed the defense case. (AOB 252-257.) The People disagree. We have already established that any misconduct was harmless when viewed singly. The alleged acts of misconduct are no more prejudicial when viewed cumulatively. This Court's statement in *People v. Wrest*, *supra*, 3 Cal.4th 1088, 1111, is appropriate: "Each of appellant's claims lacks merit, was waived, or was clearly harmless beyond a reasonable doubt. Their cumulative effect did not infringe on any of appellant's state or federal constitutional, statutory, or other legal rights."

Here, defense counsel conceded to the jury that the prosecution "has proven that Sarah LaChapelle was killed during the course of a burglary or a robbery." (34RT 4547.) And the evidence otherwise overwhelmingly established that it was appellant who murdered LaChapelle while engaged in the commission, attempted commission, or the flight thereafter of a robbery, and burglary. On April 18, 1988, appellant went to his family's home at 9919 Hesket Road between 4:00 p.m. and 5:00 p.m., seeking money and a gun. (31RT 4123-4125.) Appellant's mother did not give him any money and appellant took a gun from his grandmother's bedroom as well as her police

scanner. (31RT 4132-4136, 32RT 4278.) Knowing the police would be looking for him, appellant hid the gun in the back of his grandmother's house to avoid detection. (31RT 4138.) Appellant walked back to Hegenberger Road along a creek, listening to the scanner, hearing that police were looking for him. (31RT 4140.) Appellant took a bus to his girlfriend's house and arrived at 8:00 p.m. (31RT 4147-4148.) Appellant hosed off his muddy clothes (due to walking along the creek) and spent time first with Reginald Henry and then with others. (31RT 4145, 4149, 4153-4158, 4160.) Sarah LaChapelle, who lived at 9938 Hesket Road, was alive at 8:00 p.m. on April 18, 1988, when she was briefly visited by her son's girlfriend. (25RT 3391, 3393, 3397-3398.) Appellant went back to 9919 Hesket Road and, without going inside his grandmother's house, retrieved the gun from the back of her house. (31RT 4162, 4165, 32RT 4215, 4279.) Before leaving the Hesket Road neighborhood, appellant entered the home of Sarah LaChapelle. (31RT 4184.)

The following morning, Sarah LaChapelle's family was looking for her when her brutally murdered body was discovered by her son. (25RT 3399, 3402, 3429-3430.) Appellant was in possession of LaChapelle's jewelry, watch, television, VCR, bank card, keys, and car. (27RT 3712-3713, 3693; 31RT 4197; 32RT 4221, 4223-4224, 4316.) Appellant drove around in LaChapelle's car during the evening of April 18, and again the following day, until the police arrested him driving the car. (26RT 3587-3591.) Appellant immediately told the officers that he had obtained the car from Fred Bush. (26RT 3589.) LaChapelle's blood was on appellant's pants, shoes, jacket, and sweater. (29RT 3907-3908, 3914-3921, 3939, 3941.) During a subsequent police interview appellant said he had obtained LaChapelle's car and other property from Fred Bush as repayment for a debt. (30RT 39953998.) When the officers confronted appellant with the information that anything involving "Fred Bush" was factually impossible given that Bush had been in jail

continuously since April 8, 1988, appellant knew the officers believed he was lying. (30RT 4018.) He responded by shrugging his shoulders and also stating, "going to jail for the rest of your life, man." (30RT 4013, 4016.)

The above-cited evidence so strongly pointed to appellant's guilt of the charged crimes that at trial he conceded he was guilty of entering LaChapelle's home and stealing her car and other personal property. (31RT 4187-4193.) Appellant also testified at trial that on April 18, 1988, he saw two unidentified African-American males coming out of LaChapelle's house and that it was after this that appellant went into her house, with a gun, discovered her body and stole LaChapelle's car and other property. (31RT 4168-4170, 4172-4173, 4176, 4179.) Appellant acknowledged that he never relayed this information to the police and stated that he was subsequently advised by his attorney not to discuss the case with anyone. (31RT 4284, 4300.) By its verdict, the jury necessarily rejected those versions of appellant's story which suggested he entered the home after the victim had been murdered by other robbers.

In short, it wasn't any acts of misconduct by the prosecutor that caused the jury to return the verdict it did. There is no reasonable probability (*People v. Watson*, *supra*, 46 Cal.2d at p. 836), that appellant would have received a more favorable verdict absent any misconduct, and we submit that such a conclusion is true beyond a reasonable doubt (*Chapman v. California, supra*, 386 U.S. at pp. 23-24). The evidence of his guilt was too strong.

### B. The Prosecutor Did Not Commit Prejudicial Misconduct At The Penalty Phase

As noted, appellant contends the prosecutor committed egregious misconduct during the penalty phase by again engaging in character assassination of appellant, and by referring to facts not in evidence and expressing personal opinion. (AOB 257-272.) Appellant calls the misconduct

prejudicial, and seeks a reversal of the penalty judgment. (AOB 272-277.) He is not entitled to it.

### 1. Any Improper Suggestion By The Prosecutor That As A Juvenile Appellant Committed A Burglary In Which He Used Gloves Was Harmless

Appellant contends the prosecutor misrepresented the facts and misled the jury by cross-examining appellant's mother about appellant's juvenile criminal behavior. Appellant's first assignment of error is a claim that the prosecutor began his character assassination of appellant by improperly suggesting that he (appellant) "committed a burglary as a juvenile in which he used gloves." (AOB 258-260.) Appellant relies on the following question the prosecutor posed to Rose Carter:

> [THE PROSECUTOR]: Incidentally, in February of 1984 did you ever receive or go pick up the gloves that [appellant] used in a burglary from my office?
>
> [Defense Counsel]: Objection, Your Honor; irrelevant.
>
> THE COURT: Sustained.

(37RT 3887.)

Appellant claims that the prosecutor's question was improper because it "insinuated," first, that there existed evidence that appellant had committed a burglary as a juvenile, and second, that he had possessed gloves or used them in the burglary. (AOB 259-260, 265-266.)

The jury could not have drawn the inferences appellant proffers from the exchange between the prosecutor and Rose because the jurors ultimately learned at the penalty phase, just as at the guilt phase, that where "an objection was sustained to a question," they could "not guess what the answer might have been" and could not "assume to be true any insinuation suggested by a question asked a witness." (44RT 5814) At any rate, appellant was not prejudiced by

any misconduct because subsequent to Rose's testimony the defense elicited evidence from one of its witnesses, juvenile probation officer Sims, that on December 21, 1983, appellant was arrested for burglary of a business. (39RT 5310.) On cross-examination, the prosecutor elicited, without objection, the evidence that "appellant was wearing gloves" when the burglary was committed. (39RT 5335-5336.)[16/]

### 2. The Prosecutor Did Not Commit Misconduct In Questioning Rose About A Court Appearance For Appellant In The Summer Of 1983

Appellant next contends (AOB 260-261, 266) that the prosecutor committed "character assassination" misconduct by questioning Rose, as follows:

> [THE PROSECUTOR]: Did you -- Did you attend court in July and August of 1983 -- . . . [¶] -- for Gregory when he hit a store owner with a rock three times in the head?
>
> [Defense Counsel]: Your Honor -- Objection, Your Honor. That's been resolved in favor of Mr. Tate.
>
> THE COURT: That is not the question.
>
> . . . . . .

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16. The prosecutor also elicited on cross-examination, without objection, that when appellant was arrested for the burglary he denied committing it and stated that he had simply been near the building when the police arrived: "'I did not do anything. . . . When I came from the side of the rear of the building, you arrested me. . . . [¶] I was in the rear of the building feeding two pit bull dogs.'" (39RT 5334-5335.) The relevance of this evidence for the prosecutor became clear during his summation, when he noted, without objection, that should the defense argue "lingering doubt" from the absence of appellant's fingerprints at the scene of the crime, the jury should reject that position, given that appellant could have been wearing gloves (just as he had in 1983), and in light of the fact that both in that case and this one appellant had a similar "somebody else was doing it" explanation. (43RT 5708.)

[Defense Counsel]: Your Honor, he was acquitted of those charges.

THE COURT: Mr. [Defense Counsel], don't make a speech. That is not the question.

You want to read the question back, please?

(Record read).

THE COURT: Change that to accused of hitting a store owner in the head three times with a rock.

[THE PROSECUTOR]: Okay.

THE COURT: The issue is did you go to court?

THE WITNESS: I don't know.

[Defense Counsel]: Is it clear that we're objecting to the question, Your Honor?

THE COURT: Yes. And I changed the question to "accused," not convicted or that he did it. And the question was did she go to court. That was the question.

[Defense Counsel]: Okay. We continue to object to permitting the question and ask that the jury be admonished with respect to the content of that question.

THE COURT: All right. I changed it. The objection is overruled.

(37RT 5061-5062.)

Appellant assigns misconduct here on the ground that the prosecutor was presenting Penal Code section 190.3, factor (b) aggravation evidence of "other violent conduct" committed by appellant that the prosecutor had not given the defense notice of pretrial, as required by statute. (AOB 266-267.) This argument fails because it is clear from the record, as quoted above, that the jury would not have concluded that there was any *evidence* appellant actually hit a store owner with a rock. The question was whether Rose had attended court on the occasion that appellant had been accused of hitting a store owner in the head three times with a rock. Jurors understand the difference between "accusations" and proof.

And furthermore, appellant is incorrect in asserting (AOB 261, 266) that this whole area was irrelevant. Appellant admits that "the defense sought to portray Rose as a parent who considered her son incorrigible and who wanted her son confined within the juvenile justice system" and further admits that the defense also theorized "that appellant was an unwanted child who was deprived of appropriate maternal affection and supervision." (AOB 261, 269.) Clearly the prosecutor, in questioning Rose about whether she had attended court with appellant on this occasion, was trying the rebut the defense's mitigation theory by showing that Rose did care about appellant and, as the prosecutor later asked rhetorically urged in summation, "How many times have the courts sought to redeem him?" (43RT 5713.)

### 3. The Prosecutor Did Not Commit Prejudicial Misconduct In Questioning Rose About Appellant's Interaction With Other Family Members

Appellant next contends that the prosecutor attempted to assassinate his character, and improperly present additional "other crimes" aggravation evidence, in the following exchange with Rose:

> [THE PROSECUTOR]: Did you witness the incident where your son struck his cousin, Carla Spencer?
>
> [Defense Counsel]: Objection, Your Honor.
>
> [THE PROSECUTOR]: Q. Was that in '85?
>
> [Defense Counsel]: Objection, Your Honor. He is aware one way or the other. But if she didn't witness it, it's putting facts before the jury that didn't exist.
>
> THE COURT: Well, he was asking her. It's assuming a fact not in evidence.
>
> [Defense Counsel]: Okay.
>
> THE COURT: Sustained on that ground.
>
> [THE PROSECUTOR]: Do you know if your son struck his cousin

Carla Spencer in October of 1985?

A. I know that there was some problems with them. I wasn't in the room.

Q. Do you know if your son struck his Aunt Mamie in October of 1985?

A. No I don't.

Q. Do you know if your son struck your sister Brenda in November of 1985?

A. Well, that could be a yes or no answer.

Q. Do you know if your son struck Carla Spencer in January of 1986?

A. I don't know.

Q. Do you know if your son stole your grandmother's and grandfather's truck in March of 1986 and wrecked it because he was mad at your grandmother?

A. He wasn't mad at my mother.

Q. Was he mad at anybody?

A. No. My mother was out of town, so how could he be mad at her? He just saw the opportunity to get a car to drive or a truck to drive.

Q. Do you know Trina Berry?

A. Yes, I do.

Q. Do you know if your son struck Trina Berry in September of 1987?

A. No, I don't.

Q. Do you know Patrick Shields?

A. Yes, I do.

Q. And who is Patrick Shields?

A. He's the father of five of my nieces and nephews.

Q. Do you know if your son --

[Defense Counsel]: Your Honor --

[THE PROSECUTOR]: Q. -- cut Patrick Shields's throat?

[Defense Counsel]: I object to this, Your Honor. There is no evidence to that. It assumes a fact not in evidence, and there is no evidence that it's going to be presented.

THE COURT: Sustained.

[Defense Counsel]: It's extremely --

THE COURT: Sustained. Sustained. Sustained. Sustained. Sustained. Sustained. Sustained.

[Defense Counsel]: Could we have an admonishment?

THE COURT: The jury may be admonished to disregard that.

[Defense Counsel]: With a little more force, Your Honor?

THE COURT: Ms. [Defense Counsel], this is not Hollywood.

[Defense Counsel]: Well, the district attorney seems to be creating a drama.

THE COURT: You made your objection, I ruled on it, and I told the jury to disregard it. You want me to stand on my feet and stomp and hold my breath?

[Defense Counsel]: That's what the district attorney is doing. I would like an admonishment at least equal to his.

THE COURT: I did it legally. I'm not going to engage in histrionics up here.

(37RT 5071-5073.)

Appellant contends that what makes the foregoing attempt at character assassination by the prosecutor so reprehensible is that pretrial the trial court had ruled that the prosecutor could not present, as evidence in aggravation in his case-in-chief, the evidence of appellant's alleged assaults on Carla Spencer, Brenda Jackson, and Mamie Spencer. (AOB 261-264, & fn. 98; citing 1RT 206-207, 211, 216.) "In utter disregard of the letter and spirit of the trial court's ruling, the prosecutor figuratively went through the back door and right at appellant's jugular" with the foregoing cross-examination of appellant's mother Rose. (AOB 262.)

Assuming, without conceding, that appellant's two "facts not in evidence" objections preserve his current allegations of "character assassination" misconduct, the claim fails. Here, Rose testified on direct examination that there had been ongoing problems between appellant and other members of the family. Rose testified that after her father (appellant's grandfather) died there existed tension between family members and that this would explode in the form of anger and physical fights. (37RT 5004.) In fact, Rose testified further, appellant was involved in some of these fights. (37RT 5004.) She discussed one incident wherein appellant not only grabbed a knife out of her hand while she was cooking, but he slapped her and then left, slashing the tires on he car along the way. (37RT 5005-5006). The defense presented these facts as mitigating evidence that appellant was not responsible for the man he had become—that his family life was so troubled he never really had a chance for a normal and healthy life. In other words, the defense opened the door to the prosecutor asking specific questions about the tension and physical fights appellant may have had with other family members so that the prosecutor could attempt to perhaps show that the evidence was not in fact mitigating.

This case is not *People v. Ramirez* (1990) 50 Cal.3d 1158, relied on by appellant. (AOB 265-266.) There, this Court held that the trial court had erred in permitting the prosecutor to ask questions on cross-examination of the defendant's mother that exceeded the scope of direct examination, and elicited inadmissible evidence of nonviolent criminal activity by the defendant as a juvenile. (*People v. Ramirez, supra*, 50 Cal.3d at pp. 1191-1193.)

> In the present case, . . . much of the evidence introduced by the prosecution on cross-examination of defendant's mother was not responsive to the evidence presented by the defense. As we have seen, on direct examination defendant's mother did not testify generally to defendant's good character or to his general reputation for lawful behaviors but instead testified only to a number of adverse

> circumstances that defendant experienced in his early childhood—e.g., an alcoholic father who did not provide adequately for his family and who beat his mother, a number of serious illnesses leading to some disability, his parents' divorce and the early death of his father. Although the prosecution was very properly permitted to bring out, on cross-examination, a number of facts that helped place the mother's direct examination testimony in proper perspective—e.g., the fact that while his father had beaten his mother, he had never beaten defendant, and the fact that defendant had always been loved by both his mother and father—the trial court also permitted the prosecution to go beyond these aspects of defendant's background and to introduce evidence of a course of misconduct that defendant engaged in throughout his teenage years that did not relate to the mitigating evidence presented on direct examination.

(*Id.* at p. 1193.)

To repeat, here the questions the prosecutor asked Rose on cross-examination regarding appellant's alleged assaults on Carla Spencer, Brenda Jackson, Mamie Spencer, and Patrick Shields were not a prosecutorial attempt to present evidence of prior violent offenses by appellant, but an attempt to probe, and place in perspective, the specifics of Rose's direct examination testimony that appellant had had physical fights with family members in the past.

In any event, should this Court find prosecutorial misconduct in this area, it was harmless for several reasons. Because jurors follow the admonitions given them (*People v. Wash, supra*, 6 Cal.4th at p. 263; *People v. Jones, supra*, 15 Cal.4th at p. 168), they would have indeed disregarded the prosecutor's Patrick Shields reference. With respect to the rest of the prosecutor's questions, the jury knew that the only evidence that Rose presented in response to the challenged questions of the prosecutor was that she had no knowledge of the incidents the prosecutor was referring to (except for the Brenda Jackson incident, where "that could be a yes or no answer"), and the jury ultimately learned that it could not "assume to be true any insinuation suggested by a question asked a witness." (44RT 5814.) The trial court

additionally eventually and specifically instructed the jury that other than the four crimes that had been presented in the prosecution's case-in-chief, that is, the assault with a deadly weapon on Althea Edwards and Clifford Parker, the battery on Marlena Bush, and the battery of Oakland Police Officer Gordon (35RT 4767-4831), it could not consider any "evidence" of any other criminal activity as an aggravating circumstance. (44RT 5819; 6CT 1077.) There thus existed no danger that the jury would have used any evidence elicited by the prosecutor in his cross-examination of Rose for an improper purpose. (See *People v. Ramirez, supra*, 50 Cal.3d at pp. 1193-1194; citing *People v. Heishman* (1988) 45 Cal.3d 147, 191.)

### 4. Any Prosecutorial Misconduct In Referring To Facts Not In Evidence Or Expressing A Personal Opinion Did Not Prejudice Appellant

Appellant argues that "on several occasions" during trial the prosecutor committed misconduct by referring "to facts not in evidence" or stating his "personal opinion." (AOB 269.) However, appellant only specifically alleges and discusses one act of each of type of alleged misconduct at the penalty phase. (AOB 269-272.) We submit that appellant suffered no harm from any misconduct in this regard.

First, at one point during the prosecutor's cross-examination of Rose she stated that she did not feel responsible for appellant's actions, but she did wonder what she could have done to change them. (37RT 5078.) The prosecutor replied, "But I don't believe you're to blame." (37RT 5078.) The court promptly admonished the prosecutor in front of the jury, ruling: "Well, that is your opinion. The jury may be admonished to disregard that." (37RT 5078.) Clearly the court's prompt admonishment, which we must presume the jury obeyed, negated any possible harm to appellant from the prosecutor's expression of a personal opinion.

Likewise, during summation, the prosecutor referred to Sarah LaChapelle as a "wholesome, sweet grandmother, whose life was committed to helping make poor and disadvantaged people's lives -- " (43RT 5692.) Defense counsel objected before the prosecutor could finish his thought, on the ground that the prosecutor was referencing a fact not in evidence. (43RT 5692.) The prosecutor responded that LaChapelle had been "a social welfare worker." (43 RT 5692.) When defense counsel stated that there had been no evidence of LaChapelle's employment, the trial court sustained the objection and ordered the jury to disregard the prosecutor's comment, stating, "The fact that people have testified that she was a sweet, caring person, you can comment on that." (43RT 5692.)

There could have been absolutely no prejudice here. The court ordered the jury to disregard the prosecutor's comment, and the jury already knew that LaChapelle was a "wholesome, sweet grandmother." Not only did Rose testify that she had known Sarah LaChapelle since before appellant was born and that LaChapelle was "a lovely lady" (37RT 5035), but Anthony LaChapelle testified that his mother was a grandmother and that her grandchildren were very negatively affected by what had happened to her (36RT 4870-4872). Indeed during the opening statement of defense counsel they conceded that "the world needs people" with LaChapelle's "love and compassion." There is simply no reasonable possibility appellant would have received a more favorable penalty verdict had the prosecutor not stated that LaChapelle's "life was committed to helping make poor and disadvantaged people's lives --" (43RT 5692.)

### 5. Any Prosecutorial Misconduct At The Penalty Phase Did Not Cumulatively Prejudice Appellant

Appellant concludes his penalty-phase prosecutorial-misconduct argument by asserting that given the closeness of the penalty phase case, and

given the pervasiveness of the misconduct, a cumulative review of the misconduct requires reversal. (AOB 272-277.) Not true. Any acts of misconduct did not prejudice appellant singly, and did not prejudice him cumulatively. The penalty phase case was not close.

Put differently, there exists no reasonable possibility appellant would have received a more favorable penalty verdict had the prosecutor committed no acts of misconduct. (*People v. Brown, supra*, 46 Cal.3d at pp. 446-448.) Appellant's case in mitigation paled in comparison to the properly-admitted evidence in aggravation. Appellant had a history of violent behavior (including shooting at an innocent motorist) and then in April 1988 forced himself into the home of an elderly woman and killed her while engaged in the commission, attempted commission, or the flight thereafter of a robbery, and burglary. Appellant killed LaChapelle in a particularly vicious and inhumane way, inflicting a total of 24 stab or incised wounds on her and 28 puncture wounds on her, with a knife and barbecue fork. (26RT 3532-3534.) Appellant damaged one of LaChapelle's eyes, her ribs, voice box, pericardial sac, heart, connective tissue and muscle of her right hand, torso, neck, back, right jugular vein, right chest cavity, right lung, the back bone of her vertebral column, left kidney, abdominal cavity, and left buttock area. (26RT 3538-3539.) He also perpetrated multiple blunt force injuries to her head, face, arms, hands and torso. (26RT 3539-3543.) What appellant did to LaChapelle, and how he did it, and the violence he had perpetrated in the past, overwhelmed the fact that he had dysfunctional parents and a very difficult childhood.

We conclude as we began: The prosecutor did not commit prejudicial misconduct at either the guilt or penalty phase and did not otherwise deprive appellant of due process or fair guilt and penalty trial.

## VI.

## THE POLICE DID NOT UNCONSTITUTIONALLY NOR PREJUDICIALLY OBTAIN THE INCRIMINATING PRETRIAL STATEMENTS THAT APPELLANT MADE BOTH TO OFFICERS AND LISA HENRY

Appellant contends that this Court must reverse both the guilt and death judgments because the trial court prejudicially erred in allowing the jury to hear the evidence of his pretrial statements to police and his pretrial statements to Lisa Henry. (AOB 276-310.) Appellant contends that the police obtained all of the statements in violation of his Fifth Amendment right against self-incrimination and his Sixth and Fourteenth Amendment rights to counsel and due process. (AOB 276-277.)

More specifically, appellant argues that he did not voluntarily, knowingly, and intelligently waive his *Miranda* rights before talking with police. (AOB 285-289.) Appellant also seemingly argues that the statements he gave police after waiving *Miranda* were involuntary and thus inadmissible. (AOB 288.) Appellant then argues that Lisa Henry was unquestionably a police agent when she spoke to him at the police station and that their discussion amounted to impermissible custodial interrogation in the absence of fresh *Miranda* warnings to him and another waiver. (AOB 289-300.) Appellant next contends that the People cannot show that the error in admitting his statements to police and Henry was harmless beyond a reasonable doubt in proving his guilt and the truth of the special circumstance and personal-use allegations. (AOB 300-306, 310.) Appellant lastly contends that if the People can prove harmless error at the guilt phase, we cannot prove, beyond a reasonable doubt, that the erroneously-admitted statements did not contribute to death judgment. (AOB 300, 306-310.)

None of appellant's arguments has merit. No prejudicial error occurred.

## A. The Factual And Procedural Background Is Detailed

In limine, by written pleading, appellant moved for the suppression of his inculpatory April 19, 1988 statements to police on the ground that the police obtained those statements in violation of his *Miranda* rights. (3CT 586.) By separate pleading he moved for suppression of his inculpatory statements to Lisa Henry, arguing that those statements were both involuntary and taken from him in violation of his *Miranda* rights. (3CT 609-614.)

The parties adduced the following evidence at the hearing on the foregoing motions. On April 19, 1988, at 6:07 p.m., Sergeant Paniagua, who was the lead investigator into the murder of Sarah LaChapelle, received information that two officers had stopped LaChapelle's car and arrested the person driving it. (23RT 3274.) At 6:45 p.m., Paniagua responded to the location of the stop and arrest. (23RT 3273-3276, 3307.) When Paniagua arrived appellant had already been placed in a patrol car and officers subsequently transported him to the Oakland Police Department. (23RT 3275.)

When Paniagua arrived at police headquarters at 7:25 p.m. appellant was in an interview room. Paniagua wanted to interview appellant because he was a possible suspect in the homicide of Sarah LaChapelle. (23RT 3275-3276, 3307.) Preliminarily, however, Paniagua and Sergeant Medsker asked appellant if he wanted coffee or to use the restroom. (23RT 3235.)

At approximately 9:25 p.m., Paniagua, accompanied by Medsker, began the interview by obtaining background information from appellant. (23RT 3277.) Paniagua asked appellant for his name, date of birth, and address. (23RT 3198, 3236, 3277.) This took approximately two minutes. (23RT 3294.) Paniagua advised appellant that he was "doing an investigation on the car, the victim's car that was stolen, and specifically the incident in which the vehicle was taken as a lady had been hurt." (23RT 3277.) Paniagua then read appellant his *Miranda* rights from a standard written form. (23RT 3200, 3277,

3291.) Paniagua asked appellant if he understood "each of these rights I've explained to you?" (23RT 3200.) Appellant responded, "Yes." (23RT 3200.) Paniagua then asked, "Having these rights in mind, do you wish to talk to us now?" Appellant responded, "Yeah." (23RT 3200, 3239, 3277-3278; 1CT 78.) Appellant also initialed the written form, acknowledging the *Miranda* advisement and his waiver of same. (23RT 3200, 3277-3278.)

At 10:07 p.m., the officers turned on a tape recorder. Appellant asked if he was in the homicide section of the police department. (23RT 3311.) Paniagua advised appellant that he was. (23RT 3311.) Appellant then asked if he was there for "a car that was stolen." (23RT 3311.) Paniagua stated that the investigation involved a "stolen car in which a lady got hurt." (23RT 3243.) Paniagua stated, "And I want it to be clear in your mind I'm not here to trick you into anything." (23RT 3243, 3311.) Appellant replied, "I know you ain't, just tell me, you just said the car was stolen." (23RT 3312.) Paniagua stated, "I said you were arrested for being in the car that was stolen and that I'm investigating the incident which the car was taken." (23RT 3312.) Appellant replied, "Whatever you said." (23RT 3312.) Paniagua then re-*Mirandized* appellant and he agreed to continue to speak with the investigating officers. (23RT 3278, 3312.)

At 10:33 p.m., they took a break. (23RT 3279.) Paniagua and Medsker took appellant to the bathroom at his request. (23RT 3245, 3279.) Paniagua gave appellant water and coffee and offered appellant food, which he declined. (23RT 3244, 3279.)

During the break, Paniagua and Medsker obtained the police communications section's "purge sheets," which detailed calls for police service that been made the previous day, including calls from 9919 Hesket Road. (23RT 3246.) Paniagua had already obtained the "hard copy" of the two 911 police communications calls made by appellant's family from 9919 Hesket.

These calls indicated that appellant had broken into his grandmother's bedroom, and the calls described the clothing appellant was wearing. (23RT 3246, 3282.) During the break, the investigators also obtained Reginald and Lisa Henry's exact address on Yuba Avenue. (23RT 3246.)

The interview resumed at 11:29 p.m. and continued until 1:40 a.m. (23RT 3202.) The officers did not record this portion of the interview. (23RT 3250.)[17/] The officers told appellant that Sarah LaChapelle was dead and that her death was a homicide. (23RT 3280-3281, 3295-3296.) Paniagua questioned appellant about how he had obtained LaChapelle's car and the VCR and the television found in the back seat of that car. (23RT 2395.) Paniagua asked appellant where he had been the previous night. (23RT 3297.) Paniagua told appellant that he and Medsker did not think appellant had told them the whole truth about the problems appellant had had with his family the previous day. (23RT 3247.) Appellant specifically denied going to his grandmother's house on Hesket Road more than once on April 18, 1988. (RT 3282.) When Paniagua directly asked appellant whether he had gone back to the family home later that evening, appellant stated, "So what if I went back again? But I didn't." (23RT 3280.) At one point during this interview Paniagua told appellant that he was lying and appellant stated, "going to jail for the rest of your life, man." (23RT 3280.)

At 1:40 a.m., Paniagua and Medsker took a ten-minute break and conferred as to how the interview should continue in view of appellant's denials of his involvement in the incident. (23RT 3281.)

At 1:50 a.m., the interview resumed. (23RT 3203-3204, 3280.) Medsker and Paniagua had collected information with which to confront

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17. Only a transcript of the taped portion of the interview, from 10:07 p.m. to 10:33 p.m., was introduced into evidence at the suppression hearing. (23RT 3317-3318; 3CT 627; Def. Exh. D.)

appellant. (23RT 3203-3204.) This portion of the interview was also not recorded. (23RT 3250, 3252.) Up until this time, appellant had maintained that he obtained the car he had been driving from Fred Bush. (23RT 3204, 3282.) The investigators had learned, however, that Bush had been in custody "the entire time." (23RT 3204.) Paniagua advised appellant that because Bush had been in custody it was not possible that appellant had received the burgundy Oldsmobile from him. (23RT 3282.) Paniagua confronted appellant with the fact that his family had called police on April 18, and asked the police to "get" appellant. (23RT 3282.) Paniagua confronted appellant with appellant's bloodstained clothing, the fact that Sarah LaChapelle's personal property was inside her car, and the fact that appellant was found by police in control of LaChapelle's car. (23RT 3204, 3282-3283.) Paniagua advised appellant that LaChapelle had been killed and that he was a suspect in the homicide. (23RT 3309, 3314.) Appellant responded, "Why should I tell the truth? What's in it for me? I'm still going to jail." (23RT 3204, 23RT 3313.)

At 3:12 a.m., Paniagua placed appellant under arrest. (23RT 3283.) At 3:13 a.m., Paniagua entered the interview room to collect appellant's sweater, which was on a chair. (23RT 3309.) Paniagua provided appellant with a blanket; the room was also being heated. (23RT 3283, 3309-3310.) At 4:10 a.m., Paniagua took appellant's pants as evidence. (23RT 3284.)

Throughout the interview, Paniagua and Medsker did not promise appellant anything in consideration for giving them information and appellant was not threatened or harmed in any way. (23RT 3201-3203, 3205, 3278, 3283-3284.)

On April 20, 1988, after appellant was arrested for murder, Sergeant Medsker obtained a search warrant for the home of Lisa Henry, where appellant had been staying. (23RT 3206.) Lisa, her brother Germaine and a woman named Jacky were at the residence. (23RT 3286.) After the search, Lisa

voluntarily accompanied officers to the Oakland Police Department. (23RT 3206, 3286, 3298-3299.) Sergeant Paniagua advised Lisa that he investigating a homicide and that appellant was a suspect. (23RT 3299.) Lisa initially asked if she could speak to appellant and was told, "no, maybe later." (23RT 3259.)

At 9:17 a.m., Medsker and Paniagua began an interview of Lisa, but that interview was interrupted when Paniagua was called out to court. (23RT 3207.) Paniagua returned at 9:50 a.m., and a taped interview commenced. The interview stopped at 10:10 a.m. (23RT 3207-3208.) At approximately 10:15 a.m., Lisa requested to see appellant, who was in the interview room next door. (23RT 3208, 3300.) The officers had told Lisa that they had been talking to appellant all night trying to get him to tell the truth. (23RT 3208, 3260.) Lisa asked if appellant had told the truth and Paniagua replied that appellant had been lying to the officers. (23RT 3287.) Neither Paniagua nor Medsker discussed with Lisa what appellant had told them. (23RT 3299.) Lisa suggested that maybe she could convince appellant to tell the truth and Paniauga said that would be "great" because so far appellant had been lying. (23RT 3287, 3289.)

Lisa spoke with appellant for five minutes. (23RT 3256, 3287.) The officers imposed no conditions on her and did not request that she do anything in particular when she spoke with appellant. (23RT 3208, 3303.) Neither Medsker nor Paniagua told Lisa what to ask appellant, did not suggest any area of inquiry they wanted covered, and did not ask her to obtain admissions from appellant about the LaChapelle homicide. (23RT 3210-3211.) The officers allowed Lisa to speak with appellant because she had asked to speak with him and she was free to talk with him about whatever she wanted. If Lisa inferred that the officers sent her in to talk with appellant to find out what had "really happened," that was not what Paniagua or Medsker intended. (23RT 3258, 3260, 3304.) Put differently, Paniagua and Medsker did not consider Lisa

Henry to be a police agent when she went in to talk to appellant. (RT 3289.)

After Lisa visited with appellant, he requested to use the bathroom. (23RT 3212.) Medsker and Sergeant Thiem took appellant to the bathroom, where he slammed his fist into the bathroom mirror. (23RT 3212.) When the officers handcuffed appellant, Medsker noticed that appellant's left wrist was bleeding. (23RT 3212.) Back inside the interview room, Medsker discovered a broken ashtray inside the blanket appellant had been given earlier. (23RT 3213.) Next, appellant was taken to the jail for booking. (23RT 3213.) This was at 10:25 a.m. (23RT 3213.) Medsker was thereafter advised by the jail that appellant was going to be taken to the hospital for treatment. (23RT 3213.)

At 10:50 a.m., the officers interview with Lisa resumed. The tape was turned on at 10:57 a.m. and the interview concluded at 11:03 a.m. (23RT 3209, 3214, 3289, 3304.)[18] During that six-minute discussion with the officers, after Lisa had confirmed her visit with appellant, Paniagua asked Lisa, "did I tell you to do anything else." Lisa stated, "you asked me just did I want to talk to him, maybe I could talk to him to convince him to tell the truth or to tell what happened." (23RT 3303.) Paniagua responded "okay," and stated that he did not respond further with regard to Lisa's statement to him, because he did not feel it would be beneficial to argue with her if she had interpreted the situation differently than he had. (23RT 3303.) Paniagua maintained that he had not asked Lisa to talk to appellant and "get him to tell the truth." (23RT 3303.)

At the conclusion of the presentation of evidence, defense counsel reiterated their argument that the trial court should exclude from evidence at trial appellant's statements to Paniagua and Medsker on the ground that appellant had not voluntarily, knowingly, or intelligently waived his *Miranda*

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18. Only a transcript of this second taped portion of the interview, from 10:57 a.m. to 11:03 a.m., was introduced into evidence at the suppression hearing. (23RT 3316-3318; 3CT 627; Def. Exh. C.)

rights. (23RT 3319.) Specifically, counsel argued that appellant had been advised that he "was at homicide talking to the sergeants about a car that was stolen and where a woman was hurt." (23RT 3319.) Counsel argued that, appellant had waived his *Miranda* rights only as to the issue surrounding the theft of the car. (23RT 3320.) Counsel further argued that appellant:

> was never given the opportunity to knowingly, freely, and intelligently give up his right to an attorney, et cetera, as to his being a suspect in a homicide, until 1:50 to 3:12, when he was finally informed that the victim was a victim of a homicide, and when he was arrested at 3:12.
>
> And so it's my position that all of the information from the very beginning where Paniagua told him that he was there to talk about a car that was stolen and an incident thereto to the stolen car, all of that is not freely and voluntarily given. Even though a *Miranda* was given to him, it wasn't given on the homicide.

(23RT 3320.) Counsel continued:

> Your Honor, this is a matter where the police have set out to deceive the defendant into waiving his *Miranda*, and it is not until they're ready to arrest him that he tells him that they are, in fact, investigating a homicide. That's truly the issue; not whether he's been *Mirandized* but whether he's been tricked into waiving his *Miranda* rights and -- and tricked into making statements that he would not have made had he known he was a suspect on a homicide.

(23RT 3322.)

The prosecutor's position was that the law did not require that the officers give appellant *Miranda* warnings for every crime they were investigating his involvement in. (23RT 3320-3321.) The prosecutor also argued that Paniagua had advised appellant that the investigation was not only about a stolen car and that it was not Paniagua's intention to trick appellant. (23RT 3321.) The prosecutor further argued that "this is one continuous interrogation session, although there are interruptions for breaks and taking him to the toilet and back and forth. But this is continuous, and the law says that all you need to do is admonish him once." (23RT 3322.)

The trial court deemed the matter submitted. (23RT 3322.)

At the conclusion of the hearing, the trial court issued its ruling on appellant's motion to exclude his statements to Officers Paniagua and Medsker:

> THE COURT: All right. I find that -- that his *Miranda* rights were adequately protected.
>
> I think the public defender's position on this case is a stretching of the *Miranda* rule. I find that it is was -- the statements made by your clients [*sic*] were voluntarily given and that there was no inducement or threats made by the police officers.
>
> So any statement that Mr. Tate made to Inspector Paniagua during the course of this interrogation would be admissible because I think there's no Fifth Amendment or *Miranda* violations.
>
> I think that based upon the evidence that I've heard in this case that your argument doesn't hold water because your client was well-advised why he was there, in my judgment, and that takes care of the first issue.

(23RT 3325.)

With respect to the second issue, the admissibility of appellant's statements to his girlfriend Lisa Henry, defense counsel reiterated their argument that Lisa was an agent of the police when appellant spoke with her at the police station. (23RT 3325.) "Mr. Tate is unaware that she is a police agent. Mr. Tate allegedly makes a statement that Lisa tells the police, and I'm asking that that be suppressed on the basis that she is a police agent and has not told Mr. Tate that she is a police agent. It violates due process." (23RT 3326.)

The trial court then rejected appellant's motion to suppress his statements to Lisa Henry, in the following detailed ruling:

> THE COURT: Lisa Henry asked the -- Medsker and Paniagua if Mr. Tate had told the truth. They advised her that they thought he was lying. And then she said -- According to their testimony, she asked to talk to him. They didn't say, why don't you go talk to him. They said she asked to talk to him. She said maybe she could convince him to tell the truth. And they let her in there, and then when she came out, she made a statement to the extent of which I'm ignorant because I haven't heard it, number one. I asked Medsker if they had made any threats to her, made any promises to her, had suggested any questions to her that she should ask Mr. Tate, and he said no. So apparently this was at her own

-- this was her own initiative.

And then Paniagua said he didn't want take issue with her version of why she was sent in there because it was an inappropriate time to do that, and I can understand that.

I don't think that Miss Henry was a police agent, number one. So I'm going to find that she was not a police agent. Based on the testimony I've heard, I don't think she was a police agent.

If by some stretch of the imagination, a reviewing court felt that she was a police agent, the ruling case, as I understand it, is *Illinois versus Perkins*, which I have read and where they say that a police agent need -- does not have to admonish, give anybody the *Miranda* right. And that particular practice of a police agent going in there and asking questions has not been condemned by the United States Supreme Court. So, as far as I know, even if she was a police agent, it's still something that the police can do and get away with.

. . . . . .

If you want me to take it a step further, it's not a violation of the Fifth Amendment.

First of all, I'm finding that she is not a police agent, for openers.

And there's a case on point here. It's called *People versus Wallace*, and it's -- I'll cite it in here. It's 9 Cal. App 4th at page 1520. The circumstances under which the wife went and talked to her husband is sort of unclear here. The detail is not in this opinion as much as we have here in the Tate case, but in that case the judge was satisfied that she was not a police agent, as I am here.

And I'm taking it a step further. If a reviewing court comes to the -- wants to second guess the Court and take a position that she was a police agent, *Illinois versus Perkins* says that that is not tantamount to any violation of his rights, including the Fifth Amendment.

(23RT 3226.)

Eventually, of course, as we detailed in our Statement of Facts (see, e.g., pp. 6-10, 12-14, *ante*), the prosecution introduced into evidence at the guilt phase (1) the specifics of appellant's damaging statements to police (through the testimony of Officer Paniagua and a playing of the taped portion of the police interview with appellant); and (2) the specifics of appellant's damaging

statements to Lisa Henry (through the testimony of Paniagua, Henry, and a playing of the second taped portion of the police interview with Henry regarding what appellant had told her).[19/]

## B. Appellant Knowingly, Voluntarily, And Intelligently Waived His *Miranda* Rights

In this Court, appellant reiterates his contention that the trial court erred in not excluding his damaging pretrial statements to police from evidence. (AOB 276-277, 285-289.) Appellant does not dispute that he was informed of his *Miranda* rights, but argues he waived them involuntarily. He asserts that Sergeants Paniagua and Medsker "deceived him as to the subject and scope of their questions" and affirmatively minimized the nature of their inquiry by withholding from him that they were investigating the murder of Sarah LaChapelle. (AOB 287.) As the trial court determined, however, there is no validity to appellant's claims.

The admissibility of inculpatory statements in California is governed by federal standards, of course. (See Cal. Const., art. I, § 28, subd. (d); *People v. Peevey* (1998) 17 Cal.4th 1184, 1188; *People v. Montano* (1991) 226 Cal.App.3d 914, 930.) *Miranda v. Arizona, supra*, 384 U.S. 436, requires that the police admonish a criminal suspect who is in custody "of specified Fifth Amendment rights." (*People v. Morris* (1991) 53 Cal.3d 152, 197.) The well-known *Miranda* warnings (the right to remain silent; the right to consult a lawyer; the right to have a lawyer present during questioning; and the right against self-incrimination) are designed to protect the privilege against compelled self-incrimination from "the coercive pressures that can be brought

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19. At trial the prosecution not only played the above-mentioned tapes for the jury, but introduced the tapes and the transcripts thereof into evidence. (People's Exhs. 62, 64, 73, 74; 28RT 3855-3864; 29RT 3877-3879; 30RT4002-4007; 34RT 4454-4462.)

to bear upon a suspect in the context of custodial interrogation." (*Berkemer v. McCarthy* (1984) 468 U.S. 420, 428 [104 S.Ct. 3138, 82 L.Ed.2d 317].) Hence, before interviewing suspects who are in custody, the police must inform the suspects of their *Miranda* rights, and obtain a voluntary, knowing, and intelligent waiver of those rights. (*Fare v. Michael C.* (1979) 442 U.S. 707, 717-718 [99 S.Ct. 2560, 61 L.Ed.2d 197]; *Miranda v. Arizona, supra*, 384 U.S. at pp. 444, 478-479.)

> "The determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel."

(*People v. Whitson* (1998) 17 Cal.4th 229, 247, quoting *Fare v. Michael C., supra,* 442 U.S. at pp. 724-725.)

In other words, a court analyzing whether a defendant voluntarily, knowingly, and intelligently waived his or her *Miranda* rights, must consider two distinct components:

> "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived."

(*People v. Whitson, supra*, 17 Cal.4th at p. 247, quoting *Moran v. Burbine* (1986) 475 U.S. 412, 421, 422-423 [106 S.Ct. 1135, 89 L.Ed.2d 410].)

In the trial court, the prosecution has the burden of showing the validity of the defendant's waiver of his or her constitutional rights by a preponderance of the evidence. (*Colorado v. Connelly* (1986) 479 U.S. 157, 168-169 [107 S.Ct. 515, 93 L.Ed.2d 473]; *People v. Markham* (1989) 49 Cal.3d 63, 71.)

Determinations as to the validity of a waiver of *Miranda* rights, a predominately legal mixed question, are reviewed independently (*People v. Mickey, supra*, 54 Cal at p. 649), although the trial court's findings as to the circumstances surrounding the statements at issue—including "the characteristics of the accused and the details of the interrogation—are clearly subject to review for substantial evidence" (*People v. Benson* (1990) 52 Cal.3d 754, 779). Also affirmed if supported by substantial evidence are the trial court's resolution of disputed facts and reasonable inferences from the facts, and its credibility evaluations. (*People v. Crittenden* (1994) 9 Cal.4th 83, 128; *People v. Wash, supra*, 6 Cal.4th at p. 235.)

Here, the trial court properly ruled that the prosecution proved, by a preponderance of the evidence, that appellant knowingly, intelligently, and voluntarily waived his *Miranda* rights. Not only did the officers read appellant his *Miranda* rights from a departmental-issue card, but appellant responded affirmatively when Paniagua then asked appellant if he understood "each of these rights I've explained to you?" (23RT 3200, 3277, 3291.) Paniagua then asked, "Having these rights in mind, do you wish to talk to us now?" Appellant responded, "Yeah." (23RT 3200, 3239, 3277-3278; 1CT 78.) Appellant also initialed the written form, acknowledging the *Miranda* advisement and his waiver of same. (23RT 3200, 3277-3278.)

Appellant's argument that his waiver was involuntarily because the officers "deceived" him into thinking that they were only going to question him about a stolen car fails. As a legal matter, the courts have held that a suspect can voluntarily waive *Miranda* even if police fail to inform him or her of all the crimes about which the officers might ask questions. (*Colorado v. Spring* (1987) 479 U.S. 564, 566 [107 S.Ct. 851, 93 L.Ed.2d 954]; *People v. Boyette* (2002) 29 Cal.4th 381, 411.) "This Court has never held that mere silence by law enforcement officials as to the subject matter of an interrogation is

'trickery' sufficient to invalidate a suspect's waiver of *Miranda* rights, and we expressly decline to so hold today." (*Colorado v. Spring, supra*, 479 U.S. at p. 576.)

> We have held that a valid waiver does not require that an individual be informed of all information "useful" in making his decision or all information that "might . . . affec[t] his decision to confess." [Citation.] "[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." [Citation.] Here, the additional information could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature.

(*Colorado v. Spring, supra*, 479 U.S. at pp. 576-577.)

And as a factual matter, appellant could not have believed that the officers only wanted to talk to him about a stolen car. Prior to reading appellant his rights Sergeant Paniagua told appellant the police were conducting "an investigation on the victim's car that was stolen, and specifically the incident in which the vehicle was taken *as a lady had been hurt.*" (23RT 3277, emphasis added.) After his waiver appellant asked the officers if he was in the homicide section of the police department. (23RT 3311.) Paniagua advised appellant that he was. (23RT 3311.) Appellant then asked if he was there for "a car that was stolen." (23RT 3311.) Paniagua repeated that the investigation involved a "stolen car *in which a lady got hurt.*" (23RT 3243, emphasis added.) Paniagua stated, "And I want it to be clear in your mind I'm not here to trick you into anything." (23RT 3243, 3311.) Appellant replied, "I know you ain't, just tell me, you just said the car was stolen." (23RT 3312.) Paniagua stated, "I said you were arrested for being in the car that was stolen and that I'm investigating the incident which the car was taken." (23RT 3312.) Appellant replied, "Whatever you said." (23RT 3312.) Paniagua then re-*Mirandized* appellant and confirmed he agreed to speak with the investigating officers. (23RT 3278, 3312.) As the trial court reasonably found, the

reasonable inference appellant drew from the foregoing was that the officers wanted to talk to him about more than just a stolen car—he knew they also wanted to talk to him about the incident in which LaChapelle got hurt. (23RT 3323.) There was no trickery. Appellant voluntarily waived *Miranda*.

### C. After Voluntarily Waiving *Miranda* Appellant Gave Voluntary Statements

Although below appellant did not argue that the false statements he gave Sergeant Paniagua and Medsker after waiving *Miranda* were involuntary lies (3CT 586, 609-614, 23RT 3319-3324), the trial court nevertheless ruled that appellant's statements "were voluntarily given and that there were no inducement or threats made by the police officers" (23RT 3325). In this Court, appellant appears to challenge that ruling, claiming that the "deception" used by Paniagua "produced false" statements from him. (AOB 288.)

The People recognize that it is occasionally the case that a suspect may voluntarily waive *Miranda* and agree to talk with police, and may ultimately inculpate himself, *but may do so involuntarily*. The admission of an involuntary statement as evidence against a defendant violates the defendant's due process rights under both the California and United States Constitutions. (*Jackson v. Denno* (1964) 378 U.S. 368, 385-386 [84 S.Ct. 1774, 12 L.Ed.2d 908]; *People v. Ditson* (1962) 57 Cal.2d 415, 438-439.) Use of such involuntary statements in a criminal prosecution is prohibited because "it offends 'the community's sense of fair play and decency' to convict a defendant by evidence extorted from him." (*People v. Atchley* (1959) 53 Cal.2d 160, 170.) In general, statements are considered voluntary "if the accused's decision to speak is entirely . . . without 'any form of compulsion or promise of reward.'" (*People v. Thompson* (1980) 27 Cal.3d 303, 327-328, citation omitted.) "Government coercion" is a "necessary predicate" to a finding that

a confession is involuntary under the due process clause of the Fourteenth Amendment. (*Colorado v. Connelly, supra*, 479 U.S. at pp. 169-170.) Conversely, inculpatory statements are considered involuntary under the due process clause of the Fourteenth Amendment when, under the totality of the circumstances, the police treat the accused in such a way that his or her statements are not the product of a rational intellect and a free will. (*Mincey v. Arizona* (1978) 437 U.S. 385, 398 [98 S.Ct. 2408, 57 L.Ed.2d 290]; *Blackburn v. Alabama* (1960) 361 U.S. 199, 208 [80 S.Ct. 274, 4 L.Ed.2d 242]; *Brown v. Mississippi* (1936) 297 U.S. 278 [56 S.Ct. 461, 80 L.Ed. 682].)

This Court's review of the trial court's ruling that appellant gave voluntary statements is "a mixed question of law and fact that is . . . predominately legal." (*People v. Mickey, supra*, 54 Cal.3d at p. 649.) This Court, therefore, exercises independent review of the trial court's ultimate determination regarding the voluntariness of a confession. (*People v. Jones* (1998) 17 Cal.4th 279, 296.) "The trial court's determinations concerning whether coercive police activity was present" is "subject to independent review as well." (*Ibid.*)

Here, a preponderance of the "totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation" demonstrate that appellant gave his statements voluntarily. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226 [93 S.Ct. 2041, 36 L.Ed.2d 854]; *Lego v. Twomey* (1972) 404 U.S. 477, 489 [92 S.Ct. 619, 30 L.Ed.2d 618]; *People v. Markham, supra*, 49 Cal.3d at p. 71; *People v. Massie* (1998) 19 Cal.4th 550, 576.)

First, we have already established that appellant is wrong in claiming that he was the victim of trickery or deception. He knew the officers wanted to talk to him about more than the stolen car. He wasn't "coerced" into talking by believing that the officers only wanted to discuss the stolen car. Second, the

police did not use any of the traditional methods of intimidation which result in involuntary confessions. At no point in the interview did Paniagua and Medsker promise appellant anything in consideration for giving them information and the officers did not threaten or harm appellant in any way. (23RT 3201-3203, 3205, 3278, 3283-3284.) There is no indication in the record that either Paniagua or Medsker ever yelled at appellant, displayed a weapon, or handcuffed him. Furthermore, appellant always appeared to understand what he and the officers were talking about. Although the officers spoke to appellant for a lengthy period, they gave him multiple breaks, and offers of refreshment.

The record amply supports the trial court's ruling that appellant inculpated himself with his falsehoods voluntarily.

**D. Lisa Henry Was Not A Police Agent**

Appellant does not appear to be renewing his trial argument that he involuntarily made his statement to Lisa Henry. Appellant does continue to maintain that Lisa Henry was a police agent when she spoke to him at the police station and that their discussion amounted to impermissible custodial interrogation in the absence of fresh *Miranda* warnings to him and another waiver, and therefore the trial court erred in not excluding the statements he made to Henry from evidence. (AOB 289-300.) Appellant continues to be wrong.

As the trial court ruled, *Illinois v. Perkins* (1990) 496 U.S. 292, is dispositive against appellant. There, the police placed an undercover agent in the cell of the defendant, who was in custody on a charge of aggravated battery. In response to questions from the agent, the defendant made incriminating statements about a murder unrelated to the battery charge. The High Court held that the admission of these statement did not violate *Miranda* because they were

not made in the type of "police-dominated atmosphere" that concerned the *Miranda* majority.

Appellant suggests that his situation is distinguishable because he was indeed in an "incommunicado" "police-dominated atmosphere" at the time Lisa Henry spoke with him. (AOB 293.) We disagree. There were no police in the room at the time Lisa was there.

In any event, as the trial court also correctly held here, Lisa was not a police agent. (23RT 3326, 3328.) That question was a purely factual one for the trial court (*People v. Mayfield, supra*, at pp. 758-759), and substantial evidence supports the court's conclusion. Sergeant Medsker testified that it was Lisa who asked officers if she could speak to appellant. (23RT 3259.) Both Medsker and Paniagua testified they never told Lisa Henry what to ask appellant, never made or sought to make any agreement regarding what they wanted her to do, never offered her any benefit in exchange for information she might obtain from appellant, and did not consider her to be a law enforcement agent. (23RT 3208, 3210, 3289, 3303.) (Moreover, Lisa later testified at trial that it was she who asked to speak to appellant. (28RT 3754, 3758, 3802, 3852.)) Additionally, appellant said nothing to indicate he thought his girlfriend was an agent of law enforcement. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301 [100 S.Ct. 1682, 64 L.Ed.2d 297] [any inquiry into whether constructive interrogation occurred "focuses primarily upon the perceptions of the suspect, rather than the intent of the police"]; see also *People v. Mayfield, supra*, 14 Cal.4th at p. 758, quoting *People v. Medina* (1990) 51 Cal.3d 870, 892; original emphasis ["'None of the police agent cases cited by defendant indicates that it would have been improper for the officers to grant an inmate's relatives special visitation privileges in the *unspoken* hope that they might elicit statements from defendant and inform the officers thereof.].)

In support of his argument that Lisa was a police agent appellant finds the end of Paniagua's conversation with Lisa significant. (AOB 292-293, 299.) At that point, after Lisa had confirmed her visit with appellant, Paniagua asked her, "did I tell you to do anything else." Lisa stated, "you asked me just did I want to talk to him, maybe I could talk to him to convince him to tell the truth or to tell what happened." (23RT 3303.) Paniagua responded "okay," and testified that he did not respond further with regard to Lisa's statement to him, because he did not feel it would be beneficial to argue with her if she had interpreted the situation differently than he had. (23RT 3303.) In other words, if Lisa had inferred that the officers sent her in to talk with appellant to find out what had "really happened," that was not what Paniagua or Medsker intended. (23RT 3258, 3260, 3304.) Paniagua maintained that he did not ask Lisa to talk to appellant and "get him to tell the truth." (23RT 3303.) Appellant claims that it "is difficult to lend credence to Paniagua's explanation that it would have served no useful purpose to contradict or deny Lisa's statement." (AOB 299.) Appellant believes that when Paniagua told Lisa "okay" he was telling the truth—and truthfully acknowledging that Lisa was his agent.

However, it is not appellant's call whether to give credence to Paniagua's explanation. As a credibility determination that call was one solely for the trial court (*People v. Mayfield, supra*, 14 Cal4th at pp. 758-759; *People v. Crittenden, supra*, 9 Cal.4th at p. 128), and the court expressly credited Paniagua's explanation (23RT 3327). Appellant offers no citation to authority in support of his assertion (AOB 300) that the issue of whether Lisa was a police agent is reviewed "independently" by this Court.

### E. Any Errors Did Not Prejudice Appellant

Where inculpatory statements by a defendant are erroneously admitted into evidence on *Miranda* or voluntariness grounds, no reversal is required if

the prosecution can show the error harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at pp. 23-24; *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [111 S.Ct. 1246, 113 L.Ed.2d 302]; *People v. Cahill* (1993) 5 Cal.4th 478, 540-541; *People v. Johnson* (1993) 6 Cal.4th 1, 32-33.) Assuming, for the sake of argument, that the trial court erred in admitting appellant's statements to police and Lisa Henry into evidence, he is not, contrary to his position (AOB 300-310), entitled to reversal of both the guilt and death verdicts. Any error is harmless beyond a reasonable doubt.

With respect to the guilt verdict, although the prosecutor emphasized appellant's pretrial statements in summation, absent those statements the verdict would have remained the same. Appellant not only gave the "Fred Bush" lie to the first officers he encountered on the traffic stop, but he was driving Sarah LaChapelle's car, and had her VCR and her television. (23RT 2395; 26RT 3589.) Appellant also had LaChapelle's blood on his shoes, jacket, sweater, and pants. Thus, it was manifest from the physical evidence that appellant was involved in the murder of Sarah LaChapelle. Likewise, it was manifest from the physical evidence that the murder occurred during the course of a robbery and burglary. A "reasonable possibility" of a different verdict "requires that, in the admissible evidence there must exist some candidate theory and basis for reasonable doubt as to defendant's guilt of felony murder. [Citation.]" (*People v. Cahill* (1994) 22 Cal.App.4th 296, 319 [finding erroneous admission of confession harmless beyond a reasonable doubt].) Here, there was none.[20/]

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20. The People acknowledge that any harmless-error analysis could not include appellant's inculpatory trial testimony. In *Harrison v. United States* (1968) 392 U.S. 219, 223 [88 S.Ct. 2008, 20 L.Ed.2d 1047], the United States Supreme Court held that if a defendant decides to testify "in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible." The Court stated that the prosecution bears the burden of showing the defendant's testimony was not induced or

With respect to the death verdict, we disagree with appellant that his statements to police and Lisa Henry comprised an important part of the prosecution's case in aggravation. This was a case where the circumstances in aggravation clearly outweighed the circumstances in mitigation. Appellant stabbed the victim repeatedly. He impaled a knife in Mrs. LaChapelle's backside, and a fork in the right side of her neck. (26RT 3529.) He perpetrated a total of 24 stab or incised wounds. (26RT 3532.) Appellant also perpetrated a total of 28 puncture wounds in Mrs. LaChapelle's back and face, including one that penetrated her eye. (26RT 3533-3535.) Appellant additionally inflicted multiple blunt force injuries to Mrs. LaChapelle's head, face, arms, hands and torso. (26RT 3539-3543.) He severed her ring finger and stole her wedding rings. (26RT 3543; 32RT 4220.) During appellant's struggle with Mrs. LaChapelle—a grandmother—he fractured her jaw and knocked out some teeth. (26RT 3552, 3581.) He wrapped a telephone cord wrapped around her wrists and torso. (26RT 3555-3556.) In sum, he viciously and callously killed an elderly woman.

Any error in admitting appellant's statements into evidence was harmless beyond a reasonable doubt for it is inconceivable the jury would have returned more favorable verdicts for appellant at either the guilt or penalty phases if the challenged statements had been excluded.

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impelled by the erroneous admission of confession. (*Harrison v. United States, supra*, 392 U.S. at pp. 224-225; *People v. Spencer* (1967) 66 Cal.2d 158, 163-169.)

## VII.

## THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY WITH CALJIC NO. 14.59 AND APPELLANT'S CONTRARY ARGUMENT IS PROCEDURALLY BARRED

The prosecution charged appellant with murder and two special circumstance allegations: murder in the commission or attempted commission of burglary and murder in the commission or attempted commission of robbery. (Pen. Code, §§ 187, 190.2, subd. (a)(17).) (1CT 194-195.) The prosecution theorized that appellant committed a *first degree murder* in one of three or more ways: (1) premeditation and deliberation; (2) felony-murder (burglary); and (3) felony-murder (robbery). (34RT 4466-4469.)

After instructing the jurors on the robbery and burglary special instructions (34RT 4603-4608), the trial court instructed the jurors on the definition and elements of both robbery and burglary (34RT 4608-4610). The court then instructed the jurors with CALJIC No. 14.59, as follows:

> If you are satisfied beyond a reasonable doubt and agree unanimously that the defendant made an entry with the specific intent to steal or to commit robbery; a felony, you must find the defendant guilty. You are not required to agree as to which specific crime the defendant intended to commit when he entered.

(34RT 4610.)

The court misspoke when it used the phrase "must find the defendant guilty" instead of the correct statement, "should find the defendant guilty," but the written version of CALJIC No. 14.59 given the jurors read correctly. (3CT 764.) The jury knew it had the written instructions available to it and knew it was to be governed by the "final wording." (34RT 4613.)

Appellant contends preliminarily that the trial court erred in instructing the jury with CALJIC No. 14.59 because it was irrelevant given that the prosecution did not charge him with the substantive offense of burglary and

given that there existed no evidence he entered the house with any intent other than to steal. (AOB 311-312.) And, appellant continues, because the instruction spoke only of "guilt," the jury would have necessarily understood the instruction as calling for a finding of "guilty" on the only crime charged—murder—if the jury unanimously found that the defendant made an entry with the specific intent to steal or to commit robbery. Concurrently appellant claims that the instruction, as spoken and written ("must" or "should find the defendant guilty"), had the constitutionally impermissible consequence of "directing" a verdict of first degree murder. (AOB 311-323.) Appellant argues that reversal of the entire judgment is required in light of the directed-verdict error. (AOB 311, 323-324.)

Appellant's assignment of instructional error is both procedurally barred and without merit.

### A. Appellant's Claim Is Procedurally Barred

Appellant cannot currently challenge CALJIC No. 14.59 because he requested the instruction below and therefore he either invited any error or his attacks are forfeited. While Penal Code section 1259 provides, in relevant part, that an appellate court "may . . . review any instruction given, refused or modified even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby," this Court has previously held that as general rule, the trial court is not obligated to revise or improve standard instructions in the absence of a request from counsel. (*People v. Wolcott* (1983) 34 Cal.3d 92, 108-109.) This is especially true if the instruction was, as here (3CT 661), specifically requested by the defendant. (See *People v. Medina* (1995) 11 Cal.4th 694, 763 [precluding attack on CALJIC No. 2.01 because counsel requested the instruction]; *People v. Wader* (1993) 5 Cal.4th 610, 657-658.)

**B. CALJIC No. 14.59 Did Not Direct A Verdict**

A trial court in a criminal case is required to give jury instructions on the general principles of law relevant to the issues raised by the evidence. (*People v. Michaels* (2002) 28 Cal.4th 486, 529-530.) A trial court commits instructional error only when, in light of all the instructions the jury received (*Francis v. Franklin* (1985) 471 U.S. 307, 315 [105 S.Ct. 1965, 85 L.Ed.2d 344]; *People v. Moore* (1988) 47 Cal.3d 63, 87), there is a reasonable likelihood that the jury either did not understand, or misinterpreted the law (*Estelle v. McGuire* (1991) 502 U.S. 62, 64, 72-73, fn. 4 [112 S.Ct. 475, 116 L.Ed.2d 385]; *Boyde v. California* (1990) 494 U.S. 370, 380 [110 S.Ct. 1190, 108 L.Ed.2d 316]; *People v. Kelly* (1992) 1 Cal.4th 495, 525-526).

Here, in light of all the instructions the jury received, there is no reasonable likelihood that the jury understood CALJIC No. 14.59 to mean that if defendant made an entry with the specific intent to steal or to commit robbery, it had to find appellant guilty of first degree murder. The jury knew it had to view the instructions as a whole and each in light of the others. (3CT 711.) The jury knew that the prosecution had charged appellant with a burglary-murder special circumstance, and thus it had to determine, as the court instructed it, inter alia, whether "the murder was committed while defendant was engaged in the commission of a burglary." (3CT 751.) The jury undoubtedly understood that the instruction defining burglary given it by the court was to help it determine whether the burglary-murder special instruction was true. In turn, when CALJIC No. 14.59 told the jury that if it agreed "unanimously that the defendant made an entry with the specific intent to steal or to commit robbery; a felony, you should find the defendant guilty" (3CT 764) the jury would have understood *that the reference to "guilty" was a reference to whether appellant had committed a burglary for purposes of the burglary-murder special circumstance.* The jury would have understood that

it could find that appellant committed burglary (and thus could perhaps find the burglary-murder special circumstance true) even if it could not agree whether he intended to steal or to commit robbery when he entered Sarah LaChapelle's home.

*People v. Holt, supra*, 15 Cal.4th 619, is instructive here. There, the court instructed the jury with CALJIC No. 14.59 as follows: "If you are satisfied beyond a reasonable doubt and agree unanimously that the defendant made an entry with the specific intent to steal or commit rape or sodomy, felonies, *you should find the defendant guilty*. You are not required to agree as to which particular crime the defendant intended to commit when he entered." (*People v. Holt, supra*, 15 Cal.4th at p. 680; original emphasis.) This Court held:

> Defendant complains that the emphasized words created a mandatory presumption that he was guilty of all of the charged crimes. Even without consideration of the instructions on the other charged offenses, each of which advised the jury of all of the elements of the crimes and that each element had to be proven, the claim lacks merit. The burglary instructions themselves made it clear that this language referred only to defendant's guilt of burglary.

(*People v. Holt, supra*, 15 Cal.4th at p. 680.)

Appellant's claim that the holding in *Holt* does not apply in this case because appellant was not separately charged with burglary (AOB 322) lacks merit. The *Holt* rationale applies here. Just as the burglary instructions there themselves made it clear that the "guilt" language referred only to defendant's guilt of burglary, here the burglary and burglary-murder special circumstance instructions themselves made it clear that the "guilt" language of CALJIC No. 14.59 applied only to the question of whether appellant committed burglary for purposes of the special circumstance.[21/]

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21. Appellant's claim that this Court, in *People v. Osband* (1996) 13 Cal.4th 622, 686-687, held that CALJIC No. 14.59, as given in our case, was

Looked at from another angle, it defies commonsense to believe that the jury would have understood, in light of all the instructions given it and the arguments of counsel (*People v. Garceau* (1993) 6 Cal.4th 140, 189; *People v. Kelly, supra*, 1 Cal.4th at p. 526; *People v. Lee* (1987) 43 Cal.3d 666, 677), that it could or had to find appellant guilty of first degree murder if it found only that appellant entered the LaChapelle home with an intent to steal or commit robbery. After all, the court had also instructed the jury with the standard felony-murder instruction, which defined what the prosecution had to have proven beyond a reasonable doubt before the jury could find appellant guilty of first degree murder under a felony-murder theory:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of burglary or robbery is murder of the first degree when the perpetrator had the specific intent to commit such crime. [¶] The specific intent to commit a burglary or robbery and the commission or attempted commission of that crime must be proved beyond a reasonable doubt.

(3CT 741.)

Consideration of the foregoing instruction, along with all the others, helps prove the unreasonableness of appellant's claim of how the jury would have understood CALJIC No. 14.59 in this case. "[A] single instruction is not to be viewed in 'artificial isolation'; instead, it must be evaluated 'in the context of the overall charge.'" (*People v. Espinoza* (1992) 3 Cal.4th 806, 823-824, quoting *Cupp v. Naughten* (1973) 414 U.S. 141, 146-147 [94 S.Ct. 396, 38 L.Ed.2d 368].) Rational and intelligent jurors do not parse instructions in a

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error, is not borne out by a close reading of the case. The *Osband* court held only that the trial court's error in giving the jury an oral version of CALJIC No. 14.59 ("guilty") that differed from the written version given the jury ("guilty of burglary") was harmless. *Osband* does not hold that the oral instruction in that case (which was essentially the written and oral instruction in our case) was erroneous on its own.

hypertechnical manner (in the way lawyers might).[22/] Appellant's seventh contention is procedurally barred and baseless.

## VIII.

## THE INFORMATION DID NOT CHARGE APPELLANT WITH SECOND DEGREE MURDER ONLY AND APPELLANT'S CONTRARY CLAIM IS FORFEITED

Count one of the information charged appellant as follows:

> [T]he District Attorney of the County of Alameda hereby accuses GREGORY O. TATE of a felony, to wit, Murder, a violation of Section 187 of the Penal Code of California, in that on or about the 18th of April 1988, in the County of Alameda, State of California, said defendant did then and there murder SARAH LACHAPELLE, human being.

(1CT 194.)

Appellant claims the trial court committed error by instructing the jury on first degree premeditated murder and first degree felony murder because the information charged him solely with second degree malice murder in violation of Penal Code section 187. (AOB 325-332.) Specifically, appellant argues that Penal Code section 187 defines second degree murder only, and that Penal Code section 189 defines first degree murder. (AOB 326-327.) Appellant thus claims that the trial court lacked jurisdiction to try him for first degree murder and this "necessarily prejudicial" error violated numerous of his state and constitutional rights and requires reversal of the first degree murder conviction

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22. Appellant's claim that CALJIC No. 14.59 was irrelevant in this case given that the prosecution did not separately charge him with burglary is baseless given the charged burglary-murder special circumstance. Also baseless is appellant's claim that the evidence only showed an entry into the LaChapelle home on his part with an intent to steal. The evidence was susceptible of an interpretation that he entered with an intent to rob—i.e.—to use force or fear to permanently deprive a person of his or her property. Appellant forced his way in (25RT 3399-3400; 31RT 4191), and even in his own testimony admitted that he had entered with the gun. (31RT 4188).

against him. (AOB 327, 331-332.) Not so. No error occurred.

Initially we note that appellant failed, at trial, to make the arguments about the charging document that he is making in this Court. Accordingly, the current assignment of error is forfeited. (See *People v. Bright* (1996) 12 Cal.4th at 652, 671 [failure to object to adequacy of notice in charging document waives issue on appeal]; *People v. Memro* (1995) 11 Cal.4th 786, 869 [defendant's claim that he was surprised when the prosecution sought a felony-murder instruction was waived where defendant did not move to reopen the taking of evidence so as to defend against the charge]; *People v. Jenkins* (2000) 22 Cal.4th 900, 1000 [appellate court will ordinarily not consider procedural defects where no objection was made at trial].)

In any event, the premise of appellant's argument, that Penal Code section 187 only defines second degree murder and that Penal Code section 189 defines first degree murder, is incorrect. Penal Code section 187 defines the offense of murder generally. It states, in relevant part, "(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." Nothing in Penal Code section 187 purports to limit that definition to second degree murder. (See *People v. Robertson* (2004) 34 Cal.4th 156, 164 [an unlawful killing with malice aforethought can be either first degree murder or second degree murder, depending on whether the killing is perpetrated by certain specified means or is willful, deliberate, and premeditated].) Penal Code section 189, on the other hand, defines both first *and* second degree murder. It states, in relevant part:

> All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of

> discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.

This Court has long acknowledged that the definition of murder in Penal Code section 187, subdivision (a), includes first degree murder, felony murder, and second degree murder. (*People v. Witt* (1915) 170 Cal. 104, 107-108.) Phrased differently, the *Witt* rule is "that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely." (*People v. Hughes* (2002) 27 Cal.4th 287, 369.)

The trial court had jurisdiction here to try appellant for first degree murder. And under no circumstances can appellant claim he had insufficient notice that the prosecution was going to proceed against him under first degree murder theories. That the information charged him with murder in violation of Penal Code section 187 was itself sufficient to put appellant on notice that he could be found guilty of either first or second degree murder. (*People v. Anderson* (2002) 28 Cal.4th 767, 776 ["An accusatory pleading charging simply murder, without specifying the degree, is sufficient to charge any degree of murder"].) Furthermore, the information alleged, as to count one, burglary-murder and robbery-murder special circumstances (Pen. Code, § 190.2, subd. (a)(17)). (1CT 194–195.) Under the plain language of Penal Code section 190.2, these special circumstances apply only to a defendant who is found guilty of first degree murder. Accordingly, the fact the special circumstances were alleged gave appellant ample notice that the prosecutor was pursuing a first degree murder conviction. Defense counsel was obviously aware that the death penalty is only applicable to first degree murder cases.

In *People v. Hughes, supra*, this Court rejected the argument that the prosecution had to invoke Penal Code section 189 in an information in order to charge felony murder when the information charged only malice murder under Penal Code section 187. (*People v. Hughes*, *supra*, 27 Cal.4th at pp.

368-370.) The specifics of Hughes argument were as follows:

> Defendant argues that (1) the trial court lacked jurisdiction to try him for the crime of felony murder; (2) the information failed to put him on notice that the prosecution planned to proceed under a first degree felony-murder theory; (3) the felony-murder instructions violated his right to have all elements of the charged crime proved beyond a reasonable doubt; and (4) charging both malice murder and felony murder in one count of the information violated Hughes' right to a unanimous verdict and unconstitutionally subjected him to double jeopardy.

(*People v. Hughes*, *supra*, 27 Cal.4th at p. 369.)

The *Hughes* court rejected the jurisdictional argument, noting that felony murder and malice murder are not separate offenses. (*Ibid.*) *Hughes* also rejected the notice argument, noting that ordinarily an accused receives adequate notice of the prosecution's theory of the case from the evidence at the preliminary hearing or postindictment proceedings. (*People v. Hughes, supra*, 27 Cal.4th at pp. 369-370.) In summary, this Court rejected, "as contrary to our case law, the premise underlying defendant's assertion that felony murder and malice murder are two separate offenses. Accordingly, we also reject defendant's various claims that because the information charged him only with murder on a malice theory, and the trial court instructed the jury pursuant to both malice and a felony-murder theory, the general verdict convicting him of first degree murder must be reversed." (*Id.* at p. 370.)

Like the defendant in *Hughes*, appellant cites *People v. Dillon* (1983) 34 Cal.3d 441, and argues that *Dillon* "completely undermined" the rule in *People v. Witt*, *supra*, 170 Cal. at pages 107-108, that an accusatory pleading charging a defendant with murder need not specify the theory of murder on which the prosecution intends to rely. (AOB 328-334.) Although appellant acknowledges that the *Hughes* court rejected reliance on *Dillon* (*People v. Hughes*, *supra*, 27 Cal.4th at pp. 369-370), he argues that this Court "has never

explained how the reasoning of *Witt* can be squared with the holding of *Dillon*." (AOB 329.)

Appellant misconstrues this Court's decision in *Dillon*. The defendant therein sought to have this Court "abolish the felony-murder rule . . . to conform the common law of this state to contemporary conditions and enlightened notions of justice." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 462.) This Court rejected Dillon's argument after conducting a thorough review of the legislative history and thereafter finding that "in California—in distinction to Michigan—the first degree felony-murder rule is a creature of statute." (*Id.* at pp. 463, 471-472.) In the next section of the opinion, the *Dillon* court rejected the argument that felony murder is unconstitutional. (*Id.* at pp. 472-476.) Contrary to appellant's analysis, this Court in *Dillon* did not address the issue of what must be alleged in an information to properly charge first degree murder, felony murder, or second degree murder. That is, *Dillon* did not explicitly or implicitly disapprove or overrule this Court's decision in *Witt*, nor "undermine it."

Appellant also argues that the United States Supreme Court's decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], required the prosecution to charge him pursuant to Penal Code section 189, rather than 187, if the prosecution wanted to proceed against him under first degree murder theories. (AOB 331.) *Apprendi* requires that "any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 476.) *Apprendi* has absolutely no applicability here. Because the information charged murder, and that includes both first degree murder and second degree murder (*People v. Witt, supra*, 170 Cal. at pp. 107-108), there existed no danger of there being a fact elicited at trial that would increase the "maximum penalty"

for first degree murder.

Appellant's claim that the jury convicted him "of an uncharged crime" has no basis in law or the facts. (AOB 331-332.) His eighth contention fails.

## IX.

## THE JURY WAS NOT REQUIRED TO AGREE UNANIMOUSLY ON A SPECIFIC THEORY OF FIRST DEGREE MURDER AND APPELLANT'S CONTRARY CONTENTION IS FORFEITED

Appellant contends that the trial court erred in failing to require the jurors to unanimously agree on a theory of first degree murder, that is, to unanimously agree on either felony murder or murder with premeditation and deliberation. (AOB 333-341.) He contends that the error denied him of his rights to have all elements of the charged crime proved beyond a reasonable doubt, to a unanimous jury verdict, and to a fair and reliable determination that he committed a capital offense. (AOB 333.) He wants a reversal of the entire judgment as a remedy. (AOB 341.)

For multiple reasons, appellant's ninth contention garners him no relief. First, this claim of instructional error, including its constitutional components, has been forfeited, because appellant failed to assert the claim in the trial court. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1189-1192.) Moreover, as appellant acknowledges, this Court has repeatedly rejected contentions identical to his, and has frequently held that jurors need not unanimously agree on a theory of first degree murder as either felony murder or murder with premeditation and deliberation. (*People v. Benavides* (2005) 35 Cal.4th 69, 100-101; *People v. Lewis* (2001) 25 Cal.4th 610, 654; *People v. Riel* (2000) 22 Cal.4th 1153, 1200.) This rule of law passes federal constitutional muster. (*Schad v. Arizona* (1991) 501 U.S. 624 [111 S.Ct. 2491, 115 L.Ed.2d 555].)

Appellant indeed recognizes that in *Schad v. Arizona, supra,* 501 U.S. 624, the United States Supreme Court held that the federal Constitution does not entitle a defendant to a unanimity instruction on different theories of first degree murder. (AOB 338; *Schad v. Arizona, supra,* at pp. 630-645 (plur. opn. of Souter, J.); *id.* at pp. 648-652 (conc. opn. of Scalia, J.).)

*Schad*, contrary to appellant's analysis, also supports a rejection of appellant's contention that his due process rights were violated when the trial court failed to require unanimity on each element of the murder charge. (AOB 333-337.) In *Schad*, the High Court held that federal due process did not require the jury to agree on one of two alternative statutory theories of first degree murder, i.e., premeditated murder and felony murder. Although the majority agreed that due process imposes some limits on the degree to which different states of mind may be considered merely alternative means of committing a single offense, the Court did not agree on the application or extent of such limits. (*Schad v. Arizona*, *supra*, 501 U.S. at pp. 632, 651, 656.)

In writing for the plurality in *Schad*, Justice Souter explained there exists no single test for determining when two means are so disparate as to exemplify two inherently separate offenses. (*Schad v. Arizona*, *supra*, 501 U.S. at pp. 633-637, 643.) Along with history and widespread practice, the relevant mental states must be considered to determine whether they demonstrate comparable levels of culpability. In addressing the culpability level of premeditated murder and felony murder, Justice Souter concluded:

> Whether or not everyone would agree that the mental state that precipitates death in the course of robbery is the moral equivalent of premeditation, it is clear that such equivalence could reasonably be found, which is enough to rule out the argument that this moral disparity bars treating them as alternative means to satisfy the mental element of a single offense.

(*Schad v. Arizona*, *supra*, 501 U.S. at p. 644.) Thus, the plurality held that unanimous agreement as to the underlying theory of first degree murder was

unwarranted. (*Id.* at p. 645.) Accordingly, unanimous agreement as to the underlying theory of murder in this case was not required. (See *People v. Nakahara* (2003) 30 Cal.4th 705, 712; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *People v. Lewis*, *supra*, 25 Cal.4th at p. 654; *People v. Box* (2000) 23 Cal.4th 1153, 1212; *People v. Riel*, *supra*, 22 Cal.4th at p. 1200.)[23/] Appellant misstates the holding in *Schad* when he asserts that it simply considered the "underlying brute facts" that made up a particular element of an offense such as whether the element of force or fear in a robbery was established by the defendant's use of a knife or use of a gun. (AOB 340.)

This Court has applied the rule not requiring unanimity consistently, regardless of the theories of guilt on first degree murder or their numbers. This Court has applied the rule where the theories of guilt were premised on malice murder and felony murder (see, e.g., *People v. McPeters* (1992) 2 Cal.4th 1148, 1185), multiple theories of felony murder (see, e.g., *People v. Lewis, supra,* 25 Cal.4th at p. 654), malice murder and multiple theories of felony murder (see, e.g., *People v. Seaton* (2001) 26 Cal.4th 598, 671), and aiding and abetting and direct culpability (see, e.g., *People v. Jenkins, supra,* 22 Cal.4th at pp. 1024-1025).

Because this Court has repeatedly considered and rejected claims identical to appellant's claim nine, and because appellant offers no persuasive reason for this Court to reconsider its prior decisions, appellant's argument fails.

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23. In *Nakahara*, this Court also rejected the assertion that a unanimous jury verdict as to either felony murder or premeditated murder is required under *Apprendi v. New Jersey*, *supra*, 530 U.S. at page 466. (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 713.)

## X.

## CALJIC NOS. 1.00 2.01, 2.02, 2.21.2, 2.22, 2.27, 2.90, 8.20, 8.83, AND 8.83.1 DID NOT UNDERMINE OR DILUTE THE REASONABLE DOUBT STANDARD

Appellant complains about the following then-standard jury instructions given in his case: CALJIC No. 1.00 (Respective Duties of Judge and Jury), CALJIC No. 2.01 (Sufficiency of Circumstantial Evidence—Generally), CALJIC No. 2.02 (Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State), CALJIC No. 2.21.2 (Witness Willfully False), CALJIC No. 2.22 (Weighing Conflicting Testimony), CALJIC No. 2.27 (Sufficiency of Testimony of One Witness), 2.90 (Presumption of Innocence—Reasonable Doubt—Burden of Proof), CALJIC 8.20 (Deliberate and Premeditated Murder), CALJIC No. 8.83 (Special Circumstances—Sufficiency of Circumstantial Evidence—Generally), and CALJIC No. 8.83.1 (Special Circumstances—Sufficiency of Circumstantial Evidence to Prove Required Mental State). (AOB 343-351.)

Specifically, appellant asserts that these instructions combined to "undermine" and "dilute" the constitutionally required reasonable doubt standard, requiring a reversal of the entire judgment. (AOB 343-351.) The People disagree.

The trial court instructed the jury on the presumption of innocence and reasonable doubt under the then-standard California instruction, CALJIC No. 2.90. (3CT 733; 34RT 4596-4597.) Appellant's attack on this instruction (AOB 342-343) must fail. CALJIC No. 2.90 correctly defines reasonable doubt. (*People v. Ray* (1996) 13 Cal.4th 313, 347; *People v. Horton* (1995) 11 Cal.4th 1068, 1120; *People v. Medina, supra*, 11 Cal.4th 694, 762; *People v. Turner* (1994) 8 Cal.4th 137, 203.) The United States Supreme Court has held that this instruction satisfies due process requirements. (*Victor v. Nebraska* (1994) 511 U.S. 1, 7-17 [114 S.Ct. 1239, 127 L.Ed.2d 583]; *People v. Millwee*

(1998) 18 Cal.4th 96, 161) No federal constitutional violation occurred.

As for the instructions on circumstantial evidence (CALJIC Nos. 2.01, 2.02, 8.83, and 8.83.1), at trial appellant proposed a modified version of CALJIC No. 2.01 (see 3CT 664), which the trial court refused in favor of the standard CALJIC charge. (33RT 4351-4353.) This Court has repeatedly held that the standard CALJIC instructions on circumstantial evidence do not negate or dilute the presumption-of-innocence or reasonable-doubt requirements. (*People v. Jurado* (2006) 38 Cal.4th 72, 126-127; *People v. Guerra* (2006) 37 Cal.4th 1067, 1138-1139 *People v. Hughes, supra*, 27 Cal.4th at pp. 346-347; *People v. Wilson* (1992) 3 Cal.4th 926, 942-943.) *Jurado* and *Guerra*, as well as cases cited therein, addressed and expressly rejected the same arguments and reasoning appellant makes and applies in attacking CALJIC Nos. 2.01, 2.02, 8.83, and 8.83.1. Appellant presents no persuasive reason to revisit the matter.

Likewise, this Court has addressed and rejected appellant's argument attacking certain language in CALJIC No. 1.00. (AOB 347.) More precisely, this Court has held:

> CALJIC No. 1.00, which directs the jury not to "infer or assume" that defendant "was more likely to be guilty than not guilty" merely because he had been arrested, charged, or brought to trial, does not undercut the burden of proof. [Citation.]

(*People v. Jurado*, *supra*, 38 Cal.4th at p. 127; see also *People v. Guerra*, *supra*, 37 Cal.4th at p. 1139.)

This Court in *Jurado* and *Guerra* also rejected arguments attacking CALJIC No. 2.21.2, CALJIC No. 2.22, and CALJIC No. 8.20. (*People v. Jurado*, *supra*, 38 Cal.4th at pp. 126-127; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1139; accord, *People v. Millwee* (1998) 18 Cal.4th 96, 158-159 [specifically rejecting attack on CALJIC No. 2.21.2].) Thus, appellant's identical arguments attacking these instructions are without merit.

As for CALJIC No. 2.27, as given to the jury in our case it provided: "You should give the testimony of a single witness whatever weight you think it deserves. However, testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of such fact depends." (3CT 727.) Appellant complains that this charge was "flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts." (AOB 350.) This, too, however, is an argument reviewing courts have rejected. (*People v. Wade* (1995) 39 Cal.App.4th 1487, 1496-1497.)

> Defendant complains this instruction failed to distinguish between prosecution and defense testimony. He points to his uncorroborated testimony that the victim had a knife and asserts the defense is only required to raise a reasonable doubt, not establish a "fact."
>
> Defendant acknowledges the Supreme Court upheld this instruction in *People v. Gammage* (1992) 2 Cal. 4th 693, 702 . . . and *People v. Turner* (1990) 50 Cal. 3d 668, 696-698 . . . . Defendant argues those cases did not address his concern that the jury be made aware of the burden of proof in respect to his testimony. However, the *Turner* court did touch on the issue, stating: "Defendant claims the instruction is . . . confusing . . . , since it erroneously suggests the defense, like the prosecution, has the burden of proving facts. On reflection, we agree that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense . . . . We encourage further effort toward the development of an improved instruction." (*People v. Turner, supra*, 50 Cal. 3d at p. 697, [] italics [omitted], fn. omitted.) The *Turner* court nevertheless concluded the jury was not misled because it received full instructions on the burden of proof. "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 these much-stressed principles." (*Ibid.*; see also *People v. Montiel*[,] [*supra*,] 5 Cal. 4th 877, 941 . . . , reaffirming *Turner*.)

(*People v. Wade, supra*, 39 Cal.App.4th at pp. 1396-1397.)

Finally, we return to CALJIC No. 8.20, the instruction that, inter alia, advised the jury that premeditation and deliberation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other

condition precluding the idea of deliberation." Appellant suggests that the word "precluding" is too strong and could be interpreted by jurors as requiring the defense to absolutely preclude the possibility of deliberation, as opposed to merely raising a reasonable doubt on that issue. (AOB 350-351.) This Court, however, has approved the foregoing instruction. (*See People v. Catlin* (2001) 26 Cal.4th 81, 148, 151; see also *People v. Nakahara, supra*, 30 Cal.4th at p. 714.)

> We think that, like CALJIC No. 2.22, this instruction is unobjectionable when, as here, it is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof. These instructions make it clear that a defendant is not required to absolutely preclude the element of deliberation.

(*People v. Nakahara, supra*, 30 Cal.4th at p. 714.)

This Court has made clear multiple times that CALJIC Nos. 1.00 2.01, 2.02, 2.21.2, 2.22, 2.27, 2.90, 8.20, 8.83, and 8.83.1 do not undermine or dilute the constitutionally required reasonable doubt standard. Appellant is wrong in asserting otherwise.

## XI.

## THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON CONSCIOUSNESS OF GUILT PURSUANT TO CALJIC NOS. 2.03 AND 2.06

Appellant contends the trial court erred in instructing the jury on consciousness of guilt pursuant to CALJIC No. 2.03 (Consciousness of Guilt—Falsehood) and CALJIC No. 2.06 (Efforts to Suppress Evidence). Appellant claims that these instructions were impermissibly argumentative, allowed the jury to make irrational inferences, were potentially misleading and were unsupported by the evidence. (AOB 352-361) Appellant contends that these instructional errors violated his rights to due process, a fair trial, a jury trial, equal protection, and reliable determinations on guilt, special

circumstances and penalty, and require a reversal of the entire judgment. (AOB 352-361.) These contentions lack merit.[24/]

Appellant's claims that CALJIC Nos. 2.03 and 2.06 are impermissibly argumentative, permit irrational inferences, and are potentially misleading are arguments that this Court has repeatedly rejected. (See *People v. Stitely* (2005) 35 Cal.4th 514, 555 [CALJIC No. 2.03 is not improperly argumentative and does not generate irrational inference of consciousness of guilt]; *People v. Benavides, supra*, 35 Cal.4th at p. 100 [same]; *People v. Holloway* (2004) 33 Cal.4th 96, 142 [rejecting claim that CALJIC Nos. 2.03 and 2.06 are argumentative and fundamentally unfair]; *People v. Nakahara, supra*, 30 Cal.4th 705, 713 [rejecting claim that CALJIC No. 2.03 is impermissibly argumentative and allowed irrational inferences]; *People v. Cash, supra,* 28 Cal.4th at p. 740 [rejecting argument that CALJIC No. 2.06 is improperly argumentative].)

Although appellant asks this Court to reconsider these prior rulings on the legal propriety of CALJIC Nos. 2.03 and 2.06, he has provided no compelling reason for this Court to do so. (AOB 356-358.)

As for appellant's claims that CALJIC Nos. 2.03 and 2.06 were inapplicable on the facts of this case, those claim fail as well.

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24. Although appellant objected generally to CALJIC Nos. 2.03 and 2.06, he did not invoke any constitutional claims of error. Thus, we do not understand his invocation of the state and federal Constitutions now to be a proffer of theories of error he did not make below—i.e.—an invocation of facts or standards different from those he asked the trial court to apply. (*People v. Avila, supra*, 38 Cal.4th at p. 527, fn. 22; *People v. Partida, supra*, 37 Cal.4th at pp. 437-438.) Once again we read appellant's invocation of the state and federal Constitutions to be an assertion that the trial court's instructional errors, insofar as they were "wrong for the reasons actually presented to that court, had the additional legal consequence of violating the [state and] federal Constitution." (*People v. Avila, supra*, 38 Cal.4th at p. 527, fn. 22.)

The record shows that over defense objection, the prosecutor requested that the trial court instruct the jury with CALJIC No. 2.03. (33RT 4402.) The trial court concluded that the instruction was appropriate and eventually instructed the jury as follows:

> If you find that, before this trial, a defendant made a willfully false or deliberately misleading statement concerning the crime for which he is now being tried, you may consider such statement as a circumstance tending to prove a 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 determination.

(34RT 4591; 3CT 718.)

A trial court must give a particular instruction, either sua sponte or upon request, only if there is evidence sufficient to deserve consideration by the jury; i.e., evidence from which a jury composed of reasonable persons could find the facts underlying the instruction true. This frees the court from any duty to present theories to the jury that the jury could not reasonably find true under the evidence presented. (*People v. Wickersham* (1982) 32 Cal.3d 307, 323, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201; *People v. Flannel* (1979) 25 Cal.3d 668, 683.) The trial court must make the determination whether sufficient evidence supports an instruction without reference to the credibility of that evidence. (*People v. Wickersham, supra,* 32 Cal.3d at p. 324; *People v. Marshall* (1996) 13 Cal.4th 799, 847.) Here, there existed sufficient evidence to support CALJIC No. 2.03. Appellant gave false and misleading statements to police that he had obtained Sarah LaChapelle's car, VCR and television in a trade with Fred Bush and it would not have been irrational for the jury to infer a consciousness of guilt on appellant's part from those statements. (26RT 3589; 28RT 3764-3765; 30RT 3996-3998, 4015-4016.)

With respect to CALJIC No. 2.06, the prosecutor also requested it, over defense objection, and the trial court determined that the instruction was

appropriate. (33RT 4356-4358.) It thus eventually instructed the jury as follows:

> If you find that the defendant attempted to suppress evidence against himself in any manner, such as by destroying evidence or by concealing evidence, such attempt may be considered by you as a circumstance tending to show a 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.

(34RT 4591-4592; 3CT 719.)

Sufficient evidence supports this instruction as well. Appellant testified that on the evening of April 18, 1988, he entered Sarah LaChapelle's house through an open door and discovered she had been killed. Although appellant's mother and the rest of his family were only a few doors away, appellant did not notify anyone of what he observed. Instead, appellant left LaChapelle's house and drove to Maxwell Park in Oakland and took off his socks and threw them away because they had LaChapelle's blood on them. (31RT 4194, 32RT 4295.) Appellant also testified that on April 19 Germaine Henry wore to school the red leather suit appellant had been wearing on April 18. (27RT 3689, 3690.) Appellant's girlfriend, Lisa Henry, testified that she washed his pants, jeans, and socks. (27RT 3794.) A reasonable jury could have inferred from these facts that appellant did not notify anyone of what he found at the LaChapelle residence and drove to a park and threw away his socks and let Germaine wear his clothes to prevent law enforcement from connecting him to the crimes. (See *People v. Williams* (1996) 46 Cal.App.4th 1767, 1780 [CALJIC No. 2.06 proper where search of defendant's house failed to produce some clothes he had worn during the crime, as "it was entirely reasonable to assume that [defendant] hid certain items of clothing that he wore to thwart efforts to establish his identification"].) In short, appellant's failure to notify anyone of LaChapelle's death, and his discarding of the bloody socks and other acts regarding his clothes support an inference that appellant acted with a

purpose to avoid observation and arrest. The instruction was properly given.

It is important to note that CALJIC 2.06 neither compelled a finding that appellant suppressed evidence nor an adverse inference if the jury found he had done so. Rather, the instruction provides generally that *if* the jury finds a defendant attempted to suppress evidence, it *may* consider that circumstance as tending to show consciousness of guilt. Further, as this court has previously found, "any possible prejudice was mitigated by the admonition contained in CALJIC No. 2.06 that 'such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.'" (*People v. Valdez* (2004) 32 Cal.4th 73, 138-139.)

Finally, as this Court has explained, the cautionary language of CALJIC Nos. 2.03 and 2.06 helps a defendant by admonishing the jury to use circumspection with respect to evidence that might otherwise be considered decisively inculpatory. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224; accord, *People v. Holloway, supra,* 33 Cal.4th at p. 142.) Moreover, as this Court has previously stated,

> The inference of consciousness of guilt from willful falsehood or fabrication or suppression of evidence is one supported by common sense, which many jurors are likely to indulge even without an instruction.

(*People v. Holloway, supra*, 33 Cal.4th at p. 142.)

The trial court did not err in instructing the jury with CALJIC Nos. 2.03 and 2.06.

## XII.

## CALJIC NO. 2.51 DID NOT PERMIT THE JURY TO FIND GUILT BASED ON MOTIVE ALONE AND APPELLANT'S CONTRARY CONTENTION IS PROCEDURALLY BARRED

The trial court instructed the jury on motive with CALJIC No. 2.51, as

follows:

> Motive is not an element of the crime 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.

(34 RT 4594; 3CT 728; emphasis added.)

Appellant contends that the emphasized portion of this instruction violated his rights to a fair jury trial, due process, and a reliable verdict in that it shifted the burden of proof because it suggested appellant had the burden of proving his innocence. (AOB 362-367; see *People v. Serrato* (1973) 9 Cal.3d 753, 766-767 [due process violation in providing instruction that shifts burden of proof].) Appellant wants a reversal of the murder conviction, special circumstances, and personal use finding. (AOB 3667.) Appellant's claim is not cognizable and not persuasive.

Once again we note initially that appellant's contention is procedurally barred. *He requested CALJIC No. 2.51 below.* (33RT 4404.) Having specifically requested the motive instruction, "appellant cannot assert the giving thereof as a ground for reversal." (*Miller v. Kennedy* (1987) 196 Cal.App.3d 141, 146; see also *People v. Medina, supra,* 11 Cal.4th at p. 763.) We recognize that Penal Code section 1259 generally allows defendants to challenge a jury instruction on appeal, without having objected below, if the instruction affects their substantial rights (*People v. Martinez* (1984) 157 Cal.App.3d 660, 670), but it is also the case that one "whose conduct induces or invites the commission of error by the trial court is estopped afterwards from taking advantage of such error." (*Abbott v. Cavelli* (1931) 114 Cal.App. 379, 383.) We are aware of no case in which a reviewing court has (1) invoked Penal Code section 1259 to review an instruction that the defendant specifically requested and (2) found reversible error in the giving of the instruction.

In any event, no instructional error occurred here. This Court has repeatedly addressed and rejected the argument that CALJIC No. 2.51 somehow shifts the burden of proof from the prosecution to the defense or somehow lessens the prosecution's burden of proof. (*People v. Cleveland* (2004) 32 Cal.4th 704, 750; *People v. Snow* (2003) 30 Cal.4th 43. As this Court stated in *Snow*,

> 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 murder.

(*People v. Snow, supra*, 30 Cal.4th at pp. 97-98.)

CALJIC No. 2.51 does not instruct jurors on the standard of proof they are to apply; instead, it "merely uses innocence as a direction signal or compass. It does not tell the jurors they must find innocence. . . ." (*People v. Wade, supra*, 39 Cal.App.4th at p. 1497; see also *People v. Estep* (1996) 42 Cal.App.4th 733, 738 ["CALJIC No. 2.51 did not concern the standard of proof in this case, but merely one circumstance in the proof puzzle—motive"].)

Moreover, as discussed previously, the correctness of a jury instruction is determined from the entire charge of the court, not from the consideration of parts of an instruction or from a single instruction. (*People v. Wilson, supra*, 3 Cal.4th at p. 943.) Here, then, the relevant language of the motive instruction must be considered in conjunction with the "reasonable doubt" standard set forth in CALJIC No. 2.90. A "reasonable juror in the present case would understand that the language of CALJIC No. 2.51 that motive may tend to establish guilt while lack of motive may tend to establish innocence, cannot be considered a standard of proof instruction apart from the reasonable doubt standard set forth clearly in CALJIC No. 2.90." (*People v. Estep, supra*, 42 Cal.App.4th at p. 739.)

Accordingly, CALJIC No. 2.51, as given in the present case and as repeatedly held by this Court and the Courts of Appeal, did not lighten the prosecution's burden of proof or shift the burden to appellant to prove his innocence. (*Id.* at pp. 738-739; *People v. Wade, supra*, 39 Cal.App.4th at pp. 1496-1497.)

## XIII.

## THE TRIAL COURT PROPERLY RESPONDED TO THE JURY'S QUESTION REGARDING THE MEANING OF LWOP DURING DELIBERATIONS AT THE PENALTY PHASE

Appellant contends that when the trial court received a question from the jury during the penalty phase about the meaning of life without possibility of parole, the court erred by failing to fully explain what "life without possibility of parole" really meant. (AOB 368-389.) Appellant maintains that the trial court's error amounted to a violation of his rights pursuant to the Eighth and Fourteenth Amendments to a determination of penalty by a jury "'suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" (AOB 369.) Appellant wants a per se reversal of the death judgment returned against him, and alternatively claims the People cannot show that the error was harmless beyond a reasonable doubt. (AOB 382-389.)

This Court need not make any prejudice decision because no error occurred. We submit that the trial court correctly responded to the question at issue, and that even if the trial court did err, there exists no reasonable possibility that the jury would have rendered a different penalty verdict absent the error.

The relevant record shows the following: On February 2, 1993, the court read the following note from the jury: "We need to talk to you. We seem to be irrivocably [*sic*] deadlocked." (5CT 1055.) An off the record discussion

with counsel then occurred. (44RT 5872.) Following that this occurred:

THE FOREPERSON: Well, your Honor, we wondered if there were further instructions that you can give us? As you finished you instructions the last time, you know, some of us thought that you said if you need more help, I can give you more help or something to that effect.

THE COURT: All right. Well, there's not any more jury instructions that I could give you. I could reiterate some of the instructions that you already have. But the instructions I've given you are the instructions that you would apply in this case.

I could reread some of those instructions to you. Sometimes when they're read to you it makes more understanding, you understand them better than when you just look at them. I can reread them to you if that would be helpful.

THE FOREPERSON: Okay. Please do that.

. . . . . .

THE COURT: And while he [the bailiff] is getting the jury book, is it the part about deciding the penalty, about the circumstances and the weighing of the aggravating and mitigating? Is that the stuff you want to hear?

THE FOREPERSON: Mm-hm, mm-hm. Okay. And your Honor, the other thing to clarify for us, when you're weighing the severity of the punishment --

THE COURT: Crime.

THE FOREPERSON: -- of the punishment, is death the more severe punishment, or is life without chance of parole?

THE COURT: I can't tell you that. You have to decide the appropriate penalty based upon the evidence in this case. It's not an issue of which is the most severe punishment. The issue is which is the most appropriate punishment in this case based upon the evidence, not which is the most severe punishment. Which is the appropriate punishment based on the evidence.

THE FOREPERSON: Okay. Okay.

THE COURT: Should I dispense -- should I start with 8.88, it is your duty to determine which of the two penalties, and read from there?

THE FOREPERSON: Yes.

(44RT 5872-5873.)

The trial court thereafter reread CALJIC Nos. 8.88 and 8.85, and the jury indicated that it needed no further reading. (44RT 5873-5875; 5CT 1091-1093.) Outside of the presence of the jury, defense counsel requested that the trial court "give the admonition to insure that we don't have any of those jurors selecting a death penalty as an as an act of mercy because they considered the death penalty not as bad as life without the possibility of parole." (44RT 5878.)

The court overruled defense counsel's objection, stating that it was

> of the position that based upon our very careful voir dire of this jury that I don't think anybody is up there deciding this case based upon executing your client as an act of mercy. I don't interpret that by what they mean. There may be some dispute up there among themselves which is worse, the death penalty or life without parole, but I don't think they're deciding it on the basis of one being an act of mercy and the other one being more lenient than the other one.
>
> Secondly, I do believe that by instructing the jury that they are to pick the appropriate penalty based on the weighing process that I gave them by considering the aggravating and mitigating factors and they can only return a verdict of death if they are satisfied that the factors in aggravation are so substantial when compared to the factors in mitigation, that that takes care of the problem.
>
> I don't like to give extemporaneous, off-the-cuff instructions or comments to the jury. I'd like to stick to the jury instructions.

(44RT 5878-5879.)

Appellant renews his trial court contention that the judge erred by failing to instruct the jury in such a fashion to "sweep away" any notion that the death penalty was a less severe punishment than life without possibility of parole. (AOB 377.) We disagree. Penal Code section 1138 provides, in part: "After the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given. . . . " Where the court has properly instructed the jury and jurors have

questions about the instructions "the court has discretion . . . to determine what additional explanations are sufficient. . . ." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) As noted earlier, a trial court abuses its discretion only when it rules arbitrarily, capriciously, or whimsically; i.e., only when it rules beyond the bounds of reason, all the circumstances before the court considered, resulting in a miscarriage of justice. (*People v. Rodrigues, supra*, 8 Cal.4th at pp. 1124-1125.) The trial court did not rule unreasonably in believing that a rereading of the instructions would make clear that death is a more severe punishment than LWOP. As the court stated, "I don't like to give extemporaneous, off-the-cuff instructions or comments to the jury. I'd like to stick to the jury instructions." (44RT 5879.) And the court could reasonably believe that CALJIC No. 8.88 answered the jury's question. It requires that a death verdict is appropriate only when each juror is "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole."

In other words, by requiring a jury to find that the aggravating circumstances are so substantial in comparison to mitigating ones in order for death to the appropriate penalty, a jury could reasonably infer that the death penalty is a more severe penalty than life imprisonment without the possibility of parole. Appellant's claim that the trial court needed to do more than reread CALJIC Nos. 8.85 and 8.88 fails.[25/]

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25. Although appellant claims the trial court did not adequately consult with counsel *prior to* answering the jury's subject question by rereading the instructions (AOB 369), counsel made no such objection below and seemingly agreed to the court's approach, except that counsel wanted the additional admonition given the jury. As for appellant's invocation of the Eighth and Fourteenth Amendments in this Court, once again we do not understand those citations to be a proffer of theories of error he did not make below—i.e.—an invocation of facts or standards different from those he asked the trial court to apply. (*People v. Avila, supra*, 38 Cal.4th at p. 527, fn. 22; *People v. Partida, supra*, 37 Cal.4th at pp. 437-438.) Appellant's invocation of the Eighth and

Appellant relies on *McDowell v. Calderon* (9th Cir. 1999) 130 F.3d 833, as support for his contention the trial court erred here by referring the jurors to the "basic California jury instructions." (AOB 373, 378.) In *McDowell*, the Ninth Circuit "held that the trial court's failure to explain a correct jury instruction to an obviously confused penalty-phase jury violated the Eighth Amendment." (*Morris v. Woodford* (9th Cir. 2001) 273 F.3d 826, 839.) However, as the Ninth Circuit itself has recognized, the *McDowell* case has been overruled by the United States Supreme Court in *Weeks v. Angelone* (2000) 528 U.S. 225 [120 S.Ct. 727, 145 L.Ed.2d 727]. (See *Belmontes v. Woodford* (9th Cir. 2003) 335 F.3d 1024, 1064, fn. 16; *Morris v. Woodford*, *supra*, 273 F.3d at p. 839, fn. 4.) In *Weeks*, the United States Supreme Court held that where a judge, in answering a jury question, directs the jury to the precise paragraph of a correct jury instruction that answers the question is an action clearly sufficient to pass constitutional muster. (See *Weeks v. Angelone*, *supra*, 528 U.S. at p. 234.)

That the trial court did not err here is further shown by the fact after its reread of the instructions the jury engaged in further deliberations for several more hours over the next three days. (5CT 1054, 1056, 1057, 1059.) At no point did the jury reask its question or express any confusion.

Appellant's assignment of error fails.

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Fourteenth Amendments are an assertion that if the court abused its discretion below in rejecting the argument actually made by appellant, that error "had the additional legal consequence of violating the [state and] federal Constitution." (*People v. Avila, supra*, 38 Cal.4th at p. 527, fn. 22.)

## XIV.

## THE TRIAL COURT DID NOT ERR IN REFUSING APPELLANT'S SPECIAL INSTRUCTION ON THE USE OF VICTIM-IMPACT EVIDENCE

The trial court gave the jury standard penalty phase jury instructions, including CALJIC No. 8.84 (Penalty Trial—Introductory), CALJIC No. 8.84.1 (Duty of Jury—Penalty Proceeding], CALJIC No. 8.85 (Penalty Trial—Factors for Consideration), and CALJIC No. 8.88 (Penalty Trial—Concluding instruction). (5CT 1061-1062, 1090-1093; 44RT 5811-5812, 5824-5827.)

The trial court declined appellant's request to give the jury the following instruction:

> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crimes. Such evidence, was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die.

(4CT 1020; 42RT 5665.)

Appellant contends that the trial court had a duty to provide a limiting instruction that explained to the jurors how they were to consider the victim-impact evidence and that cautioned them not to base their decision on emotion. Appellant contends that the failure to provide such an instruction prejudicially violated his right to a properly-instructed jury, his due process right to a fair trial, and his right to a fair and reliable penalty determination. (AOB 390-395.) Appellant's contention is without merit.

As this Court has made clear, "the standard CALJIC penalty phase instructions 'are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.'" (*People v. Gurule* (2002) 28 Cal.4th 557, 659.) In *People v. Brown* (2003) 31 Cal.4th 518, 573, this Court rejected the claim that the trial court erred in not instructing the jury on how to consider victim impact evidence, where, as here, the court instructed the jury with standard CALJIC No. 8.85. And in *People v.*

*Ochoa, supra*, 26 Cal.4th 398, this Court refused to find error in the trial court's refusal to give the defendant's special instruction concerning the evaluation of the evidence of harm caused by his crimes. The proposed instruction read as follows (and was in part, identical to the appellant's proposed instruction in this case):

> Evidence has been introduced for the purpose of showing the specific harm caused by the Defendant's crimes. Such evidence was not received and may not be considered by you to divert your attention from your proper role of deciding whether the Defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotion though relevant subjects may provide legitimate reasons for the Jury to show mercy to the Defendant.

(*People v. Ochoa, supra*, 26 Cal.4th at p. 455.)

This Court concluded that the trial court properly refused the instruction, since "[t]he proposed instruction would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1[.]" (*Ibid.*) To the extent appellant similarly contends that the trial court should have cautioned the jurors not to base their decision on emotion, his claim fails for the same reason, i.e., CALJIC No. 8.84.1 adequately addressed the matter. CALJIC No. 8.84.1 states, in pertinent part: "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feeling." (5CT 1062; 44RT 5812.)

And, to the extent appellant requested the trial court to give an instruction that was nearly identical to that in *Ochoa* (see 4CT 1020), the trial court properly denied it.

*Gurule*, *Brown*, and *Ochoa* compel rejection of appellant's 14th assignment of error. But even assuming, arguendo, that the trial court erred in not providing a limiting instruction concerning the victim impact evidence, the error must be deemed harmless since appellant points to nothing that suggests

the jury might have used the evidence in an improper manner. (See *People v. Williams* (1997) 16 Cal.4th 153, 268 [rejecting claim that aggravating factors listed in section 190.3 were unconstitutionally vague where, inter alia, defendant cited no evidence suggesting penalty jury considered impermissible matter, and thus defendant failed to demonstrate prejudice]; *People v. Hughes, supra*, 27 Cal.4th at p. 386 [failure to provide limiting instruction in penalty phase was harmless where there was no reasonable possibility that the error affected the penalty verdict].)

## XV.

## THE TRIAL COURT PROPERLY RESPONDED TO THE JURY'S QUESTION REGARDING "DURESS"

This Court has repeatedly held "that the standard CALJIC penalty phase instructions 'are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.' [Citation.]" (*People v. Brown, supra*, 31 Cal.4th 518, 569; *People v. Gurule, supra*, 28 Cal.4th 557, 659; *People v. Moon, supra*, 37 Cal.4th at pp. 41-42); *People v. Crew* (2003) 31 Cal.4th 822, 858.) Here, during the second day of penalty phase deliberation, the jury sent a question to the judge indicating that they needed clarification as to CALJIC No. 8.85, factors (d) and (g). (5CT 1050; 44RT 5835.) Outside of the presence of the jury, the court read the referenced sections to counsel:

> Section (d) reads: Whether or not the offense was committed while the defense was under the influence of extreme or emotional disturbance.
>
> And (g) says: Whether or not the defense acted under extreme duress or under the substantial domination of another person.

(44RT 5835.)

The court advised counsel that, without more, he was inclined to tell the

jury that "(d) and (g) are factors which are listed as mitigating factors, and whether or not any of those factors apply in this case will depend [on] the evidence they heard and whatever conclusions they came to." (44RT 5835.) The court advised counsel it believed the factors were clear, and that beyond this, it was "a factual issue for them to resolve, and basically that's what I would tell them, that they are factors in mitigation. Whether or not they exist in this case are for them to decide based upon the evidence they heard in this case." (44RT 5836.) Both the prosecutor and defense counsel agreed with the proposed response. (44RT 5835-5836.)

In open court, the trial court indeed informed the jury that factors (d) and (g) in CALJIC No. 8.85 were mitigating factors. (44RT 5838.) The judge reread the factors and instructed:

> Whether or not that is a fact is for you to decide based upon evidence that you heard in this case. That's a factual issue for you to resolve based upon what you heard. Does that answer your question?"

(44RT 5838.)

The foreperson responded, "I think we would like a good definition of 'duress.'" (44RT 5838.) The foreperson and the court then engaged in the following exchange:

> THE COURT: A good definition of --
>
> THE FOREPERSON A good legal definition for this -- .
>
> THE COURT: What the word --
>
> THE FOREPERSON: -- contemplation.
>
> THE COURT: What the word means?
>
> THE FOREPERSON: Yes.
>
> THE COURT: Okay.
>
> THE FOREPERSON: And the -- the -- And I think that the other -- the part of "duress" that we are concerned with is how direct or indirect can the duress be, at what distance might duress be impacted.
>
> THE COURT: At what distance?

THE FOREPERSON: Well, both in a physical and in an abstract sense, how does --- how does one person put another under duress.

(44RT 5838-5839.)

Outside of the presence of the jury, the court discussed the issue and the proposed response with counsel as follows:

[Defense Counsel]: My position, your Honor, is that they are to use the word "duress" in the common usage that they have determined "duress" in common sense to mean.

THE COURT: Well, that's what -- that's what I would think any intelligent jury would decide. These people --

There are 12 people up there, and one of them doesn't know what "duress" means?

[Defense Counsel]: Well, apparently they want a legal definition. And in the penalty phase and in mitigation, what mitigation is saying is that you in your opinion feel that some duress had something to do with this, give it what weight you want to give it. And that's a commonsense definition of duress. And I don't think we should be giving them a legal definition of duress which goes to whether or not somebody is or is not guilty or culpable of a crime.

THE COURT: Well, that's certainly the easy way out.

[Defense Counsel]: That's the way I want to do it, the easy way out.

. . . . . .

[Defense Counsel]: My request is use the common sense, everyday definition that you're aware of and go from there.

(44RT 5843-5844.)

After the discussion with counsel, the court responded to the jury as follows:

THE COURT: Ms. S[], we've given this - tried to give this response a lot of thought, and I'm not so sure this will be a satisfactory answer to you, but this is the best thing we can come up with. First of all, with respect to the definition of "duress," I'm going to tell you to use your common sense understanding of what "duress" means. To assist you, in Webster's New 20th Century Dictionary Unabridged, it

can be defined as "compulsion or coercion." All right?

The second thing, as I understand Mr. M[]'s question, is whether or not you can have direct or indirect duress and how long can it last. Is that what you're asking? Is that the question?

FOREPERSON: If duress can be directed from outside.

THE COURT: Okay. Now, see, you're asking me to testify and give you information. I can't do that.

FOREPERSON: Oh.

THE COURT: All I can tell you is, is that --- that you have to decide that yourself based upon the evidence that you've received in this case and any reasonable inferences that you, as the fact finders, come to. See, I can't tell you stuff that's not in the evidence.

Okay?

FOREPERSON: I see.

THE COURT: So I hope that helps you with the definition of duress.

All right?

(44RT 5854-5855.)

It is beyond dispute that the trial court is obligated to help the jurors understand the legal principles they have been asked to apply. (*People v. Beardslee, supra*, 53 Cal.3d 68, 97.) In particular, the court must, under Penal Code section 1138, attempt "to clear up any instructional confusion expressed by the jury. [Citations.]" (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212.) This does not mean, however, that a court "must always elaborate on the standard instructions." (*People v. Beardslee, supra*, 53 Cal.3d at p. 97.) Where, as here, the original instructions are themselves full and complete, "the court has discretion under Penal Code section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.]" (*People v. Beardslee, supra*, 53 Cal.3d at p. 97.)

Appellant claims that the trial court's response to the jury regarding "duress" was inadequate since it was not legally complete; potentially misled

the jury to believe that "no evidence had been presented from which the jurors could find that appellant had acted under duress from 'outside;'" and that the term "reasonable inferences" limited the juror's discretion to view the mitigating evidence subjectively." (AOB 397-422.) Appellant claims the court's error violated state statutory law and state and federal constitutional error, specifically his right to a penalty determination with minimal risk of wholly arbitrary and capricious action. (AOB 397.) Appellant lastly claims the death judgment must be reversed as a consequence of the error. (AOB 397, 418-422.)

Assuming, without conceding, that appellant's arguments are preserved, they lack merit.[26/] There was nothing about the trial court's response that, expressly or implicitly, misled the jury or precluded the jury from considering mitigating evidence. The trial court properly used plain language to answer the jury's question and did not suggest any particular finding.

In *People v. Viscotti, supra*, 2 Cal.4th 1, this Court discussed duress under Penal Code section 190.3, factor (g):

> Penal Code section 190.3, factor (f) asks the jury to consider whether the defendant believed his act was morally justified, while factor (g) is predicated on duress, a noun whose meaning is generally understood as force or compulsion. "Duress" is modified by the word "extreme," which has a meaning that is generally understood as describing the farthest end or degree of a range of possibilities. There is no comparable vagueness, and the defendant is further protected against possible arbitrary sentencing in that any mitigating evidence he offers must be considered by the jury.

(*People v. Viscotti, supra,* 2 Cal.4th at p. 75)

Here, not only was the jury properly instructed on the element of duress,

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26. At trial, appellant had two counsel. Lead counsel appeared initially satisfied with the court's response. But subsequently both counsel stated that they believed there was a "time component" that needed to be addressed in the duress answer from the court. (44RT 5844, 5850-5851, 5856.)

but the court also assisted in defining the term "duress" when requested to do so by the jury ("it can be defined as "compulsion or coercion"). (44RT 5854-5855.) We fail to see how the court's dictionary assist to the jury was somehow "legally incomplete." (See *People v. Thompkins* (1987) 195 Cal.App.3d 244, 250 [in order to adequately answer a jury's question, a court may use any available means to facilitate the jury's understanding of the applicable legal principles].)

Appellant next argues that in light of the court's ultimate response, the trial court should have also instructed the jury that "the application of duress could extend as far back as each juror deemed appropriate." (AOB 402; see 44RT 5856.) The court declined that request below as follows:

> Now whether or not the duress in this case has existed for a long period or a short period of time is a factual issue for them to determine from the evidence in this case and the inferences therefrom.

(44RT 5851-5852.)

We submit the court correctly interpreted the issue of "how far back" the "application of duress could extend" was a factual issue, not a legal one, and thus properly declined defense counsel's request for an instruction on it. (44RT 5851-5852.) There is no reasonable likelihood that the jury ultimately understood the instructions themselves and the dictionary definition as putting a time frame on any duress. There exists nothing from which the jury could have reached such a conclusion.

Likewise, nothing in the CALJIC No. 8.85, factor (g) instruction, the court's use of the dictionary definition of duress, or the court's exchange with the jury, that would have led the jury to believe that the court had told them there existed no evidence from which they could find that appellant had acted under duress from outside, or that their discretion to view the mitigating evidence subjectively had been limited.

Appellant's 15th assignment of error fails. The jury asked for

clarification and the court gave it, expressing no opinion on whether duress existed, where it might have come from, or how long it existed. No abuse of discretion is present. There is no reasonable likelihood the jury would have understood or applied the complained-of comments in an improper or erroneous manner. (*People v. Frye, supra*, 18 Cal.4th at p. 970.)

## XVI.

## THE INSTRUCTIONS CONCERNING THE AGGRAVATING AND MITIGATING FACTORS PASS CONSTITUTIONAL MUSTER

Appellant raises a number of constitutional challenges to (1) CALJIC No. 8.85, the instruction regarding the statutory factors set forth in Penal Code section 190.3 that the jury is to consider in determining whether to impose a sentence of death or life imprisonment without the possibility of parole, and (2) CALJIC No. 8.88, the instruction regarding the weighing of aggravating and mitigating factors. (AOB 423-435.)

As demonstrated below, this Court has previously rejected the identical claims raised by appellant. This Court should do so again in the instant case as appellant has not presented any compelling or persuasive reason for this Court to reconsider its prior decisions on this point.

First, appellant's claim that instruction set forth on Penal Code section 190.3, factor (a), as applied, allowed arbitrary and capricious imposition of the death penalty (AOB 424425) has been repeatedly rejected by this Court. (*People v. Hinton* (2006) 37 Cal.4th 839, 912; *People v. Guerra, supra*, 37 Cal.4th at p. 1165; *People v. Elliot* (2005) 37 Cal.4th 453, 487; *People v. Smith* (2005) 35 Cal.4th 334, 373; *People v. Maury* (2004) 30 Cal.4th 342, 439; *People v. Hughes, supra*, 27 Cal.4th at pp. 404-405; see *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750] [explaining that section 190.3, factor (a), was "neither vague nor otherwise improper under our

Eighth Amendment jurisprudence"]). It should be rejected again in this case.

Second, appellant's claim that the failure to instruct that statutory mitigating factors are relevant solely as mitigators violated the Eighth and Fourteenth Amendments (AOB 425-427) has been rejected by this Court. (*People v. Hinton*, *supra*, 37 Cal.4th at p. 912; *People v. Morrison* (2004) 34 Cal.4th 698, 730; *People v. Kraft* (2000) 23 Cal.4th 978, 1078-1079.) It should be rejected again.

Third, appellant's claim that written findings regarding the aggravating factors is required under the federal Constitution (AOB 427-430) has been rejected by this Court on numerous occasions. (*People v. Morrison, supra*, 34 Cal.4th at p. 730; *People v. Prieto* (2003) 30 Cal.4th 226, 275; *People v. Snow*, *supra*, 30 Cal.4th at p. 127; *People v. Lucero* (2000) 23 Cal.4th 692, 741.) It should be rejected again in this case.

Finally, appellant claims that the absence of the "previously addressed procedural safeguards" render the death penalty scheme unconstitutional because, according to him, those safeguards are provided to non-capital defendants. (AOB 430-435.) This Court has held many times that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Hinton*, *supra*, 37 Cal.4th at p. 912; *People v. Smith*, *supra*, 35 Cal.4th at p. 374; *People v. Morrison, supra*, 34 Cal.4th at p. 371; *People v. Brown*, *supra*, 33 Cal.4th at p. 402; *People v. Boyette, supra*, 29 Cal.4th at pp. 465-467; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.)

All of appellant's complaints about CALJIC No. 8.85 and 8.88 are without merit.

## XVII.

## CALJIC NO. 8.88 CONTINUES TO PASS CONSTITUTIONAL MUSTER

Appellant contends that the trial court's use of CALJIC 8.88 in instructing the jury at the penalty phase resulted in numerous errors due to alleged flaws in that instruction. (AOB 436-450.) However, each of appellant's challenges to CALJIC No. 8.88 has already been rejected by this Court, and appellant provides no basis for this Court to reconsider its prior rulings.

The trial court instructed the jury with CALJIC No. 8.88 in relevant part as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.
>
> 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 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 aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgement 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.

(5CT 1090-1091; 44RT 5824-5825.)

As a preliminary matter, appellant neither challenged the instruction nor sought a clarifying instruction on the grounds offered in this Court in the trial court.[27] He has thus waived any claim of error concerning it. (*People v. Arias* (1996) 13 Cal.4th 92, 171; *People v. Rodrigues, supra*, 8 Cal.4th at p. 1192; but see Pen. Code, § 1259.)

Even if the issue is properly preserved, this Court has repeatedly held that this instruction is adequate to ensure reliability in a death verdict, since it makes clear to the jurors that each must reach an individual decision that evidence or factors that the individual juror believes are aggravating outweigh those that the juror deems mitigating. (*People v. Jones* (2003) 30 Cal.4th 1084, 1128; *People v. Prieto*, *supra*, 30 Cal.4th 226, 263-264; *People v. Boyette, supra*, 29 Cal.4th at pp. 464-465; *People v. Ochoa, supra* , 26 Cal.4th 398, 452; *People v. Coddington* (2000) 23 Cal.4th 529, 642.)

Appellant nonetheless first contends that the "so substantial" language of CALJIC No. 8.88—i.e.—that the jurors "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" (emphasis added) -- is impermissibly vague and ambiguous. (AOB 437-440.) This Court has repeatedly rejected the claim that the "so substantial" language of CALJIC No. 8.88 is unconstitutionally vague. (See *People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 124; *People v. Griffin, supra*, 33 Cal.4th at p. 593; *People v. Breaux* (1991) 1 Cal.4th 281, 315-316.)

Appellant next contends that the term "warrants" in CALJIC No. 8.88 —i.e.—that the jurors "must be persuaded that the aggravating circumstances

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27. Appellant posed one modification to CALJIC No. 8.88, with respect to the language "extenuating circumstance." (3CT 992.) This is not the issue on appeal.

are so substantial in comparison with the mitigating circumstances that it *warrants* death instead of life without parole" (emphasis added), is overbroad. Appellant contends that instead of determining whether death was *warranted*, the jury should have been instructed to determine whether death was *appropriate*. (AOB 441.) This Court has repeatedly rejected this claim. (*People v. Griffin, supra*, 33 Cal.4th at p. 593; *People v. Medina* (1995) 11 Cal.4th 694, 781; *People v. Breaux, supra*, 1 Cal.4th at pp. 315-316.)

Appellant next contends that the instruction was inadequate because it failed to expressly inform the jurors that they were required to return a verdict of life imprisonment if they found that the aggravating factors did not outweigh the mitigating factors. (AOB 443–446.) Again, this Court has repeatedly rejected this claim. (See *People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 124; *People v. Kipp* (1998) 18 Cal.4th 349, 381; *People v. Duncan* (1991) 53 Cal.3d 955, 978.)

Appellant next contends that the instruction was defective because it did not tell the jurors that they could impose a life sentence even if the aggravating factors outweighed the mitigating factors. (AOB 446-447.) This Court has repeatedly held that a defendant is not entitled to such an instruction. (See *People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 124; *People v. Medina, supra*, 11 Cal.4th at p. 782; *People v. Beeler, supra*, 9 Cal.4th at p. 997.)

Appellant next contends the instruction does not tell the jury it can impose a life sentence even if the aggravating factors outweigh the mitigating factors. (AOB 447.) However, appellant is not entitled to an instruction telling the jury it may choose life without parole even if aggravating circumstances outweigh mitigating circumstances. (*People v. Beeler, supra*, 9 Cal.4th at p. 997; *People v. Medina, supra*, 11 Cal.4th at p. 782.)

Finally, appellant contends that the instruction was defective because it failed to inform the jury that appellant did not have the burden of persuading

it that the death penalty was inappropriate. (AOB 449-450.) As this Court stated in *People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 125, "[CALJIC No. 8.88] was not defective for failing to inform the jury as to which side bore the burden of persuading it of the appropriateness or inappropriateness of a death verdict in this case." (See also *People v. Hayes* (1990) 52 Cal.3d 557, 643 ["Because the determination of penalty is essentially moral and normative [citation], and therefore different in kind from the determination of guilt, there is no burden of proof or burden of persuasion"].)

In sum, appellant repeats the same arguments that this Court has considered and rejected in the previously cited cases. He adds nothing to the equation to warrant a fresh look at this issue. CALJIC No. 8.88 did not violate any of appellant's constitutional rights. Accordingly, appellant's challenges to CALJIC No. 8.88 are meritless.

## XVIII.

## THE ADMISSION OF THE PENAL CODE SECTION 190.3, FACTOR (B) EVIDENCE DID NOT VIOLATE ANY OF APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant contends the Penal Code section 190.3, factor (b) ("factor (b)") evidence of three incidents of prior criminal activity admitted during the penalty phase of his capital trial violated his constitutional rights. (AOB 452.) Appellant's constitutional rights were not violated. This Court has previously considered and rejected the claims now raised. Appellant presents no compelling reasons for the Court to revisit its prior holdings. Accordingly, his arguments are off base.

Factor (b), allows the trier of fact, in determining penalty, to take into account:

> 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.

(See 5CT 1092; 44RT 5825; CALJIC No. 8.85.)

Appellant's claim that the jury's consideration of the three incidents of unadjudicated criminal activity introduced against him at the penalty phase violated his due process rights and rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, thereby rendering the death sentence unreliable, must be rejected. This Court has repeatedly held that the introduction of factor (b) unadjudicated criminal activity evidence is constitutional. (*People v. Boyer* (2006) 38 Cal.4th 412, 483; *People v. Chatman* (2006) 38 Cal.4th 344, 410; *People v. Guerra, supra*, 37 Cal.4th at p. 1165; *People v. Hinton, supra*, 37 Cal.4th at p. 913; *People v. Brown, supra*, 33 Cal.4th at p. 402; *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 795, 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. 967, 976; *People v. Lewis, supra,* 25 Cal.4th at p. 677.) The nations's High 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*, 512 U.S. at p. 976.) The Court concluded, "Factor ( b) is not vague." (*Ibid.*)

Appellant also complains that the jury was not impartial since it was the same jury that had convicted him of capital murder. According to appellant, it is "self-evident" that the same jury could not fairly evaluate the evidence and

make a reliable penalty determination. (AOB 454.) It is well-established, however, that the statutory preference for a unitary jury in Penal Code section 190.4, subdivision (c) in a capital case is consistent with constitutional principles. (*People v. Cornwell* (2005) 37 Cal.4th 50, 106; *People v. Osband, supra,* 13 Cal.4th at p. 668; *People v. Horton* (1995) 11 Cal.4th 1068, 1094.) Appellant was not entitled to separate guilt and penalty phase juries. Additionally, contrary to appellant's assertion (AOB 457), there is no requirement that the jury unanimously agree on the aggravating circumstances that support the death penalty, since the aggravating circumstances are not elements of an offense. (*People v. Medina, supra*, 11 Cal.4th at p. 782.) Nor is it necessary to instruct the jury that it must unanimously agree beyond a reasonable doubt that the defendant committed each unadjudicated offense. (*People v. Sims* (1993) 5 Cal.4th 405, 462; *People v. Anderson* (2001) 25 Cal.4th 543, 590.) Accordingly, appellant's jury-related claims of error are without merit.

Appellant also contends that the use of unadjudicated factor (b) evidence violates his right to equal protection because the same evidence is not allowed in non-capital trials. (AOB 457.) This Court has held many times that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Hinton, supra,* 37 Cal.4th at p. 912; *People v. Smith, supra*, 35 Cal.4th at p. 374; *People v. Morrison , supra*, 34 Cal.4th at p. 371; *People v. Brown, supra*, 33 Cal.4th at p. 402; *People v. Boyette, supra,* 29 Cal.4th at pp. 465-467; *People v. Allen, supra*, 42 Cal.3d 1222, 1286-1288.) Thus, appellant's equal protection claim is without merit.

Appellant asserts that this Court's decisions are inconsistent with *Apprendi v. New Jersey, supra*, 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Blakely v. Washington* (2004) 542

U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], which relate to the requirement that a jury finding beyond a reasonable doubt is prerequisite to imposition of a sentence beyond the statutory maximum for the underlying offense. (AOB 457.) However, as this Court's precedent makes clear:

> The death penalty law is not unconstitutional for failing to impose a burden of proof—whether beyond a reasonable doubt or by a preponderance of the evidence—as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence. [Citation.] Unlike the statutory schemes in other states cited by defendant, in California 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification. [Citations.]
>
> The jury is not constitutionally required to achieve unanimity as to aggravating circumstances. [Citation.]
>
> Recent United States Supreme Court decisions in *Apprendi v. New Jersey*[,] [*supra*,] 530 U.S. 466, and *Ring v. Arizona*[,] [*supra*,] 536 U.S. 584, have not altered our conclusions regarding burden of proof or jury unanimity. [Citation.]

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

Consistent with its earlier *Brown* decision, this Court has more recently addressed appellant's complaint in *People v. Ward* (2005) 36 Cal.4th 186. In *Ward* the defendant asserted *Apprendi, Ring,* and *Blakely* constitutionally mandate instructing a capital jury to: (1) find proof beyond a reasonable doubt of aggravating factors; (2) find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors; (3) find beyond a reasonable doubt the appropriateness of death; (4) reach unanimity as to the aggravating factors; and (5) presume that life imprisonment without the possibility of parole is the appropriate sentence. (*People v. Ward, supra*, 36 Cal.4th at p. 221.) In response, this Court noted it had previously determined this state's death penalty statute withstands constitutional scrutiny as to each of those claims. (*People v. Ward, supra*, 36 Cal.4th at p. 221, citing *People v. Prieto, supra,* 30

Cal.4th at pp. 262-263, 271, and *People v. Jenkins, supra*, 22 Cal.4th at p. 1054.) This Court also said it has reexamined these conclusions in light of *Apprendi*, *Ring* and *Blakely*, and determined the holdings of those three high court cases have not altered this Court's conclusions. (*People v. Ward, supra*, 36 Cal.4th at p. 221, citing *People v. Morrison, supra*, 34 Cal.4th at pp. 730-731 ["We repeatedly have held that neither *Apprendi* . . . nor *Ring* . . . affects California's death penalty law or otherwise justifies reconsideration of the foregoing decisions"], and *People v. Prieto, supra*, 30 Cal.4th at p. 275 ["Ring does not undermine our previous rulings upholding the constitutionality of California's death penalty law, and we reaffirm our rejection of defendant's contentions"]; *accord People v. Cornwell, supra,* 37 Cal.4th 50, 103-104; see also *People v. Stitely, supra*, 35 Cal.4th at p. 573 ["Recent high court decisions, such as . . . *Apprendi* . . . do not require reconsideration of our long-standing conclusions in this regard"]; *People v. Panah* (2005) 35 Cal.4th 395, 499 ["neither federal nor state Constitution requires the jury to unanimously agree as to aggravating factors, nor have our conclusions in this respect been altered by [the] recent . . . decisions in *Apprendi* . . . and *Ring*"].)

As this Court explained in *Ward*, under the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole. (*People v. Ward, supra*, 36 Cal.4th at p. 221, citing *People v. Prieto, supra*, 36 Cal.4th at p. 263.) For the same reason, this Court held neither *Apprendi*, *Ring* or *Blakely* affects its prior determination that the jury may properly consider evidence of unadjudicated criminal activity involving force or violence under factor (b) of Penal Code section 190.3 and need not make a unanimous finding on factor (b) evidence. (*People v. Ward, supra*, 36 Cal.4th at pp. 221-222,

citing *People v. Brown, supra,* 33 Cal.4th at p. 402.)

In sum, the evidence of appellant's prior criminal activity was properly admitted under Penal Code section 190.3, factor (b). Appellant's arguments that the factor (b) evidence violated his constitutional rights are unavailing and have been previously rejected by this Court. Appellant provides no reason for this Court to revisit its prior decisions rejecting his contentions.

## XIX.

## THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS DO NOT VIOLATE THE CONSTITUTION

Appellant alleges that California's death penalty statute is unconstitutional because it fails to provide any of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. (AOB 459.) He claims these omissions run afoul of the Fifth, Sixth, Eighth and Fourteenth Amendments. (AOB 459.) However, as he acknowledges, these are challenges to the substance and application of the capital sentencing statute which this Court has analyzed and rejected. (AOB 460, 477, 479, 484, 490.) Appellant offers no compelling reasons to change those analyses or holdings, and appellant's claims should all be rejected consistent with this Court's previous rulings.

### A. The Statute Is Not Unconstitutional For Failing To Assign To The State The Burden Of Proof During The Penalty Phase

Appellant first argues that Penal Code section 190.3 is unconstitutional because it fails to assign the appropriate burden of proof. (AOB 460–473.) Specifically, appellant asserts the statute does not require the trial court to instruct the jury at the penalty phase that the State had the burden of proving: (1) all aggravating factors beyond a reasonable doubt; (2) that aggravation must

outweigh mitigation beyond a reasonable doubt; and (3) that death must be found to be the appropriate penalty beyond a reasonable doubt. (AOB 460.) He also argues that the death penalty statute is unconstitutional because it fails to require instructions to the jury it may impose a death sentence only if they are persuaded beyond a reasonable doubt that (1) aggravation outweighs mitigation and (2) death is the appropriate penalty. (AOB 473-479.) Appellant's claims are without merit.

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. Brown, supra*, 33 Cal.4th 382, 401; *People v. Welch*, *supra*, 20 Cal.4th at pp. 767; *People v. Sanchez* (1995) 12 Cal.4th 1, 81.) This Court has repeatedly rejected claims identical to appellant's regarding a burden of proof at the penalty phase. (See e.g., *People v. Stitely, supra,* 35 Cal.4th at p. 573; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Monterroso* (2004) 34 Cal.4th 743, 796; *People v. Morrison*, *supra*, 34 Cal.4th at p. 730; *People v. Brown, supra*, 33 Cal.4th 382, 401; *People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Box*, *supra*, 23 Cal.4th at p. 1216; *People v. Welch, supra*, 20 Cal.4th 701, 767-768; *People v. Ochoa*, *supra,* 19 Cal.4th at p. 479; *People v. Dennis* (1998) 17 Cal.4th 468, 552.) Because appellant offers no valid reason to overturn these past decisions, his claim fails.

Insofar as appellant contends that *Blakely v. Washington, supra*, 542 U.S.296; *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, compel a different conclusion (AOB 460-469), he is mistaken. This Court has already considered these cases and found that they have not altered or undermined this Court's conclusions regrading the burden of proof. (See *People v. Stitely, supra*, 35 Cal. 4th at p. 573 [*Blakely, Ring* and *Apprendi* "do not require reconsideration or modification of our long-standing

conclusions in this regard"]; *People v. Monterroso, supra,* 34 Cal.4th at p. 796 [*Apprendi* and *Ring* "have not altered our conclusions regarding the burden of proof"]; *People v. Morrison, supra*, 34 Cal.4th at p. 730 [neither *Apprendi*, *Ring* nor *Blakely* require reconsideration of past decisions]; *People v. Brown, supra*, 33 Cal.4th at p. 402 [*Apprendi* and *Ring* have not changed court's conclusions regarding burden of proof]; *People v. Pollock* (2004) 32 Cal.4th 1193, 1196-1197 [*Ring* and *Apprendi* have no application to California's death penalty procedures]; *People v. Nakahara, supra*, 30 Cal.4th 705, 721-722 [same]; *People v. Smith, supra,* 30 Cal.4th 581, 642 [same]; *People v. Prieto, supra*, 30 Cal.4th at p. 275 [*Ring* does not undermine court's prior rulings].)

### B. The Trial Court Was Not Required To Instruct On The Burden Of Proof At The Penalty Phase

Appellant claims the penalty-phase instructions violated the Sixth, Eighth, and Fourteenth Amendments by failing to inform the jury regarding the standard of proof. (AOB 473.) This Court has repeatedly held the California death penalty statute is not unconstitutional because it does not contain a requirement that the jury be given burden of proof or standard of proof instructions for finding aggravating and mitigating circumstances in reaching a penalty determination. (*People v. Stitely, supra*, 35 Cal.4th at p. 574; *People v. Panah, supra*, 35 Cal. 4th 395, 499; *People v. Vieira* (2005) 35 Cal.4th 264, 300; *People v. Morrison, supra,* 34 Cal.4th at pp. 730-731 *People v. Welch, supra*, 20 Cal.4th at pp. 767-768) Because appellant offers no meritorious reason for this Court to reconsider this rule, his claim should be rejected.

### C. The Trial Court Need Not Instruct That The Prosecution Has The Burden Of Persuasion On The Issue Of Penalty

Appellant further argues the California death penalty statute and

instructions are unconstitutional because the penalty phase instructions fail to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury has to make. (AOB 479.)

Because of the individual and normative nature of the jury's sentencing determination, the trial court need not instruct that the prosecution has the burden of persuasion on the issue of penalty. (*People v. Combs* (2004) 34 Cal. 4th 821, 868; *People v. Lenard* (2004) 32 Cal.4th 1107, 1135-1136; *People v. Steele* (2002) 27 Cal.4th 1230, 1259; *People v. Kipp, supra*, 26 Cal.4th at p. 1137; *People v. Bemore* (2000) 22 Cal.4th 809, 859.) Appellant offers no meritorious reason for this Court to reconsider this rule. Thus, appellant's argument should be rejected.

**D. The Jury Is Not Required To Agree On Aggravating Factors**

Appellant contends that California law violates the Sixth, Eighth, and Fourteenth Amendments by failing to require unanimous jury agreement on any particular aggravating factor. (AOB 483.) This Court has consistently and repeatedly held that the jury is not required to agree unanimously on what aggravating factors exist. (*People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Combs, supra,* 34 Cal.4th at p. 867; *People v. Monterroso, supra,* 34 Cal.4th at p. 795; *People v. Morrison, supra,* 34 Cal.4th at p. 730; *People v. Pollock, supra,* 32 Cal.4th at p. 1196; *People v. Yeoman* (2003) 31 Cal.4th 93, 157; *People v. Jenkins, supra*, 22 Cal.4th at p. 1053; *People v. Howard, supra,* 1 Cal.4th at p. 1196.) This Court has likewise already rejected appellant's claim that *Arizona v. Ring, supra,* 536 U.S. 584, requires otherwise. (See e.g., *People v. Monterroso, supra,* at p. 796 [*Apprendi* and *Ring* have not altered conclusions regarding juror unanimity]; *People v. Morrison, supra*, 34 Cal.4th at p. 730 [same plus observation that *Blakely* does not undermine prior analysis]; *People v. Pollock, supra*, 32 Cal.4th at p. 1197; *People v. Prieto,*

*supra*, 30 Cal.4th at p. 275 [*Ring* does not undermine previous ruling on point].) Because appellant provides no persuasive reason for departing from this precedent, his claim should be rejected.

### E. The Trial Court Was Not Required To Instruct The Jury On The Presumption Of Life During The Penalty Phase

This Court has also repeatedly rejected appellant's contention that the trial court was constitutionally required to instruct the jury that there is a presumption favoring a sentence of life in prison. (AOB 489) (See e.g., *People v. Young* (2005) 34 Cal.4th 1129, 1233; *People v. Combs, supra*, 34 Cal. 4th at p. 868; *People v. Pollock, supra*, 32 Cal.4th at p. 1196; *People v. Lenard, supra*, 32 Cal.4th at p.1137; *People v. Kipp, supra*, 26 Cal. 4th 1100, 1137; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064; *People v. Arias, supra*, 13 Cal.4th at p. 190.) Because appellant provides no compelling reason for reconsideration, his claim should likewise be rejected.

## XX.

## INTERCASE PROPORTIONALITY REVIEW OF A CAPITAL SENTENCE IS NOT REQUIRED UNDER EITHER THE FEDERAL OR STATE CONSTITUTIONS

Appellant claims his death sentence violates the Eighth and Fourteenth Amendments because California does not provide intercase proportionality review of sentences in capital cases. (AOB 491.) The United States Supreme Court examined California capital sentencing laws and held intercase proportionality review was not required by the Eighth Amendment. (*Pulley v. Harris* (1984) 465 U.S. 37, 50-51.) This Court has consistently found that state capital law does not necessitate this type of review. (*People v. Jablonski* (2006) 37 Cal.4th 774, 837; *People v. Manriquez* (2005) 37 Cal.4th 547, 590; *People v. Harris*, *supra*, 37 Cal.4th at p. 366; *People v. Gray* (2005) 37 Cal.4th

168, 237; *People v. Moon*, *supra*, 37 Cal.4th at p. 48; *People v. Prieto*, *supra*, 30 Cal.4th at p. 276.) Appellant urges the decision in *Pulley v. Harris* be reevaluated (AOB 493); however, he provides no compelling reason to do so and this Court can obviously not overrule a decision of the United States Supreme Court anyway. Appellant's claim should be denied.

Appellant's sentence is not grossly disproportionate to his moral culpability for the brutal, vicious, and senseless murder of his neighbor, Sarah LaChapelle. His 20th assignment of error fails.

## XXI.

## APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE INTERNATIONAL LAW

Appellant claims his death sentence violates international law, and the covenants, treaties, and norms that bind the United States. Appellant contends his death sentence should be reviewed under "international standards for a fair trial." He further claims such standards "affirm the right to life" and require any death sentence be supported by evidence "that is so clear that it leave room for no alternative explanation of the facts." Appellant concludes since the evidence in this case fails to meet this level, his death judgment must be set aside. (AOB 495-500.)

Appellant is precluded from raising this issue because he lacks standing to assert a violation of international law. Additionally, this Court has previously and repeatedly rejected the notion that California's death penalty statutes somehow violate international law.

Initially, it is observed that appellant should be precluded from claiming violations of international customary law or treaties for the first time on appeal, since he never raised any such claims in the trial court. Convicted defendants are generally precluded from raising claims on appeal if the claim was not

previously raised in the trial court. (See, e.g., *People v. Jones* (1997) 15 Cal.4th 119, 181; *People v. Collie* (1981) 30 Cal.3d 43, 64.) Moreover, appellant has failed to show that he has any standing to invoke the jurisdiction of international law in this proceeding, because the principles of international law apply to disputes between sovereign governments and not between individuals. (*Hanoch Tel-Oren v. Libyan Arab Republic* (D.D.C. 1981) 517 F.Supp. 542, 545-547.)

Even assuming appellant has standing to raise an alleged violation of the International Covenant on Civil and Political Rights, his claim is without merit because he has not established that any violations of federal or state constitutional law occurred during his trial. (*People v. Cornwell*, *supra*, 37 Cal.4th at p.106; *People v. Turner* (2004) 34 Cal.4th 406, 439-330.)

This Court has previously rejected the claim that California's death-penalty scheme violates international law. Nevertheless, appellant claims the State's capital sentencing statutes and individual death sentences violates Article 6 of the International Covenant on Civil and Political Rights and the Eighth Amendment of the United States Constitution. (AOB 496.)

Appellant's claim lacks merit because it has previously been specifically rejected by this Court. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 511 ["International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements"]; accord *People v. Perry, supra,* 38 Cal. 4th at p. 322; *People v. Brown*, *supra*, 33 Cal.4th at p. 404; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1055; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In *Ghent*, this Court held that international authorities do not compel elimination of the death penalty, and do not have any effect upon domestic law unless either self-executing or implemented by Congress. (*Ibid.*) As in *Ghent*, appellant cites no authorities suggesting the international treatises on which he relies have been held effective

as domestic law.

In summary, appellant has forfeited this claim and further has no standing to invoke international law as a basis for challenging his state convictions and judgment of death. Moreover, appellant has failed to state a cause of action under international law, for the simple reason that appellant's various claims of violations of due process in connection with his prosecution, conviction, and sentencing in the instant case are without merit. American federal courts carry the ultimate authority and responsibility for interpreting and applying the American Constitution to constitutional issues raised by federal or state statutory or judicial law.

California's death-penalty law does not violate the International Covenant of Civil and Political Rights, which prohibits the "arbitrary" deprivation of life and bars the "cruel, inhuman or degrading treatment or punishment." The covenant specifically permits the use of the death penalty "if imposed only for the most serious crimes in accordance with law in force at the time of the commission of the crime." When the United States ratified the treaty, it specifically reserved the right to impose the death penalty on any person, except a pregnant woman, duly convicted under the laws permitting imposition of the death penalty. (See 138 Cong. Rec. S-4718-01, S4783 (1992); *People v. Perry* (2006 )38 Cal.4th 302, 322; *People v. Brown* (2004) 33 Cal.4th 382, 403-404.) This Court's earlier rejections of similar claims have equal applicability in this case.

Based on the foregoing, all of appellant's challenges to California's capital punishment statutes and procedures must again be rejected by this Court.

## XXII.

## APPELLANT RECEIVED A FAIR TRIAL AS NO PREJUDICE FROM CUMULATIVE ERROR EXISTS

Appellant's final contention is that 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. (AOB 501.)

However, in this case, there are 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. (See *People v. Guerra*, *supra*, 37 Cal.4th at p. 1165; *People v. Hinton*, *supra*, 37 Cal.4th at p. 913; *People v. Jablonski*, *supra*, 37 Cal.4th at p. 837; *People v. Panah*, *supra*, 35 Cal.4th at pp. 479-480; *People v. Burgener*, *supra*, 29 Cal.4th at p. 884.) Even a capital defendant is entitled to only a fair trial, not a perfect one. (*People v. Box*, *supra*, 23 Cal.4th at pp. 1214, 1219.) The record shows that appellant received a fair trial. Nothing more is required. This Court should, therefore, reject appellant's claim of cumulative error.

## CONCLUSION

Accordingly, for all of the foregoing reasons, the People respectfully ask this Court to affirm the judgment.

Dated: June 14, 2007

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 69208 words.

Dated: June 14, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

SARA TURNER
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Attorneys for Respondent

## DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Gregory O. Tate***

No.: **S031641**

I declare:

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

On June 14, 2007, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

**Harry Gruber**
**Joel Kirshenbaum**
**Deputy Public Defenders**
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**1225 Fallon Street**
**Oakland, CA 94612-4293**

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 June 14, 2007, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature

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